

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

March 14, 2007

THE AMERICAN COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 2005-105-R
v.	:	Order No. 7581153; 6/8/2005
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA,	:	
Respondent	:	Galatia Mine
	:	Mine ID 11-02752
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	CIVIL PENALTY PROCEEDINGS
ADMINISTRATION, MSHA,	:	
Petitioner	:	Docket No. LAKE 2005-87
	:	A.C. No. 11-02752-54503
	:	
v.	:	Docket No. LAKE 2005-117
	:	A.C. No. 11-02752-61764 01
THE AMERICAN COAL COMPANY,	:	
Respondent	:	Docket No. LAKE 2005-118
	:	A.C. No. 11-02752-61764 02
	:	
	:	Docket No. LAKE 2005-129
	:	A.C. No. 11-02752-64670
	:	
	:	Docket No. LAKE 2006-2
	:	A.C. No. 11-02752-67066
	:	
	:	Docket No. LAKE 2006-10
	:	A.C. No. 11-02752-69633
	:	
	:	Docket No. LAKE 2006-23
	:	A.C. No. 11-02752-72941
	:	
	:	Docket No. LAKE 2006-27
	:	A.C. No. 11-02752-73441
	:	
	:	Docket No. LAKE 2006-28
	:	A.C. No. 11-02752-72416-01
	:	

: Docket No. LAKE 2006-29
: A.C. No. 11-02752-72416-02
:
: Docket No. LAKE 2006-43
: A.C. No. 11-02752-75198
:
: Galatia Mine

DECISION

Appearances: Marco M. Rajkovich, Jr., Esq., Noelle Holladay True, Esq.,
Rajkovich, Williams, Kilpatrick & True, Lexington, Kentucky,
for the Contestant/Respondent;
Christine Kassak-Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for the
Respondent/Petitioner;

Before: Judge Feldman

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). The hearing in these matters was conducted on October 17, 2006, in Owensboro, Kentucky. There are 12 dockets in this consolidated proceeding - - 11 civil penalty proceedings and one contest proceeding. These proceedings concern 98 citations and orders. At the hearing the Secretary of Labor (“the Secretary”) and The American Coal Company (“American Coal”) advised that they had settled 96 of the 98 citations and orders in issue. The record was left open for the parties to submit their written comprehensive settlement agreement for approval. The settlement motion was received on March 7, 2007. The parties have agreed that American Coal will pay a total civil penalty of \$163,314.00 in satisfaction of the 96 citations and orders instead of the \$271,668.00 civil penalty initially proposed by the Secretary. The parties’ settlement agreement is approved below.

At the evidentiary hearing, American Coal continued its contests of Citation No. 7581904 in Docket No. LAKE 2005-129 and Citation No. 7581788 in Docket No. LAKE 2006-28. The Secretary has proposed a total civil penalty of \$899.00 for these citations. Based on the evidence adduced at the hearing, as well as the arguments presented in the parties’ post-hearing briefs, the Secretary’s \$899.00 civil penalty proposal for Citation Nos. 7581904 and 7581788 shall be affirmed. Consequently, American Coal’s total liability for the subject 98 citations and orders is \$164,213.00.

I. Statement of the Case

Citation Nos. 7581904 and 7581788, both designated as significant and substantial (S&S),¹ each allege a violation of the Secretary's mandatory safety standard in section 75.380(a), 30 C.F.R. § 75.380(a). The citations were issued on two separate occasions in different longwall sections of American Coal's bituminous Galatia Mine. The citations were issued because stage loaders had migrated into adjacent ribs at the headgate belt entries, significantly impeding access to entries designated as primary and secondary escapeways.

Specifically, the provisions of section 75.380(a), in pertinent part, provide: ". . . at least two separate and distinct travelable passageways shall be designated as escapeways and shall meet the requirements of this section." Section 75.380(a) incorporates by reference numerous subsections of section 75.380, discussed *infra*, that specify the requirements for these designated escapeways. Consequently, the provisions of section 75.380 must be read in their entirety in order to ascertain the plain meaning of this regulatory standard.

