

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 19, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 2005-129
	:	LAKE 2006-28
v.	:	
	:	
THE AMERICAN COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY THE COMMISSION:

In these consolidated civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act” or “Act”), Administrative Law Judge Jerold Feldman upheld two citations against The American Coal Company (“American”), for violations of the underground bituminous coal mine escapeway requirements of 30 C.F.R. § 75.380(a).¹ 29 FMSHRC 252 (Mar. 2007) (ALJ). American petitioned for review of the judge’s decision, which the Commission granted.²

¹ Section 75.380(a) requires that underground coal mine operators designate and provide as escapeways at least two separate and distinct travelable passageways that meet the extensive requirements of section 75.380.

² American also moved for oral argument in this case. That motion is hereby denied.

I.

Factual and Procedural Background

In 2005, American was mining its Sixth and Seventh North longwall panels at its Galatia Mine in Saline County, IL. *Id.* 254; Tr. 22; Jt. Stip. 8 & 9. The panels of coal, approximately 6-1/2 feet high and 1,000 feet long, were cut by the longwall's shearer, which would cycle from the longwall headgate to the tailgate and back again. 29 FMSHRC at 255. Coal would fall on to the longwall pan line, also known as the face conveyor, which ran parallel to the face and moved the coal towards the headgate. *Id.*; Gov't Ex. 3.

Access to the panels was provided by three parallel entries at the headgate and three parallel entries at the tailgate of the longwall. 29 FMSHRC at 255. The headgate entries of the Sixth North longwall panel later became the tailgate entries for the Seventh North longwall panel. *Id.* at 254; Tr. 362. Each entry was approximately 18 feet wide and 7 feet high. 29 FMSHRC at 255; Tr. 383.

For each panel, the entry farthest from the longwall was headgate Entry No.1, the intake air entry. Tr. 104, 107; Gov't Ex. 4. Pursuant to section 75.380, American had designated Entry No. 1 as the secondary of the two passageways to be used to exit the section in emergencies. 29 FMSHRC at 255; Tr. 104, 106; Gov't Ex. 4. The primary escapeway was the middle headgate entry, Entry No. 2. 29 FMSHRC at 255; Tr. 106-07; Gov't Ex. 4.

The closest entry to the longwall was headgate Entry No. 3, also called the belt entry. Tr. 107-08; Gov't Ex. 4. While Entry No. 3 was not a designated escapeway, it would nevertheless be used by workers leaving the face via the headgate to reach the other entries via crosscuts. Tr. 101-05, Gov't Ex. 4. On one side of Entry No. 3 was the coal intersected by those crosscuts (hereinafter "the rib side"), while on the other was the solid block of coal to be cut by the shearer on subsequent longwall cycles (hereinafter "the block side"). Gov't Exs. 3, 4.

Much of the width of the No. 3 entry heading immediately outby the face was occupied by essential longwall equipment, specifically and in order: (1) the end of the pan line that connected perpendicularly to the stage loader, and from which the coal from the face was deposited into the stage loader; (2) the stage loader, which would crush the coal and move it outby the entry, depositing it onto the conveyor belt; and (3) the conveyor belt to transport the coal to the surface. 29 FMSHRC at 255; Tr. 91-94; Gov't Ex. 4. The pan line was approximately 3 feet wide where it connected to the tailpiece of the stage loader, while the width of the stage loader varied according to its component parts. 29 FMSHRC at 255; Tr. 388, 423. At its widest point, the stage loader was 13 feet wide, including the motor connected to it on the rib side, which powered the pan line. 29 FMSHRC at 255; Tr. 109, 117-19, 388; Gov't Ex. 4. The stage loader reached a height of 4-1/2 feet, approximately 2-1/2 feet below the roof of the entry. 29 FMSHRC at 255-56.

The stage loader would normally remain stationary in the middle of the entry, and thus leave pathways on either side of it that narrowed to no less than 2-1/2 feet. *Id.*; Tr. 382; Gov't Ex. 5. Because the pan line where it connected to the stage loader obstructed access between the face and the block side of the stage loader, use of the pathway on the opposite side of the stage loader, the rib side, was necessary for unobstructed travel around the stage loader. 29 FMSHRC at 258; Gov't Exs. 4, 5.

