

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 9, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2008-189
Petitioner	:	A.C. No. 36-05018-136171
v.	:	
CUMBERLAND COAL RESOURCES LP,	:	Cumberland Mine
Respondent	:	

DECISION

Appearances: Paul A. Marone, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary"), seeking the imposition of a civil penalty for the alleged violation by Cumberland Coal Resources, LP ("Cumberland") of 30 C.F.R. § 75.380(d)(7)(iv), at four separate locations.¹ Subsequent to notice, this case was heard in Pittsburgh, Pennsylvania. Following the hearing, each party filed proposed findings of fact, a brief, and a reply brief.

I. Stipulations

The parties stipulated as follows:

1. Cumberland is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 803(d), at the coal mine at which the citations at issue in this proceeding were issued.

¹The petition also seeks the imposition of penalties for the alleged violation of various other standards. These citations were settled by the parties prior to the hearing (See III) (F), *infra*)

2. Operations of Cumberland were issued in this proceeding are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. At all material times involved in this case, the products of the subject Mine, or the operations or products thereof, affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 804.
5. The individual whose signature appears in Block 22 of the citations at issue in this proceeding was acting in his official capacity as an authorized representative of the Secretary of Labor when Citation Nos. 7019884, 7019885, 7019887 and 7019889 were issued.
6. Payment of the total proposed penalty of \$39,161.00 for the subject Citations will not affect Cumberland's ability to continue in business.
7. The Citations Nos. 7019884, 7019885, 7019887 and 7019889 are authentic copies of the subject Citations, with all appropriate modifications or abatements, if any, and may be admitted into evidence for the purpose of establishing their issuance.
8. The Cumberland Mine (the "Mine") mined a total of 7,515,984 tons of coal in 2006.
9. Affiliated companies to Cumberland produced 71,492,892 tons of coal in 2006.
10. Cumberland was assessed 224 violations over 676 inspection days during the 15 months preceding the issuance of the subject Citations.
11. The Assessed Violation History Report reflecting the history of violations of Cumberland is an authentic

copy and may be admitted as a business record of the Mine Safety and Health Administration.

12. True copies of the citations that are at issue in this proceeding were served on Cumberland as required by the Mine Act.
13. Citation No. 7019884 was issued on December 6, 2007, for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iv), and alleged as follows:

The lifeline provided in the #1 entry (belt), secondary escapeway for the 5 Butt East Longwall (011-0) working section was not maintained in a usable condition for the entire length of the escapeway. The lifeline was hung from the mine roof with J hooks and could not be reached by a miner or pulled down in most areas. The lifeline was also hung above cables in several areas and could not be pulled down for use.

14. Citation No. 7019885 was issued on December 7, 2007, for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iv), and alleged as follows:

The lifeline provided in the #2 track entry, primary escapeway for the 5 Butt East Longwall (011-0) working section was not located in such a manner for miners to use effectively to escape in the event of an emergency. The lifeline was hung from the mine roof directly over the longwall mule train, supply cars and mantrips for a distance of approximately 450 feet. Cables and hoses were also hung under the lifeline at several locations.

15. Citation No. 7019887 was issued on December 10, 2007, for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iv), and alleged as follows:

The lifeline provided in the #2 track entry, primary escapeway for the 8 Butt East (027-0) working section was not located in such a manner for miners to use effectively to escape. The lifeline was hung directly over top of 5 supply cars, rail car, and a personnel carrier from the end of the track outby for a distance of approximately 120 feet. There was also no means provided to get on a lifeline where miners could enter the escapeway at man doors. The lifeline was

hung 8 feet from the mine floor and could not be reached. Water line was hung under the lifeline at the #35 crosscut. This is the third citation issued for this condition this quarter.

16. Citation No. 7019889 was issued on December 11, 2007 for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iv) and alleged as follows:

The lifeline provided in the #2 track entry the primary escapeway for the 15 Butt East (029-0) working section was not installed in such a manner for miners to use effectively to escape. The lifeline was hung from the mine roof directly overtop of a rail truck, 8 supply cars and a mantrip. The distance of approximately 300 feet from the end of the track.

