

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

August 18, 2016

CANYON FUEL COMPANY, LLC,
Contestant

v.

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

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

v.

CANYON FUEL COMPANY, LLC,
Respondent

CONTEST PROCEEDINGS

Docket No. WEST 2015-676-R
Citation No. 8480766; 05/26/2015

Docket No. WEST 2015-677-R
Citation No. 8483666; 05/22/2015

Sufco Mine
Mine ID 42-00089

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2015-635
A.C. No. 42-00089-380386

Docket No. WEST 2016-214
A.C. No. 42-00089-385868

Sufco Mine

DECISION

Appearances: Alicia A.W. Truman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary;
R. Henry Moore, Esq., Jackson Kelly, Pittsburgh, PA, for the Respondent.

Before: Judge Manning

These cases are before me upon notices of contest filed by Canyon Fuel Company, LLC (“Canyon Fuel”) and petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Canyon Fuel pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Salt Lake City, Utah, and filed post-hearing briefs. Three section 104(a) citations were adjudicated at the hearing. Canyon Fuel operates the Sufco Mine, a large underground coal mine in Sevier County, Utah. For the reasons set forth below, I vacate Citation No. 8483666, modify Citation No. 8480766, and affirm Citation No. 8483766.

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. This decision includes a detailed summary of the testimony because this case raises rather unique issues and an understanding of the evidence presented is necessary to appreciate the legal issues raised.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation Nos. 8480766 and 8483766 both involve the surface termination point of the mine's alternate escapeway. Many of the key facts are the same with regard to both citations. I discuss Citation No. 8483766 first, but the evidence for that citation is also relevant to Citation No. 8480766.

A. Citation No. 8483766

Citation No. 8483766 alleges a violation of section 75.380(d)(5) of the Secretary's safety standards and asserts that, in the event of an emergency, the surface termination point of the mine's designated alternate/secondary escapeway was not accessible via a roadway for land-traveling vehicles. Section 75.380(d)(5) requires that each escapeway be "[l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners[.]" 30 C.F.R. § 75.380(d)(5).

This citation was issued to Canyon Fuel on March 16, 2015. The citation alleges that an injury was unlikely to be sustained and that the violation was not of a significant and substantial nature ("S&S"), but that if any injury did occur it would reasonably be expected to result in lost workdays or restricted duty. The citation further alleges that 20 persons were affected by the cited conditions and that Canyon Fuel's negligence was moderate. The Secretary has proposed a penalty of \$425.00 for this alleged violation.

Summary of the Evidence Presented by the Secretary

In June of 2014, Russell Riley,¹ the District Manager for Coal District 9, visited Canyon Fuel's Sufco Mine. (Tr. 16, 20). Canyon Fuel operates the Sufco Mine, an underground coal mine with both longwall and conventional mining sections. (Tr. 20). The mine liberates very little methane. (Tr. 100). About 80 to 90 miners work at the mine per shift, with roughly 20 of those miners in the two working sections at the mine. (Tr. 21, 48, 90).

During his visit, Riley met with the mine's safety department and asked to see an escapeway map. (Tr. 21-22). He observed that the primary escapeway designated on the map exited the mine through the West Lease Portal, while the alternate escapeway, which was significantly shorter, exited through the 4 East Fan Portal.² (Tr. 22-23; GX-2). He noted that

¹ Riley has been in the mining industry since 1975, with MSHA for 16 years, and has been the District Manager for Coal District 9 for two and a half years. (Tr. 16, 18). As District Manager he is involved in plan reviews, over which he has ultimate authority, and oversees the technical division, enforcement division, as well as other divisions. (Tr. 16-17). Prior to his time as District Manager he worked at MSHA headquarters, as well as in MSHA offices in Pennsylvania, West Virginia, and Washington state. (Tr. 17). He has been on mine rescue teams, been a mine rescue instructor, and has taught mine foremen how to read and develop mine maps. (Tr. 19).

² Riley testified regarding the primary and alternate escapeways while referring to GX-2, a mine

other portals existed close to the working sections and asked why those portals were not used for escapeways if they were intakes. (Tr. 22). According to Riley, mine personnel explained that there were no roads to those portals. (Tr. 23). In addition, mine personnel told him that there was no road to the 4 East Fan Portal, which served as the termination point of the mine's alternate escapeway. (Tr. 23-24). When Riley asked how the operator would take away people from that portal in an emergency, mine personnel told him that they did not know and had never been asked. (Tr. 24-25). Although Riley visited other portals in the mine that day, he did not travel to the 4 East Fan Portal. (Tr. 30). It was his understanding that the geography of the 4 East Fan Portal was similar to that of the 3 East Portal, which he did visit. He also understood that the 4 East Fan Portal exited into a steep canyon and onto a 200 foot long, by 50 foot wide ledge. Several structures were present on the ledge including fan structures and an air discharge fan that pointed up into the air to avoid contamination with intake air. (Tr. 28-31). The power for the fan comes from cables that travel through the mine.

Riley testified that he told mine personnel that he was concerned that it would be difficult to evacuate miners from the alternate escapeway's termination point at the 4 East Fan Portal. (Tr. 32). Mine management told him that the alternate escapeway had been that way for at least 20 years and it was the most direct way out of the mine. (Tr. 33). Riley did not cite the mine for a violation of any safety standard because he wanted to get more details. (Tr. 37). He told management that he would look into why the escapeway was allowed to exist that way for so long, but assumed it was an MSHA oversight. (Tr. 33). On cross-examination he acknowledged that inspectors would have performed quarterly inspections at the mine and travelled the air courses and the mine would have submitted ventilation maps, which identified the escapeways and air courses, for annual review by MSHA. (Tr. 93-95). When Riley left the mine that day it was his understanding that the mine was going to take action to correct what he believed was a deficiency and relocate the alternate escapeway to run parallel to the primary escapeway that terminated at the West Lease Portal. (Tr. 38).

On March 16, 2015, about nine months after his earlier visit to the mine, Riley made the decision to issue Citation No. 8483766 following a discussion with mine personnel in which he learned that the mine was not going to change the alternate escapeway route. (Tr. 36, 39). At hearing, Riley explained that, once miners exited the mine at the 4 East Fan Portal, there was "no reasonable means to get the miners, including disabled miners, off of the canyon edge" and, as a result, that mine portal was not suitable for the safe evacuation of miners. (Tr. 40-41). Riley understands the word "evacuation," as used in the standard, to mean "move out of the danger, move out of harm's way to a safe place." (Tr. 40). It was his opinion that the area outside the mine opening presented the potential for hazards, including contamination by gases and smoke in the event of a fire or explosion. (Tr. 41). Riley acknowledged that the standard does not require that the portal be accessible by a road but opined that, when there is a disaster and miners get CO poisoning, burns, or are in shock, they need to get to medical assistance or transport immediately. (Tr. 42).

map dated March of 2015. (Tr. 26). The primary escapeway was marked with a blue line on the map, while the alternate was marked with a red line. (Tr. 27-28)

Riley explained that MSHA looked at potential alternatives to the mine's 4 East Fan Portal alternate escape route. After looking at other potential alternate escapeways, MSHA determined that an alternate escapeway which paralleled the primary escapeway out the West Lease Portal would satisfy the standard's requirements and make the primary and alternate escapeways separate and distinct for the full length.³ (Tr. 42-44; GX-2). Riley stated that, in evaluating the best route, MSHA considers all three factors in the standard, i.e., whether the proposed route is the most direct, safe, and practical. (Tr. 50-51). He also pointed to MSHA's Program Policy Manual, which states that the chosen route does not have to be the shortest and that other considerations are important. (Tr. 58-59; GX-4). Finally, he noted that the decision should be made while taking into account all of the standards that apply to escapeways and evacuations and not just section 75.380(d)(5). (Tr. 59).

