FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2014-0746 A.C. No. 11-03141-360105
v.	
MACH MINING, LLC, Respondent	Mine: Mach No. 1 Mine

AMENDED DECISION AND ORDER

Appearances: Daniel McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Chris Pence, Esq., Hardy Pence, PLLC, Charleston, West Virginia, for Respondent

Before: Judge McCarthy

The decision that issued August 24, 2016 is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. 2700.69(c), to read as set forth below.

I. STATEMENT OF THE CASE

This case is before me upon a petition for the assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). Docket No. LAKE 2014-0746 involves thirteen section 104(a) citations issued by the Secretary of Labor ("the Secretary") between July 14 and 28, 2014, charging Mach Mining, LLC ("Mach") with violations of mandatory health and safety regulations. On October 29, 2015, the Secretary submitted a motion to approve settlement for 11 citations, which I approve below.

A hearing was held in St. Louis, Missouri on November 2, 2015 on Citations Nos. 8450924 and 8450926. During the hearing, the parties offered testimony and documentary evidence.[1] Witnesses were sequestered.

Citation No. 8450924 charges Mach with violating 30 C.F.R. § 75.400 for failing to prevent and clean up accumulations of coal dust, loose coal, and other combustible material. The Secretary alleges that the violation was significant and substantial (S&S)[2] and the result of Mach's high negligence. Citation No. 8450926 charges Mach with violating 30 C.F.R. 75.363(b) for failing to properly record the accumulation hazard alleged in Citation No. 8450924. The Secretary alleges that this violation was also S&S and the result of Mach's high negligence. The issues presented in the case are whether Mach violated the standards cited by the Secretary; if so, whether the Secretary properly assessed the gravity of the violations and the level of negligence attributed to Mach; and what penalties, if any, should be assessed against the Respondent. For the reasons set forth below, I affirm Citation No. 8450924, as written, and assess a civil penalty of $15,570. I also affirm Citation No. 8459026, as written, and assess a civil penalty of $6,996.

Based on a careful review of the record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,[3] I make the following findings of fact and conclusions of law:

II. STIPULATIONS AND GENERAL FACTUAL BACKGROUND

A. Stipulations of Fact and Law

At hearing the parties stipulated to the following:

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[1] In this decision, "Tr." refers to the hearing transcript, "ALJ Ex. #" refers to the ALJ's exhibits, "P. Ex. # refer to the Petitioner's exhibits, and "R. Ex. #" refers to the Respondent's exhibits. ALJ Exs. 1 and 2; P. Exs. 1, 2, 4, and 5; and R. Exs. 1 and 2 were received into evidence at the hearing. R. Ex. 4 (Longwall Production Reports for July 12-14, 2014) and R. Ex. 5 (Continuous Miner Production Reports for July 12-14, 2014) were submitted after the hearing, and I now admit them into the record.

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814 (d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

1. Mach was at all times relevant to these proceedings engaged in mining activities at the Mach Number One Mine located in or near Johnson City, Illinois.

2. Mach's mining operations affect interstate commerce.

3. Mach is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*

4. Mach is an "operator" as the word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mach Number One Mine (Federal Mine I.D. No. 11-03 141) where the contested citations in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.

6. On the dates the citations in these dockets were issued, the issuing MSHA coal mine inspectors were acting as duly authorized representatives of the United States Secretary of Labor, assigned to MSHA, and were acting in their official capacity when conducting the inspections and issuing the MSHA citations.

7. The MSHA citations at issue in these proceedings were properly served upon Mach as required by the Mine Act.

8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance.

9. Mach demonstrated good faith in abating the violations.

10. In 2013, the Mach Number One Mine produced 6,694,630 tons of coal and its controlling entity produced 18,772,988 tons of coal.

11. The penalties proposed by the Secretary in this case will not affect the ability of Mach to continue in business.

Resp't's Pre-Hrg. Rpt. 1-2; Pet'r's Br. 2-3.

B. General Factual Background

1. Mine Examiner Adams' Shift Examination

On July 14, 2014, mine examiner David Adams conducted a midnight shift examination of the slope belt at approximately 6:00 a.m.[4] Tr. 116. The slope belt is located in the mine travel way, which slopes downward from the surface to the underground sections of the mine. Tr. 54-55. The ceiling is approximately ten feet high, and is supported by a steel, arch-supported line opening. Tr. 55. The travel way is divided into two parts: a 12-foot-wide road for vehicles on the left-hand side and a seven-foot-wide slope belt flanked by a four-foot-wide walkway on the right-hand side. Tr. 55, 68, 222. The travel way and the slope belt are separated by steel beams placed at five foot intervals. Tr. 197. There are four carbon monoxide ("CO") detectors and a fire suppression system present along the slope. Tr. 346-47.

Adams conducted his examination by driving along the 3,600-foot slope belt and checking for accumulations of coal, structural damage, and hazards on both the driving side and back side of the slope belt. Tr. 215, 222, 239. At the end of his examination, Adams filled out the examination book for each belt line and travel way, which takes about 20 minutes. Tr. 231. He observed spillage on the slope belt due to washback, but denied observing any accumulations in contact with the belt. Tr. 227, 229.

At the time of the inspection, Respondent was mining a new panel, which resulted in water coming off the longwall face, and spillage onto the slope belt. Tr. 283. Although some of this water was discharged through water pumps and pipes, some was transported with coal and rock via the belt. As the material was transferred from one belt to another, the weight of the water and other material made it difficult for the belt to force the material uphill and out of the mine. Tr. 98. As a result, the material washed back downhill, flooding the area below. Tr. 98. Mine manager Rorer described this as "washback," which happens when water builds up to a certain peak on the belt, and rolls back on the belt instead of exiting the slope.[5] Tr. 334.

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[4] David Adams worked full time for Respondent from 2007 until March of 2015. Tr. 212. At the time of the inspection, Adams was a mine examiner, who was required to check all working sections, belt lines, and air courses for hazardous conditions or violations. Tr. 214. At the time of the hearing, Adams had retired and was working for Respondent as a part-time contractor. Tr. 212. Adams began mining in 1972, and held mine examiner, mine manager, EMT and electrical certifications. He has thirty years of experience in the mining industry. Tr. 213-15.

[5] Rorer has worked at Mach for over seven years. Tr. 321. He spent one year running a scoop, three years as a belt foreman, and the three years before the inspection as a certified mine manager. Tr. 321, 323-24. Prior to working at Mach, Rorer worked at the Eagle Valley mine for five years as a roof bolter, and then at the Willow Lake mine as a roof bolter and a scoop operator. Tr. 322.

Adams testified that accumulations can occur very quickly on a slope belt due to spillage resulting from "washback," which consists of water, coal, and other materials sliding down the slope belt as a result of efforts to remove the water discharged from longwall mining operations. Tr. 253. Mach has a 44-46 percent recovery rate, meaning that 44 to 46 percent of what is mined by weight is coal. The rest is rock or other rejected material. Tr. 390.

