FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

DEC 30 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL CO., LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2019-8 A.C. No. 36-07416-474254 Mine: Enlow Fork Mine

DECISION AND ORDER

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

Patrick Dennison, Esq., Fisher & Phillips, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Lewis

I. STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). A hearing was held in Pittsburgh, Pennsylvania wherein the parties presented testimony and documentary evidence.

At hearing the parties indicated that they had reached a partial settlement regarding 16 of the citations associated with the within docket. (*see also* Petitioner's brief outlining partial settlement). On August 29, 2019, this Court issued a decision approving this partial settlement.

The remaining Citation Nos. 9079297 and 9077387 were litigated at hearing. The parties have submitted post hearing briefs and reply briefs which have been fully considered in reaching the within decision.

FINDINGS OF FACT AND CONCLUSION OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

II. JOINT STIPULATIONS

The parties' joint stipulations are contained in Joint Exhibit 1 and read as follows:

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C § 802(d), at the mine at which the Citation(s)/Order(s) at issue in this proceeding were issued.

2. Enlow Fork Mine is a "mine' as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. Operations of the Respondent at the mine at which the Citations were issued are subject to the jurisdiction of the Mine Act.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

5. Enlow Fork Mine is owned by the Respondent.

6. Payment of the total proposed penalty of $2,850.00 for the two remaining citations in this matter will not affect the Respondent's ability to continue in business.

7. The individual whose name appears in Block 22 of the Citations in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citations were issued.

8. The Citations contained in Docket No. Penn 2019-0008 were issued and served by a duly authorized representative of the Secretary of Labor

upon an agent of Respondent at the date, time and place stated in the Citations, as required by the Act.

9. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 2019-8 contains authentic copies of Citation Nos. 9077387 and 9079297 with all modifications or abatements, if any.

J-1.[1]

III. CITATION NO. 9077387

SUMMARY OF TESTIMONY

At hearing Walter Young appeared and testified on behalf of the Secretary.[2] On August 8, 2018, Young had written a violation for a branch line that was not connected to a refuge chamber (T. 19). Consol Safety Inspector Matthew Roebuck was escorting Young.[3] Roebuck and Young

---

[1] References to the transcript of the hearing in this matter are designated "T." followed by the page number. References to joint exhibits are designated as "J" followed by the number. References to the Secretary of Labor's exhibits are designated as "GX." References to Respondent's exhibits are designated "R." References to the Secretary's Post-Hearing Brief are designated "SB" followed by the number. References to the Secretary's Reply Brief are designated "SRB" followed by the number. References to the Respondent's Post-Hearing Brief are designated "RB" followed by the number. References to Respondent's Reply Brief are designated "RRB" followed by the number.

[2] He had been working for MSHA for approximately 14 years. (T. 16). At the time of hearing, he was currently working as a mine safety specialist/ventilation and had worked for a few months as a field office supervisor. (T. 17). He had nearly 36 years of experience in underground mining. (T. 17). Previously, he had worked as a mine foreman, weekly examiner, a fire boss, section foreman on both longwall and development, field and shift foreman, and field and construction foreman. (T. 17).

Young had worked at Enlow Fork for 15 years. (T. 18). He had West Virginia miner's papers, Pennsylvania miner's papers, Pennsylvania mine foreman certificate, federal electrical cards, and federal dust certification. (T. 18). He had previously conducted 44 quarterly E01 inspections at Enlow Fork over the span of approximately 11 years. (T. 18).

[3] Matthew Roebuck appeared and testified on behalf of Respondent. He had worked for Consol for approximately eight years, his jobs including industrial trainee, foreman trainee, and safety inspector. (T. 91). In August 2018 he was working as a safety inspector. (T. 91). This position involved escorting MSHA and state mine inspectors approximately four to five days per week. (T. 93).

walked up the No. 2 entry through the crosscut at 44 wall, toward the No. 1 entry. (T. 98). While investigating the branch line, Young noticed another hazard at number 44 crosscut where the mine roof and part of the rib were not being adequately supported. (T. 20; GX-16). The lower half of the right outby corner was undercut—likely as a result of mobile equipment going around it—and had the rib torn away, creating an overhang or brow. (T. 21). Young cited a violation of section 75.202(a), which requires that roof, face, and ribs of areas where persons work or travel be supported or otherwise controlled. (T. 21). The brow measured 28 inches in length, 32 ½ inches in height, and 30 inches at base.[4] (T. 22). The overhang's weight was calculated to be about 621 pounds. (T. 22).

The average ceiling height at Enlow Fork Mine was roughly 8 feet, which means that a miner could have walked underneath the cited condition. (T. 23). If the full weight of the overhang had fallen on a miner, the resulting injury would have been fatal.[5] (T 24). Young observed the brow being scaled down by Roebuck. (T. 116). Once the point of the bar was stuck into the fine crack at the roof and got a foothold, he testified that it took "hardly nothing to pull it down."[6] (T. 25). The crack at the roofline into which the scaling bar was placed was a hairline crack and not a gaping 3 to 4 inch gap. (T. 66). If there were a large gap in the crack, the overhang would have been on the ground. (T. 66). Young testified that except for the overhang, which should have had a post or crib placed under it, the roof and ribs in the cited area were in "decent" condition. (T. 74).

Young described "a lot of" foot traffic going through the cited area. (T. 25). The easiest way to get materials to the working section was through the open crosscut. (TT.26-27, 32). Additionally, the examiner and contractors would travel through the area. (T. 27). People might also travel through the area to avoid mud in the track entry. (T. 27). Miners would travel or work in the area multiple times a shift. (T. 28). Additionally, there would be multiple examinations in the area, including a required exam every 8 hours. (T. 28). Further, the lifeline to the primary

---

Roebuck had taken written notes regarding Young's inspection which he had transcribed on his computer approximately five to seven days after receiving the citation. (T. 95; *see also* R-A).

