FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
Phone: (202) 434-9933 | Fax: (202) 434-9949

June 27, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2018-0116 A.C. No. 36-10045-453471
v.	:	
CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	:	Mine: Harvey Mine

DECISION AND ORDER

Appearances: Maria Del Pilar Castillo, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Petitioner

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

Kenneth Polka, CLR, U.S. Department of Labor, MSHA, Mount Pleasant, Pennsylvania

Before: Judge William B. Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d) for failure to keep travelways clear of obstruction, in violation of 30 C.F.R. § 75.205(b). A hearing was held in Pittsburgh, Pennsylvania on February 12, 2019. The Secretary of Labor ("Secretary") proposes a $625.00 penalty for the issues in this matter. For the reasons that follow, the Court upholds the violation, but modifies the citation in part and imposes a penalty of $200.00 to Consol Pennsylvania Coal Company, LLC ("Respondent").

Violations at Issue in Docket No. PENN 2018-0116

At issue in Docket No. PENN 2018-0116 is one 104(a) citation,[1] **Citation No. 9076875.**

[1] A separate citation – Citation No. 7031476 – was originally part of this docket. However, that citation was issued 20 days prior to Citation No. 9076875, involved a different inspector, and was resolved by a separate Decision Approving Settlement which is being issued contemporaneously with this decision. *See* Decision Approving Settlement, PENN 2018-0116 (unpub. order) (June 27, 2019).

Citation No. 9076875 alleged a violation of 30 C.F.R. 77.205(b).[2] The MSHA inspector assessed the likelihood of injury as "reasonably likely," with an expected injury of "lost workdays or restricted duty." The violation was listed as significant and substantial, with one person affected. Negligence was listed as "moderate." The condition or practice alleged stated:

> Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards. On the slope belt near the mouth there were multiple tripping/slipping hazards on the elevated graded walkway. There was a 1.5" wash down hose on the steps and a 64" roller and coal spillage at the top of the stairs. It was raining during my inspection which limits visibility and traction. This belt is firebossed every shift in its entirety.
>
> Standard 77.205(b) was cited 3 times in two years at mine 3610045 (1 to the operator, 2 to a contractor).

Citation No. 9076875.

The citation was issued at 10:58 AM on October 23, 2017. The citation was terminated seven minutes later, at 11:05 AM that same day, with the notation that "[t]he hazards were removed from the walkway." *Id.*

Joint Stipulations & Findings of Fact

The Secretary submitted a post-hearing brief ("Secretary's Brief") on April 19, 2019, as did the Respondent ("Respondent's Brief"). The parties stipulated that the Harvey Mine was a "mine" within the meaning of the Mine Act, and subject to the jurisdiction of MSHA under the Mine Act. Secretary's Brief at 2.

The Secretary and Respondent agreed that a violation of 30 C.F.R. § 77.205(b) as described in Citation No. 9076875 occurred. Tr. 20. The parties also stipulated that the expected injury in this matter was Lost Workdays or Restricted Duty. Tr. 62-63. However, the Secretary argued that the injury was reasonably likely, Tr. 19, while the Respondent contended that the expected injury was unlikely. Tr. 12. The Secretary also argued that the violation was significant and substantial, Secretary's Brief at 5, while the Respondent countered that the violation was not significant and substantial. Respondent's Brief at 8.

[2] 30 C.F.R. § 77.205, titled "Travelways at Surface Installations" provides in subsection (b), "[t]ravelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

Testimony of MSHA Inspector Lawrence Piko

MSHA Inspector Lawrence Piko was the Secretary's sole witness in this matter, and testified first. Piko has been an inspector with MSHA for the past four years. Tr. 24. Before his time at MSHA, Piko worked five years for Consol Energy at their Bailey Mine.[3] Tr. 25. Piko received MSHA's mandatory 22-week inspector training, and received what he referred to as "blur training," which he described as MSHA's attempt to combine training for metal, non-metal, and coal miners into a single course. Tr. 25-26.

On October 23, 2017, Inspector Piko arrived at the Harvey Mine to conduct an EO1 inspection, which covers "every part of the mine, surface and underground." Tr. 27. On that particular day, Piko covered the surface of the mine. *Id.* Upon his arrival at the mine, Piko went to the shop area, where he met Respondent's employee Matt West. As none of the Respondent's safety representatives volunteered to travel with Piko, West accompanied the inspector for his surface inspection. Tr. 29. Piko first reviewed the mine file, looking for prior accidents and citations logged in the file before conducting the surface inspection. Piko testified that there had been six accidents "involving something similar to this citation." at the mine. Tr. 30.

After reviewing the mine file, Piko went to the long belt identified in the photo labelled Joint Ex. J-1. Tr. 36. After walking the long belt, Piko and West went to the top of the silos indicated in J-1 to inspect for a variety of safety hazards, such as methane concentrations and faulty electrical wiring. Tr. 37.[4] No such violations were found. Piko and West then returned to the transfer building, made their way to the top, and began walking down the slope belt. *Id.* Piko asserted that there were five different tripping hazards in this portion of the slope belt: a roller, a plastic bag, a water hose, and some accumulations of coal. Tr. 46. He estimated the roller was approximately 64 inches in length. *Id.* At the hearing, Piko marked on Ex. J-1 with a red pen indicating where the hazards identified in Citation No. 9076875 were on the slope belt. Tr. 39. Piko took a photo of the area that was later admitted at hearing as Ex. P-2.

At that point, Inspector Piko decided to write a citation for a violation of the travelway obstruction standard: 30 C.F.R. § 75.202(b). Tr. 45. He said he considered writing the negligence for this citation as "high" rather than "moderate," because West informed him that "a certified individual, fireboss or mine examiner" was in that area "a few hours before." This meant "[s]omeone had to have seen that [the alleged tripping hazards] or at least walked away."[5]

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[3] That mine is not the subject of this hearing.

