FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

December 10, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. KENT 96-254
	:	KENT 96-320
	:	KENT 96-321
HARLAN CUMBERLAND	:	KENT 96-322
COAL COMPANY	:	KENT 96-333

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). At issue are: whether Harlan Cumberland Coal Company ("Harlan") committed a significant and substantial ("S&S") violation of 30 C.F.R. § 75.202(a) by failing to remove drawrock from roof support straps along the main intake roadway; whether Harlan committed an S&S violation of 30 C.F.R. § 75.220 by impermissibly deviating from the pillaring provisions of its roof control plan; whether Harlan committed an S&S violation of 30 C.F.R. § 75.1106-3(a)(2) by improperly storing compressed gas cylinders; whether Harlan committed S&S violations of 30 C.F.R. § 75.604(b) by failing to insulate and seal two permanently spliced trailing cables to exclude moisture; whether Harlan committed an S&S violation of 30 C.F.R. § 75.517 by failing to adequately insulate and fully protect a power cable; and whether Harlan violated 30 C.F.R. § 75.400 by allowing float coal dust to accumulate on energized power conductors. Administrative Law Judge David Barbour concluded that Harlan committed S&S violations of sections 75.202(a), 75.220, 75.1106-3(a)(2), 75.517, 75.400, and two S&S violations of section 75.604(b). 19 FMSHRC 911 (May 1997) (ALJ).[1] The Commission granted Harlan's petition for discretionary review ("PDR") challenging these determinations. For the reasons that follow, we affirm in part, reverse in part, and remand

[1] Judge Barbour approved settlements of numerous other alleged violations in the consolidated dockets. 19 FMSHRC at 950-55.

for reassessment of civil penalties.

I.

Citation No. 4243656

A. Facts and Procedural Background

Harlan operates the C-2 Mine, an underground coal mine in Harlan County, Kentucky. *Id.* at 912. The roof above the main intake roadway is supported by bolts. *Id.* at 913. At various locations, steel straps are bolted to the roof perpendicular to the roadway to supplement the roof bolts. *Id.*; Tr. 34-35. The straps are approximately 13 to 14 feet long and 8 inches wide. 19 FMSHRC at 913. The straps are centered approximately four feet apart. *Id.*; Tr. 35. During an inspection on March 11, 1996, Inspector Larry Bush from the Department of Labor's Mine Safety and Health Administration ("MSHA") observed that the roof along the main intake roadway contained several areas of loose hanging drawrock.[2] 19 FMSHRC at 913; Tr. 29. Some of this rock was loose and wedged between other rocks, and some lay suspended on or between the straps. Tr. 29. The drawrock measured between one inch and one foot thick. 19 FMSHRC at 913. Bush issued a citation alleging an S&S violation of 30 C.F.R. § 75.202(a).[3] Gov't Ex. P-5.

After a hearing, the judge concluded that the Secretary had proven a violation of section 75.202(a) by demonstrating that drawrock at various points along the intake roadway was hanging and ready to fall. 19 FMSHRC at 914. The judge designated the violation S&S due to the likelihood of an eventual rock fall and the serious danger posed by the loose hanging rocks. *Id.* at 914-15. In reaching these determinations, the judge relied on Inspector Bush's testimony, which was based on Bush's first-hand observation of the roof conditions. *Id.* at 914.

B. Disposition

1. Violation

Harlan contends that the drawrock was supported within the meaning of the standard. PDR at 3. The Secretary responds that substantial evidence supports the judge's finding of a violation. S. Br. at 14-16. The Secretary argues that the judge properly credited and relied upon Inspector Bush's testimony in reaching his finding. *Id.*

---

[2] Bush described drawrock as "rock that's just above the coal seam between the coal seam . . . and . . . the immediate roof . . . [and that] tends to separate from the main roof." Tr. 21.

[3] 30 C.F.R. § 75.202(a) provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

The Secretary's roof control standard is broadly worded. *See* 30 C.F.R. § 75.202(a). Accordingly, we have held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987) (cited in *Helen Mining Co.*, 10 FMSHRC 1672, 1675 (Dec. 1988)).

