

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 15, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-241
Petitioner,	:	A.C. No. 05-03836-166946-01
	:	
	:	Docket No. WEST 2009-580
	:	A.C. No. 05-03836-175445-02
	:	
v.	:	Docket No. WEST 2009-820
	:	A.C. No. 05-03836-180513-02
	:	
TWENTYMILE COAL COMPANY,	:	Docket No. WEST 2009-1322
Respondent.	:	A.C. No. 05-03836-192254-01
	:	
	:	
	:	Foidel Creek Mine

**DECISION**

Appearances: Jennifer A. Casey and Amanda K. Slater, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado; Larry W. Ramey, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for Petitioner.  
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania; C.G. Peterson, Jackson Kelly PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Twentymile Coal Company (“Twentymile”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Steamboat Springs, Colorado, and filed post-hearing briefs. Twentymile operates the Foidel Creek Mine, a large underground coal mine in Routt County, Colorado. The mine extracts coal in panels using a longwall system.

## I. STIPULATIONS

At hearing, the parties offered the following stipulations into evidence:

8. The proposed penalties will not affect Twentymile's ability to remain in business.
9. Twentymile demonstrated good faith in abating the cited condition.
10. Twentymile is a large operator.
11. The certified copy of the MSHA Assessed Violations History reflects the history of the mine for the fifteen months prior to the date of the citations/orders and may be admitted into evidence without objection by Twentymile.
12. These cases involve ten Section 104(d)(2) orders. The 104(d)(1) order giving rise to Order No. 8460508 was issued on October 25, 2006 (Order No. 7286324) and has been resolved in settlement by the parties. The 104(d)(1) order giving rise to Order Nos. 8463325, 8463326, 8463327, and 8463330 (Order No. 7286321) was also issued on October 25, 2006 and has been resolved in settlement by the parties. In the period from October 25, 2006 to June 23, 2009, Twentymile was issued more than 30 orders (including those at issue here) pursuant to section 104(d) of the Act. Ten such orders are listed as being final orders. The rest are still in contest.
13. Order No. 8460508 refers to Citation Nos. 8460506 and 8460507. Copies of such citations are marked as Government Exhibit 8 and may be admitted into evidence without objection from Twentymile. Citation Nos. 8460506 and 8460507 were designated as significant and substantial violations. The citations and corresponding civil money penalties for such citations have been contested by Twentymile and are currently pending before the Commission in Docket No. WEST 2010-1323. The fact that Twentymile does not object to the admission of such exhibits does not in any way constitute an admission that such citations were validly issued or that any allegation therein is true.
14. Order No. 8463330 refers to Citation No. 8463328. A copy of this citation is marked as Government Exhibit 8 and may be admitted into evidence without objection from Twentymile. Citation No. 8463328 is designated as a non-significant and substantial violation. The citation and corresponding civil money penalty have been contested by Twentymile and are currently pending before the Commission in Docket No. WEST 2010-1323. The fact that Twentymile does not object to the admission of such exhibits does not in any way constitute an admission that such citations were validly issued or that any allegation therein is true.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### 1. WEST 2009-1322, Order Nos. 8463325, 8463326, 8463327, 8463330

Inspector Mark Jay Albrecht has been employed by MSHA since 1998. During his time with MSHA he has worked as a metal/non-metal inspector and supervisor at surface and underground mines. Albrecht is currently a coal mine safety and health specialist in the Gillette, Wyoming, field office of MSHA District 9. As a health and safety specialist he is responsible for conducting health sampling and, occasionally, regular inspections. Prior to joining MSHA he worked for 10 years as a miner at above ground, non-coal mines. Inspector Albrecht has an associate's degree in electronic science and a second degree in assurance management.

On June 16, 2009, Inspector Mark Albrecht traveled to the Foidel Creek Mine to conduct health sampling and check the mine's Part 90 miners. The Part 90 miners he desired to check were not on shift at the time, so Albrecht selected an alternative inspection assignment to sample the seal lines in the North Main, which had been shut down and sealed. Albrecht was accompanied by Matt Winey, the shift foreman at the mine. Albrecht issued the orders discussed below while traveling the return entry of the North Mains section of the mine.

#### A. Order Nos. 8463325 and 8463326

On June 16, 2009, Inspector Albrecht issued Order Nos. 8463325 and 8463326 under section 104(d)(2) of the Mine Act for alleged violations of 30 C.F.R. § 75.333(h). Order No. 8463325 alleges the following:

The permanent stopping provided between the intake and the return air courses 3 left, north mains, across from the #1 seal, between #1 & #2 entry was not maintained to separate the air courses. There was a hole at the base of the stopping 4" wide by 2" high that allowed intake air to short circuit into the return air course. The area had been inspected on 6/15/09 by a company responsible person. The condition had not been identified on the examination report 6/15/09 and citation 8463330 was issued to the mine operator for the improper examination of this area. The condition was obvious to the most casual observer and this company has been cited 30 times in the past 15 months for the same standard. The persons examining this area engaged in aggravated conduct constituting more than ordinary negligence by failing to identify obvious conditions that affect miner's safety. This is an unwarrantable failure to comply with a mandatory safety standard.

(Ex. G-1). Albrecht determined that an injury was unlikely but, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature (“S&S”), that one person would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty of \$4,000.00 for this violation.

The second order, Order No. 8463326, alleges the following:

The permanent stopping provided between the intake and the return air courses 3 left, north mains, across from the #2 seal, between #1 & #2 entry was not maintained to separate the air courses. There was a hole at the base of the stopping 6" wide by 2" high that allowed intake air to short circuit into the return air course. The area had been inspected on 6/15/09 by a company responsible person. The condition had not been identified on the examination report 6/15/09 and citation 8463330 was issued to the mine operator for the improper examination of this area. The condition was obvious to the most casual observer and this company has been cited 30 times in the past 15 months for the same standard. The persons examining this area engaged in aggravated conduct constituting more than ordinary negligence by failing to identify obvious conditions that affect miner’s safety. This is an unwarrantable failure to comply with a mandatory safety standard.

(Ex. G-2). Albrecht determined that an injury was unlikely, but, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty of \$4,000.00 for this violation.

Subsequently, the Secretary modified both of these orders to allege violations of section 75.333(b)(1) which requires that “[p]ermanent stoppings or other permanent ventilation control devices . . . , shall be built and maintained . . . [b]etween intake and return air courses . . . .” 30 C.F.R. § 75.333(b)(1).

i. *Summary of Testimony*

Inspector Albrecht testified that he began his inspection by traveling the Two Mains, which he noted as being in good shape and as having a good stopping line and plenty of rock dust. (Tr. 26). He then traveled to the Three Left North Mains which was quiet and clear. (Tr. 26). Albrecht stated that air was blowing in his face. (Tr. 26). Upon reaching the first seal, which was not a sampling point, Albrecht could hear air rushing through the stopping on the

opposite side of the return entry. (Tr. 27, 28). After checking the integrity of the seal, he approached the stopping, which separated the return entry from the intake, and noticed a hole approximately four inches by two inches, slightly left of center, at the bottom of the stopping. (Tr. 27, 28, 30, 31, 86). Albrecht was unable to determine how the hole got there, or how long it had been there. (Tr. 31, 34). He stated that the air passing through the stopping was “whistling, noisy, loud” and very different from the sound of air that normally moves through the return. (Tr. 27, 113-114). According to Albrecht, there was dirt and approximately three to four inches of rock dust in the cross cut in front of the stopping. (Tr. 86-87). He sprinkled rock dust in front of the hole and determined that air was flowing from the intake side to the return side of the stopping. (Tr. 29, 115). Albrecht agreed that there was a significant amount of air pressure and that he was not concerned that air would back up into the intake. (Tr. 115). He testified that he did not take an air sample at the hole because he did not think he needed to do so to determine that the stopping was not serving its intended purpose, i.e., separating the intake air from the return air. (Tr. 31-32, 40). Further, he did not travel to the intake side to measure the air so as to determine how much intake air was blowing through the hole. (Tr. 88, 111). Albrecht testified that the hole would continue to deteriorate due to the amount of air traveling through it, although he could not say whether this particular hole changed in appearance over time. (Tr. 90).

Albrecht explained that the stopping line between the intake and return must be checked weekly. (Tr. 20-21). Generally, the return is quiet, while the intake may be louder with equipment running. (Tr. 21). According to Albrecht, the weekly examiner of the return should be concerned mainly with the roof and rib conditions, but also with the seal line, permanent stoppings, ventilation control devices, and rock dust. (Tr. 35-36). On cross-examination Albrecht agreed that the primary focus of the weekly examination conducted pursuant to section 75.364 is to look for hazards related to air quantity, methane, and ventilation. (Tr. 93, 94, 96). Albrecht testified that he looked at the Date Time and Initial board (“DTI”) that was in the area and determined that someone had conducted a weekly exam of the area on the 15th. (Tr. 34). While he could not read the initials of the individual who conducted the exam on the June 15th, he later determined that the examiner was Tim Bertram. (Tr. 34-35).

According to Albrecht, this particular stopping was a Kennedy stopping<sup>1</sup> approximately 20 feet wide and 10 feet high. (Tr. 29, 88-89). Albrecht explained that the stoppings are designed to separate the air current in the return from the air current in the intake. (Tr. 29). He acknowledged that all stoppings have leaks which allow air to pass through, but they should not have holes. (Tr. 30, 95). The only time a hole would be acceptable would be to vent a power center to the return. (Tr. 30, 89). Albrecht did not know if there was an electrical installation on the other side of the stopping and he did not look at the other side, although he acknowledged that he could have. (Tr. 87-89). While Albrecht’s inspection notes indicated that the hole

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<sup>1</sup> Albrecht described a Kennedy stopping as a set of bars that go from wall to wall, with six foot panels that slide together and clip to form a metal wall. (Tr. 29-30). Foam is used to seal the cracks to stop airflow. (Tr. 29-30).

“appears to be a vent for a power center,” he testified that Winey told him that the hole was not a vent because the mine would not put a vent on the mine floor. (Tr. 112).

Based on his observations, Inspector Albrecht issued Order No. 8463325 for a violation of section 75.333(h), which he described as a “catchall” section of the Secretary’s regulations. (Tr. 32). Albrecht acknowledged that he mistakenly cited the wrong standard, and that the order was later modified to reflect a violation of section 75.333(b)(1), which specifically requires permanent stoppings or other ventilation controls between the intake and return air courses. (Tr. 32, 33, 84). According to Albrecht, the stopping was not being maintained as required by that safety standard. (Tr. 33-34). The violation was terminated by using foam and other material to patch the hole. (Tr. 36).

Albrecht designated the order as an unwarrantable failure to comply with the mandatory standard because the noise created by the air passing through the hole was extremely obvious and could not have been easily ignored. (Tr. 36, 37). He did not have to get down on his hands and knees to see the condition. (Tr. 37). Further, the weekly examiner had been in the area the day before the inspection, yet the condition had not been noted in the examination books. (Tr. 36-38). Albrecht acknowledged that he could not determine how the hole got there or exactly how long it had been there. (Tr. 36). Albrecht agreed that the condition was not extensive. (Tr. 106). He testified that the mine had been cited for violations of section 75.333(h) about 30 times in the previous 15 months. (Tr. 40). However, while some of the past section 75.333(h) violations did involve holes in stoppings, he was not sure how many of those violations involved a condition similar to the one cited in this instance and he acknowledged that section 75.333(b)(1) is different from the one he based his unwarrantable failure finding on. (Tr. 41, 94, 95). Moreover, not all of the violations in the history he relied upon were final orders, and he did not run any comparison against other mines or national rates. (Tr. 101-102). Albrecht, in determining that the violation was the result of high negligence, relied on the past history of violations of the cited standard, the failure of the weekly examiner to discover the condition, and the fact that he issued a second order for the same condition at another seal. (Tr. 41-42). According to Albrecht, this was a continuous problem and it was not getting fixed. (Tr. 42).

Albrecht determined that the violation was not S&S based on his observation that the size of the hole was not going to affect airflow and that the condition did not amount to a hazard. (Tr. 39, 40, 93). However, while this individual hole was not a hazard, he noted that it is difficult to tell how big a hole can be, or how many holes would be needed, before it would become a hazard. (Tr. 39, 40, 114).

Following his inspection of the stopping across from the first seal, Albrecht traveled to the stopping across from the second seal. (Tr. 43). He agreed that the stopping across from the second seal was a block stopping and was covered with sealant. (Tr. 88). He discovered a hole, approximately six inches by two inches, at the bottom of the stopping on the mine floor. (Tr. 43, 86). There was dirt and other material on the mine floor in front of the stopping. (Tr. 87). He testified that, again, it was the sound of air passing through the stopping that brought his attention

to the condition. (Tr. 43). Albrecht again sprinkled rock dust in front of the hole and determined that air was traveling from the intake to the return side of the stopping. (Tr. 44). He stated that he was concerned that, if the hole were not plugged up, it would continue to deteriorate and get bigger, and, in time, it would stop making noise and would not be easily identified. (Tr. 44-45). Nevertheless, he could not say whether this particular hole changed in appearance over time. (Tr. 90). According to Albrecht, this condition was virtually identical the one he cited at the stopping across from the first seal. (Tr. 46). On cross-examination Albrecht agreed that the condition did not present a hazard. (Tr. 93).

Based on his findings, Albrecht issued Order No. 8463326. He initially cited a violation of section 75.333(h), but, as with the first order, the cited standard was later modified to section 75.333(b)(1). (Tr. 46). He designated the order as non-S&S. (Tr. 46). Again, as with the first order, he designated the condition as an unwarrantable failure after looking at the history, the extent of the condition, its obvious nature, and the fact that he issued another order for the same condition. (Tr. 46). He acknowledged that he could not determine if the hole was present at the time of the weekly examination, but he believed that the hole had been there for a while due to the rock dust. (Tr. 47). He again acknowledged that his unwarrantable failure determination was based on the history of violations of section 75.333(h) rather than on the standard now being litigated. (Tr. 94, 95).

Albrecht testified that, later that evening, he went back to the mine to attempt to sample some of the Part 90 miners who were not at the mine earlier that day. (Tr. 45). That night, Albrecht traveled with Jim Wells, one of the Part 90 miners who was an examiner and was conducting a preshift examination of a belt line. (Tr. 45, 95, 74). According to Albrecht, Wells said that “he did not have time to stop and look at these things” and the mine does not “want us to identify the stuff because we don’t have the people to correct it.” (Tr. 46). Albrecht testified that he had a difficult time keeping up with Wells. (Tr. 45).

Matt Winey, who has worked at Twentymile for 23 years, is certified to conduct preshift and weekly examinations. (Tr. 118-119). He testified that he was not sure what drew Albrecht’s attention to the stopping across from the 39 crosscut, although he does remember Albrecht saying that he could “hear air.” (Tr. 117, 120-121, 135). According to Winey, you could not see the hole from the area where they were walking in the entry and it was necessary to travel to the stopping to see the hole. (Tr. 121, 124). He opined that, while there was no water in the area at the time of the inspection, the hole was possibly created in the past to drain water that had accumulated near the high voltage electric switch on the opposite side of the stopping. (Tr. 126).

Winey testified that there is noise in the No. 1 entry from the movement of air. (Tr. 125). He acknowledged that there was a “pretty good quantity of air . . . rushing” through the two cited holes and described the sound as like wind whistling through an improperly sealed house door. (Tr. 125). He stated that there was a lot of pressure across the stoppings and there was no potential of an air reversal due to the hole. (Tr. 125-126). On cross-examination Winey agreed that the stoppings were installed quite a while ago and, when installed, they were one solid

structure without holes in them. (Tr. 144). Further, he agreed that, with the exception of vents, stoppings should be constructed in solid form. (Tr. 145). However, on redirect, Winey agreed that it was also acceptable to put a hole in a stopping in order to drain water from around electrical equipment. (Tr. 145).

Winey testified that, generally, a weekly examiner would not travel up to each stopping but would just look at the stopping from the entry to see if it was providing a proper seal and if it was taking weight, damaged, or had large holes in it. (Tr. 124). On cross-examination Winey agreed that weekly examinations should include checking the structural integrity of stoppings, including whether there are any defects of those stoppings. (Tr. 136). Further, he agreed that the purpose of the stoppings was to separate the intake and return air courses. (Tr. 141). Winey acknowledged that Tim Bertram, the examiner who had checked the return the day before the inspection, has lost some of his sense of hearing over the course of his career as a miner and there is a possibility that his condition would have affected his ability to hear the air traveling through the hole. (Tr. 127, 135).

Winey testified that the day after the orders were issued he traveled with Tim Bertram and Dick Conkle to the subject area to investigate and follow up on the order. (Tr. 119). During their investigation they took a photograph of the intake side of the stopping at crosscut 39, i.e., the opposite side of the stopping that he and Albrecht looked at. (Tr. 121; TM Ex. 6a). Winey stated that the photo shows a concrete block stopping with a high voltage electrical switch in the foreground. (Tr. 121-122; TM Ex. 6a). He explained that this particular switch does not need to be vented to the return. (Tr. 122). Winey explained that venting is accomplished by putting a hole in the stopping. (Tr. 123). Further, while the subject stopping separates the return from the intake, there is also a Kennedy stopping in the same crosscut that separates the intake roadway from the switch. (Tr. 123).

Michael Ludlow is currently a project manager at the Sage Creek Mine. (Tr. 152). In June of 2009 he was mine manager at the Foidel Creek Mine. (Tr. 152). Ludlow testified that the holes in the stoppings were not a hazard, but would be violations based on the way the law is interpreted. (Tr. 157). He opined that weekly examiners are supposed to be looking for hazardous conditions. (Tr. 153). According to Ludlow, “a hazard is something that would cause immediate harm or danger to persons if they were exposed to it.” (Tr. 155). Based on his conversations with examiners, the examiners have enough time to complete their job. (Tr. 154). No examiner, including James Wells, has ever said they do not have enough time to complete their job. (Tr. 154). According to Ludlow, the mine has the resources to fix hazardous conditions as soon as they become aware of them and he has never told an examiner not to fix something because the mine did not have the resources to do so. (Tr. 155).

ii. *The Violation*

The Secretary argues that the Respondent twice violated the cited standard by failing to maintain permanent stoppings across from the No. 1 and No. 2 seals in the Three Left North

Mains. (Sec’y Br. 11). The purpose of the stoppings is to separate the intake and return air courses. *Id.* at 12. When the stoppings were installed, they did not have holes. At the time of the inspection there were holes in both stoppings and air was traveling from the intake through the holes and into the return air course. *Id.* As a result, the stoppings were not fulfilling their purpose and, accordingly, were not being properly maintained. *Id.*

The Respondent argues that the holes in the two stoppings did not compromise the airflow in the return and, as a result, the stoppings had been maintained in a “functioning condition and were serving the purpose for which they were constructed.” (TM Br. 7). Further, the hole in the stopping across from the No. 1 seal served the purpose of allowing water to drain from around the electrical switch on the intake side of the stopping. *Id.* at 8.

It is undisputed that a hole existed at the bottom of both stoppings. The cited standard requires that permanent stoppings be built and maintained between the intake and return air courses. I credit Inspector Albrecht’s testimony that air was traveling from the intake, through the holes in the stoppings, and into the return. Further, I credit Albrecht’s testimony and find that, while leaks in a stopping may be unavoidable, holes in stoppings are indicative of improper maintenance of the stoppings. For that reason I find that Secretary has satisfied her burden and she proved that the stoppings were not properly “maintained . . . [b]etween the intake and return air courses” as required by the plain language of section 75.333(b)(1).

Further, with regard to the Respondent’s argument that the hole across from the first stopping was intentionally created to serve a purpose, I find that, while the hole may have been created to drain water from around an electrical installation on the other side of the stopping, the reason for that hole no longer existed. I credit Winey’s testimony that the electrical switch on the other side of the stopping did not need to be vented. Further, it is undisputed that there was no water in the area at the time the order was issued. In light of these facts, there was no need for the hole in the stopping. Proper maintenance of the stopping would have included plugging holes once they were no longer needed for their intended purpose.

iii. *Gravity*

The testimony of both parties reveals that it is undisputed that neither of the cited conditions amounted to a hazard. Accordingly, the orders were properly designated as non-S&S. The condition would have affected, at most, the examiner who traveled this area on a weekly basis. An injury or illness related to these particular conditions was highly unlikely. For the foregoing reasons, I find the gravity of these violations to be very low.

iv. *Unwarrantable Failure and Negligence*

The Secretary argues that the holes in the stoppings were obvious to anyone who traveled in the area. (Sec’y Br. 12). In spite of their obvious nature, the conditions were not identified in the weekly exam that occurred the day before the orders were issued. *Id.* at 13. The fact that the

examiner was unable to hear the air traveling through the holes is irrelevant. *Id.* The history of ventilation and weekly exam-related violations put the Respondent on notice that greater efforts were needed for compliance. *Id.* Respondent has engaged in high negligence and has exhibited an unwarrantable failure to comply with the mandatory standard. *Id.*

The Respondent argues that the Secretary has failed to establish that any aggravated conduct occurred. (TM Br. 10). The two holes in the stoppings were small and could not be seen from the return entry. *Id.* at 11. Examiners do not typically travel into each crosscut to examine stoppings individually. *Id.* The Inspector based his unwarrantable failure and high negligence finding on a history of violations which was, admittedly, a catchall standard. *Id.* The history of violations of the cited standard reveals no previous violations that could have put the Respondent on heightened notice of the need to increase efforts to comply with the cited standard. *Id.* at 12. No allegation has been made that the cited conditions constituted a hazard. *Id.* at 13.

