FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

December 5, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2021-0118 A.C. No. 36-07230-541358 Mine: Bailey Mine

DECISION AND ORDER

Appearances: Ryan M. Kooi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner,

Kenneth J. Polka, CLR, U.S. Department of Labor, MSHA, Mt. Pleasant, Pennsylvania, for the Petitioner,[1]

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

Before: Judge Sullivan

I. INTRODUCTION

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against CONSOL Pennsylvania Coal Company, LLC ("CONSOL" or "Respondent"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). After my August 25, 2022 Decision Approving Settlement of three of the four penalties in this docket, at issue remains a citation alleging a violation of 30 C.F.R. § 77.205(b), for which the Secretary seeks a civil penalty of $791.00.

The parties presented testimony and documentary evidence for the single citation during a hearing on August 17, 2022, in Pittsburgh, PA. MSHA Inspector Robert W. Swope testified on

[1] On July 13, 2022, I issued an Order Granting Request to Practice for Mr. Polka, a Conference and Litigation Representative ("CLR"). With this Order, Mr. Polka was permitted to conduct this hearing with the understanding that Mr. Kooi would accompany him per the long-standing practice of the U.S. Department of Labor.

behalf of the Secretary and CONSOL Compliance Supervisor Keith Woncheck testified on behalf of the Respondent. Both parties subsequently filed post-hearing briefs on October 24, 2022.[2]

II. GENERAL FACTUAL AND PROCEDURAL BACKGROUND

CONSOL owns and operates the Bailey Mine, which is located in Greene and Washington Counties in Pennsylvania and crosses into Marshall County, West Virginia. The Bailey Mine includes a large prep plant, divided into five "subplants" with up to nine floors, some with half floors in between. On July 28, 2021, Inspector Swope conducted part of MSHA's quarterly EO1 regular inspection of the prep plant. Tr. 30-31.

During his inspection that day, Inspector Swope issued two citations. The first and only citation that is relevant to this proceeding, Citation No. 9204511, was issued because a 38-inch-wide walkway located in the coal preparation plant was covered with a combination of wet coal slurry and fine magnetite. Tr. 41. Sec'y Ex. P-1. This alleged violation of 30 C.F.R. § 77.205(b) was designated as significant and substantial (S&S). To terminate the citation, CONSOL "cleaned all of the extraneous material from the walkway[] and replaced the missing overhead light to improve the illumination of [the] area." Sec'y Ex. P-1, at 001. At issue here is that alleged violation and its associated findings, including whether the violation was S&S, and if the violation is upheld, the penalty to be assessed.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 9204511 for Alleged Violation of Section 77.205(b)

1. Fact of Violation

Before beginning his inspection that day, Inspector Swope notified the Safety Director's Office of his presence and offered for someone to travel with him throughout the facility. CONSOL Compliance Supervisor Woncheck accompanied Inspector Swope during his review of the plant and facility. Tr. 31-32. Inspector Swope began his inspection on the sixth floor and moved on to the fifth and a half floor before proceeding down a set of stairs to the fifth floor of the 2C subplant. Tr. 89, 161.

Attached hereto as Appendix A is Resp't Ex. R-C.1, a map showing the main details of the fifth floor of the plant, as annotated by Woncheck at hearing. The annotations include the route that the two men took on the floor to reach the 2A subplant. Tr. 164, 167. As is shown, when arriving on the fifth floor, Inspector Swope, followed by Woncheck, walked past four coal screens, made a right past two more coal screens and three feeders, and proceeded to make a quick left before turning right onto the right-side concrete walkway of the platform for two other coal screens, identified as A1 and A2. Tr. 167-69; Resp't Ex. R-C.1.

[2] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Sec'y Ex. #," and "Resp't Ex. #" respectively.

At the end of the walkway, Inspector Swope and Woncheck turned 90 degrees to the left and stepped up onto the 15- to 18-foot long metal-grated catwalk that ran across the front of the A1 and A2 coal screens. Tr. 91-93, 101, 169-70. The A1 and A2 coal screens were surrounded by catwalks and concrete on all sides. Tr. 91. On the right side of the coal screens was a step up onto the catwalk, and on the left side of the coal screens (or at the opposite end of the catwalk) was a step down. The catwalk provided access to the front of the A1 and A2 raw coal screens and the catwalk could only be accessed from the rear, via the right or left side pathways. Resp't Ex. R-C.1.