The parties do not dispute that drawrock was present on and above the straps. Tr. 21, 37. They disagree, however, on the dangers posed by loose hanging drawrock. Harlan's safety director, Eddie Sargent, testified that Harlan employees are instructed to remove drawrock that appears dangerous. Tr. 33, 36. Based on information given to him by Harlan's superintendent, Sargent believed the position of the drawrock leading to the citation did not warrant immediate correction. Tr. 37-38. Sargent testified that prematurely removing drawrock increases, rather than decreases, the danger of rock falls. Tr. 38. Conversely, Inspector Bush, who had five years of experience inspecting the C-2 mine (Tr. 20), testified that simply because drawrock is lying on a strap does not mean that it will remain there. Tr. 30. He stated that the drawrock he observed was "loose" and could fall "within a short period of time." Tr. 23.

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). We have recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) ("*Dust Cases*") (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)).

The judge credited Inspector Bush's testimony that the drawrock was hanging and ready to fall. 19 FMSHRC at 914. We see no basis for overturning the judge's crediting of the first-hand observations of Bush over the testimony of Harlan's safety director, who did not personally view the roof conditions. We also conclude that the judge correctly determined that a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have removed the drawrock upon observing that large, loose slabs, which appeared ready to fall, were hanging from the roof and lying on straps above the intake roadway. Accordingly,

we find that substantial evidence[4] supports the judge's determination that Harlan violated section

---

[4] 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 *Consolidated Edison Co. v. NLRB*, 305

75.202(a), and affirm his finding of violation.

2. Significant and Substantial

Harlan challenges the judge's S&S finding, asserting that the evidence fails to establish "a reasonable likelihood that the hazard contributed to will result in an injury." PDR at 4 (quoting *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)). The Secretary responds that substantial evidence supports the judge's designation of the violation as S&S. S. Br. at 16.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. 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). In *Mathies*, we 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.

Mathies, 6 FMSHRC at 3-4 (footnote omitted); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary 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. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

At issue is the third *Mathies* element. We have noted that an inspector's judgment is an important element in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *National Gypsum*, 3 FMSHRC at 825-26); *see also Buck Creek Coal*, 52 F.3d at 135-36 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). Here, the judge credited Inspector Bush's testimony that the hanging drawrock, which he found to be loose and ready to fall, posed a reasonable likelihood of serious injury to miners traveling the roadway below and, therefore, the violation was S&S. 19 FMSHRC at 914-15. Bush testified that once the rock is broken loose, that does not mean that it will remain directly above the strap. Tr. 30. Harlan also acknowledged that drawrock had previously fallen and injured a miner's foot, an injury that kept the miner out of work for a week. Tr. 39. Most importantly, Bush testified that a roof fall could happen at any time — in fact, he believed a fall was virtually imminent. Tr. 23.

U.S. 197, 229 (1938)).

In sum, we find that substantial evidence supports the judge's determination that Harlan's violation of the standard was S&S. Accordingly, we affirm his S&S determination.[5]

II.

Citation No. 4243921

A. Facts and Procedural Background

On March 11, 1996, Harlan was in the process of retreat mining on the 005 section of the C-2 Mine.[6] 19 FMSHRC at 920. The approved mining sequence for pillar extraction is set forth in the mine's roof control plan. Gov't Ex. P-10. Under the prescribed sequence, a cut is made in the middle of the pillar (the "key cut") and the roof is then supported by roof bolts. 19 FMSHRC at 920. The second cut is made from the opposite side of the pillar, splitting the pillar in two. *Id.* The two portions of the pillar are called "wings." *Id.* Each wing is then extracted in the sequence described in the roof control plan. *Id.*; Gov't Ex. P-10. The plan also specifies other permissible mining sequences, including a two-pillar sequence and an alternative mining sequence. Gov't Ex. P-10 at 134, 136. In addition, the plan permits deviation from the required

mining sequence when adverse conditions are encountered, provided that equivalent pillar support is maintained under the alternate method. *Id.* at 116.

During his March 11 inspection, Inspector Bush came upon a row of six pillars, — numbered from left to right as 1, 3, 6, 7, 2, and 4 — four of which had already been mined. He observed that pillars 1 and 3 had been mined from right to left and that pillars 2 and 4 had been mined from left to right. 19 FMSHRC at 921. He further observed that pillars 6 and 7 were being cut straight ahead at the time of inspection. *Id.* Bush interpreted the roof control plan as mandating that the entire row of pillars be key cut in the same direction, and he concluded that

---

[5] Commissioner Marks agrees that this violation and those contained in citations 4250669, 4250624, and 4250670 are S&S. However, for the reasons set forth in his concurring opinions in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he continues to urge that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent. On February 5, 1998, MSHA issued a lengthy Interpretative Bulletin, setting forth a new agency interpretation of S&S and announcing that MSHA would challenge the Commission's narrow interpretation of S&S. 63 Fed. Reg. 6012 (1998). However, on April 23, 1998, MSHA suspended that Interpretive Bulletin with little explanation. *Id.* at 20,217. Commissioner Marks is curious as to MSHA's change in position on the S&S question and requests that the Secretary promptly advise him on this important issue.