I find that the Twentymile was moderately negligent and that the violation was not the result of its unwarrantable failure to comply with the mandatory standard. The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

Inspector Albrecht testified that he was unsure how the holes were created and how long they had existed. While he believed that holes would continue to deteriorate over time, he did not indicate how long it would take for the holes to get significantly larger. I find that there is little to no evidence as to the length of time the cited conditions existed and that, for purposes of this analysis, this factor weighs in favor of the Respondent. Albrecht conceded that the conditions presented by both holes were not extensive and did not amount to a hazard. As a consequence, I find that these factors weigh in favor of Twentymile.

Inspector Albrecht testified that the whistling sound created by the holes rendered the condition obvious to any observer. However, as discussed above, Albrecht also conceded that the hole could have appeared after the weekly examination of the area. If the holes were present,

they may not have been making the whistling sound that Inspector Albrecht heard at the time of the weekly examination. I find that, while the condition may have been obvious at the time of the MSHA inspection, it is unclear whether it was as obvious, or even present, at the time the weekly examination was conducted. As a result, I find that it is unclear how “obvious” this condition was, or whether the Respondent had any knowledge of the existence of the condition.

The Secretary asserts that the history of violations demonstrates that the Respondent was on notice that greater efforts were necessary for compliance. At hearing, Albrecht testified that he based his unwarrantable failure analysis on a history of violations related to a “catchall” standard, i.e., 75.333(h), and not the history of violations of the standard at issue. It is unclear how many of the catchall standard violations related to holes in stoppings. The history of violations entered into the record in these cases does not show any violations of 75.333(b)(1). (Ex. G-32). I find that the Respondent was not on notice that greater efforts were necessary for compliance.

I find the factors to weigh heavily in the Respondent’s favor. There is no evidence of the Respondent engaging in aggravated conduct constituting more than ordinary negligence, nor is there any evidence of reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care. I find that the Twentymile was moderately negligent and that the violation was not the result of the Respondent’s unwarrantable failure to comply with the mandatory standard. Accordingly, Order Nos. 8463325 and 8463326 are modified to section 104(a) citations with moderate negligence and low gravity. A penalty of \$200 is appropriate for each of the violations.

**B. Order No. 8463327**

On June 16, 2009, Inspector Albrecht issued Order No. 8463327 under section 104(d)(2) of the Mine Act for an alleged violation of 30 C.F.R. § 75.202(a). The order alleges the following:

Ground support was not maintained for the access to the north mains, 3 left, #4 seal. The last row of permanent roof bolts was about 13 feet from the rib and the last bolt was more than 5' from the seal. Three posts had been installed on the right side of the access to the seal and there was more than 2' of space from the top of the posts to the roof. The posts were not supporting the roof in this area. The pile of material on the ground from the rib failure supported the posts in the upright position. The area was inspected on 6/15/09 by the weekly examiner and the condition was not identified in the examination book. The condition was obvious to the most casual observer and order #8463330 was issued for the improper examination. The mine operator engaged in aggravated conduct, constituting more than ordinary negligence by failing to

conduct a proper inspection of the area, identifying the unsafe condition and not correcting the condition that existed. This is an unwarrantable failure to comply with a mandatory safety standard.

(Ex. G-3). Albrecht determined that an injury was reasonably likely and such an injury could reasonably be expected to be permanently disabling. He determined that the violation was S&S, that one person would be affected, and that the violation was the result of reckless disregard on the part of the operator.

The standard cited by the Secretary requires that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” 30 C.F.R. § 75.202(a). The Secretary has proposed a civil penalty in the amount of \$30,288.00.

i. *Summary of Testimony*

After issuing the two orders discussed above, Albrecht, along with Winey, continued down the return entry. (Tr. 48). In front of the No. 4 Seal, Albrecht observed two posts intended for roof support that were missing their cap blocks. (Tr. 49). Posts were put in place to provide temporary roof support. (Tr. 49). In order to support the roof, the posts must be flush with the roof. (Tr. 49-50). Cap blocks are intended to sit on top of the posts and be wedged between the post and roof. (Tr. 49). Here, the two posts did not have cap blocks. (Tr. 50). Albrecht estimated that the space between the tops of the posts and the roof was approximately eighteen inches to two feet in height. (Tr. 52).

Albrecht agreed that TM Ex. 10 looked like the subject area. (Tr. 55-56). Albrecht described the area on the left side of the seal as having a can, with a deteriorating wall, and a post without a cap block. (Tr. 50). Most of the roof bolts to the left side of the seal were intact, and, according to Albrecht, that area was “pretty well supported.” (Tr. 50). There was a crib slightly left of center in the front of the seal, which was wedged into the area to provide secondary roof support. (Tr. 50, 97). Three other cribs were also present. (Tr. 97). Albrecht assumed that the crib in the middle of the seal was there because of the condition of the ribs. (Tr. 97). When Albrecht turned his attention to the right side of the seal and the right rib, he saw two posts without cap blocks, as well as a lack of good bolts from the right rib line out about twelve feet to the last row of good bolts. (Tr. 51). The good bolts were supporting the roof. (Tr. 97-98). Albrecht testified that a good bolt is one that is grounded to the roof, and has not had material fall away from the plates such that there is a space between the plate and the roof. (Tr. 51-52). The bolts beyond the last good row, heading towards the right rib, were not good. (Tr. 51-52). Albrecht explained that the posts had been set up to act as supplemental roof support in the area but, because the cap blocks were missing, no support was being provided. (Tr. 51-52). He estimated that the posts were six feet from the rib, while the last row of good bolts was approximately twelve to thirteen feet from the rib. (Tr. 54, 61). Based on that information, Albrecht determined that there was no roof support from the last permanent support, i.e., the

good bolts, all the way to the rib. (Tr. 52). There were bolts in the unsupported area, but they were not good bolts, as material had fallen from behind the plates. (Tr. 54). On cross-examination, Albrecht agreed that the number of bolts in the area was probably in excess of what was required by the roof plan, and that the seal would have provided some support. (Tr. 99).

Albrecht testified that both ribs had sloughed, and it appeared that some of the fallen material was actually holding up the posts. (Tr. 53). When estimating the amount of material that was on the ground, Albrecht stated that he “guess[ed] two and a half, three foot, from the angle of repose. Probably a foot or foot and a half of material around the base of the post. Some of it had fallen out of the roof.” (Tr. 53). He determined that the condition had existed for some time based on the fact that there was approximately  $\frac{1}{4}$  to  $\frac{1}{2}$  inch of rock dust on the material that had fallen. (Tr. 52-53, 99). While he was not sure how long the posts had been in place, he is sure that it was for more than a day due to the amount of rock dust that had settled on the cap blocks. (Tr. 60). Albrecht acknowledged that he was familiar with MSHA’s policy that rib sloughage in the return should not be cleaned up because the sloughage helps support the rib. (Tr. 98). Albrecht saw no cracks in the roof at this seal. (Tr. 103).

Albrecht testified that, generally, an examiner at the seal should take a methane reading, check the condition of the seal, roof, and ribs, and then mark the DTI board. (Tr. 103). It takes two to five minutes to gather a sample at a seal. (Tr. 22). Albrecht testified that there was a DTI board on the seal between the last row of good bolts and the uncapped timbers, i.e., in an area of unsupported roof. (Tr. 59). According to Albrecht, an examiner would have to get close to the seal to examine it and would have had to walk in the unsupported area to sign the DTI board. (Tr. 59, 62). Albrecht noted that this particular seal was not a methane sampling point. (Tr. 62).

Albrecht testified that he noticed footprints in the rock dust in front of the seal which showed a path that led down the timber line, i.e., to the left side of the uncapped posts, to the DTI board. (Tr. 59, 100). He explained that, in many areas of the return, the rock dust is up to a foot deep. (Tr. 60). He is not sure how old the footprints in the rock dust were, but they were identifiable enough that he determined they were not very old. (Tr. 60). Albrecht agreed that there was a possibility an examiner traveling to the DTI board could walk through the left side of the area and then come up from the back to sign the board, but even if they avoided the unsupported area on the way to the board, once they reached the board, they would be under unsupported roof. (Tr. 59-60). If the examiner stayed to the left of the middle crib, then he could safely walk all the way to the seal. (Tr. 98). Albrecht testified that, while neither he nor Winey went all the way to the DTI board or the face of the seal, they were able to see from the pillar line that Tim Bertram had conducted the examination of the area one day prior. (Tr. 53, 61, 66, 100). Albrecht did not get an opportunity to talk to Bertram. (Tr. 63).

Albrecht noted that the weekly examination book did not mention any problems with the roof in the area. (Tr. 63). The condition should have been listed since it was hazardous. (Tr. 63). According to Albrecht, roof falls cause the largest number of fatalities in the mining

industry. (Tr. 63-64). Examiners are the first line of defense and are responsible for examining these areas and making sure that things get fixed. (Tr. 64).

Based on his observations, Albrecht issued Order No. 8463327 for a violation of section 75.202(a). Albrecht agreed that section 75.202(a) is a catchall provision. (Tr. 100). He determined that the violation was S&S. (Tr. 64). Albrecht testified that a roof fall is a serious hazard. (Tr. 64). Here, the roof was not adequately supported, there was sloughage from the ribs, and the entry was wide. (Tr. 64). Material had fallen away from a number of bolts, and although there were no significant cracks in the roof, that fact does not establish that the roof cannot fall. (Tr. 64). Any injury sustained as a result of a roof fall would, at a minimum, cause spinal damage from material falling on the head of the miner. (Tr. 65). Most of the time, the injuries are permanent, but not always. (Tr. 65). On cross-examination, Albrecht agreed that most roof fall fatalities happen on working sections rather than in outby areas. (Tr. 101).

Albrecht designated the violation as an unwarrantable failure to comply with the safety standard. (Tr. 65). The examiner signed the DTI board, which was in the area of inadequately supported roof. (Tr. 65). It is the examiner's job to identify the hazards so that they can be fixed or the area cordoned off. (Tr. 65). The examination was conducted less than 24 hours before Albrecht arrived in the area. (Tr. 65). While, generally, there is not much traffic in this area, examiners, inspectors, supervisors, rock dusters, and miners conducting repairs would all need to be in the general area. (Tr. 66, 102). The condition of the timbers was obvious. (Tr. 66) A casual observer would have known that the roof was not adequately supported. (Tr. 66-67). According to Albrecht, there had been 28 violations of the cited standard in the previous 15 months. (Tr. 67). However, not all of the violations in the history he relied upon were final orders and he did not run any comparisons against other mines or national rates. (Tr. 101-102). The approximate ½ inch of rock dust on sloughage indicated that the condition had existed for some time. (Tr. 68). However, on cross-examination, Albrecht stated that he "had no idea how long it existed." (Tr. 99). Albrecht was not sure what the area looked like at the time the previous MSHA inspection party came through and agreed that it could have looked the same as it did when he traveled through the area. (Tr. 90, 99).

Albrecht designated the violation as being the result of "reckless disregard" on the part of the Respondent. (Tr. 68). He explained that he understood "reckless disregard" to mean "without reasonable care for the miner, aggravated conduct, intentional violation of the law." (Tr. 105). According to Albrecht, the examiner is an agent of the operator and is certified to inspect these areas. (Tr. 68-69). Further, the examiner, who is certified and should know the law, is required by law to identify the hazard and then report the condition in the books. (Tr. 68-69). Here, the examiner did not do that. (Tr. 69).

Winey testified that a miner could safely travel on either side of the crib in the middle of the entry to get to the face of the seal, where he could then safely examine the seal. (Tr. 130). He explained that an examiner could get to the face of the seal without walking under the hanging roof bolts. (Tr. 131). Moreover, an examiner would not be able to walk through the

area where material had sloughed off. (Tr. 132). According to Winey, the cribs in the area provided extra roof support. (Tr. 131). Winey could not remember where the date board was at the time of the inspection. (Tr. 130). He explained that the material on the right side of the crib was sloughage from the rib and the roof. (Tr. 131). The timbers were not touching the roof because of the roof sloughage. (Tr. 133). Winey could not remember any cracking in the roof in the subject area. (Tr. 131). He testified that there were a number of good bolts in the area, and that the area had more bolts than the mine would normally install. (Tr. 132). This particular seal had been in place for approximately 10 years. (Tr. 132). Winey testified that the condition of the area must have existed for some time. (Tr. 133, 137). Winey believed that it was possible that an MSHA inspector or a company examiner could have missed this condition. (Tr. 133-134, 137-138). He agreed that it is the mine's responsibility to examine the area. (Tr. 138). Because this particular seal was not a sampling location, an examiner would only be in the area to look at the face of the seal, sign the DTI board, and walk away. (Tr. 134). On cross-examination, Winey acknowledged that, even if there were no need to sample the seal, the examiner would still need to get pretty close to the seal to check and make sure there were no leaks or other problems. (Tr. 136). An examiner would need to go to the DTI board to write on it. (Tr. 146)

Winey testified that during the inspection he and Albrecht walked to the face of the seal to see the DTI board. (Tr. 138, 144). Winey could not "remember exactly" how they got to the face of the seal, but he thinks they traveled to the left side of the crib so they could walk under the good roof bolts. (Tr. 138-139, 143). Winey testified that there was a portion on the right side that was not safe to walk under. (Tr. 139). He agreed that the last row of bolts was more than five feet from the rib, and that the timbers were not good. (Tr. 139). Winey was "pretty sure" that there was rock dust on the floor, but he does not remember footprints between the last set of good bolts and the timbers. (Tr. 140).

Dianna Ponikvar, the compliance manager at the mine, testified on behalf of the Respondent. (Tr. 147). Ponikvar testified that, on the day of the hearing, she called the mine to find out where the DTI board was located. (Tr. 148-149). Based on her conversation with another individual, she marked a "B" on TM Ex. 10 to reflect the current location of the DTI board. (Tr. 148-149, 150-151). Ponikvar could not say whether the board was at that location at the time of the inspection, but she does not know of any reason why it would be moved. (Tr. 149). Ponikvar stated that almost every seal has a crib set in the middle of the entry to provide additional support so that, in the event of sloughage, one can still access the seal. (Tr. 149). Ponikvar testified that there have been no previous citations for roof control, or other violations, at this seal. (Tr. 150). She agreed that this seal did not have a sample point. (Tr. 151).

Mine Manager Ludlow testified that weekly examiners are supposed to be looking for hazardous conditions. (Tr. 153). According to Ludlow, "a hazard is something that would cause immediate harm or danger to persons if they were exposed to it." (Tr. 155). Whether an inadequately supported roof creates a hazard depends on "where it located, on where it is endangered off, and whose opinion it is." (Tr. 155-156). If he saw a violation of the roof control plan that was not a hazard, he would note it on the preshift exam in the remarks section and then

find the resources to abate it. (Tr. 156). He reviewed the orders issued by Albrecht and disagreed with Albrecht's findings. (Tr. 156).

ii. *The Violation*

The Secretary argues that Respondent failed to adequately support the roof at the No. 4 seal. (Sec'y Br. 13). A roof falls is one of the most serious hazards in underground coal mining. *Id.* Here, the roof between the last row of good roof bolts and the rib was unsupported. *Id.* at 14. The Respondent's examiner signed the DTI board the day prior to the issuance of the order. *Id.* On the day the order was issued, the DTI board was located underneath the unsupported roof. *Id.* at 14-15. Moreover, footprints in the rock dust led to the face of the seal and were below unsupported roof. *Id.* Accordingly, the roof in an area where persons worked at the mine was inadequately supported. *Id.* at 15.

The Respondent argues that the adequacy of a particular roof support must be measured against what a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have provided to meet the protection intended. (TM Br. 14). The cited area had roof support in the form of bolts, cribs, a can, and timbers. *Id.* at 15. The area had more bolts than the plan required, there were no cracks in the roof, the roof to the left side of the seal was in good condition, and the seal itself provided support such that the area could be adequately examined. *Id.* A person would not normally travel in the area where there was sloughage. *Id.* A person could safely travel to the seal on either side of the crib in the middle of the entry. *Id.* Moreover, the alleged footprints in the rock dust do not establish that anyone walked under unsupported roof. *Id.* Rather, the footprints, if anything, were directly under a row of roof bolts that were spaced closely together. *Id.* For those reasons, the Respondent argues that no person traveled in an area with inadequate roof support. *Id.*

The Secretary's roof-control standard at 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission has held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987) (*cited in Harlan Cumberland Coal Co.* 20 FMSHRC 1275, 1277 (Dec. 1998)).

I credit Inspector Albrecht's testimony as to the fact of violation and find that adequate roof support to protect against hazards did not exist in an area where persons worked or traveled. The last row of good bolts heading from the center of the seal toward the right rib was twelve to thirteen feet from the rib. While bolts did exist in the twelve to thirteen foot gap, they had potted out and were not providing complete support. The mine clearly had recognized the danger presented by this condition, as it had, at some undetermined point, placed supplementary support, in the form of the timbers, in the area between the last row of good bolts and the rib. However, those timbers were no longer providing support at the time of the inspection, as their cap blocks

were missing and nothing was in contact with the roof. The mine asserts that the seal itself provided some support. However, while the seal may have provided some support, it is not a structure designed for roof control but, rather, is designed primarily to achieve a purpose related to the ventilation plan. Further, while the evidence establishes that there were no cracks in the roof of the subject area at the time of the citation, it is well established that roof falls are unpredictable. I find that adequate support did not exist over the twelve to thirteen foot distance between the last row of good bolts and the rib.

Albrecht testified that the DTI board was on the face of the seal between the last row of good bolts and the uncapped timbers. Consistent with my earlier findings, the area of inadequately supported roof existed from the last set of good bolts to the rib. I credit Albrecht's testimony that the DTI board was located in the area of unsupported roof. I further credit his testimony that, in order to sign the DTI board, a miner would need to be standing in the area of inadequately supported roof. It is not entirely clear where the footprints that Albrecht described were located. I credit Albrecht's testimony that  $\frac{1}{4}$  to  $\frac{1}{2}$  inch of rock dust was on the material that had sloughed and fallen from the roof and ribs. Moreover, Albrecht stated that the cap blocks, which should have been against the roof, had rock dust on them such that he was convinced that the sloughed material, which presumably was at one point supported by the timbers and cap blocks, had been there for more than a day. It is undisputed that Tim Bertram initialed the DTI board the day prior to the issuance of this order. I find that it would have taken longer than one day for the amount of rock dust observed by Albrecht to accumulate on top of the sloughed material and cap blocks. I further find that Tim Bertram, the examiner, did travel into the inadequately-supported area when he signed the DTI board the day prior to inspection.

I find that a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided additional roof support in the area where the DTI board was located. Timbers were not touching the roof and potted out bolts were in the area. An examiner is required by law to travel to this area on a weekly basis. A reasonably prudent person would not fail to provide roof support in an area that is traveled on a regular basis. Based on the foregoing analysis, a violation of the cited standard has been established.

iii. *Significant and Substantial and Gravity*

The Secretary argues that the violation contributed to the discrete safety hazard of a roof fall. (Sec'y Br. 15). Roof falls are one of the most serious and dangerous hazards in the coal mining industry. *Id.* The roof in this area was obviously deteriorating, and the support that was in place was not being maintained. *Id.* at 16. It was at least reasonably likely that the continued failure to support the roof in the area would lead to a serious injury. *Id.* at 16-17.

The Respondent argues that there was no reasonable likelihood that the violative condition would result in an injury causing event. (TM Br. 17). The roof was adequately supported, and there were no cracks at the seal. *Id.* Further, there was limited exposure of miners to the condition, as only the weekly examiner would visit this area, and his stay would be

limited to the amount of time it took to look at the seal and mark the DTI board. *Id.* at 18. Moreover, the inspector did not credibly testify as to the location of the DTI board, or the footprints he allegedly saw in the coal dust. *Id.* Finally, this area is in an outby area, away from the face, and is unlikely to experience any sudden change that will result in a roof fall. *Id.* at 19.