Respondent had previously investigated the washback phenomenon, and mine manager Parker Phipps visited other mines to view their dewatering systems.[6] Tr. 389. After these visits, Phipps ordered a new dewatering system to address the washback issue. Tr. 337, 389. It took about three months to purchase and install the system. Tr. 339. The dewatering system was installed at the mine nearly two months after the issuance of Citation No. 8450294. Tr. 389.

In the interim, Phipps testified that additional miners were hired to shovel as needed each shift, and company foremen patrolled the belt for rollers contacting accumulations. Tr. 227, 383, 399. The number of shovelers varied from day to day, but more miners were needed early in the week because the longwall was idled on Saturdays and Sundays, and then started again on Sunday, causing washback. Tr. 391. Rorer testified that in order to combat the water, the mine would set pumps over the weekends. On Sunday night, before the long wall began production, the gates on the tail would be opened to run water off the long wall before coal was produced. Tr. 333.

After his examination, Adams spoke to mine manager Rorer to relay the results of his examination and the progress that the shoveling miners had made at that point. Tr. 232; 236. Adams noted in the slope belt examination book that the "slope belt needs cleaned—work in progress." Tr. 116, 229; R. Ex. 1. This July 14, 2014 entry was standard practice at the mine. Adams testified that Rorer would "know what [his notation] meant." Tr. 264. Adams testified that he would verbally have told Rorer any additional or more specific information. Tr. 264.

2. The Instant Inspection

MSHA Inspector Bernard Reynolds arrived at the mine at 7 a.m. on July 14, 2014 to conduct a regular E01 inspection.[7] Tr. 51, 186. During that inspection, miner Guy Webster

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[6] Phipps has a Bachelor of Science in Mining Engineering. Tr. 382. He holds underground mining foreman papers from Colorado, and a mine manager certification for Illinois. Tr. 382. Phipps has seven years of underground mining experience. Tr. 382. He began working for Mach Mining in 2013, and was promoted to general manager in July of 2014. Tr. 383.

[7] Reynolds has been an inspector with MSHA for 7 years. Tr. 33. He is a ventilation specialist and has a Bachelor's of Science degree in Mining Engineering. Tr. 33. Reynolds had 22 years

drove Reynolds into the mine.[8] Tr. 54, 56, 301. As they proceeded down the travel way, an unidentified miner stopped their vehicle to inform Webster that a set of rails on the slope was broken, and that the belt was running in contact with coal accumulations. Tr. 56.[9] Hearing this, Reynolds decided to inspect the broken rail on foot. The broken rail was located approximately 300-500 feet from the top of the slope. Tr. 57-58.

When Reynolds set out on foot, there were five to seven miners at the top of the slope cleaning the belt. Tr. 69. Reynolds observed coal accumulations up to 30 inches deep and six feet wide. Tr. 60. In some places, rollers touched the accumulations. Tr. 60. Based on the extent of the accumulations, Reynolds estimated that the accumulations had existed for several shifts. Tr. 63-64.

As Reynolds walked the belt, he found accumulations 12 inches deep on the back side of the belt approximately 100 feet from the slope collar. Tr. 65. At 200 feet, he found accumulations approximately 14 inches deep. Tr. 66. The accumulations increased to about 16 inches at 250 feet. Tr. 66. At 570 feet down the belt, Reynolds observed that the belt and three of the bottom idler rollers were running in approximately ten feet of coal dust accumulations that were 24-30 inches deep. Tr. 69-70, 72.

At 650 feet, Reynolds found that three bottom roller brackets were hot from contact with the moving belt. Tr. 78. Further, the belt had cut into the I-beam approximately one-eighth of an inch. Tr. 78. Reynolds estimated that the rubber belt had rubbed into the steel I-beam for at least 24 hours. Tr. 79.[10]

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of experience in underground mining. Before becoming an inspector, most of this experience involved long-wall mining. Tr. 34, 37.

[8] Webster has twenty years of experience in underground mining. Prior to the hearing, Webster worked for Mach for ten years, the last six as an out-by boss. Tr. 278. As an out-by foreman, Webster led a team performing various jobs and projects, other than producing coal. Tr. 279-80. Webster has mine examiner and mine manager papers. Tr. 279. At the time of the inspection, Webster supervised underground miners, who were performing tasks other than extracting coal, such as shoveling the belt. Tr. 277.

[9] The rail is part of the belt structure's framework and supports the rollers on the belt. Tr. 57-58.

[10] This estimate is in dispute. Webster testified that this result would have occurred after a "long time." Tr. 301-302. Adams testified that it would not take very long, possibly four hours. Tr. 268-269. In light of their substantial combined experience, I credit the testimony of Reynolds and Webster indicating that the friction between the belt and I-beam likely existed for a significant period of at least 24 hours, and I reject Adams' contrary testimony.

Approximately 1,100 feet down the belt, near the slope tripper drive, Reynolds observed another area of significant accumulation, where five rotating rollers were rubbing the belt, creating a frictional heat source. Tr. 80.[11] Reynolds testified that dust was visible in the air near the slope tripper drive, which led Reynolds to conclude that the coal in that area was fairly dry. Tr. 83, 131. Although Reynolds did not observe any miners in the immediate area, Reynolds noted that the air would take the suspended dust up the slope, toward the location where the five to seven miners were cleaning the belt at the top of the slope. Tr. 81, 83-84. Water sprays were installed near the slope tripper drive to suppress the dust, but they were non-functional on the day of the inspection because the water from the main pipe had been shut off. Tr. 86-87.

Approximately 1,600 and 2,000 feet down the belt, Reynolds observed even more significant accumulations in contact with roughly fifteen feet of the moving belt and two rotating belt rollers. Tr. 87-88. Further down the belt, at 2,000 to 2,200 feet, Reynolds observed varying amounts of accumulations, up to 30 inches deep, in contact with two rollers and ten feet of the belt. Tr. 88. At 2,200 feet, Reynolds observed 24-inch-deep accumulations in contact with one bottom belt roller. Tr. 89. At 2,300 feet, Reynolds observed accumulations between four and 24 inches deep along half the width of the belt, but no potential heat sources were present. Tr. 90.

In sum, Reynolds observed six discrete locations where bottom rollers contacted accumulations. In total, 14 bottom rollers and 105 feet of belt were in contact with coal. Tr. 100; P. Ex. 4, at 14.

Initially, Reynolds thought it would be necessary to shut the belt down to clean up the accumulations, but thereafter he determined that the accumulations could be cleaned while the belt was running. Tr. 91. Reynolds declined to issue a closure order because he determined that shutting the belt down would cause a buildup of water. Tr. 93-94.

