

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

<b>SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),</b>	)	<b>CIVIL PENALTY PROCEEDING</b>
	)	
	)	<b>DOCKET NO.        PENN 2018-169</b>
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<b>Petitioner,</b>	)	<b>A.C. NO.            000459561</b>
	)	
<b>v.</b>	)	
	)	
<b>CONSOL PENNSYLVANIA COAL COMPANY LLC,</b>	)	<b>Mine ID: 36-10045</b>
	)	
<b>Respondent.</b>	)	<b>Mine: Harvey Mine</b>

**CONSOL PENNSYLVANIA COAL COMPANY, LLC’S  
PETITION FOR DISCRETIONARY REVIEW**

Consol Pennsylvania Coal Company, LLC (“Consol”), hereby petitions the Federal Mine Safety and Health Review Commission (“Commission”), pursuant to Section 113(d)(2)(A)(ii) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act”), 30 U.S.C. § 823(d)(2)(A)(ii), and 29 C.F.R. §2700.70(c), for review of a portion of Administrative Law Judge William B. Moran’s (“ALJ”) October 11, 2019 Decision and Order ("Decision"). In this regard, Consol requests that the Commission review the ALJ’s fact of violation decision as to Citation No. 9077096 (30 C.F.R. § 62.130(a)-Noise) and the ALJ’s S&S decision as to Citation Nos. 9076610, 9077085 and 9077091.

**I.        WHY THE COMMISSION SHOULD REVIEW THE ALJ’S DECISION.**

The ALJ’s Decision on Citation No. 9077096 (30 C.F.R. § 62.130(a)-Noise) raises substantial issues which are likely to be repeated in the absence of a Decision by the Commission. The first fundamental issue is the ability of the operator to have access to evidence against it and the scope of an operator’s rights under Section 103(f) of the Mine Act. The right of an operator to be afforded an opportunity to be present and to accompany an inspector and have access to

evidence collected during an inspection is a fundamental right. Moreover, evidence collected in violation of an operator's Section 103(f) rights should be excluded.

Here, MSHA denied Consol's request to view the dosimeter data with a computer program which Consol had available for this specific purpose. The Inspector acknowledged the existence of software to analyze the dosimeter but claimed that Consol did not have it readily available. However, Consol's respirable dust coordinator (who was also responsible for noise protection), Troy Helen, testified the software was available. Of course, Inspector Yates would have no knowledge of what software Consol had. (*Tr., Helen, 585-86; Yates, 317-320*).<sup>1</sup>

Mr. Helen testified:

Q Did you actually see the dosimeter readings yourself?

A No, I did not.

Q Did you ask to see the dosimeter readings?

A I asked him if I could download the dosimeter. There's a program that we use at the mine where we can download the dosimeter's information and get a minute-to-minute count of where noise levels occur, and he was surprised that actually existed, and he said he didn't have any of that information. He didn't have a program to download the dosimeter, but we have a --And this is what I do. I download the dosimeters, and I could have -- at that point, if I had his dosimeter or if I could get a download from his dosimeter, I would be able to match up the minute-by-minute time according to our tracking because I can track minute-to-minute where this individual was in the mine or where he would have been, and I could see where the noise levels would increase or wherever they would come in, and then I could isolate the noise, so I could help, you know, protect him.

Q Did you all have that program on the day the citation was issued?

A Yes. It's on a disk, and it was on my computer.

Q And when you asked to download the dosimeter, what was the response?

A "We can't. You can't. You can't download our dosimeters." I said, "Well, then maybe you could download them at your field office or wherever you have to and give me this information." Because if we were really concerned with the safety of our men, then we would want it. It would be simple. I mean, that's my responsibility as a safety individual, as a respirable dust coordinator, as a noise health, you know, safety representative. The safety of the men, that's the primary concern that I have in the mine. That's my job is to protect them.

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<sup>1</sup> All references to testimony or exhibits refer to the administrative hearing held in this matter on February 19-20, 2019 in Pittsburgh, Pennsylvania.

Q So without that specific information, what did you do next?

A I asked him -- I asked him if he could find out if he could get that information, and I left him with that, and he came back to me maybe a few days later and told me that he wasn't going to be able to get that information, and I was like, "Well, that's sad because it would be important." And so I did some studies later, you know, on this using our tracking to try to determine where the noise level came from.

After issuing the citation, MSHA then retained no records of the dosimeter data forming the basis for the citation and made no contemporaneous records of pre-sample or post-sample calibration. Inspector Yates reasoned that this was not required because no dosimeters were purportedly out of calibration by "more than one percent." (*Tr., Yates*, 303). However, here the violation was within this 1% calibration margin of error. MSHA also has a practice of wiping the dosimeter data so it is not available for review by the operator. Inspector Yates freely admitted that MSHA "wipes clean" or records over the results of the survey without retaining a copy or allowing the operator to download the results to determine the validity of the citation or the source of the noise. (*Tr., Yates*, 319) Further, MSHA does not calibrate the dosimeters in the presence of the operator or retain records of the calibration.

Despite these issues, the ALJ found no violation of Consol's Section 103(f) rights and found that these issues did not provide grounds to vacate the citation. However, the ALJ provided no basis for his determination, other than a cursory assertion that Consol's contentions were "a misapplication of walk around rights." Decision at 59. Without access to the dosimeter data which was destroyed long before the hearing, Consol was deprived of the opportunity to review the reliability of the data, the calibration and determine the source of the alleged noise. Consol was very concerned by this because this was the first noise violation Consol had received and the miner's dosimeter reading was nearly twice that of the other five miners on the crew. Even the

Inspector conceded that he had never seen any reading at this mine above the “Permissible Exposure Limit” (“PEL”). (*Tr., Yates*, 308)

Absent Commission guidance on this issue, it is likely that MSHA will continue to withhold crucial evidence related to alleged noise violations which is collected during noise surveys from operators in the future. Such a practice places operators in two unenviable and disadvantageous positions. First, operators can be subjected to noise surveys that utilize unreliable monitoring equipment. For example, how can the operator know if the dosimeter was properly calibrated? This is analogous to inspectors taking rock dust samples underground without the operator being present and the subsequent inability to contest the validity of the sample. To avoid this, MSHA has developed the practice of “cutting” the operator a portion of the 75.403 sample so the operator can have it tested independently. At the time of the citation, Consol had a computer program to analyze the dosimeter data, but the Inspector would not allow Consol access to the dosimeter and wiped it clean without affording the operator an opportunity to review it. (*Tr., Helen*, 585-86).

