

this order were not entered in the record books for either 8/10/09 [or] 8/11/09. The hazards of the coal accumulations are in contact with the return belt, as well as dried coal fines on the hardware and belt roller clusters. The conditions were cited in citation # 8460434 issued on 8/11/09. The violation resulted from unwarrantable failure based on the extensive accumulations which were obvious to anyone concerned with safety.

Gov't Exh. 1.

The order was issued on August 11, 2009, after Mine Safety and Health Administration Inspector Randy Gunderson observed accumulations of coal and coal fines along the 8 Main North Belt at Twentymile's Foidel Creek Mine.² Tr. 291-292. Gunderson's description of the accumulations is set forth in the court's underlying decision and is incorporated by reference into this remand decision. 34 FMSHRC at 2168. Significantly, the accumulations were extensive, so much so that there were places where black accumulations were contacting the bottom belt of the conveyor. *Id.* There also were dry coal fines on the belt structure and on the belt rollers. *Id.* In the inspector's opinion, the accumulations were "obvious." *Id.* (citing Tr. 300). Further, and as explained in the underlying decision:

Gunderson thought it likely that the accumulations had come into existence at

² The accumulations found by Gunderson are described in Citation No. 8460434, August 11, 2009. The citation states:

Coal accumulations have been allowed to exist along the 8 North Main belt conveyor, from the tail piece to the take-up. The accumulations of coal have piled high enough to come in contact with the return belt and rollers, ranging in depth to 1' 8", 6' wide and 600 feet in length. Dry coal fines have accumulated on the belt structure, and around the roller clusters. This belt was in operation just prior to this inspection. All coal accumulations, both on the hardware and under the belt, shall be cleaned, in their entirety, and the area rock dusted.

Gov't Exh. 2.

a “progressive” rate. Tr. 300. “It could be a week, a couple of days. It could be a month.” *Id.* He based his belief on “[j]ust experience.” *Id.*

34 FMSHRC at 2169.

Equally important, Gunderson testified that on August 10, he cited the company for other extensive accumulations of coal on the same section. In addition, he cited the company for extensive accumulations of coal fines in a crosscut. 34 FMSHRC at 2169. He discussed the August 10 citations with company management officials. *Id.*

After finding and citing the extensive accumulations on August 11, Gunderson also cited the company for violating section 75.362(b), the standard requiring on-shift examinations for hazardous conditions along belt conveyor haulageways. Gunderson believed the on-shift examination on August 11 was inadequate in that the extensive accumulations Gunderson found on August 10 and August 11 were not reported by the on-shift examiner and recorded in the examination book. In Gunderson’s opinion, the company’s failure to adequately conduct the on-shift examination was an S&S violation of the standard and was the result of the company’s unwarrantable failure to comply. Gov’t Exh. 1.

THE VIOLATION

In reversing the court, the Commission found that Twentymile’s August 11 “early morning examination” (slip op. 4) was conducted during the “graveyard shift,” that coal was produced during that shift, and that the on-shift examination was required to be adequate. Slip op. 5. In considering the question on remand, the court concludes that the examination was in fact not adequate and that Twentymile violated section 75.362(b). The court reaches this conclusion because it finds logical and persuasive the testimony of Gunderson that the extensive accumulations came into existence at a “progressive” rate. Tr. 300. Gunderson could not rule out that the accumulations he observed along the belt on August 11 developed following the subject on-shift examination, however, he thought it unlikely. *Id.* In the court’s view the accumulations were so extensive, the only reasonable conclusion to draw from the evidence is that for the most part they were present when the on-shift examination was conducted during the grave yard shift. There is in fact nothing in the record to suggest a plausible reason for the extensive accumulations other than a multi-shift failure to note them and clean them up.

Guderson speculated that the examiner did not report the accumulations because he “wasn’t looking hard enough.” Tr. 316. The accumulations were “obvious” (Tr. 300) and a less generous but more reasonable conclusion to draw from the testimony is that the on-shift examiner, who traveled the belt line when the accumulations were present, in fact, saw the accumulations, but failed to report their presence. The court therefore finds that the presence of the extensive accumulations during the examination and the failure to mention the hazard in the

on-shift examination report establishes that the on-shift examination was indeed inadequate and that the violation occurred as alleged.

