

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

December 22, 2014.

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

v.

M-CLASS MINING LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2011-295
A.C. No. 11-03189-241092

Mine: MC #1 Mine

DECISION

Appearances: Bryan R. Kaufman, Esq., Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado, for Petitioner;

Christopher D. Pence, Esq., Hardy Pence PLLC, Charleston, West Virginia,
for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). In dispute are two section 104(a)(1) citations issued by the Mine Safety and Health Administration (“MSHA”) to M-Class Mining LLC (“M-Class” or “Respondent”) as the owner and operator of the MC #1 Mine. To prevail, the Secretary must prove the cited violations “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom.*, *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

The two alleged violations in this case were issued at M-Class Mining’s MC #1 Mine. The first alleged violation involves Citation No. 8424233, which charges M-Class with a

violation of 30 C.F.R. § 75.380(d)(4)¹ for failing to maintain the mine's alternate escapeway at the required width. The second involves Citation No. 8424774, which charges Respondent with a violation of 30 C.F.R. § 77.1109(d)² for failing to provide a fire extinguisher at the top of the clean coal stacker tower. The Secretary characterizes M-Class's negligence as high for Citation No. 8424233 and as moderate for Citation No. 8424774. The Secretary proposes a penalty of \$425.00 for the first violation and \$100.00 for the second, for a total penalty of \$525.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. LAKE 2011-295 to me, and I held a hearing in Evansville, Indiana.³ The Secretary presented testimony from MSHA inspectors Marty Gayer and J. Scott Lee. M-Class Mining presented testimony from Safety Manager Tim Kirkpatrick, former M-Class Vice President of Operations Barrett Fox, and current M-Class President Anthony Webb. The parties each filed post-hearing briefs and reply briefs.

II. ISSUES

For Citation No. 8424233, the Secretary asserts that Respondent failed to fulfill the duty imposed by 30 C.F.R. § 75.380(d)(4) by placing equipment in the mine's alternate escapeway

¹ Section 75.380(d) provides, in relevant part—

Each escapeway shall be –

....

(4) Maintained at least 6 feet wide except –

....

(iv) Where mobile equipment near working sections, and other equipment essential to the ongoing operation of longwall sections, is necessary during normal mining operations, such as material cars containing rock dust or roof control supplies, or is to be used for the evacuation of miners off the section in the event of an emergency. In any instance, escapeways shall be of sufficient width to enable miners, including disabled persons, to escape quickly in an emergency. When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher.

² Section 77.1109 provides, in relevant part, as follows:

Preparation plants, dryer plants, tipples, drawoff tunnels, shops, and other surface installations shall be equipped with the following firefighting equipment.

....

(d) Fire extinguishers shall be provided at permanent electrical installations commensurate with the potential fire hazard at such installation in accordance with the recommendations of the National Fire Protection Association.

³ In this decision, the hearing transcript, the Secretary's exhibits, and M-Class Mining's exhibits are abbreviated as "Tr.," "Ex. GX-#," and "Ex. MC-#," respectively.

that impermissibly reduced the width of the passage, preventing miners from exiting quickly through the escapeway during an emergency. (Sec’y Br. at 8–11.) The Secretary claims that M-Class’s actions constituted high negligence because the operator knew MSHA considered the conditions to be a violation. (*Id.* at 14.) In contrast, M-Class argues that an exception in the regulation requires only that miners be able to move through the narrowed escapeway carrying a stretcher, and that its miners satisfactorily completed this stretcher test. (Resp’t Br. at 1–2.) M-Class does not claim that any other regulatory exceptions apply. (*Id.*) Alternatively, Respondent claims its actions did not constitute high negligence because it did not know the conditions constituted a violation under the regulations. (*Id.* at 16–17.)

For Citation No. 8424774, the Secretary contends M-Class failed its duty under 30 C.F.R. § 77.1109(d) to provide a fire extinguisher for all permanent electrical installations. (Sec’y Br. at 16–17.) The Secretary asserts that electrical fixtures at the top of M-Class’s clean coal stacker belt required a fire extinguisher. (*Id.* at 17.) Respondent contends no permanent electrical installations were located at the top of the clean coal stacker, and therefore a fire extinguisher was not required at the location. (Resp’t Br. at 18.)