17. At all relevant times herein, the average width of the belt and track entries in the Mine was sixteen (16) feet.
18. At all relevant times herein, the average height of the mine roof in the belt and track entries in the Mine was seven and one-half (7½) feet.
19. The 5 Butt East section of the Mine on December 6, 2007 was a retreating longwall section.
20. On December 6, 2007, portions of the lifeline in the #1 belt entry secondary escapeway for the 5 Butt East Longwall (011-0) working section of the Mine was hung from the mine roof with “J” hooks and high voltage hangers.
21. The secondary escapeway for the 5 Butt East Longwall is the belt entry in a set of three entries which comprise the longwall headgate. Each entry is isolated by stoppings from the other entries. The belt entry contains a CO monitoring system which will detect low levels of carbon monoxides and provide alerts and alarms at 5 and 10 ppm of CO above ambient respectively.
22. The belt entry was ventilated with intake air that had not ventilated the longwall face.
23. On December 7, 2007, the lifeline in the #2 track

entry primary escapeway for the 5 Butt East Longwall (011-0) working section of the Mine was hung from the mine roof with Hilti fasteners. The fasteners are plastic and the tip at the end of the fasteners bends down when pressure is applied.

24. The track entry of the 5 Butt East Longwall headgate was isolated from the belt by stoppings.
25. The track entry of the 5 Butt East Longwall headgate contained intake air that had not ventilated the working section and was traveling in an inby direction.
26. On December 10, 2007, the lifeline in the #2 track entry primary escapeway for the 8 Butt East section of the Mine was hung from the mine roof with Hilti fasteners. The fasteners are plastic and the tip at the end of the fasteners bends down when pressure is applied.
27. The 8 Butt East section was a three entry longwall development section. Each entry was isolated by stoppings from the other entries.
28. The track entry of the 8 Butt East section was isolated from the belt and No. 3 entries by stoppings. It contained intake air that had not ventilated the working section and was traveling in an inby direction.
29. On December 11, 2007, the lifeline in the #2 track entry primary escapeway for the 15 Butt East section of the Mine was hung from the mine roof with Hilti fasteners. The fasteners are plastic and the tip at the end of the fasteners bends down when pressure is applied.
30. The 15 Butt East section was a three entry longwall development section. Each entry was isolated by stoppings from the other entries.
31. The track entry of the 15 Butt East section was isolated from the belt and No. 3 entries by stoppings. It contained intake air that had not ventilated the

working section and was traveling in an inby direction.

32. Requirements for lifelines in escapeways were first established as part of an emergency temporary standard issued on March 9, 2006, published at 71 Fed. Reg. 12252. A copy of the rule and preamble are offered into evidence as Government Exhibit 20. Cumberland does not object to the admission of this exhibit.
33. The requirement for lifelines in escapeways became a final rule on December 8, 2006, and was published at 71 Fed. Reg. 71430. A copy of the rule and preamble are offered into evidence as Government Exhibit 21. Cumberland does not object to the admission of this exhibit.
34. MSHA addressed policy issues with respect to lifelines in “Training Questions for Emergency Mine Evacuation, Emergency Standard Compliance Guide.” A copy of such questions and answers are offered into evidence as Government Exhibit 22. Cumberland does not object to the admission of this exhibit.
35. MSHA also addressed policy issues with respect to lifelines in “Emergency Mine Evacuation, Emergency Standard Compliance Guide, Volume 2,” dated April 7, 2006. A copy of such questions and answers are offered into evidence as Government Exhibit 23. Cumberland does not object to the admission of this exhibit.
36. MSHA also addressed policy issues with respect to lifelines in “Emergency Mine Evacuation, Emergency Standard Compliance Guide, Volume 3,” dated June 16, 2006. A copy of such questions and answers are offered into evidence as Government Exhibit 24. Cumberland does not object to the admission of this exhibit.
37. MSHA addressed policy issues with respect to lifelines in “Emergency Mine Evacuation Final Rule Questions and Answers, May 3, 2007.” A copy of such questions and answers are offered into evidence

as Government Exhibit 25. Cumberland does not object to the admission of this exhibit.

