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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2015-0339 A.C. No. 36-07230-390481 Mine: Bailey Mine

DECISION

Appearances: Jane Hwang, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner.

Patrick W. Dennison, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Andrews

This proceeding is before me on a petition for assessment of civil penalties filed by the Secretary of Labor ("Secretary" or "Petitioner"), acting through the Mine Safety and Health Administration ("MSHA"), against Consol Pennsylvania Coal Company, LLC, ("Consol" or "Respondent"), at its Bailey mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 ("Mine Act" or "Act"). This docket involves twenty citations issued pursuant to Section 104(a) of the Act during the period from October 2, 2014 through July 29, 2015 with total proposed penalties of $20, 166.

A hearing was held in Pittsburgh, Pennsylvania on August 14 and 15, 2017. Prior to the hearing, the parties settled sixteen of the citations, and those settlements were placed on the record. The partial settlements were approved on December 20, 2017. Testimony and documentary evidence was presented by the parties on the remaining four citations.[1]

[1] References to the transcript will be "Tr." followed by the page number(s). Joint exhibits will be "JX", the Secretary's exhibits will be "GX", and Respondent's exhibits will be "R", each followed by the number.

After the hearing, each party submitted a post-hearing brief and Respondent filed a Reply Brief.[2] All of the evidence of record has been considered.[3]

Joint Stipulations were admitted at the hearing:

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 803(d), at the Bailey Mine (Mine I.D. 36-07230) at which the citations at issue in this proceeding were issued.

2. Operations of the Respondent at the mine at which the citations were issued are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

4. The individuals whose names appear in Block 22 of the citations were acting in their official capacities and as authorized representative of the Secretary of Labor when the citations were issued.

5. True, authentic copies of the citations were served on the Respondent or its agent as required by the Mine Act.

6. The citations contained in Exhibit "A" and attached to the Secretary's Petitions are authentic copies.

7. Payment of the total proposed penalties listed in Exhibit "A" for Docket No. PENN 2015-339 will not affect Respondent's ability to continue in business.

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[2] Throughout this decision the Secretary's Post Hearing Brief will be cited as "SPHB". Respondent's Post Hearing Brief will be cited as "RPHB" and the reply brief as "RRB".

[3] The findings of fact in this decision are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also evaluated demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the ALJ's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

8. The R-17 Certified Assessed Violation History Report (Exhibits GX1) is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.

9. The citations contained in Docket No. PENN 2015-339 were each issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the Citations, as required by the Act.

10. In July 2015, Bailey Mine (Mine I.D. 36-07230) was subject to 5-day Methane Spot Inspections.

JX-1

Legal Principles

Strict Liability

The Commission has established that under the Mine Act an operator may be held liable for a violation of a safety standard without regard to fault. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd* 868 F.2d 1195 (10th Cir. 1989). Therefore, the Mine Act is a strict liability statute and if a violation of a mandatory safety standard occurs, an operator will be held liable regardless of the level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Ames Construction, Inc.*, 33 FMSHRC 1607, 1611-12, n.6 (July 2011).

Burden of Proof

In 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). The burden imposed on the Secretary by the Mine Act is to prove alleged violations and related allegations such as gravity and negligence by a preponderance of the evidence. *Garden Creek Pocahontas Company,* 11 FMSHRC 2148, 2152 (Nov. 1989), citing *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989); Jim Walter Resources, Inc., 30 FMSHRC 872, 878 (Aug. 2008) (ALJ). Quoting the Supreme Court in *Concrete Pipe*, 508 U.S. 602, 622 (1993), the Commission observed that "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir 2001); *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Gravity

The term "gravity" is contained in Section 110(i) of the Mine Act in the context of factors to be considered by the Commission in assessing civil monetary penalties. Among those factors

is "the gravity of the violation". This is generally expressed as the degree of seriousness of the violation and is measured in terms of the likelihood of injury, the severity of such injury should it occur, the number of persons affected, and whether the violation is significant and substantial.

Significant and Substantial ("S&S")

Section 104(d) (1) of the Mine Act describes an S&S violation as being "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d) (1). The Commission has established that a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable likelihood the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981). The four-part test long applied to establish the S&S nature of a violation examines: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The *Mathies* test has been revised to focus on the interplay between the second and third steps. The second step addresses the contribution of the violation to a discrete safety hazard and is now primarily concerned with "the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed." *ICG Illinois*, at 2475, *citing Newtown Energy Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) *citing Knox Creek,* at 162-63. At this step a two-part analysis is required. First, the particular hazard to which the violation contributes must be clearly described. The Commission defines "hazard" in terms of prospective danger, *i.e.*, the danger which the safety standard at issue is intended to prevent. The starting point for determining the hazard is the regulation cited by MSHA. Second, a determination is required of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. *ICG Illinois,* at 2475-76; *Newtown,* at 2038. The Commission has recognized that "reasonable likelihood" is not an exact standard capable of measurement in precise terms, but is a matter of the degree of risk of the occurrence of a hazard or a reasonably serious injury. *ICG Illinois,* at 2476; *Newtown,* at 2039.

At step three the focus shifts from the violation to the hazard and the analysis is concerned with gravity. The *Knox Creek* Circuit Court reasoned that at this stage of the analysis the existence of the hazard should be assumed. *Knox Creek*, at 164. The inquiry is whether, based on the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. *ICG Illinois,* at 2476, *Newtown,* at 2037, *citing Cumberland Coal Res.,* at 2365. The Commission has not equated the reasonable likelihood standard with a probability greater than fifty percent; The Secretary is not required to prove an injury was "more probable than not". *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-66 (Jun. 1996). The step four gravity determination is essentially unchanged, whether any resultant injury would be reasonably likely to be of a reasonably serious nature. *Newtown,* at 2038.

Negligence

Section 110(i) of the Mine Act also includes "negligence" as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but over 30 years ago the Commission recognized that: "[e]ach mandatory standard...carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A. H. Smith Stone Company,* 5 FMSHRC 13, 15 (Jan. 1983).

The Commission has established that its judges may "evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care-a standard of care that is high under the Mine Act." *Brody Mining, LLC,* 37 FMSHRC 1687, 1702 (Aug. 2015). This evaluation considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014).

The Secretary's regulations categorize negligence into levels labeled "no", "low", "medium", "high", and "reckless disregard". These levels are based on the degree of the operator's knowledge of the violative condition or practice along with the existence or multiples of mitigating circumstances found to be present. The procedure used takes the level of negligence determined and applies a number of "points" from a table which are then added together with points from other factors to arrive at the calculated proposed penalty amount. *See*, 30 C.F.R. § 100.3, Tables I-XIV.

