

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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MAR 29 2018

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

CONSOL PENNSYLVANIA COAL  
COMPANY, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2015-0341  
A.C. No. 36-10045-390490

Mine: Harvey Mine

**DECISION**

Appearances: Jane Hwang, Esq., Office of the Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for Petitioner.

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

Before: Judge Andrews

This proceeding is before me on a petition for assessment of civil penalties filed by the Secretary of Labor (“Secretary” or “Petitioner”), acting through the Mine Safety and Health Administration (“MSHA”), against Consol Pennsylvania Coal Company, LLC, (“Consol” or “Respondent”), at its Harvey mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (“Mine Act” or “Act”). This docket involves eight citations issued pursuant to Section 104(a) of the Act during the period from January 12, 2015 through July 20, 2015, with total proposed penalties of \$4,734.

A hearing was held in Pittsburgh, Pennsylvania on August 1 and 2, 2017. Prior to the hearing the parties settled four of the citations. The partial settlements were placed on the record, and on December 20, 2017, were approved<sup>1</sup>. Testimony and documentary evidence was presented by the parties on the remaining four citations.<sup>2</sup> After the hearing, each party submitted

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<sup>1</sup> An amended partial settlement was issued to correct several clerical errors.

<sup>2</sup> References to the transcript will be “Tr.” followed by the page number(s). Joint exhibits will be “JX”, the Secretary’s exhibits will be “GX”, and Respondent’s exhibits will be “RX” each followed by the number.

a post-hearing brief and Respondent submitted a response brief.<sup>3</sup> All of the evidence of record has been considered.<sup>4</sup> Joint Stipulations were admitted at the hearing:

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. § 803(d), at the mine at which the citations and orders at issue in this proceeding were issued.
2. Operations of the Respondent at the mine at which the citations and orders were issued are 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 pursuant to Sections 105 and 113 of the Mine Act.
4. The individuals whose names appear in Block 22 of the citations and orders were acting in their official capacities and as authorized representative of the Secretary of Labor when the citations were issued.
5. True, authentic copies of the citations and orders, were served on the Respondent or its agent as required by the Mine Act.
6. The citations and orders contained in Exhibit “A” attached to the Secretary’s Petitions are authentic copies with all appropriate modifications or abatements, if any.
7. Payment of the total proposed penalties listed in Exhibit “A” for Docket No. PENN 2015-341 will not affect Respondent’s ability to continue in business.

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<sup>3</sup> Throughout this decision the Secretary’s Post Hearing Brief will be cited as “SPHB”. Respondent’s Post Hearing Brief will be cited as “RPHB” and the response brief as “RRB”.

<sup>4</sup> The findings of fact in this decision are based on the record as a whole and the Administrative Law Judge’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ 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 ALJ has also evaluated demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the ALJ’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 (8<sup>th</sup> 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).

8. The R-17 Certified Assessed Violation History Report (GX1) is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.

JX-1.

## **Legal Principles**

### *Strict Liability*

The Commission has established that under the Mine Act an operator may be held liable for a violation of a safety standard without regard to fault. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd* 868 F.2d 1195 (10<sup>th</sup> Cir. 1989). Therefore, the Mine Act is a strict liability statute and if a violation of a mandatory safety standard occurs, an operator will be held liable regardless of the level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Ames Construction, Inc.*, 33 FMSHRC 1607, 1611-12, n.6 (July 2011).

### *Burden of Proof*

In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). The burden imposed on the Secretary by the Mine Act is to prove alleged violations and related allegations such as gravity and negligence by a preponderance of the evidence. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (Nov. 1989), citing *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ). Quoting the Supreme Court in *Concrete Pipe*, 508 U.S. 602, 622 (1993), the Commission observed 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 probable than its nonexistence.’” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir 2001); *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

### *Gravity*

The term “gravity” is contained in Section 110(i) of the Mine Act in the context of factors to be considered by the Commission in assessing civil monetary penalties. Among those factors is “the gravity of the violation.” This is generally expressed as the degree of seriousness of the violation and is measured in terms of the likelihood of injury, the severity of such injury should it occur, the number of persons affected, and whether the violation is significant and substantial.

### *Significant and Substantial (“S&S”)*

Section 104(d) (1) of the Mine Act describes an S&S violation as being “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine

safety or health hazard.” 30 U.S.C. § 814(d) (1). The Commission has established that a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable likelihood the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The four-part test long applied to establish the S&S nature of a violation examines: “(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 will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission has clarified that “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury,” and “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (October 5, 2011), *citing Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). The determination ought to be made at the time the citation is issued without any assumptions being made regarding abatement activities by the mine operator. *Knox Creek Coal Corp.*, 811 F.3d 148, 165-66 (4<sup>th</sup> Cir. 2016), *citing U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (Jul. 1984). The determination is made assuming continued normal mining operations, and the operative time frame includes the time a violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal*, at 905, *citing Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989), *citing United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (Aug. 1985). It has also been well established by Circuit Courts and the Commission that redundant or additional safety measures are irrelevant to all elements of the S&S analysis. *ICG Illinois, LLC*, 38 FMSHRC 2473, 2481 (Oct. 2016); *Black Beauty Coal Company*, 38 FMSHRC 1307, 1312-13 (Jun. 2016); *Knox Creek Coal Corp.*, 811 F.3d 148, 162 (4<sup>th</sup> Cir. 2016); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011) *aff’d* 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Buck Creek*, at 136.

The *Mathies* test has been revised to focus on the interplay between the second and third steps. The second step addresses the contribution of the violation to a discrete safety hazard and is now primarily concerned with “the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed.” *ICG Illinois*, at 2475, *citing Newtown Energy Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) *citing Knox Creek*, at 162-63. At this step a two-part analysis is required. First, the particular hazard to which the violation contributes must be clearly described. The Commission defines “hazard” in terms of prospective danger, *i.e.*, the danger which the safety standard at issue is intended to prevent. The starting point for determining the hazard is the regulation cited by MSHA. Second, a determination is required of whether, based on 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. *ICG Illinois*, at 2475-76; *Newtown* at 2038. The Commission has recognized that “reasonable likelihood” is not an exact standard capable of measurement in precise terms, but

is a matter of the degree of risk of the occurrence of a hazard or a reasonably serious injury. *ICG Illinois*, at 2476; *Newtown*, at 2039.

At step three the focus shifts from the violation to the hazard, and the analysis is concerned with gravity. The *Knox Creek* Circuit Court reasoned that at this stage of the analysis the existence of the hazard should be assumed. *Knox Creek*, at 164. The inquiry is whether, based on the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. *ICG Illinois*, at 2476, *Newtown* at 2037, *citing Cumberland Coal Res.*, at 2365. The Commission has not equated the reasonable likelihood standard with a probability greater than fifty percent; The Secretary is not required to prove an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-66 (Jun. 1996).

The step four gravity determination is essentially unchanged, whether any resultant injury would be reasonably likely to be of a reasonably serious nature. *Newtown*, at 2038.

### *Negligence*

Section 110(i) of the Mine Act also includes “negligence” as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but over 30 years ago the Commission recognized that: “[e]ach mandatory standard... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A. H. Smith Stone Company*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission has established that its judges may “evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). This evaluation considers “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014).

The Secretary’s regulations categorize negligence into levels labeled “no,” “low,” “medium,” “high,” and “reckless disregard.” These levels are based on the degree of the operator’s knowledge of the violative condition or practice along with the existence or multiples of mitigating circumstances found to be present. The procedure used takes the level of negligence determined and applies a number of “points” from a table which are then added together with points from other factors to arrive at the calculated proposed penalty amount. *See* 30 C.F.R. § 100.3, Tables I-XIV.

The Commission and its judges are not bound to apply the 30 C.F.R. Part 100 regulations that govern the MSHA’s determinations. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016) *citing Brody* at 1701-03. Therefore, the Commission’s judges are not limited to an evaluation of allegedly “mitigating circumstances” and instead may consider the “totality of the

circumstances holistically.” *Brody*, at 1702; *Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir 2016). For example, the Commission has stated the real gravamen of high negligence is that it “suggests an aggravated lack of care that is more than ordinary negligence.” *Newtown*, at 2049, citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). High negligence may be found in spite of mitigating circumstances, or, for example, moderate negligence may be found without identifying mitigating circumstances. *Brody*, at 1702-03. The Commission has described ordinary negligence as “inadvertent,” “thoughtless,” or “inattentive” conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987).

