FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 3, 2018

PEABODY TWENTYMILE MINING, LLC, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket No. WEST 2017-0247-R Order No. 9025723;02/19/2017 Docket No. WEST 2017-0248-R Citation No. 9025724;02/19/2017 Foidel Creek Mine Mine ID 05-03836
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. PEABODY TWENTYMILE MINING, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-0553 A.C. No. 05-03836-439555 Foidel Creek Mine

DECISION

Appearances: Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;
Christopher G. Peterson, Esq., and Benjamin J. Ross, Esq., Jackson Kelly PLLC, Denver, Colorado for Respondent.

Before: Judge Manning

These cases are before me upon notices of contest filed by Peabody Twentymile Mining, LLC ("Twentymile") and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Twentymile pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a hearing held in Steamboat Springs, Colorado, and filed post-hearing briefs. A section 104(d)(1) citation and a section 107(a) order were adjudicated at the hearing. Twentymile operates the Foidel Creek Mine, an underground coal mine in Routt County, Colorado.

The citation and order were issued on February 19, 2017 by MSHA Inspector Rufus Taylor during a regular inspection of the mine. Inspector Taylor was accompanied by his supervisor Inspector Richard Eddy and by Twentymile's Safety Compliance Officer Jordan Gustafson. For reasons set forth below, I modify the citation to a section 104(a) citation and I vacate the imminent danger order. Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Inspector Taylor testified that he arrived at the mine at about 7:20 a.m. on Sunday, February 19, 2017, and began his inspection. Tr. 15-18. While inspecting a bolter at about 1:00 p.m., the inspectors heard what Taylor described as a scream and then a second scream. Tr. 18-21. At that point, both inspectors turned and observed what they described as a miner bent over the trough of a feeder, approximately 100 feet away. *Id.* Taylor was concerned that the miner may have fallen into the feeder. Tr. 21. When they went over to investigate, they saw that the miner, David Lomas, was standing on the off-walkway side of the feeder, the feeder conveyor was operating, and a shuttle car was dumping material into the feeder. Tr. 25, 31. Inspector Taylor issued a verbal imminent danger order requiring Gustafson to remove the miner from the off-walkway side. Tr. 22-23. The inspectors subsequently learned that what the inspectors thought were screams were actually whoops of joy, as described below. Tr. 191.

For as long as anyone can remember and for at least the last 30 years, Twentymile has used a method colloquially known as "fishing" to remove roof bolts, wood, and other extraneous material from feeders. Tr. 135, 137-138. Fishing is more often used when an area of the mine is being rehabilitated rather than when coal is being produced. Tr. 135-136. If the floor needs to be graded, for example, Twentymile uses a continuous miner to grade the floor to remove material that has heaved. Tr. 133, 178-179. The resulting material is loaded into shuttle cars and slowly dumped into feeders that slowly load it onto conveyor belts to remove the material from the mine. Tr. 135. This material is mostly rock and mud but also may contain roof bolts and other extraneous metal parts that can damage conveyor belts. Tr. 136. Pieces of wood may also be present. Tr. 285. The feeder is equipped with a pick breaker that can crush most of the material before it dumps on the belt but, to protect the belts, Twentymile uses fishing to remove as many metal pieces from the feeder as possible.[1] Tr. 136. Metal and/or wood are capable of jamming the pick breaker. Tr. 136-137, 166.

Twentymile developed a written procedure for miners to follow when fishing. RX-7. In order to fish material from the feeder, a miner takes a D-Ring, bends it into the shape of a hook and attaches it to a piece of drill steel using electrical tape. Tr. 208, 211. The drill steel is

[1] The feeder unit consists of a hopper, conveyor and pick breaker. Material is slowly dumped into the hopper located on the inby end of the feeder unit. The material is moved along the feeder by a chain conveyor from the hopper to the pick breaker at the outby end of the feeder. Material is then dumped onto a conveyor belt and sent out of the mine. Throughout this decision the phrase "feeder conveyor" refers to this chain conveyor on the feeder.

typically about five feet long. Tr. 219. The feeder is set to its lowest speed. Tr. 259. The feeder in this case moved 1.42 feet per second. RX-18; Tr. 54, 277. The miner engaged in fishing positions himself so he can see the shuttle car as it approaches. Tr. 138. He signals the shuttle car operator to approach the feeder and to begin slowly dumping the material into the feeder. Tr. 138. He also signals the operator to stop dumping when the feeder is full or when he sees metal or wood in the material. Tr. 138-139. The fishing miner then uses his hook to remove the object. If the object the miner tries to hook weighs more than about 10-15 pounds, the D-Ring will separate from the drill steel because it is only attached with tape. Tr. 219-220. A railing surrounds parts of the feeder. Tr. 73, 84. The miner who is fishing can shut off power to the feeder conveyor and the pick breaker by using an e-stop button on the side of the feeder or an e-stop cord that stretches across the feeder. Tr. 255-57. He can also lock-out and tag-out the feeder if he sees a large object that needs to be removed or he can simply let it go through the pick breaker and onto the belt. Tr. 202-204. Pat Sollars, the general manager of Peabody's Colorado operations, as well as Michael Zimmerman, the mine's compliance manager, both testified that no miner has ever been injured while fishing material out of a feeder. Tr. 137, 285.

