FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 5, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PEABODY MIDWEST MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2017-0073 A.C. No. 11-03156-423356 Docket No. LAKE 2017-0074 A.C. No. 11-03156-423356 Mine: Wildcat Hills Mine - Underground

DECISION AND ORDER

Appearances: R. Jason Patterson, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;

Arthur M. Wolfson, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge L. Zane Gill

These cases originally comprised four section 104(a) citations issued at Peabody Midwest Mining, LLC's Wildcat Hills Mine-Underground. Citation No. 9038387 was resolved by settlement prior to hearing.[1] The remaining three citations, Nos. 9039355, 9039356, and 9039357, were tried at a hearing in Marion, Illinois.

Citation Nos. 9039355, 9039356, and 9039357 were issued on September 8, 2016, for an area then known as the "old 2B panel."[2] (Tr.39:8–14; 43:19–21) Each alleges a violation of an escapeway-related requirement: Citation No. 9039355 alleges that the area lacked post-accident communication and tracking; Citation No. 9039356 alleges that a lifeline was not provided; and Citation No. 9039357 alleges that a refuge alternative lacked communication. (Ex. S–2) It is

[1] A Motion to Approve Settlement was filed for that citation on April 9, 2018. (Tr.10:17–11:6)

[2] The "old 2B panel" is the area where mining unit No. 2 was previously located. Unit 2 was moved to another location in the mine. (Tr.43:17–44:1)

Peabody's position that these measures were not required because, at the relevant times, escapeways were not required in the old 2B panel. The Secretary asserts that escapeways were required. Therefore, the three citations involve a common foundational issue: whether escapeways were required in the old 2B panel in September 2016.

The dispute hinges on the determination of what the terms "removed" and "area" mean in the context of 30 C.F.R. § 75.380. Section 75.380(b)(1) requires that escapeways be "provided from each working section, and each area where mechanized mining equipment is being installed or removed, continuous to the surface escape drift opening [. . .] ." 30 C.F.R. § 75.380(b)(1) (emphasis added). Section 75.380(b)(2) specifies that "[d]uring equipment removal, [escapeways] shall begin at the location of the last loading point." 30 C.F.R. § 75.380(b)(2).

Production at the old 2B panel stopped on August 26, 2016. (Tr.172:8–173:14; Ex. R–7 at 2) An air change and other items related to moving the production unit, including moving needed mechanized mining equipment, commenced on August 27, 2016. (Tr.124:15–125:1) Three pieces of equipment that were planned to eventually be transported from the mine were moved outby the last loading point and stored in nearby crosscuts. (Tr.99:3–7; 147:6–10; 148:4–6) Production was started at a new production unit on September 1–2, 2016. (Tr.174:13–175:4; Ex. R–7 at 8–9) The Secretary does not claim that active mining was being done in the old 2B panel when Inspector Brittan Belford was conducting his E01 inspection on September 6–8, 2016. (Tr.43:22–44:4)

The Secretary argues that escapeways were still required because the mechanized mining equipment had not been "removed" from the old 2b panel, which he argues is the relevant area in the regulation. Peabody argues that their mechanized mining equipment was "removed" because it had been moved outby the last loading point, which it sees as the relevant area in the regulation. If it was "removed," as they argue, there was no requirement to maintain escapeways, and the three citations must be vacated since they all derive from the assumption that escapeways were required.

I. DECISION SUMMARY

In summary, I find that the essential removal process, which changed the requirements for maintaining escapeways, had been completed by the time Inspector Belford arrived. The Secretary's interpretation of section 75.380(b), that mechanized mining equipment needed to be moved off the old 2b panel before escapeways could be discontinued, is not supported by the regulatory language, history, or logic. Thus, the fact that surplus equipment was stored outby the last loading point after being removed from an active face did not require Peabody to maintain escapeways. Consistent with Respondent's position, once a formerly active production area is shut down and the equipment is moved outby the last loading point, the need to maintain escapeways is obviated. I conclude Citation Nos. 9039355, 9039356, and 9039357 must be vacated.

II. STIPULATIONS

1. Peabody Midwest Mining, LLC is an "operator" as defined in 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d) at the time the citations at issue in this proceeding were issued.

2. Peabody Midwest Mining, LLC operates Wildcat Hills Mine.

3. Wildcat Hills Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. 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.

5. The individual whose signature appears in Block 22 of the Citations at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.

6. A duly authorized representative of the Secretary served the citations and terminations of the citations upon the agent of the Respondent at the date and place stated therein as required by the Mine Act, and the citations and terminations may be admitted into evidence to establish their issuance.

7. The total proposed penalty for the citations at issue will not affect Respondent's ability to continue in business.

8. The citations contained in Exhibit A attached to the Petition for Assessment of Penalty are an authentic copy of the citations at issue in this proceeding with all appropriate modifications and terminations, if any.

9. The exhibits to be offered by the Secretary and Peabody are stipulated to be authentic, but no stipulation is made as to the relevance of the truth of the matters asserted therein.

III. FACT SUMMARY[3]

A. The Unit 2 Move and Air Change (July–August 2016)

Wildcat Hills Mine has three active production units.[4] (Tr.99:8–10; 112:1–4; 200:20–23) In late August 2016, coal production on the "2B panel" reached the geographic limit of the mining claim and had to stop, necessitating a production unit move several miles away in the same mine. (Tr.112:5–113:1; 170:14–171:3)

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[3] The findings of fact are based on the record as a whole and my careful observation of the witnesses as they testified. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, all consistencies or inconsistencies in their testimony, and their demeanor. Any failure to analyze each witness' testimony is not a failure to have fully considered it. The fact that some evidence is not discussed does not mean 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).

[4] Active workings are "[a]ny place in a coal mine where miners are normally required to work or travel." 30 C.F.R. § 75.2.

When a production unit moves, either because mining has reached the permitted geographic limit or a section has run out of coal or it has become unprofitable, the shut-down process generally includes an "air change." (Tr.168:3–6; 270:16–271:3) An air change is done to maximize fresh air flow to the new active production area. (Tr.110:23–111:12; 271:5–9) More airflow is needed in active production areas to dilute gases and dust, etc., (Tr.111:13–17), while mined-out portions of a mine can be ventilated with return air.[5] (Tr.271:5–7)

After an air change, the escapeways that were required when the unit was in production are no longer required. (Tr.168:22–169:3) Any time mining equipment is moved for any reason from one place to another, it is moved in entries ventilated by belt air, not in a primary escapeway.[6] (Tr.268:18–269:12) MSHA has never indicated that it is out of compliance to do so (Tr.269:13–23), and this is the standard practice in District 8. (Tr.269:24–270:4) A plan to transport equipment from place-to-place in an entry ventilated by belt air has never been required. (Tr.270:5–9)

Prior to the air change, the intake air course and the 2B travelway were the primary and secondary escapeways, respectively. (Tr.94:7–20) They were required to be separate and could not have air in common. (Tr.94:21–95:3) The maps submitted with the air change plan showed

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[5] Return air is defined in 30 C.F.R. § 75.301 as:

> Air that has ventilated the last working place on any split of any working section or any worked-out area whether pillared or nonpillared. If air mixes with air that has ventilated the last working place on any split of any working section or any worked-out area, whether pillared or nonpillared, it is considered return air. For the purposes of § 75.507–1, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air. Notwithstanding the definition of intake air, for the purpose of ventilation of structures, areas or installations that are required by this subpart D to be ventilated to return air courses, and for ventilation of seals, other air courses may be designated as return air courses by the operator only when the air in these air courses will not be used to ventilate working places or other locations, structures, installations or areas required to be ventilated with intake air.

[6] A primary escapeway has to be ventilated with intake (fresh) air, and it has to go all the way to each section. 30 C.F.R. § 75.380(f). It cannot be used for any other purpose. (Tr.273:5–14) A secondary (alternate) escapeway is less restricted; it can be common with belt or travel road air. (Tr.274:5–15; 30 C.F.R. § 75.380(h))

that the entries that had been separate escapeways when unit 2 was operational would be made common on the 7 main north. (Tr.121:15–24; Ex. R–2)

1. Ventilation Plan

Peabody had to redirect ventilation air flow once production stopped on the 2B panel to send more and fresher air to other parts of the mine (Tr.111:5–17) and leave the current (but soon to be "old") 2B panel in a worked-out status.[7] (Tr.275:10–276:7) In this case, the air change was substantial and complex enough to require a plan approved by MSHA. (Tr.109:17–110:3; 113:2–13) Matthew Kimbel[8] and his team modeled the ventilation capacity of the mine and determined how the ventilation controls needed to be arranged. (Tr.110:10–22; 114:10–17) The air change plan was based on the decision to move the production unit (i.e., unit 2) to the "Second East Mains." (Tr.115:3–5; Ex. R–1 at 1) The plan proposal was submitted to MSHA on July 12, 2016. (Tr.116:5–7; Ex. R–1 at 1) MSHA did not approve this submittal. (Tr.117:18–20)

After receiving feedback from the MSHA district office, Peabody realized it had unneeded equipment (a spare belt drive) and decided to change the location of unit 2's future faces from the "Second East Mains" to the "Second East Main Parallel" (new unit 2). (Tr.117:22–118:2; Ex. R–1 at 3–4) On July 29, 2016, Peabody submitted a superseding air change plan to MSHA along with three new revised maps, which identified the then-current ventilation controls and what ventilation control changes would be made. (Tr.115:6–14; 117:22–25; 118:3–119:11) The amended air change was planned for a single work shift, during which the escapeways would be maintained. (Tr.120:19–121:10; 124:15–23) MSHA approved this plan on August 17, 2016. (Tr.119:24–120:1; 121:9–10; Ex. R–1 at 5)

2. Equipment Plan

Stephen Reynolds[9] and Kimbel participated in making the decision as to where the equipment on the 2B panel would be moved. (Tr.129:1–3; 183:17–21) At Wildcat Hills, mechanized mining equipment is prepared for transport before an air change occurs. (Tr.271:10–272:7) First, all equipment is moved outby the loading point before the air change. (Tr.184:8–15) Next, subsequent decisions are made about what to do with each piece of equipment, with priority given to equipment needed for production at the new unit. (Tr.184:16–

[7] A worked-out area is "[a]n area where mining has been completed, whether pillared or nonpillared, excluding developing entries, return air courses, and intake air courses." 30 C.F.R. § 75.301.

