**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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WASHINGTON, D.C. 20004-1710

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket Nos. WEST 2015-635 |
| | : | WEST 2015-676-R |
| v. | : | WEST 2015-677-R |
| CANYON FUEL COMPANY, LLC | : | |

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

## DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The case involves two citations issued to Canyon Fuel Company by the Department of Labor's Mine Safety and Health Administration ("MSHA").[1] Both citations address the surface conditions at the mine opening where the alternate escapeway for Canyon Fuel's Sufco Mine terminates. Citation No. 8483766 alleges that those surface conditions make the mine opening unsuitable for safe evacuation, in violation of 30 C.F.R. § 75.380(d)(5).[2] Citation No. 8480766 alleges that emergency services could not reliably reach injured persons at the mine opening, and therefore Canyon Fuel had failed to provide 24-hour emergency transportation, as required by 30 C.F.R. § 75.1713-1(b).[3]

After a hearing on the merits, an Administrative Law Judge issued a decision affirming both citations. 38 FMSHRC 2205 (Aug. 2016) (ALJ). Canyon Fuel filed a petition for discretionary review, which the Commission granted.

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[1] A third citation, No. 8483666, was vacated by the Judge, and the Secretary of Labor did not appeal. 38 FMSHRC 2205, 2227 (Aug. 2016) (ALJ). Accordingly, Docket No. WEST 2015-677-R is no longer at issue.

[2] The standard requires that escapeways "shall be . . . [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5).

[3] The standard requires operators to "make arrangements with an ambulance service, or otherwise provide, for 24-hour emergency transportation for any person injured at the mine." 30 C.F.R. § 75.1713-1(b).

The Commission unanimously affirms the Judge's finding that Canyon Fuel violated section 75.1713-1(b), which requires 24-hour availability of ambulance service. With regard to the citation issued for a violation of section 75.380(d)(5), two Commission members vote to affirm the Judge's decision, and two Commission members vote to reverse. As a result of the split votes, the Judge's decision as to that citation will stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

## I.

## Factual and Procedural Background

### A. Factual Background

Canyon Fuel's Sufco Mine is an underground coal mine in Utah, with approximately 20 miners per shift in the working sections. The mine's primary escapeway exits at the West Lease Portal, which has road access, and where Canyon Fuel maintains a 24-hour ambulance.

The alternate escapeway terminates at the 4 East Fan Portal, which exits onto a flat area on a mountain slope approximately 150 feet above the canyon floor. This area is approximately 200 feet long and 50 feet wide. Three buildings housing the fan motor, a diesel generator, and spare parts take up more than half of the surface area. There is no road access. To leave the area on foot, one could hike down to a creek bed at the bottom of a canyon, then follow an unpaved trail for a few miles to a gravel road. This path took Canyon Fuel's operations manager two hours to walk, in good weather, while uninjured. Alternatively, one could hike uphill 400-500 yards up to a plateau, then follow a ridge for a short way to a Forest Service road which was not plowed in winter months. This route was not tested.

During an inspection in June 2014, MSHA Coal District 9 Manager Russell Riley viewed the mine's escapeway maps and noticed that the 4 East Fan Portal did not have road access. He asked mine personnel how miners would be evacuated away from the portal in the event of an emergency. They responded that they did not know, and had never been asked. During the closeout conference, Riley expressed his concerns to mine management. He was told that the alternate escapeway followed the shortest path out of the mine, and that MSHA had never previously taken issue with the route since it was developed in 1991. Riley described MSHA's failure to raise the issue for 21 years as an oversight. He left the mine without issuing a citation, because he was under the impression that the mine planned to take steps to relocate the alternate escapeway.

In March 2015, Riley learned that the mine did not intend to relocate the escapeway, and issued Citation No. 8483766. The citation alleges that the 4 East Fan Portal is not provided with surface road access or any dependable alternative evacuation methods in the event of a mine emergency, and therefore the mine's alternate escapeway does not terminate at a mine opening suitable for safe evacuation as required by section 75.380(d)(5). Riley explained that miners at the portal would be exposed to potential hazards such as exposure to gas and smoke, and would be cut off from medical assistance.

MSHA proposed a new alternate escapeway which would run parallel to the primary escapeway and terminate at the West Lease Portal. This route would require rehabilitation, including widening entries, adding support, and installing signs, lifelines, reflectors, and caches of Self-Contained Self-Rescuers ("SCSRs"). Riley conceded that the existing route is more direct than the proposed route. The 4 East route is 2.34 miles long with 5 overcast crossings,[4] and would require 2 SCSR change-outs. The West Lease route is 5.88 miles long with 12 overcast crossings, and would require 5 SCSR change-outs. However, Riley believed the proposed route to be the safer and more practical option. He noted that two-thirds of the distance could be travelled by vehicle, that the extra overcasts had well-built stairs and would only take a few seconds to traverse (assuming that miners were not injured), that miners would be unlikely to require SCSRs since the route was ventilated with intake air, and that it would exit at a portal with road access.

In May 2015, Canyon Fuel contacted Intermountain Life Flight to arrange for helicopter rescue services at the 4 East Fan Portal. Although helicopters would not be able to land on the area outside the portal, miners could be evacuated two at a time using a hoist. However, helicopters would not be able to perform rescue services in winds above 10 mph, in poor weather or poor visibility, or at night. Because the mine operates in winter and at night, Riley determined that reliable 24-hour emergency transportation was not available at the 4 East Fan Portal as required by section 75.1713-1(b), and issued Citation No. 8480766.