A stage loader, however, does not always remain stationary and may migrate due to the alignment of the longwall shearer while it is cutting coal. 29 FMSHRC at 255; Tr. 136-37. Here, cutting coal deeper at the tailgate area of the Sixth and Seventh North longwall panels would gradually cause the stage loader to migrate, over the course of several shifts, from the center of the No. 3 entry, farther away from the block side and closer to the rib side of the entry. 29 FMSHRC at 255, 256.

The adverse effect such migration could have on miner travel through the No. 3 entry was noticed by MSHA on May 11, 2005, when Inspector Steven Miller issued Citation No. 7581075 to American. 29 FMSHRC at 256-57. The citation, charging a violation of section 75.380(a), alleged that the migration of the stage loader to near the rib prevented “[a] safe egress route . . . off or on” to the longwall face, as miners could only access or leave the face by climbing over the stage loader. Gov't Ex. 11. In order to terminate the citation, American had to make longwall adjustments. 29 FMSHRC at 257. Citation No. 7581075, which is not at issue in this case, was terminated seven days later.³ Gov't Ex. 11. American did not contest the citation. 29 FMSHRC at 257.

On June 7, 2005, MSHA Inspector Arthus Wooten witnessed a miner climb over the top of the stage loader in the vicinity of the pan line motor, while the motor was running, in order to access the Sixth North longwall face. *Id.* at 257; Tr. 121-22, 128. In that instance the stage loader had again migrated towards the rib, such that it was only 3 to 5 inches away from it. 29 FMSHRC at 257; Tr. 117, 148. Thus, the stage loader prevented any miner from traveling around it on that side of the entry. 29 FMSHRC at 257; Tr. 241-42.

Consequently, Inspector Wooten issued Citation No. 7581904 to American, again alleging a violation of section 75.380(a) because the stage loader migration had prevented “[a] safe egress/escape/travelway . . . on and off the 6th[] North long wall face as required.” 29

³ To counteract stage loader 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 has returned to the center of the entry. 29 FMSHRC at 256. Just as the initial migration of the stage loader will take place gradually over several shifts, so too does the redirection back to the center. *Id.*

FMSHRC at 257; Gov't Ex. 2. The citation was designated significant and substantial ("S&S"),⁴ due to the muddy conditions in the headgate area, which the inspector believed made it more likely that a miner would slip and fall while climbing over the stage loader. 29 FMSHRC at 257. In addition, at that time the tailgate was not considered a travelable alternative route to the designated escapeways because of unsupported roof in the tailgate area. *Id.*; Tr. 132.⁵

By September 8, 2005, the longwall had moved to the Seventh North section, where Inspector Miller witnessed a miner climbing over the stage loader, this time over its crushing mechanism. 29 FMSHRC at 258; Tr. 273-74. Again, the miner could not have gone around the stage loader on the rib side of the entry, because the stage loader had migrated towards the rib side, with the pan line motor being within 10 inches of the rib. 29 FMSHRC at 258; Tr. 279-80. Consequently, Inspector Miller issued a third citation to American for a violation of section 75.380(a), No. 7581788, alleging that "[a] safe egress route was not provide[d] off or on the 7th North Longwall Face as required." 29 FMSHRC at 258; Gov't Ex. 10, at 1. This citation was also designated as S&S because of muddy conditions in the headgate area. 29 FMSHRC at 258; Tr. 286-87; Gov't Ex. 10, at 1.

The Secretary proposed a penalty of \$375 for Citation No. 7581904 and a penalty of \$524 for Citation No. 7581788. 29 FMSHRC at 257, 258. American contested both penalties on the ground that it had not violated section 75.380(a). *Id.* at 258.

At trial, Paul Kraus, American's Manager of Health and Safety, explained that the coal seam at the longwall sections in the Galatia Mine not only rolls, but dips from the headgate to the tailgate. *Id.* at 256. Kraus explained that, consequently, the longwalls there are normally aligned by American to mine the headgate approximately 50 feet further ahead than the tailgate, so that the deeper cuts at the headgate keep the stage loader in the center of the entry. *Id.* At the time of the citations, however, there were adverse roof conditions in the tailgate area of the sections being mined. *Id.* Roof falls there required that American make deeper cuts in the tailgate area in order to create a clear tailgate entry as quickly as possible. *Id.* Kraus thus attributed the stage loader migration to American's having to make those deeper cuts. *Id.*

⁴ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." Because Inspector Miller did not observe any miner near the stage loader at the time of the first citation, he did not designate that violation as S&S. 29 FMSHRC at 256-57; Tr. 279.