[8] Kimbel is the Manager of Engineering at the Wildcat Hills Mine in the Arclar Complex. (Tr.107:15–108:6) He is a professional engineer with a Master of Science degree and has 11 years of experience in the mining industry. (Tr.108:25–109:11)

[9] Reynolds is a project manager for Peabody. (Tr.165:13–18) In August of 2016, he was the underground superintendent and general mine manager. (Tr.165:25–166:7) He has 43 years of mining experience at various underground mines in the region. (Tr.166:15–167:15) Any unit move would be under Reynolds' supervision. (Tr.167:16–168:2)

185:7) However, all of the mining equipment is not always moved to the new area when the production unit moves. (Tr.168:12–21) At Wildcat Hills, equipment is on a contractual tonnage-based maintenance schedule (Tr.278:4–10); thus, when a piece of equipment reaches its tonnage limit, it has to be transported out of the mine to be refurbished. (Tr.277:25–278:17) Continuous miners are taken out of the mine for these repairs once every two or three section changes, with rebuilt continuous miners taking their place at the new unit. (Tr.278:10–13) According to Kimbel, Peabody had never been required to specify in a ventilation or air change proposal submitted to MSHA where excess mechanized mining equipment would be stored pending transport from the mine. (Tr.130:20–131:4; 132:16–24)

Chad Barras[10] gave the order to have the equipment moved outby the loading point prior to making the air change so that the escapeway air flow would be preserved until the equipment was moved. (Tr.272:9–16; 303:24–304:13) Peabody believed this was consistent with industry practice and in line with section 75.380(b). (Tr.295:14–296:4) Peabody further believed that once all of the mechanized mining equipment that had been used to mine at the face of the 2B panel was moved outby the former loading point, "removal" would be complete, the area would no longer be active, and escapeways would no longer be required. (Tr.169:6–21) This has long been the practice and understanding of "removal" at Wildcat Hills. (Tr.169:6–170:3; 198:5–21; 264:19–265:2; 296:2–4) There is no requirement that all of the equipment be moved within a given time. (Tr.294:4–295:3)

3. Execution of the Unit 2 Move

Production at the 2B panel (hereafter "old 2B panel") stopped on August 26, 2016. (Tr.171:19–173:14; Ex. R–7) Consistent with the plan, all mechanized mining equipment was first moved outby the former loading point. (Tr.173:4–11; 189:6–12) Reynolds testified that most[11] of the essential equipment was moved to the new mining location before the air change. (Tr.187:13–188:3) In preparation for the unit move, the area near the former working face was roof bolted, loose accumulations of coal were back scooped, and the area was rock dusted. (Tr.173:19–174:2; Ex. R–7 at 3–4)

Under Reynolds' supervision, Peabody carried out the unit move and air change during the "owl" and day shifts on August 27, 2016. (Tr.124:24–125:4; 131:11–14; 171:4–18; 173:25–174:12; Ex. R–7 at 4–5) One effect of the air change was to change the designation of air courses in the old 2B panel so that they were no longer considered "escapeways," as required when the unit was in active production. (Tr.162:2–7; 202:19–22) This was accomplished by removing some stops and constructing new stoppings to direct the air into its new course. (Tr.124:15–21) Production at new unit 2 commenced on September 1, 2016. (Tr.174:13–175:4; Ex. R–7 at 8–9)

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[10] Barras is (and was) the safety and compliance director for Peabody Energy. (Tr.258:24–259:9; 260:22–25) Barras was a ventilation engineer at MSHA prior to working for Peabody. (Tr.261:3–7) Mark Eslinger was his supervisor at MSHA. (Tr.261:10–12)

[11] Reynolds could not recall, however, if all of the essential equipment was moved before the air change. (Tr.187:13–189:4)

Although most of the mechanized mining equipment was moved to new unit 2 to resume production, three pieces of equipment — Continuous Miner #234 (CM234), Continuous Miner #235 (CM235), and Feeder Breaker #605 (F605) — were not. New unit 2 did not need CM234 and CM235 because newly rebuilt miners — Continuous Miners Nos. 237 and 238 — had already been sent to new unit 2. (Tr.175:19–177:6; 201:4–11; Ex. R–7 at 8–9) It is not clear from the record why F605 was not needed at new unit 2.

Although CM234, CM235, and F605 could have been moved completely off the 2B panel before the air change (Tr.189:17–21), they were left in the crosscuts just outby the former loading point.[12] (Tr.44:5–9; 50:8–19; 52:19–21; 302:23–303:15) The decision regarding what to do with these three pieces of excess mechanized mining equipment was instead deferred. (Tr.129:21–25; 183:17–187:10) Peabody's management was certain, however, that the equipment would not be stored indefinitely in the crosscuts outby the former loading point on the old 2B panel. (Tr.129:16–20; 192:10–193:15)

B. Inspector Belford's Inspection (September 6–8, 2016)

1. September 6, 2016

Enter now MSHA Inspector Brittan Belford[13] of the Marion, Illinois field office. (Tr.28:15–24) Belford visited the mine site on three consecutive days to conduct an E01 Inspection. (Tr.38:10–15; 39:8–14) He was familiar with the mine, having previously conducted three or four E01 inspections at Wildcat Hills. (Tr.37:25–38:1)

On the first day, September 6, 2016, Belford arrived at the Wildcat Hills Mine at 7:30 a.m. and met with Douglas Combs[14] in the mine's safety office. (Tr.42:20–43:8) The two

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[12] The last former loading point was located at crosscut 130. (Ex. J–3) While there is no dispute that the three pieces of mechanized mining equipment were outby the former loading point (Tr.90:18–23; 99:3–7), there is a slight discrepancy in the record about precisely where they were parked. During the hearing, Inspector Belford illustrated on Joint Exhibit 3 that F605 was located in crosscut 129 and the continuous miners were located in crosscuts 128 and 127. (Tr.50:8–19; Ex. J–3) Douglas Combs' map shows F605 located in crosscut 127 and the continuous miners located in crosscuts 125 and 126. (Tr.147:6–10; 148:4–6; Ex. R–6) This discrepancy does not alter my analysis. Thus, I will refer to Inspector Belford's locations.

[13] Belford received a bachelor's degree in mining engineering in 2010. (Tr.29:2–16) After graduation, Belford spent one year in the private sector as a full-time production management trainee. (Tr.30:1–4) In 2011, Belford began working at MSHA as a coal mine inspector. (Tr.31:5–10)

[14] Combs was the safety supervisor at Wildcat Hills. (Tr.135:24–136:3) Combs' responsibilities included working on policies and procedures and escorting federal and state inspectors. (Tr.136:6–9)

traveled underground together to the old 2B panel via the 2A Sub Main.[15] (Tr.43:14–21; 137:8–138:3) Once there, Belford and Combs traveled inby the old 2B travelway on a stinger ride.[16] (Tr.91:4–18; 95:10–12; 96:1–5; 138:10–17) Belford observed FB605, CM234, and CM235 parked outby the former loading point. (Tr.52:12–21) Belford also observed a lifeline hooked up in the old 2B travelway. (Tr.58:17–21; 95:13–19) Belford's notes indicate that no violations were observed up to this point. (Tr.92:14–93:1; Ex. S–2) Once Belford and Combs traveled the length of the travelway and reached the end of the panel, they took a left turn and entered into the left return. (Tr.91:4–23; 138:18–21)

While in the old 2B left return, their vehicle got stuck. (Tr.139:1–3) Belford and Combs exited the vehicle and used a man door to enter back into the old travelway at approximately the 5,700 foot mark.[17] (Tr.138:24–139:17; 140:2–13; *See* Ex. J–3) Combs then attempted to use his mine site cell phone to call for a ride. (Tr.53:3–5; 139:21–22; 140:14–19; 149:17) There was no cell service. (Tr.53:5–7; 139:22–23; 140:20–22; 149:10–17) Combs and Belford discussed the lack of cell signal and communication coverage, which was a surprise to both. (Tr.140:20–142:1) At this time, Belford testified he told Combs that equipment — i.e., FB605, CM234, and CM235 — was still being removed from the area and, therefore, the travelway was a secondary escapeway, which required tracking or communication. (Tr.53:8–13) Combs testified, however, that Belford asked if tracking or communications were required in the area. (Tr.141:13–14) Combs was unsure but thought the fact the excess equipment was parked outby the former loading point was a relevant factor. (Tr.141:15–17) At this point, according to Combs, neither man was certain. (Tr.141:18–21)

The two discussed and referenced the federal regulations for an answer but, according to Combs, could not reach a conclusion. (Tr.53:17–20; 141:22–142:1; 143:5–10) Combs and Belford traveled outby where there was cell service, called to the surface, and requested a ride for Belford out of the mine. (Tr.142:4–15)

Once back at the surface, Belford went to the tracking office to speak with Nathan Sumner, the supervisor of tracking and communications.[18] (Tr.53:21–54:2; 93:25–94:5) Sumner explained that because the power center for unit 2 had been moved from the old 2B panel on August 26, 2016, there was no power for a tracking system in the area. (Tr.54:9–16; *see also* Tr.181:10–18) Sumner told Belford that it would not be a problem to put the power center back in and re-establish communication and tracking. (Tr.55:3–8) Belford testified that he informed Sumner that the old 2B travelway was an escapeway that required communication and tracking; nevertheless, Belford did not issue a citation that day. (Tr.55:13–21) Belford claimed that he

[15] The old 2B panel developed at a 90 degree angle off of the 2A Sub Main. (Tr.138:4–9)

[16] A stinger ride is a battery powered vehicle. (Tr.138:13–17)

[17] The old 2B left return and old 2B travelway are adjacent to each other and connected by a man door. (Tr.139:12–17)

[18] There is a discrepancy in the record whether Combs was also present at the tracking office for this discussion. (Tr.54:3–8; *contra* Tr.142:16–143:4)

was affording the company the opportunity to come into compliance before enforcement action was needed. (Tr.55:22–24)

Later that day while on his way home from work, Barras learned that Inspector Belford had asked questions about communication and tracking on the old 2B travelway. (Tr.285:2–12) In Barras' mind, the equipment in the 2B panel was "removed" once it was moved outby the former loading point so there was no need for escapeways and thus no need for communication and tracking. (Tr.285:14–16) Barras called Marion field office supervisor Mike Rene and expressed his opinion. (Tr.285:17–22) Rene said he would talk to Belford the next morning. (Tr.285:22–24) Barras believed that Rene would resolve the issue with Belford. (Tr.285:25–286:2)

2. September 7, 2016

Belford returned to the mine the next morning, September 7, 2016. (Tr.55:25–56:8) He again went to the safety office and spoke to Combs. (Tr.56:6–11; 144:12–18) Prior to going underground to resume the inspection, Belford asked Combs about the status of tracking and communication in the old 2B travelway. (Tr.56:17–22) Combs responded that they had not installed tracking or communication, did not plan to, and had additionally pulled the lifeline[19] that was in the travelway the previous day. (Tr.56:22–25) Belford recalled telling Combs that the old 2B travelway was still an escapeway, but now it was an escapeway without a lifeline.[20] (Tr.57:1–4)

Belford reviewed the mine map and examination records before returning underground to the old 2B panel. (Tr.57:5–12) He was accompanied by Eric Blackford, a member of Wildcat Hills' safety team. (Tr.57:13–20) At the old 2B panel, Belford verified the lifeline had been removed. (Tr.57:21–25) Additionally, Belford noted where the last known loading point was, where the excess equipment was, and that the phone at a nearby refuge alternative did not work. (Tr.58:1–9) Belford and Blackford took the right return heading outby and spoke with mine examiner J. Jackson, the miner responsible for conducting pre-shift examinations. (Tr.58:22–59:8; 72:19–73:1) Belford asked Jackson if he knew there was no tracking or communication along the old 2B panel. (Tr.59:11–12) Jackson replied that he was aware and that manual tracking was being used in place of the wireless tracking system.[21] (Tr.59:12–14) The phone system and wireless tracking were not operational because the power source had been taken out

[19] Barras believed that the lifelines were pulled out of the old 2B panel on September 7 to avoid the appearance they were connected to functioning refuge alternatives. (Tr.307:21–308:8)

[20] Combs, on the other hand, recalled Belford saying that Wildcat Hills would either get two or three serious citations or none at all. (Tr.144:21–145:1)

[21] Although manual tracking can vary from mine to mine, here, miners were instructed to call out and somebody would write in a record book the names of the miners going into the old 2B panel. (Tr.59:12–14; 101:24–102:2)

during the unit move.[22] (Tr.308:9–15; 309:9–18) At this time, records in the area indicated the old 2B panel was still being pre-shifted three times a day, as if it was still in active production. (Tr.72:1–13)

After speaking with Jackson in the mine, Belford returned to the surface and met with Reynolds[23] and Barras in the staging area.[24] (Tr.60:6–19; 181:21–182:5) Belford asked Reynolds why the lifeline was taken down and communications were not re-established as he had instructed the previous day. (Tr.61:14–17) Reynolds responded that Barras had allowed him to remove the lifeline. (Tr.61:17–19) Reynolds had the lifeline removed because it is not required if there is no active escapeway. (Tr.178:8–179:2) Reynolds explained that it was potentially dangerous to have a lifeline in an airway other than an escapeway since it could give a false impression to miners and lead them in the wrong direction. (Tr.179:3–14) After speaking with Belford about the lifeline issue, Reynolds stood by his view that no escapeway was required because the excess equipment was outby the last former loading point. (Tr.180:16–181:6)

During his conversation with Barras, Belford reiterated that the old 2B travelway was still an escapeway that required a lifeline, communication, and tracking.[25] (Tr.62:24–63:3) Barras adamantly disagreed, stating that because equipment was moved outby the former loading point, they were no longer required to maintain an escapeway and the other requirements associated with it. (Tr.62:17–63:6; 295:14–296:4)

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[22] Barras explained that Wildcat Hills' Emergency Response Plan requires two forms of tracking in escapeways. (Tr.308:16–310:3) His belief was that the old 2B travelway was not an escapeway by that time.

