FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0070 A.C. No. 36-07416-552312 Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Ryan M. Kooi, Esq., & Doug Sciotto, CLR, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor

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

Before: Judge Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (The "Act" or "Mine Act"). A hearing was held via Zoom Government on May 2-3, 2023.[1] The parties subsequently submitted briefs. The within Decision has been reached after careful consideration of the evidence presented at hearing and arguments advanced by the parties.

At issue in this case is a single violation—Citation No. 9206769—issued under 30 C.F.R. §75.1725(a) for failure to maintain a continuous miner in safe operating condition. Specifically, the Citation states:

> The Company No. 25 continuous miner located on the H-2 Development Section (MMU 007-0) is not being maintained in safe operating condition. There are 2 damaged cutting bits on the right outer sump ring of the cutting head, approximately 2 feet from each other. One of the bits is missing the carbide tip, and the other is broken off at the lug. The continuous miner was out of service at the time due to a 103(k) order being issued for an ignition investigation. According to miners working on the section who witnessed the ignition, the ignition originated on the

[1] This docket originally included four citations. Prior to hearing, the parties settled Citation Nos. 9205021, 9204786, and 9205026. A Decision Approving Partial Settlement was issued on May 18, 2023.

right-hand side of the cutting drum, was orange in color, and was approximately 2-2.5 feet in diameter. This is a contributory citation to a non-injury face ignition which occurred at 11:18 AM on 2/16/2022.

P-1 at 27.

LAW AND REGULATIONS

30 C.F.R. § 75.1725(a) provides, in pertinent part:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

CREDIBILITY ASSESSMENT

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has 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, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's 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).

JOINT STIPULATIONS

The parties agreed to the following stipulations which were admitted as Joint Exhibit 1 ("J-1").

1. The Respondent was an "operator" as defined in 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. 802(d), at the mine at which the citations at issue in this proceeding were issued.
2. At all times relevant to these proceedings, Enlow Fork Mine (ID 36-07416) is a "mine" as defined in 3(h) of the Mine Act, 30 U.S.C. 802(h).
3. Operations of the Respondent at the Enlow Fork Mine at which the citations were issued are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
5. Enlow Fork Mine is owned by the Respondent.
6. Payment of the total proposed penalty in this matter will not affect the Respondent's ability to continue in business.

7. MSHA Inspector Brandon Crutchman was acting in his official capacity and as an authorized representative of the Secretary of Labor when Citation No. 9206769 was issued and during the course of the accident investigation and inspection.
8. MSHA Inspector Walter Young was acting in his official capacity and as an authorized representative of the Secretary of Labor during the course of the accident investigation and inspection.
9. A true copy of Citation No. 9206769 was served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated therein, as required by the Act.
10. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 2022-0070 contains an authentic copy of Citation No. 9206769 at issue in this matter with all modifications or abatements, if any.
11. Petitioner's Exhibits are authentic copies of the documents they depict.

S. Br. at 4-6 (July 14, 2023).[2]

STATEMENT OF FACTS

Consol Pennsylvania Coal Company, LLC is the owner and operator of Enlow Fork Mine, an underground bituminous coal mine located in Southeastern Pennsylvania. J-1; P-14. In February of 2022, Enlow Fork Mine was liberating in excess of 11 million cubic feet of methane per 24-hour period. Tr. I at 57, 169. At that time, the mine used three portals: Oak Springs Slope, Sparta Portal, and Archer Portal. Tr. I at 27. Most active mining was conducted through the Archer Portal. Tr. I at 27.

I. The Ignition

At approximately 11:18 a.m. on February 16, 2022, a face ignition occurred on the H2 development section of Enlow Fork Mine. Tr. 1 at 82-83; P-1; P-2. At that time, MSHA Inspectors Brandon Crutchman and Walter "Bud" Young were conducting regular quarterly inspections in the Oak Springs side of the mine. Tr. I at 27, 161. At approximately 11:30 a.m., they met with Matt Roebuck—a company representative—at the Oak Springs hoist bottom to exit the mine. Tr. I at 27-28, 89, 161-62. It was at this time that Roebuck received a call on the mine radio reporting that an ignition had occurred and requesting that he report it to the MSHA inspectors to investigate. *Id*. Crutchman, Young, and Roebuck immediately exited the mine along with Inspector Rob Hutchinson, who had already issued a verbal 103(k) order to control and preserve the scene of the accident.[3] Tr. I at 28-29; P-2, P-9.

