FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 29, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. KENT 2014-753 A.C. No. 15-17741-357963
v.	
KENAMERICAN RESOURCES, INC., Respondent.	Mine: Paradise #9

DECISION

Appearances: Michele A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;

Jason W. Hardin, Esq., Fabian VanCott, Salt Lake City, Utah, for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). In dispute are three section 104(a) citations issued by the Mine Safety and Health Administration ("MSHA") to KenAmerican Resources, Inc. ("KenAmerican" or "Respondent"), as the owner and operator of the Paradise #9 mine in Muhlenberg County, Kentucky. To prevail, the Secretary must prove the cited violations "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

The Secretary initially charged KenAmerican with four section 104(a) citations as part of Docket No. KENT 2014-753. The parties settled one of the four citations, for which I issued a Decision Approving Partial Settlement on November 16, 2015. Three section 104(a) citations remain at issue.

Citation Nos. 8513258 and 9041084 allege violations of 30 C.F.R. § 75.380(d)(7)(iv) for improperly hung lifelines.[1] Citation No. 9041085 alleges a violation of 30 C.F.R. § 75.1722(b) for an inadequately guarded tail roller.[2] The Secretary has designated each violation as significant and substantial ("S&S").[3] The Secretary characterizes KenAmerican's negligence as moderate for Citation Nos. 8513258 and 9041085, and as high for Citation No. 9041084. The Secretary proposes penalties of $15,570.00 for Citation No. 8513258, $48,472.00 for Citation No. 9041084, and $1,795.00 for Citation No. 9041085, for a total of $65,837.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. KENT 2014-753 to me, and I held a hearing in Nashville, Tennessee.[4] The Secretary presented testimony from MSHA inspectors Abel DeLeon and Jon Ryan Newbury. KenAmerican presented testimony from Shift Foreman James Pendegraff and Safety Director Shannon Baker. The parties each filed post-hearing briefs, and the Secretary filed a reply brief.

II. ISSUES

For Citation No. 8513258, the Secretary asserts that Respondent failed to comply with 30 C.F.R. § 75.380(d)(7)(iv) by locating the lifeline near a moving belt return roller and by

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[1] Section 75.380(d)(7)(iv) provides, in relevant part:

> Each escapeway shall be –
> . . .
> (7) Provided with a continuous, durable directional lifeline or equivalent device that shall be –
> . . .
> (iv) Located in such a manner for miners to use effectively to escape

30 C.F.R. § 75.380(d).

[2] Section 75.1722 provides, in relevant part:

> . . .
> (b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

30 C.F.R. § 75.1722.

[3] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[4] In this decision, the hearing transcript, the joint exhibit, the Secretary's exhibits, and KenAmerican's exhibits are abbreviated as "Tr.," "Joint Ex. #," "Ex. GX–#,"and "Ex. R–#," respectively.

routing the lifeline near a communications cable and a carbon monoxide monitoring cable. (Sec'y Br. at 6–8.) The Secretary asserts that the violation was S&S and claims KenAmerican's actions constituted moderate negligence because two months prior an MSHA inspector had warned the operator about commingling the lifeline with similarly sized cables. (*Id.* at 8, 12–13.)

For Citation No. 9041084, the Secretary similarly asserts that Respondent failed to comply with 30 C.F.R. § 75.380(d)(7)(iv) by routing the lifeline alongside the communications cable and the miner location tracking cable near an active mining section. (Sec'y Br. at 8–9.) The Secretary asserts that the violation was S&S and claims KenAmerican's actions constituted high negligence because the operator developed the area after the inspector's prior warning and citation. (*Id.* at 13.)

In contrast, KenAmerican argues that the cited lifeline conditions did not constitute violations of section 75.380(d)(7)(iv) because the Secretary's interpretation and enforcement of the regulation are improper. (Resp't Br. at 3–25, 35–41.) Alternatively, Respondent argues that the gravity and negligence of the citation should be reduced and that the Secretary's proposed penalties are too high. (Resp't Br. at 25–35, 41–48.)

For Citation No. 9041085, the Secretary asserts that Respondent failed to comply with 30 C.F.R. § 75.1722(b) by using hog wire fencing with excessively large openings as guarding on top of a motorized belt tail roller. (Sec'y Br. at 14–17.) The Secretary asserts that the violation was S&S and that KenAmerican's actions constituted moderate negligence. (*Id.*)

Respondent argues that the cited conditions were not a violation of section 75.1722(b) because the guarding would prevent miners from contacting moving components of the belt. (Resp't Br. at 44–45.) Respondent alternatively contends that the gravity and negligence determinations should be lowered and the Secretary's assessed penalty reduced. (*Id.* at 45–47.)

Accordingly, the following issues are before me: (1) whether Respondent violated the Secretary's mandatory health or safety standard on locating lifelines in an underground coal mine; (2) whether Respondent violated the Secretary's mandatory health or safety standard regarding the installation of guards for mechanical equipment; (3) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations, including the S&S determinations; (4) whether the record supports the Secretary's assertions regarding KenAmerican's negligence in committing the alleged violations; and (5) whether the Secretary's proposed penalties are appropriate.

For the reasons that follow, it is hereby **ORDERED** that Citation Nos. 8513258, 9041084, and 9041085 are **AFFIRMED.**

III. FINDINGS OF FACT

The parties stipulated to the following:

> 1. KenAmerican Resources, Inc. ("KenAmerican") at all times relevant to these proceedings, engaged in mining activities and

operations at the Paradise #9 Mine in Muhlenberg County, Kentucky.

2. KenAmerican is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et. seq.* (the "Mine Act").

3. The Administrative Law Judge has jurisdiction over these proceedings pursuant to [section] 105 of the [Mine] Act.

4. Abel DeLeon was[,] at the times the citations were issued, an authorized representative of the United States of America's Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citations at issue in these proceedings.

5. The citations at issue in these proceedings were properly served upon KenAmerican as required by the Mine Act.

6. The exhibits offered by the parties are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The penalties assessed in this case will not affect the ability of KenAmerican to remain in business.

8. KenAmerican demonstrated good faith in abating the violations.

(Joint Ex. 1.)

A. Background of the KenAmerican Mine

KenAmerican's Paradise #9 mine is a room-and-pillar coal mine located in Muhlenberg County, Kentucky. (Joint Ex. 1; *see* Ex. R–7 at 1.) KenAmerican has developed the mine by cutting a series of entries and perpendicular crosscuts that form a grid if viewed from above. (Tr. 34:9–12; Ex. R–7.) The Paradise #9 mine is a large mine, with the working sections located five to seven miles from the mine's entrance. (Tr. 26:22–27:2.) Driving from the mine's active face to the exit takes 45 minutes to an hour, while walking the distance can take several hours. (Tr. 26:15–21.) KenAmerican has three working sections in Paradise #9 and operates on three rotating shifts: two are production shifts and one is a maintenance shift. (Tr. 21:1–10, 39:24–25, 40:1–3.) To ensure coal production is uninterrupted, KenAmerican overlaps the shifts at Paradise #9. (Tr. 40:6–15.)

At the Paradise #9 mine, KenAmerican is required to maintain two entries as designated escapeways for miners to use in case of an emergency. (Tr. 41:3–13, 103:25–104:9, 111:11–22.) The primary escapeway also acts as the mine's main intake ventilation entry, providing clean air

to sweep away methane, carbon dioxide, and dust at the active mining section. (Tr. 41:14–42:2.) Paradise #9's secondary escapeway has neutral air and doubles as the mine's main travelway. (Tr. 86:7–15, 90:13–19.) In portions, the secondary escapeway also contains the mine's coal conveyor belt. (Tr. 35:15–36:5, 57:1–25; Ex. R–7.)

