

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 30, 2022

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

v.

CONSOL PENNSYLVANIA COAL  
COMPANY LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2020-0080  
A.C. No. 36-07416-511932

Mine: Enlow Fork Mine

## **DECISION AND ORDER**

Appearances: Ryan M. Kooi, Esq., & Kenneth J. Polka, CLR, Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary  
of Labor

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

Before: Judge Lewis

### **STATEMENT OF THE CASE**

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (The “Act” or “Mine Act”). A hearing was held via Zoom Government on Thursday, August 19, 2021.<sup>1</sup> The parties subsequently submitted briefs. The within Decision has been reached after careful consideration of the evidence presented at hearing and arguments advanced by the parties.

### **LAW AND REGULATIONS**

30 C.F.R. § 75.517 provides, in pertinent part:

Power wires and cables [. . .] shall be insulated adequately and fully protected.

### **CREDIBILITY ASSESSMENT**

The findings of fact are based on the record as a whole and the undersigned’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony,

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<sup>1</sup> This docket originally included six citations. Prior to hearing, the parties settled Citation Nos. 9200923, 9200927, 9203371, 9078965, and 7033984. A Decision Approving Partial Settlement was issued.

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

## JOINT STIPULATIONS<sup>2</sup>

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. §802(d), at the mine at which the citation at issue in this proceeding was issued.
2. At all times relevant to these proceedings, Enlow Fork Mine (ID 36-07416) was a "mine" as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. Operations of the Respondent at the mine at which the citation was issued are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
5. Enlow Fork Mine is owned by the Respondent.
6. Payment of the total proposed penalty in this matter will not affect the Respondent's ability to continue in business.
7. The individual whose name appears in Block 22 of the citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
8. A true copy of the citation at issue in this proceeding was served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the citations, as required by the Act.
9. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 2021-0080 contains an authentic copy of the citation at issue in this matter with all modifications or abatements, if any.

*S. Br.* at 1-2 (Nov. 8, 2021).<sup>3</sup>

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<sup>2</sup> At hearing, it was agreed that the parties would submit joint stipulations in their post-hearing briefs. *Tr.* 7-8. Specifically, the joint stipulations were submitted as part of the Secretary's post-hearing brief.

<sup>3</sup> Hereafter, the joint stipulations, transcript, the Secretary's exhibits, Respondent's exhibits, the Secretary's post-hearing brief, and Respondent's post-hearing brief are abbreviated as "Jt. Stip.," "Tr.," "Ex. S-#," "Ex. R-#," "S. Br.," and "R. Br.," respectively.

## SUMMARY OF TESTIMONY

### WITNESSES

#### Robert Revi

At hearing, Robert Revi testified on behalf of the Secretary. In addition to the certifications Revi held during his employment in the coal industry and with MSHA, Revi earned a Bachelor of Science degree from California University of Pennsylvania. Tr. 15-17. At the time of hearing, Revi had worked 9 and 1/2 years as an inspector for MSHA.<sup>4</sup> Tr. 15.

On February 4, 2020, Revi, accompanied by his field office supervisor, Tom Bochna, went to Enlow Fork Mine to conduct a 103(i) spot inspection. Tr. 18. During the inspection, Revi was also accompanied by the operator's safety escort, Matthew Roebuck. Tr. 19.

Revi issued Citation No. 9079562 to Consol on the day of inspection. Tr. 19; Ex. S-1. The citation was served to Roebuck. Tr. 19. In his citation, Revi noted that the power cable to the Fletcher rib bolter was not being adequately protected from damage. Tr. 22; Ex. S-1. The damaged cable was laying on the mine floor between the 25-25.5 wall with damage to both the outer jacket and inner insulation of the red and white leads. Tr. 22. The operator had violated mandatory safety standard 75.517 45 times in two years at the subject mine. Tr. 22. After seeing the rib bolter and the cable coming off the cable roll of the bolter, Revi noticed damage to the cable. Tr. 22. After finding damage to the outer jacket and inner insulation, Revi informed Roebuck that he would be issuing an S&S citation. Tr. 23. Revi recalled that Roebuck had, in fact, gone over to trip the power; however, he did not record such in his notes. Tr. 23. The damaged portion of the cable was approximately 50 feet from the bolter. Tr. 24.

It appeared that a piece of equipment had been running over the cable. Tr. 24. Revi noted damage to the outer jacket and, upon further inspection, damage to the red and white insulation, exposing bare energized copper conductors. Tr. 24-25. This damage could be observed without touching or moving the cable. Tr. 25.

The damaged cable was located along a travel way. Tr. 25. The area at issue was a haul road that was still used as a primary entrance to get to the end of the track. Tr. 25. The loading crew unloaded supplies to store in the cross cuts and along the rib in the section. Tr. 25. Miners could walk right over the cable. Tr. 26. A miner, in attempting to move the cable out of the way, might grab the energized cable unaware of the "bad spot" in it. Tr. 26. The cable was a 4-gauge cable that handled 480 volts. Tr. 26. The breakers were set to trip at 500 amps. Tr. 27.

Revi determined that there was a reasonable likelihood of injury because of the location of the cable in a high travel area and the number of people who might encounter it. Tr. 27-28. He determined that the number of people affected would be one. Tr. 28. Revi testified that any miner using the rib bolter or handling the cable could be injured. Tr. 28-29. Given the potential

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<sup>4</sup> See Tr. 15-17 for a detailed description of Revi's mining experience and specialized certifications.