A S&S violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated 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). The Commission has explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

As discussed above, I have already found a violation of the cited mandatory standard. Further, I find that there was a discrete safety hazard, i.e., that the lack of adequate support created a source of danger in the form of a roof fall in an area where persons travel. Furthermore, I find that the third element of the *Mathies* test has been satisfied.

There are many factors that could be used to support a conclusion that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. Albrecht testified that there were no cracks in the roof in the unsupported area. Further, he acknowledged that one could safely travel to the face of the seal under good roof. I credit Winey's testimony that an examiner would not travel where the material had already sloughed off, but could travel to the face on either side of the crib and under the good roof bolts. Based on TM Ex. 10, and Albrecht's and Winey's testimony, the DTI board, while located under inadequately supported roof, was very close to the area of roof that was properly supported by the last row of good bolts and was immediately adjacent to the seal. An examiner would only need to enter the area of inadequately supported roof to write the date, time, and his initials on the DTI board. This would take less than a minute. This seal was not a sampling point and the only reason anyone would go to the face of the seal was to inspect it. Examiners are only in this area once a week and would only need to be under the unsupported section of roof for a matter of seconds. Moreover, as conceded by Albrecht, the seal itself provided some support. Further, Albrecht agreed that, while a roof fall could occur at this location, most roof fall fatalities happen in working sections, within 40 feet of the face and, typically, do not occur in outby areas like the one found here.

Nevertheless, considering continued normal mining operations and the fact that the DTI board was under unsupported roof, I find that the evidence establishes that an injury was reasonably likely. Roof falls are unpredictable. The condition had existed for a considerable period of time and there is no indication that Twentymile planned to install additional roof support in the area or take other steps to make the area safe for the weekly examiner. *See Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005). I find that the violation contributed to the cause and effect of a hazard that was significant and substantial. The Secretary is not required to establish that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co., Inc.*, 18 FMSHRC 862, 865 (June 1996). The Secretary also established the fourth element of the *Mathies* analysis and I find that, if an injury were suffered as a result of this hazard, it would be of a serious nature.

#### iv. *Unwarrantable Failure and Negligence*

The Secretary argues that the subject violation was a result of the Respondent's reckless disregard and unwarrantable failure to comply with the cited standard. (Sec'y Br. 17). Specifically, she argues that the condition presented a high degree of danger, and was extremely obvious, yet had been ignored by the weekly examiner the day prior to the inspection. *Id.* This operator has a history of roof control and weekly examination violations and was on notice of the need to conduct more thorough weekly exams. *Id.* at 18. By failing to identify and correct this

obvious condition, the Respondent has “exhibited the absence of the slightest degree of care and an unwarrantable failure to comply with the mandatory safety standard.” *Id.*

The Respondent argues that the condition did not pose a high degree of danger and was limited to a small area in front of one seal. (TM Br. 19). Further, there are numerous seals in the area with no roof control issues. *Id.* The duration of this condition is not a significant factor, given that the inspector testified that the condition could have existed during previous MSHA inspections, yet had not been cited. *Id.* at 19-20. Moreover, the history of violations is based on a catchall standard that can address a variety of conditions, and the Inspector did not make his determination based on final orders. *Id.* at 20. The Secretary has not shown that there is a similarity of prior violations to the condition at issue in this case. *Id.*

I find that Twentymile was highly negligent, and that the violation was the result of the Respondent’s unwarrantable failure to comply with the mandatory standard. I again credit Albrecht’s testimony that this condition had existed for longer than one day and did exist at the time the examiner conducted his weekly examination the day prior to the issuance of this order, yet was not noted or corrected. The condition was obvious. Timbers which had been set at some point were not in contact with the roof, and were not providing the necessary support. The fact that these timbers were no longer touching the roof should have immediately alerted the examiner of the condition. The parties agree that the bolts in the subject area were potted out and not providing support. In addition to being obvious, the condition also presented a high degree of danger. While the likelihood of an injury was not particularly high, it is well established that if any injury occurs due to a roof fall, it will be a serious injury and could potentially be fatal. I credit Albrecht’s testimony in that respect. I agree with the Respondent that a violation history that is not based on final orders, for an admittedly catchall standard, is not very helpful when considering whether the Respondent was on notice that greater efforts were necessary for compliance.

The Respondent had obviously attempted to address the roof support issue by installing the timbers at some time in the past; however, no attempt had been made to provide roof support after the roof had sloughed and the timbers were no longer providing support. I find that the aggravating factors, when looked at together, reflect aggravated conduct that constituted more than ordinary negligence. I give great weight to the obviousness of this condition and the fact that the examiner had been in the area one day prior, yet had failed to note the condition or correct it. The examiner, who is charged with identifying hazards, exhibited a serious lack of reasonable care when he did not identify the subject condition. An examiner acts as the agent of a mine operator during his examination and his conduct is imputable to a mine operator. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 197 (Feb. 1991). I find that the Respondent’s conduct, while it did not reach the level of reckless disregard, did amount to high negligence. Accordingly, I affirm the Secretary’s unwarrantable failure finding, but modify the level of negligence from reckless disregard to high. I assess a penalty of \$25,000.

**C. Order No. 8463330**

On June 16, 2009, Inspector Albrecht issued Order No. 8463330 under section 104(d)(2) of the Mine Act for an alleged violation of 30 C.F.R. § 75.364(d). The order alleges the following:

The weekly examination conducted in the north mains, 2 left to the 7 left section of the mine did not identify conditions that adversely affect the safety and health of miners required to travel this area. 104-d-2 order 8463325 and order 8463326 were issued for failure to identify opening in the permanent stopping's between the intake and return air courses. 104-d-2 order 8463327 was issued for failure to identify, report and correct roof control in the 3 left #4 seal access. Citation 8463328 was issued for failure to clearly mark the escape way from the return air course to the intake air escape way. The conditions were obvious to the most casual observer and adversely affect the safety and health of miners. The examiners engaged in aggravated conduct constituting more than ordinary negligence by failing to identify, record and correct conditions that adversely affect miner's safety and health. This is an unwarrantable failure to comply with a mandatory safety standard.

(Ex. G-4). Albrecht determined that the cited condition was reasonably likely to result in a fatal injury. He determined that the violation was S&S, that one person would be affected, and that the violation was the result of reckless disregard on the part of the operator.

The standard cited by the Secretary requires that “[h]azardous conditions shall be corrected immediately. If the condition creates an imminent danger, everyone except those persons referred to in §104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected.” 30 C.F.R. § 75.364(d). The Secretary has proposed a civil penalty in the amount of \$41,574.00.

i. *Summary of Testimony*

After exiting the mine on June 16th, Albrecht reviewed the information related to the citations and orders he had issued and determined that the weekly examination conducted of the return air course on June 15th did not appropriately address the hazards present. (Tr. 70). As a result, Albrecht issued Order No. 8463330 for a violation of section 75.364(d). (Tr. 70). Albrecht based this order on the two 104(d)(2) orders that he issued for holes in the stoppings, i.e., Order Nos. 8463325 and 8463326 discussed above, the 104(d)(2) order for the lack of adequate roof support at the seal, i.e., Order No. 8463325 discussed above, and a citation issued for failure to clearly mark the escapeway from the return air course to the intake air escapeway.

(Tr. 70-71). The cited section requires the operator to conduct a weekly examination and record any hazardous conditions that would affect the safety and health of a miner. (Tr. 72). Once the conditions are identified, they must be recorded and then corrective action must be taken. (Tr. 72). Albrecht acknowledged that not all of the conditions observed on the 16th were hazardous, and none of the conditions rose to the level of imminent danger. (Tr. 73).

According to Albrecht, none of the conditions related to these alleged violations were recorded in the weekly exam book. (Tr. 25). Albrecht acknowledged that the stoppings violations were non-S&S, but he identified them in the body of the order because no one identified the conditions and they contributed to a hazard. (Tr. 71). He is not sure how many holes in stoppings would be necessary before it becomes a hazard, but the condition at least needs to be identified. (Tr. 71). The biggest hazard he saw was the cited roof condition near the seal. (Tr. 71, 72).

The fourth alleged violation referenced by the subject order was for a lifeline sign that was pointing in the direction of a rib and was not conspicuously marked. (Tr. 72-73). Albrecht testified that this area was a marked escapeway on the map, although he acknowledged that this was not on a working section, and that the escapeway requirements apply to active sections or sections where the mine is tearing down or installing equipment. (Tr. 73, 92). He was not sure if they were tearing down or installing equipment in this section and he agreed that it was several miles to the nearest coal-producing section. (Tr. 92). He stated that the sign could have misdirected a miner, although on cross-examination, he acknowledged that the sign was pointing into the rib. (Tr. 91). Further, the lifeline present in the escapeway had directional markers. (Tr. 91). Moreover, he acknowledged that the sign is not required to have an arrow, but that it must be conspicuously marked. (Tr. 91). Even though he found the violation to be non-S&S, not extensive, and not a hazard, he referenced it in the order since the condition was not identified in the examination book. (Tr. 73, 93, 106). According to Albrecht, a condition like the sign being out of place is what the examiner should be looking for since it may affect the safety and health of the miners. (Tr. 73). The sign citation could have been easily corrected by moving the sign to show the correct direction of travel. (Tr. 73). The condition was fixed by flipping the sign around. (Tr. 103). He acknowledged that there were air currents in the area, but since the sign was connected on both sides, he had no idea how it got flipped around. (Tr. 104).

Albrecht testified that it took about four hours to complete his entire inspection of the return entry on June 16th. (Tr. 74). As stated earlier in this decision, Albrecht traveled with mine examiner Jim Wells while he was conducting a preshift examination of a belt line. (Tr. 45, 95, 74, 76). According to Albrecht, Wells said that “he did not have time to stop and look at these things” and the mine does not “want us to identify the stuff because we don’t have the people to correct it.” (Tr. 46, 74-75). Albrecht noted that this conversation took place while Wells was examining a belt entry, which, according to Albrecht, has a lot more items to check than a return entry. (Tr. 74). Albrecht recorded notes about this conversation, which he wrote contemporaneously with the inspection. (Tr. 77). Albrecht opined that the examiners are

moving too quickly and are not taking time to stop and look at the conditions in the mine. (Tr. 75-76).

Albrecht designated this order as S&S based on the nature of the roof condition he observed. (Tr. 77). He stated that it is the examiner's job to identify these conditions, and, by not doing so, they are contributing to more extensive hazards. (Tr. 77). The examination is the first line of defense for miners. (Tr. 77). Albrecht explained that faulty examinations expose miners to numerous hazards, including roof and rib conditions, air currents, insufficient rock dust, explosions, and fire, all of which are things that an examiner must check for. (Tr. 78).

Albrecht designated this order as an unwarrantable failure to comply with the mandatory standard. He noted that there had been a number of citations issued for alleged examination violations during the previous 15 months. (Tr. 77-78). On the day of the inspection, after exiting the mine, Albrecht had a discussion with Dick Conkle, Mike Ludlow, and Walt Shilling. (Tr. 79). During that discussion, management expressed its opinion that the conditions of the stoppings did not amount to hazards. (Tr. 79). Albrecht explained to them that, if the conditions are not noted in the book, then they will not be corrected. (Tr. 79). Albrecht testified that the unwarrantable failure and reckless disregard designations were based on the number of violations issued and the conditions at the mine. (Tr. 81; Ex. G-5, p. 9). According to Albrecht, obvious conditions were not identified or corrected and the mine had been issued in excess of 50 citations. (Tr. 81). Albrecht explained that at some point the negligence has to be elevated, and that is how he arrived at his unwarrantable failure designation. (Tr. 81). Albrecht testified that he arrived at his reckless disregard designation for the same reasons as he stated with the roof control order. (Tr. 82). Further, according to Albrecht, the escapeway sign violation "stuck out like a sore thumb." (Tr. 82).

Winey testified that the escapeway sign referenced in the order was hung from both ends, such that the two wires came together to form an upside-down "V". (Tr. 128). The condition was fixed by flipping the sign over. (Tr. 128). He did not know how the sign got pointed in the wrong direction and he did not believe that the escapeway was active at the time. (Tr. 128-129). He does not believe anyone would have been confused by the sign because the lifeline was still there, as were the reflectors. (Tr. 129).

ii. *The Violation*

The Secretary argues that the roof control violation created a possible source of danger, as described above. (Sec'y Br. 18). Respondent argues that the Inspector incorrectly based his finding of violation on two stoppings violations that were not hazardous, a roof control violation that was not hazardous, and a non-S&S violation for an escapeway sign that had flipped around. (TM Br. 22). Weekly examiners are required only to identify hazards. *Id.* There is no evidence that the weekly examiner hurried through his examination and recklessly disregarded obvious hazards. *Id.* at 23. Moreover, the only condition that the inspector identified as a hazard was the

roof control condition at the No. 4 seal, but the condition did not prevent safe travel to, or inspection of, the seal, and therefore was not a hazard. *Id.*

I agree with the Respondent that the inspector improperly relied upon the two stoppings violations and the escapeway sign violation in his finding of a violation in this instance. The inspector testified that each of these three violations did not involve a hazard. I agree. The cited standard contemplates that “[h]azardous conditions shall be corrected immediately.” 30 C.F.R. § 75.364(d). Because these violations were, admittedly, not hazardous, the inspector incorrectly relied upon them when assessing whether a violation of the cited standard occurred. However, I find the inspector’s reliance upon the roof control violation to be valid. Further, for the reasons set forth in my discussion of the roof control violation, I find that the violation created a hazardous condition. While it may not have been more likely than not that the roof would fall on an examiner, a roof fall was reasonably likely assuming continued normal mining operations, and therefore a hazard condition existed. Further, I also rely upon my earlier finding that this condition existed at the time of the weekly examination, yet was not immediately corrected or recorded in the examination book. As a consequence, I find a violation of the cited standard.

iii. *Significant and Substantial*

I have already found that the underlying roof control violation was the only hazardous condition that violated the safety standard. Further, the findings set forth above describe the reasons why the roof control violation was S&S. Given that I have already found that the underlying hazardous condition was reasonably likely to result in an injury-causing event, I conclude that Respondent’s failure to record the roof condition was likely to lead to an injury-causing event. I find that this violation was S&S and the gravity was high.

iv. *Unwarrantable Failure and Negligence*

I have already found the roof control violation discussed above to be an unwarrantable failure to comply with the mandatory standard. Further, I have also found that this condition was present during the weekly examination conducted the day prior to the roof control violation. My unwarrantable failure and negligence analysis related to the underlying roof control violation is equally applicable here. The examiner, who was charged with identifying hazards, exhibited a serious lack of reasonable care when he did not identify the subject condition. I find that the Respondent’s conduct, while it did not reach the level of reckless disregard, did amount to high negligence. Accordingly, I affirm the Secretary’s unwarrantable failure finding, but modify the level of negligence from reckless disregard to high. I assess a penalty of \$25,000.

**2. WEST 2009-1322, Order No. 8460508**

Inspector Richard Boyle has been employed by MSHA for approximately seven years as a coal mine inspector and diesel specialist. As a diesel specialist, Boyle is responsible for checking diesel equipment in underground mines to determine whether it is in compliance with federal

regulations. Prior to joining MSHA, Boyle worked in the mining industry for a number of years and held positions including general laborer, diesel mechanic, and diesel maintenance supervisor. Boyle holds certifying papers for mine foreman, fire boss, federal electrical underground, electrical instructor, and diesel qualification.

On June 23, 2009, Inspector Boyle traveled to the Foidel Creek Mine to assist in the E01 quarterly inspection. During that inspection Boyle issued Order No. 8460508 under 104(d)(2) of the Mine Act for an alleged violation of 30 C.F.R. § 75.363(a). The order alleges the following:

Hazardous conditions were found and noted in the preshift examination record for the inspections done in the travelways book. These conditions were listed as “Remarks” and not in hazardous conditions. The inspections referred to were done on 06-22-09 on the 02:00 PM - 05:00 PM examination, and on the 06-22-09 10:00 PM - 01:00 AM examination. These conditions were cited in citations 8460506 and 8460507. There was no action taken to correct or post with a conspicuous danger sign by either the examiner or the mine operator. This constitutes more than ordinary negligence and a serious lack of reasonable care to prevent and correct known violative conditions. These conditions even after being reported did not get corrected until after being cited.

(Ex. G-6). Boyle determined that an injury was reasonably likely, and that such an injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was S&S, that 14 persons would be affected, and that the violation was the result of high negligence on the part of the operator. Further, he designated the violation as an unwarrantable failure to comply with the mandatory standard. The cited standard requires that:

[a]ny hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected.

30 C.F.R. § 75.363(a). The Secretary has proposed a civil penalty of \$14,743.00 for this violation.

## A. Summary of Testimony

Inspector Boyle stated that, before going underground on June 23, 2009, he inspected the mine's preshift examination books and looked for hazardous conditions. (Tr. 163). Boyle explained that the pages of the mine's preshift books are divided into two areas: one area to record hazardous conditions and one area to record remarks. (Tr. 164). Boyle testified that he noticed a number of entries in the books that "believed to be hazardous conditions written in the remarks section of the preshift books." (Tr. 164). After reviewing the books, Boyle spoke with Matt Winey, the shift supervisor that day, and discussed his concern that the books did not reflect that any corrective action had been taken to address the hazardous conditions recorded in the remarks section. (Tr. 164, 165). According to Boyle, Winey told him the conditions were not hazardous and were just remarks. (Tr. 164). Boyle explained to Winey that, even if recorded in the remarks section, if the conditions are hazardous, then some sort of action must be taken. (Tr. 165). On cross-examination, he agreed that, ultimately, it does not make a difference where on the page the conditions are recorded, as long as they are recorded. (Tr. 193). Boyle agreed that it is not always clear whether a condition is a hazard. (Tr. 191-192). According to Boyle, a hazardous condition is one where there is a "foreseeable potential that someone is going to be injured or exposed to a danger, either injury or illness." (Tr. 168).

Boyle testified that, after reviewing the books and taking a few notes, he entered the mine and immediately proceeded to the areas described in the preshift book. (Tr. 166). Boyle traveled to crosscut 8+63 on the 24 right section and found that the crosscut leading to the man door, which provided access from the return entry into the primary escapeway, was blocked by a number of items. (Tr. 168). Specifically, he noted the presence of a five foot diameter roll of 71-inch belt, an oil storage tool box that had been pushed into the walkway approaching the man door, a bucket, an old man door, and a length of tubing. (Tr. 169; Sec'y Ex. 7 p. 2). At this mine, the intake is the primary escapeway, which is the only escapeway from the 24 Right Section. (Tr. 207). Boyle agreed that, while the 24 Right (8+63) is not an escapeway, it does lead to the escapeway from the return entry. (Tr. 207). According to Boyle, the materials restricted access near the door to 44 inches, and he agreed that the path leading to the door was as wide as 26 inches at most points, but as narrow as 22 inches at one point. (Tr. 169-170, 195). There was no walkway to the door, but rather only a path between debris that was obstructing access to the man door. (Tr. 211).

Boyle believed that this crosscut should not have been used as a storage area. (Tr. 170). In addition, Boyle testified that there were other crosscuts in the area that did not have man doors and could have been used to store the materials. (Tr. 171). Boyle acknowledged that this particular mine installs more man doors than are required; however, by choosing to do so the mine must then maintain the walkways to all man doors so that safe passage is possible. (Tr. 171). Boyle testified that the man door was not dangered off or designated as not available for use. (Tr. 171, 172). He determined that, in an emergency situation, the condition of the crosscut would hinder rapid escape. (Tr. 171). Boyle explained that, even with good visibility, it would be difficult to navigate in between the materials to get to the man door. (Tr. 171).

Boyle testified that this condition was noted in the “remarks” section of the preshift examination book, although, in his opinion, the condition was worse than what was described in the book. (Tr. 170, 172). Further, according to Boyle, no corrective action had been taken by the time he arrived, and it was only after he arrived that he saw anyone working to correct the condition. (Tr. 169, 172). Moreover, there were personnel mining coal in by this area. (Tr. 172). It is Boyle’s opinion that a hazard was created because a miner wanting to travel from the return to the escapeway via the man door would be hindered by the various objects in the crosscut. (Tr. 168-169). Escapeways must be available for use by disabled and injured miners. (Tr. 171). Based upon his observations, Boyle issued Citation No. 8460506 for an alleged violation of 75.380(d)(1) for the failure to maintain safe access from the return entry into the primary escapeway. (Tr. 168). The citation was terminated by bringing in machinery to take everything out of the crosscut and clean the area. (Tr. 173). It took approximately one hour to clean the area. (Tr. 173).