Canyon Fuel contested the first citation, asserting that the alternate escapeway met the requirements of section 75.380(d)(5) by following the most direct, safe and practical path *to* the surface. Contrary to the Secretary's interpretation, Canyon Fuel argues that the purpose of the section is to permit the fastest, safest route to the surface. Alternatively, Canyon Fuel argues the conditions on the bench were safe. Canyon Fuel also contested the second citation, asserting that the mine complied with section 75.1713-1(b) by providing 24-hour ambulance services at the West Lease portal, or alternately, that the second citation should be vacated due to lack of notice.

**B. The Judge's Decision**

With respect to the citation issued for the failure to provide a safe escapeway, the Judge deferred to the Secretary's interpretation of the standard, finding it reasonable to consider surface conditions outside the mine when determining whether a mine opening is suitable for safe evacuation. 38 FMSHRC at 2214-16. The Judge rejected Canyon Fuel's argument that the Secretary's interpretation was inconsistent with MSHA's prior practice, finding instead that the Secretary simply had not previously considered the issue at this mine. *Id.* at 2217. Having accepted the Secretary's interpretation, the Judge found that the escapeway violated section 75.380(d)(5). He found that the 4 East Fan Portal was not suitable for safe evacuation because miners would be stranded and exposed to hazards once they exited the mine, particularly if dealing with harsh weather or injury. He concluded that the Secretary's proposed alternative,

[4] An overcast is an "enclosed airway that permits an air current to pass over another one without interruption." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 384 (2d ed. 1997). Ramps or stairs are built to allow miners to cross over the overcast. Tr. 53-54, 182-83.

although longer and more difficult to traverse, is the most direct, safe and practical route to a mine opening suitable for safe evacuation, noting that it terminates at a portal with road access, the overcasts had well-built stairs, and it is similar in length to the primary escapeway. *Id.* at 2217-18.

The Judge also affirmed the citation issued for the failure to provide 24 hour ambulance service, holding that "a violation is established if, as in this case, an operator has arranged for emergency transportation, but that transportation is not available 24 hours a day at the alternate escapeway." *Id.* at 2220. He explained that the standard requires emergency transportation for "*any person* injured at the mine," but such transportation was not available for injured miners at the 4 East Fan Portal, because they could not be reliably reached by ambulance or helicopter. *Id.* The Judge rejected Canyon Fuel's argument regarding lack of notice, but found that it did indicate the operator's belief that it was in compliance with the standard. Accordingly, he reduced the degree of negligence from moderate to low. *Id.* at 2220 n.11, 2222.

## II.

## Disposition

For the escapeway citation, Canyon Fuel argues on appeal that the Judge erred in deferring to the Secretary's interpretation and in concluding that the existing escapeway violated the standard. It claims that section 75.380(d)(5) requires escapeways to follow the most direct, safe and practical evacuation route to permit safe exit from the mine, and that the existing escapeway does so. With regard to the 24-hour ambulance service citation, Canyon Fuel argues on appeal that the Judge erred in rejecting its claim that the standard did not provide adequate notice of what it required.

### A. 24-Hour Ambulance Citation No. 8480766 (Docket No. WEST 2015-676-R)

Canyon Fuel challenged the Judge's finding of a violation of section 75.1713-1(b).[5] The plain language of the standard requires 24-hour emergency transportation to be provided "for any person injured at the mine." 30 C.F.R. § 75.1713-1(b). Here, injured miners exiting at the 4 East Fan Portal may not be able to hike to the nearest road, could not be reliably reached by helicopter, and could not be reached at all by ambulance. Injured miners at the 4 East Fan Portal would be stranded without reliable immediate access to medical transportation. Common sense dictates that compliance requires accessibility; transportation cannot be provided on a 24-hour basis if the injured persons cannot be reached. The requirement for ambulance service was not available to "any person injured at the mine." Hence, we conclude that Canyon Fuel was not able to provide the requisite 24-hour ambulance service to the portal from its existing alternate escapeway and was in violation of the standard.

[5] Canyon Fuel devoted little or no attention in its brief to contesting the violation. At oral argument counsel for Canyon Fuel prudently stated that its arguments on appeal were focused upon the notice issue. PDR at 11; Oral Arg. Tr. 14, 66.

Alternatively, Canyon Fuel argued that it could not be found to have violated the standard because it had never received fair notice that the standard required the 24-hour availability of ambulance service to the alternate escapeway portal. For the reasons set forth below, we conclude that Canyon Fuel had adequate notice of the requirements of the cited standard.

To comport with due process, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [the person] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept. 1991). In determining whether a safety standard provides adequate notice, the Commission generally applies an objective standard, asking "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). Adequate notice may also be established when the language of the standard provides unambiguous notice of its coverage and requirements, or when an agency gives actual notice of its interpretation prior to enforcement. *See DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087 (Dec. 2014) (citing *Bluestone Coal Co.*, 19 FMSHRC 1025, 1029 (June 1997)); *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

As set forth above, the plain language of the standard requires 24-hour emergency transportation for persons injured at the mine. In determining whether emergency transportation arrangements comply with the standard, a reasonably prudent operator would consider accessibility. Had Canyon Fuel considered accessibility as a reasonably prudent mine operator, it should reasonably have realized that its existing arrangements at the termination point for the alternate escapeway — an area where one would reasonably foresee injured miners — did not comport with the requirements of the standard. Helicopter services that cannot operate at night or in bad weather, and that could not safely land on the area outside the portal, did not provide 24-hour access; and ground ambulances simply could not reach the site due to the absence of road access. A reasonably prudent operator would have understood that such a situation does not comply with section 75.1713-1(b).