⁵ If both passageways designated by an operator as escapeways run from the headgate, as was the case here, and conditions at a longwall face make it impossible for miners working there to exit via the headgate of the longwall, miners are supposed to use the tailgate as an alternative route to reach a designated escapeway pursuant to 30 C.F.R. § 75.384. 29 FMSHRC at 257; Tr. 213, 333, 367.

In his decision, the judge viewed this case as one in which he needed to decide the point at which, under the terms of section 75.380, the designated escapeway off the longwall section began. *Id.* at 254. The judge ruled that the escapeway started at the face in this instance. *Id.* at 260-62. He did so by applying what he understood to be the plain meaning of the standard's requirement that escapeways are to run "from each working section." *Id.* He concluded that the language meant that escapeways were required to run not only from the loading point of a working section, as American argued, but were to also include the remainder of the working section. *Id.* at 261. He further concluded that in both instances when the stage loader migrated to within less than one foot from the rib, miners were denied the "assurance of passage" section 75.380(d)(1) requires. *Id.* at 259.⁶ The judge held that American's receipt of an earlier citation provided it with notice that section 75.380(a) applied in the later instances, further found that both violations were S&S, and assessed the \$899 in total penalties requested by the Secretary for the two citations. *Id.* at 262-63.

II.

Disposition

American has limited its appeal to the findings of violation. As it did below, American argues that the area in which the stage loader sat was not within the scope of the escapeway requirement. According to American, under the plain meaning of section 75.380, an operator is only obligated to provide an escapeway "from each working section," and "working section" is defined in the Mine Act to start at the loading point of the section, so any point inby the loading point is not within the ambit of the escapeway requirement. Am. Br. at 2-6. Since the loading point was the belt tailpiece, and the stage loader was inby it, American argues that it was inappropriate to cite it for a violation of section 75.380 because the stage loader had migrated and blocked the rib side pathway. *Id.* at 6-7.

The Secretary responds that in order to give effect to the purpose of section 75.380, the standard must be interpreted to require that the route to entries necessary to access designated escapeways must not be blocked or impeded to such an extent that the escapeway is rendered inaccessible. S. Br. at 11-12. The Secretary relies on the regulatory requirement that the designated escapeways be "travelable" to support this interpretation. *Id.* at 14-15. She also maintains that, although the judge's approach to interpreting section 75.380 is slightly different than hers, both approaches are consistent with the language and purpose of section 75.380. *Id.* at 12-23.

⁶ The judge also noted American's failure to report the migration for correction in its pre-shift or on-shift reports. 29 FMSHRC at 263.

A. Interpretation of Section 75.380

The requirement that underground bituminous coal mines have designated escapeways was imposed by section 317(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (“Coal Act”), and was carried over without change to section 317(f) of the Mine Act, 30 U.S.C. § 877(f). With regard to the requirement, section 75.380 states in pertinent part:

(a) Except in situations addressed in §75.381, §75.385 and §75.386, at least two separate and distinct travelable passageways shall be designated as escapeways and shall meet the requirements of this section.

(b)(1) Escapeways shall be provided from each working section, and each area where mechanized mining equipment is being installed or removed, continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface.

(2) During equipment installation, these escapeways shall begin at the projected location for the section loading point. During equipment removal, they shall begin at the location of the last loading point.

