

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

June 29, 2023

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. PENN 2022-0011 |
| Petitioner, | : | A.C. No. 36-07416-543019 |
| | : | |
| v. | : | |
| | : | |
| CONSOL PENNSYLVANIA COAL | : | |
| COMPANY LLC, | : | Mine: Enlow Fork Mine |
| Respondent. | : | |

DECISION

Appearances: Sharon H. McKenna, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Patrick W. Dennison, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Paez

This docket is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815.¹ In dispute is a single significant and substantial (“S&S”)² section 104(a) citation issued to CONSOL Pennsylvania Coal Company, LLC for an alleged violation of an escapeway standard.

To prevail, the Secretary must prove any cited violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom., Sec’y of Lab. v. Keystone Coal Mining Corp.*, 151 F.3d 1096,

¹ In this decision, the original hearing transcript, the supplementary hearing transcript, the Joint Exhibit, the Secretary’s exhibits, and the Respondent’s exhibits are abbreviated as “Tr.,” “II Tr.,” “Jt. Ex. #,” “Ex. P-#,” and “Ex. R-#,” respectively.

² The S&S terminology comes from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard” 30 U.S.C. § 814(d)(1).

1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Citation No. 9204482 alleges CONSOL violated section 75.380(d)(1) by failing to maintain an escapeway in safe condition to assure passage of anyone, including disabled persons. 30 C.F.R. § 75.380(d)(1). The Commission has held the phrase “maintained in a safe condition” to mean an escapeway must allow miners to “expeditiously escape a dangerous underground environment in an emergency.” *Am. Coal Co.*, 29 FMSHRC 941, 950 (Dec. 2007). Specifically, the Secretary alleges six hoses protruding from a pump car obstructed the escapeway, thus preventing escaping miners from effectively and safely using the escapeway in the event of an emergency. The Secretary proposed a penalty of \$2,844.00. CONSOL timely answered the petition and contests the issuance of the citation.

I held an in-person hearing in Pittsburgh, Pennsylvania. At the hearing, the Secretary presented testimony from MSHA Inspector Allan Jack, and CONSOL presented testimony from its Safety Inspector, Joseph Bartolotto. One of CONSOL’s witnesses, Steven Barr, Longwall Coordinator, was ill on the date of the original hearing and unable to attend. With the agreement of counsel, I held a remote Supplementary Hearing the following week to elicit his testimony. Both parties submitted post-hearing briefs and reply briefs.

II. ISSUES

The Secretary argues Citation No. 9204482 must be upheld as S&S and is the result of at least a moderate degree of negligence. (Tr. 21:10–13; Sec’y Post-hr’g Br. 11–23.) CONSOL contests the fact of the violation, the S&S designation, the negligence determination, and the penalty. (Resp’t Post-hr’g Br. 5–25.) Accordingly, the following issues are before me: (1) whether CONSOL violated the provisions of section 75.380(d)(1) as alleged in Citation No. 9204482; (2) whether the citation was properly designated as S&S; (3) whether CONSOL’s negligence was correctly determined as “moderate”; and (4) whether the assessment of a penalty is appropriate.

For the reasons set forth below, Citation No. 9204482 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Parties’ Stipulations

At the hearing, the parties, in a joint exhibit, stipulated to the following items, verbatim:

1. The Respondent was an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 802(d), at the mine at which the Citation at issue in this proceeding was issued.

2. Enlow Fork Mine is a “mine” as defined in §3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. Operations of the Respondent at the mine at which the Citations were issued are subject to the jurisdiction of the Mine Act.
4. This Citation [Penalty]³ proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
5. Enlow Fork Mine is owned by the Respondent.
6. Payment of the total proposed penalty of \$2,844.00 for the one citation in this matter will not affect the Respondent’s ability to continue in business.
7. The individual whose name appears in Block 22 of the Citation in contest, Allan Jack, was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citation was issued.
8. Citation No. 9204482 contained in Docket No. PENN 2022-0011 was issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the Citation, as required by the Act.
9. Exhibit “A” attached to the Secretary’s Petition in Docket No. PENN 2022-0011 contains an authentic copy of Citation No. 9204482 with all modifications or abatements, if any.

(Jt. Ex. 1.)

B. Operations at the Enlow Fork Mine

CONSOL operates the Enlow Fork Mine in Washington County, Pennsylvania and mines bituminous coal underground using the longwall retreat mining process. (Sec’y Post-Hr’g Br. 6; Tr. 41:15–19, 43:13–15, 112:19–113:5.) Enlow Fork Mine is considered a gassy mine because it liberates high amounts of methane requiring ventilation spot checks every five days. (Tr. 55:2–24; II Tr. 38:21–39:23.) Ignitions have occurred at this mine where an accumulation of coal dust or methane ignited with one such ignition resulting in an explosion knocking out ventilation controls and changing the air flow. (Tr. 56:1–57:25.)