Davis Lomas, the miner who was fishing on the day of the inspection, is not a mechanic and does not perform maintenance at the mine. Tr. 180. He made a whooping sound at the time of the inspection because he had been fishing for several 12 hour shifts and he found something that he needed to hook. He testified that he "jokingly yelled [to another miner] woo hoo! Yea! I got something." Tr. 191. I credit this testimony.

B. Citation No. 9025724 – Fact of Violation

Inspector Taylor issued Citation No. 9025724 under section 104(d)(1) later that day. The citation states, in part,

> Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments. When examined by this inspector the operator is failing to remove power to company No. 237 feeder to block against motion on the 9 east longwall[.] There is miner with a piece of Roof Bolter steel with a metal hook attached to the end removing wood and metal from the moving feeder conveyor. The miner is on the off walkway side of the feeder within approximately 41 inches of the moving conveyor chain. In the event of the miner falling into the moving conveyor chain the miner will be pulled into pick breaker causing the miner to be fatality injured. This is obvious to the most casual observer. The operator engaged in aggravated conduct constituting in more than ordinary negligence in that after further review and interviewing the miner it is determined that the miner was instructed to perform these functions.

The inspector charged a violation of section 75.1725(c) which provides that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is

blocked against motion, except where machinery motion is necessary to make adjustments." 20 C.F.R. § 75.1725(c).

There is no dispute that Lomas was not performing repairs and no adjustments were being made. Further, there is no dispute that the feeder conveyor and pick breaker were not locked out at the time.[2] The singular issue is whether Lomas's action of fishing constituted "maintenance" under the standard. I find that it did.

The Secretary argues that Lomas's act of fishing metal and wood out of the feeder amounted to preventive maintenance because it kept the feeder's pick breaker and the attached belt in good repair. Sec'y Br. 9. Roof bolts, if not fished out, could damage the pick breaker and/or become wrapped around the pick breaker, which would require removal via a torch. Similarly, metal objects could damage the belts and wood could jam the pick breaker. Sec'y Br. 8-9.

Twentymile asserts that it did not violate section 75.1725(c) because the miner was not performing repairs or maintenance on the feeder. A feeder can operate without fishing. Fishing does not correct a malfunction of the feeder, nor does it affect the feeder or pick breaker in any manner. Twentymile Br. 7. Wood and metal do not stop the feeder from operating. Although, a roof bolt may get stuck in the pick breaker, it cannot jam the breaker, and bolts are often too heavy to remove via fishing. If a feeder stalls or an impediment must be removed from the pick breaker, miners lock out and tag out the equipment. Twentymile Br. 7-8.

The Commission, relying on the ordinary meaning of the word, has defined "maintenance" as "'the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep ...' and '[p]roper care, repair, and keeping in good order.'" *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997) *aff'd,* 156 F.3d 1076 (10th Cir. 1998) (quoting *Webster's Third New International Dictionary, Unabridged* 1362 (1986) and *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968)). In *Walker Stone* the Commission found that the breakup and removal of rocks clogging a crusher amounted to maintenance. *Id.* at 51. The Commission, in reaching its decision, focused on the purpose of the work being done, which was to restore the crusher to a functioning condition, and reasoned that the purpose clearly fit within the "broad phrase 'repairs or maintenance of machinery or equipment[.]'" *Id.* Further, "[t]he removal of rock was necessary to . . . 'keep [the crusher] in a state of repair or efficiency.'"

[2] Following the submission of briefs the Secretary submitted a letter that was essentially a reply brief in which he argued that Lomas's testimony that he deactivated the feeder and pick breaker should not be seriously considered due to the presence of more reliable evidence, including testimony from Twentymile witnesses, that the feeder conveyor was running and the chain was in motion when the inspection party arrived. Sec'y Reply 1. Twentymile filed a response to the Secretary's reply arguing that Lomas was in the best position to know what the feeder was doing when he was fishing and that the feeder likely restarted after Lomas fished. Twentymile Response 1. Although the parties dispute whether the feeder and pick breaker were moving the entire time Lomas was fishing, it is clear that the equipment was not locked out, i.e., blocked against motion. In addition, the feeder was operating when the loader was dumping material into the hopper while Lomas was looking to see if anything needed to be removed.