Section 75.380(b)(1) requires escapeways to be provided "from each working section." The term "working section" is defined in the Mine Act and the Secretary's regulations as "all areas of the coal mine from the loading point of the section to and including the working faces." 30 U.S.C. § 878(g)(3); 30 C.F.R. § 75.2. The question presented is whether the operative language in section 75.380(b)(1), describing an escapeway as beginning "from" each working section, requires a mine operator to maintain an unobstructed escapeway from the working faces, or, from the loading point. American Coal does not dispute the severity of the obstructions. Rather, American Coal argues that section 75.380(b)(1) only requires it to maintain clear escapeways from the loading point. Thus, American Coal argues that the cited belt entry blockages located inby loading points do not constitute violations of section 75.380.

The working section is the area of an underground mine where miners perform their work of extracting coal. It is the miners' point of departure from the depths of the mine to the surface in the event of an emergency. It is clear that the plain language of section 75.380, that requires unobstructed escapeways from each working section, obliges mine operators to maintain a clear escape route from the working faces, where the miners are situated, to the surface. Consequently, Citation Nos. 7581904 and 7581788 shall be affirmed.

II. Findings of Fact

Citation Nos. 7581904 and 7581788 were issued based on stage loader migration towards the coal ribs at the Sixth and Seventh North longwall headgates, respectively. The headgate for the Sixth North longwall section became the tailgate for the Seventh North longwall section.

¹ A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

The Sixth and Seventh longwall sections are each approximately 1,000 feet long. The coal seam at these sections is approximately six to six and one-half feet high. The entries, including the headgate, are approximately 18 feet wide and seven feet high.

In order to appreciate the nature and location of the impediments caused by the position of the stage loaders in proximity to the rib in the headgate entries at the Sixth and Seventh North longwall sections, it is helpful to describe the longwall operations at the Galatia Mine. The headgate and tailgate entries are at opposite ends of each longwall that is 1,000 feet in length. Unlike continuous mining sections, which have multiple entries with multiple means of access to designated escapeways, longwall sections only have one route of access to the designated escapeway entries. Specifically, the sole access from the longwall face to the primary or secondary escapeway is by travel outby the headgate belt entry to connecting crosscuts.

The relevant three parallel entries at the Sixth and Seventh North longwall sections are the No. 3 headgate or belt entry, the No. 2 primary escapeway, and the No. 1 secondary escapeway. (Joint Ex. 2; Gov. Ex. 4). Crosscuts from the No. 3 headgate belt entry are used to access the No. 2 and No. 1 entries. The specific route to the surface from the face in an emergency is outby the No. 3 belt entry and through the last open crosscut into the No. 2 or No. 1 designated escapeway entry. (Gov. Ex. 4).

The No. 3 headgate belt entry can comprise part of a section 75.380 escapeway even though the No. 3 entry is not a designated escapeway entry. In fact, American Coal asserts the escapeway starts at the loading point which is located in the No. 3 belt entry.

The component parts of a longwall unit are: the shields; a shearer; a pan line; and a stage loader. The shields, located above the pan line, hold up the roof and afford miners protection from roof falls during the coal extraction process. The shearer contains two cutting drums. It runs on a track up and down the pan line the full length of the longwall, cutting coal and spraying water to control dust. The extracted coal falls on the pan line which is approximately four and one-half feet wide. Chains, stretching from the headgate to the tailgate, provide the motion for the pan line which transports the coal to the headgate area where it is transferred from the pan line onto the stage loader. The width of the pan line in the No. 3 belt entry where the pan line connects to the stage loader is approximately three feet wide.

As noted, the stage loader is located in the headgate entry outby the face. The height and width of the stage loader varies at different locations. The height of the stage loader conveyor motor assembly, including the side rail, is approximately four and one-half feet high. The stage loader belt width ranges from 48 inches wide to as much as 13 feet wide. The width of the tailpiece is approximately three feet wide.

When facing the face, the headgate belt entry has ribs with crosscuts on the outermost left side, and a solid rib of coal on the right side. Normally, the stage loader remains stationary in the center of the headgate entry. However, the stage loader can migrate toward the rib or toward the solid block of coal depending on the alignment of the longwall shearer. For example, cutting coal deeper at the tailgate area of the longwall causes the stage loader to migrate from the center of the entry to the rib.

There are two reasons for American Coal to prevent stage loader migration. First, as the stage loader approaches the rib it decreases clearance between the loader and the rib obstructing access through the headgate to the designated escapeway entries. Second, the stage loader can be damaged if it migrates against the rib.