Based on his observations, Reynolds issued Citation No. 8450924, alleging a violation of 30 C.F.R. § 75.400. Section 75.400 provides that "coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel powered and electric equipment therein." 30 C.F.R. § 75.400. The condition alleged in Section 8 states:

> Loose coal was allowed to accumulate in excessive amounts along the slope belt, from approximately 100 feet below the slope collar to the bottom. These accumulations were in continuous windrows along both sides of the belt (the majority of the instances were

[11] The slope tripper drive provides increased power to the belt to keep it moving and transporting coal. Tr. 81. The slope tripper drive is a transfer point, where coal travels from one belt to another. When coal is dumped onto another belt, it travels through the air before landing on the next belt. This transfer often generates coal dust as the coal being transferred breaks and creates dust. Tr. 82.

> along the back side of the belt), which ranged from 4" to 30" deep & from 16" to 72" wide, and occasionally up to the full width of the belt. Additionally, the accumulations were in contact with the moving belt and bottom rollers at the following approximate locations: 570' station; 1100' station; 1900' station; 2100' station; 2200' station; 2300' station.

P. Ex. 2. Reynolds designated the violation as significant and substantial, and determined that, as a result of Respondent's high negligence, the alleged violation was reasonably likely to result in lost workdays or restricted duty for six miners. *Id.* The Secretary initially proposed a penalty of $15,570.

After his underground inspection, Reynolds inspected the Respondent's record books for the previous month. Tr. 119. The belt inspection examination entries are kept in a separate book. A review of the belt examination book indicates that each of the eleven belts at the mine is inspected every shift, and the results are recorded on a separate page for each morning, evening, and midnight shift. Thus, each page represents one shift, and contains eleven entries, one for each belt examined during the shift. The pages include spaces to designate the mine name, the date of the examination, and the shift, and contain the following instruction:

> List all belts checked and make notation of any corrections needed or made in the following spaces. Include violations of designated regulations. If belt inspected is OK, so state. Indicate all corrections by action taken, date, and signature.

R. Ex. 2.

As noted, slope belt examination book entry at issue that Adams made for July 14, 2014 states that the "slope belt needs cleaned—work in progress." Tr. 116, 229; R. Ex. 1.

All of the slope belt exam notations for each shift from July 9 to July 13, 2014 (the five days and fifteen shifts preceding the issuance of Citation No. 8450924 on July 14) stated either "needs cleaned—work in progress" or "needs cleaned—cleaning in progress," except for the July 9 evening shift, which stated "none." *Id.* Some of the entries for other belts were more specific, such as the July 9 day shift entry for the east belt ("Need to clean under rollers from 3 to 8") or the July 10 day shift entry for the SM3 belt ("Need to clean 7A flowthrough"). These more specific entries were followed by the additional notation "done," and initials, presumably from the miner or supervisor, who took the corrective action. *Id.*

The slope belt exam book entry for the July 15 midnight shift (the first shift examination following the issuance of Citation No. 8450942) states: "Needs cleaned 100 foot inby tripper to tailpeace [sic] on back side tripper to travel road side 300 foot from tripper to top travel road side." The July 15 day shift entry states: "Need to clean from 1800 to 2300 and 1000 to 1100

need to clean tail of take up." The July 15 evening shift entry reads: "Need to clean tail on backside and under tail roller, need to clean from 300 ft marker to tripper backside and from tripper to tail backside. Need to clean from tripper to tail travel road side. Need to clean take-up under belt." *Id.*

Reynolds testified that the accumulations that he observed on the morning of July 14, 2014 were too extensive for an examiner to miss. He found that the examination record simply stated "slope belt needs cleaned, work in progress." R. Ex. 1; Tr. 121-124. Reynolds described this as "non-specific, non-critical" language which did not mention "coal accumulation" or "washback." Tr. 116-17, 124. According to Reynolds, if the examiner had, in fact, noticed the extent of the accumulations on the slope belt, then the language "needs cleaned" failed to indicate the extent of the accumulations or that they needed to be removed immediately. Tr. 117-18.

Since the notation made by Adams did not reflect the conditions Reynolds observed in the mine just two hours after Adams' examination, Reynolds issued Citation No. 8450926 for an alleged violation of 30 C.F.R. § 75.363(b), which states in pertinent part:

> (b) A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found *and shall include the nature and location of the hazardous condition or violation and the corrective action taken.* This record shall not be required for shifts when no hazardous conditions or violations of the nine mandatory health or safety standards are found. (italics added)

The citation alleged:

> The mine examiner has not properly recorded hazardous conditions in the examination record as were found to exist along the slope belt. Six individual areas were observed which posted distinct safety hazards in that accumulations of combustible material in the form of loose coal was in contact with the moving belt and bottom belt rollers. The exam record for the last examination of this area, which was completed just prior to the MSHA inspection, only indicated that the slope belt "needs cleaned." This language does not indicate the hazard that was found to exist.

Ex. P-3. Reynolds designated the violation as significant and substantial, and determined that the alleged violation was reasonably likely to result in lost workdays or restricted duty for six miners, as a result of Respondent's high negligence,. *Id.* The Secretary proposed a penalty of $6,996.

Two weeks later, on July 28, 2014, MSHA inspector Brittain Belford issued Citation No. 8451307, alleging another violation of 30 C.F.R. § 75.400 based on slope belt accumulations "extend[ing] from the bottom of the slope to the top and rang[ing] from approximately 1 ft-4 ft in depth and 1 ft-3ft in width." P. Ex. 5. Inspector Belford also observed rollers touching the accumulations. *Id.* Respondent agreed to settle Citation No. 8451307, as part of the partial settlement in this docket. ALJ Ex. 1.

III. PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The operator may avoid liability only by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

B. Gravity and Significant and Substantial (S&S)

The Mine Act describes a S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). By contrast, the gravity of a violation "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996).)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

As the Commission has noted, the gravity component of the penalty assessment is not synonymous with finding that a violation is S&S, but may be based on the same evidence. The

gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that "the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury… but rather on the effect of the hazard if it occurs"). Alternatively, a violation is S&S if, "based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard–that is, a measure of danger to safety–contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.[12] *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984). The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *see also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

The Commission has explained that "the reference to 'hazard' in the second element [of the test] is simply a recognition that the violation must be more than a mere technical violation – i.e., that the violation presents a measure of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug.1984) (internal citation omitted). "There is no requirement of 'reasonable likelihood'" encompassed in this element. *Musser Engineering, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010). Rather, longstanding Commission precedent indicates that

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[12] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

the likelihood of harm should be accounted for in the third *Mathies* element, which "requires that the Secretary establish a *reasonable likelihood* that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel*, 6 FMSHRC at 1836 (quoted by the Commission on numerous occasions over the next two decades, including in *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998); *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993); and *Texasgulf*, 10 FMSHRC 498, 500 (Apr. 1988). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc.*, 32 FMSHRC at 1281). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc.*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC at 906); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

In a decision issued on January 21, 2016, the Fourth Circuit shifted the focus of the traditional S&S analysis from the third to the second *Mathies* prong, restricting the consideration of the facts bearing on the reasonable likelihood of injury under the third prong. *See Knox Creek*, 811 F.3d at 162. The Fourth Circuit interpreted the second *Mathies* prong to entail an inquiry into the likelihood of harm, stating:

> In our view, the second prong of the test . . . primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.

