FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 520N
WASHINGTON, DC 20004

August 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2009-371
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). At issue are five citations/orders issued against Consolidation Coal Company ("Consol"). Administrative Law Judge Margaret Miller affirmed the citations and orders. 32 FMSHRC 930 (July 2010) (ALJ). Consol filed a petition for discretionary review challenging the judge's determinations, which the Commission granted. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background and Disposition

Consol operates the Robinson Run No. 95 Mine, an underground coal mine located in Marion County, West Virginia. The mine is subject to five-day spot inspections by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to Mine Act section 103(i) for liberation of excessive quantities of methane of more than one million cubic

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[1] Commissioner William I. Althen assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Althen has elected not to participate in this matter.

feet of methane or other explosive gases during a 24-hour period. 30 U.S.C. § 813(i). In August and September 2008, MSHA Inspector Aaron Wilson conducted inspections at the mine. 32 FMSHRC at 931. A number of citations and orders were issued during the inspections, including the five at issue here. We set forth the factual and procedural backgrounds and the corresponding analytical dispositions for each of the citations and orders separately in the following sections.

A. Order No. 6608537; Accumulation Violation

On August 18, 2008, Inspector Wilson observed loose coal and coal fines accumulated underneath a coal conveyor belt from the tail roller outby for a distance of 17 feet. Gov't Ex. 1 (Order No. 6608537). According to the order, the accumulations were up to one foot deep and were in contact with the belt for a short distance. The accumulations were also piled up around the tail roller for a height of 20 inches across the 64-inch tail roller. The inspector's order stated that the accumulations were wet in nature but starting to dry out. The tail roller was warm to the touch. Accumulations were also present on top of the feeder in the form of fine and lump coal that was dry in nature. The inspector noted that the condition of the spillage of the tail piece was listed in the preshift record book with no corrective action for the five prior consecutive shifts since the midnight shift on August 17, 2008. *Id.*; 32 FMSHRC at 931.

The inspector issued an order under section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging a violation of 30 C.F.R. § 75.400, which requires that "[c]oal 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." The inspector designated the violation as significant and substantial ("S&S") and a result of the operator's unwarrantable failure to comply.[2] The Secretary of Labor proposed a penalty of $6,115. 32 FMSHRC at 931.

The judge found that the violation existed as cited in the order, and in fact, Consol's witnesses did not dispute it. *Id.* at 932. The judge also determined that the violation was S&S and was the result of an unwarrantable failure. *Id.* at 935, 937. The judge assessed a penalty of $7,500 based on the negligence and gravity of the accumulation violation and the fact that a fire at this location would affect everyone working in the mine. *Id.* at 949. The Commission granted review on the issues of S&S and unwarrantable failure.

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[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." The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

1. <u>S&S Analysis</u>

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. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Applying this analysis, we conclude that the first element is satisfied in that the judge found a violation. As to the second element, the judge determined that a discrete safety hazard existed as a result of the violation, consisting of "accumulations of coal rubbing against the belt and in the feeder [that] create a significant risk of smoke and fire in an underground mine environment." 32 FMSHRC at 932. We examine this finding to determine if it is supported by substantial evidence.[3] Inspector Wilson testified that the coal was dry around the edges of the tail piece, which was warm to the touch. Tr. 17-18, 20-22. He testified that additional coal accumulations were alongside and underneath the belt and were in some places in contact with the belt. Tr. 19-20. As the judge noted, "[f]rictional heat from the belt dries and heats the accumulations and, in turn, can cause a fire." 32 FMSHRC at 933 (citing Tr. 18-20). Consol's witness conceded that the coal was in contact with the bearing, Tr. 176, and in fact, one of the photos that Consol took of the condition shows accumulations in contact with the belt tailpiece. Gov't Ex. 39(a); Tr. 41. The inspector also testified that additional accumulations were located

[3] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

at the tail roller and that with continued operations, the coal would dry out, grind into smaller particles, and easily ignite. Tr. 21. The inspector noted that accumulations were also on top of the section feeder in the form of fine and lump coal, dry in nature, 55 inches in length, up to two feet high, and approximately one foot less than the width of the feeder. Tr. 18; Gov't Ex. 1.

The inspector's testimony, which was credited by the judge, 32 FMSHRC at 933, was corroborated by the testimony of Richard Sandy, a safety representative of the United Mineworkers of America ("UMWA"), who accompanied the inspector. Tr. 35, 108-09. Sandy testified that when the feeder was moved for cleaning, he could see that in addition to the coal observed by Wilson, there were further coal accumulations packed underneath the feeder. Tr. 111-12. Sandy also observed that coal was in contact with the belt and the tail roller where it was drying out. Tr. 110-11. He testified that this created a dangerous condition because, although the accumulations were wet in some areas, the accumulations were drying out in other areas, and the constant rubbing of coal touching moving parts would cause a fire given the high methane liberation at the mine. Tr. 110-13. Thus, substantial evidence supports the judge's finding that the cited accumulations contribute to a hazard of smoke and fire in the underground mine environment.

As to the third and fourth elements of *Mathies*, the judge found that it was reasonably likely that the hazard of smoke and fire would result in an injury that would have been of a serious or potentially fatal nature. 32 FMSHRC at 935. Both Wilson and Sandy testified that the accumulations created a dangerous condition which would result in thick black smoke, reducing visibility or the ability to breathe, or worse. Tr. 23-25, 111-12. As the Seventh Circuit explained in *Buck Creek*, 52 F.3d at 135-36, in affirming a judge's S&S determination, nothing more was necessary to support an inspector's "common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation." *See also Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (recognizing that "ignitions and explosions are major causes of death and injury to miners"); *Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997) (holding that an ignition source and large amounts of coal and coal dust that could propagate a fire or fuel an explosion satisfies the third element of *Mathies*).

We are not persuaded by Consol's argument that the accumulation violation should not be designated as S&S because the accumulations were in large part wet. The judge expressly credited the testimony of Inspector Wilson that the accumulations were drying out over the testimony of Larry Jones, the Consol safety personnel who accompanied the Inspector. 32 FMSHRC at 934. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). In addition, a number of photos taken by Consol depicting the accumulations show the coal beginning to dry out. Tr. 42-43, 46-47;Gov't Exs. 39C and 39M; C. Ex. 39M; 32 FMSHRC at 934. We also have long held that wet coal accumulations pose a significant danger in underground coal mines. *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); *Mid-*

Continent Res. Inc., 16 FMSHRC 1226, 1230, 1232 (June 1994) (affirming S&S determination and holding that "accumulations of damp or wet coal, if not cleaned up, can dry out and ignite").