[23] Combs also recalled participating in a conversation about tracking, communications, and the lifelines in the old 2B panel with Reynolds, Max Hainey (Safety Manager), and Inspector Belford. (Tr.148:14–149:7) At this point, Combs believed that nobody, including Inspector Belford, had a clear notion whether the old 2B travelway was still an escapeway. (Tr.150:3–13) It is not clear from the record whether the meeting Belford recalled is the same as the one Combs recalled.

[24] Belford testified that he was sure he met separately with Barras and Reynolds (Tr.60:18–19), but he was unsure if he also spoke with Barras and Reynolds together at the same time. (Tr.316:4–10) Barras recalled that Reynolds was present. (Tr.290:3–8) Barras could not remember the exact date but remembered the substance of this meeting vividly because Belford accused Barras of not caring about the safety of his men, which was upsetting to him. (Tr.290:3–18)

[25] Reynolds testified that he came up on Combs, Barras, and Belford talking. (Tr.182:6–9) Reynolds recalled Belford saying that it would be okay if the mine just hooked the lifelines back together. (Tr.182:10–11) Reynolds recalled Barras saying that would not fix the issue because the primary and secondary escapeways were now common. (Tr.182:12–16) Barras also recalled this exchange with Belford. (Tr.290:21–291:14) Inspector Belford, however, denied ever telling Barras that the mine could just put the lifelines together. (Tr.316:16–21)

After leaving the mine that day, Belford returned to the MSHA district office and spoke to supervisor Bob Bretzman.[26] (Tr.63:10–14) Around that time, Rene called Barras and told him that he was passing the issue on to Bretzman because Rene was scheduled to go on vacation. (Tr.286:9–17; 287:16–288:11) During this call, Rene did not indicate whether he thought Peabody was in or out of compliance. (Tr.288:3–11) Barras never heard from or spoke to Bretzman before the citations were issued. (Tr.288:14–17)

3. September 8, 2016

Before returning to the mine on the morning of September 8, 2016, Belford reviewed the mine's Emergency Response Plan and wrote three citations: Nos. 9039355, 9039356, and 9039357. (Tr.63:18–64:5; 289:6–14) Belford then traveled back to the mine and went to the safety office where he met with Mike Cummins, a member of the mine's safety staff, to give him the paperwork for the citations. (Tr.64:12–65:4) Belford spoke again with Barras. (Tr.65:5–11) Barras reiterated his position that the area was no longer an escapeway and the tracking system, lifeline, and refuge alternative were no longer required. (Tr.65:18–66:3) Belford repeated his position that an escapeway was needed because Wildcat Hills was still removing mine equipment — CM234, CM235, and FB605 — from that area. (Tr.66:4–8) The two went to Barras' office and called Belford's field office supervisor, Bob Bretzman, for a conference call. (Tr.65:5–17; 66:18–22)

4. Abatement and Termination of Citations

On September 12, 2016, Belford terminated all three citations after Peabody re-established the escapeways in the old 2B panel. (Tr.312:12–313:10; Ex. S–2 at 3, 6, 10) Citation No. 9039355 was terminated after Peabody received approval from MSHA for a manual check-in/check-out system in the old 2B panel, which also included a requirement that miners re-report in every two hours. (Tr.102:3–11; 292:11–294:1; Ex. S–2 at 10) Citation No. 9039356 was terminated after Peabody installed a continuous durable lifeline in the old 2b secondary escapeway.[27] (Tr.79:10–15; Ex. S–2 at 3) Citation No. 9039357 was terminated after Peabody re-established communication at the old 2B refuge alternative by use of a mine phone. (Ex. S–2 at 6)

As part of the abatement of these citations, MSHA did not require that FB605, CM234, or CM235 be moved within a specified time period. (Tr.294:4–295:3) Nonetheless, they were

[26] Belford had never received any training from MSHA about what constitutes removal of equipment for purposes of the escapeway requirement. (Tr.90:8–15) Belford had never encountered a situation like this (Tr.88:9–13), so it is not surprising that he had not been trained to this interpretation of the regulation. (Tr.88:2–89:18)

[27] In order to terminate the citation, the lifeline had to be re-established but was moved from the travelway to the left return entry. (Tr.79:10–23) Belford testified that this was because the travelway (where the lifeline had originally been located) was now ventilated with the same air as the primary escapeway after a few brattices were knocked down during the air change on August 27, 2016. (Tr.79:24–80:10; 317:10–19)

eventually moved out of the mine between September 8, 2016, and January 2, 2017. (Tr.299:13–303:4)

IV. FURTHER FINDINGS OF FACT AND CREDIBILITY

A. Eslinger's Testimony

Respondent's witness Mark Eslinger[28] is a former MSHA civil engineer with extensive experience with ventilation work. (Tr.205:10–208:11) He served as the supervisory mining engineer for ventilation in MSHA's District 8 office in Vincennes, Indiana — the same district where the Wildcat Hills mine is located — for more than 25 years. (Tr.207:11–209:1) Eslinger supervised ventilation inspectors who enforced MSHA ventilation regulations. (Tr.209:14–210:8) After retiring from MSHA in 2009, Eslinger worked as general safety manager over three underground mines in District 8. (Tr.209:2–13; 211:18–212:2; 233:22–234:15) In this capacity, Eslinger was personally involved in the planning and execution of several unit moves, which included air changes. (Tr.233:22–235:9)

1. Subpart D–Ventilation Rewrite Committee 1985–1988

On January 28, 1985, MSHA established a task force to study commonly employed practices and equipment used in longwall mining. 53 Fed. Reg. 2,382-01, 2,382–83 (Jan. 27, 1988). Eslinger participated on this task force and assisted in rewriting Subpart D of the 300 series ventilation regulations, sections 75.300 through 75.398, which included the escapeway regulation in question here.[29] (Tr.212:3–19) In 1988, MSHA issued its proposal for Subpart D–Ventilation. (Tr.216:6–17; 53 Fed. Reg. at 2,382)

2. Pyro Mining Company Disaster

In September 1989, an explosion at Pyro Mining Company's William Station No. 9 mine in Kentucky claimed the lives of 10 miners.[30] (Tr.217:11–14) Eslinger was one of the chief investigators in the post-event investigation into the causes of the tragedy.[31] (Tr.217:7–18) The

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[28] The Secretary moved *in limine* to exclude Eslinger's testimony. The motion was denied, and Eslinger was allowed to testify. (Tr.11:7–12:22)

[29] Eslinger also participated in the subsequent 1996 rewrite, which did not involve a change to the escapeway regulation's paragraphs (b)(1) and (b)(2) that are at issue here. (Tr.210:19–23; 61 Fed. Reg. 9764-01, 9810 (Mar. 11, 1996). In 2004, he was also on the committee that drafted and issued a new belt air rule that permitted the use of belt air on working sections. (Tr.210:23–211:8)

[30] *Gas Explosion in Kentucky Leaves 10 Coal Miners Dead*, N.Y. TIMES (Sept. 14, 1989), https://www.nytimes.com/1989/09/14/us/gas-explosion-in-kentucky-leaves-10-coal-miners-dead.html

[31] The Pyro mine disaster took place at a longwall panel, Longwall Panel O. (Tr.217:25–218:2) Unlike a continuous miner unit, longwall recovery and removal involves much more

investigation committee found that a ventilation change, which directed air to the new longwall panel, Longwall Panel P, was made on shift. (Tr.221:5–8) As a result, methane gas had accumulated at the longwall face while miners were still disassembling the equipment at Longwall Panel O. (Tr.217:25–218:13; 220:23–221:5) The investigation committee concluded that the likely source of ignition was a flame from a cutting torch.[32] (Tr.221:12–15) The investigative team subsequently wrote a report, which became widely known in the mining industry. (Tr.221:16–25)

3. The 1992 Final Rule for Subpart D–Ventilation

The specific events at the William Station mine prompted the ventilation committee to rewrite portions of the ventilation regulations before the 1992 final rule was issued. After significant discussion, the rewrite committee concluded that if sufficient ventilation had been maintained until after all the mechanical equipment had been dismantled and moved away from the face, lethal conditions could have been avoided at the William Station mine. (Tr.222:21–223:9) Thus, one of the revisions the rewrite committee worked on was a clarification that escapeways must be maintained during both the installation and removal of equipment at the working face. (Tr.222:19–223:15; 57 Fed. Reg. 20,868-01, 20,894 (May 15, 1992)) Prior to this, there was no express requirement that escapeways be maintained with the attendant requirement for separate and supplemental escapeway ventilation during installation or removal. (Tr.222:7–18; 226:11–16; *see* 53 Fed. Reg. at 2,382)

The final rule was issued in 1992. 57 Fed. Reg. at 20,868. The new requirement that two escapeways be maintained as equipment was being installed or removed from an area was added. (Tr.223:10–15; 232:12–14; 233:3–9; 57 Fed. Reg. at 20,904; 30 C.F.R. § 75.380(b)(1)) Eslinger testified the rule became widely known through a series of well-attended informational meetings held around the country. (Tr.224:19–225:1) The escapeway standard was one of the topics covered in these meetings. (Tr.226:8–19) The specific point of when "removal" was complete was also covered. (Tr.226:20–22) According to Eslinger, removal was considered complete when all of the face equipment had been moved outby the last loading point and the loading point was decommissioned. (Tr.226:23–227:20) Eslinger explained the logic behind this: once equipment is moved outby the loading point, the risk level drops considerably. (Tr.248:18–22) Methane is most often liberated at the working section during mining (or shortly thereafter) and not as likely liberated outby the loading point. (Tr.249:2–4; 250:12–19) Additionally, the chance for explosions decreases because there would be no cutting and welding by the time all of

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work, including disassembling and moving hundreds of shields, a double arm sheer, the stage loader, the chain conveyor, and the pan line. (Tr.218:16–219:5; 230:12–232:9) This process can take weeks. (Tr.219:4–6)

[32] The pan line is in sections and connected by "dog bone connectors," which are connected by screws. (Tr.219:12–17) During the mining process, the screws rust. (Tr.219:17–19; 232:3–7) The easiest way to remove the rusted screws is to cut them out with an acetylene torch. (Tr.219:19–220:10; 232:7–9)

the equipment is moved outby the loading point.[33] (Tr.248:22–249:10)

This interpretation was disseminated throughout District 8 during Eslinger's tenure, until his retirement in 2009. (Tr.227:24–228:19; 265:19–21) Eslinger testified this interpretation was a matter of agency culture; it was never reduced to a formal written policy statement. (Tr.228:24–229:16) Similarly, Eslinger's interpretation of "removal" is not covered in any of MSHA's Program Policy Manuals (PPM). (Tr.244:9–16) Until September 8, 2016, to Eslinger's knowledge, MSHA never contradicted this practice. (Tr.235:10–22)

B. Eslinger's Credibility

The Secretary uses a generous portion of his briefs challenging Eslinger's testimony. The Secretary argues Eslinger's testimony is (1) irrelevant (Sec'y Br. 21–23, 25–26; Sec'y Reply Br. 3–4); (2) inconsistent with the plain language and intent of the regulation (Sec'y Br. 21–22, 24–26; Sec'y Reply Br. 3–4) ; and, (3) factually implausible (Sec'y Br. 21–23, 26; Sec'y Reply Br. 3–4)

The Secretary argues Eslinger's testimony is irrelevant because he has not been employed by MSHA in nearly a decade and admittedly has no authority to speak on MSHA's behalf. (Sec'y Br. 23) Additionally, even if he were still working for MSHA, Eslinger's view would not be binding on the Secretary as it does not "represent an official position" of the agency. (*Id.*; Sec'y Reply Br. 3) While this is true, it does not preclude me from crediting the factual portions of Eslinger's testimony without reference to his ultimate legal conclusion.