Each entry in Paradise #9 is approximately 18 to 20 feet wide. (Tr. 29:20–30:3.) To support the mine roof in excavated entries, KenAmerican has installed a series of roof bolts drilled into the mine ceiling with roof bolt plates attached at the end of the bolt. (Tr. 31:11–24.) KenAmerican typically installs roof bolts in four rows across the width of an entry. (*Id.*) KenAmerican pins the roof bolt plates firmly against the mine roof with a bolt through the center of each plate. (Tr. 51:8–18.) Each roof bolt plate is square or rectangular and has two eyelets located on opposite corners of the plate. (Tr. 50:19–23, 51:19–52:1.) In the escapeways, KenAmerican strings several different cables along the mine roof by attaching the cables to the roof bolt plates' eyelets. (Tr. 52:2–8, 55:17–25.) On one side of the entry, KenAmerican suspends its high-voltage power cables from the roof with coated hangers specially designed for these cables. (Tr. 83:24–85:1, 124:25–125:3, 125:10–23, 128:15–25.) On the other side of the entry, KenAmerican hangs its carbon monoxide detection cable, miner tracking cable, and communications cable using strong plastic zip ties or metal wire ties. (Tr. 123:8–17, 126:6–9, 141:9–14, 153:1–14.)

KenAmerican must also run lifelines down the primary and secondary escapeways. (Tr. 103:25–104:13); 30 C.F.R. § 75.380(d)(7)(iv). KenAmerican attaches the lifelines to the eyelets with smaller plastic zip ties that break with eight to 11 pounds of force. (Tr. 121:9–20.) The coal seam at Paradise #9 is approximately five feet deep, so the lifeline is hung within reach of standing miners. (Tr. 53:4–8.) If necessary, miners can break the zip ties and pull the lifeline down toward the mine floor. (Tr. 157:15–23.) Miners on each unit are trained to first gather at the unit's fire center in an emergency. (Tr. 121:21–122:2.) There, the miners would discuss their route of escape with their section foreman before grabbing the lifeline and proceeding out of the mine with their foreman. (Tr. 122:3–10.)

Altogether, KenAmerican has 24 to 28 miles of lifelines in Paradise #9. (Tr. 143:6–12.) Lifelines are made of braided nylon rope and contain a number of cones, balls, and swirls directing miners to safety in case smoke in the mine limits visibility. (Tr. 20:9–13, 28:4–10, 136:5–12; Exs. R–10, R–13.) Every 100 feet, the lifelines have directional cones pointing miners toward the mine's exit. (Tr. 22:17–23:5.) A ball on the lifeline indicates an upcoming branch in the line leading to a main door for passage to the next entry. (Tr. 23:6–24:13.) A swirly cone indicates the direction to a refuge chamber, where miners can take shelter if escape is not possible. (Tr. 23:8–10.) Two diamond-shaped cones indicate a nearby cache of self-contained self-rescuers ("SCSRs"), i.e., personal respirators that miners must rely upon if the mine becomes inundated with smoke and other fumes. (Tr. 25:1–12, 21:11–15, 26:12–14, 150:15–25.) Because each SCSR contains only up to an hour's worth of oxygen, workers escaping the mine on foot could require multiple SCSRs. (Tr. 27:3–9.)

In addition to housing miles of lifelines, the Paradise #9 mine contains a long series of conveyor belts that KenAmerican uses to bring coal to the surface of the mine. (Tr. 44:4–8.) To transfer coal between belts, coal is dumped from the head of one belt onto the tail of the next.

(Tr. 185:22–186:9.) At this exchange point, an electric motor propels the conveyor belt by turning a roller located in the belt's tail. (Tr. 172:22–173:4, 173:23–174:15.) The tail roller stands at about waist height and is large, measuring approximately two feet in diameter and four feet long. (Tr. 173:23–174:6, 175:17–176:1.) The rollers propel the belt at a rapid pace of 1,200 to 2,000 feet per minute. (Tr. 36:17–37:4.) KenAmerican installs guarding around the sides and top of the belt near the motorized tail rollers to protect miners from being caught in the moving parts and injured. (Tr. 175:4–9.) The operator also places guarding around the belt in other areas where miners could be pinched by the moving parts. (*See* Tr. 77:8–18.)

B. April 2014 Mine Inspection and Warning

In April 2014, MSHA Inspector Abel DeLeon traveled to Paradise #9 as part of an inspection of the underground mine. (Tr. 18:20–19:15.) Due to a jurisdictional realignment of MSHA's offices, DeLeon's office in Madisonville, Kentucky, had taken over inspections of Paradise #9 in the previous year from MSHA's Beaver Dam office. (Tr. 18:2–19.) At the mine, DeLeon traveled with Mike Harris, a safety official for KenAmerican. (Tr. 18:20–19:15.) Inside the mine, DeLeon found an area 50 to 70 feet long in which the lifeline was strung along the mine roof in close proximity to other similarly sized cables, including the communications line and the miner tracking line, on the same roof bolt plate. (Tr. 19:12–19, 29:4–7.) Concerned that a worker attempting to escape the mine could mistakenly grab one of the nearby cables instead of the lifeline, DeLeon directed Harris to move the lifeline so it was not commingled with the other cables in the entry. (Tr. 19:20–20:3.) DeLeon feared that disoriented miners could follow the wrong line and get lost during an emergency, leading the miners to suffocate. (Tr. 20:4–21.) DeLeon did not write KenAmerican a citation for the commingled wires, but instead gave the mine a warning. (Tr. 29:8–19.) Although Harris disagreed about the need to reposition the lifeline, he moved the lifeline to a different set of roof bolt plates without other cables. (Tr. 19:20–20:3, 29:14–19, 30:5–21.) When DeLeon left the mine later that day, he discussed the problem with KenAmerican's safety director, Shannon Baker, and stressed that the operator needed to fix any other instances of commingled lines. (Tr. 30:14–31:10.) DeLeon told KenAmerican the lifelines had to be far enough away from other similarly sized cables to avoid confusion, but the inspector did not explicitly tell the operator where it needed to hang the lifelines. (Tr. 30:14–31:10.)

C. June 11 Inspection and Citation No. 8513258

On June 11, 2014, Inspector DeLeon returned to Paradise #9 as part of a spot inspection.[5] (Tr. 32:1–8; Exs. GX–2, R–2.) Inside the mine, DeLeon traveled down the secondary escapeway[6] to Third Southwest Mains, an area of the mine that was developed in 2010. (Tr.

[5] In addition to regular examinations, MSHA conducts spot examinations of mines that liberate large amounts of methane gas. (Tr. 32:9–20.) KenAmerican's Paradise #9 liberated more than 500,000 cubic feet of methane per day and was thus subject to MSHA's ten-day spot inspection. (Tr. 32:9–33:18.)

[6] Inspector DeLeon initially believed the conditions he found were near an underpass in the primary escapeway. (Tr. 56:25–57:4.) DeLeon did not specify the location of the underpass in his notes or in the citation, and at hearing he could not identify the location of the cited

38:24–39:6; *see* Ex. R–7 at 4.) While traveling the escapeway, DeLeon came upon an area where the escapeway passed under the coal conveyor belt. (Tr. 35:15–36:5.) Although KenAmerican had installed some guarding on the belt to protect miners' heads, the guarding was limited. (Tr. 77:8–18.) Where the lifeline ran under the overpass, the sides of the belt's rollers were exposed without guarding. (Tr. 36:1–5.) The lifeline was located six to eight inches from the side of the turning belt rollers. (Tr. 36:6–16, 37:21–24.) The lifeline had slack in the line in this area near the belt. (Tr. 38:1–6.)

Further into the mine, DeLeon discovered an area where the lifeline was suspended from the same roof bolt plate as other similarly sized cables. (Tr. 38:12–23, 58:8–21.) DeLeon believed these conditions existed for two crosscuts, or a distance of 100 to 130 feet. (Tr. 38:12–23, 56:8–13.) The affected area was approximately one mile from the three working sections in Paradise #9. (Tr. 38:24–39:16, 10:9–14; *see* Ex. R–7 at 1.) Miners from all three working sections would pass the area while exiting the mine. (Tr. 38:24–39:16.)