30 C.F.R. § 75.380(a)-(b). 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 U.S.C. § 378(g)(3); 30 C.F.R. § 75.2. Here, the loading point was where the stage loader dumped the crushed coal onto the conveyor belt. Tr. 297, 301; Gov’t Ex. 4.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary’s reasonable interpretation of her regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec’y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation . . . is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’”) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). In determining whether a standard is plain or ambiguous, the “language of a regulation . . . is the starting point for its interpretation.” *Dyer*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

The Secretary argues that the narrowing of the pathway around the stage loader from 2-1/2 feet to less than a foot violated section 75.380(a)'s requirement that the passageways designated under the regulation as escapeways be "travelable," based on the dictionary definition of that term as "capable of being traveled: PASSABLE." S. Br. at 15 (citing Webster's Third New Int'l Dictionary 2433 (2002)). According to the Secretary, under this definition an inaccessible escapeway cannot be considered "travelable."

Resort to the dictionary definition of "travelable" is appropriate here, because neither the Mine Act nor MSHA's regulations define the term. In the absence of a regulatory definition or technical usage of a word, we apply the ordinary meaning of the word. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table).

However, we do not agree with the Secretary that the term "travelable" as it applies to an escapeway necessarily encompasses whether the escapeway is accessible. Whether a route is "passable" or "travelable" generally refers to the internal qualities of the route itself, from end to end, and not whether someone can get to the route from outside it. For instance, during snowy conditions, main roads are often described as "passable," with the qualifier that it is difficult to get to the road because of the condition of connecting secondary roads. The inaccessibility of a main road due to snow on the connecting road is thus not considered to render the main road "impassable." The concept of accessibility as applied to a route is a different concept from passability or travelability.⁷

Furthermore, the extensive regulatory history to section 75.380 does not support the Secretary's specific interpretation. *See, e.g.*, 57 Fed. Reg. 20868, 20904-06 (1992); 61 Fed. Reg. 9764, 9810-20 (1996). At no point did MSHA indicate that, in using the term "travelable," it meant to extend the meaning of the term beyond its normal usage to include the concept of accessibility. Consequently, we cannot agree that the Secretary's interpretation of section 75.380(a) is supported by the plain meaning of the term "travelable."

While we would normally next examine whether the Secretary's proffered interpretation of section 75.380(a) should nevertheless be upheld as reasonable, in this instance we need not because other language in the standard plainly addresses the issue raised by the citations. Section 75.380(a) provides that the two designated escapeways "shall meet the requirements of this section," and one of those requirements is that "[e]scapeways *shall be provided* from each working section." 30 C.F.R. § 75.380(b)(1) (emphasis added). To "provide" is not an

⁷ Moreover, while the requirement that escapeways be "travelable" appears in both the Coal Act and the Mine Act, there is nothing in the legislative history to resolve the issue presented by this case. *See* S. Rep. No. 91-411, at 83 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 209 (1975) ("Legis. Hist.").

ambiguous term as it is employed in this instance, as it is defined to mean “to supply for use.” Webster’s Third New Int’l Dictionary 1827 (1993).

An operator thus violates section 75.380(b)(1)’s requirement to “provide” escapeways from a working section when its miners are substantially hindered or impeded from accessing designated escapeways, as in such an instance the escapeways are not being supplied for the use of the miners. There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is “to allow persons to escape quickly to the surface in the event of an emergency.” S. Rep. No. 91-411, at 83, *Legis. Hist.*, at 209 (1975). While escapeways themselves may be, from end to end, in total compliance with the requirements of section 75.380 as to the conditions of the escapeways, the inability of miners on a working section to quickly reach the escapeways constitutes a violation of the standard’s basic requirement that the escapeways be “provided” to miners on the working section.

Such an interpretation of section 75.380(a) & (b) is also consistent with the remainder of the standard. Section 75.380 contains extensive requirements as to the location and physical attributes of escapeways so that miners, including those disabled in a mine accident and needing assistance, can quickly and safely get from the start of the escapeway to the surface. Moreover, section 75.380 obligates operators to continually maintain the condition of escapeways so that such passage is not hindered. *See generally Maple Creek Mining, Inc.*, 27 FMSHRC 555, 559-61 (Aug. 2005). Interpreting section 75.380(a) to require that escapeways be accessible is consistent with the standard as a whole.