Second, by being denied access to the underlying dosimeter data, operators cannot determine the sources of noise exposure and put additional administrative and/or engineering controls in place to reduce miners’ exposure. This is one of the fundamental purposes of 30 C.F.R. § 62.130(a). Considering that this was Consol’s first noise violation, this data was crucial.

The surreptitious manner in which MSHA conducts its noise surveys and its reluctance to share the underlying data with operators does not promote the purpose of the standard and prevented a fair hearing here. It also served to shield MSHA from answering any informed questions related to the calibration of its equipment, the validity of its test results or what an

operator can do to solve the problem. Without access to the data, operators are relegated to guessing (as Consol did here) what caused an overexposed sample, when the exposure level was at its peak, and how to ensure compliance moving forward.

The second fundamental issue that requires Commission guidance relates to what is required for the Secretary to prove a violation of 30 C.F.R. § 62.130(a). Both the standard itself and the guidance provided by MSHA in its “Compliance Guide to MSHA’s Occupational Noise Exposure Standard” (“Compliance Guide”) are ambiguous as to what constitutes a violation of the standard and when a citation may properly issue. In Consol’s view, the standard and related Compliance Guide mandate that MSHA allege and prove several elements. The Compliance Guide makes it clear that finding a noise violation is not as simple as saying a single dosimeter was over the PEL. Rather, the Compliance Guide contemplates a multi-step process to ensure that the sample was taken properly and that it was not an aberration. The flow chart attached to the Court’s Decision at p. 68 demonstrates this.

However, the view implemented by the ALJ in his Decision, is that if a sample exceeds the PEL, the operator violated 30 C.F.R. § 62.130(a), “subject to any valid defenses.” Decision p. 58. This interpretation impermissibly shifts the burden of proof to the operator and fails to consider that the Compliance Guide process indicates that an operator may not be cited even if the sample exceeds the PEL. See, Decision, p. 68. The ALJ seems to take the position that the four requirements included in the standard and the Compliance Guide<sup>2</sup> essentially serve as affirmative

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<sup>2</sup> (1) that the operator did not use all feasible engineering and administrative controls to reduce the miners’ noise exposure (not charged in the Citation); (2) that the operator did not enroll the affected miners in a HCP (not charged in the Citation); (3) that the operator did not provide and require miners to use personal hearing protection (not charged in the Citation); and (4) that the operator failed to post administrative controls on the mine bulletin board and provide a copy to the affected miners (not charged in the Citation).

defenses to a violation of the standard. Such an interpretation places the burden on the operator to show that it satisfied all four requirements (although none were charged in the Citation). This impermissibly shifts the burden of proof to the operator.

Consol urges the Commission to adopt a different approach, and one that is mandated by the standard. Namely, that the four requirements included in the standard and the Compliance Guide are necessary *elements* of a violation which MSHA must allege and prove to demonstrate a violation. In other words, in addition to having a sample which exceeds the PEL, MSHA must prove that it conducted the survey in accordance with the Compliance guide.<sup>3</sup> Moreover, MSHA must allege and prove that the operator failed to meet the other requirements in order to violate the standard. Under this interpretation, and consistent with the Commission’s Rules, the burden would necessarily be on the Secretary to show that the operator failed to satisfy all the requirements. Absent guidance from the Commission, the ambiguity related to alleged noise violations has and, likely will continue, to lead to inconsistent, arbitrary, and erroneous applications of the requirements of 30 C.F.R. § 62.130(a).

The ALJ also erred as a matter of law when he held: “determining the source of noise exposure is on the operator.” Decision at p. 58. Again, how can an operator do this if deprived of the dosimeter data? Further, 30 C.F.R. § 62.130(a) requires MSHA to allege and prove that all feasible administrative and engineering controls have not been applied. How can Consol do this if MSHA wipes the dosimeter data? Frankly, even MSHA cannot do this if it wipes the dosimeter data prior to conducting any analysis. The ALJ’s Decision directly contradicts the procedures outlined in MSHA’s Compliance Guide. R-27. This Compliance Guide contemplates that citations

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<sup>3</sup> Since MSHA **recognizes and allows a 32% margin of error**, (this sample was allegedly at 132.3%) this indicates that there are significant challenges with obtaining a scientifically reliable sample.

will not be issued unless and until MSHA conducts a full analysis of the source of the noise to determine if the operator has properly implemented engineering and administrative controls. The “Compliance Guide” states:

How will MSHA determine if a citation is warranted when evaluating whether I have implemented all feasible controls?

Because the objective of Section 62.130(a) is to reduce noise exposure to the PEL, once you comply with the requirements of this section by (1) using all feasible engineering and administrative controls to reduce the miners’ noise exposures; (2) by enrolling the affected miners in HCP; (3) by providing and requiring miners to use personal hearing devices; and (4) posting procedures for administrative controls on the mine bulletin board and providing a copy to affected miners, you will be in compliance with the section and no citation will be issued under paragraph (a) even though a miner’s noise exposure may continue to exceed the PEL.

On the other hand, if MSHA determines that you failed to install all feasible controls or you failed to implement any of the requirements under paragraph (a) you will be out of compliance and appropriate citations will be issued.

The third fundamental issue is the ALJ’s erroneous findings of fact regarding the administrative and engineering controls Consol utilized to limit miners’ noise exposure level at the time of issuance. Despite evidence in the record that Consol only required its shearer operators to mine every other pass, the ALJ inexplicably found that Respondent did not have engineering and administrative controls in place. Decision at 61. This finding was erroneous as Consol alternated its shearer operators and they were wearing hearing protection. The ALJ’s conclusions that there was a violation here were clearly wrong and affected by errors of law.

In addition to the Noise citation, Consol also seeks review of the S&S determinations on three citations. In Citation No. 9076610, the ALJ found that Consol’s failure to place a reflector at the end of a line curtain was S&S notwithstanding that a pile of coal and a roll of tensar mesh prevented an examiner from going inby the last strap. The Inspector conceded that the examiner

would have to walk over a pile of coal (estimated at 2 ½ to 3 feet) to go inby supported roof. Decision, p. 7, citing *Tr.*, 35. Moreover, the ALJ misidentified the potential hazard from an absent reflector under the second element in *Mathies*, stating that the hazard was that material would come out of the roof and roll off the pile of coal and rock. Decision at 11. A reflector would not have stopped that. Legally, the potential hazard from an absent reflector is that a miner would go under unsupported roof.