Three different entries provide access underground to the longwall sections of the mine: the primary escapeway, the No. 2 Entry (secondary escapeway), and the belt entry. (Tr. 66:9–20, 220:13–15; II Tr. 9:25–10:4.) On a daily basis, most of the mining crew travel along the No. 2 Entry to reach the working face. (Tr. 132:20–134:7.) The preshift examiner also travels the No. 2 Entry. (Tr. 133:14–22.) The No. 2 Entry is also called the track entry, due to the track which traverses down one side of this entry. (Tr. 66:17–20, 68:8–69:5, 86:10–18.) Looking toward the mine exit, the track traverses the No. 2 Entry mostly along the right side, hereinafter the “track side” (Tr. 95:7–21; II Tr. 40:9–23), so miners can walk along the left side, hereinafter the “rib side.” (Tr. 77:18–20, 95:7–18; II Tr. 40:9–23.) A lifeline hangs on the rib side paralleling the track. (Tr. 67:15–17, 141:18–19.) Railcars, known as “pump cars,” transport supplies along the track to the working face. (Tr. 66:17–20, 68:8–69:5, 86:10–18.) One such pump car supplies “pressurized emulsion” through its six hoses for the operation of the longwall. (Tr. 69:1–23,

³ The parties incorrectly list this as a “Contest” proceeding in Item 4 of their stipulations.

86:13–18; II Tr. 11:11–22:18; Ex. R–7.) The pump car remains stationary on the track until the longwall face retreats from the original working face to a new crosscut, at which time the pump car moves with the longwall. (Tr. 109:9–16, 113:1–5, 115:13–15.) Because the timing of the longwall’s retreat depends on the rate of mining, the timing of the pump car’s move also varies based on the rate of mining. (Tr. 109:9–11, 112:19–113:18, 114:1–16, 156:22–24, 217:9–15.) The pump car moves on average once per week. (Tr. 114:4–25.)

In the event of an emergency, CONSOL instructs miners to don their ten-minute Self-Contained Self-Rescuers (“SCSRs”)—oxygen masks that miners carry underground which allow a miner to breathe for up to ten minutes in smoky or low-oxygen conditions. (Tr. 102:16–22, 107:4–8, 125:22–126:4.) Miners also use an escapeway lifeline containing directional cones indicating the mine’s exit merely through touch. (Tr. 130:10–19, 227:16–23, 258:6–10.) CONSOL teaches miners to use the lifeline to guide them to a designated location—usually an emergency cache of longer-use SCSRs and tethers—and then to exit the mine. (Tr. 102:9–13.) The longer-use SCSRs allow miners to breathe in smoky or oxygen-scarce conditions for up to an hour. (Tr. 102:13–22, 125:22–126:4.) CONSOL instructs the miners to use the tethers (ropes) to hook themselves together in an emergency, so if a miner loses the lifeline another miner can quickly guide the miner back. (Tr. 102:1–103:12, 201:21–22, 202:23–203:3, 249:9–13.) As required by MSHA, CONSOL trains miners on specific emergency procedures in yearly smoke room trainings where CONSOL fills a room with smoke to simulate an emergency, and miners navigate obstacle courses. (Tr. 34:1–20, 244:1–252:25; II Tr. 49:23–50:4.)

C. Conditions at Intersection of Entry No. 2 and Crosscut 15.5 on August 17, 2021

Crosscut 15.5 of the No. 2 Entry (secondary escapeway) is sixteen feet wide and eight feet high. (Tr. 75:21–24, 84:25–85:16, 164:19–21; Ex. P–4.) The pump car measures ten to twelve feet wide, leaving four to six feet between the pump car and the rib side of the No. 2 Entry. (Tr. 85:4–13, 86:19–21, 135:25–136:2, 164:19–25; Ex. P–4.) On August 17, 2021, six rubber, high-pressure (Tr. 225:8–12) hoses protruded from the side of the pump car and extended into the walkway of the escapeway, as represented by the red lines in Exhibit R–7.⁴ (Tr. 66:18–23, 74:4–20, 87:15–88:2, 220:22–221:2; II Tr. 9:25–10:15; Ex. R–7.) At the time, the pump car sat across from crosscut 15.5 (Tr. 119:7–17; II Tr. 14:6–15:18) allowing the hoses to extend across the No. 2 Entry and into Crosscut 15.5 to link up to the longwall. (Tr. 157:15–20.)

Two of the six hoses sat rigidly on the mine floor and varied in size but spanned two to four inches in diameter, roughly the size of a baseball or softball. (Tr. 82:11–18, 164:16–17; II Tr. 45:24–47:1.) These two hoses (the hoses closest to the working face) were lying across the mine floor (Tr. 74:4–15), while the remaining four hoses protruded from the pump car extending in the air into the escapeway. (Tr. 73:18–23, 74:4–15; II Tr. 45:6–23; Ex. P–2-2.) Measuring directly below the lifeline (Tr. 79:9–21), these four protruding hoses hung at heights of 29”, 28”, 15”, and 12” from the mine floor, depending on the height from which each protruded from the

⁴ The photographs in Exhibit R–5 do not depict the cited condition and were not taken the day the citation was issued. They were entered into evidence to show a “general idea” of similar conditions, and depict, among other conditions, high pressure hoses protruding into a track entry. (Tr. 12:19–14:16, 225:18–232:12; Ex. R–5.)

pump car, as depicted in Exhibit P-2. (Tr. 73:18-23, 74:4-15, 169:1-24; II Tr. 45:6-23; Ex. P-2-2.) These protruding hoses extended across the full width of the No. 2 Entry and into Crosscut 15.5, eventually falling onto the mine floor approximately eight or ten feet from the pump car. (Tr. 82:14-18, 83:11-84:3, 91:11-23.) Measuring perpendicularly to the direction the hoses protruded, these four suspended hoses spanned six feet along the walkway of the No. 2 Entry. (Tr. 74:4-6.) This means a miner in the escapeway would need to traverse over six feet of protruding hoses. (Tr. 74:4-6.) Thus, a miner attempting to escape in the event of an emergency would first encounter the two rigid pump hoses lying on the mine floor, then the four suspended hoses at heights of 15", 29", 28", and 12" from the mine floor, respectively, over six feet of the escapeway. (Tr. 81:5-82:10.)