480-volt shock, he had originally determined that any injury would be permanently disabling in nature. Tr. 27-28; Ex. S-2. After further reflection, Revi decided that it was more reasonable to expect that any injury sustained would be fatal in nature. Tr. 32; Ex. S-1. Revi noted that 110 volts can kill most people and that the damaged cable carried 480 volts. Tr. 32. Revi concluded that this was an S&S violation. Tr. 33. Exposure to bare copper conductor leads could result in death by electrocution. Tr. 34.

The inspector referenced Respondent's assessed violation history that was considered in determining the penalty imposed. Tr. 36, Ex. S-4. Revi designated the level of negligence as "Moderate" because the area in question was located in the track entry, an area which was examined three times per shift by an agent of the operator. Tr. 39. In making his determination, he considered circumstances that may have contributed to the Respondent's failure to have found the unsafe condition. Tr. 39.

Revi did not interact with any crew members the day he issued the citation. Nor did he observe any equipment, including the Fletcher roof bolter, being operated in the area. Tr. 41.

Revi found no other violations, excluding the roof bolter cable. Tr. 42. He agreed that the red leads – and not the white leads – were the only actual leads exposed. Tr. 50. He had concluded that the cable's energy was on because there were lights illuminated on the bolter which was parked in a crosscut. Tr. 52.

Revi conceded that he did not have an electrical background and had not used an electrical meter to test the cable. Tr. 54-55. He agreed that the rib bolter and cable were powered with an electrical system that contained ground fault protection. Tr. 55. He had not gone to the power center to check whether the breaker was kicked. Tr. 57-58. Revi agreed that the Respondent also had a ground monitoring system in place. Tr. 59. He observed, however, that the tripping mechanisms used by the operator did not always trip whenever damage was done to the cable. Tr. 59.

Revi did not know when the cable was damaged nor whether any employee of the operator had been aware of damage to the cable. Tr. 66. He conceded that he had not recorded in his notes that the bolter lights were on. Tr. 77. He further agreed that the purpose of the ground wire in the cable was to trip and de-energize the cable if there was damage to the cable. Tr. 80.

### Matthew Roebuck

On February 4, 2020, Roebuck accompanied Revi and Bochna during their safety inspection. Tr. 88-89. Roebuck kept a digital copy of his notes taken during the inspection. Tr. 90; Ex. R-1.

At the time of hearing, Roebuck had worked for Consol for a little over 10 years. Tr. 86. He started as an industrial engineer and had become a safety inspector shortly thereafter.<sup>5</sup> Tr. 87.

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<sup>5</sup> See Tr. 86-87 for a detailed description of Roebuck's mining experience and specialized certifications.

Revi called Roebuck's attention to the damaged cable. Tr. 97. Roebuck observed "a little bit" of red and white in the cable. Tr. 97. He informed Revi that he was going to the load center to knock the power off. Tr. 97. As he approached the power center, he noticed that one bolter had power on and one did not. Tr. 99. Because of some question as to what cable connected to what bolter, a mechanic, called to the scene, elected to knock power on both bolters. Tr. 99-100. Roebuck did not recall seeing any lights on either of the bolting machines near the 25 wall. Tr. 101.

Roebuck disagreed with Revi's "Reasonably Likely" and "S&S" designations. Tr. 102. Roebuck testified that an investigation revealed that power to the damaged cable's bolter had been knocked at the load center. Tr. 102. To return power to the damaged cable, the breaker at the load center would need to be reset. Tr. 102. Roebuck observed that abatement involved a mechanic splicing the damaged cable. Tr. 106.

### Travis Stout

Travis Stout had worked for Consol for 27 years. Tr. 113. His jobs included: chief electrical foreman, system master mechanic, long haul mechanic, general maintenance foreman, and shift maintenance foreman.<sup>6</sup> Tr. 114. As general maintenance foreman, Stout maintained rib bolters, including bolter cables, on a day-to-day basis. Tr. 116. Stout reviewed the reports of electrical examinations conducted at Enlow Fork. Tr. 119; Ex. R-2.

There were various ground fault protections associated with the power center and the rib bolter. Tr. 122-23. These were: a sensitive ground fault on the individual circuit; a ground fault on the main circuit; and a backup ground fault on the main circuit. Tr. 123. A Bender ground fault relay was used at Enlow Fork in February of 2020. Tr. 126; Ex. R-3.

If both the red and white leads were damaged, the cable would not be expected to be energized. Tr. 133-34.

The type of machinery in question had a "tone monitor," which monitored all three phases. Tr. 134. If two phases had damage, it would cause the ground wire to trip the breaker, not permitting reset. Tr. 134.

Stout agreed that anybody at any time could take the bolter and energize it.<sup>7</sup> Tr. 136.

The trip rating on the sensitive ground fault was set at 300 milliamps. Tr. 137. The setting was adjustable and could be changed. Tr. 137. The breaker ground fault was probably closer to 7.5 amps and was also adjustable. Tr. 137.

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<sup>6</sup> See Tr. 114-16 for a detailed description of Stout's mining experience and specialized certifications.