Finally, Consol also requests review of the ALJ's S&S determination as to Citation Nos. 9077085 and 9077091 for the simple reason that neither wire rope could have been used in the condition found by the Inspector.

## **II. STATEMENT OF PERTINENT FACTS**

Citation No. 9077096 involved the results of the full shift noise sample taken on the 3A longwall, MMU-001, on January 24, 2018. At the conclusion of the survey, the Inspector asserted that the dosimeter reading for one of six miners who wore dosimeters that day registered 132.3%. At the time of the survey, the miner was wearing hearing protection which afforded him a 30 decibel Noise Reduction Rating (*Tr.*, *Yates*, 329). The Inspector issued Citation No. 9077096, citing Consol with a violation of, 30 C.F.R. § 62.130(a). Both at the hearing and in its post-hearing briefing, Consol identified several reasons why Citation No. 9077096 should be vacated, including: (1) the Inspector did not complete the multi-step MSHA prerequisites for issuing a Citation; (2) the Inspector did not follow the MSHA approved procedures for the noise sampling; (3) the elevated sample was an aberration; (4) the Inspector failed to consider the impact of the noise reduction rating of the miner's hearing protection;<sup>4</sup> (5) MSHA can provide no basis for its

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<sup>4</sup> Consol contends that the miner was not, in fact, exposed to noise in excess of the TWA PEL since he was wearing earplugs with a NRR of 30 (*Tr.*, *Yates*, 329). Here, Consol contends that the NRR is a physical fact since earplugs are

32% margin of error and cannot differentiate this from a 32.3% margin of error; (6) the MSHA Form 2000-84 does consider decimals; (7) the 132.3% reading, even if accurate, is within the calibration margin of error of +/- 1dB at 114dB; and (8) MSHA's recording over/destruction of the sample and calibration results and calibrating dosimeters outside of the presence of the operator violates Consol's Section 103 "walk-around" rights. Despite the numerous issues raised by Consol, the ALJ affirmed Citation No. 9077096

Citation No. 9076610 involved a failure to place reflective warning devices immediately outby the last row of permanent roof support in the No. 2 entry on the 5 A Section, MMU 080-0, as required by the approved roof control plan. Consol did not contest the fact of violation of the approved roof control plan. Rather, Consol argued that a physical barrier (roof mesh) and a large pile of rocks and coal, as depicted in the Inspector's notes, clearly indicated the location of the last row of permanent roof support and created a physical barrier thereby making it unlikely that a miner would go under unsupported top or that an injury would result from the cited condition.

Citation No. 9077085 involved a wire rope on the winch reel mounted to the Co. #14H Caterpillar battery scoop. The rope was no longer attached to the winch reel and any tension put on the rope would simply cause the winch reel to free spin. Thus, the rope could not to be used for pulling equipment. Yet, despite these obvious defects the ALJ credited the Inspector's testimony that the rope could still be used by tightening onto itself inside the spool thereby creating an anchor point for pulling equipment. There are numerous flaws in this factual finding. First, the Inspector

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an engineering control. Prior to the most current regulation, NRR was considered in determining whether there was elevated exposure. For example, in *Secretary v. U.S. Steel*, 23 FMSHRC 851, 852 (2001) (ALJ), the ALJ, when interpreting the predecessor noise rule noted: "Under the regulatory scheme then applicable, if a miner wore some form of hearing protection, e.g. ear plugs, the TWA of the miner's noise exposure was multiplied by the device's noise reduction rating (NRR)..." MSHA's interpretation to disregard this documented engineering control is clearly wrong, arbitrary and conflicts with the provisions of the regulation and policy statements encouraging engineering controls.

admitted that he never saw the wire rope being used in this manner. Other than a picture showing scratches inside the spool itself and inside the scoop bucket, the Secretary presented no evidence that the rope was used in this way. Common sense dictates that scratches would reasonably be expected to appear in both locations and the mere presence of scratches is not in any way indicative of improper use. Thus, the ALJ should have afforded the picture no evidentiary weight. Second, if the wire rope was used to pull equipment in such a manner it is very unlikely that there would be enough laps of slack on the spool for the rope to tighten onto itself. In order to pull equipment, most of the rope slack would necessarily be extended out off of the spool. This would leave very little, if any, slack remaining on the spool to create an anchor point for pulling. Accordingly, Consol argued that it was not reasonably likely that this condition created a hazard or that any miner would be injured by this condition.

Citation No. 9077091 involved an alleged failure to maintain the wire rope on a Venturo lifting device mounted on the Co. #55 Brookeville jeep in safe operating condition. The citation alleges that the hook on the winch was not properly attached to the wire rope and that the rope was damaged. The machine was found at the portal bottom and was not in use and the winch controller disconnected from the power source. The wire rope appeared to be taped with electrical tape to prevent the loss of the hook and to prevent the broken rope from being pulled up into the boom. There is no indication that the winch was used or could have been used in this condition. Accordingly, Consol argued that it was not reasonably likely that this condition created a hazard or that any miner would be injured by this condition.

### III. ASSIGNMENTS OF ERROR

Consol asserts the following substantial errors of law, policy, discretion and/or sufficiency of the evidence in this case:

- A. The ALJ erred in finding a violation with respect to Citation No. 9077096, as a matter of law and his findings are not supported by the substantial evidence.
- C. The ALJ erred in his application of the S&S criteria to Citation No. 9076610, as a matter of law, and his findings as to S&S are not supported by the substantial evidence.
- B. The ALJ's S&S findings as to Citation Nos. 9077085 and 9077091 were not supported by the substantial evidence.

### IV. ARGUMENTS CONCERNING ASSIGNMENTS OF ERROR.

- A. **The ALJ erred in finding a violation with respect to Citation No. 9077096, as a matter of law, and his findings are not supported by the substantial evidence.**

- 1. **MSHA inappropriately refused to allow Consol access to the dosimeter data collected and analyzed during the inspection.**

Consol is entitled to review and obtain the evidence against it. In a case involving scientific measurements such as a noise violation, this right is particularly important. During the inspection, Consol requested access to the dosimeter to download and analyze the data on software it had available. However, Consol's request was denied and the Inspector wiped the dosimeter data before it could be analyzed by Consol or by MSHA. This begs the question, why did the Inspector refuse to grant Consol access to the data?