[6] Retreat mining is the extraction of the pillars remaining after advance mining. 19 FMSHRC at 920.

Harlan's failure to do so constituted an S&S violation of the plan and 30 C.F.R. § 75.220. Gov't Ex. P-12.

The judge concluded that Harlan violated the plan by mining the key cuts in different directions. 19 FMSHRC at 923. The judge vacated the S&S designation, finding that the Secretary failed to establish that there was a reasonable likelihood that the hazard contributed to would result in an injury. *Id.* at 923-24.

B. Disposition

Harlan contends that the judge erred in finding that the Secretary proved a violation, arguing that adverse conditions made mining the entire row of pillars in the same direction impractical, thereby permitting deviation from the mining sequence described in the roof control plan. PDR at 5-10. Harlan further alleges that "nothing in the plan requires a return to the original direction of [key] cuts after adverse circumstance [sic] prompt a deviation." *Id.* at 9. The Secretary responds that substantial evidence supports the judge's finding that Harlan violated section 75.220 by deviating from the pillar cutting sequence described in the mine's roof control plan. S. Br. at 18-21. The Secretary argues that "although the existence of a swag and low roof may have made it impractical to cut pillars 2 and 4 from right to left, Harlan identified no reason why it would have been impractical to cut pillar 7 from right to left." *Id.* at 18.

To prove a violation of a mine plan, the Secretary must first establish that the provision allegedly violated is part of the approved and adopted plan. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). She must then prove that the cited condition or practice violated the provision. *Id*. When a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties[7] by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement. *Id*.

Here, the issue is whether, as the Secretary alleges, Harlan's plan required the operator to return to the original mining direction to remove pillars six and seven after adverse conditions required a deviation in direction to remove pillars two and four. We conclude it did not. The plan contains no such explicit requirement.[8] Additionally, the Secretary's evidence fails to

---

[7] *Cf.* 9 FMSHRC at 907 ("The ultimate goal of the [mine plan] approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord.").

[8] The relevant plan provision states:

> The standard cut sequence as indicated may be deviated from where adverse conditions make it impractical to attack a pillar in the locations indicated. Such deviation is permitted only where

demonstrate a "meaning intended by the parties." *See id*. The Secretary did not present any evidence of prior consistent enforcement of the mining direction requirements of the plan that would have demonstrated that Harlan was on notice regarding the Secretary's interpretation of the plan. *Cf. id.* at 908. Moreover, considering the location of pillars six and seven, we conclude that the Secretary's argument in this case is actually at odds with the broad purpose of the plan to protect miners from dangerous roof conditions.

Harlan asserts that "it was *SAFER* to attack [pillars 6 and 7] head on. . . . [I]t would have been crazy to . . . drag men and equipment around into an area that was (1) already pillared, with the attendant roof weakening that results, and (2) already suffering from bad mining . . . ." PDR at 9 (emphasis in original). We agree. A review of the mining sequence clearly establishes that attempting to mine pillar seven from right to left, as the Secretary suggests, would have required miners to enter an area where the mine roof had already been substantially compromised due to the extraction of pillars two and four. This mining approach would have subjected miners to an extremely dangerous and unpredictable area of mine roof. In retreat mining, standing pillars serve as roof support, and the extraction of the pillars weakens the roof above the area where the pillar stood. Moreover, once a pillar is removed, the mine roof is also weakened in the areas immediately surrounding a removed pillar — such as entries and intersections — rendering these areas impassable because of the danger of an imminent roof collapse without warning.[9]

In the instant case, MSHA's trial exhibit P-11 clearly illustrates that at the time Inspector Bush entered the area in question, the mine roof was compromised in the areas where pillars two and four formerly stood, but more importantly was also compromised in the surrounding entries and intersections up to the right corner of pillar seven, thereby eliminating the possibility that pillar seven could be mined from right to left. *See* Gov't Ex. P-11. The procedure suggested by the inspector who filed the citation, considering that he was a roof control specialist, astonishes us. In fact, attempting to mine pillar seven from right to left, which was the logical outgrowth of Inspector Bush's interpretation of the plan, would have required miners to enter an unpredictable and highly unstable area to commence mining, and would have been extremely dangerous. The judge was, therefore, incorrect in finding that "there [was] no reason apparent why pillar No. 7 could not have been cut from right to left." 19 FMSHRC at 923. Mining pillar seven straight

---

> equivalent pillar support is maintained in the alternate method.
>
> . . . .
>
> More than one pillar may be worked in cycle, provided that the same sequence of recovery and support is followed.