At the surface, Crutchman and Young learned the location of the ignition and that no injuries occurred. Tr. I at 32, 162. They gathered the pre-shift and on-shift examiners' reports,

[2] Hereafter, the joint stipulations, transcript, the Secretary's exhibits, Respondent's exhibits, the Secretary's post-hearing brief, and Respondent's post-hearing brief are abbreviated as "Jt. Stip.," "Tr.," "Ex. P-#," "Ex. R-#," "S. Br.," and "R. Br.," respectively.

[3] Inspector Hutchinson has since retired and was unavailable to testify at hearing, as he resides outside of subpoena range under Fed. R. Civ. P. 45(c). Tr. I. at 29.

relevant pages of the mine's ventilation plan, and a map of the section. *Id.* The inspectors then proceeded underground, accompanied by company representatives—Scott Watson, John Heffelfinger, Gaven Verbosky, Don Blumetti, Brett Farrell, and Steve Barr—and two inspectors from the Pennsylvania Department of Environmental Protection—Harry Casteel and Ralph Scott. Tr. I at 32-33, 163. They arrived at the H2 development section via mantrip and met the section crew who had gathered at the section power center. Tr. I at 33, 91, 163. Crutchman and Young then conducted a group interview of eight miners who witnessed the ignition—Sam Stempell, return side bolter; Josh Polk, miner operator; Brad Simpson, shift foreman; Cody Gibson, intake side bolter; Justin Drew, continuous miner coordinator; Dave Eisenhower, foreman; Tristian Demidovich, return rib bolter; and Mike Kuzma, intake rib bolter. Tr. I at 34, 91, 163-65, 247; Tr. II at 332; P-2.

The miners reported witnessing an orange ball or glow in the face of the number three entry that measured between two and two-and-a-half feet in diameter and lasted approximately ten seconds before self-extinguishing. Tr. I at 34-35, 92, 164-65, 244-48, 258-59; Tr. II at 325; P-2; P-16. Prior to the ignition, the miners had cut the bottom of the coal face underneath the hard rock binder. Tr. I at 198-99, 244. After mining one foot into the middle cut, the ignition occurred. Tr. I at 37, 198-99, 252. When he saw the orange glow, Polk appropriately glanced at the methane monitor which read 0.1 percent, de-energized the continuous miner, and started spraying the area where the ignition occurred with a wash down hose. Tr. I at 111-112, 165, 244, 258-59; P-2.

II. The Investigation

Upon arrival at the site of the ignition, Young—escorted by Mine Superintendent Steve Barr—conducted an initial methane check at the number 3 entry that detected methane levels twelve inches from the roof, face, ribs, and floor between 0.3 and 1.7 percent. Tr. 58, 165-66; P-16. After Young adjusted the ventilation controls, the methane levels dropped below 1 percent. *Id*. Young also observed a methane feeder—a fracture in the coal near the rock binder that was emitting higher concentrations of methane between 2.7 and 3.4 percent. Tr. I at 58, 113-14, 167; P-16.

Crutchman began his investigation by conducting an imminent danger run of the other entries in the H2 development section. Tr. I at 58, 165-66. Following his return from the imminent danger run, he conducted methane tests that showed the adjustment of the ventilation controls had lowered the level of methane near the feeder to between one and two percent. Tr. I at 58-59, 64, 113; P-2. Crutchman determined the methane levels were safe and modified the 103(k) order to permit Consol to clean up the coal behind the continuous miner and back the machine out of the face area so that they could continue the investigation. Tr. I at 59, 64-65, 102.

