FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 10, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. PENN 2019-0008
CONSOL PENNSYLVANIA COAL COMPANY, LLC	: :	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

DECISION

BY: Commissioner Rajkovich[1]

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act") and concerns a citation issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Consol Pennsylvania Coal Company, LLC ("Consol"). The citation alleges a violation of the mandatory safety standard at 30 C.F.R. § 75.517, which requires that "[p]ower wires and cables . . . shall be insulated adequately and fully protected." The inspector designated the citation as significant and substantial ("S&S"),[2] and MSHA charged Consol with a moderate degree of negligence.

Consol contested the citation and the proposed civil penalty. The case proceeded to a hearing before a Commission Administrative Law Judge. On December 30, 2019, the Judge issued a decision affirming the citation and finding moderate negligence and an S&S violation. The Judge assessed a $2,487 penalty. 41 FMSHRC 803 (Dec. 2019) (ALJ). Consol filed a petition for discretionary review, contending that the record evidence does not support findings in the Judge's decision and that the decision contains errors of law. The Commission granted the petition for review.

The Commission affirms the findings of a violation and moderate negligence; however, we reverse and vacate the S&S designation. Finally, in the interest of judicial economy, the

[1] A majority of Commissioners joins in each section of Commissioner Rajkovich's opinion in result, and therefore it constitutes the Commission's decision in this case.

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

Commission assesses a penalty of $1,000. Chair Traynor writes a separate opinion in which he dissents from the majority's conclusion that the S&S designation should be reversed and from the majority's assessment of a $1,000 penalty. In addition, Commissioner Althen includes a separate opinion in which he sets forth an alternative reason for concluding that the S&S designation should be overturned.

I.

Factual and Procedural Background

On August 26, 2018, MSHA inspector Bryan Yates arrived at Consol's Enlow Fork coal mine in Pennsylvania to conduct an inspection. Yates proceeded underground, accompanied by Daniel Colby, Consol's safety representative.

During the inspection, Yates and Colby walked along an entry in the No. 13 feeder location. As Yates walked along the entry, he observed the feeder cable hanging down from hooks secured to the roof or rib. Tr. 142, 144. The cable was energized during Yates' inspection, but the section was not working. Consol had conducted an electrical inspection of the cable the previous day and had not reported any deficiencies in the cable. The inspector did not issue any citations in connection with that inspection.

Yates did not take any photographs of the cable hanging on the hooks in the citation location. However, he did take two pictures of the cable hanging in a different area where testimony established the roof was lower than in the citation area.

Yates had testified that the cable was hung from a hook that he called a "J hook." Colby, at one point, also used the term "J hook." However, Colby then explained that the term "J hook" was incorrect and that the hooks upon which the cable hung were properly referred to as "cable hooks" or "locked hooks." Tr. 228-30. Colby illustrated the difference using two photographs taken by Yates, which show the subject cable further along the entry. Sec'y Ex. 13 (third and fourth photographs), Tr. 148.

Looking at the third picture (the word "pinch" appears"), Colby pointed out that the cable hung on a locked hook that was completely closed and attached to the rib of the entry. He referred to the hook as a "cable hook" or "locked hook" attached to the rib. To show the difference between J-hooks and the cable hook upon which the cable hung, Colby circled a small open hook that he identified as a "J hook" at the edge of the picture. This small hook contrasted with the larger locked hooks supporting the cable.

Colby explained that, due to the way the cable was hung on the locked hooks, the only way for the cable to fall to the floor was to destroy the insulated and locked hooks. Tr. 227. Thus, according to Colby, the cable could not simply fall from the roof but could be dislodged only if some event destroyed the entire closed and attached hook.

Yates testified that, in looking at the cable, he thought he saw possible damage. Tr. 143. His belief was that coal would strike the cable as it passed underneath. Tr. 143. He did not provide details about the scope or location of damage at this stage—i.e., the bottom, side, or top

of the cable. Colby testified that he could not see any damage to the cable at that time. Tr. 203. Thus, neither Yates nor Colby identified specific damage to the cable at that point. Tr. 171, 203, 217. Yates had the cable de-energized and locked-and-tagged out of service so that he could take it down to examine it hand-over-hand.

Yates and Colby varied somewhat on their estimate of the height of the entry. However, they agreed its removal required a team effort in which they reached above their heads, and Colby used a walking stick to grasp the cable to remove it from the hooks. Yates also said, "it was pretty hard" to get the hooks "out of those plates," which enhanced the difficulty in removing the cable. Tr. 174-175. Colby explained that the purpose of the height of the cable was to allow materials to pass under the cable freely.

After Yates and Colby took the cable down, Yates proceeded with his hand-over-hand inspection. Colby testified that Yates said he felt a "couple [of] bumps," which he showed to Colby. Tr. 204. Colby was standing four to five feet from Yates at the time. Yates did not identify the location of these bumps on the cable – top, bottom, or side. He also did not testify to the location in relation to the entry– right side, middle, left side, etc.

Colby testified that before Yates showed him any damage at this stage, Yates then picked at the area with a screwdriver to clean that area of the cable. Tr. 204. Yates initially denied such action. Later, however, he testified that he did carry a screwdriver and did use it to clean out cuts. When questioned whether he used it in this instance, Yates replied, "I don't remember." Tr. 165. Colby further testified that Yates twisted the cable, applying a strong torque. Tr. 219. Yates conceded that he twisted the cable. Tr. 173. Yates also stated that he tapped or hit the cable, though he could not remember what he used to hit it. Tr. 165.

Yates testified that he found two cuts in the cable. He described the first cut as three-quarters of an inch. He did not take a picture of this cut or describe it, but he did testify that the cut did not expose any energized wires. The parties presented no additional evidence regarding this cut.

Yates's testimony focused on the second cut, three feet from the first cut along the cable. Yates described it as one and three-quarters inches long; he did not estimate a width. However, he said he could see the white lead and exposed copper. Colby also testified that he could see the lead and further testified that he had then agreed with Yates that the opening was a violation. Tr. 208, 220, 222.

After handling the cable as described above, Yates took pictures of the cut. Sec'y Ex. 13 (first two photographs). In taking the pictures, Yates used a zoom feature which greatly enlarged the depiction of the cut. When asked whether using the zoom feature would distort the appearance of the cuts, Yates replied, "I'm sure it would." Tr. 186.

