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October 11, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. PENN 2018-0169 A.C. No. 36-10045-459561
v.	
CONSOL PENNSYLVANIA COAL COMPANY LLC, Respondent	Mine: Harvey Mine

DECISION AND ORDER

Appearances: Brian P. Krier, Esq., U.S. Department of Labor, Office of the Regional Solicitor Philadelphia, Pennsylvania for the Petitioner

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

Kenneth Polka, CLR, U.S. Department of Labor, MSHA, Mount Pleasant, Pennsylvania

Before: Judge William B. Moran

Introduction and preliminary matters

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). This docket involves 11 (eleven) section 104(a) citations, three of which were marked as "significant and substantial," and all were designated as involving "moderate negligence." No unwarrantable failure claims were made. A hearing was held in Pittsburgh, Pennsylvania on February 19-20, 2019. The Secretary proposed a total penalty assessment of $4,941.00. For the reasons which follow, with some modifications, all of the citations are affirmed, and a penalty of $3,688.00 is assessed.

Principles of Law

Significant and Substantial

In order to prove a violation is significant and substantial, the Secretary must prove by a preponderance of the relevant evidence that 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). A determination that a violation is significant and substantial requires consideration of the particular facts surrounding the violation. *Texasgulf Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). The Commission established a four prong test for significant and substantial violations in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). There, the Commission said that 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; *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); *see also Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, 1899 (Oct. 2017). With regard to the second element of the *Mathies* test, the Commission has elaborated that "the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016) ("Newtown").

With respect to the third element of the *Mathies* test, the Commission has stated that "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742-43 n.13 (Aug. 2012). Finally, the Commission has stated that the evaluation of a significant and substantial violation should assume continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

The Court notes and agrees with the Secretary's comments regarding S&S that he "does not need to prove a reasonable likelihood that the violation itself will cause injury, but rather that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984); *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). That "[t]he determination of "significant and substantial" must be based on the facts existing at the time of issuance and assuming continued normal mining operations absent abatement. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984) [and that] [t]he Court cannot infer that the violative condition will cease. *Gatliff Coal Company*, 14 FMSHRC 1982, 1986 (Dec. 1992) [and that] the Court cannot assume that miners would exercise caution: 'While miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act,

to prevent unsafe work conditions. *Eagle Nest, Inc.*, 14 FMSRHC 1119, 1123 (July 1992). Additionally, the presence of redundant safety measures does not militate against an S&S finding. *See Cumberland Coal Res., L.P. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013) ('Because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry.'); Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 136 (7th Cir. 1995); *Amax Coal Co.*, 19 FMSHRC 846, 850 (May 1997) (same); *Maple Creek Mining, Inc.*, 22 FMSHRC 742 (2000). Finally, the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995)." Sec. Br. at 4-5.

Penalty Assessments

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent,[1] [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

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[1] The Secretary takes note of 29 C.F.R. § 100.3(d) for the proposition that moderate negligence is where "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Sec. Br. at 6. There is no dispute about the general test for negligence. Rather the dispute is whether there were mitigating circumstances.

That said, the Commission states that an operator is negligent if it fails to meet the requisite standard of care in adhering to the standards set forth in the Mine Act and its associated regulations. *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Commission Judges, when determining negligence, are asked to consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014). ... The Commission and its judges are not required to apply the 30 C.F.R. Part 100 regulations that govern the MSHA's determinations. *Newtown*, 38 FMSHRC at 2048, citing *Brody* at 1701-03. Therefore, the Commission's judges may consider the "totality of the circumstances" in assessing the operator's negligence for a given violation. *Brody*, at 1702; *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir 2016). The Commission has described ordinary negligence as "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987), while high negligence is described by the Commission as "an aggravated lack of care that is more than ordinary negligence." *Newtown*, at 2049, citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998), citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991).

Per the parties' stipulations, payment of the total proposed penalty of $4,941.00 in this matter will not affect the Respondent's ability to continue in business. Tr. 10. Also, for proposed Stipulation No. 10, MSHA's data retrieval system, accurately assessed the size of the Respondent's production tons or hours worked per year, the size and production tons or hours worked per year of the mine, the total number of assessed violations for the time period listed and the total number of inspection days for the time periods listed therein. For proposed Stipulation No. 11, Exhibit A of the Secretary's petition for the assessment of civil penalty accurately sets forth the size of Respondent in production tons or hours worked per year; the size and productions tons or hours worked per year of the mine; the total number of assessed violations for the time period listed and the total number of inspection days for the time period listed therein. Tr. 10-11. However, Respondent's Counsel informed that regarding proposed stipulations 10 and 11, the parties only agreed that the R-17 is a certified version of that report and the Respondent wants that document admitted in lieu of Stipulations 10 and 11. Further, as to Stipulation No. 8, Respondent points out that for some of the citations in issue, it disputes their validity and therefore it seeks to have those vacated. Tr. 11-12.[2]

The Court considered each of the stipulations, together with the Respondent's issues limiting them, in factoring the operator's history of previous violations, and the appropriateness of such penalty to the size of the business of the operator charged. Consol did not address the proposed penalties in its brief since each of the Secretary's proposed penalties were consistent with the Penalty Conversion Table in 30 CFR § 100.3(g). Consol simply requests that the Court apply this table in determining the appropriate penalties. R's Response Brief at 23. The Court notes that the Penalty conversion table, Table XIV, found at 30 CFR § 100.3(g), provides that "[t]he penalty conversion table is used to convert the total penalty points to a dollar amount."

Among the parties' stipulations were the following: Payment of the total proposed penalty of $4,941.00 in this matter will not affect the Respondent's ability to continue in business, Petitioner's Exhibit P-17, the assessed violation history report was admitted and was considered in the Court's penalty determinations. The Court concludes that the history of violations did not materially affect the ultimate penalty calculations in either direction: the mine's history of violations was not so egregious as to merit steeper penalties relative to MSHA's proposals, but also not so spotless as to merit decreased penalties relative to MSHA's proposals.

The size of the mine and its controller also supports the proposed assessment. This criterion must take into account not only the size of the operator, but the size and resources of any controlling company to ensure that a penalty has the financial impact to deter future violations. *See Thunder Basin*, 19 FMSHRC 1495, 1505 (1997). "Stiffer penalties against larger mines are necessary...to ensure that operators of mines with more complex management structures would notice and correct violations." *Coal Employ. Proj. v. Dole*, 889 F.2d 1127, 1135 (D.C. Cir. 1989), citing 42 Fed. Reg. 23,515 (May 30, 1978) ("penalties must be such as to encourage management at all levels to respond positively to health and safety concerns").

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[2] The Court pointed out, whether upheld or vacated, the *issuance* of the citations is the subject addressed by the stipulation. Tr. 12.

The penalties must be significant enough to ensure that Respondent's management responds positively to the safety concerns posed by the violations." Gravity and negligence are among the most important factors to be considered in the penalty criteria. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001). Sec. Br. at 7.

As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act." *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). A Commission Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000); *see also Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary's burden to provide sufficient evidence to support the proposed assessment; and the Court's obligation to explain the basis for any substantial divergence from the proposed amount. Thus, the Commission has noted that:

> [The] Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary's proposed penalty cannot be glided over, as the Commission also stated, 'Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. ... If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

The American Coal Co., 38 FMSHRC 1987, 1993-94 (Aug. 2016), citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

The Court agrees with the Secretary's observation about penalties that "[d]epending on the circumstances of the violation, some of the six criteria may be weighed more heavily than the other criteria. Sec. Br. at 6, citing *Musser Engineering & PBS Coals*, 32 FMSHRC 1257, 1289 (2010); *Spartan Mining*, 30 FMSHRC 699, 725 (2008).

Alleged Violations

As the citations in this matter were issued for violations under a number of different safety standards with a number of different elements the Secretary is required to prove, the Court's decision is organized by citation.

Citation No. 9076610

Citation No. 9076610 alleges a violation of 30 C.F.R. § 75.220(a)(1), for the absence of reflectorized warning devices placed immediately outby unsupported roof. The Respondent admits the violation but seeks to have the citation listed as non-S&S, unlikely and low negligence.

MSHA inspector James Baker was the first witness for the Secretary. Tr. 14. He has some 20 years of coal mining experience and has been an inspector for about five years. Tr. 15-16. In January 2018 he was at the Respondent's mine to perform an E02 spot inspection.[3] Baker identified Citation No. 9076610, Ex. P-1, as the citation he issued on January 4, 2018 for an alleged violation of 30 C.F.R. § 75.220(a)(1), the mine's roof control plan.[4] In the No. 2 entry, the inspector noted there were no reflectorized signs to warn of unsupported roof. Tr. 18-19. This entry was about 16 feet wide with an 8½ to 9 foot roof height. Tr. 19. While there was no mining equipment in the entry, no reflective signs were present. The inspector added that

> [t]he top was in [ ] very poor shape, lots of large rock ... [had fallen, which he estimated to be] the size of large garbage cans that fell all the way to the last roof support, the last strap, that fell there. And they meshed their top of the plastic screen called Tensar,[5] but it was rolled up into a one-foot diameter ... that day.

Id.

Later, the inspector described [the fallen rock] size as two to three feet in height and width. Tr. 19-20. The material which had fallen was a mix of slate, coal and rock. Tr. 21. This material was inby unsupported roof. Tr. 22. There was plastic mesh on the roof which was rolled up to the last roof strap. He informed that the mesh material is rolled out as they install roof bolts and straps. The inspector's notes included a sketch of the rolled up material.

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[3] Because the mine liberates more than one million cubic feet of methane in a 24 hour period, MSHA does a spot inspection every five days. Tr. 17.

[4] The Respondent stated that it was not contesting the fact of violation. The Court advised that by conceding the fact of violation, it understood that the Respondent was contending "that the injury/illness, the likelihood would be something ... less than reasonably likely because of these other indicia given that the reflectors were not there. People would have been alerted and, therefore, reduced the likelihood, and the same would be true as to the S&S element." Tr. 52-53. Respondent did not disagree with the Court's characterization.

[5] The Tensar material is made out of plastic and it is part of the roof support. Tr. 40. It is analogous to the plastic orange silt fences one sees at construction sites. Tr. 41. As such, it does not provide the primary support. That primary support comes from the straps and the roof bolts. *Id.*

The standard cited by the inspector, under the mine's roof control plan, requires reflectorized signs in all entries to the face for unsupported roof. Tr. 24. The purpose of the reflectorized signs is keep miners from going under the unsupported roof. *Id.* Thus, the signs provide a warning to the miners. A sign is required on each side of the entry. Based on the material he saw on the ground, if a miner were in the unsupported area and something were to fall, any injury "could be real bad." Tr. 26-28. Characterizing the potential injury as "serious," the inspector stated that it could result in a broken neck or a broken back. Tr. 28. In addition to miners, a mine examiner would also be exposed to this risk during the onshift and preshift exams. *Id.*

As for the roll of material that was hanging down from the roof, the inspector did not believe that would serve to warn miners in the manner of the reflective sign. Tr. 29. The mesh does not have a reflective quality to it and, the mesh was two to three feet above his head. In contrast, the reflectorized signs reflect brightly off a miner's cap lamp. *Id.* The inspector also observed a "DTI," which refers to date, time, and initials, in this area. The DTI revealed that the area had been onshifted some 47 minutes before the inspector found the problem. Tr. 30. He marked the negligence as moderate, informing that he reserved "high" negligence for instances when the foreman knew of the condition but took no action. Not finding such a situation, he did not find a basis for designating high negligence in this instance.

Upon cross-examination, the inspector informed that a number of people might have the task of hanging the reflectors and this would include the roof bolters. The Tensar mesh material is continuously unrolled as mining progresses, in that one puts up a strap,[6] then roof bolting follows, then four feet or so of the mesh is unrolled. Tr. 32. The inspector acknowledged that, using his cap lamp, he was able to see where the wedge cut[7] started, and where the ventilation curtain ended, with the latter ending at the last strap. Tr. 33. In terms of the debris he saw, the inspector stated that [i]t fell all the way to the last supported strap, and therefore it could be seen. From the last row of supported bolts and from the last strap, the material fell all the way to that point and to the wedge cut." Tr. 34. He observed those conditions when he got to the last strap, as he got through the curtain. *Id.* He agreed that in order to proceed further, that is, beyond the last strap, one would have to walk over the pile of coal and rock. Tr. 35. As some pieces were two to three feet in height, one would have to go over that pile. *Id.* The inspector did not agree with the Respondent's assertion that the Tensar material was hanging down some two to three feet, asserting instead that it was hanging down about one foot from the roof. Tr. 36. For the mesh itself to have acted as a barrier, he stated, it would need to hang down to chest level, which it was not. *Id.* Had it been that low, he allowed that it would have changed his S&S designation to non-S&S. *Id.*

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[6] The straps are made of steel. They are about 11 feet in length and are installed with roof jacks when the roof bolting is being done. The roof bolts go through the straps, holding them up, so the two work in tandem. Tr. 42-44.

[7] A wedge cut is made from the last row of bolts and it gradually decreases down to the floor. Tr. 38. Typically, such a cut will be from 12 to 14 feet, from the last strap to the toe of the wedge. *Id.*

The inspector agreed that, speaking for himself, as *he* was cognizant of the location where the Tensar material stopped, where the ventilation curtain was, and since he realized that upon walking through that curtain, he was never *personally* in any danger of walking under unsupported top. Tr. 39. The inspector could not recall if the debris he observed extended *beyond* the last permanent support, where the Tensar was rolled up, but he could recall that it was to the last strap. Tr. 45.

On redirect, it was brought out that the roof control plan does not allow the mine to use mesh in place of the reflectorized signs, nor that the curtain may serve as an alternative to signal where the last row of supported roof is located. Tr. 46. It was also noted that in the inspector's significant experience with roof bolting and with roof support, that there is no way to predict when a roof may fall. Tr. 48. In this particular instance, based on the timing of his discovery of the debris, the hazard was then limited to *additional* rock falling, though the particular hazard would be that such material would roll down and strike a miner. Tr. 49. As the inspector noted, though *he* saw the issue, a miner, less experienced, working in the cited area might not pick up on the hazard, because of the lack of the signs. Tr. 49-50.

In its defense to this citation, the Respondent called Albert Stein. Mr. Stein is a safety inspector for the Respondent. He has been employed with the mine for seven years, with six of those in the safety department. Tr. 391-92. Directed to the subject Citation, No. 9076610, Ex. P-1, involving the absence of a reflective sign, he affirmed that he was with the inspector when this citation was issued, along with Mr. Roman, Stein's boss. Tr. 393-95. Admitting that when they approached they saw there was no reflective sign at the face of the No. 2 entry, he added that there was a pile of rock and coal from the last strap and there was mesh hanging down. Tr. 394; Ex. R-1. Thus, two points were being asserted by the witness: the mesh was hanging some two to three down from the roof and there was a pile of material on the mine floor at that location. As for the mesh, Stein stated that its presence was obvious. Tr. 398. The shear on the continuous miner can only go ten feet past the last strap. *Id.* The ATRS system at the last strap holds the strap up against the roof, allowing the bolter to drill his hole and bolt. From that point the mesh will drop. Tr. 399. Stein's point was that there was no trouble seeing the location of the last row of supported top. Tr. 400. According to him, the roof height was about eight feet with the mesh hanging down from the roof some two to three feet. *Id.* As noted, combined with that was a pile of rock or coal on the floor, which Stein also described as two to three feet in height, characterizing it as "a little hump." Tr. 401. There was also the ventilation curtain, which went up to the last strap. Tr. 402. Stein did not believe that the gravity should be designated as "reasonably likely" given the strap and the pile on the floor, and as such they would not have walked past the last row. Tr. 401.

Stein did not agree that only a reflective sign meets the standard, as a barrier also suffices. Tr. 403. However he conceded that mesh is not used to protect miners from roof falls or debris, nor is it used to protect miners from going into unsupported areas. Tr. 403. The same is true for ventilation curtains – they are not used to prevent miners from entering unsupported areas. Further, he agreed that the pile on the floor came from material that had fallen from the roof. Tr. 403. As for the witness' assertion that the mesh came down some two to three feet from the roof, he agreed this was not measured. Tr. 404. Stein made notes about the condition, but he admitted that those notes made no mention of the pile of debris from the roof. Also, the

diagram in Ex. R-2 was not drawn by him, but rather by the engineering department. Yet that person from engineering was not underground with the inspector at the time of the citation's issuance. Tr. 405. Additionally, Stein agreed that the pile of debris was under unsupported roof. *Id.* Further, Stein conceded that *more debris could fall* on the pile and that such material could roll off the pile and strike a miner. Tr. 406.

Parties' Arguments as to Citation No. 9076610

Respondent, while admitting the violation, contends that this citation, No. 9076610, should be reduced to non-significant and substantial (non-S&S) and low negligence. R's Br. at 1. Its non-S&S argument is direct – asserting that "the physical barrier indicating the location of the last row of permanent roof support was present thereby making it unlikely an injury would result from the cited condition." *Id.* at 1-2.[8]

Respondent admits that 30 C.F.R. § 75.220(a)(1) requires a mine operator to develop and follow a roof control plan approved by the District Manager and that roof control plan provisions are enforceable as mandatory standards. However, Respondent contends that when affirming an S&S designation for failure to hang reflective warning signs, judges typically find that the absence of reflectors would cause a miner to think it's safe to proceed under unsupported roof and, being so lulled, the second S&S factor under *Mathies* would be met. Citing *Independence Coal Co.*, 26 FMSHRC 520, 531 (Jun. 2004) (ALJ); *Remington, LLC.*, 36 FMSHRC 491, 502 (Feb. 2014) (ALJ); and *Prospect Mining & Development. Co., Inc.*, 39 FMSHRC 49, 56-57 (Jan. 2017) (ALJ), Respondent maintains that in those cases, unlike in this matter, each judge found that the miners were trained to rely solely on the presence of reflectors to indicate the location of the unsupported roof. It asserts that those judges reasoned that, without the reflectors, or any other warning devices being present to identify the location of unsupported roof, it was likely that a miner would believe that it was safe to travel underneath an unsupported area.

Accordingly, Respondent contends that "the Secretary has failed to meet his burden of showing that the absence of reflectors would cause a miner to think it was safe to travel inby unsupported roof under normal mining conditions or that an injury was reasonably likely to occur," and that these are necessary elements to show that the violation was S&S. R's Br. at 29. In support of this, Respondent notes that it is undisputed that the "mesh was hanging down from the last row of permanent roof support," and from that Respondent contends the mesh indicated the location of unsupported roof inby that mesh. *Id.* Respondent claims the mesh "also served as a physical barrier to prevent miners from traveling inby that location," adding that the inspector also conceded the mesh would serve as a physical barrier. *Id.* Further, as the hanging of roof mesh is part of Consol's regular mining practice, the miners know its presence signals the start of unsupported roof inby that point. *Id.* Coupled with those contentions, Consol adds that the mesh was "clearly visible" so that it was "extremely unlikely" a miner would proceed inby the mesh. *Id.* at 29-30.

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[8] In its Response Brief, Consol argues that the Secretary has misinterpreted the test for determining if a violation is significant and substantial. R's Response at 1-3. The Court addresses the S&S issue both generally, *infra*, as well as particularly, later, in its discussion for this admitted violation.

Consol separately contends that the negligence level should be "low" due to considerable mitigating circumstances. First, Inspector Baker admitted that he did not know when the area was last mined or how long the condition had existed and as such the condition could have happened since the last examination of the area and the Secretary has failed to prove otherwise. Second, consistent with its normal mining practices, Consol did hang down roof mesh to serve as both an indication of the location of unsupported roof and a physical barrier to traveling inby that location. Tr. 225. Therefore, the evidence of considerable mitigating circumstances should reduce the negligence designation to "Low." *Id.* at 31.

The Secretary notes that the Respondent does not contest the fact of violation. Tr. 52, 402. Regarding the two disputed issues, regarding the S&S designation, the Secretary observes that:

> [t]his violation is reasonably likely to result in a reasonably serious injury associated with additional pieces of the rock and coal from the roof falling and striking a miner who was not alerted to the serious hazard of unsupported mine roof due to the lack of reflectorized signs in the entry. This violation would affect one person. Reflectorized signs are used as a visual signal to alert miners of unsupported mine roof and prevent them from traveling underneath it. (R. at 24-25). A miner's helmet lamp reflects brightly off the reflectorized signs. (R. at 29). Given the pile of roof pieces laying across the entry, additional pieces of mine roof could fall and hit the pile, striking a nearby miner. (R. at 26-27, 37, 49-50). An examiner would be near this hazard twice per shift during the pre-shift and on-shift examinations. (R. at 28).

Sec. Br. at 5.

Addressing the degree of negligence, the Secretary comments:

> Inspector Baker observed section foreman Craig Williamson's dates-times-initials ("DTIs") indicating that he had performed his on-shift examination of the area 47 minutes earlier. ... Due to the section foreman on-shifting the area 47 minutes prior, the operator either knew or should have known that there were no reflectorized signs indicating unsupported mine roof. Although Respondent will likely argue that the roof mesh would be a physical barrier preventing a miner from wandering inby the last roof support and the ventilation curtains would act as substitute, neither are designed or used for the same purpose as the reflectorized signs, and neither meet the requirements of the roof control plan. ... Further, the roll measured only one foot from the mine roof, which is at least eight-feet high. Respondent has been cited at Harvey Mine for violating the roof control plan six times in the two years preceding the issuance of this citation. (Exhibit P-1). Therefore, Respondent was moderately negligent.

Sec. Br.. at 6. On the basis of its foregoing contentions, the Secretary asserts that the proposed penalty of $638.00 should be imposed.

Analysis of Citation No. 9076610

The essential problem with the Respondent's assertion that the admitted violation was not significant and substantial and that the negligence should be deemed less than moderate is that the facts do not support those claims.

