FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE N. W., SUITE 520N
WASHINGTON, D.C. 20004-1710
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

April 29, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CONSOL PENNSYLVANIA COAL COMPANY LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. PENN 2021-0019 A.C. No. 36-07230-524717 Mine: Bailey Mine

DECISION AND ORDER
and
RULING ON MOTION FOR ADVERSE INFERENCE

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

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

Before: Judge William B. Moran

This matter involves an accident which occurred on July 17, 2020 at Respondent Consol Pennsylvania Coal Company's Bailey Mine when six fully loaded rail supply cars broke loose from the brakeman car and traveled out of control down the mine's Crabapple slope some 1,600 feet before crashing into the coal seam at the slope's bottom. The case primarily[1] concerns the

[1] Well over 90% of the hearing involved the safeguard issues. A third citation cited a non-functional parking brake on a truck. This is not to say that the brake issue was inconsequential but only that it did not consume much time. For that matter, the Respondent admits to the brake violation, but challenges the "significant and substantial" finding. As explained within, the Court finds that the violation was significant and substantial. Two other matters were also part of this docket, Citation Nos. 9203766 and 9201843. The Secretary vacated Citation No. 9203766. Vol. I, Tr. 9-10. Citation No. 9201843 was settled. Already assessed at the minimum penalty,

validity of two citations which were issued following that accident, Citation Nos. 7033990 and 7033991. The citations were issued upon reliance of two notices to provide safeguards, which notices were issued nearly nine years earlier, on October 25, 2011. Respondent challenges the applicability of those safeguard notices to the July 2020 accident. Throughout the hearing the "accident" was often referred to as the "incident." Both terms apply to the same event. During the course of the three-day hearing, a secondary issue arose concerning the appropriateness of the Court making an adverse inference on the grounds of spoliation of evidence, to wit a failure by the Respondent to preserve evidence of a component of a car's coupler known as a key stock.

For the reasons which follow, the Court finds that the underlying notices to provide safeguard are fully applicable to the conditions identified in the citations and that an adverse inference is warranted.

Preliminary Information

Before addressing the particular findings of fact, it is necessary to set forth the Notices to provide safeguards which were the foundation for the citations in this litigation. Safeguards are derived from 30 U.S.C.874(b) of the Mine Act which provides "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

First, there is Notice to Provide Safeguard No. 7070545, issued on October 25, 2011. It provided: "Condition or Practice. During an accident investigation which began on 10-19-2011 it was determined the Company No. 32 **general supply car was not being properly maintained.** The supply car was the lead car attached to the Slope Hoist Brakeman Car that became un-coupled causing six rail mounted cars to travel approximately 1700 feet down the slope track uncontrolled. The #32 supply car was found at the bottom of the Slope Track with the metal eyelets used to connect the safety chains broken off. The condition exposes miners to serious injury resulting in a fatality from being struck by runaway supply cars. **This is a notice to provide safeguard requiring all rolling stock to have properly maintained safety chains and safety chain connection points**. **It also requires all rolling stock to be examined *prior to* being hoisted or transported in or out of the slope** as well as throughout the mine. If any defects are found the rolling stock shall be immediately removed from service. **Finally all persons involved in the operation or movement of rolling stock and other types of rail mounted equipment equipped with couplers will be trained in an inspection procedure to determine when defects are present.**"[2] Ex. P 2 (emphasis added).

The Court finds that the safeguard notice is plain and direct with its requirements that all rolling stock is to have *properly maintained safety chains and safety chain connection points* and that all rolling stock is be examined prior to being hoisted or transported in or out of the slope

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$123.00, the settlement, which is APPROVED, modified the evaluation to lost workdays/restricted duty.

[2] Later, the safeguard was modified to eliminate the phrase "as well as throughout the mine." It added that "[t]here are safeguards already in place that do not require the use of both safety chain connection points to be used when transporting rolling stock through the mine. Ex. P 2.

and if defects are found, the stock is to be immediately removed from service. Last, those involved with the operation or use of rolling stock must be trained as to the inspection procedure so that they can determine when defects are present.

The second Notice to Provide Safeguard, No. 7070546, arising out of the same accident that resulted in Safeguard, No. 7070545, was also issued on October 25, 2011. It provided: "Condition or Practice. Based on an accident investigation conducted on 10-19-2011 it was determined that **the coupler and mounting bracket on the Slope Brakeman Car is not being maintained.** The condition resulted in four supply cars and two dollies becoming uncoupled from the brakeman car and travel uncontrolled down the slope track into the mine. This condition exposes miners to serious injury from being struck by runaway supply cars. **This is a notice to provide safeguard requiring that the slope brakeman car and all rolling stock will [be] provided with properly maintained couplers. This also requires all couplers on rolling stock to be examined prior to being hoisted and prior to being transported throughout the mine**. When defects are found the couplers will be removed from service. Finally[,] all persons involved in the operation or movement of rolling stock and other types of rail mounted equipment equipped with couplers will be trained in an inspection procedure to determine when defects are present." Ex. P 4 (emphasis added).

The Court finds that this safeguard notice is equally plain and direct with its requirements that **the slope brakeman car and all rolling stock will provided with properly maintained couplers**. As with the first notice to provide safeguard, the second notice also required that all couplers on rolling stock are to be examined prior to being hoisted and prior to being transported throughout the mine. So too, it required that when defects are found, couplers are to be removed from service and, to make that requirement effective, it also required that all persons involved in the operation or movement of rolling stock and other types of rail mounted equipment equipped with couplers must be trained in an inspection procedure to determine when defects are present.

Accordingly, based on the two safeguard notices issued in October 2011, when reduced to their core requirements, as pertinent to this proceeding, the Court is to determine, by a preponderance of the evidence, whether the Secretary established that the rolling stock did not have properly maintained safety chains and safety chain connection points and whether the slope brakeman car and all rolling stock were not provided with properly maintained couplers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The hearing, a three-day affair, commenced on November 30, 2022. The Secretary called Joseph A. Vargo as his first witness. Vol. I, Tr. 26.[3] Vargo is an electrical specialist with MSHA, working out of its Waynesburg field office. An interesting aspect of his work history, Vargo had been employed at the Bailey Mine. The mine is located in Crabapple, Pennsylvania. He left that employment to join MSHA in August of 2007. Tr. 152.

[3] Once a new day and therefore a new Transcript Volume occurs, the Court marks that event with the new Volume involved, but it does so only once, with subsequent transcript pages referring only to the new transcript pages for the succeeding day.

Vargo informed that MSHA's Walter 'Bud' Young participated in the accident investigation involved in this case and that he was the administration's lead person in the matter. Tr. 33-34, 45. Directed to his notes for this event, Vargo confirmed that he arrived at the mine to start his investigation on July 17, 2020, at 13:55.[4] Tr, 39, 42. At that time they met with Randy, 'Rusty,' McHenry, mine foreman and Mike Tenant, mine safety director. The MSHA investigators spoke with Danny Williams, the hoist operator. Williams informed that at the start of the shift "they had a trip of cars that was already loaded, and he [Williams] had the cars pushed up to the brakeman car where he made the connection point for the couplers, and he checked the safety chains on the trip at that time." Tr. 45-46. The cars are lowered into the mine on an incline (i.e. on a slope). Tr. 226. Six loaded cars, weighing some 94 tons, were to be dropped into the mine. Tr. 47. The cars were rail mounted. Tr. 123. The cars were connected to the brakeman car as follows: "The first car that was attached to the brakeman car was the strap[5] car. [That strap car] … would be No. 1. No. 2 and 3 would be general cars. No. 4 and 5 would be slag cars, and the last car would be another strap car." Tr. 49. The first strap car was further identified as the '187 strap car.' Vol. II, Tr. 124.

Importantly, the brakeman car, which was also referred to as the "hoist car" and "brake car,"[6] during the hearing, was connected to the first strap car by a coupler and two safety chains. *Id.* The coupler is the primary connection point between cars, and that is the case whether that be the brake car to a car, or a car connected to another car. Tr. 87. Thus, couplers also connect supply cars to each other. Safety chains are secondary connection points; there are two such chains on each car connection. For the chains connecting the brakeman car to the first strap car, one was measured to be 52 inches and the other was 61 inches. Tr. 50. Plainly, the two chains were not of equal length. As the process to drop the cars into the mine began, the cars went over "the knuckle," which is a small hill, and from that point started down the slope track. That brakeman car, which is connected to the drum cable, pushed the six cars initially, but once the cars passed the knuckle, it's gravity that is causing the cars to move down the slope. Tr. 51. However, at about 400 feet, the cars went into overspeed. That overspeed caused the hoist drum to activate the brakes on the brake car. *Id.*

Vargo elaborated that "[o]nce the overspeed condition activated, the hoist acted as it should when in overspeed condition. It stopped the brake car immediately. **Which at that point, the coupler failed on the strap car, pulled out [from it], and then simultaneously, one of the chains failed. And in exactly milliseconds after that, the other chain failed. And at that point, the six cars traveled to [the] slope bottom in an uncontrolled manner.**" Tr. 52. (emphasis added). The cars then sped down the slope at a rate of more than 600 feet per minute. *Id.* To be clear, all six cars went down the slope; all that remained at the top of the slope was the hoist car and the detached coupler from the first car. *See also,* Transcript VII at 88, testimony of

[4] Ex. P-8, consisting of 111 pages, which exhibit includes Vargo's notes. Tr. 38.

[5] The 'strap' car refers to contents of straps, bolts and resins. Tr. 47.

[6] As noted, the terms 'brakeman car,' 'brake car' and 'hoist car,' all refer to the same car in this litigation. VII Tr. 41.

hoist operator Williams. The 600 feet per minute rate of speed is intended for personnel travel, not for supplies. Tr. 54. For supplies, the normal rate of speed is to be 300 feet per minute. Tr. 56. When the event occurred, the hoist man initially thought that the hoist rope[7] had broken. He then went to the slope track opening, where he discovered that the hoist [i.e. brake] car was still present. Tr. 56. That meant that the hoist rope did not break. The hoist man then traveled down the slope track and when he came to the brakeman car[8] he saw that the coupler had pulled out of strap car and was still attached to the brakeman car. Tr. 57-58.

After checking the hoist house itself, and finding nothing wrong there, Vargo then inspected the brakeman car, where he found, as just noted, "a coupler that was pulled out of a car and was still attached to the brakeman car." Tr. 58. Vargo observed some damage to the coupler. It was pulled out and its "sandwich plates, the rubber plates were bent back a little bit, and the draft gear[9] had some rounded edge on it, on the front of it." *Id.* He also saw that "two couplers, clevises that [were] still attached to the brakeman car." Tr. 59. A clevis is horseshoe shaped piece of metal that has a pin through it. It is also called a shackle. V II, Tr. 135. Its primary use is as a connection point. Vol I, Tr. 89. Vargo informed that those clevises "were spread apart slightly, and the pin was broke out, and the part that screws into the clevis was still remaining inside of the clevis." Tr. 59. The clevis is not part of the coupler. It functions to connect the safety chains to the brakeman car. *Id.*

Following that first visit, on July 23rd Vargo made a second visit to the mine, accompanied by Mike Snyder with MSHA's Tech Support. They went underground to the location where the cars crashed. Tr. 63-64. Vargo described Snyder as an engineer and a wire rope specialist. *Id.* and Ex. P 6, photos taken on that earlier, July 17, visit by Bud Young. Tr. 67-68.

Vargo was then directed to Ex. P 7, which consists of 76 pages. They pertain to photos that were taken on July 23, 2020 by Mr. Snyder. Vargo was present when they were taken. Tr. 73. There is no dispute that the first strap car, the car attached to the brakeman car, shows that its coupler is missing. Tr. 77-78. This was the car from which its coupler pulled out. Tr. 79. Vargo identified, within photos 2 and 3 of P 7, the compartment or hole where the coupler assembly is normally to reside and the key stocks, which are also in that location. In part, key stocks serve to keep the draft gear assembly from moving back towards the center of the car. Vargo expressed the view that the key stocks looked like something was rubbing on them. Tr. 83. A different photo showed the front key stock. For those front key stocks, their purpose is to prevent the coupler from coming out. Tr. 84. However, the left front key stock was missing. Vargo did not find any indication that the key stock was present at the time of the accident. Key stocks are welded to the car frame. *Id.* In support of his opinion, Vargo stated that if a

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[7] Vargo explained that the 'rope,' meaning a wire or hoist rope, connects the brakeman car to the hoist drum. Tr. 60.

[8] At times, Vargo called the brakeman car, the 'slope' car, but he clarified that its proper name is the brakeman car. Tr. 57-58.

[9] The draft gear is attached to the coupler and it is part of it, fitting inside the car pocket. Tr. 58-59.

piece of metal breaks away, the remaining surface will be shiny, but he observed no such shiny or light spots. *Id*. While underground, Vargo found no key stocks on the ground. *Id.* In response to a question from the Court, Vargo informed that in his opinion the missing key stock was not something that recently occurred. Tr. 85-86.

The Court also inquired of Vargo how the coupler is secured to a car. Vargo stated: "that's the importance of the key stocks. The key stocks from the back, once they're there, the -- we'll call this the pocket, the draft gear fits inside of there, and then the key stocks are welded against the pocket to keep it from moving either direction. That's what the key stocks are for, to keep them from coming in or to keep it from traveling outward, an outward direction." Tr. 86. Vargo also affirmed that "in order to effectively secure the coupler, there needs to be a key stock at least on both sides of this photograph, and one is missing on the left side." He added, "It's an importance that all four key stocks be in place, or at that point, you're weakening the coupler. You're setting it up for failure is what you're doing." Tr. 87. Vargo affirmed that the key stocks are integral to the coupler system, stating, "Yes, they are. All four -- all four should be in place for the coupler to act as the way it should. If not, as I stated before, if not, you're setting up for failure at that point." Tr. 88.

Questioning by the Secretary then turned to the chains. The chains, described as secondary connections, were found by Vargo to have one longer than the other.[10] As referred to above, Ex. P 6 at Bates 0052 is a photo of a new, 12-ton, clevis, with its pin. Tr. 90.[11] The photo depicts the exact type of clevis used in this event. Ex P 7, Bates stamp 0105, is a photo of the clevis from the accident, showing that it had spread apart. Tr. 92. That clevis was the one attached to the brakeman car. Tr. 93.

Following the investigation, Vargo issued two citations on August 12, 2020. Tr. 105-106. Ex. P 1. In issuing the citation, No. 7033990, reflected in Ex. P 1, Vargo stated that it referenced the safeguard that was in already in place. He determined that the cause of the accident was that "the safety chains were not properly maintained, because they were not connected up the same length. And that caused the cars to separate from the brakeman car." Tr. 107. That referenced safeguard is No. 7070545. *Id*. As mentioned, that prior-issued safeguard was issued to the Bailey Mine on October 25, 2011. Tr. 107 and Ex. P 2. Vargo stated that the safeguard, No. 7070545, requires the mine "to properly maintain safety chains and safety chain

[10] Though Vargo explained the chain arrangement connections, the salient point is that the chains *were not* of equal length. Nevertheless, for the sake of completeness here is his description: "the chains were welded to the brakeman's car, … [the mine's] supply cars are staggered. One has a chain on one side, and diagonal has it welded on the other side. The pin is welded, not the chain. So this car could not be fastened to the ear of the strap car. So at that point, they connected it up to another chain." That additional connection was by using a clevis. The clevises were welded on the brake car. Tr. 88-89.

[11] There was a problem with some of the Secretary's exhibits during the hearing, as the Bates numbers were missing. Per the Court's instruction, Counsel for the Secretary corrected this on December 13, 2021, by filing on e-CMS the admitted exhibits with the Bates stamp numbers on them.

connection points, between two -- between the cars." Tr. 109. Vargo stated that safeguard was issued because "there was a cause an uncoupling of cars, six rail mounted cars." *Id.* Thus, he affirmed that in 2011 six rail mounted cars became uncoupled, just as occurred in this matter.

Vargo stated that to be considered 'properly maintained,' chains used for the secondary connection must be the same length. He elaborated that "[t]he reason being so anything that would create a shock is if the couplers would -- the coupler would separate the primary connection point. The secondary would apply equal action to each chain." Tr. 109-110. By 'equal action' Vargo explained, if there is separation, both chains can be shared to the same amount of load. Tr. 110. If there is slack in one chain, the other chain will bear 100 percent of the load. *Id*.

Also on August 12, 2020, Vargo issued Citation No. 7033911. Ex P 3. *Id.* This, second, citation was issued on the basis that it "was also a contributory factor to the accident, because of the key stock missing." Tr. 112. That second citation referenced Safeguard No. 7070546. That safeguard, as with the one just referenced, was also issued to the Bailey Mine on October 25, 2011. Tr. 112. For this second safeguard, Vargo stated that it requires "all couplers and rolling stock to be examined prior to being hoisted and prior to being transported throughout the mine." Tr. 112. It also required that "all rolling stock will be provided with proper maintained couplers." Tr. 113. Vargo asserted that each coupler was not properly maintained because he "determined the key stock was never in place when the car was being hoisted." *Id.* Vargo added that the key stock is part of the coupler, because, without it, the coupler will not function. *Id.*

In the evaluation section of the citations issued by Vargo, Ex. P 1 and P 3, he marked the gravity as "reasonably likely" that an injury would occur because of "[t]he way those cars traveled down the slope at a tremendous speed uncontrolled, and if it struck somebody, that would be a reasonable likelihood it was going to cause injury." Tr.114. There were two people down the slope when the event occurred. He was told they were in the shanty. The shanty is located "directly at the bottom of the slope track. From the track itself, the cars, it's up a little elevated step, in a crosscut, maybe 12 feet, 15 feet away." *Id*. This was an estimate, as Vargo did not measure the distance. Vargo further described the shanty, informing "[i]t's a little room, maybe 12 foot by -- 12 foot by 12 foot, 12 foot by 10 area. There's a bottom person when the cars are being hoisted. That's their job. They stay in that shanty. They've got phones there. They can communicate. Heater to keep warm in the wintertime. Stay out of the elements." Tr. 115. It is constructed out of block or corrugated metal. *Id*.