[4] Young had used a tape measure in taking the rib's measurements and stood approximately six feet—2.3 feet plus his arm's length—from the corner. (T. 55). Young was not permitted to pull down the overhang himself due to workers' compensation considerations. (T. 86).

[5] On cross-examination, Young agreed that there could be circumstances where a roof fall could occur without a violation of section 75.202(a). (T. 42).

[6] Roebuck testified that the process involved six to ten minutes of pulling down the piece which was in a "semi-higher spot." (T. 117). He stated that Young stood back 6 to 6 ½ feet from the area. (T. 117). Roebuck did not remember Mr. Young standing and taking measurements. (T. 117).

escapeway ran through the area and under the overhang.[7] (T. 30). Roebuck testified that men on foot would have been in the cited area when they were assisting the can setter. (T. 120). A pre-shift examiner, depending upon his route of travel, would need to come up through the primary escapeway and cited area to examine where cans were being set, the crosscut, the roof/rib conditions. (T. 122).

It appeared that some type of mobile equipment—likely the scoop hauling materials to the face—had damaged the corner while making the turn. (T. 28). Multiple trips had knocked off multiple pieces of the corner creating the overhang. (T. 28). On the date he issued his citation, Young did not personally observe a scoop travel in the cited area or undercut the rib at issue. (T. 51). He had not interviewed any scoop operators as to whether they had undercut the cited corner. (T. 52). Similarly, Roebuck had not spoken with any scoop operators regarding the citation. (T. 111). Roebuck had observed cracks in the corner cited by Young, but stated that the roof conditions were "fairly good." (T. 112, 114). However, based upon Young's 36 years of experience and the facts that no other ribs were blown off or deteriorated "that bad," and that there were scoop tracks up through the entries, he concluded that a piece of equipment had undercut the corner. (TT. 52-53).

The citation had been evaluated as "low negligence" because—although Young had suspected that the condition had "probably" lasted more than one shift—he could not prove it. (T. 32). Young has past experience with such hazards. He had seen in the past where corners could pop or start to deteriorate quickly. (T. 32). There was therefore "a reasonable chance" that the condition had only become existent since the last pre-shift was conducted. (T. 32). Young conceded that the unsafe condition could have occurred after the last pre-shift examination—which would have been conducted between 5:00 am and 8:00 am that morning. (T. 71-72). He further agreed that management's lack of knowledge regarding an unsafe condition would lessen the degree of negligence. (T. 73). He did not encounter anyone during his inspection who knew of the cited condition. (T. 76). In finding low negligence, Young opined that the operator should have known of the violative condition. Further, in terminating the condition, the operator had no question of what brow was being referenced in the citation or when they moved the lifeline. (T. 78).

The violation was listed as affecting one person because it was deemed unlikely that, in the event of a rib fall, more than one person at a time would be injured. (T. 33). Any injury could reasonably be expected to result in lost workdays. (T. 33). Young had witnessed roof falls in the past. In one instance he observed the upper part of a rib fall off, resulting in a chunk approximately the size of a softball striking a miner's foot and fracturing his metatarsal bones. (TT 33-34).

---

[7] Young had used poor wording in his notes when he stated that the lifeline was rerouted to the center of the entry as a result of pulling down the corner. (T. 67). The rerouting was actually to the crosscut. (T. 67).

Given the size and the weight of the brow at issue here, the types of injury could range from a "fatality to a concussion, to broken bones, to contusions, lacerations, evulsions, concussions." (T. 34). In assessing the likelihood of injury as being "reasonably likely" rather than "highly likely," Young described himself as being "pretty kind" to Respondent in that a falling 641 pound piece or quarter of such could easily cause more than broken bones. (T. 77).

Young, in his notes, had written that the lifeline for the primary escapeway had been installed directly under the corner. (T. 56; GX-16). Roebuck disagreed with Young's contention that the lifeline for the primary escapeway was located directly underneath the cited corner. (T. 98). He explained that the line was a branch line. (T. 98). Between Enlow Fork's secondary escapeway, which was in the No. 2 entry, and the primary escapeway, which was in No. 1 entry, Consol had a branch line on the long wall face going from the secondary to primary. (T. 98-99). Roebuck asserted that Consol had been forced to install such and that it was confusing to miners. (T. 99-101). On August 21, 2018, the branch line was yellow with red fiber nylon rope. (T. 106). It had no cones or reflectors. (T. 106). It only had the spiral, which was directly where the secondary escapeway lifeline met the branch line. (T. 106). Going to the left of a can, it was connected to the primary escapeway lifeline. (T. 106). If an issue arose necessitating the use of an escapeway, Roebuck would travel outby, taking the easiest route, the No. 2 entry. (T. 106).

However Young explained that it was not a "branch line" because under the law "branch lines" only go to de-refuge chambers and SCSR caches. (T. 56). However, Consol trains its people to follow the branch to the lifeline in the primary escapeway. In the event of an emergency, Consol had also trained people to use the No. 2 entry to get to the track. (T. 57). However, if there were smoke coming up the track, the No. 2 entry would not be used. (T. 57). Young stated that the lifeline for the primary escapeway, which was located in the No. 1 entry, was not located directly underneath the corner, stating thusly: "That is true. The branch line that connects the two escapeway lifelines would run underneath it, yes sir." (T. 57).

Roebuck testified that cans were located in the No. 1 entry as a permanent floor to roof support to support the entry for bleeder travel and bleeder examination.[8] (T. 107). The can closest to the area cited by Young was two to three feet away. (T. 107). One could not get equipment into the crosscut with the can there. (T. 108). Roebuck, however, could not say when the can was built there. (T. 108). Roebuck did not recall seeing anyone working in the No. 1 entry while he accompanied Young. (T. 110). The only supplies that could be hauled into the No. 1 entry would be cans for permanent roof support, wall sealant, wall replacement, and building supplies. (T. 110).