The Commission and its judges are not bound to apply the 30 C.F.R. Part 100 regulations that govern the MSHA's determinations. *Newtown Energy, Inc.,* 38 FMSHRC 2033, 2048 (Aug. 2016) *citing Brody* at 1701-03. Therefore, the Commission's judges are not limited to an evaluation of allegedly "mitigating circumstances" and instead may consider the "totality of the circumstances holistically." *Brody,* at 1702; *Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir 2016). For example, the Commission has stated the real gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Newtown,* at 2049, *citing Topper Coal Co.,* 20 FMSHRC 344, 350 (Apr. 1998) *citing Eastern Associated Coal Corp.,* 13 FMSHRC 178, 187 (Feb. 1991). High negligence may be found in spite of mitigating circumstances, or, for example, moderate negligence may be found without identifying mitigating circumstances. *Brody*, at 1702-03. The Commission has described ordinary negligence as "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987).

Penalty

The Mine Act delegates the duty of proposing civil monetary penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The proposed penalty is calculated by application of the Secretary's regulations at 30 C.F.R. Part 100. By referring to each citation or order along with operator data and violation history, points are applied and totaled to arrive at a monetary penalty

amount. 30 C.F.R. § 100.3 and Tables I-XIV. The Commission and its judges are not bound by the Secretary's proposed assessment, and the Part 100 regulations are in no way binding in Commission proceedings. The Commission alone is responsible for assessing the final monetary penalty. *Sec'y of Labor v. American Coal Company,* 38 FMSHRC 1987, 1990, 1993 (Aug. 2016) *citing Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984); *Mach Mining, LLC, v. Sec'y of Labor,* 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) If the operator challenges the proposed penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28.

The Mine act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). In assessing civil monetary penalties the six criteria to be considered are the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The principles governing the authority of Commission Administrative Law Judges to assess civil monetary penalties *de novo* are well-established. *Hidden Splendor Resources, Inc.,* 36 FMSHRC 3099, 3104 (Dec. 2014). Congress has conferred broad discretion upon the Commission and its Judges in the assessment of civil penalties under the Act. *American Coal,* at 1993 *citing Westmoreland Coal Co.,* 8 FMSHRC 491, 492 (Apr. 1986). The assessment of the Judge is entirely independent of the Secretary's penalty proposal, which is not a baseline, starting point or guidepost. *American Coal*, at 1990, 1995. However, the broad discretion accorded to the Judge is not unbounded and must reflect proper consideration of the statutory penalty criteria. *Id.*, at 1993. For each of the six statutory criteria, the Judge must make findings of fact. *Id.*; *Sellersburg Stone Company*, 5 FMSHRC 287, 292 (Mar. 1983); 29 C.F.R. § 2700.30(a). Although all six of the statutory criteria must be considered, the factors need not be assigned equal weight, and for more serious violations gravity and negligence may be weighed more heavily than the other four criteria. *Knight Hawk Coal, LLC,* 38 FMSHRC 2361, 2374 (Sept. 2016) *citing Lopke Quarries, Inc.,* 23 FMSHRC 705, 713 (July 2001); *see also Spartan Mining company, Inc.,* 30 FMSHRC 699, 724-25 (Aug. 2008) and *Musser Engineering, Inc.,* 32 FMSHRC 1257, 1289 (Oct. 2010).

Underlying the Mine Act's penalty assessment scheme is the deterrent purpose of its penalty provisions. *Black Beauty Coal Company*, 34 FMSHRC 1856, 1866-67 (Aug. 2012) *citing Sellersburg Stone* at 294. The Judge may take into account the deterrent effect of the penalty assessed. *Black Beauty* at 1168-69; see also *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989). The Commission has also stated Judges "must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge." And, "If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *American Coal,* at 1994; *citing Sellersburg,* at 293. The Judge need not make exhaustive findings. *See, Cantera Green*, 22 FMSHRC 616, 621 (May 2000).

Citation No. 7033764

This citation was issued on July 16, 2015 by Inspector Richard L. Eddy ("Inspector Eddy" or "Eddy").[4] The Condition or Practice was described as follows:

> Based on the laboratory analysis Bag No. 0155006AA of a rock dust survey taken by M.S.H.A. on 07/08/2015 on 4J, MMU No 002-0 at 40' outby the face of the No. 1 Entry, it was determined that the sample collected was non compliant. All underground areas of a coal mine shall be maintained in such quantities that the incombustible content of the combined coal dust, rock dust and other dust shall not be less than 80%. The sample collected was at 65.9%.
>
> Standard 75.403 was cited 23 times in two years at mine 3607230 (23 to the operator, 0 to a contractor).
>
> Supporting rock dust sample bag numbers: 0155006AA

Inspector Eddy designated the violation as S&S. He determined injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 4 persons. Eddy rated the negligence as moderate. The citation was terminated about 3 hours later when he found the area had been rock dusted. GX-7. The proposed penalty is $807.

The safety standard cited provides:

> **Maintenance of incombustible content of rock dust.**
>
> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane.

30 C.F.R. § 75.403.

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[4] Inspector Eddy stated he had a little over 44 years in the coal mining industry. Tr. 164. He started in 1973 and learned to run all types of underground equipment. Tr. 162-163. He then worked as a Certified Mine Foreman and a mine Examiner. Tr. 163-165. From 1989 to 1993 he was a full-time labor representative for the United Mine Workers (UMW), then a District President until 2004, and then a District Vice-President until 2010, when he retired. He returned to the UMW for a couple of years until he started with MSHA. Tr. 164. From July 2012 until October 2015 he was certified in accident investigations such as ignitions and personal injury. Tr. 160-162. At the time of the hearing, he was a Field Office Supervisor in Craig, Colorado overseeing all functions of that office including all types of inspections and accident and injury investigations. Tr. 160.

In addition, in pertinent part:

> **Rock dusting.**
>
> All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter....

30 C.F.R. § 75.402.

Contentions

Respondent contends that rock dust sample bag No. 0155006AA was collected at or less than forty feet outby the face of the No. 1 Entry, where Respondent was not required to rock dust. Respondent argues that measuring the distance from the face by counting roof bolts and straps was neither accurate nor reliable because of the use of roof mesh and the spacing of roof straps less than four feet apart. As a result, the Secretary has not sustained the burden of demonstrating the fact of this violation by preponderance of the evidence. RPHB, pp. 23-32.