The purpose of fishing was to remove metal and wood objects that could affect equipment and/or the product shipped to customers.[3] The primary concern with metal objects, especially roof bolts, was that they could seriously damage the belt used to remove this material from the mine. However, Sollars acknowledged that metal, along with wooden objects such as cribs, could jam the pick breaker. Tr. 136-137, 166. Sollars also testified roof bolts that are not fished out could wrap around the pick breaker and "would stay there and you'd go in later and cut them out" with a torch while the equipment was locked out.[4] Tr. 136, 166-167.

The Secretary specifically categorized Lomas's activity as "preventive" maintenance. While the term "preventive" is not included in the cited standard, I find that the term "maintenance" may include actions of a "preventive" nature. "Preventive maintenance" involves a "system that enables breakdowns to be anticipated and arrangements made to perform necessary overhauls and replacements in good time." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 426 (2d ed. 1997). Essentially, it is anticipatory maintenance designed to address potential problems before they come to fruition. In that way, it fits squarely within the type of "care," "upkeep," and "keeping in good order" contemplated by the Commission's definition of "maintenance" in *Walker Stone*.

I find that Lomas was engaged in preventive maintenance. A jammed pick breaker is not a functioning pick breaker. Lomas, by removing metal and wood objects from the feeder prior to those objects reaching the pick breaker, was keeping the feeder and pick breaker in a functioning condition by preventing a possible jam. Further, even if roof bolts wrapped around the pick breaker did not affect its performance while operating, they certainly affected its efficiency in the form of future downtime because at some point those bolts would need to be removed. Removal of the bolts wrapped around the pick breaker required a miner to deenergize the equipment and block it against motion before cutting the bolts out with a torch. Removing the bolts via fishing prior to the bolts reaching the pick breaker prevented a shutdown and kept the pick breaker in a state of efficiency. Further, there is no dispute that removing metal objects prevented possible damage to the belt.[5] I find that the purposes of fishing fit within the "broad phrase 'repairs or maintenance of machinery or equipment[.]'" *Walker Stone* at 51; *see also Sec'y of Labor v. Ohio*

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[3] Zimmerman testified that wood fed through the pick breaker and dumped onto the belts would not be separated from coal in the mine's wash plant, since both wood and coal float, and could potentially be sent to Twentymile's customers. Tr. 285.

[4] Although Twentymile, in its brief, attempted to qualify Sollar's testimony by citing Owens testimony that roof bolts were too heavy to remove via fishing, it is quite clear that nothing prevented miners from attempting to remove bolts via fishing. Twentymile Br. 7. Owens himself testified that he had attempted to do just that, but that the tape holding the hook to the drill steel failed and the hook was pulled off. Tr. 220.

[5] Twentymile argues that because the conveyor belt and feeder are distinct pieces of equipment, maintenance can be conducted on each piece of equipment without blocking the other. Specifically, it argues that because fishing is aimed at protecting the belt, the act of fishing does not constitute maintenance of the feeder and, in turn, does not require the feeder to be locked out and tagged out. Twentymile Br. 10. However, the belt and feeder are linked because the feeder would never be operated without the presence of the belt to remove the material from the mine.

Valley Coal Co., 359 F.3d 531 (D.C. Cir. 2004) (broadly interpreting the standard's "repairs or maintenance" language to include not just actual physical work by the miner, but also a miner's assessment of a piece of equipment in order to identify an apparent problem if the miner doing the assessment is in a location where their safety might be threatened by running machinery.)

Twentymile also argues that the Secretary is attempting to stretch the definition of maintenance so as to require that a mine operator lock-out and tag-out all section equipment when maintenance is required anywhere on the section. Twentymile Br. 8-9. While the Secretary alluded to this at hearing, he did not expressly mention it in his brief. Nevertheless, I reject the idea that in order to comply with the standard all equipment on the active section must be deenergized. Rather, consistent with the D.C. Circuit's finding in *Ohio Valley Coal Co.*, it would seem that only that equipment posing a potential safety threat to a miner in the location where they are conducting the maintenance needs to be deenergized and blocked against motion.

Because Lomas was engaged in maintenance on the feeder while it was operating, I find that the Secretary established a violation of the cited standard.

1. Fair Notice of the Requirements of Section 75.1725(c).

Twentymile argues that the court should vacate the subject citation because it lacked fair notice of the requirements of section 75.1725(c). Twentymile Br. 11. A reasonably prudent person would not have fair warning of the standard's requirement because this mine has used fishing to remove metal and wood for thirty years and MSHA has never suggested it violated a mandatory standard. Many people, including numerous mine managers and apparently one current MSHA inspector have fished materials out of the feeder while it was operating in the belief that such activity was safe and did not violate a safety standard. Twentymile Br. 11. Indeed, Twentymile had in place a standard work procedure spelling out how fishing should be performed in a safe manner. RX-7 pp. 4-5.