Section 103(f) of the Mine Act provides, in relevant part, "a representative of the operator... shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine." 30 U.S.C. § 813(f). Evidence collected in violation of an operator's 103(f) rights should be excluded. See *Big Ridge*,

*Inc.*, 36 FMSHRC 1677, 1730 (Jun. 2014) (citing *DJB Welding Corp.*, 32 FMSHRC 728, 733, 735 (June 2010) (ALJ)). The Commission has previously recognized the critical role that section 103(f) plays in the overall enforcement scheme of the Mine Act, and has cautioned that “[w]e are not prepared to restrict the rights afforded by that section absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation.” *Consolidation Coal Co.*, 3 FMSHRC 617, 618 (Mar. 1981).

Here, the ALJ held that Consol misconstrued the rights granted to operators by Section 103(f). Decision at p. 59. Additionally, relegating his explanation to a footnote, the ALJ found that the two cases cited by Consol in support of its argument that the dosimeter data should be excluded were “neither persuasive nor useful,” as neither case “involve[ed] noise violations ... [and] the facts involved here do not translate to those cases.” *Id.* However, the ALJ fundamentally misconstrued Consol’s argument and its reliance on those cases. First, the fact that neither case involved a noise citation is wholly irrelevant to the issue of whether Consol’s 103(f) rights were violated by MSHA refusal to grant Consol access to the evidence.

Aside from refusing access to the dosimeter at the time of the inspection, the MSHA Inspector essentially admitted to “spoliation” of the evidence<sup>5</sup> but contends he has no obligation to allow Consol access to the dosimeter evidence at the time of the inspection or thereafter. Based

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<sup>5</sup> In *N.J. Wilbanks*, 39 FMSHRC 2069, 2082 (ALJ), an ALJ noted “Spoliation refers to “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Oil Equipment Co. v. Modern Welding Co.*, 661 F. App’x 646, 652 (11th Cir. 2016) (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). Sanctions for spoliation of evidence are intended “to prevent unfair prejudice to litigants and to insure the integrity of the discovery process.” *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005).

on this spoliation, and particularly in the context of the operator's 103(f) rights, the dosimeter data should have been excluded by the Court.

Consol's reliance on the authority which the ALJ relegated to footnote 43 was to show that evidence obtained in violation of an operator's Section 103(f) rights should be excluded. Moreover, the ALJ proffered no explanation as to why MSHA's failure to grant Consol access to the dosimeter data falls outside the purview of the rights granted by Section 103(f) or should otherwise not be excluded, other than to say Consol's contentions were a "misapplication of walk around rights." *Id.*

There is no clear indication in the regulatory language of 30 C.F.R. § 62.130(a) that the Secretary intended to limit an operator's 103(f) rights with respect to noise inspections and the ALJ failed to identify any such limitation. Accordingly, Consol should have been afforded the opportunity to participate in the inspection from the outset. Initially, this would have involved Inspector Yates calibrating the dosimeters to be used in conducting the inspection in the presence of a representative of Consol. Inspector Yates freely admitted he calibrated the dosimeters at MSHA headquarters and in his car. (*Tr., Yates*, 267, 304, 305). Obviously, the dosimeters play a fundamental role in the collection of evidence during a noise inspection and failing to calibrate the dosimeters in the presence of a Consol representative violated Consol's right to participate in the inspection.

More importantly, however, was Inspector Yates' refusal to allow Consol to access the data on the non-compliant sample. As noted *supra*, Troy Helen testified that Consol asked to review the data but Inspector Yates would not allow access to it. (*Tr., Helen*, 585-86) Inspector Yates freely admitted that MSHA "wipes clean" or records over the results of the survey without

allowing Consol to download the results to determine the validity of the citation or even more importantly, the source of the noise. (*Tr., Yates*, 319). Inspector Yates' protestations that Consol did not have the appropriate software to download and review the dosimeter data rings hollow. Troy Helen testified that Consol has the software. (*Tr., Helen*, 586).

Inspector Yates was very defensive and evasive throughout his testimony (and apparently in his interactions with Mr. Helen). The Court had to remind him several times to simply answer the question (*Tr., Yates* 300, 311, 317, 319, 327, 333-34). This is important because it goes to his credibility.<sup>6</sup> The ALJ never made a credibility determination on this point of contention between the parties. MSHA should have allowed Consol to download the dosimeter data collected during the Inspection to determine the source of any elevated noise.

In its Compliance Guide, MSHA proports that the objective of 30 C.F.R. § 62.130 is to "reduce noise exposure to the PEL[.]" How, then, can an operator achieve the objective of the standard by reducing noise exposure to permissible levels if it cannot access the dosimeter data on an allegedly non-compliant sample? Without access to the data, Consol is left to guess what caused the allegedly non-compliant sample. Moreover, the data is not available for Consol to contest its

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<sup>6</sup> There are other examples of where Inspector Yates' credibility was called into question. One example was when he described calibration. At first, he had no recollection of the specific calibration results. (*Tr., Yates*, 302). However, as the questioning proceeded, his memory became clearer and he was certain that the cited miner's dosimeter had no calibration issues. (*Tr., Yates*, 303, 304). Another example is when he denied knowing that the miner whose dosimeter was cited was already over 120% when he went on the longwall section. (*Tr., Yates*, 323-24). Inspector Yates' denial is suspect given that two witnesses stated he was aware of this. Stein indicated he told Inspector Yates this from "arm's length." (*Tr., Stein*, 463). Mr. Shaffer testified that Yates mentioned this on the surface (*Tr., Shaffer*, 517). Both Stein and Shaffer referred to this point in their notes. (R-32, R-33). It is ironic and illustrative that before this issue was even raised by Consol's counsel at the hearing, Inspector Yates offered up nearly the exact scenario as a hypothetical when discussing mitigation. (*Tr., Yates*, 282). In this regard, Inspector Yates testified:

--say you check it on the ride in and it's 128 on your thing and you let them go to the section at that dosimeter level and let them continue working, then you obviously knew it was about out of noise...

Consol contends that this hypothetical offered by Inspector Yates prior to any discussion of the event at the hearing was not a mere coincidence and should affect the Court's decision on whether Inspector Yates' evasiveness affects his trustworthiness on this issue.

validity. Finally, without the data, Consol has no way of knowing where the exposure occurred, when the exposure occurred and how to reduce exposure to permissible levels moving forward.

Despite the glaring issues with the secretive tactics employed by MSHA while conducting the noise inspection, the ALJ simply glossed over the issue in his Decision. This case presents the perfect opportunity for the Commission to make clear that an operator's Section 103(f) rights apply to noise inspections and that evidence gathered in violation of those rights and not preserved for review by the operator should be excluded.