Boyle then traveled to another area of the mine to inspect the condition of a refuge chamber that, according to a note in the “remarks” section of the preshift exam book, was “impounded with mud and water.” (Tr. 174, 178; Sec’y Ex. 9 p. 1). According to Boyle, “impounded with mud and water” are not casual words and, instead, paint a picture of a serious problem. (Tr. 194). The preshift exam was signed by the examiner and countersigned by Winey and the assistant foreman. (Tr. 179; Sec’y Ex. 9 p. 1). Boyle testified that, when he arrived at the area, the chamber was sitting in a down dip at the back of the crosscut and there was lots of mud in the area. (Tr. 177). There was a four-inch high water mark that indicated that the water was four inches lower than it had been prior to his arrival. (Tr. 189, 203, 209). There were also tripping and stumbling hazards in the mud and the mud was deeper toward the back of the chamber, which is an area where the examiner is required to travel to check the chamber controls. (Tr. 176-177). Boyle noted that the pieces of wood and straps in the mud were “terrible obstacles” that would catch miners’ feet, trip them, and cause them to fall in the mud or go face first into the steel rescue chamber. (Tr. 177).

Boyle was concerned about safe access to the chamber. (Tr. 199). He does not know why the chamber was placed in that location. He acknowledged that the chamber was still deployable. (Tr. 207). Boyle testified that the condition was obvious, extensive and, while he could not tell how long the condition had existed, he believed that it had existed for some time. (Tr. 177). Further, when he arrived in the area there were no danger signs or postings and no one was attempting the clean up the area or relocate the chamber. (Tr. 180). Boyle did note that someone had attempted to push water out before he arrived, but as far as he was concerned, that did not abate the condition. (Tr. 189). Boyle testified that the chamber had been noted by the examiner, and that other people had countersigned the exam book, including Winey. (Tr. 181).

Boyle explained that, in the event escape from the mine is blocked, the refuge chamber, which has an oxygen supply, provides a safe location where miners can isolate themselves from the poisonous mine atmosphere as a last resort. (Tr. 174, 199, 207). Miners can remain in the chamber until rescued. (Tr. 175). According to Boyle, rescue chambers are important tools that

must be maintained at all times, and anything that presents a hazard to the chamber must be addressed. (Tr. 176). Moreover, what might present a small obstacle to an uninjured individual trying to access or deploy the chamber, might be an insurmountable obstacle to someone who is injured. (Tr. 176-177).

Boyle testified that, at some point after he inspected the exam books, an entry was made saying that water had been pushed out of the area around the chamber. (Tr. 200). This notation was not there at the beginning of the shift. (Tr. 201). Had the notation been there, he might not have traveled to that area. (Tr. 201). Nevertheless, the condition was still hazardous when he arrived. (Tr. 202). Based upon his observations, Boyle issued Citation No. 8460507 for a violation of 30 C.F.R. § 75.380(d)(1). (Tr. 173). The citation was terminated by using a large piece of equipment to move the chamber from the low side of the entry, across the entry, to the high side where the ground was dry. (Tr. 180).

Boyle testified that both of the 75.380(d)(1) citations involved hazardous conditions that were noted in the preshift examination book but were not dangered off or corrected. He did not issue those citations until he went underground and observed the conditions. (Tr. 194, 210). Based on his inspection, he issued Order No. 8460508 for a violation of section 75.363(a). (Tr. 167). According to Boyle, section 75.363(a) requires that, prior to the commencement of work, a certified individual must examine all areas where people are scheduled to work. (Tr. 167). If hazardous conditions are discovered then they must be corrected, or dangered off and posted, so that miners are not exposed to them. (Tr. 167, 174, 192).

Boyle determined that an injury or illness was reasonably likely to occur based upon what he believed was a “foreseeable potential” that anyone attempting to gain access to the escapeway via the cited man door crosscut would encounter “numerous tripping, slipping, [and] stumbling hazards.” (Tr. 182-183). Further, if a miner were not able to access the escapeway, it would necessitate the use of the rescue chamber, which was located such that an injured miner would have accessibility issues. (Tr. 183). Boyle found that any injury could be reasonably expected to result in lost workdays or restricted duty based on the slipping and tripping hazards in the crosscut with the man door and under the mud near the rescue chamber. (Tr. 183). If a miner falls, it is reasonably likely that he will be injured or cut. (Tr. 183-184). Boyle testified that he had difficulty navigating the subject areas under normal conditions. (Tr. 184).

Boyle testified that he determined that the violation was the result of high negligence based on his knowledge that management had been informed of the condition by the exam books, which they are required to review and sign. (Tr. 184-185). He issued the order as an unwarrantable failure because management had not taken care of a hazardous condition that they knew about from the preshift examination books. (Tr. 185). The certified person must make sure that there are no hazardous conditions that the men working in the section would be exposed to. (Tr. 185). When the certified person finds a hazardous condition, the law requires that he correct it, or post it and danger it off. (Tr. 186). Boyle stated that the mine’s history of 40 violations of section 75.380 should have put Twentymile on notice of escapeway issues. (Tr.

203). Boyle observed that a miner arrived at subject crosscut and began to clean up while he was there. However, Boyle believed that the miner was cleaning the area only because the operator knew that a citation was going to be issued for the condition. (Tr. 198, 207, 209). The order was terminated by retraining the examiners and supervisors as to the requirements of section 75.363 including their responsibilities are when a hazardous condition is found. (Tr. 187).

Winey testified that he was the shift foreman on the date the subject order was issued. (Tr. 213). His job was to communicate with the crew from the previous shift and look at the books when he arrived at the mine to see what needed to get done. He would then assign miners to work on any matters listed in the preshift book. Finally, he would communicate with miners on the next shift regarding what needed to be accomplished on that shift. (Tr. 213-214, 217-218). When he looked through the books, he looked to see what had been turned in as hazards. (Tr. 214). According to Winey, a hazard is something that requires immediate attention, as opposed to that which is just a violation and needs to be worked on. (Tr. 214). If something is marked as a hazard, then the mine will take care of it right away. (Tr. 214).

Winey then testified that he relies on the preshift examiner, who sees the conditions first hand, to determine if the conditions are hazards or just violations, and then he will countersign the books. (Tr. 216). Winey has no reason to believe that the examiner inaccurately assesses whether a condition is a hazard. (Tr. 217). On cross-examination, Winey agreed that, if a mine examiner tells him that a rescue chamber is impounded with mud and water, the condition “could” be a hazard, but it also could just be something that needs to be taken care of. (Tr. 223). The examiners received training on hazard recognition. (Tr. 217). He agreed that the examiner was concerned enough with the condition that he wrote it down. (Tr. 223).

Winey does not remember any specific conversations with Boyle, but he has had discussions with other inspectors regarding a difference of opinion as to what should be identified as a hazardous condition. (Tr. 218, 219). Winey, after refreshing his recollection with the shift report, stated that the rescue chamber was in the cited location because it had just been moved there in order to have it within the required proximity of the face. (Tr. 222). The chamber should be properly maintained in a ready, usable condition. (Tr. 224).

Ken Wolgram, an 18-year veteran of the mine, was a fire boss at the time of the alleged violation. (Tr. 226). His primary responsibility is examining for hazardous conditions and looking for violations. (Tr. 226). When looking for hazards he looks for something that is going to “injure a miner immediately or cause harm to them.” (Tr. 226). He is bound by law to address those conditions immediately. (Tr. 226, 232-233). Wolgram conducted the travelway preshift exam from 1:00 a.m. to 4:00 a.m. on June 22nd. (Tr. 227-228; TM Ex. 11 p. 6). He noted in the remarks section that the rescue chamber was impounded with mud and water. (Tr. 228). He made these notes after observing mud and water in front of the chamber and on the right side. (Tr. 228).

Wolgram did not believe the condition was a hazard, but he knew it was a violation, so he recorded his observation in the “remarks” section of the exam book. (Tr. 228). He did not think it was a hazard because a fire or explosion would have to occur before miners would even consider using the chamber. (Tr. 229). He also did not think people would be kept from using the chamber by the mud and water. (Tr. 229). To access the chamber, you would have to approach it from the right-hand side, turn on the valves, and then open the front. (Tr. 229). In his opinion, the chamber was still deployable with the water and mud. (Tr. 229). He has no idea where the “pushed water out from in front of chamber” language on the exam sheet came from, but it is a note from the miner who corrected the condition. (Tr. 230; TM Ex. 11 p. 6). It is typical procedure for the party making the correction to write a note saying he has corrected it. (Tr. 230). Here, the individual who corrected the condition had the initials “JF.” (Tr. 230-231).

Scott Reid, a CM downshift foreman/bull gang foreman at the mine, is responsible for moving belts, power equipment, and making sure that everything is set up when the production shifts come in. (Tr. 236). He remembers removing debris, mud, and water from in front of the subject chamber on the morning of June 23rd. (Tr. 237). He undertook the task because it was in the travelways exam book that he countersigns and Matt Winey told him to get it done. (Tr. 237, 241; TM Ex. 11 p. 6). The travelways book said that the chamber was impounded with mud and water. (Tr. 238). When he saw that language, he knew it was something that needed to be taken care of during the shift. (Tr. 238). As a result, he had a crew member use a skidsteer to move as much mud and water as he could, and then rock dust the area. (Tr. 238). He does not recall what time this occurred on the morning of the 23rd, but it would have been toward the beginning of the shift. (Tr. 238-239). The preshift that identified the chamber condition was conducted from 10:00 p.m. on the 22nd, until 1:00 a.m. on the 23rd. (Tr. 242). He came on shift at 6:00 a.m. on the 23rd. (Tr. 242). He is also a preshift examiner and preshifted the area that morning. (Tr. 243, 244). He identified his signature on the exam report. (Tr. 243).

Once the condition was fixed, Reed called out to Jim Forquer to take the condition out of the books. (Tr. 240). The action was not taken in response to a citation being issued. (Tr. 240). Once the area was cleaned, the chamber could be accessed and deployed. (Tr. 240). The chamber was in the subject location because it was the longest crosscut, which would keep it from being deployed into a travelway. (Tr. 241). He was not there when the chamber was moved to terminate the citation and he is not sure that it was moved to a better location since now it would deploy into a travelway. (Tr. 241, 246).

Jim Forquer, a continuous miner coordinator at the mine, testified that he was working at the mine on 22nd and 23rd of June in 2009. (Tr. 248). On the 23rd, he worked the day shift, which he believes was from 7:00 to 3:00, during which he wrote the entry into the preshift exam book that water had been pushed out from in front of the chamber. (Tr. 248, 251; TM Ex. 11 p. 6). He put the entry into the book because it either was called out to him or he otherwise knew that it had been done. (Tr. 249, 251). As a result, he highlighted the original entry and made the corrective note. (Tr. 249). According to Forquer, the general mine foreman usually makes sure that all tasks listed in the remarks section are taken care of. (Tr. 250).

Kenneth Ferrier, a longwall utility lead man at the time of the alleged violations, vaguely remembers working at the mine on the 22nd and 23rd. (Tr. 252). Farrier examined TM Ex. 11 p. 4 and identified it as the standard preshift for the travelways. (Tr. 253). He testified that he initialed and dated the form on the 22nd, which indicated that, to the best of his knowledge, he either corrected the problems identified on the preshift book concerning access to the man door or he sent someone to correct it. (Tr. 253; TM Ex. 11 p. 4). If something in the books needs to be corrected, then it is possibly a hazard or a violation. (Tr. 253). If it is written in the remarks section of the book, then it is not necessarily a hazard, but the potential is there. (Tr. 253-254). Typically, if problems are listed anywhere in the preshift book, they are taken care of. (Tr. 254). Whether he or someone else makes the correction is dependent on how busy he is. (Tr. 254). He does not recall whether it was he or someone else who corrected this condition, but he would not have initialed the book without looking at the condition and making sure there was a 24 inch walkway. (Tr. 254, 256). Ferrier was not aware that a citation had been issued for the condition when he corrected it. (Tr. 256). On cross-examination, Ferrier agreed that, once a hazardous condition is identified, it needs to be corrected immediately or posted or reported. (Tr. 256-257). Ferrier believed that, as long as a clear 24 inch travelway was provided, the condition was safe and not a hazard. (Tr. 257). Further, the path does not need to be straight. (Tr. 257). Ferrier could not recall what was done to correct the condition. (Tr. 258).

Dianna Ponikvar testified that you do not want to deploy a rescue chamber into a travelway because an explosion will “take it out.” (Tr. 260). The main path of an explosion would be through the main entry. (Tr. 261). She has never been in an explosion, so she does not know if they go into the crosscuts and adjacent entries although, she acknowledged that it could go in all directions and blow out stoppings. (Tr. 261). The subject chamber was in the 18 left because it was a longer crosscut. (Tr. 260).

## **B. The Violation**

The Secretary argues that Twentymile violated section 75.363(a) by failing to correct or post hazardous conditions. (Sec’y Br. 23). A hazardous condition is one that is “a possible source of peril, danger, duress, or difficulty, or a condition that tends to create or increase the possibility of loss.” *Id.* at 24. (*quoting Lodestar Energy*, 22 FMSHRC 238, 241 (Feb. 2000) (ALJ)). In order for a condition to be considered “hazardous” it need not be something that will immediately injure a miner. *Id.* It is undisputed that the two conditions, i.e., the debris blocking the man door in the crosscut and the impounded rescue chamber, were identified in the preshift examination book but were not posted with conspicuous danger signs. *Id.* The Commission and the courts have determined that an experienced MSHA inspector’s conclusion that a violation is hazardous is entitled to substantial weight. *Id.* Here, the inspector, after observing the conditions noted in the preshift book, determined that both were hazardous and should have been immediately corrected rather than corrected sometime during the shift. *Id.*

The Respondent argues that because the conditions were not hazards, they were not required to be recorded as such. (TM Br. 32). Only hazardous conditions noted in the preshift

book can serve as a basis for a section 75.363(a) violation. *Id.* at 33. Here, the conditions were noted in the “remarks” section and, as a consequence, these remarks cannot serve as a basis for this violation. *Id.* The pre-shift reporting requirement sets a regulatory floor and operators are free to exceed the standards by reporting more than what is required. *Id.* at 35. Moreover, the subject conditions listed in the preshift examination record were in the process of being addressed when Inspector Boyle arrived at the mine. *Id.* at 36.

The cited standard, as relevant to this analysis, requires hazardous conditions discovered by the preshift examiner to be corrected, or posted and dangered off until corrected. The Commission has held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 175, 178-79 (Dec. 1998); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). The second element of the *Mathies* S&S test is that the “Secretary of Labor must prove . . . a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). Accordingly, an experienced inspector’s determination of what is a hazardous condition is also entitled to weight. However, when viewed in the context of the cited standard, the inspector, and in turn the Secretary, must necessarily be able to establish that the conditions were “hazardous” conditions at the time the preshift examination was conducted. I find that the Secretary established that hazardous conditions existed at the time of the subject preshift examination.

Twentymile argues that because the conditions were recorded in the remarks section of the preshift book rather than in the hazardous conditions section, they were not hazardous and the cited safety standard does not apply. I reject this argument because that would leave the determination to the sole discretion of the preshift examiner. Under this interpretation, if the preshift examiner determines that a condition is not hazardous, then it is not a hazard and the considered opinion of an MSHA inspector is irrelevant. As stated above, the opinion of an experienced MSHA inspector that a condition creates a hazard is entitled to substantial weight. An objective test should be used looking at whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the subject conditions as presenting a hazard to miners. *See Utah Power & Light*, 12 FMSHRC 965,968 (May 1990).

In the present case, the two subject conditions were “found” by the preshift examiner, so the issue is whether the conditions were hazardous as that term is used in section 75.363(a). To put it another way, the evidence establishes that Twentymile conducted an adequate preshift examination that met all the requirements of section 75.360, but the issue in this case is whether two of the conditions found by the examiner presented a sufficient hazard to invoke the requirements set forth in section 75.363(a).<sup>2</sup>

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<sup>2</sup> The parties spent considerable energy arguing about the format of the form used by Twentymile for recording the results of preshift examinations. The form contains three sections entitled “Hazardous Conditions Observed and Reported,” “Air Measurements,” and “Remarks.”

In *Enlow Fork Mining Co.*, the Commission defined the term “hazardous conditions” as used in section 75.360(b). 19 FMSHRC 5, 14 (Jan. 1997). It defined “hazard” as a “possible source of peril, danger, duress, or difficulty” or a “condition that tends to create or increase the possibility of loss.” *Id.* (citation omitted). That definition is equally applicable here. The issue in the present case is whether the two subject conditions were hazardous at the time of the preshift examination taking into consideration the opinion of the inspector and the reasonably prudent person test.

Boyle testified that he did not make a final determination that the two subject conditions were hazardous until he observed them while underground. However, early in his testimony, when discussing what he saw when examining the preshift books before going underground, he stated that he “found several issues that [he] believed to be hazardous conditions written in the remarks section of the preshift books.” (Tr. 164). Boyle’s testimony makes clear that, while the conditions cited in the preshift examination book were “potentially hazardous” based on the language in the book, his determination of what was actually a hazard was based on what he observed when he went underground. I credit his testimony in this respect. In both instances, Boyle could not say how long the conditions had existed.

With regard to the rescue chamber citation Boyle could only opine that “[t]he condition had existed for some time. Lots of mud.” (Tr. 177). Moreover, Boyle acknowledged that the four inch water mark was evidence that some work had been done to address the condition. The citation for mud and water impounding the rescue chamber was issued at 12:50 p.m. on June 23rd, while the preshift examination that noted the condition was conducted from 10:00 p.m. on the 22nd until 1:00 a.m. on the 23rd. Thus, at least 12 hours had elapsed since the preshift examination. The entry in the preshift examination book stated: “Rescue chamber in 18LT is impounded with mud and water.” (Ex. G-9). The inspector was, of course, not present when the preshift examination was conducted. He based his determination on what he observed and the words written in the preshift examination book. As he put it, the choice of words in the book brought him “into focus on it” because it “is not casual language.” (Tr. 194). I find that the evidence establishes that the conditions at the rescue chamber presented a hazard, as that term is used in the safety standard, and that these conditions were the same or even worse at the time of the preshift examination. I credit the testimony of Inspector Boyle on the conditions he found. A reasonably prudent person would have recognized that the conditions presented a hazard to

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(footnote continued) The Secretary contends that Twentymile’s preshift examiners routinely record hazards in the remarks section rather than in the hazardous conditions section so that the hazards do not have to be corrected immediately. Twentymile argues that it properly lists all hazardous conditions in the hazardous conditions section and that the remarks section is, in effect, a “To Do” list for use by the shift foreman and these items are not required to be included on the form. I find these arguments to be irrelevant. An MSHA inspector can look at the preshift exam book and then go to those areas that are listed as having problems in the hazards or remarks section, but there would be no violation of section 75.363(a) if the condition did not present a hazard at the time of the preshift examination.

miners who might need to use the chamber. In the context of section 75.363(a), I hold that one should not consider the likelihood of a fire or explosion necessitating the use of the rescue chamber when considering whether a hazardous condition existed.

With regard to the citation issued for debris in the crosscut with the man door, Inspector Boyle noted that the entry in the preshift book states: “access to man door is blocked @ XC 8-63 2 to 1 entry.” (Ex. G-9 p. ). The citation for debris in the crosscut at the man door was issued at 10:30 a.m. on June 23rd, while the preshift examination report that noted the condition was conducted from 2:00 p.m. to 5:00 p.m. on June 22<sup>nd</sup>. Thus, at least 17 hours had elapsed since the preshift examination. As with the rescue chamber notation, Inspector Boyle was not present during the preshift exam. Based on the notation in the examination book and the conditions he personally observed, Boyle surmised that a hazardous condition existed when the preshift exam was made. I find that the evidence establishes that the conditions in the crosscut presented a hazard, as that term is used in the safety standard. I credit the testimony of Inspector Boyle on the conditions he found and the language used in the preshift book make it clear that the conditions were similar if not exactly the same 17 hours earlier. A reasonably prudent person would have recognized that the conditions presented a hazard to miners who might need to exit the mine through the man door in the crosscut, especially injured miners. In the context of section 75.363(a), I hold that one should not consider the likelihood of a fire, or other event necessitating the use of the man door as an escape route during an emergency, when considering whether a hazardous condition existed.

Because Twentymile did not either immediately post the two areas with a conspicuous danger sign or immediately correct the conditions, I find that the Secretary established a violation. When hazardous conditions are found or conditions that a reasonably prudent person would consider to be hazardous, such conditions must be immediately corrected or dangered off. The fact that the preshift examiner did not personally consider the conditions to be hazardous is not a defense if the objective evidence establishes the hazardous nature of the conditions.

### **C. Significant & Substantial and Gravity**

I find that the Secretary did not establish that this violation was S&S. Although she established the first two elements of the *Mathies* S&S test, she did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury. The likelihood of an injury was remote. There was a walkway to the man door, but it was a little too narrow in some places and it was not a straight line. The refuge chamber could be deployed, but it was not as easily accessible as it should be. Conditions in the mine made it unlikely that either the man door or the chamber would need to be used in an emergency. Both conditions were noted in the preshift examination book. As discussed in more detail below, Twentymile was in the process of correcting both of the hazardous conditions at issue in the subject order. The gravity of the violation was serious, however.