The Secretary contends the Inspector was required to take samples beginning at least forty feet from the face, and the sample at forty feet outby the face of the No. 1 Entry was only 65.9% incombustible content. The Secretary argues there were mining machines in the No. 1 entry and production was shut down for the sample; when machines are present the Inspector does not use a measuring tape, but the four foot spacing of the roof bolt straps. Further, the Inspector counted eleven straps back from the face, and considering that the first strap would be one to two feet from the face, this resulted in a distance of forty one to forty two feet, which is the accurate measurement rather than his notes stating the sample was at forty feet outby. SPHB, pp. 15-21.

Evidence

Inspector Eddy testified he was familiar with E01 inspections at the Bailey mine. Tr. 165. He had conducted at least two quarterly inspections at the Bailey Mine, equal to 6 months of inspection time. Tr. 166. On July 8, 2015, Eddy conducted an E01 inspection at Bailey, which was under a 103I spot inspection for methane liberation because the mine generated more than 1 million cubic feet of methane per 24 hour period. Tr. 167-168. That day Eddy traveled to the 4J MMU 002-0 section and collected rock dust samples. Tr.168-169. When he took the sample, the section had to shut down. Tr. 176-177.

Eddy testified he collected the violative sample 41 feet from the face. Eddy testified that he typically used a 25-foot measuring tape, but he did not want to use it in this instance because there was machinery in the No. 1 entry. Tr. 172. Eddy used the roof bolt metal straps to calculate the distance because he believed the straps were at 4-foot intervals and he counted 11 of them; and because the last strap was one to two feet from the face, his measurement would be 41-42 feet from the face. Tr. 173. Eddy testified that the roof straps were every 4-5 feet

according to the Bailey mine's roof control plan. Tr. 174. However, Inspector Eddy also testified that in the notes submitted to MSHA with the sample and in the citation he wrote he took the sample at 40 feet outby the face, not 41 or 42 feet outby. Tr. 193-194, 199; GX-7. He submitted the samples he collected for testing. The result for bag 0155006AA was 65.9% incombustible material with .3% of methane present. Tr. 170-171, GX-8. The location of the sample was "40' Outby Face of No 1 Entry".

Inspector Eddy testified that at .3% methane, miners were allowed to roof bolt because the explosive range of methane is between 5-15%. Tr. 207-208. Additionally, Eddy testified that a continuous miner will deenergize at 1.9% methane. Eddy noted the ventilation in the section at the time was safe at 31,323 CFM. Tr. 208. There were no permissibility violations for the mining equipment that day. Tr. 209.

When Inspector Eddy returned to the mine on July 16, 2015, with the sample results from July 8, 2015, he issued the citation for a violation of 30 C.F.R. § 75.403 for having an incombustible content less than 80%. Tr. 171. Eddy testified the regulation requires the mine to rock dust 40 feet out from the face. Tr. 180-181. Eddy further testified that this standard requires an ignition source, and the continuous miner and roof bolter machines create sparks that can be ignition sources. Tr. 171-172, 180, 182-183.

Inspector Eddy's notes for July 8, 2015, show that he did not record the name of the company representative accompanying him on the inspection. GX-10, p. 1. After traveling to the 4J, MMU 002 section and terminating two citations, he collected three rock dust samples in the No. 1 entry. The third sample was listed as: "Rock Dust Sample No 0155006AA at 40' Outby Face of No. 1 Entry". *Id.*, pp. 3, 4. Eddy then proceeded on an imminent danger run from entry No. 1 to entry No. 3. With his findings in the No. 3 entry he listed a continuous miner, a Joy loader, a Joy shuttle car, and a power center, observing no violations for any of the equipment. *Id.*, pp. 5-8.

John Opfar ("Opfar"), Dust Coordinator, testified for Respondent.[5] Opfar was the respirable dust coordinator in July 2015, but he also helped the safety department by traveling with inspectors. Tr. 234. As the dust coordinator for Consol, Opfar helped Consol ensure it complied with all respirable dust regulations and made sure that Consol took all quarterly respirable dust samplings. He also helped the safety department often, escorting inspectors and running safety meetings. Tr. 235. Citation No. 7033764 was issued to Opfar on July 16, 2015. Tr. 236.

[5] John Opfar worked at Mine 84 for a little over 4 years and then at Consol's Bailey mine for 12 years. Tr. 233. At Consol he worked in the safety department as a Safety Inspector and Respirable Dust Coordinator. He has a number of certifications, including dust sampling, continuous personal dust monitor (CPDM) sampling, gravimetric sampling, maintenance and calibration of the sampling devices, methane and oxygen deficiency, mine examiner, and EMT. Tr. 233-234. In 2015 he was the Respirable Dust Coordinator. He graduated in 2004 with a Bachelor's of Science Degree in Safety and Environmental Management. Tr. 234.

Opfar testified that in the 4J section, there were three entries, 1, 2, and 3. Tr. 239. No. 1 was the belt entry, and No. 2 was the track entry, with intake air. Tr. 239-240. Opfar testified that in the 4J section, the continuous mining machine cut out 12 feet, advanced the miner, then roof bolts were installed to hold the roof up, "275 feet up the return." Tr. 240-241. After the miners moved to the track entry, they would start the same cycle again. During that time, if they mined 40 feet, they rockdusted "the whole cycle." The miners used a loading machine with a hopper on it to rockdust. Opfar testified that the air carried the rock dust a little farther than it was being sprayed. Tr. 241.

Opfar testified that David Govan traveled with the inspector on July 8, 2015, when the sample was taken. Tr. 236-237. Govan is no longer employed by Consol due to a work force reduction. Tr. 237. After the Citation was issued, David Govan recorded his contentions regarding the violation:

> 1. The three other samples taken in the area were all well above the 80% standard. 2. There was not any active mining in the entry the sample was taken. The active mining was taking places (sic) two entries away from the area that was cited.

R-9.

Opfar helped Dave Govan with his notes. Tr. 246. He testified the date of July 13, 2015, on the document was not accurate, since the citation was not issued until July 16, 2015, and the notes were prepared the day the citation was issued. Tr. 247-248, 268.