Accordingly, the following issues are before me: (1) whether the Secretary has carried his burden of proof that Respondent violated the Secretary’s mandatory health or safety standards regarding the requisite width of mine escapeways; (2) whether the Secretary has carried his burden of proof that Respondent violated the Secretary’s mandatory health or safety standards regarding the presence of fire extinguishers at above-ground mine locations; (3) whether the record supports the Secretary’s assertions regarding the gravity of the alleged violations; (4) whether the record supports the Secretary’s assertions regarding M-Class Mining’s negligence in committing the alleged violations; and (5) whether the Secretary’s proposed penalties are appropriate.

For the reasons that follow, Citation No. 8424233 is **AFFIRMED** as written and Citation No. 8424774 is **VACATED**.

III. BACKGROUND

The MC #1 Mine is a coal mine in Franklin County, Illinois, that opened in 2008. (Tr. 194:15–20.) By October 2010, M-Class had begun development of the headgate and tailgate that eventually would provide access and ventilation for the mine’s first longwall panel. (Tr. 74:8–16.) The mine’s headgate, which is integral to creating the longwall operation, had three entries, with large pillars of coal approximately 100 feet wide separating each entry. (Tr. 78:7–9, Tr. 95:2–3; Ex. MC–1, Ex. MC–1A). Every 100 feet, crosscuts through the coal pillars connected the entries, creating a latticework grid pattern if viewed from above. (Tr. 95:7–10; Ex. MC–1.)

M-Class installed permanent concrete stoppings in the crosscuts to control the flow of air through the mine. (Tr. 79:21–23, 179:12–22.) Fresh air flowed into the headgate through the No. 3 Entry to ventilate the area being developed by a continuous miner. (Tr. 78:19–79:6.) The No. 3 Entry, as the intake, also served as the primary escapeway from the headgate. (Tr. 78:19–25, 190:13–191:12.) After sweeping across the face where active mining was taking place, the now-contaminated air flowed down the No. 1 Entry, or the return, and out of the mine.

(Tr. 79:24–25.) A lesser volume of air also flowed away from the active mining face and down the No. 2 Entry, which is located between the No. 1 and No. 3 entries. (Tr. 79:7–16.) The No. 2 Entry served as the mine’s alternate escapeway, i.e., the back-up route of escape in case the primary escapeway is blocked. (Tr. 79:7–12.)

In accordance with MSHA regulations, M-Class placed its coal conveyor belt in the No. 2 Entry. (Tr. 79:7–9.) The coal conveyor belt transports coal mined during the headgate’s development to the surface, where the coal is processed before being placed into storage. (Tr. 27:5–12, 143:14–17.) After this processing, a long belt takes the clean coal to the top of a 100-foot-tall clean coal stacker tower, from which the mine loads the coal into storage silos to await shipment to market. (Tr. 157:8–12, 158:2–3.)

In the No. 2 Entry, M-Class had hung the coal conveyor belt from the ceiling so the bottom of the belt’s frame was two or three feet above the mine floor. (Tr. 38:23–39:15, 90:20–21.) Near the active mining face, M-Class also kept several other large pieces of equipment in the No. 2 Entry, including a power transformer, cable tub, and water booster pump. (Tr. 28:11–23.) The power transformer supplied electricity to mining equipment used at the face. (Tr. 28:20–23.) The water pump provided water to the continuous miner to suppress the coal dust produced from the mining process. (Tr. 28:22–23.) The cable tub held slack in the cable that connected the transformer with power sources closer to the surface. (Tr. 29:4–7.)