Regarding the S&S issue, as noted, the violation was conceded, thereby meeting the first *Mathies* element. The measure of danger to safety, contributed to by the violation, that is, whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed was also established. This determination is supported by a number of findings.

First, the mesh is not the equivalent of the reflectorized sign, and therefore did not serve the same purpose as such a sign. Additionally, the Court finds that the mesh did not extend as far down as Respondent's witness asserted and while one cannot be precise about how far it did extend down from the roof, as it was not measured, it still did not serve as a warning.[9] That is not the purpose of the mesh in any event – it is instead part of the roof control plan, with the amount hanging down to be extended and employed later together with the roof bolting. Nor does the roof control plan provide that hanging mesh is an alternative to the reflective signs. Further, there certainly was no testimony that the mine had instructed its employees that mesh extending down from the roof was to alert them that unsupported roof was beyond that point. The other ALJ decisions cited by Respondent for this proposition are not precedential but may be relied upon in circumstances where the underlying logic is persuasive to another court. However, this Court does not subscribe to the idea that a violation is S&S only where miners are trained to rely solely upon the presence of warning devices.

The Court has a different take on the pile of rock and coal that had fallen from the roof, just beyond the hanging mesh. Rather than construing that rubble and the mesh as warning barriers, the Court views the former as demonstrating the importance of the reflective sign and the material which had fallen as a real life demonstration that roof did fall, thus underscoring the importance of the sign. The condition of fallen material graphically illustrates the danger involved. In this case, the roof in fact fell and so it is with some pluck that the Respondent should point to that as diminishing the S&S determination. Mesh is not an alternative to reflectors. The particular hazard would be that such material would roll down and strike a mine. The Court does not agree with Respondent Stein's view that a barrier meets the standard. Viewing the violation in the context of continued normal mining operations, there was no testimony that reflectors were routinely installed, nor were other areas identified in the mine that had such reflectors and thereby there could be no suggestion that the admitted violation was an

[9] Though it would not alter the outcome, the Court does not accept the Respondent's contention that the mesh extended some two to three feet down from the mine roof. The Court finds credible the inspector's testimony that the mesh would have to hang down much further to pose any putative warning to entry in areas with unsupported roofs. Tr. 36. An exact determination of the extent to which the mesh extended down cannot be made on this record, but that is not a critical fact in any event. That is, short of the mesh creating a virtual mesh wall, the mesh would not be a factor in any S&S analysis. Restated, absent a mesh of such a wall-like extent, mesh does not operate as a factor in the S&S determination.

aberration. Finally, even if the Court were inclined to conclude that the mesh was some sort of alternative warning sign to miners that unsupported roof was present, such a system constitutes a redundant safety measure, as it is not proscribed in the roof control plan for purposes of warning miners of supported roof locations. The D.C. Circuit has rejected the notion that other conditions, such as the presence of the mesh and the roof material which had fallen, should be weighed in making the S&S evaluation. As the D.C. Circuit explained:

> [T]his court again interpreted the statutory text [of 30 U.S.C. § 814(d)(1)] to focus on the 'nature' of 'the violation' rather than any surrounding circumstances. More to the point, the court held that 'consideration of redundant safety measures,' — that is, 'preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely'—'is inconsistent with language of [section] 814(d)(1).'

Sec'y of Labor, Mine Safety & Health Admin. v. Consolidation Coal Co, 895 F.3d 113, 118-19 (D.C. Cir. 2018), citing *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Com'n.* 717 F.3d 1020 (D.C. Cir. 2013):

> As we have explained, the focus of the significant and substantial inquiry is the nature of the violation. By focusing the decisionmaker's attention on 'such violation' and its 'nature,' Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards. Because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry.

Id. at 1028-29.

Thus, the Court concludes that the absence of the reflectors presented a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation, by the absence of a genuine warning that unsupported roof was ahead.

As for the third element, whether the hazard identified under element two is reasonably likely to cause injury, there are two observations to be made. One, across the board, it can be said that roof falls are a continuing threat in underground mining. The other is that in this instance the roof did indeed fall. A roof fall, it can be said without qualification, is reasonably likely to cause injury.

Similarly, speaking to the fourth element, it is a given that any roof fall presents a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Accordingly, the Court finds that the violation was S&S.

Turning to the issue of negligence and the Respondent's claim that there were considerable mitigating circumstances, the Court does not find such circumstances. Essentially Consol relies upon the same considerations it marshalled for its non-S&S contention by applying them to its "low negligence" argument. The Court does not consider either the mesh or the material which fell to be mitigating factors. Neither was employed to mitigate the hazard. The mesh stopped where it was located because the mine roof support process stopped there. The material which fell from the roof, fell, which is to say that event, a roof fall, can hardly be considered mitigating. Further, the DTI for the on-shift, occurring less than an hour earlier, and not noting the condition does not advance the Respondent's diminished negligence contention. Certainly, the mesh hanging down, which was in that condition only because it was awaiting its implementation once the process of supporting the roof began, cannot constitute mitigation. That rock had fallen, creating an impediment, but not a barrier, to proceeding under the unsupported roof cannot be deemed to be mitigation. The mine did not cause the roof to fall in order to act as a barrier. It simply fell, the very hazard that brought about the requirement for reflectorized signs to be installed by effectively announcing – "Caution unsupported roof ahead."

While it is true that the inspector could not state how long the condition had existed, it is uncontested that the area was onshifted less than an hour before the violation was discovered. Accordingly, the Court finds no mitigation and upholds the determination of moderate negligence, with the Court finding that the Operator either knew or should have known of the dangerous condition.[10]

As noted, this citation was marked as S&S, with the gravity as "reasonably likely," resulting lost workdays and the negligence denominated as moderate, each of which determinations by the inspector, the Court upholds. The other penalty factors have been factored into the penalty determination for this violation, and upon considering all of them and not finding any mitigating circumstances as to the gravity and negligence of the violation, the Court concludes that the proposed penalty of $638.00 should be and is imposed.

Citation No. 9077085

Citation No. 9077085 alleged a violation of 30 C.F.R. § 75.1725(a); the citation states that the winch cable on the Caterpillar duckbill battery scoop was severely damaged. The Respondent seeks to have the citation listed as non-S&S, unlikely and low negligence.

MSHA underground coal mine inspector Bryan Yates performed an E01 (i.e. regular) underground inspection at Consol Penn's Harvey Mine on January 6, 2018. Tr. 60-61. He issued Citation No. 9077085 that day, which alleges a violation of 30 C.F.R. § 75.1725(a). Tr. 62, Ex. P-2. That standard requires that mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

[10] 30 C.F.R. § 100.3(d).

Involved was a Caterpillar 630 duck bill battery operated scoop with a defective winch cable. Tr. 63. The cable is also referred to as a "rope."[11] Tr. 66. The steel cable was "in the front middle beside the operator and behind the scoop bucket" and it is on a spool. Tr. 64. The winch for the cable, or "rope," faces outward towards the front of the scoop." Tr. 65. "The cable is used to pull — to move longwall equipment components. It's used to move shields, which shields weigh around ... — common shields weigh around 22 tons, ... [a]t the time, they were installing longwall equipment across from where the scoop was located." Tr. 65.

The inspector found the cable to "be broken and frayed ...[and he saw] that it was in pretty bad condition." *Id.* The cable itself had "a whole broken strand on it,[with] several kinks and frays in [it]. ... [t]he broken strands were frayed out on the ends ... making it stick out." *Id.*

The cited cable was wrapped around the reel, or "spool," when Yates observed it. The cable attachment point, that is, where the cable is supposed to be attached to the spool, was broken. Tr. 67-68 and photographs of the broken strand on the cable, Exhibits P-3A-G. The scoop was not out of service when the condition was cited. Tr. 69. In addition to the broken strand, there was evidence of other breaks and kinks and where the cable was "bird caged."[12] There, the cable gets twisted and spewed out. Tr. 69-70. Per Exhibit P-3D, the inspector noted the termination end for the cable where it should be welded on the spool and he also called attention to a grooved out area on the spool. Tr. 72. Ex. P-3E, another photo, shows the cable before any corrective action was taken. Per photo 3G, the termination point was not attached to the scoop. Ex. P-3G. Tr. 73.

The cable was used in this defective condition, as the inspector noted that the lines on the housing are "indications that that cable has come on and off several times with those broken frays, that it's rubbed the bucket, so you can tell it has been used in this condition." Tr. 74. As the frayed area comes off or is reeled up, those frayed areas rub on the inside of the bucket, creating the lines. *Id.* Again, the hazard is that the cable can break and injure people if that occurs. Tr. 75. A broken cable, being used to pull heavy components puts tension on the cable and if the cable breaks a whiplash effect can occur. Tr. 76.

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[11] Inspector Yates has had experience in his career working with cables. In making a visual inspection of such a cable, one looks at a lay of it. A lay of the cable is one complete revolution of the strand. Tr. 66. Yates also knew of an accident involving a cable which broke and struck a miner, rendering him unconscious and causing fractures in his face. Tr. 67.

[12] Just as it sounds, by "bird caging" the inspector meant the strands appeared like a bird cage. Tr. 70. Bird caging, the inspector later explained, is

> so bad because it takes the layout of cable, the strength, and it exposes the inner to squeezing or pinching. So if the inside of that cable is bird caged and is sticking up and you start putting tension on it, it's going damage the wires and stuff that's inside the core of the cable.

Tr. 93. The inspector stated that in the photograph, Ex. P-3C, one can see the cable "starting to bird cage some and come open. You can see the inner inside of the cable, some of the inner layers." Tr. 95.

The inspector believed that if the cable were to break, injuries could range from broken bones to a fatality in the worst case scenario. *Id.* In explaining why he marked it as S&S, he stated that "in an event that an accident occurs, it is reasonably likely that the injury will result in permanently disabling conditions." Tr. 77. On the other aspect of S&S, the issue of likelihood of the event occurring, he expressed that it would be likely as

> [w]ith one broken strand already, frayed, other bird cages, ... other things in the photographs [ ] indicate that the cable was mistreated. There's kinks. There's evidence of abrasion on the cable. Putting the pressure on this cable that is required to move some of this equipment around corners, around other equipment is highly – it is likely -- reasonably likely that someone would get damaged -- would get hit, if not by the cable, then by the moving loads that you're trying to pull.

Id. In terms of exposure to the hazard, the inspector stated that he knew there were "three miners working around this area at the time." Tr. 78. He evaluated negligence as moderate, "[b]ecause [the operator] didn't have really mitigating circumstances why that cable was left on in that condition." Tr. 79. Nor, had they taken other action such as taking the cable off, and tagged it out. Had they done such things, he would have listed the negligence as lower than moderate.

In terms of evaluating how long the condition had existed, the inspector stated it had been "at least one shift." Tr. 80. That conclusion was based upon "[t]he amount of damage that was done." This was not speculation since he was up in that area and observed that they were working as they were setting up a new longwall face there. Tr. 80. In further support of his conclusion, the inspector stated that it could not have occurred in one shift because it would take several times for a cable to be pulled on and off before it would be in the condition he observed. Tr. 81-82. The inspector added his view that this did not develop over one shift, as the frays rubbing against the inside of the scoop bucket indicated that the cable had been reeled on and off multiple times. Tr. 82.

The Court then asked some questions to clarify the circumstances involved with the cable. The inspector agreed with the Court's analogy of the cable to a garden hose with a hose reel, and also that the cable here had a hook or some device at its end in order for it to pull some piece of equipment. Tr. 85. The inspector informed that indeed the cable had a hook at its end. *Id.* Thus, the inspector confirmed that the cable was available for use and, by his testimony, had been used. *Id.*

On cross-examination, the inspector described the scoop as a "duck bill scoop," and that it is primarily used to pull or move shields around. In Exhibit P-3C, he identified the edge of the bucket in that photo, while adding that his focus was on the cable, not the bucket. He estimated the bucket's depth to be six to eight feet. Tr. 87-88. The winch itself is set back about another foot from the bucket. Tr. 88. Though he did not measure it, the inspector thought the cable was a maximum length of 20 feet. *Id.* He confirmed that the anchor piece, which is normally on the spool, was completely off. Tr. 89. When attaching the cable to a piece of equipment, chains are used to make the attachment. In other words, it is not simply a matter of having the cable directly attach to the equipment. Instead, chains are used in concert with the cable hook.

When Respondent's Counsel suggested that if the cable were completely unwound, it would simply turn on the spool, as it was not attached, the inspector countered that the indication was that the cable, stretched out too far, broke and luckily no one was hit when that occurred. Tr. 91. Respondent's argument was that if the cable were simply let out 20 feet, the spool would simply spin freely. To that hypothetical, the inspector agreed, but only if there was no binding effect on the cable. *Id.* For such a binding effect to occur, the inspector stated there would need to be two to three wraps around the spool. *Id.* The Court sought clarification on this. The inspector agreed that the cable wrapping two to three times around the spool can act as an anchor point and that it is designed that way, as the anchor point itself is not designed for tension to be placed on it. Tr. 92. Thus the inspector agreed with the Court's understanding that "the cable serves part of the anchoring itself if it's wrapped around enough times." *Id.*

The inspector was also asked about the "red zone," as that term is applied where winches are used. He informed that it refers to the "stay clear zone," and he agreed that Consol provides training on that subject. Tr. 97-98. However, the inspector did not agree that the scratches he observed could have developed simply in the normal rolling up of the cable, because there were too many of them and such marks don't occur in the normal process of rolling up the cable.[13] Tr. 98-99.

Chase Shaffer testified for the Respondent. He is employed by Consol as a safety inspector. Directing him to Citation No. 9077085, he acknowledged that he was with Inspector Yates on January 6, 2018. Addressing Ex. R-4, he identified the exhibit as his notes and that he made them soon after the inspection. Tr. 479. He then spoke to the duck bill battery scoop, which was on the 4A working section at the number 2 track entry. He asserted that it was not being used when they viewed it. Tr. 480. He described it as a "tractor of the coal mine. ... basically a tractor/forklift-type of piece of equipment used, [a] utility piece of equipment for supplies and other equipment." Tr. 480. Yates, Shaffer stated, wanted to check various pieces of equipment as part of his E01 inspection for their overall safety features, and this included examining the steel cable. Tr. 481.

Essentially, Shaffer's description of the use of the cable on the scoop comported with the other testimony of record. However, he added that the person operating the reel is "inside an enclosed steel cage, operator's compartment fully surrounded 360 degrees by a protective cage." Tr. 483. Shaffer described the length of the scoop bucket as eight by four and a half feet. Tr. 484. The spool of wire rope's location is recessed about three feet from the front of the scoop. *Id.* Shaffer asserted that the spool was not useable, that is, "[i]t would not be functionally useable for its intended purpose, what you would need to use it for. It was not in a condition where it would be useable." *Id.* He added that "the grommet, the connection point where it attaches onto the reel itself was off. It wasn't attached. So when you would go to use it, for lack of a better term, it would free spin, so you would never be able to properly secure your item that you want to load. It would just sit there and free spin." Tr. 485. Shaffer spoke to the most

[13] The Court felt compelled to comment to Respondent's Counsel that the evidence seemed "fairly compelling," up to that point. The Court emphasized that it was not prejudging the matter, but it had an issue whether the number of scratches on the reel was a winning argument. Tr. 99.

recent time the duck bill was examined, informing it occurred on January 15, 2018, per Ex. P-2, at the next to the last page of that exhibit, and referencing the No. 14 Cat 636 battery scoop. "4A" also appears on that line identifying that it was on the 4A working section. Tr. 486. According to that exhibit, the examiner found no defects. Shaffer explained that the discrepancy, with the model numbers, with the citation identifying it as a CAT 630 but the report listing it as a CAT 636, as a mistake, and neither he nor Yates are certified mechanics and one of them was simply in error. Tr. 487-88.

Shaffer informed that he is experienced in operating wire ropes and winches. Tr. 488. Reviewing Ex. P-3, he agreed that it shows damaged and fraying wire braids and strands. This included in one photo that "it's to a point where the rope was completely severed into two parts because of the broken strands. ...[and he saw] a broken grommet,[14] anchor point so to speak, a snub that would secure the rope into the reel. Tr. 489-90. In sum, Shaffer stated that from operational standpoint in this condition, you would not be able to accomplish your task. Plainly speaking, it was not useable. Tr. 490. Shaffer also offered that the "person operating rope can't see the spool [and that] person is in the machine inside that fully enclosed cage. Tr. 492. Further, Shaffer did not believe that, given the Consol requirement for a pre-op before using the equipment, any would try to use the equipment in that condition. Tr. 493. Directed to some scratching on the empty spool, per the third photo in that exhibit, Shaffer believed the grommet created that. *Id.*

On cross-examination, Shaffer was directed to his notes, per Ex. R-4. He agreed that the reel was not connected to the anchor point. Tr. 495. Asked if it was possible that if there's a load on that cable, even without an anchor point connection, whether there could be enough force on that cable to bite onto the reel, Shaffer responded, no, because it was a shortened rope, that is to say, "the amount of rope you would have pulled off to load something would not leave you enough cable on that reel to accomplish [a task]." However, in general terms he conceded that it was possible. Tr. 496. The Court interpreted Shaffer's answer as a qualified no, in that if one did not need the full length of the wire rope unwound, it would be possible for the cable to bite on the reel. Further, Shaffer conceded that he did not know how many times the cable would need to wrap for a bite to be created. *Id.* He also agreed that the equipment was not locked or tagged out and therefore it was available for service. Tr. 497. As he was not present when the most recent weekly exam was performed, Shaffer could not speak to whether that exam was thorough, but he responded that Consol's employees are qualified and certified to perform such work. *Id.*

While bantering over questions posed by the Secretary's counsel over whether the cable was in a safe condition, he preferred to answer instead that it was not usable.[15] Tr. 498. He then allowed that one could injure oneself if attempting to handle it. So too, he preferred to state that

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[14] Shaffer stated that the grommet anchors the rope to the reel. Tr. 492.

[15] To make it usable, Shaffer stated it would need to be attached to the reel and all the strands repaired, as for example where it was "completely severed" and it would need to be restored to its full length. Tr. 498. As a practical matter, Shaffer informed on redirect that the 'fix' would actually be replacement of the cable. Tr. 499.

the cable was damaged, avoiding a response as to whether the condition was a violation of the standard. *Id.*

For this matter, Citation No. 9077085, the Respondent asserts in its post-hearing brief that as the "cable was no longer attached to the winch reel [ ] any tension put on the cable would simply cause the winch reel to free spin. Thus, the cable could not to be used for pulling equipment." R's Br. at 2. The Court finds that the Respondent's contentions regarding the S&S designation are conclusory in nature, merely asserting that "[i]t was not reasonably likely that this condition created a hazard or that any miner would be injured by this condition ... ." *Id.* As for negligence, its argument is that "no agent of the operator was aware the condition existed and the condition could have developed since the last exam." None of these contentions have merit.

Here, the Respondent contends that the Secretary has failed to meet his burden by showing that the winch cable contributed to a discrete safety hazard warranting an S&S designation and has also failed to show that the winch cable was reasonably likely to cause an injury. The cited winch cable is used primarily for loading heavy equipment or supplies onto the duckbill scoop. The cable is extended toward the equipment that is being loaded and secured with a large stabilizing hook to stabilize the equipment as it is being loaded. The person operating the winch is inside a fully enclosed steel cage. The winch cable was severely damaged in several areas and was functionally unusable, making it extremely unlikely that it would be used for pulling or loading equipment. The anchor point connecting and securing the cable to the reel was no longer attached. The result of the anchor point being disconnected from the reel is that it would cause the wheel to free spin when attempting to pull anything with the winch cable and not allow the winch cable to tighten or secure itself to the reel.

Shaffer analogized attempting to use the cable for pulling equipment in this damaged condition with trying to load a vehicle onto a tow truck under the same conditions. He offered that if there is no fixed point to secure the tow cable onto the reel attached to the truck, the tow cable would just keep "spinning and spinning and doesn't have the ability to secure [the vehicle] onto the truck." Further, Respondent asserts that Mr. Shaffer credibly testified that the cable was not long enough to wrap around the reel enough times to serve as an anchor point and still maintain enough length to pull equipment.

Consol states that, in an attempt to support the allegation that the winch cable had been previously used in its damaged condition, the inspector testified that lines and grooves in the scoop bucket indicated prior use, attributable to the frayed cable rubbing against the scoop bucket. However, the Respondent asserts that Yates presented no evidence that the winch cable actually caused the lines and grooves in the scoop bucket or that the grooves could not have been created by an undamaged cable. Consol adds that a scoop is used for numerous applications in a coal mine, including scooping up piles of sharp, rigid loose coal and rock and loading heavy equipment and supplies, thereby creating countless potential sources of lines and grooves inside the bucket. Thus, it contends that the scratches and grooves in the scoop bucket have little evidentiary value to show prior use and they could have been caused by any number of different types of material inside the bucket. Accordingly, it argues the Secretary has failed to prove that they were caused by use of the damaged winch cable. Therefore, because it was not reasonably

likely that this condition contributed to a discrete safety hazard or that any miner would be injured by this condition, the citation, No. 9077085, should be reduced to non-S&S and unlikely. R's Br. at 32.

Consol further contends that the negligence level should be "low" due to considerable mitigating circumstances. First, the scoop was parked with no miner around it at the time of the inspection. Tr. 497. Second, the condition of the cable was not reported to Consol and could have happened since the last examination of the scoop and the Secretary has failed to prove otherwise. Third, the damages condition of the cable negated any ability to use the cable for pulling equipment. Tr. 492. Therefore, the evidence of considerable mitigating circumstances should reduce the negligence designation to "low." R's Br. at 33.