Id. Under the Fourth Circuit's application of *Mathies*, the occurrence of the hazard must be assumed under the third prong of the test. *Id.* at 161-65. Evidence of the likelihood that the hazard will occur is not considered at this prong. Rather, the inquiry is whether the hazard, assuming it occurred, would likely result in serious injury. *Id.* at 162. The Seventh Circuit has previously adopted a similar interpretation of the *Mathies* test, stating that the question in applying the third prong of *Mathies* "is not whether it is likely that the hazard . . . would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest*, 762 F.3d at 616.

For violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third *Mathies* element is satisfied when a "confluence of factors" is present that could have triggered an ignition, fire, or explosion, under continued normal mining operations. *Zeigler Coal Co.*, 15 FMSHRC at 943; *Texasgulf*, 10 FMSHRC at 501; *see, e.g.*, *Paramont Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). In particular, "the confluence of factors analysis requires consideration of the particular circumstances in the mine, including

the possible ignition sources, the presence of methane, and the type of equipment in the area." *Excel Mining, LLC,* 37 FMSHRC 459, 465 (Mar. 2015).

The fourth *Mathies* factor requires the Secretary to show, by a preponderance of the evidence, a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. The Commission noted in *Mathies* itself that, "as a practical matter, the last two elements will often be combined in a single showing." *Id.* Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* elements.[13]

C. Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC at 708 (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody*, 37 FMSHRC at 1701.

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[13] Inspectors are trained not to designate a violation as S&S, unless item 10.A on the citation form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), as noted, MSHA has defined negligence by regulation in the civil penalty context as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care.

30 C.F.R. § 100.3, Table X.

I note that the Commission generally gives deference to MSHA's regulations. *See Auer v. Robbins,* 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulation is controlling unless "erroneous or inconsistent with the regulation"); *cf. Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101-02 (Dec. 2014) (holding that the ALJ was not bound by the Secretary's definition of "high negligence" set forth in 30 C.F.R. § 100.3(d)). Under MSHA's standard, high negligence is properly designated when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* This analysis considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. 30 C.F.R. § 100.3(d). MSHA's negligence regulation further provides that mitigation is an affirmative action by the operator with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. *Id.*

D. Penalty Criteria

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining*, 30 FMSHRC at 723.

I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel*, 37 FMSHRC at 1880 n.1 (Jordan, Chairman and Nakamura, Comm'r concurring); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). The Secretary's assessment is not binding, but operates as a lodestar, since the factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. My independent penalty assessment analysis applies to each of the two citations at issue in this case.

IV. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Accumulation Violation, Citation No. 8450924

As discussed above, on July 14, 2014, Reynolds found that the accumulations which ran the length of the slope belt constituted a violation of 30 C.F.R. § 75.400, a mandatory safety standard. P. Ex. 2. Reynolds designated the violation as S&S, and reasonably likely to result in lost workdays or restricted duty for six miners. P. Ex. 1. He found that the violation was attributable to Respondent's high negligence.

The Secretary requests that I affirm the citation as written. Sec'y Br. 32. The Respondent requests reduction of the negligence designation, deletion of the S&S designation, and reduction of the number of persons affected. Resp't's Br. 3, 30. Although Respondent does not contest the fact of the violation, it argues that the Secretary has not met his burden to support the second, third, and fourth prongs of the *Mathies* test. Resp't's Br. 15. Respondent argues that the coal was wet and mixed with other material, that the accumulations were being shoveled, and that safety measures were in place to negate any risks of ignition or explosion. Accordingly, Respondent argues that ignition was unlikely, and even if an ignition were to occur, injuries would be minimal. Resp't's Br. 16.

1. Citation No. 8450924 was Appropriately Written as S&S.

I find that the large amount of coal accumulations in continuous contact with the belt rollers created the possibility of a belt fire, which constitutes a discrete safety hazard under the second element of the *Mathies* test. I find unpersuasive the Respondent's argument that the dampness of the accumulations and the absence of any ignition sources negate the existence of a hazard. *See* Resp't's Br.16. Although Reynolds conceded that he did not measure the heat of the belt parts that were in contact with the coal, and did not issue an imminent danger withdrawal order because he did not observe a visible flame or any smoldering or smoke, I do not find these facts fatal to the Secretary's assertions that the accumulations created a discrete safety hazard. Tr. 100-101, 178. The Commission has long held that "wet coal accumulations pose a

significant danger in underground coal mines." *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013); *Black Diamond*, 7 FMSHRC at 1120-21 (rejecting the argument that wet coal does not pose a dangerous combustible risk because wet coal can dry out and fuel or propagate a fire or explosion); *see also Continent Res. Inc.*, 16 FMSHRC 1226, 1230-32 (June 1994) (affirming S&S determination and holding that "accumulations of damp or wet coal, if not cleaned up, can dry out and ignite").

I also find that the discrete safety hazard created by the accumulations was reasonably likely to cause harm, satisfying the second prong of the Fourth Circuit's application of *Mathies*. *Knox Creek*, 811 F.3d at 162. In other words, the accumulations were reasonably likely to ignite, and such an ignition would likely case cause harm. Respondent argues that the wetness of the coal and the 45% recovery rate reduce the likelihood of an ignition. Resp't's Br. 16. Reynolds' testimony, however, establishes that the frictional heat from the belt would dry the coal under continued normal mining conditions, and the accumulations touching the belt therefore constituted a potential ignition source. Tr. 70. In fact, Reynolds testified that three of the bottom roller brackets that he observed were hot from contact with the moving belt. Tr. 78. Phipps conceded that if heat is applied to wet material, the water would eventually evaporate, drying the material. Tr. 410.

