

March 2021

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ADMINISTRATIVE LAW JUDGE ORDERS

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No Review was Granted or Denied During the Month of March 2021

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

March 8, 2021

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

MARFORK COAL COMPANY

Docket No. WEVA 2019-0321
A.C. No. 46-09048-479245

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 15, 2019, the Commission received from Marfork Coal Company (“Marfork”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on December 10, 2018, and became a final order of the Commission on January 9, 2019. Marfork asserts that the proposed assessment was received at the operator’s mailing address on December 10; however, the

delivery driver who received it was unable to deliver the document to the mine's operational address until two days later. As a result, the assessment was incorrectly stamped as received on December 12, 2018, with a response deadline of January 11, 2019. Marfork mailed the notice of contest on January 11, two days after the assessment became final. Marfork learned that the delinquency in late February 2019, and filed a motion to reopen within 30 days.

The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed. Marfork states that it will endeavor to ensure that the date entered in its processing system reflects the actual date of receipt, and will remind all personnel handling contests, including mail delivery handlers, of the importance of proper mail-handling and calendaring.

Having reviewed Marfork's request and the Secretary's response, we find that the delay in this instance was the result of an inadvertent administrative error. To prevent such a mistake from recurring, however, we urge the operator to enact procedures to ensure the correct date of receipt is entered into the calendaring system going forward. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Arthur R. Traynor, III
Arthur R. Traynor III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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March 24, 2021

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CARGILL DEICING TECHNOLOGY

Docket No. CENT 2020-0130
A.C. No. 16-00509-506934

Docket No. CENT 2020-0131
A.C. No. 16-00509-503010

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On April 24, 2020, the Commission received from Cargill Deicing Technology a motion seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

¹ For the limited purpose of addressing the motions to reopen, we hereby consolidate these captioned dockets. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that a proposed assessment was delivered on November 4, 2019, and became a final order on December 4, 2019 (CENT 2020-0131). A second proposed assessment was delivered on January 10, 2020 and became a final order of the Commission on February 9, 2020 (CENT 2020-0130). Cargill asserts that it inadvertently mailed the notice of contest forms along with payment for the remainder of the citations at issue to MSHA's address in St. Louis, Missouri.

The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed with MSHA's Civil Penalty Compliance Office in Arlington, Virginia.

Having reviewed Cargill's request and the Secretary's response, we find that Cargill's failure to timely contest was the result of an inadvertent mistake. In the interest of justice, we hereby reopen these matters and remand the cases to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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March 24, 2021

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

RIVER VIEW COAL, LLC

Docket No. KENT 2019-0205
A.C. No. 15-19374-481326

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 24, 2020, the Commission received from River View Coal, LLC a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that a proposed assessment was delivered on January 18, 2019, and became a final order on February 17, 2019. River View asserts that it attempted to file the notice of contest for the captioned proceeding on February 11, 2019 by email.

The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed and sent to MSHA's Civil Penalty Compliance Office at the address stated in the proposed penalty assessment.

Having reviewed River View's request and the Secretary's response, we find good cause to relieve River View from the final order. In the interest of justice, we hereby reopen this matter and remand the case to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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March 24, 2021

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

COPENHAVER CONSTRUCTION, INC.

Docket No. WEST 2019-0461-M
A.C. No. 45-03745-490744

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On July 23, 2019, the Commission received from Copenhaver Construction, Inc., a motion seeking to reopen a penalty assessment that it previously paid. The Secretary did not oppose the request.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On June 4, 2019, the Mine Safety and Health Administration (“MSHA”) received a \$8,062 payment from Copenhaver in satisfaction of the 15 citations at issue in this proceeding.

Sometime thereafter, Copenhaver contested a specially assessed civil penalty for an additional citation which was issued by an MSHA inspector during the same inspection as the 15 subject citations. Copenhaver represents that after receiving the special assessment and conferring with counsel, it now desires to contest every citation that arose from the inspection.

Yet, Copenhaver concedes that its change-of-heart “does not reflect indifference, inattention or general carelessness.” Mot. at 1. And its motion does not assert that the operator made a mistake, nor does it provide any other reason that would justify relief pursuant to Rule 60(b). Accordingly, Copenhaver’s motion is deficient on its face. The operator has failed to establish good cause to reopen a final order. *See Brzeczek v. Centerior Energy*, 221 F3d 1333 (6th Cir. 2000) (“A change of mind is not an adequate basis to vacate a judgment pursuant to Rule 60(b).”).¹

Therefore, the operator’s motion is DENIED.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

¹ Furthermore, on November 6, 2019, a Commission Judge issued a Decision Approving Settlement for the referenced specially assessed penalty (Docket No. WEST 2019-0457-M.) Copenhaver agreed to pay a regularly assessed penalty in lieu of the specially assessed penalty.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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March 26, 2020

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

BAILEY QUARRIES, INC.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CARROLL COUNTY STONE, INC.

Docket No. CENT 2020-0043
A.C. No. 23-00252-496351

Docket No.: CENT 2020-0044
A.C. No. 23-01978-496352

Docket No.: CENT 2020-0045
A.C. No. 23-02219-498428

Docket No.: CENT 2020-0046
A.C. No. 03-01232-498119

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On December 6, 2019, the Commission received a motion from Michael Boardman on behalf of Bailey Quarries, Inc., and Carroll County Stone, Inc., seeking to reopen multiple penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating

¹ For the limited purpose of addressing the motions to reopen, we hereby grant the operator’s request to consolidate these captioned dockets. 29 C.F.R. § 2700.12.

requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that three of the proposed assessments were delivered on August 5, 2019, and thus became final orders of the Commission on September 4, 2019 (Docket Nos. CENT 2020-0043, CENT 2020-0044, CENT 2020-0046). A fourth proposed assessment was delivered on September 10, 2019 and became a final order on October 10, 2019 (Docket No. CENT 2020- 0045). The operator asserts that it mistakenly sent the notice of contests along with the payment of the other citations to MSHA’s address in St. Louis, Missouri.

The motion, however, does not make clear the relationship between Bailey Quarries and Carroll County Stone. Nor does the motion make clear the relationship between Mr. Boardman and the operators. If Mr. Boardman is an owner, partner, officer, employee of, or attorney for the operators, he is permitted to represent them pursuant to Commission Procedural Rule 3(b)(3) and 3(a). If not, he may be permitted to represent the operators with the permission of the Commission, pursuant to Commission Procedural Rule 3(b)(4).

The Secretary does not oppose the motions to reopen, but urges the operator to take all steps to ensure that all future penalty contests are sent to MSHA’s Civil Penalty Compliance Office at the address in Arlington, Virginia as stated in the proposed penalty assessment within 30 days of receipt.