The Secretary argues that Twentymile was on notice that fishing violated the mandatory standard. Notice is only inadequate where a reasonably prudent mine operator would not have understood that a specific condition was in violation of the standard. Sec'y Br. 9. The definition of "maintenance" in *Walker Stone* has been established law for two decades and any reasonable operator would know that working on materials being conveyed into a feeder without deenergizing and blocking the equipment against motion was a violation of the cited standard. Sec'y Br. 10. Twentymile had actual notice of the hazards associated with miners working near the belt and this was the first time MSHA inspectors had ever observed the practice of fishing during an inspection. Sec'y Br. 10.

The Secretary must provide fair notice of the requirements of a broadly written safety standard. The language of section 75.1725(c) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec, 1982). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (Jan. 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of

common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)(citation omitted). A standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Id.* (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

In *Alan Lee Good d/b/a Good Construction,* 23 FMSHRC 995 (Sept. 2001), Commissioner Jordan and former Commissioner Beatty stated the following:

> In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the operator's employees as to whether certain practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

23 FMSHRC at 1005 (citations and footnote omitted). Although the Commission split as to whether the operator in that case had been provided with fair notice, the Commission did not disagree as to how the notice issue should be analyzed in future cases.

The text of 75.1725, which is contained in "Subpart R- Miscellaneous," is instructive because it illustrates that the Secretary intended to include preventive maintenance within the scope of subsection (c). Subsection (d) of the safety standard states that "[m]achinery shall not be lubricated manually while in motion, unless equipped with extended fittings or cups." Lubrication is clearly a type of preventive maintenance because an operator will want to keep machinery lubricated even when it is working perfectly to ensure that it continues to operate as designed. If the Secretary did not consider preventive maintenance to be "maintenance" as that term is used in the safety standard, subsection (d) would not be as necessary.[6] This provision

[6] The regulatory history of section 75.1725(c) is scant, at best. The proposed rule prohibited lubrication of operating machinery "where a hazard exists" unless equipped with extended fittings or cups. 37 Fed. Reg. 11777, 11779 (June 14, 1972). The final rule was changed to

provides notice to mine operators that the Secretary intends that preventive maintenance is included in the coverage of the safety standard.

The Secretary did not provide, and the court has been unable to find through its own research, any MSHA documents that provide guidance on how to interpret the standard in the context of the facts of this case. MSHA's Program Policy Manual, for example, does not address any issues related to the interpretation of 75.1725(c) as relevant here. *See* V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 156-59 (2018).

Fishing has been conducted at the mine for a long time, perhaps 30 years or longer. It is important to note however that, until Longwall Panel 9 was developed, fishing was not a frequent occurrence. Prior to the development of this panel, fishing occurred once or twice a year. Because of floor heaving problems in Panel 9, however, fishing was being conducted monthly for a period of 8-16 days each month. Tr. 52, 133, 162, 164, 224-225, 243-244. Consequently, it is not surprising that MSHA inspectors had never observed anyone fishing at the mine until the subject inspection. Field Office Supervisor Eddy indicated that he asked the inspectors at the Craig, Colorado, office whether they had ever observed fishing at the mine. He testified that each inspector told him that they had not.[7] Tr. 128. I credit the Secretary's evidence that no MSHA inspector had previously observed fishing while inspecting the mine.

Twentymile correctly argues that MSHA does not always prohibit miners from working around moving pieces of equipment. For example, Inspector Taylor admitted that miners are allowed to shovel coal accumulations onto belts that are moving at a high rate of speed. Tr. 96-97, 99-100. Twentymile believes that working around a fast-moving belt poses a greater safety hazard than fishing around a slow moving feeder. Consequently, it argues that the Secretary is not sending a consistent message about prohibited conduct around moving machinery.

I agree that there is some inconsistency but, as the inspector stated, the area around the head and tail pulleys of conveyor belts are regulated. *See* 30 C.F.R. § 75.1722. Head and tail pulleys are more analogous to the subject feeder and they must be tightly guarded.

I hold that a reasonably prudent person familiar with the mining industry and the protective purposes of section 75.1725 would have recognized that the act of fishing at the feeder is a type of preventive maintenance that is covered by the requirements of section 75.1725(c).

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reflect the fact that machinery is often self-lubricating. 38 Fed. Reg. 4974, 4975 (Feb. 23, 1973). There was no discussion of subsection (c) in the regulatory history.

[7] I recognize that Inspector Eddy's testimony is hearsay, but it is consistent with the testimony of Twentymile's witnesses that the mine did not start engaging in fishing on a frequent basis until floor heave problems developed in Longwall Panel 9. Twentymile presented hearsay evidence that another MSHA inspector, who once worked at the Foidel Creek Mine, called Sollars to tell him that he had fished while working at the mine and he did not believe that it created a hazard. RX-6; Tr. 127, 183. Twentymile attempted to call this inspector as a witness but, by order dated January 24, 2018, I quashed the subpoena. 40 FMSHRC 242.