In its Response brief, Consol repeats its view that the violation should not be deemed S&S, contending that the Secretary's reliance on *Eagle Nest,* 14 FMSHRC 1119, 1123 (1992), is misplaced because it conflates assuming miners will be cautious with looking at the surrounding facts to determine if it is likely a miner will be exposed to a hazard. Consol agrees that one may not presume that a miner will be cautious but that the likelihood that a miner will be exposed to a hazard is a very different consideration. It offers, as an example, evidence that miners would not be expected to be injured by an outby rib at the precise time it falls, because they rarely go there. In a similar fashion it contends that the likelihood is nil because the winch is operated from inside the operator's cage. Thus, it contends that the contention that the cable could break and strike a nearby miner is unsupported. R's Response at 5-6.

Continuing its somewhat unusual defense – that the cable's condition was so bad that it could not hold a load by being wrapped around the spool – and that the inspector's notion that the cable could so wrap on itself, was mere speculation, Consol points to Shaffer's assertion that the cable would be too short to pull a load if it had to wrap around itself. *Id.* at 6.

The Secretary asserts that both Yates "detailed testimony and photographs prove that the Operator failed to maintain the cited winch cable in safe operating condition, and failed to remove the scoop or the winch from service." The Court agrees that the Respondent did not present any evidence to contradict this. As for gravity, the Secretary notes that the winch cable was not in safe operating condition, was not locked or tagged out, and was available for service. The Secretary points to the scratch marks, as photographed by the inspector, to show that the winch had in fact been used without the cable being properly anchored to the reel.

While conceding that the scoop operator sits in a protected compartment, that person often works together with another miner outside the scoop in the mine entry or crosscut to direct travel in the low-visibility conditions and around corners. Accordingly, the Respondent cannot simply rely upon miners' training about red zones to discount their exposure to the hazard. As for the negligence involved, again the Secretary looks to the inspector's testimony and photographic evidence to support a moderate negligence finding. The number of damaged areas to the cable, including the broken anchor point, frayed threads, severed threads, and "bird-caged wires" all indicate that these conditions developed over time and after repeated use of the cable in an unsafe condition. For that reason, a conclusion that the operator either knew or should have known of the dangerous condition is appropriate. Last, there was no evidence from the

Respondent that the cable had only been damaged during the same shift. Given this state of affairs the Secretary urges that, applying the six statutory criteria, the proposed civil penalty of $953.00 remains appropriate.

Analysis of Citation No. 9077085

Upon consideration of the credible evidence, the Court finds that the violation was S&S and that the negligence was moderate. An unusual defense, the Respondent contends that the cable was so bad it was not useable. However, the cable had not been removed and the equipment was not tagged out. Consequently, the equipment was available for service. The inspector's testimony as to the cable being the source of the scratches and marks in the bucket was also credible, establishing use, especially given the undisputed condition of the cable.

The Respondent's challenge does not dispute the fact of violation, but rather that it was deemed S&S with moderate negligence. Regarding S&S, the Court finds that there was a reasonable likelihood of the occurrence of the hazard against which the standard is directed. The duck bill scoop was not maintained in safe operating condition, nor was it removed from service, and it was being used in that defective condition. The cable's condition of disrepair presented a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation, which was at least somewhat likely to result in harm.

The obvious hazard is that a cable in this undisputed condition can break and an injury could result in such an event. Use of such a damaged cable, being used to pull heavy components puts tension on the cable and, if the cable breaks, a whiplash effect can occur. Though the equipment's operator was protected from a whiplash event, the Court finds that, per the inspector's testimony, others could be at risk should a cable failure occur. Even if such other person(s) were not struck by a cable failure, there could be associated injury with the load attempting to be moved. Under these circumstances and findings, in the Court's estimation of the credible evidence, this situation was an accident waiting to happen. Accordingly, with a cable in such disrepair, on these facts, the occurrence of the hazard would be reasonably likely to result in an injury. And, rather obviously, such an injury would be of a reasonably serious nature.

As for the inspector's view that moderate negligence was involved, the Court concurs that the operator did not present any mitigation to explain why, given the cable condition, the machine was not tagged out or taken out of use. Moderate negligence was a more than fair designation under these circumstances.

Given this state of affairs the Secretary urges that, applying the six statutory criteria, the proposed civil penalty of $953.00 remains appropriate. From its independent application of the 110(i) penalty criteria, particularly with regard to the gravity and negligence of the violation as described above, the Court assesses a $953.00 penalty.

Citation No. 9077083

Citation No. 9077083 alleges a violation of 30 C.F.R. § 75.517, involving holes in the 480 volt power cable for a scoop charger. The Respondent seeks to have the citation modified to list the expected injury as no lost workdays and low negligence.

Inspector Yates testified regarding Citation No. 9077083, Ex. P-4, which he issued on January 6, 2018, pertaining to a 480 volt power cable to the No. 12 groundhog scoop charger, citing 30 C.F.R. § 75.517. Tr. 100. That standard, a statutory provision, titled, "Power wires and cables; insulation and protection," provides "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." While the inspector was checking the battery charger to make sure there was adequate ventilation, he observed that "the cable looked like it was possibly damaged," in that it appeared to be deformed. Tr. 101-02. After making sure that the high voltage cable was disengaged from the power source, and then locking it out, he began checking the power cable by hand. In that process, he found at the area of his initial concern, that the inner conductors of the cable were damaged. There, he found a hole of about one inch in the outer jacket and he could see the copper wire inside the cable. The inner conductors were exposed for almost the entire one inch opening. The problematic cable was hanging on the rib loops. Tr. 102-04. Also, where that cable connects to the charger he found another cut. Tr. 104-05. Clarifying the locations of conditions he observed, the inspector stated that the first cable, which had three conductors, came from the power center supplying the 480 volts to the groundhog scoop charger. That cable was coming outby the load center and going to the charger. Separate from that charger cable, there was a cable that turns the AC into DC, which cable was also damaged. Tr. 105.

The bottom line was that the inspector found a problem area in two cables and his citation recorded this. Tr. 105-106. He took photographs of both conditions. Tr. 106-07; Ex. P-5A-B. As noted, the inspector stated that he could see the copper wire. Tr. 107. Ex. P-5C, another photo, shows the other cut, involving the second cable, which was in the outer jacket of the cable that leads from the charger to the scoop batteries. *Id.* Yates stated that exposure to that condition would occur anytime a miner was putting the scoop on a charge and that miners were exposed to the damage from both cables. This would involve examiners as well as helpers walking in those areas. Helpers for the scoops assist the operators who are charging batteries. Tr. 107-08. At those times, the cable would be energized. Tr. 108. The 480 volt cable would also be energized when the scoop batteries were charging. As for the second cable, from the charger to the scoop battery, a miner would be exposed any time he's taking the scoop off the charge. Tr. 108.

As for the type of injury, the inspector marked that as "fatal." Though it was unlikely to happen in this instance, he felt that if it did occur, the result would definitely be fatal. Tr. 109. He marked the negligence as moderate because he found no mitigating circumstances to warrant lowering that designation, and he noted that he easily detected the problem just passing by it. He added that a good examiner, that is, one who's trained to do proper examinations, should also check those cables as they're walking, to ensure that their miners are safe, so that they won't come in contact with any damaged cables. Tr. 110-11. Further, he believed the condition had been present for more than one shift because of "[t]he amount of dust present and the condition

of the cable. The amount of dust inside the hole indicates that that condition has been there more than one shift." Tr. 111.

On cross-examination, the inspector agreed that the second cable he cited is similar to a jumper cable from the charger to the batteries. Given that, the inspector agreed that hooking up such a cable is never done under power. Tr. 114. In both cited instances, the condition was abated by re-insulating the outer jacket, not by splicing the cables. Tr. 115. Splicing involves connecting two cables together. *Id.* While the inspector's notes for this do not expressly state that he saw copper wires, he stated that he did see copper and that is what he meant by writing "damaged." Tr. 116. The inspector agreed that both cables are moved as mining continues. For the charger cable, he agreed that it should be locked and tagged out before it is moved. Tr. 116. As for the other cable, which was hung and had slack in it, he agreed it was on the rib, not located on the floor. Tr. 117. He admitted that in taking his photos, he bent the charger cable a little so that he could have a good photo to reflect the condition he cited. Tr. 119. He added that he could not damage the inner cable by bending it and, if that were possible, the cable would need to be removed from service. As for the other cable, the one on the rib, he stated that he did not manipulate it all. Tr. 119. To the suggestion that the inner cable was rugged, he responded that current and abrasiveness are separate considerations. Tr. 120. *Id.* The inspector agreed that the 480 volt cable had ground protection. Tr. 121.

On re-direct, the inspector affirmed that the inner conductors are covered only by a thin membrane, to wit, the black insulation he described in earlier testimony. Beneath that membrane is copper. Tr. 122. Referring to the photos in Exhibits P-5A and P-5B, the inspector stated that he did not manipulate or bend the cable prior to taking those photos. He only had to wipe the dust off. Tr. 122-23. While the cables are, during normal mining, designed to be bent and moved around, that does not include getting run over or squeezed against a rib. Tr. 123. On further cross-examination, the inspector maintained that, though it was difficult to see and though the photo was not great, the copper wire is visible in Photo 5A. Tr. 123-24.

This equipment was on the same working section as discussed in Citation No. 9077085; it is the area that charges all the batteries. Inspector Yates was in the process of performing a full inspection of the No. 12 groundhog scoop charger when he found the damaged cable on the scoop charger. Tr. 501. Respondent's witness Shaffer noted that the citation itself recounts that the damage to the cable was to the outer jacket exposing the damaged black inner conductor. The damaged section of the cable was alongside the rib on what he described as "Christmas tree hangers," that is to say, insulated cable hangers, and that the damaged area was located at the fifth loop back, meaning the furthest loop back against the rib in that section of cable. Tr. 502. Given that location, Shaffer expressed that the damage could not be easily seen. The scoop charger is typically moved every eight to ten days. When that occurs the power is off. *Id.* According to Shaffer, the inspector had to bend or twist the cable to show him the damaged section. Tr. 503. Upon doing that, Shaffer did see the inner cable but saw no damage to those inner leads. *Id.* Shaffer then directed that a certified electrician examine the cable to ensure that there was no more damage beyond what they could visualize. Tr. 504. A splice was then made to fix the cable. Tr. 504. A second issue was identified with the charger, which Shaffer described as "a small hole on the outer jacket of ...the charger jumper cable." *Id.* The jumper cables go from the charger to the scoop. *Id.* Shaffer stated that in the mining environment it is

not difficult for holes such as this to occur. Tr. 505. The Secretary elected not to conduct cross-examination for this citation.

For this matter, Citation No. 9077083, Consol accepts the inspector's likelihood of the injury or illness designation, which was marked as "unlikely," but it does challenge the claim that the injury from this condition would reasonably be expected to be fatal. It contends that it was unlikely that a miner would contact the hung section of the cable while the scoop charger was energized and that the Secretary did not prove that a fatal injury would result from the condition. R's Br. at 2. It adds that the Secretary failed to prove that the cited condition was present at the time of the last electrical exam and that, since the condition was not obvious, the negligence should be reduced to "low." *Id.* In support of its position that the gravity should be reduced from "Fatal" to "Lost Workdays or Restricted Duty" and that the negligence should be low, the Respondent looks to MSHA's Citation and Order Writing Handbook. R's Br. at 35–37.

While the Respondent concedes that there were two cables at the scoop charger which were damaged, the damage to the power supply cable was located at the area closest to the rib, and therefore less obvious. For the other cable, the charger jumper cable, Respondent contends that neither cable is handled by miners or moved while it energized. Respondent notes that the inspector admitted that it would be unlikely that a miner would contact the cable.

Notwithstanding the inspector's relating of an incident wherein a miner was allegedly electrocuted from a pinhole in a cable, Respondent, noting that the inspector is not an electrician, asserts that the cable's voltage, in and of itself, is not sufficient to show that a fatal injury would be reasonably expected to occur. It adds that the Secretary introduced no evidence of the cable's amperage. Further, the inspector admitted that cables had ground fault protection.
The Respondent also asserts that the Secretary's case was deficient in its failure to consider how the environmental conditions may affect the type of injury to be expected. For instance, there is no evidence in the record setting forth how an injury would be affected if a miner's clothing came into contact with the cable as opposed to his bare skin and there was no evidence considering whether conditions were wet or dry and how such conditions can affect the type of injury to be expected. Without such information, the Respondent concludes, the fatal designation cannot be sustained.

Speaking to negligence, Respondent contends that there was no evidence that the cables were in the cited condition during the previous electrical examination, nor evidence that the operator was aware of the condition, and it discounts the inspector's claim that the dust he observed supports his view that the condition had existed for more than a shift.[16] R's Br. at 37.

[16] The Respondent adds that there was no evidence as to the cable condition at the last exam, no evidence as to the conditions the cables were subjected to since the last exam, and no evidence as to whether the load center, charger and cables had been moved since the last exam. But, if the Respondent is suggesting that somehow the Secretary should have provided this information, and without offering just how the Secretary would have made those determinations, it is the Court's view that such information was the Respondent's burden to provide, not the Secretary's.

Apart from the above, the Respondent also objects to the Secretary's eleventh hour attempt to amend the citation's likelihood/S&S designations, as the Respondent did not challenge the inspector's determination of the likelihood of the event's occurrence. R's Response at 7-9. It notes that this apparent change was not litigated at the hearing and the Secretary never moved the Court to amend the citation. In this regard, the Respondent opposes any attempt by the Secretary to amend his pleadings post-hearing without any motion, citing *Jim Walter Resources, Inc.*, 35 FMSHRC 1709, 1714-15 (2013) (ALJ).

From the Secretary's perspective, the evidence supports a finding that the violation was reasonably likely and that it was S&S. In that regard, the Secretary notes that the scoop charger was not locked or tagged out of service, and was available for use. In support of that view, the Secretary notes that the cable leading from the power center to the charger was hanging on the rib in loops near the charger, and contends that a miner connecting scoop batteries to the charger would be exposed to this damaged area of cable. Mine examiners would also be exposed while performing their duties, such as when checking to make sure that the charging station properly ventilates into the return. Further, the cables would be energized whenever a miner puts the scoop batteries on charge, including when they are getting out of the scoop operator's compartment, and when the batteries were charging. Coming into contact with the damaged areas of the energized 480-volt cable could cause fatal injuries from electrocution, and this is true even if the inner copper power leads were not exposed or damaged. Sec. Br. at 11. Furthermore, the Secretary notes that he is not required to establish that there were exposed copper leads, as the danger of electric shock is present even where only small holes in the insulation are present as they pose a risk of serious injury. *Id.*, citing *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1286 (Dec. 1998). At a minimum, the Secretary concludes that the evidence supports the inspector's generous designation of the violation as non-S&S.

As for the degree of negligence, the Secretary submits that the dust and the damage to the cables, establish that the conditions had existed for more than one shift and therefore moderate negligence is appropriate as the operator either knew or should have known of the damaged cables.

Accordingly, the Secretary asserts that the Court should affirm MSHA's proposed civil penalty of $429.00 using the six statutory criteria and the Part 100 regulations. Sec. Br. at 12.

Analysis of Citation No. 9077083

The inspector found two cable defects: a 480 volt power cable to the No. 12 groundhog scoop charger, described as the charger cable; and a separate cable from the charger to the scoop battery. The inspector agreed that the second cable was analogous to jumper cables and that when employed that cable is not under power. Though his notes did not record that he saw the copper wires, the inspector stated that he did observe them and the Court finds that the inspector's testimony was credible on that issue. The inspector marked the violation as non-S&S, but the injury as fatal and the negligence as moderate, as he found no mitigating circumstances. The inspector also considered that the problem was easily detected, simply by walking by the cable. Thus he considered the condition to be obvious, as a diligent mine examiner would have seen the problem. Dust in the hole informed the inspector that the condition had not just

occurred and thus had existed for more than one shift. For the charger cable, he agreed that it should be locked and tagged out before it is moved.

In this instance, as noted, the Respondent challenged the claim that the injury would be fatal and it seeks to have the negligence denominated as "low."

The Court finds that the Respondent, in its analysis, has merged the likelihood of the injury or illness designation, which was marked as "unlikely," with the claim that the injury from this condition, though unlikely, would reasonably be expected to be fatal, but the two concerns should be evaluated separately. The Court finds that the credible evidence is that, though not S&S, and unlikely, should an unfortunate miner come in contact with the charger cable at least, a fatality could result and more so for the power cable than for the jumper cable, as the latter is never hooked up under power. With the inspector's non-S&S determination being upheld, the Court therefore rejects as unsupported by the evidence, the Secretary's afterthoughts that an S&S designation could be entertained.

Regarding negligence, the Court does agree with the Respondent's contentions that it should be deemed low. Only one of the cables, the 480 volt cable, presented a plausible risk of shock, but given the location of the defect for that cable with the 1 inch hole in the outer jacket and accepting that cable had to be bent or twisted to reveal the defect, low negligence is the proper characterization of this violation. It is noteworthy to the Court that the Secretary elected not to conduct cross-examination of the Respondent's witness for this citation.

Accordingly, based upon all the evidence of record and the Court's findings as to the challenged issues of negligence and whether a fatal designation was warranted, the Court finds the former should be characterized as low but that the fatal designation remains appropriate. That latter determination is distinct from the inspector's determination that the event was unlikely to occur, a finding that the Court agrees is consistent with the evidence adduced.

The Secretary proposed a penalty of $429.00. However, the 110(i) penalty factors strongly suggest a reduction in the penalty amount in light of the lower negligence finding. For the above stated findings and reasons, the Court finds that, applying the six statutory criteria, a civil penalty in the amount of $100.00 is imposed. Further the Citation is to be modified to reflect "low" negligence.

Citation No. 9077086

Citation No. 9077086 alleges a violation of 30 C.F.R. § 75.508, which requires all stationary electric apparatuses to be shown on a mine map. The Respondent seeks to have the citation vacated.

Citation No. 9077086 was issued on January 7, 2018. Ex. P-6. Inspector Yates described it as "a citation that an electrical component of the electrical system was not listed on the outside electrical map. Tr. 126. The cited standard provides:

> The location and the electrical rating of **all stationary electric apparatus** in connection with the mine electric system, including permanent cables, switchgear, rectifying substations, transformers, permanent pumps, and trolley wires and trolley feeder wires, and settings of all direct-current circuit breakers protecting underground trolley circuits, **shall be shown on a mine map**. Any changes made in a location, electric rating, or setting shall be promptly shown on the map when the change is made. Such map shall be available to an authorized representative of the Secretary and to the miners in such mine.

30 C.F.R. § 75.508 (emphasis added). The cited standard requires that the mine map be updated with all the main electrical equipment, such as the main electrical, 12,400 volt cables, load centers, switch houses, in short, anything that is not going to be moved. Tr. 128. In this instance, the load center was at the three cross-cut, on the 4A new longwall section face. Tr. 128-129. There was another load center inby the one cited. Tr. 129.

The essential charge is that the *cited* load center was not advancing – instead it was stationary. The Secretary contends that this is a violation because, while *moving* load centers do not need to be listed on the map, *high voltage cables that take energy to those load centers must be so listed on the map*. Such maps are kept outside and they are to list the location of the high voltage cables. Tr. 127. In this instance, the citation was for a "load center that had moved with the section at one time, [in the past] but [the mine was] then jumping off of it to power another load center that was actually moving on that section." *Id.* The inspector had been in that area the day before, so he knew where the mining was going and he knew that the load center was not on the map. *Id.* A moving load center will advance as mining continues. In contrast, at the time of the citation, the *cited* load center was not advancing, instead it was stationary. *Id.*

The purpose behind the standard's map listing requirement is if an "emergency" occurs, it is known where power is located and how to direct people underground in the event that there is a rescue situation, so that rescuers or mine personnel will be able to energize equipment as needed. Tr. 129. The inspector marked "no likelihood" on his citation and one person affected, because he considered it to be a paperwork violation. Tr. 130. He viewed it as a failure by the mine to keep their maps up-to-date. However, he marked the negligence as moderate because he found no mitigation. *Id.*

On cross-examination, the inspector did not agree that if the load center was servicing a working section, it would not be considered stationary equipment. Tr. 132. While he agreed that it was on *the section*, he deemed it stationary because the cited load center did not advance as the section advanced. *Id.* Thus, for the inspector, the key determinant was if the load center advanced as the section advanced. He determined that the load center was not advancing and therefor it was stationary. He knew this to be the case because:

> they have to have powered equipment to run the other equipment that's running up and down the face, so if they move this load center up there, they don't have enough power for that shuttle car -- or cable because we limit it to 900 foot at that mine to reach where the coal is going to dump to the feeder.

Tr. 133. He conceded that although at *some* point the load center would be moved, it would not be for the 4A working section.[17] *Id.* The Court notes that those assertions by the inspector were not contradicted.

The inspector's position was plain – if equipment is not being moved with the section, then it is stationary. Tr. 134. The working face, he informed, is the section – thus, the working face is not somewhere outby that location. *Id.* In asserting that the load center was *serving* the 4A working section, the inspector explained "the load center was being used to run power through that load center and take it onto the next load center." Tr. 136.

Reading from his notes in connection with this citation, the inspector stated, "[t]he load center on 4A working section ... MMU-081 is not shown on the map." Tr. 137. His notes do not state that this is a pass-through load center. The inspector was *not* of the view that any load center on the section had to be on the map when he issued the citation. Tr. 137-38.

The Respondent contends that the 4A Section load center is not 'stationary electrical equipment' required to be identified on the electrical map because its location changes as the section advances. R's Br. at 2-3. As before, Shaffer was with the inspector when this matter arose. The citation involved a problem on the surface in that the inspector was on the surface examining the mine's electrical map. That map has to show all permanent underground electrical installations, and the inspector was determining if the underground equipment was properly marked on that map for its location. Tr. 507. Under his interpretation of the standard, Respondent's Shaffer did not consider the equipment to be stationary. Tr. 509. The Secretary's counsel asked no questions for cross-examination.