The hoist operator did not immediately call down to the shanty but did so after he saw that the brakeman car was still there. He told them to stay in the shanty. Tr. 115-116. Others were potentially exposed to the hazard created by the event. Vargo described it as "a frequently traveled area. You've got mine examiners walk through there, you've got motor men that always bring their trips in. You might have a mechanic doing permissibility on cables, or what have you down in the area of the shanty. They could be in the area, contractors walking through." Tr. 116. Slope cars are also used to hoist miners out of the mine. Tr. 117. However, when stock or cars are being lowered in the slope, a siren and a light are employed as a warning. *Id.*

Vargo marked the injury reasonably to be expected as 'fatal,' expressing, "Well, just looking at the cars, the seven or six cars traveling down the slope at such a high speed with the weight involved. If it would strike a miner, there wouldn't be a chance he could survive." Tr. 118. And though in the past miners have told him that they could get out of the way if a car is coming down, that they could hear the car coming, he did not buy into such claims. Tr. 119.

Vargo confirmed that the hoist man informed that when the event occurred there were two motor men in the shanty. Tr. 120. Listing the negligence as moderate, Vargo's rationale was that the "cars are used every day in the workforce, in and out of the mine, and somebody needs to take -- take account of the cars when checked. They need to be examined somehow." Tr. 120. Vargo could not find any documentation that the cars had been checked. *Id.* In the records he saw, Vargo saw no problems noted as to the "the conditions of the coupler or the conditions of the secondary connections, the chains and the clevises." Tr. 121.

Speaking again to the chains, he stated, "they're supposed to be of equal length. I believe each link, there's a total of 11, and they're all -- they're all 11 links. That way, they get the same stretch point where both are going to execute the same, share the load. That would be failure, disconnection of couplers." *Id.* Vargo brought some experience to the subject, informing that he ran a "motor previously on the job when [he] was working [at the Bailey Mine]." *Id.* During that time he observed "cars that would actually uncouple from each other, and the safety chains held, because they was of the equal length. We always made sure they was equal length. Because you're defeating the purpose if one's longer than the other." Tr.121-122. Although he could not say definitively, it was his opinion that if the chains had been of equal length, the cars would not have disconnected. Tr. 122. Similarly, Vargo believed that if the key stock was in place *and it was properly welded*, the coupler would not have pulled out of the car as the primary connection point. Tr. 122-123.

In response to a question from the Court, Vargo answered that he believed that one of cars went off the rails in the event. Tr. 124. Vargo also affirmed that the sequence of events once things got out of hand, was the coupler detached, then the chains failed. Restated, the coupler broke away and then the chains failed, with the shorter chain failing first and then, milliseconds later, the other chain failed. Tr. 124-125. All the remaining cars had couplers and chains. Tr. 125. Further, the only coupler and chain failures occurred between the brakeman's car and the No. 1 strap car. Tr. 125. The Court remarked, after seeing a number of photographs of the wreckage following the event, as discussed at transcript pages 136-144, that they showed "quite a mess" from the accident. Tr. 144. Vargo's description was more vivid, expressing that calling it a mess was putting it "lightly." Instead, he said it was "almost say like a bomb went off and exploded. Things are everywhere. I mean, everything's all spread out." Tr. 145.

Upon cross-examination, Inspector Vargo acknowledged that he has no background in mechanical or structural engineering, nor has he ever performed maintenance on hoists, or slope ropes. Tr. 150. However, he had done some welding on cars, with one of those involving cutoffs, disconnecting the pin in the coupler. Tr. 151. Vargo agreed that to become a hoist man one has to learn how to conduct examinations of the hoist, and how to operate the hoist, including operation with supply cars. That job also includes conducting examinations of supply cars and couplers before they are hoisted. He also affirmed that to become a hoist man one has

to learn how to operate the hoist with supply cars and "to conduct examinations of supply cars and the couplers before you hoist them."[12] Tr. 152.

The Respondent raised several challenges to Inspector Vargo about the safeguard, with the inspector agreeing that Safeguard No. 7070545 does not describe what properly maintained safety chains and safety chain connection points mean, though the inspector did opine that the safety chains being of equal length would be one such proper maintenance requirement, and that for a safety chain connection point, in his opinion, it would require that "the eyelets or what the clevis would be attached to. That would be a connection point. Whatever the clevis is attached to." Tr. 161. In a similar challenge, Respondent obtained the inspector's agreement that the safeguard notice itself does not describe what a defect means. Tr. 162. So too, Vargo was asked what criteria were used to determine whether a defect in rolling stock exists. He answered, "one of the connection -- connection points, if it would be not properly welded, not properly made -- fit into the car correctly. If the hole is too big or it started to split where the eyelet was, or any unusual thing with the clevis." *Id.*

Despite the inspector's agreement with many of the assertions raised by Respondent's Counsel, Vargo did not agree that Safeguard No. 7070545 does not describe how a hoist man should examine the rolling stock to look for defects. He responded, "[p]roperly maintain safety chains and safety chain connection points. I've never seen a connection point going from a clevis to another chain. It typically goes from an eyelet to an eyelet." Tr. 162-163.

Some of Respondent's Counsel's questions presented inherent conflicts in them. For example, Vargo was asked by the Respondent with the assertion "[i]f an adequate inspection was conducted of the rolling stock, but no defect was found during that inspection, it would not be a violation of the safeguard to fail to remove the rolling stock from service." Tr. 164. Vargo agreed, but the Court would note that the problem with the question is whether an inspection could be deemed "adequate" if no defect was found but in fact, there was a defect, and if a closer exam would have detected it. The clear evidence is that a missing key stock would be detectable, though it would require some effort.

Turning to Safeguard No. 7070546, Vargo acknowledged that it provided "a notice to provide safeguard requiring that the slope brakeman car and all rolling stock will be provided with properly maintained couplers … [and that] it requires all couplers on the rolling stock to be examined prior to being hoisted and prior to being transported throughout the mine; [and that] [w]hen defects are found, the couplers will be removed from service … [and that] all persons involved in the operation or movement of rolling stock and other types of rail mounted equipment, equipment couplers will be trained in an inspection procedure to determine when defects are present." Tr. 165. As with his previous responses to the other safeguard, Vargo again agreed that this safeguard does not describe "what properly maintained couplers means." Tr. 166. Seemingly confining himself after describing the criteria to determine whether a coupler is properly maintained, he answered "[w]ell, one of the things is the coupling device,

[12] These cross-examination questions were obviously aimed to diminish Vargo's background and experience. However, for the limited expertise and background required, the inspector was fully qualified to offer his opinions about the cause of this accident.

another thing is the slop in it, the up and down movement of it. The connecting device, I always called it the tongue that's inside the coupler to see if that will push in and out, lock and unlock freely." *Id.* Respondent's Counsel then asked in light of his answer, "if all of those things are okay during the inspection or the examination prior to hoisting, you would think that the coupler would be okay; would you agree with that?" Tr. 166-167. Vargo answered "Yes."

From the Court's perspective, such responses have to be taken in the context of the facts at hand. That is, the inspector's opinion can't be used to defeat a safeguard if, for some other reason, a coupler was shown to be improperly maintained and the same result would apply to an improperly maintained chain.

Vargo gave some examples of defects in couplers, stating, "a defect is one of the things I just said. It wouldn't uncouple. The uncoupling device wouldn't work, the tongue wouldn't work, sloppy play, dirt inside of the couplers." Tr. 167.

In issuing Citation No. 7033990, Vargo agreed he referenced Safeguard No. 7070545. Tr. 167. For Citation No. 7033991, he referenced Safeguard No. 7070546. Tr. 168. Vargo further acknowledged that the loaded trip began to accelerate until it reached an overspeed condition at about 600 feet per minute. Once that happened, the hoist supervisory system, or 'HSS,' actuated an emergency stop. This caused the hoist drum brakes to engage to stop the load with the effect of having the brakeman car stop rapidly. Following that, the coupler disengaged from the strap car. Tr. 168-169. None of this is in dispute.

Though he tried, Respondent's Counsel could not obtain Vargo's agreement that the coupler would not have disengaged if the speed of the cars had been 300 feet per minute. Tr. 169. Vargo did agree that *the coupler itself* did not fail, that is, the coupler on the brakeman's car as connected to the coupler on the strap car, those couplers didn't separate from one another. *Id.* The missing key stock, an integral part of the coupler, was the culprit here.

Vargo acknowledged that the hoist man, Daniel Williams, told MSHA that he did an inspection of the safety chains and connection points. Specifically, Williams told the MSHA inspectors that he "checked the couplers, safety chains, clevises, 3/8 figure 8 chains on the adjoining couplers, … [and] conducted the pre-op checks on the brake car and everything checked out to be okay with the brake car." Tr. 176. Further, Williams informed that he called Mr. Minear, who was on the bottom of the slope, to make sure they were ready to receive the cars, in order to make sure no one was on the slope track or slope bottom. Tr. 176-177.

Vargo agreed that it was his contention that the left key stock, as Respondent's Counsel expressed it, may not have been in place when the accident occurred. Tr. 179. Of course, Vargo did not view the key stock before the accident, but it was his view that it was not in place before the accident, an opinion based on "from what [he] visualized on that, [he] would say it was not in place." *Id.* He was not contending that Mr. Williams knew there was a missing key stock before the accident. Tr. 180.

Vargo's understanding was that a coupler is inserted into a supply car and gets pushed back into the back key stocks, then additional key stocks are put in the front of the draft gear assembly and they are welded in place. Tr. 181. If a coupler was inside the supply car hole, it would be hard to see the key stock. *Id*. Ex. P 7. Ex. 7 at MSHA 0055, Vargo stated, shows the back key stocks, but that on the left side the front key stock was missing. He agreed that there was some weld material present but it was not continuous and he described it as a poor weld. Tr. 183. Vargo maintained that if the key stock was in place, one could still determine if there was a poor weld. This would require having one look at the weld on the key stock to determine if the weld was good or bad. Tr. 184. He asserted that the examiner is supposed to make a visual examination. *Id.*

Turning to the subject of safety chains, Vargo reaffirmed that one of the safety chains was longer than the other. Tr. 184-185. He acknowledged that Safeguard notice No. 7070545 does not specify that those chains must be of a certain length, nor that they must be of equal lengths. Tr. 185. MSHA has not contended that there was any issue with the hoist rope, finding that it was compliant. *Id*. He also agreed that before a trip is dropped down a slope, the hoist man notifies the bottom personnel. Tr. 186-187. There is also a visual warning device and there is no claim that it was not working on July 17, 2020. Tr. 187. The same is true for the audible warning device; it too was found to be working. Tr. 187-188.

It was Vargo' position that if the key stock was properly welded, it would have held the coupler in place. Tr. 189. This view, he asserted, was based upon his "experience of seeing loads travel throughout the mine." *Id.* However, he conceded that he had no information to support his view that "the couplers would have withstood the force exerted on the supply car when the brakeman car suddenly stopped." Tr. 190. The Court would point out that such a result would not be necessary to uphold a violation. Similarly, while he could not state that the safety chains could have withstood that same force when the brakeman car suddenly stopped, he did maintain that if those chains were of equal length, they could have shared the load, instead of one chain taking the load. *Id*.

Vargo reaffirmed that key stocks must be present for the coupler to function. Tr. 218. Speaking to the secondary chains, he reasserted that one chain was shorter than the other; with one measured at 52 inches and the other at 61 inches. Tr. 219.

On the subject of testing or evaluating the integrity of key stocks, Vargo maintained that "by looking at the weld on the key stocks. I mean, those cars could be -- those cars could be turned upside … when they're in the yard before they're actually used. Like to get a better representation. Sometimes there's a cover on it. It's called an inspection plate. And I don't know if they're welded over top of it. The inspection plate should be kept open just for that reason, to inspect the coupler." Tr. 191. Although he was not asserting that the hoist man is to turn over a supply car every time before he sends the hoist down into the mine to load supplies, because to so assert would be impracticable, he did contend that "there ought to be some inspection procedure put in place for [the mine] to check the cars." Tr. 191-192. Still, he agreed there was a visual inspection *procedure* in place at the mine on July 17, 2020 and that the procedure was sufficient on that date. Tr. 192. The question, however, is whether the visual inspection was sufficient, not just the procedure. The Court finds that it was not.

There was then a reference to Ex. P 9. Tr. 195. This stemmed from a question by Respondent's Counsel regarding whether MSHA's tech support tested or evaluated the structural integrity of the safety chain connection points. Vargo could not confirm that Tech Support did such an evaluation of the structural integrity, noting only that "[i]n the report, the mine operator went with an 18 ton clevis an equal length of 30 millimeter chain." Tr. 198-199. On that issue of structural integrity, the Court commented that the principle of *res ipsa loquitur* could come into play. Tr. 196. The chains, of unequal length, broke away.

Vargo confirmed that he issued a new safeguard on the same day that he issued the citations in this matter. Tr. 200. In that safeguard Vargo agreed that he concluded that "the hoist brakes engaged causing the brake car to come to an abrupt stop, and the force applied to the strap car caused the car coupler to sever and separate." Tr. 200. Reading further from that safeguard, Vargo agreed it reflects "that two 30 millimeter safety chains with one and a quarter inch retainer pins tied the cars together. Each chain attached by a 12-ton clevis and that, quote, both retainer pins broke from the shock load." Tr. 201. Thus, he also agreed by using the term 'shock load' it refers to "when the overspeed brake stopped the brakeman car, and the force exerted from that resulted in those pins severing." Tr. 202.

Respondent's Counsel also had Vargo's agreement that the hoist was designed to operate at 600 feet per minute but that Consol has since removed that ability to operate at that speed. *Id.* Counsel also had Vargo's agreement that the state of Pennsylvania approved the hoist. *Id.* However, the Court would note that Pennsylvania's approval of the hoist is not determinative of the issues in this matter. That is to say, approval by the state of the hoist cannot be used to insulate Consol if it is determined that either or both of the safeguard notices were violated.

Counsel for Consol then turned to MSHA's modification of the k order that was issued in connection with this matter. That modification "permit[ed] the operator to start to clean debris and supplies on the slope track between the bottom of the slope and the inbound No. 4 slope bottom switch." Tr. 204 and Ex. P 8, 9203689. A subsequent modification occurred on July 20, 2020, permitting "the operator to clean up the slope bottom track from the No. 4 slope bottom switch to the wreck at the end of the slope track … from the slope bottom to the wreck site … and place the slope bottom tracks back into operation." Tr. 205.

Turning next to photos in Ex. P-7, which were taken on July 23, 2020, Vargo stated that he did not see any debris in those photos. Tr.206. He agreed that, in the words of Respondent's attorney, that he didn't "see any photos that look like the photos from 7/17 that showed roof bolts and plates and channels and pipes sticking up vertically when [he] testified about those." Tr. 206.

Vargo further acknowledged that, per photos within Ex. P 7, the strap car and the chain were covered with some sort of material, though he couldn't say that it was mud and dust. Tr. 207. He also agreed that he was not contending that the clevis, per those photos, was spread apart before the accident, meaning that the event itself spread the clevis apart. Tr. 208-209. The point of these questions was apparently to show that the photos did not reflect the rust or material on the equipment at the time of the accident, but rather as a consequence of the equipment having been brought to the surface, and, being outside, it was exposed to the elements. Vargo did not walk to the bottom of slope until July 23rd. Neither he nor Bud Young

ever found the missing key stock. Tr. 210. Vargo agreed that the key stock was not found on the slope, nor were the pins and clevises found there either. Tr. 213-214.

Questioning then turned to the shanty at the bottom of the slope. This line of questioning was obviously designed to show that those at the slope bottom were in no danger. However, the Court views such a suggestion as a bit much. Vargo agreed that the shanty is a small room "where persons are supposed to go when they're hoisting supply cars to make sure they're in a safe area …[a]nd [it's] elevated above the floor at the bottom of the slope [and one has] to climb up steps to get into the shanty where miners go to be in a safe place when Bailey's hoisting material down the slope." Tr. 211. Beyond that, Vargo also agreed that the shanty "is set at a 90-degree angle and crosscut, which protects it from anything falling down the slope at the bottom." Tr. 214.

Vargo has never known of examination of hoist cars when they are underground; the point being that such exams are done on the surface. Tr. 216. Regarding the subject of defects, he acknowledged that the word 'key stock' does not appear in Safeguard notice, No. 7070546. In response to the Court, Vargo did clarify that a missing key stock would be a defect because a coupler can't function properly if key stocks are missing. Tr. 217. Thus, he affirmed that key stocks are integral to couplers functioning. *Id.*

Why was a new safeguard issued?

Regarding Safeguard notice No. 7033989, which Vargo issued on August 12, 2020, Ex. P 8, at page 14, MSHA Bate stamp 0142, he was asked why he issued a new safeguard, if he felt that the existing safeguards were sufficient. He explained that it related to the changing of the remote from 600 to 300 feet per minute. Tr. 220. He elaborated that it was brought about because of "what the select mode is in." Tr. 221. That new safeguard spoke to this because it was a contributing factor to the accident, and it also addressed "hoisting rates and the weights … nobody knew … how much weight … to drop and not to drop." Tr. 221. Thus, the Court finds that the 2020 notice to provide safeguard addressed a new and distinct hazard with respect to the transportation of men and materials.

The Court pressed Vargo further asking, given the length of the text in the new safeguards, if it would be fair to view them as undercutting the existing safeguards, that is, to assert that the existing safeguards didn't cover the accident here. Vargo answered that the Respondent was asserting that the existing safeguards didn't point out every little thing. He stated that was the mine operator's point of view, not his. He then noted the safety chains with their mismatched lengths as such an issue. Tr. 222-223.