38. A diagram of a sample portion of the # 1 belt entry, secondary escapeway of the 5 Butt East section, with approximate distances, is offered into evidence as demonstrative evidence as Joint Exhibit 1.
39. A diagram of a sample portion of the # 2 track entry, primary escapeway of the 5 Butt East section, with approximate distances, is offered into evidence as demonstrative evidence as Joint Exhibit 2.
40. A diagram of a sample portion of the # 2 track entry, primary escapeway of the 8 Butt East section, with approximate distances, is offered into evidence as demonstrative evidence as Joint Exhibit 3.
41. A diagram of a sample portion of the # 2 track entry, primary escapeway of the 15 Butt East section, with approximate distances, is offered into evidence as demonstrative evidence as Joint Exhibit 4.

II. Findings of Fact and Discussion

A. Interpretation of Section 75.380(d)(7)(iv)

Section 75.380(d)(7)(iv), provides as follows:

(d) 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;

Thus, the regulation requires, as pertinent, that an escapeway shall be (1) provided with (2) a continuous durable directional lifeline or equivalent device that shall be (a) located in such a manner for miners to use (b) effectively to escape.

Established Commission case law regarding the interpretation of a regulatory term was set forth in *Phelps Dodge Tyrone, Inc*, 30 FMSHRC 646, 651-52 (Aug. 2008) as follows:

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); see also *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. See *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); accord *Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation... is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted))).⁵

The "language of a regulation . . . is the starting point for its interpretation." *Dyer*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning of the word. See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997)(table).

⁵ The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation [] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts' review, involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); see also *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

The terms in the standard at issue are not defined in the regulations. Thus, reliance is placed on the common meaning of the operative term, "effectively". Webster's Third New International Dictionary, (2002 ed.) ("Webster's") defines "[E]ffective", when used as an adverb,

as follows: “in an effective manner”. “[E]ffectively” as an adjective, is defined as follows: “1a: capable of bringing about an effect: productive of results.”

In support of its position that the cited manner of location of the lifeline was in conformity with the terms of 75.380(d)(7)(iv), Cumberland argues that “the essence of the standard is whether a lifeline would be available to aid a person to get out of the mine in an emergency.” (Cumberland’s Proposed Findings of Fact and Post-Hearing Brief, at 25) (“Cumberland’s Brief”), and that the “determination of whether a violation exist depends upon whether the lifeline is located in a fashion that would permit miners to use it during escape.” (Cumberland’s Brief, at 26).

On the other hand, the Secretary argues, in essence, that the regulatory standard, which requires that lifelines be located in a manner to use effectively to escape, is not complied with if the lifelines location would have substantially hindered or impeded miners from using the lifeline quickly to escape in the event of an emergency. (See Secretary of Labor’s Proposed Findings of Fact, Conclusions of Law, and Memorandum in Support, at 22. (“Secretary’s Brief). I find the Secretary’s argument to be reasonable, as it is supported by the regulatory scheme of the requirement for lifelines, its regulatory history, the regulatory context, and the sentence structure of the standard at issue.

The sentence structure of the regulatory phrase at issue, the location of lifelines “in such a manner for miners to use effectively to escape;” Section 75.380 (d)(7)(iv), clearly indicates that the word “effectively,” between the phrase “to use” and the phrase “to escape” is meant to modify the latter phrase. Thus, based on the common meaning of the term “effectively” as set forth above, I find that the clear meaning of the standard at issue is that the location of a lifeline shall be in such a manner for miners to use it to escape in “an effective manner.”

Further, it is significant to note that the requirements for lifelines and the manner of their location, Section 75,380(d)(7)(iv), are placed under Section 75.380, which sets forth the regulatory mandate for the provision of escapeways and all their requirements, including lifelines. Thus, any interpretation of the requirement relating to the manner of the location of lifelines must be consistent with Section 75.380 as a whole, and must be in harmony with and not in conflict with the objective of Section 75.380. (See *American Coal Company*, 29 FMSHRC 941, 948 (Dec. 2007); *Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002) (quoting *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)).