Indeed, evidence demonstrates that Canyon Fuel was aware of the insufficiency of its plan for extracting injured miners. It began making arrangements for helicopter rescue services, and was informed by Intermountain Life Flight that there may be a fair number of no-fly days, *prior* to the issuance of the citation. Gov. Ex. 5. These facts indicate awareness that the existing ambulance arrangements were insufficient, and that even helicopter services would not be able to guarantee 24-hour availability. Canyon Fuel should have been, and may indeed have been, aware that existing emergency transportation arrangements did not comply with the standard, given the conditions at the 4 East Fan Portal.[6]

A reasonably prudent operator familiar with the industry and the standard's protective purpose should have recognized that the existing arrangements at the mine did not meet the

[6] In addition, the record indicates that Canyon Fuel had never contemplated how injured miners would be rescued from the area prior to Inspector Riley's visit in June of 2014. Tr. 24-25.

requirements of section 75.1713-1(b). The Judge properly rejected Canyon Fuel's claim of inadequate notice. We affirm the Judge's decision with respect to Citation No. 8480766.

### B. Separate Opinions of the Commissioners Regarding Safe Escapeway Citation No. 8483766 (Docket No. WEST 2015-635)

**Commissioners Jordan and Cohen, in favor of affirming the Judge:**

Canyon Fuel raises both legal issues of interpretation and factual issues as to the sufficiency of the cited escapeway. The Commission applies de novo review for legal issues, and the substantial evidence test for factual issues. *See, e.g.*, *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1194 (Nov. 1999). For the reasons below, we conclude that surface conditions are relevant to and may properly be considered when determining compliance with section 75.380(d)(5), and that substantial evidence supports the Judge's conclusion that the cited escapeway was not the "most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners" as required by the standard.

*1. Interpretation of Section 75.380(d)(5)*

Section 75.380(d)(5) requires that escapeways be "located to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5). Citation No. 8483766 alleges that the alternate escapeway is not routed to a mine opening suitable for safe evacuation because there is no reliable means of evacuation from the surface at the portal where the escapeway terminates. The Secretary claims that "safe evacuation" as required by the standard involves conditions *at* the surface as well as underground, while Canyon Fuel argues that the standard only addresses underground conditions and the route *to* the surface. The Judge found that the standard was ambiguous, and that the Secretary's interpretation was reasonable.[7] 38 FMSHRC at 2214-16. We would affirm in result, finding that the plain meaning of the standard allows for consideration of surface conditions in determining whether a mine opening is suitable for safe evacuation.

The plain text of the regulation requires that escapeways be routed to the "nearest mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5). Basic rules of grammar and interpretation dictate that "suitable for safe evacuation" modifies "mine opening," rather than "most direct, safe and practical route." *Cf. Barnhart v. Thomas*, 540 U.S. 20, 26

[7] Where the language of a regulatory provision is clear, the terms 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 Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010); *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (Jan. 1998). If the language is ambiguous, the Commission generally defers to the Secretary's interpretation unless it is unreasonable, i.e., it is plainly erroneous or inconsistent with the regulation, or there is reason to suspect that it does not reflect fair and considered judgment. *Drilling and Blasting Syst., Inc.*, 38 FMSHRC 190, 194 (Feb. 2016) (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)); *Island Creek*, 20 FMSHRC at 18-19.

(2003) (under the "rule of the last antecedent," a limiting clause or phrase should be read to modify only the noun or phrase that immediately precedes it). As both parties agree, the ordinary meaning of "evacuation" is removal from an endangered area to a place of safety. In other words, evacuation is a process that ends once the miners being evacuated are no longer exposed to hazards. As a general matter, one might expect the majority of portals to be free of surface hazards, such that evacuation is complete once miners reach the surface, and compliance effectively turns on underground conditions. However, in order to truly provide for safe evacuation, the standard must be read to consider surface hazards, if and where they exist. Our colleagues agree that the standard requires consideration of surface conditions, rejecting Canyon Fuel's argument that only underground conditions are relevant. *See* slip op. at 13.

Indeed, the Secretary offers a convincing hypothetical: If section 75.380(d)(5) were limited to underground conditions, then theoretically, an escapeway would be compliant if it followed a safe, direct and practical route to a mine opening which opened onto thin air. Clearly, such a mine opening is not suitable for safe evacuation. Indeed, at oral argument Canyon Fuel's counsel conceded that such an escapeway would not provide for "safe evacuation." Oral Arg. Tr. 8. While this is obviously extreme, the point stands: To serve the purpose of the standard (safe evacuation), miners must be able to safely exit away from the escapeway's termination point, as well as safely reach it. *Cf. American Coal Co.*, 29 FMSHRC 941, 948 (Dec. 2007) (interpreting an escapeway standard to find that an escapeway had not been "provided" where it was not readily accessible). Section 75.380(d)(5) must logically be read to allow for the consideration of surface conditions.[8]

Our colleagues disparage the Secretary's hypothetical of an escapeway leading to a mine opening into thin air, slip op. at 15, overlooking the fact that Canyon Fuel's position was — and continues to be — that the standard only addresses underground conditions and the route *to* the escapeway. In this context, the hypothetical makes complete sense. Indeed, Commissioner Young addressed this hypothetical to Canyon Fuel's counsel at oral argument. Oral Arg. Tr. 7-8.

Canyon Fuel dismisses the risk of surface hazards, arguing that the expected hazards during an emergency in an underground coal mine are underground, and therefore travelling *to* the surface removes miners from the endangered area. In support, Canyon Fuel notes that the preamble to the final rule for section 75.380(d)(5) focuses on underground conditions. Canyon Fuel correctly characterizes the focus of the preamble. *See* 61 Fed. Reg. 9764, 9812-13 (Mar. 11, 1996). This is a logical focus for the preamble. As Canyon Fuel states, it is reasonable to assume that most hazards in an underground coal mine emergency will indeed be underground, and most mine openings will be safe at the surface. As the Judge stated, "the drafters of the safety standard quite naturally assumed that once miners reach the surface, they would be safe." 38 FMSHRC at 2216.

