FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. PEABODY TWENTYMILE MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-64 A.C. No. 05-03836-362873 Mine: Foidel Creek Mine
PEABODY TWENTYMILE MINING, LLC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDING Docket No. WEST 2014-930-R Citation No. 8481807; 08/06/2014 Foidel Creek Mine Mine ID 05-03836

DECISION

Appearances: Michele A. Horn, Office of the Solicitor, U.S. Department of Labor
1244 Speer Blvd., Suite 216, Denver, CO 80204

R. Henry Moore, Jackson Kelly
Three Gateway Center, Suite 1500,
401 Liberty Avenue, Pittsburgh, PA 15222

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), against Peabody Twentymile Mining, LLC (Respondent) Foidel Creek Mine, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. Prior to hearing, the parties settled five of the six citations contained in this docket. The remaining citation contested at hearing involved the alleged improper use of polyurethane spray foam to seal the perimeter of a concrete block ventilation stopping.

At hearing, MSHA Inspector Yasser Akbarzadeh, Inspector James Preece, and Technical Advisor Barry Grosley testified for the Secretary. Peabody Twentymile Supervisors Adam Patterson, Ronald Hockett, and Robert Derick testified for the Respondent. For the reasons that follow, Citation No. 8481807 is **AFFIRMED** as written and assessed with a civil monetary penalty of **$162.00**.

II. FINDINGS OF FACT

A. Background

The Foidel Creek Mine is an underground bituminous coal mine that has been in continuous operation since 1983 and is commonly referred to as the Twentymile Mine. Tr. 42, 137, 139. The mine employs both longwall and conventional room and pillar mining methods. Tr. 32. The mine produces approximately 7 million tons of coal annually and contains over a thousand different ventilation stoppings built at different stages of the mine's development. Sec'y Petition, Ex. A; Tr. 49, 98. The ventilation stoppings separate the intake and return to the belt intake air and prevent contamination of air in the escapeway and working face. Tr. 30.

Pursuant to the mine's MSHA approved ventilation plan, the mine uses both dry-stacked blocks and metal panel (Kennedy) construction to build ventilation stoppings. Tr. 136. As concisely summarized by Respondent's counsel:

> The building of a block stopping involves the removal of any loose debris from the floor and the rib lines across a 17 to 23 foot wide entry that is 8-1/ 2 feet high. Tr. 11 6-17. A level base is built with three inch cinder blocks across the floor. Tr. 118. Rows of cinder blocks are then stacked and wedged against the ribs by driving a wedge between the last cinder block and the coal rib. Tr. 117, 125. This holds the blocks in place as the stopping is built. Tr. 125. The blocks are "dry" stacked, meaning that no mortar is placed between the blocks. Tr. 117. Once the blocks reach the roof line, wedges are driven between the roof and the top of the blocks. Tr. 117.
>
> This secures the blocks and provides strength to stopping. Tr. 99, 117. The face of the blocks is then coated with a strength

> enhancing sealant material. Tr. 117.
>
> This material is applied using a trowel and is not the sealant that is (cited within Citation No. 8481807). Tr. 118. Prior to the citations at issue here, the perimeter of the stopping, as referenced in the MSHA-approved ventilation plan, was sealed by injecting a ()[1] polyurethane grout around the perimeter. Tr. 118.

Resp. Br., 2-3 (citing Under Ground Mine Manager Ronald Hockett's testimony).

The ventilation plan contains a section entitled "USE OF POLYURETHANE FOAM" that lists RHH Versi-Foam System 15, Micon FoamPak, Touch 'n Seal Mine Foam, and Touch 'n Seal Mine Block Mortar as the only polyurethane foam used at the mine. Sec'y Ex. 3, 1. The ventilation plan states that:

> Application of foam for ventilation device installation will be limited to sealing the perimeter and joints of such devices. Foam may be used to repair ventilation device doors and holes in stoppings up to 4 inches by 4 inches in size. Foam may not be applied to the inside of ventilation tubing or ducting. The application shall not overlap more than 12 inches onto the roof and ribs.

Id.