Respondent also argues that the likelihood of ignition was reduced due to the smaller percentage of combustible material being transported by the belt. Resp't's Br.16-18. Phipps testified that 44 to 46 percent of what is mined by weight is coal, and the rest is rock or other rejected material. Tr. 390. Although Reynolds conceded the possibility that only 45 percent of the material transported by the belt was coal, this fact did not change his opinion that the accumulation constituted an S&S violation. Tr. 178, 179, 180, 200. Reynolds' determination is consistent with Commission precedent holding that "even wet coal accumulations are prohibited by section 75.400 because they can dry out in a mine fire and ignite." *Manalapan Mining Co., Inc.*, 32 FMSHRC 690, 698 (June 2010) (citing *Utah Power & Light Co.*, 12 FMSHRC 965, 968-69 (May 1990) (internal citations omitted). Reynolds explained that if coal is present, it is combustible, and any ignition will spread through both the combustible and noncombustible material. Tr. 200. Therefore, due to the frictional heat sources present, I find that the coal accumulations presented an ignition hazard that would likely result in an injury under the Fourth Circuit's application of the *Mathies* test. *See Knox Creek*, 811 F.3d at 162 ("[F]or a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.").

Regarding the third *Mathies* factor, Respondent argues that the reasonable likelihood of an injury was so low that Reynolds allowed the belt to continue operating, and therefore the S&S designation should be deleted. Resp't's Br. 12. Reynolds permitted the belt to continue operating because, after consultation with Webster, he determined that the accumulations could be cleaned up without immediate danger. Tr. 292. The Fourth Circuit and Seventh Circuit's *Mathies* application requires an assumption that the hazard occurred, and the third prong of the test focuses on whether the hazard is likely to result in a serious injury. *Knox Creek*, 811 F.3d at

162; *Peabody Midwest*, 762 F.3d at 616. Based on the extent of the accumulations and the presence of ignition sources, I credit Reynolds' testimony that if the accumulations were left unabated, then an ignition would likely result. Tr. 105. Circuit Court precedent indicates that equipment operating in coal accumulations constitutes an ignition source for S&S purposes, even absent any defects in the equipment. *See Buck Creek*, 52 F.3d at 135 (affirming S&S designation where the frictional heat from a roller turning in coal dust could easily cause a fire, despite no evidence that the roller was either hot or defective). Additionally, Commission judges have found accumulation violations to be S&S based solely on contact between accumulated coal dust and non-defective equipment that could constitute an ignition source. *See, e.g.*, *American Coal*, 36 FMSHRC 1311, 1343 (May 2014). High levels of methane may also increase the risk of ignition and are appropriately considered in a confluence-of-factors analysis. *Excel Mining, LLC,* 37 FMSHRC at 462. The mine was on a 5-day spot inspection because the mining process liberated an excessive amount of methane. Tr. 188. In short, the gassiness of the mine, coupled with the extent of accumulations touching hot rollers, created a dangerous combination that was reasonably likely to cause an ignition.

Regarding the fourth *Mathies* factor and the likelihood that any injury caused by the hazard would be of a reasonably serious nature, Respondent argues that the violation is not S&S because the CO detectors on the belt would alert miners to fire, and the slope's fire suppression equipment would prevent any serious injury. Resp't's Br. 18. Redundant safety measures do not constitute a defense to an S&S allegation. The Commission has held that extra precautions may reduce risks, but do not make a violation non-S&S. *Consolidation Coal Co.,* 35 FMSHRC at 2330. The Seventh Circuit has specifically rejected the contention that fire prevention and safety measures mitigate the S&S status of an accumulation violation. *Buck Creek*, 52 F.3d at 135; *see also Cumberland Coal Res., LP*, 33 FMSHRC at 2369 (treating redundant mandatory safety protections as a defense to S&S findings would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made), *aff'd sub nom., Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Comm'n*, 717 F.3d 1020, 1029 (D.C. Cir. 2013). Even Rorer testified that an extinguished fire would still generate smoke, which could be inhaled by a miner downwind. Tr. 354. In addition, Reynolds testified that in the event of an ignition, not only would miners in the immediate area be affected by flames, smoke inhalation, or carbon monoxide exposure, but miners downwind of the vent would also be exposed to smoke and carbon monoxide. Tr. 106. Furthermore, the slope is next one of two designated escapeways, potentially exposing miners to burns and smoke inhalation as they attempt to exit a mine during an emergency. Tr. 191. Smoke inhalation and burns constitute serious injuries for purposes of the *Mathies* analysis. *Amax Coal*, 19 FMSHRC 846, 847 (May 1997) (upholding judge's finding of S&S based on evidence of smoke inhalation and burns as serious injuries) . Accordingly, I reject the Respondent's argument that the presence of CO detectors or the fire suppression system justifies deleting the S&S designation.

In conclusion, I find that even if the accumulations were wet and the belt primarily transported non-combustible material, the reasonable likelihood of an ignition risk remained. Frictional heat was likely to dry the coal accumulations, and high methane concentrations compounded the risk of ignition. Any injury from an ignition would likely result in smoke inhalation and burns, which constitute serious injuries likely to result in lost work days or restricted duty. In these circumstances, I find that the citation was properly designated as S&S.

2. Citation No. 8450924 was the Result of Respondent's High Negligence.

As noted above, in determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. Reynolds testified that, based on the extent of the accumulations observed, mine managers or examiners, who traveled the slope numerous times every day, should have recognized and dealt with the accumulations. Tr. 109. Accordingly, Reynolds designated Respondent's negligence as "high." P. Ex. 2.

Respondent argues that its actions regarding the accumulations were consistent with what a reasonably prudent operator familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have done in the circumstances. Resp't's Br. 14. The Respondent argues that Mach's mitigation efforts weigh in favor of a lower negligence designation. Resp't's Br. 5-8. Respondent argues that the accumulations increased significantly between Adams' initial examination and Reynolds' inspection about two hours later. In light of that alleged rapid build-up, Respondent argues that the actions it took were sufficient to mitigate Reynolds' high negligence designation. Resp't 13.

Respondent also argues that while it awaited the arrival of the new dewatering system, conditions on the slope belt were being monitored and abated. As noted, the dewatering system was installed at the mine nearly two months after the issuance of Citation No. 8450294. Webster testified that ten miners were shoveling the belt around the clock. Tr. 283, 304; Resp't's Br. 13. Phipps testified that additional miners were hired to shovel as needed, and company foremen patrolled the belt for rollers contacting accumulation. Tr. 383, 389, 399. I note, however, that only five to seven miners were shoveling at the time of the inspection, and they were located at the top of the slope belt where the accumulations were less significant.

While installing a dewatering system was a prudent long-term decision, Respondent's belated reaction to the recurring washback issue fails to mitigate its negligence. Rorer conceded that it would have been possible to shut the long wall down and install a dewatering system before mining the longwall panel, but Respondent declined to do so. Tr. 367. As indicated by the receipt of another accumulation citation just two weeks after the instant citation, Respondent's mitigation efforts were inadequate to address the accumulation hazards. P. Ex. 5.