Likewise, we categorically reject Consol's argument that its other safety measures, including rock dusting, carbon monoxide monitors, and fire fighting equipment reduced the degree of danger and rendered the violation non-S&S. In *Buck Creek*, 52 F.3d at 136, the Seventh Circuit rejected the operator's contention that other fire prevention safety measures mitigated the S&S nature of an accumulation. It stated that the fact that the operator "has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners." 52 F.3d at 136; *see also Amax Coal Co.*, 18 FMSHRC 1355, 1359 n.8 (Aug. 1996) (rejecting operator's contention that its redundant fire suppression system reduced the likelihood of serious injury); *Cumberland Coal Res. Inc.*, 33 FMSHRC 2357, 2369 (Oct. 2011) (reasoning that adopting the position that redundant, mandatory safety protections provide a defense to a finding of S&S 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. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013) (stating "because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry"). We agree with the judge that "[w]hile extra precautions may help reduce some risks, they do not . . . make accumulations violations non-S&S." 32 FMSHRC at 935.

For these reasons, we affirm the judge's finding that the accumulation violation was properly designated S&S.

2. **Unwarrantable Failure Analysis**

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek*, 52 F.3d at 136 (approving Commission's unwarrantable failure test). Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These factors need to be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist. *Id.*

The record demonstrates that the accumulations were obvious. When Inspector Wilson, UMWA representative Sandy, and company representative Jones arrived at the area, Jones immediately shut down the belt. 32 FMSHRC at 935; *see also* Tr. 36 (inspector testimony that Jones acted like he knew he was going to get an order when he saw the condition). Sandy testified that the condition was "plain as day." Tr. 111.

Regarding the extensiveness of the accumulations, the evidence demonstrated that they were extensive in nature in that it took five miners approximately two hours to clean up the condition. Tr. 21, 38. The accumulation underneath the belt was 17 feet long, approximately 30 inches wide and approximately one foot deep. Tr. 19; Gov't Ex. 1. The accumulation around the tail roller was 64 inches wide and 20 inches in height. Tr. 19-20; Gov't Ex. 1. On top of the feeder, the accumulation was 55 inches in length, up to two feet high and one foot less wide than the width of the feeder. Tr. 18; Gov't Ex. 1. It has also been established that the violation posed a significant degree of danger, as the accumulations created a hazard which was reasonably likely to lead to, or propagate, a mine fire or explosion. Slip op. at 4; *see* 32 FMSHRC at 937.

As to the duration of the accumulations, the judge determined that the condition had appeared on the pre-shift examination reports as spillage at the tailpiece for the five previous shifts, without any notation of correction. 32 FMSHRC at 937; Gov't Ex. 41. Substantial evidence supports the judge's determination. On cross-examination, Consol's witness Jones testified that he did not dispute that spillage at the tailpiece had been carried on the books for five shifts. Tr. 169. He also testified that the spillage notation had been carried over because it had not been cleared on the shift. Tr. 171. Jones conceded that the spillage should have been cleaned up the first time that it was reported. Tr. 169. The judge expressly discredited Jones' testimony on direct examination that the spillage listed on the pre-shift reports did not refer to the same spillage observed by the inspector. 32 FMSHRC at 936; Tr. 151, 179. The judge noted Jones' equivocation on this issue and Sandy's testimony that the accumulations were packed around the rollers, indicating that the accumulations had been there a long time. 32 FMSHRC at 936; Tr. 112. It was well within the judge's province to reject Consol's argument that the notations on the pre-shift reports represented distinct spillage from that observed by the Inspector. 32 FMSHRC at 936. Consol has not provided any basis for us to take the extraordinary step of overturning the judge's credibility determinations. *Farmer*, 14 FMSHRC at 1541. Therefore, we affirm the judge's conclusion that the accumulations at issue were present for five shifts, which supports a finding of unwarrantable failure. *See Buck Creek*, 52 F.3d at 136 (holding that accumulations that were present for more than one shift, after a pre-shift examination had been performed, were properly designated unwarrantable).

Consol had direct knowledge of the accumulation at issue because, as noted above, its managers had signed five pre-shift reports that listed spillage at the tailpiece, without any notation of any clean-up efforts. Gov't Ex. 41. Additionally, the judge found, and Consol does not dispute on appeal, that the mine experienced an extensive history of accumulation violations in the months preceding the violation at issue. 32 FMSHRC at 937; Gov't Exs. 43A, 45, 46, 47. Thus, substantial evidence in the record supports the conclusion that Consol was on notice that it had an

ongoing accumulation problem at the mine requiring greater efforts to assure compliance with section 75.400 and that it had actual knowledge of the accumulation at issue here as shown by the pre-shift reports. 32 FMSHRC at 936-37; *Peabody Coal Co.*, 14 FMSHRC 1258, 1263-64 (Aug. 1992) ("[A] history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction."); *Mid-Continent Res.*, 16 FMSHRC at 1232-33 (same).

We are not persuaded by Consol's argument that the unwarrantable failure finding is mitigated by its clean-up plan (according to which its shuttle car workers were to clean up accumulations at the tail piece and feeder when they drove by them). Given that the condition was listed in the pre-shift books for five shifts, Consol's plan was not even effective in cleaning up accumulations of which it had actual notice. We have held that an ineffective clean-up plan, which permits known, obvious, and extensive accumulations to continue to build up, cannot mitigate a determination of unwarrantable failure. *Jim Walter Res, Inc.*, 19 FMSHRC 480, 489 (Mar. 1997).

In sum, we affirm as supported by substantial evidence the judge's determination that Consol's violation of section 75.400 was a result of an unwarrantable failure.[4]

B. Citation No. 6608551; Panic Bar Violation

On September 4, 2008, Inspector Wilson issued an S&S citation alleging a violation of 30 C.F.R. § 75.523-3(b)(3) because the emergency brake on a scoop, when applied using the panic bar, did not engage and bring the equipment to a complete stop.[5] The inspector gave the operator several attempts to engage the emergency brake, all to no avail. The scoop had been used during the shift before to haul equipment and supplies to another area of the mine. The panic bar is within easy reach of the scoop operator, who can operate it by hand. The panic bar is intended to stop the scoop in an emergency but it also functions as a common way to shut down the scoop. 32 FMSHRC at 942-43.