**2. The ALJ erred as a matter of law in holding that the Secretary need only show an exceedance of the PEL to sustain a violation of 30 C.F.R. § 62.130(a).**

30 C.F.R. § 62.130(a) which is entitled "Permissible exposure level" provides:

"(a) The mine operator must assure that no miner is exposed during any work shift to noise that exceeds the permissible exposure level. If during any work shift a miner's noise exposure level exceeds the permissible exposure level, the mine operator must use all feasible engineering and administrative controls to reduce a miner's exposure to the permissible exposure level, and enroll the miner in a hearing conservation program that complies with §62.150 of this part. When a mine operator uses administrative controls to reduce a miner's exposure, the mine operator must post the procedures for such controls on the mine bulletin board and provide a copy to the affected miner."

MSHA has provided guidance to the regulated community as to the requirements of 30 C.F.R. § 62.130(a) through its Compliance Guide. In the Compliance Guide, MSHA advises of four conditions that must be present in order for a citation to properly issue. *supra*, p. 6. First, there must be an exposure that exceeds the PEL. Second, there must be a failure to use all feasible engineering and administrative controls to reduce the miners' exposure. Third, there must be a failure to enroll the affected miners in a health care place ("HCP"). Fourth, there must be a failure to post administrative controls on the mine bulletin board and provide a copy to affected miners.

However, despite the guidance provided by MSHA, the ALJ held that an exceedance of the PEL is all that is required to constitute a violation of 30 C.F.R. § 62.130. Decision at p. 58. In response to Consol's argument that MSHA must first identify the source of the noise exposure to determine whether the operator has utilized all feasible engineering and administrative controls, the ALJ asserted that Consol had "put the cart before the horse." Decision at p. 58. This is an interesting characterization given the fact that neither the operator nor MSHA is in position to determine the necessary administrative and/or engineering controls needed to reduce exposure levels below the PEL if neither party can identify the source of exposure that caused a PEL exceedance. In any event, the ALJ clearly held that, as a matter of law, "determining the source of the noise is upon the operator." Thus, the ALJ requires that the operator prove that it did, in fact, use all feasible administrative and/or engineering controls rather than the Secretary to show that the operator did not. There are several fundamental problems with this interpretation.

However, if it was that simple, why did MSHA promise not to cite operators if the PEL is exceeded unless many other conditions were met? The reason is that MSHA made an enforceable policy decision in the Compliance Guide that no citation would issue against an operator unless its Inspector found, cited and documented all conditions precedent thereto were met. (R-27). The Secretary almost concedes this point. Right after implying that the PEL is the "end of the story," the Secretary discusses the "Coal Mine Health Inspection Procedures Handbook" (R-25) and the procedures outlined therein (i.e., the "rest of the story").

Here, the Inspector made no effort to comply with the multi-part test in § 62.130(a) and discussed by this ALJ in *Secretary v. Highland Mining Company, LLC*, 35 FMSHRC 221, 241 (2013). In *Highland*, this Court noted MSHA's Compliance Guide states that MSHA assures

operators that if the mine “employed all feasible engineering [and administrative] controls, had enrolled affected miners in a hearing conservation plan and which provides those miners with personal hearing protectors, would not be issued a citation” *Id.* In *Highland*, the Court seemed to apply the two-part test, determining first that that the continuous miner operator was exposed to noise above the permissible standard and then noting that because of a loose chain, the mine had not employed all feasible engineering controls. *Id.* One significant difference between *Highland* and this case is that the inspector in *Highland* sought out and discovered the actual source of the excessive noise. Here, the Inspector never seriously looked for a source because he felt it was not his obligation.<sup>7</sup>

Then, to compound the error, the Inspector prevented the operator from analyzing the data on the dosimeter, thereby forcing the operator to guess as to a potential source of the noise. The operator certainly could not duplicate the exposure, although Mr. Helen certainly attempted to do so.<sup>8</sup> Unlike *Highland*, where the source of the noise was the failure of the operator to tighten a chain on the continuous miner, in this case, neither the Inspector nor the operator could determine the real source of the noise and the Inspector did not evaluate the “engineering controls” such as hearing protection and maintenance of various machinery or examinations. The Inspector also failed to evaluate or consider the administrative controls Consol had in place. Specifically, Consol’s shearer operators only cut every other pass and sat out when they were not operating the shearer. (*Tr., Stein*, p. 464). This fact was apparently not considered by the Inspector (or the ALJ)

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<sup>7</sup> The Coal Mine Inspection Procedures Handbook obligates the Inspector to examine all administrative and engineering controls to determine if they are being followed (R-25, p. 3-6).

<sup>8</sup> Mr. Helen’s efforts were reflected in the exhibits for which Consol’s Counsel made an offer of proof (*Tr., Helen*, 607). However, Mr. Helen described his unsuccessful efforts to locate the source of the noise in his testimony. (*Tr., Helen*, 604).

in connection with the application of the “flow chart” attached at page 68 of the Decision. In *Highland*, the ALJ determined that “pre-operational examinations” of equipment was an “engineering control.” *Highland*, 35 FMSHRC at 241. The Inspector did not document the former and MSHA arbitrarily refuses to consider the latter.

MSHA also conceded that the “[t]he total survey time for each of the miners was nine hours, or 540 minutes” rather than the required eight (8) hours. *Id.* at 24. Of course, Consol objects to a portal-to-portal sampling approach since § 62.101 is facially based on an eight-hour sample. To date, we still do not know what the TWA8 was on the date of the citation and the Inspector failed to present this evidence. Since the PEL is measured in terms of TWA8, a 9-10 hour shift is a defective and unreliable TWA8 sample. Since the TWA9-10 hour reading was only .3% above what the Inspector contends is the maximum, this is a material error.

**3. The ALJ improperly relieved the Secretary of his burden of proving that Consol failed to meet all requirements of 30 C.F.R. § 62.130(a).**

The Commission has long held, “[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). accord *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992). Here, the ALJ impermissibly shifted the burden of proof and this burden shifting had an adverse effect of Consol. First, the ALJ, in effect, took the requirements of § 62.130(a) and the guidance provided by MSHA in its Compliance Guide and molded his own standard with one element and three affirmative defenses. Under the ALJ’s interpretation of the standard, the Secretary must show only that there was an exceedance of the PEL to sustain a violation. Once a PEL exceedance is established, the onus is on the operator to show that it satisfied the other

requirements of the standard to avoid a violation. This is the essence of unlawful burden shifting. Because of this, the Inspector failed to gather and the Secretary failed to present the other evidence.