After the continuous miner was removed, Crutchman and Young inspected the methane feeder and observed a mist of water coming from the rib and a low hiss that would have been inaudible while the continuous miner was in operation. Tr. I at 59-60, 69, 167-68. Crutchman conducted a test which confirmed that methane was emitting from the feeder at levels of one to

two percent. Tr. I at 59-60, 64.[4] The inspectors also checked the cutting bits on the head of the continuous miner and found two bad bits within approximately two feet of each other—one that had the carbide tip completely worn off and one that was broken off at the lug where it attached to the cutting head. Tr. I at 69, 172-73; P-1; P-2; P-16. The bits were located on the right side of the outer sump of the cutting head, in the area where the ignition occurred. Tr. I at 69, 254-55; P-1; P-2. Polk—the continuous miner operator—testified at hearing that the damaged bit looked worn and the broken bit looked like it had been broken by a sulfur ball. Tr. I at 246-47.

As a result of the investigation, Inspector Crutchman concluded that the direct cause of the ignition was damaged or missing cutting bits contacting intrusions in the face area—sulfur balls and laminated sandstone—which then created a spark and ignited the methane feeder. Tr. I at 82; P-2. Respondent replaced the two bits in order to abate the violation. Tr. I at 79, 179. The mine also submitted a ventilation plan addendum to MSHA, which included a requirement that Consol check the bits on the cutting head of the continuous miner every twenty feet when mining in the H1 to H5 districts. Tr. I at 81; P-8.[5] MSHA approved this plan. *Id*.

A. Conditions in the H2 Development Section

At the beginning of the shift, the crew examined the cutting bits, sprays, and parameters, and did not find any worn or broken bits. Tr. I at 37, 164, 240; P-2; P-16; R-3. The water pressure at the cutting head measured at 80 P.S.I. with a flow of 62 gallons per minute. Tr. I at 37, 129, 164; P-2; P-16; R-3. The crew used an 18-inch ventilation tube with a 16-inch slider that extended to approximately five feet from the face. Tr. I at 37; P-2; R-3. The crew had mined approximately 47 feet that shift and the continuous miner had not de-energized due to high methane. Tr. I at 37, 109, 164, 245, 252; P-2; P-16. Methane readings on a probe had increased to 0.3 percent during the shift. Tr. I at 37, 164; P-2; P-16.

The mining of the coal seam in the H2 development section was complicated by the presence of a rock binder and sulfur balls. Tr. I at 39, 69, 98, 174. The rock binder—made of hard shale and thin layers of sandstone—measured approximately eight inches and was located 5.7 feet above the bottom of the coal seam. Tr. I at 39, 69, 98, 174; P-2. The miners told the inspectors that they occasionally witnessed sparking while cutting into it. Tr. I at 39, 98; P-2. The inspectors noted that there was evidence of hard rock binder in the ribs as well as the face, indicating that the miners had mined through the binder during the shift. Tr. I at 40-41, 174. Sulfur balls—round, hard rock formations—and a clay vein—an intrusion of clay within the coal seam that indicated a possible source of methane or adverse roof conditions—were also present in the face area. Tr. I at 41-2, 69, 174-75, 246; P-2; P-16. Shale, sandstone, and sulfur balls are

[4] The inspectors discovered that the methane monitor mounted on the continuous miner detected a lower level of methane than their monitors—2.2 percent compared to 2.5 percent—and issued a citation for failing to maintain the methane monitor in permissible and proper operating condition. Tr. I at 66; P-3. This citation was issued as non-contributory to the face ignition. Tr. I at 66-68, 184-85.

[5] Since Consol implemented this addendum, there have been no further ignitions in the H district. Tr. I at 81-82, 183. However, there have been additional ignitions in the G District, which does not require more frequent bit checks. Tr. I at 82.

harder materials than coal, and mining through them causes bits to wear down faster. Tr. I at 40, 107. This increases the potential for the bits to break and for sparking to occur. Tr. I at 40, 107, 246.