Gov't Ex. P-10 at 116, 135.

[9] Here, the roof control plan provides: "While using remote controls, the continuous mining machine operator and other persons will position themselves[] [u]nder permanently supported roof." Gov't Ex. P-10 at 118.

ahead was the *only* option available to extract the pillar in a safe manner, and in a manner that was also consistent with the company's roof control plan.[10]

Accordingly, we reverse the judge's determination that Harlan's mining of pillar seven straight ahead violated the roof control plan. We also vacate the civil penalty assessed by the judge.

III.

Citation No. 4243726

A. Facts and Procedural Background

During an inspection of the 004 section of the C-2 Mine on February 27, 1996, MSHA inspector Robert Clay observed an oxygen tank and an acetylene tank leaning against the rib of a coal pillar in an active roadway. 19 FMSHRC at 924. Clay determined that the roadway was used by "very large [mobile] equipment" and that this equipment passed within one foot of the tanks. *Id.* at 925. Clay did not examine the tanks to determine whether they contained any oxygen or acetylene. *Id.* at 924. Based on his determination that the tanks were not secured in an upright position, Clay issued a citation alleging an S&S violation of 30 C.F.R. § 75.1106-3(a)(2).[11] Gov't Ex. P-3.

Judge Barbour concluded that Harlan violated section 75.1106-3(a)(2) by failing to secure the gas tanks against accidentally tipping over. 19 FMSHRC at 925. He noted that the possible absence of gas from the tanks was immaterial, since the standard draws no distinction between full and empty tanks. *Id.* The judge also affirmed Inspector Clay's S&S designation, relying on Clay's testimony regarding the extreme hazard posed by acetylene and oxygen gas and the proximity of the gas tanks to the path of mobile equipment. *Id.* at 925-26. However, the judge specifically found that the inspector "did not know if any oxygen or acetylene remained in the tanks." *Id.* at 924 (citing Tr. 104).

B. Disposition

Harlan argues that the judge erred in finding the violation of section 75.1106-3(a)(2) to be S&S, contending that since the Secretary produced no proof that the tanks contained anything, "there is no evidence in the record to support a finding of a 'reasonable likelihood' that the

---

[10] *See* Gov't Ex. P-10 at 132.

[11] 30 C.F.R. § 75.1106-3(a) provides in pertinent part: "Liquefied and nonliquefied compressed gas cylinders stored in an underground coal mine shall be . . . [p]laced securely . . . in an upright position . . . or otherwise secured against being accidentally tipped over."

condition cited would result in injury." PDR at 13.[12] The Secretary responds that the judge properly credited Inspector Clay's testimony regarding the dangers of oxygen and acetylene ignitions, and that substantial evidence supports the judge's designation of the violation as S&S. S. Br. at 22-23. The Secretary asserts that it is "reasonably likely" that gas was in the cylinders because the tanks "were in a working area where gas might well be used." *Id.* at 23. The Secretary also notes that Harlan never gave any indication that the tanks did not contain gas and that section 75.1106-3(a) draws no distinction between cylinders containing gas and empty cylinders. *Id.*

When evaluating the reasonable likelihood of a fire, ignition, or explosion, we have examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). We also have indicated that proof of a fuel source is necessary to establish the reasonable likelihood that the hazard contributed to will result in injury. *Id.* at 503.

At issue here is the third *Mathies* element. The judge made no explicit finding concerning whether the tanks contained fuel. His view that the presence of fuel was "immaterial" to the violation question further indicates that he felt no finding was required. *See* 19 FMSHRC at 925. Under *Texasgulf*, however, such a finding is a prerequisite to an S&S determination. *Texasgulf*, 10 FMSHRC at 501. By arguing that the location of the tanks in a work area makes it "reasonably likely" that the tanks contained fuel, the Secretary is in essence asking the Commission to make an inference at the appellate level. We decline this invitation. It is for the judge in the first instance, not the Commission on review, to make inferences and findings based on record evidence. *See Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1139 (May 1984) ("It is . . . the judge's duty to draw conclusions from the record . . . ."); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989). We conclude that the judge's failure to apply *Texasgulf*, and his consequent failure to make the necessary factual finding as to the presence of fuel in the tanks required by that precedent, constitute error.