Consol's General Maintenance Foreman Travis Stout testified that ground fault protection of 300 milliamps, 25 times more sensitive than the law requires, protected the cable. Consequently, if a lead wire were bare or compromised, it would trip the breaker. Tr. 242. In short, if the lead were damaged, the electricity would go to ground, and the cable would

immediately de-energize. Stout testified that Yates' photos showed damage to the outer jacket and what might be damage to the inner conductor but that he could not see any damage to a lead. Tr. 238. Stout agreed that it would be possible that the electricity might go to ground by striking the person holding the cable. Tr. 244

Yates issued a section 104(a) citation citing moderate negligence and a significant and substantial violation. Regarding negligence, he opined that Consol should have found the cut. As the basis for the S&S designation, Yates believed the cable could be easily knocked off the locked hooks and fall to the floor. He assumed miners then would grasp an energized cable to reattach it to the hooks near the roof.

II.

The Judge's Decision

Consol's argument centered upon Yates' actions before he identified a violative cut. Consol argued there was not substantial evidence of the status of the cable before Yates' action picking, hitting, and twisting. In turn, according to Consol, without such evidence, there could not be substantial evidence of a violation, negligence, or an S&S violation because Yates' actions may have created the condition he cited.

The Judge found that:

> This Court further recognizes that Yates' vigorous manipulations may have embellished the cable's opening. (*see* Colby's comments regarding such at R-D). However, this Court does not find that Yates' examination techniques, however unorthodox or embellishing, created the cited cable's inner damage.
>
> The undersigned has practiced law for over 40 years and is not naive regarding the regrettable truth that witnesses sometimes lie on the stand. This Court further understands that Yates' personality and zealotry have raised antipathy and suspicion on the part of the Respondent. However, having considered all the evidence presented by the Secretary and Respondent, *in toto* this Court ultimately rejects Respondent's arguments, express or implied, that Yates had deliberately or recklessly damaged the cable so as to have self-created the violation and then had given perjured testimony in support of such.

41 FMSHRC at 818-19 (footnote omitted).

The Judge, therefore, concluded that the Secretary demonstrated that Consol violated the safety standard and was moderately negligent. He affirmed the S&S designation concluding that there was a reasonable likelihood of a miner grasping an inadequately insulated power conductor knocked from a hook and receiving a serious or fatal injury.

III.

Disposition

A. Substantial Evidence Supports the Judge's Finding of a Violation.

The record evidence supports the Judge's determination that Consol violated section 75.517.[3] The Judge credited Yates' testimony that he observed possible damage to the cable when hanging in the entry, performed a hand-over-hand inspection, and identified two cuts. Tr. 143-45, 166-68; 41 FMSHRC at 819.

Colby did not get a close look at the cable until after Yates' manipulations. After those manipulations, he observed damage to the outer jacket and the inner conductor; he acknowledged that the cable did not meet the requirements of the standard. Tr. 208, 217-18, 222, R. Ex. D. General Maintenance Foreman Travis Stout agreed that the photograph in the record depicted damage to the outer jacket and perhaps showed the inner conductor. Tr. 238; Sec'y Ex. 13.

On review, Consol argues that it should not be held liable for the violation, because the inspector engaged in a series of manipulations on the cable, such as hitting it, picking at it with a screwdriver, and vigorously manipulating it. The Judge determined that Yates' manipulations embellished damage to the cable but did not create damage.[4] 41 FMSHRC 818-19. The record is sufficient to sustain the Judge's finding of cuts in the cable so that it was not fully protected when Yates conducted his initial hand-over-hand inspection. Accordingly, we affirm the finding of a violation.

B. Substantial Evidence Supports the Judge's Negligence Determination.

The Judge found that the operator knew or should have known of the violative condition and affirmed the citation's moderate negligence designation. 41 FMSHRC at 823. We conclude that the record supports a determination of moderate negligence.

As noted in the Judge's decision, Yates had concerns that the cable could be damaged from coal passing beneath it. 41 FMSHRC at 815-17. That caused him to take it down for a closer look and conduct a hand-over-hand inspection, which ultimately disclosed damage on the

[3] When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[4] Commissioner Althen notes that there is an important difference between creating a violation and embellishing a violation thereby worsening the condition of a cited area making it amenable to an S&S finding. Based upon Yates' established embellishments of the violation and the absence of evidence of the condition of a cut before the embellishment, Commissioner Althen finds substantial evidence does not support the Judge's S&S finding based upon the condition of the cable after Yates picked at, hit, and twisted the cable.

outer covering. We do not find any basis to reverse the Judge's determination that Consol's failure to detect the problem and take corrective action before Yates' identification constitutes moderate negligence.

C. Substantial Evidence Does Not Support the Judge's Significant and Substantial Designation.

A violation is deemed to be S&S if, based on the particular facts surrounding the violation, there is a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., National Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981). The Commission has refined the standard into four steps:

> In order to establish that a violation of a mandatory safety standard is significant and substantial, the Secretary of Labor under *National Gypsum* must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020), citing *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-38 (Aug. 2016).

The hazard from a violation of section 75.517 is that it may cause an electrical shock to a miner resulting from contact with an inadequately insulated or not fully protected power cable.[5] Thus, the *Newtown Energy* Step 2 issue is whether the violation was reasonably likely to expose a miner to an electrical current. The allegation of an S&S violation fails at this step.

Yates identified *one reason* for issuing the citation as S&S regarding the cable affixed to the mine roof. He opined that the cable might get hit or otherwise dislodged from the insulated hooks, causing it to fall to the mine floor. He believed miners might then grasp the cable and attempt to rehang it above their heads. The relevant testimony by Yates is:

> Q. And why did you evaluate it [hazard of touching]as reasonably likely?
>
> A. We take several things into consideration there. Exposure is definitely one big part of it, and it's reasonably likely that if a miner -- when a miner grabs that cable to hang it back up, *after becoming knocked down* with the shuttle car or a ram car, or scoop, that where it was at in that location, it's

[5] Colby testified that Yates said he found a "couple bumps" when doing the hand-over-hand inspection. Tr. 204. A finding of mere "bumps" would not support the existence of a hazard. However, from the testimony, cuts did exist. As set forth above, we affirm the Judge's decision that the cuts constituted a violation.

reasonably likely that they would grab it in that area and become seriously injured or fatal.

Tr. 150 (emphasis added).

The Judge accepted this basis for finding a likelihood that a miner would come into contact with the damaged portion of the cable. 41 FMSHRC at 820. The difficulty with that reasoning is that there is no evidence that the cable could be easily knocked to the floor. To the contrary, the evidence demonstrates that it would be very unlikely for the cable to be dislodged unintentionally.

Yates stated that he believed the cable could be knocked down because he had seen cables knocked off J-hooks before. Tr. 150. However, he also testified that it was "pretty hard" to take down *this particular cable*, requiring the efforts of both Yates and Colby. Tr. 174-75.