The No. 2 Entry (escapeway) lifeline hung from the roof approximately 66 inches above the mine floor (Tr. 75:15-18; II Tr. 25:17-21, 47:6-10; Ex. R-7) on the rib side directly above the pump car hoses. (Tr. 67:15-17, 74:19-20, 219:17-220:12, 233:12-14; II Tr. 48:7-11.) When tugged away from the rib, the escapeway's lifeline provided about six to seven inches of slack before getting caught on power cables, preventing it from stretching into Crosscut 15.5 where the pump hoses dipped to the mine floor. (Tr. 71:1-8, 83:13-84:3, 88:21-89:13, 171:1-173:3; II Tr. 23:21-24:11, 48:12-16.)

D. MSHA Inspection, Issuance of Citation No. 9204482, and Abatement

MSHA Inspector Allan Jack arrived at the Enlow Fork Mine on August 17, 2021, for a regular semiannual roof control inspection. (Tr. 44:8-19, 48:10-25.) According to Inspector Jack, Enlow Fork Mine experienced a reduced rate of mining that day due to roof issues. (Tr. 114:4-7, 194:1-11, 270:1-16.) Joseph Bartolotto, Safety Inspector for CONSOL, escorted Inspector Jack underground to Crosscut 15.5. (Tr. 59:17-61:2, 70:10-15; Exs. P-2, R-1.) Using his cap light (Tr. 84:4-16), Inspector Jack observed hoses protruding from the pump car, crossing the width of the No. 2 Entry (escapeway), and proceeding into Crosscut 15.5, whereby he issued Citation No. 9204482. (Tr. 70:15-23, 74:19-20, 79:9-21, 83:11-19, 93:15-94:13, 100:16-101:19.)

In the narrative portion of Citation No. 9204482, Inspector Jack wrote:

The alternate escapeway was not being in a safe condition to always assure passage of anyone in the G2 longwall section (MMU-011-0) at 15.5 crosscut in the No.2 entry. Longwall pump hoses were hindering the escapeway because they were installed between 29 and 12 inches off the mine floor where the lifeline was coursed over the hoses causing a tripping hazard to those who have to use the escapeway.

Standard 75.380(d)(1) was cited 4 times in two years at mine 3607416 (4 to the operator, 0 to a contractor).

(Ex. P-1.)

Inspector Jack issued this citation at 10:40 a.m. for failure to maintain the escapeway in a safe condition per section 75.380(d)(1). (Tr. 119:23–120:25, 149:15.) He found the violation to be S&S, reasonably likely to lead to an injury resulting in lost workdays or restricted duty, and due to CONSOL’s moderate negligence. (Tr. 105:1–11, 129:17–24, 130:20–25; Ex. R–1.) Inspector Jack determined the hazard in question could affect three persons because miners are usually tethered together during an emergency escape, so when one miner trips and falls on a hose that miner is “going to pull a couple people down . . . behind him because they’re all connected together.” (Tr. 101:2–16, 122:21–124:1–15.) Inspector Jack noted that the lifeline went directly over the six hoses at the heights documented in the citation. He determined that miners could not avoid the hoses without letting go of the lifeline because the lifeline contained little slack and was “bow string tight.” (Tr. 79:13–21, 259:5–20.) Letting go of a lifeline in smoky conditions or poor visibility could result in a miner becoming disoriented, wandering down a crosscut, and being unable to find the lifeline again. (Tr. 108:9–14.)

To abate the violation and allow Inspector Jack to terminate the citation, CONSOL moved the No. 2 Entry lifeline into Crosscut 15.5 where the hoses laid on the mine floor due to their greater distance from the pump car. (Tr. 93:17–22, 135:12–141:22; Ex. P–1.) To achieve this, CONSOL added fifteen feet of slack to the lifeline. (Tr. 141:7–15.) This resulted in the lifeline running along the No. 2 Entry (escapeway) rib, extending about eight feet into the opening of Crosscut 15.5 where all six hoses laid on the mine floor, providing miners easier passage, and then continuing along the rib side of the No. 2 Entry on the opposite corner of Crosscut 15.5. (Tr. 177:15–24.) After moving the lifeline, CONSOL placed rock dust bags in front of and between the hoses to create a small bridge over them. (Tr. 93:17–22, 135:12–141:22; Ex. P–1.) This approximately two-foot-wide (II Tr. 29:18–24) “rock dust bag” bridge sat in Crosscut 15.5, approximately eight to ten feet from where the hoses exited the pump car. (Tr. 83:17–84:3, 142:18–20; II Tr. 86:9–87:18.) This “rock dust bag” bridge stood approximately a foot high at its highest point. (Tr. 139:23–140:4.)