<sup>7</sup> On redirect, Stout testified that if the ground fault was reset without correcting the condition that caused the fault in the first place, the breaker would trip out and the cables would be de-energized. Tr. 142.

Stout expressed surprise that a shock between 50-150 milliamps could cause fatal results. Tr. 138. He agreed that it was possible to have an exposed lead and still have power on the cable if it was not faulted out. Tr. 140.

## **CONTENTIONS OF THE PARTIES**

The Secretary contends that the Respondent was moderately negligent in failing to adequately insulate and maintain a power cable in direct violation of 30 C.F.R. § 75.517. The Secretary contends that—assuming continued normal mining operation—there was a reasonable likelihood that the hazard contributed to by the violation would result in fatal injury to one person and would constitute an S&S violation. Finally, the Secretary argues that consideration of Respondent’s sensitive ground fault system is irrelevant to an S&S inquiry.

The Respondent contends that the Secretary failed to prove any negligence on behalf of the operator, and that the cable in question was not in fact energized at either the time it was damaged or the time it was inspected. Respondent argues that exposure to the damaged cable would be unlikely. Further, if contact occurred, Respondent contends that it would result in no lost workdays, in part because the operator’s grounding systems protected miners from potential electrical injury. Accordingly, Respondent contends that no S&S designation is warranted.

## **BURDEN OF PROOF AND STANDARD OF PROOF**

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

Commission precedents have held that “[t]he burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1070 (Sept. 2000), (quoting *Concrete Pipe & Prods of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 8 U.S. 602, 622 (1993).

The United States Supreme Court has held that “[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*. 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: “[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to

find for the party in whose favor it preponderates.” *Lilienthal’s Tobacco v. United States*, 97 U.S. 237, 266 (1877).<sup>8</sup>

While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court’s factual determinations must be supported by substantial evidence.<sup>9</sup>

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

## ANALYSIS

- Issue I: Did the Secretary carry his burden of proving a violation of 30 C.F.R. § 75.517?
- Issue II: Given that the Respondent had in place a sensitive ground fault system when Citation No. 9079562 was issued, would this preclude a finding of S&S?
- Issue III: Was the violation of 30 C.F.R. § 75.517 significant and substantial in nature?
- Issue IV: Assuming the violation constitutes an S&S violation, is the moderate level of negligence designated by the inspector supported by a totality of the circumstances?
- Issue V: Assuming the citation constitutes an S&S violation, is the originally assessed penalty of \$3,046.00 appropriate?

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<sup>8</sup> “What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly, the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case.” 2 McCormick on Evid. § 339 (7<sup>th</sup> Ed.). Indeed, the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad*’s Book XXII: “Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor.” Homer, *The Iliad*, Book XXII (Samuel Butler trans., [Publisher] [ed.]) (1898).

<sup>9</sup> When reviewing the finding of fact by a lower court, the Commission will decline to disturb the determination if it is supported by substantial evidence. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1687 (Dec. 2010); *U.S. Steel Mining Co.*, 8 FMSHRC 314, 319 (Mar. 1986). This test of factual sufficiency has been a part of Commission jurisprudence since its inception, required by the plain text of the Mine Act itself. 30 U.S.C. § 823(d)(s)(A)(ii)(I). Substantial evidence has been described by the Commission as “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. The Secretary carried his burden of proving a violation of 30 C.F.R. § 75.517.

Section 75.517 provides, in pertinent part, that power cables shall be insulated adequately and fully protected. 30 C.F.R. § 75.517. I find that Respondent did not adequately insulate or fully protect the cable supplying power to the rib bolter, and therefore, violated 30 C.F.R. § 75.517.

At hearing, the Secretary presented testimony from Inspector Robert Revi that he had observed a cable lying on the floor of Enlow Fork Mine. Tr. 21-22. The cable, which supplied power to a rib bolter, had damage to both the outer jacket and inner insulation, exposing bare conductor wires. The damaged cable was approximately 50 feet away from the bolter, across from the refuge alternative, in by the corner of the rib, in the No. 4 Entry. Tr. 22, 24, 94.

This Court found Revi to be credible in his testimony, establishing that the power cable was noticeably damaged, not adequately insulated, and not fully protected.<sup>10</sup>

Respondent at hearing and in its brief questioned whether the cable was energized at the time it was damaged or at the time the citation was issued. *See inter alia* Tr. 54-57 and R. Br. 3-6. The Respondent, however, has presented no Commission case law indicating that the underlying violation of this mandatory safety standard requires proof of cable energization.<sup>11</sup>

This Court finds that the Secretary carried his burden of proving a violation of 30 C.F.R. § 75.517 based, *inter alia*, upon the credible testimony of Inspector Revi. *See also* S. Br. 5.

### II. Respondent's ground fault system in place when Citation No. 9079562 was issued would not, as a matter of fact or of law, preclude a finding of S&S.

At hearing and in its post-hearing brief, Respondent advanced various arguments as to why its sensitive ground fault system would have precluded the reasonable likelihood of serious injury or death and, accordingly, would have warranted against a finding of S&S. *See, inter alia*, R. Br. 13-14, 17-19.