More importantly, Colby testified that the cable at issue was held in place by cable hooks with locking mechanisms, *not* open J-hooks.[6] Tr. 226-30. Yates' own photographs of the subject cable in a nearby area support the locked attachment.[7] Sec'y Ex. 13 (third and fourth photographs). These photographs show a cable locked in place with a closed loop, rather than an open J-hook. The third photograph provides a useful comparison between the two types of hooks discussed: a circled J-hook can be found at the edge of the picture, while the photographed cable is hung on a nearby locked hook. This locked hook is completely closed and attached to the rib of the entry. Colby testified that for a cable secured in this fashion to fall to the floor, "you would have to destroy [the] hooks." Tr. 226-27. The Secretary presented no evidence, through Yates' testimony or otherwise, to suggest any likelihood of the cable being dislodged from locked cable hooks or of such hooks being destroyed.

We review a Judge's factual determinations under the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). A determination as to the substantiality of evidence supporting a challenged finding "must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (quoted in *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997). Here, the weight of testimony and exhibits does not show a likelihood of the cable being knocked to the floor by passing equipment, thus exposing miners to the theorized hazard of electric shock when attempting to replace the dislodged cable. Given the absence of evidence supporting Yates' theory and the weight of

[6] Colby does at one point state that the cable was hung from J-hooks (Tr. 202), however he explained that this was a misstatement (Tr. 228-30) and otherwise refers to them as cable hooks or insulated hooks. Colby notes that the cable at issue could not even fit inside a J-hook, as shown by Yates' photographs. Tr. 228-30; Sec'y Ex. 13 (third photograph).

[7] There is no testimony to suggest that the photographed portion of the cable was unusual with respect to the type of hooks used. Yates introduced these photographs in the context of discussing the cited damage. Tr. 147-48. Presumably, they would not have been introduced as evidence if they could not properly be considered relevant and comparable to the portion of the cable at issue.

evidence that detracts from it, we find that substantial evidence does not support the Judge's S&S determination under Yates' theory of the hazard.

The Judge's decision also suggests two other possible sources of exposure to the hazard. First, the Judge noted that a miner "could" reach overhead and grasp the cable. 41 FMSHRC at 821. However, there is no testimony as to why (or whether) a miner would be likely to do so. The Judge also noted that miners "might" be exposed to the hazard while handling the energized cable during feeder moves. *Id.* at 822. The testimony regarding feeder moves is extremely brief. *See* Tr. 161-62, 245. For example, the Secretary provided no information as to when the cable is energized and de-energized during this process or how miners would handle the cables, factors which affect likelihood of exposure to the shock hazard. As the Judge's own language indicates ("could" and "might"), the Secretary failed to present substantial evidence to support an S&S determination under either of these theories.

For the above reasons, substantial evidence does not support a likelihood of miners coming into contact with the cable (and thus being exposed to electric shock) under any of the theories presented above. The determination is reversed and vacated. [8]

D. The Penalty Assessment is Reduced to a Penalty of $1,000.

MSHA applied its penalty point system to the violation and assessed a penalty of $2,487. The Judge accepted the MSHA assessed penalty and imposed a penalty of $2,487. A significant portion of the penalty assessed by MSHA resulted from the gravity finding accompanying the S&S designation – a reasonable likelihood of the hazard occurring. The Judge's assessment, likewise, turned substantially on the gravity designation. 41 FMSHRC at 823.

The Commission considers six factors in assessing monetary penalties, namely: the operator's history of previous violations, the appropriateness of the penalty to the size of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and efforts toward good faith compliance. 30 U.S.C. § 820(i). Our decision vacates the S&S designation and, effectively, finds it unlikely that the hazard upon which the inspector based the S&S designation could occur. Thus, the gravity of the violation is reduced. The Judge's findings concerning the other factors remain unchanged. *See* 41 FMSHRC at 823-24.

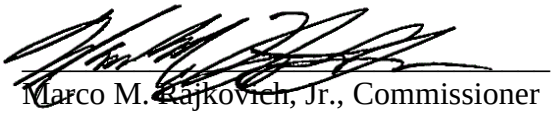
Given the relatively small penalty assessed by the Judge and in the interest of judicial economy, we deem it appropriate to conserve resources and complete this proceeding at this juncture by setting a penalty directly. *See, e.g.*, *Spartan Mining Co.*, 30 FMSHRC 699, 724 (Aug. 2008); *Capitol Cement Corp.*, 21 FMSHRC 883, 896 (Aug. 1999). Taking our findings of moderate negligence and the unlikeliness of exposure to electrical current into account, we assess a final penalty of $1,000.

[8] Because we find the absence of a likelihood of the occurrence of the hazard, we do not need to discuss the operator's argument regarding the issue of redundant safety measures.

IV.

Conclusion

Based upon the preceding analyses, the violation and finding of moderate negligence is affirmed. The significant and substantial designation is reversed and vacated. Finally, the Commission assesses a penalty of $1,000.



Marco M. Rajkovich, Jr., Commissioner

Commissioner Althen, concurring,

I join my colleague, Commissioner Rajkovich without qualification to form a majority decision that substantial evidence does not support a finding that the cable was reasonably likely to result in a reasonably serious injury to a miner. I also find that a penalty assessment of $1,000 against Consol Pennsylvania Coal Company, LLC is appropriate. Commissioner Rajkovich clearly explains the error regarding the absence of any reasonable likelihood of a miner touching a live wire. I write separately only to explain an additional rationale as to why the Judge erred in finding the violation to be significant and substantial ("S&S").

Commissioner Rajkovich explains the undisputed elements of a significant and substantial violation. Thus, there is no need to recite those elements here. Indeed, the S&S standard is not an issue in this case.[1] Moreover, we need not discuss the established S&S standard because this case should turn on the Inspector's mishandling of the cable before examining the interior of the cable.

I would reverse the S&S finding because the Judge accepted deeply flawed and mishandled evidence as a basis for his decision. The Judge found the actions by Bryan Yates, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), wrongful and that such actions embellished the damage. Nonetheless, he discounted the inspector's action. That was error. Having found the inspector's actions improper and affecting the evidence and his testimony overstated, the Judge should have dismissed the S&S claim. The inspector's interactions with the cable before finding a tiny area of exposed wire in the interior irremediably tainted the evidence. Accordingly, I would find the inspector's inspection technique in this specific case prevents a finding of an S&S violation.[2]

[1] Chair Traynor's errant discourse on the S&S test is odd. The proper standard for an S&S violation is not at issue in this case. Commissioner Rajkovich identifies the standard that has been applied for forty years. *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The core issue in the accepted standard is whether the Secretary preponderates in proving a reasonable likelihood of a reasonably serious injury due to a hazard caused by the violation. The Secretary does not challenge that standard here. My additional objection does not involve the S&S standard but rather turns on the inspector's inability to provide any meaningful testimony regarding the status of interior of the cable prior to his admitted mishandling of the cable. That failure vitiates the testimony of the condition of the inner area of the cable. No one can know whether any insulation was broken before the inspector's picking at the cut, hitting it, and severely twisting it.