2. Significant and Substantial.

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[,]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id.* at 2475-2476. This determination must be made "based on the particular facts surrounding the violation[.]" *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard "was reasonably likely to result in serious injury." *Newtown* at 2038; *ICG Illinois* at 2476.

The "reasonably likely" provision does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

The Secretary maintains that "[g]iven the proximity of Lomas to the moving feeder conveyor, the uneven trench in which he was standing, the pile of material collected around him, the monorail hanging from the roof, and the generally cramped location from which Loma was fishing, the violation contributed to the discrete hazard of falling into the feeder and being pulled through the pick breaker." Sec'y Br. 11. Twentymile was aware of the hazards of working around the feeder because it would lock and tag out the feeder when miners cleaned or shoveled around it. Tr. 260. Fishing was usually assigned to less experienced miners and was becoming a more regular function which increased the likelihood of an accident. Any injury would be of a reasonably serious nature and could be fatal.

Twentymile argues that the evidence demonstrates that the hazard of a miner falling or being pulled into the feeder while fishing was highly unlikely. Miners have been performing this task for 30 years without incident. The fishing miner usually stops the feeder conveyer when he finds an object that needs to be removed. If he does not stop the feeder, the conveyor moves at a

slow rate of speed, about 1.42 feet per second, and the hook would separate from the drill steel if it snagged on something. Twentymile argues that at that slow speed, material would travel along the feeder conveyor for about 24 seconds before reaching the pick breaker. Twentymile Br. 14. Lomas testified that at all times he stood at a distance from the pick breaker and he cleaned the area around him to remove tripping hazards. Tr. 183, 186, 190. He deactivated the feeder when necessary as he removed objects with the drill steel. Tr. 186. The conveyor chain was 35-41 inches from the edge of the feeder closest to Lomas and 19 inches from the top of the feeder, making it unlikely that the fishing rod would snag on anything. Twentymile Br. 14; Tr. 87, 289; RX-20. In addition there were emergency stop switches and a stop cord in the area.

I find that the Secretary did not establish that the violation was S&S. I determined that Twentymile violated section 75.1725(c), above.

The next issue is whether there was a discrete safety hazard. To resolve this issue a judge must first determine the nature of the hazard. A hazard is the "prospective danger the cited safety standard is intended to prevent." *Newtown Energy*, 38 FMSHRC at 2038. Section 1725(c) is designed to prevent miners from being injured by becoming entangled in moving machinery while repairs or maintenance are being conducted. The hazard in this case was the risk of a miner being pulled into the feeder or falling into the feeder while in the process of fishing as the feeder conveyor was moving. Next, the judge must determine whether the violation sufficiently contributed to this hazard. That is, was there a "reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id.*

I find that it was unlikely that the hazard that the safety standard is designed to prevent will ever occur assuming continued mining operations. It was highly unlikely that David Lomas or any other fishing miner would be pulled into or fall into the moving feeder. First, Lomas testified that if he sees a piece of metal as it is being slowly dumped into the feeder by the loader operator, he stops the feeder conveyor and uses his fishing stick to grab it and move it to the side. Tr. 185-86. Second, the type of fishing stick that he and other miners use has the hook attached to the drill steel with tape. Thus, even if the feeder is moving and the hook gets entangled in something, the hook will come off and the miner will not be pulled in. The hook easily separates from the drill steel. Tr. 186-87, 211, 259. The feeder conveyer is always run at the lowest speed possible so even if the miner kept holding the pole for a second or more after it snagged, he would not be pulled for any significant distance and he would not be pulled so hard that there would be a chance that he would be pulled onto the feeder conveyor. RX-7, p. 5; Tr. 259-60.

Third, the dimensions of the feeder would make it very difficult for anyone to be pulled into the feeder conveyor or fall into it. The deck plate for the hopper of the feeder was about 34 inches above the ground level where Lomas was standing. Tr. 274-75; RX-10. It is 35 inches from the top edge of this deck plate close to the fishing miner to the other side of the flat surface of the deck plate close to the feeder conveyor. *Id.* The feeder conveyor is 19 inches below the top of the deck plate. Tr. 288-29; RX 19, 20. Thus, the distance from the ground where a miner would be standing to the feeder conveyor would be 34 inches up to the edge of the deck plate, 35 inches across to the other side of the deck plate, and then 19 inches down to the feeder conveyor. I credit these measurements that were taken by Twentymile soon after the inspection party arrived. It would take a lot of force to pull a miner into the feeder conveyor and the tape on the

fishing pole would give way if the miner kept grasping the pole. It would also be next to impossible to fall into the conveyor. The likelihood of falling into the feeder conveyor from where Lomas was standing would be about the same as the chance of standing on one side of a typical office desk and falling over to the other side of the desk while leaning over the desk; it is possible but very unlikely.