Riley acknowledged that the 4 East Fan Portal route was more direct than MSHA's proposed alternate route out the West Lease Portal and it would be easier for miners to carry someone on a stretcher out to the 4 East Fan Portal. (Tr. 52, 98-100). However, he explained that distance is not the primary factor of concern in every situation and, in this case, the proposed West Lease alternate escapeway route was approximately the same distance as the primary escapeway that also exited out the West Lease Portal. (Tr. 56, 133). Moreover, roughly two thirds of the proposed West Lease alternate escapeway could be driven if the mine staged vehicles in the escapeway. (Tr. 133-134).

Riley agreed that the number of overcasts in an escapeway is something that a mine operator must consider but did not believe that overcasts make a route much more difficult because going over them only takes a few seconds. (Tr. 53-54). He conceded, however, that if injured miners have to be carried over overcasts, it could take more than a matter of seconds. (Tr. 109). Evacuating out the proposed West Lease route would require crossing over twelve overcasts using stairs. (Tr. 111). While he acknowledged that the number of SCSR caches needed along a route should be taken into consideration, he did not believe that a difference in that number makes one route safer than another route and stated that, since the proposed West Lease route was ventilated with intake air, it was unlikely that miners traveling out that way would need SCSRs. (Tr. 54, 132-133). He agreed, however, that miners carrying an injured miner on a stretcher would use up the oxygen from the SCSRs faster, thereby requiring them to change SCSRs more often. (Tr. 101). Riley acknowledged that there were a number of seals along the proposed West Lease route. (Tr. 106).

Riley concluded that the proposed West Lease alternate route was safe, direct, and took miners out a portal where medical transportation could be waiting for them. (Tr. 43, 132). This alternate escapeway would be in return air from the working sections south to the 4 East turnout, but would then be in a separate fresh air intake all the way out of the mine. (Tr. 44). Riley opined that, in order for the proposed West Lease alternate escapeway to be compliant, the mine would need to rehabilitate the entries and put in signs, reflectors, a lifeline and some SCSR caches. (Tr. 70, 106, 108).

³ Riley testified that the alternate escapeway route proposed by MSHA is marked with a green line on GX-2. (Tr. 43).

Riley testified that Canyon Fuel offered to make changes to the 4 East Fan Portal termination point in an effort to satisfy the standard, but he did not think the proposed changes were sufficient. (Tr. 59). Mine personnel said they would develop a safe house and provide additional medical supplies and food in line with what was required for a refuge alternative in the mine. (Tr. 59, 129). Riley acknowledged that the area would probably have power since there was a generator outside the portal. (Tr. 129-130). Because some escaping miners may well need immediate medical transportation, the use of a refuge at the 4 East Fan Portal would not meet the requirements of the safety standard. (Tr. 60, 134-135). Although Canyon Fuel officials said they would look into the possibility of retrieving miners from the 4 East Fan Portal using a helicopter, they had not taken those steps prior to the issuance of the Citation No. 8483766. (Tr. 60).

Canyon Fuel looked into the availability of helicopter rescue services from Intermountain Life Flight and communicated its findings to MSHA. Riley learned the helicopter service cannot land the helicopter on the fan pad at the portal and would be required to drop a basket from the helicopter in order to retrieve miners. (Tr. 62, 65-66; GX-5 and 6). These helicopters cannot fly in winds greater than 45 mph, with less than three miles of visibility, nor in “rain, ice, sleet, fog, snow, heavy cloud cover, and could not drop a basket [in winds] over 10 [mph.]” (Tr. 62-65, 67-68, 118; GX-5 and 6). In addition, rescue operations cannot be performed at night. Moreover, this helicopter service is the only civil helicopter operator in the area capable of basket rescues, which presents the possibility that its helicopters could be on another job. Given that the mine operates in the winter months when the helicopter service experienced the most “non-flying weather days,” as well as during the night, Riley felt that helicopter rescues are too unreliable and cannot provide the 24 hour a day, 7 day a week coverage required under the Secretary’s regulations. (Tr. 63-65, 68, 118).

Sydel Yeager,⁴ a Supervisory Coal Mine Inspector for MSHA, traveled to the mine prior to the hearing and marked a map of the proposed West Lease alternate escapeway while walking the route with an inspection party. (Tr. 174-175; GX-16). It took Yeager and her inspection party five to six hours to travel the proposed alternate escapeway while conducting an inspection along the way. (Tr. 199-201, 208). They walked from crosscut 212 to 176, which was not drivable and required them to make their way over three banks of overcasts, then took a vehicle from crosscut 176 to crosscut 4. (Tr. 181, 182, 198-199, 212). She stated that, while a miner could walk all the way out, she would hope that the mine would stage enough vehicles for miners to drive out. (Tr. 200-202, 208). Yeager noted that, with the exception of the first eight blocks outby crosscut 212 in the North Mains, the proposed alternate escapeway was in intake air and the risk of smoke inhalation was unlikely. (Tr. 177, 180). According to Yeager, the proposed alternate escapeway out to the West Lease Portal would not be affected by a fire in the working section or in the belt entry. (Tr. 180). While the proposed route did make a number of turns, the route was easy to identify because it was bolted, meshed, and had been cleaned up fairly well. (Tr. 181). Yeager acknowledged that there were a few areas where the route would need to be widened, including some of the overcast stairs and that some rehabilitation, supplemental

⁴ Yeager has been with MSHA for four years, during which she has been a ventilation specialist, mining engineer, and part of MSHA’s Mine Emergency Operations Division of Technical Support. (Tr. 170-172). Prior to working for MSHA she worked in the mining industry as a ventilation engineer and industrial hygienist. (Tr. 173).

support, extra SCSRs and other changes would be needed. (Tr. 182-186, 203). Yeager also acknowledged that, although there were seals along the route that were outgassing at the time, it was unlikely that the outgassing would render the route unsafe. (Tr. 346-347).

Subsequent to the issuance of the citation, James Preece,⁵ the Assistant District Manager for Coal District 9, traveled to the mine to examine the alternate escapeway and the 4 East Fan Portal. (Tr. 149). Preece confirmed Riley's estimated measurements of the ledge area and described it as being on the side of a canyon. (Tr. 150). He noted that the multiple structures on the ledge took up 50-70% of the available area leaving two open areas, both roughly 25 feet by 25 feet. (Tr. 150-151). He testified that the mine is in a remote, mountainous area, with the portal on the side of a canyon. (Tr. 151-154; GX-10, 11, 13). Like Riley, he believed that, given these factors, the 4 East Fan Portal was not a suitable area from which to transport an injured miner off the mine site. (Tr. 150, 154-155).

Summary of the Evidence Presented by the Canyon Fuel

Gary Leaming,⁶ the mine's safety manager, was involved in developing the 4 East Fan Portal when the fan was installed around 1991. (Tr. 223-224). He accompanied multiple MSHA inspectors during mine inspections of escapeways and airways. (Tr. 238). Both he and Jacob Smith,⁷ the mine's engineering manager, testified that, prior to Riley, MSHA officials had never questioned whether the 4 East Fan Portal was an appropriate place to terminate an escapeway. (Tr. 224-225, 239, 296). The area was first designated as an escapeway in 1992, at which time it was the primary escapeway before later being changed to the alternate escapeway. (Tr. 296-297). Canyon Fuel contends that the 4 East Fan Portal is the best alternate escapeway because it is the most direct, safe, and practical way out of the mine to fresh air. (Tr. 226, 240, 262, 268, 297-298). The term "evacuation" in the standard requires miners to exit the mine. (Tr. 262).

⁵ Preece has been with MSHA for 16 years, and the Assistant District Manager of Coal District 9 since October of 2015. (Tr. 146-147). As the Assistant District Manager he is responsible for managing and overseeing the inspection program. (Tr. 147). Prior to his time with MSHA, he worked for coal companies and contractors in positions ranging from mine foreman and superintendent, to coal engineer. (Tr. 148-149).