To counteract migration from centerline to rib, the longwall shearer must be adjusted to cut deeper into the headgate area to cause the stage loader to migrate toward the solid block of coal until it is centered in the headgate entry. Stage loader migration does not occur immediately or over a single shift. Rather, migration is gradual in that it takes several eight hour shifts for the stage loader to migrate noticeably. So too, deeper or shorter cuts required to correct migration are time consuming and cannot be accomplished quickly. Correcting migration takes approximately two to four shifts. (Tr. 434).

As previously stated, the headgate entry dimensions are approximately 18 feet wide and seven feet high. The stage loader and motor assembly is approximately four and one-half feet high and has a maximum width of 13 feet. (Tr. 382). Paul Kraus, American Coal's Manager of Health and Safety, testified the fundamental goal in longwall mining is to keep the stage loader positioned "right dead on" in the center of the headgate entry. (Tr. 382). Maintaining the stage loader in the center of the headgate provides miners with a two and one-half feet wide travelway between the stage loader and the rib which can be used to traverse through the headgate to the designated escapeway entries. When stage loaders migrate against the rib, miners must climb over the loaders to access the designated escapeway entries, with only approximately two and one-half feet clearance between the top of the loaders and the headgate roof.

The coal seam at the longwall sections in the Galatia Mine dip from the headgate to the tailgate. The coal seam also rolls, which means it goes up and down. Consequently, Kraus stated longwalls are normally aligned to mine the headgate approximately 50 feet further ahead than the tailgate. (Tr. 385-86). The deeper cuts at the headgate keep the stage loader in the center of the entry.

However, Kraus related that roof falls in the tailgate require deeper cuts in the tailgate area in order to create a clear tailgate entry as quickly as possible. Thus, a tailgate roof fall may require tailgate advancement of 75 feet or more, which would cause the stage loader to migrate from the centerline towards the rib. Kraus attributed the migrations cited in Citation Nos. 7581904 and 7581788 to adverse roof conditions in the tailgate areas of the Sixth and Seventh North longwall sections that required adjusting the longwall shearer to cut deeper into the tailgates.

On May 11, 2005, Mine Safety and Health Administration (MSHA) Inspector Steven Miller issued Citation No. 7581075 citing a violation of section 75.380(a) because a safe egress route was not provided from the Sixth North longwall face. (Gov. Ex. 11). The citation was issued because the stage loader had migrated to the headgate rib requiring miners to climb over the loader. Although Citation No. 7581075 is not a subject of this proceeding, it was issued for an identical obstruction in the same headgate entry cited in Citation No. 7581904 that American Coal contests in these proceedings. Miller designated the cited violative condition as

non-S&S because he did not personally observe anyone attempting to climb over the stage loader. Shortly after issuing Citation No. 7581075, Miller met with American Coal management and hourly employees at which time he expressed MSHA's concern with the hazards associated with stage loader migration. Citation No. 7581075 ultimately was terminated on June 15, 2005, after adjustments were made that caused the stage loader to migrate back to the center of the entry providing four feet clearance between the rib and the stage loader. American Coal did not contest Citation No. 7581075.

a. Citation No. 7581904

Following Miller's May 2005 meeting with American Coal, on June 7, 2005, MSHA Inspector Arthur Wooten conducted a follow-up inspection of the Sixth North longwall. Although the tailgate is not considered an escapeway, it provides an alternative escape route from the face if escapeways are inaccessible because of adverse conditions at the headgate. On June 7, 2005, the Sixth North tailgate was not travelable because of unsupported roof. The tailgate was deemed unsupported because American Coal's roof control plan requires supplemental roof support when the tailgate shield is more than five feet from the closest roof bolt support in the tailgate. On June 7, 2005, the tailgate shield was approximately nine feet away from roof bolt support in the tailgate. Consequently, Citation No. 7581701 was issued on June 7, 2005, for American Coal's failure to follow its approved roof control plan because of the inadequately supported tailgate. American Coal did not contest Citation No. 7581701.²

During the course of Wooten's June 7, 2005, inspection, he noted that the Sixth North longwall headgate belt entry was blocked because the stage loader's conveyor motor assembly had migrated to within three to five inches of the headgate rib. While the belts were running, Wooten observed a miner climb over the four and one-half feet high stage loader motor assembly to access the face. The miner had approximately two and one-half feet clearance between the top of the loader and the mine roof. At the time, the mine floor was muddy, and the miner had mud up to the top of his boots. Wooten was concerned, given the muddy conditions, that a miner could slip and sustain serious injury while attempting to climb over the loader.