Returning to the violations at hand, Vargo then elaborated that the key stocks are arranged so that there is a set, fore and aft, on each side to secure the coupler. Tr. 227. He informed that it will be difficult, but possible, to see the fore key stocks if the coupler is moved to one side. Tr. 227-228. The coupler can move left or right by 40 degrees. Tr. 228. When the car is being moved, the coupler will be directly in the middle. Tr. 228. In such a position, while one would have to kneel, one could see the key stocks. Tr. 228-229. Pressed further, the Court asked if it would be difficult to view an intact key stock. Vargo agreed, but emphasized the

importance of making such exams because of safety concerns. Tr. 229. Summing up his opinion, Vargo expressed that during a regular inspection one could miss seeing an issue with a key stock and a coupler. Tr. 230. On re-cross-examination, Vargo agreed that key stocks and couplers are not the same thing, but "key stocks [are] critical to the draft gear of the coupler working as designed." Tr. 231.

Regarding the issue of whether a safeguard can be modified and if that occurs if that means there can be no violation following such a modification until there is a subsequent violation of the then modified safeguard, the Court commented "if I issue a safeguard on July 1st, and on July 3rd, two days later, I add additional information, that's different in my mind from a safeguard where three months down the road, I modify the safeguard. Because one originates from the original issuance and is part of it, much like a citation can have an extended page to it, and it doesn't mean it's a separate citation. It's just a clarification, really, of the original safeguard versus one that's issued two months down the road as a hypothetical." Tr. 234.

On re-direct, referring again to the length of safety chains, the Secretary's attorney asked of Vargo if he had any experience with the issue. Vargo offered anecdotal information that the chains are to be of equal length. Tr. 235. The Court then commented that it just makes common sense, so that the dual chains care share the load, stating, "I would also observe in this process, we don't have to park our common sense. In the sense that … it stands to reason that if you have two chains of unequal length, and then you have to stop suddenly, the chain of the shorter length will necessarily feel the force first, and, therefore, if the purpose of having two chains to provide additional -- adequate support, then it's not working as intended, that the second chain is not for decoration. And so I would just say, again, common sense leads to the conclusion that both chains perform[ ] their function in tandem." Tr. 235-236.

Following the Court's comment, Respondent's counsel asked Vargo if either of the safeguards in issue in this matter mention anything about the length of safety chains, to which he responded that they do not. Tr. 236-237. Under redirect to that point, Vargo was then asked if the safeguard includes maintaining them of equal length. Vargo answered it does not mention chains being of equal length, but he then added that chains of different lengths defeats their purpose. Tr. 237.

Given so much back and forth between the parties on the length of chain issue and the suggestion that perhaps the chains had been adjusted to be of the same length before the accident, the Court asked of Vargo if anyone from the mine ever asserted to him that the chains were in fact of the same length, to which he responded no such claim was made. Tr. 242.

As a factual matter, Vargo confirmed that the clevises were attached to the brakeman car and that the chains were attached to those clevises. Tr. 242. Further, Vargo informed that the pins on the clevises were welded to them, so the pins could not be moved. Accordingly, being welded, the chain lengths could not be changed on that end. Tr. 243. With the chains on the slope car still attached, the suggestion by the Respondent that perhaps the chains had been altered to make them of equal length amounts to unsupported speculation. The Court finds that the subject chains were in fact at least functionally of different lengths.

Following Inspector Vargo, witness Justin Jones, was called by the Respondent. Presently, Mr. Jones is a maintenance officer for the United States Air Force. Tr. 247. Prior to that, he worked for Consol Energy at the Bailey Mine, and had been so employed there for eight years. Tr. 249. For the majority of that time he was a safety inspector for Consol. He confirmed that the purpose of the slope hoist is to raise and lower equipment in and out of the mine. Tr. 251. As part of his duties, he was involved in inspecting the slope hoist with MSHA inspectors. Besides the hoist itself and its rope, the inspectors would also check the supply cars, checking couplings, making sure the safety chains were on, and checking the wheels on the cars to make sure they weren't locked up. Tr. 252. Jones was employed at the Bailey Mine at the time that the alleged safeguard violations in issue in this proceeding were invoked. Tr. 253. In fact, he was working at the mine on the day the "event" occurred on July 17, 2020 and on that day, he went underground with MSHA Inspector Bud Young. Tr. 254.

Jones described a key stock as a metal piece inside the coupler pocket *that holds* the coupler assembly inside the car. Tr. 255. He added that the key stock is attached to the car, not the coupler. Incorrectly, he stated it was bolted. *Id*. The overwhelming evidence is that key stocks are welded.

Addressing Safeguard No. 7070545, Ex. P-2, Jones was asked if that safeguard referred to the safety chain length, answering it did not. Tr. 256. He admitted to having a discussion with some MSHA personnel about the "different lengths" of the safety chains. *Id.* Jones also stated that while he and the MSHA people looked at the connection points, no one saw anything wrong with them. Tr. 257.

It must be said that Jones' memory was short on details. For example, after Counsel for the Respondent, referring to Ex. P-3, made a long assertion about the allegation that "it was determined that the coupler of the No. 187 supply car was not being maintained. Says that the left front key stock inside a coupler pocket was missing. There were no markings or weld materials on the pocket," he then asked Jones: "Did you inspect the couplers on July 17th, 2020 with Mr. Young?" Tr. 257.

Jones answered: "I mean, to say specifically we did, it's hard to remember. But we went over the entire wreck, looked at everything, so, yes." *Id.* And when then asked if there was any mention of a missing key stock on July 17, 2020, Jones responded only, "[n]ot to my recollection, no." Tr. 258. When counsel for the Respondent stated that Citation No. 7033991 was issued based on safeguard No. 7070546, referencing Ex. P-4, Jones stated that he was familiar with it but that it does not refer to key stocks. Tr. 259. Jones had no information to offer about the basis for the safeguard that was issued on October 19, 2011. *Id.*

Asked if he agreed with MSHA's allegations regarding the missing left key stock, he responded that he did not agree because he believed "it's impossible to prove or even assume that the key stock was missing prior to the accident. [He thought] the tremendous force that that key stock and pocket -- or coupler pocket was under, very easily could have likely caused the damage to the key stock, to rip it out." Tr. 260. Jones then identified Respondent's Exhibits 1 and 2 as his notes for the citation issued by Vargo. Referring to his notes, Jones believed the mine did not "break that section of law." Tr. 262. For example, he took issue with the

"mechanically sound safety chains connection points, [asserting that] our safety chains and connection points were completely fine. There was nothing wrong with them. They likely failed well past." Tr. 262.

Jones also disagreed with the likelihood of anyone being injured from the event, expressing "[j]ust because of the safety mechanisms we had in place on the slope bottom make it near impossible for anybody to get hurt [because] before a load is even put over top of those Crabapple slope, an alarm goes off [and] [a] phone call is made, first of all, down to the bottom of the slope to ensure that the entire area is clear. Then an alarm is sounded, which is a very loud alarm, which lets you know you need to get out of the way. In addition, the way that the slope is designed. It's shaped like an umbrella with all of the switch points facing away from the rail that comes down. So even if someone was back behind in a switch, the way it's designed, the trip cannot go with the switch. So the likelihood of this -- I checked it, the likelihood of someone getting hurt is zero *at the bottom of the slope*. Because everyone that's down there -- in addition, everyone that's down on the slope is a trained person for that area, and they know the phone call comes, and they know the alarms that go off." Tr. 263-264. (emphasis added). That alarm, Jones added, "[i]t sounds like an air raid siren. It's the loudest thing you've ever heard." Tr. 264. There is also, he believed, a "red flashing light … right at the bottom of the slope where it starts to level off." *Id.*

Jones acknowledged that there are people that work at the bottom of the slope, but he maintained that they would be out of harm's way by being either in a break room area or in the "umbrella portion of the slope" that he referred to earlier. Tr. 264-265. Jones reasserted his belief that if, as in this event, equipment broke loose and traveled down the slope, there was "[z]ero percent chance" that anyone would be affected.[13] Tr. 265. Jones also was of the opinion that as "[n]ever once did any of these clevises or chains come into question. We've never experienced broken chains or clevises in a setting like this. So I don't know how we could be considered negligence [sic] being as that has never happened in the past." *Id.*

The Court does not share Mr. Jones' sanguine evaluation. This is because it is founded upon everything going according to plan when cars are being dropped. But obviously that didn't happen here with six cars screaming out of control down the slope. A controlled drop is a very different event from what occurred here. Further, while Jones is entitled to express his opinions about negligence and whether anything like this had happened before, as affecting negligence, ultimately such determinations are for the Court. In that regard, the Court finds that a nearly identical event *had occurred* before and resulted in the 2011 safeguards being issued.

[13] Later Jones elaborated about the shanty at the slope bottom, expressing that "[i]t's up three steps, and it's recessed into the rib probably eight feet. So it -- you can open the door and still have two steps to probably four or five or six feet until you get within the rib line. Then it would be another three or four feet to get to the rail. So it's pretty well back out of the track -- off the track" and that it's back in the crosscut. Tr. 280.

Respondent's Counsel then turned to Ex. R-2, involving Citation No. 7033991, the coupler violation. For this citation too, Jones did not believe it was a "valid citation, because [ ] there's no way to know the key stock was missing prior to this accident. There's just no way to know that after *the violent event* that happened." Tr. 267 (emphasis added). Jones was "[p]retty sure" that on July 23rd Mr. Snyder and Mr. Vargo walked the slope and that those two were looking for a missing key stock. Asked if they found a key stock, Jones answered "[t]o my knowledge, no." *Id.* Asked if those two looked for the clevis pin at that time on the slope, Jones affirmed they did. As to whether they found one, he did not remember. *Id.* He only remembered "we had some *stuff* at the top of the slope. I don't know if they recovered all of it." Tr. 268. (*italics* added, as 'stuff' was not explained).

Jones repeated his view of the likelihood of an injury occurring as based on the same reasons he gave in his testimony about the other citation. *Id*. Though he was present when the MSHA personnel spoke with the hoist man, he could only recall "bits and pieces" of what was said, explaining he "[j]ust got the gist." *Id.* His recollection was that it was about the speed setting being too fast for the amount of weight involved and they simply forgot to put the hoist back to the slower speed. Tr. 269.

On cross-examination by the Secretary, Jones agreed that he didn't do any calculations in support of his opinion about the forces that would be applied to the clevises, coupler or safety chains. Tr. 270. Jones also agreed that the warning is given before a load is dropped to make sure that miners are out of the way. Tr. 271. He did not believe it was a "highly traveled" area, stating that there would only be two to three people down there on a shift. *Id.*

Asked about anyone finding the missing key stock, Jones again repeated "[t]o [his] knowledge, no." Tr. 272. He did see the coupler pocket where the key stock was missing. *Id.* Asked if he saw any marking showing that the key stock had been ripped out, Jones answered, "[n]o, but it went under a severe wreck with lots of dust." *Id*. The Court then asked Jones about the dimensions of a key stock, to which he informed it was about 7 inches long with thickness of about one inch. *Id.* As a point of reference, the Court notes that the width of the paper for this decision is 8½ inches, with the point being that the key stock length is not especially short.

Jones was then referred to Ex. P-6, a photo, date stamped 7-17-20 at 15:50, with Bates stamp 0034. He identified it as a coupler pocket, presuming it was of the supply car that had the missing key stock. Tr. 273-274. Jones agreed that as to the back key stocks there are indications that something was rubbing against the key stocks. *Id.* When asked the important question of whether there was any indication that a key stock had broken away, Jones at first responded that he didn't know if he understood the question. The Court then interceded, stating that it was not a hard question. The Court noted that the Secretary was asking about the left side and the two welding marks or welding sites present. When asked the same question again, this time Jones agreed that there was no indication that metal had been torn away or ripped away from that location. Tr. 275. Also, when asked if the outside key stocks are missing does the coupler still work to keep the cars together, Jones responded, that he couldn't "answer that. I don't know. I would think so." *Id*. Yet, he then agreed that the purpose of key stocks is to keep the coupler in place and that key stocks are an *integral* part of the system. Tr. 275.

Asked if one can see the key stocks, even if the coupler is present, Jones responded it was difficult to answer that and that he could not recall if it's easy to see them. Tr. 276. Jones agreed that the bottom of the coupler pocket is open and therefore one could see from the underside if a key stock was missing, at least on the car in the photo. *Id*. Even on basic issues, such as if chains are normally of equal length, Jones said normally yes, but could not "speak to that a hundred percent." Tr. 277. He did agree however that with chains of equal length they would share the load, each catching 50% and further that if he saw one chain nine inches longer than the other it would cause him to question if the chains were adequate. *Id.*

On redirect from Respondent's Counsel, referring to the same MSHA photo 0034, Jones was asked where the rub marks were located. He responded that they were on the key stocks themselves. Asked the hypothetical if the key stock broke and was no longer present, Jones again expressed that the rub marks would be on key stock itself, not on the welds. Tr. 279.

On December 1, 2021, the second day of testimony began with the Respondent calling Daniel Williams, an employee of Consol for 21 years. Holding several positions over those years, his most recent position is outside hoist operator in the yard. Vol II Tr. 6.[14] In July 2020 he was the hoist operator. That position includes lowering equipment and supplies into the mine and raising those things out of the mine as well. Describing his day-to-day duties for that job, he stated:

> If I'm running the hoist that day, come in, and if you'd have cars on the hoist, you're to look at all the cars, *make sure your chains are all in place*. There should be a 30-millimeter chain on each side of the car. There should be a figure eight gold chain on the coupler. Just do a general exam of the couplers. Any visible, noticeable damage, we take the cars out of service and put them in the shop and have them repaired. Then we have daily checks that are written down, what we're expected to do as far as with the hoist. We check the brakes, we check the over travel switches. We check the emergency tops. We check for accumulation. There's a few tests like we call them roll back tests, in case the car would be coming out of the mine and roll back. The brakes would automatically set. It's in our computer program on the hoist car. There's an overspeed, in case the hoist would break loose then travel faster than what it's allowed on the computer, that the brakes would automatically set.

Tr. 8. (*italics* added)

He continued:

> Down at the main hoist house is where the main cable comes off of that holds the hoist car in place. We're to go down there and check for -- there's a bar at the window that shows if there's slack in the rope. We check that and make sure it's working properly. There's an indicator underneath the drum that shows if there's

[14] Until references move to day three of the hearing, citations are now referring to Vol. II of the transcript.

> slack underneath the drum. If something would happen, that's to -- it will automatically take the system -- shut the system down, so we need to check and make sure that's working. *We check the key stocks down there*. Just check the fire extinguishers. It's a pretty detailed list of things that we check off every morning, that we're looking and make sure that everything's safe to transport. Mainly, it's to check and make sure that the equipment is safe to transport men if we have to bring people out of the mine. But it's also to check in case something would happen. Another one of our checks would be to contact the men on the bottom and make sure that we have communication with our bottom people, because every time we move that car, we talk to the people on bottom and make sure that the track is clear. There's also a light audio and visual alarm at the bottom of the slope. Our bottom guys check that, make sure it's working.

Tr. 9-10. (*italics* added).

Mr. Williams has a federal hoist certification card. He has held that certification since about 2015 – 2016. Tr. 11-12. Williams was the hoist operator on the day of the accident, July 17, 2020. Though not positive, his recollection was that when he began work that day "the last shift had left cars on the hoist. They were loaded and ready to be dropped in the mine. So honestly, I can't remember if they was loaded before we loaded the cars ourselves. But anyhow, I checked, did all my checks like I do every day … we checked every car to make sure that the chains were in place. Did a visual exam of the cars, and did all my checks that I previously talked about, as far as checking the brakes and everything on the hoist car itself." Tr. 12.

As for checking the chains, Williams stated "[w]e're just basically making sure that the chains are in place. Sometimes the clevises, the pin that actually goes through the clevis will back out. We like to make sure that the pin[s] are all secure. Looking for any obvious wear. If there would be a real thin chain that had been used for years, you noticed it was getting thin, then you would replace that." Tr. 12-13.

Regarding the couplers, Williams stated that "[w]e do a check of the couplers. The cars are already hooked up. It's hard to see the complete coupler, because it's coupled to another car. But it's a general check to look and make sure that there's no obvious damage of anything that would affect the safety or the working of the general cars." Tr. 13.

In terms of indications that there could be an issue with a coupler, Williams stated "[i]f you're just looking at the coupler itself, and it's not coupled to another car, you would notice that the coupler would be hanging down a lot farther than what it normally does. I think the standard is the coupler should be 12 inches off the ground. There's a jaw on the side of the coupler. If the cars aren't coupled, you can see that jaw. Sometimes the impact of [ ] those cars coming together will break that jaw in half. We would replace that." *Id.*

Williams, further describing the arrangement, added that "there's a hood on the car -- on the couplers, … and that's kind of hard to explain … [b]ut when the cars go over the knuckle to drop down the slope, we're basically on a flatter area, and the cars would drop over that hump. And there's a hood on there that protects the cars from when they come over the knuckle, they

could separate from one another if that hood wasn't there. So we make sure those hoods are on every car." Tr. 13-14.

For cars that are coupled, he looks for "obvious damage that it would have to be something that the cars would be -- had to be wrecked to tell that the coupler was bent or there was some type of extreme wear on the coupler. You look at just basically anything that would look out of place on the coupler to make it look like it had some substantial wear or anything like that." Tr. 14. Supply cars are treated the same way. Tr. 14-15. However, he then added "[w]e're just looking that the chains are in place. And looking at the coupler." Tr. 15.