IV. ADDITIONAL FINDINGS OF FACT, PRINCIPLES OF LAW, ANALYSIS, AND CONCLUSIONS OF LAW

A. 30 C.F.R. § 75.380(d)(1) – Failure to Maintain Escapeway in Safe Condition

Per section 75.380(d)(1) the following is required of escapeways in bituminous and lignite mines: “Each escapeway shall be [m]aintained in a safe condition to always assure passage of anyone, including disabled persons.” 30 C.F.R. § 75.380(d)(1). The Commission defines “maintained in a safe condition,” to mean escapeways that allow miners to “expeditiously escape a dangerous underground environment in an emergency.” *Am. Coal Co.*, 29 FMSHRC 941, 950 (Dec. 2007) (“[T]he 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.”) (emphasis added) (citing *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 560 (Aug. 2005)); see *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 562–63 (Aug. 2005) (upholding the ALJ’s finding that “the conditions created a slip and fall hazard that precluded swift passage through that portion of the escapeway” in affirming the violation); see, e.g., *Mill Branch Coal Corp.*, 34 FMSHRC 2090 (Aug. 2012) (ALJ) (“There is

no dispute 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.”) (emphasis added); *see also* 61 Fed. Reg. 9764, 9810–11 (Mar. 11, 1996) (preamble to section 75.380 stating purpose is “to enable miners, including disabled persons, to escape quickly in an emergency” and “no delay in escape assures that there is no reduction in safety.”).

The Secretary alleges that CONSOL violated section 75.380(d)(1), because miners attempting to use the escapeway in an emergency would need to navigate over the hoses protruding across the No. 2 Entry. Escaping miners would first encounter the two rigid hoses lying on the mine floor and then attempt to hurdle the 15”-high hose, followed by the 29”-high hose, the 28”-high hose, and finally the 12”-high hose over the course of six feet. (Tr. 81:5–82:10.) In emergency conditions,⁵ Inspector Jack determined the “first miner in the [line] would hit these hoses, would trip, would pull two or three miners behind him over as he falls.” (Tr. 104:11–24, 107:9–22.) Inspector Jack noted that subsequent miners would also struggle because once one miner fell, others would stack on top of the first miner, creating a chain reaction. (Tr. 122:21–123:2, 124:1–15.) When miners trip, they may sustain injuries from the fall itself, as well as lose valuable time needed to escape from the mine. (Tr. 108:9–14, 128:19–25.)

CONSOL argues that no violation of section 75.380(d)(1) occurred. CONSOL points to section 75.380(d)(4)(iii) which mentions a “stretcher test” and asserts that disabled miners could safely escape because a stretcher could fit through the escapeway and, thus, no escapeway violation exists. (Resp’t Post-hr’g Br. 10, 11, 23.) Not only is this argument inapposite but it misinterprets and misapplies the Commission’s stretcher test rule. The stretcher test under section 75.380(d)(4) requires that a stretcher with an injured miner be able to fit through the escapeway. 30 C.F.R. § 75.380(d)(4)(iii). Inspector Jack issued Citation No. 9204482 for hoses obstructing the escapeway, not for an insufficiently wide escapeway—which the exceptions like the stretcher test under section 75.380(d)(4) are meant to address. Indeed, the Commission found that sufficient width, while necessary for a safe escapeway, is insufficient, on its own, to assure the safe escape of disabled persons. *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 560 (Aug. 2005) (finding the escapeway inadequate where additional miners were required to guide a stretcher through the escape route by pointing out obstacles along the way.) While the parties here agree the No. 2 Entry (escapeway) was wide enough for a stretcher, it did not assure safe passage for a stretcher. (Tr. 167:2–8.) Inspector Jack emphasized that if a team of miners needed to carry a miner on a stretcher, the team’s unexpected navigation over the protruding and uneven hoses would create a “mess,” by endangering those carrying the stretcher and delaying medical attention for the injured miner. (Tr. 151:10–11.) I am not persuaded by CONSOL’s argument regarding the stretcher test and reject it as misplaced.

Rather than addressing the safety issue created by the protruding hoses, CONSOL makes arguments as to why section 75.380(d)(1) should not apply under the circumstances. (Resp’t

⁵ CONSOL submitted its Examination of Electrical Equipment and the Longwall Section On-shift Dust Parameter Examination Record. (Exs. R–3, R–4.) While coal dust and electrical equipment maintenance may affect the likelihood of an emergency, this information does not affect my analysis of the existence of a violation because emergency conditions are assumed. *Am. Coal Co.*, 29 FMSHRC at 950.

Post-hr'g Br. 5–7.) Among these, CONSOL argues for no violation because: (1) the Secretary cited the wrong standard; (2) the Secretary added requirements to the regulation; (3) an exception to the standard applies; and (4) abatement did not improve the condition. (*Id.*)

First, CONSOL argues that the Secretary cited the wrong standard and should instead have cited a lifeline standard. (Resp't Post-hr'g Br. 12.) However, the Commission held that whether an alternate standard could have been cited for a condition does not negate the applicability of the cited standard. *CONSOL Pa. Coal Co.*, 44 FMSHRC 691, 696 n.10 (Dec. 2022) (holding “[w]hether or not a different subsection of the standard would have also been applicable, has no bearing on whether the Secretary established a violation of [the cited standard]. . . .”). Here, the position of the lifeline has no bearing on the fact that hoses protruded from the pump car creating an unsafe condition by hampering passage along the No. 2 Entry (escapeway) that could injure and/or delay miners from expeditiously escaping a dangerous underground environment in the event of an emergency.