Peabody applied polyurethane foam as the primary sealant at the perimeter of both dry-stacked block and metal ventilation stoppings on a routine basis at the Twentymile Mine from the start of the mine's operation in 1983 until the issuance of Citation No 8481807 in August 2014. Tr. 87, 118, 140. MSHA performs complete inspections of the Twentymile Mine at least four times annually on a quarterly basis. Tr. 14. Prior to the issuance of Citation No. 8481807, MSHA had issued Citation No. 8468872 on October 16, 2012 for excessive application of Versi-Foam at a metal Kennedy stopping. Tr. 72-73. MSHA inspectors had not cited any block stoppings for impermissible use of spray foam prior to the issuance of Citation No. 8481807. Tr. 111-13, 157.

B. Citation No. 8481807

MSHA Inspector Yasser Akbarzadeh issued Citation No.8481807 for an alleged violation of 30 CFR §75.333(e)(1)(i) on August 6, 2014. Akbarzadeh alleged within the citation that:

> The usage of "polyurethane spray foam" for application as a sealant for Kennedy mine ventilation structures and as a repair sealant for cracks in concrete block ventilation structures is not

[1] The Respondent refers to the Polyurethane grout as MSHA approved. Resp. Br., 3. While the cited Touch n Seal U2 200/600 is listed as a suitable stopping sealant by MSHA, it is listed as non strength enhancing and is not included in approved block stopping construction methods.

> built in a traditionally accepted method that has demonstrated to perform adequately. It was observed that the foam sprays at the sealant are not strengthened and are not reaching the ribs. The seal was located at 13 left, 3-4 Entry, one crosscut outby the dump point. The MMU number was 008. Parameters of the stopping (Ribs, floor along the top) was not made of strengthen enhance material. The ventilation plan needs to be revised to address; 1) the guidelines for the use of polyurethane foam system. 2) Temporary underground storage for polyurethane spray foam containers....
>
> Standard 75.333(e)(1)(i) was cited 2 times in two years at mine 0503836 (2 to the operator, 0 to a contractor).

Sec'y Ex. 1, 1-2.

Akbarzadeh filed a modification for Citation No 8481807 later that day, stating that,

> The cinder block stopping being used on the 13 Left working section MMU 008-0, located in the first crosscut outby the loading point, No. 3 to 4 crosscut between the haulage road and the belt. The stopping was not built in a traditionally accepted method that has demonstrated to perform adequately. The following conditions were observed;
>
> 1.) The perimeter of the stopping was not sealed with mortar.
> 2.) The perimeter of the stopping was sealed with touch N seal foam measuring approximately 0 to 6 inches along the ribs and roof.
> 3.) Underground storage of foam was not being with in accordance with the manufacture recommendations.
> 4.) The foam packs were being stored in a mobile trailer along with other extraneous materials on the working section.
> 5.) The valves on a set of foam canisters were left in an on position. The mine operator is in the process of revising their handling procedures and implementing this into their ventilation plan. Termination time will be extended to allow the operator time to train miners in the handling procedures.

Id. at 3.

Akbarzadeh designated Citation No. 8481807 as a moderate negligence violation that was unlikely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. *Id* at 1. Akbarzadeh determined that the failure to properly seal the ventilation structure was not significant and substantial. *Id.* The Respondent abated the citation by removing the block stopping and installing a metal panel stopping that was sealed with spray foam at the perimeter. *Id.* at 4. The Secretary has proposed a regularly assessed penalty of $162.00 for Citation No.

8481807. Sec'y Petition, Ex. A.

1. Testimony

a. The Secretary

Inspector Akbarzadeh testified that he had received a Ph.D. in mine engineering and rock mechanics and completed an internship with the National Institute of Safety and Health (NIOSH) prior to joining MSHA. Tr. 17. However, Akbarzadeh confirmed on cross-examination that he had not worked in the mining industry or visited underground mines on a regular basis prior to joining MSHA. Tr. 24. Akbarzadeh testified that Citation No. 8481807 was the fourth citation he had issued as an inspector and that the subject inspection was his first underground inspection. Tr. 22.

Akbarzadeh stated that Assistant District Manager Jim Preece accompanied him on the inspection to show him if he was "missing something." Tr. 19. Akbarzadeh stated that Preece pointed out the spray foam and explained how that was a violation. Tr. 20. Akbarzadeh stated after review with Preece and other MSHA officials, Akbarzadeh made modifications to the text of Citation No. 8481807. Tr. 21-22.