[2] I agree with the finding of a violation because there apparently was a small cut in the cable that had not been addressed. The Commission has not opined and most likely would find it impossible to opine on a specific degree of "damage" necessary for a cable to fall within the scope of 30 C.F.R. § 75.517. Because of the environment in underground mining and the thickness of cable jackets, it is certain that cables incur many nicks, scratches, bruises, or bumps that do not compromise the adequacy of insulation or protection. This case does not provide sufficient evidence in depth, specificity, or expertise to permit a definitive ruling on the quantum

The Secretary must prove the S&S elements of a violation by a preponderance of the evidence. Here, that determination depends upon whether substantial evidence supports a finding that the cable was S&S when found by Yates—that is before he admittedly inflicted additional damage to the cable.[3]

Yates did not identify any meaningful damage to the cable before he took several actions that, as the Judge found, certainly affected the condition of the cable. The evidence is that he first saw a small slit in the cable. Testimony regarding Yates' actions in probing, striking, and twisting the cable undercut a finding of substantial evidence because the testimony compels a finding that Yates' actions likely, or at least may well have, created the hazard of exposure to a live wire.

The Judge essentially found the inspector altered ("embellished") the adverse condition of the cable. 41 FMSHRC 803, 818 (Dec. 2019) (ALJ). In turn, Yates based the S&S designation upon observations after those embellishments.

Yates testified his hand-over-hand examination disclosed two bumps on the surface of the jacket. He found or at least testified to nothing more at that point. Daniel Colby, Consol's safety representative, testified that he did not see any damage at that point. Thus, the inspector did not testify to the exposure of any inner level of the cable beyond a surface bump. Colby's notes refer to a "nick" in the cable. Tr. 216. Certainly, a "nick" does not portend access to a live wire underneath the thick jacket.

Such testimony does not constitute substantial evidence that there was damage to the inside of the cable, creating a hazard that a miner might contact a live wire at that point. Yates did not say he saw any damage to the interior of the cable while it was hanging or even after his hand-over-hand inspection. Tr. 171. Had he not taken the destructive actions but simply found a violation and required standard taping, there would not be any S&S question. However, Yates did not stop with his visual and manual cable inspection. He took three distinct actions intentionally designed to "open" the cable.

First, Yates used a screwdriver assertively to affect the bump on the cable. Colby testified that he saw Yates use the screwdriver to "dig" into the bump. Tr. 225. He characterized Yates' conduct with the screwdriver to "pry" at the bump. *Id.* Yates initially denied such action. Later, however, he testified that he did carry a screwdriver and did use it most of the time. When

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of damage that must exist for the insulation to be inadequate on a cable or for the cable to be not fully protected for purposes of section 75.517. I accept Commissioner Rajkovich's reasoning on this issue.

[3] I do not suggest that the inspector intended to create an S&S violation. Indisputably, however, his actions were intended to affect the condition of the cable. It is this effect of the picking, hitting, and twisting upon the inside of the cable that is important.

questioned whether he used it in this instance, Yates replied, "I don't remember." Tr. 165.[4] Thus, there is positive testimony that Yates dug into the cable jacket with a screwdriver, and Yates testified to a lack of memory but that he does normally use a screwdriver.[5]

Second, Yates affirmatively testified that he struck the bump with his screwdriver or walking stick. Tr. 165. Certainly, the purpose was to affect the area of the bump. Yates testified he was "cleaning" it. However, obviously, hitting a bump or cut on a cable jacket with a stick will tend to crack it or widen any existing crack and cause additional damage.

Finally, Yates twisted the cable and applied a strong torque to the bump area. Yates initially denied twisting the cable; however, during cross-examination, he recanted and conceded he twisted the cable so he could open it. Tr. 173.

Colby testified that he had never seen an inspector engage in such conduct in his time as a safety representative. Colby's testimony was:

> Q. When you say you have never seen an inspector do that before, what do you mean by that?
> A. I never saw one that actually rotated the cable and started really getting into it and torquing it to try to inspect it. I never saw that.

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[4] Yates testified:

> [M]ost of the time, . . . I peck it with a small screwdriver. So, when the cable is damaged, I can move the outer jacket out to see if the inner conductors are exposed. That's why they keep going to my screwdriver because I do pack a small screwdriver.

Tr. 165.

[5] Chair Traynor fails to appreciate the difference between credibility issues and facts on the record. Therefore, he asserts the type of hook from which the cable was hanging is a matter for credibility even though indisputable evidence in the record shows it was hanging from a locked hook attached to the sidewall. Sec'y Ex. 13 (third and fourth photographs); Tr. 148-49. He asserts that the majority does not recognize the cable was hanging over an entry. Of course, he is incorrect. Commissioner Rajkovich's opinion explains the position of the cable and that the inspector and Colby had to struggle with it above their heads (even using a walking stick) to unhook it from the locked hooks. Further, evidence showed that the cable was lengthy. The Secretary did not introduce any evidence to demonstrate any likelihood of a miner touching a cable in a place far removed from the feeder in moving the cable. We do not even know whether the nick was on the top, bottom, or side of the cable. The evidence establishes that the cable could not be knocked from the locked, secured hooks without a virtually catastrophic contact. The Secretary did not provide any evidence that a miner would have any reason, advertently or inadvertently, to grasp the cable at any location even in the vicinity of where the inspector found the nick during a move of the cable to meet the test of S&S.

Q. What about with the screwdriver and digging into the hole, did you ever see that?
A. Never.

Tr. 205.