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[8] We fail to understand why our colleagues assert that the Secretary's interpretation of section 75.380(d)(5) "extends beyond the plain language of the standard." Slip op. at 15. The standard requires that the mine opening at which the escapeway terminates be "suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5). The Secretary's concern for "safe evacuation" at the surface clearly is within the standard's plain language. *See infra* p. 6.

However, the preamble's failure to address surface conditions does not mean that such conditions should never be considered. Rather, it simply indicates that such a scenario was so unlikely that the drafters of the preamble did not address it. As the Judge said, "[w]hen MSHA promulgated and revised the safety standard, it is unlikely that the drafters of the standard thought that a situation would arise in which miners escaping from a mine might be required, after arriving at the mine opening, to hike four to five miles along a wildlife/cattle trail over rough terrain or hike up to the top of a canyon. Likewise, it is unlikely that MSHA contemplated that injured miners would require rescue via baskets suspended from a helicopter." *Id.* at 2216.

Preambles need not expressly detail every circumstance in which a standard may apply. A regulation may be applied to a scenario which was not expressly anticipated by its drafters, as long as it serves the regulation's intended purpose. *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1132–33 (9th Cir. 2003); *cf. Simola, empl. by United Taconite LLC*, 34 FMSHRC 539, 549-50 (Mar. 2012), *citing People of Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937) (Congress would have intended section 110(c) of the Mine Act to apply to LLCs, if they had existed when the statute was drafted); *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (a statute can apply in situations not expressly anticipated by Congress).

Section 75.380(d)(5) requires escapeways to provide for safe evacuation, i.e., the removal of miners from an endangered area to a place of safety. That miners will be safe once they reach the surface in most situations does not mean that potential surface hazards at the mine opening can be ignored if and when they are relevant. The plain language and purpose of the standard provide for the consideration of surface conditions when determining if an escapeway follows "the most direct, safe and practical route to the nearest mine opening *suitable for the safe evacuation of miners*."[9] 30 C.F.R. § 75.380(d)(5) (emphasis added).

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[9] Because we rely on the plain meaning of the standard, we need not address Canyon Fuel's claim that the Secretary's interpretation is undeserving of deference because it is inconsistent with prior interpretations. However, even if it were otherwise, the claim would be unconvincing. Canyon Fuel notes that MSHA's Program Policy Manual ("PPM") focuses on underground conditions. V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 42-43 (2015). However, the relevant section almost directly quotes the preamble, so the same analysis applies. *See supra* pp. 7-8. Regardless, "the Commission has never held that the Secretary is bound by the recommendations in a PPM." *Big Ridge, Inc.*, 37 FMSHRC 213, 216 (Feb. 2015).

Canyon Fuel also notes that the Secretary has never before taken issue with the surface conditions at the portal. However, prior inconsistent enforcement does not constitute a viable defense. *See U.S. Steel Mining Co., Inc.*, 15 FMSHRC 1541, 1546-47 (Aug. 1993); *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981). An individual inspector's decision not to issue a citation (or failure to notice a violation) does not create a binding interpretation on behalf of the Secretary. As the Judge found, the "Secretary's failure to enforce the safety standard at the Sufco Mine until District Manager Riley's visit is more accurately attributed to a lack of attention by MSHA than to a change in the interpretation of the standard." 38 FMSHRC at 2217. District Manager Riley should be commended for recognizing the potential danger to miners evacuating out of the 4 East Fan Portal.

*2. Substantial Evidence*

In establishing a violation of section 75.380(d)(5), the Secretary's burden is "to prove that, as compared to the [operator's] designated route, there is at least one other escapeway route that [he] has determined more closely complies with the standard's requirement." *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (Nov. 1992). In other words, the Secretary must show that the operator's route is *not* the most direct, safe and practical route to a mine opening suitable for the safe evacuation of miners. The Judge held that the Secretary's proposed alternative route is the safer, more direct and practical route to a mine opening suitable for safe evacuation. We find that substantial evidence supports the Judge's conclusion.

An escapeway must lead to a "mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5). The record supports the Judge's conclusion that the cited escapeway is deficient in this respect. The mine is in a mountainous region in Utah, and operates at night and in the winter. *See* Tr. 64-67, 266, 280; Gov. Ex. 11. As previously mentioned, the escapeway terminates at the 4 East Fan Portal, which exits onto a flat area approximately 50 feet wide, 200 feet long, and 150 feet above the canyon floor. Tr. 30-31, 150, 163. There is no road access. Tr. 23. To leave on foot, miners have to either walk down the slope to a creek bed and follow a cattle trail for 4-5 miles, or hike up the canyon a few hundred yards to a plateau, then walk to a Forest Service Road which is unplowed in the winter. Canyon Fuel's operations manager, John Byars, testified that the lower route took two hours to travel on foot, while he was uninjured and walking in good weather. The upper route has never been tested. Tr. 232-37, 276, 300-303, 317, 340.