#### **D. Unwarrantable Failure and Negligence**

I find that Twentymile was moderately negligent with respect to this violation and that the violation was not the result of Twentymile's unwarrantable failure to comply with the standard. I credit Reid's testimony and find that, on the morning of June 23rd, in response to a discussion with Matt Winey and after noting the entry in the travelway preshift book, he instructed one of his crew members to use the skidsteer to remove debris, mud, and water from in front of the subject rescue chamber. While he does not remember the time that he completed the task, it was near the beginning of his shift, which would have started at 6:00 a.m. on the 23rd. Once the mud and water were removed, he called out to Jim Forquer to have it noted in the preshift book that the condition had been corrected. I credit his testimony that the action he took was not in response to the MSHA inspection being conducted by Inspector Boyle.

I credit Forquer's, Wolgram's, and Ferrier's testimony that when conditions noted in the exam books are corrected, it is typical practice at the mine for the correcting party, or someone who has knowledge that the correction has been made, to make a notation in the exam book. Here, it appears that, either before Boyle went underground, or between the time he went underground and the time he arrived at the rescue chamber, Twentymile had remedied the hazard to a certain extent.

I credit Ferrier's testimony that, based upon his initials on the preshift exam, he, or someone he instructed, took steps to correct the condition. He would not have initialed the examination book without traveling to the area and making sure that there was a 24-inch walkway in front of the man door. He was not aware that Inspector Boyle was issuing a citation when he took steps to correct the condition.

The refuge chamber had not been in the cited location for very long and there is no evidence that the route to the man door had been partially blocked for a lengthy period of time. Although the conditions were obvious, they were noted in the preshift book. As stated above the conditions did not pose a high degree of danger. I find that Twentymile had not been put on notice that it needed to do a better job maintaining its preshift examination books or correcting hazardous conditions. Management knew that the conditions existed, as evidenced by the fact that the examiners marked the conditions in the preshift book. A penalty of \$1,000 is appropriate for this violation.

#### **3. WEST 2009-241, Citation No. 7622553; and WEST 2009-580, Citation No. 8456110**

Inspector Carol Miller has been employed by MSHA for four years as a coal mine inspector. Miller's responsibilities include performing quarterly inspections of underground coal mines. Prior to joining MSHA, Miller worked 18 years as an underground coal miner. During that time she worked as a general laborer, a longwall crew member, downshift longwall crew member, shuttle car operator, haul truck operator, wash plant operator, and fire boss. Miller holds certification papers for mine foreman, shop fire, and methane and oxygen deficiency.

**A. Citation No. 7622553**

On September 21, 2009, Inspector Miller traveled to the Foidel Creek Mine to conduct an E02 spot inspection. During that inspection Miller issued Citation No. 7622553 under 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.325(c)(2). The citation alleges the following:

The 22 Right Longwall was mining coal with only 317 cubic feet per minute air velocity at shield No. 15. When the longwall foreman measured the velocity with his anemometer he read only 370 cubic feet per minute. The ventilation plan requires 400 cubic feet per minute air velocity at shield No. 15. The longwall is currently mining through a stress zone.

(Ex. G-10). Miller determined that an injury was reasonably likely, and that such an injury could reasonably be expected to result in lost workdays or restricted duty. She determined that the violation was S&S, that seven persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. Prior to hearing, the cited standard was modified from section 75.325(c)(2) to section 75.370(a)(1).<sup>3</sup> The cited standard requires that:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control

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<sup>3</sup> On October 22, 2010, the Secretary filed a Motion to Amend (the “motion”) this citation to allege a violation of section 75.370(a)(1), as opposed to section 75.325(c)(2). In support of her motion the Secretary stated that “[a]fter further review of Citation No. 7622553 . . . Petitioner has determined that the alleged violation was not issued under the appropriate standard.” (Sec’y Mot. Amend 1). After oral argument on the issue, I granted the Secretary’s motion. In her post-hearing brief the Secretary alleged that the conference and litigation representative who presented the evidence on this citation mistakenly “presented evidence under the originally cited standard.” (Sec’y Br. 28. n. 3). Further, she states that the CLR was not aware that the Secretary had moved to change the safety standard cited. She requested that I evaluate the evidence presented at hearing under the originally proposed standard, but stated that “both standards basically require operators to comply with their ventilation plan, so the Court is free to consider the violation under either standard.” *Id.* Twentymile alleges in its Reply Brief that the Secretary is moving to amend a cited standard after the hearing in an effort to bolster her case by waiting to see what standard the evidence best supports. (TM Reply Br. 6). Finally, in her own reply, the Secretary reiterates that she is not moving to amend the cited standard, and is simply “acknowledging her oversight . . . and leav[ing] it to the Court to decide which standard to apply.” (Sec’y Reply 1). In her initial motion the Secretary stated that the first amendment was necessary because the violation was “not issued under the appropriate standard.” I find that the appropriate standard was litigated and **DENY** the Secretary’s request to amend the citation a second time. I have not considered section 75.325(c)(2) in this decision.

methane and respirable dust and shall be suitable to the conditions and mining system at the mine.

30 C.F.R. § 75.370(a)(1). The Secretary has proposed a civil penalty of \$2,473.00 for this violation.

i. *Summary of Testimony*

Inspector Miller testified that she was accompanied by Frank Pennington, the shift foreman, during her inspection. (Tr. 268). She explained that, at the time of her inspection, the mine was liberating more than 500,000 cubic feet of methane per 24 hours and, as a result, was on a 10-day E02 spot inspection schedule. (Tr. 269). According to Miller, an inspector on an E02 inspection is responsible for checking the ventilation controls, checking to see that the actual ventilation is correct, and checking for certain gases and air readings. (Tr. 269).

Miller testified that coal was not being mined when she arrived. (Tr. 269, 292). Before going underground, Miller checked the preshift books and found air readings in the subject area to be in compliance, with no recorded hazards. (Tr. 273, 286). She then traveled to the 22 Right section via the main roadways, and then walked the return entry to the longwall face. (Tr. 269-270). She checked the ventilation and air along the face as she traveled from the tailgate to the headgate. (Tr. 270, 284). Miller testified that, after passing the shearer as she neared the headgate, production began and the shearer started to run up the face. (Tr. 276, 293). Miller took an air velocity reading at Shield No. 15 with her anemometer and found that the air velocity was below the mine ventilation plan's requirement for that area. (Tr. 271-272). Specifically, the air velocity was 317 cfm, which is below the 400 cubic feet per minute required at Shield No. 15 by the mine's ventilation plan. (Tr. 272, 291). Miller noticed no abnormal roof conditions at Shield No. 15. (Tr. 289). She estimated that the air along "probably about 50 feet" of the longwall was not being maintained at 400 feet per minute. (Tr. 272). Miller testified that she continued to the headgate and got the attention of the longwall foreman to inform him that there was not enough air velocity at Shield No. 15 to begin mining, and that the longwall had to shut down until the air could be restored. (Tr. 271, 288-289). The longwall foreman then took a reading with his anemometer and measured a velocity of 370 cfm. (Tr. 271, 273, 291). She believed that the velocity at the tailgate was sufficient at that time. (Tr. 272, 284, 291). According to Miller, the tailgate generally has enough air velocity because the material behind the shields in the tailgate stays tightly caved in because there is no entry to keep the roof behind the shields bolted up. (Tr. 284-284). The smaller area results in increased air speed at the tailgate end of the longwall. (Tr. 285).

While in the headgate, Miller observed that a ventilation curtain was not completely in place at the No. 1 shield. (Tr. 270). She explained that the Nos. 1, 2, and 3 shields are typically in the entry. (Tr. 270). The roof in this particular entry had been previously bolted. (Tr. 270). As a result of the bolting, a void is often present when the roof hangs up and does not cave right away. (Tr. 270, 287). Although the curtain is not required by the ventilation plan or by any

standard, there usually is a curtain present to push air up on the face and prevent air from traveling into the void. (Tr. 270, 288).

Miller discussed the condition with Pennington and the longwall foreman. (Tr. 273). No mitigating information was provided as to why the velocity was not being maintained, and no efforts were underway to correct the condition when she arrived on the scene. (Tr. 273-274). Miller testified that she issued the citation for a violation of section 75.325(c)(2) due to the failure to follow the ventilation plan that had been submitted and approved by MSHA. (Tr. 271).

Miller determined that an injury or illness was reasonably likely to result in lost workdays or restricted duty based upon her determination that, without enough air velocity on the face, falling roof in the void behind the shields can push noxious gases and low oxygen across the face where miners are working. (Tr. 274). Based on her longwall experience, the headgate does not cave immediately due to the entry having been bolted and, as a result, it is necessary to hang a curtain in the headgate to direct air onto the face and prevent it from being lost in the void behind the shields. (Tr. 274-275, 287, 288). Miller explained that miners can become disoriented or lose consciousness as a result of low oxygen. (Tr. 275). She explained that miners in a low oxygen atmosphere on the longwall face are likely to break bones or suffer lacerations if they stumble or fall. (Tr. 276). Miller testified that she did not attempt to detect whether low oxygen existed behind the shields. (Tr. 275). While she was using a gas monitor to check the air in the area, she acknowledged that she did not detect high levels of methane and did not see any problems with coal dust. (Tr. 275-276, 285-286, 292).

Miller testified that she determined that the violation was S&S. (Tr. 276). The required velocity is necessary to pressurize the gob and keep the noxious gases, methane, and low oxygen away from the face during mining. (Tr. 277, 285). Miller explained that, at the time of the citation, this particular longwall was on the uphill side of a bowl-shaped stress zone. (Tr. 279). According to Miller, the uphill side is where more methane will gather, as methane liberates more uphill than downhill. (Tr. 279). Miller determined that seven persons would be affected based upon the number of persons that were at the face at the time she issued the citation. (Tr. 277).

Miller found that the violation was the result of moderate negligence. (Tr. 277). She explained that checking the air is one of the first things you do before cutting coal. (Tr. 277). Even if a reading is taken during the preshift examination, other conditions in the mine may change and it is necessary to make sure that the required air velocity is present when the cutting of the coal is performed. (Tr. 277-278). The longwall foreman should go through a parameter check, which includes checking the air velocity, right before mining begins. (Tr. 286-287). After adjusting the curtain that was present in the No. 2 entry, the air velocity was still not adequate. As a consequence, Twentymile installed an additional curtain and hung it from Shield No. 1 to Shield No. 15. (Tr. 280-282). This second curtain brought the air velocity at Shield No. 15 back up to the required level. (Tr. 280, 288).

Scott Simpson testified on behalf of the Respondent. Simpson has been at Twentymile for approximately 16 years and was the longwall production supervisor, or foreman, at the time in question. (Tr. 295, 310). Simpson testified that, on the day in question he would have conducted his parameter check prior to the commencement of mining. (Tr. 300). During the parameter check he would have made sure that the required air velocities, quantities, and water pressures were present before mining began. (Tr. 300). He explained that the parameter check is different than the preshift exam because the check is less concerned with hazards, and more concerned with looking for specific air quantities and velocities. (Tr. 300). According to Simpson, he conducted his parameter check from approximately 6:20 a.m. to 6:25 a.m. (Tr. 300, 313). Once the parameter check was completed, the shearer was started and mining commenced. (Tr. 300).

Simpson stated that between 6:35 a.m. and 7:20 a.m., following the parameter check and after production had begun, he conducted a preshift examination of the subject area and made and entry in the exam book. (Tr. 296; TM Ex. 12). The shearer was operating and coal was being produced during the preshift examination. (Tr. 300, 301). According to Simpson, at the time of his examination, the area was safe, as he detected no methane or other dangerous gases in the area, and the air velocity at shield No. 15 was 548 cfm. (Tr. 296-297, 301). Simpson opined that the shearer was probably on the tailgate side when he took his reading at Shield No. 15. (Tr. 301). Further, the curtain in the No. 2 entry was properly hung and not knocked down. (Tr. 297, 303). Simpson explained that he took the reading at Shield No. 15 by standing on the relay bar and reaching out over the pan toward the face with his anemometer. (Tr. 298, 318). During his examination he also took a second air velocity reading, as required by the plan, at Shield No. 135 near the tailgate. (Tr. 299). At Shield No. 135 the reading was 636 cfm, which was also in compliance with the ventilation plan's 400 cfm requirement. (Tr. 299). Following his preshift, he phoned out the results to the surface. (Tr. 296, 299).

According to Simpson, approximately 1½ hours after commencing mining, the roof extending from Shield No. 13 to Shield No. 16 fell in. (Tr. 301). Simpson estimated that 2½ feet of roof over the four shield area had fallen out, thereby creating a void and increasing the roof height from nine feet to twelve feet. (Tr. 302, 310, 311). The shield was then raised to the reach the higher roof. (Tr. 310). The roof material fell in front of the shields in the pan area. (Tr. 310) At the time, Simpson did not make any velocity adjustments because “[e]verything seemed normal.” (Tr. 302). “There was no indication that there was a decrease in the velocity on the face.” *Id.* At hearing, Simpson explained that the roof fall increased the size of the area at Shield No. 15, thereby decreasing the velocity of the air traveling through that specific area. (Tr. 302, 304). At some point after the roof fall, Inspector Miller arrived in the area and took an air velocity reading at Shield No. 15. (Tr. 302). Her reading showed that the mine was not getting enough air to the area. (Tr. 303). As a result, Simpson then shut down the longwall and went to take another reading and check the curtains. (Tr. 303). Simpson's reading was not as low as Miller's, which he attributed to his having a longer reach and ability to get further out over the pan and closer to the face where the higher velocities are. (Tr. 308).

Simpson testified that, when he went to check the curtains, there was a curtain hung from the rib to the wall. (Tr. 306). The curtain was designed to direct air onto the face and prevent air from going back into the gob. (Tr. 306). He does not recall any curtains being down. (Tr. 316). At around 9:00 a.m. or 9:30 a.m., after checking the curtains that were already in place, Simpson took an additional set of air velocity readings in various areas along the longwall between Shield Nos. 10 and 20. (See TM Ex. 13; Tr. 304). Based on those readings, Simpson determined that he was getting the required air velocity everywhere but at Shield No. 15. (Tr. 304, 305).

Simpson testified that he discussed his readings with Miller. (Tr. 305). At some point he had an additional curtain brought in, which was eventually hung from Shield No. 1 to Shield No. 20. (Tr. 303, 305). Simpson testified that, even after hanging the second curtain, the air velocity, while improved, was still a little low and, as a result, he had to drop Shield No. 15 off of the roof down to the level of the other shields in order to decrease the area. (Tr. 306-307, 310, 312, 313). Simpson stated that Miller was present and aware of what he was doing when he dropped the shield, but she did not say anything. (Tr. 319). The installation of this second curtain, combined with dropping Shield No. 15 off of the roof, resolved the air velocity issue. (Tr. 306, 307, 317). During this entire time, the methane, low oxygen, and methane sensors were all reading zero and were in compliance. (Tr. 307).

Simpson does not believe that low oxygen coming out of the gob was a potential hazard because, even without the second curtain, there were still proper velocities across the face everywhere except at Shield No. 15. (Tr. 309). He based this opinion on the group of readings that he took between Shield Nos. 10 and 20 after the shut down. (Tr. 309). In his opinion, there was still enough air on the face to flush out the methane and respirable dust. (Tr. 309).

## ii. *The Violation*

The Secretary argues that the Respondent violated its ventilation plan when it failed to provide the required velocity of air at Shield No. 15. (Sec’y Br. 28-29). According to the Secretary, “[i]t is undisputed that this is one of the locations that requires a specified velocity under Respondent’s ventilation plan[,]” and the “Respondent admits that they were in violation of their ventilation plan and Citation No. 7622553 was properly issued.” *Id.* at 29. The Respondent does not address the fact of violation in its post-hearing brief.

The undisputed facts show that the Respondent’s ventilation plan required that 400 cfm be maintained at Shield No. 15. Both Miller and Simpson recorded air velocities below 400 cfm at Shield No. 15. I find that a violation of section 75.370(a)(1) has been established.

## iii. *Significant and Substantial*

The Secretary argues that the violation was S&S. (Sec’y Br. 29). If there is not enough air velocity on the face, “miners can be exposed to noxious gases and low levels of oxygen.” *Id.* As the void behind the shields collapses, bad air is forced onto the face. If there is not sufficient

air velocity at the face, then there is a “possibility that miners will be exposed to bad air and suffer disorientation or loss of consciousness.” *Id.* The Respondent’s witnesses acknowledged that there may have been a void behind the shield, and that the decreased air velocity may have been caused by air traveling into that void. As a result, when the roof of the void collapsed, there would be insufficient air on the longwall face to dilute the gases that would be pushed onto the face where miners were. *Id.* at 29-30.

Twentymile argues that there was no “reasonable likelihood” that an injury would occur and, therefore, the S&S designation was inappropriate. (TM Br. 45). The inspector’s testimony that injuries “could” occur is not sufficient to satisfy the “reasonably likely” aspects of the *Mathies* test. *Id.* Further, the lower velocity was limited to a very small area. *Id.* at 46. Twentymile argues that the cause of the low air was the increased area that resulted from the roof fall. *Id.* at 46. In addition, the Inspector did not provide any basis for her assertion that the velocity of the air would be insufficient to dilute methane or low oxygen from the gob, and her own readings did not detect low oxygen or the presence of high levels of methane. *Id.* Moreover, the air that was allegedly not traveling along the face was being diverted into the gob and would likely have lowered the methane levels and raised the oxygen levels in the gob, thereby reducing the potential for a hazard where bad air is forced out onto the face by a cave-in of the void. Finally, the air along the face was sufficient both inby and outby Shield No. 15. *Id.* at 47.

I have already found that there was a violation of the mandatory safety standard. Second, I credit Inspector Miller’s testimony and find that a discrete safety hazard existed as a result of the violation. However, with regard to the third factor, I find that there was no reasonable likelihood that the hazard contributed to would result in an injury. I credit Simpson’s testimony that the air readings he took both inby and outby of Shield No. 15 indicated that the low air velocity was limited to Shield No. 15. Further, I find that the roof fall in the vicinity of Shield No. 15 increased the area and decreased the air velocity at that location. In addition, the presence of a void behind the shields also contributed to lost air velocity at Shield No. 15. As soon as the second curtain was hung from the shields, much of the lost velocity returned. Simpson and Miller offer conflicting testimony about whether the second curtain hung from the shields fully terminated the citation; however, both acknowledged that it helped restore air velocity at Shield No. 15. I agree with Twentymile’s argument and find that the hanging of the second curtain and subsequent restoration of velocity to the face, combined with the prior readings taken both inby and outby Shield No. 15, is evidence that some of the air was traveling into the gob at that particular area. It is important to recognize that Inspector Miller did not detect low oxygen, high levels of methane, or the presence of noxious gases during her inspection. Any air traveling in the void would necessarily have helped dilute methane and noxious gases in the void, as well as raised the oxygen level. In the event of a cave-in of the void, the air pushed out onto the face would already have received some level of ventilation. Further, any collapse would seemingly fill the void and immediately return much of the air velocity to the face. I find that an injury or illness is unlikely to occur as a result of this violation. The affected area was not very large and it

was unlikely that anyone would become disoriented as a result of a low level of oxygen in that area. I find that the violation is not S&S. The violation was moderately serious.

iv. *Negligence*

Miller's testimony regarding her knowledge of whether the longwall foreman took an air velocity reading is confusing. On one hand, she states that nothing led her to believe that the required parameter check was not conducted before coal was cut, and she assumed that it was conducted. On the other hand, she wrote in her inspection notes that the foreman did not check the air velocity before mining.

I credit Simpson's testimony that he checked the air velocity and obtained satisfactory readings during both his preshift examination and parameter checks. However, Simpson's testimony reflects, and I find, that no check was completed after the alleged roof fall. In his testimony Simpson stated that he did not check the velocity because "[e]verything seemed normal [after the fall]." (Tr. 302). "There was no indication that there was a decrease in the velocity on the face." *Id.* However, the evidence is clear that air velocity was lacking on the face in the vicinity of the alleged roof fall. It is clear that Simpson, based on his testimony, is aware that a roof fall, or any other increase in area, can result in a decrease in air velocity as the air travels through the larger area. In light of the foregoing, I find that the violation was appropriately designated as moderate negligence. A penalty of \$200 is appropriate.

**B. Citation No. 8456110**

On December 9, 2008, Inspector Miller traveled to the Foidel Creek Mine to conduct an E02 spot inspection. During that inspection Miller issued Citation No. 8456110 under 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iii). The citation alleges that "[t]he lifeline located in the primary escapeway of 23 Right, No. 2 entry from 7 Main North to the last open crosscut was not marked with reflective material every 25 feet." (Ex. G-13).