Opfar testified that roof straps were always less than 4 feet at the Bailey mine because the straps held the roof mesh up, and the roof mesh was 4 feet. Thus, the straps were less than 4 feet apart to secure the mesh. Tr. 243. Opfar further testified that Consol put extra bolts in the belt entry to prevent a roof fall because it was difficult to get equipment in the area once the belt was installed. Tr. 245. Opfar testified that Bailey mine always added extra roof bolts in a belt entry even if the roof was in good condition. Tr. 276.

Opfar agreed the continuous miner and roof bolter can create sparks, and that methane was released during mining. Tr. 270. Opfar testified that ignition can occur even though there were sprays at the tip of the bits on the continuous miner. Tr. 284-285. However, Opfar testified there was no mining in the entry and no roof bolting in that area on July 8, 2015. Tr. 273. He stated there was no mining that day in the No. 1 entry, so there was no ignition source. Tr. 265.

Analysis

It is well established that the phrase "to within 40 feet of all working faces" has been accepted to mean *beyond* 40 feet of working faces or *more than* 40 feet from the face. For example, it is not required that rock dust be applied from the face to 40 feet outby the face. *Consol,* 39 FMSHRC 572, 573 (Mar. 2017) (ALJ Steele). The sample submission form location and the written citation locations were different than the testimony of the Inspector at the hearing. Inconsistencies between the Secretary's documentary and testimonial evidence and the

contradictory testimony of an operator's witness are important factors when assessing the credibility of witnesses as well as, in this case, the location of a sample.

The sample submission form shows the collection date of July 8, 2015, and the location as "40' Outby Face of No 1 Entry". GX-8. On the citation issued on July 16, 2015, the location was "at 40' outby the face of the No. 1 Entry". Not until the hearing was there a change in the location to 41-42 feet from the face. The Secretary suggests the discrepancy is a mere 12 inches.

Inspector Eddy relied on the mine's roof control plan requiring roof bolting every 4 to 5 feet. Then, counting 11 rows out, and considering the first row only 1-2 feet from the face, he concluded the distance must have been at least 41-42 feet from the face. However, he did not actually measure the distance with a tape measure.

The reason given for not using the tape measure was that he recalled machinery, not identified, was in the entry, and also that the section had to shut down for him to collect the sample. But Eddy's own notes do not support his testimony. The imminent danger run ended at entry No. 3. In his notes from the No. 3 entry Eddy recorded the presence of three mining machines, a power center and a refuge alternative. There was no indication of shutting down production. Under his notes at entry No. 1, there is no indication of any machine.

Inspector Eddy also did not measure the distance between any of the rows of roof bolts and straps to confirm that they were at least 4-5 feet apart. There is no indication that he visually estimated any of the rows to even determine that the 4 to 5 foot distance was actually being maintained.

Respondent's witness Opfar disagreed that the sample was properly taken. He described in detail the reason the roof bolts and straps were spaced at less than 4 feet apart. Opfar testified that the roof bolts and straps also secured wire mesh to the roof, and this mesh is 4 feet wide. To secure rows of mesh, the spacing must be at less than 4 feet. This would place the sample location at or less than 40 feet from the face. Opfar's testimony, based on an objective means of determining distance, is of greater probative value than the recollections, estimates and reliance on the roof control plan by the Inspector. Further, Opfar's testimony that there was no mining taking place in the No. 1 entry is more consistent with the Inspector's notes.

It is the Secretary's burden to prove a violation by a preponderance of the evidence. Here, the evidence found credible does not show that the sample at issue was taken *more than* 40 feet from the face of the No. 1 entry. Therefore, the Secretary has not carried the burden to establish a violation of 30 C.F.R. § 75.403 occurred. Accordingly, Citation No. 7033764 should be vacated.

Citation No. 9057948

Inspector Michael D. Moten ("Inspector Moten " or "Moten")[6] issued this citation on July 28, 2015 under safety standard 30 C.F.R. § 75.1722(b). The Condition or Practice was described as follows:

> At the 4 West-#2 conveyor tail pulley the operator has failed to install a guard extending a sufficient distance to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. When checked, the installed guard placed the self cleaning tail pulley within 9 inches of reach.

Moten designated the violation as S&S. He determined that injury was reasonably likely and could reasonably be expected to be permanently disabling to 1 person. He rated the negligence as moderate. The citation was terminated only minutes later when:

> A guard was installed and secured which extends a distance appearing adequate to prevent a miner from reaching behind and coming caught between the belt and tail pulley. GX-3.

The proposed penalty is $807.

The safety standard provides:

Mechanical equipment guards.

(a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.
(b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.
(c) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

30 C.F.R. § 75.1722

Contentions

Respondent contends the guarding at the 4 West No. 2 belt tailpiece had existed since 2008 and had been inspected by MSHA many times. The sides, back and top of the tail pulley

[6] Inspector Moten had worked since 2002 at a number of underground and surface mines as section foreman, equipment operator, apprentice electrician, rescue team member, and mine examiner. Tr. 15-16. He holds state certifications in mine rescue and assistant mine foreman; his EMT certification has lapsed. Tr. 16. He became a Coal Mine Inspector in 2012. Tr. 13.

were completely covered and enclosed, with only a small opening for the belt to enter and wrap around the tail pulley; a miner would not be in a position to reach behind the guard. Therefore, the pinch points were entirely protected by the guarding to satisfy the standard; there was not a reasonable potential risk of contact with the tail roller or pulley by stumbling, falling, inattention, or carelessness. The additional piece of guarding installed to abate the citation only blocked access to the belt, but nothing was done to the existing guarding to the tail pulley or roller. Further, Respondent argues it did not have adequate notice that this guarding was insuffient and in violation of the cited safety standard. RPHB, pp 1-13; RRB, pp. 1-2, 4-5.

The Secretary contends there was an opening large enough to fit a hand and arm in the guarding so a person could reach behind and come between the tail pulley and the belt. The opening was on the walkway side of the belt, and putting a hand into the opening would cause contact with moving parts. It was reasonably likely, due to a water hose and hardware in the area, that a person could stumble or trip and place their hand into the tailpiece. Examiners travel through the area three times daily. SPHB, pp. 7-8.

Evidence

Inspector Moten testified he had mining experience with guarding, installing belt heads, and conducting examinations of belt heads in working and outby areas. Tr. 15-16. When he checked the tailpiece for the 4 West No. 2 conveyor belt he discovered an opening in the installed guarding that was large enough to allow a person to reach behind the opening and get caught between the belt and the tail pulley. The opening was large enough that he could fit his hand and arm in the opening. He would have easily been able to reach and touch the moving parts. The belt ran at 840-850 feet per minute. Tr. 21-24, 28; GX-3. The moving parts were accessible at a distance of 9 inches, by tape measure, to where the belt and pulley contacted each other. This was adjacent to the travel way on the walkway side of the belt. Tr. 23-24; GX-4, p. 6. The opening was obvious, an examiner should have known the condition existed because you could just stand and observe there was an opening. Tr. 28.