Alternatively, miners might stay on the ledge and await helicopter rescue. However, the ledge at the 4 East Fan Portal does not have room for a helicopter to land. Tr. 155-56; Gov. Ex. 10. To perform a rescue, the helicopter crew would have to hover overhead and drop a basket to hoist miners up to the helicopter. Tr. 62, 65-66, 265-66; Gov. Exs. 5, 6. Only two miners at a time could be transported in the helicopter, and so as many as 10 helicopter trips might be necessary to bring all the miners off the ledge. Tr. 156. The hoist operation could not be performed at night, in winds over 10 miles per hour, in rain, or in most winter weather. Tr. 62, 64-68, 265-67; Gov. Exs. 5, 6. Moreover, the helicopter service requires that the lowest level of cloud cover be at least 1000 feet above the ground, and that visibility be at least three miles. Tr. 67; Gov. Ex. 6. Additionally, District Manager Riley and Assistant District Manager James Preece expressed concern that the fan at the portal discharges several hundred cubic feet of air from the mine up toward any helicopter which is hovering above, trying to drop a basket to hoist miners. This could affect the helicopter's control, and the discharge could contain mine gases or smoke. Tr. 65-66, 155.

Essentially, miners exiting at the portal in the event of a mine emergency would have to choose between hiking down a slope and then walking some distance along a cattle trail, hiking up a slope to a road that may not be passable, or waiting on the ledge until conditions are fair for helicopter rescue, all potentially in the dark, in inclement weather. They might need to do so while injured, or while assisting other injured miners. Depending on the nature of the injury, a miner may not be able to be hoisted up to the helicopter in a basket.

Safe evacuation means removing miners to a place of safety. Miners who may emerge from the escapeway to find themselves hiking through or stranded in harsh weather, while injured and without access to medical assistance, have not yet reached that place of safety.[10] Based on the record, the Judge reasonably concluded that the 4 East Fan Portal is not a mine opening suitable for safe evacuation.

Escapeways must also follow "the most direct, safe and practical route" to that mine opening. 30 C.F.R. § 75.380(d)(5). Canyon Fuel argues that MSHA's proposed route does not meet those criteria, as it forces miners to stay underground in dangerous conditions for a longer period of time. The underground portion of the proposed route is indeed longer than the existing alternate escapeway, with more overcast crossings. However, substantial evidence supports the Judge's conclusion that, *when all relevant factors are considered*, the Secretary's proposed route better complies with the standard. 38 FMSHRC at 2217-18. The proposed route may be longer than the present alternate escapeway, but it is no longer than the primary escapeway which runs parallel to it. Tr. 133. Unlike the existing alternate escapeway, it is drivable for the majority of its length. Tr. 133-34. While there are more overcasts, Supervisory Inspector Sydel Yeager testified that they would not be difficult to negotiate, as they have well-built stairs. Tr. 182. Perhaps most importantly, MSHA's proposed route leads miners to a portal where there is an ambulance continually stationed. Tr. 43.

Furthermore, as discussed above, compliance with section 75.380(d)(5) is not limited to underground considerations. Here, the underground portion of the existing route is more direct (2.34 miles with 5 overcasts), but miners following the most likely route away from the ledge would still have to descend a canyon slope and walk an additional 4-5 miles before evacuation is complete. The underground portion of the proposed route is less direct (5.88 miles with 12 overcasts), but evacuation is complete once miners reach the surface. When considering both

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[10] With regard to potential hazards, the Judge also noted that miners stranded on the ledge could be exposed to gas and smoke. 38 FMSHRC at 2218. Canyon Fuel contests this, stating that exhaust from the fan would disperse any gases. Of course, this assumes that the emergency which prompted the evacuation did not affect the operation of the fan. Regardless, even without the added hazard of exposure to toxic fumes, miners still potentially face being stranded in inclement weather without medical assistance.

Canyon Fuel argues that neither harsh weather nor unavailability of medical care is relevant here. It states that concerns regarding exposure are addressed because miners can take shelter in the buildings on the ledge. Oral Arg. Tr. 11. However, shelter and evacuation are fundamentally different; if a miner is trapped in a building surrounded by hazardous conditions, he has not been moved away from the danger — particularly if the miner is injured and in need of medical attention. Canyon Fuel also states that medical assistance is more properly addressed by section 75.1713-1(b). However, the standards are different in scope. Section 75.1713-1(b) focuses on the transportation of injured individuals, whether or not there has been a mine emergency. Section 75.380(d)(5) focuses on ensuring that all miners can be evacuated during a mine emergency without being unduly exposed to hazards, one of which might be the exacerbation of injury due to the unavailability of medical care.

underground and surface conditions, substantial evidence supports the Judge's conclusion that the proposed route better complies with the standard.[11]

For the foregoing reasons, we would affirm the Judge's decision with respect to Citation No. 8483766. Substantial evidence supports a finding that the alternate escapeway here violated the plain meaning of section 75.380(d)(5).

**Acting Chairman Althen and Commissioner Young, in favor of reversing the Judge:**

We join our colleagues in affirming the violation of 30 C.F.R. § 75.1713-1(b), stated in Citation No. 8480766, for a failure to provide 24-hour emergency transportation at the 4 East Fan Portal, the site of the alternate escapeway at Canyon Fuel's Sufco Mine. We write separately because we would reverse the Judge's finding of a violation of 30 C.F.R. § 75.380(d)(5). We disagree with our colleagues' reading of the language of the regulation. Moreover, we do not agree that the Secretary has met his burden of proving that the operator's designated route was not "the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5).

Section 75.380(d)(5) states that "[e]ach escapeway shall be . . . [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners." The focus of this provision is the route itself and more specifically addresses the

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[11] Our colleagues assert that the Secretary failed to consider the "relative risks and benefits" of each route. Slip op. at 13-14, 16. They overlook that District Manager Riley considered various alternative routes for the secondary escapeway, taking into consideration the most direct route, among other factors. Tr. 49-56. More importantly, the Secretary's assessment did not rest on a pure cost-benefit analysis. Rather, the Secretary's finding of a violation is based on the fact that the existing escapeway to the 4 East Fan Portal failed to meet a basic requirement of section 75.380(d)(5). The termination point of this escapeway failed to provide for "safe evacuation of miners," as the standard requires, and thus was not "suitable." 30 C.F.R. § 75.380(d)(5); Tr. 40-41; Sec. Br. at 26-27.