Based on his observations, DeLeon issued Citation No. 8513258, alleging a violation of 30 C.F.R. § 75.380(d)(7)(iv):

> The lifeline in the primary [sic] [escapeway] is not being maintained in a manner for miners to use effectively to escape. The lifeline is running within inches of a belt return roller of the 2nd Southwest belt line underpass on the 2nd Southwest roadway. The lifeline is also entangled within communication and CO2 [sic] monitor cables for two crosscuts (XC68–XC69) on the 3rd [Southwest] roadway. This condition would cause a delay in a miner escaping the mine during an emergency by following a cable instead of the lifeline. A miner could become entangled in the belt roller[,] causing him fatal injuries.

(Exs. GX–1, R–1.) Because the conditions would delay miners in an emergency, DeLeon marked the citation as reasonably likely to result in fatal injuries to 30 persons and S&S. DeLeon characterized the operator's negligence as "moderate." To abate the violation, KenAmerican Foreman James Pendegraff moved the lifeline to a row of roof bolts in the middle of the entry and repositioned the lifeline away from the other cables. (Tr. 73:23–74:20, 78:5–79:10.)

D. June 23 Inspection and Citation Nos. 9041084 and 9041085

On June 23, Inspector DeLeon returned to Paradise #9 for another spot inspection of the mine. (Tr. 44:9–23.) At the mine, DeLeon traveled to the No. 1 Unit on the First Northwest Submains, an active mining section. (Tr. 44:24–45:5.) There, DeLeon discovered that the lifeline again had been strung alongside other cables of similar size, including the communications line. (Tr. 46:1–4; Ex. R–17.) KenAmerican had hung the lifeline together with the other cables for approximately 800 to 950 feet from crosscut number two to crosscut number

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conditions on a mine map. (Tr. 59:2–60:12.) On cross examination, DeLeon acknowledged that he likely was in the secondary escapeway. (Tr. 58:21–59:1.)

16, the crosscut closest to the active mining face. (Tr. 45:2–5, 46:1–8, 95:12–23.) KenAmerican advanced the active section by two to six crosscuts per week, so DeLeon surmised the operator had installed the commingled lines after the inspector's citation on June 11. (Tr. 45:14–25, 47:25–48:10.)

Based on his observations, DeLeon issued Citation No. 9041084, alleging a violation of 30 C.F.R. § 75.380(d)(7)(iv):

> The lifeline coming off of Unit #1 in the primary escapeway from [crosscut] #2 to #16 was intersecting with the communication line and tracking line. Communication line and tracking line are all approximately the same size in diameter. A major emergency event would result in miners being confused with which line was for escape. This hazard would result in fatal injuries.
>
> Location: 1st Northwest Submains, primary escapeway.

(Exs. GX–3, R–3.) DeLeon marked the citation as S&S and reasonably likely to result in fatal injuries to 15 miners, the number of miners on the section. (*Id.*; Tr. 48:25–49:9.) DeLeon characterized KenAmerican's negligence as "high" because the operator had hung the cables after the inspector's recent citation. (Tr. 47:25–48:10.) To abate the citation, KenAmerican's James Pendegraff and several other miners moved the lifeline from the right-most roof bolt plate to a roof bolt plate in the middle of the entry. (Tr. 97:4–98:6; Ex. R–8.)

After KenAmerican abated the citation, Inspector DeLeon continued his examination of the mine. In the Third Southwest header, DeLeon inspected the exchange point for two coal conveyor belts placed one on top of the other. (Tr. 172:13–21, 174:24–175:3, 185:22–186:9.) The lower belt was approximately waist-high. (Tr. 174:4–6.) Around the perimeter of the lower belt, KenAmerican had installed metal panels as guarding. (Tr. 173:17–22.) KenAmerican also placed hog wire fencing on top of the metal panels, forming an enclosed box around the end of the belt where the tail roller created a pinch point. (Tr. 172:13–21, 174:24–175:9, 186:10–13.) Although the hog wire was strong material, it had openings of approximately 2.5 inches by 3.5 inches in size. (Tr. 172:17–21.) The vertical distance from the hog wire to the tail roller was only a few inches. (Tr. 179:13–20.) DeLeon estimated that the horizontal distance from the back end of the metal panel guarding to the tail roller was shorter than arm's length or approximately 12 to 18 inches, though he did not measure the distance with a tape measure. (Tr. 179:21–180:8, 188:2–10.) DeLeon thus believed a miner working in the area could put an arm through one of the hog wire openings and contact the moving tail roller. (Tr. 177:12–178:2.)

Based on his observations, DeLeon issued Citation No. 9041085, alleging a violation of 30 C.F.R. § 75.1722(b):

> The guarding material on the belt head tail piece at the 3rd Southwest header was not adequate. The openings were 2.5" by 3.5" by 2' long. A miner would be able to come in contact with

> the moving tail roller. This would result in permanently disabling injuries from loss of fingers and/or limbs.

(Exs. GX–4, R–4.) DeLeon marked the citation as S&S and reasonably likely to result in permanently disabling injuries to one miner. (*Id.*; Tr. 184:10–22, 189:7–17.) DeLeon characterized KenAmerican's negligence as "moderate" because KenAmerican had installed some guarding, albeit inadequately. (Tr. 185:3–9.) KenAmerican abated the citation by staggering a second layer of hog wire on top of the tail roller, cutting in half the size of the openings. (Tr. 178:3–10.)

KenAmerican's Baker later traveled to the belt transfer point and measured the horizontal distance from the side of the metal panel guarding to the side of the tail roller, which he determined to be three feet and nine inches. (Tr. 198:16–199:19.) Baker noted that the horizontal distance from the back of the metal panel guarding to the tail roller was greater than three feet and nine inches. (Tr. 199:7–11.)

IV. PRINCIPLES OF LAW

A. Significant and Substantial

A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish a S&S 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 in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element has been realized and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

The Commission has further emphasized that evacuation standards such as section 75.380(d)(7)(iv) are "intended to apply meaningfully only when an emergency actually occurs." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011), *aff'd sub nom. Cumberland Coal Res., LP v. Fed. Mine Safety & Health Admin.*, 717 F.3d 1020 (D.C. Cir. 2013). Therefore, "when applying the *Mathies* analysis with respect to escapeway violations, a Judge is to consider the S&S nature of those violations within the context of an emergency." *Big Ridge, Inc.*, 36 FMSHRC 1115, 1117 (May 2014) (citing *Cumberland*, 717 F.3d at 1027–28).

Finally, it is well settled that redundant safety measures are not to be considered in determining whether a violation is S&S. *Cumberland Coal Res. LP*, 717 F.3d at 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp.*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek*, 52 F.3d at 135; *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

B. Negligence

The Commission evaluates the degree of negligence using "a traditional negligence analysis." *The American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted)). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *Id.* at 1702 (citation omitted). In making a negligence determination, a Judge is not limited to an evaluation of allegedly "mitigating" circumstances, but may consider the totality of the circumstances holistically. *Id.*

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. The Lifeline Violations – 30 C.F.R. § 75.380(d)(7)(iv)

1. Interpretation of 30 C.F.R. § 75.380(d)(7)(iv)

Section 75.380(d)(7)(iv) requires lifelines in underground coal mines to be "[l]ocated in such a manner for miners to use effectively to escape." 30 C.F.R. § 75.380(d)(7)(iv). Accordingly, a violation of the regulation occurs where miners cannot "effectively" use the lifeline to escape the mine in an emergency. The Secretary asserts that the standard's requirements differ from mine to mine depending on conditions at the mine. (Sec'y Reply at 1–2.) The Secretary further asserts that to be effective the lifeline at Paradise #9 should have been hung separately from other cables of similar size. (*Id.*; *see* Tr. 107:19–108:5.)

Respondent challenges the Secretary's interpretation of the regulation and asserts that the miners in Paradise #9 could still effectively use the lifeline to escape while strung to the same roof bolt plates as other wires. (Resp't Br. at 3–10.) KenAmerican asserts that the Secretary's interpretation of the standard is unreasonable, and therefore should not receive any deference. (*Id.* at 7–10, 160:16–25; Ex. R–9.)