Reynolds testified that the washback phenomenon was a predictable consequence of Respondent's decision to use the belt conveyor to transport water out of the mine, and opined that since the Respondent was using the belt conveyor to discharge water, its pumping system was inadequate to handle the amount of water encountered. Tr. 97-99. Although Respondent argues that the severity and timing of the washback was unpredictable, it also admits that the phenomenon itself was an inevitable consequence of using the slope belt to remove water. Tr. 385; Resp't's Br. 14. As the Secretary argues, the development of accumulations is therefore directly attributable to Respondent's choice to expel water using the slope belt. Sec'y's Br. 19; *see also* Tr. 99, 199.

I find that despite the foreseeability of the washback accumulations and the assignment of miners to shovel the belt each shift, Respondent did not implement adequate measures to keep the belt clear of accumulations. In fact, Respondent was only able to keep the slope clear an estimated ten percent of the time in the month prior to the issuance of Citation No. 8450294. Tr. 403; R. Ex. 1; Sec'y's Br. 20. Given the high methane concentrations within the mine, Respondent should have been particularly attentive to recurring accumulations with possible ignition hazards present. Tr. 334.

Both the Secretary and Respondent have directed my attention to a prior case involving a section 75.400 citation issued to Respondent at Mach No. 1 Mine for slope belt accumulations. *See Mach Mining, LLC*, 33 FMSHRC 763 (March 2011) (ALJ). In that case, Judge Manning deleted the Secretary's S&S designation due to the wetness of the accumulations and the redundant fire-suppression safety measures. *Id.* at 773. The accumulations at issue in that case, however, were significantly less extensive than those at issue here. *Id.* at 770. Furthermore, as discussed above, precautionary safety measures do not make a violation non-S&S. *Consolidation Coal Co.*, 35 FMSHRC at 2330; *see also Buck Creek Coal, Inc.*, 52 F.3d at 135; *Cumberland Coal Res., LP*, 33 FMSHRC at 2369. Judge Manning's decision was not appealed and is not binding here. I find it particularly significant, however, because it indicates that Respondent was aware of the issues caused by the washback phenomenon for at least five years prior to the installation of the dewatering system.

In sum, I conclude that Respondent failed to address serious and largely self-imposed accumulation hazards that developed over the course of several shifts in a particularly gassy mine. I do not find persuasive Respondent's contention that its actions were consistent with what a reasonably prudent operator familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have done in the circumstances, particularly since Respondent knew of the washback problem as early as 2011. Resp't's Br. 14. Furthermore, in the 15 months preceding Citation No. 8450294, Respondent received 58 citations for violating section 75.400. P. Ex. 2. Respondent was aware of the frequent and extensive accumulations caused by using the slope belt to transport water and the consequent washback accumulations. Respondent's failure to timely assign sufficient miners to correct the recurring problem

demonstrated more than an ordinary lack of care. The totality of circumstances warrants a finding of high negligence.

B. Recordkeeping Violation, Citation No. 8540926

The Respondent requests that Citation No. 8540926 be vacated, the negligence designation be reduced, and the S&S designation be deleted. In support of its request to vacate, Respondent argues that the accumulations at the time of Adams' examination were not in contact with the slope belt, that Adams' notations satisfied 30 C.F.R. § 75.363(b), and that Respondent did not have fair notice that MSHA required more detail in recordkeeping notations. Resp't's Br. 20.

Adams testified that at the time of his shift examination two hours before Reynolds' inspection, Adams observed spillage on the belt due to washback, but did not observe accumulations touching the belt. Tr. 228-29. Adams' testimony is corroborated by Webster, who stated that accumulations were not touching the belt at 6:00 a.m., and by Rorer, who passed by the belt at 7:15 a.m. Tr. 299; Tr. 342, 344.

While it is possible that the accumulations occurred rapidly as a result of the washback, considering all the circumstances of this case, I credit Reynolds' testimony that accumulations had existed for several shifts. Tr. 64. Adams conducted his slope belt examination as he drove out of the mine. Reynolds conducted his inspection on foot by walking the length of the belt from top to bottom. Tr. 56, 196, 239. Reynolds testified that the majority of the accumulations were on the back side of the belt, opposite the travel way, and partially obstructed from view by the steel I-beams and the belt itself. Tr. 56, 196-98. Reynolds opined that it would be difficult to conduct a thorough examination of the belt from a moving vehicle, as Adams had done, due to these obstructions. Tr. 197-98. Reynolds also testified that there were fewer accumulations on the side of the belt facing the road, and it appeared that those accumulations had been cleaned. Tr. 68.

In addition, at 650 feet down the slope, Reynolds observed that the slope belt had cut into the I-beam for approximately one-eighth of an inch. He estimated that this would have taken at least 24 hours for the rubber belt to cut into the steel I-beam. Tr. 78-79. Webster confirmed that it would have taken some time for the rubber belt to cut one-eighth of an inch into a three-eighths of an inch-thick, steel I-beam. Tr. 301-02. As noted above at note 10, I have credited the testimony of Reynolds and Webster that the friction between the belt and I-beam likely existed for a significant period of at least 24 hours. As such, it should have been noted by Adams. The frictional damage to the I-beam undercuts Respondent's claim that it was actively monitoring belt conditions because Adams or other shift examiners should have noticed and documented such belt damage, and they did not. Based on the facts outlined above, I find that the Secretary proved by a preponderance of the evidence that the accumulations existed at the time of Adams' inspection and were in contact with the belt rollers.

1. **Citation No. 8450926 was Properly Issued for Respondent's Failure to Record the Nature and Location of Hazardous Conditions as Required by 30 C.F.R. § 75.363(b).**

Respondent argues that section 75.363(b) requires five elements:

> [1] A record shall be made of any hazardous condition and any violation of the mine mandatory health or safety standards found by the mine examiner. [2] This record shall be kept in a book maintained for this purpose on the surface of the mine. [3] The record shall be made by the completion of the shift on which the hazardous condition or violation of the mine mandatory health or safety standards is found and [4] shall include the nature and location of the hazardous condition of the violations and [5] the nature of the corrective action taken.

30 C.F.R. § 75.363(b); Resp't's Br. 23. Based on these elements, Respondent argues that Adams' notation of "slope belt needs cleaned—work in progress" satisfied the first four requirements, and was insufficient only in that it did not specifically refer to precise locations along the belt where accumulations had occurred. *Id.* The Secretary argues that the notation was inadequate because it failed to identify the specific hazard of accumulations touching the running belt in six locations. Sec'y Br. 24; Tr. 113.

Although my research reveals that the Commission has not addressed section 75.363(b), the Secretary points out that prior Commission ALJ decisions have recognized three discrete elements pertaining to records kept under the requirements of section 75.363(b): the nature of the hazard, the location of the hazard, and the corrective action taken. *Drummond Company, Inc.*, 25 FMSHRC 644, 646 (Oct. 2003) (ALJ). The Secretary contends that Adam's notation is deficient in that it fails to document the extent of the accumulations and the locations where the rollers and the moving belt were in contact with the accumulations. Tr. 116-17; Sec'y's Br. 23. Respondent argues that Adams' notation regarding the accumulations was sufficient to meet the requirements of section 75.363(b) because the notation of "slope belt needs cleaned" would have been understood by a reasonable person familiar with the mining industry to mean that the entire belt needed cleaning from top to bottom. Resp't's Br. 9, 20, 22-23.