Our colleagues further assert that "the agency has created the tension here between the competing obligations of the standard by questioning the previously-approved escapeway." Slip op. at 14. In so arguing, our colleagues overlook the facts that (1) when asked by Riley, mine personnel said that they had never considered and did not know how to evacuate miners from the ledge at the 4 East Fan Portal (Tr. 24-25); (2) after his discussion with mine personnel in June 2014, Riley did not issue a citation because he understood that Canyon Fuel would consider alternatives to the existing escapeway (Tr. 38); and (3) during the next nine months, Canyon Fuel not only failed to consider relocating the escapeway but did not even contact a helicopter service to inquire about emergency evacuation from the 4 East Fan Portal. Tr. 267. Hence, rather than "creat[ing] the tension," MSHA acted in a measured way, and only issued a citation after it became clear that Canyon Fuel would not act to resolve the problem of unsafe evacuation at the termination of the alternate escapeway.

efficiency of that route for purposes of providing miners, in the event of an emergency, quick and safe egress out of the mine.

Subsection (d)(5) explicitly requires the mine operator to provide the most direct, safe and practical route to the nearest mine opening. These terms clearly identify the characteristics the Secretary must use to evaluate whether the operator's designated escapeway is preferable to an alternative route. Hence, the Secretary must evaluate and compare alternatives and determine which is the most (1) direct, (2) safe and (3) practical route to (4) the nearest mine opening (5) suitable for the safe evacuation of miners.

The plain, ordinary meaning of the term "direct, safe and practical route" is not in dispute. This case turns on the meaning of "suitable for the safe evacuation of miners." The circumstances here present an evident tension between the two clauses. In seeking to resolve that tension, the Secretary has not fully considered the implications his solution will have on miner safety. This is contrary to fundamental principles of administrative law:

> Proper administrative interpretation of a statute, rule, or regulation must meet the following three requirements: (1) the factual findings underlying the interpretation must be supported by substantial evidence, *Greater Orlando Aviation Auth. v. FAA*, 939 F.2d 954, 958 (11th Cir. 1991); *HHS v. FLRA*, 885 F.2d 911, 915 (D.C. Cir. 1989) (citations omitted); (2) the agency must offer a satisfactory explanation for its actions, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 . . . (1983); and (3) the interpretation must be consistent with the statute, rule, or regulation being interpreted, *U.S. v. Larionoff*, 431 U.S. 864, 873 . . . (1977).

*Rocky Mountain Helicopters, Inc. v. FAA*, 971 F.2d 544, 547 (10th Cir. 1992). The Secretary's interpretation fails on all three counts.

First, there is no substantial evidence regarding the comparative safety trade-offs presented by the two escapeways. The Secretary can cite nothing in the record showing that he even considered this aspect, even though his preferred route would have the miners remain underground for hours longer. This also renders the explanation for his policy choice unsatisfactory, as explained further below. Finally, in choosing to elevate one clause of the standard — that requiring a "safe" location upon evacuation — over the prime imperative to choose the most direct, safe and practicable route, the Secretary has made a decision at odds with the express terms of the standard.

The record clearly establishes that the operator's secondary escapeway to the 4 East Fan Portal is safer, more direct, and more practical than the Secretary's alternative route. First, it is much shorter. The Secretary's chosen alternative escapeway is to the West Lease Fan Portal, which at 5.9 miles long is more than twice the distance than the 2.3-mile escapeway via the 4 East Portal. Canyon Fuel Ex. 7; Tr. 49-50.

Additionally, the operator's route has fewer obstacles, such as overcasts, making it easier to traverse — especially with injured miners. Further, this opening is the nearest to the active working sections where miners would be working. The Secretary's route requires 12 overcast crossings compared to 5 in the 4 East Portal. Canyon Fuel Exs. 2, 7; Tr. 244, 247-48, 254.

While the Secretary downplays these difficulties, Gary Leaming, Canyon Fuel's safety manager, testified that the West Lease Fan Portal is the most difficult escapeway to travel. Tr. 243. Thus, the operator's designated escapeway provides the shortest, most direct route out of the active working sections of the mine in the case of an emergency. Tr. 99, 207, 225-26, 297-98. This must be the primary consideration, absent extreme conditions that would make the shortest, most direct and practical route unsuitable for the safe evacuation of miners.

The Secretary has not explained why it must be preferable to expose miners to the hazards of a longer, more arduous journey through the perils imposed by an underground mine disaster. We concede that the conditions outside the mine at the 4 East Fan Portal are not ideal, but they are *outside the mine*. Should an emergency occur, the most urgent and primary concern is getting miners out of the mine quickly and safely.

Once miners have exited the mine, they should ideally be in safe conditions away from dangers both underground and on the surface. However, the issue before us is not limited to only the route taken from the active workings to the outside, or only the conditions encountered outside. The standard requires both. Here, neither option clearly meets both of the standard's criteria, and there is thus no "ideal" alternative.

The question posed by the standard, then, is "safe compared to *what*?" The Secretary never addresses this, and the failure to do so renders his choice impermissibly arbitrary. It is a policy prerogative ungrounded on any consideration of the real problem, whose resolution may have real-world, life-and-death consequences for miners.

Our colleagues seem untroubled by the Secretary's myopia and are more than willing to fill in the interpretive gap by assuming that the Secretary's alternative is safer, without any evidentiary support for this logical leap. This is clear error:

> The Supreme Court has stated that "a rational connection between the facts found and the choice made" would be a satisfactory explanation, but that where the agency has failed to adequately supply this, "[t]he reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given."