### *Penalty*

The Mine Act delegates the duty of proposing civil monetary penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The proposed penalty is calculated by application of the Secretary’s regulations at 30 C.F.R. Part 100. By referring to each citation or order along with operator data and violation history, points are applied and totaled to arrive at a monetary penalty amount. 30 C.F.R. § 100.3 and Tables I-XIV. The Commission and its judges are not bound by the Secretary’s proposed assessment, and the Part 100 regulations are in no way binding in Commission proceedings. The Commission alone is responsible for assessing the final monetary penalty. *Sec’y of Labor v. American Coal Company*, 38 FMSHRC 1987, 1990, 1993 (Aug. 2016) citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7<sup>th</sup> Cir. 1984); *Mach Mining, LLC, v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) If the operator challenges the proposed penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28.

The Mine Act delegates to the Commission and its judges the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). In assessing civil monetary penalties the six criteria to be considered 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 of 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 principles governing the authority of Commission Administrative Law Judges to assess civil monetary penalties *de novo* are well-established. *Hidden Splendor Resources, Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014). Congress has conferred broad discretion upon the Commission and its Judges in the assessment of civil penalties under the Act. *American Coal*, at 1993 citing *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). The assessment of the Judge is entirely independent of the Secretary’s penalty proposal, which is not a baseline, starting point or guidepost. *American Coal*, at 1990, 1995. However, the broad discretion accorded to the Judge is not unbounded and must reflect proper consideration of the statutory penalty criteria. *Id.* at 1993. For each of the six statutory criteria, the Judge must make findings of fact. *Id.*; *Sellersburg Stone Company*, 5 FMSHRC 287, 292 (Mar. 1983); 29 C.F.R. § 2700.30(a). Although all six of the statutory criteria must be considered, the factors need not be assigned equal weight, and for more serious violations gravity and negligence may be weighed more

heavily than the other four criteria. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2374 (Sept. 2016) citing *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001); see also *Spartan Mining company, Inc.*, 30 FMSHRC 699, 724-25 (Aug. 2008) and *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

Underlying the Mine Act's penalty assessment scheme is the deterrent purpose of its penalty provisions. *Black Beauty Coal Company*, 34 FMSHRC 1856, 1866-67 (Aug. 2012) citing *Sellersburg Stone* at 294. The Judge may take into account the deterrent effect of the penalty assessed. *Black Beauty* at 1168-69; see also *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989). The Commission has also stated Judges "must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge." And, "If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *American Coal*, at 1994; citing *Sellersburg*, at 293. The Judge need not make exhaustive findings. See *Cantera Green*, 22 FMSHRC 616, 621 (May 2000).

### **Citations 7030768 and 7030777**

Citation No. 7030768 was issued on January 28, 2015, by Inspector Richard L. Eddy ("Inspector Eddy" or "Eddy").<sup>5</sup> The condition or practice was described as follows:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts. When examined by this inspector, the ribs along the No 7 North Mains, MMU 061-0 and MMU 079-0 located at the No 22 Block, between the No 2 and No 3 Entry was not adequately supported. The unsupported area measured approximately 22' in length by 6 ½' in height and approximately 6" to 18" in depth. Visible cracks measuring approximately 4' in height and 6' to 8' in length was observed with loose material hanging.

Standard 75.202(a) was cited 6 times in two years at mine 3610045 (6 to the operator, 0 to a contractor).

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<sup>5</sup> Inspector Eddy started in coal mining in 1973, operating load machines, shuttle cars, ram cars, continuous miners and just about every piece of equipment. Tr. 78-79, 123. He also worked as a section supervisor and mine examiner. During the period from 1989 to 2012 he held several positions with the United Mine Workers of America. Tr. 79-80. From 1989 to 2010 he was a full time labor representative on investigation teams in accidents and fatalities, but did not work underground. Tr. 123. He calculated 44 ½ years of underground coal mining experience, and was a certified mine foreman and EMT. Tr. 80. Eddy has been employed by MSHA since 2012, and was a Coal Mine Inspector from July 2012 to October 2015 conducting inspections and accident investigations. Tr. 76-77. He was familiar with the Harvey Mine, having conducted various inspections there for about 6 months. Tr. 80-81. He had investigated a face ignition at the Harvey Mine. Tr. 81.

Inspector Eddy designated the violation as S&S. He determined that injury was reasonably likely and could be reasonably expected to result in lost workdays or restricted duty to 1 person. Eddy rated the negligence as moderate. The citation was terminated on February 2, 2015, by a different Inspector who found the area at that time adequately supported. GX-7. The proposed penalty is \$540.

Inspector Eddy was at the Harvey mine on February 12, 2015, when he issued Citation No. 7030777, also under safety standard 75.202(a). The Condition or Practice described a different area of the mine, but was otherwise similar to Citation No.7030768, discussed above:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts. When examined by this inspector, the ribs at the entrance of the No 2A track along the Bleeder Track haulageway was not adequately supported. The unsupported area measured approximately 19' in length by 8' in height and approximately 6" to 36" in depth. Visible cracks measuring approximately 3' in height and 4" to 36" in length was observed with loose material hanging.

Standard 75.202(a) was cited 7 times in two years at mine 3610045 (7 to the operator, 0 to a contractor).

As with the previous citation, Eddy designated the violation as S&S. He again determined that injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 1 person. And he again rated the negligence as moderate. The citation was terminated on February 15, 2015, by a different Inspector who found the area at that time adequately supported. GX-12. The proposed penalty was the same at \$540.

The safety standard provides:

**Protection from falls of roof, face and ribs.**

- (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

30 C.F.R. § 75.202(a).

*Contentions*

Respondent contends that both of the cited rib areas were where miners did not often work or travel. RPHB, p. 1. Both rib areas were solid, had no loose or hanging material, and there was no sloughage. *Id.*, pp. 8-9. In one rib area a few bolts had been struck by equipment, and in the other area the rib had been struck, but neither rib was unsupported or unstable. Respondent argues nothing was scaled down, and the cracks were not actually measured. *Id.*



Further, the citations should not be S&S because the areas did not constitute a hazard and injury was unlikely. *Id.*, pp. 11-13; RRB, p. 7.

The Secretary contends that the operator failed to support the ribs in areas where persons work or travel. SPHB, pp. 7, 11-12. The Inspector found visible cracks and loose coal and rock hanging from the rib. *Id.* at pp. 8, 10. The Inspector found a rib fall reasonably likely and reasonably likely to cause severe injury. *Id.*

*Citation No. 7030768*

Inspector Eddy was accompanied by safety inspector Al Sturgeon, (“Sturgeon”) on the January 28, 2015, inspection.<sup>6</sup> Tr. 84. Eddy described the mine as large, with 5 Mechanized Mining Units (“MMUs”). Tr. 81-82. It was on a 5-day spot inspection, meaning the mine generated more than a million cubic feet of methane in a 24-hour period. Tr. 82. Eddy testified there was an area at the 22 block, 7 north mains, between the No. 2 and No. 3 entries where he observed the ribs were unsupported. Tr. 85, 131. He described an area with a length of 22 feet where there were places with visible cracks, but not for the entire length. Tr. 85-86. He testified he saw loose material that day, both coal and rock. Tr. 86. From a minimum of five to seven feet away, he and Sturgeon used a 25-foot tape measure to measure the 22-foot length. Tr. 86-87, 139. Eddy felt the cracks could fall out at any time, and did not want to put himself or anyone else in harm’s way. Tr. 87. The cracks were observed to be four feet in height, and six to eight feet in length, with loose hanging material. Tr. 85. He did not measure the width or depth of any cracks on the rib, but approximated these measurements using visual observations. Tr. 140-141, 160, 220.

Eddy testified he did not scale or pry anything down because there was not any type of temporary support in the area. Tr. 91. Though he had on him a 36-inch sounding device walking stick with a brass handle on the end, he did not use it to test to see if the visible cracks were loose because he believed it was too dangerous Tr. 143-144. Eddy did not recall any sloughage on the ground or, material that had fallen, and testified that was not the issue. Eddy testified that the issue for him was the evident lack of support. Tr. 142-143. He did not danger off the area because he knew no one would travel the area until the problem was corrected. Tr. 92. He told the operator that no miners could travel the area until the problem had been corrected. Tr. 92, 146.