The Secretary next argues Eslinger's interpretation is at odds with the safety objective of the escapeway regulation. (Sec'y Br. 21–22; Sec'y Reply Br. 3–4) Notably, the Secretary states that "[t]he fact equipment is moved past the former loading point does not eliminate the hazards associated with equipment removal." (Sec'y Br. 25) As discussed in detail below, Eslinger's interpretation is closely compatible with the specific escapeway-related safety concerns enumerated in the preambles. *See* discussion *infra* Section VI. B.

Finally, the Secretary argues Eslinger's testimony was factually implausible because Eslinger's interpretation is not found in the extensive regulatory history of the escapeway standard. (Sec'y Br. 24) While it is true the various Subpart D-related sections in the Federal Register do not explicitly clarify when "removal" is complete, as outlined below, there is ample evidence to support Eslinger's position. *See* discussion *infra* Section VI. B. The Secretary additionally claims to have serious doubts about Eslinger's factual recounting, stating that the six public meetings Eslinger mentioned at the hearing took place before the William Station mine disaster — a temporal impossibility given that the "removal" language of the escapeway regulation was added in response to the disaster. (Sec'y Br. 24–25) It appears, however, the Secretary either misunderstood or misconstrued Eslinger's statement. Eslinger's statement about the six informational meetings starts on page 223 of the transcript. (Tr.223:20) Indeed, while speaking about the six public meetings in 1988, Eslinger specifically mentioned Grand Junction,

[33] The disassembly of equipment precedes the moving of equipment. (Tr.249:19–250:7) Nonetheless, dissembling of equipment is part of "removal." (Tr.258:1–5)

Colorado (Tr.223:25–224:1), one of the locations listed in the Federal Register and cited by the Secretary. (Sec'y Br. 24; 57 Fed. Reg. at 20,868) However, on page 224, Eslinger began talking about the 1992 final rule and the subsequent informational meetings. (Tr.224:4–225:15) Thus, Eslinger described two sets of meetings: (1) the six public meetings in 1988 and (2) the three informational sessions after 1992. The Secretary's failure to understand this detail is not a negative reflection of Eslinger's credibility.

I have no reason to doubt the relevance and applicability of Eslinger's testimony about how the escapeway requirement came into existence, his role in investigating the William Station mine disaster, or his role in updating the ventilation regulations. Nevertheless, even if I were to discredit Eslinger under any of the Secretary's various theories (which I am not), I need not rely on Eslinger's testimony to reach my conclusion. A thorough review of the Federal Register confirms many of his factual statements, insofar as I am able to make various inferences, which leads me to an interpretation regarding section 75.380(b).

C. Respondent's Employee-Witnesses' Credibility

The Secretary also criticizes Respondent for relying on the "self-serving" testimony of its witness managers. (Sec'y Reply Br. 5) The Secretary uses this blanket proposition as an attempt to discredit Respondent's witnesses, but such a broad argument is not very convincing. It ought to go without saying that a party's own witnesses tend to support said party's contentions. I will not reject the testimony of Respondent's witnesses strictly on the basis of a current or former employment relationship. *See Cannelton Indus., Inc.*, 20 FMSHRC 726, 731–32 (July 1998) (citing *Breeden v. Weinberger*, 493 F.2d 1002, 1010 (4th Cir. 1974)). Similarly, the fact that Respondent's witnesses' testimonies do not conform to the Secretary's theory is an insufficient reason to discredit or disqualify them.

Of Respondent's four employee-witnesses, only Reynolds and Barras spoke in detail about the historical application of the escapeway provision in District 8. Reynolds and Barras both testified that they learned about removal of equipment, as it pertains to section 75.380(b), in the same manner Eslinger described, and they have taught and applied it that way since 1992. (Tr.169:6–170:3; 264:21–24) Barras' interpretation of what "removed" means was informed by his participation in a public information meeting, a possible phone call with Eslinger to get clarification, and years of doing it that way, including while working as an MSHA inspector in District 8. (Tr.265:19–266:1; 297:5–20) Reynolds' interpretation was based on his four decades of mining experience, the way air changes have been done since 1992, what he was trained and told to do, and his understanding of how it is done everywhere in the region. (Tr.197:8–200:12) Barras had never heard of any change in this view of when "removal" is complete. (Tr.267:4–10) Both witnesses were internally consistent in their testimony, have decades of combined mining experience in District 8, and their actions between September 6–8 were consistent with their statements at the hearing. I see no reason to discredit their testimony about their personal

work history and understanding of the escapeway provision.[34]

V. PRINCIPLES OF LAW

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC 579, 587 (Aug. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989)). In determining the meaning of regulations, the Commission "utilizes 'traditional tools of [. . .] construction,' including examination of the text and the intent of the drafters." *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44–45 (D.C. Cir. 1990)). The meaning of a regulation is "ascertain[ed] [. . .] not in isolation, but rather in the context in which those regulations appear." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 n.7) (Feb. 2004)). As recently articulated by the Supreme Court in *Kisor v. Wilkie*, a court should not afford *Auer* deference (established in *Auer v. Robbins*, 519 U.S. 452 (1997)) unless the regulation is genuinely ambiguous. 588 U.S. ___ (2019) (slip op. at 13) (citing *Christensen v. Harris Cty*, 529 U.S. 576, 588 (2000); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Before concluding that a rule is genuinely ambiguous, a court must first exhaust all the "traditional tools" — the text, structure, history, and purpose — of construction. *Id.* at __–__ (slip op. at 13–14).

If a regulatory provision is found to be ambiguous, the agency's interpretation of that provision is entitled to deference if it is found to be reasonable. *See Drilling & Blasting Syst., Inc.*, 38 FMSHRC 190, 194 (Feb. 2016) (citing *Auer*, 519 U.S. at 452). However, "an agency's [. . .] interpretive authority is not unfettered." *Hobet Mining Co.*, 26 FMSHRC 890, 899 (Nov. 2004) (ALJ). Deference to the agency's interpretation is inappropriate if its interpretation is not reasonable, when it is plainly erroneous or inconsistent with the regulation, or if it does not reflect the agency's fair and considered judgment. *Drilling & Blasting Syst.*, 38 FMSHRC at 194 (citing *Auer*, 519 U.S. at 461; *Christopher v. Smith-Kline Beecham Corp.*, 567 U.S. 142, 154 (2012)); *see also U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) (finding that the amount of deference to which an agency is entitled depends on, among other things, the agency's consistency and persuasiveness of its position). Additionally, the regulatory interpretation must be one "actually made by the agency." *Kisor*, 588 U.S. at __ (slip op., at 15). In other words, it must be the agency's "authoritative" or "official position," rather than an ad hoc statement not reflective of the agency's views. *Id.*

[34] By contrast, the Secretary's sole witness, Inspector Belford, had only six years of professional mining experience, had not been specifically trained on what constituted "removal," and had never seen this application of facts to the regulation.

As the Supreme Court has explained, an agency's interpretation may not reflect its fair and considered judgment when it conflicts with a prior interpretation. *Christopher*, 567 U.S. at 155; *cf. Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (court considered longstanding and consistent interpretation as a factor on whether to defer); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (stating that a regulatory interpretation that conflicts with a prior interpretation is "entitled to considerably less deference than a consistently held agency view"). Courts should not give deference to an agency's reading except to the extent it has the "power to persuade." *Christopher*, 567 U.S. at 159. The Secretary bears the burden of establishing the factors necessary to afford his position deference. *See Peabody Twentymile Mining LLC*, 39 FMSHRC 1323, 1332 (July 2017) (declining to grant the Secretary's position *Auer* deference when he failed to establish such a factor), *argued*, No. 17-9540 (10th Cir. Mar. 22, 2018).

VI. DISCUSSION AND ANALYSIS

The central issue before me is whether the old 2B panel required escapeways at the time of Inspector Belford's inspection. The Wildcat Hills mine had three active units. Each of the units ran continuous mining machines and feeders. The parties agree that an escapeway starts at the former loading point and continues out of the mine. (Tr.36:8–11; 37:4–5; 305:3–11) The parties also agree the old 2B panel was still being pre-shifted by examiners after the air change, which occurred on August 27, 2016. (Tr.72:4–6; 307:16–20) Belford considered the old 2B panel a working area because it was being pre-shifted three times a day, and, in his mind, equipment was still being removed from the area.[35] (Tr.36:14–17; 66:6–8; 71:17–18; 72:4–6; 81:8–18; 103:1–2)

As a preliminary matter, I conclude the fact that the old 2b panel was being pre-shifted three times a day by examiners does not mean that the old 2b panel was an active working area or that mechanized mining equipment was still being removed.

Active workings are "any place in a coal mine where miners are normally required to work or travel." 30 C.F.R. § 75.2. By contrast, a worked out-area is "an area where mining has been completed [. . .] excluding developing entries, return air courses, and intake air courses." 30 C.F.R. § 75.301. If a portion of a mine is not in active production, and no one is scheduled to work there, the examination frequency is reduced to once a week. (Tr.161:23–162:10; 30 C.F.R. § 75.364) In the event that work is planned to be done in worked-out panels, e.g., pre-planning or job testing, a pre-shift examination must be conducted even though there is no production. (Tr.154:19–155:4; 193:19–22; 194:7–12; 30 C.F.R. § 75.360(b)(10)) Importantly, escapeways are not required in worked-out areas of the mine even though miners go there to perform weekly

[35] Upon seeing CM234, CM235, and FB605 stored in the crosscuts outby the loading point, Belford could have concluded the stored equipment was not needed to operate any of the three working units because the three units were all currently in operation at the time. (Tr.100:13–101:8) Thus, he could have further concluded that the old 2B panel was no longer active and should be considered a worked-out part of the mine.

examinations or to conduct repairs. (Tr.282:10–12)

Here, the record is clear that mining on the old 2b panel ceased on August 26, 2016. (Tr.173:4–14; Ex. R–7 at 2–3) The new unit 2 was operational and coal was being mined as early as September 1, 2016, five days before Inspector Belford's inspection. (Tr.174:24–175:4; Ex. R–7 at 8) Belford relied on the fact that the old 2B panel was being pre-shifted three times a day to conclude that the area was active and an escapeway was necessary. (*See* Tr.72:4–6) But without further information, his conclusion does not follow from the frequency of examinations. It is clear that no coal was being mined at the old 2b panel in September 2016. But, it is not clear what type of work was being done to necessitate pre-shift examinations. (*See* Ex. S–2 at 19) It is the Secretary's burden to show by a preponderance of the evidence that the work being done in the old 2b panel during Belford's inspection was the type of work that not only required pre-shift examinations but also required escapeways. The fact that parts of the old 2b panel were being pre-shifted three times a day does not in and of itself make the old 2b panel active, requiring an escapeway. As was explained in testimony, various types of work can be required in worked-out mine areas, such as clean-up and maintenance. Any time that type of work is done, a pre-shift examination is required, even though the area is in a worked-out area. But, this type of maintenance work does not require the establishment of an escapeway. Once the work is done, the examination frequency reverts to weekly, and as before, no escapeway is required.

If I were so inclined, I could end the discussion here. Nevertheless, I will continue on with a full analysis of the escapeway regulation. The inquiry turns to whether the escapeway regulation, particularly the language regarding the removal process, is clear or ambiguous. If the regulation is ambiguous, the question is whether the Secretary is entitled deference. For the reasons that follow below, I conclude the Secretary is not.