[4] At this point in his testimony, Piko indicated that he issued a citation for tripping hazards at the top of the silos. Tr. 37. That citation is not a part of this docket.

[5] Though the transcript states that Inspector Piko testified that a fireboss "had to have seen that *or at least walked away*," (emphasis added), it appears to the Court that the inspector meant "someone had to have seen that or at least *walked that way*," which would be consistent with explaining his decision to write the citation with "moderate" negligence.

Tr. 48. He indicated in his notes that West informed him the area was firebossed[6] between 5:00 AM and 8:00 AM that morning. Ex. P-1, at 11.[7] Piko then testified that the cited walkway is the only walkway on that particular belt, meaning that any individual travelling this belt would have to use this walkway. Tr. 51. The inspector made this distinction because the other belt depicted in Ex. J-1 has walkways on both sides of the belt. *Id.*

Inspector Piko next stated that he served the citation to West, as West was the individual travelling with him on that particular day. Tr. 51. According to Piko, West stated that independent contractors employed by GMS[8] worked there, though he was unsure exactly how many. Tr. 52. He testified that West did not contest the citation as the inspector wrote it, and that he recalled that Matt West "even shook his head in disappointment that stuff like this was left" on the walkway. Tr. 52-53. The inspector then testified that West immediately began abating the citation. Tr. 53. Piko did not walk through the area himself, noting that "it would be pretty hard to make it an S&S if you're going to walk through a hazard." *Id.* The inspector testified that he gave West "roughly 15 minutes" to abate the citation, which he also described as "more than enough time." Tr. 53. West abated the citation in seven minutes. Tr. 102.

Next, Piko testified that he took the pictures marked as Ex. P-2 concurrently with the issuance of the citation. Tr. 54. He testified that "it was a rainy day" on the day of the inspection, which was relevant to the citation because "it diminishes your visibility. You're dealing with wet conditions on metal, on rubber, on plastic, on coal making it easier to slip and fall, and even if you try to catch yourself because you're dealing with wet metal." Tr. 54. The inspector estimated the width of the elevated walkway as approximately three and a half feet. Tr. 56. He also noted that, while it was "not unusual" to encounter rollers placed in a walkway, the rollers were usually "against the side, not right in the middle. This one is hanging out in the middle mainly because that conduit takes up a lot of room." Tr. 57. The inspector estimated the roller was 64-inches long and weighed "at least 50 pounds, if not more." Tr. 58.

Inspector Piko expressed that the most likely injury would occur when the miner tripped or slipped over the various hazards previously described. In addition to tripping or slipping, the inspector suggested that a miner could injure him or herself while attempting to grab onto something while stumbling. Tr. 63. From this, the inspector concluded that the injury expected should be marked as "lost workdays or restricted duty" on the citation.

During cross-examination by the Respondent, the inspector acknowledged that he arrived at the mine at 7:30 AM, which was a half-hour ahead of when the day shift begins. Tr. 70. The inspector estimated that it took him and West approximately an hour to an hour and a half to travel from the shop area to the belts. Tr. 71.

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[6] "Firebossing" as described by Piko is when a fireboss – a supervisory position at the mine – walks a certain area looking for fire hazards. *See* Tr. 49.

[7] Inspector Piko stated that this statement was written on Page 10 of his inspector's notes, which is page 11 of the exhibit.

[8] Respondent later specifies in its post-hearing brief that "GMS" refers to contractors from GMS Mine Repair. *See* Respondent's Brief at 2.

The inspector next acknowledged that a citation issued under 30 C.F.R. § 77.205(b) – as cited in this matter – can be designated as non-significant and substantial by an inspector, and that Inspector Piko had previously issued a non-significant and substantial citation for a violation of the aforementioned standard on the very inspection at issue in these proceedings. Tr. 73-74. When asked about how mine operators keep outdoor walkways clear such as the one at issue in this matter, Inspector Piko stated that typically the operator would use a hose to spray down the walkway with water. Tr. 77. Inspector Piko also testified that spraying the walkway down with water would be a standard part of maintaining the walkway, and that, at the time of the year when the inspection was conducted (late-October), it would not have been cold enough to warrant removing the hose from the walkway area when not in use. Tr. 79. The Court surmises from this testimony that the inspector does not believe that the mere presence of the hose in the walkway area constitutes a violation of the standard, but the manner in which the hose is stored might constitute a violation.

Upon further cross-examination, Inspector Piko admitted that it would not be unusual to find coal accumulations around a slope belt, and that when spraying down a walkway, the operator's employees would spray in a specific direction to make sure the coal consistently went in one direction. Tr. 83. He also admitted that, although he spoke with West and GMS Employees about who might have placed the roller in the walkway, nobody was able to tell him who last handled the roller or when it might have been placed in the walkway. Tr. 86-87. The inspector also acknowledged that, at some point when walking up the walkway, a miner would be "eye level" with the hose lying in the walkway. Tr. 90-91 and Ex. P 2. When asked by the Court, Piko was also unable to recall how West removed the coal accumulation or the roller in the seven minutes it took him to abate the violation. Tr. 106.

On redirect examination, Inspector Piko stated that he had conducted approximately "50 to 60" inspections between the inspection in this matter and the hearing, suggesting that it would be difficult to remember details from any individual inspection, such as how it was abated. Tr. 108. The inspector also indicated that, had the roller, the plastic bag, and the coal accumulations not been present, he would not have issued a citation for a violation of 30 C.F.R. § 77.205(b) simply for the presence of the hose in the walkway. Tr. 110.

