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

MAR 24 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2015-41 A.C. No. 36-07416-365834 Docket No. PENN 2015-42 A.C. No. 36-07416-365834 Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Anthony M. Fassano, Esq., U.S. Department of Labor, Philadelphia, PA, for Petitioner

Patrick W. Dennison, Esq., Jackson Kelly, PLLC, Pittsburgh, PA, for Respondent

Before: Judge Lewis

These cases are before the Court upon two petitions for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). PENN 2015-42 contains one section 104(d)(2) order, and PENN 2015-41 contains 15 section 104(a) citations, two of which remain at issue.[1]

A hearing in this matter occurred on Tuesday, July 14, 2015, in Pittsburgh, Pennsylvania. The Court heard testimony from three witnesses: Jason Tungate, MSHA Inspector; Chris Demidovich, maintenance supervisor; and Shane Jobes, outside shop and maintenance foreman. Two witnesses, Christopher O'Neil, assistant manager of maintenance for Pennsylvania operations, and Brian Henry, a hoistman, were allowed to provide testimony at subsequent depositions.

During the hearing, the parties entered the following joint stipulations into evidence:

1. At all relevant times, Respondent is/was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter referred to as "the Mine Act"), 30 U.S.C. § 803(d), of the Enlow Fork Mine.

[1] The parties settled 13 of the 15 citations contained in PENN 2015-41. That settlement is approved by the Court in this Decision and Order, and the terms of the settlement are contained in Appendix A.

2. The Enlow Fork Mine, at which the Citations and Order in contest were issued, is an underground coal mine subject to the jurisdiction of the Mine Act.

3. 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.

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

5. The Citations and Order at issue, as well as any modifications thereto, were properly served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of Respondent on the date and place stated therein.

6. Payment of the total proposed penalty of the citations and order at issue in this matter will not affect Respondent's ability to continue in business.

7. Consol demonstrated good faith in the abatement of the alleged violations.

8. The parties stipulate to the authenticity of the exhibits referenced in the parties Prehearing Statements (with all amendments thereto) but not to the relevancy or the truth of the matters asserted therein. The Secretary has not stipulated to the authenticity of Mr. Shane Jobes's notes, which were provided to Counsel for Consol and Solicitor Anthony Fassano on July 13, 2015.

9. With respect to Citation No. 7018138 Respondent admits that a violation of 30 C.F.R. § 50.10(d) occurred, and that the Citation was properly designated as "Unlikely" and Non-S&S.

10. With respect to Citation No. 7018138, the Citation was properly designated as "Lost Workdays or Restricted Duty."

11. With respect to Citation No. 7018138, the Citation was properly designated as "1 Persons Affected."

12. With respect to Citation No. 7018139, if a violation of 30 C.F.R. § 77.1401 occurred, the Citation was properly designated as "Unlikely" and Non-S&S.

13. With respect to Citation No. 7018139, if a violation of 30 C.F.R. § 77.1401 occurred, the Citation was properly designated as "Lost Workdays or Restricted Duty."

14. With respect to Citation No. 7018139, if a violation of 30 C.F.R. § 77.1401 occurred, the Citation was properly designated as "1 Persons Affected."

15. With respect to Order No. 7018140, Respondent admits that a violation of 30 C.F.R. § 77.1400-4 occurred.

16. With respect to Order No. 7018140, the Order was properly designated as "1 Persons Affected."

JX-1 at 1-3.[2]

Given the stipulations of the parties, the remaining issues before the Court are: (1) whether Citation No. 7018138 was properly designated as high negligence; (2) whether, as set forth in Citation No. 7018139, there was a violation of 30 C.F.R. § 77.1401, and, if so, whether it was properly designated as low negligence; (3) whether Order No. 7018140 was properly designated as reasonably likely, significant and substantial, high negligence, and an unwarrantable failure; and (4) the appropriate penalty for each violation.

I. Summary of the Testimony

Enlow Fork Mine ("the Mine") is an underground coal mine operated by Consol Pennsylvania Coal Company LLC ("Consol") and is located in western Pennsylvania. The Mine is considered a large coal mine by the Mine Safety and Health Administration ("MSHA"). *See* Sec'y of Labor's Petition for Assessment of Civil Penalty, Ex. A, No. PENN 2015-41; 30 C.F.R. § 100.3, Table I. The mine has two slope hoists, the Enlow slope hoist and the Oak Springs slope hoist. Tr. 97-98. The areas are located approximately six miles apart, which takes 10-15 minutes to drive. Tr. 82, 163. This proceeding concerns the Oak Springs slope hoist.

A slope is a diagonal entrance to a mine created by blasting into the ground until the operator of a mine reaches the coal seam. Tr. 150. The slope at Oak Springs is 2,700 feet long, and has a grade of 16 degrees. Tr. 157. Coal is transported out of Enlow Fork Mine up the Oak Springs slope via a belt, and the coal is then transported over land back to the Enlow area. Tr. 150.

A slope hoist consists of several parts, including the personnel or "brakeman" car, the rope, the spool, the motor, the gearbox, the driver, and the operator station. It is used to bring personnel and supplies into and out of the mine. Tr. 97, 99. The Mine has three hoists: the Enlow slope hoist, a vertical hoist, and the Oak Springs slope hoist. Tr. 98. The Enlow slope hoist is similar to the Oak Springs slope hoist, and the vertical hoist is effectively an elevator for the transport of personnel only. *Id.*

The Oak Springs slope hoist is the most technologically advanced of the three hoists. Tr. 98. The hoist is equipped with a Programmable Logic Controller (PLC) and a Hoist Safety Supervisor (HSS). RX-K at 6-7. Both systems monitor the operation and condition of the hoist as well as monitor each other. Tr. 65-67. If the systems detect a problem with the hoist (a "fault"), it will show up on a screen in a control room, and the HSS and PLC have the ability to stop the car slowly (controlled stop fault) or abruptly (emergency stop fault). Tr. 117-18, 120-21. The screen also shows the speed, torque, and position of the car for each fault. Tr. 122.

The Oak Springs slope hoist took approximately two years to construct. Tr. 27-28. It was built by a contractor, Frontier-Kemper Lake Shore ("Frontier-Kemper"). Tr. 102. Before a slope hoist can be put into operation, it must be commissioned. Tr. 100. In this instance, the commissioning ceremony (or "witness test") was held on April 1, 2014, at which Frontier-

[2] Joint exhibits will be cited as "JX," the Secretary's exhibits will be cited as "GX," and Respondent's exhibits will be cited as "RX."