In *American Coal Company*, the Commission held that an operator violates Section 75.380(b)(1)’s requirement to “provide” escapeways when its miners are “substantially hindered or impeded from accessing designated escapeways.” 29 FMSHRC at 948. In reaching this conclusion, the Commission set forth the following regarding the purpose and legislative history of escapeways which is equally applicable to the case as bar:

There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a

designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard state that the purpose of requiring escapeways is ‘to allow persons to escape quickly to the surface in the event of an emergency.’ S. Rep. No. 91-411, at 83, *Legis. Hist.*, at 209 (1975).” 29 FMSHRC at 948 (emphasis added.)

Based on the regulatory scheme and legislative history it is manifest that (1) the purpose of escapeways is to allow miners to quickly escape, and (2) the requirements of lifelines are included in the same standard that mandates the provision of escapeways. Thus, it is not logical to accept an interpretation of Section 75.380(d)(7)(iv) that would permit lifelines to be located in a manner that would not similarly achieve the purpose of allowing miners to escape quickly.

Further, I take cognizance of the regulatory history of the requirements for lifelines. Section 75.380(d)(7)(iv) was first promulgated in an Emergency Temporary Standard (“ETS”) 71 Fed. Reg. 12252, (Mar. 9, 2006). The SUMMARY of the ETS recognized “the grave danger that [miners] face when they evacuate a mine after an emergency occurs.” *Id.* The summary sets forth the following regarding the utility of the proper positioning and location of lifelines: “the proper positioning of the lifeline regarding height, accessibility, and location as determined by the mining conditions improves the ability of miners to effectively use lifelines to escape during emergency situations.” (*Id.* at 12261)(emphasis added) This language is reiterated in the preamble to the final rule 71 Fed. Reg. 71430, 71437, Dec. 8, 2006, which promulgated Section 75.380(d)(7)(iv), with the same wording as was set forth in the ETS.

Accordingly, it is clear from the regulatory history of Section 75.380(d)(7)(iv), that the manner of the location of lifeline for miners “to use effectively to escape” is intended to mean a location which “improves the ability of miners to effectively use lifelines to escape during emergency situations.” As set forth above, in such circumstances the need is for miners to escape quickly (*see American Coal*, 29 FMSHRC at 941 (Dec. 2007)). I thus find, based on all the above, that the clear wording of 75.380(d)(7)(iv), requires that lifelines must be located in a manner for miners to use “effectively” to escape, i.e., to achieve the results of a quick escape in an emergency.

B. The Citations at Issue

1. Citation No. 7019884

On December 6, 2007, MSHA special investigator, Thomas H. Whitehair II inspected the No. 1 belt entry, the secondary escapeway for the longwall section. He inspected the escapeway, outby from the number 44 crosscut to the number 7 crosscut, a distance of approximately 6,650 feet. A lifeline, not under tension, was suspended from the roof. The height of the lifeline

throughout the escapeway from the number 44 crosscut to the number seven crosscut was approximately seven feet eight inches. At more than two locations between the number 24 crosscut and the number seven crosscut, the lifeline was located above cables that ran perpendicular to the lifeline.

Also, portions of the lifeline were suspended by four-inch long hooks shaped like the letter J (“J hooks”).³ The J hooks were approximately 50 feet apart. The hooks, which were attached to the roof at the top, were open-sided and curved upward at the bottom to hold the lifeline. They were not pointed in the same direction throughout the escapeway.

Whitehair, upon observing these conditions, issued Citation No. 7019884 alleging a violation of Section 75.380(d)(7)(iv).

Cumberland argues, in essence, that the location of the lifeline cited by Whitaker, i.e. suspended along portions of its length from “J” hooks and hung at some location above cables, did not render the lifeline “ineffective.” Cumberland’s Brief at 27). In this connection, Cumberland asserts that “[i]t was possible to remove the lifeline from the J-hooks by either grasping or removing it with any number of available tools within the mine, such as a hammer, a cap piece, or a wedge.” (sic) (Cumberland’s Brief at 27). This assertion appears to be based upon testimony elicited from Whitehair on cross examination, wherein he conceded that miners carry tools like hammers, and they “possibly” could reach up and flip the lifeline out of the J-hooks with one of those tools. (Tr. 158). Also, Whitehair stated on cross examination that this “probably” could be done with a cap piece. (Tr. 158). He was asked whether the lifeline could be flipped out of the other hooks once it was removed from “one of the hooks” and he testified that “I expect you could... .” (Tr. 158). However, significantly he testified as follows regarding the delay in escaping resulting from the need to flip the lifeline from the J hooks:

... I believe that anything that would delay the miners’ escape by trying to flotate and flip a lifeline with a stick when you can’t see what you are even doing to get on that lifeline, to me, it’s not adequate and it can’t be safely used to escape the mine.