A. The Escapeway Regulation is Ambiguous

The escapeway regulation states:

> (b)(1) Escapeways shall be provided from each working section, and each area where mechanized mining equipment is being installed or removed, continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface.
> (2) During equipment installation, these escapeways shall begin at the projected location for the section loading point. During equipment removal, they shall begin at the location of the last loading point.

30 C.F.R. §§ 75.380(b)(1),(2) (emphasis added).

Thus, escapeways are required in two instances: (1) at each "working section" and (2) at each "area where mechanized mining equipment is being installed or removed." Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless

such meaning would lead to absurd results. *Jim Walter Res.*, 28 FMSHRC at 587. Working sections are defined as "all areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2. This much is clear.

It is not immediately evident, however, what constitutes "removal" or what the parameters of the "area where mechanized mining equipment is being [. . .] removed" are. Despite this, both parties assert in their briefs that the plain language of the regulation is clear. (Sec'y Br. 14; Resp't Br. 18) When both parties advance competing claims that the regulation is "plain," such as is the case here, it may indicate ambiguity. *Canyon Fuel Co. v. Sec'y of Labor*, 894 F.3d 1279, 1290 (10th Cir. 2018) (stating that both parties advanced plausible interpretations of the regulation's plain language and that the regulation is ambiguous); *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1081 (10th Cir. 1998); *Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914–15 (Sept. 2001). In determining the meaning of regulations, the Commission "utilizes 'traditional tools of [. . .] construction,' including examination of the text and the intent of the drafters." *Amax Coal*, 19 FMSHRC at 474. The meaning of a regulation is "ascertain[ed] [. . .] not in isolation, but rather in the context in which those regulations appear." *Wolf Run Mining*, 32 FMSHRC at 1681. As recently stated by the Supreme Court, a court must exhaust the "traditional tools" of construction and "cannot wave the ambiguity flag" prematurely because the regulation is merely difficult to understand. *Kisor*, 588 U.S. at ___ (slip op. at 14). I will analyze both "removal" of equipment and the "area" where equipment is being removed below.

1. "Removal"

The parties do not agree on what constitutes "equipment removal." The Secretary envisions "removal" as a process of physically moving the equipment out of the "area." The Secretary does not commit to a concrete definition of "removal" but states "the equipment removal process involves transporting dangerous equipment through the mine, often requiring the use of additional dangerous machinery to provide transport." (Sec'y Br. 16) (emphasis added). It is not clear from his briefs, however, whether he thinks "removal" also involves disassembly of mechanized mining equipment or lacing of cables.

In contrast, the Respondent draws a line between disassembly and transportation. During the hearing, whenever the Secretary's counsel used the word "removal" to indicate the physical moving of mining equipment (Tr.298:22; 301:15–16; 304:20; 305:14), Respondent's counsel objected (Tr.299:1–4; 301:18–19; 305:16–19), arguing the term "removed" in the context of section 75.380(b) is a "very weighted term" and "a term of art." (Tr.298:25–299:7)

Respondent's post-hearing brief, however, gives the impression Respondent does not disagree that removal of mechanized mining equipment involves at least some degree of physical movement or transportation. For example, Respondent's post-hearing brief states its position that removal is completed once all section equipment is "moved outby the location of the former loading point." (Resp't Br. 18, 20) (emphasis added).

However, in its reply brief, Respondent readopts and rearticulates its position from the hearing that "removal" of mechanized mining equipment is "distinct from transportation."

(Resp't Reply Br. 9) Notably, Respondent cites that the William Station mine disaster, on which the escapeway equipment removal language was predicated, "did not involve transportation." (*Id.* at 10) Thus, Respondent argues section 75.380(b)(1) does "not contemplate transportation of equipment from place to place." (*Id.*) Respondent then argues that removal activity — for example, cutting, disconnecting, or lacing cables — is "distinguishable from mere transportation." (*Id.*) According to Respondent, removal activities are steps taken to "aid in transportation" but are distinct from it. (*Id.*)

This is peculiar. Although Respondent cites heavily to Eslinger's testimony to support its contentions here, Eslinger himself stated unambiguously that disassembling of machinery is part of removal. (Tr.257:23-258:5) Respondent's own language in its post-hearing brief that removal is completed "once all section equipment is moved outby the location of the former loading point" (Resp't Br. 18) (emphasis added) also contradicts its apparent position that "removal" does not involve any transportation. These two seemingly contradictory positions can be reconciled, however, if "transportation" and "move[ment]" are discrete concepts. If such a distinction exists, neither the Respondent (nor the Secretary) has yet to expound on it.

I am similarly unpersuaded by Respondent's position that "removal" is a term of art. There is nothing in the plain language of the regulation or even the regulatory history to support the position that "removal" is a technical term that limits the process to only the disassembly or cable lacing steps. Words that are not technical in nature are to be given their usual, natural, plain, ordinary, and commonly understood meaning. *W. Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989) (citing *Old Colony R.R. Co. v. Comm'r of Internal Revenue*, 284 U.S. 552, 560 (1932)). To my knowledge, to date, neither the Commission nor its ALJs have had to define the word "remove" or "removal." Remove means "[t]o move from a place or position occupied; to transfer or convey from one place to another; to take off; to take away; to withdraw." *Remove*, The Am. Heritage Dictionary of the English Language 1476 (4th ed. 2009); *see also* Webster's Third New Int'l Dictionary 1921 (3d ed. 1993) ("to change or shift the location, position, station, or residence of; to move by lifting, pushing aside, or taking away or off"). Removal means "[t]he act of removing; the fact of being removed; relocation, as of a residence or business." *Removal*, The Am. Heritage Dictionary of the English Language 1476 (4th ed. 2009); *see also* Webster's Third New Int'l Dictionary 1921 (3d ed. 1993) ("[t]he act of removing or fact of being removed; shift of location").

Thus, I conclude that "removal" in section 75.380(b) involves at least some degree of physical transportation or movement of mechanized mining equipment.

2. "Area"

The more important question before me is the extent of such physical transportation or movement. The language of the regulation reads: "Escapeways shall be provided from each working section, and each area where mechanized mining equipment is being [. . .] removed [. . .] ." 30 C.F.R. § 75.380(b)(1). With respect to this second condition, once the mechanized mining equipment is removed from the "area" — whatever that is determined to mean — removal is complete and escapeways are no longer required. Unfortunately, the definition

section in the regulation is of no assistance here. Similarly, a standard American English dictionary does not give any meaningful guidance.[36]

The parties interpret the relevant "area" in vastly different ways.[37] According to the Secretary, the relevant "area" is the entirety of the old 2b panel (Sec'y Br. 14, 17, 19–20, 29, 31),[38] which spans a distance of 8,920 feet. (Tr.52:7; Ex. J–3) By contrast, Respondent argues that the relevant "area" is based on the former working section, that is to say the area from the former loading point inby to the former working face (Resp't Br. 18, 20–21), a distance of approximately 360 feet. (Tr.52:5–8; Ex. J–3) Despite the fact that the Secretary's interpretation yields a result 25 times larger than Respondent's, both interpretations of "area" are facially plausible.

According to the Secretary, had Respondent fully removed the equipment from the old 2B panel prior to making the air change, escapeways would not have been required because the old 2B panel "would no longer constitute an area from which equipment was being removed." (Sec'y Br. 20) In support of his interpretation that "area" in section 75.380(b) means the old 2B panel, the Secretary cites repeatedly to the plain language of the regulation. (Sec'y Br. 2, 10, 12, 14–15, 17–18, 21, 36; Sec'y Reply Br. 1, 2, 4) However, the word "panel" does not appear anywhere in section 75.380. *See* 30 C.F.R. § 75.380. In all of Subpart D as currently written, the word "panel" only appears nine times. *See* 30 C.F.R. §§ 73.333; 75.335; 75.351. Two of the "panels" relate to strength tests for building construction. *See* 30 C.F.R. § 75.333. Four of the "panels" relate to seals constructed to separate the active longwall panel from the longwall panel previously mined. *See* 30 C.F.R. § 75.335. The final three "panels" relate to carbon monoxide and smoke monitors. *See* 30 C.F.R. § 75.351. Similarly, the word "unit" does not appear in section 75.380. *See* 30 C.F.R. § 75.380. Thus, the plain language does not clearly support the Secretary's contention that "area" in section 75.380(b) is referencing the entirety of the panel.[39]

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[36] Area is defined as "[a] roughly bounded part of the space on a surface; a region." *Area*, The Am. Heritage Dictionary of the English Language 94 (4th ed. 2009); *see also* Webster's Third New Int'l Dictionary 115 (3d ed. 1993) ("a level or relatively level piece of unoccupied or unused ground; the superficial contents of any figure; any particular extent of space or surface").

[37] The centrality of the concept of "area" in this case is evident by the frequency it appears in the record and briefs. The word "area" was used by the Secretary 32 times in his briefs. The Respondent used it 35 times. It appeared in the transcript 176 times.

[38] While the Secretary was very careful to state that equipment was still being removed from the "old 2B panel" in his briefs, Belford repeatedly characterized the removal from an undefined "area" at the hearing. (Tr.36:14–17; 53:10–13; 66:6–8; 71:17–18; 72:4–6; 81:8–9, 17–18; 103:1–2)

[39] Curiously, the 1988 Federal Register discusses disallowing "permanent electrical equipment or diesel equipment outby working panels" in at least one intake escapeway from each working section in the draft escapeway regulation preamble and draft 75.380 language. 53

Respondent argues the meaning of "area" is clear once one understands the purpose and context of section 75.380(b). (Resp't Br. 18) However, even after an exhaustive review of the Subpart D regulations as well as the various Federal Register preambles pertaining to Subpart D, *see* discussion *infra* Section VI. B., although strongly supported, I cannot conclude that Respondent's interpretation is plainly evident either.

Upon review of the plain language of section 75.380(b) as well as the definition section in section 75.2, and as evident by the clearly diverging interpretations proffered by the parties, I conclude the term "area" as used in section 75.380(b) is ambiguous.

B. The Secretary is not Entitled to Deference Because His Interpretation does not show the Agency's Fair and Considered Judgment

Having found above that section 75.380(b) is ambiguous, I am to give deference to the Secretary's interpretation if it is found to be reasonable. *See Drilling & Blasting Syst.*, 38 FMSHRC at 194 (citing *Auer*, 519 U.S. at 452). However, as recently articulated by the Supreme Court, *Auer* deference does not always apply; in fact, "it often doesn't." *Kisor*, 588 U.S. at ___ (slip op. at 18). Deference to the agency's interpretation is inappropriate if its interpretation is not reasonable, when it is plainly erroneous or inconsistent with the regulation, or if it does not reflect the agency's fair and considered judgment. *Drilling & Blasting Syst.*, 38 FMSHRC at 194 (citing *Auer*, 519 U.S. at 461; *Christopher*, 567 U.S. at 155); *see also Mead Corp.*, 533 U.S. at 228 (finding that the amount of deference to which an agency is entitled depends on, among other things, the agency's consistency and persuasiveness of its position). Additionally, courts should not give deference to an agency's reading except to the extent it has the "power to persuade." *Christopher*, 567 U.S. at 159.

As the Supreme Court has explained, an agency's interpretation may not reflect its fair and considered judgment when it conflicts with a prior interpretation. *Christopher*, 567 U.S. at 155; *cf. BethEnergy Mines*, 501 U.S. at 698 (court considered longstanding and consistent interpretation as a factor on whether to defer); *see also Thomas Jefferson Univ.*, 512 U.S. at 515 (stating that a regulatory interpretation that conflicts with a prior interpretation is "entitled to considerably less deference than a consistently held agency view"). The Secretary bears the burden of establishing the factors necessary to afford his position deference. *See Peabody Twentymile Mining LLC*, 39 FMSHRC at 1332 (declining to grant the Secretary's position *Auer* deference when he failed to establish such a factor), *argued*, No. 17-9540 (10th Cir. Mar. 22, 2018).