Referring to the incident on July 17, 2020, when the supply car disengaged from the brakeman car, overspeed was an issue. Overspeed refers to situations where cars go too fast and when that occurs, brakes are activated. Tr. 17. However, Williams distinguished that from the event here. He explained that the hoist car didn't take off. Instead, he pulled the hoist car and the supply cars up the hill to clear the switch. Once sure that miners at the bottom knew there would be drop of the cars, he threw the switch to begin the drop process. The cars are put in "automatic" mode, which is done by hitting a button, at which point "the computer is actually dropping the cars." Tr. 19. As this process begins, Williams stated it's the "last chance right there to check and make sure that your chains are in place, to check and make sure that everything is proper on your cars. So we watch out the window as the cars go by the hoist house and [we] look[ ] at all of our chains and everything." Tr. 20. After passing the portal approach area, the cars automatically enter the full speed area, which is supposed to be at 300 feet per minute. *Id.* Williams recounted that, almost immediately, he knew something had gone awry, as he heard a bang and it sounded like he had a runaway train. He could not recall if he hit the emergency stop or if the computer activated that, but through a camera he "could see the cars flying" by. Tr. 21. Soon thereafter, Williams alerted mine foreman Rusty McHenry that he had "just lost a trip of cars." Tr. 22.

In what the Court views as a natural defensive reaction, an attempt to absolve himself from fault in the accident, Williams stated he told McHenry "I know I did everything right. I know my chains were there. Every chain was on them cars. Because every time I walked past them cars, I look at those chains. Because this is a major event. You know, you're talking about, you know, way over any type of weight that you can really fathom on a job above ground. You're talking, I guess, hundred ton. And I said, Rusty, the chains are on. I know they're on." *Id.*

This is an appropriate point for the Court to express that it finds that Williams did look at the chains. The Court also determined that Mr. Williams was a forthright, credible witness. Distinct from that however are two different issues: Were the chains connecting the supply car to the brakeman car of different lengths and was the left front key stop missing from the coupler on that supply car prior to the accident?

Following McHenry's instructions, Williams did go to see the brakeman car. There, he saw that the hoist car (which car, as noted, has also been identified as the brakeman car) was "still in place. It was connected to the rope. … [b]ut the coupler was still in place and [its coupler

was still] connected to the hoist car."[15] Tr. 24. Asked if, when inspecting safety chains, he has ever looked at the length of the chains, Williams responded that he has done that, but now there is a different system in place. Tr. 25. The system was such that "any time that you coupled two cars together, there is two chains in place." Tr. 26. He asserted that "it's the very rare situation that there would be different lengths of chain. Because when we welded them altogether, *they was all the same length chains put on all the cars*." Tr. 26-27 (emphasis added).

Thus, the Court notes that, by that remark, implicitly the Respondent knew the chains had to be of equal length. Adding to the importance that the chains be of equal length, Williams continued "[l]ike if one gets damaged and replaced, somebody could replace it with a different size chain. I have come across that. And *if you would visibly notice that it was a longer chain, you might see it dragging the ground more than what they normally do. Then that would be a situation where you would cut that chain off and replace it with the right length chain*." Tr. 27. (emphasis added). Williams stated that on the date of the incident, he did not observe different length safety chains. *Id.*

Turning to the issue of key stocks, Williams described it as "a solid square piece of metal. That could be a one inch by one inch piece of steel. But basically a key stock is just a solid piece of square stock." *Id.* As applied to couplers, key stocks involve "those couplers have steel built around them. So where the coupler, when it makes a turn, it will only allow the coupler to turn so far. So there's solid pieces of steel welded in between -- inside the car, basically, and at the end of that piece of steel, there's normally a piece of key stock that is welded to the piece of steel." Tr. 28.

Williams expressed that, when inspecting couplers before dropping cars, he is not looking for key stocks. They are difficult, but not impossible, to visualize. One would need to get down on hands and knees to see a key stock. "It would be like trying to see something that's under the car, you know. It's something that takes a little bit to see," as opposed to just a glance. *Id.* Williams denied seeing any missing key stocks on July 17, 2020. Tr. 29. Given that there were only six cars to examine, not dozens, the Court believes that perhaps it was not too much to expect that the key stocks be examined more closely, especially when considered in the context of the event that occurred, the risk to safety presented by the runaway cars, and the time involved in cleaning up the wreck, and further, in the Court's assessment, that this was a repeat occurrence of the 2011 runaway cars accident.

On cross-examination, Williams, referring to speed settings on the hoist, informed that there are two speed settings, operated by a toggle switch, between speeds of 300 feet or 600 feet per minute, with the latter, faster, speed only used when "pulling the fire boss out or pulling men

[15] Williams stated that he never made it to see the wreckage. He was instructed to walk the slope and clear anything off the tracks, to throw everything to the side if there was any materials that came off the cars. Tr. 24-25.

or dropping men out of the mine.[16] It should never be [at the 600 speed] when you're dropping equipment in the mine." Tr. 32. Williams shared the blame for having the speed set at 600; the person running the hoist before him did not turn the speed down to 300 and when he "did [his] drop, [he, Williams] neglected to see that it was left at 600 feet." Tr. 33.

On the morning of the incident, the weight of the full trip was, at most, 94 tons. Tr. 34-35. The mine had previously been written up for excessively filling the cars, as gravel was falling off the over-filled cars. *Id.* That problem, and the solution for it, occurred before the incident in this matter.

Turning to the subject that some clevises were welded, Williams confirmed that it was the left side clevis which was welded. Tr. 36. The right side was not welded. *Id.* The pin in the clevis is threaded. For the supply car which became detached, the left clevis was welded but "[t]here was no clevis or chain along the right side. Just the connection point." Tr. 37. Asked about the arrangement when the supply car was connected to the brakeman car, Williams responded, "There's two chains on our hoist car. It's not like our supply cars. So the chain from the hoist car on the side that we're calling the right side, the clevis was hooked directly into the connection point. On the left side of the car, which we've already spoken about, there was a 30-millimeter chain hooked to the connection point already. So the chain that came from the hoist car to that supply car was connected into a link of the chain that was on the supply car." Tr. 37-38.

The Secretary informed that his question was directed about the right side of the supply car. Williams answered, "The chain from the hoist car went directly to the connection point on the supply car." Tr. 38. It was connected with a clevis, but it was not welded. *Id.* He confirmed that on the right side, the chain connection consisted of a clevis inserted into the connection point on the right side. That chain connected to the clevis and that chain was connected to another clevis, which was connected to the brakeman car. *Id.* The clevis connected to the brakeman car was welded. Tr. 38-39.

Explaining the different lengths in the chains, Williams explained "on my hoist car that has the same chain as the right side had, but my clevis was hooked into a link of the 30 millimeter chain that was coming off the supply car. I think there was a discrepancy in two different lengths of chains. There wasn't two different length[s] of chains. The chain on the right side was connected directly to the connection point. The chain on the left side was connected to the chain that was welded to the connection point on the left side. *That is where the discrepancy in the different length was*. Where the[y] … are saying there was different length of chains. So it was actually connected to another chain. *So it did make it longer on one side than the other.*" Tr. 40-41 (emphasis added). The Court would comment that the nuances of the connections should not obscure the fact that, *functionally*, the chains *were* of different lengths. Williams admitted this.

[16] The term "fire boss" refers to one whose duties are to walk a certain area to check for safety problems, air quality and things like that, including riding the car and examining the track. The expression 'pulling the fire boss' refers to pulling that person out of the mine. Vol II, Tr. 90-91.

Importantly, Williams agreed that was the source for the difference in the chain lengths, when the Secretary asked "And that was nine inches longer; correct?" Williams responded, "I've never measured it, sir, but I would assume that is probably a good estimate." Tr. 40-41. But again, the Court notes that the key point is that the chains were attached in such a manner as to create different lengths.

Williams agreed that the standard length of the chains is 11 (eleven) lengths. This is done, he stated "just so all the cars will have the *same* chains on them." Tr. 42 (emphasis added). Though Williams asserted that no inspector has ever told him that the chains must be of the same length, he agreed that it would be a good practice in that "*in case the cars come apart, that they would tighten up at the same time*." Tr. 43 (emphasis added). Williams amplified that response, explaining that "[f]or the cars if they would separate, that the chains would tighten up at the same time." *Id*. To be precise, Williams agreed that the purpose is "to share the load that the supply cars are putting on those chains." *Id.* The Court notes that again this is an acknowledgement that chains need to be of the same length. It is certainly not an aesthetic thing.

In fact, Williams agreed that if the chains are of different lengths, "one takes a load before the other, and it takes a hundred percent of the load." *Id.* And further that the chains are designed so that each chain takes 50 % of the load, Williams agreed. Tr. 43-44. *Williams agreed that if he observed two different chain lengths, one side being longer than the other, he would want to address such a condition.* Tr. 44.

Returning to the subject of key stocks, Williams stated he wasn't familiar with the term "draft gear," but he agreed that the end of the coupler assembly goes in the back of the car Tr. 46-47. However, he could not speak knowledgeably at all about the role that the key stock serves, mechanically. Tr. 47. The Court intervened at that point, asking Williams if he knew the purpose of the key stock, to which he responded, "I know that there's a piece of key stock *welded* in there."[17] *Id.* (emphasis added).

As for Williams earlier remark about walking the slope, he stated that while debris was removed from the path of the tracks, nothing was removed from the slope. Tr. 50. Regarding safety concerns associated with the incident, Williams stated there are manholes, but no crosscuts until one gets down into the mine. Tr. 51. He did not know if it occurred in this accident, but he stated that debris or supplies from the runaway cars could have ended up in the manholes. *Id.*

Returning to the topic of key stocks, Williams described them as "just a solid square piece of steel. The ones that you're referring to, they're angled at each end, and they're welded

[17] A follow-up question by the Court underscored Williams' very limited understanding of key stocks. When asked again if he understood their purpose, he only answered "I do not know if it's there to hold that rubber piece in, or if it's there to keep the coupler from turning a certain distance. I don't know. I don't weld these things on or I don't work on the cars. … I'm not a mechanic, so I really don't get into that depth of what all the pieces inside the car do." Tr. 48. Knowledge about how key stocks function or their purpose was not part of his training. *Id*. However, as noted, he did know they are welded in place.

into place." Tr. 52. Concerning to the Court, when Williams was asked if he found any key stocks while he was walking the slope, he responded, he "[didn't] recall seeing anything like that. But that's really not what [he] was looking for. [He] was just throwing stuff out of the railway so the hoist car could pass." Tr. 52-53.

In terms of alerting miners before a load is lowered, Williams spoke to the importance of that, as "[i]n the mornings, that's when our motor men goes down there. Obviously, that's where our supplies go to. So when the motor men need to come do their job in the morning, they most likely, there could be motor men down there in the switches pulling their supplies out of the switches into the mine." Tr. 54. The switches are located "off to either side of the slope track after you get down into the bottom of the coal mine. … [they] lead[] [miners] from the slope track into other parts of the mine." *Id*. Throwing a switch from the slope track will take one to another track. *Id*. Motor men could be working at those switches. Tr. 54-55.

As to the speed of the runaway trip, Williams noted that the slope is steep and the cars were freewheeling. They were, in his words, "moving pretty fast." Tr. 56. And on the day of the incident, there were miners working at the bottom of the slope. Tr. 57. There is a break room at the bottom of the slope, which room is also referred to as a shanty or hen house. Miners are to stay in that room when a trip is coming down the slope. Tr. 58. While he could only speculate, Williams admitted that if one was not in the shanty, one would "have to jump out of the road pretty quick to get away from it. But you would have to have a death wish to be in that area." Tr. 59. Fire bosses also travel along the slope bottom. Tr. 60.

It is fair to state that Williams believed that the procedures, their "safety protocol" that the mine had in place, protected against miners being in the slope area when loads are dropped. Those procedures, including alarms and lights have been noted earlier. **Williams did admit that a danger to safety was presented by "94 tons of runaway trip running down the slope."** Tr. 64 (emphasis added).

On redirect, Williams described, again, the connection points and chains on July 17, 2020. Tr. 67-70. The Court observes that, as this has been discussed earlier, there is no purpose served by repeating that information.[18] Further, as noted, the paramount determination is that, at

[18] Yet, the parties' continued to address the connections, but in the Court's opinion it was of no added value. For the sake of completeness only, the go-round is presented here. On subsequent redirect, Respondent's Counsel again revisited the subject of chains. Williams confirmed that there are three chains connecting the brakeman car to the supply car. Asked again, later, Williams reconfirmed that three chains connected the hoist car to the supply car. Tr. 95. As Williams described it "there was one on the right. There was the one on the left that was welded fast to the supply car, and there was one coming off of the hoist man car on the left side." Tr. 93, and Ex. P-7. MSHA 0057, time stamp 10:19. Speaking with reference to that photo, Williams confirmed the presence of two chains, stating on the left "[t]hat's the one that was welded fast to the supply car, and the other one is the one that pulled out of the hoist -- the brakeman car, the hoist car." *Id.* Thus, he stated, the one on the right side that was not welded fast, pulled out of the brakeman car. He identified it as located in the middle of the picture. The chains were discussed yet again on recross exam, with the Secretary referring to the same

a minimum, functionally, the chains were connected in such a manner as to result in different lengths. The Court finds that such a condition, as explained further *infra*, constitutes a failure to properly maintain the chains because, to work as intended, they need to be of equal lengths.

A point of clarification on re-cross examination, Williams agreed that it is the clevis, not the chain, that is welded to the supply car. Tr. 71, Ex. P-7, Bates stamp 0053, with a time stamp of 7/23/2020 at 10:12. Tr. 72. Williams identified the photo as the supply car that was connected to the brakeman car. Tr. 73. But again, to avoid muddying the waters, it should not be lost that, essentially, Williams agreed that the chain lengths were not the same. Tr. 75.

In what the Court views as a concise summary of the arrangement, Williams was asked "considering that there was a clevis welded in place on the left side of the supply car with a chain attached, and on the same side of the brakeman car, or the hoist car, there was a welded clevis with a chain attached, the only way for you to connect, or anybody to connect the chains so you have a secondary connection, was with another clevis, was it not?" Williams responded, "Yes, sir." Tr. 77. Importantly, from that admission, Williams was asked if one has "to run the clevis through one of the links of the chain?" Again, Williams agreed that was true. *Id.* Last, given his two affirmations, Williams was then asked, "*And so that will make it longer than the connection on the right*?" Williams answered without equivocation, "*Correct*." *Id*. (*italics* added).

The Court then asked some questions under the topic of "back to the basics." Williams agreed that the hoist car was connected to the number one supply car. Tr 78. He then agreed that the connection points between the hoist car and the supply car consisted of the coupler and the two chains adding that there is the "figure 8 chain that goes around the couplers." Tr. 79. Then the Court inquired about the 'gold' colored chain, which gold chain, Williams informed, did not break. Williams knew this because he saw that the clevis from the first supply car was still connected to the hoist car, which hoist car still had the gold chain wrapped around the clevis. Tr. 80. Williams added that the two clevises were still connected, and that is the idea behind the gold chain. *Id.*

The Court then turned to Williams' testimony about the many checks that are done concerning safety issues, such as the visual checks, inquiring if those checks were done solely by Williams. His answer was that most of the time there is another hoist man with him during those checks. Tr. 81. Williams also informed that, following the incident, he did see the car with the missing key stock. Williams' opinion was that with the immediate stop that occurred and the

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photo, as above. Williams confirmed that the chain with a "J" type shape in the middle of the photo was connected to the brake car, but he added that "[t]here was two connected to the brake car. The two on the right that has no clevises are the two that was connected to the brake car, because the clevises are still at the brake car." Tr. 96. However, it appears that the Respondent's Counsel was trying to portray that there were three chains connecting the cars, but in fact as Williams ultimately acknowledged there were really just two (2) chains. Williams admitted as much, stating that one end of the three (3) chains "was not connected to the brakeman car." *Id*. at 99. The point, to which Williams agreed, is that on the left side there was one connection that happened to use two chains. Tr. 99. All of this, in the Court's estimation, simply serves to obscure the critical fact – the chains were functionally of different lengths. Full stop.

break which followed, the weight of the car "made that coupler and the rubber piece that's connected to the coupler pull out with such force that it tore all that steel up." Tr. 81-82. Thus, it was his view that the "key stock would have been ripped out with the force of the coupler being pulled out." Tr. 82.

The Court was struck by Mr. Williams' remark that the first thing he said to Mr. McHenry was that all the chains were on and therefore asked why he said that first. Williams answered that "Because when something like this happens at the mine, you're concerned for your job, and I wanted to assure Rusty [McHenry] that I had done my job … I did my job right ...my chains were there." Tr. 83. The Court views this as an understandable human reaction and it holds Mr. Williams in high regard in connection with this unfortunate, but avoidable, accident.

The Court then asked what lessons were learned from the event. Williams responded that "there was a mistake on [his] part … in [ ] leaving the switch in the 600 position." Tr. 84-85. Williams then added that he learned that the different length of chains, "making one chain tighten up faster than the other" could have been a factor. Tr. 86. In further response to the Court, Williams confirmed that he, with the help of another person, still examines the cars before a drop is made. However, key stocks are still not examined before a drop is made. Tr. 89. Thus, he agreed that the exam involves looking at the couplers and the chains, not the key stocks, because it is "pretty difficult to see that piece of key stock." Tr. 90.

Following the testimony of Mr. Williams, the Secretary called Michael Paul Snyder, who is employed by MSHA as an engineer in their technical support office. Tr. 102. Although Mr. Snyder's title is mechanical engineer, he does not claim to be one. Instead, he is a registered professional engineer ("PE") in mining. Tr. 103. His experience includes inspecting hoists and elevators. Snyder informed that a hoist needs five essential things: "[t]hey need to have overspeed protection, they need to have overtravel protection, automatic stop, the brakes on the hoist have to be capable of stopping the fully loaded system. And they also need safety catches. Where in the case of a slope hoist, a brakeman car. That would function as the safety catches." Tr. 106.