Before continuing down the catwalk in the direction towards the downward step, both men noticed a "material" that was "raining down" like a "shower" from above, and because "slurry was built up" on the surface underneath, they did not proceed further. Tr. 45, 171. Woncheck stated that he called to have the problem—a plugged pipe that was leaking—fixed. Tr. 170.

Once the pipe was fixed from the floor above, which took about 20 minutes, the men went around to the other (left) side of the coal screens to view the accumulation. With his cap lamp, Inspector Swope was able to see that the slurry had "started out about ten feet." Tr. 45, 170.

According to Inspector Swope, given the angle of the walkway on that (left) side, the slurry had "built up just about to the top of the metal walkway in front . . . to the point where it was either running out somewhere else or running over top of the toe boards of the expanded metal," approximately five to six inches deep. Tr. 45-57. Inspector Swope also noted that the handrails which would guide a miner downwards were also covered with "a lot of slop." Tr. 44. At hearing, Inspector Swope described the material as "very wet slurry." Tr. 55.

Woncheck described the slurry as a combination of magnetite, water, and ultrafine coal material, that was "real wet," having the consistency of a "milkshake," and "soup," and not slippery but gritty "like sandpaper." Tr. 198-99. Woncheck disagreed with Inspector Swope on how deep the slurry accumulation was, stating that it was not built to the top of the toe boards but rather "a good inch or two below" that point. He measured it to be four-and-a-half inches. Tr. 209-11; Resp't Ex. B-3, B-5, B-6.[3] At hearing, Woncheck circled on the map where the step on the left side of the catwalk was located, to indicate where the material had built up. Tr. 171-72; Resp't Ex. R-C.1.

In addition to the accumulation, Inspector Swope noted that an overhead light in the area was missing, which he believed made it even harder to see the accumulated material and necessitated his use of a camera flash to produce clear photographs of the area. Tr. 44, 56, 123; Sec'y Ex. P-2, at 005 & 009. Woncheck acknowledged the missing overhead light but stated that "there was plenty of light," he could see the spillage "just fine," and he did not need to utilize the flash feature on his camera when taking photos of the area. Tr. 179.

[3] After Inspector Swope had taken photos and completed his inspection, Woncheck "wanted to do his own investigation" and took additional photos, which were admitted at hearing as Resp't Ex. B-1 to B-6.

Inspector Swope subsequently issued Citation No. 9204511 alleging that CONSOL violated section 77.205(b), in that:

> The 38[-]inch[-]wide concrete travelway on the left side of the Plant 2A raw coal screen was not being kept clear of all extraneous material and other stumbling, slipping, or tripping hazards. A combination of extremely wet coal slurry and very fine magnetite was covering the entire width of the walkway (38 inches wide), and 8 [to] 10 feet long. The mixture of materials was built up to the top of the toeboards (6 inches high) at the end of the left side walkway. There is a 6 [to] 7 inch step up to the expanded metal walkway that runs across in front of the elevated metal walkway. The overhead light, directly above the affected (sic) was missing, which significantly reduced the illumination and visibility at the turn and step down in the walkway. There was also a significant overhead leak of water, coal slurry, and magnetite directly in the walkway. Standard 77.205(b) was cited 15 times in two years at mine 3607230 (10 to the operator, 5 to a contractor).

Sec'y Ex. P-1, at 002.[4]

In designating the citation as S&S, Inspector Swope indicated that the presence of accumulated material was reasonably likely to cause an injury that could be reasonably expected to result in lost workdays or restricted duty of one miner. Sec'y Ex. P-1, at 002. Moreover, Inspector Swope categorized the violation as resulting from CONSOL's moderate negligence. *Id.*

2. Analysis

Section 205, titled "Travelways at surface installations," provides in pertinent part that:

> (a) Safe means of access shall be provided and maintained to all working places.
> (b) Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or tripping hazards.