Inspector Eddy also testified about the activity in the area. There was a large scoop in the No. 2 to No. 3 crosscut. Tr. 88, 129. There were contractors in the No. 2 entry and a supply crew moving supplies between the No. 2 and No. 3 entries. Tr. 88. There were miners taking supplies

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<sup>6</sup> For a little over 5 years Sturgeon had worked in the mining industry, first for Murray Energy and then at Consol Energy. Tr. 213-214. At Murray he did face work, general maintenance and operating shuttle cars, miners and bolters. At Consol, he did the same work and also became an outby supervisor and then a safety inspector. Tr. 214. He holds a 4-year collage degree in business. Tr. 215. For about the last two years, he has worked as a superintendent for a company in Pittsburgh, Pennsylvania. Tr. 213.

off cars in by the No. 22 block. Tr. 128-129. The area was preshifted by mine examiners three times each day. Tr. 89, 96. Exhibits RX-1A, RX-1B, RX-19 and RX-20 were maps showing the location of the citation. Tr.126-127.

Inspector Eddy was shown photographs taken by Sturgeon but he did not seem to recognize these as the area he cited. RX-2, RX-3; Tr. 156-159. Eddy testified that no photographs were taken at the time the citation was issued. Tr. 96. He did not recall if there were rib straps present. Tr. 159. He was also shown Sturgeon's notes. RX-4. He testified that the notes incorrectly detailed the conditions as no loose rock or coal that needed to be scaled down, and that no one was in the area. Tr. 160. Eddy stated there was no violation of the mine's roof control plan, and no improper examination cited. Tr. 162-163.

Inspector Eddy issued this citation as S&S because he believed there was a risk of the rib line possibly falling at any time. Tr. 94. He evaluated the citation as reasonably likely to cause injury because it was reasonably likely that this condition would fall and cause a serious injury. Inspector Eddy designated the injury as lost work days/restricted duty because broken bones, lacerations, and concussions could occur. Tr. 95. Additionally, Eddy designated the negligence as moderate because he believed the operator should have known of the condition from the preshift examination. He determined one person would be affected because one person would travel through the area at a time. Tr. 96.

Safety Inspector Sturgeon testified for Respondent. He disagreed with this citation because the area was controlled, it was not a travelway, and a scoop was very rarely brought through. Tr. 219. There was no scoop and no people in the crosscut or anywhere near where Inspector Eddy issued the citation. He testified that the rib and roof were adequately supported, with no falling material, loose material, or dislodged material. Tr. 219. He further testified that Eddy hit the rib all over with his sounding device trying to dislodge whatever he thought was loose. Tr. 220. Inspector Eddy tried to use his walking stick to dislodge a small crack that Eddy argued was loose material that would fall; when he tried to dislodge it nothing happened. Tr. 217. There was no obvious condition, no loose material, nothing that was ajar from or falling off or threatening falling from the rib. Tr. 229-230. The 22-foot area was supported. Tr. 219. The measurement with the tape was from approximately 2 to 3 feet away. Tr. 220-221. Bolts were dislodged, but this did not mean the ribs were loosened. Tr. 219, 240. Sturgeon did not believe the condition was dangerous because there was no loose material and the area was not a walkway. Tr. 221. He said Inspector Eddy did not state that people could not travel into the crosscut. Tr. 221. Sturgeon further testified he did not observe any equipment near the corner or in the crosscut between the No. 2 and No. 3 entries at the 22 block, and there were no supplies in the crosscut that day. Tr. 222. He took notes and photographs when the area was being inspected. Tr. 234-235.

Sturgeon testified that his notes also contain photographs he took of the corner where the citation was issued. Tr. 216. The photographs in Exhibit RX-2 depict the corner of block 22 between the No. 2 and No. 3 entries with the dislodged bolts, and reflected the condition of the

straps and bolts and rib as existed on January 28, 2015. Tr. 225-226.<sup>7</sup> The photograph in Exhibit RX-3 shows the aftermath, the extra bolts, straps and pan on the rib. Tr. 227.

Sturgeon wrote in his notes that day:

Mr Eddy observed a corner where bolts were loose. A distance spanning 22' was measured where bolts were loose. The corner was 2 walls out by the tailpiece in the 7N mains. There was no loose rock or coal that needed to be scaled down. I asked him if the citation would be non S&S, he stated it has to be because of the way it has to be entered. The Inspector at no time measured Cracks for length or depth. There was no equipment or personnel in the area. We then contacted the 7NL mains section boss and he sent a bolter to bolt the corner.

RX-4.

Respondent's Day Shift Foreman Terry Arthur Long<sup>8</sup> ("Long") and Respondent's Safety Inspector Albert Stein<sup>9</sup> ("Stein") also testified on this citation. Stein was present on February 2, 2015, when the citation was terminated. Tr. 311. He testified that the photograph in RX-3 was taken a couple of weeks before the hearing. Tr. 312. Long was the Section Foreman on January 28, 2015. Tr. 248. He testified when there was a request, he would send a bolter to fix conditions. Tr. 251. There was often no damage from a scoop hitting a rib. Tr. 255-256.

*Citation No. 7030777*

On February 12, 2015, Inspector Eddy traveled to the 2A belt line accompanied by Bob Clark ("Clark").<sup>10</sup> Tr. 98-99. At the 2A switch, the No. 2 and No. 3 entries of the bleeder system, he observed ribs with cracks and loose rock and coal material hanging, and issued this citation. Tr. 99-101; GX-12. Eddy and Clark used a 25-foot tape to measure the rib from approximately 5 feet away. Tr. 100-101. The length was approximately 19 feet and the height 8 feet but the entire area was not loose. Tr. 101. Eddy testified this was near a track that miners traveled on, and examiners, belt workers, pipe layers, and others would be in the area. The area would be preshifted once each shift. Tr. 101-102. There was a man door and stopping, and motors could not drive through the area. Tr. 173-174. Eddy did not scale anything because he believed it was dangerous. Tr. 104. The crack widths were not measured. He testified there was

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<sup>7</sup> The three images in RX-2 appear to be those from the notes, but enlarged with better brightness and contrast.

<sup>8</sup> Long has been a section foreman since 2004, the last 5 years in the 7 North mains at the Harvey mine. He holds a Mining Engineering Degree from West Virginia University. Tr. 247.

<sup>9</sup> Stein had been with Consol a little over 5 years, the first year as an industrial engineer and since then as a safety inspector. His duties include traveling with and escorting federal and state inspectors. Tr. 310. He holds an Associate Degree in Specialized Technologies and Maintenance Electricity. Tr. 310-311.

<sup>10</sup> Bob Clark no longer worked for Respondent at the time of hearing, and he did not testify at hearing. Tr. 284.

no sloughage on the ground. Tr. 177. He dangled off the entries to 2A but not the main line, and miners could still travel to the bleeder. Tr.104. A close-up map at RX-7 looked like the area cited. Tr. 172. Eddy believed the photographs RX-9A and 9B did not depict the area described in the citation. Tr. 182. He was not aware of any photographs taken at the time the citation was issued. Tr.106.

Inspector Eddy did not believe the condition was from equipment hitting the rib, and did not recall anything being parked there. Tr. 181. He also disagreed with Clark's notes about the cited condition. Tr. 179-180. There was no roof control plan violation, and no improper examination citation was issued. Tr. 182-183.

The citation was designated S&S by Inspector Eddy because the rib could have failed at any time, and it was designated reasonably likely to cause an injury. Tr. 105. Eddy found lost workdays or restricted duty could reasonably be expected because lacerations, broken bones, and concussions could result from the condition. Tr. 105. He determined there was moderate negligence because the area should have been examined; he also found one person would be affected. Tr. 105-106.

Albert Stein and Bill Hockenberry ("Hockenberry")<sup>11</sup>, testified for Respondent on Citation No. 7030777. Stein and Hockenberry were working on a lifeline in the area when the citation was issued. Tr. 313-314. Stein testified the citation was issued because equipment hit a few bolts, which were knocked out and ugly; he believed this drew attention to them. Tr. 315-316. He did not believe the bolts were a safety issue. Tr. 315. He further testified no one tried to scale the rib and no measurements were taken. Tr. 316. The ribs were supported and there were no cracks or anything hanging when the Inspector came through. Tr. 318-319. There was no sloughage or pieces of coal on the ground indicating the rib was giving out. Tr. 320. Stein believed the RX-9 photographs taken by Clark were of the area because there was a water line and a track at the bottom of the entry where it turns into 2A. Tr. 329. He was involved in terminating the condition on February 15, 2015, with another MSHA Inspector.

Hockenberry also saw no hazardous condition when Inspector Eddy issued Citation No. 7030777. Hockenberry observed the inspection area for five to ten minutes. Tr. 337-338. He identified RX-9 as photographs of this violation. Tr. 338. Hockenberry saw nothing loose in the rib and no sloughage. There were some dislodged bolts, which he testified could be common in older areas. Tr. 339. Hockenberry believed the rib was adequately supported, and saw no cracks in the rib. Tr. 340. He testified that miners were rarely in the area, and never in the area next to the rib. Tr. 340. Hockenberry saw nothing wrong with the rib, did not believe it was S&S, and he believed there was no negligence. Tr. 341-342.