Young had seen evidence of scoop tracks in the No. 1 entry, which was the primary escapeway. (T. 79). Scoops could not tram past the No. 2 entry which was the secondary

[8] Young could not recall if there were cans in the entry, but testified that if there were cans then a scoop could not have traveled in the entry of the 44 crosscut, unless scoops had traveled in the area before cans were set. (T. 64).

escapeway. (T. 70). There were no objections voiced regarding Young's measurements of the overhang at the scene. (T. 82, 131).

Roebuck disagreed with the S&S designation, stating that in the event of an emergency a miner would "more than likely" use the No. 2 entry and would not be expected to be traveling by the cited corner. (T. 115).

A. CONTENTION OF THE PARTIES

The Petitioner contends that the Respondent had failed to maintain the roof and rib at a right outby corner, allowing a hazardous overbrow to form in violation of § 75.202(a). Given the size and location of the overhang, including its proximity to foot and vehicle traffic, the violation was S&S in nature.[9]

The Respondent contends that the cited area was not traveled regularly and that examiners traveled in the middle of the entry and not near the cited corner. Respondent further contends that the cited corner was not loose and not reasonably likely to fall and was, in fact, difficult to pull down. Any violation of § 75.202(a) could not survive a *Mathies/Newtown* S&S analysis.

B. BURDEN OF PROOF AND STANDARD OF PROOF

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by the preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006). *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probably than its nonexistence.'" *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California,* 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the

---

[9] The Secretary further argued that the second prong of the S&S analysis should be less burdensome and that its position should be entitled to deference. (SB at 16). Because this Court finds that the Secretary met its burden under the *Newtown* analysis, the question of whether the Secretary's test for S&S is entitled to deference is left for a future case.

requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California.* 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States,* 97 U.S. 237, 266 (1877).[10]

While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court's factual determinations must be supported by substantial evidence.[11]

As to this and other controverted matters discussed *intra*, this Court has credited the opinions of Young, an experienced MSHA inspector.[12] (*see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998) and *Buck Creek Coal, Inc. v. MSHA*, 52 F. 3d 133, 135-136 (7th Cir.) re crediting opinions of experienced MSHA inspectors).

This Court observes that the applicable "degree of certainty" is particularly pertinent to the present controversy. For example, in evaluating the testimony of the MSHA inspectors, this Court was guided by a civil "more probable than not" standard. If the within matters were criminal in nature requiring that the government establish proof of violation(s) beyond a reasonable doubt, the within outcome may have been different.

---

[10] "What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case." 2 McCormick On Evid. § 339 (7th Ed.). emphasis mine. Indeed the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad*'s Book XXII: "Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor." HOMER. THE ILIAD, BOOK XXII, trans. Samuel Butler, 1898.

[11] When reviewing the finding of fact by a lower court, the Commission will decline to disturb the determination if is supported by substantial evidence. *Wolf Run Mining Co.,* 32 FMSHRC 1669, 1687 (Dec. 2010), *U.S. Steel Mining Co.,* 8 FMSHRC 314, 319 (Mar. 1986). This test of factual sufficiency has been a part of Commission jurisprudence since its inception, required by the plain text of the Mine Act itself. 30 U.S.C. § 823(d)(s)(A)(ii)(I). Substantial evidence has been described by the Commission as "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

[12] With respect to Citation No. 9079297, *infra*, this Court similarly credits the opinions of Inspector Yates for the same legal reasons.

C. ANALYSIS

1. The Secretary has proved by a preponderance of the evidence that there was a violation of 30 C.F.R. § 75.202(a).

At hearing, MSHA Inspector Young credibly described his discovery of an overhanging brow at the right outby corner of the No. 1 entry, the overhang measuring 28 inches in length, 32 ½ inches in height, with a 30-inch base and weighing approximately 620 pounds. (T. 20-22; GX-16).

Young observed the lower corner being pulled down with a slate bar and noted that it had taken "hardly nothing to pull it down." (T. 25).

Section 75.202(a) provides, in pertinent part:

> The roof, face, and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face, and ribs...

The cited condition patently appears to be in violation of this mandatory safety standard. Neither at hearing nor in its briefs has Respondent offered persuasive evidence or argument to contest the fact of violation.

The Secretary has carried its burden of proving that section 75.202(a) was, in fact, violated.

2. The Respondent's violation of section 75.202(a) was S&S in nature.

For nearly a generation the Commission's analytical framework for evaluating purported S&S violations rested upon the four step process set forth in *Mathies Coal Co.*, 6 FMSHC 1, 3-4 (Jan. 1984).

Mathies required that the Secretary prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard; (3) a reasonable likelihood that the hazard contributed to will result in injury; (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, (Jan. 1984).

In *MSHA v. Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036-2040 (Aug. 2016), the Commission modified *Mathies* by shifting the "reasonable likelihood" inquiry to the second step. Under *Newtown*, the S&S analysis inquires whether:

> (1) there has been a violation of a mandatory safety standard;
> (2) 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;

(3) based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury; and
(4) any resultant injury would be reasonably likely to be reasonably serious.

MSHA v. ICG Illinois, LLC, 38 FMSHRC 2473, 2483 (Oct. 2016) (Althen Dissenting).

The Commission, in *Newtown*, held that the proper focus of the second step in *Mathies* was the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown*, 38 FMSHRC at 2037, FN 8. The majority further emphasized that it was essential for the judge to adequately define the particular hazard to which the violation allegedly contributed. *Id.* at 2038. The starting point for determining the hazard should be the actual cited section. *Id.*.