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<sup>10</sup> In assessing the credibility of witnesses, this Court, as trier of fact, found Revi to be a forthright and honest individual. This Court specifically rejects Respondent's contention that Revi's testimony was unreliable and inconsistent; *see also* R. Br. 12. Indeed, the testimony of Travis Stout, Respondent's witness, that he was shocked to hear that a current of 50-150 milliamps might cause fatal results, raised much more doubt in this Court's mind as to veracity. Tr. 138.

<sup>11</sup> While this Court does not find that the energization or de-energization of the cable is relevant to the existence of a violation, I am aware that the status of its energization—along with other factors—may affect the likelihood of exposure to a shock hazard, as stated in a recent Commission decision. *Consol PA Coal Co.*, 44 FMSHRC \_\_\_, slip op. at 8, No. PENN 2019-0008 (Feb. 10, 2022).



As both a matter of fact and law, this Court rejects Respondent's arguments.

At hearing, Inspector Revi gave undisputed testimony that the 480-volt power cable at issue carried a current of 500 amps. Tr. 26-28. Based upon his training and experience, Revi opined that electrocution could occur with a current as low as 15 milliamps. Tr. 32. Respondent's witness, Travis Scott, testified that the three different fault systems were normally set at 300-500 milliamps, but with an adjustable setting. Tr. 123, 137-38. On cross-examination, Stout expressed surprise that a current between 50-150 milliamps could cause fatal results. Tr. 138. He further conceded that the sensitive ground fault system might not trip even if damage were done to the cable. Tr. 139-40.

At hearing, this Court did not allow admission of an OSHA document (Secretary's Ex. S-3), outlining the effects of electric currents on the human body. Tr. 30-32.<sup>12</sup> This Court did permit Inspector Revi, based upon his own experience, to testify as to the milliamps necessary to cause possible fatal injury. Tr. 30-32. In his hearing brief, the Secretary requested that this Court take judicial notice of the exhibit as it was a public record. *See* S. Br. 10.

Rule 201 of the Federal Rules of Evidence provides, in pertinent part, that the Court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and reasonably determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. The Court may take judicial notice at any stage of the proceeding on its own or if a party requests it. *Union Oil Co. of CA*, 11 FMSHRC 289, 300 n.8 (Mar. 1989) (stating that official notice may be taken of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true).

After careful consideration, this Court takes judicial notice of the fact that a current carrying 50-150 milliamps can cause—as described in Ex. S-3/P-3—"extreme pain, respiratory distress, severe muscular contraction, and possible death." To the extent that Respondent has challenged Revi's opinions on the basis of his lack of advanced electrical knowledge (*see, e.g.*, R. Br. 3), this Court finds that the foregoing judicially noticed fact essentially corroborates Revi's testimony regarding the potentially fatal nature of the power cable's current, successfully rebuts respondent's arguments otherwise, and supports the Secretary's S&S determination.

Given that the Respondent's own witness testified that the sensitive ground fault system was set to trip at 300-500 milliamps—at least double the amount that could cause serious injury or death—such sensitive ground fault system measures, as a matter of fact, would not have protected miners from a potentially fatal electrical shock. Tr. 137; *see also* S. Br. 11.

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<sup>12</sup> This exhibit is attached hereto and has its original marking of petitioner's "Ex. P-3." As discussed within, Revi opined that 15 milliamps could be a killing current. According to this OSHA document, a current of 6-30 milliamps can cause painful shock, loss of muscular control, and a freezing current in which an individual cannot let go. This document further indicates that a current of 50-150 milliamps can cause extreme pain, respiratory distress, severe muscular contractions, and possible death. One amp equals 1000 milliamps, or milliamperes. Ex. S-3.

As trier-of-law, this Court further agrees with the Secretary's argument that Respondent's sensitive ground fault system should be treated as a redundant safety measure and should not be taken into account in reaching an S&S determination. *See* S. Br. 11-12.

There is a long line of Commission and Circuit Court cases holding that redundant safety measures are not relevant to the S&S inquiry. The Commission has recently stated that, "[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry." *Consol PA Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *Cumberland Coal Res., L.P. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013) (noting that consideration of redundant safety measures is inconsistent with the language of § 104(d)(1) of the Mine Act)); *see also Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018); *ICG Illinois, LLC*, 38 FMSHRC 2473, 2481 (Oct. 2016); *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1312-13 (June 2016); *Knox Creek Coal Co. v. Sec'y of Labor*, 811 F.3d 148 (4th Cir. 2016), *aff'g* 36 FMSHRC 1128 (May 2014); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Big Ridge, Inc.*, 35 FMSHRC 1525, 1529 (June 2013); *Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995); S. Br. 11.

In determining whether the subject violation was S&S in nature, this Court refuses to set aside this corpus of Commission jurisprudence so as to make an exception to such when it comes to evaluating Respondent's backup protections for damaged power cables in the context of an S&S determination.

If there is one lesson that the history of American mining has taught, it is that operators' fail-safe systems often fail. Whether because of degradation due to normal continuing operations, "Acts of God," human error, mechanical defects, or, in the most bitter of cases, intentional disablement, secondary safety measures may not protect miners from harm. It must be assumed that under continuing operations, the hazard arising out of the unsafe condition will occur. To presume otherwise can only result in real danger to miners.