I am convinced the position taken by the Secretary is unreasonable and deserves no deference for three reasons. First, the Secretary has failed to provide sufficient evidence to support that his interpretation is reasonable or the result of the agency's fair and considered judgment. Second, when applied to section 75.380(b), the Secretary's interpretation of "area where mechanized mining equipment is being installed or removed" is logically inconsistent. Finally, when applied to other similar sections in Subpart D, the Secretary's interpretation of

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Fed. Reg. at 2,408, 2,423 (emphasis added). However, this language was dropped in the 1992 final rule. *See* 57 Fed. Reg. at 20,904–06, 20,926–27.

"area where mechanized mining equipment is being installed or removed" leads to absurd results. I will address each in turn.

1. The Secretary has Failed to Provide Sufficient Evidence to Support his Interpretation that the "Area" in Section 75.380(b) is the Old 2B Panel

The Secretary's briefs state at least two dozen times that the relevant "area" the mining equipment must be removed from is the old 2B panel. (Sec'y Br. 3, 6–8, 10–11, 14–15, 17–20, 29, 31; Sec'y Reply Br. 1–2, 4–5) As justification for this, the Secretary cites repeatedly to the plain language (Sec'y Br. 2, 10, 12, 14–15, 17–18, 21, 36; Sec'y Reply Br. 1–2, 4), the regulatory intent, (Sec'y Br. 12, 17, 21, 25– 27; Sec'y Reply Br. 2, 4–5), the regulatory history, (Sec'y Br. 16, 21, 23–24, 27; Sec'y Reply Br. 3–4), and various preambles. (Sec'y Br. 16–17, 21, 26; Sec'y Reply Br. 2, 4)

Beyond this level of generality, however, there is little if any exposition of how he arrives at his conclusion. An example of this can be seen on page 15 of the Secretary's post-hearing brief. The first line correctly cites the language in the regulation: "areas where mechanized mining equipment is being removed." (Sec'y Br. 15) (emphasis added) But, after citing case law on determining whether a standard is plain or ambiguous, the Secretary states, "[i]n this case, because equipment was being removed from the Old 2B panel [. . .] ." (*Id.*) (emphasis added) The Secretary seemingly pulls the "old 2B panel" language out of nowhere and merely substitutes it for the "area" he cited a moment earlier. This logical legerdemain permits the Secretary to avoid addressing the fundamental question before me: Why it is reasonable to think the old 2B panel is the "area" where mechanized mining equipment is being removed from. The Secretary cannot assume away his burden. Likewise, I cannot assume the Secretary has a good reason for his policy choice: The Secretary is obliged to supply a rationale and articulate a reasoned judgement as to why his interpretation must be adopted. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Secretary's persistent citing to the regulatory intent, regulatory history, and preambles, while authoritative at first glance, lacks persuasive strength when placed under scrutiny. This is not to say the Secretary did not at times point to specific language in the Federal Register. Between both of his briefs, the Secretary cited or referenced specific language in the Federal Register several times. (Sec'y Br. 16, 23–24, 26, 26 n.10, 29; Sec'y Reply Br. 4) However, none of his citations helped support the major contention that "area" in section 75.380(b) means the old 2b panel.

"Area(s) Where Equipment is Being Installed or Removed" Mirrors the Term "Working Section"

As discussed above, *see* discussion *supra* Section IV. A. 3, the phrase "area(s) where equipment is being installed or removed," which is at the heart of this litigation, did not appear in

the 1988 preamble or draft language.[40] *See* 53 Fed. Reg. 2,382 et seq.

Consistent with Eslinger's testimony about the Pyro Mining Company's William Station No. 9 Mine disaster and how his investigative committee's findings prompted the ventilation committee to rewrite portions, *see* discussion *supra* Section IV. A. 3, the 1992 Federal Register states:

> The specific reference in the final rule requiring preshift examination of areas where equipment is being installed or removed has been added to clarify the existing rule. The Agency has always considered these areas to be subject to the requirements of the preshift examination; however, an investigation following an explosion at the William Station Mine indicated that some confusion existed on this issue.

57 Fed. Reg. at 20,894 (emphasis added). MSHA subsequently added the phrase or close variant of the phrase "area(s) where equipment is being installed or removed" [41] 17 times in the 1992 preamble and 12 times in the then-newly promulgated regulations. 57 Fed. Reg. 20,868 et seq.

The first explanation in the Federal Register[42] about mechanized mining equipment being "installed or removed" provides useful context:

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[40] As a direct example, the escapeway regulation found in the 1988 draft proposal read as follows:

> § 75.380 Escapeways.
> (a) Except in situations addressed by §§ 75.384 and 75.385, at least two separate and distinct travelable passageways shall be designated as escapeways and shall be:
> (1) Provided from each working section continuous to the surface or to escape shaft or slope facilities to the surface;
> (2) Maintained in a safe condition to ensure passage at all times of any person, including disabled persons [. . .] .

53 Fed. Reg. at 2,422. The phrase "area where mechanized mining equipment is being installed or removed" is nowhere to be found.

[41] Although this phrase is used in different regulations throughout Subpart D, an important canon of statutory and regulatory interpretation is that a word or phrase is presumed to be used consistently and bear the same meaning throughout a text. *See U.S. v. Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring); *see also* Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 167 (2012).

[42] Admittedly, "[a]gency regulations can sometimes make the eyes glaze over." *Kisor*, 588 U.S. at ___ (slip op. at 14). Combing through regulatory history, while not always exciting, is sometimes necessary to solve these "hard interpretive conundrums [. . .] ." *Id.*

> Areas where coal is being extracted or mechanized mining equipment is being installed or removed are typically the places in any underground mine where methane accumulation and other hazards to health or safety can develop quickly when ventilation is interrupted. To avoid exposure of miners to these hazards, timely withdrawal of persons is an important safety practice. Requiring withdrawal from the working section means that miners must be withdrawn out by [sic] the section loading point. In areas where equipment is being installed or removed and the loading point has not been established or has been removed, withdrawal is to be to the anticipated location of the loading point or to the last location of the loading point.

57 Fed. Reg. at 20,875 (emphasis added). This language highlights two critically important points: (1) methane accumulations develop quickly when ventilation is interrupted, especially at the working face (i.e., "[a]reas where coal is being extracted") and (2) MSHA's intention that "areas where equipment is being installed or removed" be made in reference to the (anticipated or former) loading point and mirrors the working section.

MSHA reemphasizes the danger of methane accumulations throughout the preambles. The general discussion section of the preamble in 1992 states that the Subpart D regulations are aimed at protecting against "mine fires and explosions due in part to the presence of explosive gases in underground coal mines; oxygen-deficient atmospheres; and accumulations of other harmful gases." 57 Fed. Reg. at 20,868. Additionally, the general discussion states that ventilation is a primary method of controlling and mitigating miners' exposures to respirable dust to prevent the development of pneumoconiosis. *Id.* The preamble discussion about escapeways states, "[e]scapeways are the primary means of escape for miners during a mine fire or similar life-threatening emergency." *Id.* at 20,904; *see also* 61 Fed. Reg. at 9,810 ("[w]hen a fire, explosion or other emergency necessitates an immediate evacuation of a mine, the designated route for miners to leave the mine is the escapeway"); 53 Fed. Reg. at 2,408 ("[e]scapeways are the primary means of egress during a mine fire or similar life-threatening situation").

Given the above, the "area" during installation and removal of mechanized mining equipment that MSHA was most concerned with logically appears to have been where "accumulation and other hazards to health or safety can develop quickly when ventilation is interrupted." 57 Fed. Reg. at 20,875. In other words, in the case of mechanized mining equipment removal, the place (former active face) where coal was formerly being extracted, i.e., the former working section.

MSHA reemphasizes the relationship between the "working section" and "area(s)" where mechanized mining equipment is/are being installed or removed in the discussion section for escapeways in bituminous and lignite mines:

> Paragraph (b)(2) recognizes that during the installation or removal of mechanized mining equipment, the term working section, as

> defined, may not be appropriate because in one case the loading point may not yet be located by the installation of a belt tailpiece or feeder and in the other, it may have already been removed. In these cases, the required escapeways must begin at the projected location of the loading point in areas where equipment is being installed and at the location of the last loading point for the section when equipment is being removed. This aspect of the final rule clarifies the existing provision and is necessary to provide safe escape for miners from hazards that may develop during this phase of the mining operation.

57 Fed. Reg. at 20,904 (emphasis added).

The meaning of words, especially those deemed to be ambiguous, is derived from context. *See Deal v. United States*, 508 U.S. 129, 132 (1993) (fundamental principle that the meaning of a word cannot be determined in isolation, but must be drawn from context in which is it used); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.") (citations omitted). Indeed, like peas in a pod, the phrase "area(s) where mechanized mining equipment is being installed or removed" nearly always finds itself positioned immediately next to "working section" (*see* 30 C.F.R. §§ 75.313(a)(3); 75.325(g); 75.332(a)(1); 75.350(a), (b), (b)(2), (b)(6), (d); 75.351(b)(1), (c)(4), (c)(7), (f), (n)(3)(iv); 75.352(c)(1); 75.360(b)(3), (c)(1); 75.371(ii); 75.380(b)(1)) or "working place" (*see* 30 C.F.R. §§ 75.323(b)(1),(2)).[43] Thus, applying the constructional cannon of *noscitur a sociis*, that a word is known by its associates, it is sensible and reasonable to conclude "area(s) where mechanized mining equipment is being installed or removed" is closely related to and mirrors the active "working section."

[43] The few exceptions can be found in section 75.362, On-Shift Examination. 30 C.F.R. § 75.362. Subsection (a)(1) requires an on-shift examination of "each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift." 30 C.F.R. § 75.362(a)(1) (emphasis added). Subsection (c)(1) requires an on-shift examination to include a determination of the volume of air "in the last open crosscut of each set of entries or rooms on each section and areas where mechanized mining equipment is being installed or removed, in the intake entry or entries at the intake end of the longwall or shortwall." 30 C.F.R. § 75.362(c)(1) (emphasis added). Subsection (c)(2) requires a determination of the volume of air "on a longwall or shortwall, including areas where longwall or shortwall equipment is being installed or removed, in the intake entry or entries at the intake end of the longwall or shortwall." 30 C.F.R. § 75.362(c)(2) (emphasis added). None of these exceptions, however, fortify the Secretary's argument that "area" where mechanized mining equipment is being installed or removed means an entire panel.

"Area" is to be Interpreted Narrowly

Even if the applicable "area" where mechanized mining equipment is being installed or removed was not meant to mirror the working section, there is ample evidence throughout the Federal Register that "area" should nonetheless be read narrowly.

The discussion of preshift examinations, section 75.360(b), notes "[i]ncluded in this examination of working sections and areas where equipment is being installed or removed are working places and ventilation controls and approaches to worked-out areas on those working sections or in these areas. 57 Fed. Reg. at 20,893–94 (emphasis added). Had MSHA intended the "area" where equipment is being installed or removed to encompass the entirety of the panel, there would be no need to enumerate these last three places. The discussion continues on to state, "[o]ther areas that require a preshift examination are approaches to worked-out areas in active workings and seals along intake entries where intake air passes through or along these entries on its way to a working section." *Id.* at 20,894 (emphasis added). Again, if "area" were to encompass the entire panel, there would be no need to describe these "other areas."