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[17] Asked how the load center is connected to the power system, the inspector demonstrated that he was knowledgeable on that issue, advising that there is a "[h]igh voltage cable 12,470 running from ... outby the front end [i.e. the beginning] of the panel, [and there is] a switch house ... with VCBs run-throughs, and [they take the 12,470] and run it all the way up through to that load center. Tr. 133-134. The load center is connected to that power. The other load center on the 4A is connected from that load center by running the 12,470 through that." Tr. 134.

Respondent adds that the load center's "location is provided on the current working maps at the Patterson Creek Portal [and] [a] mine electrical schematic sheet was posted next to the map that had the location and load rating of the 4A Load Center posted on it." R's Br. at 3. Also, the Respondent asserts that there were several copies of the mine electrical schematic sheet which was available for all electricians to take underground and use.

On those grounds, the Respondent asserts that the citation should be vacated and, if not, the negligence should be low. However, the Respondent does not explicitly explain the basis for its low negligence contention, but the basis for this position is apparent from its contentions, as described above and in its post-hearing brief. *Id.* at 3.

Respondent points to MSHA's Program Policy Manual, Volume V, at pg. 52, (2003), for the proposition that only the circuit supplying power to the working section must be identified on the map. *Id* at 6-7. Here, Inspector Yates admitted that in his notes he identified the cited load center which he believed must appear on the electrical map as the load center on the 4A working section MMU-081. When asked whether that load center was on the section, Mr. Yates conceded that it was on the section. Mr. Yates also admitted that the load center was used to help power the 4A working section due to the very big distance between the main power supply and the working section. Respondent points to the testimony of witness Shaffer in support of its claim that it was in compliance with standard 75.508 by identifying the circuit supplying power to the working section on the electrical map. Thus, Respondent contends that since the load center *serviced* the working section it was not a stationary electrical installation and therefore it was not required to appear on the mine electrical map. *Id.* at 7.

Alternatively, the Respondent asserts that if a violation is upheld, the negligence should be deemed as low, on the basis that there were considerable mitigating circumstances. In this regard it notes that there was a mine electrical schematic sheet posted on the wall next to the map showing the location of the 4A load center that was cited for failing to appear on the map. Exs. R-8, R-10. Second, there were numerous copies of the electrical schematic available for miners to take underground to perform their duties. Ex. R-10. Third, the section load center is marked with its current location on the working maps in the foreman's assembly room and is updated regularly as the location of the section load centers changes. Ex. R-8. Finally, Consol did what it believed it was obligated to do under the standard by identifying the circuit supplying power to the working section on the electrical map. R's Br. at 8.[18]

For its part, the Secretary contends that Citation 9077086 should be sustained, reasoning that one of the two load centers for the 4A Section should be deemed to be "stationary" and a part of the mine's permanent electrical system because "[r]espondent was using it as a "pass-through" load center." Sec. Br. at 12. A review of the Citation indicates that the Inspector cited the "*the load center located on the 4A working section.*" Exhibit P-6 (emphasis added). There is no mention of two "load centers." The Inspector's notes similarly state that the Inspector intended to cite the "load center on the 4A working section MMU-081" Ex. P-6, at 3 (emphasis added).

[18] In its Response Brief, Respondent again urges that the citation be vacated, but without offering any new justifications. R's Response Br. at 9-11.

At the hearing, the Inspector claimed that this "load center" was a "pass-through" load center but the Respondent contends that using a load center as a "pass-through" does not make it "permanent' or "stationary." If that were true, every component of a longwall mule train that is not at the end of a circuit, and which allows current through, would be deemed "stationary." Rather, the test MSHA has imposed on itself in the Program Policy Manual (PPM) is that "equipment being used ***on the working section*** is not considered to be stationary equipment" Ex. R-9 (emphasis added). While the Inspector attempted to avoid the implications of the PPM at the hearing, his own words in the citation and his notes that he intended to cite the load center ***on the working section.***

Further, the language of the standard makes it clear that it was intended to refer to truly stationary equipment such as "permanent cables, switchgear, substations, transformers, permanent pumps and trolley wires." All of these items are installed permanently for an obvious long duration and do not move with a section.

Although every "load center" may not advance often, it does move with the mining. While the testimony was imprecise on the issue, the Respondent maintains that when two load centers were used for a section, and one load center reached its capacity as the Section 4A panel advanced, a second load center may be moved in to take the place of the first one, which was then moved forward. With the use of two load centers, the mine is then able to complete the panel. Only later, when the panel was complete, will the mine move the equipment to a new section and at that time both load centers move with the mining.

Clearly, the load center cited by the inspector was described by him as being "on the working section" and whether "pass-through" or not, the "load center" is moved from time to time and is not stationary. It will go from one section to the next as the mining advances. Based on these facts, the Respondent concludes that the citation should be vacated. R's Br. at 10.

Analysis of Citation No. 9077086

Plainly, the question is whether a stationary electrical apparatus was involved here. It is undisputed that the Operator failed to list the location and electrical rating of the cited power center on the electrical map. Thus, the essential charge is that the cited load center was not advancing – instead it was stationary. The term "stationary" is not defined and MSHA points to no authority for its position as applied to this set of facts.[19] Therefore, the term must be applied in a practical manner in this instance. Although the Court views it as a close call, based on the inspector's explanation, the cited load center must be considered as stationary. Did the load center move? The answer, based on the credible evidence, is not really. While the inspector conceded that although at some point the load center would be moved, it would not move while performing its function for the 4A working section.

[19] Nor was the Court able to find any Commission case law or MSHA policy papers, defining "stationary equipment."

Still, the inspector described the matter as a paperwork violation and as such he designated the gravity as no likelihood of injury, non-S&S, no lost workdays, and affecting one person – an examiner or miner. The Secretary maintains that because the General Maintenance Supervisor maintains the electrical map outside his office, an agent of the operator either knew or should have known of the condition, and accordingly moderate negligence is appropriate. Under such assumptions, the Secretary contends that using the six statutory criteria the proposed civil penalty of $118.00 is warranted.

Given the legitimate differing views of whether the cited load center should be deemed stationary, the Court accepts as valid, the Respondent's considerable mitigating factors, as described above. That leaves only one statutory criterion in dispute – the appropriate negligence designation. In this instance, the proper designation, taken together with the mitigating circumstances identified by the Respondent, is no negligence was involved. The Respondent had a reasonable, though incorrect, understanding of the stationary equipment requirement as it applied to this load center.

Considering the factors above and the other statutory criteria, the Court finds that a $29.00 (twenty-nine dollars) is appropriate and is so imposed. The negligence finding is to be modified to reflect no negligence.

Citation No. 9077087

Citation No. 9077087 alleged a violation of 30 C.F.R. § 75.209(f), involving a lack of ATRS certification for multiple roof bolters. The Respondent seeks to have the citation vacated.

Inspector Yates also testified about this Citation, No. 9077087, Exhibit P-7, which he issued on January 7, 2018, citing 30 C.F.R. §75.209(f).[20] Tr. 138. That standard, titled, "Automated Temporary Roof Support (ATRS) systems," provides at subsection (f) that "[t]he support capacity of each ATRS system and the structural capacity of each compartment shall be certified by a registered engineer as meeting the applicable requirements of paragraphs (e)(1) and (e)(2) of this section. The certifications shall be made available to an authorized representative of the Secretary and representative of the miners." The citation asserted that the operator "failed to keep or to supply the Secretary with the ATRS[21] certifications for several roof bolters in the coal mine and the roof bolters on the continuous miners that's located inside of Harvey Mine." Tr. 139. This information has to be made available to the inspector, as the Secretary's representative. *Id.* Specifically, the ATRS certifications were missing for "[t]he Company No. 3, 1B 35, 34, 32 and 11 Fletcher roof bolters, and the Company No. 1, No. 3 joy; 14 ED 25 continuous miners, nor the Company No. 42 Sandvik 450 continuous miner had certifications for

[20] The inspector informed that the cited standard "requires that the operator must maintain copies of the professional engineer who certified that ATRS, that it will meet the standards that -- whether it's 1,800 or 11,800 or 18,000 pounds of pressure to hold up." Tr. 139.

[21] The ATRS is a bar that hydraulically it lifts the jack up and lifts that bar, and it pushes against the roof and the bottom, and it holds that roof up as it is being bolted. This is to protect the miners who are installing roof support. Tr. 139-40.

their ATRSs on the surface." Tr. 140-41. Absent a re-build, this is a one-time, not an annual, certification. Tr. 141.

The inspector requested copies of the certifications for the named equipment from Mr. Shaffer, who was the safety escort that day and is also the mine's safety representative. The mine did provide the inspector with certifications for some equipment, but not for the equipment he cited, as the operator's representative could not find them. **Eventually, the paper showing certification was provided, but it took nearly a week to do that.** Tr. 143 (emphasis added). Plaques on the equipment do not constitute certifications and no one made such a claim at that time. Tr. 144. The standard requires certification from an engineer and the plaques do not contain such information. *Id.*

The inspector marked the negligence as "moderate," as he did not find any mitigating circumstances such as, for example, if they had presented the records in the past but now could not locate them. Tr. 145. In any event, ultimately, the records were located. *Id.* As it was deemed strictly a paperwork violation, the inspector marked the citation as non-S&S. On the same basis, he marked it as no lost workdays. Tr. 147. Upon cross-examination, the inspector stated that, because he was a roof bolter for ten years and he has examined many pieces of equipment at this mine, he knows the plaques do not state that they are engineer certified and therefore such plaques are not a substitute. Tr. 148.

Nevertheless, Respondent's Brief asserts that,

> [a]ll the cited equipment is marked with an ATRS certification tag which can be inspected by the operator, miners, and inspector at any time. Each tag certifies that the ATRS system has been tested, approved, and verified by a certified professional engineer to withstand the required 18,000 lbs. of pressure. Furthermore, the ATRS certifications for the equipment were eventually provided to the inspector indicating that the ATRS systems had been properly certified. For this reason, this Citation should be vacated.

R's Br. at 3.

In its Response Brief, the Respondent adds "30 CFR § 75.209(f) requires two things. First, each ATRS system must be certified. Second, the operator must make the certifications available to an authorized representative." R's Br. at 11. The Secretary contends that Consol "violated this standard because it was unable to produce to the Secretary's representative the engineering certifications...." Sec. Br. at 14. However, the testimony of the Inspector indicates that Consol did produce the certifications, just not immediately upon request.

There is no question that Consol was eventually able to produce all certifications. The Respondent observes that 30 C.F.R. § 75.209(f) does not use the term "immediately," and from that claims that to the extent that the Secretary seeks to write this word into the standard, this should be accomplished through "notice and comment" rulemaking, a suggestion the Court cannot take seriously. As an example, Consol, citing 30 C.F.R. § 75.363(b), looks to the record of pre-shift/on-shift examinations which must be kept "on the surface at the mine."

Other regulations, it notes, simply state that the records must be available "upon request," offering the example of 30 C.F.R. § 46.9(h). It notes that MSHA has interpreted the "upon request" language to allow 24 hours for the mine to produce the records, citing *QMAX Company*, 2006 WL 2927266 (Sept. 29, 2006) (ALJ). In *QMAX*, the ALJ vacated a citation where the mine produced records on the grounds that "[t]here is no specific requirement that the records be kept at the mine site, or that they be produced within a specific time after a request is made." *Id.* at *21. Here, 75.209(f) contains no requirement for immediate production and on that basis, the Respondent argues that the Secretary failed to prove a violation of the standard and accordingly the citation should be vacated. Response Br. at 10-11.

At its heart, Consol's argument is that, at most, this was a technical violation since the certifications were produced, albeit it was not able to locate the records immediately. R's Br. at 9. Effectively, the inspector agreed that Consol had misplaced them and did not suggest that there was any chicanery involved. Thus, there was no suggestion of falsified or forged documents. Respondent notes that the standard "is silent as to when the certifications must be provided, rather, it simply requires that the ATRS systems be "certified by a registered engineer" and "made available" to an authorized representative of the Secretary. Therefore, because Consol complied with both requirements, Citation No. 9077087 should be vacated because the Secretary has failed to prove a violation of the standard by a preponderance of the evidence. *Id.*

In the alternative, should the citation be upheld, Consol believes any negligence should be found to be "low" for two reasons. First, the certifications were produced and second, "Mr. Shaffer testified that the metal plaques or tags on each piece of equipment do[ ] certify that the ATRS system complies with the requirements of the standard and can be inspected at any time." *Id.* at 10.

The Secretary contends:

> Respondent violated this standard because it was unable to produce to the Secretary's representative the engineering certifications for six roof bolters and three continuous miners. Although Respondent's witness testified that these pieces of equipment have plaques describing the manufacturer, approval number, and serial number (R. at 558-559), Respondent did not offer any credible evidence or photographs that these plaques have the certifications required by § 75.209. Based on his extensive mining experience, Inspector Yates confirmed that the plaques do not have the required engineering certifications.

Sec. Br. at 14. According to the Secretary, this is fatal to the Respondent's claim. It has already been noted that, as a paperwork violation, the inspector designated the gravity of this citation as no likelihood of injury, non-S&S, no lost workdays, and affecting one person: an examiner or miner.

Analysis of Citation No. 9077087

The Secretary seeks a $118.00 civil penalty for this violation. The operator's stance that the citation should be vacated is without merit. In response to the Respondent's argument that the records were ultimately provided, the Court observes that there has to be an implied reasonable time to provide these documents. This means that the Respondent's contention can't be upheld other than for delays of short duration in producing the documents, meaning hours and not many at that. If the mine is unable to produce the documents by the time the day's inspection has concluded, there is a problem. Whether more time will be afforded needs to be left to the inspector's discretion, which will in turn depend upon the reason advanced by the mine operator to warrant additional time. But here, no such dilemma was faced. The delay was not short, taking nearly a week to furnish them. Therefore, the certifications were not "made available" in the common sense meaning of the term, and the fact of violation was established.

However, the Court finds that the Respondent's negligence was low, not moderate. There was some negligence here; the Respondent failed to meet the standard of care by being unable to produce the records within a reasonable time after the request to supply them. In examining whether the operator knew or should have known of the violative condition, it can only be said that the operator was unaware of the misplaced records until asked to produce them and that it should have maintained better recordkeeping. The operator failed to meet the standard of care by being unable to produce the records within a reasonable time after requested to supply them. Accordingly, this situation fits as no more than low negligence, under the circumstances.

As with the Court's analysis for the stationary electrical equipment citation, discussed above, given in this instance that the negligence was low and upon consideration of the remaining statutory penalty factors, a $59.00 (fifty-nine dollar) penalty is appropriate.

Citation No. 9077091

Citation No. 9077091 alleges a violation of 30 C.F.R. § 75.1725(a), alleging a lifting device on the Operator's #55 Brookeville jeep was not maintained in a safe working condition. The Respondent seeks to have the citation listed as non-S&S, unlikely risk of injury, and low negligence.

Inspector Yates also testified about Citation No. 9077091, Ex. P-8, which he issued on January 19, 2018, citing 75.1725(a) for a material lifting device mounted on the 55 Brookville jeep. The standard, titled, "Machinery and equipment; operation and maintenance," provides at subsection (a) that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The inspector observed that the hoisting cable on the lifting device on a longwall maintenance "Jeep" mantrip was attached to a hook in an improper manner. Tr. 150. The lifting device was a small crane, [the venture lifting device] akin to a winch, located on the back of the mantrip. The cable is a wrapped stainless steel variety. *Id.*

The safety issue was that "about two or three feet of the original cable was broken off and still attached to the hook, and [he added] someone had run the other cable from the winch back through and tried to braid it back in and make a connection point for the hook." Tr. 151. Photographs of this hoisting cable were admitted in the record. Tr. 151-52, Ex P- 9A-E. The cable was frayed with broken and loose strands, and these had been wrapped with black tape. This condition of the cable presented a hazard because it had not been terminated in a proper fashion, with the risk that someone could get smacked in the face or get cut. Tr. 154. The Jeep mantrip is used on the longwall for lifting very heavy components, such as motors, jacks and pumps. Tr. 155-56. The mine tried to fix the improper termination by braiding it back into itself. *Id.* Instead of properly terminating the cable, such as by using an eyelet, the mine just had the cable running through the hook. The end result was that upon pulling and applying pressure, the improper termination could fail. The inspector observed that the cable had already creased and started to pinch, evidencing that tension had been applied to it and therefore that it had been used to lift equipment. Tr. 157.

At its core, the inspector concluded that the cable broke when used improperly or when lifting something that was too heavy. Instead of performing a proper repair, which would've necessitated taking the cable out of service, this unsafe fix was attempted. A proper fix wouldhave required a new cable or properly terminating it on the hook. Tr. 159. The Jeep was not tagged out and consequently it was available for service. Tr. 160. The inspector characterized the negligence as moderate because the attempted, inadequate, fix took some time to perform, and therefore evidences that the operator knew about the issue. Following up on that point, he inspector stated that it was possible for him to have considered the negligence to have been high because to make an inadequate repair reflects that the operator knew they would need to be using the cable. Tr. 161. In fact, the inspector believed that the cable had been used with the inadequate attempt at repair, because of evidence as to the manner in which it was connected to the hook. *Id.*

The inspector emphasized the hazards – the hook could fly off and one could drop a load. Further, the cable could break, especially given the way the hook was attached to it. If that happened, the cable could come back and contact the person operating the equipment or one who was helping to load the Jeep. Tr. 162. Thus, the inspector agreed that two hazards were presented: the cable snapping and hitting someone and a load falling. *Id.* The potential injuries could be quite serious, ranging from "[c]uts, broken bones, contusions, and considering what loads you have, the motors, it could easily crush your legs. You know, it could crush your feet, maybe even amputation if it hits right." Tr. 163. Although he marked the injury as lost work days or restricted duty, he stated that he could have marked it as permanently disabling with one person affected. *Id.*

On cross-examination, the inspector agreed that this equipment is to be examined weekly and there is to be a pre-operation inspection each time before the equipment is to be put in service. Tr. 169. Pertinent to that point, he noted that he found the condition at the end of the shift, so it had been used on that shift. *Id.* The inspector's emphasis was upon the condition of the cable, not the condition of the hook; the fact that the cable was shiny around the hook showed that it had been used on the hook. Tr. 170. The inspector agreed that there could be "red zone considerations" in the use of the winch, meaning that, if followed, a person would be a safe

distance from the cable in the event of a mishap. Tr. 171. At bottom, the concern of the inspector was that if the improperly terminated end were to fail, the whiplash effect could injure a miner. Tr. 180. Further, lifting straight up is not the only function involved, as the cable may be used to drag loads before attempting a lift. *Id.*

The inspector agreed with the Court's summary of the two hazards associated with this citation: "One is that the cable itself, this jury-rigged cable, could just come undone and perhaps whip and hit someone possibly" and the other is that if it collapses, due to this poor way to secure the hook, it could also result in whatever this hook was intending to lift, that item could drop. Tr. 184. On re-cross examination, the inspector agreed that miners are supposed to operate this machinery from a distance. Tr. 187.

Respondent's Mr. Stein was with Inspector Yates for this citation as well. The jeep was parked in an area between entries where rides not in use are parked. Stein described this area as the "track shoot." Tr. 409. Ex. R-12 reflects Stein's notes regarding this citation. Stein related that the inspector came to the jeep and "saw on the crane there was tape on the cable, and he pulled the tape off the cable to see what was underneath it, and the hook had been broken off. They looped it back on and stuck it there, so the cable I believe wouldn't roll back up into the spool." Tr. 410. Essentially, Stein's description was in accord with the inspector's. Ex. R-13, a photo, shows the jeep and its boom on the back end. *Id.* Stein, referring to page 3 of the exhibit, stated that there is metal shield on top of the boom. Tr. 411. As indicated in earlier testimony, the boom is used to pick up broken equipment, such as a longwall motor and bring it to the track. Tr. 412. Also, consistent with earlier testimony, Stein explained that there is a cable on the spool and a hook which was used to pick up the piece of defective equipment. Once picked up, the boom would deposit the item on the duck bill. Tr. 413. He also agreed about the red zone, adding that the miners were trained "to be two times the length of the cable that they're working with out of the way, and they would also have the piece of equipment itself, the Jeep, between them and what they were picking up." Tr. 413. This training included demonstrating to the miners "how far the cables would fly. After it was over, they would go look and see how far down the entry it went and to show them, you know, you got to be out of the line of fire, out of the red zone, and everybody in our mine went through that [training]." Tr. 414.[22]

[22] Respondent attempted to introduce a record of the weekly exam for this equipment, but which record had not been disclosed to the Secretary. The exam record purported to show that the equipment had been examined on the day prior to the citation. Tr. 416. Yet, Respondent's Counsel stated that he "would represent to the Court that the examination records are not consistent with that date." Tr. 417. The Court denied the request for the record to be introduced. Tr. 418-419.

Referring to Ex. R-8, the citation in issue, Stein believed that an injury was unlikely, offering as his reasoning that

> it was metal on metal. ... if it was used, it would slip right out. And there's a safety latch on the hook, so if the cable [were to] come off, it's going straight up in the air because they use it to pick things up. They don't use it to pull, and it would be lucky if it held five pounds. It was held on by tape.

Tr. 419-20.