If Respondent's argument is taken to its logical conclusion, the existence of alleged foolproof backup safety systems would always preclude a finding of likelihood at *Newtown's* second step, necessarily vitiating the protective intent of the mandatory safeguard at issue. If operators begin to assume that backup ground fault safety measures will preclude S&S findings and their inspectors begin assuming such measures will always protect miners from electrical hazards associated with damaged wiring and cables, there is a real peril that operators and their agents might become less vigilant or, in the worst scenario, lackadaisical in ensuring 30 C.F.R. § 75.517 safeguards are adhered to.

This Court also takes note of Respondent's argument that its sensitive ground fault protection settings are the lowest in the country and that it should be credited for reducing the likelihood of electrical hazards and encouraged to enhance miners' safety.<sup>13</sup> R. Br. 17-18. Respondent's safety initiatives are commendable. However, protection of miners' lives should be

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<sup>13</sup> As discussed *intra*, Consol's settings still are not set low enough to protect against serious injury or death.

sufficient motivation for the installation of additional electrical hazard protections. There is something jarring about Respondent's request for praise for doing the right thing.<sup>14</sup> This Court specifically holds that such efforts do not warrant a finding of non-S&S.

III. The violation of 30 C.F.R. § 75.517 was significant and substantial in nature.

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set forth a four-step analysis for determining whether a violation was S&S in nature.

Under the *Mathies* test, the Secretary must prove:

(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard; (3) a reasonable likelihood that the hazard contributed to will result in injury; (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984).

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

- (1) there has been a violation of a mandatory safety standard;
- (2) based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed;
- (3) based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury; and
- (4) any resultant injury would be reasonably likely to be reasonably serious.

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

The Commission, in *Newtown*, held that the proper focus of the second step in *Mathies* was the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown*, 39 FMSHRC at 2037 n.8. The majority further emphasized that it was essential for the judge to adequately define the particular hazard to which the violation allegedly contributed. *Id.* at 2038. The starting point for determining the hazard should be the actual cited section. *Id.*

For the following reasons, this Court finds that the Secretary has established that all four prongs of *Mathies/Newtown* have been met, and therefore Citation No. 9079562 was properly designated as S&S.

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<sup>14</sup> "[T]he first priority and concern of all in the coal [ . . . ] industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801 (2)(a).

A. A violation of a mandatory safety standard occurred.

The facts and discussion *supra* establish a violation of 30 C.F.R. § 75.517, which is a mandatory safety standard.

B. There was a reasonable likelihood of the occurrence of the hazard.

The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, but rather whether there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc.* 32 FMSHRC 1257, 1280-1281 (Oct. 2010).

In the case *sub judice*, the discrete safety hazard created is electrocution due to intentional or non-intentional contact with the cited cable. The particular facts surrounding the violation created a reasonable likelihood of the occurrence of the hazard against which 30 C.F.R. § 75.517 was directed. These particular facts include the cable's damaged condition, its location in a main travel way, and the frequent usage of the rib bolter and power cable.

As argued by the Secretary in his brief, even assuming damage only to the outer jacket of a cable, a violation of this standard may warrant an S&S designation. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1287 (Dec. 1998) (affirming an ALJ's finding that "[w]hen the jacket is ruptured, the cable is not insulated as designed."); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (recognizing that a gash in the outer jacket of a trailing cable significantly weakens the protection afforded by inner insulation); *Spartan Mining Co.*, 30 FMSHRC 699, 707-08 (Aug. 2008) (finding that an S&S designation was appropriate where a trailing cable was damaged, but the outer jacket did not appear to be broken).

Additionally, cables will likely sustain further wear and deterioration during continued normal mining operations.<sup>15</sup> *Webster Cty. Coal, LLC*, 31 FMSHRC 219, 235 (Feb. 2009) (ALJ); *see also* S. Br. 7-8; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (recognizing that a cut in the outer jacket of a cable constituted an S&S violation in part because of the "harsh environment of a coal mine."). Here, there was evidence of exposed bare copper, further supporting the Secretary's S&S finding.

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<sup>15</sup> Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). When evaluating that contribution, it is assumed that normal mining operations will continue. *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984); *see also U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). An S&S designation must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease. *U.S. Steel Mining*, 6 FMSHRC at 1574; *Gatliff Coal Co.*, 14 FMSHRC 1982, 1986 (Dec. 1992).

The damaged cable was located near the No. 4 Entry, the main travel way used to access the section and the mining face. Tr. 25-26. Individuals walking down the No. 4 Entry might pick up the cable or step on it, sustaining electrical shock. Tr. 26.

The Fletcher rib bolter was readily available for use and its supporting power cable was also readily available. At hearing, Stout noted that, given the great number of cables laying about, it was difficult to determine which cable connected to a particular machine, further increasing the chances that the damaged cable might be picked up in error. Tr. 29, 99.

In view of the foregoing, this Court finds that the Secretary presented sufficient evidence to meet the second step of *Mathies* and *Newtown*.

- C. Based upon the particular facts surrounding the violation, the occurrence of the hazard—electrocution due to intentional or non-intentional contact with the damaged cable—would be reasonably likely to result in an injury that would be reasonably likely to be serious, and indeed, fatal.

Considering the facts and discussion *supra*, intentional or non-intentional contact with a damaged 480-volt cable, carrying a 300-milliamp current, would be reasonably likely to cause electrocution and injuries such as electrical shock, burns, or death. Accordingly, the third and fourth steps of *Mathies* and *Newtown* are also met.