The Judge did not discredit Colby's testimony. Rather, he found Yates manipulative actions "unorthodox or embellishing." 41 FMSHRC at 819. Strangely, the Judge faulted Consol for not providing testimony about proper inspection techniques. *Id*. Thus, the Judge affirmed an S&S designation even while acknowledging the Inspector embellished or exacerbated the condition to an unknown extent through prying, striking, and physically manipulating the cable and requiring the operator to explain proper investigation techniques. He placed a duty on the operator to explain the obvious: picking at, hitting, and twisting a cable is unsuitable and may cause further damage.[6]

Finally, Yates' intended for his photographs to magnify the image of damage. A small crack is magnified many times over and, even then, does not show any metal. Whatever damage is discernible to an inner cable clearly may have resulted from opening a slit and then vigorously twisting the cable.[7]

In summary, there is no evidence of any hazard created by the cable condition before Yates' actions. The Judge made no effort to determine the extent to which Yates' activities, which the Judge found exacerbating or embellishing, affected the condition of the cable. Thus,

[6] In faulting Consol for not having provided evidence of proper investigation techniques the Judge stated, "Respondent presented little or no evidence as to what should be the proper or preferred techniques for examining and photographing damaged cables." 41 FMSHRC at 819. This analysis turns the Secretary's burden of proof on its head. It is MSHA's obligation to act in a demonstrably proper way. It is not incumbent upon a respondent to "prove" that proper inspection techniques do not include prying into a cable with a screwdriver, striking it with a walking stick or screwdriver, and vigorously twisting it thereby causing or opening any cut that may exist or may have been created by a probing screwdriver. One need not be an expert to understand that an intrusion into or initial widening of a slit would make the cable amenable to further widening by additional interaction with the cable such as a strong twist. Colby did not see any damage until after the manipulations. If the operator's and/or the miners' safety representatives are present, these representatives must be given an opportunity to see the alleged violation before an MSHA Inspector takes potentially damaging and prejudicial actions.

[7] The Secretary introduced two pictures Inspector Yates took of the cable after his manipulations. In taking the pictures, Yates he used a zoom setting knowing that it could distort the image to make the cut appear larger. Tr. 186. Pictures magnifying a scene naturally may have a dramatic impact upon the perception of a viewer. Magnification may cause a small cut to appear as a gash with the predictable psychological results. The extent of magnification in Yates' pictures may be seen by comparing the opening to a small "0" on adjacent black tape. As a result, the photographs depict the cut as significantly lengthier and wider than the reality.

the record lacks substantial evidence regarding the hazard of an exposed live wire existing before Yates' manipulations that had an indeterminate effect upon the cable.

I must and do tread carefully when a violation alleges the danger of an electrical shock. However, in this case, we have: (1) no evidence of the condition of the cable before Yates' intervention, (2) multiple severe manipulations of the cable, (3) the use of locked, insulated cable hooks virtually immune from accidental dislodgement, and (4) the absence of evidence of actions during a move affecting the condition of the cable. Substantial evidence does not support a likelihood that the condition of the cable before the Inspector's mishandling caused any hazard of touching a live wire or an adverse effect upon any miner.

William I. Althen

William I. Althen, Commissioner

Chair Traynor concurring in result, in part, and dissenting,

I concur, in result, with the majority's decision to affirm the Judge's finding of a violation and a moderate level of negligence. I cannot, however, join their erroneous decision to vacate the Judge's decision that the violation below was "significant and substantial" ("S&S") – that is, of a nature that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. 30 U.S.C. § 814(d)(1). Unfortunately, my dissent will illustrate that my fellow Commissioners have taken an approach in this case that departs from basic norms of honest and principled appellate review.

The Judge concluded that the Secretary demonstrated it was reasonably likely that a miner would contact an inadequately insulated cable that provided power to a trammable coal feeder. 41 FMSHRC 803, 820 (Dec. 2019) (ALJ). He relied upon evidence that, *considered cumulatively*, demonstrates that the feeder's trailing cable was accessible and would be contacted by miners during continued normal mining operations. Specifically, the Judge relied on: (1) the position of the cable at the time of inspection – hanging off a hook on the ceiling and into the entry, (2) the potential for the cable to be knocked to the floor by a passing vehicle, (3) the frequency with which miners traveled through the entry, and (3) undisputed evidence of the miners' routine handling of the cable during moves of the trammable feeder. *Id*. at 820-822. Notably, the record below included the uncontroverted testimony of a witness from each party – the Secretary of Labor's inspector and the respondent company's master mechanic – that miners regularly handled the damaged cable while it carried 480 volts of electricity necessary to move the large machine.

The majority badly mischaracterizes the Judge's S&S decision by focusing exclusively on the likelihood of miners contacting the damaged cable after it is knocked from the hook by a passing vehicle. Slip op. at 4. But **undisputed record evidence offered by both parties** establishes that miners handled the energized cable regularly during powered moves of the feeder. To reverse the S&S determination, the majority ignores this critical evidence in favor of a *de novo* record, built by discarding credibility determinations without discussion.

In Part I of my dissent, I identify the majority's errors with more specificity. In Part II, I demonstrate that the Judge's S&S decision is supported by substantial evidence in the record.[1]

PART I

A. The Majority Errs in Ignoring the Judge's Credibility Determinations

Inspector Bryan Yates was joined by Consol safety representative Daniel Colby during the inspection of the entry. Each testified as a witness at the hearing and although portions of their recollections were consistent, in certain instances their testimony materially differed. The Judge ultimately resolved the conflicts by crediting the testimony of Yates over Colby. 41 FMSHRC at 819 (finding "the inspector's testimony to be credible and reliable."); *id*. at 820

[1] Included within Part II are my thoughts upon the growing confusion in the Commission's S&S caselaw.

(rejecting "many of the Respondent's suggested finding of fact in favor of those argued by the Secretary.").[2] The majority's fact section does not acknowledge the Judge's credibility determination. Accordingly, they err. *See Consol Pennsylvania Coal Co.*, 43 FMSHRC 145, 151 (Apr. 2021) (citation omitted) (holding that a Judge's credibility determination is entitled to great weight and may not be overturned lightly.).

Instead, my colleagues inappropriately recite the record evidence *de novo*. *See Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (finding that it was error for the Commission to "substitute a competing view of the facts for the view the ALJ reasonably reached"); *see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998) ("We see no basis for overturning the judge's crediting of the first-hand observations of [the inspector] over the testimony of Harlan's safety director.").

It is well established that the Commission reviews a Judge's credibility determinations under an abuse of discretion standard. *See Jim Walter Res., Inc.*, 37 FMSHRC 1868, 1871 (Sept. 2015). There must be "compelling reasons" to take the "extraordinary step" of reversing a Judge's credibility determination. *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (quoting *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (Nov. 1986)) (internal quotations omitted).

In proceedings under the Mine Act, the Judge is the fact finder, empowered to make credibility determinations to resolve conflicting evidence. *See, e.g., Jim Walter Res., Inc.*, 37 FMSHRC at 1871; *see also* Commission Procedural Rule 69(a), 29 C.F.R. § 2700.69(a). We have consistently held that:

> [The Commission is] not a supervening fact-finding panel and may not reverse a Judge's decision merely because evidence in the record could have supported a contrary outcome. [ ] If the Judge's decision is one a reasonable fact finder could reach based upon the evidence, we must accept the Judge's determination even though, were we the fact finder, we might have reached a different outcome.

Consolidation Coal Co., 39 FMSHRC 1737, 1743 (Sept. 2017).