Having reviewed operator’s request and the Secretary’s response, we find that the operators have established that they failed to timely contest the assessments due to a mistake and in the interest of justice, we hereby reopen these matters conditionally. We direct either Mr. Boardman or the parties themselves to file a motion explaining the relationship between Bailey Quarries and Carroll County Stone, as well as their relationship to Mr. Boardman. If required by the nature of the relationship, the motion must also seek permission to have Mr. Boardman represent the operators in reopening the motions.²

² As stated above, Mr. Boardman is permitted to represent the operators without seeking permission if he is an owner, partner, officer, or employee of the operators. Rule 3(b)(3). He is also permitted to represent any operator for which he is an attorney. Rule 3(a). If Mr. Boardman does not fall into any of these categories, he may file a motion seeking permission to represent any of the operators under Rule 3(b)(4). The motion should state the basis for his request, including basic information identifying his relationship to each operator and the basis for his request to represent each operator.

If the motion directed by this order is not filed within 30 days, our conditional grant of the motion to reopen will lapse and the motion to reopen will be deemed denied with prejudice. Unless the Secretary objects and demonstrates that permitting said representation would be improper, the motion will be granted and will apply retroactively to the date the original motion was filed.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 9, 2021

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

CONSOL PENNSYLVANIA COAL
COMPANY LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2019-0094
A.C. No. 36-10045-486018

Mine: Harvey Mine

DECISION AND ORDER

Appearances: Mathew G. Tom, Esq., & Kenneth J. Polka, CLR, Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary
of Labor

James P. McHugh, Esq., Hardy Pence, PLLC, Charleston, West Virginia,
for the Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act” or “Mine Act”). A hearing was held in Pittsburgh, Pennsylvania. The parties subsequently submitted briefs which have been fully considered in reaching the within decision.¹

LAW AND REGULATIONS

30 C.F.R. § 75.380(d)(7) provides:

Each escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [l]ocated in such a manner for miners to use effectively to escape.

¹ The Decision Approving Partial Settlement issued by this Court on February 10, 2020, disposed of Citation Nos. 9080394 and 9079324.

FINDINGS OF FACT AND CONCLUSION OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

JOINT STIPULATIONS

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 were issued.
2. Harvey 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 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. Harvey Mine is owned by the Respondent.
6. Payment of the total proposed penalty of \$768.00 for the one remaining 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 was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citation was issued.
8. Citation No. 9076458 contained in Docket No. PENN 2019-0094 was properly 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 2019-0094 contains authentic copies of Citation No. 9076458 with all modifications or abatements, if any.
10. Citation 9076458 remains in contest.

SB at pp. 1-2.²

SUMMARY OF TESTIMONY

WITNESSES

Joseph A. Vargo

At the time of hearing, Inspector Vargo had worked for MSHA for over 12 years. T. 13. He initially worked as a coal mine inspector and later in 2012, had been working as an electrical specialist. Prior to working for MSHA, Vargo had worked as a coal miner for approximately 30 years.³ T. 24.

Inspector Vargo had issued Citation No. 9076458 to Respondent arising from conditions observed at the Harvey Mine during a quarterly EO-1 inspection conducted on February 21, 2019. T. 27; *see also* P-2.

While traveling the No. 2 track entry of the 5A longwall section, which was designated as an alternate escapeway, Inspector Vargo walked inby the No. 2 entry towards the working section. As he was walking, he observed hoses protruding from a pump car into a walkway at the 47 ½ crosscut. The hoses were located directly under a lifeline. T. 33; 64. When Vargo travelled underground, he was accompanied by Consol representative Troy Hellen.⁴ T. 86.

At hearing, photographs of the condition were admitted into evidence. However, because neither Vargo nor anyone else at the scene carried a camera at the time the condition was observed, the photographs were taken after abatement of the condition. As such, the lifeline was not visible in the photographs. T. 34-40; *see also* R-8A-8D.

The lowest hose protruding from the pump car was fourteen inches vertical distance from the mine floor. The highest hose was 38 inches vertical distance from the mine floor. T. 41. The

² “T” refers to the hearing transcript. “P” refers to the Secretary’s exhibits. “R” refers to Respondent’s exhibits. “SB” refers to Secretary’s post hearing brief and “RB” refers to Respondent’s post hearing brief.

³ *See* T. 23-25 for a detailed description of Vargo’s mining experience and specialized certifications.

⁴ Inspector Rob Hutchinson, Inspector Steve Cofuss (Vargo’s supervisor), and another inspector were underground with Vargo, but split off to do the permissibility on the longwall face before Vargo encountered the condition at issue. T. 87; 105.

farthest extending hose was 43 inches away from the pump car and into the walkway. T. 43. At the end of the 43-inch protrusion of hoses into the crosscut, there was a rock dust bag on the ground. T. 46-47.

The citation at issue cites a § 75.380(d)(7)(iv) violation, which requires that lifelines be located in such a manner for miners to effectively use them to escape during an emergency.⁵ T. 48.

According to Inspector Vargo's notes, the lifeline at issue was hung approximately 12 inches away from the pump car and 12 inches off of the roof of the mine. T. 52.

Miners are trained to use taglines, or lines resembling clotheslines that attach to each miner in the working section to keep them together in case of an evacuation. Miners attach themselves to taglines after they have donned their self-rescuers and proceed in a single-file line to the exit, guiding themselves by keeping one hand on the lifeline. T. 53-54. In an emergency, miners are trained to don one self-rescuer and potentially carry an extra depending on the ratio of miners to self-rescuers. T. 52.

The lifeline at issue was able to be pulled down from the art clips on the roof of the mine and stretched up to 54 inches in length. At the time the condition was observed, the safety representative tested whether the line stretched far enough outward for miners to avoid the slip and trip hazard presented by the hoses. Vargo determined that even when the line was stretched to its furthest extent, the hoses would not be avoided. T. 57-58.

Inspector Vargo indicated that the gravity of this citation was "Reasonably Likely," because in the event the lifeline had to be used, it would have been more than reasonably likely that a miner would trip and fall over the obstruction in the walkway and could have possibly cause a domino effect of miners tripping over one another as they tried to quickly exit the mine. T. 59-60.

Inspector Vargo marked this citation "Significant and Substantial," and explained in his testimony that he found an underlying violation of § 75.380(d)(7)(iv); identified a slip, trip, and fall hazard posed by the hoses protruding out from the pump car; determined that the hazard was likely to occur; and concluded that injury would have been reasonably likely and reasonably serious. T. 61-63.