As a result of his observations, Wooten issued Citation No. 7581904 citing a violation of section 75.380(a) because a safe means of escape was not provided from the Sixth North longwall face. (Gov. Ex. 2). Wooten designated the violation as S&S because there was no "speedy access to the escapeways" for miners working at the face at a time when there was no viable tailgate option because of unsupported roof. Wooten also believed a serious slip and fall injury was likely because of the muddy conditions in the headgate area. (Tr. 138, 150-51). Wooten attributed the violation to a moderate degree of negligence because he did not observe management personnel witness the miner climb over the stage loader. The Secretary proposes a civil penalty of \$375.00 for Citation No. 7581904.

² MSHA records reflect American Coal has paid the \$60.00 civil penalty proposed by the Secretary for Citation No. 7581701.

b. Citation No. 7581788

Inspector Miller inspected the Seventh North longwall section on September 8, 2005. Miller observed a miner climb over the stage loader in the vicinity of the stage loader's rock crusher. At that time, Miller noted the stage loader motor assembly had migrated to within approximately ten inches of the headgate rib. Miller also noted that conditions in the headgate were muddy. Based on his observations, Miller issued Citation No. 7581788 citing a violation of section 75.380(a). The violation was designated as S&S because of the likelihood of a slip and fall injury, as well as the likelihood of serious injury or death in the event miners were prevented from accessing the designated escapeways during an emergency. The cited condition was attributed to a moderate degree of negligence. The citation was terminated on September 9, 2005, after the stage loader had adequately migrated back toward the tailgate once again providing safe egress to the escapeway. (Gov. Ex. 10). The Secretary has proposed a \$524.00 civil penalty for Citation No. 7581788.

III. Further Findings and Conclusions

a. Factual Basis of Violation

As a threshold matter, at trial, the parties stipulated that the cited obstructions were significant as the stage loaders essentially were against the ribs in the Sixth and Seventh North longwall headgate entries. Although the distance from each stage loader to its respective rib varied by several inches, the parties also stipulated that the degree of impediment caused by each stage loader was essentially the same. (Tr. 71, 265).

American Coal, in essence, presents alternative arguments. First, American Coal challenges the fact of a violation of section 75.380 because it asserts that miners had an alternative to climbing over the stage loader obstructions to reach the designated escapeway entries. Second, based on its interpretation of the cited regulatory standard, American Coal asserts the obstructions do not constitute violations because section 75.380 does not require mine operators to maintain escapeways in working sections.

With respect to its first argument, American Coal asserts the migration of the stage loaders does not constitute violations of section 75.380(a) because climbing over the pan line to reach the designated escapeway entries is an acceptable alternative to climbing over the stage loaders. (*Am. Coal post-hrg. br.* at p. 5). As previously noted, the headgate belt entries have ribs with crosscuts on one side, and a solid ribs of coal on the other side. In this case, the stage loaders had migrated within inches of the ribs. American Coal asserts, after de-energizing the pan, a miner could: (1) climb over the pan assembly at the face; (2) walk outby in the headgate entry through the wider travelway between the stage loader and the solid rib of coal; (3) climb over the conveyor tailpiece; and (4) walk to the last open crosscut from the No. 3 headgate entry into the No. 2 primary escapeway.

Section 75.380(d)(1) requires these escapeways to be kept in a safe condition “to assure passage of anyone, including disabled persons.” (Emphasis added). The problem with American Coal’s suggested escape route is that the pan line is three feet high and a minimum of three feet wide, and as wide as five feet counting the spill trays. (Tr. 421-22). Moreover, the belt tailpiece is three feet high and four feet wide. (Tr. 424). Clearly, American Coal’s evacuation route, that involves significant climbing and crawling over belts, particularly when viewed in the context of exigent circumstances such as fleeing from smoke or fire, does not satisfy the “assurance of passage” requirements of section 75.380(d)(1). In addition, it is self evident that section 75.380 does not sanction injured miners navigating over inclined pans and belts during an emergency evacuation. Thus, American Coal’s assertion that the facts do not support the fact of a violation of section 75.380(a) is unpersuasive.