Second, CONSOL asserts that the Secretary added requirements to section 75.380(d)(1), arguing Inspector Jack issued the violation for the lifeline hanging over the pump car hoses, which adds requirements on the placement of the lifeline. (Resp't Post-hr'g Br. 8, 12; Resp't Reply Br. 5.) Yet again, CONSOL's argument strains logic because Inspector Jack did not issue the violation for the presence of the lifeline above the hoses but rather because the hoses created unsafe conditions for use of the escapeway in the event of an emergency.⁶ (Ex. P–1.)

Third, CONSOL argues that no violation existed because the pump car hoses were “essential to the ongoing operation of [the] longwall section” and, therefore, the exception under section 75.380(d)(4)(iv)⁷ applies. (Tr. 153:5–156:11; II Tr. 65:21–25; Resp't Post-hr'g Br. 10, 11; Resp't Reply Br. 2–4.) However, CONSOL mischaracterizes section 75.380(d)(4)(iv) in that a plain reading reveals that such “essential” equipment only provides an exception to the requirement that an escapeway be maintained to a width of six feet (which is not an issue in this case). 30 C.F.R. § 75.380(d)(4)(iv). Section 75.380(d)(4)(iv) is not an exception to the

⁶ The citation's focus is properly on the obstruction as evident by the way Inspector Jack allowed CONSOL to abate the citation. The abatement focused on the obstruction of passage, which corresponds to the proper standard: section 75.380(d)(1). CONSOL laid bags filled with rock dust between the hoses to create a bridge to eliminate or reduce any tripping hazard and redirected the lifeline into Crosscut 15.5 where the hoses laid flat on the mine floor, allowing miners to safely use the passageway. (Tr. 93:17–22, 135:12–141:22; Ex. P–1.)

⁷ Section 75.380(d)(4)(iv) states: “Each escapeway shall be maintained at least 6 feet wide except where mobile equipment near working sections, and other equipment essential to the ongoing operation of longwall sections, is necessary during normal mining operations, such as material cars containing rock dust or roof control supplies, or is to be used for the evacuation of miners off the section in the event of an emergency. In any instance, escapeways shall be of sufficient width to enable miners, including disabled persons, to escape quickly in an emergency. When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher.” 30 C.F.R. § 75.380(d)(4)(iv).

requirement that the escapeway be maintained in a “safe condition,” as required by section 75.380(d)(1). Thus, the “essential” nature of the hoses to the longwall operation does not excuse CONSOL from ensuring the pump car hoses are situated in a manner so the escapeway is maintained in a safe condition to assure passage expeditiously in the event of an emergency. *See* 30 C.F.R. § 75.380(d)(1). Consequently, the pump car hoses can remain in the escapeway *so long as they are situated in a “safe condition,”* which was not the case here as described above. (Tr. 153:5–9, 164:2–7.)

Finally, CONSOL contends no violation existed because abatement did not improve the hazard, as the rock dust bags themselves could trip miners or cause miners to hit their heads. (Resp’t Post-hr’g Br. 15–17, 24; Resp’t Reply Br. 4–6, 24; II Tr. 28:14–29:7, 31:8–21.) The Commission, however, has rejected such arguments. *See CONSOL Pa. Coal Co.*, 44 FMSHRC 691, 696 (Dec. 2022) (holding “[w]hether or not abatement occurs has no bearing on the underlying violation”); *Western Indus. Inc.*, 25 FMSHRC 449, 453 (Aug. 2003) (holding the abatement method is irrelevant in determining whether a violation occurred). Though Inspector Jack observed that the approximately one-foot-tall bridge is “still a little rough,” he opined “it’s a lot better than the condition we found.” (Tr. 139:19–140:17.) Indeed, CONSOL’s witness Steven Barr confirmed that he had used similar “rock dust bag” bridges in the past. (II Tr. 28:1–11.) Creating a bridge over the hoses, as well as rerouting the lifeline into Crosscut 15.5 to reduce tripping hazards and maintain a safe passageway out of the mine, improved the conditions along the escapeway that miners would encounter in the event of an emergency. Thus, I reject CONSOL’s argument that abatement failed to reduce the hazard, and I find CONSOL’s other arguments altogether unpersuasive.

In considering the fact of a violation, I found Inspector Jack’s testimony at hearing to be well reasoned and based upon his many years of experience as a miner and as an inspector of underground coal mines. In applying the facts to the applicable standard and Commission case law, I determine that CONSOL violated section 75.380(d)(1). The pump car hoses were situated in such a way as to impede safe passage of persons, including disabled persons, from expeditiously escaping the mine through the No. 2 Entry (escapeway) during emergency conditions. Therefore, I conclude that CONSOL violated section 75.380(d)(1) by failing to maintain the escapeway in a safe condition to always assure passage of anyone.