As support for the likelihood of injury occurring, Inspector Vargo explained that in an emergency, miners would be walking quickly and may not be able to see where they are walking, particularly if there is smoke. In a smoke-filled atmosphere, headlamps, flashlights, or reflectors would not help with visibility. T. 64. Vargo contemplated a number of possible injuries including bumps, bruises, dislocations, sprains, lacerations, and contusions, and also mentioned the

⁵ Lifelines are thin nylon lines resembling clotheslines that are hung in mines for miners to hold onto and follow when escape is necessary, particularly when vision is obstructed by smoke. T. 48-49. Tactile signals are placed along lifelines to signify emergency resources such as manddoors, self-rescuers, or caches nearby. T. 49-50.

possibility of self-rescuers falling off if miners tripped or hit the corner of the metal pump car. T. 62-64. Due to the possibility of these injuries occurring, Vargo designated the likely injuries as “Lost Workdays and Restricted Duty.” T. 66.

Vargo testified that in the No. 2 entry, the air flowed from the area of the hoses inby to the working section. In regular conditions, there are multiple electrical installations outby that could catch on fire as well as diesel transportation rides traveling the haulage route that could spread smoke up the No. 2 entry to the working section if a fire were to occur. T. 65. In an emergency situation, when ventilation is disrupted, all three entries could be filled with smoke. T. 65-66. Vargo added that he was aware of ignitions occurring in this mine in the past. T. 66.

The fastest route for the miners to escape in the event of an emergency would be the No. 2 entry, which means they would have passed by the cited condition. T. 68. The citation indicates that ten miners would have been exposed to the hazard. Vargo counted a stage loader operator, a supervisor, two shieldmen, two shear operators, two mechanics, a maintenance foreman, and some contractors in the working section at the time he issued the citation. T. 67. However, Inspector Vargo marked one person as affected. His reasoning was that the first person to reach the pump car would be the one who trips, falls, or slips. T. 68.

Inspector Vargo marked negligence as “Moderate” because, in his estimation, the operator should have known the condition existed. The condition had been in existence for at least eight days, as the pump car had been moved eight days prior to the issuance of this citation. During this period, three shifts of miners, including the supervisor, traveled past the condition three times daily. T. 69-71.

On cross-examination, Inspector Vargo was asked about stretcher tests. In a stretcher test, a stretcher measuring 72 inches long by 16 inches wide is navigated through an area and around obstacles to ensure that a stretcher would fit through the area in the event of an evacuation. T. 177. Vargo clarified that a stretcher test is not performed to check for slip and trip hazards. T. 79. The Inspector denied that there was an issue of clearance and claimed that the stretcher test was never discussed or asked for by anyone underground. T. 80; 84-85; 110.

The pump car from which the hoses protruded was part of a “mule train,” which moved as a unit on tracks along the longwall. The mule train was made of multiple cars, one of which was the pump car. As the miners move farther away from the mule train to retrieve the longwall panel, a “power move” occurs, wherein the mule train is backed up so that the cables are positioned correctly. T. 88-89.

One side of the mule train is referred to as the “walkway side,” while the other is referred to as the “tight side” or the “off-side.”⁶ T. 90-91.

⁶ Vargo repeatedly denied his familiarity with the term “tight side.” Hellen later stated that he would be surprised if an inspector was not familiar with the word. T. 156. For the remainder of this Decision, the “tight side,” or “off-side,” of the track will be referred to as the “tight side” in the interest of uniformity.

Vargo denied being told that the position of the lifeline above the hoses was usual practice in the mine and that the miners were used to its location. He further denied ordering the miners to move the lifeline to the tight side of the pump car. T. 92-93.

Vargo recalled Consol representative Troy Hellen explaining that the miners could pull on the lifeline and maneuver around the hoses and onto the rock dust bags, although he disagreed with counsel's characterization of the bags as a bridge. T. 94. He stated that he had no problem with the lifeline being positioned above the rock dust bags as long as the lifeline did not pull back towards the pump car. T. 95.

The lifeline at issue was manufactured like a bungee cord that allowed miners to stretch the line up to 54 inches. After measuring the lifeline, Vargo determined that even at its furthest extent, the lifeline did not stretch far enough to ensure that evacuating miners would avoid the tripping hazard. T. 99-100; 103.

Vargo testified that the use of rock dust bags to even out the walkway was common, but also mentioned that at the site of the citation, there were hoses protruding above the rock dust bags where the bags were supposed to be flat. T. 100; 102.

Vargo did not agree that the condition had been the same for five years and five panels, explaining that if the car was not moved up to the point where it was on the day the citation was issued, the hoses would have been eight feet back and would have been in a position to lay flatter on the ground. T. 102-03.

Consol typically positions the pump car so that its hoses are aligned with a crosscut, but it is often difficult to center the pump car at a crosscut because of the functions of other cars in the train. T. 110-11.

Vargo addressed the Judge during his testimony in order to clarify that clearance was not at issue in this citation, stating "I didn't even consider the stretcher. I considered where the lifeline was located was a tripping hazard." T. 124. When asked whether he considered the lifeline's flexibility when issuing the citation, the inspector replied that if the lifeline was over the top of something, he would have cited it. In the event of an emergency, it's not likely that a miner under stress would have a clear enough mind to put serious thought into maneuvering around obstacles. T. 125-26.

Although Vargo recalled a meeting with several miners following his inspection, he did not recall the names of the persons in attendance or what was discussed. T. 126-27.

In the event that the lifeline passed through a mandoor that presented a tripping hazard, Vargo claimed he would have cited it. T. 129. He also claimed that he would cite uneven ground depending on the vertical distance of the deviation. T. 130-131.

Another MSHA inspector, Inspector John Hayhurst, inspected the area of the condition two days prior to the issuance of this citation and did not cite a violation for the lifeline. T. 133. Vargo denied any knowledge of what Hayhurst was inspecting when he was at the 47 ½ crosscut.

It is possible that he was on the opposite side of the crosscut, where the belt is located, in which case he may not have observed the cited condition. T. 134-35; 137-38.

On redirect examination, Vargo explained that there are directional cones in different shapes connected to lifelines that signify caches of self-rescuers, refuge alternatives, or mandos. T. 137.

Vargo stated that the “safety guy” with him decided how to abate the lifeline issue and ultimately abated this particular citation in his presence. T. 138-39.

Vargo clarified that the lifeline was not routed above the rock dust bags, but instead hung directly over the hoses coming out of the pump car. T. 139-40.