When re-crossed, Inspector Piko engaged in a colloquy with the Court over why Piko described the roller as "in the middle" of the walkway. Piko acknowledged that the roller was not exactly in the middle of the walkway, and from looking at Ex. P-2, "[t]here's not another half of the walkway to the right of the roller," but rather, only a few inches. Tr. 116. Piko also stated that, had the roller been the only object in the walkway at the time of inspection, he still would have issued a citation for a violation of 30 C.F.R. § 77.205(b). Tr. 118. Instead, he explained that he referred to it as "in the middle" of the walkway because there was grating from the walkway on both sides of the roller, and that the roller was not "off to the side." Tr. 120.

Testimony of Consol Pennsylvania Employee Matt West

After Piko testified, the Secretary rested. The Respondent called one witness to testify: Matt West. West is a Consol Energy employee who worked at Harvey Mine dating back to 2008. Tr. 126. In his time with the operator, West has worked as a roof bolter, shuttle car operator, and a mechanic/electrician. *Id.* At the time of the hearing, West was a mechanic/electrician, and had a federal electrician card since 2009, which requires at least 1,000 hours of supervised work under a qualified electrician and an 80-hour class. Tr. 127. West has worked aboveground for the operator for the past four years. *Id.* His job responsibilities as an aboveground electrician are "to repair any equipment, mobile equipment on the surface, as well as underground equipment, fan checks, elevator checks, basically repair anything on the surface." Tr. 128. West testified that he escorts MSHA inspectors on a regular basis as part of his job responsibilities. Tr. 129.

On October 23, 2017, West traveled with MSHA Inspector Piko on the aboveground inspection described in the inspector's testimony. Tr. 130. West stated that the walkway photographed in J-1 was used primarily by GMS employees who were responsible for maintaining the belt. Their responsibilities included "changing rollers, hosing, basically anything as far as keeping the belt clean." Tr. 139. He also testified that the GMS contractors are "supposed to maintain the walkways, as well as underneath the belt rollers." According to West, GMS contractors primarily maintain the walkways and belt by hosing it down to remove excess coal accumulations. *Id.*

West testified that the belt is examined by a fireboss "every shift," though West could not definitively say whether the belt was examined on the day of the inspection. Tr. 142-143. According to West, had the belt been examined by a fireboss on the day of the inspection, it would have occurred on the midnight shift "between 5:00 a.m. and 8:00 a.m." Tr. 143. West further testified that GMS contractors do not start their day-shift until 8:00 a.m. Tr. 144. West told the Court that, when Piko issued the citation, there was coal, a roller, and a hose "balled up" in the walkway. *Id.*

When asked by Respondent's counsel why a roller would be on the walkway, West said that they are typically "spotted" on a production shift, or in ordinary parlance, placed near a location on the belt where a roller needs to be replaced. Tr. 149. West stated that it is not unusual for a roller to be placed on the walkway in the manner depicted in Ex. P-2 when a roller on the belt is going to be changed out of the belt. *Id.* At the time the photo in Ex. P-2 was taken, West testified that he had no difficulty spotting the roller in the walkway. Tr. 150. West did not "express [his] agreement or disagreement with the inspector" as to the Citation, as he testified that he felt "it's my job if a citation is issued to correct the situation and make it safe at that point." Tr. 152. West testified that he terminated the citation by rolling the hose up and placing it clear off to the side of the belt and picked up the roller and carried it down the steps. West did not remove the coal accumulations identified by Piko in Ex. P-2. Tr. 154-156. Neither the coal accumulation nor the plastic bag were required to be addressed for the citation to be terminated. Thus, West did two things to abate the citation; he moved the location of the water hose and the roller.

On cross-examination, West agreed with the Secretary's counsel that the hose on the belt was potentially a tripping hazard. Tr. 158. West also stated that it was his understanding that GMS contractors are responsible for maintaining the walkway on a regular basis. Tr. 163. West acknowledged he did not remove the plastic bag identified in Ex. P-2 while abating the citation. Tr. 164. While West could not definitively answer one way or another, West did say that he had no reason to believe the area had not been firebossed at some point between 5:00 and 8:00 a.m., as he stated to the inspector. Tr. 165. Finally, West agreed that he had not taken notes during the inspection, and that he had not read the portion of the citation where Piko stated that it had been raining that day. Tr. 166, 169.

Re-direct examination of West then commenced. West testified that the hose discussed earlier would be conspicuous to employees walking from the transfer house to the cited area. Tr. 175. He added that even were an employee to approach the walkway from the opposite direction, the yellow color of the hose would cause it to "stand out" and be seen. Tr. 176. When asked about the weather on the date of the inspection, West stated that even if it had been raining on that day, it would not make the belt walkway any less safe, because the walkway had a significant amount of expanded metal[9] which aids with traction. Tr. 178.

The Court had a brief discussion with West before the Secretary's counsel completed re-cross. The Court asked West if anyone from the Respondent had instructed him not to challenge the inspector. West stated that it was not a company directive but rather personal practice to not challenge the inspector during an inspection. On re-cross West testified that he did not feel intimidated by Piko and that, had he wanted to address Piko's decision to issue a citation, he could have. Tr. 180, 181. After this exchange, the Secretary rested, and with no other questions from Respondent's counsel, West was excused. After ensuring that all copies of the admitted exhibits had been identically marked by the witnesses, the hearing concluded.

Principles of Law

In all cases where an operator contests a violation, the Secretary must prove, by a preponderance of the evidence, that a violation occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), citing *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989). Preponderance of the evidence simply means that the trier of fact must believe "that the existence of a fact is more probable than its non-existence." *In re Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), aff'd 151 F.3d 1096 (D.C. Cir. 1998), quoting *Concrete Pipe and Prod. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993).

[9] "Expanded Metal" refers to a form of sheet metal cut into grooves or patterns and used as a walking surface to increase traction. *See, e.g.* Ex. P-2.