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<sup>11</sup> Hockenberry has worked for 6 years as a safety inspector, 2 years at Patriot Coal and 4 years at Consol Energy. Tr. 335-336. He has a Bachelor's Degree from Marshall University in Safety. Tr. 336.

Clark's notes, dated February 12, 2015, contain the following:<sup>12</sup>

- The 2A crew does not use that track to access the section. They come through at 7 North Mains
- I or the inspector never scaled down any of these alleged 3' x 36" hanging pieces; condition did not exist
- The roof control plan does not require replacement bolts on out by areas
- The area was smooth with no flakes or major cracks visible
- If there was loose material hanging we would have cautioned that area off or scaled the hanging material
- I put caution tape just along the 19 feet of rib. I did not caution entry off because the inspector had not mentioned caution the entry off
- There was no big pieces of coal laying along the ground where affected area was
- This area was on the tight side
- There was no mantrips parked in the switch

RX-8.

Inspector Eddy's notes for each of the inspections were essentially the same as the written citations. GX-8. On January 28, 2015, the hazard was described as the potential of falling rocks and other material. *Id.*, pp. 4-5. The observed cracks were 2 feet to 4 feet in length in different areas for a total distance of 22 feet. *Id.*, p. 6. On February 12, 2015, Eddy traveled to the Patterson Creek Portal. GX-13. He again wrote that a rib area was not adequately supported with visible cracks present, indicating a hazard. *Id.*, pp. 18-19.

### *Analysis*

The safety standard requires, in pertinent part, that the ribs where persons work or travel must be supported or controlled to protect them from falls or bursts of coal or rock from the ribs. The existence of compromised but unsupported ribs gives rise to operator liability. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989).

There are three elements required in the evaluation of this safety standard. First, it must be determined if the cited area is one where persons work or travel; second, the area must be supported or otherwise controlled; and third, such support must be adequate to protect persons from falls or bursts of rib. *Oxbow Mining, LLC*, 35 FMSHRC 932, 944 (Apr. 2013)(ALJ).

Although Respondent contends both of the rib areas were where miners did not often work or travel, there is evidence that the areas would be traveled by mine examiners. Sturgeon testified there were no people near the area when Citation No. 7030768 was issued but that does not mean there would not be miners in the area at other times, as Inspector Eddy testified regarding activity there. Both Stein and Hockenberry were working in the 2A area at the time Citation No. 7030777 was issued. Therefore, persons would work or travel in the cited areas.

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<sup>12</sup> Grammatical errors are in original.

There is evidence that both of the areas had been supported or controlled. As to the rib in the 7 North Mains, the photographs taken by Stein of the corner where the citation was issued as it existed on January 28, 2015, do show bolts and straps installed. RX-2, #1 and #2. As to the 2A area rib on February 12, 2015, Clark's photographs in RX-9 also show bolts and straps installed. Eddy did not recognize the rib areas in the photographs as those he cited and did not recall rib straps present in one of the cited areas. His testimony was essentially that he was not aware of any photographs being taken and did not believe they depicted the rib areas cited. Sturgeon testified his photographs were of the area as it existed on January 28, 2015, and Stein was able to identify details in Clark's photographs as being present in the other rib area. None of these photographs are of good quality, and they are not accepted as showing the support was adequate; however, the photographs do show that both areas had been bolted. There is also testimony that bolts had been knocked loose.

The question presented is whether the conclusions drawn by Inspector Eddy of inadequate support are correct, or whether the rib areas were solid and not unstable as contended by Respondent.

When assessing rib conditions pursuant to an alleged violation, it is important that the observations and descriptions of the Inspector are adequately supported by sufficiently detailed and specific information regarding the rib conditions existing at the time of the inspection. In the instant case, both citations alleged unsupported ribs with visible cracks and with loose material hanging.

Adverse rib conditions can be clearly described in sufficient detail to provide credible evidence that there was dangerously loose material on a rib. In addition to cracks, obvious indications can be rib material that is overhanging and apparently ready to fall, or material flaked off from the rib or falling out from the rib causing the sloughage to fall onto the mine floor. The expectation would be pieces of rock or coal found on the floor at or near the rib. Also observable are loose rib materials that are "pulled" away or "gapped" away from the underlying rib by one or more inches. Rib material thought to be loose may be able to be pulled off or scaled down by walking stick or pry bar, showing that it was *in fact* loose. See, *Warrior Coal*, 39 FMSHRC 509, 531-534 (Mar. 2017)(ALJ Andrews); See also, *Sec'y of Labor v. Peabody Midwest Mining, LLC*, LAKE 2016-0120, 0140, pp. 2-3 (Feb. 2018)(ALJ Moran).

Missing from the citations, notes, and testimony of Inspector Eddy was sufficient detail about the cracks. The only actual measurements taken were the lengths along the ribs cited. All other descriptions of the cracks recorded by Eddy were made visually, and he did estimate how long the cracks were and the height at each of the rib areas. However, the widths of the cracks were not estimated and the depth of the cracks was not made clear. Also, the number of such cracks in each rib area was not reported.

Inspector Eddy also did not write or testify about any estimate of any material actually observed to be pulling away or gapping from the underlying rib. This type of condition is observable and visually measureable. Also important is that according to Eddy nothing was done to test any part of either rib area by scaling to determine if material was actually loose. Eddy testified this would be too dangerous, but he did not explain *why* these rib areas were so

dangerous they could not be checked. Similarly, that there was hanging material was not adequately explained. Hanging rock or coal is readily observable, especially where the material has little or nothing underneath to keep it from becoming unattached from the rib and falling. Eddy dismissed the importance of sloughage from the ribs on the mine floor, Tr. 141-142, 180, but I do not because this would be clear evidence that coal and/or rock was loose and had fallen off.

Respondent's witnesses who were in the cited areas did not see the conditions the Inspector reported. Sturgeon saw Eddy test a small crack with his walking stick with no material being dislodged, but otherwise saw no loose material ajar from or threatening to fall off of the rib. Stein saw no cracks or anything hanging from the other rib, and Hockenberry observed the same rib area as Stein and saw nothing loose and no cracks. As to both areas it is uncontroverted there was no sloughage on the mine floor.

I understand, of course, that the observations of an experienced Inspector are entitled to significant weight. Since Sturgeon saw a crack, and Clark wrote there were no *major* cracks, it is clear there were cracks in each of the rib areas. But the argument that the ribs were unsupported with loose material hanging is not persuasive on the basis of some cracks alone, without an adequate description of just how such cracks caused rib material to be loose at either of the locations. In fact, on the record before me, little is known about the actual condition of the cited ribs. It is not established that either was unsupported or uncontrolled; it is more likely than not the areas had been bolted. There is no description, with even a minimal amount of detail, of the "loose material hanging" said to be in both ribs. The evidence is insufficient to establish the fact of either alleged violation by a preponderance of the evidence. These two citations should be vacated.

#### **Citation No. 7033146**

Inspector Eddy was back at the Harvey mine on February 23, 2015, and issued Citation No. 7033146. The Condition or Practice was entered as follows:

The No 5 Joy loading machine, located on the No 1 A Longwall, MMU 001-0 at the No 10 Block along the beltline is not being maintained in a safe operating condition. When examined, the self centering on-off switch was not functioning properly. This hazardous condition would not shut off the machine when the emergency shut off (panic bar) was activated. The Mine Operator immediately tagged and locked out this machine and removed it from service.

Standard 75.1725(a) was cited 17 times in two years at mine 3610045 (17 to the operator, 0 to a contractor).

Inspector Eddy designated the violation as S&S. He determined injury was reasonably likely and could reasonably result in lost workdays or restricted duty to 1 person. He rated the negligence as moderate. Eddy terminated the citation about an hour later when the machine was repaired. GX-16. The proposed penalty was \$540.