b. Plain Meaning of Section 75.380

The provisions of section 75.380 require the maintenance of at least two separate and distinct travelable passageways designated as primary and alternative (secondary) escapeways. Sections 75.380(f)(1) and 75.380(h). Section 75.380(g) requires that “. . . the primary escapeway must be separated from belt and trolley entries for its entire length, to and including the first connecting crosscut outby each loading point”

American Coal’s remaining argument, that the cited obstructions do not constitute violations, is based on its interpretation of section 75.380 that escapeways begin at the loading point. American Coal asserts, if section 75.380 only requires a mine operator to maintain an unobstructed escapeway from the loading point, instead of from the working face, the obstructions inby the loading points near the headgate faces do not constitute violations. To support its assertion, American Coal relies on deposition statements and testimony by Inspectors Miller and Wooten concerning MSHA’s policy that two separate and distinct escapeways must be provided from the tailpiece (loading point). (*Am. Coal post-hrg. br.* at pp. 6-8).

The MSHA policy relied upon by American Coal is consistent with the provisions of section 75.380(g). This mandatory safety standard requires that belt entries must be separated from the primary escapeway at the crosscut outby the loading point. It does not relieve a mine operator of its obligation to maintain section escapeways in belt entries that provide access to the primary escapeway at the first crosscut outby the loading point. In other words, escapeways must be maintained in belt entries up to the first connecting crosscut before the loading point at which point the separate primary escapeway begins. Consequently, the testimony of Miller and Wooten is not inconsistent with the issuance of the subject citations.³

³ Section 75.1704 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 75.1704 (1976) (setting forth approval of escapeways) is the predecessor to section 75.380. While not controlling, MSHA’s policy manual summarizing the escapeway requirements in section 75.1704 is instructive. The policy manual refers to “section escapeways” as “. . . that portion of the escapeway system beginning at the working faces and extending to the section loading point area.” (Gov. Ex. 7, p.2).

Turning to the specific regulatory provisions, it is axiomatic that the “language of a regulation is . . . the starting point for its interpretation.” *Jim Walter Resources*, 28 FMSHRC 983, 987 (December 2006) *citing Dyer v. United States*, 832 F.2d at 1066. In this regard, a regulation must be read in its entirety to understand its intended purpose. *Mettiki Coal Company*, 13 FMSHRC 3, 7 (January 1991). Significantly, the provisions of section 75.380(b)(1) do not expressly require escapeways to be provided only from the loading point. Rather, section 75.380(b)(1) expressly requires escapeways to be provided “*from each working section.*” (Emphasis added). The term “working section” is defined as “all areas of the coal mine from the loading point of the section to and including the working faces.” 30 C.F.R. § 75.2

American Coal has made the meaning of “from” the focus of its argument. Absent a technical term or statutory definition, the Commission applies a word’s ordinary meaning. *JWR* 28 FMSHRC at 987. “From” is defined as “a function word to indicate a starting point: as (1) a point or place where an actual physical movement (as of departure, withdrawal or dropping) has its beginning.” *Webster’s Third New Int’l Dictionary, Unabridged* 913 (1993).

Applying the plain meaning of the word “from” to determine where the escapeway begins, it is clear that escapeways include the working section as the point of departure. Any other interpretation would turn section 75.380 on its head for it would deprive miners of the assurance of a clear escapeway from the area where it is needed most - - the area where they are working.

Moreover, contrary to American Coal’s assertions, section 75.380(b)(2) permits the escapeway to begin at the loading point *only* during installation and dismantling of the loading point. In fact, the very reason section 75.380(b)(2) is an exception is because escapeways normally begin at the working face. The face as the normal starting point for an escapeway is supported by the preamble to section 75.380. While a preamble is “not officially promulgated” and does not take precedence over the express provisions of a regulation, an examination of the preamble of section 75.380 is helpful in placing the loading point exception in section 75.380(b)(2) in context. *Martin County Coal Corporation*, 28 FMSHRC 247, 269 (May 2006) (concurring opinion). The relevant portion of the preamble states:

Paragraph [75.380](b) *requires escapeways from each working section* and from each area where mining equipment is being installed or removed. *These escapeways must be continuous to the surface* escape shaft opening or to the escape shaft or slope facilities to the surface. Paragraph (b) (2) recognizes that during the installation or removal of mechanized mining equipment, *the term working section, as defined, may not be appropriate* because in one case the loading point may not yet be located by the installation of a belt tailpiece or feeder and in the other, it may have already been removed. In these cases, the required escapeways must begin at the projected location of the loading point in areas

where equipment is being installed and at the location of the last loading point for the section when equipment is being removed. This aspect of the final rule clarifies the existing provision and is necessary to provide safe escape for miners from hazards that may develop during this phase of the mining operation.