Upon cross-examination by the Secretary, Stein admitted he had never operated this crane and that it was not locked or tagged out and accordingly it was available for service. Tr. 420. He also did not take issue with the inspector's description of the cable, agreeing that the damaged area was held on by tape and looped back through itself. Tr. 421. He also agreed that only the area where the spool is located was completely covered by metal. Tr. 422. Referencing R-13, the manual, and the diagram of the crane within that, Stein agreed that towards the end of the boom is an exposed area and also that "any area underneath where the cable runs through the pulley down to ... the hook" is also exposed. Tr. 423. Additionally, Stein agreed that "[i]f the the cable snapped ... where the area was damaged, it was above where the hook was [located] [and] if someone was attempting to use this crane to lift a piece of equipment in that condition, it would have snapped at that point." *Id.* Respondent's counsel tried to diminish Stein's adverse testimony, asking what would occur if the cable were to snap while lifting a piece of equipment, to which Stein responded that the cable would have gone up in the air or backtracked into the spool. Tr. 423.

Respondent's Brief remarks that:

> [t]here is no indication that the winch was used or could have been used in this condition and the Inspector did not observe it being used in this condition. There was no evidence that an agent of the operator was aware of this condition. On those bases, it argues that the Citation should have been marked non-S&S and low negligence.

R's Br. at 3-4. The Respondent also asserts that the Secretary failed to meet his burden of establishing that the cited condition contributed to a discrete safety hazard warranting an S&S designation and also failed to show that the winch cable was reasonably likely to cause an injury. The Respondent asserts that the lifting device is used primarily for lifting equipment and components onto and off the track mounted Jeep. However, at the time the citation was issued, the machine was found at the bottom, was not in use, and the winch controller was disconnected from the power source. Supporting these observations, the inspector conceded that the controller must be connected to the power source to operate the boom and lift an object with the machine. Respondent contends that Yates further conceded that he was only guessing that the cable had been in that condition for at least a shift and had no proof to support that allegation. Thus, Respondent asserts that there is no indication that the winch could have been used in the condition that it was found and that Yates conceded that he did not see it used in this condition.

Speaking to the twin hazards identified by the inspector, whiplash and an item being dropped upon attempting to perform a lift, the inspector conceded that use of the controller would allow the machine operator to stand 20 feet away from the device and the object being lifted while in use and that the purpose of the controller is to allow the machine operator to stand away from both the machine and the object that is being lifted. Consol trains its employees to stay out of red-zones and to use the controller when operating the lifting device. Thus, Consol asserts that use of the controller would negate both potential sources of injury identified by the inspector. R's Br. at 33-34.

Respondent maintains that, in order to be injured by the cable, the machine operator must either be standing directly underneath or beside the object being lifted or have greater than 20 feet of cable off the spool to be in reach of the cable in the event of a whiplash. However, it asserts that both scenarios are extremely unlikely to occur because the machine is designed to vertically lift very heavy objects for short distances. Thus, it is unlikely that greater than 20 feet of cable would ever be utilized for any lifting application that would place a miner in danger of being struck by a whiplash. Respondent also contends that Mr. Stein explained that a whiplash is very unlikely to occur because if the cable snapped, it would most likely backlash into the spool and away from any miner. Further, given the large size and nature of the components that are typically lifted with the device, it is very unlikely the cable could be used for lifting such objects in the damaged condition it was found. After all, Stein testified that because the hook was merely taped on, he believed that it would be difficult to lift as little as five pounds with the machine. Therefore, because it was not reasonably likely that this condition contributed to a discrete safety hazard or that any miner would be injured by this condition, Citation No. 9077091 should be reduced to non-S&S and unlikely. R's Br. at 34.

Consol further contends that the negligence level should be "low" because there were considerable mitigating circumstances. It notes that the controller to energize and use the winch was not plugged in on the #55 Brookeville jeep at the time the citation was issued and that the machine was located at the bottom and was not in use at the time the citation was issued. Moreover, there were no reports of the cited condition and the operator was unaware that the condition existed. Contrary to the inspector's assertion that the cable was looped back into itself and covered with tape for continued use, Respondent asserts that the cable appeared to be taped *to prevent* the loss of the hook and to prevent the broken cable from being pulled up into the boom. Consol also submits that the condition could have developed since the time of last examination and that the Secretary failed to prove otherwise. For those reasons, it believes that the negligence designation is more reasonably identified as low. R's Br. at 35.

In its Response Brief, Consol disputes the Secretary's claim that the exhibit photos show that the cable on the Venturo lifting device had been used in its damaged condition. Consol counters that this is simply speculation and that the photos only show that the cable on the lifting device was broken and the piece with the hook had been tied on, with electrical tape added. Consol contends that S&S requires a more detailed analysis of the surrounding facts and that a judge must determine if the specific circumstances present at the time of the violation make a hazard and injury of a reasonably serious nature reasonably likely. R's Response Br. at 12.

Consol suggests that "[i]n this case, it is more likely that the cable was tied and taped up simply to avoid losing the hook and to keep the cable from being pulled back into the boom," adding that "[e]lectrical tape and the modest tie job were not going to allow the cable to be used to lift a load [and that] [c]ommon sense dictates that if the lifting device was used in this condition, the taped/tied area would come apart." *Id.*

Consol submits that inspector Yates was speculating when he suggested the cable had been used in this condition, maintaining that the hazard identified by Yates, that the cable would snap with the load dropping on a miner, "strains logic." Given the way the lifting device is used with a remote controller and the location of the broken cable, Inspector Yates' account strains logic and should be rejected. The citation should be Non-S&S. On the issue of negligence, Inspector Yates failed to present any evidence that an agent of the operator was aware of this condition. This equipment is examined weekly. There is no evidence that the condition existed at the time of the last exam, so the Secretary presented no evidence that the operator knew of this condition." *Id.* at 12-13.

The Secretary's brief simply asserts that because the lifting device cable was not maintained in safe operating condition and had not been taken out of service, the standard was violated, noting that the Respondent's witnesses did not present any evidence or testimony contradicting the fact of violation of this standard. As for gravity, the Secretary observes that the Jeep was neither locked nor tagged as out of service, and was available for use. He contends that, relying on the inspector's testimony, a miner attempting to use the lifting device in that condition would be exposed to two discrete safety hazards: the cable snapping under the weight of a load and striking a nearby miner due to a "whiplash" effect of the tension on the cable; and the load itself dropping and striking a miner. Either hazard could reasonably be expected to cause cuts, broken bones, contusions, and even amputations, in the event of a falling load. One person would be exposed to this hazard: the miner operating the crane with the remote. Again, under *Eagle Nest*, a respondent cannot abdicate its duty to minimize and eliminate safety hazards by shifting that responsibility onto its employees, nor can a respondent attempt to claim mitigation regarding S&S when it rests upon the assumption that miners would stay out of red zones or otherwise exercise caution. Sec. Br. at 16. As for negligence, the Secretary notes that the inspector designated the violation as moderate negligence because it appeared to have existed for at least one shift. The evidence is compelling – "[r]ather than locking and tagging the lifting device out of service, someone had attempted to loop the broken cable back into itself and cover it with tape." Sec. Br. at 17. Given these circumstances, the Secretary submits that, using the six statutory criteria, MSHA's proposed civil penalty of $638.00 is appropriate.

Analysis of Citation No. 9077091

To the Court, though intended to show the hazard associated with a cable whiplash which hazard the mine wanted to impress upon the miners, Stein's testimony demonstrated how real the hazard was. It is hardly sufficient to depend upon miners' adhering to their safety training, especially when a cable, as in this case, was insufficiently jury-rigged. Thus, it is no answer to deal with a hazard by hoping that miners will adhere to their training about risks from a cable failure.[23]

On the day in issue, Stein asserted that the controller was unplugged. Tr. 414. He agreed that Consol has a policy requiring that equipment be pre-operationally checked before it is used. Tr. 414-15. Here too, that is no answer to the hazard presented by the condition, since the method used to secure the cable was insufficient and an intentional act, contrary to that policy. The tape served to hide the inadequate fix.

There is no dispute about the condition found by the inspector; the cable was broken and attached to the hook improperly. The Court accepts the inspector's credible testimony that the cable had been used in its improper condition, as he discovered the defect at the end of a shift. It is important to note that the Jeep was not locked or tagged out and was available for use. Moderate negligence was a generous finding by the inspector, as the improper fix took some time to accomplish. There were two hazards presented by this condition: the cable could snap back and a load could be dropped. The Court rejects the Respondent's claims that there were mitigating circumstances and finds that moderate negligence was involved. This violation was clearly S&S. The twin discrete safety hazards were identified by the inspector, presenting a clear measure of danger to safety. Thus, there was a discrete safety hazard, a measure of danger to safety, contributed to by the violation, and such hazard was at least somewhat likely to result in harm. The seriousness of the expected harm was also established by the inspector's testimony that such harm was reasonably likely to result in lost workdays/restricted duty-type injuries affecting one person.

The Court finds that, applying the six statutory criteria under section 110(i) for this S&S violation, which also involved moderate negligence, an assessment of $638.00 is appropriate.

Citation No. 9077089

This matter alleged a violation of 30 C.F.R. § 75.517, for a power cable with two holes in its outer jacket. Ex. P 10 The citation was issued on January 19, 2018 and involved a 480-volt cable supplying power to the 6B shuttle car on the 7 north mains, which car was in an active working section. Tr. 189-190. The Respondent seeks to have the citation vacated.

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[23] Though the Court does not factor into its analysis for the determination of violation for this citation, nor for the penalty imposed for this citation, No. 9077091, it is still noted that less than two weeks earlier, there was another dangerous cable situation found at this mine as reflected in Citation No. 9077085, which was issued by the same inspector, as discussed earlier in this decision.

The standard requires that all cables will be protected from damage and properly insulated. Specifically, the text of the standard, which is a statutory provision, is titled "Power wires and cables; insulation and protection," and provides "[p]ower wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

While inspecting the cable, the inspector found two holes in the outer jacket but there were no damaged leads inside. However, the cable's inner power leads were exposed. Tr. 193. Consequently the inspector determined that the issue could be fixed with a boot wrap. Tr. 191. At the time he checked the cable, it was connected to the shuttle car and the power was on. *Id.* He checked the entire length of the cable, which was about 1,000 feet. Exposure to this condition would occur when moving the cable, where, for example, it was in the way or there was slack around the power center. The damaged area of the cable was not on the working section. The cable does run on the mine floor. If the damaged area is not corrected, over time it could increase the chance of a shock and this could occur even if the copper leads were not exposed. The cable can run up against equipment, such as load centers. Tr. 194-95. Also, cable gets run over in the mining environment. With its 480 volts, that presents a fatal current. Tr. 195. By comparison, on the surface, people can be killed by 110 volts. Tr. 198. Exposure to the risk would occur when an examiner is checking the cable or when one is moving it. Tr. 198. Again, the cable was energized and the shuttle car was not locked out at the time the inspector found the condition. Tr. 198. However, the inspector marked the injury as unlikely to occur as coming into contact with the affected section was not likely and the inner conductors were undamaged too. Tr. 199.

The inspector marked the negligence as moderate since the mine told him they had just checked the cable and it was good, yet he then found the two holes. Tr. 196. The mine is required to visually check the cable completely once each production shift. Tr. 197. The holes he found were a good distance from the snub.[24]

Upon cross-examination, the inspector informed that the holes were less than an inch. Tr. 200. When asked why he did not take a picture of the condition, the inspector responded that he tries to avoid taking pictures inby because of methane. Tr. 200. Even if he wanted to take pictures inby the last open crosscut, he would have to receive permission from his District Manager. Tr. 202. The inspector does not factor in any "preop," when assessing a broken jacket. Instead, the inspector evaluates based on the condition he finds. Tr. 203. The inspector did acknowledge that there was a mechanic who was fixing a splice. Tr. 204. The operator's duty regarding a cable's condition is to visually inspect it; the operator is not required to examine a cable hand over hand, as the inspector did. *Id.* When challenged about his claim that the power to the cable was on, the inspector reasserted that it was on, adding that he included that in his notes. Tr. 206. Because the inner leads were not damaged, he did not mark the violation as

[24] A "snub" pulley is an idler pulley mounted as to increase the arc of contact between a belt and a drive pulley. When used in a wrap drive, it has the added function of changing the direction of the return belt travel. It is related to a requirement that the mine not have more cable than what is needed to reach the face. This means that slack has to be kept outby that area. It is on a reel so that it unfurls and also reels back hydraulically in order to keep tension on the cable. It gets reeled back onto the shuttle car. Tr. 195-96.

S&S. Tr. 208. Further, even if the inner cables were exposed, that would not trip the ground cable. That would occur only if one of the inner cables were to cross with the other or with the ground. Tr. 209.

Referring to Ex. R-15, the inspector agreed that exhibit is an onshift report and that it reflected that maintenance was performed on that cable. Tr. 210. Ex. R-16 reflected a weekly exam on the equipment in issue, which was performed the day before the citation, on January 18. *Id.* The inspector agreed that such cables are subjected to fairly extreme conditions and that a defect or cut in a cable's outer jacket can occur rapidly. Tr. 211. However, the inspector rejected the assertion that the condition he found developed since the last exam, responding, "Not the day prior, absolutely not. I believe he missed them -- on his exam." Tr. 215. He reiterated his view that the problem developed since the last exam because it was outby and they didn't move the power. Tr. 217. He did not believe that the cable had been moved because "[y]ou're only supposed to run with enough cable from that loading point to your miner. [ ] As you advance, you move more cable into your reel and through your snub." Tr. 218.

On redirect, the inspector affirmed that a pinhole sized hole in a 480 volt cable can cause a shock. The inner leads do not provide protection against mining conditions, nor do they protect against wear and tear in normal mining conditions. Tr. 219. The inspector informed that even with a pinhole defect one can get shocked, as the electricity could go to ground through the miner contacting it. Tr. 220. The Secretary then made a motion to amend the citation to S&S, reasonably likely. It was then immediately pointed out that on the day the inspector issued the citation he did not mark it as S&S. *Id.*

The Respondent's witness Stein was directed to Ex. R-14 and the issue of the 6B shuttle car. He stated that the shuttle car operator was having a splice done on the car's cable. As the cable was unreeled, the operator offered for the inspector to check it. The inspector began doing just that. The shuttle car was not under power at that time. Tr. 426. Stein admitted that the inspector found a defect with the outer jacket on the cable between the snub and the machine. Tr. 427. He described that there were two holes, the size of a BB gun shot. The holes were corrected by being wrapped with tape. Tr. 428. Stein believed that the inspector's use of a screwdriver could cause damage to the inner leads, though he saw no damage to those leads. *Id.* Regarding the likelihood of injury, Stein expressed that it wasn't likely since no internal leads were exposed. *Id.* The Court then noted that the inspector marked it as unlikely as well. *Id.* Similarly, Stein believed that a fatality would not occur because no leads were exposed. Tr. 429. Because the holes were so small, Stein believed that the negligence should be considered low. Further, based on his mining experience, he expressed that such a condition could occur rapidly. *Id.*

On cross-examination, Stein reiterated that the shuttle car was not powered up, and further, if the inspector said otherwise that would not be true. Tr. 430. Stein felt his recollection was better based on his notes, Ex. R-14. Tr. 430-31. It was also his view that inner power leads on a trailing cable would need to be exposed for it to be S&S. Tr. 432. He allowed that, if left uncorrected, the holes could get larger and eventually there could be damage to the inner leads. Tr. 432. He did not agree that if one could still get shocked upon touching a power lead that was not damaged. The Court sought clarification, asking, Stein "[i]f the inner lead is not broken,

[and] there's no copper exposed," if he was asserting one cannot get a shock. He affirmed that was his view, informing "[u]nless you touch the copper, you're not getting shocked." *Id.* Stein agreed that the cables would be handled weekly during permissibility. Tr. 434.

On re-direct, Stein informed that when the weekly permissibility exam is being performed, the power is off. Tr. 435. He also opined that miners would locate conditions, like the holes cited in this instance, during permissibility exams or pre-operational checks. *Id.* In response to the Court's question, Stein stated that a pre-operational check had not just been done; instead they had just completed a splice. *Id.* However, he then stepped back from that claim, stating that he did not know if the shuttle car operator had done his pre-op at that time. Tr. 437. In performing the pre-op, the shuttle operator is not required to do a hand over hand exam. Tr. 438. Stein agreed that his description of the holes as BB size was his description, not that used by the inspector. Tr. 437.

Respondent contends that this citation should be vacated. Its brief notes that "[a]t the time the citation was issued, the shuttle car was not in use and had been de-energized to repair the cable by making a cable splice. Prior to the issuance of the citation, the operator had not yet had the opportunity to walk the cable to check its condition prior to placing the shuttle car back into service. Because work on the cited cable was in progress, including checking the cable for any additional areas that needed repair, Citation No. 0977089 [sic] should be vacated." R's Br. at 4.

In the alternative, Consol argues that "if the violation is upheld, the reasonably expected injury would not be fatal and the negligence designation should be "low," as the "inner leads in the two cited areas of the cable were not exposed and the condition would have been discovered in the pre-operational check before the shuttle car was placed back into service. It asserts that the shuttle car was de-energized, negating any potential for a miner to receive a fatal electrical shock from handling the cable. Consol also asserts that the "condition was not apparent to any agent of the operator" and the Secretary "failed to prove that the condition was present at the time of the last exam." *Id.*

Again, Consol advances a twin argument – that the citation should be vacated or alternatively, the negligence should be found to be "low." R's Br. at 10, citing *Ziegler Coal Company*, 7 FMSHRC 452 (Mar. 1985). Additionally, Respondent argues that "[p]rior to the issuance of a citation, an operator should have the opportunity to check equipment for violations while repairs to the equipment are ongoing." R's Br. at 10. Consol contends that its situation is analogous. It also looks to *Beaver Creek Coal Company*, 12 FMSHRC 868, 871-73 (Apr. 1990) for support, asserting that the circumstances involved "ambiguous communications between the operator and the inspector while repairs to equipment were ongoing." R's Br. at 10. However, Consol acknowledges that in *Beaver Creek*, the continuous miner involved in that citation was locked and tagged out for repairs. *Id.* The judge in that case vacated the citation prematurely because *Beaver Creek* had not yet completed all the repairs and made its in-house permissibility check. *Id.* at 11, citing *Beaver Creek*, 12 FMSHRC at 873.

Consol challenges MSHA's claim that the shuttle car was energized prior to the inspector's inspection of the cable and that he instructed an escort to disconnect the energized cable from the power center so that he could place his lock and tag on the cable. R's Br. at 11-12. Since the inspector agreed that a splice was being performed on the shuttle car cable, it is difficult to ascribe credibility to the inspector's claim that the work was being done on an energized cable, especially since Consol was not cited for that.

In any event, Consol emphasizes that "clearly [it] had not yet completed all the intended repairs while the shuttle car was de-energized, including performing a required pre-operational permissibility check of the entire shuttle car." *Id.* at 12. In that regard it notes that Consol's employees are required "to perform a pre-operational permissibility check on all equipment prior to the equipment being energized and placed into service." *Id.* Consol urges that in fairness "while repairs to equipment are ongoing, the operator should have the opportunity to check the entire machine for violations in accordance with its in-house pre-operational policy prior to the issuance of a citation." *Id.* It adds that "[t]he cited area of the cable would likely have been discovered during the pre-operational check of the cable had Consol had the opportunity to do so prior to the issuance of the citation." On that basis, it contends that the Secretary did not establish the violation by a preponderance of the evidence. *Id.* at 13.

Again, presenting its alternative position, Consol argues that if the citation is upheld, low negligence is the appropriate characterization. It notes that it is undisputed that repairs to the shuttle car were going on, that the cable defects were quite small and the inner leads themselves, which were not bare, were not damaged. *Id.*

The Secretary notes that the cable is on a hydraulic reel, nicknamed a "snub" that keeps tension on the cable as it is reeled back up from the shuttle car and that miners move the snub whenever the section moves during mining. The cables are energized when the snubs are moved. The damaged areas of the cable were located in between the snub and the shuttle car, and the Secretary observes that it is undisputed that the cited cable was damaged. Therefore it was not insulated adequately or fully protected. Sec. Br. at 17.

The Secretary also urges that the Court should grant the Secretary's motion to amend the citation to reasonably likely, and significant and substantial. The motion was made following the testimony of Inspector Yates. The Secretary notes that, in line with the Federal Rules of Civil Procedure, the Commission procedural rules have been interpreted to allow liberal amendment of pleadings and citations in advance of a hearing, during a hearing, and even after a hearing, so that the pleadings conform to the evidence adduced at trial, citing *Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997) (allowing post-hearing amendment of citation); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289-90 (Aug. 1992); *Portable Inc.*, 36 FMSHRC 279 (Jan. 2014) (ALJ Moran) (granting motion to plead in the alternative). It adds that the Respondent did not object to Petitioner's oral motion to amend during the hearing, nor has Respondent asserted any bad faith, dilatory conduct, undue delay, or prejudice caused by the Secretary's motion to amend the gravity of Citation No. 9077089 and that the underlying facts and evidence are unchanged. Therefore, the Court should grant the Secretary's motion, consistent with Commission case law

and the spirit of liberal amendment of pleadings "when justice so requires." Fed. R. Civ. P. 15(a).[25] Sec. Br. at 18.

In support of its contention that the violation was reasonably likely to result in a reasonably serious injury, the Secretary notes that at the time of issuance, the damaged cable was energized from the load center and connected to the shuttle car and that the shuttle car was available for service. It adds that the Inspector locked it out of service with his own lock after the operator knocked power and unplugged the shuttle car. The Secretary contends that one miner would be exposed to fatal electrocution hazards when handling the cable to move it out of the way. Additional exposure to the cable occurs when an examiner is checking the cable during weekly examinations or pre-operation. Although the Secretary concedes that the inner conductors were undamaged at the time of issuance, over time, the two holes would continue to deteriorate and become impacted with coal or moisture, or become wet, which would increase the shocking hazard. On those grounds it submits that this Citation should be affirmed as S&S. As for negligence, the Secretary maintains that the operator knew or should have known of the damaged cable and accordingly moderate negligence is appropriate. Given these considerations, the Secretary believes that MSHA's proposed civil penalty of $638.00 using the six statutory criteria is fully warranted but beyond that because the evidence supports modifying this citation to S&S, reasonably likely, the Court should assess a higher civil penalty reflecting those more serious considerations. Sec. Br. at 19.