MSHA Assistant District Manager Preece testified that he had worked in the mining industry since 1975 and joined MSHA in 2000. Tr. 27-28. Preece testified that in his experience concrete block stoppings were intended for permanent use along permanent main entries while metal Kennedy stoppings were designed for temporary use in retreat areas in longwall sections. Tr. 32. Preece stated that he had always used strength enhancing block bond mortar to seal the perimeter of block stoppings. Tr. 34-35. Preece testified that metal Kennedy stoppings normally used metal flags to narrow the gap between the panel edge and rib wall in addition to the spray foam. Tr. 36-37.

Preece stated that at the cited stopping, he noticed that the block face had been properly sealed but the perimeter only had polyurethane foam. Tr. 44. Preece did not recall if there were any gaps at the perimeter of the stopping and did not recall if Inspector Akbarzadeh had measured any gaps. Tr. 46. Preece stated on direct examination that the polyurethane foam was not strength enhancing and was not fire rated and could burn out in the event of a fire and allow smoke to spread into the escapeway. Tr. 50.

On cross-examination, Preece confirmed that Touch N Seal Foam does in fact have an ASTM flame spread rating that meets MSHA requirements. Tr. 53-54. However, on re-direct, Preece explained that MSHA standards required sealants at block stoppings to meet flammability, strength, and fire requirements and that that the Touch N Seal Foam had only received a flame spread rating. Tr. 62-63. Preece also testified that the seal at the perimeter should have the same strength as the rest of the stopping. Tr. 65.

MSHA Inspector Grosley testified regarding guidance he had previously provided to Peabody safety personnel regarding the use of spray foam at block stoppings while issuing a

separate citation.[2] Tr. 71. Grosley stated that on October 16, 2012 he issued a citation at the Twentymile Mine for improper use of spray foam at a metal Kennedy stopping. Tr. 72-73. Grosley stated that at that stopping, the operator had attempted to fill voids up to 17 inches wide with spray foam. Tr. 73. Grosley testified that this application did not comply with manufacturer's recommendations and resulted in a very weak seal that allowed air to leak through to the other side of the stopping. Tr. 73-74.

Grosley further stated that after he issued this citation, he had a conversation with Peabody Safety Manager Lance McLaughlin regarding his concerns on the application of spray foam at the Twentymile Mine. Tr. 76. In addition to concerns regarding proper application at metal stoppings, Grosley stated that he informed Mr. McLaughlin that spray foam should only be applied at block stoppings as a secondary sealant after first filling the perimeter with a strength enhancing mortar. Tr. 78.

During rebuttal testimony, Assistant District Manager Preece acknowledged that MSHA had not issued citations for using spray foam to seal the perimeter of dry-stacked blocked stoppings prior to Citation No. 8481807. Tr. 157. Preece stated that the regional MSHA inspection unit relied on a number of inexperienced inspectors that may not have had adequate training or may not have been paying attention to the perimeter of the stoppings. *Id.* On cross-examination, Preece conceded that the Twentymile Mine had been regularly inspected by a number of experienced inspectors in the years prior to the issuance of Citation No. 8481807. Tr. 158-59.

b. The Respondent

Peabody MSHA Compliance Manager[3] Adam Patterson testified for the Respondent that he accompanied Inspectors Akbarzadeh and Preece on the August 5, 2014 inspection. Tr. 86. Patterson stated that the cited block stopping had been constructed in the same manner as all other block stoppings at the Twentymile Mine prior to 2014. Tr. 86-87. Patterson testified that he did not observe any deficiencies in the construction or the six inch gaps described in the body of the citation. Tr. 87.

Patterson testified that he believed the language of the mine's ventilation plan permitted the operator to use polyurethane foam to seal the perimeter of both metal and block stoppings. Tr. 91. Patterson stated that in his experience the polyurethane foam was a better sealant because it did not dry and crack like the mortar mix sealants did. Tr. 90. Patterson testified that the mine considered testing a customized stopping per ASTM standards but that the laboratory tests did not permit the blocks to be wedged at the top of the assembly. Tr. 93. Patterson stated that without the wedges, any test would not have been representative of how the stopping functioned. Tr. 93.