The parties agreed that there was a violation, and thus the only issue before the judge was whether the violation was S&S. *Id.* Applying the *Mathies* analysis, the judge determined the panic bar violation to be S&S and assessed a penalty of $1,203, the same amount proposed by the

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[4] We note that the judge adequately explained her reasoning for increasing the penalty from $6,115 to $7,500 for Order No. 6608537. She determined that if a belt fire were to occur, the entire crew of 13 miners would be exposed to the fire and smoke hazard, whereas the Secretary's original assessment only considered that two persons would be affected. The judge modified the penalty "to reflect the exposure of the entire crew." 32 FMSHRC at 933-34.

[5] Section 75.523-3(b)(3) provides that "[a]utomatic emergency-parking brakes shall – safely bring the equipment when fully loaded to a complete stop on the maximum grade on which it is operated."

Secretary. *Id.* at 944, 949.

The judge found that the first element of the *Mathies* test was satisfied by her determination of a violation of section 75.523-3(b)(3). *Id.* at 943. Regarding the second element, the judge found that the hazard contributed to by the violation was "the danger of being unable to stop the equipment in an emergency." *Id.* Similar to *Cumberland*, 33 FMSHRC at 2364, we conclude that this statement is an accurate description of the relevant hazard contributed to by the violation. In *Cumberland*, the Commission determined that the hazard contributed to by defectively placed lifelines, that are only used in emergency situations, necessarily involved consideration of an emergency. *Id.* In affirming the Commission's decision in *Cumberland*, the D.C. Circuit held:

> [A] violation of the lifeline standard could only contribute to the delayed evacuation from emergency hazard if there is an emergency, but the likelihood of an emergency will usually have nothing to do with the violation of the emergency safety standard. Thus, if the decisionmaker does not assume the existence of the emergency, then his focus must necessarily shift away from the nature of the violation to the likelihood of the emergency.

717 F.3d at 1027. Just as the need for a lifeline would arise only in the context of a situation involving an emergency requiring evacuation from the mine, so the need for a panic bar (i.e., "emergency brake") on a scoop would arise in the context of an emergency requiring the use of the emergency brake. Thus, as the judge concluded, the relevant hazard contributed to by the panic bar violation is the inability to stop the scoop in an emergency. *See also Maple Creek Mining Inc.*, 27 FMSHRC 555, 563 n.5 (Aug. 2005) (evaluating S&S with regard to emergency standard in the context of an emergency).

In addressing the third *Mathies* element, the judge determined that "the hazard created by the non-functioning panic bar would contribute to a [serious] injury in the event of an emergency." 32 FMSHRC at 944. This analysis is consistent with our recent precedents on S&S. *See Cumberland*, 33 FMSHRC at 2365; *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*"). Through the testimony of Inspector Wilson, which the judge credited, the Secretary provided ample evidence that a scoop which cannot be stopped because of a non-operational panic bar could lead to an injury. The inspector testified that in the event that the scoop cannot be stopped, a spotter – a pedestrian miner who directs the scoop operator – could be run over, or the scoop driver could slam into a rib or another piece of equipment such that the scoop operator as well as any person in the way could be severely injured. Tr. 55-57. The inspector testified that "miners expect the . . . emergency safety devices to operate when they're needed, and in the event that they don't work, you may not have too much time to come up with another way of getting the equipment to stop or shut down." Tr. 57. Accordingly, we conclude that substantial evidence supports the judge's determination that the hazard created by the non-functioning panic bar is reasonably likely to contribute to an injury.

Similarly, the record supports the judge's finding on the fourth element of *Mathies* that there is a reasonable likelihood that a nonfunctional panic bar in an emergency situation would result in serious injuries either to the scoop operator or another miner in the scoop's vicinity. 32 FMSHRC at 943-44.

Consol frames its appeal as "whether . . . the Secretary of Labor (the "Secretary") can simply presume that a hazardous condition was reasonably likely to occur." PDR at 7. Consol then argues that "the ALJ presumed the occurrence of an emergency, and proceeded to analyze the S&S nature of the condition based upon that faulty presumption." *Id.* at 10. Consol further argues that "the ALJ's approach ignores the long established requirements of *Mathies Coal* and its progeny." *Id.* at 10.

We reject Consol's arguments. The need to stop the scoop immediately to avoid a collision is an inherent element of the hazard which the braking standard, section 75.523-3, is intended to prevent. Thus, the judge's analysis was not inconsistent with *Mathies*. Furthermore, Consol's argument is inconsistent with the D.C. Circuit's recent decision in *Cumberland Coal*, quoted *supra*, slip op. at 8. Indeed, Consol's underlying argument – that the Secretary must establish a reasonable likelihood that the hazard will occur, PDR at 8 – has been rejected by the Commission. *Cumberland Coal*, 33 FMSHRC at 2364-65; *PBS*, 32 FMSHRC at 1280-81.

Nor are we persuaded by Consol's contention that the violation was not S&S because the scoop operator could have braked using the normal braking equipment. First, the record reveals that the panic bar was commonly the primary means for scoop operators to engage the braking system during everyday use. Tr. 55; 32 FMSHRC at 944. The inspector testified that the panic bar is the braking device that "a lot of scoop operators . . . [are] most comfortable with and . . . [is] going to be their first reaction, especially in the event of an emergency, and if [it is] not function[ing] properly and the scoop operator needs to immediately shut down . . . could lead to a person being crushed or worse." Tr. 55-56.

Second, in an emergency, "miners naturally panic and don't have enough time to stop or shut down the scoop in another way." 32 FMSHRC at 944 (citing Tr. 57). Thus, while Consol asserts that the violation is only S&S if all the normal brakes were non-functioning, the panic bar is an integral part of a fully functioning braking system. If the panic bar is not operational when a miner needs to stop the scoop at any time, substantial evidence establishes that miners may be seriously injured. Tr. 57. *See Steele Branch Mining*, 18 FMSHRC 6, 12-13 (Jan. 1996) (finding S&S violation when brakes only provided one brake application in the event of unexpected engine failure when all five brake applications should have been operational) (opinion of Chairman Jordan and Commissioner Marks); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1144-47 (July 1996) (noting

that violation for failure to have operational service brakes resulted in miner fatality, which parties stipulated was S&S).[6]

Accordingly, we affirm the judge's determination that the violation of section 75.523-3(b)(3) was S&S.