Regulatory interpretation is a two-step process. First, unambiguous regulatory provisions "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), and *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). The meaning of regulations is "ascertain[ed] . . . not in isolation, but rather in the context in which those regulations occur." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004)). Second, if the meaning of the regulation is ambiguous, the Secretary's reasonable interpretation of the regulation is entitled to deference. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012). Courts defer to an agency's interpretation of its own regulation, which may be advanced in a legal brief, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). However, the courts have withheld such deference where the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citations omitted).

First, I must determine whether the regulation is unambiguous. I begin with the text of the regulation. Lifelines must be "[l]ocated in such a manner for miners to use effectively to escape." 30 C.F.R. § 75.380(d)(7)(iv). Rather than providing for a singular method of compliance, the regulation establishes a performance-oriented standard that mines must meet. *See MSHA, Training Questions for Emergency Mine Evacuation, Emergency Temporary Standard Compliance Guide* 4, http://arlweb.msha.gov/REGS/COMPLIAN/Guides/MineEvacETS/MineEvacETSComplianceGuide.pdf. To understand what this performance standard requires, I first must find the meaning of "effectively." The Secretary's regulations do not define "effectively" for the purposes of section 75.380(d)(7)(iv). The Oxford Dictionary defines "effectively" as "in such a manner as to achieve a desired result." *Effectively, The New Oxford American Dictionary* (2d ed. 2005). The desired result of the lifeline standard is for miners to escape the mine quickly. *See* 71 Fed. Reg. 71,430, 71,431 (Dec. 8, 2006). Accordingly, section 75.380(d)(7)(iv) requires mine operators to provide a lifeline that is located in such a manner for miners to use to escape the mine quickly.

Next, I look to the phrase "positioned in such a manner" for context. MSHA has provided little firm guidance regarding how lifelines should be hung to satisfy this requirement. (*See* Tr. 80:7–23, 82:2–15, 109:14–22.) In comments accompanying the rulemaking, MSHA stated simply that "[p]roper positioning of the lifeline regarding height, accessibility, and location *as determined by mining conditions* improves the ability of miners to effectively use lifelines to escape during emergency situations." 71 Fed. Reg. at 71,437 (emphasis added). Thus, the agency drafted the regulation with an understanding that its requirements would shift as mining conditions dictated.

Given the intentional flexibility of the standard, I conclude that the regulation's meaning is ambiguous insofar as it depends on particular mining conditions.

Having found the regulation to be ambiguous, I next must determine whether the Secretary's interpretation is reasonable and entitled to deference. Here, the Secretary interprets the regulation to require that lifelines at Paradise #9 be hung from separate roof bolt plates than other cables of similar size. (Sec'y Br. at 4–13; Sec'y Reply Br. at 1–2.) Inspector DeLeon testified that lifelines must be "separate and distinct" from other cables to be effectively used to escape the mine. (Tr. 107:19–108:5.) DeLeon explained that in the smoke and confusion of an emergency, a miner could follow a cable rather than the lifeline and get lost in the mine. (Tr. 20:4–24.) Specifically, a miner forced to release the lifeline could grasp another cable in the dark mistakenly believing the commingled cable to be a lifeline. (Tr. 106:10–24.) Hanging the lifeline alongside similarly sized cables could cause confusion and delay the miners' escape. (Tr. 46:21–47:13.) DeLeon further averred that although MSHA has not issued written guidance for mines about the placement of lifelines, the agency trains its inspectors that lifelines should not be commingled with high voltage power lines or other cables of similar size. (Tr. 81:9–82:15.)

Respondent asserts that the Secretary's interpretation of the standard creates a per se rule against hanging a lifeline on the same roof bolt plate as other similarly-sized cables. (Resp't Br. at 78.) However, the Secretary has simply stated that under the standard, the lifeline should not be commingled with other cables and should be separate and distinct. (Sec'y Br. at 4–13; Sec'y Reply Br. at 1–2.) Although terminating the two disputed violations ultimately required KenAmerican to move the lifeline to a separate roof bolt plate, the record suggests that this abatement measure was specific to Paradise #9 based on how KenAmerican developed the mine and installed its roof bolts, power center, and cable system. (Tr. 74:2–6, 98:1–6, 31:11–24, 51:8–52:8, 83:24–85:1.) Whether a lifeline would need to be attached to a separate roof bolt plate in another mine would depend on the type and size of the roof bolt plate, which in turn depends on the mine's roof and structure. In other words, a lifeline's location for miners to use effectively to escape depends on the mine's conditions, as MSHA has stated. Accordingly, I decline to adopt Respondent's position that the Secretary's interpretation of the standard creates a per se rule requiring mine operators to attach lifelines to separate roof bolt plates. Rather, I determine that the Secretary's interpretation requires mine operators to locate lifelines separately and distinctly from other similar-sized cables as determined by mine conditions for miners to use the lifelines effectively to escape.

Respondent further asserts that the Secretary's interpretation is unreasonable. (Resp't Br. at 8–10.) Respondent argues that the Secretary's interpretation is arbitrary because a disoriented miner could still grab the wrong cable even if the lifeline is hung from a separate roof bolt plate. (*Id.* at 8.) Respondent contends that the only way to completely prevent such speculative confusion would be to place the lifeline in a separate entry from the other cables. (*Id.*)

Despite Respondent's arguments, the standard requires lifelines to be located effectively for miners to escape – the operative term being "effectively." Here, Inspector DeLeon determined that having the lifeline commingled with other cables in Paradise #9 could more than likely lead to confusion, thus creating delay and reducing the ability of miners to use the lifeline effectively to escape. DeLeon has worked for MSHA since 1998 and has been a field office

supervisor since 2008, was a coal miner in Kentucky and Virginia for 11 years, and holds an associate's degree in mining technology. (Tr. 15:14–16:21, 17:3–21.) I credit DeLeon's opinion that commingling the lifeline could tend to cause a delay in escaping. DeLeon further testified that MSHA teaches inspectors to separate lifelines from similarly sized cables to limit confusion. (Tr. 81:9–82:15.) Although hanging lifelines in separate entries may further eliminate potential confusion, the existence of a potentially safer alternative does not negate DeLeon's determination here that placing the lifeline where it commingled with other cables could delay and reduce the ability of miners to use the lifeline to effectively escape. Further, there is no evidence in the record suggesting that the Secretary arbitrarily declined to adopt such a requirement that a lifeline be given a separate entry altogether given that such a requirement would depend on each mine's specific conditions.

Respondent also asserts that the Secretary's bright-line rule runs contrary to MSHA's guidance, which emphasizes that the standard's requirements will change from mine to mine. (*Id.* at 8–9 (citing 71 Fed. Reg. at 12,261, 71,437).) Although MSHA has noted that the standard's requirements may vary, guidance suggesting flexibility does not forestall MSHA from barring in all instances those practices the agency deems unacceptable, such as commingling lifelines with other cables.

Respondent finally avers that the Secretary's interpretation deviates from previous interpretations, as prior inspectors declined to cite Paradise #9 for the same lifeline conditions. (Resp't Br. at 9.) However, the Commission has held that "[a]n inconsistent enforcement pattern does not estop MSHA from proceeding under the interpretation of the standard that it concludes is correct." *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1547 (Aug. 1993) (citing *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1142 (Sep. 1988)). Thus, lax prior enforcement does not demonstrate arbitrariness in MSHA's current interpretation. I also note that Inspector DeLeon, a field office supervisor, was only recently assigned to Paradise #9 after the mine's transfer to MSHA's Madisonville office's jurisdiction. (Tr. 18:2–9.) Furthermore, two months prior to issuing this citation, Inspector DeLeon verbally warned KenAmerican that hanging the lifeline from the same roof bolt plates as other cables constituted a violation, giving advanced notice to the operator. (Tr. 29:8–19.)