Kemper performed a series of tests for Consol, the Pennsylvania Bureau of Deep Mine Safety, and MSHA. Tr. 60-62. If the tests are successful, the state of Pennsylvania approves the hoist for use, and the hoist gets a certification number. O'Neil Dep. 11.[3] There is no equivalent requirement for MSHA to certify or approve the hoist prior to operation. *Id.*

Consol's maintenance supervisor, Chris Demidovich, was present at the ceremony.[4] Tr. 98-99. He stated that they tested the max load for the hoist, 107 tons, by assembling 100 tons to add to the weight of the brakeman car. Tr. 103. Once the hoist was loaded, they sent it down the slope shaft and hit the brakes to make sure the brakes would hold the weight. *Id.* They also demonstrated overtravel and overspeed safety features. *Id.* Demidovich testified that at the end of the ceremony on April 1, 2014, "[e]verybody seemed to be satisfied that [Consol] was okay to put this hoist in operation." Tr. 104.

According to Christopher O'Neil, Consol's Assistant Manager of Maintenance for the Pennsylvania Operations, Frontier-Kemper had additional items to complete after the ceremony.[5] O'Neil Dep. 12; RX-E. Some of the items were from Consol, and some were from the State. *Id.* Consequently, O'Neil stated, the commissioning was not finished until the items were completed and he signed the "Commission Certification." *Id.* He signed the Commission Certification, which states that "[t]he owner herby [sic] accepts the above listed hoist system as complete, and assumes operational and maintenance responsibilities of the system," on April 7, 2014. RX-C.

---

[3] The transcript from Christopher O'Neil's deposition will be cited as "O'Neil Dep." The transcript from Brian Henry's deposition will be cited as "Henry Dep."

[4] At the time of the hearing, Chris Demidovich had worked for Consol at Enlow Fork Mine for thirteen and a half years. Tr. 94. During that time period, he had been a mechanic, maintenance foreman, maintenance supervisor, and senior electrical supervisor. Tr. 94-95. Prior to working at Enlow Fork, he performed maintenance at Dana Mining for four years. Tr. 95. He holds a Pennsylvania bituminous mining certification as a miner and is a Pennsylvania certified electrician. Tr. 95. In March and April of 2014, Demidovich was a maintenance supervisor. Tr. 96. His responsibilities included overseeing other mechanics, performing preventative maintenance, and ensuring generally that machines were in safe operating condition and permissible. Tr. 96.

[5] O'Neil had worked for Consol Energy since graduating from college in 1995. O'Neil Dep. 4. He worked as an industrial engineer, shift maintenance foreman, electrical engineer, longwall maintenance coordinator, master mechanic, general maintenance mechanic, and assistant manager of maintenance. O'Neil Dep. 4. When he was deposed, he was currently working as the assistant manager of maintenance of the Consol Pennsylvania operations. O'Neil Dep. 4, 5. He has a B.S. in electrical engineering technology and a Master's in Business Adminstration. O'Neil Dep. 5. He also has a federal electrician certification and an MSHA instructor certification for Part 48. O'Neil Dep. 5. As assistant manager of maintenance, his duties and responsibilities included involvement with underground, surface, and plant equipment, including the purchase of equipment and assuring written specifications are met. O'Neil Dep. 6. With reference to hoist installation, O'Neil acts as a liaison between Consol and the State of Pennsylvania, including facilitating the approval process. O'Neil Dep. 6.

Additionally, as of the commissioning ceremony, Frontier-Kemper had not trained Consol's hoist operators. O'Neil Dep. 13. They were trained on April 3, 2014. Tr. 106; RX-F at 17. The Commissioning Report also states that "[t]he commissioning consisted of successful completion of the included checklists, required periodic tests, and training of 16 Consol hoistmen." RX-F at 3.

Chris Demidovich, hoistman Brian Henry, and 15 others attended the training on April 3, 2014.[6] Tr. 105-06; Henry Dep. 12; RX-F at 17. During the training, the Frontier-Kemper representative instructed the miners on the operation of the hoist, all of the fault screens and panels in the hoist building, the brake systems, and how to check the safety features. Tr. 106-07; Henry Dep. 12. There were no discussions about daily examinations at that time. Henry Dep. 12. Demidovich, however, had one of his mechanics record that a weekly examination had been performed, since Frontier-Kemper covered all of the safety devices on the brakeman car and the mechanic was trained. Tr. 109. On April 3rd and April 4th, Consol recorded weekly electrical examinations of the slope car, the slope pump, and the slope rope.[7] RX-D at 1.

After the training, Brian Henry was sent from the Enlow slope to the Oak Springs slope to watch the belts that ran up the slope with the hoist. Henry Dep. 13. During this time, Henry operated the Oak Springs slope hoist to hoist a fire boss so that he could examine self-contained self-rescuer stations along the slope. *Id.* He was never directed to hoist the fire boss, but the fire boss asked if the hoist was operational, and to Henry's knowledge, it was, so he pulled up the fire boss. *Id.* Henry could not recall who told him that the hoist was operational. *Id.* at 14. Shane Jobes and Inspector Jason Tungate also testified that another fireboss was pulled out of the mine by another hoist operator.[8] Tr. 48; Tr. 160.

---

[6] Brian J. Henry also gave testimony by deposition subsequent to the hearing. Henry had been employed as a hoistman at Enlow Fork Mine since 2013 and had worked for Consol for 10 years. Henry Dep. 7-8. His past jobs included mine operator, mine side bolter, loader operator, and motorman. Henry Dep. 7. He was a certified hoistman and had been paid on an hourly basis at the time of the written citation and order. Henry Dep. 7-8.

[7] A slope pump is a pump midway down the shaft that must be examined to make sure it is in permissible condition. Tr. 110.

[8] Shane Jobes was the outside shop and maintenance foreman at Enlow Fork Mine at the time of the hearing and in April of 2014. Tr. 149. He had worked at Enlow Fork Mine since September 2013, and before that was with engineering and maintenance groups with Consol since 1998. Tr. 147. He started working for Consol at the Bailey Prep plant in 1991, just after he graduated from West Virginia Institute of Technology, where he received a bachelor's in engineering. Tr. 149. His duties included repairing broken parts in the maintenance shop and sending away broken parts to get repaired. Tr. 149.