M-Class developed the headgate of the MC #1 Mine at a rate of nearly 500 feet per day. (Tr. 221:7–14.) As a result, M-Class had to advance its coal belt and the mining equipment by several crosscuts every 24 to 48 hours. (Tr. 86:2–5, 221:10–14.) To simplify the moving process, the company chose to leave the transformer, cable tub, and booster pump in the No. 2 Entry rather than placing them in the crosscuts. (Tr. 209:13–210:6.) By leaving the equipment in the entry, M-Class could advance the section by hooking the three pieces of equipment to a scoop, towing them straight forward like a train. (Tr. 207:15–17.) M-Class also believed that moving the equipment straight forward rather than in and out of the crosscuts enhanced safety in the mine. (Tr. 221:12–222:9.)

IV. CITATION NO. 8424233—THE NARROWED ESCAPEWAY

A. Findings of Fact—Citation No. 8424233

On October 22, 2010, MSHA Inspector Marty Gayer visited M-Class Mining’s MC #1 Mine as part of a regular quarterly inspection of the mine. (Tr. 22:6–14.) Inspector Gayer has extensive training and experience as a mining safety inspector, working for more than ten years as an MSHA inspector, training specialist, and conference litigation representative. (Tr. 16:20–17:4.) Gayer also has specialized training in mine emergency situations and worked as a member of MSHA’s national mine rescue team. (Tr. 17:8–9, 17:25–18:18.) Prior to joining MSHA, Gayer worked for almost 25 years in various other positions in the coal mining industry. (Tr. 20:7–13.)

On the day of this inspection, Inspector Gayer went to the headgate, which M-Class had advanced approximately 1,500 feet to the thirteenth crosscut. (Tr. 22:18–22.) Between the

twelfth and thirteenth crosscuts in the No. 2 Entry, Gayer found the alternate escapeway substantially blocked by the coal conveyor belt on one side and on the other side by mining equipment, including the power transformer, cable tub, and water pump. (Tr. 23:2–5, 28:11–23.) The lifeline running down the mine roof of the alternate escapeway passed between the coal belt and these three pieces of equipment. (Tr. 42:3–6.) Inspector Gayer measured the distance between the power transformer and the frame of the coal belt and found a width of only 34 inches. (Tr. 35:20–36:13; Ex. GX–2 at 3.) The passageway narrowed even further to 17.5 inches between the belt and the cable tub, and just 15 inches between the belt and the booster pump. (Tr. 37:1–13.) Altogether, the equipment narrowed the alternate escapeway for a length of approximately 50 feet. (Tr. 57:13–15.)

Informed that the alternate escapeway was impermissibly narrow, the operator requested permission to attempt a stretcher test through the narrowed area. (Tr. 58:7–8.) To perform the stretcher test, four miners placed another miner on an emergency stretcher and attempted to carry him through the narrowed escapeway. (Tr. 57:21–25.) The miners were able to pass through the pinched area, but Gayer noted that they got through the area “with difficulty” and had to juggle and maneuver the occupied stretcher to pass the constricted section. (Tr. 58:15–21, 115:3–7.) Rather than carrying the stretcher with one miner at each corner, as designed, the miners had to line up single file and reach across the stretcher to avoid dumping out the supported miner. (Tr. 199:9–12, 204:13–25.) To pass the power transformer, which stood approximately five feet tall, the miners had to lift the occupied stretcher above their heads and sidestep through the narrow area. (Tr. 58:10–12.) The miners rested the stretcher’s weight on the water pump to pass that piece of equipment. (Tr. 204:6–12.) Specifically, Inspector Gayer saw the miners scooting or sliding the stretcher along the mining equipment. (Tr. 58:7–21.) While passing through the pinched area, the miners at times held on to the frame of the coal conveyor belt. (Tr. 210:19–211:22.)

Based on his observations, Inspector Gayer issued Citation No. 8424233, alleging a violation of 30 C.F.R § 75.380(d)(4):

The Alternate Escapeway in #2 Conveyor Belt Entry for Headgate #1 is not being maintained at least 6 feet wide. The presence of the Section Transformer #PC 2, the 12,470 high voltage cable tub, ISE Booster Water Pump #WP 1, and the conveyor belt reduces the width from 15 to 34 inches between the listed equipment and the conveyor belt on the North side and from 16 to 35 inches between the rib and the listed equipment on the South side for a distance of approximately 50 feet. The route of travel at this location does not pass [through] a door or other permanent ventilation controls, nor is there any necessary supplemental roof support in the affected area, located between 12 and 13 crosscuts. The reduced width is due solely to the presence of the equipment listed.