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[2] The Respondent objected to Mr. Grosley's testimony as not relevant. The Court overruled the Respondent's objections and for the reasons stated within found Mr. Grosely's testimony relevant to determining the negligence level of the alleged violation.

[3] Mr. Patterson stated that he had started work as a long term planner for the continuous miner section of the Foidel Creek Mine after the issuance of Citation No. 8481807.

When questioned on cross-examination, Patterson explained that he considered the cited stopping "traditionally accepted" as it was built the same as hundreds of other block stoppings at the Twentymile Mine that had previously been observed by MSHA inspectors. Tr. 107-08. Patterson stated that Safety Manager McLaughlin had not informed him of Inspector Grosley's instruction regarding the use of spray foam at block stoppings. Tr. 110.

Peabody Underground Mine Manager Ronald Hockett testified regarding the construction of ventilation stoppings at the Twentymile Mine. Tr. 116-118. Hockett stated that using the polyurethane spray foam formed a superior seal to mortar mix at the perimeter of block stoppings as it was easier to spray into the narrow void space and the spray foam expanded rather than cracked like the mortar mix. Tr. 118-119. Hockett testified that the citation Inspector Grosley issued in 2012 was issued for deficient workmanship and was not similar to Citation No. 8481807. Tr. 120. Hockett also stated that he believed that using spray foam to seal the perimeter of block stoppings was a traditionally accepted construction method because the operator had built stoppings in that manner for the entire twenty three years he had worked at the Twentymile Mine and MSHA had never raised an objection to the use of spray foam itself at any stopping. Tr. 123.

Former Peabody Safety Manager Robert Derick testified on the development of the Twentymile underground ventilation plan. Tr. 132. Derick explained that in his mining career, he had observed polyurethane foam applied to block stoppings at many different mines. Tr. 136. Derick stated that when he began work at the Twentymile Mine in 1991, the operator was using polyurethane foam to seal both block stoppings and metal Kennedy stoppings. Tr. 136, 138. Derick stated that upon his review, he had confirmed that each version of the Twentymile ventilation plan submitted to MSHA included the use of polyurethane spray foam to seal ventilation stoppings. Tr. 138-39. Derick explained that this included the original 1983 ventilation plan as well as revisions submitted in 1991, 2000, and 2011. *Id.* On cross-examination, Derick confirmed that no version of the ventilation plan specifically listed polyurethane foam as an approved primary sealant at the perimeter of block stoppings. Tr. 143-44.

C. The Cited Standard

30 CFR § 75.333(e)(1) mandates:

> Except as provided in paragraphs (e)(2), (e)(3) and (e)(4) of this section all overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after June 10, 1996, *shall be constructed in a traditionally accepted method and of materials that have been demonstrated to perform adequately or in a method and of materials that have been tested and shown to have a minimum strength equal to or greater than the traditionally accepted in-mine controls*.... In-mine tests shall be designed to demonstrate the comparative strength of the proposed construction and a traditionally accepted in-mine control.

30 CFR § 75.333(e)(1)(emphasis added).

MSHA promulgated the current version of 30 CFR 75.333(e)(1) along with a number of other revisions to MSHA's ventilation regulations in June 1996. In adopting the revised rules, MSHA published a detailed synopsis of each revised rule within the preamble to the rule. March 11, 1996 Federal Register 61 FR, 9783-84. For 30 CFR § 75.333(e)(1) MSHA states,

> Since the inception of the Mine Act, a number of traditionally accepted construction methods have performed adequately and have served their intended function of separating air courses. These traditionally accepted construction methods are: 8-inch and 6-inch concrete blocks (both hollow-core and solid) with mortared joints; 8-inch and 6-inch concrete blocks dry stacked and coated on both sides with a strength-enhancing sealant suitable for dry-stacked stoppings; *8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing sealant suitable for dry-stacked stoppings*; steel stoppings (minimum 20 gauge) with seams sealed using manufacturer's recommended tape and with the tape and perimeter of the metal stopping coated with a suitable mine sealant; and lightweight incombustible cementatious masonry blocks coated on the joints and perimeter with a strength enhancing sealant for dry-stacked stoppings. . . . For new construction methods or materials other than those used for the traditionally accepted constructions identified above, the final rule requires that the strength be equal to or greater than the traditionally accepted in-mine controls. Tests may be performed under ASTM E72-80 Section 12 . . . or the operator may conduct comparative in-mine tests. In-mine tests must be designed to demonstrate the comparative strength of the proposed construction and a traditionally accepted in-mine control.