Troy Hellen

At the time of hearing, Troy Hellen had worked at the Harvey Mine for approximately 10 years, and held the title of respirable dust coordinator at the Harvey Mine. T. 153-54; 162. Hellen accompanied Inspector Vargo and another inspector during the inspection on February 21, 2019. The citation at issue was served on Hellen by Inspector Vargo. T. 154.

Hellen took the photographs labeled as R-8 either later on the day of the inspection or the day after the inspection in order to document the condition after the citation was issued. With the exception of the lifeline having been moved, Hellen testified that the photographs accurately depicted the scene. T. 158-59.

Vargo and Hellen discussed their opposing views on the safest location of the lifeline after Vargo informed Hellen he would be issuing a citation. Hellen was of the belief that the lifeline was able to be stretched over and around the hoses, allowing for a sufficient walkway on the walkway side of the entry. Hellen recollected that Vargo thought the hoses were a problem, and that they ultimately decided to move the lifeline, although Vargo did not instruct him to do so. T. 159-60.

Hellen testified that the lifeline had been hung in the same location and position for five panels and five years. T. 162. That is, it was hung from the roof of the mine down the middle of the walkway and over the protruding hoses. T. 167-68. Consol dealt with the obstacle by building a bridge with rock dust bags or placing a bridge over the hoses. T. 162-63.

The exact location of the pump car, and the train in general, depends on multiple factors and changes with each power move. T. 163. The pump car is necessary for the operation of the longwall section. T. 177.

The lifeline was on a bungee extension so that escaping miners could stretch the line without losing contact. In Hellen’s opinion, miners would have had no problem holding onto the lifeline and following a path around the hoses in the walkway. T. 163-64. The use of rock dust bags to make an area as level as possible is customary in mining. The crew at the longwall used

rock dust bags to level out various tripping hazards in the mine, including track ties that stick out into the walkway. T. 164-65.

Consol installed the lifeline with flexible extensions throughout its entire length in order to allow miners flexibility when using the lifeline. T. 168-69. *See also* R-6. Because of the bungee extension on the lifeline, the rock dust bags used to even out the floor would not impair the miners' ability to use a stretcher in the area. T. 179. The miners working near the affected area walked through the cited area several times per day. T. 169.

According to Hellen, the lifeline could be used effectively where it was hung. T. 181-84. In an interview requested by Hellen, Inspector Vargo spoke with several crew members who conveyed their belief that a stretcher would be able to pass through the walkway side in case of an emergency.⁷ T. 181-184. Hellen himself was of the opinion that the walkway side would pass a stretcher test, and that escaping miners would have no difficulty navigating the area, even with a disabled miner on a stretcher. T. 190.

In Hellen's opinion, the decision to move the lifeline from the walkway side to the tight side was illogical. Hellen testified that the tight side was narrower than the walkway side and had many more obstacles that needed to be moved or held back, including hoses, airlines, mesh, catheads, knee-high cable trays, cable troughs, head height airlines, and drisco lines. T. 184-85. He was of the belief that the walkway side was "by far the better choice," as it had fewer things the miners would need to navigate around. T. 186.

Hellen provided examples of conditions that would provide obstacles similar to rock dust bags, including track crossties and rails, fallen ribs, and rocks, all of which could be present in an emergency situation. T. 188-89.

On cross-examination, Hellen did not dispute two recent instances in which a slip, trip, and fall hazard led to reasonably serious injuries at the mine: (1) a July 24, 2019 slip and fall that resulted in three stitches; and (2) an October 1, 2019 twisted ankle resulting in two lost workdays. T. 203.

On redirect, Hellen stated that Consol will either need to place rock dust bags or a bridge over the hoses regardless of the exact location of the pump car. Once the car is parked in its new location, the miners ensure that the lifeline will go around the obstacles without a problem. T. 225.

Chase Shaffer

At the time of hearing, Chase Shaffer was employed by Consol as a safety inspector. He had worked at Harvey Mine for approximately six years.⁸ T. 231-32. Shaffer accompanied the

⁷ Hellen recalls that the group of crew members was made up of: Abraham Dickie, stageloader operator; Scott Yakicic, face foreman; Larry Anderson, outby foreman; Mike Petrich, maintenance P&M; and himself. T. 181.

⁸ For other mining positions held and certifications received, see T. 230-234.

group of MSHA inspectors who went underground in Harvey Mine on February 21, 2019. He served as Consol's company representative. He personally escorted Inspector Rob Hutchinson. T. 233-34.

Shaffer explained that the pump car from which the hoses protruded was one of several cars in the mule train along the longwall. Other cars included equipment for dusting, power, and hydraulic pumping. T. 234-35. Shaffer stated that the longwall pump car was essential to the ongoing operation of the longwall section. T. 246.

Shaffer was aware that two days prior to the issuance of this citation, Inspector Hayhurst had issued an unrelated citation at the 47 ½ crosscut. T. 239-40.

A brief discussion took place between Shaffer and Vargo, in which Shaffer voiced his opinion that the lifeline was better off in its original position than where it was moved to for abatement. This was in part because the clearance on the tight side was smaller and there were more obstacles (things coming off the pump car and trough arms holding various cables) on the tight side, limiting the space through which miners could move. T. 241-242. Mr. Shaffer also explained to Vargo that the original position of the lifeline on the walkway side was normal practice and expressed at hearing that leaving the lifeline in its original position would have promoted consistency for the miners. T. 242.

According to Shaffer, the biggest difference between a primary and secondary escapeway is the mandatory required clearance. Primary escapeways must be six feet wide, while secondary escapeways must only be four feet wide. Secondary escapeways can be even narrower if necessary equipment is present, in which case they need only be wide enough to safely egress with an injured or ill miner. Oftentimes, questions pertaining to the adequacy of clearance are addressed by a stretcher test. T. 245-46.

If an emergency were to occur underground, Shaffer believed that miners would rely heavily on their memory of their surroundings which, before this citation was issued, had not changed in about five years. T. 251-52.

The 5A longwall mining crew had worked the longwall since its first panel. Each panel is 15,000 feet in length and is worked for a little over a year. At the time the citation was issued, the crew was on its fifth panel. T. 252. For the most part, the 5A longwall crew was still made up of its original members.⁹ Shaffer was of the opinion that because this crew had worked in the same setup for five years, an alteration to the familiar environment could "mess them up." T. 253.

Harvey Mine does not have any policies dictating the proper way to level out uneven walking surfaces in the mine. However, the mine had used a few different methods to flatten out areas where obstacles present themselves. Sometimes the miners used rock dust bags. Other times, they placed an aluminum platform crossover bridge over the hoses. In wetter places, the miners had even used brick. T. 253-54.