As a consequence, I find that the Secretary did not establish that there was a discrete safety hazard, the second step of the *Mathies* S&S test. The hazard contributed to by violation was not reasonably likely to cause an injury.[8] The inspector's S&S determination is vacated.

3. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.

I find that the gravity of this violation was not very serious. It was unlikely that Lomas or anyone else who fished from the cited location would be injured for the reasons discussed above. A serious injury was possible but improbable. If an injury did occur, it was likely to be minor. For example, if Lomas tripped while fishing, he could suffer sprains or bruises. It is highly unlikely that he would fall into the feeder. I find the gravity to be low.

4. Negligence

The Secretary argues that Twentymile unwarrantably failed to comply with the cited standard because the "fishing process presented a high degree of danger to miners, was open and obvious, and in the aggregate, existed for significant periods of time." Sec'y Br. 14-15. Moreover, the act of fishing "was known to and sanctioned by" management as evidenced by the fact that it had been made into a standard work procedure. Sec'y Br. 13-15. Because Owens was Lomas's supervisor, his knowledge that Lomas engaged in fishing must be imputed to Twentymile for purposes of finding that it was highly negligent and that it engaged in aggravated conduct. Sec'y Br. 13-16.

Twentymile argues that the unwarrantable failure and high negligence designations are inappropriate because its conduct was not aggravated. Twentymile Br. 14. There was little to no degree of danger associated with the act of fishing. Moreover, Twentymile genuinely believed that it was in compliance with the safety standard. *Id.* Fishing was an "established, regulated

[8] If I assume that the Secretary established that there was a discrete safety hazard, that is that the violation sufficiently contributed to the hazard that the safety standard was intended to prevent, I would be required to assume such occurrence and determine whether the occurrence of that hazard would reasonably be likely to result in an injury. *Newtown*, 38 FMSHRC 2038. An injury would be reasonably likely in such instance which could range between sprains and bruises to serious or fatal injuries.

practice" at the mine, was not an obvious violation, and MSHA had never put the mine on notice that greater efforts were necessary to comply with the cited standard. Twentymile Br. 16.

Section 110(i) of the Mine Act includes "negligence" as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but over 30 years ago the Commission recognized that: "[e]ach mandatory standard ...carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A. H. Smith Stone Company,* 5 FMSHRC 13, 15 (Jan. 1983).

Commission Judges are not bound by the Secretary's definitions in 30 C.F.R Part 100 when considering an operator's negligence. *Brody Mining, LLC,* 37 FMSHRC 1687, 1702 (Aug. 2015); *Newtown Energy, Inc.,* 38 FMSHRC 2033, 2048 (Aug. 2016). Rather, a Judge "may consider the totality of the circumstances holistically." *Id.* The Commission has established that its judges may "evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care - a standard of care that is high under the Mine Act." *Brody Mining* 37 FMSHRC at 1702. This evaluation considers "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." *Jim Walter Resources,* 36 FMSHRC 1972, 1975 (Aug. 2014). The Commission has stated the real gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Newtown,* at 2049 (*citing Topper Coal Co.,* 20 FMSHRC 344, 350 (Apr. 1998)).

I find that the violation was a result of low negligence and that Twentymile did not unwarrantably fail to comply with the mandatory standard.[9] Much of the Secretary's argument in support of the high negligence and unwarrantable failure designations is based upon the fact that Twentymile sanctioned the practice of fishing and its managers routinely assigned miners that task. Sec'y Br. 13-16. I agree that Twentymile sanctioned the act of fishing and had knowledge that miners, including Lomas, engaged in fishing. However, I find that Twentymile permitted the act of fishing based on "an objectively reasonable and good faith belief that the cited conduct was in compliance with applicable law."[10] *Oak Grove Res.*, LLC, 38 FMSHRC 1273, 1279 (June 2016).

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[9] The Commission has held that "[t]he statutory language of section 104(d)(1) expressly makes a significant and substantial finding a prerequisite for the issuance of a section 104(d)(1) citation." *Youghiogheny & Ohio Coal Co.*, 10 FMSHRC 603, 608 (May 1998). Given that I have found that the violation was not S&S, Citation No. 9025724, by operation of law, is modified from a 104(d)(1) citation to a 104(a) citation and the unwarrantable failure designation is vacated. My finding that Twentymile's negligence was low is also inconsistent with an unwarrantable failure finding.