Significant and Substantial

In order to prove a violation is significant and substantial, the Secretary must prove by a preponderance of the relevant evidence that there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). A determination that a violation is significant and substantial requires consideration of the particular facts surrounding the violation. *Texasgulf Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). The Commission established a four prong test for significant and substantial violations in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). There, the Commission said that the Secretary of Labor must prove:

> (1) The underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies, 6 FMSHRC at 3-4; *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria); *see also Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, 1899 (Oct. 2017). With regard to the second element of the *Mathies* test, the Commission has elaborated that "the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016) ("Newtown").

With respect to the third element of the *Mathies* test, the Commission states that "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742-43 n.13 (Aug. 2012). Finally, the Commission has stated that the evaluation of a significant and substantial violation should assume continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Negligence

An operator is negligent if it fails to meet the requisite standard of care in adhering to the standards set forth in the Mine Act and its associated regulations. *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Commission Judges, when determining negligence, are asked to consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014). ... The Commission and its judges are not required to apply the 30 C.F.R. Part 100 regulations that govern the MSHA's determinations. *Newtown*, 38 FMSHRC at 2048, citing *Brody* at 1701-03. Therefore, the Commission's judges may consider the "totality of the circumstances" in assessing the operator's negligence for a given violation. *Brody*, at 1702; *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir 2016). The Commission

has described ordinary negligence as "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987), while high negligence is described by the Commission as "an aggravated lack of care that is more than ordinary negligence." *Newtown*, at 2049, citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998), citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991).

The Parties' Contentions

The Secretary contends that Citation No. 9076875 was properly designated as significant and substantial, asserting that the violation created a discrete safety hazard of tripping/stumbling, and that the hazard of tripping and falling was reasonably likely to cause an injury of cuts, bruises, and broken bones, which would be of a reasonably serious in nature. Secretary's Brief at 3, 7. Even if each individual item in the walkway may not have established a significant and substantial violation, the Secretary argues that the confluence of objects makes the violation significant and substantial: "[w]hile each of the hazards ... on their own, may not individually establish an S&S violation, taken together they create[d] a dangerous situation that present[ed] a discrete hazard to safety." *Id.*

In contrast, the Respondent argues that the Secretary failed to establish by a preponderance of the evidence that the stumbling or tripping hazard was reasonably likely to occur as a result of the violation. Respondent's Brief at 12. The Respondent also argues that most of the walkway was free of extraneous materials, and that the objects in the travelway were highly visible to any miner who may have traveled the walkway. *Id.* at 13-14. Finally, the Respondent argues the inspector improperly based his conclusion as to significant and substantial on speculation and conjecture, unsupported by the actual conditions at the mine. *Id.* at 16-17.

Discussion

In the context of the specific facts involved in this matter, the Court will first add to its earlier remarks about the significant and substantial designation. To put it in practical terms, when analyzing S&S, the critical issues involve likelihood and gravity. Two important recent decisions speaking to those characteristics under *Mathies* are here noted – the Fourth Circuit's decision in *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148 (4th Cir. 2016)("Knox Creek") and the Commission's decision in *Newtown*.

The first prong of *Mathies* is straightforward. A violation must be found; without that determination any further S&S analysis cannot proceed. As described above, the parties stipulated to the existence of a violation. Secretary's Brief at 3. This stipulation is sufficient for the Secretary to meet its burden of proof as to the existence of the violation under Commission precedent. However, the Court independently concludes that, after reviewing the photographic evidence submitted as Ex. P-2, and the testimony of both Inspector Piko and West, that a violation of 30 C.F.R. § 75.202(b) occurred in this case, as there were objects, located in the travelway. 30 C.F.R. § 75.202(b) is a mandatory safety standard. The Court therefore concludes that the first prong of the Mathies test has been satisfied by the parties' stipulations and its own review of the evidence.

Speaking to the second prong of *Mathies*, with its requirement that there be a showing of a "discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation, that prong is focused upon the likelihood that a given violation may cause harm. This means that for any violation to contribute to a discrete safety hazard, the violation must be at least somewhat likely to result in harm. *Knox Creek* at 162.

The Commission's decision in *Newtown* tracks the *Knox Creek* analysis in that it follows the Fourth Circuit's explication of the correct S&S analysis. In *Newtown*, the Commission stated that "the relevant concept tying together the second step "likelihood" analysis and third step "gravity" analysis of *Mathies* is the "hazard" at issue." *Id.* at 2037. The Commission elaborated about the essential importance "for the Judge to adequately define the particular hazard to which the violation allegedly contributes. A clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations. That same clearly defined hazard will also frame the potential source of injury for purposes of determining gravity in the third step analysis. The Commission thus defines the 'hazard' in terms of the prospective danger the cited safety standard is intended to prevent." *Id.* at 2038.

The Commission added "[i]f the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the hazard identified at step two, the Judge then assumes such occurrence and determines at step three whether, based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. At step four, the Judge determines whether any resultant injury would be reasonably likely to be reasonably serious." *Id.* at 2039. "All Commissioners agree that the Judge must analyze the likelihood of the occurrence of the hazard at step two of the *Mathies* test." *Id.*

Although the other three elements of the *Mathies* test have been sufficiently proven by the Secretary, the Court concludes that the Secretary failed to prove by a preponderance of the evidence the second prong of the *Mathies* test: that there was a discrete safety hazard contributed to by the violation. Both the Secretary and the Respondent devote a significant portion of their post-hearing briefs to the third prong of the *Mathies* test.[10] This emphasis is misplaced, as the second prong is where the "particular facts surrounding the violation" are primarily considered. *Newtown Energy*, 38 FMSHRC at 2038. The Secretary describes the discrete safety hazard in this matter for fulfilling the second prong of *Mathies* as "tripping/stumbling." Secretary's Brief at 7. However, the Court identifies the discrete safety hazard in this instance with more particularity as the possibility that miners working will trip or stumble *over the extraneous objects* in the travelway.