We further conclude that remand is unnecessary because this record cannot support a finding that the Secretary met her burden of proving that the tanks contained fuel.[13] The Secretary does not quarrel with the judge's finding that Inspector Clay "did not know whether the cylinders contained oxygene [sic] and acetylene." 19 FMSHRC at 925. Furthermore, the

---

[12] Harlan does not challenge the judge's finding of violation.

[13] We have held that the Secretary bears the burden of proving the significant and substantial nature of a violation. *Union Oil Co. of Cal.*, 11 FMSHRC 289, 298 (Mar. 1989); *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Secretary's contention that Harlan gave no indication that the tanks did not contain gas erroneously places the burden of establishing that a violation is S&S on the operator.

Secretary presented no direct evidence that the tanks contained fuel. In addition, we find unpersuasive the Secretary's contention, advanced for the first time on review, that the tanks' location in a work area makes the presence of fuel "reasonably likely." The fact to be inferred must be "inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek*, 11 FMSHRC at 2153. The alleged presence of fuel in the tanks is not rationally connected to the presence of the tanks in a work area. Without any evidence about when the tanks arrived in the work area, when if ever they were last used, their weight, or company practice in dealing with such tanks, their presence in the work area says nothing about whether they contained fuel. Further, "recognition of an inference is largely influenced by the difficulty of obtaining the direct evidence necessary to establish the fact to be inferred." *Id.* (citing *Mid-Continent*, 6 FMSHRC at 1138). Here, the Secretary has made no showing that proof of the presence of fuel was "unavailable to the Secretary or was unreasonably difficult to obtain." *See id.* Indeed, the presence of fuel in the tanks would appear to be readily provable.

In sum, because the record supports only the conclusion that the Secretary failed to carry her burden of proof as to the critical element of a fuel source, substantial evidence does not support the judge's S&S designation. Accordingly, we reverse the judge's determination that this violation was S&S, and remand for reassessment of the penalty.

IV.

Citation Nos. 4250669 and 4250624

A. Facts and Procedural Background

On May 8, 1996, during an inspection of the 004 section, Inspector Clay noticed a defective permanent splice on the trailing cable to the section's roof bolting machine. 19 FMSHRC at 930. Clay testified that he could see into the splice of the cable, which carried 480 volts of electricity. *Id.* at 930-31; Tr. 107.

On May 14, 1996, during an inspection of the 005 section, Clay noticed an improperly insulated permanent splice on the trailing cable from the section's continuous miner. 19 FMSHRC at 934; Tr. 113. Clay testified that he could see into the cable, which carried 995 volts of electricity. 19 FMSHRC at 934-35; Tr. 114.

Clay determined that neither splice was insulated as to exclude moisture, as required by 30 C.F.R. § 75.604(b).[14] 19 FMSHRC at 930, 934. He issued two citations alleging violations of

---

[14] 30 C.F.R. § 75.604 provides in pertinent part: "When permanent splices in trailing cables are made, they shall be . . . [e]ffectively insulated and sealed so as to exclude moisture . . . ."

section 75.604(b). Gov't Ex. P-26; Gov't Ex. P-36. He designated both violations S&S, noting that the cables are handled frequently by miners. Gov't Ex. P-26; Gov't Ex. P-36; Tr. 115.

The judge affirmed both citations, stating that "[a]n open splice is not effectively insulated and sealed to exclude moisture." 19 FMSHRC at 935. The judge relied on Clay's unrefuted testimony that the 004 MMU trailing cable splice was open and damp, and his testimony that the 005 MMU trailing cable splice was open. *Id.* at 931, 935. The judge also affirmed both S&S designations, emphasizing the potentially fatal hazard created by inadequately insulated high-voltage cables, parts of which lay in water, and which miners handled frequently. *Id.*

B. Disposition

Harlan contends that the judge erred in designating the violations S&S.[15] PDR at 13-16. The operator argues, with respect to both violations, that there were no exposed copper leads and that the Secretary failed to prove "that anyone was or would be exposed to electrical current by handling the cable." *Id.* at 15, 16. Harlan also alleges that Clay's testimony that there is "[no] way of knowing" whether an accident would occur manifests a lack of evidence "that an injury of *any* consequence was 'reasonably likely.'" *Id.* at 15 (emphasis in original). Regarding the 005 MMU citation, Harlan also asserts that the judge's finding that a miner "could receive a serious electrical burn" does not satisfy the "reasonable likelihood" standard in *Mathies*. *Id.* at 14-15.