*Rocky Mountain Helicopters*, 971 F.2d at 548, (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43 (citations omitted)).

Thus, we cannot assume that the Secretary has a good reason for his policy choice: It must be shown. The Secretary is obliged to supply a rationale and a factual basis that takes into account the relative risks and benefits of each route and must articulate a reasoned judgment as

to why his route — clearly not the most direct, safe or practical, in terms of the route itself — must be adopted. The record is entirely barren of such proof.

We note that the agency has created the tension here between the competing obligations of the standard by questioning the previously-approved escapeway. The Secretary must thus "acknowledge and account for a changed regulatory posture the agency creates." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011). This duty, too, has been ignored. Indeed, the Secretary appears entirely oblivious to the requirement to exercise a thoughtful, comparative analysis before choosing between two less-than-perfect alternatives.

When the question of regulatory interpretation involves a choice between two options, neither of which clearly meets the requirements of the standard, the question is not really one of interpreting the meaning of each term contained in the regulatory standard. Rather, the inquiry focuses on whether the Secretary has demonstrated that the operator's choice is either not compliant with the plain terms of the standard or, as is the issue in this case, is not a "suitable" choice. *Cf. Peabody Coal Co.*, 18 FMSHRC 686, 690-91 (May 1996) (stating that in plan disputes, the Secretary bears the burden of proving to the Judge that an operator's proposed plan or revision was unsuitable to the mine, which is reviewed by the Commission under the substantial evidence standard); *Prairie State Generating Co. v. Sec'y of Labor*, 792 F.3d 82, 90-91 (D.C. Cir. 2015) (noting that the plan approval process is akin to notice-and-comment rulemaking, in which mine operators receive written notice of reasoning and bases for the Secretary's initial plan-suitability determination).

Here, the issue is whether the Secretary has proven that the operator's 4 East Fan Portal, which clearly is the most direct, safe and practical route to the nearest mine opening, was not "suitable for the safe evacuation of miners." When viewed properly against the gravamen of the Secretary's policy choice, the evidence does not support the Secretary's finding of a violation of section 75.380(d)(5).

As our colleagues acknowledge, the Secretary's burden is "to prove that, as compared to the [operator's] designated route, there is at least one other escapeway route that [he] has determined *more closely* complies with the standard's requirement." *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (Nov. 1992) (emphasis added). Hence, our colleagues explain that the Secretary must show "that the operator's route is *not* the most direct, safe and practical route to a mine opening suitable for the safe evacuation of miners." Slip op. at 9.

Having correctly stated the law, our colleagues fail to apply it. The Secretary's failure to meet the burden stated in *Southern Ohio Coal* is manifest in this case. He has not explained why the most direct, safe and practical route out of the mine is less acceptable — indeed, *un*acceptable — because the relative safety of the operator's route likely puts them in greater danger than the alternative route.

The facts clearly do not support the Judge's finding that the operator's route does not meet the requirements of section 75.380(d)(5) because the Secretary focused entirely on only one part of a binary standard. The Secretary must concede that the operator's route is superior as an

evacuation route. But he asserts that the imperfect refuge available at the 4 East Fan Portal renders the escapeway "[un]suitable for the safe evacuation of miners."

In so doing, the Secretary posits the extreme example of a route which terminates at a plummet into space. Yet this amounts to a *reductio ad absurdum*. Obviously, an escapeway that exposes miners to a deadly hazard on their exit from the mine would not constitute a "safe evacuation." But miners exiting from the 4 East Fan Portal would not have faced the certain death postulated by the Secretary's hypothetical. On the contrary, the miners would have been "safely evacuated from the mine."

Whether they would be safe enough, relative to the alternative approach — which would have confined them inside the mine for hours longer, but would have ensured better egress from the mine site to medical treatment facilities — is a valid question. The problem is that the Secretary never seeks to address that question.

The answer is essential. As the Supreme Court has noted, "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). In order to determine whether the Secretary's approach conforms to this standard, he must consider the alternatives and compare their relative costs and benefits. He has failed to do so here.

Instead of making a qualified determination that the record cannot support, our colleagues focus instead on the surface conditions outside the 4 East Fan Portal in isolation, and argue for an interpretation of section 75.380(d)(5) that extends beyond the plain language of the standard. This interpretation disregards Commission precedent governing the interpretation and application of, and compliance with, standards applicable during emergency conditions.

We have previously agreed with the Secretary's contention that violations of standards that become relevant only during a mine emergency must take into account the occurrence of the emergency when determining if the violation is S&S. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2366-67 (Oct. 2011), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). Ironically, the Secretary has generally failed to contemplate the type of emergency that would require an evacuation in this case.

We must assume that this would be a severe emergency requiring evacuation of the workforce. The emergency must be of such nature as to render the primary escapeway unsuitable, because our concern in this case lies entirely with the secondary escapeway. Further, we must acknowledge certain conditions the Secretary does take into account, including numerous injured miners, some with serious injuries that would require professional medical attention, and the presence of noxious gases emanating from the mine. Indeed, section 75.380 is in Subpart D of Part 75, which provides the mandatory standards for mine ventilation. The problem with the Secretary's thesis is that it utterly disregards the fact that these conditions, especially smoke and gases, would also exist inside the mine, an environment in which the miners would be confined for several hours longer if egress were required instead from the West Lease Fan Portal alternative preferred by the Secretary.