MSHA Inspector Jason Tungate appeared and testified on behalf of the Secretary. Tungate's duties as an inspector included the inspection of hoists and elevators at mines and approving shaft and slope plans. Tr. 21. He had worked for 5 years with MSHA as an electrical specialist and an additional 4 years as a general inspector. Tr. 21-22. Prior to working for

Between April 3, 2014, and April 10, 2014, three issues occurred on the Oak Springs slope hoist. The first, an overspeed glitch, occurred between April 3rd and April 8th. Tr. 123. When the hoist was operated at 600 feet per minute, the HSS showed a fault because the brakeman car's overspeed control and the hoist drum's overspeed control were not communicating. *Id.* To fix the issue, Consol turned one of the controls "maybe five feet a minute lower than the HSS [to] kind of give it a little bit of a buffer so those two could try to keep in sync with each other. *Id.* At 600 feet per minute, they could run the hoist for a little while without having a fault, then they could hit the "fault reset and acknowledge button" to run it again, but when they slowed down the hoist to 300 feet per minute, "it worked flawlessly." Tr. 123-24.

The second issue, a kink in the hoist's rope, occurred on April 7th. Tr. 138. Brian Henry, the hoistman, dropped dollies, or flat cars used to haul equipment, into the mine using the Oak Springs slope hoist. Henry Dep. 15. When the dollies reached the bottom of the hoist, Henry surmised at the hearing, the motormen hooking up to the dollies "must have pushed the car up the hill too far and it kinked the rope." Henry Dep. 16. At that same time, Demidovich was with Chris O'Neil and Tom Muser, maintenance managers, at Oak Springs, looking at the conveyor belt system, and O'Neil and Muser wanted to stop by the hoist house to look at the hoist remote building. Tr. 125. When they exited the hoist house, the brakeman car had returned to the top of the rope, and they noticed the kink in the rope. Tr. 125; Henry Dep. 16. Demidovich called Ketchem Construction to reterminate the rope. Tr. 138. They were at the Enlow slope portal that day, however, so Ketchem could not perform the work until April 8th. *Id.* The hoist was taken out of service until Ketchem "reterminated" the rope on April 8th by removing the 25 feet that contained the kink and reconnecting the rope to the brakeman car. O'Neil Dep. 19; Tr. 126.

The third issue occurred on April 8th when the three overtravel devices failed to stop the brakeman car from crashing into the shiv wheel at the top of the hoist. After Ketchem reterminated the rope, they asked Tom Nelms, a hoist operator, to do a full test run of the hoist before they left the area. Tr. 126. When he did so, he failed to drop the brakeman car far enough into the mine to resync the system with the reset switch. *Id.* Because he did not resync the system, the HSS and PLC systems, which set a limit for how far up or down the slope hoist the brakeman car can go, did not register that the rope was now 25 feet shorter than it was prior to the retermination. *Id.* Consequently, when the car reached the top of the hoist, the systems did not register that it had done so. Regardless, a third overtravel device, a "mechanical limit switch," should have stopped the car short of running into the shiv wheel. This switch failed, too. Tr. 52.

The mechanical limit switch consisted of a spring-loaded, foot-long rod that, when struck by the car, should have caused the car's brakes to engage. Tr. 127. However, the inch-wide plate on the car "barely caught the end of the rod, so when it shoved the rod down . . . and it went past the rod, the rod popped itself back up in a neutral position." *Id.*

MSHA, Tungate had worked as an underground electrician, mine supply contractor, and general laborer. Tr. 24. He possessed an Associate's degree in electrical engineering. Tr. 25. Tungate was familiar with Enlow Fork, having both inspected and worked at the mine. *Id.*

On Thursday, April 10, 2014, Inspector Tungate conducted an inspection at the Oak Springs portal. Tr. 28. His supervisor had told him that an inspector at the mine on April 9, 2014, was made aware of issues with the hoist, so Tungate's supervisor sent Tungate to look at the hoist. Tr. 84. The cited conduct and conditions were discovered by Tungate during the April 10th inspection.

Inspector Tungate issued Citation No. 7018138 for a violation of 30 C.F.R. § 50.10(d), which requires that a mine operator contact MSHA within 15 minutes if a hoist sustains damage that endangers an individual or interferes with use of the hoist for more than 30 minutes. *See* GX-5. He marked the cited condition as unlikely to result in a lost workdays or restricted duty injury or illness, not significant and substantial, but resulting from high negligence, with one person affected. *Id.* At the hearing, Tungate stated that he designated the citation as high negligence because the mine knew, because they have other hoisting systems at the mine, that "if there's something that causes the hoist to be down for longer than 30 minutes they have to report it." Tr. 57.

Inspector Tungate issued Citation No. 7018139 for a failure to have automatic stop controls in violation of 30 C.F.R. § 77.1401. *See* GX-3. He designated this violation as unlikely to result in a lost workdays or restricted duty injury or illness, not significant and substantial, and the result of low negligence, with one person affected. *Id.* Tungate designated the negligence as low because the violation occurred during a test run and the failure to reset the sensors, which caused two of the automatic stop controls to fail, was inadvertent. Tr. 54.

Finally, Tungate issued Order No. 7018140 due to Consol's failure to record daily examinations between April 1, 2014, and April 9, 2014. 30 C.F.R. §75.1400-4 requires that daily examinations be recorded after each examination is completed and be retained for one year. *See* GX-1. He designated the violation as reasonably likely to result in a lost workdays or restricted duty injury or illness, significant and substantial, the result of high negligence, affecting one person, and an unwarrantable failure to comply with a mandatory safety standard. *Id.* Tungate stated at the hearing that a high negligence finding was warranted, mainly, because the mine took ownership of the hoist on April 1st, and no exams were recorded in the next nine days, even though the hoist was operated by qualified operators and company officials were around the hoist throughout the time period. Tr. 40. When Tungate arrived at the hoist house, additionally, he saw the empty examination book sitting within five feet of the hoist operator on a table or electrical box, with no other books around. Tr. 44.

II. Findings of Fact and Conclusions of Law

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have 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, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my 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).

A. Citation No. 7018138 Is Properly Designated as High Negligence

Citation No. 7018138 was issued due to a violation of 30 C.F.R. § 50.10(d), which requires the operator to "immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knowns or should know that an accident has occurred involving . . . [a]ny other accident." The regulations define accident broadly, but it includes "[d]amage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes." 30 C.F.R. § 50.2(h)(11).

Inspector Tungate issued the citation because Consol failed to report the kink in the rope and the damage caused when the car was pulled into the shiv wheel following retermination of the rope by Ketchem. GX-5.

i. Negligence Determination

Consol has stipulated to the fact of violation for Citation No. 7018138. JX-1, ¶ 9. Consol has also stipulated that the violation was properly characterized as unlikely, non-S&S, that the reasonably likely injury was lost workdays or restricted duty, and that one person would likely be affected. JX-1, ¶¶ 9-11. The only remaining issues with respect to this violation are whether the inspector properly characterized it as being due to high negligence, and the appropriate penalty to be assessed.