C. <u>**Citation No. 6608553; Bolter Permissibility Violation**</u>

On September 4, 2008, Inspector Wilson observed a roof bolter on the 13-A section not being maintained in permissible condition in that there was an opening greater than .008 inch in the step flange joint in the permissible cover for the area light. 32 FMSHRC at 944. The path must be no greater than .007 inch. *Id.* at 945. The inspector issued Citation No. 6608553 for a violation of 30 C.F.R. § 75.1002(a).[7] Gov't Ex. 7.

Because the parties agreed that a violation occurred, the only issue before the judge was whether the violation was S&S. 32 FMSHRC at 945-46. She found it to be S&S and assessed a penalty of $1,304, the same amount proposed by the Secretary. *Id.* at 946, 949.

Applying the *Mathies* analysis, the judge found the first element satisfied, as the violation was conceded. *Id.* at 945. She determined that the second element was also present in that the violation contributed to the hazard of "the danger of allowing an ignition source to be available in this gassy mine." *Id.* We conclude that this statement is an accurate description of the relevant

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[6] Similarly, we disagree with Consol's contention that the scoop would have been inspected prior to its next use and therefore the violation should not have been designated as S&S. Accepting this argument would permit operators to claim as a defense that, sometime in the future, they were going to find and remedy the violation at issue. *Jim Walter Res., Inc*, 28 FMSHRC 579, 604 (Aug. 2006) (holding that it was "improper to rely on later circumstances to find that the violation was not S&S") (citation omitted). Thus, the judge correctly rejected the Consol witness' testimony that he "'hop[ed]' that the last operator . . . had checked the panic bar brake prior to use.") 32 FMSHRC at 944.

[7] Section 75.1002(a) provides: "Electric equipment must be permissible and maintained in a permissible condition when such equipment is located within 150 feet of pillar work or longwall faces." "Permissible equipment" means "a completely assembled electrical machine or accessory for which a formal approval has been issued by [MSHA]." 30 C.F.R. § 18.2. At issue is whether the cover of a light on a roof bolter was maintained in permissible condition. In order to measure permissibility, the inspector measured the "step flange joint" or the gap between the cover and the actual light bulb. Tr. 62. If that gap is larger than the required .007 of an inch, a spark could escape to the surrounding atmosphere and the light is not considered permissible. Tr. 62-63. The judge noted that "permissibility is designed to limit the number of ignition sources" in a mine. 32 FMSHRC at 945.

hazard contributed to by the violation, in that the permissibility requirement is designed to prevent hot gases from escaping from an enclosure containing electrical connections, thus causing an ignition outside the enclosure. As Inspector Wilson testified, the purpose of the permissibility standard is to ensure that if methane enters an enclosure containing electrical connections, and ignites from a spark, the gap between the enclosure containing the electrical connection and its cover would be so small that the ignition would cool before it entered the mine atmosphere, Tr. 63, preventing an ignition of methane in the mine atmosphere. The judge's conclusion that the violation contributed to the hazard – the second *Mathies* factor – is supported by substantial evidence.

In addressing the third factor of *Mathies*, the judge determined that there was a reasonable likelihood that this identified hazard would result in injury in view of the continued course of mining. 32 FMSHRC at 945. The judge relied on methane being emitted as the bolter drills into the roof, and on Inspector Wilson's testimony that because the mine is a gassy mine and because of the location of the roof bolter at a point close to the gob and far from the bleeder fans, there was a reasonable likelihood of injury from an explosion despite no methane being detected at the time of the violation. Tr. 64-65; 32 FMSHRC at 945-46.

The judge's conclusion as to the third *Mathies* factor is supported by substantial evidence, since the Robinson Run mine liberates more than a million cfm of methane during a 24-hour period and is subject to five-day methane spot inspections under Mine Act section 103(i), 30 U.S.C. § 813(i). Tr. 15-16; 324. Inspector Wilson testified that the roof bolter was in a location at the face at the farthest point from bleeder exhaust fans and in close proximity to the gob, such that gob air could migrate to where the roof bolter was operating, as opposed to the direction of the bleeder fans. Tr. 64-65. He testified that "it would only take a roof-fall" for the gob air to migrate where men are working and create "an explosive amount of methane" at that location. Tr. 64-65. The inspector testified that methane coming out of the gob could occur at any time. Tr. 68. According to the inspector, this danger of explosion was more likely because the mine is a gassy mine. Tr. 64-65.[8] Thus, we reject Consol's argument that the judge erred by "simply assum[ing] that methane will be present (despite the undisputed evidence that methane was not present)." PDR at 28.

Nor are we persuaded by Consol's reliance on *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988), in which the Commission determined that certain permissibility violations were not S&S.

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[8] We note that the Secretary agrees with Consol that the judge misstated Inspector Wilson's testimony about roof bolting and methane emission. Nonetheless, we conclude that this mischaracterization is irrelevant because the inspector's testimony that the location of the roof bolter, close to the gob – and far from the bleeder fans – supports the finding that an explosive amount of methane could be released near the impermissible roof bolter, resulting in a reasonable likelihood of a methane explosion or fire. Tr. 64-68.

There is a significant distinction between *Texasgulf* and the case at bar. The mine in *Texasgulf* had never produced ignitable or explosive levels of methane and possessed unique geological features not conducive to virtually any methane liberation. 10 FMSHRC at 501-503. In contrast, the Robinson Run mine liberates large quantities of methane and is characterized as a gassy mine. Similar to the present case, in *U.S. Steel Mining Co.*, 6 FMSHRC 1866, 1869 (Aug. 1984), the Commission found that a permissibility violation was properly designated S&S because of the gassy nature of the mine.

We also reject Consol's argument that the violation was not S&S because the equipment was not in operation at the time of the inspection.[9] The Commission, in determining whether a violation is S&S, considers circumstances assuming that normal mining operations continue without the intervention of an inspector. *U.S. Steel*, 7 FMSHRC at 1130. Thus, in *U.S. Steel*, 6 FMSHRC at 1869, the Commission rejected an operator's contention that the violation was not S&S because mining was not taking place at the precise moment the citation was issued, reasoning that mining was scheduled to resume.

Additionally, as we noted earlier, slip op. at 10 n.6, Consol's assertion that the violation is not S&S because it would have been detected in the next equipment inspection is contrary to *Jim Walter*, 28 FMSHRC at 604. Consol's approach is at odds with the basic tenets of mine inspection requirements, in that all violations could be defended against as to whether they are S&S by maintaining that they would have been recognized in the next pre-shift examination.