Miller determined that an injury was unlikely but that, if an injury occurred, it could reasonably be expected to result in lost workdays or restricted duty. She determined that the violation was not S&S, that eight persons would be affected, and that the violation was the result of moderate negligence on the part of the operator.

The cited standard requires that "[e]ach escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [m]arked with a reflective material every 25 feet[.]" 30 C.F.R. § 75.380(d)(7)(iii). The Secretary has proposed a civil penalty of \$585.00 for this violation.

i. *Summary of Testimony*

Inspector Miller testified that she was accompanied by Dick Conkle while conducting her E02 inspection on December 9, 2008. (Tr. 321). While traveling the primary escapeway on the 23 Right section, Miller noted that there was no reflective material on the nylon rope lifeline. (Tr. 322, 323, 328). As a result, Miller issued the subject citation for a violation of section 75.380(d)(7)(iii), which requires that the lifeline be marked with reflective material every 25 feet. (Tr. 322). The citation was terminated on December 12th after reflective material was attached to the lifeline. (Tr. 326).

Miller testified that the reflective material should be able to be seen with a miner's cap light. (Tr. 322) She was unable to provide an exact distance over which the condition existed, but she did state that it was from the "loading point out to the main roadway that turns off into the section." (Tr. 323). She estimated that the section had been "developed in at least one thousand feet at a minimum, in order to come from Seven Main North all the way to the Number 2 Entry, all the way to the 23 Right's last open." (Tr. 323). On cross-examination, Miller acknowledged that it is possible that the reflective tape was present, but was obscured by rock dust. (Tr. 328).

Miller testified that "reflective" means that the material will reflect back whatever color is on it when light hits the material. (Tr. 329). Miller was unsure if reflective tape had been installed by the manufacturer of this lifeline, or if it had come without reflective tape, however, she did state that most lifelines include pieces of reflective material. (Tr. 324). While the lifeline did not have reflective material on it, it did have directional cones every 100 feet, as required by the standard, but she was unsure if the cones had reflective material on them. (Tr. 324, 329). According to Miller, lifelines are to be used when an entry becomes so smoke filled that one cannot see to walk straight out the escapeway. (Tr. 329). The hazard presented by an unmarked lifeline is that miners will be unable to find the lifeline in the event of an emergency where the atmosphere is filled with smoke or unsettled rock dust. (Tr. 327). The visibility of the reflective material on the lifeline is dependant upon how dense the smoke is. (Tr. 329). She explained that the reflective markings make it easier for a miner to find the lifeline or pick out the lifeline from other cables that may be present in the area. (Tr. 327).

Miller explained that she marked the likelihood of an injury or illness as "unlikely" based upon her knowledge that the mine trains its miners on both the use of the primary and secondary escapeways, and also puts reflectors, which she believes were present and visible at the time of the issuance, in the entries to show direction of travel. (Tr. 325, 328, 329). Miller explained that any injury could reasonably be expected to result in "lost workdays or restricted duty" because a miner who cannot find a lifeline will be unable to exit the mine and gain access to fresh air as quickly as possible. (Tr. 325). Miller testified that eight miners on the section were subject to being affected by this condition. (Tr. 325-326). Finally, she determined that the mine's negligence was "moderate" based upon the timely notice of the lifeline requirements that was provided through hearings and publication in the Federal Register. (Tr. 326).

Dianna Ponikvar testified on behalf of the Respondent. Ponikvar was the Senior Safety Representative at the mine at the time the subject citation was issued. (Tr. 330). Ponikvar believes that the term “reflective” means “that it reflects back at you, and you might be able to see it.” (Tr. 331). According to Ponikvar, all of the lifelines installed at the mine were purchased with 2-3 inches of reflective material attached to the lifeline at 25 foot intervals. (Tr. 330). Ponikvar testified that, when a miner is in smoke he cannot see anything, including the reflective material on the lifeline, and his way out of the mine is through the use of the directional cones on the lifeline. (Tr. 331). Each year the mine conducts training where it fills an area of the mine with smoke and then has the miners locate the lifeline and find their way out of the smoke-filled area. (Tr. 331). According to Ponikvar, you cannot see the reflective materials, the man door signs, or anything else through the smoke. (Tr. 331).

ii. *The Violation*

The Secretary argues that the Respondent violated section 75.380(d)(7)(iii) by failing to have reflective material every 25 feet along a lifeline in an escapeway at the mine. (Sec’y Br. 30). According to the Secretary, the only evidence offered by the Respondent was that “all lifelines installed in the Mine were purchased with factory provided reflective material” and the “reflective material may have just been obscured by rock dust.” (Sec’y Br. 30-31). Nevertheless, the reflective material was not visible to the inspector. *Id.* at 31. “The citation was abated by marking the lifeline with [new] reflective material.” *Id.* If, as the Respondent suggests, the reflective material was simply covered by rock dust, it would follow that the citation would have been abated by cleaning the lifeline rather than installing new reflective material.” *Id.* at 31.

Twentymile argues that the citation should be vacated. The fact that the inspector could not recall whether the reflective markings were obscured by rock dust is evidence that the inspector did not have a good recollection of the condition and, therefore, the Secretary has failed to meet her burden of proof. (TM Br. 49). All lifelines purchased by Twentymile have reflective markings. *Id.* The plain language of the standard is satisfied if the reflective markings are present, even if they are obscured. *Id.* at 50.

The Commission has recognized that, although sections of the Act may not literally set forth a requirement that an object function effectively, such a requirement may be implicit in the standard’s language and consistent with the underlying statutory purpose. *Cumberland Coal Resources*, 28 FMSHRC 545, 552 (Aug. 2006). Congress has recognized the importance of lifelines:

Providing underground personnel with assistance in locating and following escape routes, particularly in circumstances of diminished visibility, is an important feature in any emergency plan. Flame-resistant directional lifelines are likely the most

common method for achieving this end, and are the most reasonably calculated to remain usable in a post-accident setting.

S. Rep. No. 109-365 (2006).

I credit Inspector Miller's testimony that she did not observe any reflective material on the subject portion of the lifeline. I also credit her testimony that it is possible that reflective tape was present but was obscured by rock dust. While not expressly required by the cited standard, I find that the standard's use of "marked with reflective material," combined with Congress' acknowledgment of the importance of lifelines in locating and following escape routes, amounts to an implicit requirement that reflective tape on the lifeline function effectively. Miller testified, and I agree, that reflective material should be able to be seen with a miner's cap light. Here, Miller saw no reflective material while traveling the escapeway in an atmosphere with good visibility. Even if I accept, as suggested by the Respondent, that the reflective material was obscured by rock dust, I still find a violation of the cited standard and what I deem to be its implicit requirement that reflective material be able fulfill its intended purpose. I find that the Secretary has established a violation of the cited standard.

iii. *Gravity*

I credit Miller's testimony regarding the gravity of the violation. The escapeway training of the miners at this mine, as well as the presence of a separate set of reflectors marking the escapeway, make it unlikely that an injury or illness will be sustained as a result of the violative condition. Further, I agree with her assessment that, in the event a miner is unable to locate this lifeline due to the lack of reflective markings, that miner would be momentarily prevented from exiting the mine as quickly as he would have been able to had the reflective markings been present and functional. Any delay in locating the lifeline would be minimal, but it is reasonable to assume that injuries related to smoke inhalation, or lack of fresh breathable air, would result in lost work days or restricted duty. Finally, I agree that the eight miners on the working section would have been affected by this condition. Given the presence of other reflectors along the escape route that were clearly visible, the gravity of this violation is very low.

iv. *Negligence*

The lifeline requirements have existed for some time. The testimony provided by Respondent's witness regarding the Mine's purchase of lifelines with reflective material attached by the manufacturer, while encouraging, does not account for the fact that the reflective material on the lifeline may not have stood up to the continuous rigors of the underground mining environment. Further, it is important to recognize that Ponikvar's testimony did not address the specific lifeline at issue. In fact, all of the Respondent's testimony is in terms of generalities and mine practices. Inspector Miller's testimony specifically addresses the condition observed. I affirm Inspector Miller's moderate negligence determination and assess a penalty of \$200.

**4. WEST 2009-580; Citation Nos. 7622362, 7622365, 7622372**

Inspector James Preece has been with MSHA since 2000. Preece has been a coal mine inspector for the last six years. Before joining MSHA, he worked for the Ohio Valley Coal Company. He has one degree in mining engineering, as well as a second degree in occupational development. Preece is a certified mine foreman in Ohio and West Virginia, and also has certification as a shop fireman, electrician, and trainer.

**A. Citation Nos. 7622362 and 7622365**

On December 4, 2008, Inspector Preece traveled to the Foidel Creek Mine to conduct an E01 inspection. During that inspection, Preece issued Citation No. 7622362 under 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.370(a)(1). The citation alleges the following:

The approved ventilation plan, page 11 was not being complied with in front of the operations center parking area. Two versi-foam packs were brought to the surface and were being stored under the staircase of the managers office.

(Ex. 15). The following day, Inspector Preece issued a second 104(a) citation for a violation of the same standard. Citation No. 7622365 alleges the following:

The approved ventilation plan, page 11 was not being complied with in front of the entrance to the warehouse. One versi-foam pack was brought to the surface and was being stored by the entrance to the warehouse in front of the No. 995 load center.

Ex. G-20). With regard to both citations, Preece determined that an injury was unlikely, but that, if an injury was sustained, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violations were not S&S, that one person would be affected, and that the violations were the result of moderate negligence on the part of the operator. The standard cited in both citations requires that:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.

30 C.F.R. § 75.370(a)(1). The Secretary has proposed a civil penalty of \$285.00 for each of these violations.

i. *Summary of Testimony*

Inspector Preece testified that, while conducting an E01 inspection on December 4, 2008, he came upon two versi-foam packs that were sitting outside the operations center building, underneath a stairway. (Tr. 333-334, 344). Preece had seen the foam packs in this location the day prior, but did not issue a citation at that time and, instead, had a discussion with management. (Tr. 345-346). Preece identified Sec'y Ex. 16 as an accurate representation of what he saw that day. (Tr. 344). He identified two versi-foam pack boxes, some trash, and possibly a PLM plug for a high voltage cable in the picture. (Tr. 356-357; Sec'y Ex. 16). He could not say whether the material was being thrown away. (Tr. 357). According to Preece, the surface under the foam packs was wet, possibly from snow melt, and the boxes supporting the chemical containers were deteriorating. (Tr. 344). From the photograph, Preece could not tell if the foam pack boxes themselves were wet, but he knows that they were sitting in water. (Tr. 364). There was no fire protection for the area. (Tr. 358). Further, the valve on one of the tanks was left in the open position, "which is part of the manufacturer requirements."<sup>4</sup> (Tr. 344). Preece did not know if the dispenser handle was also open, and he did not see any of the chemical product from the containers in the area. (Tr. 363). Preece stated that this location is where miners board the man trip to travel underground. (Tr. 343-344, 355). He testified that, at the time of this inspection, the outside temperature was below freezing at times overnight and in the morning, but would warm to 40s and 50s during the day. (Tr. 343). Preece remembered that, while there were times in December of 2008 when there was a substantial amount of snow on the mine property, there were other times when there was not much snow. (Tr. 343). Preece determined that the location of the packs under the stairway outside the operations center, amounted to a violation of the mine's ventilation plan and issued Citation No. 7622362 to Dianna Scott Ponikvar. (Tr. 337).

The following day, Preece returned to the mine and observed a versi-foam pack that had been brought to the surface and was sitting outside a warehouse. (Tr. 348). Again, Preece determined that the location of the pack was a violation of the mine's ventilation plan and, accordingly, issued Citation No. 7622365. (Tr. 348-349). Preece determined that the canisters had been at this location for some time based on his observation that they were covered with dust and snow. (Tr. 349)

According to Preece, by placing the versi-foam packs in the locations where he observed them, the mine had failed to comply with the manufacturer's guidelines for the poly foam and, in turn, had violated its ventilation plan. In the past he had talked Dianna Ponikvar, Dick Conkle, and mine management about the storage and handling procedures for the foam packs both underground and on the surface. (Tr. 345-346, 360). With regard to the packs on the surface of the mine, Preece told them that the packs could not be "haphazardly" thrown around given that the materials were compressed in the containers. (Tr. 360). Preece testified that Ponikvar,

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<sup>4</sup> Preece deduced that the valve was open because the yellow knob, visible in Sec'y Ex. 16 p. 2, was not screwed down flush with the top of the tank. (Tr. 345, 362)

Conkle, and management told him that they would handle the packs according to the ventilation plan and the manufacturer's guidelines for storage procedure underground. (Tr. 360-361).

Preece explained that the versi-packs are a polyurethane foam ("poly foam") system used by Twentymile. (Tr. 338, 339). The system is made up of two chemical components stored under low pressure, i.e., 25 p.s.i., in separate containers that come in a cardboard box. (Tr. 338, 339, 357, 360). The containers look like tanks for a gas cooking grill. (Tr. 338). The cardboard box provides a protective cover for the system, and also holds the guidelines, which should be followed when operating the system, and the Material Safety Data Sheet ("MSDS") for the chemicals used by the system. (Tr. 339). Foam is created when the two components are mixed at the nozzle dispenser attached to a hose. (Tr. 338, 363). This foam is used on ventilation controls across the country, including on Kennedy stoppings, and to repair cracks and leakage in the sealant on concrete block walls. (Tr. 338).

According to Preece, the cited standard requires the mine to comply with the approved ventilation plan. (Tr. 337, 353). Preece explained that, in addition to controlling respirable dust, the ventilation plan addresses control of methane, the installation of fans, and other matters such as the handling of versi-foam packs on the surface and underground. (Tr. 353, 355). He agreed that the mine's ventilation plan has specific storage locations and that, while underground, the packs should be stored in those areas. (Tr. 354). Once the packs are empty, or are unused, they should be removed from the mine within 24 hours. (Tr. 354). If there is still product in the container, then the foam pack is considered to be available for use. (Tr. 358). Twentymile's ventilation plan requires that polyurethane foam be handled, stored, and applied according to the manufacturer's guidelines. (Tr. 339, 355; Sec'y Ex. 17). Preece explained that the manufacturer's guidelines specify that the poly foam system be stored in a controlled environment no warmer than 100 degrees Fahrenheit, no cooler than 30 degrees Fahrenheit, and away from direct sunlight, hot pipes, chimneys, and heat ducts. (Tr. 340; Sec'y Ex. 18 p. 4). In addition to the operating instructions, the mine must also look at the MSDS for the chemicals involved in the system. (Tr. 340; Sec'y Ex. 19). Preece initially testified that the MSDS sheet said that the product would "react[] violently" with water. On cross-examination, Preece agreed that the reaction occurs when the actual product itself comes into contact with water. (Tr. 358).

According to Preece, he marked the likelihood of an injury or illness as "unlikely," but if the packs are left out in the cold, and exposed to water, there is a risk that there could be a premature rupture of the tanks, or that they could be run over by mobile equipment. (Tr. 365). In the right conditions, the tanks could explode. (Tr. 365).

Preece stated that the manufacturer's guidelines regarding handling, storage, and application of the foam packs apply not only when the packs are underground but also when they are on the surface. (Tr. 346). Preece testified that he covered this issue with mine management the day before he issued the first citation, yet, when he left and then came back, the containers under the stairs were still there. (Tr. 346). As a result, he determined that the packs had been at

that location for more than 24 hours. (Tr. 347, 356, 358). Both citations were abated by moving the foam packs into a warehouse with a controlled environment. (Tr. 359, 365).

Preece acknowledge that, at the time he issued the citations, the packs were not a hazard but the packs could create a hazard over time. (Tr. 347). The risk of leaving the tanks out in the cold, and exposed to water, was that they could rupture. (Tr. 347). Given that the canisters were compressed gas, there was a risk that, if they ruptured, a miner would become inundated with the chemical inside the tank. (Tr. 347). Preece testified that he was aware of a situation where a miner was inundated with foam and ended up suffering respiratory problems. (Tr. 348).

Preece testified that he designated both citations as “moderate negligence” because he had multiple meetings with the mine where they had discussed the handling procedures for the foam. (Tr. 350). The containers in both citations were located in areas that mine management and miners would have passed by regularly. (Tr. 350).

Preece testified that Inspector Art Gore issued a section 104(d)(2) order to Twentymile on December 6, 2008, for a violation of the ventilation plan because a pack was thrown into a dumpster at the mine. (Tr. 351, 361). Preece believes that mine management was not listening to MSHA’s warnings. (Tr. 351-352).

Dianna Ponikvar testified that she has accompanied Inspector Preece on a number of inspections, but she was not sure that she accompanied him on this particular one. (Tr. 367). According to Ponikvar, during the approval process of the mine’s ventilation plan, the mine was able to work through certain terms with the District Manager. (Tr. 367). Among those terms were the specific locations underground for the storage of foam packs. (Tr. 367-368).

Ponikvar explained that the mine uses versi-foam as a sealant around the edge of stoppings. (Tr. 368). The foam pack consists of a box with two metal containers that look like propane tanks. (Tr. 368). Each container holds a chemical that, when mixed with the other, turns into foam that expands and dries quickly. (Tr. 368) The foam is used on the stoppings and seals, as well as for other purposes. (Tr. 368). Ponikvar agreed that the ventilation plan requires the mine to comply with the manufacturer’s guidelines. (Tr. 375). The miners are trained in proper storage, use, handing and disposal procedures for the foam packs. (Tr. 368-370). Empty canisters are sent to the landfill but reusable canisters are taken to the surface to be stored in the warehouse. (Tr. 369). Canisters for reuse must be brought to the surface within 48 hours. (Tr. 370). The canisters are transported to the surface on man trips are dropped by the stairs because that is where things are dropped that are to be taken to the warehouse. (Tr. 370-71). She explained that this area is a staging area for things taken out of the mine. (Tr. 372). According to Ponikvar, there is only one warehouse for material storage and all materials are stored there or thrown away. (Tr. 372).

Ponikvar remembers discussing with Preece the issue of the foam being outside. (Tr. 373). Preece told her that he did not want the packs outside. (Tr. 373). However, she testified

that the ventilation plan covers the underground mine and has nothing to do with outside air. (Tr. 373). The subject citations are for violations of Part 75, which address underground ventilation, and not for Part 77, which addressed surface issues. (Tr. 374-375). According to Ponikvar, the subject packs were stored and not thrown away. (Tr. 373).

ii. *The Violation*

The Secretary argues that the mine's ventilation plan requires that the manufacturer's guidelines for the storage and handling of polyurethane foam be followed. (Sec'y Br. 33). The manufacturer's guidelines require that foam not be left or stored in locations where the temperature drops below freezing, nor should the foam be left or stored in locations where it can be exposed to water. *Id.* at 34. On two separate occasions the mine left foam in locations that exposed the foam packs to water, snow, and freezing temperatures. *Id.* Section 75.370(a)(1) requires the mine to develop and follow a ventilation plan and is not limited in scope to only underground operations. *Id.* at 35-36.

The Respondent argues that the mine's ventilation plan does not apply to surface storage of the foam packs. (TM Br. 52). Rather, the plan addresses underground mine ventilation and dust control. *Id.* Further, the language of the plan which addresses "storage" of the foam packs applies only to underground storage. *Id.* at 53. Moreover, it is not clear that "storage" was occurring. *Id.* Even if the guidelines did apply, the Secretary did not prove that the temperature guidelines were exceeded. *Id.* at 55. Moreover, the "product" never came in contact with water and, rather, it was only the cardboard box for the metal canisters that might have been in contact with damp ground. *Id.* The Secretary did not prove that it was clearly understood that the plan provision applied to the surface. *Id.* at 55. As a result, the plan provision was ambiguous. *Id.* at 56. When a plan provision is ambiguous, the Secretary must "dispel the ambiguity" by establishing the intent of the parties on the issue through credible evidence as to the history and purpose of the provision and evidence of consistent enforcement." *Id.* (citing *Jim Walters Resources*, 9 FMSHRC 903, 907 (May 1987)). The Secretary has failed to dispel the ambiguity, and, therefore, has not satisfied her burden of proving that the plan applied to foam packs on the surface. *Id.* at 55-57.

At the outset, it is necessary to address whether the cited standard and, in turn, the mine's ventilation plan and the incorporated manufacturer's guidelines can apply to the handling, storage and application of polyurethane foam on the surface. Section 75.1 of the Secretary's regulations states that "[s]ome standards [within part 75] also are applicable to surface operations." 30 C.F.R. § 75.1. The Secretary does not "specify which of the standards are so applicable, how this is to be determined and, finally, whether the specific standard here involved is one that is intended to be applicable to surface areas of underground mines." *Jim Walters Resources*, 1 FMSHRC 1317, 1324 (Sept. 1979) (ALJ). In *Jim Walters*, the Judge was presented with the question as to whether section 75.1403 and its subparts were applicable to surface areas of underground mines. *Id.* at 1325. The judge noted that some standards, by way of their language, are made specifically applicable to surface areas at underground mines, while others

standards mention activity which is to be conducted on the surface. *Id.* In an effort to determine whether section 75.1403 was applicable to the surface, the judge asked if “the standard itself expressly states that it is applicable to surface areas” or “is it clear from the language that [the standard] is applicable to both underground and aboveground.” *Id.* While limiting his decision to the facts of the case, the judge found that the particular standard, which addressed safeguards, was sufficiently broad enough to cover certain surface conditions. *Id.* at 1325-1326. While I am not bound by the decisions of other judges, I find the judge’s methodology in the Jim Walter’s decision instructive.