For the following reasons, this Court finds that the Secretary has established that all four prongs of *Mathies/Newtown* have been met.

a. Violation of a Mandatory Safety Standard

The discrete safety hazard presented by the within violation was the danger of falling materials upon individuals passing near to or under the overhanging brow. The Secretary has proved the existence of particular facts surrounding the violation of section 75.202(a) to establish that the occurrence of falling materials would be reasonably likely to result in an injury.

b. Reasonable Likelihood of the Occurrence of the Hazard

i. Exposure to the Unsafe Condition

At hearing Inspector Young credibly described the cited area as one involving "a lot of" foot traffic. (T. 25). Persons in this area could have easily walked directly underneath or nearby the unsupported brow. (T. 23). Miners, contractors, and examiners (pre-shift, on-shit, and weekly) could have been exposed to the hazard. (T. 27-28).

Miners driving scoops near the rib corner had apparently contributed to the overhang and were in its vicinity. This exposure of so many individuals who might walk or operate machinery near or under the overhang increased the likelihood of this occurrence of the hazard. (T. 18; *see also* Young testimony re scoop tracks. TT. 52-53).

This Court has carefully considered the arguments advanced by Respondent that the cited area was less heavily traveled than contended by the Secretary and that access to the cited area would be difficult.[13] (*see inter alia* R-B at 10-11). This Court, however, is persuaded that various individuals, including equipment operators, did travel in vicinity of the area and could have been exposed to the hazard. This Court takes further note of the Commission decisions cited by the

[13] Regardless of disputes in lifelines, the area was travelled.

Secretary upholding an S&S designation where only a weekly examiner was exposed to the unsafe condition. (*see* SB at p. 24).

ii. Size and Weight of Overhang

This Court found the size and weight of the overhang to constitute other particular facts surrounding the violation which contributed to the reasonable likelihood of the occurrence of falling materials. (*see also* T. 22-23).

At hearing and in its briefs, the Respondent offered little evidence or argument contesting the size and weight of the overhang.

iii. Existence of Cracking in the Overhang

At hearing Inspector Young credibly described a crack at the roof line of the overhang and the certain collapse of the overhang if there were a large gap. (T. 66).

Given the size and weight of the overhang, its beginning roof line cracking and considering the inexorable force of gravity, this Court found said factors to increase the likelihood of falling materials.

iv. Ease of Abatement

As noted *supra* the overhang was scaled down without much difficulty, a reasonable inference flowing from such that the overhang could easily have fallen during continuing mining operations.

Considering all of these particular facts surrounding the within violation, there was a reasonable likelihood of the occurrence of falling materials so as to satisfy *Newtown* step 2 requisites.

c. Occurrence of the Hazard Would Be Reasonably Likely to Result in an Injury

There was a reasonable likelihood that if the 600-plus pound brown fell, it would result in would reasonably result in a serious injury to a miner standing or traveling beneath it. Inspector Young testified that he had observed roof and rib falls that resulted in serious injuries. (T. 33-34).

d. Any Injury Resulting from the Occurrence of Falling Materials Would Be Reasonably Likely to Be Serious in Nature

At hearing MSHA Inspector Young credibly testified regarding the serious injuries that could be caused by roof/rib falls. (TT. 33-34). Given the size and weight of the overhang in

question, the occurrence of falling materials would reasonably be likely to result in a serious injury, if not a fatal one.[14]

3. The inspector's gravity assessments of lost work days or restricted duty and of one person being affected is supported by the record.

Considering the serious nature of any injury involving the large overhang at issue, the inspector's gravity assessment of lost work days is more than supported by the record.

Likewise, the inspector's assessment of one person affected, given the unlikeliness of more than one person affected, given the unlikeliness of more than one person at a time being injured by the falling corner, is supported by the record. (*see also* T. 32).

4. The low level of negligence designated by the inspector is supported by the totality of the circumstances.

29 C.F.R. § 100.3(d) provides that low negligence is where "the operator exercised diligence and could not have known of the violative condition or practice." As noted *supra*, Commission judges are not required to apply the definitions of Part 100 but may evaluate negligence from the starting point of a traditional negligence analysis, considering the circumstances holistically. (*see also Brody Mining, LLC*, 37 FMSHRC at 1702). After carefully considering the testimony at hearing, including that of Inspector Young who conceded that corners can pop or start to deteriorate quickly (T. 32), this Court is persuaded that the low negligence was a proper finding.

5. The Secretary's proposed penalty of $363.00 is affirmed.

This Court affirms the penalty of $363.00 and finds no reason to diverge from such pursuant to *Sellersburg*, *supra.* In arriving at this conclusion this Court has considered the six statutory factors in section 110(i) of the Act. This Court noted that Respondent stipulated that Secretary's proposed penalty would have no effect on his ability to continue in business and that the size of Consol is relatively large. The operator does have a history of similar violations. (*see* GX-18). As found within, the violation was S&S in nature but involving only low negligence. The operator did display good faith in attempting to achieve rapid compliance.

[14] This Court takes judicial notice that roof falls remain the leading cause of miner fatality. *See inter alia*, Sep. 8, 2017 "Fatalgram" reporting death of 62 year old section foreman killed in West Virginia mine by a 3 foot by 2 foot rock-fall between roof bolts.

IV. CITATION NO. 9079297

SUMMARY OF TESTIMONY

On August 26, 2018, Bryan Yates was conducting an E02 spot inspection for methane.[15] (T. 140). Yates was escorted by Respondent's safety inspector, Daniel Colby.[16] (T. 199; R-D). During Yates's inspection, he noticed an energized cable going to a feeder, which was hanging down. (TT. 142, 144). He performed a visual observation and noted possible damage to the cable, which was located in the center of the entry. (T. 143, 146-149). Colby testified that he did not see any damage to the cable which Yates requested be taken down. (T. 203).