As to the fourth element of *Mathies*, the inspector testified that the hazard of a methane gas ignition or explosion would result in burn-type injuries or worse. Tr. 65. Accordingly, we affirm the judge's determination that the lack of a permissible light on the roof bolter would contribute to a hazard which is reasonably likely to cause a permanently disabling or fatal injury. 32 FMSHRC at 946; *See Buck Creek*, 52 F.3d at 135 (holding that the S&S determination was adequately supported by the inspector's "common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners who are present.")

D. Order No. 6608544; August 26, 2008 Ventilation Violation

On August 26, 2008, Inspector Wilson was on a five-day spot methane inspection, checking air velocities. Tr. 322-24. At the idle face of an entry, the inspector detected only 2,160 cfm of air being maintained although the mine ventilation plan required that "a minimum of 3,000 cfm will be maintained at each working place." Tr. 325; Gov't Ex. 14, §14(D). The inspector issued Order No. 6608544 for a section 75.370(a)(1) violation, alleging that Consol was not following the approved

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[9] Requiring that mining equipment be in operation at the moment of the inspection would allow operators to evade citations merely by shutting down equipment as inspectors approached.

ventilation plan.[10] Gov't Ex. 3. Inspector Wilson designated the violation as S&S and a result of unwarrantable failure. He believed that the violation was unwarrantable because he had specifically communicated to mine management that he would take harsher action if non-compliance with the relevant section of the ventilation plan continued. Tr. 402. The order itself states: "Management was put on notice on the date of 7/30/2008 after the issuance of citation 6608359 that the next time this condition was observed by this inspector stronger enforcement actions would be taken." Gov't Ex. 3; *see also* Gov't Ex. 33 (7/30/08 Citation and inspector notes about conference with Consol). The inspector also based his order on the mine's previous violation history and that management had instituted nothing to prevent this condition from recurring. Tr. 337-38, 402.

The violation was admitted by Consol, and the judge found that the violation occurred as stated.

1. <u>S&S Analysis</u>

In determining that the violation was S&S, the judge found the discrete safety hazard as a result of the violation to be the danger of methane accumulation resulting in explosion. She then concluded that the hazard would result in an injury of a serious or fatal nature. 32 FMSHRC at 938.

The violation as set forth in Order No. 6608544 was admitted by Consol, which satisfies the first element of *Mathies*. 32 FMSHRC at 938. With respect to the second element, the judge's determination that the danger of methane accumulation resulting in explosion constituted a discrete safety hazard is an accurate description of the relevant hazard contributed to by the violation.

Substantial evidence supports the judge's conclusion that the violation contributes to this hazard. MSHA ventilation supervisor John Hayes testified that Robinson Run is a gassy mine, that idle places are important to ventilate, and that failure to keep adequate air movement will result in a build-up of methane and a potentially fatal explosion. Tr. 254-57.[11] Supervisor Hayes and

[10] 30 C.F.R. § 75.370(a)(1) provides in pertinent part: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

[11] An idle place is a working place where the continuous miner is not operating. Tr. 252. (If the continuous miner is in the area, a greater quantity of air is required. *Id.*) Supervisor Hayes testified that the requirement of 3,000 cfm of air in idle places was added to the ventilation plan at section 14(D) when Consol decided that it wanted to take longer cuts in its development sections in order to put the longwall in place more quickly. Gov't Ex. 14; Tr. 249-56. The revision to the ventilation plan enabled Consol to extend each entry from 200 to 300 feet. Tr. 249-51; Gov't Ex. 14. The method of taking longer cuts means mining faster, which equates to greater levels of methane liberation. Tr. 254-55.

Inspector John Mehaulic testified that the mine was having methane problems in the summer of 2008, the time of the order. Tr. 269; 417-422. Mehaulic testified that in June 2008, he issued an imminent danger order under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), for an accumulation of methane in the explosive range in the idle places of the section, in violation of the ventilation plan. Tr. 417-22. Similarly, Ann Martin, chairman of the UMWA safety committee at Robinson Run, described higher than normal methane liberation in the summer of 2008 on this section. Tr. 302-09.

Against this backdrop of high methane emissions, Inspector Wilson and Supervisor Hayes both testified that ignition sources were present on the section. Inspector Wilson testified that there was roof bolting equipment in the entry, that Robinson Run has a history of impermissible equipment, that equipment regularly operates near or passes by this area, and that a belt was being moved resulting in equipment being powered up and moved throughout the shift. Tr. 343-44. Wilson testified that a person could easily take a piece of equipment into the idle place where methane had accumulated and, if the equipment created a spark from frictional movement of a machine or non-permissible condition, it could ignite the methane and cause an explosion. Tr. 343. Similarly, Supervisor Hayes testified about a prior Consol violation of not maintaining a loader in a permissible condition, stating that it is "not uncommon . . . for that loading machine to end up in an idle working place [with] a permissibility issue." Tr. 266-67. Hayes stated that there is a tendency to park equipment such as roof bolters, scoops, and loaders in idle places and "so maintaining the minimal flow" is "extremely important" to avert "disasters." Tr. 297.

Additionally, Inspector Wilson determined that the methane level was rising at the time of the order. When he arrived on the section, his methane reading was 0.45 percent, although an hour earlier it was at 0.2 percent. Tr. 336, 344. Given the mine's gassy nature and this rising methane trend, assuming continued mining operations, methane levels could be expected to increase. Although Consol argues that 2,160 cfm was sufficient to ventilate the area, this represents nearly a 30 percent reduction in airflow from what is established as the minimum required to safely ventilate the idle places in the operator's own plan. Tr. 254-57. On balance, our review of the record indicates that substantial evidence supports the judge's determination that the violation contributed to a discrete safety hazard of the danger of methane accumulation resulting in explosion.

As to the third and fourth elements of *Mathies*, the record supports the judge's finding that this hazard of methane accumulation would be reasonably likely to result in serious or fatal injuries. Inspector Wilson testified that a methane gas explosion would result in fatal types of injuries. Tr. 346; *see Buck Creek*, 52 F.3d at 135.

Consol argues that the judge's decision amounts to a presumption of S&S for all violations concerning permissible equipment, and that the decision failed to meet the requirement of a confluence of factors in a case involving the threat of a possible explosion, in violation of the Commission's decisions in cases such as *Texasgulf*. However, Consol's argument misrepresents the judge's decision. Rather than applying a presumption (actual or implied), the judge carefully

analyzed the evidence and concluded, pursuant to *Mathies*, that the facts established the existence of a hazard, contributed to by the violation, which was reasonably likely to result in a serious injury. In finding the existence of this discrete safety hazard, the judge recognized the need for the Secretary to show a confluence of factors – methane and ignition sources under continued normal mining operations – as required by *Texasgulf*.