Here, the cited standard states, in pertinent part that “[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.” 30 C.F.R. § 75.370(a)(1). This provision is unique in the context of this analysis since it incorporates by way of reference the provisions set forth in the mine’s approved ventilation plan, which then incorporates by way of reference the manufacturer’s guidelines. As a result, a three-step analysis is necessary. First, on its face, it is clear that the cited standard does not expressly reference that it is applicable to surface areas, nor does it mention activity which is to be conducted at the surface. Rather, the text is silent on the issue. Second, the mine’s ventilation plan, in a section entitled “Use of Polyurethane Foam,” states that “Manufacturer Guidelines for safe handling, storage and application will be followed.” (Sec’y Ex. 17). Again, nothing from this text expressly references that the provision is applicable to surface areas, nor does the provision mention activity which is to be conducted at the surface. Instead, the provision incorporates by reference the manufacturer’s guidelines. The third and final step of the analysis requires an examination of the manufacturer’s guidelines as they relate to “safe handling, storage, and application.” The guidelines state that “at no time should the kits be stored in temperatures above 100 F (38 C) or lower than 30 F (-1 C).” (Sec’y Ex. 18 pp. 3 & 4). “Nor should they be stored in direct sun or near hot water pipes, furnaces, chimneys or heat ducts.” *Id.* at p. 4.

The Material Safety Data Sheet (“MSDS”) that accompanies the guidelines, and is incorporated by reference, states that one of the component chemicals “reacts slowly with water, releasing carbon dioxide, which can cause pressure buildup and rupture of closed containers.” Sec’y Ex. 19 p. 1. It advises to “[a]void contact of this product with water at all times during handling and storage,” *Id.* at p.2. On its face, the manufacturer’s guidelines do not expressly reference that it is applicable to surface areas; however, I find that it does mention activity that could potentially be done on the surface, namely, storage of the packs outside of the temperature parameters, and exposure to water. Nothing in the guidelines or the MSDS suggests that the foam packs are for underground use only. As a consequence, I conclude that these guidelines and the MSDS apply to the handling, storage and application of polyurethane foam both underground and on the surface. The guidelines have been incorporated by reference into Twentymile’s ventilation plan and the MSDS is part of the guidelines. (Ex. G-17). On this basis, I conclude that the provisions of the ventilation plan at issue here apply to the surface and underground portions of the mine.

I credit Inspector Preece's testimony that the two cited conditions involved foam packs that were located in areas that were not a controlled environment. While I do not disagree with Respondent that the two locations were not formally designated storage areas, I find that the duration of the time that the packs were in these areas they were exposed to impermissible temperatures in violation of the manufacturer's guidelines and, in turn, the cited standard. First, Preece credibly testified that the packs that are the subject of the first citation were in the same location the day before he issued the citation. The packs were left out overnight under the stairs. They may have been intended for permanent storage somewhere else, but the length of time they existed at that location does not square with the Respondent's argument that this was a staging area. I find that the packs were stored under the stairs. Further, I credit Preece's testimony that the outside air temperature at the time of his inspection was below freezing at night. In light of the above analysis, I find the Secretary has proven that the foam packs that are the subject of Citation No. 7622362 were not properly handled pursuant to the manufacturer's guidelines and were, therefore, in violation of the mine's ventilation plan. The Secretary has established a violation.

With regard to the second citation, I credit Preece's testimony that the foam pack was covered in snow and dust. While the dust may not have been indicative of the time the pack spent outside, I agree with Preece's assessment that the snow on the canister is evidence that the pack had been outside for an extended period of time. Further, the accumulated snow on the canister is evidence of the canister's presence in temperatures below freezing. I find that the Secretary has proven that the foam pack that is the subject of Citation No. 7622365 was not properly handled pursuant to the subject manufacturer's guidelines and was, therefore, in violation of the mine's ventilation plan. The Secretary has established a violation.

Twentymile argues that, consistent with the Commission's decision in *Jim Walters Resources*, 9 FMSHRC 903 (May 1987), the Secretary has not "dispelled the ambiguity" of the cited provision. Here, however, there is no ambiguity. The provision of the mine's ventilation plan is clear on its face. "Manufacturer Guidelines [related to polyurethane foam] for safe handling, storage and application will be followed." Twentymile seeks to insert ambiguity where there is none. It asserts that the provision is ambiguous due to the lack of an express statement that the provision applies to the handling, storage and application of the foam on the surface. I disagree that such an express statement is necessary and rely upon my above analysis as to why the cited standard, the incorporated ventilation plan provision, and the manufacturer's guidelines apply to the surface. It is more than reasonable to assume that the manufacturer did not develop its guidelines to only be applicable in certain situations and locations. If this product is mishandled at any point, the safety of the product may be compromised. According to Ponikvar, these canisters had already been in the mine and had been removed and were in staging areas before they were to be stored in the materials warehouse. Storage in the materials warehouse, versus disposal, indicates that the canisters were to be used again in the future, meaning that they would return underground at some point. As such, the packs should be stored, placed, or staged in an area that would comply with the manufacturer's guidelines so that, when the packs are taken back underground, they have not deteriorated or been compromised.

iii. *Gravity*

Preece determined that an injury was unlikely but that, if an injury were sustained, it could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violations were not S&S and that one person would be affected. I agree with Preece's assessment of the likelihood of an injury. The canisters' pressure was low. A rupture was unlikely, even after the canisters were exposed to low temperatures. It is unlikely that more than one person would use these containers at one time. Preece acknowledged that when he issued the citations there was no hazard but that a hazard could develop. I find that the gravity was low.

iv. *Negligence*

Preece designated both citations as moderate negligence. He based his determination on the fact that he had conducted multiple meetings with the mine where they had discussed the handling procedures for the foam, and the fact that both cited locations were areas that miners and management would have passed by. At hearing, Preece stated that he could have possibly designated the citations as high negligence. In her brief, the Secretary also advocates that I modify the negligence of both citations to "high."

I credit Preece's testimony that, the day before the December 4th citation was issued, he specifically identified the foam packs under the stairs and indicated his concern that they be properly stored. In spite of such, the Respondent took no action. As a result, he issued Citation No. 7622362 the following day for the same foam packs. The next day, Preece again noted foam packs that were improperly stored outside, this time with snow having accumulated on them. I agree with Preece's assessment that management was not taking this issue very seriously. Although I understand the reasoning behind the Secretary's request that the citations be modified to charge Twentymile with high negligence, I am affirming the inspector's moderate negligence determination. Twentymile genuinely believed that the ventilation plan did not apply to its surface operations. I assess a penalty of \$150 for each of these citations.

**B. Citation No. 7622372**

On December 10, 2008, Inspector Preece traveled to the Foidel Creek Mine to conduct an inspection of the mine. During that inspection Preece issued Citation No. 7622372 under 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.1100-3. The citation alleges the following:

The firefighting water sprinkler system located on the 3 Main North belt drive and head roller was not being maintained in a usable and operative condition. The sprinkler heads were covered were impacted (sic) with a heavy layer of rock dust. The sprinklers are heat activated.

(Ex. G-21). Preece determined that an injury was unlikely, but that, if an injury were sustained, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. Prior to hearing, the Secretary moved to have the citation amended to reflect a violation of section 75.1107-16(b). The motion was granted. The cited standard requires, in pertinent part, that:

(b) Each fire suppression device shall be tested and maintained in accordance with the requirements specified in the appropriate National Fire Code listed as follows for the type and kind of device used: . . . National Fire Code No. 13A “Care and Maintenance of Sprinkler Systems” (NFPA No. 13A--1971).

30 C.F.R. § 75.1107-16(b). The Secretary has proposed a civil penalty of \$285.00 for this violation.

i. *Summary of Testimony*

Inspector Preece testified that, while conducting an inspection on December 10, 2008, he noticed that the sprinkler heads for the fire suppression system along the Three Main North Belt were “impacted with rock dust” and were not clean. (Tr. 379, 398). Preece later testified that the material on the heads was both rock and coal dust. (Tr. 392). As a result, he issued the subject citation. (Tr. 379).

At hearing, Preece testified that section 75.1107-16(b) of the secretary’s regulations requires the mine to maintain the fire suppression system in accordance with the National Fire Protection Association. (Tr. 380). Preece agreed that the National Fire Protection Association No. 13A, Care and Maintenance of Sprinkler Systems, 1971, is the National Fire Code that section 75.1107-16(b) is referring to. (Tr. 380). Preece testified that the fire code states that “sprinklers should be checked regularly to make sure they are in good condition, free from corrosion, loading, white wash, bent, or damaged.” (Tr. 380-381 (paraphrasing the fire code at Sec’y Ex. 23 p. 3)). Preece explained that this provision means that you “can’t have any buildup on the sprinkler head itself.” (Tr. 381).

Preece testified that the MSHA Program Policy Manual (“PPM”) states that sprinklers should be free of dirt, and all damaged sprinklers should be replaced. (Tr. 386; *see* Sec’y Ex. 24). On cross-examination he agreed that rock dust is not what is commonly referred to as “dirt,” and that the PPM does not address rock dust on sprinkler heads. (Tr. 393).

According to Preece, this particular type of sprinkler has a glass tube that is filled with liquid and an air bubble. (Tr. 381). When the temperature rises, the liquid inside the tube expands until it ruptures. (Tr. 381). The rupturing of the tube allows water to flow. (Tr. 381). Preece believes that the standard temperature at which a head should activate is 250 degrees, but

he could not say what was the activation temperature of this particular head. (Tr. 392). On cross-examination Preece agreed that the sprinkler shown in Sec'y Ex. 22 p. 2 is a dual sprinkler head, with one head directed toward the belt, while the other is directed at the rib. (Tr. 391). In response to a question as to whether the rock dust on the sprinklers would have prevented the liquid from expanding, Preece responded by saying, "I think that eventually this would rupture and become a functional system." (Tr. 382). He believes that the rock dust would potentially delay the reaction time for the sprinkler system to come on. He explained that there is a difference between being "impacted" and having a light layering. (Tr. 398). While he did not measure the thickness of the dust on the heads, it was not a thin layering like a sheet of paper. (Tr. 398). Preece testified that reaction time is crucial. (Tr. 383). His concern was the dust on the glass piece. (Tr. 397).

Any delay in the reaction time reduces the effectiveness of the sprinkler. (Tr. 383). Further, it is possible that a fire will spread more quickly if there is a delay in the sprinkler being activated. (Tr. 383). Preece agreed that he did not know how long the reaction time would be delayed but, according to a conversation with MSHA technical support about the effect of rock dust on sprinklers, there would be a difference in the reaction time. (Tr. 383, 394).

On cross-examination Preece agreed that the subject type of sprinkler system is used in many different environments. (Tr. 396). Preece testified that he was aware of a 1994 NIOSH report that tested sprinkler systems that were impacted with rock dust and their activation times. (Tr. 382). The report concerned testing of temperatures ranging from 212 degrees down to 83 degrees, and with high and low velocities of air. (Tr. 382). The report concluded that the reaction times were delayed, but he thinks all of them eventually went off. (Tr. 382). Preece did not have a copy of this report at the time he issued the citation. (Tr. 387).

Preece acknowledged that rock dust is good to have in a mine, depending on where it is placed. (Tr. 392). He opined that, in spite of the fact that there is a whole standard addressing the sufficiency of rock dust in entries, you do not want rock or coal dust on the sprinkler heads. (Tr. 392-393). Preece did not know the history violations at this mine for rock dust on sprinkler heads, but he agreed that there are no Commission cases that address the issue. (Tr. 394).

Preece determined that the alleged violation was the result of "moderate negligence." (Tr. 384). Preece testified that, at some point before the issuance of the subject citation, he traveled with Dianna Ponikvar, Dick Conkle, and the mine representative to a different belt drive where the suppression system was in the same condition as the cited one. (Tr. 384-385). There, they used a pump spray bottle to wash off the sprinkler heads. (Tr. 384-385). No citation was issued on that drive, but it did bring to light the issue of rock dust on the sprinkler heads. (Tr. 385). Later, either during or following the subject inspection, Preece had a discussion with the same individuals and explained to them that there cannot be a buildup of rock dust on the sprinkler heads. (Tr. 384).

Edwin Brady is currently the maintenance manager at the mine and was previously the mine's conveyance manager for 20 years. (Tr. 399). As conveyance manager he was responsible for, among other things, the initial design and installation of the sprinkler system along the belt. (Tr. 399-400). Brady is a member of the SME Bulk Material Handling Committee, which has put out several papers that address fire suppression on conveyor systems. (Tr. 400-401).

Brady examined the photographs of the subject sprinklers and testified that this is a two-diffuser system. (Tr. 402). One diffuser on the sprinkler head directs water over the conveyor belt, while the other directs water at the ribs. (Tr. 402). The mine utilizes the double diffuser because, while conveyor belts are dangerous, the mine believes that the bigger danger is the ribs catching fire. (Tr. 402). MSHA does not require the ribs to be protected with water. (Tr. 402-403). Further, Twentymile spaces its sprinkler heads closer together than MSHA requires. (Tr. 403). These particular sprinkler heads are activated by a fusible link, i.e, a metal alloy that melts at a low temperature, attached to a spring. (Tr. 403). When the fusible link melts, the sprinkler is triggered. (Tr. 407). These heads would melt around 150 degrees. (Tr. 403). Brady disputed earlier testimony and stated that these heads are not activated by a bubble with water in it. (Tr. 403-404). According to Brady, the sprinklers are inspected weekly to see that the water supply is on and that the system is not damaged and is given an annual functional test to see that the fire flow switch detects fire and automatically shuts down the conveyor. (Tr. 410). Brady testified that, when the citation was issued, he believed that the mine offered to test the sprinklers to show that they would operate, but the Inspector did not want to do that. (Tr. 405).

According to Brady, the photographs do show rock dust on the sprinkler heads. (Tr. 404; Ex G-22). Rock dust is required by law and is put in the belt entry deliberately. (Tr. 409-410). Brady explained that, given the regularity of rock dusting in belt entries, it would be common to have rock dust on sprinkler heads. (Tr. 404). In fact, prior to Preece's inspection, no inspector, including those with the MSHA belt initiative after the Aracoma belt fire, had ever told the mine that it was a violation to have rock dust impacted on sprinkler heads. (Tr. 404, 405). On cross-examination Brady stated that he would not classify rock dust as "dirt." (Tr. 404). He defines "clean" as "free of debris" and it is possible that rock dust could be considered "debris." (Tr. 408). He agreed that if something is "impacted," it is not "clean." (Tr. 408).

Brady explained that he did not believe that rock dust would affect the temperature at which the heads would activate. (Tr. 405). Further, he does not believe that rock dust impacting the heads should be a citation. (Tr. 407). He checked with Matt Bujewski, Peabody's risk analysis consultant for the company's insurance carrier, who told Brady that rock dust on the sprinklers was not even an issue, and that the sprinklers are routinely "put inside dust collectors, where it is more than likely dust will be found on sprinklers in those environments." (Tr. 406). Bujewski is apparently the chair of the NFPA mining division. (Tr. 406).

Brady explained that, in order to remove the rock dust, the sprinkler heads would need to be washed off with a high pressure hose rather than a squirt bottle. (Tr. 411). Given the delicate nature of the sprinklers, washing with a high pressure hose could potentially damage the heads.

(Tr. 411). According to Brady, there are several thousand sprinkler heads along the belt line.  
(Tr. 412).

ii. *The Violation*

I find that the Secretary has not alleged a violation of a mandatory standard for which I can find a violation. The Secretary argues that the Respondent violated section 75.1107-16(b) of her regulations by failing to maintain the fire suppression system in accordance with the requirements of the National Fire Code. (Sec’y Br. 38).

The Respondent argues that the National Fire Protection Code, while appropriately incorporated by the Secretary’s regulations, does not create an enforceable requirement. (TM Br. 59). Specifically, the referenced code offers only “recommended practices,” which are not requirements and, according to the code, are only “advice and suggestions relative to the care and maintenance of sprinkler equipment.” *Id.* Moreover, the provisions of the National Fire Code cited by the Secretary use the word “should,” which indicates the non-mandatory nature of the provision. *Id.* at 60.

The standard cited by the Secretary is clear: the fire suppression device shall be tested and maintained in accordance with the requirements specified in the appropriate National Fire Code. The language is clear and unambiguous. Only those “requirements” set forth in the appropriate National Fire Code are mandatory standards.

This mandatory standard incorporates by reference a provision of the National Fire Code. Certain pages of the subject National Fire Code were offered and accepted into evidence at the hearing as Sec’y Ex. 23. (Tr. 413). In her brief, the Secretary relies on two particular provisions of the Code. The first provision states that “[s]prinklers should be checked regularly to make sure that they are in good condition, clean, free from corrosion or loading, not painted or whitewashed, and not bent or damaged.” (Sec’y Ex. 23 p. 3). The second provision relied upon by the Secretary states that “[i]t is of prime importance to keep sprinklers in good condition. If they are subject to loading with dust or foreign material, the authority having jurisdiction should be consulted.” *Id.*

As pointed out by Respondent, the Commission has spoken to the use of the word “should” in the context regulatory language. In *Utah Power & Light Co.* the Commission stated the following:

The Secretary’s argument is undercut also by the use of the term “should” in the wording of the criteria, a term that normally signals the non-mandatory nature of a regulation. *See generally, Jim Walter Resources, Inc.*, 3 FMSHRC 2488 (November 1981). The Commission has emphasized that when assessing the nature of a regulation the essential question is whether the standard as written

imposes a mandatory duty upon operators. For instance, the Commission has found that even the inadvertent use of the word “should” instead of “shall” could be overcome as an indicia of a regulation’s non-mandatory nature where the regulatory history of the standard made clear that the standard imposes a mandatory duty on mine operators. *See Kennecott Minerals Co., Utah Copper Division*, 7 FMSHRC 1328, 1332 (September 1985). The standard at issue, however, was neither proposed as mandatory nor promulgated with a mandatory designation. *Compare Kennecott Minerals Co., supra.*

11 FMSHRC at 1931-1932. Each of the National Fire Code provisions relied upon by the Secretary incorporates the word “should” in its directive language. As noted by the Commissioners, the use of “should” signals the non-mandatory nature of a regulation. Obviously, the National Fire Code was not promulgated as an MSHA standard and, instead, it was simply incorporated by reference into the Secretary’s regulations. *See* 30 C.F.R. §§ 75.1107-16 and -17. However, the language of the incorporated National Fire Code is clear; the subject provisions only state that certain things “should” be done or what should be considered by local authorities. Further, the foreword to the National Fire Code states that its provisions “offer to property owners and managers advice and suggestions relative to the care and maintenance of sprinkler equipments upon which the safety of their property may depend.” (Sec’y Ex. 23 p. 2). The National Fire Code was not written to be mandatory standards. As a consequence, I cannot see how the referenced provisions of the subject National Fire Code can be considered “requirements” as contemplated by section 75.1107-16.

In *Jim Walters Resources* the Commission stated that, “[a]lthough safety and health standards are to be construed liberally, any resultant interpretation must be reasonable in order to be upheld.” 3 FMSHRC 2488, 2490. Here, the Secretary’s interpretation, which is not backed by any policy statements, or regulatory or legislative history, would have the Respondent comply with advisory National Fire Code provisions, despite the fact that the Secretary’s own regulation incorporating the National Fire Code clearly states that fire suppression devices shall be tested and maintained in accordance with the “requirements” of the Code.

I find that, while the standard cited by the Secretary may be mandatory in nature, only those provisions of the National Fire Codes that are “requirements” are incorporated by reference into the standard. The National Fire Code provisions referenced by the Secretary as having been violated are not “requirements.” As such, the Secretary has failed to allege a violation of a mandatory standard for which I could find a violation. Accordingly, the citation is vacated.<sup>5</sup>

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<sup>5</sup> Even if the subject National Fire Code provisions could be considered as mandatory safety standards, I find that the Secretary failed to establish a violation. I credit the testimony of Brady that the sprinklers are activated by fusible links rather than by glass bubbles filled with liquid and an air bubble. Inspector Preece’s knowledge of Twentymile’s sprinkler system, how it activates,

**5. WEST 2009-820, Citation Nos. 8456301 and 8456311**

Inspector Phillip Ray Gibson is a MSHA coal mine inspector based out of the Craig, Colorado field office. He inspects both underground and above ground coal mines and estimates that he has been to the Foidel Creek mine over one thousand times.