B. The Coal Bed Methane Well NV-89 Cut Through Plan

Prior to the ignition, the crew was approaching a coal bed methane well (CBM well NV-89), which was drilled laterally into the coal seam from the surface to reduce methane levels. Tr. I at 50, 57, 132, 178-79, 234; P-14. At the time of the ignition, the miners had advanced approximately 20 feet into the minimum working barrier around the suspected location of the well. Tr. I at 38, 50, 52-55; P-2; P-7. This would have been the first intersection of that well. Tr. I at 38. The first intersection of a coal bed methane well can be hazardous because there is no way of knowing if the previous well preparation was sufficient to prevent a methane inundation. Tr. I at 38, 47, 49, 134, 141, 178; P-7.

Mining through coal bed methane wells is a hazardous process that has the potential to cause methane to inundate mines, possibly leading to explosions or ignitions. Tr. I at 42. Respondent has a history of explosions—including one explosion causing injuries at the Enlow Fork mine—caused by the presence of methane at the coal face. Tr. I at 74-75, 183. Four of these ignitions occurred on the H Section. Tr. I at 183. As a result, 30 C.F.R. § 75.1700 prohibits mining through gas wells. Tr. I at 42. In this case, however, Respondent had submitted a Petition for Modification to permit mining through the coal bed methane well. *Id.* MSHA approved Consol's Petition for Modification, Docket No. M-2009-039-C, and Consol submitted a cut-through plan as an addendum to its approved ventilation plan incorporating approximately 40 additional procedures mandated by MSHA due to the hazardous nature of mining through gas wells. Tr. I at 45-46; P-7.

As soon as mining encroaches on the minimum working barrier, the mandatory procedures specified in the cut-through plan must be implemented. Tr. I. at 45, 234; P-7. These special procedures are designed to mitigate the risk of methane inundations and associated hazards. Tr. I at 49-50; P-7. Among other things, the mandatory procedures include more frequent methane tests, the application of rock dust to within 20 feet of the face rather than 40 feet, more frequent permissibility checks, daily calibration of the methane monitor on the continuous miner rather than once every 31 days, a prohibition from traveling or working in remote areas of the mine while crews are working within the minimum working barrier, the adjustment of the mining cycle to prevent methane from advancing into other active areas of the mine, and additional equipment to prevent and extinguish fires. Tr. I. at 46, 49, 54, 132-34, 176-77, 234-35; P-7. The procedures also require that the mine notify MSHA in the event that a methane inundation were to occur and normal section ventilation is unable to dilute the methane. Tr. I at 47-48; P-7. At the time the ignition occurred, the mine had implemented the procedures required by the cut through plan. Tr. I at 55. The miners had finished applying rock dust to the entry, ventilation was compliant, and the required firefighting equipment was present and operational. Tr. I at 39, 56, 108.

C. The Testimony of Michael Bohan—Consol's Senior Geologist

At hearing there was some controversy as to whether Respondent's witness, Michael Bohan, was appearing as an expert witness and, if so, whether Respondent had failed to give proper notice of such. Tr. II at 345-348.

Said issues have been rendered essentially moot in that this Court afforded Bohan's testimony little or no probative weight. Often argumentative and non-responsive to the Secretary's questioning, Bohan was evasive in answering whether the continuous miner's damaged bits posed any risk, including that of ignition.[6]

CONTENTIONS OF THE PARTIES

The Secretary contends that Respondent violated 30 C.F.R. 75.1725(a) when it failed to maintain a continuous miner in safe operating condition or remove it from service when one bit was damaged and one bit was missing from the cutting head of the machine. In addition to affirming the violation and penalty, the Secretary argues that for Citation No. 9206769, the gravity should be modified from "Reasonably Likely" to "Highly Likely," and from "Lost Workdays or Restricted Duty" to "Fatal."

The Respondent contends that this citation should be vacated or—at the very least—modified from "Reasonably Likely" to "Unlikely" gravity and to remove the S&S designation. Respondent argues that it is common for a shower of sparks to occur when the metal bits on a spinning continuous miner drum strike iron pyrite or sulfur balls, and that sparking is well-documented even when cutting bits are in perfect condition. Respondent's Post-hearing Brief at 3-4. Respondent also contends that the Secretary did not produce adequate evidence to support the "reasonably likely" gravity designation, and that the S&S designation is not warranted because the continuous miner operator immediately stopped the machine and called MSHA when the bits sparked, thereby negating the possibility of a hazard.