The Secretary defines high negligence as requiring that "management knew or should have known of a violation, and there are no mitigating factors." 30 C.F.R. § 100.3(d), Table X. Respondent urges use of this definition as well. Resp't Br. 29. Judges, however, are not bound by the Secretary's definitions of negligence. *Wade Sand & Gravel*, 37 FMSHRC 1874, 1878 n.5 (Sept. 2015). The Commission has a broader definition of high negligence, which requires that such a finding result from "an aggravated lack of care that is more than ordinary negligence." *E. Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). Under this definition, "a Commission Judge may find 'high negligence' in spite of mitigating circumstances or may find 'moderate' negligence without identifying mitigating circumstances." *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015).

The Court agrees that the citation was properly characterized as high negligence. Consol is a seasoned operator, and has another hoist and elevator at Enlow Fork Mine. Not only does it know of the responsibility to report accidents, members of mine management had personal knowledge of the damage that occurred and the time that it took to abate the kinked rope. Without reporting accidents, MSHA cannot investigate causes and cannot work to prevent additional accidents.

Respondent argues that the hoist was not being used for production purposes, that Ketchem was directing the hoistman when the car was pulled into the shiv, that the hoist was not a designated escapeway, and that, although the hoistman had pulled firebosses in the car, he was never directed to do so. Resp't Br. 30-31. However, Respondent identifies no basis in the caselaw or regulations that would exempt it from the reporting requirement of § 50.10(d) for any of these reasons, and the Court does not recognize these as mitigating circumstances.

Respondent also asserts that MSHA's designation of Citation No. 7018139 as "low negligence" is inconsistent with a finding of high negligence for this citation. Resp't Br. 32. This assertion is unpersuasive because the negligent conduct that resulted in each violation is completely different. For this citation, a finding of high negligence is warranted because (1) mine management knew of the damage to the rope and the subsequent damage to the shiv wheel, and (2) mine management knew of the requirement in § 50.10(d) by virtue of the fact that the mine has another operating hoist. The negligence that resulted in Citation No. 7018139 was based on the short length of time the condition existed and the fact that the hoistman should have known that the hoist would need to be resynced following the retermination of the rope. The negligence that caused the automatic stop controls to fail is irrelevant and unrelated to the mine's negligence in failing to report the resulting accident to MSHA.

ii. Penalty Determination

When assessing civil penalties, the Commission considers the factors contained in section 110(i) of the Mine Act. These six factors are:

> the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and 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). The parties stipulated that the penalties as assessed by the Secretary would not affect Respondent's ability to continue in business, and Respondent demonstrated good faith in abating the violations. JX-1, ¶¶ 6-7.

The Court finds that Respondent had no history of violations of this type, the operator was highly negligent, and the gravity, with injury unlikely to occur, was somewhat low. Based on these factors, the Court finds that the Secretary's proposed penalty is appropriate. Accordingly, a civil penalty of $362.00 is assessed against Respondent for Citation No. 7018138.

B. The Conduct in Citation No. 7018139 Violates 30 C.F.R. § 77.1401, and the Citation Is Properly Designated as Low Negligence

i. The Fact of Violation

The Secretary has carried his burden of proof, establishing that Respondent violated 30 C.F.R. § 77.1401 by a preponderance of the evidence. The standard requires that "[h]oists and elevators shall be equipped with overspeed, overwind, and automatic stop controls and with brakes capable of stopping the elevator when fully loaded." 30 C.F.R. § 77.1401.

The undisputed record discloses that the Oak Springs slope hoist was equipped with three stop controls: the PLC system, the HSS system, and the mechanical switch. Tr. 127. All three, however, failed to stop the car, and the car crashed into the shiv wheel. Tr. 52.

The Secretary interprets § 77.1401 as requiring that "the hoist be equipped with automatic stop controls capable of stopping the hoist." Sec'y Br. 20. Consequently, those that fail to stop the hoist do not satisfy the plain meaning of the regulation. *Id.* It is unclear, however, whether the adjective phrase "capable of stopping the elevator when fully loaded" modifies only the noun "brakes," or both "brakes" and the series "overspeed, overwind, and automatic stop controls." Because the regulation is ambiguous, the Secretary's reasoned interpretation is entitled to deference unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

Regardless of whether the Secretary's interpretation of the standard is correct, automatic stop controls by their very nature must be able to stop the car in order to comply with the regulation, and the Court finds Respondent's arguments to the contrary unpersuasive. Respondent argues that the hoist was "equipped" with automatic stop controls, and it therefore met the standard, even though they were not functioning due to operator error. Resp't Br. 27.[9] This is a distinction without a difference, because the operator's actions caused the stop controls to no longer function, and controls that do not automatically stop a brakeman car from running into the shiv wheel at the top of the hoist do not meet the definition of "automatic stop controls" for the purposes of § 77.1401. If non-functioning stop controls met the standard, the standard would be rendered useless since they would not achieve the purpose for which they are intended—actually stopping the car.

To the extent that operator error played a role in the brakeman car's failure to stop, such a factor may be taken into consideration in determining the degree of negligence but not as to whether a violation of § 77.1401 had taken place. Additionally, the mechanical switch would not have been capable of stopping the car even in the absence of error. Regardless of whether the hoist operator, who had only been trained a few days earlier, *see* RX-H, had failed to resync the system, none of the automatic stop devices, including the mechanical switch, actually stopped the car when they should have.

---

[9] Respondent's "plain language" argument is reminiscent of that rejected by the Commission in *Watkins Engineers & Constructors*, 24 FMSHRC 669 (July 2002). The operator in that case argued that 30 C.F.R. § 56.15005, which requires that "[s]afety belts and lines shall be worn when persons work where there is danger of falling," does not require that "such belts and lines be used or 'tied off.'" 24 FMSHRC at 681. The Commission disagreed with this reading, and instead cited to its statement in a similar case that "[a]lthough a literal reading of the standard might suggest that compliance is achieved whenever a miner wears any kind of line in any manner, such an interpretation is inconsistent with the [safety enhancing] purposes of the Part 57 regulations and this standard in particular." *Id.* at 682 (quoting *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981)) (alterations in original). Similarly, stop controls that are non-functioning and unable to serve the purpose for which they are "equipped" do not meet the requirements of 30 C.F.R. § 77.1401.

ii. Negligence Determination

Given the stipulations of the parties, the gravity of the violation of § 77.1401 was properly designated as "unlikely," the injury that could reasonably be expected was "lost workdays or restricted duty," and the violation itself was non-S&S with "1 person affected." *See* JX-1, ¶¶ 12-14. This Court found nothing in the record to contraindicate said designations, leaving only the question of whether the negligence was properly characterized as "low."