The lifeline should be readily available for a miner to be able to get on that lifeline and quickly escape.

* * *

... I think it would take considerable doing and a considerable amount of time to do it.

I mean, you have to bear in mind that you are totally blind. You can’t see. You have no sense of direction, you know, and all you are trying to do is blindly try to flip this out of a hanger, (Tr. 158-59).

³Other portions were suspended by various hangers or clips.

I accord considerable weight to this opinion, as it is based upon conditions attendant upon a fire or explosion necessitating the use of an escapeway and a lifeline, i.e., smoke and limited visibility.

Cumberland also relies on the testimony of Michael A. Konosky, its Senior Safety Representative who was with Whitaker when the citations were issued. Konosky testified that if he came upon a cable below the lifeline he would “[I]eave it go, walk under the hose and grab it on the other side”. (Tr. 205). He also opined that he could do that in smoke “[b]ecause I know where its at. It ain’t like you got to hunt for it. It would be right ... in the middle of [a four foot walkway between the rib and the structure].” (*Id.*). I find this testimony speculative regarding the action of miners in an emergency mine evacuation in conditions of fire and smoke.

Further, I find that the need for miners escaping during an emergency to flip the lifeline from the overhead open J-hooks in order to access the lifeline would certainly impede their escape in an emergency. In the same fashion, the presence of cables below the lifeline in the entry at several locations prevents access to the lifeline on a “continuous” basis. Thus, miners would be delayed by losing contact with the lifeline at the point of its intersection with the cable, and then having to relocate it by feel would further hinder their escape especially in conditions where vision is obscured due to the presence of smoke.

As set forth above, (*see, supra*, Section III (A)), the regulatory purpose of the requirements of lifelines and escapeways is, to allow miners to quickly escape in an emergency. Also, applying, in this context, the plain meaning of the terms of Section 75.380(d)(7), as discussed above, I find that the suspension of the lifeline by numerous J-hooks, and its location above cables would not enable miners to use it “effectively” to escape. I thus find that it has been established that the cited location of the lifeline was violative of Section 75.380(d)(7)(iv).

2. Citation No. 7019885

On December 7, 2007, Whitehair inspected the lifeline in the No. 2 track entry of the 5 Butt East longwall section from the last outby piece of track equipment in the entry at around the No. 38 crosscut, inby to the inby end of the lifeline, a distance of approximately 750 to 850 feet. This entry was the primary escapeway for the longwall section. The lifeline in the escapeway was located over various track equipment for a distance of 450 feet. The lifeline was hung in the middle of the entry, and was positioned over the track equipment 12 to 24 inches from its edge on the walkway side. The various pieces of track equipment were all at least seven feet wide and between three and five feet high. In addition, at various locations along the cited lifeline, cables and waterlines, located approximately seven inches down from the roof, ran perpendicular and under the lifeline at issue. Upon observing these conditions, Whitehair issued Citation No. 7019885, alleging a violation of Section 75.380(d)(7)(iv).

Cumberland argues that the lifeline in the cited area was capable of being used effectively. Cumberland asserts, *inter alia*, that the lifeline could be accessed by standing on the track equipment, track rail, or the ballast. Also, Cumberland argues that the lifeline could be reached more easily at the inby end, and that there were pull-downs that hung down from the lifeline at various locations in the track entry.⁴

Whitehair expressed his concerns regarding the location of the lifeline above track equipment as follows:

Q What effect if any did the equipment on the track have on the miner's ability to use the lifeline in that escapeway?

A Well, I had two concerns. My first concern was, if a miner or miners were using the lifeline in order to escape, obviously they would be in smoke so thick that they couldn't see or they wouldn't be using the lifeline, and the miners would get on the lifeline at the end. It would pull down like it's designed to do and they would be hastily trying to escape.