⁶ Leaming has worked at Canyon Fuel for 42 years and has been the safety manager since 1995. (Tr. 215-216). As safety manager he is responsible for mine rescue efforts. (Tr. 219-220). He is a certified professional, holds fire boss and foreman papers, and was a member of a mine rescue team in the 1970s and 1980s, during which he responded to multiple events, including underground fires and roof falls at other mines. (Tr. 219-223).

⁷ Jacob Smith has worked at the mine since March of 2013. (Tr. 295). As the mine's engineering manager he is responsible for overseeing the engineering in the mine, which includes the ventilation, belt systems, water systems, roof control and surface facilities. (Tr. 293-294). Prior to this he was the mine's ventilation engineer and was responsible for preparing and submitting the ventilation plan, which included escapeways. (Tr. 294).

Leaming does not consider the area of the 4 East Fan Portal to be a ledge but described it as a flattened pad containing multiple structures. (Tr. 232). There was no surface road that led to the portal, so an ambulance could not drive there. (Tr. 264, 281-282). The fan house outside the portal included the fan and motor, first aid and communication equipment, and an internal area that was warm year round as long as the fan was running. (Tr. 227, 315). A backup diesel generator was in another building on the pad and the generator would operate in the event the power went out. (Tr. 229). Leaming testified that, in the event of an evacuation, there was enough room in the generator building and fan building for 20 miners. (Tr. 230). Smith also testified that 20 miners could fit in the fan house. (Tr. 316). A storage shed in the area housed fan blades and other parts. (Tr. 230). Leaming believed that there was enough room for a helicopter to lower a basket onto the pad. (Tr. 230-231).

Leaming, Smith, and John Byars,⁸ the operations manager at the mine, described the 4 East Fan Portal in relation to the canyon. The slope to a dry creek bed at the bottom of the canyon from the 4 East Fan Portal was gradual and miners could easily angle themselves down. (Tr. 232). Leaming and Smith acknowledged that they had never walked out along the creek bed, nor had the mine tested the route and there was no way to get an ambulance down into the creek bed area. (Tr. 234, 274-275, 317). Smith testified that he was familiar with the area and there was a game trail that paralleled the creek at the bottom of the canyon and could be used to walk out to a road. (Tr. 303, 317-318). Byars, who grew up in the area and ran cattle in the canyons when he was younger, has walked the four to five miles from the 4 East Fan Portal to the bottom of the canyon and out to the gravel road. (Tr. 335). It took him approximately two hours to travel from the portal to the gravel road without any snow on the ground. (Tr. 340). Byars described the cattle trail as unpaved, approximately two feet wide and free of trees. (Tr. 335, 341). He stated that the area could have eight inches to a foot of snowpack in the winter, but it never stopped him from taking a horse or walking the area on foot. (Tr. 338). A Forest Service road was located at the top of the canyon on the plateau above the 4 East Fan Portal. (Tr. 234, 299-300; GX-11; CFX-17) (Forest Service road marked in red). The plateau has a large, open, flat area. (Tr. 299-300). Miners who exited the mine at the 4 East Fan Portal would have to travel 400 to 500 yards up a drainage area to get to the top and then walk a short way to the Forest Service road where Leaming and Byars believed a helicopter could land. (Tr. 235-237, 200, 339, 343; CFX-17). However, Leaming acknowledged that the Forest Service road was not plowed during the winter months. (Tr. 276-277). While it would be difficult for miners to carry someone on a stretcher to the top, he believed it could be done. (Tr. 237). Neither Leaming nor Smith had tried to walk from the 4 East Fan Portal to the top of the canyon and they did not believe that this route had ever been tested. (Tr. 235-236, 276, 317).

Leaming described the mine's access to medical services. The closest hospital to the mine is approximately 50 miles away. (Tr. 256). While the mine has its own EMTs and ambulance service, it only provides basic services. (Tr. 256, 274). The mine has an agreement

⁸ John Byars has worked at the mine for eleven years. (Tr. 329). As operations manager he is responsible for safety, maintenance, and production at the mine. (Tr. 330). Prior to his current position, Byars was the engineering manager for ten years. (Tr. 330). Byars has also worked as a ventilation engineer and is certified as a professional mining and mechanical engineer, fire boss, and mine foreman. (Tr. 331-334).

with an EMS service to provide ambulance transportation from the mine. (Tr. 256-258; CFX-10). Leaming acknowledged that there are restrictions on when a helicopter can be used and recognized that a letter from the helicopter service stated that the service was bound by “a set of very conservative weather criteria.” (Tr. 258, 265-266; GX-5). Leaming agreed that the mine operated at night as well as during the winter months, when the helicopter service is restricted, and that miners could be stuck at the portal until daylight or the weather improved. (Tr. 266-267, 280-281). He acknowledged that Intermountain Life Flight was the only provider identified by the mine as being capable of conducting hoist removal operations from the surface at the 4 East Fan Portal. (Tr. 264-265). The mine did not make initial contact with Intermountain Life Flight until after Citation No. 8483766 was issued and has never conducted a test using the helicopter service during an escapeway drill. (Tr. 267-268).

Leaming explained that, at MSHA’s request after Riley’s 2014 visit, Canyon Fuel considered other alternate escapeways. Mine personnel sent MSHA a letter examining four alternate escapeway possibilities: (1) the cited route out the 4 East Fan Portal, (2) the proposed route out the West Lease Fan Portal, (3) a route out the Link Canyon Portal, and (4) a route out the 3 East Breakout Portal. (Tr. 240-241; CFX-2). Mine personnel determined that the distance from the deepest point of penetration in the working sections to the 4 East Fan Portal was 2.34 miles, which was the shortest distance of the four possibilities. The distance from that same point using the route suggested by MSHA to the West Lease Fan Portal was 5.88 miles, which was the second longest route. (Tr. 242-243). Further, mine personnel determined that the 4 East Fan Portal route was the least difficult route to travel because it was the shortest, had the fewest overcasts, and fewer SCSR change-out stations would be required. The West Lease Fan Portal route was the most difficult route to travel because it had the most overcasts and some of the route was particularly difficult to travel compared to the other options. (Tr. 242-245). It would also require the second most SCSR change-out stations. Leaming explained that overcasts are obstacles which cannot be driven over and make travel more difficult, especially when carrying a miner on a stretcher. (Tr. 247-248, 251).

Leaming acknowledged that MSHA’s proposed West Lease alternate escapeway route largely parallels the current primary escapeway route and is similar in length. (Tr. 269). He agreed that the proposed route could be partially driven, but stated that miners cannot count on vehicles being there when they need them. (Tr. 249). The first people who come to the vehicles are going to take them. (Tr. 249-250). There would be sufficient vehicles in the primary escapeway because the miners would have used these same vehicles to get into the mine. (Tr. 269-270). It took Leaming just under three hours to walk the proposed alternate escapeway out from where the 4 East entries intersect the North Mains. (Tr. 252-253, 280). He opined that an injured miner, a miner wearing a SCSR, or a miner carrying another miner on a stretcher would take much longer, and there is a chance that they might not have transportation to take them out. (Tr. 253-255, 280).

Smith testified that the seals along the proposed West Lease alternate escapeway could create issues. (GX-16). The seals along the proposed alternate escapeway are used to seal out mined areas. (Tr. 313). According to Smith, there are times when the seals outgas and harmful gases travel through the seals from the mined out areas and into MSHA’s proposed route. (Tr. 314-315). Byars testified that there are approximately 90 to 100 seals along the route. (Tr. 339).

Brief Summary of the Parties' Arguments

The key facts are not disputed. The Secretary argues that, because there was “no reasonable and reliable means to evacuate miners, including disabled miners,” from the ledge outside 4 East Fan Portal, the mine opening was not suitable for the safe evacuation of miners, and the operator violated section 75.380(d)(5) of the Secretary’s regulations. Sec’y Br. 7. Canyon Fuel contends that the 4 East Fan Portal meets the requirements of the safety standard because miners, including injured miners, can easily and quickly escape from the dangerous conditions within the mine using that route.