30 C.F.R. § 100.3, Table X, provides that a finding of low negligence is warranted when "the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances."[10]

Respondent was aware that Ketchem had reterminated the rope, so Respondent clearly knew or should have known of the violative condition. However, as noted by Inspector Tungate, the condition had existed for only a few hours. Tr. 54; GX-4. Given that Respondent had acted on constructive knowledge that the hoist car would need to be resynced following retermination so that the systems could accurately measure the rope's length and the stopping distance, Respondent has not advanced any persuasive argument for a finding of no negligence. *See* 30 C.F.R. § 100.3, Table X ("The operator exercised diligence and could not have known of the violative condition or practice."). Accordingly, the Court finds that Citation No. 7018139 was appropriately designated as arising from low negligence.

iii. Penalty Determination

The Court finds that Respondent had no history of this type of violation, Respondent is a large operator, Respondent showed low negligence in committing the violation, and the gravity was otherwise low. Considering those factors and the factors stipulated to by the parties, the Court finds that the originally assessed penalty, $100.00, is appropriate for Citation No. 7018139.

C. Order No. 7018140 Is Properly Designated as Reasonably Likely, Significant and Substantial, High Negligence, and Resulting from an Unwarrantable Failure

Order No. 7018140 was issued to Respondent for failing to record the hoist examination for nine days, from April 1, 2014, to April 9, 2014. GX 1. It is undisputed that during his April 10, 2014, inspection, MSHA Inspector Tungate found that the examination book for the Oak Springs slope hoist was blank. Respondent was unable to produce any records of daily exams for the time period of April 1 through April 9, 2014. Given such, the parties stipulated that 30 C.F.R. § 75.1400-4 was violated and that this violation affected one person.

[10] The Commission has stated that ALJs are not bound by the Secretary's negligence definitions in Part 100, *see, e.g.*, *Wade Sand & Gravel*, 37 FMSHRC at 1878 n.5, but the Court finds the Secretary's definitions of low and no negligence to be appropriate in this case.

30 C.F.R. § 75.1400-4, in reference to daily examination of hoists, provides:

> At the completion of each daily examination required by § 75.1400, the person making the examination shall certify, by signature and date, that the examination has been made. If any unsafe condition is found during the examinations required by § 75.1400-3, the person conducting the examination shall make a record of the condition and the date. Certifications and records shall be retained for one year.

i. Significant and Substantial and Likelihood

Well-settled Commission precedent sets forth the standard used to determine if a violation is Significant and Substantial (S&S). 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." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984). This determination "must be made at the time the citation is issued '*without any assumptions as to abatement*' and in the context of 'continued normal mining operations.'" *Paramont Coal Co.*, 37 FMSHRC 981, 985 (May 2015) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

Since Respondent stipulated to the fact of the violation, and 30 C.F.R. § 75.1400-4 is a mandatory safety standard, the first element of *Mathies* has been proven by the Secretary. The second prong of *Mathies* is also clearly satisfied. The failure to record daily examinations clearly contributes to a discrete safety hazard: hoist operators, miners, or MSHA inspectors may be unaware of unsafe conditions with the hoist that would pose a hazard for transporting men or materials. *See* Tr. 37-38.

The third element of the *Mathies* test—a reasonable likelihood that the hazard contributed to will result in an injury—is also supported by the record and applicable case law. The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury." *Id.* at 1281. Importantly, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id.*

The lack of notice of a possible unsafe condition on the hoist due to the lack of a daily examination record clearly creates a reasonable likelihood that the hazard contributed to will result in an injury. Viewed through the perspective of continued mining operations, the Court assumes that Respondent would continue to fail to record daily examinations. Fire bosses at Enlow Fork Mine would continue to be exposed as they utilized the slope hoist while conducting their preshift examinations. *See* Tr. 39. These preshift examinations take place three times per day, once per shift. Miners traveling in a hoist that had unrecorded unsafe conditions could be thrown about if the hoist moved suddenly or had a violent impact due to a collision or an emergency stop. Tr. 39-40.

The Secretary has also established the fourth and final element of *Mathies*: "A reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies*, 6 FMSHRC at 3-4. Being thrown about in a hoist that is malfunctioning, causing it to overspeed or overtravel, or causing sudden movements or violent impacts, creates a reasonable likelihood that injuries will be of a reasonably serious nature.

Respondent argues an injury was not reasonably likely to occur due to the recording violation because of the redundant safety features and "the significant attention paid to and work conducted on the hoist during the relevant time." Resp't Br. 14. However, "the Commission and courts have soundly rejected the argument that additional safety measures should preclude a finding of S&S." *Small Mine Development*, 37 FMSHRC 1892, 1901 (Sept. 2015); *see also Buck Creek Coal*, 52 F.3d 133, 136 (7th Cir. 1995) (finding that additional safety measures did not preclude a finding that a fire contributed to by coal dust accumulations would be reasonably likely to result in serious injury). This point is especially important because the safety features that Respondent relies on, which include the PLC, HSS, mechanical switch system, and fault screen, all in some way failed within the first nine days during which the hoist was active. The PLC and HSS failed when the hoist operator did not recalibrate the hoist following the kink in the rope. The mechanical switch failed of its own accord—it would have never stopped the car from crashing into the shiv wheel, regardless of operator error. Finally, the fault screen cannot notify the operator of every issue with the hoist, as demonstrated when it did not identify the kink in the rope as a problem. Henry Dep. 23.

Respondent's argument that there was "no hazardous miscommunication," Resp't Br. 18, is only true in the most technical sense. Brian Henry stated that one of the ways that he would be aware of problems with the hoist on prior trips would be through talking to the hoistman from the prior shift. Henry Dep. 20-21. While operating the Oak Springs slope hoist, he did not remember talking to anybody. *Id.* at 21. In fact, even though he was operating the hoist to pull out firebosses and send dollies into the mine, no one told him whether he was allowed to operate the hoist or not. *Id.* Rather than stating that there was "no hazardous miscommunication," it appears that there was simply "no communication," even though Respondent asserts that "significant attention was paid to the hoist by both Frontier Kemper and Consol." Resp't Br. 15.