30 C.F.R. § 205(a)-(b). There is no dispute that the cited area – the catwalk that provided access to the front of the two raw coal screens and the adjoining pathways to that catwalk – constituted a "[t]ravelway" or "platform" that provided a "means of access to areas where persons are required to work or travel."

As for whether the mixture that was falling from the overhead pipe and accumulating on the travelway and platform below should be considered "extraneous material," that term is not defined in the regulations, so its ordinary meaning applies in this instance. *Peabody Twentymile Mining Co. v. Sec'y of Labor*, 931 F.3d 992, 997 (10th Cir. 2019) (holding that in "[t]he absence of a definition in the standard . . . . we apply the ordinary or dictionary definitions of the terms.") "Extraneous" is defined as "1. Not constituting a vital element or part. . . . 3. Coming from the

[4] At hearing, the inspector explained that he meant the material had built up to bottom of the metal grating of the catwalk. Tr. 117.

outside. . . ." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 629 (4th ed. 2009). In the context of the cited area and the purpose it served at the plant, the material in question was clearly "extraneous," so, at a minimum, a technical violation has been established in this instance.

In its post-hearing brief, CONSOL admits as much and thus now concedes a violation. Resp't Br. at 8. In challenging the S&S designation, however, CONSOL otherwise takes issue with the inspector's description of the violation. CONSOL does not agree that the extraneous material in this instance posed any stumbling, tripping, or slipping hazard. *Id*. at 8-10. Consequently, before determining whether the violation was S&S, I address the extent to which the Secretary established the scope of the alleged violation of section 77.205(b).[5] My findings are as follows.

As discussed, the two witnesses differed markedly on whether the conditions posed a stumbling or slipping hazard to miners. I note at the outset, as will be discussed further herein, that between the two men, Wonchek was substantially clearer on the details of how the inspection of the raw coal screen area unfolded. With respect to the extent of the violation, however, the tangible evidence of the cited area's actual conditions at the time of the inspection is of more probative value.

At hearing, each man relied on the photographs he had taken of the conditions during the inspection and soon afterwards. Having reviewed all of those photographs, I conclude that, although the photographs may not substantiate all the details of the citation, they supply sufficient support for Inspector Swope's fear that, given the nature and amount of the fallen material and where it had accumulated, in theory a miner traveling across the catwalk from right to left might not perceive that there was a step down while making a turn onto the adjoining concrete pathway, and lose his footing upon stepping down unexpectantly. The gray, watery nature of the accumulated material and its tendency, if viewed from close range in the reduced lighting, to blend in with the left side edge of the catwalk, would have largely if not totally obscured the step down. This can be seen most clearly in Sec'y Ex. P-2, at 004 & 013, as well as Resp't Ex. B-2 & B-3.

It is true that the photographs taken from farther away, down the adjoining concrete pathway, tend to show that the difference in height between the catwalk and the pathway remained perceptible. Sec'y Ex. P-2, at 007, 010, & 011; Resp't Ex. B-1. However, as Inspector Swope explained, the risk the conditions posed was not to a miner coming from the direction that those photographs were taken, because a miner coming from that direction would have noticed the accumulated material. Tr. 75. Rather, at risk was any miner coming across the catwalk from its *other* end to round the corner onto the concrete, who would have a significantly worse

[5] In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc*., 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co*., 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has defined the Secretary's burden as a preponderance of the evidence, "which simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland Res. Corp*., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152 (Nov. 1989).

vantage point to appreciate how the fallen material had obscured the step down. Tr. 51-52, 56, 75.[6]

Again, however, the foregoing establishes little more than a technical violation in this instance, for the record shows that it was unlikely a miner would have traveled across the catwalk to get to the point where he would turn the corner and take the step down. That is because, as the citation states and Swope testified, there was an ongoing "significant overhead leak of water, coal slurry, and magnetite" that caused the cited conditions. Sec'y Ex. P-1, at 001; Tr. 45-46, 103-04. There is no evidence that either of the two men considered walking through the material that was falling at such a rate that Wonchek compared it to a "shower" that was "raining down." Tr. 171, 180. Indeed, the evidence is that both men circled back and walked around to access the catwalk at its other end even *after* the leaking pipe was addressed from a floor above, and the material had stopped falling. Tr. 59, 70, 171-72, 195, 232-33. Swope testified that he did not consider it advisable to walk into the material from either direction. Tr. 56-57, 75-76, 86, 105, 141, 143.