Inspector Moten also testified there were tripping hazards near the unguarded area, including a 1-inch washdown hose and hardware for installation of the belt head and tailpiece. Tr. 24. A miner tripping, and attempting to catch themselves, could place their hand into the tailpiece. Tr. 26. This area would be examined at least 3 times every day, and inspected at least 4 times a year. Tr. 25, 42. Belt mechanics also worked in the area. Tr. 25, 130. This citation was terminated when a large piece of guarding was attached to cover the opening, so that a hand or fingers could no longer fit through. Tr. 25-26, 53. It took nine minutes to abate this violation. Tr. 62-63. Inspector Moten testified he was told no guarding had ever been there, and no one had "an issue" with the area previously. Tr. 63.

Inspector Moten designated this violation as Significant & Substantial ("S&S") because he believed there was a tripping hazard near the opening, which could lead to a person stumbling and putting an arm through the hole. Tr. 26. He testified that this could lead to a permanently disabling injury because a miner could lose their hand up to the middle of the forearm or be pulled into the belt. Tr. 27. Inspector Moten evaluated the negligence as moderate because this area was examined three times daily and the opening was obvious. Tr. 28. Photos taken after the

citation show the abatement guarding in place; the opening into the moving parts cited is not visible because of the mesh. R-2.

Justin Jones ("Jones"), a Consol Safety Inspector, accompanied Inspector Moten that day and testified for Respondent.[7] He testified he believed it was impossible for a person to injure themselves by putting a hand in the cited opening unless they were actively trying to do so because of the angle. Tr. 109. He also testified this guarding had been installed by 2008 and every MSHA inspector since that time who had observed this tail pulley never had an issue with the guarding. Tr. 111. The only time work would be done on the tail pulley would be once a week when it was greased. When the pulley was being greased, the belt would be locked and the electrical switch would be thrown. Tr. 110. He testified there was guarding above the tail pulley, where the belt moves through the guarding. Tr. 50. There was 3-5 inches between the belt and this original guarding. Tr. 106-107.

Jones testified that the guarding he installed to abate the violation was a 4x8 fiberglass mesh, which he attached with a zip tie. Tr. 104-105, 113-114. Jones testified that he found this mesh approximately a couple hundred feet away because guarding was interchanged frequently. Tr. 123.

Jones recorded his contentions on the date of the inspection:

> The way the guarding is shaped and where it is located would make it very difficult for someone to fall in such a way to put their hand into the roller. Yes, it was only 9 inches away, but nearly impossible to reach up and over and around the guarding to get hurt....

R-1.

Analysis

The Commission has considered the meaning of the safety standard:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the

[7] At the time of the hearing Jones had worked for Consol at the Bailey mine for almost 5 years, beginning as a safety trainee, then a safety technician, and becoming a safety inspector. Tr. 93. He has three dust certifications, mine examiner's papers, and EMT certification. Tr. 96-97. He described his No. 1 job at Bailey as escorting inspectors. Tr. 97. Prior to this employment in 2012, he had not worked in the mining industry. Tr. 93. In 2006 he graduated with a Bachelor's Degree in Psychology, and earned a Master's Degree in Leadership and Business Ethics in 2012. Tr. 97. After college in 2006 he began in the Air National Guard as a general aircraft mechanic, becoming commissioned in 2014 and now serving as an aircraft maintenance officer one weekend a month and two weeks of duty a year. Tr. 95-96.

> construction of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct.

Thompson Brothers Coal Company, 6 FMSHRC 2094, 2097 (Sep. 1984) (citations omitted).

The standard requires that guarding must be in place and extend a sufficient distance to *prevent* a person from reaching behind and coming into contact with the pulley and belt. This has been interpreted by the Commission to mean a *reasonable possibility* of contact and injury which includes inadvertent stumbling, falling, inattention or ordinary carelessness. The moving machine parts here were accessible through a small opening from a walkway where miners would travel to wash down the area and maintain the tailpiece. The mine's examiners would travel the area three times daily.

The opening cited by Moten was adjacent to the walkway and would allow a hand to fit into the tailpiece and contact moving parts. The pinch point between belt and roller was only 9 inches from the opening; this was determined by a tape measure. The drawing in Jones' notes points to the particular intersection of the installed guarding. R-1. Photographs 2 and 3 in Exhibit R-2 show this point, but with the abatement mesh in place requiring the observer to imagine that location without the 4X8 frame and mesh. Although Jones testified he thought it impossible, because of the angle, for a person to put a hand in the opening unless they were trying to do so, his opinion is outweighed by the credible testimony of Inspector Moten that you could just stand and see the opening accessible from the walkway. The cited opening was not measured for size, but Moten testified he would easily be able to put his hand into the opening.

The evidence found credible supports a reasonable possibility of contact and injury; I find there was a violation of the safety standard requiring guarding to prevent a person from contacting a belt and pulley.

Respondent also argues a lack of fair notice. However, the safety standard is clear in its prohibition, and a reasonably prudent person familiar with the protective purposes of the standard, standing and observing the opening seen by the Inspector would have recognized that a hazard existed. The purpose of the regulation is to prevent contact with moving parts, and no prior specific notice that additional guarding was needed at this tailpiece location was required.

That an occurrence is *possible* does not mean that it is *likely* to happen. While the small opening into moving parts 9 inches away was just enough for a hand to get through, that an inadvertent circumstance would occur with a miner being in the walkway resulting in such a hazardous contact with the tailpiece parts appears unlikely. This would be the case even in the event of a slip or trip over the washdown hose or other hardware in the walkway. The *possibility* of harmful contact does not rise to the level of a *reasonable likelihood* of such occurrence under the facts and circumstances presented here. The unmeasured size of the opening would be quite small if only enough to admit the inspector's hand. Not well described on this record is the actual position, or angle, of a person standing next to the belt structure in the walkway that would allow for that person's hand to be thrust through the opening. Since access to moving machine parts existed there was a hazard, but there was not a reasonable likelihood an injury would result. Therefore, I find the violation was not S&S.