Accordingly, the Court finds that the failure to record examinations was significant and substantial and appropriately designated as reasonably likely. The violation contributed to the hazard that miners would use the hoist with unrecorded and uncommunicated defects and hazards, which would be reasonably likely to cause a jarring stop, either from the automatic stop

controls or by running into the shiv wheel. This stop would throw them about the car, resulting in reasonably serious lost workday or restricted duty injuries. The known failures of the safety devices and the admitted lack of communication, additionally, served to make an injury reasonably likely to occur.

ii. Respondent's Failure to Record Examinations Constituted an Unwarrantable Failure

The Commission has determined that an "unwarrantable failure is aggravated conduct constituting more than ordinary negligence." *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). Such a failure may be characterized by the following types of conduct: reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987).

> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance.

Manalapan Mining Co., 35 FMSHRC at 293. The Court must consider all relevant factors, the facts and circumstances of the case, and whether mitigating circumstances exist. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

1. The Extent of the Violative Condition and the Length of Time that the Violative Condition Existed

Because this is a daily recordkeeping violation, the extent of the violative condition and the length of the time the condition existed are, in this case, one and the same. Accordingly, the Court will consider these two factors together.

In order to determine the length of time that the condition existed, the Court must determine when the Oak Springs slope hoist was commissioned. The Secretary contends that Respondent failed to record exams for nine days, from April 1, 2014, to April 9, 2014. Respondent, however, asserts that it was not required to perform daily examinations until Monday, April 7, 2014, when Chris O'Neil signed the Commission certification document, RX-C, which was signed, scanned, and emailed to Jeremy Cundiff, Frontier-Kemper Operations Manager. Resp't Br. 21.[11]

[11] At O'Neil's deposition, Respondent moved to admit into evidence two different copies of the Commission certification document, designated Exhibits C and C-1. Exhibit C, containing O'Neil's signature, was offered without objection. That exhibit is hereby admitted. The Secretary objected to the admission of Exhibit C-1, which contained the signatures of both

The Court finds that, by the preponderance of the evidence, the Oak Springs slope hoist was commissioned on April 1, 2014. The cover page of the Commissioning Report from Frontier-Kemper states that the hoist was commissioned on April 1, 2014. RX-F at 1. The "Final Commissioning Checklist" states "Date Completed: 4/1/2014." RX-F at 8. Chris Demidovich was present at the commissioning ceremony on April 1, 2014, and confirmed that "[e]verybody seemed to be satisfied that we [were] okay to put this hoist in operation." Tr. 104. Brian Henry, the hoist operator, similarly stated that he understood the hoist to be operational. Henry Dep. 21. Respondent also recorded weekly electrical examinations of the Oak Spring slope hoist that occurred on April 3, 2014, and April 4, 2014. RX-D at 1. Demidovich confirmed that the electrical exams were performed and recorded. Tr. 109.

Respondent states that Frontier-Kemper continued to perform tests at the Oak Springs slope hoists and even serviced the hoist's brake coil on April 5, 2014. Resp't Br. 16-17; RX-E. These facts are stated to provide evidence for the assertion that the commissioning had not yet occurred. While Exhibit E does show that Frontier-Kemper performed work on April 1st through April 4th, it also states, on the first line, "April 1, 2014 – Commission Testing and Operational Turn-over." RX-E. Exhibit E, instead of supporting Respondent's argument that operation of the hoist had not yet been passed to Consol, provides strong evidence that the commissioning was completed on April 1st.

Additionally, Respondent argues that Frontier-Kemper had not trained the hoistmen until April 3, 2014, so Respondent could not have performed the examinations until then because hoistmen are the ones who perform examinations. Resp't Br. 16. The Court is unconvinced by this argument. Respondent would usually have hoistmen perform daily examinations on the midnight shift at the Enlow slope hoist. Tr. 142. Respondent had no midnight shift hoistmen at the Oak Springs slope hoist, but that does not excuse the responsibility to perform daily examinations. Similarly, Respondent's failure to either (a) train the hoistmen to perform daily exams or (b) direct other miners to perform the daily examinations until hoistmen were trained does not obviate the requirement to perform and record daily examinations.

For the preceding reasons, the Court finds that the Oak Springs slope hoist was commissioned on April 1, 2014. To find otherwise would be to ignore the plain statements of

---

O'Neil and Cundiff, on the basis that the Secretary had not been provided with the exhibit until July 23rd, nine days after the hearing in this case and just one day before the deposition. O'Neil Dep. 15-16. The document differs from the one provided in discovery and the one identified in Respondent's prehearing report. O'Neil Dep. 16. Respondent asserted that the document had been provided to him late, and he offered to provide the email sending him the document. O'Neil Dep. 16. The Court's Notice of Hearing, issued February 24, 2015, stated that "a list of exhibits expected to be introduced" must be provided to the other party and to the Court on or before June 12, 2015. Failure to do so, it warned, may result in that exhibit's exclusion at the hearing. Respondent has offered no good reason why the exhibit was not identified in the prehearing statement since it was available over a year prior to the date prehearing statements were due. Accordingly, the Secretary's objection is sustained, and Respondent's Exhibit C-1 is not admitted into evidence.

the commissioning report, Consol's own witness, Chris Demidovich, the fact that electrical exams were conducted on April 3, 2014, and the fact that the Oak Springs slope was being operated by Consol hoistmen. The violation was therefore extensive and existed for nine days, a substantial period of time.

2. Whether the Violation Posed a High Degree of Danger

The Court finds that the violation posed a high degree of danger. As the Court stated in its S&S analysis, the Oak Springs slope hoist had several problems during this short time period, a period in which it was being used to transport miners. Respondent argues that there was no hazardous miscommunication, which the Court has already addressed; that none of the conditions were S&S; and that hoist operators would not have even relied on the daily examination for the operation of the hoist. Resp't Br. 23. Insofar as Respondent's argument relies on hoist operators' use of the fault screen or communication with other hoist operators, the Court notes that Brian Henry stated that he did not remember checking the fault screen before operating the hoist, that he would not normally check the fault screen, and that there was no communication with other hoist operators. Henry Dep. 20-21. Hoist operators' failure to use tools, such as the daily examination book, to ensure that the hoist is being operated safely does not mitigate a finding that this violation posed a high degree of danger. Failing to record daily exams leads to exams being missed, contributing to the hazard that the hoist will be operated in an unsafe condition, and miners will be thrown about in the hoist car when it stops suddenly, either due to the automatic stop controls or when it overtravels into the top or bottom of the hoist. Given the problems that had already occurred with the hoist and that it was in use by miners, the violation posed a high degree of danger.