Additionally, Consol takes issue with the judge's failure to credit its witnesses, who believed that the violation was not S&S because of the absence of ignition sources and the presence of some air movement. However, Consol has not presented us with sufficient reason to overturn the judge's credibility determination. *See Farmer*, 14 FMSHRC at 1541. In deciding not to credit the testimony of Consol's witnesses, the judge evaluated their demeanor and noted that most of their testimony was in response to leading questions. 32 FMSHRC at 939. Moreover, as the judge noted, Consol's witnesses Jones and Nestor "require, in essence, an imminent danger to exist in order for the violation to be significant and substantial." *Id.* The judge observed – quite accurately – that if there was no air movement and energized equipment was immediately present – as Consol's witnesses seemed to require for a finding of S&S – it would have constituted an imminent danger requiring the withdrawal of miners under section 107(a) of the Mine Act. *Id.* Conditions justifying a finding of S&S are very distinct from, and far less dangerous than, those requiring withdrawal of miners under section 107(a).

Thus, while the record does not (and need not) establish the existence of an imminent danger, it does contain substantial evidence supporting the judge's conclusion that the violation was S&S. The 30 percent reduction in air velocity was not sufficient to dilute the methane in the idle places, which was rising. *See* Tr. 297 (Hayes testimony that 3,000 cfm needed to adequately ventilate the idle places). The judge also was entitled to give substantial weight to the testimony of the inspectors as to the presence of ignition sources in the form of the roof bolter, equipment involved in the belt move and other energized equipment or vehicles driving past or brought into the section. Tr. 255-56, 343-345; *see Buck Creek*, 52 F.3d at 135-36. As the judge noted, Inspector Wilson "ably explained the many ignition sources available." 32 FMSHRC at 940.[12]

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[12] Commissioner Young would not hold that all of the alleged ignition sources cited by the inspectors are supported by substantial evidence. He believes that testimony as to most of the sources was general, vague and speculative. *See, e.g.*, Tr. 343 ("A person could easily take a piece of energized equipment into that place.") However, the roof bolter that was actually in the idle place is a different matter. Although the inspector testified that he did not know whether the roof bolter was energized or not, Tr. 344, the roof bolter would eventually either be energized or be moved by another piece of powered equipment, either of which would introduce an ignition source to the area.

We are precluded from assuming that the rising methane level would have been discovered and abated before an explosion hazard could develop. *See U.S. Steel*, 7 FMSHRC at 1130 (noting that while methane levels at the time of the violation were low, "[i]f normal mining

In sum, we affirm as supported by substantial evidence the judge's determination that the ventilation violation of August 26, 2008 was S&S.[13]

2. **Unwarrantable Failure Analysis**

This is a classic case of unwarrantable failure where an operator has neglected to remedy a condition "because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part." *Emery*, 9 FMSHRC at 2002 (citation omitted). In determining that the violation was a result of an unwarrantable failure, the judge relied on Consol's "many previous citations for ventilation plan violations and, specifically, for violations of the particular provision in the ventilation plan that is at issue in this matter," i.e., not maintaining 3,000 cfm in idle places. 32 FMSHRC at 940, 942. Accordingly, she concluded that Consol was on notice that it needed to do more to ensure adequate ventilation in idle places. *Id.* at 941. Against a backdrop of unusually high levels of methane in the mine, the judge found that Consol "ignor[ed]" the ventilation plan requirement of maintaining the 3,000 cfm air flow in idle places, which made the violation obvious and highly dangerous because it created a "risk of methane explosion." *Id.* As discussed below, her findings are supported by substantial evidence.

We first address whether the operator was placed on notice that greater efforts were necessary for compliance. *IO*, 31 FMSHRC at 1353. Inspector Wilson issued multiple violations for exactly the same condition of not maintaining 3,000 cfm in idle places. Tr. 337. Supervisor

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operations were to continue, a rapid buildup of methane could reasonably be expected"); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574-75 (July 1984) (rejecting the operator's argument that absent some future additional aggravating condition, the violation would not likely result in injury and holding that it was proper to evaluate the cited violation in terms of "continued normal mining operations"). Similarly, we cannot assume that miners would test for methane before energizing the equipment. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1838 n.4 (Aug. 1984) (in concluding that injury was reasonably likely to result from violation, the Commission explained that "relying on [the] skill and attentiveness of miners to prevent injury 'ignores the inherent vagaries of human behavior'") (citation omitted); *see also Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (a miner's exercise of caution is not a factor in considering whether violation is S&S); *Crimson Stone v. FMSHRC*, 198 Fed. Appx. 846, 851 (11th Cir. 2006) (unpublished opinion) ("[a]ny assumptions about how and when [the equipment] would have been repaired do not alter the significant and substantial nature of the violation") (citations omitted). Therefore, Commissioner Young would affirm the judge based on a reasonable likelihood that the increase in methane levels and the presence of powered equipment placed the methane and ignition source on a path toward convergence under normal mining conditions and represented the confluence of factors the law requires.

[13] For the reasons set forth, *supra*, slip op. at 5, we again reject Consol's argument that redundant safety measures, such as methane monitoring equipment and required methane checks, may mitigate against an S&S designation.

Hayes introduced six citations that had been issued to Consol for violating this same section of its ventilation plan and not maintaining 3,000 cfm in idle places from January 2008 to August 2008. Tr. 264-69; Gov't Exs. 20, 21, 23, 24, 27, 30.

Additionally, the Commission has recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (quoting *Consolidation Coal*, 23 FMSHRC at 595). The record reflects that Wilson met with upper management and put them "on notice that the next time these conditions were found, stronger enforcement action would be taken." Tr. 337; Gov't Ex. 3. Similarly, the inspector's notes from July 30, 2008, reported that "in conference with Mike Nester, Mike Jacques and Todd McNair, this inspector put the operator on notice that this type of violation seems to be occurring on a somewhat regular basis and if future instances occur, stronger enforcement actions will be taken." Gov't Ex. 33.

Although Consol denied that the MSHA meeting occurred and that it received a warning from Inspector Wilson, the judge did not credit the Consol managers. Tr. 525; 32 FMSHRC at 941-42. Instead, she credited the memory of the inspector as his notes clearly evidenced the meeting. 32 FMSHRC at 942. She stated that the mine "gave little credence to what [the MSHA inspectors] had to say about . . . ventilation in the idle faces," *Id.*, and reasonably inferred that the Consol managers' lack of memory as to MSHA's July 30 meeting may suggest a lack of attention to MSHA's safety concerns. She found the attitude of Consol towards ventilation "troubling" and dismissive of the importance of following its ventilation plan in idle places. *Id.*; *See also Buck Creek*, 52 F.3d at 136 (holding that operator's failure to remedy the situation was egregious and unwarrantable in light of the fact that it had already received repeated warnings regarding this very problem).