In making his arguments, the Secretary stresses the fact that the 4 East Fan Portal is in a remote, mountainous area with no road access. The use of a helicopter to evacuate miners is unreliable and this evacuation method would not be available at night or in inclement weather. The Secretary avers that the operator, in selecting the 4 East Fan Portal as the termination point of its alternate escapeway, focused almost entirely on the safety standard’s “direct” element and not the element in the standard that requires that the route lead to a mine opening “suitable for the safe evacuation of miners.” Requiring miners to stay in a structure at the portal for an unknown length of time cannot be considered safe evacuation nor can asking miners to hike up a steep canyon to a forest road or to hike four miles down the canyon to another gravel road. Rather, the Secretary argues that an alternate escapeway running “largely parallel to the Mine’s current primary escapeway” was the only acceptable route. Sec’y Br. 15. Even though the route is “not the most direct way out of the mine, it is safe and practical[.]” *Id.*

The Secretary further argues that the plain meaning of the standard requires that escapeways lead to a mine opening suitable for the safe evacuation of miners. “Evacuate” is defined as to “[r]emove (someone) from a place of danger to a safer place.” Sec’y Br. 19 (citation to dictionary definition omitted). As a result, the plain language of the standard demands that the escapeway route “lead to a mine opening that is suitable for removing miners from places of danger.” Sec’y Br. 19-20. The 4 East Fan Portal is not such a place. The standard does “not allow use of the shortest escapeway route in all cases, but instead requires first determining if a route leads to a mine opening suitable for the safe evacuation of miners and then weighing the remaining factors.” Sec’y Br. 19.

In the event the judge determines that section 75.380(d)(5) is ambiguous, the Secretary argues that he should defer to the Secretary’s interpretation that an alternate escapeway that ends at a location where miners cannot be reliably rescued does not constitute safe evacuation. Sec’y Br. 20. This interpretation gives effect to the clause “suitable for the safe evacuation of miners” and advances the Act’s goal of protecting the safety of miners. Further, while this condition may have existed for some time, the fact that MSHA had not previously cited it does not preclude the agency from finding a violation in this instance.

Canyon Fuel argues that the plain language of the cited standard supports vacating the citation. It asserts that, while the Secretary understands the phrase “for the safe evacuation of miners” to mean evacuation from the mine site once the miners are outside, Canyon Fuel contends that the phrase refers to the “evacuation out of the mine.” CF Br. 7. “Evacuation” means “the removal of persons or things from an endangered area.” CF Br. 8 (citation to

dictionary definition omitted). Here, the endangered area is the underground area of the mine. Arrival at the portal eliminates the potential for injury from events in the mine. Because the Secretary's proposed alternate escapeway out the West Lease Portal is longer and more difficult to travel than the cited route to the 4 East Fan Portal, he has not met his burden under Commission case law to establish a violation of the standard.

Canyon Fuel argues that, even if the plain language is not conclusive, the standard, when viewed in the context of the regulatory history, as well as MSHA's own PPM, clearly is focused on evacuation from the mine, not the mine site. Further, given that MSHA had accepted the mine's escapeway to the 4 East Fan Portal since 1992, it is clear that the agency's interpretation was in line with that of Canyon Fuel until Riley became District Manager. Canyon Fuel argues that the enforcement history of the safety standard demonstrates that MSHA agreed with Canyon Fuel's interpretation of the standard until Riley became District Manager.

Finally, Canyon Fuel argues that no deference should be afforded to the Secretary since the plain language of the standard controls and the enforcement history of the standard is inconsistent, conflicts with his prior position and, as a result, does not reflect the agency's fair and considered judgement on the matter. CF Br. at 18.

Analysis

I find that the Secretary has established a violation of the cited safety standard. The Commission and courts have stated that where the language of a standard 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 a meaning would lead to absurd results." *Northern Illinois Service Co.*, 37 FMSHRC 1514, 1520 (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) and *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989)). If however, a standard is silent or ambiguous with respect to the specific point at issue, the Commission defers to the Secretary's interpretation as long as it is reasonable. *Small Mine Development*, 37 FMSHRC 1892, 1894 (Sept. 2015) (citing *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001) and *Auer v. Robins*, 519 U.S. 452 (1997)).

I find that the standard is ambiguous. In reaching this conclusion I find that the standard, and in particular the phrase "suitable for the safe evacuation miners," can be reasonably interpreted several ways. I accept the Secretary's definition of the term "evacuate," i.e., to remove someone from a place of danger to a safer place, which is also consistent with the definition used by the operator. With that definition in mind, I find that there are two reasonable readings of the plain language of the standard.

The standard can be read to require that escapeways follow the safest, direct and practical route to the surface. The standard can also be read to require that escapeways follow the safest, direct and practical route to a surface portal where miners can be easily rescued, i.e., removed from the mine site. The 4 East Fan Portal meets the first interpretation of the standard while the route proposed by the Secretary to the West Lease Portal fits the second interpretation.

Until 1996, this safety standard required each escapeway be “[l]ocated to follow the most direct, safe and practical route to the surface[.]” The “suitable for the safe evacuation of miners” language was added that year. Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764, 9812-9813 (Mar. 11, 1996). The preamble to the final rule is instructive but it does not resolve the issue. The preamble states as follows:

A question arose during an informational meeting as to whether MSHA intended that the existing rule eliminate the requirement that escapeways be routed to the “nearest mine opening.” It was not MSHA's intent to change this requirement from the previous standard. The existing requirement that the escapeway follow the most direct route to the surface would, in fact, require the route to go to the nearest mine opening. However, to eliminate any confusion that may exist, the final rule revises paragraph (d)(5) . . . [to require] that the escapeway must follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners.

Id. at 9812. The preamble further provides:

MSHA acknowledges that the nearest mine opening may not always be the safest route to the surface. A number of factors affect whether or not the safest, most direct, practical route has been selected. These factors include roof conditions, travel height, fan location, physical dimensions of the mine opening, and similar considerations. For example, if bad roof conditions are present along the shortest direct route and those roof conditions are beyond reasonable control, then an alternate “safe” route designated by the mine operator may be appropriate. However, the presence of roof falls does not necessarily indicate that the passageway would not be suitable for evacuation if it is reasonable to rehabilitate the area. By way of another example, where coal seam thickness varies to the extreme, the shortest route may be through lower coal, making travel relatively slow and difficult. An alternate route through a high passageway may permit easier travel. Such an alternate route, although longer, may be more practical and therefore may be more appropriate. Similarly, there can be other instances where the “nearest mine opening” may not be suitable for safe evacuation of miners. For example, an old mine shaft may not be safe for travel because of badly deteriorated conditions, such as a deteriorated shaft lining or deteriorated timbers, even though the shaft is still suitable for mine ventilation purposes.

Id. at 9812-13. Each of the examples provided concern conditions within the mine and the preamble suggests that MSHA was interpreting the safety standard to require miners to follow the “safest route to the surface.” *Id.* Nothing in the preamble suggests that MSHA was

concerned about conditions that might exist once miners reach the surface. Based on this discussion in the preamble, one could interpret the safety standard to require that each escapeway be located to follow the most direct, safe and practical route suitable for the safe evacuation of miners to the nearest mine opening. Under this reading, the phrase “suitable for the safe evacuation of miners” modifies the phrase “most direct, safe, and practical route” rather than the phrase “to the nearest mine opening.”