At some point, the lead miner is going to run right into the end piece of equipment that is in the middle of the entry or close to the middle of the entry, and my belief was that he could very easily be injured, he could fall, he could rupture his breathing bag on his SCSR, and that was one concern.

My other concern is that if the lifeline was pulled down on top of this equipment, that there were areas that the lifeline could snag, become entangled and prevent the miners from using it.

Tr. 101

This testimony was not impeached on cross-examination, and therefore I accept it.

Based on all the above, I conclude that the location of the lifeline above track equipment for approximately 500 feet, and water lines and cables at some points, would tend to impede or hinder the escape of miners in an emergency. As such, I find that the location of the lifeline herein was not positioned in such a manner for miners to use "effectively to escape." *see* Section

⁴Not much weight was accorded this assertion in light of the fact that the record does not establish the existence of pull-downs along the lifeline in the cited area. The only evidence on this point consist of the testimony of Konosky, who was with the inspector during the inspection of the cited area. Konosky indicated that he was not sure that the pull-downs were in place at the time of the inspection.

75.380(d)(7)(iv). Thus, I find that the location of the lifeline in the entry at issue was not in conformity with Section 75.380(d)(7)(iv).

3. Citation No. 7019887

On December 10, 2007, Whitehair inspected the lifeline in the number two track entry, the primary escapeway for the Eight Butt East section of the mine. He examined the lifeline in by from the No. 35 crosscut to the end. He indicated that the lifeline, which was hung from the mine roof approximately seven and a half feet above the floor, was located over various track equipment at a point approximately one to two feet in from the outer edge of the equipment, for a distance of approximately a hundred and twenty feet. In addition, at the No. 35 cross cut, the lifeline was located over a waterline that ran perpendicular to the lifeline. He issued a citation alleging a violation of 30 C.F.R. § 75.380(d)(7)(iv).

The location of the lifeline at issue herein was essentially the same, i.e. over track equipment and a waterline, as the location cited in Citation No. 719885. For the reasons set forth above, (*See, supra* Section III (B)(2)), I find the location of the lifeline herein similarly to be not in conformity with Section 75.380(d)(7)(iv). Thus, I find that the location of the lifeline violated Section 75.380(d)(7)(iv).

4. Citation No. 7019889

On December 11, 2007, Whitehair inspected the lifeline in the No. 2 track entry, the primary escapeway for the Fifteen Butt East section of the mine. He indicated that the lifeline, which was hung approximately seven and a half feet above the floor, was located above track equipment for approximately three hundred feet. The lifeline was located at a one to two feet in from the outer edge of the equipment. He issued a citation alleging a violation of Section 75.380(d)(7)(iv).

Since the cited condition is essentially the same as that cited in Citation No. 7019885, I find, for the reasons set forth above, *supra* Section III(B)(2), that the location of the lifeline herein violated section 75.380(d)(7)(iv).

C. Notice

In essence, it is the position of the Cumberland that, prior to the issuance of the citations at bar, it had not been provided with any notice that the manner in which the cited lifelines were located was not in conformity with the requirement of Section 75.380(d)(7)(iv). In this connection, Cumberland cites the facts that these conditions had never before been cited in any inspection subsequent to the promulgation of Section 75.380(d)(7)(iv), that neither the regulatory history regarding the promulgation of Section 75.380(d)(7)(iv), nor its placement within 30 C.F.R. Part 75 Subpart D is instructive regarding what is to be considered an “effective” location

for lifelines, and that the Secretary had failed to provide any definitive guidance regarding the subject of the placement of lifelines, or on how Section 75.380(d)(7)(iv) is to be applied.

In evaluating whether an operator has received notice of the regulations of a mandatory standard the Commission has adopted a reasonably prudent person test. As set forth in *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694 (July 2002):

The appropriate test for notice is “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

In *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656, (Aug. 2008), the Commission⁵ reiterated the following “reasonably prudent person” standards:

[T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (Dec. 1982); see also *Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), “in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement,” but whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The reasonably prudent person is based on an “objective standard.” *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

In *Lodestar*, 24 FMSHRC 694-95, the Commission identified various factors that are relevant in deciding whether a party had notice of a regulation’s requirements as follows:

⁵Although two of the four Commissioners filed a separate opinion regarding one of the matters at issue, all of the Commissioners were in agreement regarding, *inter alia*, the decision on the issue of notice.