(Ex. GX–1 at 1.) Gayer designated the violation as unlikely to cause injury and characterized M-Class Mining’s negligence as “high.” (*Id.*) Inspector Gayer terminated the citation five days

later on October 27 after M-Class raised the coal conveyer belt so its bottom was at least five feet above the mine floor. (*Id.* at 2.)

B. Analysis and Conclusions of Law—Citation No. 8424233

Respondent relies on two theories to escape liability: (1) the area in question fits under the exception provided in section 75.380(d)(4)(iv), and, alternatively, (2) M-Class did not have sufficient notice that the conditions constituted a violation. (Resp't Br. at 6–16.)

1. Violation of Section 75.380(d)(4)

Section 75.380(d)(4) requires that a coal mine's escapeways be at least six feet, or 72 inches, wide unless an area falls under one of a limited number of exceptions. To prove a violation, therefore, the Secretary must show (1) the escapeway was less than six feet wide, and (2) the cited area does not fall under any of four enumerated exceptions.

The exception provided by section 75.380(d)(4)(iv) allows for mobile equipment or longwall mining equipment to narrow the escapeway to less than six feet. 30 C.F.R. § 75.380(d)(4)(iv). Yet the area must still be of sufficient width "to allow miners, including injured persons, to escape quickly in an emergency." *Id.* To determine whether an area is of sufficient width, MSHA may require a stretcher test, whereby four miners carry a person through the area in question on a stretcher. *Id.*; 61 Fed. Reg. 9764, 9811–9812 (Mar. 11, 1996).

Here, Respondent argues that the cited area fell under the exception provided by section 75.380(d)(4)(iv).⁴ (Resp't Br. at 7–11.) M-Class further asserts that its miners satisfactorily completed a stretcher test, proving that the escapeway was of sufficient width in accordance with the regulation. (Resp't Br. at 11–13.)⁵

Contrary to Respondent's assertion, the evidence before me does not establish that the alternate escapeway was wide enough that miners, including injured miners, could escape quickly during an emergency. Respondent's stretcher test failed outright under a strict reading of section 75.380(d)(4)(iv), which requires four persons to *carry* a miner through the area in

⁴ M-Class does not dispute the Secretary's contention that the exceptions provided in section 75.380(d)(4)(i), (ii), and (iii) do not apply. See 30 C.F.R. § 75.380(d)(4)(i), (ii), (iii) (describing exceptions to the width requirement for escapeways).

⁵ In support of its argument, Respondent points to *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 933 (June 1991) (ALJ). (Resp't Br. at 12–13.) In that case, an Administrative Law Judge vacated the Secretary's citation under a prior version of the regulation because the Secretary failed to meet its burden of proof to show a stretcher could not be navigated through an area approximately 36 inches wide. Nevertheless, *Rochester & Pittsburgh* is both legally and factually distinct from the case at hand. First, *Rochester & Pittsburgh* dealt with an earlier version of the regulations addressing the need to maintain escape facilities to ensure passage. Furthermore, *Rochester & Pittsburgh* involved a three-foot-wide opening, more than double the width of the escapeway in question here. I am not bound by *Rochester & Pittsburgh*, and, given the factual and legal differences, I see no reason to follow it. 29 C.F.R. § 2700.69(d).

question on a stretcher. As Inspector Gayer and M-Class Vice President Fox testified, the miners rested the stretcher on top of the water pump and slid it across the equipment instead of carrying it. I see little to differentiate dragging the stretcher across the equipment at hand and simply placing the stretcher on the ground and dragging it through the cited area. Neither scenario satisfies the text of the regulation.