I conclude that deference is owed the Secretary’s position that the safety standard should be interpreted to take into consideration surface conditions as well as underground conditions. I believe that the drafters of the safety standard quite naturally assumed that once miners reach the surface, they would be safe. When MSHA promulgated and revised the safety standard, it is unlikely that the drafters of the standard thought that a situation would arise in which miners escaping from a mine might be required, after arriving at the mine opening, to hike four to five miles along a wildlife/cattle trail over rough terrain or hike up to the top of a canyon. Likewise, it is unlikely MSHA contemplated that injured miners would require rescue via baskets suspended from a helicopter. As a consequence, conditions at the surface were not specifically addressed in the standard or in the preamble. In addition, each standard in Part 75 should be interpreted in a manner that is in harmony with other related safety standards to protect the safety and health of miners. As discussed below, section 75.1713-1(b) requires, in part, that mine operators “provide for 24-hour emergency transportation for any person injured at the mine.” 30 C.F.R. § 75.1713-1(b).

When a safety standard is ambiguous, the Commission gives deference to the Secretary’s interpretation of the standard as long as it is not plainly erroneous or inconsistent with the language or the purpose of the standard. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (2002). The Secretary’s interpretation of a safety standard is reasonable where it is “logically consistent with the language of the regulation and ... serves a permissible regulatory function.” *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 192 (1998) (citations omitted). I find that the Secretary’s interpretation is logically consistent with the language of section 75.380(d)(5). Canyon Fuel argues that the language of the standard and the regulatory history make clear that the purpose of the standard is “to get miners out of the mine, not to address what happens afterward.” CF Br. 10. I agree that the focus of the standard is to get miners out of the mine, but typically that is all that is necessary to get them to a safe place. That is not the case here. The evidence demonstrates that miners who evacuate through the 4 East Fan Portal would not necessarily be safe once they reach the surface. The Secretary’s interpretation reasonably applies the phrase “for the safe evacuation of miners” to the entire standard. “[A] fundamental rule of construction is that effect must be given to every part of a statute or regulation, so that no part will be meaningless.” *Daanen & Janssen, Inc.*, 20 FMSHRC at 194 (citations omitted).

Canyon Fuel argues that deference should not be granted to the Secretary’s interpretation of the safety standard because his interpretation has not been consistent and the fact that his present interpretation conflicts with his prior position, “evidences that the Secretary’s current position “does not reflect the agency’s fair and considered judgment on the matter in question”” CF Br. 18 (quoting *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012)).

Although the Secretary's interpretation of the Mine Act or a standard adopted during litigation "is not a formalized statement of statutory interpretation of the sort that usual[ly] invokes *Chevron* deference," it may still be entitled to deference under the Mine Act. *Twentymile Coal*, 411 F.3d 256, 261 (D.C. Cir. 2005) ("But because 'in the statutory scheme of the Mine Act, the Secretary's litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a ... health and safety standard, [it] is therefore deserving of deference.'" *Id.* (quoting *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003) (citations omitted))).

In any event, I find that the evidence does not establish that the Secretary's interpretation of the safety standard has changed. Rather, the record shows that MSHA had not seriously considered the ramifications of the use of the 4 East Fan Portal as an escapeway termination point prior to District Manager Riley's visit to the mine. It appears that no MSHA official had previously focused on the issue of how miners would be evacuated from the 4 East Fan Portal during an emergency once they leave the mine. Indeed, mine personnel told Riley that they did not know how miners would be evacuated from that portal and had never been asked that question. (Tr. 24-25). The Secretary's failure to enforce the safety standard at the Sufco Mine until District Manager Riley's visit is more accurately attributed to a lack of attention by MSHA than to a change in the interpretation of the standard. The parties agree that this case is one of first impression before the Commission.

The next issue is whether the Secretary established a violation of section 75.380(d)(5). In *Southern Ohio Coal Co.*, the Commission interpreted a safety standard containing similar language, as follows:

[I]t is the Secretary's burden to prove that, as compared to the [operator's] designated route, there is at least one other escapeway route that she has determined more closely complies with the standard's requirement of "the safest direct practical route." Thus, in order for the Secretary to establish a prima facie case of violation, she must show that the operator's designated escapeway is deficient because it is not "the safest direct practical route." It is insufficient for the Secretary to merely cite the designated route as being out of compliance with the regulation. She must present a specific escapeway alternative that she believes is more appropriate.

14 FMSHRC 1781, 1785 (Nov. 1992). I find that the Secretary established that Canyon Fuel's route was deficient. The escapeway to the 4 East Fan Portal did not account for the fact that miners would be stranded there once they exited the mine. This fact would create a hazard to escaping miners particularly in cold or snowy weather and more especially if any miners are seriously injured. The Secretary presented a specific escapeway alternative he believes provides for a safer, direct, practical route for escaping miners. The Secretary took into consideration a number of factors, including those discussed above. MSHA's proposed escapeway is drivable for most of its length and is mostly in a separate intake air course. This air course would not be affected by a fire in the working section or the belt. Although the alternate escapeway favored

by the Secretary is longer than Canyon Fuel's, it is similar in length to the primary escapeway. Yeager traveled the Secretary's proposed route and testified that the overcasts are not difficult to negotiate, noting that there were well-built stairs. (Tr. 182). The Secretary acknowledges that if SCSRs are needed, miners will need to change them out more frequently using the West Lease Portal escape route. Finally, any escaping miners who must remain at the 4 East Fan Portal for a period of time before they can be rescued, could be overcome by smoke and toxic fumes. The Secretary maintains that in considering all the factors set forth in the safety standard, his designated alternate escapeway is the safest direct practical route.

I affirm the citation as written. I have considered the evidence presented in this case and I conclude that an injury was unlikely, the violation was not S&S, and Canyon Fuel's negligence was moderate.⁹ I find that the Secretary's proposed penalty of \$425.00 takes into consideration the penalty criteria set forth in section 110(i) of the Act.

B. Citation No. 8480766

Citation No. 8480766 alleges a violation of section 75.1713-1(b) of the Secretary's safety standards and asserts that the mine failed to make arrangements for 24-hour ambulance service at the surface termination point of the mine's alternate escapeway. Specifically, the Secretary asserts that because helicopter service is not reliable, Canyon Fuel failed to make arrangements for 24-hour emergency transportation of injured miners. Section 75.1713-1(b) requires that the operator "make arrangements with an ambulance service, or otherwise provide, for 24-hour emergency transportation for any person injured at the mine." 30 C.F.R. § 75.1713-1(b).

The citation was issued on May 26, 2015, a little more than two months after Citation No. 8483766 was issued. MSHA determined that the alleged violation was reasonably likely to result in a permanently disabling injury, was S&S,¹⁰ affected 20 persons, and was the result of Canyon Fuel's moderate negligence. The Secretary proposed a penalty of \$3,143.00 for this alleged violation.

⁹ This citation is similar to a technical citation MSHA issues when a mine operator wishes to contest a provision that MSHA seeks to include in a roof control or ventilation plan in that the parties did not focus on the gravity and negligence criteria at all. As a consequence, I accept the Secretary's proposals on the gravity and negligence criteria and the penalty.

¹⁰ An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

Summary of the Evidence

Riley testified that, based on the information he learned about the helicopter service's limited capabilities, discussed above, he determined that Citation No. 8480766 should be issued to the mine for its failure to arrange for 24 hour emergency medical transportation. (Tr. 72-73, 74). Although the mine had an agreement for 24 hour ambulance service by land, it was not sufficient since that service could only be provided at the West Lease Portal, which was accessible by road, and not at the 4 East Fan Portal, which was not accessible by road. (Tr. 73-74). The cited standard requires that that 24 hour emergency transportation arrangement be made for any person injured at the mine. (Tr. 75).

Brief Summary of the Parties' Arguments

The Secretary argues that, given the lack of road access to the 4 East Fan Portal, as well as the inability of the helicopter service to provide 24-hour service, the operator violated section 75.1713-1(b). The 4 East Fan Portal was an established exit point from the mine in the event of an emergency. The Secretary avers that "[t]he only logical interpretation that satisfies the purpose of the regulation is that 24-hour emergency transportation must be provided to wherever miners are instructed they should leave the mine." Sec'y Br. 26.