In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors are relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *See also Diamond Roofing Co. v. Occupational Safety and Health Review Comm.*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997).

The parties stipulated that subsequent to the promulgation of Section 75.380(d)(7)(iv), Cumberland had not been previously cited for a violation of the standard until December 6, 2007, when Citation No. 7019884 was issued, even though the lifeline had been located in the same manner since the promulgation of the standard. Also, I note that the Secretary has not provided any express written guidance with regard to the specific manner of location of the lifeline to satisfy the requirements set forth in Section 75.380(d)(7)(iv). However, as set forth above, (*See supra*, Section III (A)), I take cognizance of the regulatory history of the mandate of lifelines, the regulatory context of the standard at issue, its sentence structure, and the common meaning of its terms. As discussed above, (*See supra*, Section III (A)), the combination of all these factors clearly establishes that the manner of the location of lifelines is to achieve the result of enabling miners to use the lifeline "effectively to escape," i.e., a quick escape in an emergency. Within the above context, I find that a reasonably prudent person would have recognized that the manner of the installation of the lifelines at issue was not in conformity with Section 75.380(d)(7)(iv). As such, Cumberland's argument regarding lack of notice is rejected.

D. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor 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.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

(Emphasis added)

I find that the record establishes, as set forth above, (*See, supra*, Section III(B), that Cumberland violated a mandatory standard, i.e., Section 75.380(d)(7)(iv), in four locations, and that these violations contributed to the hazard of miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape. At issue is the third element of *Mathies*, which asks whether there is a reasonable likelihood that the hazard contributed to a violation will result in an injury, i.e., a reasonable likelihood of an injury-producing event. (*See, U.S. Steel Mining Co.*, 7 FMSHRC, 1125). In other words, the question is whether there was a reasonable likelihood that the hazard contributed to by the violative conditions of the location of the lifelines, i.e., a delay in the evacuation in the event, of an emergency necessitating the use of such lifelines resulting in injury, is dependent upon the existence of a reasonable likelihood of an injury-producing event i.e., a fire or explosion. The Secretary has failed to adduce the existence of facts that, in normal mining operations, would have tended to establish that there was a reasonable likelihood of a fire or explosion. Indeed, Whitehair conceded on cross-examination that a fire or explosion that would lead to reduced visibility to the point where use of a lifeline was necessary was not reasonably likely.⁶

⁶The Secretary asserts, in essence, that the third element of *Mathies* must be "viewed in the context of continuing mining operations and of an emergency necessitating use of the escapeway, and by analogy, the lifeline." (Secretary's Brief at 31). The Secretary cites the following cases in support of its position: *Twentymile Coal Co.*, 29 FMSHRC 806 (Sept. 2007) (Judge Manning), *Harlan Cumberland Coal Co.*, 19 FMSHRC 911 at 916-17 (May 1997) (Judge Barbour), and the dissenting opinion of two Commissioners in *Manalapan Mining Co. Inc.*, 18

Therefore, for all the above reasons, I find that the third element set forth in *Mathias*, 6 FMSHRC 1 has not been established and thus that it has not been established that the violations were significant and substantial.

E. Penalty

I find, based on the parties' stipulations, that Cumberland produced over seven and a half million tons of coal at the subject mine, and that affiliated companies produced over 71 million tons of coal in 2006. The Secretary acknowledged that the fact that Cumberland was assessed for 224 violations during 676 inspection days in the fifteen months prior to the violation at issue was evidence of a low history of violations. The parties stipulated that the proposed penalties will not affect Cumberland's ability to continue in business. I find that the violations were abated in a timely fashion, and as such Cumberland exhibited good faith.

As set forth above, (*See, supra*, Section III (D)), I found that the violations were not significant and substantial based on the lack of evidence that an injury-producing event was reasonably likely to have occurred. As such, an injury of a reasonably serious nature was not reasonably likely to have occurred. However, I note Whitehair's testimony that, in the event of a fine or explosion, due to the manner in which the lifeline was located, miners would either be delayed or prevented from using it to escape, which could result in a fatal injury due to carbon monoxide poisoning. (*See* Tr. 158) This opinion was not impeached or contradicted. Thus, within this context, I find that the level of gravity was more than moderate.