[10] Consideration of an operator's objectively reasonable and good faith belief that the cited conduct was in compliance with applicable law is appropriate in the analysis of unwarrantable

The evidence establishes that Twentymile reasonably believed that the act of fishing was not dangerous and did not constitute "maintenance" as contemplated by the cited standard. As discussed above in the S&S analysis, as well as in the imminent danger order analysis below, I find that a significant hazard did not exist. Twentymile personnel, including members of management and apparently at least one current MSHA inspector, had engaged in the act of fishing for decades without incident. Twentymile clearly believed that it was not engaging in violative conduct. I find that this belief, albeit an incorrect one, was objectively reasonable under the facts of this case. Given that the violation did not create a serious safety hazard and that Twentymile had a reasonable good faith belief that this practice did not violate a safety standard, I find that Twentymile's negligence was low.[11]

C. Imminent Danger Order No. 9025723

Inspector Taylor also issued Order No. 9025723, a section 107(a) order that alleges that Lomas's act of fishing, as described above, created an imminent danger. 30 U.S.C. § 817(a).

The Secretary argues that the imminent danger order was validly issued when the inspector observed a miner fishing in an energized conveyor using a piece of drill steel with a hook attached. Sec'y Br. 4. Inspector Taylor, in response to screams, believed that a miner had been caught and pulled into the moving feeder conveyor. Sec'y Br. 6. Although the miner was actually unharmed, in other situations miners have been pulled into moving conveyors and suffered fatal injuries. Sec'y Br. 6 (citing GX-8, a collection of fatalgrams involving miners pulled into pick breakers). Here, the miner was standing in a 13 inch wide trench with uneven ground, removing pieces of wood and metal of various sizes and weights from the feeder. Sec'y Br. 6-7. Although the miner testified that he could easily let go of the pole if it became caught, the natural human reflex is to grab tighter when an item is being pulled from one's grasp. While the inspector did not review fatalgrams at the time of issuance, he was generally familiar with the many deaths that have resulted from these types of situations and had personally experienced a close call with a conveyor belt. Sec'y Br. 7.

Twentymile argues that the inspector abused his discretion because there was no imminent danger. The inspector based his order on the incorrect belief that a miner was in danger when the inspector heard shouting. Twentymile Br. 18. The two inspectors present were excited and yelling before they reached the feeder or Lomas, who had finished fishing and was never in the feeder. Twentymile Br. 19. Standing next to the feeder is not dangerous and no

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failure and the degree of negligence. *Lehigh Anthracite Coal, LLC et al.*, 40 FMSHRC __, slip op. at 9, No. PENN 2014-109 (April 10, 2018).

[11] Earlier in this decision, I determined that that a reasonably prudent person familiar with the mining industry and the protective purposes of section 75.1725 would have recognized that the act of fishing at the feeder is a type of preventive maintenance that is covered by the requirements of section 75.1725(c). That determination is not inconsistent with my finding here that Twentymile had a reasonable good faith belief that it was in compliance with MSHA safety standards. I am holding that Twentymile *was negligent* in permitting the violation but the degree of its negligence should be lowered given the circumstances discussed above.

regulations prevent it. Twentymile Br. 19. The inspector's investigation was not reasonable given that he took no photographs, did not investigate the floor conditions, did not know Lomas's location, and took incorrect measurements. Twentymile Br. 19-20. The inspector's statement at hearing that "anytime you're around moving machine parts it is an imminent danger" is not a proper basis for an imminent danger order and ignores the fact that miners must stand next to a feeder to access its controls. Twentymile Br. 19.

Section 107(a) of the Act states that if an inspector "finds that an imminent danger exists, [the inspector] shall ... issue an order requiring the operator of such mine to cause all persons ... to be withdrawn from" the subject area until the inspector "determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist." 30 U.S.C. § 817(a). Section 3(j) of the Act defines an "imminent danger" as a condition "which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j); *See also Wyoming Fuel Co.*, 14 FMSHRC 1282, 1291 (Aug 1992). While the danger justifying the issuance of the order need not be immediate, an inspector must find that the hazardous condition or practice "has a reasonable potential to cause death or serious injury within a short period of time." *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006)(citation omitted).

In reviewing a 107(a) imminent danger order, the judge must determine if the inspector, who must make a quick decision at the time of issuance, "abuse[d] his discretion[.]" *Utah, Power & Light Co.*, 13 FMSHRC 1617, 1622-23 (Oct. 1991). In order to establish an imminent danger order the Secretary must prove "by a preponderance of the evidence that the inspector reasonably concluded, based on information that was known or reasonably available to him at the time the order was issued, that an imminent danger existed." *Knife River Constr.*, 38 FMSHRC 1289, 1291 (June 2016) (citing *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993)). "[A] Judge is not required to accept an inspector's subjective perception that an imminent danger existed but, rather, must evaluate whether it was *objectively reasonable* for the inspector to conclude that an imminent danger existed." *Id* (emphasis added). "[I]n making such a determination, a judge 'should make factual findings as to whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported issuance of the imminent danger order.'" *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993) (citing *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992)).