B. Significant and Substantial Determination

A violation is S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove:

- (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, 42 FMSHRC 379, 383 (June 2020) (citing *Newtown Energy*, 38 FMSHRC 2033, 2037–38 (Aug. 2016)); *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); see also *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming the application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Lab.*, 861 F.2d 99, 103–04 (5th Cir. 1988) (affirming the application of the *Mathies* criteria).

1. Underlying Violation of a Mandatory Safety Standard

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. I have determined that CONSOL violated section 75.380(d)(1), because it failed to maintain the secondary escapeway in a safe condition to always assure passage of anyone, including disabled persons, and assure expedient passage in the event of an emergency. See discussion *supra* Part IV.A. Thus, I determine that the Secretary has satisfied the first element of the *Mathies* test.

2. Likelihood of Causing the Occurrence of the Discrete Safety Hazard Against Which the Standard Is Directed

For the second *Mathies* element, the Secretary must establish that “there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Newtown Energy*, 38 FMSHRC 2033, 2038 (Aug. 2016). Here, the hazard is the possibility of miners tripping on or falling over the hoses in the escapeway during an emergency, resulting in injury and/or delayed exit from the mine. (Tr. 129:17–24.) The relevant analysis is whether miners could expeditiously traverse the hoses during emergency conditions. See *Spartan Mining Co.*, 35 FMSHRC 3505, 3508–09 (Dec. 2013) (holding that S&S for escapeway citations must be considered in the context of an emergency in affirming the ALJ’s determination of significant and substantial violation of 30 C.F.R. section 75.380(d)(1)).

Inspector Jack attested that during emergencies miners act unpredictably, and emergencies alter the environmental conditions that miners face. (Tr. 107:12–13, 123:9–11.) Specifically, Inspector Jack stated that during emergency situations, miners may panic. (Tr. 107:12–13, 123:9–11.) He stated, “[w]hen you’re in an emergency event like that people act differently. They don’t think straight. They’re in a panic. The only thing they want to do is get out . . . that could lead to people running, pushing, shoving” which “sometimes . . . come[s] at the cost of other individuals who are escaping” at the same time. (Tr. 125:4–17.) CONSOL’s witness Steven Barr⁸ noted miners may temporarily lose their sense of hearing (II Tr. 49:2–22) and did not dispute the hoses could impede miners. (II Tr. 49:23–54:11.) Miners feel disoriented (Tr. 108:9–14), panic (Tr. 107:12–13, 123:9–11), feel confused (Tr. 257:9–12), or may lose their vision due to blackout conditions. (Tr. 123:9–25, 249:20–23.) CONSOL’s Joe Bartolotto who worked for CONSOL for seven years noted that miners would not be able to see more than two feet in front of their face in smoky conditions. (Tr. 212:23–213:1, 249:20–23.) Inspector Jack added a miner’s cap light would be “useless” if it was smoky. (Tr. 123:9–25.)

⁸ Barr has worked in many different positions in his twenty-one years with CONSOL, including stints as longwall coordinator and general mine foreman. (II Tr. 5:17–7:1.)

Inspector Jack has worked for over twenty-four years in the mining industry. (Tr. 38:17–20.) He has worked for MSHA for the last 15 years, including eight years as a coal mine inspector and seven years as a roof control specialist. (Tr. 29:7–30:17.) Before his employment with MSHA, Inspector Jack worked at CONSOL’s Enlow Fork Mine as an underground miner for approximately eight years (Tr. 32:1–2, 33:14–19), including working on longwalls and on the installation of a bridge over pump car hoses. (Tr. 191:10–192:12.) For his General Mine Service training, Inspector Jack received instruction on emergencies, escapeways, and navigating the mine. (Tr. 32:20–33:12.) Considering Inspector Jack’s extensive experience and credible insights on the witness stand, I give great weight to his testimony.

CONSOL argues that miners would know of the hoses in Crosscut 15.5 and be able to navigate them. (Resp’t Post-hr’g Br. 22.) But according to Inspector Jack, miners escaping an emergency situation would likely be panicky and somewhat disoriented (Tr. 107:12–13, 108:9–14, 123:9–25, 249:20–23, 257:9–12) and would not likely know they were approaching the hoses at Crosscut 15.5. (Tr. 153:1–157:25, 224:15–225:7; Ex. R–7; Resp’t Post-hr’g Br. 8, 9, 22.) The miners would be tethered together and would contact the protruding hoses at heights of 12” to 29” off the mine floor. Inspector Jack, who is 5’10” tall (Tr. 78:17–79:2, 169:6–8), observed that the suspended 29” hose reached his mid-thigh, the 15” hose hung just below his kneecap, and the twelve-inch hose hung mid-shin. (Tr. 80:6–19.) Therefore, the positions of the hoses would likely trip miners and, as Inspector Jack observed, the “first miner in the [line] would hit these hoses, would trip, would pull two or three miners behind him over as he falls.” (Tr. 104:11–24, 107:9–22.) Because miners are tethered together, when one miner falls, other miners will “stack,” where one miner falls and the next falls on top of the first miner, and the chain reaction continues. (Tr. 122:21–123:2, 124:1–15.)