Although I find injury unlikely in this case, I also find that if contact and injury did occur, the result would be very serious, with permanently disabling injuries or worse. Inspector Moten determined the negligence of the operator to be moderate. To the extent that the operator should have known of this small unguarded opening, considering years of daily examinations and other work in the tailpiece area, I agree. However, I find the degree of negligence to be low. Under the totality of circumstances presented, not seeing the small opening was inattentive in nature. It took an Inspector who had not been in this area before, but who had experience with conveyor belt systems, to see what others had missed for years. Inspector Moten did not have a history with this tailpiece and clearly made no assumptions about such guarding as was in place. His discovery enhanced the safety of miners working in the area.

Penalty

Of the six penalty criteria, the most important for this violation are gravity and negligence. The Bailey mine is large, and the ability to pay the proposed penalties was stipulated. Compliance was within minutes. I have found the violation was not S&S, and reduced the likelihood to unlikely and the negligence to low. If injury should occur, it would be very serious. On the basis of the above analysis, I independently assess a penalty of $150.

Citation No. 9057956

Inspector Moten was back at the mine on July 29, 2015 and issued citation No. 9057956. The Condition or Practice was written as follows:

> At the 4 West-#1 Belt Drive the operator has failed to secure the guarding in place to prevent a person from entering the take-up and drive rollers. The area is surrounded to "area guard" the drive. A gate with hinges was made guarding the tight side of the belt and take-up against the mine rib. The gate was in no way secured or signed to prevent entry.
>
> Standard 75.1722(a) was cited 8 times in two years at mine 3607230 (8 to the operator, 0 to a contractor).

Inspector Moten designated the violation as S&S. He determined injury was reasonably likely and could reasonably be expected to be fatal to 1 person. He rated the negligence as low. Moten terminated the citation minutes later when the gate was closed and secured. GX-5. The proposed penalty is $807.

The safety standard is set forth above, under Citation # 9057948.

Contentions

Respondent contends the belt drive was completely surrounded by fencing and the cited area was on the non-walkway side of the drive. A gate was hinged to the fencing on the left and was against a rib on the right; it could not be pushed open into the drive area. Cleaning and

greasing were performed from the other, walkway side of the belt, and any maintenance on the tight side would require shut down, lock out, and tag out. Moving parts inside the gate were 5 to 50 feet from the gate. Access to the tight side of the drive area could only be accomplished by pulling the gate open and walking through the entrance, both intentional acts. A slip, stumble, trip or fall into the gate could not cause contact with moving drive parts. The guarding had been in place for many years and had been inspected by MSHA and state inspectors with no evidence of any issue taken with the guarding. The citation was abated using a piece of wire to tie the gate to the rib. RPHB, pp. 14-17; RRB, pp. 2-3.

The Secretary contends the inspector found a partially opened gate on the offside or tight side of the belt, and there was no lock or chain on the gate or other way to keep a person from entering the area. The gate was easily opened and once inside the entire side of the take-up with moving parts was open and unguarded. This was a very hazardous condition, and likely to cause a fatal injury. Further, there was a reasonable likelihood of a miner entering the unguarded take-up area if the gate remained unsecured. SPHB, pp. 12-13.

Evidence

Inspector Moten testified that on this day he traveled to the 4 West No. 1 belt accompanied by Jones. Tr. 29-30. While checking the belt drive he saw a gate partially open at the end of the take-up drive. Tr. 30-31. The gate could be easily opened by hand because there was no lock or wire holding it closed. Tr. 32-33. Moten testified there were many moving parts, at a distance of 5 to 20 feet away. Tr. 31, 72-73. The moving parts were closer when the belt starts and stops, Tr. 90-92, and on this day were 20 feet away. Tr. 72-73. Moten also testified he would not have entered the gated area if he had known the take-up drive was unguarded. Tr. 34. The condition was hazardous, and likely to cause a fatal injury because a person could enter the area and their whole body could be pulled through the belt. Tr. 34, 36. He was unable to say for certain when the gate was shut or when it was left open. Tr. 37. Mine examiners would travel the area. Tr. 35. Jones used a wire to close the gate and abate the citation. Tr. 36.

Moten's notes were not detailed or extensive, but he did record the gate was not secured to prevent entry into the area. He also wrote that if an injury were to occur from falling into the moving belts it would reasonably be expected to be fatal. GX-6, pp. 21-22.

Justin Jones also testified for Respondent regarding this citation. He stated the gate was closed during the inspection, and was on an angle preventing a miner from pushing it in. Tr. 139-140. He also testified the closest moving parts to the gate were 15 to 20 feet away, and could be as far as 50 feet away. Tr. 145.

Jones also recorded notes on this citation. He wrote "the door was pushed up against the rib-effectively blocking travel into the tight side of the belt drive area." He also wrote "a person would have to open the door and walk into the belt pulley that is roughly 50 feet away." R-3.

Analysis

The contention that a piece of wire from the gate to the rib would make a difference to the security or ease of access to the drive area is without merit. The gate itself constitutes a significant barricade, an obstruction capable of preventing passage. Area guarding does not violate the standard, the moving parts were 5 to 20 feet away from the gate, and pulling the gate open to walk through this entrance and into the area required an intention to access the area that would not be deterred by a piece of wire. The inspector did not require a chain and lock to be installed, which would certainly be a deterrent, but was satisfied by an easily placed and removable piece of wire. The gate, without the wire, could not be pushed inward; therefore a fall into the gate would not result in a fall into the area. Even in the event of inadvertence, inattention, or carelessness in pulling open the gate, a person familiar with the protective purposes of the standard would recognize the danger, just as Inspector Moten did, and not proceed the 15-20 foot distance to make contact with moving belt parts.

It is clear from the citation and Inspector Moten's notes that the violation alleged was based on *preventing* access into the drive area. However, similar to the guarding citation discussed above, there must be a *reasonable possibility* of contact and injury. Again, this does include inadvertent stumbling, falling, inattention, or ordinary carelessness. No trip hazards were identified in the inspected area. Any stumbling or falling into the gate would not breach the entrance into the area. Inattention or carelessness would be interrupted by the need to pull the gate toward the person before walking through the entrance and then walking an additional distance to the obviously moving belt parts. Further, a trained miner, viewing the area from the gate would know the belt needed to be shut down, locked out and tagged out. While there was disagreement as to whether the gate was partially open or closed and pushed up against the rib, this would not make a difference since the gate must still be pulled open. The vagaries of human conduct are not ignored when finding the area guarding and gate used at this belt drive location to be adequate. The violation has not been proven by a preponderance of the evidence, and the citation should be vacated.