Canyon Fuel argues that it has made emergency transportation arrangements from the mine. Specifically the operator argues that it has its own ambulance which it can use to provide initial transport from the mine before handing off a patient to an EMS service. The standard does not require that emergency transportation be required at every portal. The Secretary's interpretation that separate arrangements need to be made for each portal that miners might use in an emergency has never been put forth and assumes an event that has never occurred, i.e., one that requires the use of the 4 East Fan Portal escapeway by injured persons. No notice of this new interpretation was provided. MSHA had never discussed the cited standard until Riley raised issues concerning the termination point of the 4 East Fan Portal escapeway.

Analysis

The cited standard requires that underground coal operators make arrangements with an ambulance service or otherwise provide for 24-hour emergency transportation for any person injured at the mine. Neither the Commission nor its judges have addressed this standard. However, the plain language of the standard makes clear that the operator is responsible for arranging or providing for round the clock emergency transportation of injured miners. Therefore, a violation will be found when a mine operator fails to arrange or provide for any type of emergency transportation. Likewise, a violation is established if, as in this case, an operator has arranged for emergency transportation, but that transportation is not available 24 hours a day at the alternate escapeway.

I find that Canyon Fuel did not make arrangements with an ambulance service, or otherwise provide, for 24-hour emergency transportation for *any person* injured at the mine. It only provided for such service for injured miners who are able to use the primary escapeway to exit the mine. The area outside the termination point of the alternate escapeway was inaccessible

by land ambulance. In addition, as discussed in detail above, the helicopter service the operator investigated could not provide 24-hour service at this termination point. Consequently, I find that Canyon Fuel did not make arrangements with an ambulance service or otherwise provide, for 24-hour emergency transportation, from the 4 East Fan Portal.

There is no dispute Canyon Fuel met the requirements of section 75.1713-1(b) at the West Lease Portal. Canyon Fuel argues that, as a consequence, it fully complied with the safety standard. It points to the fact that the plain language of the standard does not require ambulance services to be available at the portal of each escapeway. This interpretation is illogical and ignores the language that transportation must be arranged for “any injured person at the mine.”¹¹ In order to provide transportation to “any injured person at the mine,” reliable emergency transportation must be available at both designated escapeways. The primary escapeway is unavailable during the emergency. Based on the above findings, Canyon Fuel did not comply with the standard and a violation has been proven. My findings are limited to the facts of this case and the provision of transportation from the 4 East Fan Portal when it is the termination point of a designated escapeway.

Gravity and S&S

The issuing inspector designated the violation as reasonably like to result in a permanently disabling injury. (Tr. 75). Riley agreed with that assessment and stated that, in general, when an ambulance or helicopter is summoned, someone is in serious need who requires medical attention immediately. (Tr. 75). He explained that the types of injuries that could require an ambulance or helicopter would include smoke inhalation, burns, shock, and CO poisoning, which can lead to heart attacks. (Tr. 76).

The Secretary argues that the violation was S&S. Specifically the Secretary argues that, as a result of the violation, a discrete safety hazard was created because injured miners at the 4 East Fan Portal would be delayed in attempting to obtain “prompt, critical medical treatment.” Sec’y Br. 27. Assuming the presence of a mine emergency in which miners use the alternate escapeway, it is reasonably likely that the delay in obtaining necessary care would result in a permanently disabling injury.

Canyon Fuel argues that the violation was not S&S. It asserts that there has never been an event at the mine requiring evacuation out the 4 East Fan Portal. Further, in the Secretary’s scenario miners would not be exposed to burns because the fire would have to be in the alternate escapeway thousands of feet away from the working sections where miners would be. In addition, miners would likely be able to evacuate out the primary escapeway ahead of any smoke

¹¹ While Canyon Fuel argues that it was not provided with notice of the Secretary’s interpretation of the standard to require arrangements be made for transportation from the 4 East Fan Portal, I disagree. “[I]f the language of a regulation provides clear and unambiguous notice of its coverage and requirements, no further notice is necessary.” *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3088 (Dec. 2014) (citing *Bluestone Coal. Co.*, 19 FMSHRC 1025, 1029 (June 1997) and *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 (Sept. 2000)). I find that the language of the standard is clear and that no further notice was required.

from a fire in the alternate escapeway. Miners who do exit the 4 East Fan Portal would no longer be exposed to underground mine hazards and would have the option of walking up to the plateau or out the bottom of the canyon and, subject to certain weather conditions, would be able to be transported via helicopter during daylight hours. CF Br. 40.

I find that the violation was S&S. When evaluating the S&S nature of a violation involving escapeways, judges must assume the occurrence of an emergency necessitating an evacuation of the mine. *Cumberland Coal Resources*, 33 FMSHRC 2357, 2367 (Oct. 2011). I hold that the logic behind that decision also necessitates that, when evaluating the S&S nature of the current violation, I must assume an emergency that requires miners to exit the alternate escapeway. I find that a discrete safety hazard certainly existed. The purpose of the standard is to promptly provide injured miners with emergency medical transportation. As a result, the safety hazard that exists when 24-hour emergency medical transportation is not provided is the inability of miners to obtain needed treatment. Here, the delay in obtaining care once a miner exited the mine via the alternate escapeway through the 4 East Fan Portal was reasonably likely to result in a serious injury. I reject the operator's argument that miners would not be exposed to possible burns. Contrary to the statement in Canyon Fuel's brief, a fire, explosion, or other underground emergency requiring the use of the 4 East Fan Portal route need not occur in the alternate escapeway to trigger the use of that escapeway. The emergency event could occur on the working section, or in the primary escapeway. I also reject the operator's argument that miners who exited the 4 East Fan Portal could walk up or down the canyon to reach emergency medical transportation. If miners are in need of emergency medical transportation, the additional time and effort required to travel up or down the canyon could reasonably be expected to exacerbate their injuries. Accordingly, I find that the violation was S&S.

Negligence

Riley testified that the violation was the result of the operator's moderate negligence because the mine had not made arrangements for medical evacuations at the termination point of the alternate escapeway. (Tr. 77). It had contacted a helicopter service and learned that it could not provide medical evacuation services unless the atmospheric conditions were good.

The Secretary notes that because MSHA previously discussed this issue with Canyon Fuel months earlier, it was on notice that it was not in compliance with the cited standard. Because the operator knew or should have known that it was failing to provide 24-hour emergency transportation for injured miners exiting the mine at the 4 East Fan Portal, Respondent was at least moderately negligent.

I reduce the negligence designation from that proposed by the Secretary to low. The operator had arranged for reliable emergency transportation from the portal at its primary escapeway and it investigated the use of a helicopter to provide transportation from the 4 East Fan Portal. It was impossible for Canyon Fuel to arrange for reliable medical transportation from that portal, however, and it did not believe it was required to do so. The operator's notice argument, although unconvincing, indicates that the operator believed it was in compliance with the standard. I find that a penalty of \$2,000 is appropriate taking into consideration the penalty criteria set forth in section 110(i) of the Act.

C. Citation No. 8483666

Citation No. 8483666 alleges a violation of section 75.380(c) of the Secretary's safety standards and states that the operator failed to maintain a separate and distinct alternate escapeway. Specifically, the citation asserts that the alternate escapeway from the 4 East Fan Portal to crosscut 6 of the 4 East entries, which is ventilated with intake air, was not being maintained separate and distinct up to the junction of the 4 East intake and the North Mains intake from crosscut 220.¹² A fire in the alternate escapeway of the 4 East intake from crosscut 6 to the 4 East Fan Portal would contaminate both the alternate and primary escapeway with smoke and other contaminants for all miners working inby that location. Section 75.380(c) requires that "[t]he two separate and distinct escapeways required by this section shall not end at a common shaft, slope, or drift opening, except that multiple compartment shafts or slopes separated by walls constructed of noncombustible material may be used as separate and distinct passageways." 30 C.F.R. § 75.380(c).