The safety standard provides:

**Machinery and equipment; operation and maintenance.**

- (a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

30 C.F.R. § 75.1725(a).

*Contentions*

Respondent does not dispute the pump motor self-leveling switch was broken and did not self-level, allowing the pump motor to come back on when the panic bar was released. Respondent argues that the panic bar disrupts power to the loader machine when it is depressed, causing both the pump motor and the conveyor/gathering arms to cease functioning because both the pump and the gathering arms switches will normally self-level. The conveyor/gathering arms switch was not broken and self-leveled independent of the broken pump motor switch. After power is interrupted by the panic bar, the conveyor/gathering arms switch will self-level and the conveyor/gathering arms will not start back up on their own. It was the case that when the panic bar was released, the pump motor did come back on. Respondent contends the loader was set up on blocks and used as a stationary feeder. Normally there would not be any miners near the gathering arms of the loader, and the citation should be unlikely to cause injury, non-S&S, and low negligence. RPHB, pp.1, 14-16; RRB, pp. 8-9.

The Secretary contends it was obvious the on-off pump switch was not self-centering and the panic bar would malfunction and not shut off the machine. When the panic bar was pushed the machine shut down, but when the panic bar was released the conveyor chain, gathering arms, and pump motor all started up again. Because of miners working in a confined area around the machine, a miner could be seriously injured when the panic bar failed to function as the emergency shut off switch. The violation should be affirmed as issued. SPHB, pp. 13-16.

*Evidence*

Inspector Eddy went to the No. 1A longwall, MMU 001-0 accompanied by Bob Clark. Tr. 107. At Block 10 there was a Joy 14BU load machine. Tr. 108; GX-16. He testified the load machine was not powered on, not moving or dumping, and was set up on blocks against motion. It was used more like a feeder. Tr. 111-113. When the load machine was operating, it would not tram. Tr. 114, 116.

Inspector Eddy explained the mining activity in the area. There was a longwall miner machine retreating back. Tr. 110. Behind the miner machine there was a shuttle car used to transport material from the miner back to the stationary load machine. Tr. 111-112. The shuttle car would drop at the load machine gathering arms. Tr. 195. Eddy drew a picture of the layout of the loader, shuttle car, and the miner machine. Tr. 197-198; RX-21. He described the area as a 16-foot wide entry with a 60-inch belt line, an extremely tight area for miners to work in. Tr.



112. In the confined area were an 8-inch pipeline, rockdust, hoses, and a fire suppression system. Tr. 113, 198. There were miners working in close proximity to the equipment, the miner operator, the shuttle car operator, the load machine operator, a utility man, and mechanics. Tr. 113, 119-120. The load machine was up on blocks, but a miner walking by could fall into the loader. Tr. 118-119.

Inspector Eddy testified a load machine is operated by a pump motor, which in turn would operate the gathering/digging arms and the conveyor chain. Tr. 108. The gathering arms dump the material onto the conveyor chain, and the 60-inch belt line. Tr. 108, 114. There were two switches, one that starts the pump motors, and beside it another switch that turns on the gathering/digging arms. Tr. 108-109. Referring to Exhibit RX-11, photograph #3 shows the two switches, the main pump motor switch is on the right. Tr. 187. To get the pump motor to run, the operator pulls the small bar on the switch from the bottom position all the way to the up position. Tr. 108-109, 116, 187. At that point, both electric and hydraulic functions are going to the entire machine. Tr. 187. On release of this switch, it comes down to the center position, but the pump motor remains on. Tr. 109-110. To then start the gathering/digging arms and conveyor chain you also have to flip the second switch right beside the pump motor switch. Tr. 109, 116. The gathering/digging arms and conveyor chain would not do anything until you have the pump motor. Tr. 116. The two switches function in the same manner, they are self-centering. Tr. 109-110.

For the inspection, Eddy asked the operator to start up the machine. Tr. 108, 115. The pump motor was started, and then the gathering/digging arms and conveyor were started. Tr. 115. Eddy then asked for the panic bar, which is designed to shut down the machine, to be pushed in. Tr. 115, 117. This did shut the machine and gathering arms down. Tr. 118, 185. Another way to shut the machine down is by pulling down an on-off switch near the tram levers. Tr. 117, 188, 193, 208.

Inspector Eddy testified that when the panic bar was released, the pump motor, gathering arms and conveyor chain started up again. Tr. 115-116, 208. He found the main pump motor switch had not self-centered, but the gathering arms and conveyor switch did properly self-center. Tr. 108-110, 115, 184-185. On cross-examination, he testified, with some prompting, that on release of the panic bar he saw the machine, and the gathering arms, start back up. Tr. 189-191. He was questioned regarding his responses at his deposition on June 20, 2017; about what happened on release of the panic bar. When asked at that time if the gathering arms did actually start moving, his answer was "yes, they will do that". Questioned further:

Q. Did you see that happen here?

A. I actually showed them when I met with the guys, I showed them how dangerous of a situation it is. You know, I met with the load machine operator, I said listen, its your job to make – when you're doing your pre-op exams, to make sure that the lever self-centers. Explained to him the importance and what could happen as result if you fail to make sure they're functioning properly.

RX-22, p. 91.

Inspector Eddy designated the citation as S&S because he believed a miner could very easily fall into the machine, the machine could have hit a big rock, and the panic bar was not working. Eddy testified that this condition was reasonably likely to cause injuries of broken bones, lacerations, and concussions, which could result in lost workdays/restricted duty. Tr. 119. He assessed the negligence as moderate because a foreman was in the area frequently and could have easily observed that the pump motor lever was in the “up position” indicating it was not self-centered and therefore should have known of the condition. Tr. 120.

Inspector Eddy’s notes are somewhat contradictory and not helpful in understanding the violation. At page 9:

The No 5 Joy loading machine is not being maintained in a safe operating condition. When examined the self centering shut off switch was not functioning properly.

At page 11:

Lost workdays/restricted duty-broken bones, lacerations, bruises, contusions could result should a miner fall into the conveyor while in operation, and the machine not able to shut off with the use of the installed panic bar.

GX-17.

Jeremy Smith (“Smith” or “Electrical Engineer Smith”), testified for Respondent.<sup>13</sup> He was not present when the citation was issued. Tr. 296. Referring to Exhibit RX-11, he testified the photographs depicted the operator’s compartment of the Joy load machine showing all of the controls. Tr. 265. Photograph #3 shows the two start switches, the closest to the tram levers<sup>14</sup> would be the pump start switch, and the one to the left would activate the digging arms and conveyor chain. The two switches are identical, three-position switches. Tr. 266. In the photograph both are in the down, off position. Smith explained you raise the switch all the way up to start and it will self-center to the middle position, staying there during operation. This allows for hands-free operation; the operator does not have to hold it up to keep the machine running. Tr. 267. In photograph #4, to the right of the tram levers is the main breaker disconnect that will deenergize the machine at the incoming trailing cable.<sup>15</sup> Tr. 267. The panic bar is to the right of the main breaker disconnect, in a red housing in the bottom right hand corner of the photograph. Tr. 268.

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<sup>13</sup> Smith had been the general maintenance supervisor at the Harvey mine running the entire maintenance department since February of 2015. Tr. 263. After graduating from Penn State with a degree in electrical engineering in 2004, he worked in the maintenance department at the Enlow Fork mine and then transferred to the Harvey mine. Tr. 263-264. He is a state and MSHA certified electrician. Tr. 264.

<sup>14</sup> The tram levers are shown with a readable label in photographs #1 and #2, RX-11.

<sup>15</sup> The main breaker is also shown with a barely readable label in photographs #6 and #7, RX-11.

Smith further explained the panic bar is a safety device; it shuts down all operating functions of the machine. Tr. 268. It shuts down all power to the pump motor and conveyor motors or anything running. Tr. 269. The gathering arms and conveyor would stop. Tr. 269. Under normal operating the conveyor switch would be in the middle position Tr. 269. To power back up, the switching has to be restarted. Tr. 269-270. The two switches are wired separately, and have to be in the up, start position to reinitiate the start function. Tr. 270. When the panic bar is released, the gathering arms would not come on because that switch was not defective and was not stuck in the up position. Tr. 270.

Electrical Engineer Smith referred to Exhibit RX-10, the electrical schematic diagram for the 14BU loader. Tr. 271. He also marked up this diagram, Exhibit RX-24.<sup>16</sup> Smith identified and marked motors, switches, and other components. Tr. 271-281. He testified the pump control switch is first, you are not able to start other functions, or activate conveyors, without the pump running. Tr. 271-272. If shut down through the panic bar, each function has to be restarted individually. Tr. 272. The 3-position switch with the lever all the way down is the off position, the middle position is the run position and the top position, all the way up, is the start position. The switches are spring loaded to return to the middle position. Tr. 274-275. When the panic bar is hit the machine will shut down, but if the pump switch is stuck all the way up in the start position the pump will start back up. But the conveyors will not. Tr. 278.