There is no indication, in the standard, in the Compliance Guide, or anywhere else, that burden shifting was contemplated with respect to § 62.130(a). Yet, that is precisely what the ALJ elected to do. Accordingly, the Commission should make clear that there is no burden shifting under § 62.130(a) and, like other standards, the Secretary bears the burden of proving each element of the offense to sustain a violation. Even assuming, *arguendo*, that the standard does require an operator to prove compliance with the three requirements to avoid a violation, Consol was unable to do that here due to MSHA's own actions in refusing access to the dosimeter data. Consequently, Consol was left with no way to defend the alleged violation.

The ALJ further seeks to support the citation using a "flow chart" included in The Coal Mine Health Inspection Procedures Handbook. Decision, p. 68. However, the "flow chart" requires the analysis of facts that were not cited in the citation or analyzed by the Inspector, such as whether administrative controls were posted.<sup>9</sup> Inspector Yates stopped at the first step. Also, the flow chart requires a determination of whether the operator has a "P-Code." If there is no P-Code, the flow chart says to "See P-Code Process," not "Cite." Even Inspector Yates indicated that if there is a P-code, there is no citation, regardless if the PEL is exceeded. (*Tr., Yates*, 321). There is no indication that the Inspector gave this option any consideration. The truth is the Inspector had no real idea what a P-Code is or how to qualify for one. (*Tr., Yates*, 322, 358). Thus, Inspector Yates clearly did not have all the information required to cite the operator. The flow chart included by

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<sup>9</sup> There is no doubt that Consol had administrative controls in place. In particular, the shearer operators only cut every other pass and sat out when they were not operating the shearer. (*Tr., Stein* p. 464). This fact was apparently not considered by the Inspector in connection with his application of the "flow chart."

the ALJ at page 68 of the Decision shows the complexity of the required analysis. The flow chart also makes it clear that if a “P-Code” is being met, there is no citation, even if the noise level exceeds the PEL. Also, with dual hearing protection, an operator can go up to 1056% of the PEL without a citation.

**4. Consol could not determine the source of the exposure because it was denied access to the dosimeter data.**

If Consol was required show that it used all feasible administrative and/or engineering controls to avoid a violation as asserted by the ALJ, how could it possibly do so without access to dosimeter data from the non-compliant sample? Again, without the data, Consol could not accurately ascertain the cause of the allegedly non-compliant sample or put in any administrative and/or engineering controls in place to reduce exposure to permissible levels. Consequently, it could not post such procedures on the mine bulletin board nor provide a copy to the affected miner. Thus, by holding that Consol has the burden to show it acted in accordance with the requirements and simultaneously holding that MSHA did not violate Consol’s Section 103(f) rights or otherwise act inappropriately by denying Consol access to the dosimeter data, the ALJ effectively foreclosed on any possible defense Consol had to the alleged violation. This is certainly capable of repetition. Under such a standard, all MSHA must do to sustain a violation of 30 C.F.R. § 62.130(a) in each and every instance where a PEL exceedance occurs is simply delete the dosimeter data. This certainly does not promote the purpose of the Mine Act which is to protect the health and safety of miners.

The obvious reason why the process is not so simple is that MSHA intended and designed the regulation (and subsequent policies) to determine the source for any elevated noise so that it can be abated. This is not possible when all the inspector does is allege, “the PEL has been

exceeded,” and then refuses access to the dosimeter data for computer analysis, and records over the data. When this occurs, the remaining provisions of the noise reduction regulations are rendered superfluous. Another reason the ALJ’s overly simplistic application of the standard is wrong is that 30 CFR § 60.160(b) expressly permits exposure of a miner to noise above the PEL, if the miner’s “noise exposure continues to exceed the permissible exposure level despite all feasible engineering and administrative controls.” This section provision directly contradicts the inspector’s simplistic conclusion that a citation is warranted when the PEL is exceeded, without any analysis of the other factors.

**5. The Noise Survey was not compliant with the Compliance Guide.**

Another reason the citation should be vacated is that the Inspector failed to follow the requirements of the Compliance Guide for conducting the noise survey. Chapter 3 of the “Coal Mine Health Inspection Procedures Handbook” has a photo demonstrating how the microphones are to be attached. (R-25, p. 8). Inspector Yates did not follow proper procedures for the noise sampling. First, when attaching the microphones, Inspector Yates placed them on the miners’ chest in violation of the requirements of the Noise Sampling Procedures. (*Tr., Stein*, 454, 474; *Tr. Helen*, 583). Of course, Mr. Yates seems to deny he placed the dosimeters on the chest and asserts that they were placed higher. (*Tr., Yates*, 290). The requirements are there for a reason and that is to avoid inaccurate samples. The weight of the testimony is that Inspector Yates improperly attached the microphones. Of course, without the dosimeter data, Consol is unable to pinpoint the real impact this had on the survey.

In addition, 30 C.F.R. §62.101 sets the PEL at a “TWA8 of 90 dBA” TWA8 is defined as the sound level over 8 hours, which would result in the dose measured. *See*, 30 CFR 62.101. Here,

Inspector Yates admitted that he measured sound exposure over a period of 9-10 hours. (*Tr., Yates, 270*). Because this exceeds the 8-hour shift, he did not follow the standard and has no basis to testify as to whether the reading at 8 hours, as opposed to 9-10 hours, would have been over the allowed TWA8.

The violative sample was nearly 50%, above the next clearest sample. When coupled with the fact that this was Consol's first violation and the fact that the Inspector could not replicate any source of noise anywhere near the test result and that there were two miners doing the same job (which means there is a built in control sample), indicates that the alleged violative sample was an aberration and should be rejected.

Under the circumstances of this case, the ALJ's affirmance of the citation was associated with several errors of law and is not supported by the substantial evidence. The Commission should vacate Citation No. 9077096.

**B. The ALJ erred in his application of the S&S criteria to Citation No. 9076610, as a matter of law and his findings as to S&S are not supported by the substantial evidence.**

Citation No. 9076610 involved a failure to place reflective warning devices immediately outby the last row of permanent roof support in the No. 2 entry on the 5 A Section, MMU 080-0, as required by the approved roof control plan. Consol did not contest fact of violation but did contest the S&S issuance. Consol contends that the pile of coal and rocks and the roll of Tensar mesh hanging from the roof created a physical barrier to prevent a miner from going into an area where there might be a hazard. The conditions, together with the location of the ventilation curtain clearly indicated the location of the last row of permanent roof support and prevented a miner from

going in by that area under unsupported top, thereby making it unlikely an injury would result from the cited condition.