The Secretary responds, with respect to both violations, that substantial evidence supports the judge's S&S designations. S. Br. at 23. She argues that the judge properly credited Clay's testimony on the factors contributing to a reasonable likelihood of injury. *Id.* at 24. The Secretary also contends that Harlan's assertion that there were no copper leads exposed does not preclude an S&S finding, because unseen holes may be present in the insulation around the conductors. *Id.* at 25.

We are unpersuaded by Harlan's chief argument that a reasonable likelihood of injury under the third *Mathies* element cannot be established if the Secretary has not shown that there were exposed copper leads by which a miner could be electrocuted. PDR at 15-16. In *U.S. Steel Mining Co.*, 6 FMSHRC 1573 (July 1984), we held that four inches of exposed wire constituted an S&S violation, despite lack of direct evidence that the exposed wires were not insulated. With regard to the 004 MMU citation, Inspector Clay testified that he could see into the splice, but could not see copper wire. Tr. 108. Similarly, with regard to the 005 MMU citation, he testified that he could see into the open splice, but could not see bare conductors. Tr. 118. However, Clay emphasized the danger of these situations, stating that "there's no way of knowing [whether there are holes in the insulation surrounding the wire within the cable]." Tr. 108; *cf. U.S. Steel*, 6 FMSHRC at 1574-75 (recognizing that a tear in the outer jacket of a cable significantly compromises the cable's protective function). Inspector Clay also testified that,

[15] Harlan does not challenge the judge's findings of violations.

even if no copper wires are exposed, there is a danger of electrocution, because "[m]uch like an extension cord with a naked place, you may not be able to see the naked place, but you grab a hold of it and you'll know it." Tr. 109.

Other record evidence supports the judge's determination that those violations were reasonably likely to result in serious injury. Parts of both cables were lying in water, and one of the splices was open and damp. 19 FMSHRC at 931, 935; Tr. 108-09, 115. The Commission in *U.S. Steel* regarded the potential effect of water on the electrical hazard posed by a violation "as an example of how conditions could develop in the mining environment which could cause an improperly protected cable to become more dangerous." *U.S. Steel*, 6 FMSHRC at 1574. As Clay testified, water is an efficient conductor of electricity. Tr. 107, 115. Moreover, during the course of their work, miners frequently moved both cables with their hands rather than with ropes or "hot sticks." 19 FMSHRC at 931, 935; Tr. 108-110, 112, 115-117.

In sum, the record as a whole supports the judge's conclusion that, under continued normal mining operations, both violations of section 75.604(b) were reasonably likely to contribute to a serious electrical injury or fatality. Accordingly, we affirm the judge's determinations that Harlan's section 75.604(b) violations were S&S.

V.

Citation No. 4250670

A. Facts and Procedural Background

On May 8, 1996, during an inspection of the 004 section, Inspector Clay noticed a readily visible rupture in the outer jacket of the trailing cable of the sections's roof bolting machine. 19 FMSHRC at 932; Tr. 141. Clay concluded that, since the insulated power conductors inside the jacket were exposed, the trailing cable was not insulated and protected as required by 30 C.F.R. § 75.517.[16] 19 FMSHRC at 932; Tr. 141. Clay issued a citation alleging a violation of section 75.517, and designated the violation S&S, noting that the cable is handled frequently by miners. Gov't Ex. P-27.

The judge affirmed the citation, stating that "[a] cable with an opening in its outer jacket through which its interior insulated conductors are exposed is not a fully protected cable." 19 FMSHRC at 933. He further found that "when the jacket is ruptured, the cable is not insulated as designed." *Id.* The judge affirmed the S&S designation, crediting Clay's inference that any force sufficient to rupture the outer cable necessarily damaged the internal conductors. *Id.* at 933-34.

B. Disposition

---

[16] 30 C.F.R. § 75.517 provides in pertinent part: "Power wires and cables . . . shall be insulated adequately and fully protected."

Harlan argues that the judge erred in designating the violation S&S.[17] PDR at 17. Harlan asserts that the judge erred in overruling its objection to Clay's speculative testimony that, based on his visual observation of the cable's ruptured outer jacket, the interior conductors were damaged as well. *Id.* 19-20. According to Harlan, the judge compounded the error by relying on this testimony to reach his S&S determination. *Id.* at 20. The Secretary responds that substantial evidence supports the judge's determination that Harlan's violation of section 75.517 was S&S. S. Br. at 26. She argues that the judge correctly credited Clay's testimony that any force sufficient to rupture the cable's outer jacket would necessarily have damaged the conductors inside. *Id.* at 26-27.