57 Fed. Reg. 20904 (May 15, 1992) (emphasis added).

The purpose of section 75.380 is to provide miners with a safe escape route. The loading point as a departure point for the escapeway only arises when there is no working section because miners are working assembling or disassembling equipment at the loading point. Thus, as explained in the preamble, the loading point serves as the departure point for an escapeway in section 75.380(b)(2) only when the traditional working section - - from the loading point to and including the working faces - - does not exist.

Finally, in its brief, American Coal refers to equipment in working sections that may cause an impediment to evacuation, such as longwall equipment that narrows clearance along the face, to support its theory that working sections are not part of an escapeway. (*Am. Coal post-hrg. br.* at p. 7). Section 75.380(d)(4)(iv) requires escapeways to be maintained at least six feet wide, except where equipment essential to longwall operations necessitates a narrower escapeway. In such instances, section 75.380(d)(4)(iv) requires escapeways to be of sufficient width to enable miners, including disabled persons, to escape quickly in an emergency. Thus, impediments caused by normal operations in a longwall section do not constitute violations of section 75.380.

However, Kraus conceded stage loader migration is not a normal consequence of the mining cycle. (Tr. 393-94). Kraus testified the stage loader should remain “right dead on center” in the headgate entry. (382-83). This would allow a passageway with two and one-half feet clearance from the rib that would not materially impede an evacuation. In contrast, the cited migrations, approximately five to ten inches from the rib, are prohibited by section 75.380(d)(4)(iv) because they would prevent miners from escaping quickly.

In the final analysis, 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. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). The plain meaning of the provisions of sections 75.380(b)(1) and 75.380(g) is that escapeways must be maintained from the working face to the crosscut outby the loading point, at which point the primary and alternate escapeways must be kept separate and distinct.

Having determined that section 75.380, when read in its entirety, is not ambiguous, we need not address the question of deference, and whether the Secretary’s interpretation is reasonable. However, I note that even if there were ambiguity, the Secretary’s assertion that section 75.380 should be applied to prohibit obstructed access to escapeways is a reasonable interpretation that furthers the safe evacuation of miners that section 75.380 seeks to ensure.

General Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (agency's reasonable interpretation of its regulations entitled to deference); *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). American Coal would be precluded from claiming a lack of notice of such an application of section 75.380(a) by the Secretary given its prior receipt of Citation No. 7581075 on May 11, 2005, for a stage loader obstruction identical to the obstructions in the contested citations. Accordingly, the escapeway obstructions cited in Citation Nos. 7581904 and 7581788 establish the fact of violations of section 75.380(a) and American Coal is liable for these violative conditions.

c. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); *Nat'l. Gypsum Co.*, 3 FMSHRC at 825. The Commission has explained that an S&S finding requires the Secretary to 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., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). The Commission has also emphasized it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.* at 1868. The Commission subsequently reasserted its prior determinations that, as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

The likelihood of injury posed by the violative condition must be viewed in the context of continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (August 1985). Consideration should be given to both the time the violative condition existed before the citation was issued and the time it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (November 1998); *Halfway, Inc.*, 8 FMSHRC 12 (January 1986).

The hazard contributed to by the obstructions is twofold. Namely, the violations create a hazard in the event of a slip and fall, as well as an impediment to escape in the event of a mine fire or explosion. As noted above, consideration must be given both to the length of time these obstructions existed when the citations were issued, and the length of time these conditions would have continued to exist had they not been the subject of citations requiring abatement.

Stage loader migration is a slow process that takes time to correct. Significantly, the evidence does not reflect that these conditions were noted in pre-shift or on-shift examinations as conditions needing remedial action. Consequently, one must assume these conditions would have continued to exist for a significant period. The fact that American Coal eventually would have corrected the migration problem to avoid damage to the stage loaders is not a mitigating circumstance.