Moreover, the evidence does not show that M-Class's stretcher test satisfied the protective intent of the regulation. Inspector Gayer credibly testified that the miners had difficulty maneuvering through the chokepoint created by the belt and the mining equipment. Instead of carrying the stretcher as designed, the miners had to line up single file, lift the disabled miner over their heads, and then shuffle the stretcher across the water pump in order to pass through the narrow area. The miners were in regular contact with the frame of the coal conveyor belt, which, when in operation, presents an additional hazard to the miners. Notwithstanding Vice President Fox's broad assertions that the miners "carried the guy right down through there" (Tr. 196:5-7), Respondent did not present evidence countering Inspector Gayer's testimony. Given Inspector Gayer's detailed testimony and contemporaneous notes, I credit his testimony over the vague statements by Fox.

Furthermore, it is important to note that the miners performing the stretcher test encountered these difficulties in ideal conditions. The Commission has consistently held that the test with respect to the use of an escape route "is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners' ability to expeditiously escape a dangerous underground environment in an emergency." *Am. Coal Co.*, 29 FMSHRC 941, 950 (Dec. 2007) (citing *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 560 (citing 61 Fed. Reg. at 9810)). The limited visibility and hazardous conditions caused by an emergency would be expected to enhance the difficulties the miners encountered while attempting the stretcher test. (Tr. 42:10-19.)

Respondent's unwavering focus on the miners' ability to squeeze through the constricted escapeway is misplaced. The Mine Act must be construed broadly to achieve the goal of health and safety, and exceptions to remedial legislation must be construed narrowly. *Local Union 7107, UMWA v. Clinchfield Coal Co.*, 124 F.3d 639, 640-41 (4th Cir. 1997), *cert denied*, 523 U.S. 1006 (1998); *Sec'y of Labor v. Cannelton Indus. Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989). The purpose of the escapeway-width requirement is to ensure that all persons, including injured miners, can quickly get out of harm's way amid a potentially catastrophic emergency. *See* 61 Fed. Reg. at 9811-9812. A successful stretcher test is a "demonstration that there is no delay in escape." *Id.* M-Class's stretcher test demonstrated just the opposite—that miners scrambling to escape a life-threatening emergency would be forced to wait as their colleagues twisted and contorted and juggled a full stretcher through a 15-inch gap. Miners should not be forced to choose between their own safety and the rescue of injured comrades.

Based on the evidence before me, I determine that Respondent's stretcher test did not show that the MC #1 Mine's alternate escapeway was of sufficient width to enable miners,

including disabled persons, to escape quickly in an emergency. Accordingly, the exception provided in Section 75.380(d)(4)(iv) does not apply to the cited area.⁶

2. M-Class Mining's Knowledge

In its defense, Respondent claims it cannot be penalized for the blocked escapeway because it had no knowledge that MSHA considered the discovered conditions to be a violation. (Resp't Br. at 13–16.) When determining whether an operator had fair notice of the requirements of a regulation, the Commission asks “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In applying this standard, the Commission has taken into account a wide variety of factors, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with “ascertainable certainty” of its interpretation of the standard in question. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694–95 (July 2002).

First, M-Class asserts the regulation is unclear because both the text and MSHA have not provided a minimum acceptable width under section 75.380(d)(4)(iv). (Resp't Br. at 15.) Here, however, the regulatory history repeatedly emphasizes the need for miners to be able to escape the mine without delay. 61 Fed. Reg. at 9811–9812. The facts in this instance establish that M-Class did not meet that standard. The escapeway narrowed to 17.5 inches at the cable tub and to a mere 15 inches between the operational coal belt and the water booster pump. Navigating such a small gap would require careful maneuvering for even an unencumbered miner, let alone a team of equipped miners carrying a wounded colleague during an emergency.

Second, Respondent argues that MSHA's failure to cite the blocked escapeway in prior inspections should forestall the violation in this instance. (Resp't Br. at 16.) In support of its argument, Respondent points to a number of decisions from Commission Administrative Law Judges vacating citations where MSHA for years prior had either failed to identify violations or openly declined to cite the conditions. (*Id.*) Those facts are not present in this case. At the time of the inspection, M-Class's first headgate was only 1,500 feet deep. M-Class developed the headgate at a rate of nearly 500 feet per day, so the specific conditions in this citation could not have existed for more than several days prior to MSHA's October 22 inspection.