Within his years of experience, he has investigated at least two incidents where slope cars separated from a brakeman (hoist) car. Tr. 118. The Secretary offered Snyder as an expert in mining engineering and hoisting and he was accepted as such. He is not an expert about chains or couplers on hoist or supply rail cars. That determination does not mean that his testimony on those subjects was without value.[19] As Counsel for the Respondent acknowledged, and the Court agrees, Mr. Snyder "can testify as a fact witness about what his investigation and report was." Tr. 122-123.

With that issue resolved, Snyder testified that, in connection with MSHA's investigation of this incident, he was at the Bailey Mine on July 23, 2020. Tr. 124. He saw that

[19] Snyder tested the hoist rope and examined the primary hoist house. Tr. 125-126. He also went underground and viewed the wreckage. He created a report based on his visit to the mine on that day. Ex. P-9, (MSHA 0240, a 16-page exhibit).

the "whole coupler assembly came right out of that first car, [aka the 187 strap car, the first car that was connected to the brakeman car.]" Tr. 130. In fact, as also noted earlier in testimony, that coupler was still attached to the brakeman car after the accident. *Id.* Snyder viewed that first strap car where it and the other cars ended up, at the bottom of the slope. Ex. P 7. His testimony included descriptions of photos showing the pocket where the coupler assembly had resided, before being torn out. Tr. 136.

Speaking to the pocket of the strap car where the coupler had resided, Snyder described it as "a rectangular piece of steel that's welded to another piece of steel that has torn and flapped up away from the front of the 187 car. …[and] there's a block of steel, a rectangular piece -- segment of steel on the inside right of the pocket. And then there's steel shaped like a U on the inside of the pocket … [with that steel on the right side called] a key stock." Tr. 137. There are supposed to be four key stocks in the coupler pocket. *Id*., and photo at P-7, page 2, 7/23/2020 at 10:12, MSHA 0054. Snyder confirmed what other witnesses had stated; that it is difficult to see the key stocks without getting on one's knees. *Id.*

Snyder then described the photo at page 3 of Ex. P-7, as looking into the opening "where the draft gear portion of the coupler assembly would [normally] reside." Tr. 138. The 'draft gear' refers to the plates and the compression pads that are part of the coupler where it sits in the pocket. This arrangement is to prevent the coupler from coming out. Snyder stated that key stocks are present in that photo. He identified three such key stocks: "two in the rear. [On the left side he stated seeing] "considerable dust present, and [he saw] a little bit of rust on the left key stock, and then some shiny material on the right key stock. Shiny steel. [He saw] a key stock to the right, and [but he did] not see a key stock on the left front." Tr. 139.

Asked about the rust and shiny spot, referring to the key stocks in the rear, Snyder's answer was non-responsive, as he stated those "would be used to provide support to the coupler assembly when cars are engaging together on the surface. Or when you have a coupled car pushing, there is some give within the -- the draft gear itself, because it's comprised of steel plates with compression pads that do give it a little bit of cushion. They're not 100 percent rigid." Tr. 139. Counsel for the Secretary then asked again if Snyder knew why the rust and shiny metal was present. He then answered, "[p]resumably impact. You know, just use. Before this was last used, you know, steel on steel rubbing. In reference to the right rear key stock." Tr. 140. Then, when asked about the absence of a key stock on the left front and ridges of material with a shadow behind them, Snyder stated he believed "that they're welded material welds that would have been applied when -- in order to attach another key stock to this -- to this unit. … as well as the right key stock." *Id*.

On the important question of whether the key stock was present just before the accident, Snyder responded that was part of what he was trying to determine when he looked at the car. He stated that he "*didn't see any evidence that the welds were disturbed to the point where we had any type of recent metal failure in them. Nothing indicated -- nothing indicated that it was there before the accident.*" Tr. 141 (*italics* added). Supporting his view, when asked if the key stock had been there immediately before the accident, he responded that he would expect "if it were there, and you had, say, a weak weld or something like that. I would think you would at least see some type of shiny metal similar to other areas of the car, this car, the metal pulled out,

that would indicate a presence of something steel being attached that was torn off or removed. I did not see any evidence that indicated that anything was there." *Id*. Thus, it was Snyder's view that the key stock had not been present immediately before the incident.

Snyder was then directed to the photo with the time stamp of 7/23/2020, at 10:13, Bates stamp 0056. He identified it as "the right side of the -- of the 187 car, as you're looking at the car. As evidenced by the blue pin in the silver paint on the shackle clevis." Tr. 142. Asked if he could tell if the coupler was new at the time, Snyder remarked "there had been a repair to this at some point." Tr. 143. To him, "[i]t looks like any old piece of key stock was taken here and welded in. That's not something I would expect from a manufactured unit that has been in service as new." *Id.*

Addressing the photo showing the secondary chains, MSHA 0057, with the date/time stamp of 7/23/2020 at 10:19, Snyder expected to see only two chains, not three. He didn't know what purpose was served by the additional chain. Tr. 147. Importantly, Snyder, speaking to the two chains, stated that "[t]he connection on the right of the strap car had 11 links of chain, as well as the chain on the left. *However, the chain on the left also included one shackle and two additional links of chain. So it was longer than the secondary on the right*." Tr. 150. (emphasis added). He added that "[t]he shorter one was 52 inches, and the longer one was 61 inches, as measured." *Id.*

Snyder saw no fresh metal in the photo on page 22, with the time stamp 10:55 and the Bates stamp as MSHA 0074. That photo is of the left side of the pocket, showing the left *rear* key stock in place. He brushed away the dirt to see the existing welds and the left rear key stock. Tr. 164. Snyder saw no fresh metal in the photograph and further saw no evidence to lead him to believe that the left front key stock was present immediately before the accident. *Id*.

Another photo of note has a time stamp of 13:16, MSHA 0107. It is a picture of one of the shackle clevises from the brakeman car, showing the remnants of the pin that failed when the secondary took the load. Tr. 179-180. The other clevis shackle on the brakeman car also failed. Tr. 181, time stamp 13:16, MSHA Bates stamp 0109.

Reaching a summary of his investigation, Snyder expressed his "understanding of the sequence of events that occurred from the time that the fully loaded trip started being lowered … down the slope." Tr. 186. Referring to Snyder's testimony at the point when all the cars were set to go down the slope, the trip went from 50 feet per minute up to 600 feet per minute, a rate far more than the 300 feet per minute it was to travel. That rate activated the electronic overspeed of the hoist, causing the brakes on the hoist to set. The brakes come on to try and stop the load but when that happens, "the draft gear -- the coupler assembly pulls out of the strap car, and at this point, at this point in time, the slack has not been taken up yet. So as -- as that's occurring, the slack starts taking up, because the secondary chains are of unequal length, the first one loads up, and to the point where it fails. The coupler has already pulled out of the car. The right side chain to the right of the strap car looking into the mine, that fails. And then the secondary from the left side takes up the load, and it also fails. So the trip continues down at an uncontrolled rate, and miraculously winds up at the back of the mine." Tr. 188-189.

Questioning by the Secretary then returned to the subject of key stocks, asking about their purpose. Snyder responded "[w]ell, the best example is looking at the rear key stock because that, when you push something, that stops it. That's what you have in place. That stops movement of that assembly further into the pocket. And in the same fashion, front key stocks prevent it from being pulled out of the pocket." Tr. 189-190.

When asked if the key stocks are missing, does the coupler hold into the car, Snyder responded "[i]t can hold -- up to [a] point, it can hold. But this was a shock loading event." Tr. 190. Without a key stock "there's enough room for that draft gear to get out of it." *Id.*

The Court then inquired, "[w]hat holds the coupler in place apart from the key stocks … what secures the coupler?" *Id*. In that regard, the Court noted that Snyder informed that under nonstress conditions, the coupler would still stay in place and therefore it wanted to know why that is so. That is, the Court was asking how does the coupler remain secured? Tr. 191. Snyder's answer was nonresponsive as he informed that even with a key stock missing and one was dragging the car around the yard, another key stock may be able to hold and grab the coupler. *Id*. The Court tried again and then Snyder informed that the coupler was *not* designed to stay in the pocket *without the key stocks*. *Id.* Making sure it was clear about Snyder's statement, the Court asked "[b]y design, the key stock is essential -- is it fair to say it's essential for a coupler to be secured with key [ ] stocks.?" Snyder answered, "Yes, sir." Tr. 191-192.

Snyder was unequivocal that when a shock load occurs, as happened here, the secondary connections have to share the load. Consequently, the chains must be of equal lengths. As he stated, "You can't have unequal lengths. You don't have even a chance unless they're the same length." Tr. 198. But because the chains were not of equal length, when the shock load occurred the pins on the shackles failed. Tr. 198-199.

Based upon his investigation and his engineering background, Snyder's view was that the left front key stock was not present at the time of the incident. Tr. 199. In his view, the missing key stock "absolutely" contributed to the incident. *Id.* In terms of the sequence of the events, Snyder stated that the coupler came out first. After that, with the mismatched chain lengths, the shackles failed. Tr. 200.

Questioned about his report, Ex. P-9, MSHA 0242, under cross-examination and, within that report, the remark that "no markings or failed portions of weldments were observed indicating that the left key stock may not have been in place when the accident actually occurred," Snyder agreed that the key stock is not a coupler, but it is the device that holds the coupler in place. Tr. Tr. 205- 207. Snyder reaffirmed that he took measurements, finding that one chain was 61 inches long and the other 52 inches. Tr. 209-210.

Snyder held to his view that the key stock was not present when the incident occurred, stating that it was not speculation on his part "because [he had] no evidence of anything fresh on the weldment, when it was actually cleaned looked at and, you know, there was nothing there." Tr. 226. However, he did allow that "if the weldment had been rusted and broke off, [he] wouldn't have any indication of a weldment or disturbance there." *Id*. From that he agreed it

was possible that the key stock could have been in place and the weld may have been rusted. Tr. 226-227.

On day three of the hearing, December 2, 2021, Russell McHenry testified. Presently, he is the assistant superintendent. Before that, for about seven years, he was the mine foreman. Vol III, Tr. 6.[20] McHenry was notified when the accident occurred on July 17, 2020. Tr. 12. The hoistman, Williams, informed him that the hoist switch was on 600 feet per minute and had tripped off on overspeed. Tr. 14. Later, McHenry stated what others had said, that the hoist switch had been inadvertently left at 600 feet per second, which he believed caused the overspeed condition. Tr. 20. When he went to the bottom of the slope he checked the safeties – lights and siren. Tr. 14. He also looked at the brakeman car, where it was found that the clevises were broken. Tr. 15. McHenry was then asked about July 23, 2020, the date of MSHA's second visit to the mine, and Ex. P-9 at page 0242. Along with others, including MSHA inspector Vargo, there was an examination of the wire rope and hoist equipment and the group also looked at the cars on the bottom. McHenry recalled that they also looked at the coupler pocket on the furthest outby car [i.e. the No. 187 supply car]. Tr. 17. In that regard, he stated, "looking at the car, the left -- I believe it was the left hand key stock was at that point missing. You could see where the weld and things was there, but, you know, we tried to determine what was the failure in the system. And what we did notice it was missing." Tr. 18.

McHenry then stated that they "did have guys look for the key stock" up the slope, but he did not believe anybody ever located it. *Id.* He described a key stock as "just a square or just a piece of metal that would have been welded inside the car, inside the coupler pocket *as a stop*." Tr. 20. (emphasis added).

As for the safety chains, McHenry stated that they were not broken, "they were actually still the -- coupled to the car on the bottom. It had broke the clevises on the brakeman car. *They* (they, meaning the chains) *were all equal lengths*, and the -- one of the brakeman car chains had actually -- was coupled to the chain on the -- the welded chain on the car." Tr.18. (*italics* added). The Court notes that while McHenry's remark that the clevises broke, is true, it sidesteps that they broke because the chains, one being longer than the other, caused them to break. There is substantial credible evidence that the chains were not of equal length, either functionally, or as secured.

Further speaking to the allegation, regarding Citation 7033990, that the safety chains and safety chain connection points were not properly maintained, McHenry restated that "none of the safety chains were broken, nor the connection points on the cars." Tr. 21. He added that by connection points, he meant "the welded pieces of the cars were damaged." *Id*. What broke were the "two clevises that were attached to the brakeman car," not the chains. *Id.*

Asked about the length of the safety chains, and the allegation that the left inby safety chain measured approximately 52 inches in length and the right inby safety chain measured approximately 61 inches in lengths, McHenry answered that "[i]t wasn't the safety chain themselves. As [he] said before, *on that side that was longer*. The safety chain for the brakeman

[20] Hereinafter, unless otherwise indicated, transcript page references are to Volume III.

car was brought up and attached to the safety chain on the car itself which extended the length of the overall system." Tr. 21-22.

Asked if he had ever heard before this incident about the length of safety chains with anybody, McHenry responded that he didn't "believe so." Tr. 22. Nor was he aware of any literature or documents about the length of safety chains. *Id.*

Turning to Citation No. 7033991 and the allegation that alleges that the left front key stock inside the coupler pocket was missing, and that there were no marking or weld material on the pocket where the key stock should have been located, McHenry stated he did not agree with that claim, "[b]ecause there was. There was key stock. It was welded on either side. On the internal side and the[ ] external side, there was weldment left." Tr. 22-23.

Upon cross-examination McHenry, made important concessions, agreeing that the safety chains were all 11 links long and agreeing that the purpose is to ensure that the secondary connections are of equal length and *that is to ensure that those connections share the load of any car that becomes uncoupled, and further agreeing that if those connections are of unequal length, the load is not shared*. Tr. 25. (*italics* added). Then, McHenry agreed that "[w]ith the left side secondary chain connected to the welded chain on the supply car, that made it longer than the one -- the secondary connection on the right; correct," answering "[y]eah *with the two chains coupled together made it longer*." *Id.* (emphasis added).

Turning to the weldments in the pocket and his remark that they were there, McHenry, when asked to confirm that he saw no fresh breaks where it looked like metal had broken away, answered "[t]o be honest with you, where the cars had crashed on the bottom was all covered in dust and dirt, and it was -- nothing was -- looked fresh or clean. I mean, I couldn't tell." Tr. 26.

Then McHenry was asked about no one finding the missing key stock when they were looking, and he confirmed that, to his knowledge, no one *found it* and *it had never been recovered*. Tr. 26. McHenry also agreed that the secondary chains are a safety feature but admitted that safety feature did not work as "there was a failure in the coupler pocket, and it failed the safety chain on the one side -- failed the clevises on the car." Tr. 27-28. Moreover, he admitted that he doesn't know if the key stock was present immediately prior to the accident. Tr. 28. McHenry then acknowledged that he was present when Mr. Snyder from MSHA's technical support investigated the site and that he observed "him use a wire brush to clean off the portions of the pocket." *Id*. When Snyder used the wire brush for that cleaning, McHenry admitted that he didn't see any fresh breaks in metal where those weldments were, answering "I don't believe so." *Id*.

On redirect, Counsel for the Respondent asked McHenry regarding the subject of the key stocks and the ability to see any fresh breaks in metal, "if the weld was rusted, would [he have been able to] see a fresh break." McHenry answered that it depended on the way it's broke. Tr. 31. The rust could be internal and therefore not visible. In such a case the only way to determine if there's a crack in metal is with an X-ray or some like process. Tr. 32.

In another round on the same issue, upon further cross-examination, McHenry agreed, with reference to Ex. P-7, and the photo with time stamp 10:12 and Bates stamp 0055, identified as the pocket of the No. 187 supply car, that the rear key stock has a shiny bit of metal, but on the front key stock where the weldments appear, there was no shiny spot. Tr. 33-34. Then, staying with the same exhibit, but directed to the page with a time stamp of 11:03 and Bates MSHA 0078, McHenry confirmed that photo depicts the left weldments and that he saw no shiny metal. Tr. 36. He also agreed that if a weld were to fail, there would be some indication of metal tearing away and fresh metal. *Id.* McHenry then admitted that "[n]o, [he] didn't see anything that something immediately happened here." Tr. 37.

Not yet over, on redirect McHenry, upon being directed to Ex. P-6, with a 7/17/2020 date and a time stamp of 17:28, Bates stamp 0051 and described by counsel as an "accordion looking thing," identified it as "a series of rubber and steel plates that absorb the shock of the coupler," which he believed is called the "draft gear." Tr. 38. For this, directed to the square plate at the beginning of the draft gear toward the brakeman car, McHenry was asked if he saw "any damage on the front plate on the front of that draft gear that appears fresh?" *Id.* McHenry responded yes, that "it appears like there's a strand at the bottom coming up at least three-quarters of the way or further that is worn -- it's freshly worn metal," and he confirmed that it is on the same side of the draft gear that would have been in contact with the left key stock. *Id*.

The Court asked if McHenry, as the general mine foreman, and after speaking with Consol people, came to a conclusion as to whether the key stock was missing prior to the incident. McHenry responded that he believed "the key stock was there, and the extra force caused by the -- it running at 600 feet per minute, when the stop happened, it ripped it off of there and turned that coupler pocket sideways, and as a result, broke the safety chains." Tr. 43. However, when asked if any Consol person expressed a different point of view on the issue of whether the key stock was not present, he responded, "I don't believe so." Tr. 44. The Court dismayed by the answer, continued, "[w]ell you say you don't believe so. That would be something you'd remember, is it not?" McHenry responded, "I would think so, yes. But I don't recall anyone mentioning that that key stock was missing prior to or anything like that." *Id.*

The Court, continued, asking, "[s]o what is the basis for your opinion that the key stock was there prior to the accident?" Tr. 44. His responded it was on "[w]hat [he saw] on the base of this metal here that there was wear there. And if that was not wore -- I mean, if that was rusted, the only way for that to be wore there and be shiny is if it was rubbing against something." *Id*. McHenry added that he was referring to Ex. P 6, MSHA photo 0051 when he made that remark, elaborating that Consol "saw wear on the front of that, like it was there, like, you know, there was damage to the front of that. Like something was there, and it -- something happened there at that point. It wasn't all rusted." Tr. 45.