Analysis of Citation No. 9077089

Respondent seeks to have this citation vacated. The inner power leads were exposed but not damaged. The two holes found by the inspector were small, being less than an inch. Exposure to the risk would occur when an examiner is checking the cable or when one is moving it. The inspector marked the injury as unlikely to occur, as coming into contact with the affected section was not likely and the inner conductors were undamaged too. It was not S&S, nor did the inspector mark it as such. Thus, the Court does not subscribe to the Secretary's motion to amend the citation, asserting that it was S&S. The Court also finds that the power to the cable was not on and that the inspector's recollection was inaccurate on that issue.

The negligence issue is more difficult to evaluate. The inspector marked the negligence as moderate, since the mine told him they had just checked the cable and that it was good, yet the inspector then found the two holes. Tr. 196. Given the circumstances of the discovery of this condition, that repairs were being made on a different section of the cable, it is unreasonable to find that the negligence was moderate. Low negligence is the more appropriate designation. Given these findings a penalty of $319.00 is more appropriate.

[25] The Court observes here that, under Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), the Federal Rules of Civil Procedure govern Commission proceedings where the Commission's own procedural rules are silent.

Citation No. 9077092

Citation No. 9077092 alleges a violation of 30 C.F.R. § 75.1504(d), for a "missing signature" violation. The standard cited is titled, "Mine emergency evacuation training and drills. The Respondent seeks to have the citation vacated. The citation was issued on January 22, 2018. Ex. P-11. It came about when the inspector was checking records and discovered that the operator failed to certify by signatures that the training and drill had been conducted. ." There is no claim that such training or drills were not conducted. Rather, at issue is subsection (d) from that standard, which provides under "[c]ertification of training and drills," that "[a]t the completion of each training or drill required in this section, the operator shall certify by *signature* and date that the training or drill was held in accordance with the requirements of this section." (emphasis added).

Thus, a recordkeeping violation was involved, which is not to suggest that it is unimportant. The inspector marked it as non-S&S and no likelihood. Tr. 221-22. The inspector noted that the mine had already done the required quarterly training and drills, but that they were not certified by the person who conducted the drills nor did the certification list the dates that the drills were conducted. Tr. 222. Without knowing who conducted the training, the inspector cannot know for sure if the miners were actually properly trained. Tr. 223. The period cited was for the fourth quarter of 2017. At the time the inspector issued this citation it was the beginning of the second quarter. The citation was related to the previous year's fourth quarter, which ended in August 2017. Tr. 224.

In support of this citation, the inspector gathered training records which reflected the absence of a signature for the person who conducted the training. Tr. 225. In total, seven signatures were missing. Tr. 226. Though no signature was present, the inspector agreed with Respondent's counsel that the person who conducted the training did list his name and his identification number but the inspector noted that a signature is required. Tr. 229-30. The inspector stated that he had cited the Respondent for this standard on a prior occasion. Tr. 231.

For this citation, Consol contends that since the "training verification documents included the names and employee numbers of all employees who participated in the training, including the foreman who conducted the training," Citation No. 9077092 should be vacated. While Consol contests the violation, if the violation is upheld, the negligence should be "low" because the identity of the person who conducted the training was included on the form. R's Br. at 4.

Consol argues that the standard is silent as to the *type of form* that an operator may utilize to certify that the training has been conducted and that the standard does not provide a definition of the term "signature." *Id.* at 13-14. Consol does admit that the standard requires that the operator shall certify by signature and date that the training or drill was held in accordance with the requirements of this section. *Id.*

Consol notes that it is undisputed that the date the training was conducted and the *printed name and unique employee number* of the persons who conducted and received the training appeared on all forms to certify that the training was held in accordance with the standard. *Id.* at 14.

Trying too hard, Consol maintains that while no *cursive* signature was on the form, all the required information was present. *Id.* Consol argues that a printed name is equal to a printed name as both serve to identify the person who conducted the training. *Id.* Besides, Consol urges, "employees are often also identified by their own unique employee number." *Id.*

Failing to persuade that the citation should be vacated, Consol believes that the negligence should be listed as "low" because the forms did have the date of the training and the names and employee numbers of the persons who conducted and received the training, and beyond that, the only missing information on the form was the name of the person who conducted the training.

As with other citations, Mr. Shaffer was accompanying Inspector Yates for this matter. Directed to Ex. R-17, Shaffer identified it as his notes. He affirmed that he challenged the inspector about this citation. Tr. 511. His objection was that "the documents that he was referencing that he was citing in the citation did have the employee's name on it and an identification number specific for that employee, the individualized personalized number that is identified to that employee." Tr. 511. Shaffer affirmed that upon his review of the training records, the person who conducted the training was listed on the form. *Id.*

Upon cross-examination, Shaffer agreed that on Ex. P-11, there are no signatures of the person conducting the drill on those pages. Stein acknowledged there were names, but no signatures. Tr. 512. On redirect, Shaffer informed that it is easier to identify a name by a number than by a signature. Tr. 513. Upon re-cross examination Shaffer was asked if the standard requires a signature and, upon being shown the standard, he conceded the point and agreed that anyone can write down a number. Tr. 514-15.

The Secretary's arguments were succinct. He noted that the standard does not permit miner identification numbers as a substitute. The Secretary acknowledged that, given this was identified as a paperwork violation, the inspector designated the gravity of this citation as no likelihood of injury, non-S&S, no lost workdays, and affecting one person: an examiner or miner. As for negligence, the Secretary notes that the inspector issued the citation in January 2018 – the second quarter of 2018 and that the training drills in question took place two quarters prior. Therefore, the Secretary maintains that due to the length of time this violative condition existed, the operator either knew or should have known that the records were not properly certified. On that reasoning, it contends that moderate negligence remains appropriate. Accordingly, the Secretary asserts that the MSHA proposed a civil penalty of $118.00 using the six statutory criteria should be imposed. Sec. Br. at 20.

Analysis of Citation No. 9077092

As noted above, Citation No. 9077092, cites a violation of 75.1504(d) and it was issued due to "missing signatures" in connection with conducting training and drills. The Respondent seeks to have the citation vacated. This citation was marked non-S&S and the gravity as no likelihood and no lost workdays. Apart from the Respondent's view that the citation should be vacated, the only remaining dispute is the degree of negligence involved. Importantly, there is no claim by the Secretary that the training or drills were not conducted. Also, at the end of the day, the Respondent acknowledged that the required signatures were not present. Although the person who did the training did have his name and identification number listed on the records, no signatures were present. That means that the standard was established as having been violated. A signature is required and the Respondent must take care to comply with that provision of the standard.

Addressing the other issue, the proper negligence designation,[26] given the other attendant facts, and taking the signature absence in context, the Court concludes that the negligence should be deemed to be low. On that basis and upon consideration of the other penalty criteria, the Court imposes a penalty of $39.00.

Citation No. 9077095

Citation No. 9077095, issued on January 23, 2018, alleges a violation of 30 C.F.R. § 75.514, for a defective splice of a welder power cable. Ex. P-12. The Respondent seeks to have the citation vacated.

The cited standard requires a splice made on a cable be insulated to the same or greater protection than on the cable prior to the splice.[27] Tr. 232. The inspector discovered the condition while checking the welder cable that was wrapped up on the load center. He found that one of the splices was torn open, exposing the inner conductors leads. A splice is used where an outer jacket has been damaged, and the operator has tried to re-insulate that outer jacket back to its original protection or better. The inspector took pictures of the cable, however none of the photos were of the alleged defective splice. Tr. 233; Ex. P-13A-E. The hole was an inch or possibly more. The welder was available for use and plugged in, although the inspector believed that the welder power had tripped and thus it was not powered.

The inspector did not believe the condition was a recent development because there was dirt and dust in the opening and because of that it was his view that the condition had existed for more than one shift. Tr. 238. The inspector informed that the cable was in a confined area with

[26] Although the inspector stated he had cited the mine for a violation of this standard on an earlier occasion, he did not identify any particulars about the nature of that deficiency.

[27] 30 C.F.R. § 75.514, a statutory provision, is titled, "Electrical connections or splices; suitability," and provides "[a]ll electrical connections or splices in conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire."

a lot of personnel traffic. If one were to come into contact with the inner lead, the result could be a fatality. Tr. 244. He marked the negligence as "moderate" because he saw no evidence that it was a recent development. Tr. 246.

On cross-examination, the inspector agreed that the cited cable is essentially an extension cord. Tr. 248. He also admitted that he has not issued many splice citations and none at the Harvey mine. Tr. 249. Further, as noted, he agreed that the power was off the welder and thus it was not hooked up and the breaker was tripped as well. Tr. 250. Stating that he did not cite the mine for a splice issue and that the issue was the condition of the cables, he offered that he should have cited the mine for a "517," referencing 30 C.F.R. § 75.517, which provides "[p]ower wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." Tr. 249. The inspector also agreed that, more than volts, amperage presents the real electrical hazard. However, the inspector was adamant that the cord was on the power center, not on a rib some distance from the power center. Tr. 251. Though Respondent's counsel asserted and the inspector agreed that the place where the miners are plugging things in and activating switches and breakers was not the location where the cord was stored, he added that miners travel by it, if they go inby from the back of the load center. Tr. 252. The inspector advised that miners run the cord to the welder and then energize it and that it could be on hanging on the load center energized. Further, he did not accept the idea that "one bad drag around the corner with enough force could cause the tape to come off," adding that if that were true they would not use such ineffectual splice material. Tr. 252-53. Respondent's counsel suggested that, in the mining environment, dust and dirt would inevitably get into the cut, but the inspector maintained that the dirty condition "took a while" to develop. Tr. 253.

Mr. Stein was accompanying the inspector for this matter too. Stein conceded that they found an area where the outer jacket was damaged. He described the cable as akin to an extension cord for the welder. Tr. 439. The welder was loaded just inby the load center. Although the cord was not plugged into the extension cord, the cord itself was plugged in, but Stein believed it was in the neutral position, meaning it had tripped and the power had to be reset on it. *Id.* Stein agreed that technically, until reset, it was not under power and he maintained that the inspector did not pull the plug out nor lock it out. Tr. 440.

Stein described the procedure for using the welder the point of which was unclear. To use the extension cord with the welder, one drags it to the device. When a task is completed, the cord is wound back on the reel. Tr. 441. Though unsure of the cord's length, Stein stated it was long: some 100 to 150 feet. *Id.* Stein maintained that the person using the cord would check it prior to its use. Tr. 442. Stein also suggested that the cord could be damaged when dragging it around, by hitting debris. As for the damaged area, Stein conceded that there was damage, noting that it was "previously nicked" and it had been repaired with MSHA tape and resealed. *Id.* Stein therefore agreed with the Court's inquiry that this was the second fix of the damaged area. *Id.* On cross-examination, he conceded that the cable was visibly damaged, at least on the outer jacket. Tr. 445. He also agreed that, unlike the other cable citation, the damage was not "BB" size and therefore not tiny, and he admitted that the inspector did not need to employ a screwdriver to visualize the problem. *Id.* Further he allowed that one could see the inner leads, while adding that the insulation was on those leads. Tr. 446. He also conceded that there was

dust and dirt inside the affected area and that on the day the citation was issued, the MSHA tape, used to make the first repair, was damaged. Tr. 446-47.

On re-direct, Stein affirmed that new damage could occur in the process of reeling the cord back to the load center. *Id.* Asked about the notation remarking "no conditions. No actions taken" reflected on Ex. R-20, Stein agreed that could have happened subsequent to the last exam. Tr. 448.

The Court inquired of Stein whether, looking at Ex. P-13D, he would agree that the cable presented a "pretty severe condition which need[ed] immediate attention to correct that." Stein did not agree with that characterization. Tr. 448-49. Stein reasoned that as no copper was exposed there was little concern and also that the pre-operation exam would have found the problem. He added that the cable looked so bad because there were so many layers of tape wrapped around it. Tr. 449. As to whether it needed immediate attention, Stein answered "[t]hey should fix it. If they know it's there, sure, 100 percent fix it. Yes." *Id.*

Beyond the contentions described above, Consol argues that the inspector cited the wrong standard because the condition found was not a splice. Instead, there was a small puncture in the outer jacket of the cable and therefore there was no violation of 30 C.F.R. § 75.514. R's Br. at 5. In the alternative, if the citation is upheld, Consol contends that since

> the welder was not energized or in use at the time the citation was issued and as there were no bare leads exposed on the cable and the broken outer jacket on the cable was not reported to the operator [t]he condition would have been discovered during the pre-operational check and corrected prior to energizing and using the welder.

Id. Under these conditions, the Respondent concludes the expected injury would not be fatal and the negligence should be low.

Consol points to MSHA's program policy manual definition and its definition that a splice is "the mechanical joining of one or more conductors that have been severed." *Id.* at 14, citing 30 C.F.R. § 75.603; MSHA Program Policy Manual, Volume V (2003). Splices are "made with an MSHA accepted and approved splice kit which includes large insulating pads, insulating strips, MSHA printed electrical tape, abrasive sand paper, and solvent wipe." R's Br. at 14.

Elaborating, Consol argues that the condition on the welder cable was not a splice because the conductors inside the cable had never been severed and all the components of an approved splice kit had not been used. Consol's safety inspector testified that the area had been previously taped over and it was terminated by being taped again. Yates' testimony was offered in support of Consol's position, because he stated that "a splice is where the outer jacket has been damaged, and the operator has tried to re-insulate that outer jacket back to the original protection or better." *Id.* at 15. Recognizing the error, the inspector acknowledged that he cited the wrong standard. Consol asserts that it is now too late for the Secretary to amend the citation to name a different safety standard violation. *Id.* at 16.

The Secretary contends that the Respondent violated the standard because the cited cable splice was damaged, exposing the inner conductors. Speaking to gravity, the Secretary states that "[d]epending on how far a miner would have to extend this 'extension cord' cable from the power center to the area being welded, the miner would handle and unravel the wound-up cable off the supply rack, exposing himself to the damaged and unsafely spliced area. He also notes that safety Inspector Stein explained that a miner would "just drag it up there." Sec. Br. at 22. Additionally, the Secretary states that "miners frequently travel through the confined, cluttered space around power center, which increases the likelihood that miners may brush up against the exposed inner power conductors." *Id.* Given these considerations, the Secretary views the inspector's evaluation of the gravity as non-S&S and unlikely as generous and that the evidence actually supports a finding of significant and substantial, and reasonably likely. Therefore, at a minimum, the Court should affirm the gravity of this violation as issued, namely, non-S&S and unlikely to result in fatal electrocution injuries to one person.

As for negligence, the Secretary contends that the physical evidence observed and photographed by the inspector supports a finding of moderate negligence. This is the case, given the visible wear and tear on the spliced area and the presence of dirt and dust on the insulated inner leads, and for those reasons the condition likely existed for more than one shift and accordingly, the mine operator knew or should have known of this condition. The Secretary concludes that, applying the six statutory criteria, the proposed civil penalty of $429.00 is the minimum amount to assess. Sec. Br. at 22-23.

Analysis of Citation No. 9077095

The standard cited, 30 C.F.R. § 75.514, addresses electrical connections or splices by requiring that they are to be mechanically and electrically efficient, and that suitable connectors are to be used. It also requires that, for both connections and splices in insulated wire, they are to be reinsulated at least to the same degree of protection as the remainder of the wire. By contrast, 30 C.F.R. § 75.517, the standard the inspector stated that he believed that he should have cited, requires that power wires are to be insulated adequately and fully protected. The citation itself, borrowing from the language of 75.514, asserts that a splice in the cable was not being reinsulated to the same degree of protection. The Secretary did not move to amend the citation by citing 75.517.

The Court takes the view that the correct standard was cited but that either standard would apply. This is because, applying 75.514, in requiring that splices be reinsulated at least to the same degree of protection, there is an implied requirement that such splices be maintained to that level of protection. Here that maintenance level was not kept up, as the splice was torn open.

The parties agreed that the cited cable was akin to an extension cord. Based on the credible testimony, the Court does not buy into the claim that the condition was a recent development. Nor does the Court accept Stein's view that this was not a pretty severe condition. Even Stein admitted that it looked bad, though he offered that was due to so many layers being wrapped around it. The Court would also note that many of the Respondent's contentions were directed at the gravity associated, such as whether the power was on at the time the condition

was found, but notes that the citation already listed it as unlikely. Though unlikely, a fatality was the correct injury or illness that could result.

Therefore, the only remaining determination is the degree of negligence. For this, the Secretary contends that it should be found to be moderate, seeking a civil penalty of $429.00. Given the obviousness of the condition and the Court's finding that the inspector's testimony that this was not a recently developed condition, it is found that the negligence was moderate. As such, upon independently applying the statutory penalty criteria, the Court imposes a penalty of $429.00.

Citation No. 9077096

Citation No. 9077096 alleges a violation of 30 C.F.R. § 62.130(a) for a noise violation on a longwall. The Respondent seeks to have the citation vacated. As the parties spent considerable time on this matter, both at hearing and in their post-hearing submissions, the Court takes a commensurate approach in its decision.

Citation No. 9077096, issued on January 24, 2018 by Inspector Yates, invoked 30 C.F.R. § 62.130(a). Tr. 264, 283; Ex. P-14.[28] That standard, titled, "Permissible exposure level," provides:

> The mine operator must assure that no miner is exposed during any work shift to noise that exceeds the permissible exposure level. If during any work shift a miner's noise exposure exceeds the permissible exposure level, the mine operator must use all feasible engineering and administrative controls to reduce the miner's noise exposure to the permissible exposure level, and enroll the miner in a hearing conservation program that complies with § 62.150 of this part. When a mine operator uses administrative controls to reduce a miner's exposure, the mine operator must post the procedures for such controls on the mine bulletin board and provide a copy to the affected miner.

The standard requires that miners not be exposed to noise levels over the 90 percent, permissible exposure level ("PEL"). If a miner's exposure level is over 100 percent —a number which allows for an error level of 32 percent— then the operator is required to begin administrative or engineering controls.[29] *Id.* Where noise levels are over 85, that represents an action level; the miner needs to be identified and a hearing conservation plan put in place. *Id.* Prior to this citation, the mine had not been on a "P code," meaning it had not previously been

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[28] The transcript mistakenly referred to the standard cited as 30 C.F.R. § 62.138. Tr. 264. The cited standard was 30 C.F.R. § 62.130(a).

[29] If, for example, a noise level is more than 132, the operator may introduce administrative controls by altering the miner's work schedule so that the exposure to those levels is not for an extended period. Engineering controls, on the other hand, involves "anything feasible from the operator to help silence or muff[le] the sounds of the equipment." Tr. 265. By feasible, it is meant methods that are cost-wise feasible. *Id.*

required to any controls installed to reduce noise. Tr. 278. If the PEL shows that it is greater than 132 percent, a citation will be issued. In this case the inspector, finding such a level, issued a citation that day, as the miner was exposed to 0.3 percent over that amount. Tr. 272.

The context for this citation was that the inspector was conducting a noise survey on the 3A longwall. That day, when still at his MSHA office, he calibrated the dosimeters to be used, and then brought them to the mine. There, he then informed the mine that he would be conducting a noise survey and thereafter he affixed the dosimeters on the miners he was testing that day. Tr. 266. The idea is to have the dosimeters as close to a miner's ear as possible, in order to as closely approximate the noise he was experiencing. Tr. 267. Two calibrations were made before testing; once in the office and then again when the survey is being conducted. *Id.* None of the devices were out of calibration. Tr. 268. The devices were calibrated at 114 dBAs and then attached on six miners, each of whom were on the 3A longwall. *Id.*

Notably, after the testing, the dosimeters calibrations were checked yet again, making a total of three calibration checks. Tr. 275. The inspector was carrying a handheld dosimeter that day as well. *Id.* He rode with the miners and, once at the face, took readings at the locations he anticipated finding the loudest amount of noise, checking levels with his dosimeter. He then continued with his E01 inspection, so as not to interfere with a normal recording of the conditions as the miners worked. Tr. 269. His measurement was as close as possible to a full shift, which was in the neighborhood of nine to ten hours' time.[30]

Speaking to the citation, Ex. P-14, the inspector noted that it reflected that the mine had not previously been over the noise limit. Tr. 274. In this instance, per Ex. P-14, in Column No. 6, survey sample No. 6, it was regarding that sample that caused the inspector to issue his citation. It pertained to the miner identified as "Jodon A," who, the inspector believed was the shear operator on the longwall, which was running during that shift. Tr. 275. The exposure level is derived as an average, referred to as "a dose average" for the entire shift. Tr. 276. The citation was issued after the inspector was again on the surface and after he performed the check to make sure the device was still in calibration. *Id.*

When the inspector advised the mine's Mr. Shaffer and Mr. Hellen of the noise results they challenged his finding, asserting, among other grounds, that he had not performed a correct survey or had failed to follow the program policy. Tr. 278. The mine was not conducting their own survey that day. Tr. 279. Neither of those gentlemen were with the inspector that day; instead Stein accompanied him. Notably, Stein did not raise any issues with the inspector about the way he conducted his noise testing. Tr. 280. The inspector designated the violation as "permanently disabling" on the basis that high noise levels will result in hearing loss. Tr. 281. One person was marked as affected by the violation, as the lone miner was the only individual the inspector found to have been exposed to noise levels above the limit. Tr. 281-82. Negligence was marked as moderate because the operator had no administrative controls in place and didn't offer any noteworthy mitigating circumstances to support a low negligence

[30] This did not include travel to and from the portal but rather from the elevator to the section and back. Tr. 270. Thus, the inspector maintained that his noise measurement recorded a full shift of exposure. *Id.*

designation. He believed there was some mitigation on the basis that the operator didn't know there was an exceedance. Tr. 282.