In making this conclusion, the ALJ misapplied *Mathies* in two ways. First, he misidentified the “hazard” as material rolling down the pile and striking a miner. Decision, p. 11. Specifically, the Judge misapplied *Mathies* when he identified the “hazard” as “material” that would roll down and strike a mine[r].” Decision, p. 11. Even the Inspector recognized that the reflector would not prevent rocks from rolling down the pile on the floor. (*Tr., Baker, 37*). The hazard that the standard was designed to protect against is clearly a miner walking under unsupported top without warning. Second, the Judge inappropriately characterized the Tensar roll as “redundant safety measure” and completely discounted it in his likelihood analysis. Decision, p. 12. Both of these legal errors adversely affected his *Mathies* analysis. Further, the ALJ’s findings of S&S were not supported by the evidence.

Obviously, in order to properly apply *Mathies*, it is essential to accurately identify the “hazard.” If a Court fails to accurately identify the “hazard,” as the Court did here, the entire S&S analysis is flawed. In this situation, the “hazard” must be of a type that can be contributed to by the violation. Here, rocks could have rolled off the pile even if there was a reflector, so this cannot be the appropriate “hazard.” Rather, the hazard here must be the risk of going under unsupported roof without warning, which was nearly a physical impossibility here due to the 2’-3’ of rock laying in a pile at the edge of the unsupported roof and the Tensar roll hanging from the roof. Even the ALJ notes that the Inspector admitted that the pile of coal was 2’-3’ and would require a miner to go over the pile. Decision, p. 7. The *Mathies* analysis is also corrupted if surrounding conditions are inappropriately characterized as “redundant safety measures.”

The ALJ's misidentification of the "hazard" and his misidentification of the Tensar roll as a redundant safety measure is surprising. The ALJ actually included a good summary of the law of S&S in the Decision, pp. 2, 3. However, Consol would add a few points to the ALJ's discussion. Clearly, the concept of "confluence of factors" or "surrounding circumstances" must be included in the S&S analysis. In footnote 10 of *Cumberland Coal Resources LP*, 33 FMSHRC 2357, n.10 (Oct. 2011), the Commission noted:

[T]he Commission's analysis of the facts in *Mathies* focused as much on the second element as on the third element. *Mathies* involved a defective sander on a mantrip. The Commission defined the hazard in the second element as "a sliding derailment or collision with some other object on the tracks." 6 FMSHRC at 4. ....The Commission then described how "the record ... establishes the existence of a hazard [not simply a violation] on the day of the citation" because of [the background facts of] "damp conditions in the mine, the wet track, and the fact that the mantrip's route traversed curves and grades ... that could have required the extra traction that sanders are intended to provide." *Id.* (emphasis added)

Obviously, the factors identified by the Commission in *Cumberland* address the "confluence of factors" and "particular facts" requirement for S&S. Thus, S&S and likelihood consider "the likelihood of the occurrence of the event against which a standard is directed." *Virginia Drilling Co.*, 2013 WL 1856608, \*2. Additionally, many cases hold that "likelihood" is an assessment of the probability that a miner will be injured from the cited condition. *Mountainside Coal Co.*, 32 FMSHRC 1409, 1413 (Sept. 2010) (ALJ). For example, consistent with note 10 of *Cumberland*, courts regularly consider the regularity with which miners access an area and the reasons why they access an area. e.g. *U.S. Borax, Inc.*, 34 FMSHRC 2437, 2441 (Sept. 2012) (ALJ).

As the court noted, there has been a recent trend to move the "reasonable likelihood" analysis away from the third *Mathies* step back to the second. e.g. *Newtown Energy, Inc.*, 38

FMSHRC 2033, 2039 (Aug. 2016), but this does not mean that the likelihood analysis based on the particular facts of the violation has been removed from the equation. One ALJ recently explained that the second step of *Mathies* actually requires an ALJ to apply a two-part analysis: 1) *identification of the hazard* created by the violation of the safety standard; and 2) “a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed.” See *Rock n Roll Company, Inc.*, 38 FMSHRC 2831, 2833 (Nov. 2016) (ALJ) (emphasis added) (citing, *Newtown Energy, Inc.*, 38 FMSHRC at 2038). Thus, the failure to properly identify the hazard throws the whole analysis off.

From *Newtown Energy, Inc.*, 38 FMSHRC at 2038, it is clear that the Commission intends to preserve the requirement that the Secretary prove the "reasonable likelihood" of the miners being exposed to a hazard as part of the S&S analysis. *Id.* (for step two, the Commission considered whether "under these particular circumstances, the violation....was reasonably likely to result in the restoration of power to the shuttle car cables while the inspection group was working on it").

This "reasonable likelihood" and "likelihood of an occurrence" analysis must include an analysis of the background facts to determine if a hazardous occurrence is reasonably likely to result in an injury. In some situations, this is referred to as the "confluence of factors," but the analysis is basically the same for all citations. There is no doubt that the degree of potential miner exposure to a potential hazard (or lack thereof), like the surrounding physical conditions (damp conditions, grades and turns in the sander context described by the Commission in note 10 of *Cumberland*, supra) is just another "particular fact" which must be considered in determining whether "based on the particular facts surrounding the violation, there exists a reasonable

likelihood of occurrence of the hazard...[.]” *Rock n Roll Company, Inc.*, 38 FMSHRC 2831, 2833 (Nov. 2016) (ALJ).

If there was a violation (which Consol disputes), it is essential to appropriately identify the potential hazard contributed to by the violation. The hazard here is going under unsupported top. After that, the Court must determine whether the conditions then present were reasonably likely to contribute to the occurrence of that hazard (Step two of *Mathies*).