After Colby disconnected the power, Yates examined the cable. Yates testified that he would literally put his hands on the cable or slide cables through his hands. (T. 159). He could tell "in a heartbeat" if there was a deformity in the cable. (T. 160). Yates found two damaged locations: one area was approximately three-fourths of an inch wide with no visible damage to the inner conductors; the second area was one and three-fourths of an inch wide with visible damage to the white inner conductor.[17] (T. 144, 166; GX-13). One location involved damage to the white inner conductor which carried electricity to the feeder. (T. 146).

Yates was 5 feet 8 inches in height, but the cable was 7 to 10 feet high. (T. 160, 175, 201). Colby had to help Yates get the cable off the J-hook using a four-foot sounding stick. (T. 174-175, 201). Before Yates and Colby had taken down the cable, it was still energized. (T. 174-175). Yates did not know why the sensitive ground fault had not been working. (T. 182-183). He

---

[15] At hearing Bryan Yates appeared and testified on behalf of the Secretary regarding the issuance of Citation No. 9079297. Yates had worked for MSHA for 4 ½ years as an underground coal mine inspector. (T. 138). Prior to joining the agency he had worked in underground mining for approximately 13 years. His jobs involved equipment operator, belt shoveler, scoop operator, fireboss, and section foreman. (T. 139). His certifications included miner's foreman's papers, Kentucky miner emergency technician, CPR instructor, and Kentucky miner instructor's certifications. (T. 139).

[16] At hearing Daniel Colby appeared and testified on behalf of the Respondent. Colby had worked for 18 years for Consol, all of which were at Enlow Fork mine. (T. 195). His positions included production maintenance person, tuber event person, bolter, center bolter, rib bolter, side bolter, machine runner, longwall shield operator, safety technician, and safety inspector. (TT. 195-196). At the time of hearing, he was working as a safety inspector and had been doing so in August 2018. (T. 196). He did PPE ordering for the miners. (T. 197). He escorted federal inspectors during their mine inspections. (T. 197). These escorts took place four out of five days. (T. 197).

[17] Yates measured the damaged area with a tape measure. (T. 156). Yates had placed his lock on the lockout/tagout device to protect himself from unauthorized re-energization of the cable. (T. 144). The cited cable had 480 volts. (T. 150).

had not talked to anyone from Consol who knew that there was damage to the cable. (T. 183-184).

The hazard to which miners would be exposed would be contacting an energized lead and getting electrocuted. (T. 149, 223). The injury would be fatal. (T. 150). Yates himself had once been badly shocked when he had attempted to pick up a damaged cable to prevent equipment from running over it. (TT. 150-151). The shock nearly killed him. (T. 145). This experience had made him "very observative" on cables. (T. 151). Yates also described a fatality in 84 Mine where a ram car pinched a cable on the rib, energizing the car and killing a miner attempting to exit. (T. 154). It was possible for electricity to track through a pinhole in the cable. (T. 191). A fatality can take place even without obvious evidence that the outer jacket is damaged. (T. 192).

The likelihood of injury was assessed as "reasonably likely." (T. 150; GX-11). A major factor taken into consideration was "exposure." (T. 150). If a shuttle car, ram car, or scoop were to knock the cable off its J-hook, a miner, in attempting to rehang it, might grab the cable on its damaged area and sustain a serious or fatal electrical injury. (T. 150). In the past, Yates had witnessed energized cables knocked off J-hooks, falling to the bottom, and being rehung by miners. (TT. 150-151). When considering the factor of exposure to the cited hazard, Yates took into account the number of miners working in and traveling by the area. (T. 186). Yates could physically reach the cable while standing on the bottom. (T. 188). He had measured the cable damage from side-to-side of the tear and not just the hole itself. (T. 190). The other damaged area did not have damage to the inner conductors. (T. 191).

On the date the citation was issued, Yates had observed ram cars, loaded high with coal, passing through the area, with rock coming into contact with the energized cable. (T. 152). Furthermore, miners standing on the bottom could have touched the cable. (T. 152). The area where the cable was located—2 east mains outby, 98 wall—was considered "wet." (T. 153). Given the way the ram cars were set up and loaded high, a cable could be struck, requiring miners to get out of their cars and rehang the cable. (T. 153).

Yates opined that miners often traveled through the area, including scoopers cleaning the feeder. (T. 154). He determined that only one person would be affected because not more than one person would be grabbing the damaged area of the cable at a time. (T. 155). He agreed that a feeder would move less frequently in a main section than in other sections. (TT. 175-176).

Referring to the photograph of the damaged cable contained in GX-3, Yates denied that he had manipulated the cable in any way before the photograph was taken. (T. 156). However, he testified that he "probably" had twisted the cable to help "get the coal and stuff" out. (T. 173). Yates testified that he had dug into damaged cables in the past in order to make certain they were safe. (T. 156, 172). He would do so only in instances where it was necessary, but testified that he did not do so in the instant case. (Tr. 156). He did not believe that twisting or turning a cable could damage an inner conductor. (T. 173). He was uncertain as to how the cable was damaged. (T. 172). He also denied digging into the cable with any tool. (T. 156, 172). On cross-examination, Yates testified that he could not remember what he had used to tap out the debris from the damaged cable's tear. (T. 165). In the past he'd use a walking stick or screwdriver. (T.

165). Colby testified that Yates used a small screwdriver to clean out the hole, prying it open and twisting the cable. (T. 204-205).