BURDEN OF PROOF AND STANDARD OF PROOF

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by the preponderance of the evidence. *Jim Walter Res. Inc.,* 28 FMSHRC 983, 992 (Dec. 2006). *RAG Cumberland Res. Corp.,* 22 FMSHRC 1066, 1070 (Sept. 2000). *Jim Walter Res., Inc.,* 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.,* 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG*

[6] This Court specifically rejects the Respondent's and Bohan's implications that the "glow" caused by the frictional contact of the continuous miner with a sulfur ball was comparable to the benign bioluminescence of a lightning bug.

Cumberland Res. Corp., 22 FMSHRC 1070 (Sept. 2000), (quoting *Concrete Pipe & Prods of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 8 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California.* 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States,* 97 U.S. 237, 266 (1877).[7] While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court's factual determinations must be supported by substantial evidence.

ANALYSIS

Following the investigation of the ignition, Crutchman issued Citation No. 9206769 for a violation of 30 C.F.R. 75.1725(a). Crutchman determined the violation was reasonably likely to result in injuries causing lost workdays or restricted duty to five miners and designated it as S&S. Tr. I at 74-77; P-1. He explained that he evaluated the gravity as S&S and reasonably likely due to the violation of a mandatory safety standard; the existence of a discrete hazard; the fact that the mine liberates over 11 million cubic feet of methane per day; the presence of anomalies in the coal such as a hard shale binder with sandstone and sulfur balls that could cause sparking; the mine's history of approximately 14 ignitions, several of which were caused by bad bits; and the fact that the miners were anticipating mining through CBM well NV-89. Tr. I at 74, 149. He also noted that a prior ignition at the mine had burned a miner and damaged the section where the ignition occurred. Tr. I at 75. Crutchman testified that based on the facts uncovered during his investigation, he would have marked the citation as S&S and reasonably likely even absent the occurrence of an ignition. Tr. I at 79.

Crutchman further evaluated the gravity of the violation to include injuries resulting in lost workdays restricted duty based on the burns that could be expected or due to smoke inhalation by miners trying to extinguish the ignition. Tr. I at 76. He considered five miners to be affected by the hazards presented by the damaged and missing bits because there were five

[7] "What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly, the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case." 2 McCormick on Evid. § 339 (7th Ed.). Indeed, the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad's* Book XXII: "Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor." Homer, The Iliad, Book XXII (Samuel Butler trans., [Publisher] [ed.]) (1898).

miners working in the immediate area—the continuous miner operator, the left-side roof bolter, the left-side rib bolter, the right-side roof bolter, and the right-side rib bolter. Tr. I at 76.

I. The Secretary carried his burden of proving a violation of 30 C.F.R. 75.1725(a).

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res., Inc*., 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp*., 22 FMSHRC 1066, 1070 (Sept. 2000). Mine operators are generally strictly liable for mandatory safety standard violations. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Nally & Hamilton Enters., Inc*., 33 FMSHRC 1759, 1764 (Aug. 2011).

Section 75.1725(a) provides, in pertinent part, "Mobile and stationary equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." 30 C.F.R. 75.1725(a). The question, then, is whether or not the equipment in this case was "unsafe." The Commission has established that the standard for a Section 75.1725(a) violation is whether "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action." Otis Elevator Co. v. Sec'y of Lab., 921 F.2d 1285, 1291 (D.C. Cir. 1990) (citing Alabama By–Products Corp., 4 FMSHRC 2128, 2129 (1982)).