The issue on review is again the third *Mathies* element: whether there exists "a reasonable likelihood that the hazard contributed to will result in an injury." *See Mathies*, 6 FMSHRC at 3-4. Harlan's argument that reasonable likelihood of injury cannot be established if the record lacks direct evidence of damaged interior conductors or proof of the existence of exposed, uninsulated wire is inconsistent with Commission precedent. In *U.S. Steel*, the parties agreed that the outer jacket of a cable had ruptured, but the Secretary presented no direct evidence that the inner insulation was compromised. *U.S. Steel*, 6 FMSHRC at 1573-74. There, we held that the gash in the outer jacket of the trailing cable constituted an S&S violation of section 75.517, in part because in the "harsh environment of a coal mine," a tear in the outer jacket weakens the protection afforded by the inner insulation, "contribut[ing] significantly and substantially[] to the cause and effect of a safety hazard." *Id.* at 1574-75. Similarly, in this case the outer jacket of a trailing cable was torn, but there is no direct evidence that the inner insulation was damaged. *Cf. id.*; *see also U.S. Steel Mining, Inc.*, 7 FMSHRC 327, 329 (Mar. 1985) (affirming S&S designation and noting that "[t]he fact that the insulation was not cut at the time the violation was cited does not negate the possibility that the violation could result in [electrocution]"). The circumstances in the instant case are similar to those in *U.S. Steel*, 6 FMSHRC 1573, which we find persuasive in this matter. Moreover, we have already held that the Secretary need not show the presence of exposed copper leads to establish the reasonable likelihood of injury from a violation of section 75.604, which contains an insulation requirement for permanent splices similar to the insulation requirement in section 75.517. Slip op. at 12.

There is no dispute that the rupture in the outer jacket of the trailing cable compromised a layer of insulation between miners and a potentially fatal 480 volt current. *See* Tr. 141. In addition, the judge credited Inspector Clay's testimony that invisible damage can exist in the internal insulation surrounding the conductors, and that even a pinhole-sized breach can conduct enough current to electrocute a miner. 19 FMSHRC at 933; Tr. 142, 145. We see no reason to disturb the judge's decision to credit this testimony.[18] *See Dust Cases*, 17 FMSHRC at 1878

---

[17] The operator does not contest the judge's finding of violation.

[18] We do not rely upon the judge's inference that any force sufficient to rupture the outer jacket of the cable would necessarily have damaged the internal conductors.

(upholding judge's credibility determination), *citing Ona Corp.*, 729 F.2d at 719. Clay's testimony supports the judge's conclusion that the rupture in the outer cable increased the likelihood of serious electrical injury. The judge's conclusion is bolstered by the presence of water and the high frequency with which the cable is manually handled during normal mining operations.[19] *See* 19 FMSHRC at 933; Tr. 143. Therefore, we find that substantial evidence supports the judge's S&S designation, and we affirm it.

VI.

Citation No. 4250672

A. Facts and Procedural Background

On May 8, 1996, during an inspection of the 004 section of the mine, Inspector Clay observed what he believed to be an accumulation of combustible material on a piece of electrical equipment. Gov't Ex. P-30. Clay made this observation by visual inspection through a plexiglass window, and determined that the material was "float coal dust." *Id.*; Tr. 155. Clay issued a citation alleging a violation of 30 C.F.R. § 75.400[20] due to the accumulation of "combustible material in the form of float coal dust . . . in and on the energized power conductors of the . . . power center . . . ." Gov't Ex. P-30. Clay designated this alleged violation S&S due to the ignitability of float coal dust, the presence of ignition sources in the power center, and the serious injuries which could result from an explosion. 19 FMSHRC at 936; Tr. 156-57.

The judge affirmed the citation, citing Clay's testimony that float coal dust was present on the power center in violation of section 75.400. 19 FMSHRC at 937. He also affirmed Clay's S&S designation, crediting Clay's testimony as to the combustibility of float coal dust, the frequency of electrical arcing in the power center, and the serious injuries which could result from an ensuing explosion. *Id.*

B. Disposition

Harlan contends that the judge erred in finding a violation of section 75.400 because the

---

[19] Inspector Clay testified that during continued normal mining operations, miners likely would manually move the subject trailing cable so that mobile equipment could pass. 19 FMSHRC at 933 (citing Tr. 148). He also testified that "[p]eople handle this cable . . . constantly during the course of a shift." Tr. 144. Finally, Clay testified that the cable is "constantly drug [sic] through these areas where water accumulates." Tr. 143.