Colby had never before witnessed an inspector actually rotate a cable and torque it during his inspection. (T. 205). Colby could not detect any inner conductor damage in viewing the photograph contained in GX-13 nor did he recall seeing any such damage in other photographs. (TT. 205-206). Colby referred to his notes in which he stated that he had observed a cut "large enough and deep enough to damage the white conductor cable." (T. 206). He did not, however, observe this tear before Yates had manipulated the cable. (T. 206). Colby did not think that Yates would intentionally damage the cable, although in his notes he described Yates' rotating the cable to embellish the opening. (TT. 218-219).

Yates assessed the violation as being the result of "Moderate" Negligence. (T. 158). He did so because a boss is required to do a pre-shift and on-shift examination of the feeder area. (T. 157). The cable had been last examined on August 25, 2018, the day before Yates' inspection. (T. 158). A member of mine management as well as an examiner should therefore have known of the condition. In order to do a thorough examination or inspection, one should go "hand-over-hand" on the cable. (T. 159). However, there was a lot of dust on the cable, indicating that the examiner had not performed an adequate examination in order to find the problem. (T. 159). Yates did not know when the cable was last examined nor did he attempt to locate and question the previous examiner. (T. 179). He did not know if Respondent had mined on August 25, 2018, or the last time Consol had dumped coal on (No. 13) feeder. (T. 180). Due to Respondent's problems with damaged cables, Yates was starting to issue citations designating high negligence because the mine operator had now been put on notice of this unsafe condition. (T. 162).

General maintenance foreman Travis Stout noted that there had been an electrical repair on the feeder on August 14, 2018.[18] (T. 235; R-E). The cable in the packing gland on the main contractor panel had pulled out of the gland and the mechanic put it back in the gland and had repaired it. (T. 235). Reviewing an electrical exam report on August 25, 2018, Stout noted that a ground fault associated with the No. 13 feeder had been detected. (T. 236). Consol had a 1 amp fault current limit which was tripped at 300 milliamps—which was 25 times less than the law required. (T. 237). Stout further testified that if the inner conductor was damaged and the sensitive ground fault tripped the breaker, power would not be expected to remain on the cable. (TT. 237-238). However, there was no issue with the sensitive ground fault on the No. 13 feeder at the time Yates had issued his citation. (T. 238).

[18] At hearing Travis Stout appeared and testified on behalf of the Respondent. He had worked for Consol for 25 years and for Enlow Fork Mine for 18 years. (T. 232). His current position was that of general maintenance foreman or master mechanic, a position which he had held for approximately seven years. (T. 232). His other jobs included shift maintenance foreman, electrical foreman, long wall maintenance coordinator, assistant master mechanic, and maintenance trainee. (T. 232). He had a B.S. in Electrical Engineering. (T. 232).

Colby conceded that he had witnessed damage to the inner white conductor. (T. 220). He further conceded that a ram car conductor might exit his vehicle to rehang the cable, if it were knocked off the J-hook. (T. 221). The feeder cable is inspected every week so the damage could potentially be there for that length of time. (T. 221).

A. CONTENTION OF THE PARTIES

The Petitioner contends that Respondent had failed to maintain an energized 480 volt power cable which provided power to a feeder. The MSHA inspector found two damaged areas on the cable, one area measuring one and three-fourths inch in length, having exposed damaged inner conductor and copper. This constituted a clear violation of § 75.517 which requires that power cables be adequately insulated and fully protected. Given the area and traffic where the cable was located, there was a reasonable likelihood that a miner would be exposed to electrical shock satisfying the S&S requirements of *Mathies/Newtown.*

The Respondent contends that the cable in question was, in fact, adequately and safely maintained. Only after the inspector had twisted, contorted, and manipulated it and misused a screwdriver during his examination, did the cable become damaged and unsafe. Further, even if the cable's tear was existent prior to the inspector's manipulations, there was no reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard was directed pursuant to the Commission's holding in *Newtown.*

B. ANALYSIS

1. The Secretary has proved by a preponderance of the evidence that there was a violation of 30 C.F.R. § 75.517.

Section 75.517 provides, in pertinent part, that power cables shall be insulated adequately and fully protected. 30 C.F.R. § 75.517. At hearing the Secretary presented testimonial and photographic evidence that the cable supplying power to the No. 13 feeder was damaged in two places, one of which posed a clear danger of electrocution to miners.

The Respondent has argued that there was no damage to the cable in the cited area until MSHA Inspector Yates had unreasonably bent, twisted, torqued or otherwise manipulated the cable and until Yates had improperly examined the tear itself with a small screwdriver.

This Court initially observes that the Respondent presented no persuasive evidence, expert testimony or otherwise, that manipulating power cables, such as those found at Enlow Fork, would actually cause the type of tear or damage, including exposure to copper, found in the cited cable.

Indeed, as to the fact of violation, Respondent's own witness, Dan Colby, conceded that a violation existed, stating:

"I've seen a lot of citations. *I don't disagree that it's not a citation.* But...I don't believe it's S&S..." (T. 208) (emphasis added).

Considering Yates testified to near fatal electrocution in the past, this Court recognizes that Yates may be abundantly cautious—to a fault—in enforcing electrical safety standards. This Court further recognizes that Yates' vigorous manipulations may have embellished the cable's opening. (*see* Colby's comments regarding such at R-D). However, this Court does not find that Yates' examination techniques, however unorthodox or embellishing, created the cited cable's inner damage. Yates provided ample reasons why he may need to manipulate a cable, such as removing coal and other debris or making certain the cable was safe. (T. 156, 172, 173). As opposed to this, Respondent presented little or no evidence as to what should be the proper or preferred techniques for examining and photographing damaged cables.