Smith testified that after the single switch was repaired, the machine functioned as it was supposed to function. Tr. 283-284. Smith was not aware of the pump switch needing to be repaired before the citation was issued. Tr. 294. Smith testified that the problem with the pump switch on this loader was a broken spring, which is a mechanical failure. Tr. 295. Only the pump switch was replaced. Tr. 283. This abated the citation. Tr. 268.

### *Analysis*

The Condition or Practice described in the citation was misleading and even confusing as written. The on-off switch was not the broken switch. The on-off was a separate switch located near the tram levers, also described as a main breaker disconnect, that deenergizes the machine at the incoming trailing cable. Also misleading is the allegation that the machine would not shut off when the panic bar was “activated.” In Inspector Eddy’s notes, at page 11, he wrote the machine was not able to shut off with the use of the installed panic bar. But Eddy testified that when the panic bar was pushed in the machine did shut down, meaning the entire machine. The testimony of Smith was that it shuts down all power to the pump motor, conveyor motors, or anything running.

It was not the panic bar or the on-off breaker disconnect switch that was broken. The only broken component of the load machine was the pump motor self-centering switch. The record does not support that any other part of this machine was broken or defective.

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<sup>16</sup> This electrical schematic is of no value to lay persons. However, witness Smith would have the knowledge to “read” and explain the functioning of the electrical components. The schematic was useful to assist in testimony explaining how the defective pump motor switch affected operation of the load machine.

The controversy surrounds what happened after the panic bar was pushed and the machine shut down; specifically, what happened when the panic bar was *released*. To consider this, the function of the two identical pump and gathering arms switches must be understood. See, photograph #3, RX-11. They are 3-position switches. The full bottom position of the bar on the switch is the “off” position. The full up position of that bar is the “start” position. Upon pushing the bar up to start the function, when released the spring-loaded bar goes to the center position, but the particular function continues to operate. This allows hands-free operation of the machine. The pump motor must be started first; the gathering arms switch will do nothing until the pump motors are operating.

At the time of the inspection, the pump motor switch was broken. The bar, upon release from the start position, would not self-center but stayed in the start position due to a broken spring. The gathering arms switch did self-center. The Secretary argues that when the panic bar was released, both the pump motor and the gathering arms all started up again. Respondent’s position is that only the pump switch was stuck in the up, start position and the gathering arms and conveyor did not come on because that switch was not stuck in start. Electrical Engineer Smith was able to clearly explain how this was the case. Although the two switches were identical in how they work, they were wired separately and if the machine was shut down by the panic bar each switch having self-centered to the middle position would have to be restarted individually. Since the pump switch was stuck in start, when the panic bar was released the pump motor started, but the gathering arms and conveyor did not. I find the testimony of Smith to be clear, detailed and credible.

The testimony of Inspector Eddy was not clear and convincing. It was brought forward that at his deposition his answer to a direct question about whether he saw the gathering arms start moving was unresponsive and evasive. With prompting, at the hearing he did finally say that he saw the gathering arms start back up. However, I credit the explanations of Electrical Engineer Smith about how the machine and its switches function, particularly the response of the machine to both push *and* release of the panic bar. The testimony of Smith is more credible and of more probative value. I note that when the pump switch only was replaced, the machine functioned properly.

The pump switch was broken, and the safety standard does require the machine to be maintained in safe operating condition. The broken switch was one of a number of safety components on the load machine. Therefore, there was a violation of 75.1725(a).

The S&S determination was based on miners working in a tight, confined area near the loader and the possibility of a fall into the gathering arms and/or conveyor chain. The machine was up on blocks and could not tram. I have credited the testimony of Smith that the gathering arms and conveyor would not come back on when the panic bar was released. Considering that the panic bar would be activated in an emergency situation, if the gathering arms and conveyor chain remain off, injury to a miner working in the confined area would be unlikely. Since injury was unlikely due to the broken switch, I find the violation was not S&S. However, should an injury occur, it would result in lost workdays or restricted duty, if not considerably worse.

The negligence was determined to be moderate. I agree that both the machine operator and the foreman should have known of the defective switch. Smith testified he was not aware the switch needed to be repaired. However, the failure of the duty of care here was that the machine was available for use with the broken switch. Therefore, I agree the negligence was moderate.

### *Penalty*

I have found this violation was not S&S, and injury was unlikely but could be reasonably serious. The negligence of the operator was moderate. The violation was abated rapidly. It was stipulated the proposed penalties would not affect the Respondent's ability to remain in business. In the context of this large mine, the history of 17 violations over a two-year period does not support an enhanced penalty. On consideration of all of the facts and circumstances, and the six penalty criteria, I independently assess a penalty of \$150.

### **Citation No. 7030454**

Inspector Joseph Pelehac ("Inspector Pelehac" or "Pelehac") issued this citation on July 20, 2015.<sup>17</sup> The Condition or Practice was described as follows:

The Trailing cable supplying 480 volts AC to the energized No.2 Fletcher Angle Bolter, S/N 2011044 on the 3-A, MMU 080-0, advancing section was not being protected from strain in the cable reel. The strain clamp was there, however it was not attached to the reel.

Inspector Pelehac designated the violation as S&S. He determined that injury was reasonably likely and could be reasonably expected to result in lost workdays or restricted duty to 1 person. He rated the negligence as moderate. Pelehac terminated the citation the next day since the strain clamp had been securely attached to the reel. GX-3. The penalty proposed was \$540.

The safety standard cited provides:

#### **Clamping of trailing cables to equipment.**

Trailing cables shall be clamped to machines in a manner to protect the cables from damage and to prevent strain on the electrical connections. 30 C.F.R. § 75.605.

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<sup>17</sup> Inspector Pelehac has been a Coal Mine Inspector since 2007, and is qualified for underground electrical low, medium and high voltage feeds for equipment such as breaker boxes, miner machines and bolting machines. Tr. 21-23. He holds an Associate Degree in Mining Engineering Technology. Tr. 23. He started in mining in 1971, was a mechanic and mechanic electrician for most of his career, with a total of 46 years of experience both underground and on the surface. Tr. 23-24. He was familiar with the Harvey Mine, having been a lead inspector there for 6 to 8 quarters conducting both spot and quarterly inspections. Tr. 25, 27. He described the mine as large, with approximately 4 to 5 MMUs and two active portals. Tr. 25-26.

## *Contentions*

Respondent contends this citation should be “unlikely and non-S&S” due to the lack of a confluence of several factors thus making the occurrence of a potential hazard unlikely. The packing gland would have to come loose at a time when 5% methane and inadequate ventilation were present, or the instantaneous breaker would have to fail. The bolter machine was equipped with an automatic tensioning cable reel that spools the cable and keeps several wraps of cable on the reel, which would secure the cable in place. The mine was authorized to use 900 feet of cable on the bolter, and the machine would never be more than 780-800 feet from the power center, leaving excess wraps on the reel to secure the cable. The cable is never completely paid out, the packing gland is never under tension, and there was no damage to the packing gland. Even if the tension clamp on the packing gland is not loose, it is not strong enough to keep the cable from being pulled out of the enclosure because of the horsepower of the slowly tramping bolter machine. RPHB, pp. 14, 16-17; RRB, pp. 9-10.

The Secretary contends the strain clamp on the trailing cable of the bolter was not properly attached to protect the cable from damage and prevent strain on the electrical connections. Even with extra feet of cable, the trailing cable could still be pulled out of the reel. The strain clamp was not attached to the reel to protect the packing gland and the power connections, or to protect the energized trailing cable from possible damage from the bolter’s movements. This should have been obvious on weekly examination upon taking all the cable off the reel and removing insulating material. There was no slack in the cable to protect the explosion-proof enclosure and over time the cable would be degraded. Methane can be released in the mine at any time, and the violation was likely to cause an explosion or electrocution. SPHB, pp. 17-20.

## *Evidence*

Inspector Pelehac testified the Harvey mine was producing coal and was on a five day spot inspection for liberation of methane in excess of one million cubic feet in a 24-hour period. Tr. 25-26. On this inspection, he traveled with Bill Hockenberry from the safety department to the 3A MMU. Tr. 28. He took notes while performing his inspection. Tr. 29. Pelehac found the violation after the angle bolter was powered down by the operator. Tr. 38. The angle bolter had a trailing cable that supplied voltage to operate the machine from the power center to the bolting machine. Tr. 30-31. The cable reel, attached to the bolter, spooled the cable off and on as the machine tramped forward and in reverse. Tr. 31, 35. Pelehac testified that on the cable reel there should have been a strain clamp that protects a flame path into the explosion-proof enclosure. Tr. 32. The strain clamp protects a cable from moving where the leads are joined together preventing an electrocution or explosion hazard. Tr. 32.