Considering these factors, I determine that a reasonably prudent miner would have recognized the alternate escapeway with equipment stored in it was too narrow to allow a stretcher team to escape quickly. While MSHA's regulations envisage instances where an alternate escapeway can be less than six feet wide, reducing the passage to a mere 15 inches is such a drastic reduction that any reasonable miner would notice the narrowing and realize it is

⁶ Because M-Class's escapeway did not meet the regulation's width requirement, I need not reach the question of whether the power transformer, cable tub, and water pump qualified under the section as mobile equipment or equipment necessary for the development of a longwall.

insufficient. M-Class's tortured reading of the regulation is akin to shoving a square peg into a round hole. That exercise, like M-Class's argument, ultimately fails.

Consequently, I conclude that the Secretary has satisfied both elements for a violation of section 75.380(d)(4), as the cited area of the escapeway was not at least six feet wide, and no statutory exceptions to the width requirement were applicable. I also conclude that M-Class reasonably should have known that its actions constituted a violation of the regulation.

3. Gravity

M-Class Mining does not dispute the Secretary's gravity determination for Citation No. 8424233. Because the primary escapeway remained clear, I determine that the Secretary properly concluded that the violation was unlikely to cause injury and that the injuries most likely to result from an incident involving the violative conditions would be lost workdays or restricted duty. Finally, I agree that the Secretary properly determined that the violative conditions affected thirteen persons, the number of miners working in that section of the mine.

4. Negligence

M-Class Mining disputes the Secretary's determination that the operator displayed high negligence in allowing the violative condition to exist, as the mine did not know MSHA considered the blocked escapeway to be a violation. (Resp't Br. at 16–18.) As discussed above, however, Respondent should have known that the escapeway was too narrow to allow injured miners to escape quickly. Furthermore, I note that M-Class abated the violation by simply raising the coal conveyor belt approximately three feet higher than it had been initially installed. Although M-Class presented testimony to the difficulty of placing its equipment in crosscuts rather than the escapeway, Respondent provided no explanation for its failure to adopt the simple precaution of raising the conveyor belt. Absent such evidence, it is unclear to me why M-Class failed to pursue such a seemingly straight-forward precaution to meet the high standards of miner safety required by the Mine Act. I conclude that the Secretary has demonstrated M-Class Mining's level of negligence to be high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.")

C. Penalty

The Secretary proposes a \$425.00 civil penalty for this violation. Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In the seven months prior to the MSHA inspectors' visit, M-Class Mining received sixteen citations or orders for violations of mandatory safety and health standards. M-Class is a

relatively large operator, receiving nine out of a potential ten points for controller size under the Secretary's penalty criteria in his Part 100 regulations. *See* 30 C.F.R. § 100.3(b). Nothing in the record suggests that the penalty would impinge on Respondent's ability to remain in business. Moreover, M-Class was highly negligent in allowing its mining equipment to block much of the mine's alternate escapeway, and although the violation was not likely to cause injury or illness, the restricted escapeway affected a large number of persons. Nevertheless, I acknowledge Respondent's timely efforts to remedy the violative condition.

Considering all of the facts and circumstances of this matter, I conclude that the Secretary's proposed penalty is appropriate and assess a penalty of \$425.00.

V. CITATION NO. 8424774—THE CLEAN COAL STACKER

A. Findings of Fact—Citation No. 8424774

On October 28, MSHA Inspector J. Scott Lee inspected the surface areas at M-Class's MC #1 Mine as part of a regular quarterly inspection of the mine. (Tr. 141:25–142:5.) Lee had worked for a total of 37 years in the mining industry, including 22 to 23 with mine operators and another 13 with MSHA. (Tr. 122:4–6.) Lee inspected coal stacker belts as a regular part of his job with MSHA and frequently as a safety inspector for the coal mines. (Tr. 122:21–25.)