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[10] The Respondent's brief does discuss *Newtown Energy* and "the interplay between the second and third prongs," though the Respondent does not itemize its arguments according to each specific prong. The Secretary for his part devotes just one paragraph to the second prong, and never cites to *Newtown Energy*, which discusses in detail how the facts of the violation are incorporated into the *Mathies* test, and which was decided more recently than *any* of the cases the Secretary cites in his significant and substantial analysis.

The Court concludes that the Secretary failed to prove that the area was traveled frequently enough for the violation to be reasonably likely to contribute to a discrete safety hazard. Respondent argued post-hearing that the area was not accessed frequently. Respondent's Brief at 13. As just mentioned, the discrete safety hazard of tripping/stumbling is more precisely identified as tripping and falling over the objects *while miners are on the travelway*. Therefore, how often the area is accessed is relevant as to the likelihood the violation creates a discrete safety hazard of a miner tripping/stumbling over the objects in the travelway.

The Secretary argues that the area was "regularly traversed by miners during their daily duties." Secretary's Brief at 9, citing Tr. 47. While the Secretary offered evidence that *the area* was regularly traversed by miners, he did not establish that *the walkway* was regularly traversed, as evidenced by the fact that Inspector Piko acknowledged he did not find anybody in the area while conducting the inspection, nor could he identify any miner who said they regularly traversed that walkway. Tr. 100. Additionally, the inspection was conducted at approximately 10:00 AM, according to West, and neither individual could say there were any workers on the travelway or even in the area at the time. Tr. 152. However, West also testified, and the Secretary did not refute, that GMS workers typically began their shift at 8:00 AM. Tr. 144. To the Court, this shows that the entire area is not frequently traveled, as neither the inspector nor West saw any employees in the area a full two hours after the morning shift began. As a result, the Court concludes the Secretary failed to prove that the area was traveled frequently, which decreases the likelihood that the violation will contribute to the discrete safety hazard of miners tripping/stumbling over objects in the travelway in the ordinary course of continued mining operations.

Second, the Court concludes that the condition was sufficiently obvious to any individual travelling in the area that it was not reasonably likely to create a discrete safety hazard. The roller photographed in the citation was a 64-inches in length. The roller was not obscured by any other object or covering, and was easy to see even during the inspection. Tr. 150. Furthermore, the roller was a bright white color which distinctly contrasted with the color of the metal walkway. Ex. P-2. As to the other objects in the walkway, the hose was a bright yellow color, and was clearly visible in the inspector's photo. *Id.* None of the cited objects were stacked on top of each or otherwise obscured from plain view. From these facts, the Court concludes that an ordinary miner would have likely spotted the potential tripping hazards while traversing the area, and therefore the objects in the walkway were not reasonably likely to contribute to a discrete safety hazard.

The Secretary states that the Court should not consider whether the roller, the hose, and the other alleged obstructions in this case might have been readily observable. Secretary's Brief at 7, citing *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992). However, *Eagle Nest* simply stands for the proposition that the Court cannot assume that miners would exercise heightened or unique caution when traveling in the area of an alleged hazard. In *Eagle Nest*, the judge committed error by "resting his decision on the possibility of mitigation by the use of caution." *Id.* at 1123. That does not require the Court to assume a miner is completely unaware or ignorant of his or her surroundings, merely that it would be inappropriate to decide a violation was not significant and substantial based *solely* on the miner's ability to exercise caution. Viewing the circumstances surrounding the violation as a whole, including the prominence of the roller and

hose, is ultimately relevant to the issue of whether the violation is reasonably likely to give rise to a discrete safety hazard.

Third, the condition was not extensive enough to be reasonably likely to create a discrete safety hazard. The objects cited were confined to one specific portion of the travelway. There was no evidence that these hazards were extensive across the entirety of the travelway. Furthermore, according to the text of the citation itself, the citation was written at 10:58 AM on October 23, 2017, and terminated at 11:05 AM on October 23, 2017. *See* Ex. P-1, Citation No. 9076875. That means that West was able to abate the violation in seven minutes,[11] which in turn means that the violation was not so extensive as to require a significant period of time to clean up. Additionally, the photographic evidence submitted by the parties shows that there was a considerable portion of the cited area of the walkway that was not obstructed by the objects referenced in the inspector's testimony. *See* Tr. at 120. Therefore, the Court concludes that the violation was not extensive enough to be reasonably likely to create a discrete safety hazard.

Finally, the Court concludes the Secretary did not prove by a preponderance of the evidence that it was raining at the time of the violation. On this point, the Secretary did provide testimony. *See* Tr. 54, Secretary's Brief at 7. However, none of the photos in Ex. P-2 show that the surfaces of the travelway were wet, and while the Respondent's witness could not say conclusively that it was or was not raining on the date of the inspection, West did say that an outdoor inspection typically would not be done if it were raining outside. Tr. 150. West also testified that there were no coverings over the top of the walkway, Tr. 151, meaning there should be water on the surfaces of the walkway and the objects in Ex. P-2 if it were raining that day. Considering all of the testimony and the exhibits, the Court concludes that the Secretary did not prove by a preponderance of the evidence that it was raining on the date of the inspection, which goes to the likelihood of a discrete safety hazard in the second prong of the *Mathies* test.