The same pattern of using the word "area" to delineate a discrete location is observed throughout the regulations. *See, e.g.*, 30 C.F.R. §§ 75.313(b) (mentioning "other areas" where methane is likely to accumulate); 75.313(c)(2) (mentioning "areas or haulageways where methane is not likely to migrate or accumulate"); 75.313(c)(3) (describing "areas where methane is not likely to migrate to or accumulate"); 75.351(b)(1), (n)(3)(iv) (noting "other areas designated in the approved emergency evacuation and firefighting program of instruction" in addition to working sections and areas where mechanized mining equipment is being installed or removed); 75.351(e)(1)(iii) (mentioning "areas along each belt entry"); 75.352(c)(1) (describing "affected areas" during sensor alerts and alarms); 75.361(b) (describing areas "required to be examined outby a working section"); 75.384(c)(2) (explaining that miners shall be withdrawn from "face areas" to "a safe area outby the section loading point"); 75.388(d) (discussing borehole penetration in an "area that cannot be examined"); 75.388(f) (mentioning an "inaccessible area of another mine"); 75.389 (describing areas penetrated by boreholes).

I note one clear exception: The phrase "underground area," which describes a portion of the mine even larger than the old 2B panel, is used throughout Subpart D. 30 C.F.R. §§ 75.311(b)(3); 75.312(c), (d); 75.313(d)(1)(i); 75.360(a)(1), (g); 75.364(f)(1), (2); 75.372(b)(9); 75.389(c)(3). However, the word "area" is modified by the word "underground." Section 75.380(b)'s "area where mechanized mining is installed or removed" does not have this expansive modifier. Thus, the most sensible conclusion is that an "area" where mechanized mining equipment is being installed or removed is also interpreted as a discrete location.

The Secretary has Failed to Provide Evidence to Bolster his Argument

As discussed above, the language of the Subpart D regulations and preambles does not support a reading of "area(s) where mechanized mining equipment is being installed or removed" in the way the Secretary interprets. The Secretary's remaining arguments shift the focus to the Respondent: (1) Respondent's interpretation is contrary to the safety purposes of the

Mine Act and (2) Respondent's witnesses are not credible.

The Secretary twice cites to the Federal Register's "hazards that may develop during [the installation or removal] phase of the mining operation" language for the proposition that equipment removal is a "distinct phase of mining" that requires an escapeway to protect against all hazards, including pinch-point hazards, crush-by hazards, and electrical hazards. (Sec'y Br. 16, 26) This interpretation distracts from the clear and intentional directive of the ventilation regulations and, more specifically, the escapeway provision. The danger the escapeway regulation addresses is not any conceivable hazard in a mine, but the potential of a methane ignition and explosion such as what happened in the William Station mine disaster, which was the impetus for adding the subject escapeway requirement during both equipment installation and removal. (Tr.217:7–221:25; *see* 57 Fed. Reg. at 20,894) The relevant danger is the one that arises from changing airflow too soon when a production unit is being decommissioned. If the face airflow is decreased too soon, methane that would otherwise have been evacuated, as during normal production, is allowed to build up. Thus, while the Secretary's general, catch-all justification of "in the interest of miner safety" (Sec'y Br. 25) is ever-present and ever-important in Mine Act cases, the Secretary fails to properly acknowledge the specific safety-purposes of escapeways.

With this purpose in mind, the Secretary's contention that Respondent's interpretation "imposes an arbitrary line as the difference between safety and danger" (Sec'y Br. 17) is less convincing. Eslinger, Reynolds, and Barras all testified about the extremely hazardous conditions — especially during the loading of coal — that exist inby the loading point, including unsupported roof and higher levels of methane. (Tr.196:4–11; 248:21–10; 250:12–251:1; 276:9–15) Indeed, the 1992 preamble discussion of methane supports Respondent's witnesses' statements and logic. *See, e.g.*, 57 Fed. Reg. at 20,875 ("Areas where coal is being extracted or mechanized mining equipment is being installed or removed are typically the places in any underground mine where methane accumulation and other hazards to health or safety can develop quickly when ventilation is interrupted."). There is also direct support in the regulations that the loading point is not an "arbitrary" line of safety. In section 75.384(c), Longwall and Shortwall Travelways, the regulation states: "[w]hen a roof fall or other blockage occurs that prevents travel in the travelway — [. . .] (2) Miners shall be withdrawn from face areas to a safe area outby the section loading point." 30 C.F.R. § 75.384(c)(2) (emphasis added); *see also* 57 Fed. Reg. at 20,908. The preamble in the 1992 Federal Register additionally supports that the loading point is an important place marker: "[t]o avoid exposure of miners to [methane accumulation and other hazards that develop quickly when ventilation is interrupted], timely withdrawal of persons is an important safety practice. Requiring withdrawal from the working section means that miners must be withdrawn out by [sic] the section loading point." 57 Fed. Reg. at 20,875 (emphasis added). Moving equipment outby the loading point, while not totally free from all potential hazards, moves it into an area substantially less hazardous for methane ignition. (Tr.248:18–249:10) This is not an immaterial consideration.

The Secretary's argument that the run-of-the-mill danger associated with moving any equipment from one place to another in a mine, not the specific danger of methane accumulation and explosions addressed in this regulation, urges the unconvincing ad hoc interpretation advocated here, that any moving of any equipment in a mine requires the establishment of an

escapeway. As will be discussed below, *see* discussion *infra* Section VI. B. 2, the absurdity of the Secretary's interpretation is evidenced by specific examples of moving mechanized mining equipment on worked-out panels.

The Secretary spends the remainder of his argument attempting to discredit Eslinger and Respondent's other witnesses. I have already determined above, *see* discussion *supra* Sections IV. B & C, that I could find no legitimate reason to discredit Respondent's witnesses. In any event, the Secretary's preferred arguments are two-sided blades. For example, the Secretary attempts to discredit Eslinger by stating that "[d]eference is owed to the decision maker authorized to speak on behalf of the agency, not to each individual agency employee." (Sec'y Br. 23, *citing Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)) It is true that despite having worked directly on the drafting of the Subpart D regulations over many years, Eslinger does not speak on behalf of the agency. But, by the same token, no single agency employee may speak for the agency, including Belford. In the absence of any additional evidence, it appears the Secretary is basing his interpretative position on the testimony of a single MSHA inspector with six years of mining experience who had never seen this type of situation before. As recently clarified by the Supreme Court, *Auer* deference can only be given if the regulatory interpretation is the agency's "authoritative" or "official" position and must "at the least emanate from [agency heads], using those vehicles, understood to make authoritative policy in the relevant context." *Kisor*, 588 U.S. at ___ (slip op. at 16). Belford and his direct superiors do not qualify.

The Secretary also argues that Respondent can point to no PPM or Question and Answer (Q&A) documents to support its interpretation. (Sec'y Br. 24) Again, this cuts both ways. The Secretary is the party uniquely responsible for issuing PPMs and Q&A documents, but he is similarly unable to point to any interpretative documentation to support his position. It is the Secretary, not the Respondent, who bears the burden of establishing the factors necessary to afford his position deference. *See Peabody Twentymile*, 39 FMSHRC at 1332, *argued*, No. 17-9540 (10th Cir. Mar. 22, 2018).

The Secretary's History of Interpretation and Enforcement is Unclear

Although not explicit in the Secretary's post-hearing brief, the Secretary implies in his reply brief that his interpretation of the escapeway regulation has been consistently held and enforced. (*See, e.g.*, Sec'y Reply Br. 5 ("Respondent's argument missed the mark because it mistakenly presumes the Secretary has changed [his] position [. . .] the Secretary is not taking a new position but instead merely opposing Respondent's misconstruing of a clear regulation.")) (emphasis added) However, there is no evidence in the record that the Secretary's current view has been long-held. The Secretary's sole witness, Inspector Belford, said nothing about this point. Belford said nothing about this being a long-held belief in the District 8 office, let alone across all MSHA offices. Belford did state on cross examination, however, that he was never trained on what "removal," and by logical extension, the applicable "area," meant. (Tr.90:13–15)

The Secretary explicitly states that MSHA had never officially adopted Respondent's and Eslinger's interpretation of the escapeway provision. (Sec'y Reply Br. 3, 5–6) Nevertheless, he

allows that even if Eslinger's interpretation was advanced when Subpart D was first promulgated, an inconsistent enforcement pattern does not estop MSHA from proceeding under the interpretation it concludes is correct. (Sec'y Br. 23, *citing U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1547 (Aug. 1993)) That he did not provide evidence of enforcement against Respondent's practices is, in the Secretary's words, "of no consequence." (Sec'y Reply Br. 6) It is certainly possible that Respondent's witnesses, with decades of combined mining experience in District 8, (and, by extension, their various operator employers) misunderstood and were in violation of the escapeway provision for 24 years. It is also possible they managed to evade reprimand or citation despite practicing mechanized mining equipment removal based on this purported misunderstanding. That these operators seem to have done so openly in plain sight does not make this a statistical impossibility either. However, as stated by the Supreme Court, "where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute." *Christopher*, 567 U.S. at 158. Quoting the sagacious Judge Posner of the Seventh Circuit, the Supreme Court further noted that "while it may be 'possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing,' the 'more plausible hypothesis' is that the Department did not think the industry's practice was unlawful." *Id.* (quoting *Dong Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007)). Such appears to be the case here.[44]

Alternative arguments are acceptable in most cases. But when the Secretary — after having provided virtually no evidence — claims the agency has been consistent in its interpretation for years, and then argues that the agency may change his views without notice, without consistent enforcement, and without evidence to support the argument, the Secretary's interpretation cannot be deemed to be fair, considered, or even reliable.

The Secretary has adduced insufficient evidence to show that his interpretation is reasonable or reflects the agency's fair and considered judgment; to the contrary, the evidence demonstrates that the Secretary's position is unreasonable and merely the ad hoc interpretation of a single inspector and his supervisors. This logical lacuna in the Secretary's interpretation is evident when I apply the Secretary's interpretation to section 75.380(b) and even more so when I apply it to the other regulations in Subpart D.

2. The Secretary's Interpretation of Section 75.380(b) Yields Inconsistent Outcomes and Leaves Logical Gaps

The Secretary cites repeatedly to the fact that moving mechanized mining equipment can create hazards, for example pinch-point hazards, crush-by hazards, electrical hazards, and fire

[44] I note that Belford did not issue any citations on September 6 or 7. This is consistent with the notion that neither he nor his supervisors at District 8 were certain about enforcement of the escapeway provision, as the Secretary's briefs would have me believe. It appears more likely that Belford was not sure whether the old 2B travelway was still an escapeway, which is consistent with the testimony that neither Belford nor Combs was sure on September 6 when they looked at the regulatory language for 75.380(b). It is also consistent with Belford's testimony that he had never been trained specifically on the meaning of "removal" nor had he ever seen this type of situation before.

hazards. (Sec'y Br. 16, 26) The Secretary correctly points to the fact that not all hazards are eliminated once equipment is moved past the former loading point. (*Id.* at 16, 18, 25) For these reasons, the Secretary argues mechanized mining equipment had to be moved off the old 2b panel in order to be properly "removed." However, there are serious inconsistencies and logical gaps if the Secretary's interpretation is adopted.

Let's suppose Respondent moved CM234, CM235, and FB605 off the old 2B panel — an additional 8,600 feet from the former loading point. According to the Secretary's interpretation, this would have constituted proper "removal" of the mechanized mining equipment. Let's suppose Respondent then dismantled the lifeline, powered off the two-way communication at the refuge alternative, shut down tracking, and completed the air change. The old 2B panel would no longer be in active working status. Now let's suppose Respondent then immediately moved the three pieces of equipment back onto the old 2B panel and parked them in crosscuts 125, 126, and 127 — the precise locations Inspector Belford found them in on September 6, 2016. It appears this would not be a violation. It is not readily apparent to me how this (non-violative) situation is any safer than what Respondent actually did. In both cases, the three pieces of mining equipment ultimately ended up in crosscuts 125, 126, and 127. Yet, the Secretary claims one fact pattern is dangerous insofar as it requires the protections of an escapeway; the other — where mining equipment was moved an additional 17,000 feet — would not. To accept this outcome would exalt form over substance. This inconsistent outcome cannot be what MSHA envisioned.