Inspector Pelehac testified the strain clamp at issue became visible when the cable was unrolled from the reel and insulating material was removed. Tr. 33-34, 42. There was no slack on the cable because the strain clamp was loose; slack on the cable is necessary to protect the explosion-proof enclosure. Tr. 33. There was a shock hazard from the cable degrading over time from movement, from wiggling, not being protected from strain, and from “the leads being worked loose a little at a time.” This was reasonably likely to cause death or severe injury. Tr.

37-38. Also, if the packing gland were degraded, as it was pulled out, this would cause a possible explosion or electrocution. Tr. 38. The machine was examined the Thursday before the Monday the citation was issued, and it was unlikely a bolt would fall off in that time span, two shifts or 16 hours. Tr. 36, 39. The strain clamp was on the cable, but the bolt that attached it to the reel was not there and was not able to be found. Tr. 34. During the previous weekly examination, the strain clamp condition would have been obvious since the examiner is required to pull the cable off the reel and take the insulating jacket off. Tr. 36.

Inspector Pelehac testified that a rib bolter does vibrate when it installs rib bolts, but not as much as a shear or miner. Tr. 61. Pelehac testified that there were circumstances under which a bolt could “back off.” Tr. 43. However, he had never seen a bolt “back off” with lock washers on them on a Fletcher cable reel bolt. Tr. 44. In his experience he did not believe that on a Fletcher a tight lock washer would come loose. Tr. 44. He had never seen a situation where bolts dislodge. Tr. 47. He found no defects with the packing gland or deterioration of the flame path. Tr. 47-48.

Inspector Pelehac testified a strain clamp should not be able to slip or it could create a dangerous situation. Tr. 62. It is possible, but difficult to damage a cable with a strain clamp because there is a rubber insulator between the clamp flanges. Tr. 62-63. The safety standard requires a strain clamp to be on the machine for the protection of the packing gland, cable, and power connectors. Tr. 69. The strain clamp is on a reel that is made of metal and fiberglass. Tr. 64-65. Less than three wraps of cable around a reel could be dangerous. Tr. 70. The Harvey mine was a gassy mine and the angle bolter could have been exposed to methane at any time which contributed to the risk of the strain clamp condition. Tr. 70.

Inspector Pelehac did not detect any methane in the 3A section where the bolter was located, but he testified that the faces had a “couple tents.”<sup>18</sup> Tr. 34. He further testified the angle bolter operated where methane is released. Tr. 34-35. Methane could be released in an explosive amount at any time. Tr. 35. There was one ignition in the mains at Harvey mine, adjacent to the 3A section, either prior to or after this inspection. Tr. 35.

Inspector Pelehac testified that for an explosion to occur, the packing gland would have to be compromised, the methane would have to be at an explosive level, and ventilation would have to be inadequate; none of these conditions were present at the time of the citation. Tr. 55-57. He also testified a “bleeder” could be hit at any time and the methane could increase. Tr. 56-57. Another factor that would have to coincide is that the operator would have to miss the tape (fluorescent tape markers at 20 and 30 feet towards the end of the cable), which Pelehac believed was present on the cable at issue. Tr. 57. Pelehac also stated the angle bolter comes with a sealed and locked instantaneous trip breaker, set at 500 amps. Tr. 60. It is tamper proof, and there was no indication that it was not working. *Id.* The instantaneous trip breaker would “kick” if the leads came off a bolt. Tr. 60-61.

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<sup>18</sup> Inspector Pelehac testified that there was .05% methane at the tailpiece. Tr. 40. The gas at the No. 1 face was .3%, the No.2 face was .4%, and the last crosscut was 0%. Tr.40-41. The explosive range of methane is 5-15%. Tr. 41. Inspector Pelehac testified that he had not come across 5% methane at the Harvey mine when he inspected it. Tr. 41.

Respondent submitted exhibit RX-17, which concerned Respondent's petition for modification for 900 foot cables. Tr. 50. This MSHA document authorized 900 feet of trailing cable on face equipment with trailing cables supplied by 480 volts. *Id.* Also submitted was RX-14, a partial map of the 3A section. Tr. 66. Pelehac testified the blocks were probably 270 feet and two blocks to the face from the power center would be approximately 600 feet. Tr. 51-52; RX-14. He also testified that there is cable hung behind the load center or on the rib, because you could only fit so much on the cable reel. Tr. 58. He stated it can happen that cable could be pulled out on tramming up to the last spot from the shift or day before. Tr. 58-59. This could also happen if a mechanic cut 50 to 100 feet out to repair the cable, and the bolter operator was not informed. Tr. 58.

Inspector Pelehac's notes for July 20, 2015, contain the notation that no violations were observed except for the instant citation. GX-4, p. 1. He checked the weekly electrical examination and attached a copy showing no dangerous condition on the No. 2 angle bolter on the 3A section. *Id.*, pp. 2, 9-10. He inspected the angle bolter and found the strain clamp was there, however it was not attached to the cable reel. *Id.*, p. 5. This condition would allow the cable to pull out of the packing gland and ignite methane as it was pulling out. *Id.*, p. 6. Persons could be exposed to burns from an ignition and an electrical shock as the cable was disconnecting from terminals in the reel from being pulled. *Id.*, pp. 6-7.

The weekly examinations on July 15, 2015 for the No. 2 angle bolter on the 3A section found only a "panic strip hanging" but no indication of an unattached strain clamp. GX-4; RX-18.

Jeremy Smith testified for Respondent regarding this citation also. He was the general maintenance supervisor for more than two and a half years at Consol. Tr. 263. Smith testified the machines needed 900 feet of cable to reach the face and complete the cycle. Tr. 287-288. He testified that a cable could be damaged, cut and spliced together, shortening the length of the cable. Tr. 301-302. The bolter operator may not be aware that the cable was shortened. Tr. 302. Smith testified that he works to maintain these cables at 900 feet. Tr. 308. Furthermore, he testified that he never saw the No.2 angle bolter completely "paid out" during the course of operations. Tr. 303.

Smith measured the 3A development section and found that at the furthest face there would always be excess cable on the angle bolters. Tr. 288-289. Further, he testified that there are warning signals at the end of the cable when the reels get close to the end; approximately 50 feet from the end of the cable there is reflective tape around the cable. Tr. 290. At this point, tension on the cable would still be on the drum, the wraps on the cable reel would be the anchor, not the clamp. Tr. 290. Smith testified that the 900 feet of cable did not sit on the reel. Tr. 299. The modification in cable length to 900 feet was granted to Harvey mine because they needed the extra length for operation. Tr. 303. The cable was hung on insulated hooks up to the start of the cycle. Tr. 299. In cases of rerouting or obstructions, the excess cable length would shrink. Tr. 300.

Smith testified that the clamp was not going to stop the machine from ripping the cable in two or ripping it clean out of the machine. He testified that vibration can loosen bolts even when



there is a lock washer on them, and the Fletcher Angle Bolter has vibration on it, "all the time." Tr. 291. The wraps of cable on the reel would be loaded all the way up the side walls, all the way filled up, if you are all the way back. Tr. 292. Smith testified that if a foreman gets down to a few wraps on any piece of face equipment he notifies his CM coordinator or he will call Smith directly. Tr. 308.

Bill Hockenberry testified for Respondent. When he and Inspector Pelehac walked up the section they saw the bolter being trammed. Tr. 343. The cable was then pulled off and a loose clamp was found; he recalled seeing bolts. Tr. 343, 345, 354-355. Referring to RX-27, he testified that the clamp is bolted right to the reel, but the restraining clamp of the angle bolter was not attached Tr. 346. Hockenberry did not recall if there was safety tape on the cable, but it was common practice to have it mark an area close to the end of the cable. Tr. 347.

Referring to RX-26, a section map, Hockenberry testified to the location of the angle bolter when the citation was issued. Tr. 343-344. This was around 720 feet to the farthest face, but less than 200 feet from the working faces. Tr. 344. Hockenberry testified that there were no permissibility violations that day. Tr. 356. Hockenberry further testified that he would consider a cable reel pulling out of the box as a permissibility violation. Tr. 356. He testified the condition he saw was the clamp being loose, the bolts needed tightened up. Tr. 357-358. Hockenberry acknowledged that a cable reel is not supposed to pull out of the permissibility box. Tr. 358-359.

Hockenberry recorded his notes the day the citation was issued:<sup>19</sup>

The #2 Fletcher Angle Bolter had a trailing cable that had a restraining clamp that was on the cable but however the clamp was not attached to the reel.