Given the evidence presented and the reasonable inferences flowing from such, the inspector reasonably concluded that it was reasonably likely that an individual in the entry area would, intentionally or unintentionally, suffer electrocution due to contact with the damaged cable. The inspector also reasonably concluded that the expected injury would affect one person and that, as discussed *supra*, the resulting injury would be fatal.

IV. The moderate level of negligence designated by the inspector is supported by a totality of the circumstances.

According to 29 C.F.R. § 103.3(d), negligence is considered moderate when “the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3, Table X. In *Sec’y of Labor v. Brody Mining, LLC.*, 37 FMSHRC 1687, at 1701 (Aug. 2015), the Commission affirmed that, in making a negligence determination, Commission judges are not required to apply the definitions of Part 100, may evaluate negligence from the starting point of a traditional negligence analysis, are not limited to an evaluation of allegedly mitigating circumstances, and can consider “the totality of the circumstances holistically.”

Considering that the area where the cable was located was highly traveled and subject to examination by an agent of the operator three times per shift, that the damage was readily observable by Revi, and that the damage was probably caused by machinery running over the cable, it is reasonable to conclude that the operator or his agents should have known of the violative condition.

Revi found a mitigating circumstance in that he could not place an agent of the operator at the cable at the time it was damaged. Tr. 27. Considering the totality of the circumstances holistically, including Respondent's contention that it had no knowledge of the damaged cable, this Court finds moderate negligence to be an appropriate designation of Respondent's failure to adhere to § 75.517 requirements.

V. The originally assessed penalty of \$3,046.00 for the violation is appropriate.

When undersigned first joined the Commission and reviewed the pertinent statutory and case law regarding penalty assessments, I concluded that the pathway to determining a proper penalty amount was short, simple, and straightforward: conduct a de novo review; consider 110(i) criteria; explain any substantial deviation from the Secretary's proposed amount; reach an independent assessment. In the fullness of time, I learned that the path could often be much more lengthy, arduous, and convoluted.<sup>16</sup>

Despite the foregoing, this Court perceives the pathway to an appropriate penalty assessment in this matter to be clear and unobstructed.<sup>17</sup>

Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). In assessing civil monetary penalties, an ALJ shall consider the six statutory penalty criteria:

[T]he 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

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<sup>16</sup> My appellate odyssey following a proposed American Coal Company penalty was an object lesson on point. See *Sec'y of Labor v. Am. Coal Co.*, 35 FMSHRC 3077 (Sept. 2013) (ALJ); *Commission Remand*, 28 FMSHRC 1987 (Aug. 2016); *Decision on Remand*, 38 FMSHRC 2612 (Oct. 2016); *Commission Split Decision Affirming ALJ*, 40 FMSHRC 1011; see also *American Coal Co. v. FMSHRC*, 933 F.3d 723, 728 (D.C. Cir. 2019), affirming ALJ decisions.

<sup>17</sup> *But, see* Stephen Crane's "The Wayfarer":

The Wayfarer,  
Perceiving the pathway to truth,  
Was struck with astonishment.  
It was thickly grown with weeds.  
"Ha," he said,  
"I see that none has passed here  
In a long time."  
Later he saw that each weed  
Was a singular knife.  
"Well," he mumbled at last,  
"Doubtless there are other roads."

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).

In *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), the Commission held that all of the statutory criteria in § 110(i) should be considered in the court's *de novo* penalty assessment, but not necessarily assigned equal weight. In *Musser Engineering, Inc.*, 32 FMSHRC at 1289, the Commission held that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. Here, the gravity of the violation as to injury was designated as fatal.

The Secretary has proposed a penalty of \$3,046.00 for the violation cited in Citation No. 9079562. I have considered and applied the six penalty criteria found in § 110(i) of the Act. Considering all the circumstances, the Secretary's original proposed penalty assessment appears appropriate.


The mine and its controlling entity are considered large in size under 30 C.F.R. § 100.3. The parties stipulated that payment of the proposed total penalty would not affect Respondent's ability to continue in business. *Jt. Stip. 6*. The history of assessed violations, admitted into evidence at Ex. S-4, showed 26 violations of this standard by this operator in the 15-month period prior to issuance of this citation. *See also* Tr. 36; Ex. S-1.

I have addressed negligence and gravity in the discussion above. This Court notes that much of Respondent's argument for a reduced penalty rested upon a modification of the gravity finding from "reasonably likely" to "unlikely," and a change of negligence from "Moderate" to "None." For reasons already discussed *supra*, this Court rejects such suggested modifications. Finally, while accepting that Respondent acted in good faith in abating the dangerous condition, this Court accords more weight to the gravity of the violation and the reasonable likelihood of fatal injury posed by the electrical hazard in determining an appropriate penalty.

Based on the foregoing, this Court finds that a penalty of \$3,046.00 is appropriate.

## ORDER

The Respondent, Consol Pennsylvania Coal Company, is **ORDERED** to pay the Secretary of Labor the sum of \$3,046.00 within 30 days of this order. <sup>18</sup>



John Kent Lewis  
Administrative Law Judge

Distribution:

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Attachment: Secretary's Exhibit P-3

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<sup>18</sup> Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.