On February 19, 2009, Gibson issued Citation No. 8456301 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.516-2(c). The citation alleges the following:

Additional insulation was not provided for two communication circuits where they passed underneath energized power conductors and an energized fluorescent lighting fixture. The two mine phones were located on the left rib of no. 4 entry (conveyor belt entry) at crosscut 7+78 in 7 Main North. The communication circuits were 4 inches to 14 inches below the energized power conductors and lighting fixture. It did not appear that there were any attempts to correct the condition before the inspector cited it. This condition was obvious and had existed for at least one week. These mine phones are used by miners during the course of their work in the conveyor belt entry. This condition contributes to an electrical shock hazard.

(Ex. G-26). Gibson determined that an injury was unlikely but that, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S, that one person would be affected, and that the violation was the result of high negligence on the part of the operator.

On February 26, 2009, Gibson returned to the Foidel Creek mine and used Citation No. 8456311 under section 104(a) of Mine Act for an alleged violation of 30 C.F.R. § 75.516-2(c). The citation alleges the following:

Additional insulation was not applied to two communication circuits (mine phones) at crosscut no. 8 between no. 3 entry (conveyor belt) and no. 2 entry (intake air course) of 2 Main North. The communication circuits touched, passed over and under two

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(footnote continued) and whether the presence of rock dust would delay the activation was vague and not very convincing. I do not give this testimony much weight. Twentymile's request to admit into evidence a U.S. Bureau of Mines (NIOSH) report entitled "The Effects of Underground Mining Conditions on the Activation of Automatic Sprinklers" is DENIED. This report was briefly mentioned for the first time in this case by Inspector Preece. (Tr. 382, 455). It is a technical report and, because no testimony was provided to explain the relevance of the report to the facts at issue, it was not admitted. A copy is included with the exhibits.

energized power cables for CSTs (electrical equipment) at this location. Miners use the phones for communication purposes on a regular basis. This condition contributes to an electrical shock hazard.

(Ex. G-29). Gibson determined that an injury was unlikely but that, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S, that one person would be affected, and that the violation was the result of high negligence on the part of the operator.

The standard cited by the Secretary requires, in pertinent part, that “[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.” 30 C.F.R. § 75.516-2(c). The Secretary has proposed a civil penalty of \$687.00 for each of these violations.

#### **A. Summary of Testimony**

On February 19th, Gibson was accompanied by Bob Owens while conducting an inspection at the mine. (Tr. 418). They traveled the No. 4 Entry, a conveyor entry, in Seven Main North. (Tr. 418). While walking on the walkway side of the conveyor, Gibson looked across the entry and saw two communication telephones and a 110-volt fluorescent light fixture. (Tr. 418, 431). However, Gibson did not believe that the subject power cord was any different from a cord that would be used on a home lamp. (Tr. 432). The light was on and the cable for the fixture was hanging from J hooks that were attached the rib. (Tr. 418-419). The power cable was not damaged. (Tr. 438, 440). Underneath the fixture and its cable were two telephones and their respective communication cables. (Tr. 418-419). Gibson explained that the two communication circuits were for a pager phone and a touch-tone phone. (Tr. 419). Both phones could be used to communicate anywhere in the mine. (Tr. 419). According to Gibson, the power cable was not touching either communication cable and, instead, ranged from four to fourteen inches away from the communication cables over a ten-foot distance. (Tr. 420-421).

Gibson noticed that no additional insulation had been provided around the communication circuits. (Tr. 421). According to Gibson, additional insulation would be something in addition to the outer jacket of the communication cables. (Tr. 421). Gibson testified that, while in this instance the communication circuits were cables with outer jackets, if the circuit had been just a twisted pair of wires, “additional insulation” would have required the only layer of insulation over the twisted wires. (Tr. 421). All that is needed for communication purposes is two conductors with insulation. (Tr. 435). An extra jacket is not needed for communication purposes, but here there was an extra jacket. (Tr. 435). He explained that the purpose of additional insulation is to provide an extra measure of safety. (Tr. 426). When additional insulation is not provided, it exposes miners to injury. (Tr. 426). The most likely thing that would happen is that the a damaged power cable, which has a higher voltage than the communication circuit, would touch a bare wire of the communication cable, thereby elevating

the power and transmitting that elevated voltage over the communication cable to a handset being used by a miner. (Tr. 426). The miner would suffer an electric shock. (Tr. 426).

According to Gibson, this particular communication circuit had insulated wires inside of an outer jacket. (Tr. 421). A circuit is not a cable unless it has an outer jacket over the two insulated twisted wires. (Tr. 421, 442). Each communication circuit has two conductors surrounded by insulation. Electricity is used to carry the communication through the conductors. (Tr. 432, 433). The communication cable was pretty standard, not extra thick, and looked like the same type of cable that is used for communication circuits at other mines. (Tr. 421-422). He has observed communication circuits at other mines that are just two insulated conductors that are twisted and do not have an outer jacket. (Tr. 422).

Based on his observations, Gibson issued Citation No. 8456301 at 2:08 p.m. for the lack of additional insulation on either the communication or power cables where the communication circuit passed under the power cable. (Tr. 417-418). Gibson spoke with a pumper about the condition while he was still underground. (Tr. 423). According to Gibson, the pumper had reported this condition to management. (Tr. 423). Gibson discussed the violation with the shift foreman once he left the mine. (Tr. 422). When he spoke with the shift foreman he reiterated that the standard required additional insulation for the communication circuits where they pass over or under power conductors or cables. (Tr. 422). According to Gibson, the foreman agreed that additional insulation was required. (Tr. 422). Gibson believed that this particular condition had existed at least longer than the beginning of the shift, which began at noon. (Tr. 426). The citation was terminated by moving the fluorescent light and its cable out by the area so that the power cable did not pass over or under communication circuit. (Tr. 426-427).

On cross-examination, Inspector Gibson agreed that there is no particular amount or quality of additional insulation that is required by the cited standard. (Tr. 434). Further, he acknowledged that the cited standard had been around since the time when mines used bare power conductors and bare communication wires, and that trolley wires are still bare and range between 3 to 600 volts. (Tr. 436). He stated that the conductors are rated to carry 24 volts, but he did not know at what voltage they would be damaged. (Tr. 441). The foil shield provides electrical insulation. (Tr. 434). The cable has polypropylene insulation, which provides an abrasion resistant protective cover for the insulated wires. (Tr. 424). The polypropylene insulation is standard in communication wire. (Tr. 424). This cable also has a PVC outer jacket, which is also typical. (Tr. 424). PVC is abrasion resistant and has some insulating qualities. (Tr. 424-425, 434). He agreed that the insulation of the cable was appropriate for the amount of current in the conductors. (Tr. 433). He has never taken a meter and tested the insulating qualities of the cable. (Tr. 434). Gibson also contacted a representative from Belden, the cable manufacturer. (Tr. 454). The representative, Teresa Bonnikur, informed him that the subject cable is "ordinary run-of-the-mill communication cable," but that the company did manufacture a different cable that had a heavy duty outer jacket with an MSHA approval stamp number on it. (Tr. 425-426). Gibson was not sure what Bonnikur's position with Belden was or what her

qualifications were. (Tr. 439). According to Gibson, there was no stamp on the subject cable. (Tr. 425).

On February 26th Gibson returned to the mine and issued Citation No. 8456311 for a violation of the same section, just in a different location, i.e., the Two Main North conveyor belt entry. (Tr. 427). Like Citation No. 8456301, this one also involved the lack of additional insulation on the outer jacket of a communication circuit. (Tr. 427). Gibson identified Sec'y Ex. 30 as an accurate representation of what he saw when he issued the citation. (Tr. 427). In this instance, there were a number of communication circuits and power cables. (Tr. 428). There was a black touch-tone phone like the one he described in the earlier citation, and a control box immediately to the left of the phone. (Tr. 428). Gibson testified that there was no additional insulation on the communication circuits or the four power cables that were in the area. (Tr. 428). He explained that the additional insulation can be on either the communication or power cables. (Tr. 428). Gibson testified that the communication cables were touching the power cables, and circled the area on the exhibit. (Tr. 428-429; Sec'y Ex. 30). According to Gibson this citation involved the same type of communication cable that was involved in the earlier citation. (Tr. 429). The corrugated tube, i.e., Camflex, in Sec'y Ex. 30 is the kind of additional insulation and mechanical protection that you might see on a properly insulated cable. (Tr. 428). On cross-examination he stated that he was not sure of the insulating properties of Camflex. (Tr. 440). He had not heard of using brattice cloth as additional insulation. (Tr. 435). On cross-examination Gibson agreed that the power cables have insulated conductors, an outer jacket, and ground monitors, but he was not sure if they had shielding. (Tr. 437-438). He further agreed that the power cables had ground monitors so that they would go to ground if there was a problem with the cable. (Tr. 438). Gibson agreed that none of the cables in Sec'y Ex. 30 were damaged. (Tr. 438, 440).

Based on the dust, Gibson believed that the condition had existed for longer than a day. (Tr. 429). According to Gibson, the condition was obvious because a mine examiner or belt man would walk right past the installation. (Tr. 429). Further, the mine examiner, who is considered a member of management, would walk right past the area three times a day during the preshift examination. (Tr. 430). The second citation was abated by wrapping electrical tape around the cable. (Tr. 434-435). He found both citations to be non-S&S.

Gibson designated both citations as high negligence. (Tr. 430, 442). He based the first citation's designation on the conversation he had with the pumper. (Tr. 430). Gibson explained that he had no reason to doubt the pumper. (Tr. 430). Gibson designated the second citation as high negligence based upon his observation that the condition was so obvious that an examiner had to see it. (Tr. 430). Gibson has issued other citations to the Respondent under the same standard, including three other citations for the same standard in the same quarter. (Tr. 430, 443). He testified that, since May 1995 the mine had been cited 39 times under this standard. (Tr. 431). On cross-examination Gibson acknowledged that the cables involved were stable, and were not dragged around like equipment cables. (Tr. 438). Further, he agreed that, in order for electricity to be conveyed to the communication cables, first the power cable would need to be

damaged such that all of the protections in the cable were short circuited so that the grounding would not work, then second, the electricity would have to go through the outer jacket, shielding, and insulation of the communication cable before it got to the conductor. (Tr. 440-441).

Rick Stillion has worked at the mine for thirteen years. (Tr. 444). He is currently the electrical department manager and, prior to that, was an electrical supervisor. (Tr. 445). Stillion has a federal and state electrical certification for low, medium, and high voltage in both underground and surface mines. (Tr. 446). According to Stillion, the electrical department works on many things, including communication and power systems. (Tr. 445).

Stillion explained that a communication cable consists of two or more small gauge copper conductors, covered by insulation, then foil shielding, and finally a PVC jacket. (Tr. 446-447). If there are multiple pairs of conductors then each pair will have a foil shield, and there will be a drain wire and a PVC jacket. (Tr. 446). The foil shield is designed to keep electrical noise off of the communications circuit. (Tr. 447). Each of the conductors is covered with insulation that is intended to keep stray voltage from getting to the conductor and prevent shorting with another conductor. (Tr. 447). The insulation is also abrasion resistant. (Tr. 447). PVC is a very good abrasion-resistant coating and has an insulation rating that goes up to 300 volts. (Tr. 447). Stillion has tested the outer jacket of these cables with a voltmeter and has determined that they do not conduct. (Tr. 447-448). He explained that, while two or more conductors connected to two telephones are a communication circuit, they are not necessarily a communication cable. (Tr. 452).

Stillion was familiar with the power cable at issue in the first citation. (Tr. 448). The cable for the light fixture did not have a PVC coating, but rather a rubber coating on each conductor. (Tr. 448). The cable had three conductors: one for power, one for return, and a ground wire. (Tr. 448). Generally, all three conductors are insulated with a rubber coating and then there is a jacket over the insulation. (Tr. 448). This cable, which has three conductors, is a little better protected than the standard cable for a 110-volt lamp in a house, which would only have two conductors. (Tr. 448-449).

Stillion examined Sec'y Ex. 30 and determined that the power cable was a 480 volt three phase cable that was powering the belt controller. (Tr. 449). This power cable is constructed in a similar manner to that of the light fixture cable in the first citation, although the jackets are heavier and are usually rated to 2,000 volts. (Tr. 449). Each of the phase conductors is covered in a rubber compound with insulating properties, then all three phase conductors are insulated, and finally the over jacket, which is abrasion resistant and provides some insulation. (Tr. 449). There would be two grounds, which are sometimes insulated, and a pilot. (Tr. 449).

Stillion explained that he is familiar with how communication cables and their closeness to power cables have been an issue at the mine. (Tr. 449). He has been told by MSHA that electrical tape, brattice, Camflex, and rubber hose conduit on the power cables will all satisfy the additional insulation standard. (Tr. 450). The electrical tape and rubber hose conduit have

insulating qualities, but the brattice and Camflex are not rated for insulation even though they may have some insulating qualities. (Tr. 449-451).

Stillion testified that, at one time, communication lines and power conductors were uninsulated in underground mines. (Tr. 452). By 1970, mines were required to have a plan to insulate or replace conductors in the mine. (Tr. 452). Given the communication and power cables that are in use at the mine, he does not see that there is a potential for a transfer of electricity to the communication cables. (Tr. 453). Additional insulation beyond that which is already there is unnecessary. (Tr. 453). Many telephone lines do not have outer jackets, and are only two insulated conductors, twisted together, and they are approved for mining. (Tr. 453). All of the telephone lines at Twentymile have abrasive resistant jackets that have multiple mills of insulation. (Tr. 453). Stillion stated that one mill of tape will not decrease the potential, although, on cross-examination he agreed that it will add some extra measure of safety. (Tr. 453)

## **B. The Violation, Gravity, and Negligence**

The Secretary argues that, in two different instances, the Respondent failed to provide additional insulation for communication circuits at points where they crossed over or under power cables. (Sec’y Br. 44). “Communication circuits,” as contemplated by the cited standard, is a broad term that is not defined but, necessarily, includes “any conductor between telephones whether the conductor is a wire, a cable, or some other type of line.” *Id.* at 45-45. “Additional insulation” is insulation beyond that which is already provided. *Id.* at 46. The Secretary relies upon a factually similar case in which I found that a mine had violated the cited standard. *Western Fuels Utah*, 17 FMSHRC 756 (May 1995) (ALJ), *aff’d by Western Fuels Utah*, 18 FMSHRC 1912 (Nov. 1996). Further, the Secretary argues that she is entitled to deference as to the definitions of “communication circuit” and “additional insulation.” (Sec’y Br. 48).

The Respondent argues that no violation of the cited standard occurred. (TM Br. 66). Specifically, the Respondent argues that the communication cables, as they existed at the time of citation, did in fact provide the “additional insulation” required by the standard. *Id.* Further, the Secretary’s interpretation of “additional insulation” is unreasonable and not entitled to deference. *Id.* at 70.

The cited standard requires, in pertinent part, that “[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.” 30 C.F.R. § 75.516-2(c). I find that the language of this safety standard to be quite clear. This is a safety standard that served an important purpose when it was first promulgated because much of the electrical wiring in mines was either uninsulated or poorly insulated. Adding extra insulation where power conductors passed near communication circuits was designed to protect those using the communication system from receiving an electrical shock. I credit the testimony of Stillion concerning modern insulated power conductors and communication circuits as well as the substantial outer jackets on power conductors. These improved, well-insulated and well-protected power conductors have rendered the safety standard

obsolete. The risk of electric shock is nonexistent as long as the operator frequently checks the conductors for abrasion or other damage. The Secretary accepts a single wrapping of electrical tape on the power conductor to abate these types of violations. Nevertheless, I do not have the authority to modify or vacate the safety standard. Mine operators are required to add “additional insulation” where communication circuits pass over or under any power conductor no matter how well-insulated the conductor is.<sup>6</sup>

There is no dispute that “additional” insulation was not provided at the cited locations. As a consequence, I find that violations were established. I also find that the violations were the result of Twentymile’s moderate to high negligence. Mine management was well aware of the requirement of the safety standard and was also aware that the standard was not being complied with at the cited locations. The violations did not pose a hazard to miners. A penalty of \$10.00 is assessed for each citation.

### III. SETTLED CITATIONS AND ORDERS

At the hearing, the parties proposed to settle the remaining citations in these cases. The terms of the settlement are set forth below.

Citation/Order No.	Originally Proposed Penalty	Settlement Amount	Modifications
<b>WEST 2009-241</b>			
7291718	\$3,689.00	\$2,250.00	Reduction in gravity to 2 persons affected.
7622548	\$3,996.00	\$1,000.00	Reduction in gravity to Unlikely, Non-S&S, and 1 person affected.
Docket Total	\$7,685.00	\$3,250.00	

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<sup>6</sup> In *Emerald Coal Resources, LP*, Judge Gary Melick vacated a similar citation on the basis that the insulated circuit far exceeded the required dielectric strength required. 29 FMSHRC 660 (July 2007). I appreciate Judge Melick’s frustration with the pointless requirement that additional insulation must be provided in all circumstances, even where the insulation provided by the manufacturer more than meets the requirement to protect the communication circuit from becoming energized. I do not agree with his conclusion that the phrase “additional insulation” can be interpreted to refer to the insulation that was provided by the manufacturer for the entire length of the power conductor. The Secretary should seriously consider eliminating or modifying section 75.516-2(c).

WEST 2009-580			
7291777	\$308.00	\$308.00	
7291781	\$308.00	\$308.00	
7291782	\$308.00	\$308.00	
7291783	\$207.00	\$207.00	
7291785	\$308.00	\$308.00	
7291786	\$807.00	\$555.00	Reduction in gravity to 7 persons affected.
7291788	\$308.00	\$308.00	
7622363	\$392.00	\$392.00	
8456002	\$392.00	\$392.00	
8456007	\$392.00	\$392.00	
7622374	\$392.00	\$392.00	
7622375	\$392.00	\$392.00	
8456010	\$392.00	\$392.00	
8456016	\$207.00	\$207.00	
7622380	\$207.00		Vacated.
8456018	\$392.00	\$392.00	
8456113	\$21,442.00	\$8,000.00	Reduction gravity to Unlikely and Non-S&S.
7622382	\$138.00		Vacated.
7622383	\$138.00		Vacated.
7622387	\$3,405.00		Vacated.
7622388	\$3,689.00	\$2,500.00	
8456025	\$362.00	\$362.00	
8456117	\$108.00	\$108.00	
Docket Total	\$34,994.00	\$16,223.00	

<b>WEST 2009-820</b>			
8456302	\$687.00	\$687.00	Reduction in negligence to Moderate.
8456304	\$2,678.00	\$1,337.00	Reduction in gravity to 5 persons affected.
Docket Total	\$3,365.00	\$2,024.00	
<b>WEST 2009-1322</b>			
8456919	\$47,716.00	\$4,400.00	Modify to 104(a) High Negligence Citation. Reduction gravity to Unlikely and Non-S&S.
8460325	\$5,645.00	\$5,645.00	
Docket Total	\$53,361.00	\$10,045.00	
<b>Settlement Total</b>	<b>\$99,405.00</b>	<b>\$31,542.00</b>	

I have considered the representations and documentation presented and I conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

#### **IV. APPROPRIATE CIVIL PENALTIES**

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports, which are not disputed by Twentymile. (Sec’y Ex. 32). Twentymile is a large mine operator, as is Twentymile’s parent company, Peabody Energy. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Twentymile’s ability to continue in business. The gravity and negligence findings are discussed above.

#### **V. ORDER**

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>WEST 2009-1322</u>	<u>30 C.F.R. §</u>	<u>Penalty Amount</u>
8463325	75.333(b)(1)	\$200.00
8463326	75.333(b)(1)	200.00
8463327	75.202(a)	25,000.00
8463330	75.364(d)	25,000.00
8460508	75.363(a)	1,000.00

WEST 2009-241

7622553	75.370(a)(1)	\$200.00
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WEST 2009-580

8456110	75.380(d)(7)(iii)	200.00
7622362	75.370(a)(1)	150.00
7622365	75.370(a)(1)	150.00
7622372	75.1107-16(b)	Vacated

WEST 2009-820

8456301	75.516-2(c)	10.00
8456311	75.516-2(c)	10.00

Total penalty for adjudicated citations/orders: \$52,120.00

GRANT TOTAL DUE: \$83,662.00

For the reasons set forth above, Citation No. 7622372 is **VACATED** and the other citations and orders are **AFFIRMED** or **MODIFIED** as set forth in this decision. Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$83,662.00 within 40 days of the date of this decision.<sup>7</sup>

Richard W. Manning  
Administrative Law Judge

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<sup>7</sup>Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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