The Court then asked of McHenry if Consol "made a *thorough* investigation of the area to find that key stock," to which he responded, "*Yes, sir*," and then confirmed that Consol did not find a key stock, answering "[*d*]*id not, no sir*." Tr. 46. (*italics* added).

The matter still not finished, on further re-cross-examination, McHenry conceded that if the key stock had broken off, that would have happened closer to the knuckle and that, not

anywhere near the 1,700 feet of the slope, and that the area around the knuckle would only be a few hundred feet. Tr. 49. Thus, he conceded that the key stock, if it broke away at the time of the accident, it would have been "[i]n that general area." Tr. 50. Later he admitted that if it broke away at the time of the accident, it should have been somewhere around there. Tr. 52.

The obvious and important point of those questions is that the area to search for the key stock was not lengthy.

McHenry confirmed that he had people look for the key stock, though he could not be precise if that direction was immediately after the accident. *Id.* As to whether he directed that the search be focused on the area where the cars broke away, he could not recall. *Id*. Further, in the area where one would expect to find the key stock, if it had come off at the time of the accident. McHenry described the area as having a "concrete base" with some gravel from the cars. Tr. 51.

The Court notes that, given the modest area to search, if the key stock had indeed torn off during the accident, one would have expected to find it. He then admitted that the key stock does not look like gravel, as it is of rectangular shape, about six to eight inches long and about an inch or two thick. Tr. 50-51. Significantly damaging to the Respondent's contentions, McHenry agreed, half-heartedly, that finding the key stock to show that it existed and was in place on the car prior to the accident would be important evidence for Consol, answering "I guess so, yes." Tr. 51.

Michael Craig Tennant was then called by the Respondent as a witness. He has been employed by Consol for more than 20 years. In 2008 he was promoted to safety supervisor, a position he held at the Bailey Mine at the time of the accident in this matter. Tr. 56. In that capacity, his responsibilities include accident investigations. Tr. 59. Tennant then related his version of the events on the day of the accident, which version as to the basic facts, was in line with the other witnesses in this proceeding.[21] Tr. 60-61.

Mr. Tennant did offer his view regarding the two safeguards which formed the basis for two of the citations in this case. With Counsel for the Respondent asserting that Citation No. 7033990 was issued "based on the length of safety chains," he asked Tennant if safeguard No. 7070545, per Ex. P-2, addresses the length of safety chains. Tennant responded that it did not, but rather the "condition of the metal eyelets used to connect the safety chain." Tr. 68.

[21] When the Court describes Tennant's testimony as in line with those witnesses who proceeded him, it is referring to the hoist speed being set at 600 instead of 300 feet per minute, and the overspeed sensor triggering the brakes. However, for some details, he misspoke by describing the effect of the brakes as "[w]hich caused the coupler pocket of the first car hooked to the brake car to come out of the coupler pockets. Obviously breaking the safety chains that were on each side of the car." Tr. 61. The weight of the evidence is that the coupler "pocket" did not come out; the coupler did, and there is general agreement that the chains didn't break, the clevis did. Later, he corrected himself about the chains, informing that the shackle pin broke. Tr. 67. His corrected statement is in line with the testimony of others.

Respondent's Counsel then directed Tennant to the condition or practice of the safeguard, reading from it that "this is a notice to provide safeguard requiring all rolling stock to have properly maintained safety chains and safety chain connection points." Tr. 69. Having read that passage, Counsel asked Tennant if there "[w]as any issue with maintenance of safety chains in the July 17th of 2020 incident?" Tennant responded, [t]here was not." *Id.* When next asked "[h]ow about the safety chain connection points," Tennant gave the same response, "[t]here was not." *Id.*

The Court would comment again that, while Mr. Tennant and other witnesses who testified in this proceeding, as well as counsels for the parties, are free to express their views of the scope of the two preexisting safeguards, as well as the new safeguard issued in the wake of the accident at the mine, ultimately, at least in the first instance, it is up to the Court to rule on these issues. It is noted that Mr. Tennant went on to opine on more of these safeguard related issues. Tr. 69. The Court takes the same stance on those views as well.

Turning to the citation based on Safeguard No. 7070546, requiring properly maintained couplers, issued on October 25, 2011, per Ex. P 4, and the citation based on that, Tennant was asked whether, regarding that safeguard's requirement "that all slope brakeman car and all rolling stock will be provided with properly maintained couplers," if the couplers associated with the accident were "properly maintained." Tennant responded that they were maintained properly on July 17, 2020. Tr. 70.

Asked about a key stock, Tennant described it as "a piece of metal that is installed inside the coupler pocket to hold a set of baffles *that ultimately holds the coupler inside the car*." Tr. 70-71. (*italics* added).

Respondent's Counsel continued with his questions directed at Tennant's take on the safeguards in this matter, noting that Safeguard No. 7070546 "also requires all couplers on rolling stock to be examined prior to being hoisted and prior to being transported throughout the mine." Tr. 71. Tennant's view was that the term 'examination' required "[t]o make sure that the couplers seat together. There's -- they're a -- they're designed to snap together to not allow them to come apart. That would be the -- the exam that would need to be done to make sure that those couplers -- one coupler can be attached to another." *Id*.

When then asked if key stocks would be part of such an examination, Tennant expressed that would not be required under the safeguard, because it would be impractical since most, but not all of the rolling stock would have to be "flipped upside down to see all of the key stocks involved with holding the coupler pocket in place." *Id.*

Tennant agreed upon further recross, that examining safety chains is part of the car inspection process. Tr. 74. He also agreed that the shackles or clevises are part of the connection with the safety chains. *Id.* As to the length of the chains, when asked if they are "all 11 links long," he responded, "[t]hey are *now*, yes, sir." Tr.75. (*italics* added). As to whether it is important that the chains be the same length, he answered "I would say yes, sir." *Id.* He also agreed that being the same length is important "because they need to bear the load equally in the event that the primary connection fails," adding, "[g]oing down the slope, yes, sir." *Id.*

Continuing, when asked the following: "in this case, the safety chain was on the left connection looking inby. That safety chain was connected to the links of another safety chain … [a]nd that made it longer than the one on the right … [s]o when the accident occurred, the right side connection, after the coupler failed, the right side connection loaded first … [a]nd that bore 100 percent of the load … [t]hen that failed … [a]nd then the other side, the left side that was longer, then that bore 100 percent of the load," Tennant agreed with each of those assertions. Tr. 75-76. He also agreed that at least post the accident he would not permit different lengths for the chains. Tr. 76. Further, he admitted that the purpose of the chains is to stop the cars if the primary connection failed. Tr. 77. Previously, he had thought, incorrectly, that one chain would suffice. *Id.*

Regarding the key stocks, Tennant expressed that, without turning the cars upside down, one couldn't see all the key stocks. *Id*. However, he admitted that he has *never* done such an inspection of the key stocks without the car being upside down, and so his remark about seeing key stocks when the car was not upside down was "speculating" on his part. Tr. 78. It was his understanding that Consol never examined or inspected key stocks. Tr. 78-79. He informed that he simply did not know if the missing key stock was present before the accident, and to his knowledge, no one at Consol found it. Tr. 80.

Then, a dramatic moment occurred in the hearing, when the Court commented that Tennant, as the mine's safety supervisor, would be the person who would know if a key stock was found. Tennant then reversed his previous statement, this time responding, "I believe that there was a key stock found, Your Honor. But I'm not sure where that key stock came from. A key stock is just a square piece of metal. I wouldn't know where a square piece of metal came from. I believe there was one found on the slope track when they were initially walking down. I'm not sure if it was a key stock or something that came off of a car. They're not any different than any other rectangular piece of metal." Tr. 80-81.

As Tennant seemed to back off his earlier remark, the Court noted that he "just said a minute ago, did you not, that a key stock was found." Tennant then reaffirmed his revised remark, stating "[t]o my knowledge it was. It was not given to me." Tr. 81. Yet, surprisingly, upon being informed that a key stock was found, Tennant stated he asked no questions about it. *Id.* In fact, displaying a remarkable lack of curiosity, he never even looked at it.

Tennant then modified his remark again, stating that "[s]omeone told [him] that they found a piece of metal on the slope track that *they called a key stock or that resembled a key stock*," but he couldn't recall who told him about this. Tr. 81-82. (emphasis added).

When then asked whether "Consol retain[ed] the key stock" he answered he "did not retain that key stock, so I'm going to say no." Tr. 82. Seemingly confused why it would be important to retain it, Tennant offered "[a]t that time, it was not our concern to show a key stock to someone. It was our concern to figure out what caused this incident, and figure out how we can prevent it in the future." *Id*.

The Court cannot help but comment that Tennant's answer was perplexing, as a missing key stock could have been a significant aspect in Consol's task of figuring the cause of the

accident. Nevertheless, Tennant had a different take on the value of the key stock that was, allegedly, found in determining the cause of the accident. When asked if "it would be important to know whether that key stock was there before the accident," he responded only that "[i]t would be -- it would be handy to know that, but it wouldn't change what *we* found in our investigation." Tr.82 (emphasis added). Yet, he conceded its value. When asked if it was correct that "if that key stock wasn't present immediately prior to the accident, then that connection would have been compromised," he answered, "yes sir." Tr. 82-83. Tennant also disclosed that the key stock or, as he alternatively described it, a piece of metal, was found on the day of the accident. *Id.* He then admitted to being aware that there was a 103(k) order that had been issued "to preserve the scene of the accident on that date." Tr. 83. He also admitted the piece of metal would have been considered to be evidence, and important evidence at that. Tr. 84.

At that point in the proceeding a sidebar conference was held at the request of the Secretary of Labor. Attorney Kooi, for the Secretary, stated "this is the first time we've heard anything about, you know -- anything resembling a key stock missing, being found. This wasn't preserved by Consol. There was an active 103(k) order at the time of the accident -- or not at the time of the accident. Shortly after the accident, issued verbally by the inspector. Consol did not preserve the evidence." Tr.87. For that reason, the Secretary moved for "an adverse inference that the key stock was not found and was not present at the time of the accident. Because they didn't preserve the evidence that they claim to have found, this one witness, and it's integral to the case, and it should be no surprise that that is a key piece of evidence. And they were under an obligation to maintain it. If -- not only because of the 103(k) order, but because it was an accident, and the -- you know, it was very easy to anticipate litigation stemming from this." Tr. 87-88.

The Respondent countered that the 103(k) order permitted Consol to clean up the debris. And that Tennant "never followed up on it, because at that time, there had not been an allegation or any investigation that a key stock was at issue. That investigation didn't commence until six days later." Tr. 89. The Court is not impressed with the argument advanced by counsel for Consol because it runs counter to the purpose of the 103(k) order. The government can't be clairvoyant and therefore it could not know of the significance of a key stock moments after the accident occurred. The Court made an initial adverse inference but advised that there would need to be a motion filed with regard to it and, following a response to the motion, it would issue a final ruling.

Following the sidebar discussion, testimony from Mr. Tennant resumed, with Attorney Dennison asked the witness about the (k) order, including the day and time it was issued, and the same information regarding modifications of it. Tr. 100-101. Though Tennant recalled someone mentioning a key stock he could not recall who told him that. Tr. 103. Asked if he had any reason to take notice of that information at that time, Tennant responded he did not, informing, though he was then the mine's safety supervisor, he didn't know what a key stock was. Tr. 104. Yet, with that perplexing answer, and that he felt no need to ask questions upon being told of the key stock, he then stated "and there was no reason to believe that a key stock had anything to do with the incident." *Id.* That is a remarkable answer: after asserting he didn't know what a key

stock is, and that he was bereft of such knowledge, and yet he was still able to conclude that "there was no reason to believe that a key stock had anything to do with the incident." *Id.*

The Court taken aback by Tennant's responses, asked, "[y]ou mean to say, sir, that someone tells you there's a key stock found, you didn't know what a key stock was, and you didn't say, well, what do you mean by a key stock? You didn't ask?" *Id*. He answered that he did not ask but he tried to explain the omission by adding that there was a lot of metal and debris along the slope and "it did not sink in that key stock was that big of a deal." Tr.104. Regarding that remark, the Court observes that compliance with MSHA's 103(k) order was not dependent upon Consol personnel determining what was a "big deal."

The Court's Ruling on Secretary of Labor's Motion for an Adverse Inference, namely that a key stock was not in place at the time of the accident. Sec's Motion at 12, 13.

This very interesting issue arose in the context of the hearing in this matter involving allegations of two violations of notices to provide safeguards. The adverse inference sought by the Secretary is that a key stock was not in place at the time of the accident and that the missing key stock was not found. Sec's Motion at 12, 13.

Though described above, it is useful to summarize the relevant facts. One of the safeguard notices is involved with the Motion for an adverse inference, Safeguard notice No. 7070546. That safeguard notice informed that "it was determined that the coupler *and mounting bracket* on the Slope Brakeman Car is not being maintained." *Id.* (emphasis added). The notice summed up its requirement that "that the slope brakeman car and all rolling stock will [be] provided with properly maintained couplers." *Id.* It is plain from the text of that notice that it pertained to the determination that the coupler *and its mounting bracket* were not being maintained. In this instance, after the accident occurred, it was found that the No. 187 supply car was missing its left front key stock.

The Secretary's Motion begins, as it must, with a brief summary of the undisputed facts, to wit that, on July 17, 2020, around 10:30 a.m. "a non-injury accident occurred at Respondent's Bailey Mine on the Crabapple slope track … [when] six fully loaded supply cars weighing a total of approximately 94 tons became disconnected from the brakeman car or hoist car that was lowering the slope cars into the mine via the slope hoist. … After they disconnected, the six supply cars traveled uncontrolled at a high speed from approximately 100 feet inby the slope entrance for approximately 1,600 feet until the supply cars crashed into the coal seam at the bottom of the slope track." Motion at 2.

The same day, as noted by the Secretary, a 103(k) Order ("Order") was issued on July 17, 2020 at 1357 (1:57 p.m.), which was about 3 ½ hours after the accident event. That 103(k) Order announced that it was being issued to protect the safety of all persons on-site but also "including those involved in … the investigation of the accident." Importantly, under the Order it provided that "[t]he Mine Operator shall obtain prior approval from an Authorized Representative of the Secretary for all actions to recover and/or restore operations in the affected area. Additionally, **the mine operator is reminded of its existing obligations to prevent the**

destruction of evidence that would aid in investigating the cause or causes of the accident." Motion at 2, and Ex. P-8 at MSHA0133 (emphasis in original).

It is true that, following the issuance of the Order, it was modified twice, once, about four (4) hours later, to "permit the Operator to start to clean *debris and supplies* on the slope track between the bottom of the slope and the inby number 4 slope bottom switch" and a second time, about an hour and a half following the first modification, "to permit the Operator to clean the slope track and slope bottom track of *debris* prior to restoring the slope track and hoist car to it's [sic] normal use of operations." *Id*., Ex. P-8. (emphasis added).

It is undisputed that a coupler connects each slope car to one another and that, when the accident occurred, the coupler for supply car No. 187, which was joined to the coupler on the brake car, failed, coming out of the supply car's coupler pocket. Couplers are held in place in the coupler pocket by key stocks. There are four key stocks securing each car's coupler; two are in the rear, and two are in the front, with both on the left and right side of the coupler. Key stocks act like a sandwich, fore and aft, on the coupler as it sits in the coupler pocket.

In support of its motion, the Secretary cited *Lincoln Leasing*, 37 FMSHRC 1551 (July 13, 2015) (ALJ). There, the Secretary sought an adverse inference "based on Respondent's failure to produce pre-operational examination records for the two weeks prior to the event in question." *Id*. at 1553. Regarding the principle, Judge L. Zane Gill stated:

"It is well-recognized that if a party has control over a writing or other type of evidence, which is relevant to an issue, and fails to produce the evidence, an inference can be drawn that the evidence would be adverse to the party." *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1359, n.11 (Dec. 2009). Indeed, '[w] hen a party intentionally destroys evidence in its control, a judge has discretion to draw an adverse inference that the evidence destroyed would have been unfavorable to the destroying party.' *Dynamic Energy, Inc.*, 33 FMSHRC 1998, 2006-07 (Aug. 2001) (ALJ Paez) (citing Kronsich v. U.S., 150 F.3d 112, 126 (2d Cir. 1998)). *McCormick on Evidence* provides that "[w]hen it would be natural under the circumstances for a party to … produce documents or other objects in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference." 2 *McCormick on Evid.* § 264 (6th ed. 2006) at 220-21. Additionally, the Commission has held that an Administrative Law Judge must address missing preshift examination reports because the operator had them within its control and should have anticipated litigation. *See IO Coal Co., Inc.*, 31 FMSHRC at 1359'" *Id.* at 1553.

Finding that it was "troubling and highly suspect that Lincoln Leasing was able to produce reports for only three days, yet its pre-operational records were kept in a bound 30-day book," Judge Gill concluded that "[w]hen Lincoln Leasing destroyed or misplaced the pre-operational reports, it had control over the reports and knew it had an obligation to preserve them in anticipation of litigation. The Secretary is entitled to an adverse inference …" *Id*. at 1554. The judge limited the adverse inference to the citation for inadequate brakes. *Id.*

In a similar case, cited by Judge Gill in his *Lincoln Leasing* decision, Judge Alan G. Paez also made an adverse inference in *Dynamic Energy, Inc.*, 33 FMSHRC 1998 (Aug. 31, 2011),

where Respondent, Dynamic, had missing preshift reports regarding a portal bus and CAT Loader. Judge Paez stated: "[i]n light of Dynamic's unexplained and questionable selective retention of records, [he] determined that when Dynamic destroyed the preshift reports, it knew it had an obligation to preserve them in anticipation of litigation. .. [b]ecause operators are required to maintain preshift report records for 30 days …" *Id* at 2009-2010. He therefor drew the adverse inference that concluded that "the preshift reports would have shown the defects to have existed." *Id.* at 2018.