Even if the miners successfully navigate past one of the hoses, the miners must successfully traverse over five more hoses of differing heights spanning six feet of the escapeway (Tr. 82:8–10, 83:6–10), like hurdling at a track meet. Any one of the obstructions could reasonably trip up any of the individual miners, likely bringing down other miners and delaying the entire group. When miners fall, they may sustain injuries from the fall itself. (Tr. 107:23–108:14.) Even if they were to come through a fall unscathed, a miner’s SCSR could be torn from their face by the force of the fall or collision with other miners, or they could let go of and lose the lifeline. (Tr. 108:9–14, 128:23–25.) Any of these scenarios would delay the miners from expeditiously escaping the mine. Miners losing hold of the lifeline would likely lose time struggling to find it again due to poor visibility or being disoriented and, if they were lucky enough to find the lifeline, would nonetheless lose time feeling around in the dark searching for it. (Tr. 108:9–14.) Any delay from stumbling or searching for the lifeline or short-term SCSR could prevent a miner from reaching the cache of long-term SCSRs before running out of time on the ten-minute SCSR they originally donned. (Tr. 125:22–126:3, 128:21–22.)

CONSOL posits that an emergency would not likely occur because Inspector Jack found no raised methane levels at the time of his inspection. (Tr. 197:25–198:7; *see* Exs. R–3, R–4.) However, the Commission has found the lack of raised methane levels irrelevant to the S&S analysis because the existence of an emergency is assumed. *Cumberland Coal Res.*, 33 FMSHRC 2357, 2366 (Oct. 2011) (overturning ALJ’s non-S&S determination for violations of

the evacuation standard under section 75.380(d)(7)(iv) where ALJ improperly considered testimony regarding the likelihood of a mine fire or explosion).

CONSOL attempts to focus this case on the lifeline. (Resp't Post-hr'g Br. 5–6, 8, 11.) As discussed above, the lifeline is irrelevant to the fact of a violation under section 75.380(d)(1). Yet, the Commission does consider the positioning of a lifeline in relation to the escapeway when analyzing whether an escapeway violation is S&S. *See Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1394 (July 2015) (considering fact that obstructions were directly under the lifeline in upholding as S&S a violation of section 75.380(d)(1)). Here, the lifeline hung directly above the pump car hoses. (Tr. 79:9–21.) Miners could not circumvent the hoses without letting go of the lifeline because the lifeline contained little slack and was “bow string tight.” (Tr. 79:13–21, 259:5–20.) Thus, miners could not both hold onto the lifeline—the “saving grace to getting outside”—and circumvent the hoses. (Tr. 130:16–19; *see* Resp't Post-hr'g Br. 4.)

Given the record as a whole, I determine it is reasonably likely that miners—tethered together in emergency conditions—would trip or fall over the hoses impeding their passage, which would delay their quick exit from the mine. Therefore, I determine the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed, and the Secretary has satisfied the second element of *Mathies*.

3. Likelihood the Occurrence of the Hazard Would Cause Injury

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the occurrence of the hazard would result in an injury. Inspector Jack stated, and CONSOL's witnesses did not refute, that tripping over the hoses, would “reasonably likely cause an accident, and that would be a trip and fall, breaking bones, tearing a rescuer off, sprains, [and] strains.” (Tr. 104:25–105:3, 107:9–22, 108:1–2, 121:15–122:2, 151:16–17.) Inspector Jack also noted that mine disasters, whether it be a fire or explosion, emit high concentrations of carbon monoxide. (Tr. 122:4–5, 123:9.) If a miner loses his SCSR, even for a short period, the miner could reasonably “be overcome by carbon monoxide before they're ever able to recover their mask,” (Tr. 122:4–16) especially if compounded by mobility issues such as broken limbs, torn ligaments, or disorientation from losing the lifeline. (Tr. 104:25–105:3, 107:9–22, 108:1–2, 121:15–122:2, 129:1–10, 151:16–17.) Losing the lifeline or a SCSR would also prevent a miner from reaching the next cache of longer-use SCSRs. (Tr. 105:3–5, 129:1–10.) Therefore, even if a miner sustained no immediate injuries during the fall, delayed escape causes a miner to use up more oxygen or breathe in more noxious gases than they would with a more expedient escape, and lose valuable time needed to get to the cache of long-term SCSRs. Consequently, I determine that tripping on or falling over the hoses themselves contributes to an injury or delayed escape, particularly for disabled miners, and the resulting delay is reasonably likely to lead to injury, thus satisfying the third element of the *Mathies* test.

4. Likelihood Resulting Injury Would Be of Reasonably Serious Nature

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood that the resulting injury would be of a reasonably serious nature. An injury of a “reasonably serious nature” does not require a specific type of injury, and a mere sprain or strain

resulting from a trip and fall may be “reasonably serious.” *S & S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013) (holding the ALJ erred in requiring the Secretary to demonstrate an injury that would result in hospitalization, surgery, or a long period of recuperation to satisfy the fourth *Mathies* element); *see, e.g., Maple Creek Mining, Inc.*, 27 FMSHRC 555, 562–63 (Aug. 2005) (affirming the ALJ’s determination that reasonably serious injury, such as a leg or back injury, would reasonably arise from the failure to maintain the walkway in a safe condition); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (affirming ALJ’s conclusion that a trip-and-fall would result in reasonably serious injuries such as “sprains, strains or fractures”).