I take cognizance of the fact that I rejected Cumberland's claim that it did not have any prior notice that the manner in which the lifeline was hung constituted a violation of the standard at issue. (*See supra*, Section III (C)) However, this finding was made based on an application of the objective reasonable prudent person test which requires an analysis of the following factors: "the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question." *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002).

FMSHRC 1375, 1386 (Aug. 1996), that ("the only logical way to evaluate the gravity or seriousness of a fire suppression violation is to consider the effect the violation would have in the event for its use arises)." I note that this dissenting opinion by only two Commissioners is not of any precedential value, and thus not binding. I choose not to follow it, as it is not in harmony with the express terms of the requirement of the third element in *Mathies*, 6 FMSHRC 1, as set forth in *U.S. Steel* 7 FMSHRC 1125. For the same reasons, I choose not to follow *Twentymile Coal Co.* 29 FMSHRC 806 and *Harlan Cumberland Coal Co.*, 19 FMSHRC 911, also, both decisions were issued by fellow Commission judges, and are not binding.

On the other hand, the level of an operator's negligence requires, *inter alia*, an analysis of the following factors: the extent of the violative condition, the length of time it had existed, the operator's efforts at abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the condition is obvious or poses a high degree of danger. (*See, Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987)).

I note that the violative location of the cited lifelines was obvious, extensive, and had existed for a considerable period of time. Also, I note that Cumberland did not adduce evidence that it had not been aware of the manner of their location. However, I place considerable weight on evidence mitigating the level of Cumberland's negligence. In this connection, I note that although the mine had been inspected on various occasions subsequent to the promulgation of Section 75.380(d)(7)(iv), Cumberland had not been cited for the manner in which the lifeline was located until the first citation at issue herein was issued on December 6, 2007. Of most significance is the fact that the Secretary had not provided Cumberland with any express guidance setting forth specifically what manner of location of lifelines would be considered to be not in conformity with the cited standard.

Within this context, I find that the level of Cumberland's negligence in regard to all the citations at issue to have been low.⁷

Considering all of the above factors set forth in Section 110(i) of the Mine Act, and placing considerable weight on the low level of the operator's negligence, I find a penalty of \$3,000 is appropriate for each of the violations found herein.

⁷The Secretary conceded that the level of Cumberland's negligence relating only to the first citation issued, No. 7019884, was low because it had previously not been cited for a violation of this standard which had been promulgated approximately a year before. The Secretary argues that once this first violation was cited on December 6, in essence, "Cumberland certainly knew or should have known of the hazardous conditions of the other lifelines ... [and that its] continued failure to take any action to present, correct, or limit exposure to these hazards at least moderate negligence." (Secretary's Brief, at 34). However, the first citation, No. 7019884, cited a violation of Section 75.380(d)(7)(iv), based on the allegation that the lifeline was hung from J-hooks and could not be reached by a miner or pulled down. Also, in several areas the lifeline could not be pulled down as it was hung over cables. It might be inferred that subsequent to the issuance of this citation other lifelines that extended over cables or waterlines (which would be considered by the issuing inspector to be violative of Section 75.380(d)(7)(iv), were hazardous as argued by the Secretary. However, such an inference would clearly not apply to the location of lifelines over various track equipment as alleged in Citations 7019885, 7019887 and 7019889, conditions that had never before been cited, and for which it had not received any specific guidance from the Secretary.

**F. Citation Nos. 7025493, 7025495, 7025975, 7025976, 7025980, 7019883,
7025981 and 7025182**

On April 24, 2009, the Secretary filed a motion to approve a partial settlement relating to the above docket numbers. The motion seeks the approval of a settlement agreement between the parties, which proposes that the total penalty for these citations be reduced to \$2,935.

I have considered the representation of the parties and find that the settlement is a fair resolution and consistent with the Mine Act. I approve the settlement and grant the motion.

ORDER

It is **Ordered** that, within thirty days of this Decision, Cumberland pay a total civil penalty of \$14,935.00.

Avram Weisberger
Administrative Law Judge
202-434-9940

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