The purpose of section 75.363(b) is to create a history of conditions in the mine that "mine management can use . . . to determine if the same hazardous conditions are occurring and if the corrective action taken is effective." *Safety Standards for Underground Coal Mine Ventilation*, 61 Fed. Reg. 9764, 9803 (March 11, 1996) (codified at 30 C.F.R. § 75.363). The adequacy of records is analyzed from the perspective of a miner reading the record for requisite information. *Twentymile Coal Co.*, 34 FMSHRC 2138, 2156 n. 22 (ALJ 2012).

Reynolds testified that the "slope belt needs cleaned—work in progress" notation was inadequate because slope belts generally need cleaning every shift. Tr. 117. While the notation

may have been generally understood by a reasonable miner to indicate that the entire slope belt needed cleaning, the notation failed to give notice as to the specific hazards posed by the slope belt accumulations, as evidenced by the fact that six miners cleaning the belt during Reynolds' inspection were working at the top of the belt where there were fewer accumulations, rather than farther down the belt where there were greater accumulations near possible ignition sources. Tr. 126.

In addition, the nearly identical previous entries for the slope belt examinations and Respondent's long history of slope belt accumulation citations indicate that the entries were not sufficiently specific to serve the regulation's purpose of demonstrating to mine management whether its corrective actions were effective. I therefore find that Adams' "slope belt needs cleaned—cleaning in progress" notation did not identify the nature or location of the hazard, nor the nature of the corrective action, i.e. that the slope belt was actually cleaned at the locations of the numerous accumulation hazards.

2. Respondent had Fair Notice Regarding the Requirements of Section 75.363(b).

The Respondent also argues that it did not have fair notice that its recording practices violated 30 C.F.R. § 75.363(b). Resp't's Br. 7. Fair notice provides a defense when the standard at issue is "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.*, 4 FMSHRC 2128, 2129 (Dec. 1982). On the other hand, where a regulation is clear, "the terms of the provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Lode Star Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002).

Regulatory interpretation is a two-step analysis. *Walker Stone*, 19 FMSHRC 48, 51 (Jan 1997), *aff'd*, 156 F.3d 1076, 1081 (10th Cir. 1998). The first step is to determine whether the regulation is clear and unambiguous. *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 709 (8th Cir. 2013). The regulation must be applied as written where the regulatory language is clear and unambiguous. *Id.* If the regulation is ambiguous, the second step is to determine whether the agency's interpretation is reasonable. *Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n*, 519 F.3d 1176, 1192 (10th Cir. 2008) (citing *Auer v. Robbins*, 519 U.S. 451, 461 (1997)). An interpretation is reasonable unless it is plainly erroneous or inconsistent with the regulation. *Id.* In making this reasonableness determination, the Commission considers the regulatory language and history. *Twentymile Coal*, 36 FMSHRC 2009, 2012-13 (Aug. 2014).

Even absent actual notice, the Secretary may charge an operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC at 3500-

01; *Ideal Cement Co.*, 12 FMSHRC at 2415-16; *Alabama By-Products Corp.*, 4 FMSHRC at 2129. The Secretary argues that the requirements of section 75.363(b) are explicit: the record of the hazard must contain the nature of the hazard, the location of the hazard, and the correction action taken. Sec'y's Br. 23. As discussed above, Respondent argues that the plain language of the statute contains five requirements: a record maintained in a book on the surface of the mine that identifies the nature and location of hazards during shift inspections and the corrective action taken to alleviate those hazards.

A review of the record book itself indicates that notations for other belt examinations contained the elements that the notations for the slope belt lacked. For example, the July 9 day shift entry for the east belt states: "Need to clean under rollers from 3 to 8." The July 10 day shift entry for the SM3 belt states: "Need to clean 7A flowthrough." Both of these entries were followed by the additional notation "done," and initials. R. Ex. 2. As demonstrated by these notations, Respondent recognized the essential elements of the regulation and properly recorded at least some of the hazards identified during its examinations prior to the issuance of Citation No. 8450962. Accordingly, I find that Respondent had fair notice regarding the plain language of the requirements of section 75.363(b). The regulation at issue is clear and unambiguous, and thus should be interpreted in accordance with its plain language.

Even assuming that the regulation is ambiguous, the Secretary's interpretation is reasonable and should be accorded deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). As noted above, the purpose of section 75.363(b) is to create a history of conditions in the mine that "mine management can use . . . to determine if the same hazardous conditions are occurring and if the corrective action taken is effective." *Safety Standards for Underground Coal Mine Ventilation*, 61 Fed. Reg. 9764, 9803 (March 11, 1996) (codified at 30 C.F.R. § 75.363). I find that the Secretary's interpretation of the regulation is consistent with this purpose. To allow generalized notations like Adams made to satisfy this standard would nullify the regulation's requirements to identify the nature and location of the hazard, and the specific identification of the corrective action taken for such hazard, thereby undermining the purpose of the regulation. Accordingly, I find that Adams' notation of "slope belt needs cleaned—cleaning in progress" does not satisfy the requirements of 30 C.F.R. § 75.363(b).

3. Citation No. 8540926 Was Appropriately Written as S&S.

Recording hazardous conditions discovered in a shift examination is crucial to the health and safety of miners. *See, e.g., American Coal Co.*, 34 FMSHRC 2058, 2082 (ALJ 2012). In the context of an S&S designation, the Commission must determine whether the failure to record contributed to a hazard that is reasonably likely to result in a serious injury. *Id.* Reynolds issued Citation No. 8540926 because, in his opinion, Adams' notation did not identify the nature and location of the accumulations hazards that were prevalent at numerous locations along the slope belt. As discussed above, accumulations touching the belt and rollers constituted an S&S violation that contributed to the discrete safety hazard of an ignition that was reasonably likely to

result in a serious injury. Accordingly, I turn to the issue of whether the failure to properly record the nature and location of the slope belt accumulations contributed to the discrete safety hazard that management and miners would be unaware of the nature and location of the ignition hazards and any corrective actions taken, thereby enhancing the likelihood of reasonably serious injuries resulting in lost work days or restricted duty.

Reynolds designated Citation No. 8540926 as reasonably likely to result in a lost workdays or restricted duty injury because the location and nature of the accumulation hazards were not detailed in the examination report. Consequently, management and miners would not be able to immediately address the accumulations most likely to result in ignitions. Tr. 130. In fact, at the time of the inspection, miners were shoveling where ignition hazards were not present. Adams' poor and deficient documentation of the accumulation and ignition hazards present were reasonably likely to enhance an actual ignition during continued mining operations, and the ignition itself was reasonably likely to result in serious injuries of smoke inhalation and burns.