The Secretary also cites to *Summit Anthracite*, 29 FMSHRC 1062, 1081-1082 (Nov. 2007) (ALJ) (*Summit*) for the proposition that the violation in this case is significant and substantial. Pursuant to Commission Rule 69(d), the decision of one Commission Judge is not binding on other Commission Judges. Additionally, as the Secretary acknowledges in his own brief, the significant and substantial inquiry depends "on the particular facts surrounding that violation." Secretary's Brief at 6, citing *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). The Court considers the facts in *Summit* sufficiently dissimilar from the facts of this case to be distinguishable. For instance, the alleged obstructions formed the actual frame of the generator building, meaning they would be impossible to remove. Furthermore, the Secretary established through testimony that the generator building was accessed daily. By comparison, the objects in this case were easily cleared from the area, and as explained above,

[11] The Secretary and Respondent focus particularly on the 64" roller and the hose, because those two objects were the largest objects in the walkway, and because Piko terminated the citation once West moved the roller and hose, but otherwise did not take any actions to abate the other initially alleged hazards: specifically, the plastic bag and coal accumulations. Tr. 164. As Respondent notes, Piko terminated the citation despite West not removing the coal accumulations and plastic bag. Respondent's Brief at 16.

the Secretary did not establish that the walkway was regularly traversed. Tr. 100. Therefore, the Court concludes that *Summit* is not sufficiently analogous to be persuasive as to the issue of a significant and substantial violation.

The Court agrees with the Secretary that the obstructions in the walkway contributed to some extent to a safety hazard. That is why the Court concluded the violation occurred separate from the parties' stipulation, and why the Court concludes a negligence finding south of moderate is appropriate. *Newtown Energy* makes it clear that merely "contributing" to a discrete safety hazard is insufficient to prove prong two of the *Mathies* test. Since regulations promulgated by the Secretary are ostensibly intended to create a safe working environment, *every* violation of a safety regulation contributes in some capacity to a safety hazard. Therefore, for the second prong of the *Mathies* test to have any meaning, not every violation can create a discrete safety hazard within the meaning of *Mathies*. Based on all of the factors described above, the Court ultimately decides that this particular violation was not reasonably likely to cause the occurrence of the hazard against which 30 C.F.R. § 77.205(b) is directed within the meaning of *Newtown Energy*. Therefore, the violation was not proven to be significant and substantial.

This does not mean that virtually every violation will amount to being S&S. The Fourth Circuit gave as an illustrative example a case where a roadway lacked berms for only a short distance, thereby making the hazard of a vehicle falling off the edge less likely. *Id.* at 163, citing *Sec'y of Labor v. Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741 n.12 (Aug. 2012). This Court concludes that the violation in this matter is a like situation: the hose presented a slip or stumble hazard for only a short distance; there was virtually no evidence of regular miner traffic along the walkway; the traffic which would primarily be using the walkway would be the GMS employees tasked with using the hose to maintain the walkway and the extraneous portion was the hose nozzle end, which end those employees would be using to clean the walkway. Again, the Court emphasizes that the violation was conceded here by Consol Pennsylvania – the only issue for this part of the discussion is whether it was also S&S.

Turning to the third prong of *Mathies*, the Fourth Circuit in *Knox Creek* noted that it has been argued by mine operators that the evidence must establish that the violation was reasonably likely to cause injury. The Court rejected that construction, informing that the test under the third prong is whether there is a reasonable likelihood that the hazard contributed to by the violation will cause injury. *Knox Creek*, 811 F.3d at 161. By contrast, the Fourth Circuit expressed that *Mathies*' third and fourth prongs, which it noted that the Commission expected would often be combined in a single showing, are primarily concerned with gravity—the seriousness of the expected harm.

This means that the Secretary need not prove a reasonable likelihood that the violation itself will cause injury. This is repetitive but bears repeating – the evidence of the likelihood of the hazard is not relevant at prong three. Instead, the relevant hazard is to be assumed when analyzing *Mathies*' third prong. *Id.* at 164. Accordingly, under the third prong, one assumes the existence of the relevant hazard. In the present case the relevant hazard is stumbling or slipping on a travelway.

Thus, the third prong assumes that if the hazard occurred, and regardless of the likelihood that it would occur, whether it was reasonably likely that a reasonably serious injury would result. Again here, that means if one were to stumble or slip on the travelway, a reasonably serious injury would result. The testimony from the inspector was uncontested that in this matter the injury cuts, bruises or broken bones, each of which would be a reasonably serious injury with the result of lost workdays or restricted duty.

The fourth prong of *Mathies* – An injury of a reasonably serious nature

After considering the evidence, the Court also agrees with the Secretary that the hazard would result in an injury of a reasonably serious nature were the injury to occur, satisfying the fourth prong of the *Mathies* test. The parties stipulated that the expected injury would be "lost workdays or restricted duty." Secretary's Brief at 3. At hearing, the inspector testified as to the possibility of injury from slipping and falling, including broken wrists or concussions. Tr. 63. While the Respondent asserts that the circumstances of the violation do not demonstrate a reasonable likelihood of an injury of a reasonably serious nature, the Respondent did not address whether the *hazard* of tripping and falling would create an injury of a reasonably serious nature. The Commission has recognized on several different occasions that stumbling over obstructions in a travelway can lead to an injury of a reasonably serious nature. *See e.g.*, *Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, 1900 (Oct. 2017) (trip and fall over "uneven floor and debris" satisfies prong four of *Mathies*); *S&S Dredging Co.*, 35 FMSHRC 1979, 1982 (July 2013) (slip and fall from steps of a loader would result in "reasonably serious injuries" under *Mathies*); *Buffalo Crushed Stone Inc.*, 19 FMSHRC 231, 238 n.9 (Feb. 1997) (slipping on a walkway would result in "reasonably serious injuries" under *Mathies*). The Court therefore concludes that the fourth prong of the *Mathies* test has been satisfied by the Secretary.

Summary of the Court's determination that the evidence of record failed to establish that the violation was "significant and substantial."

To recap, the Court, after considering the evidence presented at hearing and the post-hearing submissions of the parties, concludes that, while the Secretary established elements one, three, and four of the *Mathies* test, the second *Mathies* element – the discrete safety hazard, that is a measure of danger to safety – contributed to by the violation – was not established by the preponderance of the evidence. A number of facts lead to this conclusion.