After careful consideration, I determine that Respondent's legal arguments do not undermine Inspector DeLeon's testimony, which I credit based on his experience. Given the evidence before me, I determine that the Secretary's interpretation of section 75.380(d)(7)(iv) demonstrates a fair and considered judgment on the requirements. Accordingly, I defer to MSHA's interpretation that the standard requires lifelines at the Paradise #9 mine to be hung from separate roof bolt plates apart from other cables of similar size.

2. Citation No. 8513258

a. Violation – Citation No. 8513258

The Secretary can prove a violation of section 75.380(d)(7)(iv) by demonstrating that the mine operator has not installed a lifeline in a manner that miners can use effectively to escape the mine quickly. For Citation No. 8513258, the Secretary asserts that Respondent violated section

75.380(d)(7)(iv) in two ways. (Sec'y Br. at 6–8.) First, the Secretary states that KenAmerican violated the standard by routing the lifeline too close to an unguarded section of the coal conveyor belt. (*Id.*) Second, the Secretary contends that Respondent committed a violation by attaching the lifeline to the same roof bolt plates as other cables. (*Id.*)

Respondent asserts that the Secretary has not demonstrated a violation by a preponderance of the evidence.[7] (Resp't Br. at 10–23.) Respondent emphasizes that the evidence supports a finding that the lifeline's placement would not affect the miners' ability to escape. (*Id.*)

KenAmerican's witnesses, Pendegraff and Baker, testified that the operator had trained miners to break the zip ties and pull the lifeline down from the mine roof when visibility is limited. (Tr. 120:23–121:20, 122:17–23, 127:6–21, 158:1–11.) Pendegraff further testified that miners could identify the lifeline by the directional cones and the nylon rope's braided texture, even while wearing gloves. (Tr. 135:5–16, 149:14–23, 161:7–16; *see* Ex. R–10.) He testified that if miners were to follow the wrong cable, they may be able to follow that line out of the mine. (Tr. 55:17–25, 116:22–117:6.) Regarding the lifeline's proximity to the coal conveyor belt, KenAmerican trained its staff to shut down the belt lines during an emergency to reduce the threat to escaping miners. (Tr. 76:16–77:7.) Additionally, because some guarding on the conveyor protected passing miners, KenAmerican argued that miners again could break the zip ties and pull the slack lifeline away from the belt. (Tr. 77:8–18, 128:1–10.)

On the other hand, although some guarding was in place to protect miners, the guarding was limited and would primarily protect the miners' heads. (Tr. 77:8–18.) Inspector DeLeon was concerned that miners could get their hands or arms caught in the belt's turning rollers, thus potentially harming miners and delaying their escape during an emergency. (Tr. 35:18–36:5, 36:14–37:24.) DeLeon believed such an accident was more likely because the lifeline was not taut. (Tr. 38:1–11.) MSHA's Jon Newbury similarly believed miners using the lifeline were at risk of contacting the belt rollers. (Tr. 168:19–169:1.) Inspector DeLeon also testified that miners in an emergency may act differently than trained. (Tr. 113:2–21.) Although regular procedure would see the belt shut off in an emergency, DeLeon questioned whether miners would follow such procedures during a major event forcing miners to flee Paradise #9 on foot. (Tr. 76:12–77:7, 105:11–16.)

Indeed, many underground mine tragedies have occurred because procedures were not followed, proving the old adage true that even the best laid plans often go awry. As the Commission has indicated, the training of miners on escape procedures does not mitigate the seriousness of a violation. *See Cumberland Coal*, 33 FMSHRC at 2369 (citations omitted).

As already discussed, section 75.380(d)(7)(iv) required KenAmerican to route its lifelines in the Paradise #9 mine to roof bolt plates separate from other cables in the mine, so miners

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[7] Respondent points to the Commission's holding in *Cumberland Coal*, 33 FMSHRC 2357, and the Administrative Law Judge's holding in *Twentymile Coal Co.*, 32 FMSHRC 628 (June 2010) (ALJ), as support for KenAmerican's position. (Resp't Br. at 11–12.) Although those cases dealt with the same standard, the violations were factually distinct. Moreover, the violation was affirmed in both instances. Respondent's position lacks a logical foundation.

could use the lifelines effectively to escape the mine. *See* discussion, *supra* Part V.A.1. It is uncontroverted that KenAmerican had located its lifeline alongside other similarly sized cables for 100 to 130 feet in the secondary escapeway. (Tr. 38:12–23.) Alone, this is sufficient to show a violation. Furthermore, I credit Inspector DeLeon's testimony regarding the lifeline's proximity to the conveyor belt and determine that miners using the lifeline were at risk of contacting the belt. The potential smoke and darkness caused by a mine emergency could easily lead a frantic miner attempting to locate the lifeline to accidentally come into contact with the belt. Accordingly, miners exiting near the belt overpass would not be able to use the lifeline effectively to escape the mine quickly and safely. Given the evidence before me, I determine that KenAmerican violated 30 C.F.R. § 75.380(d)(7)(iv) by locating the lifeline alongside other similarly sized cables and close to the belt line in the Paradise #9 mine.[8]

b. S&S and Gravity Determination

The Secretary asserts that the lifeline violation was S&S and reasonably likely to result in fatal injuries to 30 miners. (Sec'y Br. at 9–14.) In contrast, Respondent asserts that the violation was not S&S because the conditions were unlikely to result in injuries and would result only in lost workdays rather than fatalities. (Resp't Br. at 25–30.) Respondent further asserts the conditions would only have affected two miners. (*Id.*)

My determination that KenAmerican violated section 75.380(d)(7)(iv) establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* test asks whether the violation created a reasonable likelihood the hazard against which the standard is directed would have occurred. *Newtown Energy, Inc.*, 38 FMSHRC at 2038. Here, section 75.380(d)(7)(iv) was promulgated to reduce the hazard of miners becoming disoriented and unable to evacuate a mine quickly and safely during an emergency. *See* 71 Fed. Reg. 71,430 (Dec. 8, 2006) (addressing standards for emergency mine evacuations). Inspector DeLeon testified that the lifeline's positioning could confuse a miner and cause the miner to follow an incorrect route while trying to escape. (Tr. 48:11–24.) DeLeon stated that a miner caught in the smoke and darkness of a mine emergency would be unable to see his hand in front of his face, let alone navigate a mine entryway. (Tr. 35:8–14.) A miner walking blindly through the mine could be forced to let go of the lifeline for a number of reasons. (Tr. 72:12–73:2, 106:10–107:18.) On direct examination, KenAmerican's Baker admitted that miners in an emergency

[8] Respondent also asserts that the citation should be vacated because KenAmerican lacked fair notice that commingling the lifeline with other cables would result in a violation. (Resp't Br. at 23–24.) KenAmerican received actual notice of the Secretary's interpretation when Inspector DeLeon warned the mine in April. (Tr. 18:20–19:24, 30:14–31:10.) "Due process is satisfied when an agency gives actual notice of its interpretation prior to enforcement." *Tilden Mining Co., LC*, 36 FMSHRC 1965, 1970–71 (Aug. 2014) (citations omitted). Regardless, in *Energy West Mining Company*, the Commission held that a mine operator lacking actual notice still had fair notice of a violation because a reasonably prudent miner familiar with the mining industry would have understood the requirements of the standard. 17 FMSHRC 1313, 1317–18 (Aug. 1995). Here, only a relatively small length of lifeline was commingled with other cables. The fact that KenAmerican had separated the lifelines from other cables for the other areas Inspector DeLeon inspected strongly suggests a reasonably prudent miner would have understood that the lifeline should not be commingled.

could be confused by the cables hung in close proximity to each other and thereby slowed down while attempting escape. (Tr. 163:15–25.) In addition, DeLeon testified that a miner making contact with the coal conveyor belt could become entangled and injured. (Tr. 35:23–36:5, 36:23–37:4.) Given this evidence, I determine that the violation contributed to the hazard of a miner being unable to quickly or safely escape in the event of an emergency.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Here, Inspector DeLeon testified that a lost and disoriented miner could run out of oxygen while attempting to escape the mine. (Tr. 25:18–26:5.) In addition, miners delayed or not following a lifeline during an emergency could be unable to reach a refuge chamber to get help. (Tr. 26:18–23.) DeLeon averred that the consequences could be particularly disastrous in a mine as large as Paradise #9. (Tr. 26:18–23.) Miners escaping the mine on foot would need several caches of SCSRs to get out of the mine. (Tr. 27:3–25.) DeLeon asserted that a miner lost in an emergency could die if he ran out of oxygen. (Tr. 48:11–24.) Indeed, the regulatory history of the emergency mine evacuation standards notes that toxic gas and reduced oxygen levels are potentially fatal hazards and are often undetectable. 71 Fed. Reg. at 71,445. Given the evidence before me, I find that during a mine emergency a disoriented miner unable to quickly or safely escape the mine could reasonably suffer fatal injuries. Accordingly, the Secretary has satisfied the third and fourth elements necessary to show a violation is S&S.