61 FR, 9783-84 (emphasis added for the method nominally employed by the Respondent at the stopping cited within Citation No. 8481807).

The spray foam applied at the perimeter of the cited stopping, Touch N Seal U-200/600FR, is currently approved by MSHA as a suitable sealant for ventilation controls but MSHA has noted that Touch N Seal U-200/600FR is "non-strength enhancing." MSHA June 2014 List of Suitable Sealants, 2 (Designating Clayton Touch 'N Seal U2-200FR & U2-600FR as suitable but non-strength enhancing sealants).[4] Additionally, within MSHA's 2013 List of Suitable Ventilation Controls Touch N Seal U-200/ 600FR is only approved when used with steel stopping materials. MSHA 2013 List of Suitable Ventilation Controls, 2-3 (Listing Touch 'N Seal Mine Foam and Clayton Corp U2-200FR as approved sealants only for Kwic-Wall steel panels and GMS modular steel overcast ventilation controls).

[4] The court took judicial notice of MSHA's publicly available list of suitable ventilation sealants and stopping construction assemblies after hearing but prior to the submission of the parties post hearing briefs. The court provided the parties copies of all referenced MSHA publications on August 18, 2015.

III. CONCLUSIONS OF LAW

A. The Violation

The cited standard requires underground coal operators to install ventilation stoppings in a "traditionally accepted manner" with "materials that have been demonstrated to perform adequately ..." 30 CFR §75.333(e)(1). The standard does not itself define what methods or materials are traditionally accepted but the preamble to 30 CFR 75.333(e)(1) states that the following five traditionally accepted methods have been demonstrated to perform adequately in separating air courses,

1) 8 inch and 6 inch concrete blocks with mortared joints;
2) 8 inch and 6 inch dry stacked concrete blocks with strength enhancing sealants on both sides;
3) 8 inch and 6 inch dry stacked concrete blocks with strength enhancing sealants on the high pressure side;
4) Steel stoppings with seams sealed with manufacturer's recommended tape and the perimeter sealed with a suitable mine sealant;
5) Lightweight incombustible cementatious masonry blocks coated on the joints and perimeter with a strength enhancing sealant suitable for dry stacked stoppings.

61 FR, 9783.

The court finds that the preamble list of "traditional construction methods" is exhaustive as MSHA states that "These traditionally accepted construction methods **are**..." and required engineering tests for all "new construction methods **or materials other than those used for the traditionally accepted constructions identified above**." FR, 9783-84. Accordingly, the court finds that the prior or even longstanding use of a particular sealant or construction method within a mine is irrelevant to whether a stopping is built according to "traditionally accepted construction methods."

The court acknowledges that the preamble to a regulation is not binding when it is not contained within the regulation itself. *Austin Powder Co.*, 29 FMSHRC 909, 916 (Nov. 2007). However, the Respondent has not offered any other MSHA publication or Commission precedent to support the argument that this court should consider an operator's customary construction technique in determining whether or not a stopping is built in a "traditionally accepted method." The Respondent has not argued that the language of the preamble contradicts the text of 30 CFR § 77.333(e)(1). As such, this court holds that the preamble to 30 CFR § 77.333(e)(1) provides the most relevant and complete set of guidance on the requirements for determining whether a stopping is built in a "traditionally accepted method." And the preamble specifically mandates that the perimeter of cementatious masonry block stoppings must be sealed with a "strength enhancing sealant suitable for dry stacked stoppings." 61 FR, 9783.

The Respondent argues in reference to the preamble that, "If (a suitable sealant) works for Kennedy stoppings, it will work for concrete block stoppings and the preamble does not

support the Secretary's position." Resp. Br, 14. However, the Respondent's argument ignores the preamble's additional mandate that "lightweight incombustible cementatious masonry blocks (must be) coated on the joints *and perimeter with a strength enhancing sealant suitable for dry-stacked stoppings*." 61 FR, 9783 (emphasis added).