In applying *Newtown* and *Mathies* to the facts of this case, there are several reasons why the hazard of a miner going under unsupported top was highly unlikely here. In this case, there were barriers in the form of a large pile of rocks and a Tensar roll. It was unlikely that a miner would go under unsupported roof for several reasons. First, at this location, there was a wedge cut and a large pile of rocks/coal across the entire entry and the entry wedged down to the floor at the pile of rocks. R-3, Inspector’s Notes, p, 3 (depicting the pile of rocks and coal and the wedge cut). In order to go under unsupported roof, the examiner would have to go up on the large pile of rocks and into the wedge. Second, there was a roll of white Tensar mesh hanging from the roof. (*Tr., Baker*, 33). Although the parties dispute how low the roll was hanging, Mr. Stein’s explanation that it was not flush with the roof because of how it would have been partially rolled out to clear the ATRS strap installation was compelling. In order to go under unsupported roof here, the examiner would have to ignore the Tensar roll and climb the pile of rocks/coal. The same helmet lamp which might show a reflector, would show the Tensar roll and the pile of rock/coal. Third, the ventilation curtain was a clear identifier of the end of the support and the pile of rock/coal was right where the curtain ended. (*Tr., Baker*, 39; *Tr., Stein*, 402). For an examiner, the location of the curtain is a clear indication of where the roof support ends. There is likely not much that

Consol could have done to persuade the ALJ that the citation was not S&S. In note 9, the ALJ stated that “short of the mesh creating a virtual mesh wall, the mesh would not be a factor in any S&S analysis.” This is an error of law. Surrounding circumstances must always be considered. The mesh roll combined with the 2’-3’ pile of coal/rock and the curtain ending at the last strap clearly made it unlikely that a miner would venture under unsupported roof.

Really, the ALJ was forced to adopt the hazard offered by the Inspector because the Inspector testified that this was the potential hazard he was really concerned about. The Inspector never testified that he was concerned about a miner going under unsupported top. If the actual potential hazard that the standard is directed to (going under unsupported top) is applied, this would have required the ALJ to conclude the Citation was Non-S&S because, based on the particular facts surrounding the violation in this case, miners are not reasonably likely to travel under unsupported top at this location. A reflector would not stop a miner and examiner from being struck by rolling rocks from the pile at the foot of the wedge. Based on all the facts related to this citation, the ALJ’s S&S determination should be reversed.

**C. The ALJ’s S&S findings as to Citation Nos. 9077085 and 9077091 were not supported by the substantial evidence.**

Citation No. 9077085 involved a wire rope on the winch reel mounted to the Co. #14H Caterpillar battery scoop. The rope was no longer attached to the winch reel and any tension put on the rope would simply cause the winch reel to free spin. Thus, the rope could not to be used for pulling equipment. It was not reasonably likely that this condition created a hazard or that any miner would be injured by this condition. Accordingly, Consol contested S&S for this citation. The ALJ held that “a cable in this undisputed condition can break and an injury could result.” Decision, 20. The ALJ calls Consol’s defense that the rope could not be used “unusual.” Decision,

p. 19. However, Consol's argument goes directly to the likelihood of the occurrence of a broken rope. It only stands to reason that the rope cannot break if it cannot be used. Thus, Consol's defense goes to the heart of S&S. The ALJ seems to believe that the rope could somehow be rolled on itself to create an anchor point. Decision, p. 16. However, this contention is mere speculation. Nobody observed the rope being used in that manner and Respondent's witnesses disputed this possibility and compared the rope to a tow truck attempting to winch a car. If there is no anchor point to get the spool started, the wire rope could not be used. If the rope could somehow be used, Consol disputed that any miner would be near the rope due to operator being in a cab and "red zone" requirements. Consol's point is that the surrounding facts made the occurrence of a hazard unlikely here.

The real issue is whether the rope could be used in the condition it was in. Without an anchor point to create a "wrap," the Inspector did not explain how the operator would wrap the rope several times on itself. The inspector conducted no tests on the equipment to demonstrate this theory. He did not write about this theory in his notes. Mr. Shaffer, on the other hand, explained that that this rope was shorter than normal and was not long enough to wrap on itself and pull a load. (*Tr., Shaffer*, 491, 492). Moreover, Mr. Shaffer explained that without an anchor point, the wire rope could not be used. The Commission should review the ALJ's S&S determination as to Citation No. 9077085 and vacate the S&S designation.

Citation No. 9077091 involved a thin wire rope on a Venturo lifting device mounted on the Co. #55 Brookeville jeep in safe operating condition. The citation alleges that the hook on the winch was not properly attached to the rope and that the rope was damaged. The machine was found at the portal bottom and was not in use and the winch controller disconnected from the

power source. The rope appeared to be taped to prevent the loss of the hook and to prevent the broken rope from being pulled up into the boom. The winch simply could not be used in this condition. In many ways, the analysis for this citation is similar to the analysis for Citation No. 9077085 except that here, the Inspector did not allege that the rope could be wound on itself. Rather, he asserted that the broken ends were woven into the rope and this would allow it to lift something. The ALJ adopted the Inspector's theory but the photos demonstrate that the rope was simply taped to keep the wire from re-entering the casing. It could not lift anything. The ALJ adopted the reasoning of the Inspector, finding two hazards contributed to by the violation: were that the rope would break as it was lifting something and that it would whiplash. Decision, pp. 38 and 39.

There are several reasons why the occurrence of these hazards was unlikely here. First, the photos show that the wire rope on the Venturo lifting device for a Brookville jeep was broken and the piece with the hook had been tied on. Most likely, the rope was tied and taped up simply to avoid losing the hook and to keep the rope from being pulled back into the boom. Electrical tape and the modest tie job were not going to allow the rope to be used to lift a load (R-13; *Tr., Stein*, 420, 421). Common sense dictates that if the lifting device was used in this condition, the taped/tied area would come apart and the rope would retreat into the spool. There would be no whiplash. That was a wholly speculative position by the Inspector. Yates performed no test on the taped-up hook to see if it would hold anything. He certainly did not see the rope being used in this condition. Given the way the lifting device is used with a remote controller and the location of the broken rope, Inspector Yates' account strains logic and should have been rejected by the

Court. Without this speculative testimony, there is not adequate evidence to support the ALJ's S&S determination.

**V. CONCLUSION**

For the reasons set forth herein, Consol respectfully requests that the Commission grant this Petition and reverse the ALJ'S fact of violation Decision as to Citation No. 9077096 (30 C.F.R. § 62.130(a)-Noise) and the ALJ's S&S decision as to Citation Nos. 9076610, 9077085 and 9077091.

Respectfully submitted,

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	DOCKET NO. PENN 2018-169
	)	
Petitioner,	)	A.C. NO. 000459561
	)	
v.	)	
	)	
CONSOL PENNSYLVANIA COAL	)	Mine ID: 36-10045
COMPANY LLC,	)	
	)	Mine: Harvey Mine
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *“Consol Pennsylvania Coal Company, LLC’s Petition for Discretionary Review”* was served by electronic mail on the 8<sup>th</sup> day of November, 2019, to the following:

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