[20] 30 C.F.R. § 75.400 provides: "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 electrical equipment therein."

inspector's visual diagnosis through a plexiglass window is not proof of the existence of float coal dust, and because the inspector failed to determine whether the cited accumulated material would pass through a No. 200 sieve before issuing a citation alleging "float coal dust" accumulation. PDR at 22-23. The Secretary responds that substantial evidence supports the judge's finding that the accumulated material in the power center observed by Inspector Clay constituted a violation of section 75.400. S. Br. at 27. The Secretary explains that nothing in the regulations suggests that performing tests is a prerequisite to issuing a citation, and that the personal observations of an experienced inspector are sufficient to support a finding of violation for accumulation of float coal dust. *Id.* at 28. The Secretary contends that when a test is required prior to issuing a citation, the regulations so state. *Id.* at n.13.

Rather than alleging the violation of section 75.400 to include accumulations of coal dust, float coal dust or other combustible materials, the citation here specifically alleges the presence solely of "combustible material in the form of float coal dust." Gov't Ex. P-30. At trial, the testimony similarly focused on the presence of float coal dust. Tr. 153-61. Section 75.400-1(b) defines "float coal dust" as "the coal dust consisting of particles of coal that can pass a No. 200 sieve." 30 C.F.R. § 75.400-1(b).

We find that substantial evidence supports the judge's determination that Harlan violated the standard. The judge implicitly credited Inspector Clay's testimony that he observed float coal dust in the power center. Clay also testified that the dust had previously gone into suspension in order to get into the vents on the power center. Tr. 158. Reduced to its essence, Harlan's argument is that, as a matter of law, the judge could not rely on the inspector's testimony to support his finding of violation. However, we have never held that violations of section 75.400 require a test to determine the particular combustible material present, and section 75.400 does not by its terms require testing. Our precedent indicates that violations of the accumulation standard have been established by inspector observations. *See, e.g.*, *Amax Coal Co.*, 19 FMSHRC 846, 847, 849 (May 1997); *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 483 (Mar. 1997); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 20 & n.2, 21 (Jan. 1997). Further, nothing advanced by Harlan here persuades us to take the extraordinary step of overruling our precedent by engrafting a testing requirement onto section 75.400.

The operator did not present any evidence to rebut the inspector's testimony that float coal dust was present, nor did Harlan establish that float coal dust could not be identified by observation. Insofar as Harlan's argument is construed as an attack on the judge's decision to credit the inspector's testimony, we see no extraordinary circumstances that would justify overturning this credibility finding. Thus, the inspector's unrebutted testimony based on his observation of the cited condition constitutes substantial evidence supporting the judge's conclusion that Harlan violated section 75.400. Accordingly, we affirm the judge's finding of violation.[21]

---

[21] Harlan contends that Inspector Clay based his identification of the float coal dust solely on its black color. PDR at 22-23. However, we find that this testimony (Tr. 158) refers to the

VII.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Harlan violated the 30 C.F.R. § 75.202(a) alleged in Citation No. 4243656, and we affirm his designation of this violation as S&S. We also affirm the judge's determinations that the 30 C.F.R. § 75.604 violations alleged in Citation Nos. 4250669 and 4250624, as well as Harlan's violation of 30 C.F.R. § 75.517 alleged in Citation No. 4250670, were S&S. We affirm the judge's determination that Harlan committed the 30 C.F.R. § 75.400 violation alleged in Citation No. 4250672. We reverse the judge's conclusion that Harlan violated the pillaring plan provision of the parties' roof control plan alleged in Citation No. 4243921, and we vacate the related civil penalty. Finally, we reverse the judge's conclusion that Harlan's violation of 30 C.F.R. § 75.1106-3(a)(2) alleged in Citation No. 4243726 was S&S, and we remand to the judge for reassessment of the civil penalty for this violation.

____
Mary Lu Jordan, Chairman

accumulation's coal composition rather than to its size.

____
Marc Lincoln Marks, Commissioner

____
James C. Riley, Commissioner

____
Theodore F. Verheggen, Commissioner

____
Robert H. Beatty, Jr., Commissioner

Distribution

H. Kent Hendrickson, Esq.
Rice and Hendrickson
P.O. Drawer 980
Harlan, KY 40831

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041