⁹ Shaffer estimated that of the six longwall crew members, five were original. T. 262.

After the miners and inspectors returned aboveground, Shaffer questioned the validity of the citation during a second conversation with Vargo. Shaffer was of the opinion that the walkway side would have passed a stretcher test if Vargo had agreed to go back underground to test the area. T. 256. Shaffer did not believe a violation existed. He believed the walkway was adequate in width and that the flexibility allowed by the lifeline made the walkway no different from any other part of the escapeway. T. 256-58.

On cross-examination, Shaffer explained that the mine employs GMS contractors that work in the longwall section along with the mine's longwall crew. T. 262.

If the lifeline was deployed by miners leaving the working section, the tension clips holding the lifeline near the ceiling would release in a domino effect along the entire length of the lifeline so that it could be used along the entire escapeway. T. 270-72.

Adam Machak

At the time of his testimony, Adam Machak had been a coal miner for approximately eight years and held the position of maintenance supervisor on the longwall for approximately four years.¹⁰ T. 275-76. Machak had worked on all five longwall panels at Harvey Mine. T. 277. The crew that Machak worked with on the longwall were "pretty much the same exact crew" that had worked together in that area for the five years leading up to the issuance of this citation. *Id.*

At the time Inspector Vargo arrived underground, Machak was working at the train in the section.¹¹ T. 278. Machak observed Vargo saying that he was not happy with the way the lifeline was routed over the hoses or the bridge and recalls that Shaffer offered to perform the stretcher test, which Vargo repeatedly turned down. T. 279. In an interview led by Inspector Vargo, members of the crew repeatedly expressed that a stretcher would be able to pass through the walkway side and that they would have been able to escape in an emergency regardless of whether the area was filled with smoke.¹² T. 280.

It was necessary for the hoses to be in their position along the longwall panel in order for them to transfer emulsion back to the tank and get pressure to the face. Consol dealt with the obstruction caused by the hoses by making walkways around the hoses out of rock dust bags. T. 281. *See also* R-8A. The walkway around the hoses had been like this since the first panel. T. 282. Similarly, Consol also placed rock dust bags over crossties, spaced between 50 and 60 feet apart along the track, as makeshift bridges.¹³ *Id.*

¹⁰ *See* T. 275-76 for other mining positions held and certifications received.

¹¹ The train is also referred to as the "power car." Machak believes he was doing something along the lines of changing emulsion filters at the time the inspector arrived. T. 278. *See also* R-8C.

¹² Machak identified two crew members that were questioned by Vargo: Abraham Dickie and Scott Yakicic. T. 280.

¹³ Crossties are also referred to as "picker ties." T. 282.

Machak testified that Vargo instructed the miners to move the lifeline to the tight side of the track. T. 283. Machak echoed Hellen and Shaffer's concerns about moving the lifeline to the tight side of the track, stating that there was less room, cables at knee height along the length of the track, and an airline and drisco line hanging low enough from the roof that miners would have to duck down to avoid potentially hitting their heads as they passed through. T. 284-85. Although Machak did not agree with the decision to move the lifeline, he did not express this to Vargo at the time the lifeline was relocated. T. 283-84.

Consol miners attend trainings that simulate conditions of a smoke-filled mine. In these trainings, miners navigate through various obstacles in a smoke-filled room. As part of this training, they must transfer a stretcher with an "injured" miner through the smoke and through a mandoor to fresh air. T. 286. Miners are taught to walk with slow and steady steps so that they do not rush in the event of an emergency. T. 287.

On cross-examination, Machak reiterated his belief that escaping miners would have no problem following the rock dust bag path and keeping ahold of the lifeline in the event of an emergency. T. 293-94.

CONTENTIONS OF THE PARTIES

The Secretary contends that the Respondent improperly allowed the positioning of obstacles below a lifeline that hindered miners' ability to use an escapeway as an effective means of escape. Specifically, the Secretary argues that nine hoses protruding from a pump car under the lifeline posed a slip, trip, and fall hazard that could possibly lead to injuries. The Secretary states that regardless of the lifeline's ability to stretch outwards into the escapeway, miners would have been forced to adapt to the adverse position of the lifeline in the event of an emergency. The Secretary further contends that the cited condition is significant and substantial in nature, reasonably likely to result in lost workdays or restricted duty for one person, and is the result of moderate negligence. Finally, the Secretary requests that the originally assessed penalty of \$768.00 remain unchanged.

The Respondent contends that the citation should be vacated due to the Respondent's belief that the lifeline at issue was fully accessible to miners and would serve as an effective means of escape in the event of an emergency. If the Court does not vacate the citation, the Respondent requests that the citation be modified from significant and substantial to non-significant and substantial and from the originally assessed penalty of \$768.00 to a lower penalty of \$100.00.

ANALYSIS

Issue I: Was Citation No. 9076458 properly issued in that the cited condition constitutes a violation of 30 C.F.R. § 75.380(d)(7)?

Issue II: Assuming the citation was a violation of 30 C.F.R. § 75.380(d)(7), was the violation significant and substantial in nature?

Issue III: Assuming the citation constitutes a violation, was the inspector's gravity assessment of lost work days or restricted duty and of one person being affected supported by the record?

Issue IV: Assuming the citation constitutes a violation, is the moderate level of negligence designated by the inspector supported by a totality of the circumstances?

Issue V: Assuming the citation constitutes a violation, is the originally assessed penalty of \$768.00 appropriate?

I: Citation No. 9076458 was properly issued in that the cited condition constitutes a violation of 30 C.F.R. § 75.380(d)(7).

A violation of 30 C.F.R. § 75.380(d)(7)(iv) exists when there is no "continuous, durable directional lifeline in the alternate escapeway" or the lifeline is not "located in such a manner for miners to use effectively to escape." 30 C.F.R. § 75.380(d)(7)(iv). At hearing and in their post-hearing brief, the Respondent challenged that a violation existed and argued that the lifeline at issue could be used effectively. Furthermore, the Respondent argued that this citation "expand[s] the application of § 75.380(d)(7)(iv) beyond its clear language." T. 181-84; 280; *see also* RB at p. 15.

The Secretary cites to the same section of the Act as support for his opposing argument, contending that the lifeline at issue was not located in such a manner that miners could use it effectively to escape the mine in the event of an emergency. *Id.* at 7. For the reasons that follow, this Court finds that the conditions that existed on February 21, 2019, violated 30 C.F.R. § 75.380(d)(7).