To hold otherwise, and to conclude that an escapeway that is not readily accessible nevertheless still qualifies as an escapeway “provided” under section 75.380, would be contrary to Commission precedent. In numerous cases, we have taken the purpose of a standard into account in determining how it should be interpreted and whether it was in fact being met. *See RAG Cumberland Res., LP*, 26 FMSHRC 639, 647-48 (Aug. 2004), *aff’d sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished) (rejecting literal interpretation of coal mine ventilation standard that would not accomplish the standard’s purpose in favor of interpretation that took that purpose into account); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998-99 (June 1997) (reversing ALJ’s determination that standard requiring that conveyor be equipped with slippage and sequence switches was satisfied even though switches were inoperable); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (rejecting, *sub silentio*, operator’s claim that 30 C.F.R. § 56.14101(a)(1) did not require brakes, once installed, to be maintained in functional condition); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991) (construing 30 C.F.R. § 77.507 to require that switches be installed with functioning lockout devices). Because American was required by section 75.380 to “provide” two escapeways to miners from the working section, finding that it complied with the standard when escapeways that otherwise met the standard could not be readily or safely accessed by miners needing to use them in an emergency would exalt form over substance.

While American contends that the Secretary is arguing that the pathway around the rib side of the stage loader was part of the escapeway subject to the requirements of section 75.380, that is plainly not the case. The Secretary has consistently maintained throughout this proceeding that the citations were issued because the migrating stage loader greatly hindered *access* to the escapeways American had designated pursuant to section 75.380, not that the stage loader was located in an escapeway. In each of the citations at issue, it is alleged that American failed to “provide” safe egress from the face. Gov’t Exs. 2, 10.⁸ The Secretary did not deviate from that position in the proceeding below. Tr. 167, 226, 288, 292; S. Post-Hearing Br. at 19-23.

Consequently, the judge erred in reaching the issue. Given the express requirement of section 75.380 that escapeways be “provided,” it was not necessary for him to address the extent to which, if at all, the escapeway requirements applied in by the loading point of the section.⁹

⁸ Citation No. 7581904 charged a violation of section 75.380(a) because:

A safe egress/escape/travelway was not provided on and off the 6th[] North long wall face as required. The longwall equipment was allowed to migrate to the head gate end rib preventing safe travel on and off the face area where miners are required to travel. The only access to the face is to climb over parts to the stage loader and a miner was observed traveling over top of the head gate conveyor motor top plate while the machine was running coal.

Gov’t Ex. 2, at 1. Citation No. 7581788 charged a violation of section 75.380(a) because:

A safe egress route was not provide[d] off or on the 7th North Longwall Face as required. The stage loader has been allowed to migrate to the headgate rib preventing safe travel in this area. The only access to the longwall face or off the longwall face is to climb over the stage loader or the belt conveyor.

Gov’t Ex. 10, at 1.

⁹ Chairman Duffy and Commissioner Young note that the Commission addressed the factors that go into determining the geographical and temporal scope of a “working section” as that term is used in the escapeway requirements when it decided a case involving the predecessor to section 75.380. *See Bethenergy Mines, Inc.*, 11 FMSHRC 1445, 1453-54 (Aug. 1989) (affirming as consistent with the four identified factors the judge’s decision vacating three citations alleging violations of 30 C.F.R. § 75.1704 (1986)). They also recognize that MSHA in section 75.380 has since adopted extensive standards regarding the characteristics and conditions of escapeways, and it is clear from the terms of the standard that it was not written to include the narrow confines of the face area of a working section, particularly in a longwall section. For instance, under section 75.380, escapeways are normally expected to be at least 6 feet wide, and

B. Substantial Evidence

The judge did not explicitly address whether the evidence regarding the extent to which miners would have been impeded or hindered from reaching a designated escapeway during the periods when the rib side pathway was blocked because of stage loader migration established that the miners at the face were not being “provided” the two escapeways required by section 75.380. Remand for him to do so is not necessary, however, because, based on the record in this case, the only conclusion that can be reached is the miners were not being “provided” an escapeway under section 75.380. *See American Mine Svcs.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993) (remand unnecessary where record supports only one conclusion).