Respondent argues that Adams' notation "slope belt needs cleaned—work in progress" served the purpose of notifying miners and management of specific hazards in the mine because six workers were assigned to shovel the accumulations on the slope belt, potentially abating the discrete hazards that might arise from inadequate reporting. Tr. 242, 317; Resp't's Br. 29. I disagree. I reject this argument. The belt was running. No specific hazards were mentioned, nor was the specific location of such hazards mentioned. Further, as Adams testified, the six or so miners were shoveling at the top of the slope, rather than addressing those areas of the belt where the accumulations were touching the rollers or the belt itself. Tr. 126.

In addition, 27 miners were assigned to clean the belt after the issuance of Citation No. 8450924. Tr. 132. It took the 27 miners between two and three days to abate the hazards. P. Ex. 2. It is therefore unlikely that the six miners assigned to shovel the belt on the morning of July 14 had any significant effect on abating the hazards, even had they been shoveling in locations were the accumulations touched the belt and rollers. Without noting the specific location of the hazards observed, Adams' notation did little to enable miners or management to abate hazards within the mine, and thus rendered the examination reporting ineffective in carrying out the purpose of the regulation. Accordingly, I uphold the S&S designation and find that Adams' notations failed to properly record the location and nature of the accumulations, thereby contributing to the reasonable likelihood of an ignition that would result in serious injuries.

4. Citation No. 8540926 Was Appropriately Written as High Negligence

Respondent argues that examiner Adams' notations accurately reflected slope conditions at the time of his inspection, and accordingly his recordkeeping was not negligent. Resp't's Br. 27. Although Reynolds conceded that Adams may have observed a "minimally less

extensive" amount of accumulations during his examination, I have found that the Secretary established that the accumulations had accrued over more than one shift, and that Adams' examination from a moving vehicle precluded him from observing the accumulations and ignition sources on the far side of the belt. Tr. 139-141.

Respondent also argues that Adams' notation provided an opportunity for the examiner and the foreman to discuss accumulation issues. According to Adams, his July 14, 2014 entry was standard practice at the mine, and the mine foreman Rorer "would know what [his entry] meant." Tr. 264. Adams testified that when he spoke to Rorer after the examination at 7 a.m., Adams told Rorer that the entire belt needed to be cleaned. Tr. 262. Adams further testified that after his examinations, he usually would verbally convey to Rorer where shoveling was needed, rather than indicating such locations in the record book. Tr. 264, 357. However, miners going underground after the examination are entitled to review the examination book to determine the nature and location of hazardous conditions and violations found, and the corrective actions taken. Allowing verbal communications between examiners and supervisors to substitute for the written record required by section 75.363(b) would deprive miners of this right. The plain language of section 75.363(b) does not allow verbal communication to substitute for its written recording requirements. Furthermore, despite his discussion with Rorer, Adams' notation did not result in any significant action regarding the abatement or mitigation of the accumulations hazards until after the citation was issued. In addition, Respondent's belt examination book entries for July 9 and 10 indicate that Respondent attempted to at least comply with the standard's specific location requirements when it wanted to do so. In these circumstances, I find that Respondent's examiner was highly negligent in failing to properly document the nature and location of the numerous accumulation hazards, and the corrective action taken.

V. Civil Penalty

The Secretary initially proposed a penalty of $15,570 for Citation No. 8450924 and a penalty of $6,996 for Citation No. 8450926. In his post-hearing brief, the Secretary requested that the proposed penalty be increased to a total of $45,000 for both citations, but provided no supporting rationale. Pet'r's Br. 32. At trial, the Secretary did not move to amend its Petition for the Assessment of Civil Penalty to increase the proposed penalty.

The parties stipulated that in 2013, the Mach Number One Mine produced 6,694,630 tons of coal and its controlling entity produced 18,772,988 tons of coal. The parties also stipulated that the penalties proposed by the Secretary in this case will not affect the ability of Mach to continue in business, and that Mach demonstrated good faith in abating the violations. Respondent was cited 58 times for violations of section 75.400 in the fifteen months prior to the issuance of Citation No. 8450924. Given this history of violations, my confirmation of inspector Reynolds' gravity, negligence, and S&S determinations, and Respondent's good-faith abatement of the violation, I assess a penalty of $15,570 for Citation No. 8450924 under the penalty criteria set forth in Section 110(i) of the Act.

Citation No. 8450926 was the first time Respondent was cited under 30 C.F.R. § 75.363(b). Given the absence of any history of violations, my confirmation of Reynolds' gravity, negligence, and S&S determinations, and Respondent's good-faith abatement of the violation, I assess a penalty of $6,996 for Citation No. 8450926 under the penalty criteria set forth in Section 110(i) of the Act.

VI. Approval of Partial Settlement

On October 29, 2015, the Secretary submitted a motion to approve settlement for 11 citations, and proposed a reduction in penalties from $34,317 to $25,461. The Solicitor states that Citation No. 8439597 has been vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *See, e.g.*, *RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993). The Solicitor also requests that:

> Citation No. 8439593 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation;
>
> Citation No. 8439594 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation;
>
> Citation No. 8439599 be modified to reduce the level of negligence from "high" to "moderate;" and
>
> Citation No. 8451307 be modified to reduce the number of persons affected from "ten persons" to "five persons."

The remaining citations and penalties are unchanged.

Pursuant to 29 C.F.R. § 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraph four from the Secretary's Motion to Approve Settlement as immaterial and impertinent to the issues legitimately before the Commission. The paragraph incorrectly cites and interprets the case law and misrepresents the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement
8439592	$334	$334
8450925	$745	$745

8439593	$2,282	$2,282
8439594	$1,944	$1,944
8451302	$108	$108
8439595	$460	$460
8451306	$11,306	$11,306
8439598	$2,282	$2,282
8439599	$5,503	$2,000
8451307	$8,893	$4,000
TOTAL	$33,857	$25,461

VII. ORDER

Citation Nos. 8450924 and 8450926 are **AFFIRMED, AS WRITTEN**.

It is **ORDERED** that Citation No. 8439593 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

It is **ORDERED** that Citation No. 8439594 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

It is **ORDERED** that Citation No. 8439599 be **MODIFIED** to reduce the level of negligence from "high" to "moderate."

It is **ORDERED** that Citation No. 8451307 be **MODIFIED** to reduce the number of persons affected from "ten persons" to "five persons."

To the extent it has not already done so, Mach Mining is **ORDERED** to pay a total civil penalty of $48,027 for the litigated and settled citations within thirty (30) days of the date of this Decision and Order.[14]

Thomas P. McCarthy
Administrative Law Judge

Distribution: (Certified Mail)

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

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