As noted above, the Secretary offers no proof that he ever has considered the relative risks and benefits of the two alternatives or that he has reached a determination that fairly contemplates the qualitative differences between a route that is more direct, safer and more practical — increasing the likelihood of a successful escape from the dangers inside the mine — versus a route that may afford better survivability once the miners have exited the mine. Instead of assuming the emergency, the Secretary assumes a safe exit through a more arduous route. This is, tragically, not a valid assumption in a mine-wide emergency.

Clearly, the standard at issue is not concerned solely, or even primarily, with surface conditions outside a mine portal. In skewing the analysis toward that consideration, though, the Secretary, the Judge, and our colleagues fail to take into consideration the overwhelming evidence that the 4 East Portal is the most direct, safe and practical route to the nearest mine opening.

As we noted before, this is not a case of self-evident unsuitability.[12] There is no contention that the portal was obscured, inaccessible, or otherwise unusable. Our colleagues' entire decision rests on the theory that the surrounding area outside the portal was not suitable because it failed to ensure ready and immediate access to professional medical care. However, that is not what the standard requires, and pretending as though it does disregards the fact that miners inside the mine would also be denied such care until they have been successfully evacuated.

Our colleagues contend that to interpret the regulation in any limiting manner that excludes consideration of the surface conditions would undermine the purpose of the standard. However, they fail to address the fact that the regulation makes no mention of surface conditions and does not identify specific requirements that would apply to surface conditions surrounding a mine portal access to an escapeway.[13] Significantly, the remaining provisions of section

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[12] Our colleagues somehow believe otherwise, asserting that the Secretary's representative did make a determination that the East Fan Portal route was *per se* unsuitable because it would not safely evacuate the miners. *See* slip op. at 11 n.11. That is patently false. The miners would in fact be outside the mine, with indoor shelter, provisions, and rudimentary first-aid available, not a plummet into the abyss as suggested by the Secretary. The problem is the Secretary's utter failure to consider the vast, gray expanse between evacuation to perfect safety and ejection into the abyss. This case is thus entirely about relative safety, because neither condition of the standard may be ideally served.

[13] Our colleagues even dismiss that the agency limited its consideration of escapeway factors, in both the rule's preamble and MSHA's Program Policy Manual, to only underground conditions. They state that the agency could not have foreseen every possibility that could arise and would need to be addressed by the rule. Slip op. at 7-8. However, underground coal mining, which is an inherently dangerous occupation, clearly occurs in remote geographic regions, and the requirement for 24-hour access to emergency medical care was clearly contemplated by MSHA and is addressed in a separate rule. *See* 30 C.F.R. § 75.1713-1(b); slip op. at 4-5. Crafting an interpretation that extends the application of the rule to matters beyond the explicit terms of the rule is tantamount to creating a rule without engaging in mandatory rulemaking,

75.380(d) in particular address other characteristics of the escapeway, such as suitability for injured miners to traverse, the height and width of the passageway, clear markings along the route, and the provision of certain safety equipment on the route, among other requirements related to the underground conditions of the escapeway. Nowhere in the entire provision does it address or define suitable surface conditions at the mine portal.

The concerns our colleagues raise about emergency vehicle access to injured miners after they have left the mine is addressed in another provision, which the Secretary cited in this case and which the Commission has unanimously sustained. Slip op. at 4-5. We agree that miners need access to emergency services and remote locations present problems with facilitating that. However, section 75.380(d)(5) does not address this requirement, expressed in section 75.1713-1(b). Interpreting section 75.380(d)(5) to require expedited access to medical care is unnecessarily duplicative of section 75.1713-1(b).

Our colleagues also rely on speculative evidence of contaminated air exiting from the mine portal onto the miners at the landing as evidence of the unsuitability of this escapeway. Slip op. at 10 n.10. But the Secretary did not offer reliable evidence about the operation of the fan, and our colleagues' affirmance of the Secretary's opinion disregards that the noxious air that concerns them so would be coming from inside the mine.[14]

In sum, the Secretary proposes a half-considered regulatory solution in contravention of well-settled tenets of administrative law. *See Motor Vehicle Mfrs Ass'n*, 463 U.S. at 43 ("[A]n agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem. . . ."). We understand our colleagues' concerns and agree that an effective escapeway must not only provide a safe passage for miners to get out of the mine, but must also lead them to a safe location once outside of the mine. But substantial evidence does not demonstrate that the Secretary even considered, let alone made a reasoned determination in concluding, that the operator's designated route was inherently unsuitable for the safe evacuation of miners.

Accordingly, we would vacate and reverse the Judge's decision and vacate Citation No. 8483766 as the product of arbitrary and capricious decision making.

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which is a violation of the APA. *See RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 82-87 (Feb. 2004) (holding that a change in occupational code amounted to substantive rule change, rather than an interpretation, requiring rulemaking).

[14] The Secretary has argued that the mine's ventilation system "could be blowing toxic gases out of the air." Oral Arg. Tr. 40. There is no factual basis for assuming that the ventilation system in the mine will continue to function in an emergency that requires evacuation of the workforce. Indeed, numerous standards presume that miners will be inundated in smoke and will require supplemental air. *See, e.g.*, 30 C.F.R. § 75.380(d)(7) (lifelines required due to presumed poor visibility); 30 C.F.R. §§ 75.1506(c)(2), 75.1714-3, 75.1714-4 (SCSRs mandated at intervals to ensure miners will have access to emergency air supplies).

## III.

## Conclusion

For the foregoing reasons, we conclude that Canyon Fuel had adequate notice that it was not in compliance with section 75.1713-1(b) and affirm the Judge's decision with respect to Citation No. 8480766. With respect to Citation No. 8483766, two Commissioners vote to affirm the Judge's decision and two Commissioners vote to reverse. Accordingly, the Judge's decision as to that citation stands as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

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