Consol's claim that the judge was biased against its witnesses does nothing more than ask us to overturn credibility determinations, which we decline to do. Moreover, we are not troubled by the judge's statement that the testimony of the mine superintendent and the safety supervisor did not "demonstrate any serious concern about the ventilation issues raised by MSHA." 32 FMSHRC at 942. This view is amply supported by the superintendent's testimony that his job was to keep methane levels low rather than focus on the ventilation plan requirements. Tr. 509-10.

An operator's effort in abating the violative condition is another factor established by the Commission as determinative of whether a violation is unwarrantable. *IO*, 31 FMSHRC at 1356. The focus on the operator's abatement efforts is on those efforts prior to the citation or order. *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996). The judge found, and the record demonstrates, that Consol did not take any additional steps to remedy or enhance its ventilation of idle places pursuant to its ventilation plan. As the section foreman reported to Inspector Wilson, "management had not put anything into place after the issuance of the previous violations and [the inspector's] conversation with management to keep this condition from recurring." Tr. 337-38.

Similarly, the judge noted, Consol "admitted that its efforts . . . did not address this portion of the ventilation plan." 32 FMSHRC at 942.

Considering the obviousness or knowledge of the violation, the judge found that the violation was obvious. *Id.* Consol asserts that the air velocity was not obvious, as it fell only 840 cfm short of the required volume. However, the section foreman had not taken an air reading when he did his on-shift examination approximately an hour before the inspector arrived, because he had not received any instructions from management to do so. Tr. 335-38. Similarly, the mine superintendent testified that at the time of the inspection Consol did not take air readings to determine whether 3,000 cfm was being maintained in idle places as required in its ventilation plan. Tr. 512. Mine Superintendent McNair even asserted that it was "debatable" whether the mine was required to maintain 3000 cfm of air in an idle entry under the ventilation plan. Tr. 509-10. In *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010) (citing *Coal River Mining, LLC*, 32 FMSHRC 82, 94 (Feb. 2010)), we recognized that "[w]hen the operator's actions have caused a condition not to be obvious, the Commission has not been persuaded that [a claim of] the lack of obviousness is a mitigating factor in the determining whether a violation is attributable to the operator's unwarrantable failure." Accordingly, we affirm that, on these facts, where the operator deliberately ignored a known problem, it cannot assert ignorance of the condition as a defense.

With respect to danger, the judge determined, and we affirm, that the violation is S&S. Slip op. at 13-16. In addition, ignoring a chronic problem increases the level of danger. As MSHA Ventilation Supervisor Hayes testified: "[W]henever you have a pattern or practice . . . to do something that is considered unsafe, which a violation of the ventilation plan [is considered to] be an unsafe condition, you increase the likelihood of — the more times you do something wrong, you increase the likelihood of something bad happening because of you doing something wrong." Tr. 344-45. In addition, as the judge recognized, the mine was experiencing high levels of methane, which made the ventilation violations even more dangerous. 32 FMSHRC at 941. Hence, we agree that the level of danger supports an unwarrantable failure finding.

As to duration, the judge noted that it was unknown how long the condition existed, but that methane levels were rising. *Id.* The judge did not discuss extensiveness in her analysis of unwarrantable failure. In her S&S analysis, however, the judge rejected Consol's argument that 2,160 cfm was sufficient to dilute methane. *Id.* at 939. Likewise, we take issue with Consol's attempt to minimize the significance of the violation by asserting that only 840 cfm was lacking. The 3,000 cfm provision is contained in Consol's own ventilation plan and if it believed the requirement to be too high, it should have taken steps to modify that requirement.

Additionally, the judge addressed all the alleged mitigating factors subsequently raised by Consol on appeal and found them insufficient. *IO*, 31 FMSHRC at 1351 (noting that judge should examine whether mitigating factors exist) (citations omitted). She made determinations rejecting Consol's testimony asserting the absence of ignition sources in the area, which we discussed above

in the context of the S&S issue. By Consol's own admission, its efforts to improve ventilation did not attempt to remedy the lack of sufficient air in idle places as required by its ventilation plan. Tr. 368-69, 536.

Nor are we convinced by Consol's attempt to distinguish its prior ventilation violations as not based on the same facts as presented here. Courts and the Commission have held that prior violations do not have to involve precisely the same activity to put an operator on notice that greater compliance efforts are necessary. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012) (rejecting argument that past violations need to be similar to support unwarrantable failure finding); *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992); *San Juan*, 29 FMSHRC at 131. Consol was on notice that it needed to remedy and rectify the chronic problem of insufficient ventilation in its idle places. When it did not do so, the inspector appropriately used his authority under the Mine Act to increase the sanction by issuing an unwarrantable failure violation.

Accordingly, we affirm the judge's determination that Consol's violation of its ventilation plan on August 26, 2008 resulted from unwarrantable failure.

E. Citation No. 8014053; Ventilation Violation of September 17, 2008

On September 17, 2008, as Inspector Wilson walked to the face of a section, he observed two miners struggling while attempting to hook a "baloney skin"[14] to the back of an auxiliary fan in the crosscut between the No. 1 and No. 2 entries in order to direct air. Tr. 355-56; Gov't Ex. 9. When they could not successfully adjust the skin, they dropped it and returned to other jobs. Tr. 356. Their actions caused a short circuit of air, which in turn blew down the ventilating curtain in the No. 2 entry. *Id.* The inspector checked the air velocity. There was not enough air flow at the end of the line canvas to spin the wheel of the inspector's anemometer, the instrument that measures air velocity. Tr. 373-74; Gov't Ex. 9. Wilson detected one percent methane and testified that, if left unabated, the methane would continue to accumulate and reach explosive levels. Tr. 361-63, 374. As a result, he issued Citation No. 8014053, alleging an S&S violation for failing to maintain 3,000 cfm of air flow pursuant to Consol's ventilation plan. Gov't Ex. 9. The inspector assessed low negligence on the part of the operator, and MSHA proposed a civil penalty of $7,578. Tr. 362; 32 FMSHRC at 946. Because the violation was admitted by Consol, the judge determined that the violation occurred as stated in the citation. 32 FMSHRC at 947.