The MC #1 Mine's stacker belt is powered by drive motors located at the bottom of the belt. (Tr. 144:8–13.) The top of the clean coal stacker belt contains a laser sensor that trips a mechanism to stop the motors if the belt becomes clogged. (Tr. 163:20–164:3.) The sensor switch is controlled from the main controller room, not from the top of the belt. (Tr. 166:23–25.) The laser sensor is connected to the main controller room with a low-voltage computer cable. (Tr. 163:20–164:12.) In addition, several lights hang from the coal stacker tower to illuminate the area below. (Tr. 167:18–168:7.) There are also a number of lights along the walkway leading to the top of the clean coal stacker. (Tr. 167:15–17.) No power distribution center or power box is located at the top of the clean coal stacker belt. (Tr. 170:2.)

Inspector Lee testified that he found permanent electrical installations, such as a circuit control panel, at the top of the mine's clean coal stacker. (Tr. 131:17–20.) Lee searched for but did not find a fire extinguisher at the top of the coal stacker. (Tr. 139:7–20.) Based on his observations, Inspector Lee issued Citation No. 8424774, alleging a violation of 30 C.F.R. § 77.1109(d): "There was no fire extinguisher located at the permanent electrical installation. This condition was observed at the drive motor for the clean coal stacker belt on top of the clean coal stacker." (Ex. GX-4.) Lee designated the violation as unlikely to cause injury and characterized M-Class's negligence as "moderate." (*Id.*)

When M-Class Mining's safety manager, Timothy Kirkpatrick, learned that Inspector Lee was issuing a citation for the lack of a fire extinguisher at the top of the tower, he asked Lee what equipment required a fire extinguisher. (Tr. 159:25–160:3.) Lee told Kirkpatrick the citation was for two gray boxes at the top of the tower. (Tr. 160:2–4.) When pressed by Kirkpatrick, Lee indicated the citation was for the stacker belt's drive motors. (Tr. 160:5–10.) After Kirkpatrick informed Inspector Lee that the belt's drive motors were not located at the top of the

tower, Lee indicated to Kirkpatrick that two gray boxes at the top of the tower required a fire extinguisher. (Tr. 160:11–20.)

Inspector Lee terminated the citation after M-Class placed a fire extinguisher on two gray boxes at the cited location that hold a carbon dioxide bottle. (Tr. 161:5–13, 163:1–9; Ex. GX–4 at 1, Ex. GX–5 at 3.) Inspector Lee did not go back to the top of the tower to see where M-Class placed the fire extinguisher. (Tr. 149:3–7.)

Inspector Lee did not mention the presence of the drive motor in his field notes, which Lee thought he filled out shortly after issuing the citation. (Tr. 125:16–24.) Lee’s notes do not identify the installation requiring a fire extinguisher, but instead refer generally to an unspecified “permanent electrical installation.” (Ex. GX–5 at 2.)

B. Analysis and Conclusions of Law—Citation No. 8424774

The threshold issue is whether the Secretary has established a violation of 30 C.F.R. § 77.1109(d). Inspector Lee issued Citation No. 8424774 for M-Class Mining’s failure to provide a fire extinguisher at the top of the clean coal stacker belt. (Ex. GX–4.) To demonstrate a violation of 30 C.F.R. § 77.1109(d), the Secretary must prove by the preponderance of the evidence that the operator (1) failed to provide a fire extinguisher (2) commensurate with the fire hazard presented by an electrical installation.

In a sparse, two-page argument, the Secretary asserts that the citation should be affirmed because M-Class failed to provide a fire extinguisher for the sensor eye located at the top of the clean coal stacker belt. (Sec’y Br. at 16.) Notably, the Secretary’s argument is a sharp diversion from the citation issued during Lee’s October 28 inspection. Inspector Lee explained his erroneous wording in the citation as a clerical error that resulted from him using a template citation rather than starting from scratch. (Tr. 124:8–20.) Although the Secretary had ample opportunity to amend the citation to properly reflect the violative conditions discovered atop the clean coal stacker belt, he nevertheless declined to do so. Moreover, Lee’s notes from the inspection provide no additional clarity. (Ex. GX–5 at 2–3.)