As the Secretary satisfied all four *Mathies* elements, I conclude that Citation No. 8513258 was properly designated as S&S and reasonably likely to result in a fatal injury.

Respondent next challenges the Secretary's claim that the conditions would affect 30 miners. (Resp't Br. at 25–30.) In support, KenAmerican points to Inspector DeLeon's mistaken belief that the cited conditions were in the mine's primary escapeway. (*Id.* at 26–28.) Respondent also points to a separate citation Paradise #9 received for a violation of section 75.380(d)(7)(iv) citing just two persons. (*Id.* at 26; Ex. R–16.)

KenAmerican employed 15 miners on each of the three working sections at Paradise #9. (Tr. 38:24–39:23.) When miner shifts overlapped, the number of miners in the mine doubled. (Tr. 40:6–20.) Miners from all three active sections would have to pass the cited areas to escape the mine. (Tr. 39:7–16.) Inspector DeLeon explained that, in an emergency, all the miners could follow a disoriented colleague and be lost in the mine. (Tr. 20:24–21:10.) Moreover, Pendegraff testified that miners on a unit were trained to first gather at a central location during an emergency to discuss their route of escape with their foreman. (Tr. 121:25–122:10.) All the miners on the unit would then travel together along the lifeline. (*Id.*)

Although DeLeon initially suggested that miners would first attempt to flee the mine through the primary escapeway, he later explained that miners would use the easiest escape route. (Tr. 41:3–24, 102:13–103:2.) KenAmerican used the secondary escapeway in Paradise #9 as the mine's supply road. (Tr. 103:9–17.) Furthermore, evacuation standards are "intended to apply meaningfully only when emergency actually occurs." *Cumberland Coal Res.*, 33 FMSHRC at 2369. Accordingly, it is fair to assume the occurrence of an emergency forcing miners to use the lifeline in the secondary escapeway at this part of the mine.

Although another inspector in a separate incident cited a lifeline violation as affecting only two persons, the facts surrounding that incident are not before me. (Ex. R–16.) Inspector DeLeon did not have sufficient evidence to discuss that citation. (Tr. 83:18–22.) KenAmerican did not present further evidence regarding that citation. Accordingly, I afford it minimal weight.

I credit Pendegraff's testimony that all miners on a unit would gather in an emergency given its consistency with DeLeon's testimony and Pendegraff's role as a shift foreman. (Tr. 118:18–24.) I credit DeLeon's testimony and find that a confused and disoriented miner would delay the escape of all the miners on a unit. I further recognize that those miners traveling with their unit would slow to help a miner caught in and injured by the coal conveyor belt. Indeed, the sad annals of mining disasters are filled with stories of miners ignoring their own well-being in an attempt to help their fellow miners. *See, e.g.*, *Jim Walter Resources*, 28 FMSHRC 579 (Aug. 2006) (describing miners rushing to help the victims of a first explosion killed in a second blast). Given the evidence before me, I agree with DeLeon's determination and find that 30 miners were affected by the violation.[9]

Accordingly, I conclude that the Secretary has demonstrated that the violation was S&S and reasonably likely to result in fatal injuries to 30 miners.

c. Negligence Determination

The Secretary asserts that the violation was the result of KenAmerican's moderate negligence because MSHA recently had warned the operator that it needed to fix any areas where the lifeline commingled with other cables. (Sec'y Br. at 12–13.) Respondent contends that the negligence level should be low because it did not know the cited conditions were a violation. (Resp't Br. at 30–32.)

In evaluating negligence, I must consider the actions that a reasonably prudent operator would have taken under the circumstances presented that are relevant to the operator's obligation to comply with a standard. *See Brody Mining, LLC*, 37 FMSHRC at 1703. Inspector DeLeon warned KenAmerican two months prior to this citation that the operator needed to fix any areas in Paradise #9 where the lifeline was still hung from the same roof bolt plates as other cables. (Tr. 29:8–19.) Additionally, the operator should have found any remaining violations during its pre-shift examinations of the mine's travelway. (Tr. 42:10–18.) DeLeon and Newbury explained that the cited conditions were obvious. (Tr. 168:15–169:12.) Given this evidence, I determine that KenAmerican was negligent because it should have known of the violative conditions and taken action to fix any defective portions of the mine's lifeline after DeLeon's initial warning.

Nevertheless, Inspector DeLeon believed KenAmerican had simply overlooked the cited conditions because they were relatively far from the active mining sections. (Tr. 47:14–24.) Moreover, the violation was not extensive, affecting only 100 to 130 feet of the lifeline. (Tr. 38:12–23, 56:8–13, 73:23–74:6.)

[9] Given the testimony, Inspector DeLeon could have determined the conditions affected even more miners (*See* Tr. 38:24–39:6, 40:6–20), although a higher number of miners affected would not have impacted the Secretary's proposed penalty calculation. 30 C.F.R. § 100.3(e).

Given the small extent of the conditions and their remoteness from the active mining section, I conclude that although KenAmerican was negligent, the level of negligence was moderate. Along the full spectrum of negligence, I determine that KenAmerican's actions fall at the lower end of moderate.

3. Citation No. 9041084

a. Violation – Citation No. 9041084

For Citation No. 9041084, the Secretary claims that KenAmerican violated 30 C.F.R. § 380(d)(7)(iv) by routing the lifeline along the same roof bolt plates as other similar sized cables for approximately 15 crosscuts in First Northwest Submains, an active mining section. (Sec'y Br. at 8–9; Ex. GX–3.) Respondent again asks that the citation be vacated (1) because the Secretary's interpretation of the regulation was unreasonable, (2) because the operator lacked sufficient notice that the conditions constituted a violation of the regulation, and (3) because the Secretary failed to prove a violation by a preponderance of the evidence. (Resp't Br. at 34–40.) In addition to repeating its previous arguments, Respondent suggests that hanging the lifeline from the same roof bolt plates as other cables was safer than placing the lifeline in the middle of the entry, where it crossed above the section's power center and other equipment. (Resp't Br. at 39.)