American argues that there were two acceptable alternatives to using the rib side pathway when it was blocked: miners could either climb over the stage loader, or take the block side pathway, which would have been wider than normal after the stage loader had migrated over to near the rib. Am. Br. at 13; Am. Reply Br. at 2. As for the feasibility of climbing over the stage loader, American points out that the inspectors witnessed miners doing it successfully. Am. Br. at 13. As we held in *Maple Creek*, however, the test with respect to the use of an escape route is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners’ ability to expeditiously escape a dangerous underground environment in an emergency. 27 FMSHRC at 560 (citing 61 Fed. Reg. at 9810). That same reasoning applies in determining whether a designated escapeway has been “provided” within the meaning of section 75.380.

The evidence shows that even the miners climbing over the four and one-half foot high stage loader going to and from the face as part of their normal duties had a difficult time doing so. Inspector Wooten testified that the miner he saw was “having trouble” pulling himself up the stage loader. Tr. 141. Once atop it, the miner had to crawl and “scoot” across it, in the 2-1/2 foot clearance between the stage loader and the roof. Tr. 148-49. That he did so with mud up to the tops of his boots because of ground conditions at the face increased the difficulty of his

never so narrow that four people carrying a stretcher would be unable to pass through that part of the escapeway. 30 C.F.R. § 75.380(d)(4). Yet the face area is where many miners will be working when the need to evacuate the mine arises, and mining operations there may interpose obstacles to the start of an evacuation. Consequently, Chairman Duffy and Commissioner Young believe the mining community may be well served by an MSHA rulemaking in which more detailed standards regarding access to escapeways are developed and adopted.

Commissioner Jordan notes that her colleagues fault the judge for reaching the issue of how far the escapeway extended. They agree that, given the clear mandate of section 75.380 that escapeways be provided, it was not necessary for him to rule on whether all escapeway requirements applied in by the loading point. She does not believe that such a determination is necessary to resolve this case. Moreover, nowhere in the language of section 75.380 does she read such an explicit finding.

climbing and crawling. Tr. 122, 138. Inspector Miller's testimony regarding the problems he observed when a miner passed over the stage loader was not as detailed. However, Miller testified that, while it was "humanly" possible for miners to make it over the stage loader, he did not consider it a safe practice. Tr. 325-26. He also confirmed the wet and muddy conditions, which likely made climbing and crawling over the stage loader even more dangerous. Tr. 286-87.

If individual miners were having difficulty going over the stage loader, it is reasonable to infer that it would be unsafe to expect miners to do so as a group, which is what would occur in the event of an emergency requiring access to one of the designated escapeways. *See Maple Creek*, 27 FMSHRC at 560. As many as 11 miners would have been exiting the face in the muddy conditions, and each would have to climb up the slippery stage loader and crawl over its top, in the limited space between it and the roof, and down again, to reach an escapeway. Tr. 137-39, 140-41, 150. Inspector Miller concluded that, in such an event, the miners would have "had very little chance to get out of there without a whole lot of effort" because of the stage loader migration. Tr. 286. In light of the foregoing, the only conclusion that can reasonably be reached is that if the sole access to the designated escapeways involved climbing up and crawling over a stage loader under the conditions that were present at the time of the two citations, the escapeways were not being "provided" as required by section 75.380.

The evidence regarding the other alternative route that American alleges existed — use of the block side pathway around the stage loader — similarly indicated that ready access to the escapeway was not being provided. It was established at the hearing that, in order for miners to exit the face using the block side pathway, component parts of the longwall would need to be de-energized, in order to stop the pan line and the conveyor belt tailpiece. Miners would then have to cross over the pan line, walk through the block side pathway, and get past the belt to access one of the designated escapeways through one or more crosscuts. 29 FMSHRC at 258; Tr. 419-20.

While American's Health and Safety Manager, Paul Kraus, testified that miners taking such a route would simply be "stepping" across the pan line and belt (Tr. 420), the judge found that significantly greater effort on the part of miners would have been necessary to do so. 20 FMSHRC at 259. Our review of the record indicates that the judge's conclusion is supported by substantial evidence,¹⁰ particularly given the dimensions of the pan line and conveyor belt.

¹⁰ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The judge accurately described the pan line as 3 feet deep, and ranging in width from 3 to 5 feet. *Id.*; Tr. 421-22. The judge also properly took into account that the belt tailpiece that the miners would have to cross was not only 3 feet wide but also at least 3 feet high. 29 FMSHRC at 259; Tr. 424. Thus, as summarized by Inspector Miller, to use the block side pathway, miners would have to climb over into the pan line, climb out of it, walk alongside the stage loader, and then climb over the belt line. Tr. 290-91. In the opinion of Inspector Wooten, such an alternative would be too time-consuming during an emergency evacuation. Tr. 229-30.