Terminating the citation was complicated by the fact that the mine had started to move their longwall and therefore replicating a normal shift could not be done. Instead, the mine advised that they were going to try some administrative or engineering controls. Tr. 283. The inspector ultimately gave them several weeks to try those remedies. Tr. 283-84. However, for a citation to be terminated, MSHA had to do a follow-up survey to assure that the noise was no longer above the violative level. Tr. 284. Such a follow-up survey was conducted and the result was that the noise was then "quite a bit less" than the 132 percent. *Id.* In fact, the same miner was tested for the follow-up.[31] *Id.*

On cross-examination, the inspector agreed that, on the day in issue, the miners were being tested both for dust and noise. Tr. 287. The noise dosimeter was clipped on their shirt collar and lapel while the dust pump was on their belt. Tr. 288. The inspector did not agree that the dosimeter was located on the miner's chest. Tr. 290. Nor did the inspector agree that, even it were placed on the chest, the sample would be invalid. Tr. 290-91. While testing, the inspector does not hover near the miners being tested because the concept is to mimic a normal work routine. Tr. 291.

Challenging his experience in conducting noise tests, the inspector informed that he had performed at least ten prior tests. Tr. 294. Although, when checking the calibrations of the dosimeters he did not write down the results, this was because each one he tested was within the acceptable calibration limits, namely between 113 and 115 dBA. Tr. 294, 296. In the case of the cited miner's dosimeter, it tested at 114 dBA. Tr. 298. The inspector then stated that, in fact, all seven dosimeters did test at 114 dBA, although his hand-held dosimeter device did not. Tr. 297, 299.

While seemingly equivocal at first, the inspector stated that he was sure that he did tell his escort that the TWA[32] was 132.3 percent. Tr. 300. The inspector was also sure that the dosimeter for which he found the exceedance was tested at 114 decibels, so there was no issue with that one at all. Tr. 304. The inspector informed that this was the first time he had issued a citation for a mine being out of noise,[33] that is, over the maximum exposure level. Tr. 307.

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[31] There was a small kerfuffle over the terms of the follow-up testing. The mine insisted that only the miner who was over the noise limit had to be tested, while the inspector believed that all six miners required re-testing. Ultimately only the one miner was retested. Tr. 285.

[32] "TWA" refers to "Time-weighted average-8 hour (TWA_8)" and is defined as "[t]he sound level which, if constant over 8 hours, would result in the same noise dose as is measured." 30 C.F.R. § 62.101, Definitions.

[33] The Court took issue with Respondent's suggestion that, because the result was unusual, in the sense that it was the first time the inspector had such a result, the result was inherently suspect. As the Court pointed out, under such reasoning one could never have a violation under this standard, because it would always be the first time such a result occurred. Tr. 308-310.

The inspector confirmed that he checked some potential sources for the excess noise level. Asked if he checked the "conveyor," he responded that "[o]ne of those was the headgate/crusher," adding that "the headgate dumps over onto the tail piece, so that, ... is a conveyer." Tr. 312. These sources were tested with his "Edge" dosimeter. *Id.* He also tested the longwall chain at the shear as it was running, finding that it was at 101 decibels. Tr. 313. The inspector acknowledged that on the day he issued his citation there were two miners in the same occupation. Both had the occupation code of 064, which represents that both miners were shear operators. Tr. 313.

During the course of the noise testing that day, the inspector informed that there were spikes in the noise, though he could not tell when, during the shift, such spikes occurred. One such spike lasted nine minutes when there was a 90 PEL, a level, the inspector informed, to which no one should be exposed.[34] Tr. 315.

The inspector also stated that the 132 time weighted PEL is a level which exceeds the standard because it accounts for an error factor. When the level exceeds 132, a citation is issued.[35] Tr. 320. For a very practical reason, the inspector explained why he did not try to determine the source of the elevated noise – he didn't know there was an excess level until he was outside. Tr. 323. The inspector also denied that the mine's Mr. Stein approached him, protesting that the miner was already above 120 percent and had not even been operating the shear yet.[36] *Id.*

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[34] Subsequently, the inspector learned that the mine had software that could inform the time when that noise exceedance occurred, although it was his understanding that this was not acquired until after the citation was issued and MSHA does not retain its noise records. This practice is so that there is no confusion or conflict with other noise sample records in the dosimeter. Tr. 318-19. Nor, the inspector clarified, did any mine employee ask for the dosimeter records so that they could apply the software to determine the time when the exceedances occurred. Tr. 319-20.

[35] The only exception to issuing a citation is when the mine has a "P-Code." A "P-Code" involves a circumstance where a mine is out of compliance by having a 132. In such an event, the mine performs a reevaluation, implementing administrative or engineering controls and MSHA then performs another sample. If the mine is still above the allowable limit, ultimately administrative controls have to be applied. Tr. 321. Explaining further, the inspector stated that a P-Code means the mine is unable to meet the noise maximum of 132 or less. Tr. 322. He did not know what the "P" stands for. Tr. 322. Delving further, use of the P-Code is an exception of sorts, as it prevents MSHA, for a time, from issuing a "b" order. Tr. 322.

[36] It must be said that many of Respondent's questions were inconsequential or beside the point. One such instance involved survey sample No. 1 where, on the line expressing "calibration check" there appears a "slash" symbol before and after that. On that same line, the Court remarked, and the inspector agreed, that it looks like all of the other marks for sample Nos. 2 through 6 all represent X's and that the only slashes that appear on the Form 2084 relates to survey sample No. 1. Tr. 325-326. The "X" employed by the inspector was his way of marking that he calibrated the device both before and after testing. Tr. 326.

In another point of clarification, the inspector informed that no one from the mine requested that he allow them to install the mine's own dosimeters on the miners. Tr. 328. Though the mine had no authorized administrative controls, the inspector did allow that the mine's use of two shear operators would be akin to an administrative control. Tr. 329. He also agreed that the affected miner was wearing ear plugs. *Id.* The miner's plugs had a noise reduction rating of 30,[37] however the inspector advised that such plugs, per MSHA's standards, mean nothing, informing that MSHA does factor hearing protection. That is only considered if a mine is over the permissibility level. Tr. 330. The inspector did feel it was important to determine why one shear operator would have an 80 reading and the other a 132. To that end he did question the company. Tr. 333.

The inspector identified Ex. R-25 as Chapter Three of the MSHA health and safety handbook, acknowledging that he uses it as a guide for his inspection procedures. Tr. 335. Though he read from page 3-21 of the handbook,[38] the inspector did not agree that prior to issuing a citation a two-step process is required. In that regard he pointed out that a flowchart on the preceding page of that handbook sets forth when a citation should be issued. Tr. 337. Rejecting the R's claim that he skipped step two, the inspector stated that he tried to follow it, because he inquired if there were any administrative controls before performing any noise evaluation at the mine that day. Tr. 338. Further, he checked the mine's bulletin board where, if present, such controls are to be posted, but he observed there were none. *Id.*

On the subject of engineering controls, asked if he made a determination of any engineering controls that weren't being maintained, the inspector informed that he had not. However, the inspector provided a clear response to this challenge, stating that he inquired if the operator had any engineering controls being employed and he found that there were none on the bulletin board. Therefore, he had no engineering controls to consider. Tr. 339. Clarifying the issue, the Court re-inquired whether it was correct that the inspector determined that there were neither administrative nor engineering controls that were at work during that time. Tr. 340. The inspector reaffirmed that he determined that neither was present. *Id.*

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[37] That number, 30, was derived by the inspector inquiring of the mine the type of ear plugs it uses. He was told it was a 3M brand. From that information he got the number. Tr. 330. Consol has a policy requiring miners to wear hearing protection; in this instance, Consol required earplugs. Tr. 331.

[38] Per that reading, he stated: "Finding that a miner's full shift noise exposure is 132 percent or more, or 156 percent for dual hearing protection or greater, a dosimeter must be used for this finding, and finding that any one of the provisions of 62.130 or 62.140 have not been complied with, feasible engineering and administrative controls have not been installed or maintained, miners are not enrolled in a HCP, the hearing conversation program, operator provided hearing protections are not being worn, administrative controls are not posted on the mine bulletin boards, copies have not been provided to affected miners or are not being followed or any other element of the hearing conversation program is not followed.". ... Determining whether a citation is warranted under 62.130 for exceeding the PEL or whether a citation is warranted under 62.140 for exceeding the dual hearing protection level is a two-step process." Tr. 336-37.

Because of all the questions posed by Respondent's counsel about the particulars of the inspector's actions during the testing, the Court inquired whether it correctly understood the inspector's protocol, expressing its understanding was that the results "are what they are." That is, after the inspector comes up with the testing results if someone were to claim that a particular miner went to another location for a period of time and then returned to his normal work location, that would not cause the inspector to discard the sampling and not issue a citation The inspector answered, "[t]he numbers control, Your Honor." Tr. 346-347. Continuing, the Court then asked, "So if someone went into some other spot and was exposed to some higher noise levels, that wouldn't cause you to say this is no good. We've got to start again; is that correct?" *Id.* Again, the inspector responded, "[t]hat is correct, Your Honor." *Id.*

On re-direct, returning to Ex. R-25, the inspector noted that pages were missing from that exhibit, including an important flowchart. Tr. 352. He described the flowchart as setting forth the steps one follows upon reaching a noise level of 132. If one determines that there are no administrative or engineering controls, the chart directs that a citation is to be issued. The inspector affirmed that he followed that flowchart process in this instance. *Id.*

The Court considers it noteworthy that on the subject of the source of the excessive noise, the inspector informed that Consol later told him that they believed the source was the conveyor chain. Tr. 353. This occurred after the citation was issued, and not on that day, and it was revealed in the context of discussions about how to abate the violation. That chain was on the longwall face and therefore the shear operator would be in close proximity to that. Of significance to several of the Respondent's contentions, the inspector affirmed that he is not required to determine the noise source in order to issue a citation. Tr. 354. Simply put, that is, appropriately, the mine operator's responsibility.

Regarding the point that there were two different shear operators and that the noise exposure levels were not the same for them on that day, the inspector informed that there are always two longwall shear operators and that the different results can be attributable to "where they are located on the shear itself. Because as the mining process of the longwall goes, you have a headgate shear and you have a tailgate shear operator. One operates it coming up, and he has to stay within a certain distance of that shear, and the other one operates it back down." Tr. 355.

The inspector also reaffirmed that if the calibration checks show readings between 113 and 115, that means the dosimeter is properly calibrated and any measurements then taken are valid samples. Tr. 355. Seeking clarity, the Court asked as a practical matter if a reading of 132.3 is of concern, given that the inspector marked the citation as "non-S&S." The inspector informed that it was. Tr. 360.

When back on the surface, after the sampling, Yates showed Stein the dosimeter readings and informed that a citation would be issued, as longwall face operator miner Jodon was over the 132 noise level. Tr. 516-17. Stein asked of Yates what noise source caused the employee to go over the limit, especially because the longwall was not operating between 11 and 11:30, when the reading was over 120 percent. Yates could not identify the source. Tr. 517-18. Stein was shocked about the result, especially because the longwall did not operate for the full shift. Tr. 524. It began operating about midway through the shift. Tr. 528.

Under cross-examination, Stein acknowledged that his notes reflected "face chain maintenance and repairs," which he half-heartedly agreed meant he had a hunch about the possible noise source, answering, "I knew mechanically what was going on up there, so I just wrote down, you know what I mean, things that -- things that were -- that I knew were going on during the time." Tr. 529. Further, Stein's notes reflect, "Chain tension. Chain broke two shifts after failed sample." Ex. R-32. Emphasizing this point, he agreed that there were issues with the chain on the longwall shear. *Id.*

In its post-hearing submissions, Consol expended significant effort addressing this alleged violation and its stance that the citation should be vacated. R's Br. at 16-26. The reasons advanced in support of that contention were that "the Inspector did not complete the multi-step MSHA prerequisites for issuing a Citation;[39] the Inspector did not follow the MSHA approved procedures for the noise sampling; the elevated sample was an aberration; the Inspector failed to consider the impact of the noise reduction rating of the miner's hearing protection; MSHA can provide no basis for its 32% margin of error and cannot differentiate this from a 33% margin of error; the MSHA Form 2000-84 does consider decimals; the 132.3% reading, even if accurate, is within the calibration margin of error of plus or minus 1dB at 114dB; and MSHA's recording over/destruction of the sample and calibration results and calibrating dosimeters outside of the presence of the operator violates Consol's section 103 "walk-around" rights." R's Br. at 5. Alternatively, Consol contends that if the citation is upheld, the negligence should be found to be "low," for two reasons: this was the first allegation of this type against Consol and all the other samples were well within the permissible range, indicating that excess noise was not generally present in the area." *Id.*

Consol also advances a series of contentions alleging "several inconsistent, arbitrary and erroneous applications of this Standard," in an attempt to show that the standard was not violated. Eight arguments are advanced in its brief, none of which impress the Court: that MSHA failed to take multiple steps to determine if the standard is exceeded and did not determine the source of the noise and whether engineering and administrative procedures were being properly utilized; that the inspector failed to follow proper noise sampling procedures; that the exceedance was 50% higher than all six miners on the crew, and therefore, effectively claiming that it had to be wrong; that it improperly rejected "the NRR, which effectively reduces exposure," determining that it does not actually reduce the miner's exposure; that, in a curious argument, it objects to the leniency of MSHA's standard for determining when a violation has occurred, when a 100% TWA[40] should result in a citation, not a sample that exceeds 32%; that MSHA's form doesn't allow for decimals to be recorded and therefore the 132.3% finding cannot constitute a violation – the amount must reach 133% for a violation to be established; that a .3% alleged violation, referring to 132.3% figure, is material; and finally that "MSHA's

[39] Consol challenged the inspector's credibility but the Court wants to make it clear that it found the inspector credible in his testimony regarding this citation. The Court's remarks to the inspector during the hearing were simply to guide the inspector as to the proper method to follow when responding to questions upon cross-examination. Accordingly, the Court rejects the various claims made by the Respondent, calling into question the inspector's credibility. *See, e.g.,* R's Br. at 17-18.

procedures of recording over sample and calibration results and calibrating dosimeters outside of the presence of the operator violates Consol's section 103 "walkaround" rights." R's Br. at 18-19. Each of these arguments are rejected as non-meritorious.

In support of its various challenges, Consol first points to what it describes as "[t]he leading case on noise exposure," *Highland Mining*, 35 FMSHRC 221 (Jan. 2013) (ALJ).[41] However, it notes that the court reasoned that if the maximum amount is exceeded, there is a violation. *Id.* at 19. The Court notes that this is still the case, subject to any valid defenses. Consol attempts to distinguish this matter from that presented in *Highland* but, as explained, its arguments are insufficient. Consol asserts that once an exceedance has occurred, "MSHA must determine the source of the noise to determine if all feasible engineering controls were being used." *Id.* This is not the case; determining the source of the noise is upon the operator.

Consol also refers to the Compliance Guide to MSHA's Occupational Noise Exposure Standard, R-27, but that reference is in the context of determining if all feasible controls have been employed, not to determine if a violation occurred. Thus, the context in that situation is how to then deal with the problem, not whether one has occurred. Figuratively, Consol's argument has the cart before the horse, as it has made a fundamental misreading of the requirements and the Compliance Guide.

Some of Consol's other contentions barely deserve mention. For example, at hearing and in its brief, it notes this noise exceedance citation was a first at this mine. But, as noted earlier, if that were the test, no first violation would ever be a violation because it had not happened before.[42] There is also some irony in Consol's pointing to *Highland* because a loose chain was involved in that case. In this matter it is likely that the culprit was also a loose chain, though Consol tries to distance itself from its "offered [ ] possible source." R's Br. at 22. To be clear, Consol's "offered possible source" was a loose chain.

Consol's assertions that the inspector improperly attached the microphones and that he tested over a period of 9-10 hours, instead of eight hours are rejected. The Court finds as fact that the microphones were properly attached and notes that a longer sampling time would assist, not hinder, the results, as it is a time weighted average. The remainder of Consol's contentions are unpersuasive. These include the argument that by allowing a 32% margin of error, MSHA effectively concedes its sampling is not reliable, that decimals don't count if one is above 132%, and being only .3% above calls into question the inspector's dosimeter calibrations.

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[41] As the Respondent describes the *Highland Mining* decision as the "leading case on noise exposure," and as *this* Court issued that decision, it is hard to find fault with the Respondent's keen characterization.

[42] A variation on this theme, is Consol's "aberration" contention. It is similarly rejected. Consol's "But wait, the miner was wearing earplugs," argument also misses the mark, as noted in the Court's *Highland* decision and acknowledged by Consol. R's Br. at 23. *See also, Highland Mining*, 35 FMSHRC at 237-38.

Consol finishes with its contention that "MSHA's practice of recording over the noise samples violates Consol's right to have access to the evidence and violates Consol's section 103 walk around rights," is a misapplication of walk around rights.[43]

Stein was with the issuing inspector on that day, January 24, 2018, the day Inspector Yates was doing noise sampling on the 3A longwall. Tr. 451. Stein stated that the dosimeters were attached "right at their collar ... below your chin at your chest." Tr. 453. The microphone was "pointing towards [the miner's] ear. *Id.* The placement was consistent with past practice in affixing the dosimeters. Tr. 454. Stein is not the mine's noise coordinator. *Id.* Stein recalled that the inspector told the miners not to yell into the microphone but could not recall about other practices, such as whistling. Stein agreed that the miners also had on dust monitors that day and that they were placed on their belts. Tr. 456. The dust pump hose ended near the near the dosimeter location, about within three inches of it. *Id.* Stein could not recall if both devices were located on the same side of the miners' vests. Tr. 457.

On that day, Stein informed that the longwall didn't start running until 11:30 or 12:00, whereas their shift started at 8:00 a.m. Tr. 458. Before the longwall started, the miners were likely doing various tasks, such as changing hoses, and helping mechanics. Tr. 459. Stein could not recall if the inspector checked the miners' dosimeters, but he did recall that Yates was checking his own readings on his device. Tr. 460. However, Stein recalled that miner Austin Jodon, aka "Skinny," spoke to him informing that his dosimeter was already at 124. This was significant because they both knew one can only get to 132.2. Tr. 460. Stein did not mention the issue at that time, but after all the readings were done, that is, after the testing was done, and they had walked back out, he then spoke to Yates about it. Tr. 461. To be clear Stein was referring to the time just before the longwall started up, not the end of the shift. Tr. 462. In Stein's estimation, though purely speculation on his part, the inspector did not grasp what he was being told and only Skinny, none of the other miners, had readings anywhere near that reading. Tr. 462, 463. Stein informed that the inspector did not invite him to come to his car when he calibrated the dosimeters, but he rejected the suggestion that he would feel uncomfortable about joining him during the calibration check, stating, "[y]eah. We get along with all of them pretty good." Tr. 467.

On cross-examination, directing Stein to Ex. R-21, at paragraph 5, ostensibly his notes, Stein informed those were *not* his notes and he denied saying at the time of the inspection that they were his notes. Tr. 470. Stein allowed they could be notes from Shaffer or Helen, but he did not know the author. Tr. 471. Regardless, he agreed that the notes do not relate that Austin Jodon came to him or anyone else to raise the issue of the noise level. Tr. 471. Yet the notes for R-21 claim: "Employee that went out of compliance was 124 percent of dose of the 132 percent dosimeter at approximately 11:30 a.m. when checked by safety personnel." Tr. 471. Nor, Stein agreed, do the notes reflect that Jodon came up to the inspector about this issue. Tr. 472. As for Stein, as he didn't receive a citation that day, he had no recorded notes. Tr. 472.

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[43] The Court is of the view that Consol's citations to *Big Ridge, Inc.*, 36 FMSHRC 1677, 1730 (Jun. 2014) (ALJ), and *DJB Welding Corp.*, 32 FMSHRC 728, 733, 735 (June 2010) (ALJ) are neither persuasive nor useful authority, as they do not involve noise violations and, more fundamentally, the facts involved here do not translate to those cases.

Yet, he acknowledged that at some point on the day of the noise testing he knew that one of his miners was at 124%. *Id.* Further, he agreed that he didn't remove the miner from the mine, nor did he notify the longwall boss. *Id.* All of this occurred, Stein conceded, before the longwall had started up. *Id.* He did not notify the longwall boss that a miner was close to the PEL. And on the day of the testing Stein did not raise any issue with the readings taken. Tr. 473.

The Secretary's Brief asserts that all the dosimeters were properly calibrated. He notes that on the date of the testing, shearer operator Austin Jodon's dosimeter recorded a time-weighted average exposure for his shift of 132.3%, exceeding the PEL by 32.3%, and exceeding the standard by 0.3%. Sec's Br. at 23-26, citing Exhibit P-14. Inspector Yates issued the citation based on this time-weighted average for Mr. Jodon. Inspector Yates only issued Citation No. 9077096 after he had checked the calibration of the dosimeters at the end of the sampling period.

The Secretary also notes that at the time of the impermissible exposure, Respondent did not have any administrative controls in place for noise exposure, nor any engineering controls. He further observes that on February 5, 2018, after performing his own investigation, Respondent's witness, respirable dust coordinator and noise coordinator Troy Hellen, wrote a letter to Mr. Jodon explaining that he had been exposed to excessive noise and that he believed it "may have come from the face chain" due to excessive wear. *Id.*

The Secretary's Brief also contends that Inspector Yates' issuance of the citation was consistent with the Coal Mine Health Inspection Procedures Handbook because it is undisputed that Respondent had no engineering or administrative controls in place at the time of issuance. Respondent did not present any evidence to the contrary. Although Respondent conveniently omitted the proceeding pages' flowchart, this flowchart is publicly available and illustrates that Inspector Yates properly issued Citation No. 9077096.[44]

Respondent omitted this flowchart from Exhibit R-25. Further, Respondent's tortured quizzing of Inspector Yates on various MSHA manuals, and Respondent's unsuccessful attempts to shift the blame for their violation onto Inspector Yates are red herrings: Respondent violated 30 C.F.R. § 62.130(a). Indeed, this very Court has affirmed a violation of § 62.130(a) based on a miner's exposure to time-weighted average noise above 132% of the PEL. *Highland Mining Co. LLC*, 35 FMSHRC 221, 241 (Jan. 2013) (ALJ Moran). At least one other Commission ALJ has done the same. *Tripple H Coal, LLC*, 35 FMSHRC 165, 169 (Jan. 2013) (ALJ).