Citation No. 7033768

Inspector Eddy issued citation No. 7033768 on July 29, 2015. The Condition or Practice was described as follows:

> The primary escape way, located on the No. 5 South Mains, MMU 083-0, in the No. 5 Entry is not being maintained with at least a 6 foot walkway. When inspected by this inspector, the No. 5 Stambler Ram Car is parked approximately 30' outby the No. 47 Block. The distance between the right rib (where the life line is hung) was measured to be 30 inches. This condition would not allow miners to evacuate the No 5 South Mains MMU 083-0 safely if an emergency were to occur.
>
> Standard 30 C.F.R. § 75.380(d)(4) was cited 7 times in two years at mine 3607230 (7 to the operator, 0 to a contractor).

Eddy designated the violation as S&S. He determined that injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 2 persons. He rated the negligence as moderate. Eddy terminated the citation within minutes when the No. 5 Ram Car was removed from the affected area. GX-11. The penalty proposed is $585.

The safety standard provides:

Escapeways; bituminous and lignite mines.

(d) Each escapeway shall be-

(4) Maintained at least 6 feet wide except-

(i) Where necessary supplemental roof support is installed, the escapeway shall not be less than 4 feet wide; or

(ii) Where the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency, or

(iii) Where the alternate escapeway passes through doors or other permanent ventilation controls or where supplemental roof support is required and sufficient width is maintained 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, or

(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.

30 C.F.R. § 75.380(d)(4).

Eddy designated the violation as S&S. He determined that injury was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty to 2 persons. He rated the negligence as moderate. Eddy terminated the citation within minutes when the No. 5 Ram Car was removed from the affected area. The penalty proposed is $585.

Contentions

Respondent contends the No. 5 entry was not a designated escapeway, it contained a power center. The ram car was parked inby the loading point and there was a clearance of 30

inches on each side of the car. A stretcher test would have been successful for the 20-foot length of the ram car. Respondent argues the designated primary escapeway was the No. 2 entry, and the designated alternate escapeway was the No. 3 entry. The refuge alternative was located in the No. 6 entry, and a branch line was routed from the No. 2 entry primary escapeway across the section to the refuge alternative. RPHB, pp. 38-43.

The Secretary contends the escapeway width requirement must be viewed in the context of an emergency situation. The No. 5 entry primary escapeway was not being maintained with at least a 6-foot walkway because a ram car was parked in the middle of the escapeway. The Secretary argues there was only 30 inches of clearance on either side of the ram car and there were huge ruts in the roadway. There was no way people could get through with a stretcher or escape on the lifeline side of the ram car. SPHB, pp. 21-26.

Evidence

Inspector Eddy testified that as he travelled to the 5 south mains MMU 083, up the No. 5 entry toward the face, he noticed a ram car parked in the middle of the roadway. Tr. 287-288. Upon further investigation, he concluded the ram car was in the primary escapeway and at least a six-foot walkway was not being maintained in violation of §75.380 (d) (4). Tr. 288. Eddy explained that primary escapeways are designed to allow miners in an emergency to safely and quickly follow the life line to travel out to the surface. Each active working section must have a primary escapeway with a minimum six-foot walkway from the working face to the surface. Tr. 288-289.

Inspector Eddy testified he found the massive ram car parked right in the middle of the entry, where there were huge massive three-foot deep ruts in the soft bottom. The clearance from the right of the ram car to the lifeline was measured and was 30 inches. Tr. 289-290, 310. He testified that because of the uneven bottom there was no way you could get through there with a stretcher. Tr. 290-291. This condition should have been known to the operator since persons arriving on the section at the beginning of the shift had to go by the ram car. Tr. 293. Eddy identified the discrete hazard as miners not able to safely and quickly exit the mine in an emergency. Tr. 292. He also testified that you depend on the lifeline to get access to the surface. 292-293.

On cross-examination, Inspector Eddy testified a working section is considered anything inby the loading point where the feeder and tailpiece are located. Tr. 299. He explained his finding that this entry was the primary escapeway on the basis that the ram car was parked underneath the lifeline, and all miners on the crew knew the No. 5 entry, via the lifeline, was the escapeway. Tr. 300-302, 314. He agreed there was no requirement for an escapeway inby the loading point, Tr. 300-302, and that the ram car was located inby the loading point. Tr. 301. He further testified that the lifeline was absolutely not a branch line running to the refuge chamber inby the loading point. Tr. 304-305. He acknowledged that a branch line breaks off the main primary escapeway lifeline and goes to a cache of self-contained rescuers and also to a refuge alternative. Tr. 305. Inspector Eddy testified that the end of the lifeline was in the No. 5 entry, and the loading point was in the No. 4 entry. Tr. 306. Eddy stated miners were not trained to

gather at the loading point in an emergency. Tr. 306. The miners would have to gather at the end of the lifeline. Tr. 307. The standard he cited does not contain anything about a lifeline. Tr. 309.

Inspector Eddy's notes for July 29, 2015 are incomplete, with pages 1 and 2, and 8 through 10 missing; the Exhibit ends at page 14 without information about the inspection beyond 1100 hours. GX-12, Tr. 297, 311. There is no information regarding an imminent danger run. The notes do contain Eddy's findings and determinations that in entry No. 5 at 30' outby the No. 47 block a ram car was parked in the primary escapeway with 30" of clearance along the right, lifeline side of the entry. *Id*, pp. 3-4. He described the mine floor as extremely uneven with ruts and determined this created slipping and tripping hazards and would cause fatigue, broken bones, strains and sprains when attempting to transport an injured miner out the obstructed primary escapeway. *Id*, pp.4-6.

Respondent's John Opfar was with Eddy and testified there was a ram car in the entry inby the section loading point, and a branch line lifeline ran past that ram car to take you to a refuge alternative. Tr. 320, 322. The branch line was running from the No. 2 entry primary escapeway on the other side of the section all the way over to the refuge alternative. Tr. 323. The branch line was not run past the power center[8], because the cables there could be a tripping hazard. Tr. 330, 331. The branch line could not run directly from the lifeline across the section to the lifesaving alternatives because there was a conveyor belt entry that could not be crossed. Tr. 323. He described the loading point as where coal is dumped onto the belt at a section tailpiece at the feeder. Tr. 324. To escape, miners would congregate at the beginning of either the primary escapeway or the alternate escapeway, or at the power center. Tr. 324. On July 29, the power center was inby the loading point, and the ram car was inby the power center. Tr. 325.