S&S and GRAVITY

The court described the legal frameworks for determining the S&S nature of a violation and the gravity of a violation in its underlying decision and it incorporates the frameworks here. 34 FMSHRC at 2157-2158. Regarding the S&S nature of the violation, there was a violation of section 75.362(b) thus satisfying the first *Mathies* criterion. The court further finds that the other *Mathies* criteria have been met. The violation contributed to a discrete safety hazard in that failure to report the accumulations meant the hazard of a fire along the beltline was not eliminated. Obviously, the hazard posed serious dangers to miners working or traveling both outby and inby the accumulations -- dangers from flames if the accumulations ignited and from smoke and fumes caused by any ignition. Moreover, the hazard was reasonably likely to come to fruition. The court accepts Gunderson's testimony the accumulations included dry coal fines, which "catch fire a lot easier than wet or damp coal fines" (Tr. 297) and that some of the accumulations were actually in contact with potential ignition sources, the return belt and the belt rollers. Gov't Exh. 2; Tr. 295, 296, 298. That the resulting injuries in the event of an ignition would likely have been reasonably serious, indeed even fatal, is beyond dispute. Thus, the violation was S&S.

The violation also was very serious. The failure to report the accumulation meant that the hazard it posed continued. It easily could have lead to one or more miners being injured or killed.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). It is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-194. Aggravating factors include the length of time a violation has existed, the extent of the violative condition, whether the operator was on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation 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 (March 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192,195 (February 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (September 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). The circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353.

The court finds that the violation was the result of Twentymile's unwarrantable failure to

comply with section 75.362(b) and that in failing to comply, Twentymile was highly negligent. The record establishes that Twentymile was on notice it had a problem with inadequate examinations. I accept Gunderson's unrefuted testimony that Twentymile was cited four times in the previous 15 months for inadequate on-shift examinations and 16 times for inadequate pre-shift examinations. Tr. 332, 344. Gunderson stated that in his opinion the examiners were not "doing a very good job." Tr. 323. In the case of the subject violation, he understated their lack of care. The accumulations were, as Gunderson testified, obvious and extensive. Tr. 300, 324. They were virtually staring the examiner in the face. Yet, he ignored them. The result was that his fellow miners faced a high degree of danger. In failing to comply with section 75.362(b), the court finds the examiner and hence the company exhibited the degree of indifference and the serious lack of reasonable care that is the mark of unwarrantable failure. Moreover, the examiner's lack of reasonable care equates to a high degree of negligence on the company's part.

CIVIL PENALTY CRITERIA

The court set forth its findings with regard to the criteria of history of previous violations, size of the operator, ability to continue in business and good faith abatement in its underlying decision, and it incorporates those findings herein. 34 FMSHRC at 2184.

CIVIL PENALTY ASSESSMENT

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENLTY</u>	<u>ASSESSMENT</u>
8460435	8/11/09	75.362(b)	\$4,000	\$4,000

The violation was very serious and the company's negligence was high. These findings and the criteria referenced above warrant the assessment of the penalty proposed by the Secretary.

ORDER

If it has not already paid the civil penalties previously assessed (34 FMSHRC at 2187), within 30 days of the date of this decision on remand, Twentymile **IS ORDERED** to pay such civil penalties in the amount of \$15,262. Within the same 30 days, Twentymile **IS ORDERED** to pay the civil penalty of \$4,000 assessed above.

Further, if he has not already done so, within 30 days of the date of this decision on remand, the Secretary **IS ORDERED** to modify and vacate the citations referenced for modification and vacation in the court's initial decision.

Upon payment of the civil penalties and upon modification and vacation of the citations, this proceeding is **DISMISSED**.

David F. Barbour
David F. Barbour
Administrative Law Judge

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