Citation No. 9076458 describes the violation as follows: "The continuous durable directional lifeline located at 47 ½ crosscut No. 2 track entry in the 5A operating longwall section MMU 001-0 is not located in such a manner for miners to use effectively to escape. There are 7 two inch hydraulic hoses and 2 three inch hydraulic hoses that extend out from the pump car 43 inches into the walkway. The vertical distance from the mine floor to the top of the hoses range from 14 inches to 38 inches. The lifeline is located directly above the subject hoses. This entry is the alternate escapeway for this section." Ex. A.

Inspector Vargo testified that the violation was issued after he came upon an area in the escapeway "where hoses were protruding out of the pump car. And directly overhead of that was a lifeline." T. 33. Under examination by CLR Polka, Inspector Vargo testified that his primary concern in issuing the violation was a "slip and trip from the hose that's protruding out from the pump car that the miners would trip over using the lifeline." T. 16-17; 58; 62; 67-68; 78; 80. Inspector Vargo also testified that, in his opinion, the location of the lifeline was reasonably likely to cause an injury in the case of an emergency, particularly if the area was filled with smoke and visibility was limited. T. 62-63. The possible injuries contemplated by Inspector Vargo included bumps, bruises, dislocations, sprains, lacerations, and contusions. T. 63-64.

The question before the Court is whether the lifeline's location above the protruding hoses posed the risk of a trip and fall hazard and whether the lifeline is located in such a manner that miners can use it effectively to escape in an emergency situation. As noted in *Black Beauty Coal Co.* and *American Coal Co.*, the Commission interprets "effectively" in the context of § 75.380(d)(7)(iv) to mean "quickly and safely." *Black Beauty Coal Co.*, 33 FMSHRC 1174, 1176 (May 2011) (ALJ), *aff'd* 36 FMSHRC 1121 (May 2014); *American Coal Co.*, 29 FMSHRC 941 (Dec. 2007).

In *American Coal Co.*, the Commission discussed the importance of escapeways and concluded that:

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). 29 FMSHRC 941 (Dec. 2007).

In *Black Beauty*, the ALJ stated that "the existence of a continuous lifeline is the means to quickly and safely exit the mine" and stressed "the danger of not being able to access or use the lifeline in the event of an emergency where visibility is reduced and miners must rely upon the tangible nature of the lifeline to quickly and safely escape the mine." 33 FMSHRC at 1177-78. The Commission later affirmed the ALJ's conclusion that a violation of § 75.380(d)(7)(iv) occurred because the lifeline was located at a height of seven to twelve feet above the mine floor and could not be used effectively. 36 FMSHRC 1121.

This Court does not find Respondent's argument that the lifeline was in an appropriate position and readily accessible persuasive, even given its ability to stretch into the escapeway. The ALJ in *Twentymile* held that a 1-inch water hose that ran underneath a lifeline presented an obstruction to miners, and that asking miners to let go of the lifeline, reach around a 1-inch water hose that ran underneath the lifeline, and find the lifeline again on the other side of the hose constituted an impediment to a quick escape in difficult conditions. *Twentymile Coal Co.*, 34 FMSHRC 2293 (June 2010) (ALJ). Here, even if miners never lost contact with the lifeline, its position would have required escaping miners to identify the protruding hoses as an obstacle and maneuver around them in order to escape quickly and safely. In emergency situations, miners "must exit the mine as quickly as possible." *Id* at 2303.

Respondent argued in its post-hearing brief that Inspector Vargo cited the wrong standard, and that the Inspector confused § 75.380(d)(7)(iv) with §75.380(d)(1), which covers obstacles and tripping hazards. At hearing, there was much testimony directed toward various escapeway conditions, including the width of the escapeway and stretcher clearance. *See* T. 83-85; 123-24; 176-78; 182-84; 191; 248. Such conditions may or may not constitute violations in and of themselves. However, in reaching this decision, this Court only considered conditions that specifically relate to the location of the lifeline and whether miners could have used it as an effective means of escape.

Considering, therefore, the record *in toto* and Petitioner's persuasive arguments on point, this Court finds Citation No. 9076458 to be properly issued.

II: The violation was correctly designated as significant and substantial.

For nearly a generation, the Commission's analytical framework for evaluating purported S&S violations rested upon the four-step analysis set forth in *Mathies Coal Co.*, 6 FMSHC 1, 3-4 (Jan. 1984). Under the *Mathies* test, a violation was S&S if:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard;
- (3) a reasonable likelihood that the hazard contributed to will result in injury;
- (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, (Jan. 1984).

In *MSHA v. Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036-2040 (Aug. 2016), the Commission modified *Mathies* by adding a "reasonable likelihood" inquiry to the second step. Under *Newtown*, the S&S analysis inquires whether:

- (1) there has been a violation of a mandatory safety standard;
- (2) based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed;
- (3) based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury; and
- (4) any resultant injury would be reasonably likely to be reasonably serious.

MSHA v. ICG Illinois, LLC, 38 FMSHRC 2473, 2483 (Oct. 2016) (Althen Dissenting).

The Commission, in *Newtown*, held that the proper focus of the second step in *Mathies* was the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown*, 38 FMSHRC at 2037, FN 8. The majority further emphasized that it was essential for the judge to adequately define the particular hazard to which the violation allegedly contributed. *Id.* at 2038. The starting point for determining the hazard should be the actual cited section. *Id.*

For the following reasons, this Court finds that the Secretary has established that all four prongs of *Mathies/Newtown* have been met, and therefore Citation No. 9076458 was properly designated as S&S.

A. Violation of a Mandatory Safety Standard

The facts and discussion *supra* establish a violation of 30 C.F.R. § 75.380(d)(7), which is a mandatory safety standard.

B. Reasonable Likelihood of the Occurrence of the Hazard

The hazard at issue is a trip and fall hazard posed by the position of hoses below a lifeline. The Commission has repeatedly stated that when emergency standards are at issue, the Court should analyze them in the context of an emergency. Emergency standards “are different from other mine safety standards,” as they are “intended to apply meaningfully only when an emergency actually occurs.” *ICG Illinois, LLC*, 38 FMSHRC 2473, 2476 (Oct. 2016), *citing Cumberland Coal Res., LP*, 33 FMSHRC at 2367, *aff’d*, 717 F.3d 1020 (D.C. Cir. 2013). Accordingly, when determining whether a violation of an emergency standard is significant and substantial in nature, the violation should be considered in the context of the emergency contemplated by the standard. *Id.*, *citing Spartan Mining Co.*, 35 FMSHRC 3505, 3508-09 (Dec. 2013).¹⁴ This Court finds that there was a reasonable likelihood that a trip and fall would have occurred as miners traveled through the No. 2 entry. This entry is the fastest route out of the section and is traversed daily by three shifts of miners traveling to and from the 5A longwall. T. 68-69. At the time the citation was issued, Inspector Vargo counted 10 miners working in this section. T. 66-67.