To begin, there were two sources of concern – the water hose, which in fact was used to maintain the walkway, and the roller, placed on the walkway for the purpose of replacing a worn roller. The walkway is maintained by contractors, identified as GMS. The inspector did not require that either the coal spillage or the plastic bag needed to be removed for the citation to be terminated.

Regarding the roller, as the photograph clearly demonstrates, was white and highly visible against the contrasting metal walkway it rested upon. Further, contrary to the inspector's claim, the roller definitely was not in the center of the walkway. From the Secretary's own photos there is no disputing that the roller was to one side of the walkway and that there was

ample room for one to traverse the walkway at the roller's location.[12] Ineluctably, that leaves but one condition posing a genuine risk of stumbling or slipping – the water hose, and it must be noted, only a small portion of the water hose posed such a risk. As the government photos show, the hose is yellow and highly visible. Where the hose shares the same space on the walkway with the roller, it is straight, running parallel to the walkway and does not present a stumbling or slipping hazard at that location, as there is a path between the roller and the hose there.

There was, however, a small portion of the hose on the portion of the walkway where there are two or three stairs and that confined area did present a slip or stumbling hazard. This confined area of the hose represented the only genuine hazard among the four conditions initially relied upon by the inspector. In fact, at the hearing, the claimed basis was reduced to only two conditions, the water hose and the roller. However, as the Respondent has admitted that the standard was violated, the only question is whether that limited area presented a significant and substantial violation under *Mathies.*

Respondent contends that the contribution of the violation to the cause and effect must be significant and substantial and asserts that the second step of *Mathies* is primarily concerned with the likelihood of the occurrence of the hazard. In this instance that means determining the likelihood of the occurrence of miners stumbling or slipping. Restated, a determination must be made as to whether, *based upon the particular facts surrounding the violation*, there exists a "reasonable likelihood" of the occurrence of the hazard about which the safety standard is concerned. Accordingly, to express it plainly, the tangible hazard for determination was whether there was a reasonable likelihood of the occurrence of miners stumbling or slipping on the walkway *at the limited location* where the hose presented an issue. The Court finds, *based on the evidence of record,* that the Secretary did not establish such a reasonable likelihood.

Keeping in mind that the hazard to apply to the S&S inquiry has been found to be limited to the discrete area where the hose extended into a portion of the walkway stairs, which consisted of two or three steps,[13] primarily on the last step and a portion of the walkway after the bottom step, the record evidence essentially[14] established that only the GMS contractors would be exposed to the hose hazard, but it is precisely those employees who use the same hose for the purpose of cleaning the walkway. Given that, the likelihood of those employees stumbling or slipping was minimal, not reasonably likely. Further, it was the nozzle end of the hose on the steps, that is to say, the end of the hose that would be used by the GMS employees to maintain

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[12] The inspector admitted that it "would be kind of hard I think to hold just the roller" as the basis for an S&S finding. Tr. 120-121.

[13] The inspector was not definitive as to the number of risers or steps were on the stairs, stating it was two or three.

[14] The record shows that the only other miner exposed to the hazardous portion of the hose was the fireboss. That individual, *whose job includes looking for hazards*, successfully negotiated the walkway that day, including that portion of the walkway where the hose presented an issue. Tr. 48.

the walkway. So too, those same GMS employees are the contractors who perform belt maintenance which includes changing out rollers.

While the Secretary could have learned from the issuing inspector about whom, if anyone, besides the GMS employees, would use the walkway, no such possible evidence was introduced and made a part of the record. Therefore, any use by other miners was in the realm of speculation and accordingly cannot be part of the S&S determination.

The record also does not support the claim that it was raining on the day the citation was issued and the inspector stated that rain was a factor which added to his S&S determination. The exhibit photos support this finding, as did the testimony of West, who offered, without contradiction, that typically they do not do an outdoor inspection if it's raining.

Having failed to meet the burden of proof for prong three of *Mathies*, the S&S claim cannot be affirmed by the Court.

The Negligence was less than moderate.

Regarding negligence, the Commission stated in *Newtown*, "[i]n analyzing an operator's degree of negligence, the Commission has recognized that '[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.'" *Id.* at 2047, citing *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

In determining whether an operator met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (citations omitted); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). However, it is noted that in this case, as distinct from *Newtown*, there was no evidence offered regarding managers or supervisors in high positions.

The Commission has also stated that "an ALJ 'is not limited to an evaluation of allegedly 'mitigating' circumstances' and should consider the 'totality of the circumstances holistically.'" *Id. at 1702; see also Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016). And, as the Commission has repeatedly held, "the Commission and its Judges are not bound to apply the regulations in 30 C.F.R. Part 100 that MSHA uses to calculate most proposed penalties." *Newtown*, 38 FMSHRC at 2048, citing *Brody Mining, LLC,* 37 FMSHRC 1687, 1701-03 (Aug. 2015). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id.* Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically. *Id.*

Although the parties dispute the level of negligence involved in this violation, the Court concludes that the inspector's designation of "moderate" negligence is more appropriately characterized as less than moderate. Though administrative law judges are not bound by the negligence categories set forth in Part 100, it is noted that "low negligence" is defined as where, "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." 30 C.F.R.§ 100.3(d). In contrast, those regulations describe "moderate negligence" as where there are mitigating circumstances. *Id.*

As Respondent argues, and as this Court agrees, the roller and hose were so conspicuous on the walkway that it was unlikely that any miner traversing the area would trip and fall over them. Respondent's Brief at 15. The Respondent also takes note that

> [h]oses are used every day to clean and this part of the workers environment. They are trained to be aware of these conditions when traveling about. Have to string out the hoses to be able to use them and they will be in the walkways and on the stairs, etc. on a daily basis. ... the walkway is an expanded metal gra[t]ing which provides traction in all weather conditions. ... all workers are aware of this and use caution when traveling through there. This area is cleaned daily. Area has handrails and toeboards.