In addressing the S&S issue, the judge determined that a discrete safety hazard existed as a result of the violation – the danger of respirable dust in the air as well as methane accumulation resulting in explosion. *Id.* She found that the hazards described would result in an injury of a

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[14] "Baloney skin" or "bologna skin" is soft tubing attached to a fan exhaust to route air. *See* www.msha.gov/S&HINFO/BlackLung/ControlDust 2007/Vent3.pdf at 27.

serious or fatal nature, thus satisfying the *Mathies* elements. *Id.* The judge also raised the negligence determination from low to moderate. *Id.* at 948. She reasoned that not only had the mine disregarded the MSHA inspector's warning regarding section 14(D) of its ventilation plan, when the mine was experiencing high levels of methane, but it had failed to ensure that miners were aware of the ventilation plan requirements. *Id.* Based on raising the negligence level from low to moderate, the judge raised the penalty to $10,000. *Id.* at 950.

As to the S&S designation, we conclude that the judge properly determined that a safety hazard in the form of methane accumulation potentially leading to an explosion resulted from no discernible air flow in the No. 2 entry. Wilson testified that the level of methane was one percent and if left unabated methane would continue to accumulate and reach explosive levels. Tr. 361-63, 374. The judge was not persuaded by Consol's arguments that the methane levels were too low to pose an explosion hazard. 32 FMSHRC at 947-48. Similarly, we are not persuaded by Consol's assertion that the inspector merely guessed that methane levels would continue to rise. The record showed that the condition was created in a few minutes and that the methane level had already risen to one percent. Tr. 362. Additionally, Consol's witness Michael Jacquez conceded, and the record showed, that methane levels on this section were "generally high." Tr. 443. Assuming continued mining operations, we conclude that substantial evidence supports the judge's finding that a lack of any discernible air flow on the section, if left unabated, would allow an explosive level of methane to accumulate. *U.S. Steel*, 6 FMSHRC at 1869. Quick abatement occurred only because of the fortuitous circumstance of an MSHA inspection.

Moreover, the inspector testified that the area contained ignition sources – such as an auxiliary fan, with fast-moving metal parts spinning against each other, and a roof bolter – and that the mine had a history of permissibility violations. Tr. 364-65. The judge credited Inspector "Wilson's testimony that the condition created by the violation, i.e., the accumulation of methane in an area with ignition sources easily accessible, would result in an injury-causing event." 32 FMSHRC at 947. The judge considered the contrary views of Consol witness Michael Nestor, and discredited them. *Id.* at 947-48. Regarding the seriousness of the injury, the inspector testified that, given the stagnant air, any methane explosion on this section would be "very violent" and would result in fatal injuries to ten affected miners on the section. Tr. 363-66. Hence, we affirm the judge's determination that Consol's ventilation violation on September 17, 2008 was S&S.

With respect to the judge's finding of moderate negligence, Consol had repeatedly violated this section of its ventilation plan. It had been specifically warned that greater compliance efforts were necessary and that the gassy mine was experiencing higher methane liberation than usual. Consol conceded that it had made no changes to improve ventilation in idle areas. Tr. 368-69, 536. Inspector Wilson testified that management should have made miners aware of the ventilation problems in idle areas. Tr. 411-13. Similarly, Ventilation Supervisor Hayes also testified that if the baloney skin falls off of a fan, miners should have known to inform their supervisor. Tr. 293. As the Commission has held, an operator's supervision and training of rank-and-file miners is relevant in determining negligence. *Southern Ohio Coal Co.*, 4 FMSHRC 1458, 1464 (Aug. 1982) (holding

that "*the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct.") (emphasis in original; citation omitted); *see also Black Beauty*, 703 F.3d at 561 (finding of high negligence was supported in part by mine's failure to train miners, when a miner failed to seek help when he encountered a danger that had been the subject of numerous prior violations).[15]

We conclude that the judge's finding of moderate negligence was reasonable and amply supported, given Consol's admission that it took no steps to remedy its ventilation problems in idle areas of the mine when it had clear notice that it needed to do so, and its failure to train its miners to notify management upon discovery of a dangerous ventilation situation in those areas. Accordingly, we affirm the judge's moderate negligence finding as well as her determination to assess a penalty of $10,000 rather than the proposed amount of $7,578.

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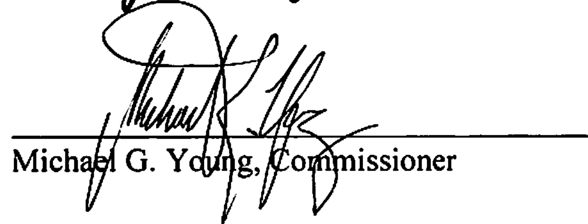
[15] We note that negligence of rank-and-file miners may not be *directly* imputed to the operator for purposes of penalty assessment. *Southern Ohio*, 4 FMSHRC at 1464. The judge here stated that "negligence on the part of the miners who changed the ventilation by moving the fan, is attributed to the operator." 32 FMSHRC at 948. We disagree with the judge's statement to the extent that the judge suggests that direct negligence of the miners is imputed to the operator in evaluating negligence. Nonetheless, the judge's statement is harmless error as she ultimately raised the level of negligence because Consol had a "responsibility to ensure that all miners are aware of the plan and how to comply with such." *Id.*

II.

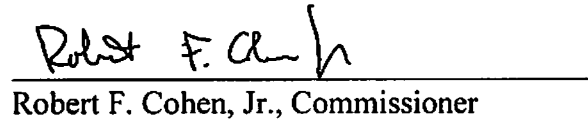
Conclusion

For the reasons set forth herein, we affirm, in their entirety, Order No. 6608537, Citation No. 6608551, Citation No. 6608553, Order No. 6608544, and Citation No. 8014053.

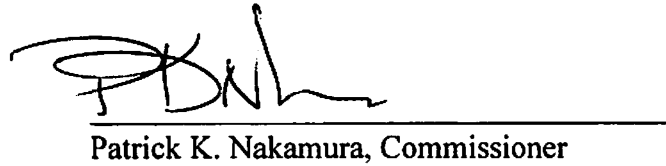
Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Distribution:

Matthew H. Nelson, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501
mathew.nelson@dinslaw.com

Carol Ann Marunich, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501
carol.marunich@dinslaw.com

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Robin Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2228
Arlington, VA 22209

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Administrative Law Judge Margaret Miller
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
721 19th Street, Suite 443