The majority irresponsibly fails to offer even the barest explanation as to why they do not apply these well-settled standards requiring our deference to our Judges' resolution of conflicting evidence. In their pursuit of a preferred outcome, they have abandoned their duty to deal squarely with the record. Below, I discuss two key facts the Judge found to support his S&S determination that were improperly disregarded by the majority. These two examples will

[2] Despite the Judge's decision to credit the testimony of Yates over Colby in instances where their testimonies contradict, Commissioner Althen makes the plainly false statement that "the Judge did not discredit Colby's testimony." Slip op. at 13. And even though I note this for his attention in this dissent, he insists on maintaining this assertion. Commissioners can have a wide variety of differing views on questions of law and policy, but quality of the Commission's decisions and the integrity of the Commission as an institution are diminished by deliberately dishonest statements.

illustrate how the majority has authored a statement of facts that, remarkably: (1) omits material findings of fact and (2) cites testimony that the Judge rejected without even passing reference to the standards that direct them to defer to our Judges' credibility determinations.

1. The cable was suspended from a J-hook.

The Judge found that the cable was suspended from the ceiling of the entry on a J-hook. 41 FMSHRC at 816 (citing Tr. 150, 153). The Judge specifically relied upon this factual finding when he determined that a passing ram car loaded high with coal might knock the cable to the floor. *Id*. at 821 (citing Tr. 152, 221 and Summary of Testimony *supra*.)

The majority does not mention that the Judge found that the cable hung from a J-hook. Instead, they cite conflicting testimony regarding the subject hook, including Colby's initial testimony that the cable was hanging from a J-hook and his later testimony that it was hanging from "cable hooks" or "locked hooks."[3] Slip op. at 2. My colleagues state that:

> Colby explained that, due to the way the cable was hung on the locked hooks, the only way for the cable to fall to the floor was to destroy the insulated and locked hooks. Thus, according to Colby, the cable could not simply fall from the roof but could be dislodged only if some event destroyed the entire closed and attached hook.

Slip op. at 2.[4]

Of course, the Judge resolved the conflict in the evidence in favor of the Secretary; the Judge credited Yates' consistent testimony and discredited Colby's inconsistent testimony. The Judge's resolution of the conflict in favor of Yates was material because it informed his subsequent conclusion that the cable could be knocked loose from the *J-hook* on the ceiling by a passing vehicle.

The majority errs in citing and relying upon Colby's inconsistent testimony that the Judge discredited.

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[3] Colby testified that the cable was "hung along what we call insulated hooks, or J-hooks" (Tr. 202), before later testifying that his reference to "insulated hooks" in his notes (R. Ex. D) actually referred to a locking hook. Tr. 229-30.

[4] My colleagues rely on Colby's testimony regarding a photograph that was taken in a *different* area of the mine, noting that Colby identified that in the photograph of this *different place* the cable hung from a locked hook. Slip op. at 2 (citing Sec'y Ex. 13 (third and fourth photographs)). As Commissioner Rajkovich acknowledges "Yates did not take any photographs of the cable hanging on the hooks in the cited location. However, he did take two pictures of the cable hanging in a *different area* . . . ." Slip op. at 2 (emphasis added). Photographs of **different** hooks in a **different** location do not contradict the Judge's decision to credit Inspector Yates' testimony regarding **the cited location** in the entry.

2. The cable was hanging off its hooks, down into the entry and in the path of miners and their vehicles.

The Judge found that at the time of inspection the cable was hanging into the entry, within the grasp of miners working or traveling in the area. 41 FMSRHC at 820-21; Tr. 160, 188. The Judge credited Yates' testimony that the cable was easy to reach, hanging approximately six feet or less from the ground.[5]

Instead, the majority states that "Yates and Colby varied somewhat in their estimate in the height of the entry. However, they agreed [the cables] removal required a team effort in which they reached about their heads."[6] Slip op. at 3. "Colby explained that the purpose of the height of the cable was to allow materials to pass under the cable freely." *Id*. at 3.

Of course, it is undisputed that the hook attached to the ceiling was above their heads. Instead, the height of the hanging *cable* was in dispute. The Judge resolved the dispute. He credited Yates, finding that the cable was in the path of miners. My colleagues refuse to acknowledge this credibility determination.

Presenting the evidentiary record without the context of the Judge's credibility determinations is an underhanded way to silently overturn those determinations. My colleagues are attempting to avoid providing the deference commonly afforded to a Judge's factual findings in order to reach their preferred result. *See Farmer v. Island Creek Coal Co*., 14 FMSHRC 1537, 1541 (Sept. 1992) (A Judge's decision to credit the testimony of a witness is entitled to great weight and may not be overturned lightly.).

---

[5] Specifically, Yates testified "in the area where [the cable] was hanging down, I could easily reach up and grab it." Tr. 160. Yates also testified:

> Q: With the cable hanging on the J-hooks, could you easily reach the cable?
> A: Where it was down in the entry, yes.
> . . .
> Q: The area of the cable that you cited, you could physically reach that cable?
> A: Yes.
> *Q: So it's not a matter of being able to take the cable down or put it back up, but you could reach the cable and touch it?*
> *A: Yes.*
>
> Tr. 188 (emphasis added).

[6] Colby assisted Yates by retrieving the cable because inspectors are not permitted to conduct "work" in a mine. Tr. 188-89.

B. The Majority Further Errs in Dismissing Uncontroverted Testimony from Both Parties' Witnesses as Insufficient.

In other instances, in their analysis reversing the Judge, the majority at time dismisses the record evidence as somehow insufficient. Specifically, the majority dismisses the parties' witnesses' agreement that the cable would be contacted by miners during the move of the feeder as well as evidence that a miner would move the cable from a vehicle's path.

1. The trailing cable is energized and handled by miners during feeder moves.

Both Inspector Yates and Consol's Master Mechanic Travis Stout confirmed that the cable is energized and handled by miners during a move. Tr. 161, 244-45. The cable is hung upon hooks in the entry between moves. It is taken down again for the next move. It remains powered during normal operation of the feeder. The Judge concluded that these moves contributed to the likelihood of electrocution.

However, the majority finds that this conclusion lacks the support of substantial evidence because they erroneously conclude the Secretary provided no information as to when the cable is energized or de-energized. The majority is incorrect; **both** Inspector Yates and the operator's witness master mechanic Travis Stout confirmed that the cable is energized and handled by miners regularly ***during*** a powered move.

> Q. So when they go to do a power move and move this feeder, will men be handling this cable?
>
> [Yates] They can, yes.
>
> Q. Would they be handling this cable with power on?
>
> [Yates] You would have to, yes.