The undersigned has practiced law for over 40 years and is not naïve regarding the regrettable truth that witnesses sometimes lie on the stand.[19] This Court further understands that Yates' personality and zealotry have raised antipathy and suspicion on the part of the Respondent. However, having considered all the evidence presented by the Secretary and Respondent, *in toto* this Court ultimately rejects Respondent's arguments, express or implied, that Yates had deliberately or recklessly damaged the cable so as to have self-created the violation and then had given perjured testimony in support of such.

There may have been some inconsistencies and self-serving exaggerations in Yates' testimony, but this Court neither finds Yates to be a fundamentally mendacious individual nor did it observe any instances where Yates engaged in fabrications.[20] On the whole, and as to the particular facts of the cable's tear and inner conductor exposure, this Court found the inspector's testimony to be credible and reliable.[21]

This Court essentially concurs with the arguments advanced by the Secretary at hearing and in his briefs that there was a violation of section 75.517 and finds that the Secretary has presented sufficiently probative and credible evidence establishing this underlying violation of a mandatory safety standard.

---

[19] *See* Professor Anthony Salzman's observation: "witnesses have violated their judicially administered oaths to tell the whole truth since the beginning of American jurisprudence..." *Journal of Criminal Law & Criminology,* Vol. 67, No. 3, p. 273.

[20] To recall Big Daddy's lines from Tennessee Williams' *Cat On a Hot Tin Roof*: "There ain't nothing more powerful than the odor of mendacity...you can smell it. It smells like death." Tennessee Williams, *Cat on a Hot Tin Roof*, 166 (2004).

[21] *See inter alia* Respondent witness Colby's observations of the cable's damaged white inner conductor and exposed copper. (T. 218).

2. The Respondent's violation of section 75.517 was S&S in nature.

This Court hereby incorporates the review of S&S requirements recited *supra*. The Secretary has established that all four prongs of *Mathies/Newtown* have been met. In determining whether a violation is S&S, the finding must be made on the facts that existed at the time of issuance of the citation and must assume continual normal mining operations absent abatement. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984). Many of the "facts" surrounding the within violation, as noted *supra*, are in dispute and must ultimately be resolved by the undersigned who is sitting both as trier-of-fact and trier-of-law. The following facts, supportive of an S&S designation, are found in favor of Petitioner.

a. Violation of a Mandatory Safety Standard

The Secretary has proved the existence of particular facts surrounding the violation of section 75.517.

b. Reasonable Likelihood of the Occurrence of the Hazard

In the within matter, the particular hazard against which section 75.517 is directed is electrical shock or electrocution due to a miner coming into contact with inadequately insulated or not fully protected power cables.

The majority in *Newtown* recognized that "reasonable likelihood" was not an exact standard which could be calculated in precise percentage terms. *Newtown*, 38 FMSHRC at 2039. Further the "reasonable likelihood" standard was a "matter of degree" evaluation with particular focus on the facts and circumstances presented regarding the risk involved. *Id.*[22]

The majority noted that the Commission had never construed "reasonable likelihood' in a narrow or cramped manner that would hinder the achievement of the Mine Act's objective of a safe and healthy mining environment. *Id.*, at 2040.

Considering the particular facts surrounding the within violation of section 75.517 and the Commission's directives in *Newtown*, this Court finds that there was "a reasonable likelihood" of the occurrence of the hazard against which the mandatory safety standard was directed.

In finding "reasonable likelihood" this Court specifically notes that it has rejected many of the Respondent's suggested findings of fact in favor of those argued by the Secretary. As noted *supra*, this Court finds that the area where the cable was located was frequently traveled by miners on foot and on motor vehicles, including ram cars, that the cable, whether in a hanging

[22] The majority rejected (for the time being) an "at least somewhat likely" standard, also noting "more probable than not" did not mean "reasonably likely." *Newtown*, 38 FMSHRC at 240, fn 12.

position or knocked to the floor, was accessible to miners traveling or working in the area, that the damage to the cable existed prior to Yates' examination and was of such character that it could cause electrocution. The area in question was considered "wet." (T. 153). Miners usually do not wear electrocution-protective gloves or gear. These particular facts also increase the likelihood of electrocution. (*see also* T. 9, 132).

In reaching the within S&S determination, this Court has not considered the redundant safety features utilized by Respondent. Such safety precautions, including the mine's sensitive ground fault, do not bear upon an S&S inquiry as to whether the hazard is "reasonably likely" to occur. (*see Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015) and Secretary's arguments with which this Court concurs, including at SB, p. 18).

This court also notes that *Newtown* upheld that whether miners would exercise caution is not relevant under the *Mathies* test. (*Newtown*, 38 FMSHRC at 2044); *See Also Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992).

In light of the foregoing matters not to be considered in the S&S inquiry and considering the totality of the circumstances, including those facts found in favor of the Secretary, this Court finds that *Newtown's* second prong is met. There was a reasonable likelihood of exposure to electrocution due to damaged power cables which section 75.517 was directed against.

i. Access/Exposure to Cable: Height of Cable

The height that the cable hung from the bottom has been disputed by the parties. (*see inter alia* Colby testimony that entry height was 8 feet to 10 feet. T. 201).

Inspector Yates, who is 5 feet 8 inches tall, testified that he could reach the cable while standing upright on the bottom. (T. 152). He estimated the roof in the cited area to be 7 to 7 ½ feet in height and the cable to be 6 feet from the bottom. (T. 160). Although the Respondent presented testimony that the cable was difficult to reach because of the height of the entry (T. 203), it presented no testimonial or photographic evidence that the hanging cable could not be touched by someone standing on the bottom. In fact, Respondent's witness, Dan Colby, acknowledged that the cable hung lower than the roof. (TT. 216-217).