MSHA Inspector James J. Pruitt issued the citation on May 22, 2015, and determined that an injury resulting in lost workdays or restricted duty was reasonably likely to be sustained, that the alleged violation was S&S, affected 20 persons, and was a result of Canyon Fuel's moderate negligence. The Secretary proposed a penalty of \$2,106.00 for this alleged violation.

Summary of the Evidence

District Manager Riley testified that, while reviewing a map of the mine, he observed that the designated primary and secondary escapeways were not separate and distinct. (Tr. 79). Riley explained that, in order for the escapeways to be separate and distinct, both the travelways and air courses must be separate and distinct and cannot "intermix." (Tr. 81, 83). Here, the intake air that came in the 4 East entries and traveled along part of the alternate escapeway eventually merged with the intake air in the primary escapeway in the North Mains. (Tr. 122). At hearing, Riley, referring to GX-2 p. 2, testified that, based on the mine's designated primary and alternate escapeways,¹³ if miners were inby crosscut 220 and traveling out the primary escapeway through the North Mains, they would encounter smoke or other contamination from a fire anywhere in the alternate escapeway outby crosscut 6 of the 4 East entries. (Tr. 81-82).¹⁴ Riley testified that the mine had diesel pickup trucks that it used underground and a vehicle fire in the alternate escapeway outby crosscut 6 of the 4 East entries would "immediately pollute or contaminate both escapeways . . . [w]ithin minutes[.]" (Tr. 82).

¹² This is the same alternate escapeway that the Secretary determined did not meet the requirements of section 75.380(d)(5) as set forth Citation No. 8483766, discussed above.

¹³ In GX-2 p. 2 the primary escapeway is indicated by a solid blue printed line, while the alternate escapeway is indicated by a dashed red line. At hearing, Riley drew a solid blue line with a marker which indicated the intake air course from the 4 East Fan Portal. (Tr. 82).

¹⁴ Riley explained that miners using the alternate escapeway would not enter intake air from the 4 East fans until they went through the doors at the 4 East "dogleg," which he indicated by circling with a red marker on GX-9 p. 1. (Tr. 123-124).

Riley explained that there are situations where the primary and alternate escapeways in mines can share air from the same intake air source, but in those situations the shaft or slope that provides the air has to be separated by a non-combustible divider. (Tr. 84). Here, the routes were not physically separated by walls constructed of non-combustible materials and a miner could travel from one escapeway to the other without passing through any doors or running into anything that would stop their travel. (Tr. 83-84). Specifically, he noted that a miner inby crosscut 220 and traveling in the primary escapeway in the North Mains could walk right into the alternate escapeway without traveling through a mandoor. (Tr. 83, 124).

On cross-examination Riley was presented with a hypothetical and agreed that, when developing a three entry longwall section, you generally have an intake entry that is usually the primary escapeway, a return entry that is sometimes the alternate escapeway, and a belt entry. (Tr. 125-126). He further agreed that, except for the air that goes up the belt, all of the air that comes through the intake will go into the return. (Tr. 126). Finally, he agreed that, in that scenario, if there were a fire in the intake escapeway, once the air travels through the face area it would contaminate both the primary and alternate escapeways. (Tr. 126-127). However, he explained that, unlike the hypothetical situation presented to him, escapeways are designed for each working section and are defined by the section loading point. (Tr. 139). It is at that loading point that the separate and distinct requirement starts and then continues for the entire length of the escapeways out of the mine. (Tr. 139). Here it was unacceptable because the loading point was inby where air from the 4 East intake alternate escapeway mixed with the air from the North Mains intake primary escapeway. (Tr. 139-140). On cross-examination Riley agreed that a fire in the North Mains primary intake escapeway would contaminate that escapeway inby the fire and then the air would travel through the sections and out the return, which would contaminate the alternate escapeway. (Tr. 127-128).

Based on his review of the of the mine map, and after consulting with his office's ventilation supervisor, Riley instructed Inspector Pruitt to issue Citation No. 8483666. (Tr. 79, 85). Riley acknowledged that the condition had probably existed for several years and, as a result, he allowed the mine to continue to use the escapeway as long as a certified examiner traveled the area every two hours until the mine could change the route to comply with the standard. (Tr. 86-87).

Yeager, who has worked as a ventilation engineer, also did not believe that the primary and alternate escapeways were separate and distinct. (Tr. 190). She based her opinion on a 1992 MSHA publication that states that "physical separation is required[,] which means the air courses cannot intermix. (Tr. 190-192; GX-17). Her review of the mine maps revealed that the air was able to intermix because due to the lack of physical separation. (Tr. 192). Specifically, the ventilation from the alternate escapeway coming from the 4 East went directly into the primary escapeway. (Tr. 193). Accordingly, the escapeways were not physically separate and distinct as explained in the MSHA publication. (Tr. 193; GX-17). She believed that the exception for ventilation from a common intake air shaft was not applicable here. (Tr. 194).

Leaming and Smith testified for Canyon Fuel about the mine's escapeways. Referring to a mine map, CFX-1B, Leaming explained that the alternate escapeway route had followed the green line since 2008. (Tr. 260-261). Both Leaming and Smith agreed that MSHA inspectors

never questioned whether the 4 East alternate escapeway and the primary escapeway were separate and distinct. (Tr. 239-240, 261, 304).

Smith, explained that the mine map, CFX-1B, showed where the alternate escapeway was located both prior to and after the citation was issued, as well as the primary escapeway, and the air courses in the subject area. (Tr. 305). He described the dogleg in the alternate escapeway and the two doors that isolated the intake air coming down the 4 East from the rest of the alternate escapeway in North Mains return. (Tr. 305-307). Both equipment and men can travel through the doors in the dogleg from the North Mains into the 4 East. (Tr. 306). Intake air coming down the 4 East empties out into the North Mains and heads north after passing the dogleg and under a series of overcasts. (Tr. 307-308). The intake air from the 4 East that comes into the North Mains, 144,000 cubic feet, is separated from the intake air in the primary escapeway, approximately 360,000 cubic feet, by a beltline until the two air courses join at crosscut 220 in the primary escapeway in the North Mains. (Tr. 308, 311, 322). Smith acknowledged that no stoppings or doors would prevent the intake air in the alternate escapeway from going into the intake air in the primary escapeway and that, in the event of a fire outby the dogleg in the alternate escapeway, smoke from the alternate escapeway would go into the primary escapeway. (Tr. 322-323). Smith explained that the alternate escapeway and primary escapeway are separated from each other for the entire length that they parallel each other in the North Mains. (Tr. 308). However, he agreed that a miner could walk from the alternate escapeway into the primary escapeway at crosscut 220 of the North Mains without anything stopping him. (Tr. 323). He believed that the two escapeways were separate and distinct because they were fed from two separate air sources and were not parallel entries within an air courses. (Tr. 308-309). He explained that the intake air from the primary escapeway went into the working sections and the return air in the alternate escapeway, up until the dogleg, came from the working sections. (Tr. 309).

Smith further testified that, during longwall development you have three entries, with the first being the beltline, the second being the primary travelway with intake air, and the third being the return air and alternate escapeway. (Tr. 309-310). He explained that, in that scenario, you can walk from the intake escapeway to the alternate without passing through a stopping by going to the face or last open crosscut which does not have a stopping. (Tr. 310).