Tr. 161. No witness for the operator testified to the contrary. Stout confirmed Inspector Yates' testimony:

> Q. What is the feeder cable -- how does the feeder cable exist in an underground coal mine?
>
> ...
>
> [Scott] Feeder cable, it's highly insulated hangers all the way to the machine. Any slack would be put on top of the machine, but the only time it's really handled is during a power move, which in this case, it would probably be once a week or once every two weeks.
>
> Q. And what voltage is this cable?
>
> [Scott] It's 480 volts.

Tr. 245. Of course, the fact that no testimony was elicited by the Secretary's counsel as to when, if ever, the cable is de-energized does not detract from the parties' witnesses' agreement that the cable *is powered and handled during moves*. What more than consistent testimony from both parties would the Commissioners in the majority need the Secretary to produce to satisfy their apparently arbitrary application of the substantial evidence rule?

The majority also states that the Secretary provided no information as to how miners would handle the cable. The majority is again incorrect. Yates testified that miners grasp the feeder cable as it trails behind the feeder. Tr. 161-62. Colby conceded that miners do not wear electrocution-protective gloves. Tr. 209-210. Yates also testified that miners are typically "hard[] on" cables during machine moves and will "bow" the trailing cable as it moves. Tr. 162. The cable is 480 volts and the surrounding area is wet. Tr. 151-53. Electricity can track through a pinhole. Tr. 191. Accordingly, there is ample evidence as to how miners handle the cable during moves.

Finally, the majority states that the Judge's use of the term "might" in finding that the move was an occasion when the miners "*might* be exposed to electrocution" indicates that the Judge was conveying that the probability of electrocution was below the threshold of "reasonable likelihood." Slip op. at 8 (emphasis added). The majority cites no precedent in support of this novel theory. Rather, their overly semantic focus is inconsistent with the Commission's guidance in *Newtown Energy, Inc*., 38 FMSHRC 2033, 2039 (Aug. 2016) ("We recognize that 'reasonable likelihood' is not an exact standard. Obviously, a Judge cannot calculate the degree of risk of the occurrence of the hazard in precise percentage terms."). Here, obviously, the Judge's decision to cite the feeder move as one of the four factors in support of his Step 2 conclusion indicates that the Judge believed that the evidence was sufficient.

2. The low height of the cable increased the potential for contact.

As previously stated, the Judge found that the cable was hanging low and into the entry at the time of inspection. Yates observed the energized feeder cable hanging down into the entry, six feet from the floor; he could easily reach up and touch it. Tr. 150-52, 160, 188.

The majority states that the Judge's conclusion that it was likely that miners would come into contact with the low-hanging cable is not supported by substantial evidence. Slip op. at 7-8. More specifically, the majority states that there is no testimony regarding why a miner would touch the cable when it was hanging down into the entry. Slip op. at 7.

Again, the majority mischaracterizes the record. Inspector Yates testified that cars were loaded high with coal and he was concerned that the coal was coming into contact with the cable. Tr. 152. Miners travel the entry in vehicles. Inspector Yates expected that a miner would move the cable to prevent it from becoming further damaged. Tr. 153-54.

C. My Colleagues Err by Ignoring the Mine Act's Penalty Criteria.

Section 110(i) of the Mine Act provides that:

> The Commission shall have authority to assess all civil penalties provided in this Act. 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

30 U.S.C. § 820(i). Under our case law and procedural rules, if the Commission reverses a Judge's decision affirming a S&S designation, the Commission should remand the case to the Judge to reassess a new civil penalty. *See, e.g.*, *Peabody Midwest Mining*, 42 FMSHRC 379, 389 (June 2020) ("vacat[ing] the S&S designation for the violation . . . [and] remand[ing] the case so that the Judge may reassess the penalty . . . ."); 29 C.F.R. § 2700.30(a) ("In assessing a penalty *the Judge* shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) of the Act, 30 U.S.C. 820(i), and incorporate such determination in a written decision. The decision shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid.") (emphasis added).

My colleagues ignore section 110(i) of the Mine Act, Commission case law and our Procedural Rules to independently assesses a penalty of $1,000 without fully considering the statutory penalty criteria and in disregard for the appropriate division of roles between us – termed political appointees on the Commission tasked with reviewing the Judge's application of the section 110(i) factors for errors of fact or law – and our long-tenured Judges tasked with applying the factors to *assess* a penalty. Unfortunately, my colleagues do not respect this boundary between the trial and appellate function, even though they did acknowledge its existence as recently as our decision in *Solar Sources Mining, LLC*, 43 FMSHRC 367, 372 (Aug. 2021).

In *Solar Sources*, I noted in dissent that my fellow Commissioners took the unusual step of re-assessing the penalty themselves in their majority decision rather than remanding to the Judge with instructions for him to reassess the penalty. My colleagues, in response, acknowledged that the "Commission typically leaves such determinations in the hands of our Judges" but explained the unique circumstances of that case compelled their departure from ordinary practice. *Id*. Not persuaded, I warned that their decision threatened to "usurp the discretionary role of our Judges in the assessment process, arrogating to themselves the power to set a penalty." *Id*. at 381. Here, they attempt to do it again – usurping the Judge's penalty setting role – this time, without even a fig leaf claim of unique circumstances. If they are going to transgress long-standing boundaries between our trial and appellate functions, they should at least do so squarely, transparently and with reasoned explanation. *See NBCUniversal Media,*

LLC v. N.L.R.B., 815 F.3d 821, 823 (D.C. Cir. 2016) ("When an agency's decision lacks adequate justification because . . . it fails to offer a coherent explanation of agency precedent, the judgment under review is wanting for lack of reasoned decision-making.")

PART II

A. The Commission's "Significant and Substantial" Standard

A violation is S&S (30 U.S.C. § 814(b)), if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation 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). In *Mathies Coal Co*., 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *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).

The Commission's *Mathies* standard had been used regularly in both Commission and federal court proceedings in its original form until it was altered by the Commission in *Newtown*, 38 FMSHRC at 2037-38.

In *Newtown*, the Commission added an additional burden to Step 2, requiring that instead of merely proving that the violation "contributed" to a hazard, the Secretary must prove a "reasonable likelihood of the occurrence of the hazard." *Id*. The Commission's *Newtown* decision was a reaction to the Fourth Circuit's decision in *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F3d 148, 162 (4th Cir. 2016), in which the court stated that "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." Accordingly, in *Newtown* the Commission raised the Secretary's Step 2 burden of proof.