I find that the imminent danger order was invalidly issued. Inspector Taylor issued the verbal imminent danger order while he and others were walking towards, but before the group arrived at, the feeder. *See* Sec'y Br. 3 (citing Tr. 22-23). The only information available to Inspectors Taylor and Eddy was that they had heard someone "scream" and it appeared to them that a miner was in the feeder. Upon further review, Inspector Taylor discovered that Lomas had shouted in joy, not screamed, and that his shouts were unrelated to any danger. Lomas had been standing next to the feeder but was never in the feeder. The information Inspectors Taylor and Eddy relied upon to issue the verbal imminent danger order was inaccurate.

Moreover, the information that the inspectors subsequently gathered does not support the issuance of the imminent danger order, for the reasons discussed above. The deck of the feeder

was about 34 inches above the ground. Tr. 33, 83, 86, 275. The feeder's metal deck was about 35 inches wide, which separated the area where Lomas was standing from the feeder conveyor. Tr. 83, 86, 275. The conveyor was moving a slow speed of about 1.42 feet per second. Tr. 54, 136, 198, 260, 277. E-stop buttons/cords were present on both sides of the feeder, with the closest being about two feet from where Lomas was standing. Tr. 198. In addition, a third e-stop was strung across the feeder conveyor in front of the pick breaker. Tr. 76, 255-257. Finally, the hook at the end of Lomas's pole was only secured with tape and Owens credibly testified that the tape would fail and the hook would come off if heavier items were snagged. Tr. 220. Given the distance Lomas was from the conveyor, the low speed of the conveyor, the fact that the hook would be pulled off when subjected to even limited stress, and the presence of multiple methods to stop the conveyor in the event of an emergency, I find that the Secretary did not establish that the conditions at the feeder had a reasonable potential to cause death or serious injury within a short period of time. An imminent danger was not present.[12]

For these reasons, Imminent Danger Order No. 9025723 is **VACATED**.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). Twentymile had a history of 280 violations during the 15 months preceding the issuance of the subject citations, 31 of which were S&S. GX-1. Twentymile is a large operator and its parent company is also a very large operator. The parties were unable to stipulate as to good faith abatement. The Secretary stated that there is confusion as to whether Twentymile is still using some type of fishing to remove extraneous material and, if it is being used, where it is taking place. Sec'y Br. 20-21. Nevertheless, Inspector Taylor terminated the citation when Twentymile removed Lomas from the feeder. Tr. 69. Thus, Twentymile immediately abated the conditions that caused Inspector Taylor to issue the citation. The proposed penalty will not have an adverse effect upon Twentymile's ability to continue in business.[13]

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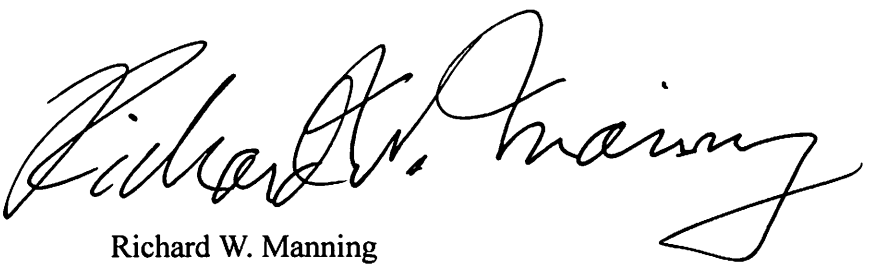
[12] Although Taylor testified that the feeder conveyor was running when the inspection party arrived at the feeder, it is unclear whether the conveyor was running at the time Lomas actually fished material out. Tr. 25. Lomas testified that he always pulls the e-stop cord to stop the conveyor before removing anything from the feeder with the fishing pole. Tr. 96, 201. As discussed above, it is clear that the feeder conveyor was moving as material is dumped into the feeder's hopper. For purposes of this decision I assume that Lomas did not always stop the conveyor when he removed objects from the feeder conveyor while fishing.

[13] The Secretary specially assessed the proposed penalty. 30 C.F.R. § 100.5. MSHA's Special Assessment Narrative Form indicates that the proposed penalty would have been $25,445 had it not been specially assessed. The Commission is not bound by the Secretary's special assessment procedure or the assessment formula used in 30 C.F.R. Part 100. I find that a penalty of $5,000 is appropriate in this case taking into consideration the penalty criteria set forth in section 110 the Mine Act. Although I determined that the violation was not serious and Twentymile's negligence was low, Peabody Twentymile Mining LLC and Peabody Energy, Inc. are large operators, so a further reduction of the penalty is not warranted.

III. ORDER

For the reasons set forth above, Citation No. 9025724 is **MODIFIED** to a non-significant and substantial section 104(a) citation with low gravity and negligence. Order No. 9025723 is **VACATED**. Based on the penalty criteria, I assess a total civil penalty of $5,000.00 for the violation. Peabody Twentymile Mining, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of $5,000.00 within 40 days of the date of this decision.[14] Docket Nos. WEST 2017-247-R and WEST 2017-248-R are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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[14] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.