In 2013, MSHA issued public guidance stating that MSHA considers the operation of continuous mining machines with damaged or missing cutting bits unsafe because mining with damaged, worn, or missing cutting bits can result in sparks—the most common source of methane ignitions. Tr. I at 73; P-13. This guidance was validated on March 31, 2021, and is currently in effect through March 31, 2024. P-13. Specifically, this guidance states that "[c]utting coal or rock with continuous mining machines or longwall shearers that have damaged, worn, or missing cutting bits have ignited methane resulting in serious injuries and fatalities." Tr. I at 73; P-13.[8]

The Commission has affirmed a violation of this standard for missing components. In *Martinka Coal Co.*, a belt structure was missing rollers, causing the belt to rub against the structure. *Martinka Coal Co.*, 15 FMSHRC 2452, 2456 (Dec. 1993). The Commission affirmed the violation because of the presence of combustible accumulations and an ignition source. *Id.* In *So. Ohio Coal Co.*, the Commission found it sufficient that the inspector and operators testified that the condition--broken track pads--was unsafe. *So. Ohio Coal Co.*, 13 FMSHRC 912, 915-16, 916 n.2 (June 1991) (quoting *Ala. By-Prods. Corp.*, 4 FMSHRC at 2129) ("Substantial evidence supports the judge's finding that the two broken track pads presented an unsafe condition."). It concluded that "safe operating condition" means that a machine can be used safely by miners. *Id.* at 915.

[8] MSHA's internal policy is to issue a citation for two or more damaged or missing bits when they are within four feet of each other on the continuous miner head. Tr. I at 73, 121.

Whether missing or broken components are involved, there still must be a danger posed to miners by use of the cited machinery. The Commission recently affirmed two Section 75.1725(a) violations as S&S where cables were found to be in bad condition and posed a risk of snapping or dropping loads. *Consol Pa. Coal Co.*, 43 FMSHRC at 150-51, 153-54. There, a cable was found to not be connected as designed--merely wrapped around the reel. *Id.* at 150.

Here, it is undisputed that the machinery contained two missing or damaged bits. There is credible testimony and evidence that missing and damaged bits increase the chances of sparking when mining and—in the presence of methane—the chances of ignition. See Tr. I at 40, 73, 184; Tr. II at 323-24; P-13. Methane face ignitions are commonly understood to lead to explosions resulting in serious injury and death. In fact, Enlow Fork Mine itself has a history of 14 methane face ignitions since 2017, and the mine experienced at least one explosion caused by a methane face ignition that resulted in serious injuries to a miner. See Tr. I at 74-75, 183.

At this step, I need not address whether there is a confluence of factors making an injury reasonably likely. It is sufficient for purposes of the violation finding that a dangerous condition could be created by use of the cited machinery with these missing and damaged bits. A reasonably prudent miner familiar with the mining industry and the factual circumstances surrounding damaged and missing bits—the observed sparking, the slow-moving and difficult mining progress, the presence of the hard binder and sulfur balls, and the proximity to the CBM well—would recognize that operating a continuous miner with damaged or missing bits presents the hazard of methane ignitions. I find that Respondent failed to maintain the continuous miner in safe operating condition and failed to remove the continuous miner from service when in an unsafe condition. Therefore, I find that Respondent violated section 75.1725(a).

II. The violation of 30 C.F.R. § 75.1725(a) was significant and substantial in nature.

A violation is properly designated as 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." *Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984) (citing Cement Div., Nat'l Gypsum Co., 3 FMSHRC 822, 825 (Apr. 1981)). The four elements required for an S&S finding are expressed as follows:

1. the underlying violation of a mandatory safety standard;
2. the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed;
3. the occurrence of the hazard would be reasonably likely to cause an injury; and
4. there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. See Consol Pa. Coal Co., 43 FMSHRC 145, 148 (Apr. 2021) (citing U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and

substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.").

For the following reasons, this Court finds that the Secretary has established that all four prongs of *Mathies/Newtown* have been met, and therefore Citation No. 9079562 was properly designated as S&S.

A. A violation of a mandatory safety standard occurred.

The facts and discussion *supra* establish a violation of 30 C.F.R. § 75.1725(a), which is a mandatory safety standard.

B. There was a reasonable likelihood of the occurrence of the hazard.

Mathies Step 2 is a two-step process: (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC at 1868. This finding must be based on "the particular facts surrounding the violation." *Northshore Mining Co.*, 38 FMSHRC 753, 757 (2016). The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, but rather whether there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc.* 32 FMSHRC 1257, 1280-1281 (Oct. 2010).