Reading the citation in light of Swope's description of the conditions as he found them, it is possible he may have been concerned that, at some point, the leak might have ceased on its own prior to the discovery of the conditions, and a miner would travel across the catwalk and thus have to navigate the step down at its end through the accumulated material. In such circumstances, remote as they may have been, I find that in addition to the material at issue being "extraneous" in this instance, it posed the stumbling hazard which the inspector was reasonably concerned about.[7]

---

[6] CONSOL argues that the design of the handrails running along both sides of the turn from the catwalk to the pathway provided an independent indication that a downward step existed. Resp't Br. at 9. Given the conditions, particularly the reduced illumination resulting from the missing light, I conclude that it would have been too much to expect a miner traveling across the catwalk to necessarily pick up and quickly process that the handrail design indicated that there was a step down onto the catwalk.

[7] I note that at hearing, Swope did not at all acknowledge that the material ceased falling from above before he issued the citation. While Wonchek explained that the leaking pipe was repaired from the floor above, and that repairs were completed *before* the two men proceeded further to examine the conditions in the raw coal screen area (Tr. 170-71), Swope's telling included no such sequence of events. Rather, in response to my questioning on his view of the steps necessary to abate the cited violation, he recounted that, upon issuing the citation, he left the area, expecting it to be first cleaned up, at which point only then the leak (and, afterwards, the missing light) could be addressed. Tr. 70-71, 85. In my view, Wonchek's version in which the leaking pipe was repaired earlier makes much more sense. This is particularly so considering the citation identifies the "Action[s] to Terminate" as only cleanup of the material and replacement of the overhead light, thus entirely omitting mention of stopping the overhead leak described earlier in the citation. Sec'y Ex. P-2, at 001. This contradicts Swope's testimony on his abatement expectations, thereby providing further support for Wonchek's version of events.

3. S&S and Gravity of the Violation

A violation is S&S if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). In *Mathies*, the four elements or steps required for an S&S finding were expressed as follows:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted). More recently, the Commission restated *Mathies* Step 2 in terms of finding that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016).[8]

a. *Mathies* Step 1 & Step 2

Step 1 of the Commission's S&S analysis is satisfied above, as noted in my conclusion that the basic elements of a section 75.205(b) violation were conceded by CONSOL and the evidence further established at least a theoretical stumbling hazard as set forth in the citation.

To satisfy Step 2, the Secretary must establish that there was at least a reasonable likelihood that a miner would step into the accumulated material, not realizing there was a step down to the concrete pathway and be subject to the stumbling hazard against which the standard is directed. Importantly, an S&S determination is based upon the particular facts surrounding the violation, existing at the time of the citation issuance, and, in general, assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984); *Northshore Mining Co.*, 38 FMSHRC 753, 757 (Apr. 2016) (ALJ). It is thus to be made "without any assumptions as to abatement." *Mach Mining,* LLC, 40 FMSHRC 1, 6 *aff'd*, 748 Fed. Appx. 347, 2019 WL 275718 (D.C. Cir. 2019).

The Secretary argues that if the conditions were "permitted to exist unabated under continued normal mining, it is reasonably likely that a miner would have walked into the area and stumbled or slipped on the walkway." Sec'y Br. at 10. Tellingly, the Secretary's analysis wholly omits a very significant fact that the inspector included in the citation: the "significant leak" of material from above. As previously discussed, that made it very much *unlikely* any miner would have attempted to cross the catwalk while the material continued to rain down in such an obvious manner.

[8] Here it makes no difference which version of Step 2 is applied. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148-49 & n.6 (Apr. 2021).

As with the violation, and because he did not directly address the issue in his testimony, I am again left to infer that the inspector may have presumed that there was a possibility that at some point the material could have ceased falling without any action by CONSOL. This would have raised the risk that, prior to discovery of the accumulated material, its clean up, and repair of the light, a miner would cross the catwalk and step onto the pathway without realizing there was a step down.