# Controlling Electrical Hazards

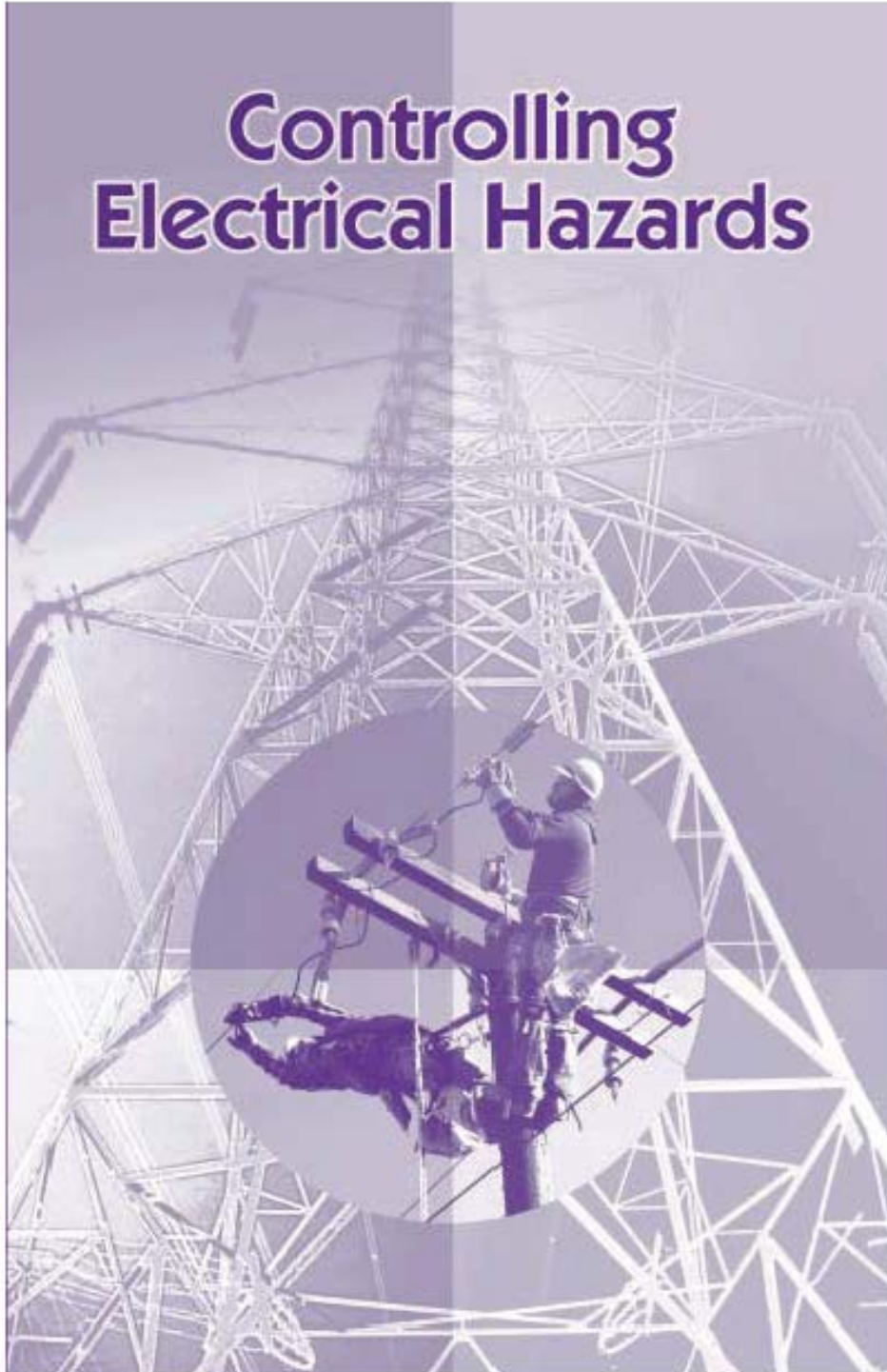


Exhibit  
P-3

U.S. Department of Labor  
Elaine L. Chao, Secretary

Occupational Safety and Health Administration  
John L. Henshaw, Assistant Secretary

OSHA 3075  
2002 (Revised)

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This booklet provides a generic overview of a standards-related topic. This publication does not alter or determine compliance responsibilities, which are described in the OSHA standards and the *Occupational Safety and Health Act*. Because interpretations and enforcement policy may change over time, the best sources for additional guidance on OSHA compliance requirements are current administrative interpretations and decisions by the Occupational Safety and Health Review Commission and the courts. This publication is in the public domain and may be reproduced fully or partially without permission. Source credit is requested but not required.

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electric circuit. This can cause an electrical shock. Shocks occur when a person's body completes the current path with:

- both wires of an electric circuit;
- one wire of an energized circuit and the ground;
- a metal part that accidentally becomes energized due, for example, to a break in its insulation; or
- another "conductor" that is carrying a current.

When a person receives a shock, electricity flows between parts of the body or through the body to a ground or the earth.

### What effect do shocks have on the body?

An electric shock can result in anything from a slight tingling sensation to immediate cardiac arrest. The severity depends on the following:

- the amount of current flowing through the body,
- the current's path through the body,
- the length of time the body remains in the circuit, and
- the current's frequency.