In the context of continued exposure to the resultant hazard, the muddy conditions support the Secretary's assertion that miners will sustain slip and fall injuries of a reasonably serious nature while attempting to climb over the top of the stage loader that is four and one-half feet above the ground. The contribution of obstructed escapeways to the reasonable likelihood of the occurrence of serious injury or death in the event of a fire or explosion is self evident. Accordingly, the significant and substantial designations in Citation Nos. 7581904 and 7581788 shall be affirmed.

d. Pertinent Penalty Criteria

Section 110(i) of the Mine Act 30 U.S.C. § 820(i), sets forth the statutory civil penalty criteria used to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

The Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Commission judges make *de novo* findings with respect to the penalty criteria in section 110(i) based on the record in adjudicatory proceedings, and they are not bound by the Secretary's proposed civil penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Applying the general statutory penalty criteria, American Coal is a large mine operator that produced more than 21 million tons of coal at its Galatia Mine in calendar year 2004. It does not contend that the Secretary's civil penalty proposal will adversely affect its ongoing operations. The Secretary does not contend that American Coal's history of violations is an aggravating factor, or, that it did not abate the cited conditions in a timely manner.

While adverse roof conditions in the tailgate, or dipping of the coal seam, as causes of the migration may be viewed as a mitigating circumstance, any mitigation is negated by American Coal's failure to note the migration for correction in its pre-shift or on-shift reports. Consequently, the conditions cited in Citation Nos. 7581904 and 7581788 are attributable to at least a moderate degree of negligence. Finally, the subject violations are serious in gravity given their S&S nature and the fact that they impact all miners in the working section.

Applying the civil penalty criteria in section 110(i), I conclude the Secretary's proposed \$375.00 for Citation No. 7581904 in Docket No. LAKE 2005-129, and \$524.00 civil penalty for Citation No. 7581788 in Docket No. LAKE 2006-28, are the appropriate penalties to be assessed. The higher civil penalty for the violation in Citation No. 7581788 is justified because it was a repetition of the condition that was cited earlier in Citation No. 7581904.

IV. Settlement Terms

As noted, the parties seek approval of their agreement to reduce the civil penalty for 96 of the citations and orders in issue from \$271,668.00 to \$163,314.00. The parties' settlement agreement is of record and is incorporated by reference. The parties settlement includes an agreement with respect to Order No. 7581153 that is the subject of the contest proceeding in Docket No. LAKE 2005-105-R that is the only contest case in these matters.

The settlement terms include vacating Citation No. 7581747 in Docket No. Lake 2006-43. In addition the terms of the agreement provide for deleting the significant and substantial (S&S) designation from the following citations: Citation No. 7596479 in Docket No. LAKE 2005-117; Citation Nos. 7581379, 7581606 and 7581611 in Docket No. LAKE 2005-129; Citation No. 7579448 in Docket No. LAKE 2006-2; Citation No. 7581780 in Docket No. LAKE 2006-10; Citation Nos. 7581973, 7581786, 7581800, 7582071, 7582072, 7582103 and 7582079 in Docket No. LAKE 2006-28; and Citation Nos. 7582510 and 7581241 in Docket No. LAKE 2006-29.

I have considered the representations and documentation submitted in the settlement motion and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Consequently, the motion for approval of settlement shall be granted and American Coal will be ordered to pay a total civil penalty of \$163,314.00 in satisfaction of the 96 citations and orders that are the subject of their settlement agreement.

ORDER

ACCORDINGLY, the parties' settlement motion **IS GRANTED**. Pursuant to the parties' agreement, The American Coal Company **IS ORDERED TO PAY** \$163,314.00 in satisfaction of the 96 citations and orders that are the subject of their settlement agreement.

Consistent with this Decision, **IT IS ORDERED** that 104(a) Citation Nos. 7581904 and 7581788 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that The American Coal Company shall pay the \$899.00 civil penalty proposed by the Secretary for Citation Nos. 7581904 and 7581788.

IT IS FURTHER ORDERED that The American Coal Company **shall pay a total civil penalty of \$164,213.00** in satisfaction of the 98 citations and orders that are the subject of these proceedings. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, the captioned contest and civil penalty matters **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Marco M. Rajkovich, Jr., Esq., Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40517

Michael B. Gardner, Esq., Associate General Counsel, The American Coal Company, 29325 Chagrin Blvd., Suite 300, Pepper Pike, OH 44122

Christine M. Kassak-Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

/mh