Inspector Lee’s citation and notes are not the only shortcomings in the Secretary’s case. At hearing, Lee’s testimony was unclear at best. When the Secretary’s counsel presented Inspector Lee with Respondent’s photographs of the area at the top of the clean coal stacker belt, Lee could not identify with certainty a permanent electrical installation requiring a fire extinguisher nearby. (Tr. 129:23–130:7, 131:13–132:15.) When further prompted on direct examination to identify the location of the cited permanent electrical installation, Inspector Lee first stated he had a feeling the electrical installation was on one side of the stacker tower but then subsequently identified the culprit as a small metal box located on the opposite side of the tower. (Tr. 132:9–12, 134:13–135:1; Ex. GX–6 at 2–5.) Undeterred, Lee again switched his testimony on cross-examination, asserting that the cited permanent electrical installation was in the first location he identified. (Tr. 146:13–25.) The Secretary did not introduce his own photographs identifying the violative condition.

Inspector Lee also could not identify what the alleged permanent electrical installation was. Lee first testified that he would have cited a circuit control panel. (Tr. 131:17–20.) He subsequently testified that even a junction box, where two wires meet, would be a permanent electrical installation for the purposes of section 77.1109(d). (Tr. 135:17–19). On cross-examination, Lee testified that he had identified a circuit box or control panel that was used to distribute electricity to instruments at the top of the clean coal stacker belt. (Tr. 145:5–8.) Lee then expanded his definition of a permanent electrical installation to include all conduits. (Tr. 145:9–18.) When questioned whether his expansive understanding effectively includes all wires capable of carrying an electrical current, Lee backed off his testimony and again insisted he was looking for a box. (Tr. 145:19–146:6.) Lee further testified that he did not need to know the contents of a “silver box” in order to identify it as a permanent electrical installation. (Tr. 150:2–18, 151:19–23.) Indeed, Lee admitted that he had not thoroughly checked the alleged electrical installation he cited. (Tr. 151:20–152:3.)

Considering Kirkpatrick’s testimony regarding the inspection, I do not find Inspector Lee’s testimony to be credible. *See Grizzle v. Picklands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (indicating ALJs have the “sole power to make credibility determinations and resolve inconsistencies in the evidence”). Furthermore, the citation itself is admittedly inaccurate and the notes unilluminating. Altogether, the Secretary has provided no evidence to support his allegations that the top of M-Class Mining’s clean coal stacker belt contained any permanent electrical installation requiring a fire extinguisher to be placed nearby. Although the Secretary in his reply brief points to the laser sensor as proof that a fire extinguisher was needed atop the clean coal stacker, he provides no details regarding the fire hazard posed by this low-voltage sensor and no theory suggesting what type of fire extinguishing equipment such an instrument would require.⁷ The Secretary chose not to put Inspector Lee on the stand in rebuttal or call any rebuttal witnesses.

The Mine Act imposes on the Secretary the burden of proving the violation the Secretary alleges by a preponderance of the evidence. *See Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989) (citations omitted). Given the lack of evidence before me, I determine that the Secretary has not satisfied his burden of proof to demonstrate the elements of a violation of section 77.1109(d). Citation No. 8424774 therefore is vacated.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8424233 is **AFFIRMED**. It is further **ORDERED** that Citation No. 8424774 be **VACATED**.

⁷ Although MSHA has not provided direct guidance on what constitutes a permanent electrical installation for the purposes of section 77.1109(d), the agency’s Program Policy Manual mentions “electric motors or transformers” as examples of such installations. V MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 77, 199–200 (2003). Here, the Secretary has provided no evidence to suggest the low-voltage sensor shares any essential characteristics with the permanent electrical installations noted in MSHA’s Program Policy Manual.

WHEREFORE, Respondent is **ORDERED** to pay a penalty of \$425.00 within 40 days of this Decision.⁸



Alan G. Paez
Administrative Law Judge

Distribution:

Bryan Kaufman, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 515, Denver, CO 80204-3516

Christopher D. Pence, Esq., Hardy Pence, LLC, P.O. Box 2548, Charleston, WV 25329

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⁸ Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.