Here, the standard requires that machinery be maintained in a condition that enables its safe use by miners. *See So. Ohio Coal Co.*, 13 FMSHRC at 915. The hazard the standard aims to prevent is one resulting from the dangerous operation of the cited machinery. The Secretary contends that "[b]y operating the continuous miner in an unsafe condition, Consol placed miners at risk of serious injury or death due to the high likelihood of an ignition, fire, or explosion." Therefore, the specific hazard here is one of ignition, fire, or explosion caused by sparks from damaged or missing bits striking iron pyrite or sulfur balls.

The remaining issue is whether a reasonable likelihood exists that the damaged or missing bits will spark and cause an ignition, fire, or explosion. The likelihood of hazard should be based upon the "particular facts surrounding the violation." *Newtown Energy, Inc.*, 38 FMSHRC at 2038. Operating the continuous miner on the H2 development section while there was one damaged bit and one missing bit on the cutting head posed a discrete safety hazard to miners because it was highly likely to lead to—and in fact did lead to—a face ignition. Damaged and worn bits increase the potential for sparking when mining, and in the presence of methane, sparking is highly likely to lead to an ignition, as it did here. Tr. I at 40, 73, 184; P-13.

As a matter of logic and common sense, I find that an event that *has* occurred *is* reasonably likely to occur. Methane face ignitions are, without a doubt, a discrete safety hazard to miners. The particular facts surrounding the violation created a reasonable likelihood of the occurrence of the hazard against which 30 C.F.R. § 75.1725(a) was directed. Mining through hard shale, sandstone, and sulfur balls further increases the potential for sparking. The presence

of the methane feeder and the machine's position within the minimum working barrier of a CBM well makes an ignition even more likely. In view of the foregoing, this Court finds that the Secretary presented sufficient evidence to meet the second step of *Mathies* and *Newtown*.

C. Based upon the particular facts surrounding the violation, the occurrence of the hazard—ignition, fire, or explosion caused by sparks from damaged or missing bits striking iron pyrite or sulfur balls—would be reasonably likely to result in an injury that would be reasonably likely to be serious, and indeed, fatal.

The third and fourth steps of the *Mathies* test require a showing of a reasonable likelihood that the hazard contributed to will result in an injury, and that the injury in question will be of a reasonably serious nature.[9] In evaluating the likelihood of injury, judges must assume the occurrence of the hazard. *See Newtown Energy, Inc.*, 38 FMSHRC at 2037. One only reaches Step 3 of the *Mathies* analysis after determining that the hazard is reasonably likely to occur. I thus assume the occurrence of the hazard—ignition, fire, or explosion caused by sparks from damaged or missing bits striking iron pyrite or sulfur balls.

Methane ignitions are reasonably likely to result in injuries of a reasonably serious nature, including burns, smoke inhalation, concussive forces, or even death. Methane ignitions have caused serious injuries to miners throughout mining history. Enlow Fork Mine has a history of at least one explosion caused by a methane ignition that resulted in burns to a miner. Tr. I at 75. Twenty-nine miners were killed by an explosion caused by a methane face ignition at the Upper Big Branch Mine in 2010. Tr. I at 85, 186-87. MSHA determined that the face ignition at Upper Big Branch that led to the explosion was caused by two damaged bits on the shearer cutting head. Tr. I at 86, 186.

An inspector's judgment is an important factor in determining whether there is "a reasonable likelihood that the hazard contributed to will result in an injury." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (1998). Given the evidence presented and the reasonable inferences flowing from such, I find that the inspector reasonably concluded that the expected injury would affect five miners and that, as discussed *supra*, the resulting injury would reasonably cause injuries at least as serious as lost workdays or restricted duty. I therefore find that the hazard—ignition, fire, or explosion caused by sparks from damaged or missing bits striking iron pyrite or sulfur balls—would be reasonably likely to cause serious injury or death. Accordingly, the third and fourth step of *Mathies* and *Newtown* are met.