I have already determined that the Secretary properly interpreted section 75.380(d)(7)(iv) to require KenAmerican to route its lifeline down a different lane of roof bolt plates than other similar sized cables at the Paradise #9 mine. *See* discussion, *supra* Part V.A.1. Here, it is undisputed that KenAmerican hung the lifeline from the same roof bolt plates as the carbon monoxide line and the communications line for a distance of 800 to 950 feet coming off the working section to the sixteenth crosscut. (Tr. 46:1–8, 130:1–10; Ex. R–17.) Inspector DeLeon determined that the lifeline was too close to the other cables, which could prevent or delay a miner from escaping the mine in the event of an emergency. (Tr. 46:21–47:13; Ex. GX–5 at 4 [11].) Inspector DeLeon did not specify how KenAmerican needed to place its lifeline to abate the citation; rather, the operator chose to move the lifeline to the center of the entry. (Tr. 88:11–16, 97:4–98:6.) KenAmerican instead could have left the lifeline on the side of the entry and moved the other cables to the center. (Tr. 108:13–23.) Moreover, the cited conditions stretched for fifteen crosscuts, far beyond the location of the power center and other equipment closest to the mine face. (Tr. 146:4–24.) KenAmerican had ample opportunity to relocate the lifelines to separate roof bolt plates as the active section advanced. (*Id.*)

Given the evidence before me, I conclude that KenAmerican committed a violation of 75.380(d)(7)(iv) by locating the lifeline too close to the other cables in First Northwest Submains such that miners could be prevented or delayed from escaping in the event of a mine emergency.

b. Gravity and S&S Determination

My determination that KenAmerican violated section 75.380(d)(7)(iv) establishes the first element of the *Mathies* test for an S&S violation. In regard to the second *Mathies* element, section 75.380(d) aims to reduce the hazard of miners becoming disoriented and delayed in

escaping in an emergency. *See* 17 Fed. Reg. 71,430. Here, the lifeline was commingled with other cables for a greater length than the previous lifeline violation. Both Inspector DeLeon and Pendegraff testified that such placement could confuse and potentially slow down a miner attempting to escape a mine during an emergency. (Tr. 48:11–24, 163:15–25.) Thus, consistent with the prior determination on the previous lifeline violation, I determine that this second lifeline violation contributed to the hazard against which section 75.380(d)(7)(iv) is directed.

In terms of the third and fourth *Mathies* elements, I have already found that a disoriented miner could run out of oxygen while attempting to escape the mine because miners rely on the lifeline to access caches of SCSRs. *See* discussion, *supra* Part V.A.2.ii. Here, the danger to miners is even more pronounced because of the greater length of lifeline affected and this particular violation's proximity to the active mining face in a gassy mine. As explained previously, the hazard of having a disoriented miner delayed in escaping a mine in an emergency could reasonably result in a fatality. (*Id.*) I thus conclude that the Secretary, having satisfied all four *Mathies* elements, properly designated Citation No. 9041084 as S&S.

Relying upon the same argument as before, the Secretary alleges that the violation was reasonably likely to affect 15 miners. (Sec'y Br. at 14.) Respondent, again, challenges this designation. (Resp't Br. 28–30, 41.) I have already found that the prior violation affected all miners inby the cited condition. *See* discussion, *supra* Part V.A.2.ii. In this violation, the cited lifeline portion was near one active working unit and was not in proximity to the other two working units. (Tr. 49:3–9; Ex. GX–5 at 4 [10–11].) DeLeon concluded, therefore, that the violation only affected one working unit, consisting of 15 miners. (*Id.*) Because miners were trained to escape together with their unit and the cited lifeline portion came directly off the working section, all miners working in the section would likely have to locate and pick up the lifeline along this particular portion. (*See id.*; Tr. 121:25–122:10.) Thus, given the evidence before me, I agree with DeLeon's determination and conclude that the violation affected 15 miners.

c. Negligence Determination

The Secretary asserts that KenAmerican exhibited high negligence by failing to properly position its lifeline in First Northwest Submains because the operator developed the section and hung the lines after Inspector DeLeon's one prior warning and one prior citation. (Sec'y Br. at 12–13.) Respondent defends its actions by stating that it did not know that it was required to locate the lifeline away from other cords on the active mining section. (Resp't Br. at 41–42.) Respondent asserts that it had been its normal practice to place the beginning of its lifeline on the right of a unit's power center, which meant attaching the lifeline to the same roof bolt plate as the communications and tracking cables. (Resp't Br. at 41.) Respondent believed the lifeline was compliant with the standard in part because other inspectors had observed the same conditions and had not cited KenAmerican. (*Id.* at 41.) Respondent also asserts that Citation No. 8513258, the previous lifeline citation, did not serve as a warning because it did not involve a portion of the lifeline that was coming off an active unit. (*Id.* at 41–42.)

The Commission has recognized that high negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Brody Mining, LLC*, 37 FMSHRC at 1703 (citation

omitted). Here, Inspector DeLeon twice warned KenAmerican orally and by citation that it needed to ensure lifelines were separate from other cables in the mine. In April 2014, DeLeon conveyed this warning directly to Shannon Baker, KenAmerican's safety director. (Tr. 30:22–31:10.) Then on June 11, 2014, DeLeon cited the operator for the same problem in another area of the mine. (Ex. GX–1.) In this instance, Inspector DeLeon believed that KenAmerican had installed the length of the commingled lifeline and cables after he had issued the previous lifeline violation, Citation No. 8513258, two weeks prior. (Tr. 45:6–13.) DeLeon testified that based on typical production, assuming no breakdowns, the operator would advance into the mine two to six crosscuts each week. (Tr. 45:17–21.) He, therefore, concluded that the operator moved at least eight or nine crosscuts from when he issued Citation No. 8513258 to when he issued Citation No. 9041084.[10] (Tr. 45:21–25.)

DeLeon's warning and subsequent citation placed KenAmerican on notice that it needed to be more careful when routing lifelines through the mine. Despite these warnings, Inspector DeLeon alleged that KenAmerican continued for two more weeks to position the lifeline next to two other cables of similar size as the company advanced the mine face in First Northwest Submains. (Tr. 152:11–25.) The operator improperly hung the lifeline for more than 800 feet in an area where miners constantly worked and traveled. (Tr. 46:1–8.)

At hearing, however, KenAmerican explained that the company did not want to place the lifeline directly above the power center, which was located at the active unit. (Tr. 129:6–18.) As the unit advanced, the power center and lifeline moved up with it. (Tr. 152:11–22.) The power center was eight to ten feet wide and prevented KenAmerican from using the two center rows of roof bolt plates. (Tr. 144:7–14, 129:6–18, 130:1–133.10; Ex. R–17.) As a result, KenAmerican hung the lifeline from the right-most row of roof bolt plates alongside other cables. (Tr. 129:6–18, 130:1–133:10; Ex. R–17.) KenAmerican offers a reasonable explanation for placing the lifeline to the right in order to prevent it from intersecting with the power center. This could explain the operator's assertion that other inspectors did not object to the lifeline's placement near the face. However, it does not forgive Respondent's duty to move the lifeline away from other cables as soon as the power center was out of the way. Indeed, the operator failed to re-adjust the lifeline located outby the power center as it advanced. The power center measured only 16 feet long, whereas the lifeline was commingled with the other cables for 800 feet or approximately 15 crosscuts. (Tr. 144:7–14, 46:1–8.)

Based on the facts as a whole, I find that KenAmerican disregarded MSHA's prior warnings about the position of the lifeline in Paradise #9. Respondent ignored MSHA's warnings despite the minimal effort necessary to properly hang the lifeline and the potentially dire consequences for miners unable to escape the section in an emergency. I determine that

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[10] I recognize that based on DeLeon's production range, the operator may have advanced anywhere from four to twelve crosscuts after the first lifeline violation's issuance. Thus, the operator may have installed a portion of the cited lifeline before DeLeon issued the prior lifeline citation. Regardless, KenAmerican had received a warning about the lifeline prior to Citation No. 8513258's issuance, and a preshift examination should have revealed and prompted the operator to fix any defective portion of the lifeline. I also note that the portion of lifeline cited in this instance was much longer than in the previous citation and came directly off the working section, making the violation much more obvious.

Respondent was highly negligent in ignoring MSHA's warnings and refusing to separate the lifeline from other cables.

B. The Guarding Violation – 30 C.F.R. § 75.1722(b)

Section 71.1722(b) requires that guarding at "conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley." 30 C.F.R. § 75.1722(b). In context, the guarding must be sufficient to protect persons from injury by "exposed moving machine parts." 30 C.F.R. § 75.1722(a).