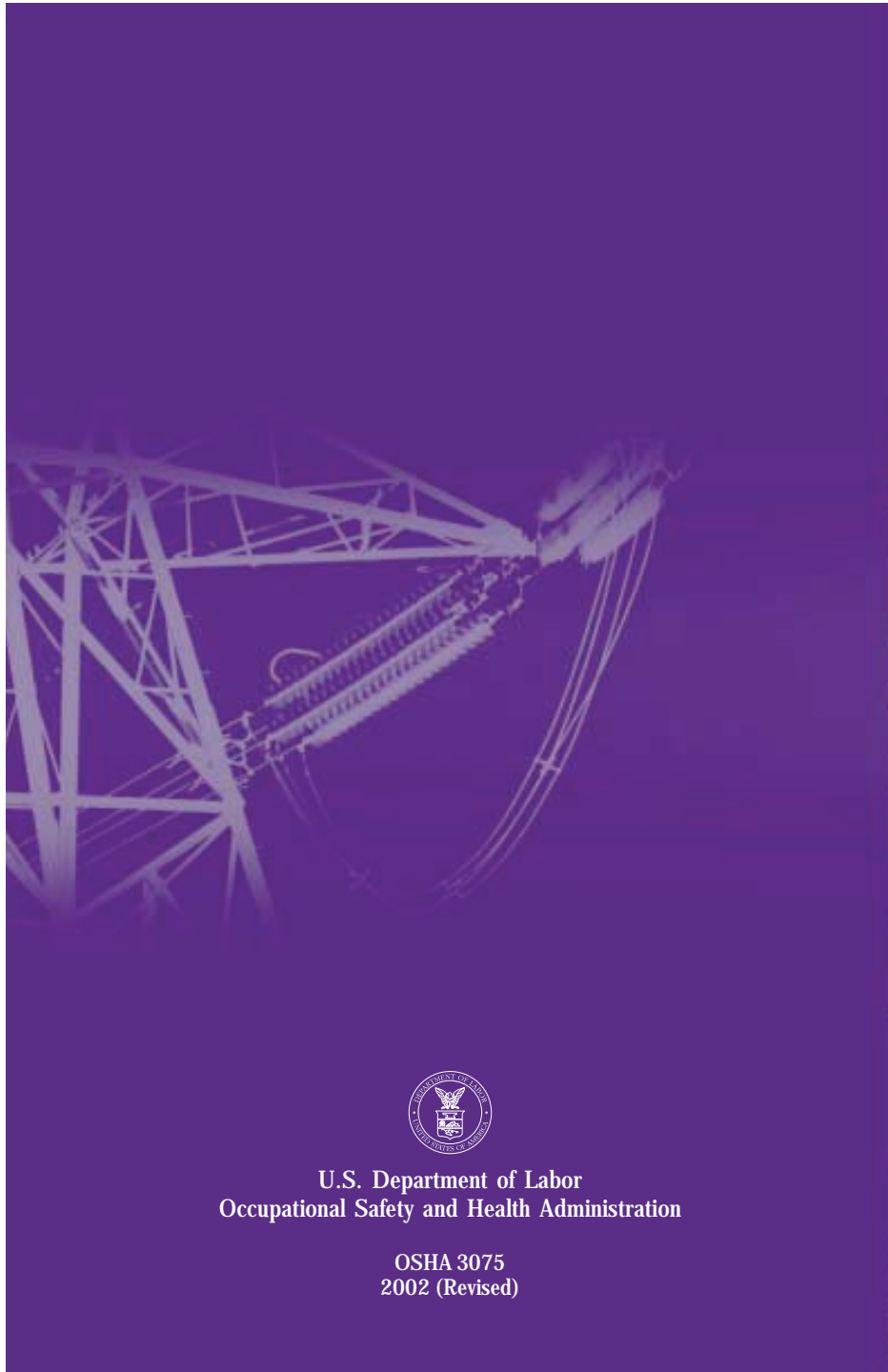
This table shows the general relationship between the amount of current received and the reaction when current flows from the hand to the foot for just 1 second.

### Effects of Electric Current in the Human Body

Current	Reaction
Below 1 milliamperere	Generally not perceptible
1 milliamperere	Faint tingle
5 milliamperes	Slight shock felt; not painful but disturbing. Average individual can let go. Strong involuntary reactions can lead to other injuries.
6–25 milliamperes (women)	Painful shock, loss of muscular control*
9–30 milliamperes (men)	The freezing current or “let-go” range.* Individual cannot let go, but can be thrown away from the circuit if extensor muscles are stimulated.
50–150 milliamperes	Extreme pain, respiratory arrest, severe muscular contractions. Death is possible.
1,000–4,300 milliamperes	Rhythmic pumping action of the heart ceases. Muscular contraction and nerve damage occur; death likely.
10,000 milliamperes	Cardiac arrest, severe burns; death probable

\* If the extensor muscles are excited by the shock, the person may be thrown away from the power source.

Source: W.B. Kouwenhoven, “Human Safety and Electric Shock,” *Electrical Safety Practices*, Monograph, 112, Instrument Society of America, p. 93. November 1968.



U.S. Department of Labor  
Occupational Safety and Health Administration

OSHA 3075  
2002 (Revised)