If the trailing cable would pull out of the reel it would knock the breaker.

The Bolter trams at a very slow rate of speed unlike a shuttle car.

Power was on the bolter at the time of inspection.

There was extra cable on the reel but however when the inspector checked the cable and once we pulled the remaining cable off the reel it was then detected that the clamp was not secured to the reel.

RX-25.

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<sup>19</sup> Hockenberry testified that it was company policy to take handwritten notes when a safety department employee traveled with a federal or state inspector. Tr. 352. All notes were typed up after being written by hand during the inspection. Tr. 353.

## *Analysis*

Respondent contends the bolter machine would never be more than 780-800 feet from the power center, the cable would never be completely paid out, and the packing gland would never be under tension. However, Graduate Engineer Smith testified the machines needed 900 feet of cable to reach the face and complete the mining cycle. The modification for extra cable length was needed for operation. Smith also testified he never saw the No. 2 angle bolter completely paid out during operation, but in cases of rerouting the machine or obstructions the extra cable length would “shrink”. Respondent’s Hockenberry testified the bolter was around 720 feet from the farthest face at the time of the inspection. Inspector Pelehac estimated from the power center in entry No. 2 and counting two blocks to the face would be approximately 600 feet. Considering that there could be reasons for rerouting the machine during mining operations, and that a damaged cable might need to be repaired by cutting out the damaged section and splicing the cable back together, the allegation the trailing cable would *never* be paid out is unsupported.

Respondent also argues the packing gland is never under tension. However, when the strain clamp is not attached to the reel, the slack between the clamp and the packing gland protecting the permissibility enclosure would not be present. Inspector Pelehac testified that when the loose strain clamp became visible, there was no slack on the cable to protect the explosion-proof enclosure. He also pointed out that movement of the cable, “wiggling,” over time would degrade the cable and the leads would be worked loose “a little at a time.”

Hockenberry recalled the strain clamp was loose, and he saw “bolts”. But Inspector Pelehac’s testimony was clear and detailed; he found the strain clamp was not attached to the reel and the bolt that attached it to the reel was not there and could not be found. While the angle bolter did vibrate Pelehac testified he did not believe a cable reel bolt with a tight lock washer would come loose, and he had never seen this.

The safety standard requires a strain clamp to be on the machine for the protection of the packing gland, cable and power connections. Inspector Pelehac did not find any defects with the packing gland or deterioration of the flame path. There appears no dispute that an angle bolter machine, continuing to tram after the trailing cable had paid out would pull the cable clean out of the machine or rip the cable in two. While there was an instantaneous electrical breaker on the machine, this does not address the torn exposed leads of the energized high voltage cable pulled out of the explosion-proof enclosure and coming into contact with metal parts and the mine atmosphere. The notes he recorded at the time of the inspection explain that as the cable is pulled out of the packing gland and the terminals are disconnecting methane could be ignited, and electrical shock could occur.

Inspector Pelehac did testify that for an explosion to occur, the packing gland would have to be compromised, methane would have to be present at an explosive level, and the ventilation would have to be inadequate. At the time of the inspection, Pelehac found low levels of methane on the section. However, Harvey was a gassy mine, and he knew of one ignition that had occurred. Further, the methane level could increase at any time during mining. The packing gland would not remain intact if the machine trammed beyond the length of cable available. Ventilation, also, can change in the dynamic mining environment. Pelehac testified the violation

was likely to cause electrocution or an explosion. The preponderance of the evidence found credible establishes a violation of safety standard § 75.605.

The violation was designated S&S, and step one of the analysis, the fact of the violation, is established.

The hazards were clearly identified by Inspector Pelehac and are supported by his credible testimony and contemporaneous notes. It is not difficult to understand that energized high voltage leads pulled off of their connecting bolts or terminals in the permissible enclosure and out of that box would create a flame path with the surrounding mine atmosphere and an electrical shock hazard upon contacting metal machine parts and/or any person near the trailing cable. In the presence of a dangerous mine atmosphere, including hazardous levels of methane, ignition could occur. Hence, there was a discrete safety hazard contributed to by the violation of an unattached strain clamp. The safety standard is directed against the prospective danger presented by an unsecured strain clamp.

Respondent argues there was no “confluence of factors,” and occurrence of a potential hazard was unlikely. At the time and place of the violation, ventilation was adequate and methane was not at explosive levels. However, in the context of continued normal mining operations, ventilation can be variable as mining proceeds and ventilation controls are adjusted to address the changing environment. Explosive levels of methane can be encountered in a gassy mine such as Harvey. The packing gland would not be intact if the angle bolter trammed too far, and could not protect persons from electrical shock due to exposed wires.

The violation of the unattached strain clamp does increase the likelihood of electrical shock or explosion. While the angle bolter is operating the unattached strain clamp causes the protective slack in the cable to be lost, increasing the tension on the packing gland and allowing movement of the cable, “wiggling,” at the point where the cable should be secure and immobile. Inspector Pelehac testified this could cause degradation of the cable and its connections over time. Further, without a secure strain clamp the cable would be more easily torn from the explosion-proof enclosure. Based on the facts and circumstances surrounding this violation there was a reasonable likelihood of the hazards of electrical shock and explosion.

Step three of the analysis is concerned with gravity. Should the hazards identified occur, injury would be reasonably likely to result. Inspector Pelehac determined that injury could reasonably be expected to result in lost workdays or restricted duty, but he also testified that electrocution could be fatal. He determined one person, the bolter operator, would be affected. Either electric shock or explosion would be reasonably likely to result in injury; thus step three is established. Step four is also established since these types of injuries would be reasonably likely to be of a reasonably serious nature.

Redundant safety measures are not for consideration. Before the trailing cable is fully paid out, there is usually a reflective warning tape on the cable. Of course, inattention could cause this to be missed. Respondent’s Smith testified that if the machine gets down to a few wraps of cable on a reel the foreman notifies a coordinator, or Smith directly. There was an instantaneous electrical breaker that would shut the machine down. But these are all examples of

redundant safety measures and they are irrelevant to the S&S determination. I find the violation was S&S, and the gravity determinations are affirmed.

The operator has a duty of care to avoid violations of the safety regulations; under the Mine Act that standard of care is high. The question presented is whether an aggravated lack of care is suggested that is more than ordinary negligence. Ordinary negligence is considered inadvertent, thoughtless or inattentive conduct.

The failure of the requisite standard of care here began with the incomplete weekly examination of the No. 2 angle bolter in the 3A section on July 15, 2015. The testimony and documentary evidence on this record reveals that the strain clamp condition was not found. The requirement of this examination is to unroll any trailing cable on the reel and take off some insulation to expose the strain clamp, and then visually examine the clamp, cable and packing gland. The mine's examination had been 5 days before the MSHA inspection, and Inspector Pelehac testified that a clamp bolt and tight lock washer would not vibrate loose; he had never seen this happen. Yet the attaching bolt was gone and could not be found. If the weekly examiner had visually checked the strain relief parts, even if the bolt was only loose at that time, the condition would have been obvious. The operator's duty of care in this context was to insure the strain clamp securing the trailing cable energized at 480 volts AC was properly clamped to the machine to prevent strain on the electrical connections.

Inspector Pelehac determined the negligence to be moderate. Because the condition would become visible only upon unwrapping the cable from the reel and removing insulation, I do not find the negligence to be high. However, the negligence here is not merely inattentive because of the examination requirements. The contention that the negligence was low is rejected; more is expected to meet the operator's duty of care to miners. I find moderate negligence to be correct.

### *Penalty*

Of the penalty criteria to be considered, gravity and negligence are most important for this violation. It was stipulated the proposed penalties would not affect Respondent's ability to continue in business. The Harvey mine was large, the violation history in the context of mine size is not a factor, and the proposed penalty was appropriate. Compliance by the operator was rapid. However, the violation was S&S, and any injury would be very serious. I have affirmed the negligence was moderate. Considering all six of the penalty criteria, I assess a penalty of \$540.

### **ORDER**

Citations #7030768 and #7030777 are **vacated**.

Citation #7033146 is **modified** to non-S&S and injury unlikely, the penalty assessed is \$150.

Citation #7030454 is **affirmed** as written, the penalty assessed is \$540.

It is further **ORDERED** that Respondent will pay the total penalties of \$690 within 30 days of this order.<sup>20</sup> Upon receipt of payment, this case is **DISMISSED**.



Kenneth R. Andrews  
Administrative Law Judge

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<sup>20</sup> 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