The judge rejected the block side pathway as an alternative route because the significant effort miners would need to expend in using it in an emergency situation was not consistent with the purpose or spirit of section 75.380. 29 FMSHRC at 259. The judge's findings as to the difficulty miners would have in using the block side pathway support the conclusion that requiring use of the block side pathway to access the designated escapeways is not consistent with the requirement that miners exiting the face be "provided" escapeways. Consequently, we affirm in result the judge's findings of violation with respect to both citations.

Finally, in interpreting and applying section 75.380 here, we cannot ignore that the applicable statute and its legislative history emphasize the need for miners on a working section to exit a mine expeditiously in emergency situations. Furthermore, Congress recently passed and the President signed into law the Mine Improvement and New Emergency Response Act of 2006, Pub. L. 109-236, 120 Stat. 493 ("MINER Act"), which amended the Mine Act in several respects. Among other things, the Mine Act now contains provisions which require mine operators to submit for MSHA's approval emergency response plans, and those plans must, among other things, "provide for the evacuation of all individuals endangered by an emergency." 30 U.S.C. § 876(b)(2)(B)(i). Ready access to escapeways for all miners is a key component of an effective evacuation of a mine.¹¹ Plainly, that access was not being provided by American at the times it was cited for violating section 75.380.

C. Notice

Separate from the issue of regulatory interpretation is whether the regulated party has received fair notice of the Secretary's interpretation of the regulation. Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. See *General Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). The notice requirement is satisfied when a party receives actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard against the

¹¹ As Inspector Miller testified, "[i]f you can't get to an escapeway, you don't have an escapeway." Tr. 292.

party. See *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996); see also *General Elec.*, 53 F.3d at 1329 (reasoning that agency's pre-enforcement warnings to bring about compliance with its interpretation may provide adequate notice to regulated party).

In order to avoid due process problems stemming from an operator's asserted lack of notice, the Commission has adopted an objective measure (the "reasonably prudent person" test) to determine if a condition is violative of a broadly worded standard. That test provides:

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

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

American maintains that it did not have adequate notice that the Secretary was interpreting section 75.380 so that the designated escapeways included the working sections of the Galatia Mine longwall sections. Am. Br. at 15-18. However, as discussed above, *supra*, at 7, 9, the citations MSHA issued were not based on the notion that the escapeways began at the face. Instead, the Secretary interpreted the standard to require that miners have safe, ready access to designated escapeways. The fact that the Secretary based her interpretation on the word "travelable" rather than the language stating that "escapeways shall be provided" — the language that we have concluded is dispositive — has no bearing on whether American had adequate notice of what it was required to do.

As for the Secretary's actual interpretation requiring safe access to designated escapeways, Inspector Miller's May 11, 2005, citation provided American actual notice that stage loader migration that prevented miners from using the rib side pathway around the stage loader constituted a violation of section 75.380. The citation specifically stated that such migration meant that "[a] safe egress route was not [being] provide[d] off or on the" longwall face. Gov't Ex. 11. Furthermore the citation mentioned that the miners' only alternative was to climb over the stage loader, thus indicating MSHA's belief that this was not an acceptable method of travel to reach the escapeway. *Id.* In addition, shortly after issuing the May citation, the inspector met

with the operator's management and hourly employees and expressed MSHA's concern about the hazards associated with stage loader migration. 29 FMSHRC at 257.

Moreover, even without the earlier citation, a reasonably prudent person would have recognized that the failure to provide miners ready access to an escapeway constituted a violation of section 75.380. The obvious purpose of requiring that escapeways always be available is to permit miners to quickly exit the mine. An operator such as American should have known that a time-consuming route to access an escapeway runs counter to this purpose and thus the standard itself. Consequently, for all of the reasons above, we conclude that American had adequate notice that the conditions cited constituted violations of section 75.380.

III.

Conclusion

For the foregoing reasons, we affirm in result the judge's decision that American violated section 75.380(a).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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