In guidance for what the standard requires, MSHA has stated that guarding must "[b]e of such construction that openings in the guard are too small to admit a person's hand," and "[b]e of sufficient size to enclose the moving parts and exclude the possibility of any part of a person's body from contacting the moving parts while such equipment is in motion." V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Subpart R, at 155–56 (2015). In addressing the mirror regulation for above-ground coal mines, the Commission emphasized that the standard "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, [the Commission] ha[s] emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sep. 1984) (citing *Great Western Elec.*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Indus.*, 3 FMSHRC 2526, 2531 (Nov. 1981)). Accordingly, the test is whether there is a reasonable possibility that miners could come in contact with the moving machinery, which includes a "minimal" possibility of contact. *Id.*

1. Violation – Citation No. 9041085

For Citation No. 9041085, the Secretary asserts that KenAmerican violated 30 C.F.R. § 75.1722(b) because miners could reach through the openings in the hog wire guarding over the coal conveyor belt and make contact with the tail roller. (Sec'y Br. at 14–17.) In contrast, Respondent contends that the cited guarding was sufficient to prevent miners from contacting the tail roller. (Resp't Br. at 44–45.) In support, Respondent points to the testimony of KenAmerican's Shannon Baker, who measured the distance from the side of the metal panel guarding surrounding the belt's perimeter to the nearest moving part of the belt. (*Id.*)

Baker found that the lateral distance from the metal panel guarding around the sides to the nearest moving part of the belt was three feet and nine inches. (Tr. 198:16–199:6.) Baker noted that the distance from the end of the metal panel guarding to the tail roller was greater than three feet and nine inches. (Tr. 198:16–199:6.) DeLeon, however, estimated that the distance from the metal panel guarding to the tail roller was less than an arm's length or approximately 12 to 18 inches. (Tr. 179:13–180:13.) DeLeon admitted that he did not measure the distance with a tape measure. (Tr. 188:8–13.) DeLeon also acknowledged that a miner would not be able to get his fingers through the metal panel guarding surrounding the perimeter of the belt tail. (Tr. 173:17–22.) He noted, however, that the hog wire on top was only a few inches above the tail roller, which Baker neither measured nor disputed. (Tr. 179:13–20, 199:14–200:3, 201:23–2.)

DeLeon explained that he was concerned a miner working in the area could slip and fall over the side metal panel guarding and reach through the hog wire openings on top to the belt tail roller because the belt and side metal panel guarding only rose to waist height. (Tr. 174:4–6, 176:20–177:1, 178:23–179:9, 199:20–200:3.) Because the mine floor around the tail roller was muddy and "soupy," DeLeon believed a miner working there could slip over the side guarding and on top of the hog wire. (Tr. 178:23–179:20.) Not only did DeLeon fear a miner could fall onto the hog wire, he also observed a grease hose sticking out of the guarding that he believed could easily slip through. (Tr. 183:3–184:3.) DeLeon was concerned that a miner would reach into the hog wire to pull out the grease hose, which was used at least once a day. (*Id.*) DeLeon also observed a hawkeye used to test the belt's slip sequence, which miners would also occasionally access near the cited area. (Tr. 183:18–23, 184:4–9.)

Given this evidence, I credit DeLeon and find that a miner could reach through the hog wire and contact the tail roller even if the perimeter guarding were three feet and nine inches from the belt. Given the mine floor conditions and low height of the guarding, I determine that it was reasonably possible that a miner working in the area could fall onto the guarding, reach over, and slip his hand or arm through the hog wire, contacting the moving tail roller only a few inches below. Accordingly, I conclude that the Secretary has shown a violation of section 75.1722(b).

2. Gravity Determination and S&S

KenAmerican's violation of section 75.1722(b) establishes the first element of the *Mathies* test for an S&S violation. For the second element, section 75.1722(b) requires guarding be sufficient in order to "prevent a person from reaching behind the guard and becoming caught between the belt and pulley." 30 C.F.R. § 75.1722(b). Inspector DeLeon testified that the guarding he observed could allow a miner to contact the pinch point between the tail roller and the mine conveyor belt.[11] I credit DeLeon's testimony and find that the insufficient guarding contributed to the hazard against which the standard is directed.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Several miners normally worked in the area performing maintenance on the belt and cleaning the exchange point. (Tr. 193:12–20.) DeLeon also observed a grease hose sticking out of the guarding, which was used by a miner at least once a day. (Tr. 183:3–184:3.) Inspector DeLeon averred that a miner exposed to the rotating tail roller would be mangled, causing permanently disabling injuries. (Tr. 184:10–22, 187:7–17.) Given this evidence, I find that a miner contacting the tail roller would be reasonably likely to suffer serious injuries, including loss of limbs. Accordingly, the Secretary has satisfied the third and fourth elements necessary to show a violation is S&S.

The Secretary has satisfied all four elements of the *Mathies* test. I therefore conclude that the violation was S&S.

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[11] Respondent asserts that the miners working in the area were trained to avoid hazards and therefore were not reasonably likely to fall into the moving tail roller. (Resp't Br. at 45–46.) Mine operators, however, cannot rely on miners' training to defeat a finding of S&S. *See Cumberland Coal*, 33 FMSHRC at 2369 (citations omitted).

3. Negligence Determination

The Secretary asserts that the violation resulted from KenAmerican's moderate negligence. (Sec'y Br. at 15–17.) Respondent, in contrast, contends that there are considerable mitigating circumstances and the operator's negligence was low. (Resp't Br. at 46.)

DeLeon testified that the hog wire guarding on the tail roller was nearly new, having been installed within the last two shifts because it appeared shiny and was not covered in rock dust. (Tr. 193:2–11; Ex. R–5 at 16.) Nevertheless, DeLeon believed the operator should have discovered the insufficient guarding in that period because belt examiners should have checked the area for hazards. (Tr. 194:7–10.) Abating the violation was simple, as KenAmerican needed only to overlap a staggered, second layer of hog wire on top of the area. (Tr. 178:3–10.)

Given the evidence as a whole, I find that KenAmerican should have known that the guarding in place was insufficient. I conclude that Respondent displayed moderate negligence in failing to install proper guarding, but again on the lower end of the spectrum for moderate negligence.

C. Penalty

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty, including the operator's history of previous violations; the appropriateness of the penalty relative to the size of the operator's business; the operator's negligence; the penalty's effect on the operator's ability to continue in business; the violation's gravity; and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary proposed a penalty of $15,570.00 for Citation No. 8513258, $48,472.00 for Citation No. 9041084, and $1,795.00 for Citation No. 9041085. The parties have stipulated that the proposed penalties would not affect Respondent's ability to remain in business. (Joint Ex. 1.) KenAmerican operates a large business with Paradise #9 producing over two million tons of coal annually. (Ex. R–6.) The parties further stipulated that KenAmerican abated the violations in good faith. (Joint Ex. 1.) In regard to the operator's general history of previous violations, KenAmerican had a total of 727 violations from March 3, 2013, to June 10, 2014. (Ex. GX–6 at 17.)

For Citation No. 8513258, I have affirmed the violation and gravity determination, but found the negligence level to be on the lower end of moderate. Respondent does not have an extensive history of violations of section 75.380 in the two years prior to this violation. (Ex. GX–6, R–15.) Considering all the facts and circumstances set forth above, I hereby assess a civil penalty of $11,000.00.

For Citation No. 9041084, I have affirmed the violation and the gravity and negligence determinations. As noted above, Respondent does not have an extensive history of violations of this standard. (Ex. GX–6, R–15.) In addition to the operator's limited history of violations of this standard, I also consider Respondent's reasonable explanation for placing the lifeline to the

side to prevent it from intersecting with the power center, which places the level of negligence on the lower end of high. Reviewing the evidence as a whole, I determine that a penalty of $38,750.00 is appropriate for this violation.

For Citation No. 9041085, I have affirmed the violation and gravity determination, but again found the negligence level to be on the lower end of moderate. Respondent has been cited twice for section 75.1722(b) in the two years prior to this violation, which I do not consider to be extensive. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of $1,200.00.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 8513258, 9041084, and 9041085 are **AFFIRMED**.

WHEREFORE, Respondent is **ORDERED** to pay a penalty of $50,950.00 within 40 days of this Decision.[12]

Alan G. Paez
Administrative Law Judge

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/lct

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