3. Whether the Violation was Obvious

The failure to record exams was obvious, and Respondent should have noticed that exams were not being recorded. First, the physical examination book was lying in the open, within reach of the hoist operator, and it was the same book used for the other hoists, both at Enlow Fork and at other Consol mines. Tr. 44-45. Members of mine management were present at the hoist on most of the nine days on which exams were not recorded. Tr. 158-59. While Respondent argues that the condition was not obvious because of the confusion surrounding the newly-commissioned hoist, Tr. 22, this confusion does not make the empty examination book any less obvious. Respondent's lack of "specific knowledge" does not preclude a finding that the violation was obvious.

4. The Operator's Knowledge of the Existence of the Violation

The inspector testified that Respondent did not know that examinations were not being performed, nor did it know that Frontier-Kemper had stopped performing examinations. Tr. 78-79. The Secretary argues not that Respondent knew of the violation, but that it should have known. Sec'y Br. 20. Accordingly, the Court finds that Respondent did not know of the violation.

5. The Operator's Efforts in Abating the Violative Condition

Respondent, having no knowledge of the violation, could not have attempted to abate the violation, and the Court finds that it made no effort to abate the violation.

6. Whether the Operator Had Been Placed on Notice that Greater Efforts Were Necessary for Compliance

Respondent, as a seasoned operator and as the operator of other slope hoists, was on notice that 30 C.F.R. § 75.1400-4 requires daily examinations to be recorded. Respondent states that the Secretary "adduced no evidence of past similar violations, of conversations regarding daily examinations or notice of any type that would serve to put Consol on notice of the need for greater compliance." Resp't Br. 23-24. In fact, Respondent asserts that "[t]he Secretary presented no evidence that Consol ever had any issue with respect to daily hoist examinations." *Id.* at 24. While this may not hold true in all circumstances, under the facts of this case, Respondent's compliance with the standard at other slope hoists itself demonstrates that Respondent *knew* that failing to record daily examinations would result in noncompliance with the standard. The operator had been placed on notice that greater efforts (than no effort at all) were necessary to comply with the standard.

In sum, although Respondent did not know that exams were not being recorded, the violative condition was "extensive," and exams were not recorded for nine days. The violation posed a high degree of danger, the failure to record the exams was obvious, the operator made no efforts to abate the violation, and the operator had been placed on notice that greater efforts were necessary for compliance.

Accordingly, consideration of the seven factors strongly supports a finding that Respondent's failure to record examinations was an unwarrantable failure to comply with a mandatory standard. None of Respondent's arguments highlighting the miscommunication, lack of actual knowledge, and confusion surrounding the commissioning of the hoist are sufficient to mitigate this finding. While Respondent's conduct was not "willful," that is not a requirement for an unwarrantable failure finding. Here, Respondent's actions constituted reckless disregard, indifference, or a serious lack of reasonable care. Miners were transported in the hoist car, multiple problems occurred with the hoist, and mine management was in the area almost every day. It should have been clear that daily examinations were not being recorded.

iii. Respondent Demonstrated a High Degree of Negligence in Violating § 75.1400-4

As stated in the Court's analysis of Citation No. 7018138, high negligence may be found, in spite of mitigating circumstances, where an operator evinces an aggravated lack of care that constitutes more than ordinary negligence. The Court finds that the violation of § 75.1400-4 was due to high negligence. Respondent was aware that there is a daily examination requirement for slope hoists, mine management was, by Respondent's admission, in the area almost daily, and the empty examination book was in plain sight.

Section 75.1400-4 plainly provides that daily examinations be made, certified, signed, and dated. In the instant case, Respondent failed to record all nine of the daily exams that were required between the time of the hoist's commissioning and the inspection. Tr. 46. Multiple members of mine management were in and around the area. Any of the members of mine management should have noticed that the book in the hoist house was blank. Tr. 37. Inspector Tungate testified that the blank record book was lying in the open, and that it was the same book used by Consol to record daily examinations at its other hoists, including the other hoist at Enlow Fork Mine. Tr. 44-45.

While Respondent's Post-Hearing Brief asserts that the high negligence designation is inappropriate, that statement constitutes the entirety of its argument on that point. *See* Resp't Br. 19-24. The entirety of the argument beneath the applicable heading applies to the unwarrantable failure designation, but, applied to the consideration of whether Respondent showed an aggravated lack of care, Respondent's arguments are similarly unavailing. The Court has found that the commissioning was completed on April 1, 2014, and Respondent's statements about the general confusion regarding responsibilities does not diminish the fact that mine management had multiple opportunities to notice and rectify the failure to record exams, yet failed to do so. Accordingly, the violation noted in Order No. 7018140 is accurately described as being precipitated by high negligence.

iv. Penalty Determination

The parties have stipulated that Respondent abated the violation in good faith and that payment of the fine would not impair its ability to continue in business. JX-1. Respondent is large in size, and does not have a history of this type of violation. The gravity and negligence of the violation were both high. Accordingly, the originally proposed penalty for this violation is appropriate. Respondent is assessed a penalty of $4,000.00 for Order No. 7018140.

III. Conclusion

The Secretary has proven, by the preponderance of the evidence, each of the issues to be addressed at the hearing. For Citation No. 7018138, Respondent is assessed a penalty of $362.00; for Citation No. 7018139, Respondent is assessed a penalty of $100.00; and for Order No. 7018140, Respondent is assessed a penalty of $4,000.00.

IV. Partial Settlement

The Secretary has also filed a Motion for Decision and Order Approving Partial Settlement, which addresses the 13 settled citations contained in Docket No. PENN 2015-41.[12]

[12] Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), the Court strikes paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

The terms of the settlement and the rationale for the settlement of each citation are contained in the table in Appendix A. The Court has considered the representations and documentation submitted in this case, finds that the modifications are reasonable as set forth in the motion to approve settlement, and concludes that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of the partial settlement is **GRANTED**.

ORDER

It is hereby **ORDERED** that Citation Nos. 7018138 and 7018139 and Order No. 7018140 are **AFFIRMED**.

It is further **ORDERED** that Citation Nos. 7027932, 7027716, 7027717, 7027878, 7027718, 7030040, 7030041, 7030042, 7028461, 7028463, and 7030049 are **AFFIRMED** as modified in the Secretary's motion to approve partial settlement, and that Citation Nos. 7028205 and 7028207 are **VACATED**.

Respondent is **ORDERED** to pay a total penalty of $10,500.00 for Docket Nos. PENN 2015-41 and PENN 2015-42 within 30 days of the date of this decision.[13]

John Kent Lewis
Administrative Law Judge

Distribution:

Anthony M. Fassano, Esq., Office of the Regional Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106

Patrick W. Dennison, Esq., Jackson Kelly PLLC, Three Gateway Center, 401 Liberty Avenue, Suite 1500, Pittsburgh, PA 15222

[13] 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.