Regarding the penalty to be imposed, speaking to gravity, the Secretary notes that the expected injury from excessive noise exposure is permanently disabling hearing loss, with one person being affected by the violation – the over-exposed miner, Mr. Jodon. As for negligence, the Secretary notes that the Respondent's witness Hellen testified that the likely source of the excessive noise was excessive wear on the headgate conveyor chain and that the issue is not

[44] The Court takes official notice of the flowchart, which originates from the same exhibit offered by the Respondent but was not included in that exhibit. It is attached in the appendix to this decision. The flowchart is, as the Secretary notes, publicly available. *See,* U.S. DEP'T OF LABOR, PH89-V-1 (15), COAL MINE HEALTH INSPECTION PROCEDURES HANDBOOK, CHAPTER 3 – NOISE 3-20 (2008). Inspector Yates correctly followed this flowchart when deciding whether to issue the citation.

unusual, as the mine changes damaged chain flights every shift. From this, the Secretary contends that not all feasible engineering controls were applied. Sec Br. at 28.

The Secretary then asserts that "several members of the Harvey Mine safety department were aware that Mr. Jodon was at risk of possible excessive noise exposure during the full-shift sampling that day, but took no action to address the miner's noise exposure." *Id.* Supporting its charge that the mine knew there was an issue but did nothing, the Secretary points to Hellen's testimony that Jodon's dosimeter was already at 128% of the PEL by 11:00 a.m., a fact he had learned from another member of the safety department.

The Secretary also observes that the mines' safety inspector, Stein, testified that Mr. Jodon brought it to his attention that he was at 124 percent already at approximately 11:30 a.m. And the Secretary adds that this is not simply the Secretary's construction of the testimony, as the operator's knowledge is also reflected in Mr. Hellen's handwritten notes from January 24, 2018, per Ex. R-33. Mr. Hellen's typewritten notes about the subsequent citation, Ex. R-21, and safety inspector Chase Shaffer's handwritten notes from the same evening, Ex. R-32, each state that Mr. Jodon was at either 124% or 128% of the PEL between 11:00 and 11:30 a.m. during the shift in question. *Id.*

Respondent also did not have, much less follow, any administrative controls. Inspector Yates gave as examples of administrative controls changing a miner's schedule or assignment to reduce or prevent their exposure to excessive noise. Despite the safety department's knowledge that Mr. Jodon was fast approaching 132% of the PEL before he even replaced the shearer operator around 1:00 p.m., the operator remarkably did not remove him from the section or alert the foreman, but instead continued to expose him to excessive noise as he operated the longwall shearer with damaged conveyor chains. Therefore the Secretary contends that the Respondent's negligence was at least moderate. Sec. Br. at 29.

Analysis of Citation No. 9077096

Much of the discussion was incorporated in the foregoing, which included many aspects of the Respondent's contentions regarding this citation. Pursuant to that prior discussion, this citation is affirmed, leaving the determination of the appropriate penalty. To recap, the citation was marked as non S&S, the injury or illness, as unlikely, but if it occurred, as permanently disabling, and the negligence listed as moderate. Although the Respondent alternatively sought to have the negligence listed as "low," this cannot be justified, as the Respondent was not at a loss about the potential source for the excess noise. Based on the credible evidence, each of these evaluations by the inspector is affirmed. The Secretary seeks to have the proposed penalty of $191.00 affirmed and the Court agrees that amount is appropriate and it is so imposed.

Citation No. 9077098

Citation No. 9077098, Exhibit P-15, alleges a violation of 30 C.F.R. § 75.333(h), concerning a ventilation return & intake issue. The Respondent seeks to have the citation listed as not affecting 10 miners.[45]

The cited standard[46] requires that ventilation controls, including seals, shall be maintained. Noting that the provision requires that the operator maintain such controls for the purpose that they were built, the inspector explained that such controls include "[v]entilation controls... [and these involve] stoppings, bradishes, walls." Tr. 363. Their purpose is to "separate [ ] airways and keep [ ] them in a sealed location, so no two airways are intermixing or mingling. If it's either return air coming out or intake air coming in, neither one [is to] have an opportunity to mix." *Id.*

The inspector described the condition he found as follows: "the stopping located on 7 north main's primary escapeway at 28 wall and 26 wall were not being maintained to serve the purpose for which they were built. The stopping at 28 wall had a hole measuring three inches by seven inches. The stopping at 26 wall had a ten-inch pipe left open, which allowed air from the intake to bypass into the return in this area." Tr. 364. The violation was the result of the stoppings not being maintained in that the airways between them were not sealed. The design is to prevent air from the primary escapeway going over to the return. *Id.* These stoppings were in cross-cuts between two separate, parallel, entries. Tr. 363-64. The inspector noted that an escapeway's use may represent miners last hope to get outside and it is for that reason that MSHA enforces the requirements rigorously. Tr. 365. In this case the escapeway was for the 7 north mains, a working section and the escapeway must be located at least at the loading point to the return shaft, or to the intake shaft. *Id.* As it relates to a working section, all of the miners in that area would be located there, and typically that means ten miners. *Id.*

The inspector took photographs of the conditions he observed. Ex. P-16. By the inspector's description, Ex. P-16A, a photograph, shows that the stopping has eroded allowing the intake air into the course of the return. Tr. 366. He confirmed that the damaged area of the stopping is in the middle of that photo, where one can see rock or coal beyond. In the photo, the top area on the rib is the darker black; above that, it is white and this is due to rock dust. Tr. 367. The inspector took the photo while standing in the primary escapeway with the hole going towards the return. Tr. 368. Properly maintained, there would be no hole present. Tr. 369. The hole created noise from the air coming through it and the inspector described the noise as similar to an airplane motor, such as a jet. *Id.* Accordingly, the inspector confirmed that the noise was quite loud. *Id.* The air was traveling from the primary, through the hole, and then to

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[45] The Respondent in its posthearing brief did not specify an alternative number of miners that would suffer an injury due to the violation, mainly that the Secretary failed to prove that ten miners would be affected. R's Brief at 39.

[46] 30 C.F.R. § 75.333(h), addressing ventilation controls, provides at subsection (h) that "[a]ll ventilation controls, including seals, shall be maintained to serve the purpose for which they were built."

the return. *Id.* Directed to Ex. P-16B, another photograph, the inspector informed that the black area, in the top third of the photo and extending out in a V shape is the hole he cited. Tr. 370-71.

Ex. P-16D, another photo, pertains to a different area on the same escapeway, two cross cuts away from the first photograph. It shows a ten-inch metal pipe that allowed air to bypass into the return entry. Tr. 373. The air at that location was leaving the intake and entering into the return. Although it was noticeable and one could hear the air moving, according to the inspector, it was not as loud as the other location. Tr. 374. The inspector marked the violation as moderate negligence. His reasoning was his belief that any examiner should have been able to notice that this pipe was open, as one could see that during a visual exam. The area is walked weekly. He learned from Mr. Shaffer that the load center that this pipe was ventilating was removed over the Christmas shutdown, and the citation was issued in January. There was confirmation of this later, when he was on the outside of the mine and noticed while reviewing the weekly exams that the exam had been conducted at least two more times since the load center has been removed. Once the mine removed the load center, the operator sealed the entrance from the adjacent entry into the intake, but the cited area had been left open. Tr. 375-76.

For the earlier ventilation issue he testified about and for which he also designated the negligence as moderate, he believed that was appropriate because one could definitely hear the sound from the air. Tr. 376. The inspector believed that the hole in the stopping at the 28 wall had been there for an extended time "due to the fact of how long it would take to deteriorate that rock and that rib. It is rock. It is not coal. It just doesn't want to peel out as easily as coal or deteriorate as fast. I believe the air helped cut that rock away." While he could not be precise about the time it had existed, its size informed him that the time was an extended period. Tr. 377-78; Exs. P-16A–C.

Nevertheless, and though a different topic, he marked the citation as non-S&S and unlikely. He explained that it was "[b]ecause it is intake air going into the return, so the likelihood of your two returns, your return coming back over, would only happen in the event that the fan went down or a major mining disaster, which we have to consider when we look at lifelines and escapeways ..." Tr. 378. Though unlikely to occur, if it were to happen, he considered it as "permanently disabling," because of traveling in smoke and the attendant smoke inhalation. In such a circumstance, whatever was in the smoke or fire would be traveling down the return, whether that was carbon monoxide, coal or hydraulic fluid. Tr. 379. Ten miners were listed as affected for a simple reason – that is the number that go out the intake to escape. Tr. 380. Both the intake and the secondary escapeway are to have clean or neutral air. *Id.*

On cross-examination, the inspector informed that the photographs he took were not zoomed in. Tr. 381. He acknowledged that it was possible that the condition could have occurred fairly recently. Tr. 382. He also agreed that the mine examiner, in performing his weekly exam, has a lot of ground to cover during that time, and that the two conditions he found were in a cross-cut. *Id.* The pipe issue was abated by having it covered and capped.[47] Tr. 383.

[47] Asked about the air quantity in the 7 north mains and the quantity of air that was coursing through the primary escapeway when the weekly exam was being conducted, the inspector answered, 179,200. Tr. 385, citing Ex. R-31, at 1.12-13. The Court sought clarification about this inquiry, asking if that reflected the quantity of air in the return. The inspector responded that

The inspector believed that the nearest working section from the cited conditions would be about 100 breaks. Tr. 386.

For this matter, the Respondent remarks that only two small voids were involved in the stoppings at the 26 and 28 wall located along the 7 north mains primary escapeway.

Further, Respondent notes,

> [t]he air was moving from the intake air course to the return air course [and] [t]he miners working in the primary escapeway were never exposed to contaminated air, nor did air the air travel from the return to the intake. Under these circumstances, there is no adverse condition that would develop and could be expected to affect ten (10) miners.

R's Br. at 6. Under these circumstances, Respondent contends that any injury should be described as lost workdays or restricted duty. *Id.* at 6. A primary contention by the Respondent is that the intake air was traveling along that course and then to the return, as it should be. Thus, there was no claim that return air was making its way into the intake course. Yet, it was the inspector's concern that such return air could enter the intake air course. R's Br. at 38. Consol asserts that the inspector admitted that contamination of the primary escapeway was unlikely and that only one person, not ten, works in the cited area, which area itself was some 100 breaks outby the working section. *Id.*

The Secretary contends that "in the unlikely event of a mine emergency and the air changing direction, smoke and toxic fumes leaking from the return into the primary escapeway could cause permanently disabling injuries to up to ten miners." Sec. Br. at 31. At the time of the citation, the mine was idle, Tr. 548, and the Inspector failed to identify the 10 miners who were affected. Tr. 380. Rather, the Secretary seems to assert that certain miners affected might be working downwind at some point in the future. Tr. 548. However, since the mine was idle at the time of the citation, the number of miners who were affected should not include these persons. The Secretary did not present evidence that this citation would affect any such miners. Of course, because the number of miners is easy to manipulate, it is important that such an assertion be supported by facts. *See, e.g. Marfork Coal Co.*, 35 FMSHRC 738, 740 (2013) (ALJ) ("Given that the number of persons affected is a way to easily manipulate the penalty, it is important that relevant facts accompany such reduction."). Normally, the number of persons affected is the number affected at the time of the citation. *See, e.g. River View Coal, LLC*, 38 FMSHRC 1771, 1779 (2016) (ALJ) ("At the time of the citation, there were four miners working downwind from the machine."). In this case, the number affected should be an examiner (one) who might be downwind during this idle shift checking air and methane.

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it reflected the quantity in the last open cross-cut to the 7 north mains. Tr. 384-385. With that, the Court asked what that meant. The inspector informed that it reflected that the mine took an air reading in the last open cross-cut, which showed how much air is traveling through the face on each side. It reflected air quantities of 120,300 and 36,564. Tr. 385. Though the quantity was much higher in the intake, that figure takes into account the track air. *Id.*

For its part the Secretary contends that the cited seals at 26 and 28 wall were built for the purpose of keeping the clean, intake air in the primary escapeway separate from the parallel entry return air course with air that has ventilated the face. Therefore, the seals were not serving their purpose. Sec. Br. at 30. The Secretary also notes that the citation was appropriately designated as non-S&S and unlikely because the clean intake air from the primary escapeway was leaking through the damaged seals into the return air course, and not vice versa. However, in the unlikely event of a mine emergency and the air changing direction, smoke and toxic fumes leaking from the return into the primary escapeway could cause permanently disabling injuries to up to ten miners inby. *Id* at 31.

Speaking to negligence, the Secretary notes that examiners travel these areas weekly and that Inspector Yates, after observing the conditions, returned to the surface and reviewed the weekly exams, which reflected that examiners had walked the area at least twice since the load center was moved. The hole at 28-wall also appeared to have developed over an extended period of time and was loud enough to be heard from at least 50 feet away and thus there is an issue of its obviousness. The Secretary further notes that the Respondent's witness, safety inspector Shaffer, admitted that the exposure of the coal rib to the mine air likely caused the coal around the stopping to deteriorate over an extended period time, and not overnight. Therefore, the Secretary contends that moderate negligence is appropriate because the Operator either knew or should have known of the deteriorated ventilation controls. *Id.*

Based on those considerations, the Secretary maintains that, using the six statutory criteria, MSHA's proposed civil penalty of $880.00 remains appropriate. Sec. Br. at 31.

Analysis of Citation No. 9077098

In this section 104(a) citation, the fact of violation is not contested. The gravity was listed as unlikely, and non-S&S, but permanently disabling, with ten persons affected, while the negligence was marked as moderate. Based on the foregoing recounting of the credible evidence, the Court concludes that each of those designations are appropriate, with some qualifications. The Court has considered the Respondent's contention that one person, not ten would be affected, but in the context of continued normal mining operations, the testimony was unrefuted that ten miners would go out the intake to escape.

However, these conclusions do not translate into a finding that it is appropriate to impose the same penalty as was proposed under Part 100. The Commission and its judges make such determinations based on the statutory criteria and the attendant facts found for a given violation. The chief reason for this is that the air was traveling from the intake into the return, not the opposite of that. While the Secretary speaks of the unlikely event of a mine emergency and *the air changing direction* with smoke and toxic fumes leaking from the return into the primary escapeway, there was no testimony explaining how that could occur nor how likely such an event could occur. Further, the two voids were quite small, not gaping breaches, and there was no testimony establishing that they could have such a profound impact. Given these considerations the Court concludes that under these particular circumstances, the appropriate civil penalty is $293.00.

Summary of penalties imposed

Because of the large number of citations at issue in this matter, the Court summarizes the following modifications and penalties described in detail above:

Citation No. 9076610, involves the absence of reflectors outside unsupported roof, for which Respondent admits the violation but seeks to have the citation listed as non-S&S, unlikely and low negligence. For the reasons discussed, *supra*, the inspector's findings are affirmed and the proposed penalty imposed by Secretary of $638.00 is independently determined by the Court to be appropriate.

Citation No. 9077085 is the winch cable issue on the Caterpillar duckbill battery scoop, for which Respondent seeks to have the citation listed as non-S&S, unlikely and low negligence. For the reasons discussed, *supra*, the inspector's findings are affirmed and the proposed penalty imposed by Secretary of $953.00 is independently determined by the Court to be appropriate.

Citation No. 9077083, involving holes in a 480 volt power cable for a scoop charger, the Court finds that, applying the six statutory criteria, a penalty in the amount of $100.00 is imposed. The Citation is to be modified to reflect "low" negligence.

Citation No. 9077086 involves the requirement for all stationary electric apparatus to be shown on a mine map. The Court finds that, applying the six statutory criteria, a penalty in the amount of $29.00 is imposed. The Citation is also to be modified to reflect "none" for negligence.

Citation No. 9077087 involves a lack of ATRS certification. The Court finds that, applying the six statutory criteria, a penalty in the amount of $59.00 is imposed. The Citation is also to be modified to reflect "low" negligence.

Citation No. 9077091, involving the Jeep "cable" issue, cites 75.1725(a). The Court finds that, applying the six statutory criteria for this S&S violation involving moderate negligence, it is properly assessed at $638.00.

Citation No. 9077089, involving a cable with two holes in its outer jacket, cites 75.517. The Court finds that, the six statutory criteria for this non-S&S violation involving low negligence, it is properly assessed the amount proposed by MSHA of $319.00.

Citation No. 9077092 is the missing signature violation regarding certifying training and drills. The Court finds that, applying the six statutory criteria for this non-S&S violation involving low negligence, it is properly assessed at $39.00.

Citation No. 9077095, citing 30 C.F.R. § 75.514, involves a defective splice. The Secretary sought a civil penalty of $429.00 and the Court imposes the same amount.

Citation No. 9077096 cited a noise exposure violation. The Secretary sought a civil penalty of $191.00 and the Court imposes the same amount.

Citation No. 9077098 pertains to ventilation return and intake breaches. Taking into account the particular facts, the Court has imposed a civil penalty of $293.00 for this violation.

ORDER

It is hereby **ORDERED** that Respondent is **ORDERED** to pay a civil penalty in the total amount $3,688.00 within 30 days of this decision.[48]

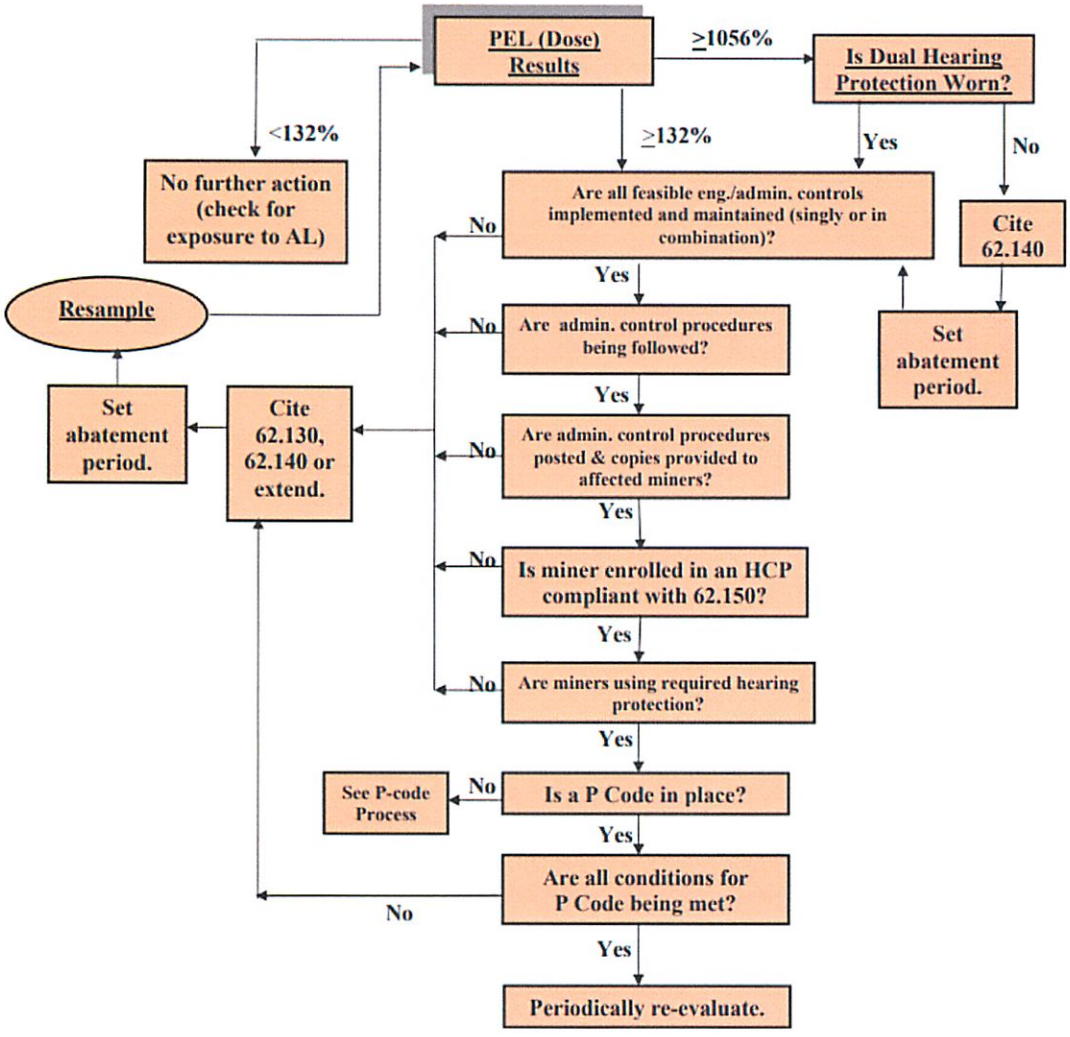
It is **FURTHER ORDERED** that the citations be **MODIFIED** in accordance with the terms contained herein.

William B. Moran

William B. Moran
Administrative Law Judge

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

APPENDIX



Source: U.S. DEP'T OF LABOR, PH89-V-1 (15), COAL MINE HEALTH INSPECTION PROCEDURES HANDBOOK, CHAPTER 3 – NOISE 3-20 (2008).

Distribution

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