Such a theoretical possibility, while it may be acceptable in the context of determining whether the alleged violation has been established, does next to nothing to advance the notion that there was a "reasonable likelihood" under Step 2 of *Mathies* of it coming to fruition and occurring. That is particularly true here, where the Secretary offered no evidence on the possibility that the leak could have ceased without action by CONSOL.

Instead, the Secretary solely focused on establishing the reason *why* a miner may have had to cross the catwalk to the lower pathway. The inspector offered an array of reasons for a miner to have done so.

The inspector first cited what appeared to be his overriding concern: the likelihood of the catwalk being used simply due to the large number of employees working throughout all parts of the plant, including the contractor employees who he described as subject to high turnover rates, given the unpleasant working conditions. Tr. 46-51, 78, 85, 146-47. As can be seen in Appendix A, however, the A1 and A2 raw coal screens and surrounding catwalk and concrete pathways were in large part set off on their own platform area, and the inspector eventually agreed that it was an area that would only be accessed if there was a specific task or tasks to be done there. Tr. 91, 94, 134, 136-38; Resp't Ex. R-C.1.

As for what those tasks could be, the inspector's initial explanation was that a miner might go to "check" on the overhead leak. Tr. 47, 52. If such a "significant" leak was ongoing, however, it was unlikely a miner would cross the catwalk underneath it, much less go entirely across it to reach the step down onto the pathway. Moreover, because the leak was fixed from the floor above, there was no need to cross the catwalk for that reason either. Tr. 170-171.

The inspector was on more solid footing when describing the potential for a miner to have to go to the area to service the raw coal screens, such as, for instance, when dust is thrown off the drive motors onto the screens, resulting in plug ups, or for the periodic need to adjust the skirting around the screens. Tr. 47, 52, 69, 85.[9] Lastly, Inspector Swope discussed the possibility that the missing light might be noticed from outside the area, and perhaps a miner would go, or be sent, to repair the light via the catwalk without appreciating that the material had covered the step down. Tr. 52, 69, 72, 85, 129-31.

[9] In response, Wonchek explained how some of these tasks could be accomplished without necessarily having to set foot on the catwalk, such as the maintenance done on screens from the concrete pathways on either side of the platform. Tr. 175-76; Resp't Ex. R-C.1. He further explained that access to the raw coal screens via the catwalk in front of them was only necessary when an electrician had to reset a "tilt switch" upon an indication of material buildup on a screen. Such would occur "once every two, three months, maybe, depending on conditions." Tr. 172-74.

However, I need not reach a conclusion with respect to the respective evidence on the likelihood of a miner having a reason to cross the catwalk and be subject to a stumbling hazard upon missing the obscured step down to the pathway. Any evidence that a miner may have had a reason to cross the catwalk to begin with is simply too greatly outweighed by the evidence that the falling material would have deterred that miner from making it to the end of the catwalk. That latter evidence prevents the Secretary from establishing *Mathies* Step 2 in this instance.[10]

b. *Mathies* Step 3 & Step 4

Inspector Swope testified that if a miner were to turn the corner leaving the catwalk and step onto the pathway without realizing there was a six- or so inch step down, the miner's resulting loss in balance could cause knee or ankle injuries or injuries stemming from falling into a handrail. Inspector Swope characterized these injuries as reasonably serious and could result in lost workdays or restricted duty. Tr. 56, 77-78. Given the conditions, I agree with the inspector on this, and find that *Mathies* Steps 3 and 4 have been satisfied by the Secretary in this instance. *See also Wolf Run Mining Co.*, 36 FMSHRC 1951, 1958-59 (Aug. 2014) ("not[ing] that an inspector's judgment is an important element in an S&S determination" as part of *Mathies* Step 3 and under Step 4 crediting inspector's testimony regarding the severity of injuries that had resulted to miner).

Due to not satisfying *Mathies* Step 2, I conclude that the Secretary has failed to establish that the violation of section 77.205(b) was S&S. I further conclude that an injury in this instance was unlikely, and that any injury would result in lost workdays or restricted duty.