Respondent's Response in Opposition to the Secretary's Motion for an Adverse Inference

Respondent maintains that the Secretary has not established that Respondent spoliated evidence. Response at 2-3. Respondent contends that it had no obligation to preserve the key stock because "at the relevant time, Respondent did not know that the key stock would assist in investigating the cause or causes of the incident … [and Mr. Tennant, Respondent's safety supervisor] testified that he had no reason to believe a key stock had anything to do with the incident at the time of the investigation." *Id*. at 3.

To this, the Court responds that, particularly given Mr. Tennant's own description of his lack of any knowledge about key stocks, it was very clearly not for him to decide what evidence would assist in investigating the accident.

The Respondent also contends that it was excused from any duty to preserve a key stock because modifications of the Section 103(k) order by MSHA permitted the cleanup of debris from the slope track. *Id* at 4. The Court rejects this contention. The term "debris" is not synonymous with "evidence," and Mr. Tennant's own testimony reveals that he was informed that a key stock was found. That he may have been ignorant about its import, his role as the mine's safety supervisor required a proactive reaction when so informed. Though, as the Respondent notes, the modifications permitted clean-up of the slope track and slope bottom track of all debris prior to restoring the slope track and the hoist car to its normal use of operation, the duty to preserve potential evidence remained intact.

Respondent also maintains that it did not spoliate the evidence knowingly or negligently. *Id.* at 5. The problem with this assertion is that the 103(k) Order put the Respondent on notice of its obligation to preserve the scene of the accident on that date and Tennant himself admitted that the piece of metal would have been considered to be evidence, and important evidence at that. In fact, Tennant's claim that "he 'didn't know what a key stock was, for one, and there was no reason to believe that a key stock had anything to do with incident [and that] [a]t the time, [he] did not - it did not sink in that key stock was that big of a deal,'" does not excuse his action. *Id*. at 3, citing Tr. III at 104. Rather, it highlights that he should have taken charge of the key stock when so informed of it.

So too, the Respondent's attempt to sidestep its responsibility to preserve evidence, by shifting the blame to the Secretary for failing to conduct discovery, is rejected.

The issue presents a conundrum – did the Respondent in fact find a key stock after the accident or was no key stock actually found? Resolution of either alternative does not enhance the Respondent's claim that the missing left front key stock from the first strap car was present before the accident occurred.

In the event that it fails in attempting to persuade the Court regarding its contentions on this issue, the Respondent asserts that "an adverse inference is an extreme and inappropriate sanction." *Id*. at 9. For this argument, the Respondent contends that bad faith must be shown and that to establish that "in the context of spoliation, generally [this] means destruction for the purpose of hiding adverse evidence." *Id.* at 8. Lacking a showing of intentional or willful conduct by the Respondent, Mr. Tennant's mere ignorance when informed of the key stock does not amount to such conduct. *Id*. at 9. Instead, the Respondent urges that the Court "consider[ ] the applicable testimony regarding the key stock and g[ive] proper weight to the applicable testimony and evidence." *Id*. at 10.

As noted below, in fact, in ruling on this issue the Court applies both approaches. That is to say, the Court finds that the adverse inference is warranted and, apart from that determination, the weight of the credible evidence, as discussed, establishes as a finding of fact that the left key stock was missing before the accident occurred.

Having reviewed and considered the Secretary's Motion and the Respondent's Response thereto, the Court finds that the missing key stock was solely in Respondent's control and is relevant to an issue in this case. In connection with those findings, the Court also finds that that the "Respondent and its personnel were the only entities or people in control of the accident scene, equipment, and wreckage before the MSHA inspectors arrived at the mine. Further, any evidence found would have remained under Respondent's control as no missing key stock was discovered by or turned over to MSHA." Sec. Motion at 10.

The Court further finds that the Respondent withheld evidence when it failed to preserve the missing key stock which the Mine Act, and MSHA's 103(k) Order, required Respondent to preserve.

If, in fact, a key stock was found, a difficult proposition to support, as Respondent's witness Michael Tennant, the mine's safety supervisor, presently, and at the time of the accident, was the only Consol employee to make that claim, then the duty to preserve that evidence is clear and the Secretary's Motion for the adverse inference is supported by the facts and case law.

It is clear that where spoliation of evidence occurs, a court has the discretion to impose sanctions for that, which include drawing an adverse inference from such spoliation. Sec's Motion at 8, citing *Gentex Corp. v. Sutter*, 827 F. Supp. 2d 384, 391 (M.D. Pa. 2011).

Under this first alternative, the Court makes the adverse inference that the missing key stock was not found and was not in place at the time of the accident.

Alternatively, apart from the adverse inference that the Court has made, given the shaky testimony of Mr. Tennant on the subject, it is reasonable to conclude that no key stock was found

and that, at most, if something was found at all, it was a nondescript piece of metal. Under this alternative, no key stock was ever found, leaving the Court to make a determination whether the missing key stock was missing *before* the accident occurred or came out as a consequence of it. For the reasons set forth in several locations in this decision, the Court finds that the more credible evidence is that the key stock was missing before the accident happened.

Analysis

Safeguard Case Law

Section 314(b) of the Mine Act grants the Secretary authority to issue "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials …"

As this Court noted in its decision in *Oak Grove Resources*, 35 FMSHRC 842, (April 2013) (ALJ), *aff'd* 38 FMSHRC 1273 (June 2016), "[t]he Commission has spoken to the issue of safeguards on many occasions, but its … decision on the subject in *American Coal* neatly ties in and summarizes its law on the issue. 34 FMSHRC 1963, 2012 WL 4026649, Aug. 2012. In *American Coal* the Commission reviewed its precedent, beginning with its holding in *Southern Ohio Coal Co*., 7 FMSHRC 509, at 512, ("*SOCCO I* "), noting that a safeguard notice must identify with specificity the "nature of the hazard" at which it is directed and "the conduct required" to remedy that hazard. It explained that the requirement to identify "the nature of the hazard" is met where the safeguard specifically identifies hazardous conditions. In *SOCCO I*, rocks and cement blocks in a travelway were identified as the hazard and the safeguard required the mine to provide at least 24 inches of clearance on both sides of conveyor belts. The Commission held that the attempt to apply that safeguard to water accumulation in the travelway was beyond the class of hazards identified in the safeguard notice. Accordingly, it held that an obstructed travelway created by water accumulation was not covered by the safeguard notice identifying rocks and blocks as the source of impeding the clear travelway. *857

In the second of the three well-known Southern Ohio Coal Company safeguard cases., *SOCCO II*, 14 FMSHRC 748, (May 1992), the Commission reiterated that a safeguard which specifies hazardous conditions and provides a remedy is valid. It added that where a safeguard is based on the specific conditions at the cited mine and a determination that those conditions presented a transportation hazard, it is valid. Particularly important as applied to this litigation, the Commission stated in *SOCCO II* that the safeguard facially specified a hazardous condition. Notably, the safeguard notice did not formally utter the words that it was hazardous that the mine lacked a sufficient number of shelter holes. Instead, it stated that there were no shelter holes along a 400 foot section of the mine's supply track and that shelter holes were to be provided. Because the lack of shelter holes along that 400 foot section presented a plainly hazardous condition, there was no need to express the obvious.

The Commission repeated this principle in its third *Socco* decision, 14 FMSHRC 748 (May 1992) ("*SOCCO III* "), where the safeguard notice identified that only 6 inches of clearance was present for a scoop being operated along a supply track. The safeguard required that at least 36 inches of clearance be provided. In upholding the safeguard's statement that there

was only 6 inches of clearance as sufficiently identifying the hazard, the Commission did not treat the notice's sufficiency by applying a grammatical test. Thus, while true that the safeguard did not assert that 6 inches of clearance was insufficient clearance nor that such small clearance thereby created a hazard, the Commission would not allow the notice to be invalidated, because it was both obvious that 6 inches of clearance was insufficient and because the safeguard informed the mine that the remedy to be provided was at least 36 inches of clearance.

Accordingly, the Commission's review, in *American Coal*, of its safeguard decisions summed up that if the safeguard specifies a hazardous condition and specifies a remedy, the safeguard will be deemed valid. *American Coal* at *5. It added that the word "hazard" in the safeguard provision means "hazardous conditions" and asserting a hazardous condition expresses the nature of the hazard and that the notice need not express the particular harm. Emphasizing this point, the Commission agreed with the judge's expression that there was no requirement to name the harm or risk because any hazard may pose multiple risks and therefore the inspector need not identify each and every risk or harm. *Id*."

Oak Grove Resources, 35 FMSHRC 842, 857-859.

The Secretary established by a preponderance of the evidence that Notices to Provide Safeguards, Nos. 7070545 and 7070546, were violated per Citation Nos. 7033990 and 7033991.

The parties post-hearing briefs regarding the safeguard violations

The parties' contentions in their post-hearing briefs have been addressed earlier in this decision. However, a few additional comments are in order.

The Court does not buy into the assertions in the Respondent's Reply Brief that because the *length* of the safety chains and because key stocks were not specifically addressed in the Safeguard Notices, the Notices failed to adequately describe the hazard and the remedy expected. R's Reply at 1-3. The reason for the Court's rejection of these contentions is not complicated. By requiring in Safeguard No. 7070545 that "all rolling stock [ ] have properly maintained safety chains and safety chain connection points," there can be no proper maintenance of the chains if their lengths are not the same, as they cannot perform their function as a secondary connection point in that state. The necessity of the same lengths was well established by the testimony.

By the same token, the requirement in Safeguard No. 7070546 that "the slope brakeman car and all rolling stock will [be] provided with properly maintained couplers," necessarily includes key stocks. Just as shoelaces are integral to tie shoes, so too are key stocks integral to and essential for a properly maintained coupler. Like a shoe and its laces, a coupler cannot be in any sense be properly maintained without all four key stocks properly in place. This too is not complicated. As the Commission plainly stated in *Gatliff Coal*, 13 FMSHRC 1370 (Sept. 1991), "Maintain" means "to preserve or keep in a given existing condition, as of

efficiency or good repair." *Id.* at 1374.[22] Both Notices also required examination of the chains and couplers prior to being hoisted and transported throughout the mine. Respondent fell short of effective examinations of the couplers and the chains.

Citation No. 7033990

In sum, the Respondent violated Notice to Provide Safeguard No. 7070545 in failing to maintain the safety chains by not having both those chains of equal length. The notice specifically identified the hazard and the remedy to address it. It would be hard to conjure up a violation more aligned with the safeguard notice invoked as it required all rolling stock to have properly maintained safety chains and safety chain connection points. It also required that all rolling stock to be examined prior to being hoisted or transported in or out of the slope

Citation No. 7033911

In sum, the Respondent also violated Notice to Provide Safeguard No. 7070546 by failing to maintain the coupler and mounting bracket on rolling stock. As noted above, the Court has determined that the adverse inference sought by the Secretary is appropriate regarding this citation, namely that the left front key stock on the 187 strap car was not present at the time of the accident. However, apart from that determination, the Court finds that the reliable evidence at the hearing also establishes that the left front key stock was not present on that strap car.

Although set forth above in the findings of fact, the Court notes that, based upon his investigation, Inspector Vargo concluded that the missing key stock was not something that recently occurred. That means the key stock was missing prior to the accident. Further, there is no dispute that the key stocks are part of the coupler because they must be present for the coupler to effectively function. Accordingly, properly maintained couplers must have intact key stocks.

Much other evidence from the hearing supports the Court's conclusion on this issue. Respondent's witness Jones agreed that the purpose of key stocks is to keep the coupler in place and that key stocks are an integral part of the system. On the issue of whether the key stock was present, Jones was agnostic. However, he agreed that there was no indication that the key stock had been torn away or ripped out from its location. Despite Jones concession on that point, he still believed that, given the force causing the cars to separate, the key stock would have been ripped out. Why only one of the two front key stocks would be ripped out, not both, was not

[22] Fully applicable to these safeguards, the Commission has also held "that the term "'maintain' [means] that warning ***devices shall be capable of performing on an uninterrupted basis and at all times…. [and] imposes a continuing responsibility*** *on operators to ensure that safety alarms* **[i.e. devices]** *do not fall into a state of disrepair.*" *Natty & Hamilton Enter., Inc*., 33 FMSHRC 1759, 1763 (Aug. 2011); *see also Sedgman*, 28 FMSHRC 322, 329 (June 2006); *Jim Walter Res., Inc*., 28 FMSHRC 983, 987 (Dec. 2006); *Jim Walter Res., Inc*., 19 FMSHRC 1761, 1765 (Nov. 1997)." *Wake Stone,* 38 FMSHRC 825,827 (emphasis added). Obviously, the Commission, in speaking to the requirement of *performing* on an uninterrupted basis and the continuing responsibility that devices not fall into disrepair, was not limiting its statement to safety alarms.

asked, nor volunteered, but in the Court's view such a result seems odd. Hoist operator Williams agreed that key stocks are welded in place in the coupler pocket.

Mike Snyder, with MSHA's Tech Support, and who was part of the investigation, like Inspector Vargo, reached the conclusion that the key stock had *not* been present immediately before the accident. Respondent's Russell McHenry, who at the time of the accident was the mine foreman and who is presently the assistant superintendent, admitted that he didn't know if the key stock was present immediately prior to the accident. Further, he acknowledged that he didn't see any fresh breaks in the weldments within the coupler pocket.

Another consideration for the issue involves the agreement that if the key stock had indeed broken off at the time of the accident, it would have broken right at the top of the slope. This is significant because it means there was no lengthy area to search for the key stock, only amounting to few hundred feet. The Court considers it to be telling that no key stock was found. Accordingly, on this basis also, the Court finds that the key stock was missing before the accident.

So too, as with the violation of the safeguard addressing the chains, the safeguard notice pertaining to the couplers, as applied to the facts in this case, also meets the Commission's test. The notice specifically identified the hazard and the remedy to address it. The absent key stock violated the safeguard's requirement to examine and properly maintain the couplers. It was undisputed that key stocks are an integral part of the couplers.

The Court finds that both violations were significant and substantial, as each element of the *Mathies* test was established. *Mathies Coal,* 6 FMSHRC 1, 3 (1984). The violation pertaining to the coupler, as noted, has been proven. The inadequately maintained coupler posed a discrete safety risk, namely the likelihood that the cars may separate, as happened here. An inadequately maintained coupler presents, inherently, a reasonable likelihood of a reasonably serious injury. Even apart from the fact that the accident occurred, an inadequately maintained coupler, in this instance one missing a key stock, is an accident waiting to happen. That no one was hurt *in this instance* does not translate into diminishing the reasonably serious injury element of *Mathies.* To claim that there is no reasonable likelihood of a reasonably serious injury occurring under circumstances of six rail cars weighing some 94 tons freewheeling down a steep slope of 1600 feet would, in the Court's opinion, render the term "significant and substantial" meaningless.

The missing key stock, as an inadequately maintained coupler, could have failed under other circumstances of transporting the cars. This is so because the key stocks aren't ornaments; they are an essential and integral part of the coupler arrangement. While a formal, i.e. controlled, drop of cars down the slope may, by procedures, alert those down the slope of the drop by activating lights and sirens, there is no guarantee that the coupler's insufficient key stock arrangement would not produce a decoupling in other situations when the cars are in motion and then stop. Further, as the lights and siren come into play during an anticipated controlled drop, there is no intensified warning when cars are literally screaming out of control, as such an event

is anything but a controlled drop.[23] The same significant and substantial analysis is equally appropriate to the chains of uneven lengths.

In addition, as the Secretary has noted, "[d]efendant's redundant safety features are irrelevant in the case of an S&S violation. *See*, *Cumberland Coal Res., LP*, 717 F.3d at 1029 (citing *Sec'y of Labor v. FMSHRC*, 111 F.3d at 917). [Further] [a]ny injury that occurred would have certainly been serious. Tr. I at 119:12-24. Inspector Vargo marked these violations as fatal, specifically because he stated that if these cars hit a miner, "there wouldn't be a chance he could survive." Tr. I at 118:15-20." Sec.Br at 10.

As to negligence, the Secretary maintains that moderate negligence is the appropriate designation. To the Court, the Secretary's characterization of the negligence is generous, as it accepts the presence of "mitigating circumstances," although no such mitigation is identified by the Secretary. The Court accepts as some mitigation that, once the cars were in service, it is difficult, though by no means impossible, to observe the key stocks.[24]

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[23] The Court considered the Respondent's arguments, disputing that it was significant and substantial and asserting that no negligence was involved. The Respondent provides a single discussion of those issues for both safeguard violations and the Court, agreeing and adopting that approach, follows suit. Respondent contends that "the occurrence of an accident does not confirm that a condition is reasonably likely to result in an injury." R's Br. at 30. The Court would agree that more is required than the occurrence of an accident. But, given what happened here, and in consideration of the twin defects established – an inadequately maintained coupler and inadequately maintained chains – that the accident occurred without anyone being injured does not foreclose the S&S finding either. Based on the uncontested facts, there was a reasonably likelihood that those two defects would combine to create uncontrolled cars upon an abrupt stop, as happened here. Further, with six cars then unleashed, it is undeniable that any contact with them would produce a reasonably serious injury.

[24] Similarly, regarding negligence, the Court cannot adopt the Respondent's assertion that no negligence was involved. Although the Respondent maintains that the hoist operator checked the couplers and the chains and found no conditions requiring that the equipment be removed from service, that does not establish that the inspection was adequate. This is particularly true of the mismatched chain lengths, but the couplers too were inadequately inspected. The missing key stock could have been identified, though it would have required some effort, as one would need to be on hands and knees. As mentioned above, another consideration is that, as only six cars would need to have the couplers inspected, the effort was not inordinately burdensome. The balance of the Respondent's arguments stray into subjects that are outside of the S&S and negligence analysis, as they involve the unchallenged remarks that the visual and audible alarms were working. As noted above, those features are not properly part of either analysis.