Brief Summary of the Parties' Arguments

The Secretary argues that the travelways and air courses involved in the primary and alternate escapeways were not separate and distinct, as required by the cited standard. The Secretary asserts that a fire in the 4 East entries would have caused smoke to pollute the alternate escapeway in the 4 East entries and this smoke would travel into the North Mains where it would contaminate the primary escapeway. In the event of a fire, miners leaving the working section would encounter smoke in the primary escapeway and, if they switched over to the alternate escapeway, would also encounter smoke there. Further, the Secretary asserts that physical separation of the escapeways is required and, in this instance, a miner could walk from one escapeway into the other without passing through a stopping or other barrier.

Canyon Fuel argues, first, that the Secretary did not establish a violation of the safety standard cited. Contrary to the Secretary's argument, section 75.380(c) does not actually require two separate and distinct escapeways, but rather only requires that the escapeways not end at a common shaft, slope or drift opening unless certain conditions are met. Here, the two escapeways do not end a common shaft, slope, or drift opening, so there can be no violation.

Canyon Fuel next argues that the two escapeways are in fact separate and distinct travelable passageways. The two escapeways are "physically/geographically separate and in the area where they are parallel, they are separated by ventilation controls." CF Br. 23. The Secretary's interpretation that the air in the passageways has to be "separate and distinct is not supported by the language of the standard or the common sense of mine ventilation." *Id.* The ordinary meanings of the terms "separate" and "distinct" do not suggest that separation of the escapeways by ventilation controls is necessary. Here, the two escapeways are in separate and different entries.

Analysis

I find that the Secretary has failed to prove a violation of the cited standard. Section 75.380(c) provides that the "two separate and distinct escapeways required by this section shall not end at a common shaft, slope, or drift opening, except that multiple compartment shafts or slopes separated by walls constructed of noncombustible material may be used as separate and distinct passageways." 30 C.F.R. § 75.380(c). The Secretary's case is premised on the argument that the mine failed to maintain "separate and distinct escapeways."

Nothing in section 75.380(c) regulates the separation of air courses between the primary and alternate escapeways. It is possible that other safety standards prohibit the mixing of intake air as alleged in the citation. Section 75.380(a) provides that "at least two separate and distinct travelable passageways shall be designated as escapeways and shall meet the requirements of this section." 30 C.F.R. § 75.380(a). Section 75.380(h), entitled, "Alternate Escapeway," provides that "[o]ne escapeway shall be designated as the alternate escapeway. The alternate escapeway shall be separated from the primary escapeway for its entire length, except that the alternate and primary escapeways may be ventilated from a common intake airshaft or slope opening." 30 C.F.R. § 75.380(h). Sections 75.380(a) and (h) appear to have some relevance to the alleged violation, but at no point during the prosecution of this case did the Secretary seek to amend the citation to plead a violation of either of those sections in the alternative.¹⁵ The Secretary had multiple opportunities to do so. As a consequence, I limit my analysis to what is before me, i.e., an alleged violation of section 75.380(c).

¹⁵ I allowed the parties to file sequential briefs. In her reply brief filed August 12, 2016, counsel for the Secretary noted that "Respondent has been well aware of the nature of the violation since issuance, tried the issue noted in the standard, and would not be prejudiced by amending the citation to a violation of the other standard." Sec'y Reply Br. 6-7 n. 4. The Secretary did not move to amend the citation, however. In addition, District Manager Riley noted at the hearing that section 75.380(h) has additional language concerning the requirement to separate escapeways. (Tr. 84) (due to a transcription error the reference to 75.380(h) was incorrectly reported as 75.388).

I find that, in order for the Secretary to prove a violation of the cited standard he must show that the two escapeways ended at a common shaft, slope or drift.¹⁶ Here, the Secretary has not met his burden of proof. The standard is clearly concerned with the “ends” of the respective escapeways and that they not be “common.” There is no dispute that the primary escapeway exited out the West Lease Portal while the alternate escapeway exited out the 4 East Fan Portal. Indeed, the Secretary issued Citation No. 8483766, discussed above, because the alternate escapeway ended at the 4 East Fan Portal, which is in a remote, inaccessible area. These two portals, which were the termination points of the escapeways, were miles apart from each other and did not end at a common shaft, slope or drift. To hold otherwise would ignore the plain meaning of the standard.

I agree with the operator that section 75.380(c) does not govern the issues raised by the Secretary in Citation No. 8483666. In *Marco Crane*, 36 FMSHRC 1610, 1614 (June 2014) (ALJ), Judge Zane Gill, when addressing a similar issue, explained that “[i]t would be inappropriate to stretch and twist the plain meaning of a regulatory provision so that the Secretary can prove a citation that was issued under the wrong standard, but that is what the Secretary is asking me to do. This request is especially problematic in light of the availability of a much more appropriate provision[.]” Although pleadings in these proceedings are, in general, easily amended by the Secretary, he chose not do so in this instance and it appears that the Secretary believes that he established a violation of section 75.380(c).¹⁷ The Secretary has failed to prove a violation under section 75.380(c) and the citation is **VACATED**.¹⁸

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). Canyon Fuel had a history of 117 violations during

¹⁶ The exception set forth at the end of section 75.380(c) concerns situations where, due to constraints in mine design, an operator is permitted to comply with the safety standard by building noncombustible walls to create two “separate and distinct passageways” so that they can terminate at what otherwise would have been “a common shaft, slope, or drift opening.” 30 C.F.R. § 75.380(c).

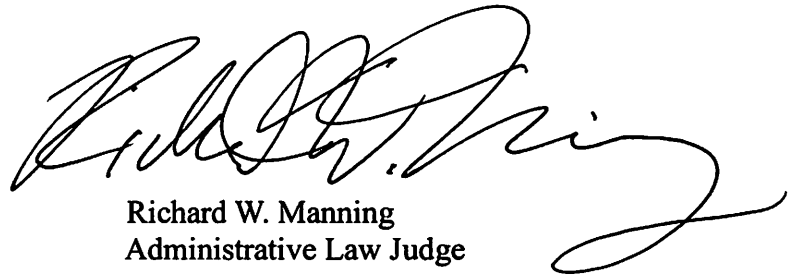
¹⁷ In *Faith Coal Co.*, 19 FMSHRC 1357, 1361-1362 (Aug. 1997), the Commission reversed a judge’s decision vacating a citation where he found that the Secretary had alleged a violation of the wrong standard and had failed to prove a violation of that standard. There the Secretary mistakenly cited a standard which had been amended and renumbered prior to the filing of the Secretary’s brief. The Commission, in remanding the case back to the judge, instructed the judge to determine whether a violation had occurred under the proper standard. Unlike the situation in *Faith Coal*, it appears that the Secretary believes that he correctly cited section 75.380(c)

¹⁸ Because I upheld the Secretary’s interpretation of section 75.380(d)(5) in Citation No. 8483766 with the result that the 4 East Fan Portal can no longer be used as the endpoint of the alternate escapeway, as discussed above, the issues raised in the present citation are moot for all practical purposes. If a road is built and maintained to that portal, the parties would need to revisit the issues adjudicated in these cases.

the 15 months preceding the issuance of the subject citations, 17 of which were S&S. Canyon Fuel is a large operator that produced over 6,000,000 tons of coal in both 2014 and 2015. The Petitions for the Assessment of Penalty in the civil penalty dockets indicate that the Secretary credited Canyon Fuel with good faith abatement. The proposed penalties will not have an adverse effect upon Canyon Fuel's ability to continue in business.

III. ORDER

For the reasons set forth above, Citation No. 8483766 is **AFFIRMED**, Citation No. 8480766 is **MODIFIED** to reduce the level of negligence, and Citation No. 8483666 is **VACATED**. Based on the penalty criteria, I assess a total civil penalty of \$2,425.00. Canyon Fuel Company, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,425.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Alicia A.W. Truman, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 515, Denver, CO 80204-3516 (Certified Mail)

R. Henry Moore, Esq., Jackson Kelly, 3 Gateway Center, Suite 1500, 401 Liberty Ave., Pittsburgh, PA 15222 (Certified Mail)

RWM