4. Negligence

The Commission "may evaluate negligence from the starting point of a traditional negligence analysis." *Brody Mining*, 37 FMSHRC at 1702. This analysis asks whether an operator has met "the requisite standard of care—a standard of care that is high under the Mine Act." *Id.* Considerations include "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 regulations." *Id.*; *see also A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). The Commission has explained that an ALJ "is not limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.; see also* 30 C.F.R. § 100.3(d) (stating that operators must be "on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.").

[10] Importantly, the Secretary does not argue that it would only be through the exercise of caution that a miner would avoid walking through the falling material. The possibility that a miner would take precautions is an impermissible consideration in determining S&S. *See, e.g., Newtown*, 36 FHSHRC at 2044; *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992). Rather, the evidence, including that introduced by the Secretary, is that all it took was basic common sense to not walk through the falling material.

Here, CONSOL is not challenging Inspector Swope's assessment of moderate negligence. In determining that CONSOL was moderately negligent, Inspector Swope testified that he had recently seen an increase in section 77.205(b) violations, specifically that "the same standard was cited 15 times in less than two years at the plant." Tr. 78-79; Sec'y Ex. P-1 at 001. Additionally, Inspector Swope noted that spills occurred "everywhere through the plant" and had been "getting worse … over the last several years." Tr. 118. These conditions, in conjunction with Inspector Swope's understanding that individuals go through and look at the plant "on all three shifts" support his determination of moderate negligence. Tr. 47, 79, 85. Woncheck himself stated that in his role as compliance supervisor, he travels every area of the plant every day. Tr. 158-59, 220-21. Thus, I credit the inspector's explanation and affirm the negligence finding.

IV. PENALTY

Commission administrative law judges have the authority to assess civil penalties *de novo* for violations of the Mine Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that the ALJ shall consider six statutory penalty criteria in assessing civil monetary penalties:

> (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, (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).

In the fifteen months preceding the issuance of Citation No. 9204511, MSHA issued 13 violations of section 77.205(b) to the Bailey Mine (seven to operator, four to contractors). *See* MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (last visited November 25, 2022). CONSOL agreed in conjunction with the Secretary that the proposed penalty would not affect its ability to continue in business. Jt. Stip. 6.

For Citation No. 9204511, the Secretary proposed a penalty of $791.00. I determined CONSOL's negligence to be moderate. *See* discussion *supra* Part III.A.4. I also determined the gravity of the violation to be non-S&S, that an injury in this instance was unlikely, and that if an injury did occur, it would result in lost workdays/restricted duty to one person. *See* discussion *supra* Part III.A.3. Moreover, CONSOL demonstrated good faith by fixing the leaking pipe and cleaning up the area promptly. Tr. 83, 149-50, 170. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of $375.00 for Citation No. 9204511.

V. CONCLUSION AND ORDER

It is hereby **ORDERED** that Citation No. 9204511 is **MODIFIED** to reduce the gravity from "reasonably likely" to "unlikely" and to remove the S&S designation. Respondent

CONSOL is hereby **ORDERED** to pay a penalty of **$375.00** within 30 days of the date of this decision.[11] Accordingly, this case is **DISMISSED.**

John T. Sullivan
Administrative Law Judge

Distribution (First Class Mail and E-mail):

Ryan M. Kooi, Esq., U.S. Department of Labor, Office of the Regional Solicitor, 1835 Market Street, Mailstop SOL/22, Philadelphia, PA 19103 (kooi.ryan.m@dol.gov)

Kenneth J. Polka, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Paladin Professional Center, 631 Excel Drive, Suite 100, Mt. Pleasant, PA 15666 (polka.kenneth@dol.gov)