Similarly, the Secretary largely avoided addressing the Respondent's legitimate counterargument that escapeways are not required every time mechanized mining equipment is being moved or transported in a mine. Respondent's witnesses and Inspector Belford testified that escapeways are not required when mechanized mining equipment is moved back into a worked-out, inactive portion to make repairs. (Tr.97:5–98:19; 162:2–19; 202:14–203:21; 280:24–283:12) For example, mechanized mining equipment might be moved into a return air course to do cleaning or roof bolting. (Tr.204:7–17; 281:6–25; 282:1–9; 283:3–12) No escapeway would be required in this situation. (Tr.204:18–20; 282:10–12) Additionally, although unusual, it is not unheard of to use a continuous miner for cleanup work. (Tr.203:22–204:3; 282:13–283:2; *contra* Tr.103:12–20) No escapeway would be required in this situation either. (Tr.204:4–6; 282:21–23) All of the hazards that would exist in moving CM234, CM235, and FB605 from crosscuts 125, 126, and 127 off the panel would exist in these cleaning/maintenance scenarios.

The Secretary's response to this compelling counterargument can be found hidden in a single footnote.[45] The Secretary states that the regulations contemplate protection during equipment removal associated with the end of a production section as a distinct phase of mining;

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[45] The Secretary's decision to address one of Respondent's most compelling arguments in a footnote was ill advised. *See CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) ("A footnote is no place to make a substantive legal argument on appeal; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture."); *see also Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (a court "need not consider cursory arguments made only in a footnote").

thus, Respondent's counterexamples are not related to the phase of mining contemplated by the regulations. (Sec'y Br. 26 n.10) The Secretary's argument conflates the "distinct phase of mining" the preambles warn about, i.e., the decommissioning of equipment that is occurring at the former working section inby the loading point, with the transportation of mechanized mining equipment outby the loading point. This side-step by the Secretary leads to a distinction without a difference. To accept the Secretary's argument here would once again place form over substance.

It makes logical, practical sense that escapeways and their related requirements are not required in every scenario when mechanized mining equipment is being moved. As Kimbel and Barras both testified, mines have a limited amount of air. (Tr.111:5–8; 276:6–7) Working sections are prioritized since dangerous levels of methane and dust exist at the working faces and need to be diluted. (Tr.111:7–17; 276:12–15) Worked-out locations, by contrast, do not require as much air to maintain safe conditions. (Tr.111:7–17; 276:1–7) If every maintenance situation in old, worked-out panels that involved mechanized mining equipment required escapeways to be installed — along with air changes — it could compromise the mine's ability to maximize its ventilation resources for the safety of miners in active areas. Consistent with this logic and history, Peabody planned for the unit 2 move by doing an engineering review to determine what changes were needed to redirect the ventilation airflow away from what had been an active mining unit in the old 2B panel so that the available airflow could be sent to higher priority areas of the mine. (Tr.168:3–11; 274:5–276:7)

The Secretary's argument — conceived for purposes of this litigation — is so narrow that it leads to an absurd result. The absurdity arises from an awareness of the need during normal mining operations to move mining equipment from one place to another in inactive, worked-out panels without having to attend to the escapeway requirement. The Secretary has provided no rational explanation to account for the inconsistent outcomes that emerge from his interpretation of the escapeway regulation.

3. The Secretary's Interpretation Leads to Absurd Results when it is Applied to Other Regulations in Subpart D

As discussed numerous times above, the Secretary argues that the applicable "area" that mechanized mining equipment must be removed from was the old 2B panel. As shown below, applying the Secretary's interpretation to related regulations in Subpart D leads to absurd results.[46]

[46] I anticipate the Secretary might protest that "area where mechanized mining equipment is being installed or removed" means the old 2B panel in the escapeway provision but, in other ventilation provisions, it means something else entirely. Justice William O. Douglas cautioned of such fickle judgment in *Zschernig v. Miller* when he cited to Humpty Dumpty's pronouncement to Alice in *Through the Looking-Glass*: "When I use a word [. . .], it means just what I choose it to mean — neither more nor less." 389 U.S. 429, 435 n.6 (1968).

Section 75.313(a), which involves procedures when there is a main mine fan stoppage while persons are underground, states:

> If a main mine fan stops while anyone is underground and the ventilating quantity provided by the fan is not maintained by a back-up fan system — [. . .] (3) Everyone shall be withdrawn from the working sections and areas where mechanized mining equipment is being installed or removed.

30 C.F.R. § 75.313(a) (emphasis added). Substituting in the Secretary's interpretation for the subject area during removal, we can understand the regulation to read, "if a main mine fan stops while anyone is underground and the ventilating quantity provided by the fan is not maintained by a back-up fan system — [. . .] Everyone shall be withdrawn from the working sections and old 2B panel [during removal]." Thus, miners at the working section must be withdrawn from the working section — in other words outby the loading point; miners during the equipment removal phase, which is no more dangerous than the active mining phase, would instead have to be withdrawn from the panel. In the case of Wildcat Hills' old 2B panel, this would account for a difference of 8,600 feet.

Section 75.351(f), which specifies the required locations for atmospheric monitoring sensors, instructs that in order to monitor the primary escapeway, "carbon monoxide or smoke sensors must be located in the primary escapeway within 500 feet of the working section and areas where mechanized mining equipment is being installed or removed. In addition, another sensor must be located within 500 feet inby the beginning of the panel." 30 C.F.R. § 75.351(f) (emphasis added). Rewritten with the Secretary's interpretation substituted in, the regulation would mandate that, during removal, sensors be located in the primary escapeway within 500 feet of the old 2B panel. This would result in a sensor being placed somewhere in the 2A Sub Main, which is absurd as it would not properly detect problems near the former working section, where the risk is greatest. I also note that the regulation mandates an additional sensor 500 feet inby at the beginning on the panel. Had MSHA intended for the "area" during equipment installation or removal to also mean "the panel," they could/would have said so.

The escapeway maps provision would also be nonsensical if the Secretary's current interpretation of "area" were adopted.[47] The escapeway map provision states:

> (a) Content and accessibility. An escapeway map shall show the designated escapeways from the working sections or the miners'

[47] For the 1992 final rule, the escapeway maps regulation was moved to section 75.383. 57 Fed. Reg. at 20,907. On December 8, 2006, section 75.383 was split up and removed: the old subsection (a) was transferred to create a new section, section 75.1505. 71 Fed. Reg. 71,430-01, 71,437 (Dec. 8, 2006). The section was amended in 2008. 73 Fed. Reg. 80,656-01, 80,698 (Dec. 31, 2008). The new section 75.1505(a) shares the same general meaning as the old section 75.383, but it is worded slightly differently and adds a few additional requirements. *Compare* 30 C.F.R. § 75.383 (1992) *with* 30 C.F.R. § 75.1505(a) (2008).

> work stations to the surface or the exits at the bottom of the shaft or slope, refuge alternatives, and SCSR storage locations. The escapeway map shall be posted or readily accessible for all miners—
>
> (1) In each working section;
>
> (2) In each area where mechanized mining equipment is being installed or removed;
>
> (3) At the refuge alternative; and
>
> (4) At a surface location of the mine where miners congregate, such as at the mine bulletin board, bathhouse, or waiting room.

30 C.F.R. § 75.1505(a) (emphasis added). Reworded with the Secretary's interpretation in mind, the escapeway map provision would read: "The escapeway map shall be posted or readily accessible for all miners [. . .] (2) in the old 2B panel [during removal] [. . .] ." If this were the case, an operator could comply with the regulation by placing an escapeway map at the former working face, at the beginning of the old 2B panel, or anywhere in the 8,900 feet between the two. Such a result would be contrary to common sense and the safety-focused purpose of the regulation as miners might not be able to reliably check the escapeway map in the event of an emergency. It is absurd and cannot be what MSHA and its drafters intended.

Section 75.323, which involves procedures when methane levels are excessive, instructs that various tests for methane concentrations be made at least 12 inches from the roof, face, ribs, and floor. 30 C.F.R. § 75.323(a). Subsections (b) and (c) describe the procedures when methane reaches 1.0% and 1.5%, respectively, in "a working place or an intake air course [. . .] or in an area where mechanized mining equipment is being installed or removed [. . .] ." 30 C.F.R. §§ 75.323(b)(1), (2). Substituting in the Secretary's interpretation for the subject area during removal would mean that methane measurements could be taken practically anywhere in the old 2b panel rather than discrete areas notorious for methane accumulations. The results of this could be catastrophic.

Section 75.332(a)(1), which involves working sections and working places, requires that "[e]ach working section and each area where mechanized mining equipment is being installed or removed" be ventilated by a separate split of intake air directed by overcasts, undercasts, or other permanent ventilation controls." 30 C.F.R. § 75.332(a)(1). Substituting in the Secretary's interpretation, the regulation would require that, during removal, the entire old 2B panel would need to be ventilated by a separate split of intake air directed by overcasts, undercasts, or other permanent ventilation controls. The infeasibility of this undertaking exposes the absurdity of the Secretary's position.

I cannot credit the Secretary's rationale for his interpretation. In contrast, Respondent's view is more defensible, coherent, and supplemented with credible testimony regarding the historical application of enforcement. As the Secretary's interpretation of the escapeway standard is unreasonable, not fairly considered, and results in absurd outcomes, deference to the Secretary is not appropriate.

VII. PARTIAL SETTLEMENT FOR CITATION NO. 9038387

On April 9, 2018, and prior to the hearing, the Secretary filed a motion to approve partial settlement. A reduction in the penalty for Citation No. 9038387 from $918.00 to $213.00 was proposed.

The Secretary also requested that Citation No. 9038387 be modified to reduce the gravity from "Reasonably Likely" to "Unlikely" and to remove the "S&S" designation. In support of this, Respondent would have presented evidence at hearing to show the cable at issue was a shielded cable and power conductors are individually shielded. If cable damage were serious enough to cut internal conductors, Respondent argued the most likely scenario would be a ground fault. Ground fault currents are limited by the grounding resistor. If a phase-to-phase short circuit occurred, the system was designed such that the minimum short circuit current available was well in excess of the setting cited. Respondent stated an analysis was conducted using the MSHA short circuit calculation program, and it was determined that the maximum available current was 6,005 amps; the minimum short circuit current available was 4,541 amps. Accordingly, Respondent argued that it was unlikely the breaker would not trip in the event of a short circuit. In consideration of the Respondent's arguments, the Secretary agreed to reduce the gravity from "Reasonably Likely" to "Unlikely," to remove the "S&S" designation, and to accept a reduced penalty.

I have considered the representations and documentation submitted in this case for Citation No. 9038387, and I conclude that the proffered partial settlement is appropriate under the criteria set forth in section 110(i) of the Act.

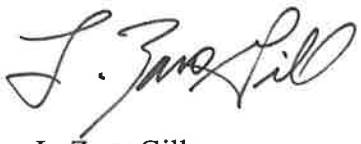
VIII. SUMMARY AND ORDER

The Secretary has failed to prove by a preponderance of the evidence that an escapeway was required in the old travelway on the old 2B panel during Inspector Belford's E01 inspection on September 6–8, 2016. As the three citations issued on September 8, 2016, were predicated on the existence of an escapeway, they must be vacated.

Accordingly, it is **ORDERED** that Citation Nos. **9039355**, **9039356**, and **9039357** are hereby **VACATED**.

It is further **ORDERED** that Citation No. **9038387** be **MODIFIED** to reduce the likelihood from "Reasonably Likely" to "Unlikely" and to remove the "S&S" designation.

It is further **ORDERED** that the operator pay a penalty of **$213.00** within 40 days of this decision and order.[48]



L. Zane Gill
Administrative Law Judge

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[48] 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.