Opfar recorded his contentions regarding the citation on the day it was issued. Under details of the violation he wrote "There was a ram car parked in the entry of the branch line run to the refuge alternative". For the reason he contested the violation he wrote:

> I dont think this even (sic) a citation since it is inby the feeder.
>
> 1. There was a walkway around the ram car it just was not 6' wide. 2. This was not the actual escapeway it was a branch line run to the refuge alternative. 3. The branch line that was run to the refuge alternative was actually running inby to get to the refuge alternative. In the event of an emergency a person would most likely be trying to get out of the mine not traveling inby to the refuge alternative.

R-16.

At the request of the Court, Opfar drew a diagram showing the entries on the section. JX-2. The purpose was to clarify what he meant by "entry of the branch line". Opfar drew five entries, numbered 1 through 5 from left to right. The drawing shows the location of the ram car

[8] The terms "power center" and "load center" were both used at the hearing and refer to the same equipment. In this decision, power center will be used.

in entry No. 5, the power center outby the ram car in entry No. 5, the feeder in entry No. 4, located outby the power center, and the refuge alternative to the right in entry No. 6. Opfar drew the branch line in red ink from the main lifeline in entry No. 2 across the section inby both the feeder and the power center to entry No. 5, where it turned inby running past the ram car on the right side before crossing to entry No. 6 and continuing to the refuge alternative. *Id.;* Tr. 331-333.

Opfar testified there were three escapeways maintained, a primary, a secondary, and a third, not required, beginning outby from the tailpiece in entry No. 5. Tr. 340. The primary escapeway was the No. 2 entry, ventilated with intake air from the nearest shaft. Tr. 341. The alternate escapeway was the No. 3 track entry, ventilated with a different source of intake air. Tr. 341-342. Opfar further testified the primary escapeway had to come up the left side because that was intake air, there were no electrical installations, no ignition sources, and it was the closest route out of the mine. Tr. 340-341, 345.

Analysis

The portion of the safety standard cited pertains only to escapeways, and how escapeways are to be maintained. However, the subsection of the standard cited should be viewed in the context of the entire regulation. Therefore, a brief discussion of escapeways is deemed useful.

At least two separate and distinct travelable passageways shall be designated as escapeways from each working section, continuous by the most direct, safe and practical route to the surface. 30 C.F.R. § 75.380 (a), (b)(1), (d)(5). One escapeway ventilated with intake air shall be designated the primary escapeway. *Id.,* at (f)(1). Equipment not permitted in the primary escapeway includes power installations such as a power center. *Id.,* at (f)(3)(iii). One escapeway shall be designated the alternate escapeway. The escapeways may be ventilated from a common intake air source. *Id.,* at (h). Each escapeway shall be maintained at least 6 feet wide; although there are a number of circumstances where the width can be less, including a location where there is a question regarding whether there is sufficient width for escape of miners and disabled persons. In such a location MSHA may require a stretcher test through the area. *Id.,* at (d)(4). Each escapeway shall be provided with a directional lifeline the entire length of the escapeway, equipped with directional indicator cones as well as a branch line leading from the lifeline to an SCSR cache and a refuge alternative. *Id.,* at (7)(i), (v-vii).

Inspector Eddy's notes do not contain information as to how he determined the No. 5 entry was the primary escapeway other than what he believed was a lifeline for escape out of the mine running beside the ram car. Absent from his notes, GX-12, is any information about an imminent danger run that morning, which could assist in a full understanding the physical layout and ventilation in the No. 5 south mains on that inspection day. Further, in his testimony, Eddy did not credibly articulate how he determined the No. 5 entry was the designated primary escapeway. What can be taken from his testimony and notes is his belief that the lifeline beside the ram car was for escape out of the mine in the event of an emergency. He also did not explain what "further investigation" he conducted or how all the miners on the crew "knew" the No. 5 entry was the primary escapeway, as he had concluded.

The condition or practice described in the citation is clear that Eddy found the No. 5 entry to be the primary escapeway. Absent is credible information about alternate escapeway(s), ventilation on the section, the location of equipment installations other than the loading point at the time of the inspection, or how in an emergency miners could find SCSRs or the refuge alternative. While the specific subsection of the standard he cited does not cover lifelines, in arriving at his determination he concluded the line running beside the ram car was "absolutely" not a branch line. But he offered no support for this such as, for example, a description of the directional cones installed in that area, whether there was a power installation in the No. 5 entry, or confirmation that the line next to the ram car ran directly out of the mine.

Respondent's Opfar was with Eddy on the inspection and he gave detailed, consistent and specific information about the entries, escapeways and ventilation that existed on the section at the time of the inspection. Consistent with the safety standard, he testified entry No. 2 to the left of the section was the primary escapeway, because it was on intake air, had no electrical installations or ignition sources, and was the most direct route out of the mine. Entry No. 3, the track entry, was designated the alternate escapeway and was on a separate source of intake air. Although not required, the mine did maintain a third escapeway beginning outby both the power center and the loading point; this was in entry No. 5. Opfar also described in detail, and illustrated, how the branch line was run to the refuge alternative. Coming from the primary escapeway, it did run past where the ram car was parked in order to cross over to entry No. 6. He explained why this route was taken, in order to avoid cables around the power center and also avoid crossing a conveyor belt line.

I find the testimony and notes of Respondent's John Opfar to be more credible and of greater probative value in making a decision in this matter than the testimony and notes of Inspector Eddy. The Inspector did not adequately support the conclusions he made from his observations, in particular that entry No. 5 where the ram car was parked was the designated primary escapeway. It was not an escapeway out of the mine until the point outby the feeder, which was not required but was maintained as a third alternative. On this record, the evidence found credible supports the Respondent's arguments that there was a branch line in entry No. 5 to a refuge alternative and a power center located outby the ram car in entry No. 5. I do not find any discussion of the disputed evidence regarding a "stretcher test" or "ruts" to be necessary to this decision. The Secretary has not established, by a preponderance of the evidence found credible, that there was a violation of 30 C.F.R. § 75.380(d)(4).

ORDER

Citations #7033764, #9057948, and #7033768 are **VACATED**.

Citation #9057948 is **MODIFIED** to non-S&S, injury unlikely and low negligence.

The total assessed penalty is $150.

It is further **ORDERED** that Respondent will pay the total penalty of $150 within 30 days of this order.[9] Upon receipt of payment, this case is **DISMISSED**.

Kenneth R. Andrews
Administrative Law Judge

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[9] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390