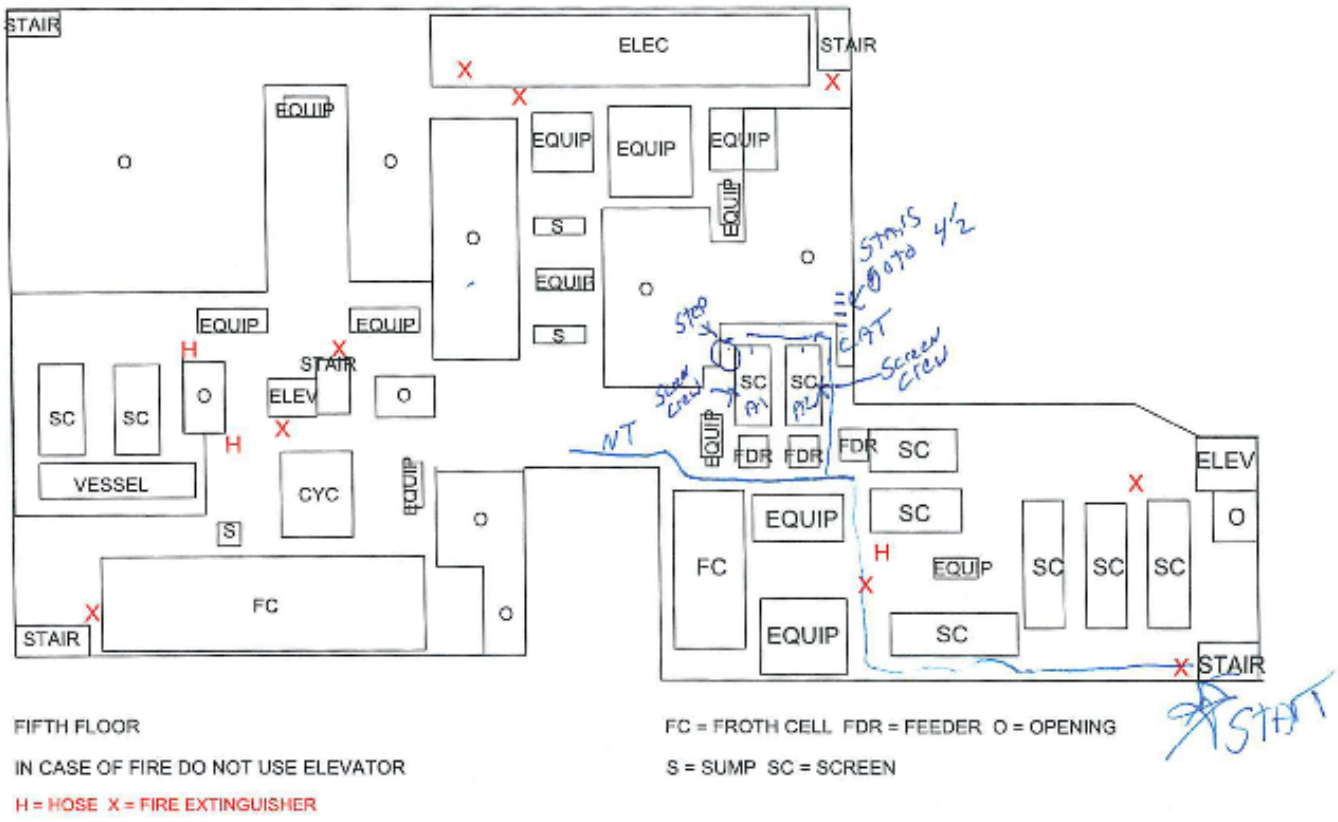
James P. McHugh, Esq., Hardy Pence PLLC, 10 Hale Street, 4th Floor, Charleston, WV 25301 (jmchugh@hardypence.com)

Attachments:

Appendix A: Respondent's Exhibit R-C.1

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

APPENDIX A


STAIR
ELEC
STAIR
EQUIP
EQUIP
EQUIP
EQUIP
EQUIP
S
EQUIP
S
EQUIP
EQUIP
H
STAIR
SC
SC
ELEV
VESSEL
CYC
EQUIP
S
FC
STAIR
SC
SC
EQUIP
FDR
FDR
FDR
SC
EQUIP
FC
EQUIP
SC
EQUIP
SC
SC
SC
SC
ELEV
STAIR
FIFTH FLOOR
IN CASE OF FIRE DO NOT USE ELEVATOR
H = HOSE X = FIRE EXTINGUISHER
FC = FROTH CELL FDR = FEEDER O = OPENING
S = SUMP SC = SCREEN