Ex. R-1.

The Court, considering the totality of the circumstances holistically, concludes that the negligence was less than moderate and approaching low negligence.

As Respondent notes in its post-hearing brief, all of the conditions cited were readily visible. While the better practice would have been for the GMS employees to completely loop up the limited portion of the hose that presented a hazard, and though it is recognized that neatness counts, the practical result *based on the record evidence* was that the GMS employees were the ones exposed to the hazard and were using the very hose to perform the walkway maintenance.

Penalty Determination

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act." *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). A Commission Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601(May 2000); *see also Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary's burden to provide sufficient evidence to support the proposed assessment; and the Court's obligation to explain the basis for any substantial divergence from the proposed amount. The Commission has noted that:

> [The] Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary's proposed penalty cannot be glided over, as the Commission also stated, 'Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. ... If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

The American Coal Co., 38 FMSHRC 1987, 1993-1994 (Aug. 2016), citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), aff'd, 57 736 F.2d 1147 (7th Cir. 1984).

Section 110(i) Penalty Factors As Applied to This Case

History of Previous Violations

As the citation indicated, 30 C.F.R. § 77.205(b) was cited three times in two years at this mine. However, only one of those citations was to the operator, with the other two citations cited to contractors. Neither party contested the existence of the prior violations of this standard. The Court therefore concludes that the history of previous violations of this sort at this mine is minimal.

Size of the Business

The parties stipulated that the Mine Data Retrieval System (MDRS) maintained by the Secretary accurately sets forth the size of the Respondent in production tons worked this year, the protection tons and hours worked at this mine specifically, the total number of assessed violations for the time period listed, and the total number of inspection days during that time period. Secretary's Brief at 3. The mine extracts 2,971,179 tons of coal per year, while the operator extracts 24,679,089 total tons of coal per year. Ex. A, Pet. for a Civil Penalty at 10.

Negligence

For the reasons described above, the Secretary's initial determination of "moderate" negligence is appropriate, and will be affirmed by this Court.

Operator's Ability to Remain in Business

The Secretary stated that the assessment of a civil penalty of $625.00 will not affect the operator's ability to remain in business. Secretary's Brief at 11. The Respondent did not contest this assertion in its own post-hearing briefs. Therefore, the Court concludes, in conjunction with the size of the mine and its annual production, that a penalty of $625.00 or less would not affect the Respondent's ability to remain in business.

Gravity of the Violation

For the reasons described above, the Court has determined that the gravity of the citation was over-evaluated; the Court concludes that the likelihood of injury was "unlikely" and was not significant and substantial, for several reasons: it took only seven minutes to abate the cited condition, the condition was obvious to any individual who might be walking through the area, the condition was not extensive, and the walking surfaces were not wet at the time of the inspection.

Good Faith Abatement

The Secretary's petition for assessment of civil penalty acknowledged Respondent's good faith abatement of the violation. As the citation was terminated seven minutes after issuance, the Court agrees that the Respondent abated the violative condition in good faith.

Analysis of Section 110(i) Penalty Factors

Most important of the six factors outlined in Section 110(i) to the ultimate penalty determination in this case was the gravity of the violation. Since the likelihood of injury and the significant and substantial designation as written in the citation were not sufficiently proved by the Secretary at hearing, the penalty should be adjusted downward accordingly. Furthermore, the fact that West immediately set out to abate the violation after it was cited, and the fact that he was successful in doing so less than ten minutes after the citation was issued, counsels in favor of reducing the penalty from the original $625.00 for good faith abatement, in addition to the reduction for gravity.

Respondent calculates that, without the significant and substantial designation and with the likelihood of injury modified to "unlikely," the penalty as calculated by 30 C.F.R. § 100.3 would be $129.00. Respondent's Brief at 22. The Court's $200.00 penalty reflects the Court's conclusion that, although the Respondent's conduct merely rises to the level of ordinary negligence, characterized as less than moderate, and approaching low negligence, in the future Respondent should be more diligent as to the requirements of the standard.

The Court ultimately determines that the 110(i) factors concerning the size of the operator, the history of previous violations, and the operator's ability to remain in business do not substantially alter the Court's determination of an appropriate penalty, especially given the already significant reductions in the penalty amount as a result of the gravity, negligence, and good faith abatement considerations.

Conclusion

Taking into account all of the preceding findings and observations, the Court concludes that the violation occurred, presented an "unlikely" risk of an expected injury of lost workdays or restricted duty. The Court also finds that one person would be affected by the violation, the violation was not significant and substantial, and that the negligence of the operator was less than moderate, approaching low negligence. In light of these considerations, the agreed-upon stipulations as to the violation and the injury expected, and the inherent power of Commission Judges to independently assess penalties based on their reasoned judgment of all the facts, the Court finds that the non S&S determination and the less than moderate negligence determination independently support the Court's imposition of a civil penalty of $200.00 for this violation.

ORDER

It is hereby **ORDERED** that Citation No. 9076875 be **MODIFIED** to change the likelihood of injury from "reasonably likely" to "unlikely," and to reflect a non-significant and substantial violation and less than moderate negligence. Respondent is **ORDERED** to pay a civil penalty in the total amount of **$200.00** within 30 days of this decision.[15]

William B. Moran

William B. Moran
Administrative Law Judge

[15] Payment is to be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Maria Del Pilar Castillo, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106

Patrick Wayne Dennison, Esq., Fisher Phillips LLP, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, PA 15219

Kenneth J. Polka, U.S. Department of Labor, MSHA, 631 Excel Drive, Suite 100, Mt. Pleasant, PA 15666