CONSOL’s witnesses did not dispute Inspector Jack’s testimony that injuries would likely include broken bones, sprains, strains, torn ligaments, or fatality (Tr. 105:1–11, 109:9–22, 129:1–10, 151:16–25), which all are of a reasonably serious nature. If a miner loses his SCSR in a fall, he is reasonably likely to inhale and succumb to poisonous gases on the spot. (Tr. 104:25–105:3, 107:9–22, 108:1–2, 121:15–122:2, 151:16–17.) Otherwise, if the miner gets disoriented, loses the lifeline, and cannot find the mine exit or is delayed in exiting and cannot reach the cache of long-term SCSRs in sufficient time with the oxygen he has, the miner is reasonably likely to die—or, in Inspector Jack’s words, is “done”—due to inhalation of the poisonous gases. (Tr. 104:25–105:3, 107:9–22, 108:1–2, 121:15–122:2, 151:16–17.) I determine that the injuries expected to result from tripping on the hoses or delayed escape are reasonably likely to be of a reasonably serious nature, thus satisfying the fourth *Mathies* element. For the same reasons, I affirm the Inspector’s gravity determination as reasonably likely to result in lost workdays or restricted duty.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9204482 is appropriately designated as S&S.

C. Negligence

Commission Judges determine negligence under a traditional analysis rather than relying on the Secretary’s regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec’y of Lab.*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015)). This analysis asks whether an operator has met “the requisite standard of care—a standard of care that is high under the Mine Act.” *Id.* In evaluating these factors, the negligence determination is based on the “totality of the circumstances holistically,” including factors such as the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Mach Mining*, 809 F.3d at 1264 (quoting *Brody Mining, LLC*, 37 FMSHRC at 1702).

Inspector Jack assigned moderate negligence to Citation No. 9204482. (Tr. 101:2–4, 130:20–131:9.) At hearing, the Secretary argued the record may show high negligence and asserts in her post-hearing brief that the “violation resulted from at least moderate negligence.” (Sec’y Post-hr’g Br. 22–23; Tr. 21:10–19.) In support, the Secretary asserts CONSOL knew or should have known about the obstructions in the escapeway. (Tr. 130:23–25, 132:3–11; Sec’y Post-hr’g Br. 23.) CONSOL was cited under the same standard at Enlow Fork Mine in the past two years (II Tr. 53:11–14), which the Secretary argues should have put CONSOL on notice that the condition in this citation violates the mandatory safety standard. (Sec’y Post-hr’g Br. 23; *see*

Ex. P-5.) The hoses protruded from the pump car at the cited location from approximately August 12-17, 2021. (Tr. 132:7-15, 148:8-24, 269:13-270:12; II Tr. 43:6-44:7, 54:6-11; Ex. R-6 at 49.) Since a mine examiner was required to inspect the entire track at least three times a day—before each shift—CONSOL’s mine examiner thus had multiple opportunities to observe the condition but did not make any notations concerning the cited condition. (Tr. 134:13-15, 148:8-24, 264:25-265:8, 269:13-270:12; II Tr. 36:9-38:2; Exs. P-3, R-2.) Further, CONSOL’s witness Steven Barr previously constructed bridges to cover hoses in an alternate escapeway and therefore knew of this safer option. (II Tr. 28:1-11.) Inspector Jack observed that placing the hoses in the cited condition was “very avoidable” because CONSOL could run the lifeline on the opposite side of the pump cars and power centers, where no hoses laid across the escapeway. (Tr. 146:7-15, 148:8-24.) CONSOL argues that no negligence is appropriate, claiming it did not breach the standard of care but does not give specific facts to support its position. (Tr. 23:13-14, 27:4-6; Resp’t Post-hr’g Br. 25.) I determine that CONSOL should have known of the violative condition, and that this violation runs on the high end of moderate negligence. Considering the totality of the circumstances, I conclude that a designation of moderate negligence is appropriate.

D. Penalty

The Secretary proposes a penalty of \$2,844.00. The Commission is not bound by the Secretary’s proposal and reviews penalty assessments *de novo*. *Mach Mining*, 809 F.3d at 1263-64. Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator’s business; (3) the operator’s negligence; (4) the penalty’s effect on the operator’s ability to continue in business; (5) the violation’s gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

CONSOL is a large operator with a low to moderate violation history. In the two years preceding the issuance of this citation, MSHA issued one violation of section 75.380(d)(1) to CONSOL’s Enlow Fork Mine that became a final order of the Commission. (Ex. P-5 at 3.) I determined CONSOL’s negligence to be moderate. CONSOL has not alleged that the proposed penalties would adversely affect its ability to continue in business. I also determined the gravity of the violation to be S&S. Finally, CONSOL demonstrated good faith by quickly moving the escapeway’s footpath into the crosscut and constructing a “rock dust bag” bridge over the hoses to comply with the cited standard. (Tr. 93:17-22, 135:12-141:22, 148:5-13, 177:15-24; II Tr. 57:10-11; Ex. P-1.) In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of \$2,844.00.

V. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9204482 is **AFFIRMED** as written.

Respondent CONSOL Pennsylvania Coal Company, LLC is hereby **ORDERED** to **PAY** a penalty of \$2,844.00 within 40 days of this decision.⁹



Alan G. Paez
Administrative Law Judge

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⁹ Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.