III. The low level of negligence designated by the inspector is supported by a totality of the circumstances.

According to 29 C.F.R. § 103.3(d), negligence is considered low when "the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." 30 C.F.R. § 100.3, Table X. In *Sec'y of Labor v. Brody Mining, LLC.,* 37 FMSHRC 1687, at 1701 (Aug. 2015), the Commission affirmed that, in making a negligence

[9] The Commission expected that the third and fourth steps of the *Mathies* test would "often be combined in a single showing." *Knox Creek*, 811 F.3d at 163, citing *Mathies*, 6 FMSHRC at 3-4.

determination, Commission judges are not required to apply the definitions of Part 100, may evaluate negligence from the starting point of a traditional negligence analysis, are not limited to an evaluation of allegedly mitigating circumstances, and can consider "the totality of the circumstances holistically."

Inspector Crutchman testified that he found the operator to be negligent for the following reasons: (1) The miners that reported the incident were experiencing difficulties cutting through the binder; (2) the miners reported observing frequent sparking; and (3) the miners anticipated mining through a well and should have known to check for increased wear on the bits. Tr. I at 76. Based on this, Crutchman reasoned that the operator should have known that there was an increased chance for wear on the bits when mining was difficult and slow-going, which could have led to increased sparking and the potential for an ignition. Tr. I at 76-78, 116. I agree with his reasoning.

Inspector Crutchman evaluated negligence as "low" due to the following considerable mitigating circumstances: (1) the mine was in compliance with its ventilation plan and all applicable provisions of the cut-through plan for the well; (2) only one of the 67 water sprays was not working correctly; (3) the atomizer sprays were working correctly; and (4) the miners inspected the bits on the cutting head at the beginning of the shift and did not find any bits that were missing or damaged. Tr. I at 76-77, 108, 130-31, 185.

I agree with the Secretary that the mining conditions were difficult and warranted checking the bits more frequently. The bits were likely damaged when the continuous miner cut through the hard binder and sulfur balls, but the inspectors were unable to determine the exact time when the bits were worn or broken. Considering the totality of the circumstances, this Court finds low negligence to be appropriate for Respondent's failure to adhere to § 75.1725(a) requirements.

IV. The originally assessed penalty of $716.00 for the violation is appropriate.

Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). In assessing civil monetary penalties, an ALJ shall consider the six statutory penalty criteria:

> [T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and 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).

In *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), the Commission held that all of the statutory criteria in § 110(i) should be considered in the court's *de novo* penalty assessment, but not necessarily assigned equal weight. In *Musser Engineering, Inc.,* 32 FMSHRC at 1289, the Commission held that, generally speaking, the magnitude of the

gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed.

The Secretary has proposed a penalty of $716.00 for the violation cited in Citation No. 9206769. I have considered and applied the six penalty criteria found in § 110(i) of the Act. Considering all the circumstances, the Secretary's original proposed penalty assessment appears appropriate.

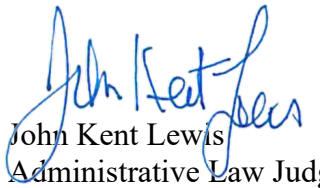
The mine and its controlling entity are considered large in size under 30 C.F.R. § 100.3. The parties stipulated that payment of the proposed total penalty would not affect Respondent's ability to continue in business. Jt. Stip. 6. The history of assessed violations, admitted into evidence at Ex. P-1, showed 10 violations of this standard at this mine in the two years prior to issuance of this citation. *See also* Tr. I at 73-74.

I have addressed negligence and gravity in the discussion above. This Court notes that Respondent's argument for a reduced penalty rests upon a modification of the gravity finding from "Reasonably Likely" to "Unlikely," and the removal of the S&S designation. For reasons already discussed *supra*, this Court rejects such suggested modifications. Finally, while accepting that Respondent acted in good faith in abating the dangerous condition, this Court accords more weight to the gravity of the violation and the reasonable likelihood of serious or fatal injury posed by the hazard in determining an appropriate penalty.

Based on the foregoing, this Court finds that a penalty of $716.00 is appropriate.

ORDER

The Respondent, Consol Pennsylvania Coal Company, is **ORDERED** to pay the Secretary of Labor the sum of $716.00 within 30 days of this order.[10]



John Kent Lewis
Administrative Law Judge

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

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