APPENDIX A

Settled and Vacated Citations in Docket No. PENN 2015-41

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
7027932	104(a), § 75.503 (failure to maintain electrical equipment in a permissible manner), S&S, Reasonably Likely, Lost Workdays or Restricted Duty, 3 Persons Affected, Moderate Negligence.	$687.00	$500.00	*Negligence modified to Low.* *Reduction in penalty.* Respondent presented evidence tending to show that the condition had developed after the most recent weekly exam, which occurred seven days earlier. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the negligence may have been less than initially assessed.
7027716	104(a), § 75.380(d)(4)(iv) (failure to maintain a walkway with sufficient width to allow disabled persons to quickly exit the mine in an emergency), S&S, Reasonably Likely, Fatal, 1 Person Affected, Moderate Negligence.	$540.00	$375.00	*Gravity modified to Lost Workdays or Restricted Duty.* *Reduction in penalty.* Respondent presented evidence tending to show that the obstruction in the walkway would slow, but not prevent, a miner's escape in the event of an emergency. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the expected injury may have been less severe than initially assessed.
7027717	104(a), § 75.403 (failure to maintain the proper	$873.00	$300.00	*Likelihood modified to Unlikely/Non-S&S.* *Persons Affected*

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
	percentage of incombustible content), S&S, Reasonably Likely, Permanently Disabling, 2 Persons Affected, Moderate Negligence.			*modified to 1.* *Reduction in penalty.* Respondent presented evidence tending to show that the area in question did not contain methane or ignition sources. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury and the number of persons affected may have been less than initially assessed.
7027878	104(a), § 75.503 (failure to maintain electrical equipment in a permissible manner), S&S, Reasonably Likely, Lost Workdays or Restricted Duty, 5 Persons Affected, Low Negligence.	$425.00	$300.00	*Persons Affected modified to 1.* *Reduction in penalty.* Respondent presented evidence tending to show that the miner operator would likely be the only miner affected in the event of an ignition. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the number of persons affected may have been less than initially assessed.
7027718	104(a), § 75.403 (failure to maintain the proper percentage of incombustible content), S&S, Reasonably Likely, Permanently Disabling, 2 Persons Affected, Moderate	$873.00	$300.00	*Likelihood modified to Unlikely/Non-S&S.* *Persons Affected modified to 1.* *Negligence modified to Low.* *Reduction in penalty.* Respondent presented evidence tending to show that the area in question did not contain methane

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
	Negligence.			or ignition sources. In addition, Respondent presented evidence tending to show that the condition would not have been obvious during the time of the most recent exam. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury, negligence, and the number of persons affected may have been less than initially assessed.
7030040	104(a), § 75.605 (failure to clamp a trailing cable to the machine), S&S, Reasonably Likely, Fatal, 1 Person Affected, Moderate Negligence.	$1,795.00	$400.00	*Likelihood modified to Unlikely/Non-S&S. Negligence modified to Low. Reduction in penalty.* Respondent presented evidence tending to show that there was no damage to the cable in question, and that the condition did not exist at the time of the most recent exam. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury and negligence may have been less than initially assessed.
7030041	104(a), § 75.403 (failure to maintain the proper percentage of incombustible content), S&S, Reasonably Likely,	$3,996.00	$2,313.00	*Likelihood modified to Unlikely/Non-S&S. Persons Affected modified to 1. Negligence modified to Moderate. Reduction in penalty.*

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
	Permanently Disabling, 4 Persons Affected, Moderate Negligence.			Respondent presented evidence tending to show that the area in question did not contain methane or ignition sources. In addition, Respondent presented evidence tending to show that the condition would not have been obvious during the time of the most recent exam. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury, negligence, and the number of persons affected may have been less than initially assessed.
7030042	104(a), § 75.360(b)(3) (failure to conduct an adequate preshift exam on the working sections), S&S, Reasonably Likely, Permanently Disabling, 4 Persons Affected, Moderate Negligence.	$1,203.00	$750.00	*Likelihood modified to Unlikely/Non-S&S. Persons Affected modified to 1. Reduction in penalty.* This citation was related to Citation No. 7030041, which was a 75.403 violation. As explained above, Respondent presented evidence tending to show that the area in question did not contain methane or ignition sources, and that the condition would not have been obvious during the time of the most recent exam. Based on those arguments, the Secretary agreed to modify the citation and reduce the penalty

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
				because the likelihood of an injury and the number of persons affected may have been less than initially assessed.
7028205	104(a), § 75.1403 (failure to follow a safeguard), Non-S&S, Unlikely, Lost Workdays or Restricted Duty, 1 Person Affected, Moderate Negligence.	$108.00	$0.00	The Secretary has determined that this violation should be vacated in an exercise of his prosecutorial discretion recognized by the Commission in *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993).
7028461	104(a), § 75.321(a)(2) (failure to maintain the proper level of oxygen), Non-S&S, Unlikely, Lost Workdays or Restricted Duty, 1 Person Affected, Low Negligence.	$100.00	$100.00	*Negligence modified to None.* Respondent presented evidence tending to show that the results of its most recent oxygen reading were compliant. Accordingly, the Secretary agreed to modify the citation because the negligence may have been less than initially assessed.
7028207	104(a), § 75.360(b)(1) (failure to perform an adequate exam on beltlines), Non-S&S, Unlikely, Lost Workdays or Restricted Duty, 1 Person Affected, Moderate Negligence.	$108.00	$0.00	The Secretary has determined that this violation should be vacated in an exercise of his prosecutorial discretion recognized by the Commission in *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993).
7028463	104(a), § 75.1725(a) (failure to maintain equipment in safe operating	$540.00	$300.00	*Likelihood modified to Unlikely/Non-S&S. Reduction in penalty.* Respondent presented evidence tending to show

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
	condition), S&S, Reasonably Likely, Lost Workdays or Restricted Duty, 1 Person Affected, Moderate Negligence.			that the machine in question was using double-braided hoses, decreasing the likelihood that the condition would cause the hose to burst. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury may have been less than initially assessed.
7030049	104(a), § 75.517 (failure to fully protect a power cable), S&S, Reasonably Likely, Lost Workdays or Restricted Duty, 1 Person Affected, Moderate Negligence.	$540.00	$400.00	*Negligence modified to Low.* *Reduction in penalty.* Respondent presented evidence tending to show that the condition did not exist at the time of the most recent monthly exam. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the negligence may have been less than initially assessed.