The occurrence of a trip and fall is particularly likely in the event of an emergency when miners would be hurrying to evacuate the mine in dangerous conditions. At hearing, Inspector Vargo testified that miners would have difficulty identifying and avoiding the hoses in a smoky atmosphere. T. 63; 132. Inspector Vargo’s concern about the difficulty of maneuvering with limited vision was further supported by parts of Troy Hellen and Chase Shaffer’s testimonies. T. 187; 222; 250-51.

This Court has carefully considered the arguments advanced by Respondent that miners working in the cited area were accustomed to locating and avoiding the hoses protruding from the pump car as they moved through the area. However, this Court does not find the arguments persuasive for several reasons. First, the location of the pump car constantly changes, as it is part of a mule train that moves as a unit along the longwall. Second, in the event of an emergency, the miners exiting the section may not be thinking clearly due to alarm or confusion. Third, the prolonged presence of a violation does not justify its existence or make the condition acceptable.

Given these considerations, it is reasonably likely that in the event of an emergency, miners using the escapeway would be reasonably likely to trip and fall over obstacles located below the lifeline.

C. Occurrence of the Hazard Would Be Reasonably Likely to Result in an Injury

In the event of an emergency, it is reasonably likely that miners hurrying to escape the section in dangerous conditions could trip and fall over the hoses located below the lifeline. The trip and fall hazard would be reasonably likely to result in injuries including strains, sprains, and fractures for the miner or miners who tripped and fell as well as for those around them. *See, e.g.*,

¹⁴ The likelihood of an emergency occurring is irrelevant to the *Mathies* inquiry. *See Black Beauty Coal Co.*, 36 FMSHRC 1121, 1124 (May 2014); *Cumberland*, 717 F.3d at 1027; *ICG Illinois*, 38 FMSHRC 2473, 2476.

Maple Creek Mining, Inc., 27 FMSHRC 555, 562-63 (Aug. 2005) (affirming a Judge’s finding that a trip and fall in a mucky escapeway would lead to leg or back injuries); *Buffalo Crushed Stone Inc.*, 19 FMSHRC 231, 238 n.9 (Feb. 1997) (finding that slipping on a walkway would reasonably result in head injuries or finger or wrist fractures); *S. Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (affirming a Judge’s conclusion that a trip-and-fall accident would result in injuries such as “sprains, strains, or fractures”). Additionally, fallen miners or equipment dislodged during the fall could become obstacles to others attempting to escape, increasing the likelihood of an injury occurring.

D. Any Injury Resulting from the Occurrence of a Trip and Fall Would Be Reasonably Likely to Be Serious in Nature

At hearing, MSHA Inspector Vargo credibly testified regarding the serious injuries that could be caused by a trip and fall over the hoses, including bumps, bruises, dislocations, sprains, lacerations, and contusions from falling onto the pump car or to the mine floor. T. 63-64. The Commission has long recognized that broken bones and other injuries likely to result from a trip-and-fall accident are sufficiently serious in nature to support an S&S designation. *See, e.g., Maple Creek Mining*, 27 FMSHRC 555, 562-63 (affirming a Judge’s conclusion that leg and back injuries arising from the failure to maintain an escapeway in a safe condition constitute reasonably serious injuries); *Buffalo Crushed Stone Inc.*, 19 FMSHRC 231, 238 (concluding that finger or wrist fractures resulting from slipping on a walkway constitute reasonably serious injuries); *S. Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (affirming a Judge’s conclusion that a trip-and-fall accident would result in reasonably serious injuries including sprains, strains, or fractures). The Inspector also noted that self-rescuers could be dislodged. T. 63-64. Because the hazard was located in an escapeway, miners would be moving through the area quickly and may experience limited visibility. A trip and fall could result not only in an immediate injury, but may also delay evacuation of the mine or require more individuals to enter the mine to perform a rescue, leading to serious injury or even death. Given this, the occurrence of a trip and fall would reasonably be likely to result in a serious injury.

III: The inspector’s gravity assessment of lost work days or restricted duty and of one person being affected is more than supported by the record.

The Commission has noted that the “gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), ‘is often viewed in terms of the seriousness of the violation.’” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.” *Sec’y of Labor v. Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (2016). Considering the serious nature of a potential injury resulting from a trip-and-fall accident, discussed *supra*, the inspector’s gravity assessment of lost work days or restricted duty is more than supported by the record. Miners exiting the mine in an emergency would be travelling quickly and may not be thinking clearly, making serious injuries including bumps, bruises, dislocations, sprains, lacerations, and contusions more likely. Additionally, the

presence of smoke could severely limit visibility and increase the risk of disorientation and injury.

The inspector's assessment of one person affected is also supported by the record. In the event of an evacuation, it is unlikely that more than one miner attached to the tagline would trip, fall, or slip over the protruding hoses while exiting single file.

IV: The moderate level of negligence designated by the inspector is supported by a totality of the circumstances.

An operator is moderately negligent when "the operator knew or should have known of the violative condition or practice but there are mitigating circumstances." 30 C.F.R. § 100.3 Table X. This Court finds that Respondent knew or should have known that this condition existed and posed a reasonable risk of injury. Respondent does not deny its awareness of the condition, which existed for approximately five years. T. 162; 251-53. At hearing, Respondent argued that miners working in the cited area were accustomed to locating and avoiding the protruding hoses as they travelled through the escapeway multiple times per day. Given that the operator knew or should have known of the condition, this Court finds that the moderate level of negligence designated by the inspector is supported by a totality of the circumstances.

V: The originally assessed penalty of \$768.00 is appropriate.

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). Commission Judges are not bound by the Secretary's penalty regulations. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge shall consider the six statutory penalty criteria:

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

30 U.S.C. 820(i).

The Secretary has proposed a penalty of \$768.00 for the violation cited in Citation No. 9076458. I have considered and applied the six penalty criteria found in Section 110(i) of the Act and, for the following reasons, affirm the Secretary's assessment.

The history of assessed violations has been admitted into evidence and shows 230 violations by this operator in the 15-month period prior to the issuance of the citation, seven of which involve a similar standard. P-4. I have addressed negligence and gravity in the discussion above and have found that the violation was the result of moderate negligence and was

reasonably likely to result in lost workdays or restricted duty to one person. The mine is a large mine that produces well over the annual tonnage required to fall into the largest category of mines under 30 C.F.R. § 100.3. The parties have stipulated that an assessment of \$768.00 would not affect the operator's ability to continue in business. *See supra* J.S. 6. Finally, I have considered that the citation was abated in good faith. Based on the foregoing, this Court finds that a penalty of \$768.00 is appropriate.