In *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020)[7] a different Commission majority again changed the S&S standard. According to *Peabody* under Step 2, the Secretary must now prove that "the violation was reasonably likely *to cause* the occurrence" of the hazard. Compared to the original requirement in *Mathies* that the Secretary must merely

[7] This decision is not yet final, as the operator's appeal of the Judge's remand decision is currently pending before the Commission.

demonstrate that the violation "contributed" to the hazard, the new *Peabody* standard represents a major change in the law. The Secretary now faces a much higher burden of proof to demonstrate that a violation is S&S.[8]

Additionally, in *Peabody*, the Commission for the first time added the term "cause" to step 3 of the test as well. The Commission's shifting interpretations of the term "significant and substantial" in section 104(d)(1) of the Mine Act demonstrates an institutional confusion at the Commission. Notably, my colleagues write separately on S&S, without a consensus opinion. The institutional confusion is the result of statutory ambiguity. The Secretary of Labor would be well-served to aid the Commission in resolving this confusion by proffering an authoritative interpretation of section 104(d)(1) of the Mine Act.[9]

B. The Judge's Decision to Affirm the "Significant and Substantial" Designation is Supported by Substantial Evidence in the Record.[10]

When reviewing a Judge's decision, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The "substantial evidence" standard is highly deferential. *See Cumberland Coal Res.*, 717 F.3d 1020, 1028 (D.C. Cir. 2013) ("we may not reject reasonable findings and conclusions, even if we would have weighed the evidence differently.") (citing *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998)); *Consol Pennsylvania*, 43 FMSHRC at 155 (citations omitted). Under the substantial evidence test, the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Sec'y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996).

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[8] Turning back to the case at hand, the majority appears to be confused as to how to analyze the concept of a "hazard" in Step 2 as compared to the likelihood of injury in Step 3. For example, in their analysis section, the majority conflates Step 2 and Step 3 and finds that the Secretary failed to fulfill his Step 2 burden because a miner is not reasonably likely to be injured. Slip op. at 6 ("The hazard from a violation of section 75.517 is that it may cause an electrical shock to a miner resulting from contact with an inadequately insulated or not fully protected power cable. Thus, the *Newtown Energy* Step 2 issue is whether the violation was reasonably likely to expose a miner to an electrical current).

[9] Of course, among the options available to the Secretary is to simply ask the Commission to defer to an interpretation of section 104(d)(1) which resembles the original *Mathies* test.

[10] The substantial evidence analysis is at times redundant of the discussion of the errors within my colleagues' joint fact section, but I present it again in the context of a full affirmative case in support of the Judge's decision.

The Judge found that the Secretary demonstrated it was reasonably likely that a miner would contact an inadequately insulated power conductor. 41 FMSHRC at 820-21 (undertaking a "step 2" analysis). The cable was accessible to miners because: (1) it was hanging off the hooks into the entry, (2) it could be knocked to the floor, (3) it is handled by miners during the feeder move and (4) because the area is frequently traveled.[11] 41 FMSHRC at 821-22. He also concluded that the occurrence of an electrical shock from the feeder cable was reasonably likely to result in a serious or fatal injury. *Id*. at 822 (undertaking a "step 3 & 4" analysis). The Judge's S&S findings and conclusions are supported by the record, eminently reasonable, and thus must be affirmed by the Commission. *Keystone Coal,* 151 F.3d at 1104 (The "sensibly deferential standard of review does not allow us to reverse reasonable findings and conclusions, even if we would have weighed the evidence differently.").

As previously stated, Yates observed the energized feeder cable hanging down into the entry, six feet from the floor; he could easily reach up and touch it.[12] Tr. 150-52; 160, 188. Yates believed that the cable had been hit by a high load of coal, which is regularly hauled through the entry. Tr. 143, 152, 172, 177. Miners frequently travel the entry on foot and in vehicles. Tr. 152-157. Yates was concerned that the low hanging cable would be knocked off the J-hooks from which it hung and a miner would attempt to rehang it. Tr. 150-151, 188. There were two cuts on the cable's outer jacket, one of which was large and deep enough to damage the inner conductor.

The trailing cable for the trammable feeder was routinely taken down from the J-hooks and handled by miners during equipment moves. Miners grasp the feeder cable as it trails behind the feeder. Tr. 161. The cable is 480 volts and the surrounding area is wet. Tr. 151-53, 161. Yates testified that electricity can track through a pinhole.[13] Tr. 191.

Citing Yates' testimony, the Judge found that during continued normal mining operations "coal loaded on top of ram cars could contact the hanging energized cable and knock it to the floor." 41 FMSHRC at 821; Tr. 143, 152-53. Whether the cable was "in a hanging position or knocked to the floor, [it] was accessible to miners traveling or working in the area." 41 FMSHRC at 820; Tr. 150, 155. Furthermore, the Judge concluded that the evidence demonstrated that miners would physically handle the energized feeder cable during a powered move. 41 FMSHRC at 821-22. Importantly, the Judge found that the damage to the cable was "sufficiently extensive so as to have created the hazard of electrocution."[14] *Id*. at 822.

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[11] The Judge considered these factual findings cumulatively when concluding that it was reasonably likely that a miner would be exposed to the damaged conductor.

[12] Yates estimated that the roof in the cited area was 7 to 7.5 feet in height. Tr. 160.

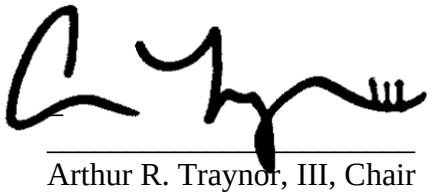
[13] Colby conceded that miners do not wear electrocution-protective gloves. Tr. 209-210.

[14] The Judge found that safety precautions instituted by the mine such as the sensitive ground fault protection are reductant safety features that are excluded from his S&S analysis. 41 FMSHRC at 821; *see also Consolidation Coal Co.*, 895 F.3d 113, 119 (D.C. Cir. 2018); *see Buck*

A Judge is well within the bounds of his discretion to credit the opinion of an MSHA inspector and affirm a S&S designation. *See Consol Pennsylvania,* 43 FMSHRC at 151 (citing *Buck Creek,* 52 F.3d at 135 ("the ALJ certainly did not abuse his discretion here in crediting the opinion of [the] Inspector.").[15]

CONCLUSION

My colleagues and I affirm the Judge's finding of a violation involving a moderate level of negligence. I would affirm the Judge's S&S determination as thoroughly supported by substantial evidence and am disappointed in the quality of the majority's decision to do otherwise.



Arthur R. Traynor, III, Chair

Creek Coal Co., Inc., v. FMSHRC, 52 F.3d 133, 136 (7th Cir. 1995); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011), *aff'd*, 717 F.3d 1020, 1029 (D.C. Cir. 2013).

[15] The refusal to apply the same legal standard in this case as was applied in *Consol Pennsylvania* is arbitrary and capricious. *See NBCUniversal Media, LLC*, 815 F.3d at 823.

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