This Court concludes that miners could have grasped the cited hanging cable—albeit less easily if they were shorter than the 5 feet 8 inches tall Yates or more easily if they were taller. In any case, the potential for coming into contact with the low-hanging cable by grasping it was existent.

ii. Access/Exposure to Cable: Cable on the Mine Floor

At hearing the Secretary presented evidence that coal loaded on top of ram cars could contact the hanging energized cable and knock it to the floor. (*see* T. at 152, 221, and Summary of Testimony *supra*). This created the reasonable potential for a miner who, attempting to retrieve or happening upon the energized cable, could come into contact with it.

iii. Access/Exposure: Trammable Feeder; Belt and Power Moves

At hearing the Secretary also presented testimony that the 480 volt cable powered a trammable feeder which miners moved frequently. (T. 161). While there was some dispute as to how often the feeder in the cited area was moved, there was no dispute that miners would be handling the energized cable during feeder movement, thus creating another occasion where miners might be exposed to electrocution. (*see also* S-B at p.15 for discussion of such).

iv. Access/Exposure: Frequently Traveled Area

At hearing the Secretary also presented evidence that the area was frequently traveled, this factor also increasing the likelihood of a miner coming into contact with the damaged cable. (*see also* T. 153-155).

v. Exposure to Damaged Cable Could Lead to Electrocution

At hearing there was some question as to whether the size and character of the cable damage would allow electrocution. Inspector Yates credibly testified that even a pinhole sized puncture could result in a fatality. (T. 191). The damage to the cable at issue was much larger and more extensive. (*see Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998), where a violation of § 75.715 was found for a tear in the outer jacket of a cable.) In assessing Yates' testimony regarding the danger posed by a pinhole sized tear in the inner conductor (T. 190-92), this Court notes the Commission holding in *Sec'y of Labor v. Wolf Run Company*, 30 FMSHRC 1947, at 1955-1956, wherein the Commission upheld the ALJ's crediting of MSHA inspector's testimony regarding the danger posed by a telephone wire lacking a required lightning arrester. Accordingly, this Court finds that the damage in the cited cable was in fact sufficiently extensive so as to have created the hazard of electrocution to any miner coming into contact with such.

c. Based upon the particular facts surrounding the violation of section 75.517, the occurrence of an electric shock/electrocution hazard would be reasonably likely to result in a serious injury.

In *Newtown* the Commission noted that the third step in *Mathies* was primarily concerned with gravity and that the analytical focus now shifted from the violation to the hazard whose existence had already been established in the analysis. (*Newtown.*, 38 FMSHRC at 2037).

Assuming the existence of an electric shock or electrocution hazard, the occurrence of such would reasonably be likely to result in injury.

Given this Court's above findings and conclusions of law, any resultant electric shock/electrocution injury would be reasonably likely to be reasonably serious or fatal.

3. The expected injury arising from the violation would be fatal, would be expected to affect one person, and involved moderate negligence.

At hearing Inspector Yates credibly testified that the expected injury resulting from a 480 volt shock would be death, the gravity designation of fatal being therefore reasonable and proper. (*see also* TT 149-150; GX-11).

Given that only one person at a time would likely handle the energized cable, the gravity designation of one person who would be affected was also reasonable and proper. Respondent did not contest such. (T. 155; GX-11).

In *Sec'y of Labor v. Brody Mining, LLC.*, 37 FMSHRC 1687, at 1701 (Aug. 2015) the Commission affirmed that, in making a negligence determination, Commission judges are not required to apply the definitions of Part 100, may evaluate negligence from the starting point of a traditional negligence analysis, and are not limited to an evaluation of allegedly mitigating circumstances and could consider "the totality of the circumstances holistically."

At hearing Yates again credibly testified that the operator knew or should have known of the violative condition. (T. 153, TT. 158-159). This Court affirms the "moderate" negligence designation.[23]

4. The penalty assessment of $2,487 is affirmed.

In *Thunder Basin Coal Co.*, FMSHRC 1495, 1503, the Commission held that all of the statutory criteria in § 110(i) should be considered in the court's *de novo* penalty assessment but not necessarily assigned equal weight. In *Musser Engineering, Inc.* 32 FMSHRC 1257, at 1289 (Oct. 2010) the Commission held that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. Here, the gravity of the violation as to injury was designated as fatal.

This Court notes the parties' stipulation that imposition of the total proposed penalties would not affect Respondent's ability to remain in business. (*see* J-1, paragraph 6).

Enlow fork is a large mine run by a large operator/controller with a history of violations. (*see also* GX-18). The degree of negligence, as discussed *supra*, was "moderate."

In reaching his own independent penalty assessment, this Court has placed greater weight on the gravity of the violation and the size of the business of the operator than the other § 110(i) factors. In light of such this Court sees no reason to deviate from Secretary's proposed penalty

[23] This Court notes the Third Circuit's holding in *Consol v. FMSHRC*, 666 Fed. Appx. 165, 168-169 (3rd Cir. 2016). that even a "high" negligence finding may be warranted in certain instances despite the presence of mitigating circumstances.

and affirms the $2,487.00 penalty that had been assessed. (*see also Sellersburg Stone Co.*, 5 FMSHRC 297, 298 (Mar. 1983), Aff'd 736 F. 2d 1147 (7th Cir) regarding ALJ's duty to explain substantial deviation from Secretary's proposed penalty.)

ORDER

The Respondent, Consol Pennsylvania Coal Company, is **ORDERED** to pay the Secretary of Labor the sum of $2,850.00 within 30 days of this order. [24]

John Kent Lewis
Administrative Law Judge

Distribution:

Brian P. Krier, Esq., The Curtis Center, 170 S. Independence Mall West, Suite 630E, Philadelphia, PA 19106

Patrick Dennison, Esq., Fisher & Phillips LLP, 6 PPG Place, Suite 830, Pittsburgh, PA 15222

[24] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390