ORDER

The Respondent, Consol Pennsylvania Coal Company, is **ORDERED** to pay the Secretary of Labor the sum of \$768.00 within 30 days of this order.¹⁵

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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¹⁵ 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.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 11, 2021

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of TRACY A. LEWIS,
Complainant,

v.

TIP TOP MATERIALS, LLC,
Respondent

TEMPORARY REINSTATEMENT

Docket No. VA 2021-0008-D
MSHA Case No.: NORT-CD 2021-03

Mine: Tip Top Materials, LLC
Mine ID: 44-07399

ORDER GRANTING TEMPORARY REINSTATEMENT OF TRACY A. LEWIS

Before: Judge Young

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor (“Secretary”) on February 26, 2021, filed an Application for Temporary Reinstatement of miner Tracy A. Lewis (“Complainant”) to his former position with Tip Top Materials, LLC (“Respondent”) at Respondent’s mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary’s application for temporary reinstatement. 29 C.F.R. § 2700.45(c). The Secretary’s certificate of service states that the Application for Temporary Reinstatement of Complainant was served on Respondent by electronic mail on February 26. The Respondent has not filed a timely Request for Hearing.

The Secretary has found that the Complaint was not frivolously brought and, as explained below, has provided evidence supporting that determination. Therefore, consistent with Section 105(c)(2) of the Act, the temporary reinstatement of Tracy A. Lewis is granted.

Law and Regulations

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. § 815(c)(1-2). The plain language of the Act also provides that “if the Secretary finds that the complaint was not frivolously brought, the Commission, on an expedited basis upon application by the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the Complaint.” 30 U.S.C. § 815(c)(2) (emphasis added).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(c). If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof, the Judge determines that the miner's complaint was not frivolously brought,¹ shall issue immediately a written order of temporary reinstatement. *Id.*

If there is a hearing, the judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."² *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). In the instant case, however, the Respondent has not timely filed a request for hearing. Thus, Commission Procedural Rule 45(c) compels me to review the Secretary's determination that the Complaint in this matter was not frivolously brought. *See* 29 C.F.R. § 2700.45(c).

Disposition

The Secretary has provided the evidentiary basis for his determination that the complaint in this matter has not been frivolously brought. The Act requires the Secretary to investigate the miner's complaint of discrimination. 30 U.S.C. § 815(c)(2). The Secretary's application includes the complaint filed by Complainant (Exhibit "A" to the Application) and the Declaration of Special Investigator Michael R. Hughes indicating that this was done (Exhibit "B.")

Mr. Hughes' Declaration provides facts in support of the Secretary's conclusion that the complaint was not frivolously brought, including:

1. Complainant was a "miner" employed as a foreman at a "mine" operated by a "person," as defined by the Act;
2. Complainant participated in an MSHA investigation into a discrimination complaint arising from the firing of his son, Matthew Lewis, allegedly for filing a safety complaint with MSHA;
3. Complainant had been ordered by the mine superintendent to fire his son for making a safety-related complaint to MSHA, and that he carried out the order;

¹ The Act's legislative history suggests that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

² "Substantial evidence" means "such relevant evidence as a reliable 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)).

4. Complainant was subsequently terminated from his employment under circumstances that Mr. Hughes found to provide “reasonable cause to believe that Tracy Lewis was discharged because he engaged in protected activities.”

Dec. of Michael R. Hughes, Feb. 4, 2021 (Ex. “B” to App. For Temp. Reinst.)

The Complaint was timely filed, within a week after Complainant was terminated. It includes additional allegations relevant to MSHA’s decision. Complainant stated that he was told by other employees at the mine that Complainant would be “gone in two weeks,” and that he was told he was fired for approaching too quickly in his vehicle upon learning of a confrontation between his son and the mine superintendent and other employees.

The facts provided in support of the agency’s decision, if true, would establish jurisdiction, a timely complaint of discrimination, and that Complainant engaged in protected activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus between his participation in an MSHA investigation and his termination.

Findings and Conclusion

At this stage, the facts alleged by the Secretary are undisputed. Therefore, I find that the Complaint for discrimination has not been frivolously brought, and that Complainant Tracy A. Lewis is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Tracy A. Lewis** be **immediately TEMPORARILY REINSTATED** to his former job as a foreman at the Tip Top Materials mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Tip Top Materials, LLC, did not violate Section 105(c) of the Act.

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

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March 16, 2021

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of TRACY A. LEWIS,
Complainant,

v.

TIP TOP MATERIALS, LLC,
Respondent

TEMPORARY REINSTATEMENT

Docket No. VA 2021-0008-D
MSHA Case No.: NORT-CD 2021-03

Mine: Tip Top Materials, LLC
Mine ID: 44-07399

ORDER OF TEMPORARY ECONOMIC REINSTATEMENT

Before: Judge Young

This matter is before me on an application for temporary reinstatement filed by the Secretary of Labor (“Secretary”) on behalf of Tracy Lewis (“Complainant”) pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2), against Tip Top Materials, LLC (“Tip Top”). The Secretary filed the Application for Temporary Reinstatement on February 26, 2021. The Respondent did not file a timely Request for Hearing, and the temporary reinstatement of Tracy A. Lewis was ordered by me on March 11, 2021.

The Respondent subsequently retained counsel and the parties to this case – the Secretary; Tracy A. Lewis; and Tip Top Materials, LLC - through their respective counsel filed a Joint Motion to Approve Economic Temporary Reinstatement Agreement for Tracy A. Lewis on March 16, 2021. Pursuant to the Agreement, Tip Top, effective March 12, 2021, shall place Lewis “in the same financial and legal position that he would be in had he physically returned to work” while his discrimination case on the merits is pending.

The Agreement sets forth the terms of the temporary economic reinstatement, including Complainant’s rate of pay and benefits. Lewis shall be paid every Friday via a check mailed to him at 8717 Lewis Mountain Road, Pound, VA 24279. The Agreement includes other terms and conditions which are incorporated into this order by reference.

ORDER

I have considered the representations and documentation submitted in this case and I conclude that the terms set forth in the Agreement are appropriate under section 105(c)(2) of the Mine Act. Consequently, the Agreement is **APPROVED** and Tip Top is **ORDERED** to economically temporarily reinstate Tracy A. Lewis pursuant to the terms and conditions set forth in the Agreement.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Tip Top Materials, LLC, did not violate Section 105(c) of the Act.

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

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