The new Notice to Provide Safeguard, No. 7033989, issued on August 12, 2020, does not diminish the applicability of the 2011 Safeguard Notices

The Court finds that MSHA's issuance of a new Notice to Provide Safeguard, No. 7033989, on 08/12/2020, in connection with its investigation of the accident at Respondent's Bailey Mine, is not relevant to the issues in dispute in this proceeding, nor does that new safeguard notice detract from the validity of the two Notices to Provide Safeguard, Nos. 7070545 and 7070546, issued on October 25, 2011. That new safeguard notice establishes that it is distinct from the 2011 notices, as the 2020 safeguard notice speaks to a newly identified hazard, per Section 314(b) of the Mine Act, with respect to transportation of men and materials, by requiring "*that the Mine Operator shall develop a fail proof system or safety notification method that will allow the hoist operator, bottom attendants, and other attendants or miners in close proximity of the hoist trip as to what particular hoisting mode the select switch is in, if more than one automatic mode is available to hoist*." (emphasis added).[25]

[25] The text of the new safeguard notice, issued on August 12, 2020 provides:
"On July 17, 2020, at approximately 10:30 a.m., a non-injury accident occurred on the Crabapple slope track entry while 6 loaded supply cars were being hoisted down the slope track. The Hoist Safety Supervisor (HSS) system faulted on "overspeed" at 692 feet per minute (FPM) causing the hoist drum brakes to engage. When the hoist brakes engaged, the brake-car, located at a slope depth of approximately 100 feet in the mine, came to an abrupt stop. The force applied to the strap car caused the car coupler to sever and separate. This action disconnected the strap car from the brake-car. Two 30mm safety chains with 1 1/4 inch retainer pins tied the cars together, each chain attached by a 12 ton clevis. Both retainer pins broke from the shock load. The 12 ton clevises were the connecting points at the brake-car to the supply car safety chains. The result was 6 loaded supply cars traveling uncontrolled at high speed to the slope bottom. The mode-select switch in the remote hoist house was in "person" mode, which is 600 fpm instead of "normal" supply car mode, which is 300 fpm. This contributed to the overspeed fault of the hoist. The total supply trip weighed approximately 94.39 tons (2 oil cars at 22.8 tons, 2 slag cars at 31.48 tons, and 2 strap cars at 32.86 tons = approximate total supply weight of 87.14 tons). Adding the weight of the Brake-car (7.25 ton) the total trip weight was 94.39 tons. The maximum hoisting weight capacity is not posted in the hoist house. Therefore, miners do not have a visual means to know what the rated capacity is for the hoist. The weight breakdown of each car or equipment being hoisted is not posted at any location. There are no safety device or measures in place to let the hoist operator and/or attendants know the mode of the hoisted trip. There are no postings of hoisting speed rates for various transportation load ratings, such as for hoisting personnel, supplies cars, or mining equipment. This slope bottom is a high traffic area where miners travel on foot. Motormen bring the locomotive and supply cars from a spur switch over into the slope bottom track frequently during any given work shift. Broken bones, crushing type injuries up to and including death is foreseeable to occur with runaway supply cars traveling down the slope track.

This is a Notice to Provide Safeguard that the Mine Operator shall develop a fail proof system or safety notification method that will allow the hoist operator, bottom attendants, and other attendants or miners in close proximity of the hoist trip as to what particular hoisting mode the select switch is in, if more than one automatic mode is available to hoist.

Citation No. 9203757; The now-admitted parking brake violation

This Citation alleges a violation of 30 C.F.R. § 77.1605(b). A plainly worded standard, it requires that "[m]obile equipment shall be equipped with adequate brakes, **and all trucks and front-end loaders shall also be equipped with parking brakes**." (emphasis added).

On September 1, 2020, MSHA Inspector Bryan Yates was conducting an EO1 inspection at the Bailey Mine's prep plant. Tr. 121. Regarding Citation No. 9203757, Ex. P-12, Bates Stamp MSHA 0263, Yates confirmed he issued it on that date. Ex. P 13, Yates' inspection notes relating to that citation. On that date he conducted an inspection of the mine's Kodiak lube truck. That inspection revealed other alleged problems with the truck, but this citation only addressed the parking brake, which he found to be not working. Tr. 126. For testing parking brakes, Yates informed they "take the equipment to a grade, [and] have the operator of the equipment set the parking brake to hold against the load of the vehicle." Tr. 118. The vehicle is stopped before the parking brake is applied. The operator does not apply the accelerator during the test. *Id.*

The subject truck is used around the mine servicing other equipment for the operator. Tr. 126. The vehicle operator told the inspector that the vehicle goes *everywhere* it is needed at the mine. *Id.* Yates described the mine having miles of roads and hills, adding that the prep plant is the largest in the United States. Tr. 127. He described the test as follows: "[w]e took it to a grade outside the Bin 6 [where he had] the operator go down to the bottom, [to] a large flat area and pull the truck back up the hill. As soon as the back wheel started up on to the grade, I had the operator start, set the emergency brake, and test it that way. He put it in neutral, and the brake would not hold [and then] [t]he truck started to roll backwards down on to the flat." *Id.*

Being familiar with the type of parking brake on the vehicle, the inspector gave the operator the opportunity to see if the brake could be adjusted down and thereby correct the problem. However, "the adjustment on the knob was maxed out. There was no more adjustment." Tr. 128. The truck was then taken out of service. When it is performing its normal

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This speed position shall be determined by the full work load weight of the cars and equipment that is being hoisted, if more than one automatic mode is available to hoist, as well as when hoisting personnel. The hoisting speed rates shall be posted and maintained as per different types of mode of transportation, if more than one automatic mode is available to hoist. The maximum hoisting weight of 107.25 tons shall be posted and maintained in the hoist house, remote hoist house, bottom attendants' shanty on the slope bottom, and in the supply yard where cars are loaded. The maximum hoisting weight shall at no time be exceeded. The weight of the hoist car (7.25 tons) shall be included when figuring total hoisting weight of trips being raised or lowered in the slope. A weight list in tons for each supply car and equipment being hoisted shall be posted and maintained in the hoist house, remote hoist house, at the motormen attendants' shanty on the slope bottom, and in the supply yard where the cars are loaded. If future modification of the hoist controls occurs, the intent of this safeguard shall be complied with at any mine slope hoist at this mine. Upon issuance, initial training on this safeguard shall be given to all hoist operators, persons who load supply cars and bottom attendants at this mine." (**bold** text added.)

tasks at the mine, servicing other vehicles, the truck may need to be running so that its compressor is operating for tasks. The hazard is that the truck will need to be neutral at those times; consequently, the emergency brake needs to be working. The truck's tires are also chocked on those occasions. Tr. 129-130. However, in the process of setting the chocks, it is possible that the vehicle may move. Inspector Yates articulated, satisfactorily in the Court's opinion, the basis for his evaluation of the gravity and negligence involved, along with his conclusion that it was a significant and substantial violation. Tr. 131-135. While it did not affect the issuance of the citation, Yates noted that it was the operator's truck, though it was being operated by a contractor, while affirming that the operator remains liable in such circumstances. Tr.135. The bottom line for this matter is that the inspector found the parking brake to be inadequate. Tr.137. The operator concedes this. The inspector also informed that the grade he tested the vehicle on was slight and that the mine has many other steeper inclines on the property. Tr. 148.

The Respondent, as noted, admits to the violation, challenging only the appropriateness of the significant and substantial designation. Tr. 150. As the Court then noted, that test examines whether there is a reasonable likelihood of a reasonably serious injury, adding that the test is measured under continued normal mining operations. Thus, it is not a static test, examining only where a particular violation is discovered, whether it be on flat ground or whatever. Tr. 151- 152.

The Respondent called Shane Reynard, who is an employee of RICO Equipment, which is a heavy equipment service dealer. Tr. 156. His position with the company is a heavy equipment field mechanic. He described himself as a "resident for the Consol Bailey Prep Plant," meaning he is there every day. Tr. 157. Reynard was at the plant on September 1, 2020, when the citation for this truck was issued. Tr. 160. He described the truck as "a medium duty 4500 series GMC truck that [it] use[s] as a lube truck, … [it] [j]ust carries oils and filters for all of the stuff that operates on our mine site here. … [to help picture it, he described it as] very similar to like a U-Haul moving van or moving truck of that nature." Tr. 160. "It's used to drive to the equipment that cannot be brought to our shop to refill oil levels, do routine maintenance like greasing the machine or changing the oil and filters in that machine." *Id*. The back of the truck contains "four oil tanks that hold [ ] engine oil, hydraulic oil, gear oil, and then there is also a fifth tank for waste oil, from whenever you drain the engine or drive trains on the trucks or dozers." Tr. 161. The truck also has a hydraulic driven air compressor on it. *Id*.

Of relevance to this citation, Reynard described the parking brake as "a drum brake that is actually mounted to the transmission right on the drive shaft ….[i]t would be used as a stationary brake. If you were to come to a complete stop, apply the parking brake, it would keep the unit from rolling away or allow you to leave the vehicle. Because it is a standard transmission, so you really can't leave it in gear with the engine running." Tr. 163-164. Though beside the point, Reynard stated it is not an "emergency" brake. Tr.164. When the inspector directed that the brake be tested, it held on flat ground. Tr. 165. At the time of the inspection the truck was not being used during that shift. Tr. 166.

The Respondent's argument seems to be that the truck would be serviced in its shop, which is on a level service. The problem is the truck doesn't stay in a shop. It's used at the mine, and therefore it's not a display. Although the shop may not present a risk of the truck rolling, because it presents a flat surface, that ignores two considerations. First, the cited standard requires working parking brakes and the Respondent concedes the standard was violated. In fact, Reynard confirmed that he had to fix the brake. Though the adjustment was not time consuming, that it beside the point. Second, the reasonable likelihood of a reasonably serious injury was established by the fact that the truck is used throughout the mine and that the mine has many hills. It is not uniformly flat.

On cross-examination, Reynard, after confirming that the brake held on level ground, then agreed that the inspector had him "pull up the grade, roll the vehicle backwards, and then set the brake," but that it did not hold under that circumstance. Tr. 172-173. Reynard offered that it didn't hold "because it is not designed to hold the unit. It's not designed as an emergency brake, like if the unit was in a roll or any type movement like that." Tr. 173. He admitted that the truck was available for use. Tr. 174.

The standard requires that all trucks shall also be equipped with parking brakes. This means, of course, that the parking brake is working and able to perform its function. As noted, the Respondent has conceded that the standard was violated, limiting its challenge to the "significant and substantial" designation. In its Reply Brief the Respondent contends that the Secretary ignored the particular facts surrounding the violation. R's Reply at 9. The arguments made by the Respondent miss the point; the particular facts are that the parking brake was tested and failed. That "the truck was parked on flat ground, was not being operated and had not been operated *during the shift* and that the lube truck is used sparingly since most of the equipment fits inside of the Bin No. 6 shop" are beside the point. *Id*. at 10. This is because, as the Respondent concedes, the "truck may be driven around the preparation plant grounds, which includes hills." *Id.* In the context of continued normal mining operations, a truck without a parking brake that can hold it on a grade is an accident waiting to happen.[26] Level ground and the inertia it may bring is not a substitute for a working parking brake. As noted, the truck is used throughout the mine and the mine has many hills. Accordingly, the violation meets the *Mathies* significant and substantial test.

[26] *See, for example,* MSHA's December 12, 2007, report of a fatal powered haulage accident attributable to "a failure in the parking brake system of the loader, which did not allow the parking brakes to apply." That fatality report also is instructive in pointing out that the use of a parking brake is not limited to the equipment's normal duties, as it arose in the context of a truck becoming stuck on a road. https://arlweb.msha.gov/FATALS/2007/FTL07c31.asp

Assessment of Civil Penalties

Statutory Penalty Considerations common to all violations

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors. 30 U.S.C. §820(i)

Mine size MSHA Exhibit A reflects a mine size of 15, placing it in the upper third of that criterion and a controller size of 10, placing it in the top of that size criterion. Accordingly, the mine is at least a medium to a large entity. Petition for Civil Penalty at 10.

Ability to continue in business The Respondent has stipulated that payment of the total *proposed* penalties for this docket, an amount of $7,626.00, will not affect its ability to continue in business. Sec's PH Brief at 5, Stipulation 6. The total penalty imposed by the Court in this matter is slightly less.

History of previous violations Under 30 C.F.R. Part 100, MSHA Exhibit A lists the Respondent's violations per inspection day ("VPID"), across the board for all five citations at "2" points, which translates into the second lowest category for that at over 0.3 to 0.5. The other three citations, that is, those not involving safeguards, received zero ("0") points for the repeat violations per inspection day ("RPID") category. More will be said later about the violation history for the three citations litigated in this proceeding.

Statutory Considerations common to the safeguard violations

The two safeguard generated violations, Citation Nos. 7033990 and 7033991, were each assessed at a proposed penalty of $3,299.00

History of previous violations As noted, under 30 C.F.R. Part 100, MSHA Exhibit A lists the Respondent's violations per inspection day ("VPID"), across the board for all five citations at "2" points, which translates into the second lowest category for that at over 0.3 to 0.5. For *repeat* violations per inspection day ("RPID"), the two safeguard citations in this docket come in at 3 points which, at over 0.02 to 0.025, is also on the low end of that measure.

However, it is clear that the Court is not constrained by Part 100. The Court considers that the safeguard- related violations in this docket amount to déjà vu accidents and therefore, in context, the Court deems the Respondent's violation history for those two citations to be significant.

Negligence The Court considers the negligence associated with these two violations to be moderate with respect to the key stocks and high with respect to the chains. The burden, though not extraordinary, regarding checking the key stocks, constitutes some mitigation. However, the chain length deficiency does not present any mitigation. Consideration of this penalty criterion must take into account the nearly identical accident years before which precipitated the two notices to provide safeguard.

Gravity The analysis of the gravity involved, as discussed above, cannot be constrained by the fact that no one was injured, nor that, through alarm and light warnings, those below, *if all goes according to plan*, will be alerted to an imminent car drop. But those advance warnings operate on the premise that a controlled drop is about to occur, not a mishap, with its unintended and unforeseeable consequences, when cars are running out of control as they race to the bottom of the mine.

Good faith The Court also does not subscribe to a salutary assessment of the Respondent's good faith in attempting to achieve rapid compliance after notification of a violation. This criterion is inapplicable to the citations stemming from the 2011 Notices to provide safeguards and therefore does not work to benefit the Respondents. Given the history prompting the issuance of the original safeguards in 2011 that, in almost an eerie sense, the runaway cars event was repeated in 2020, no good faith penalty reduction is warranted here. Given the wreck of the six cars, the mine operator had no choice but to clean up the mess at the bottom of the slope.

Upon consideration of the statutory criteria, though higher penalties could be justified, the Court imposes a civil penalty of **$3,299.00 for *each* of the safeguard violations**.

Statutory Considerations for the brake violation per Citation No. 9203757

Three of the statutory considerations; **mine size, ability to continue in business, and violation history** have been discussed above, albeit with a limited discussion for the violation history regarding this admitted violation. No previous violations for this standard are reflected under the history category. Therefore, that element benefits the Respondent in determining the civil penalty.

Negligence There does appear to be some mitigation in that the Respondent had a designated independent contractor using and servicing the lube truck. Moderate negligence is appropriate.

Gravity The Court does not agree with the Respondent's position that the event was unlikely to occur. This is because the lube truck travels throughout the mine and therefore there are many opportunities for one to be injured from the truck's brake not being able to hold, even on a slight grade. Lost workdays or restricted duty is a moderate characterization of the injury which could reasonably be expected to occur. Given the breadth of the mine and the scope of the truck's use throughout it, is not outlandish to suggest that a more serious injury could also have been reasonably expected. Accordingly, the Court rejects the Respondent's contention that the violation was not significant and substantial.

Good faith Certainly the Respondent demonstrated 'good faith' in attempting to achieve rapid compliance after notification of the violation.

Taking into account the entirety of the evidence for this conceded violation, the Court, upon application of the statutory criteria, imposes a civil penalty of **$200.00** (two hundred dollars) for this citation.

ORDER

For the reasons set forth above, Citation Nos. 7033990 and 7033991 involving the safeguard are AFFIRMED, with each assessed a civil penalty of $3,299.00. Citation No. 9203757 is AFFIRMED, and assessed a civil penalty of $200.00. Citation No. 9201843 has been settled. The minimum penalty, $123.00, was assessed for that citation. That Citation is modified to "lost workdays/restricted duty." Citation No. 9203766 has been VACATED by the Secretary. **Accordingly, the total amount due is $6,921.00.**

Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this Decision. Upon timely receipt of payment, the captioned civil penalty matters are DISMISSED.[27]

William B. Moran
Administrative Law Judge

Distribution:

Ryan M. Kooi, Esq., U.S. Department of Labor, Office of the Regional Solicitor, 1835 Market Street, Mailstop SOL/22, Philadelphia, PA 19103-2968 kooi.ryan.m@dol.gov

Patrick W. Dennison, Esq., Fisher & Phillips, LLP, Six PPG Place, Suite 830, Pittsburgh, PA 15222 pdennison@fisherphillips.com

Douglas Sciotto, CLR, U.S. Department of Labor, MSHA, 631 Excel Drive, Suite 100, Mt. Pleasant, PA 15666 sciotto.douglas@dol.gov

Craig Aaron, CONSOL Energy Inc., 1000 Consol Energy Drive, Suite 100, Canonsburg, PA 15317 craigaaron@consolenergy.com

[27] It is preferred that penalties be paid 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.