In the court's view, concrete block stoppings are much more similar to lightweight cementatious block stoppings than the metal panel stoppings relied upon by the Respondent in their argument. Furthermore, the preamble states the requirement for a strength enhancing sealant at the *perimeter* of cementatious masonry blocks by requiring a "strength enhancing sealant *suitable for dry-stacked stoppings*." *Id.* Accordingly, this court finds that 30 CFR 77. 333(e)(1) requires operators to seal the perimeter of dry-stack block stoppings with a strength enhancing sealant in order to conform with traditionally accepted construction methods.

Finally, upon this court's review, none of the block stoppings included on MSHA's 2013 List of Suitable Ventilation Controls use Touch N Seal U-200/600FR, or any other polyurethane spray foam, as a perimeter sealant. MSHA 2013 List of Suitable Ventilation Controls, 1-4. Indeed, although MSHA approved Touch N Seal U-200/600FR as a suitable sealant in 2001, it has consistently designated Touch N Seal U-200/600FR as non-strength enhancing and only approved its use as a perimeter sealant when used in metal stopping assemblies. MSHA June 2014 List of Suitable Sealants; MSHA 2013 List of Suitable Ventilation Controls; MSHA 2010 Suitable Sealant List; MSHA 2001 Touch N' Seal S-17-00 Sealant Approval.

The Respondent has argued that the Secretary has not properly alleged a violation of 30 CFR 75.333(e)(1) as Citation No. 8481807 contains allegations that relate to polyurethane spray foam requirements set forth in the mine's ventilation plan and not 30 CFR § 75.333(e)(1). Resp. Br., 9-10. The Respondent's argument is unavailing. Citation No. 8481807 clearly and unambiguously lists 30 CFR § 75.333(e)(1) as the standard violated. Sec'y Ex. 1, 1. Additionally, the text of both the original citation and subsequent modification reference the improper use of spray foam at block stoppings, in addition to alleging improper spray foam storage procedures. Sec'y Ex. 1. The court agrees that Citation No. 8481807, particularly the original version, is less than a perfect model of clarity. However, the text of Citation No. 8481807 describes the alleged violative condition (improper application of spray foam) with sufficient specificity to allow the Respondent to both abate the citation and prepare an adequate defense. *Erie Mining Co.*, 2 FMSHRC 2717, 3721 (Sept. 1980)(ALJ Lasher).

The Respondent also contends that this court should rely on the mine's ventilation plan to determine whether the cited stopping was built in a traditionally accepted method. Resp. Br., 9-10 (citing *Big Ridge, Inc.*, 32 FMSHRC 1020, 1028 (Aug. 2010)(ALJ Melick); *Cyprus-Empire Corp.*, 11 FMSHRC 1795, 1809 (Sept. 1989)(ALJ Morris). However, the ALJ decisions cited by the Respondent do not elevate the language of mine specific plans over the language of the agency's regulations. They only state that the Commission should employ the most specific relevant Congressional statute or agency regulation to the alleged facts of the violation. *Big Ridge*, 32 FMSHRC 1028 (applying 30 CFR § 77.1107(d) rather than 30 CFR § 75.1107(1)(c) when the regulation treated battery powered equipment differently than cable powered equipment);Cyprus-Empire Corp., 11 FMSHRC 1809 (holding that an alleged violation of 30 CFR § 70.100 must be evaluated under the language of section 104(f) of the Act).

Accordingly, this court will not defer to a provision of an operator's "MSHA approved" ventilation plan if it is, in fact, contrary to the language of the regulation. Furthermore, the Twentymile ventilation plan does not specify that the operator intended to use polyurethane spray foam at the perimeter of *block* stoppings. Sec'y Ex. 3, 1; Tr. 143-44. Given all the above, determining the proper interpretation or import of the Respondent's ventilation plan is unnecessary to these proceedings. Similarly, any inquiry into prior MSHA inspectors' acceptance of similar construction techniques at the Twentymile Mine is immaterial to the court's ruling on the violation. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (1981)(holding that "evidence of prior inconsistent enforcement of a safety standard does not constitute a viable defense to a violation...").

In sum, this court finds that 30 CFR 77.333(e)(1) requires the use of strength enhancing sealant at the perimeter of block stoppings in order to conform with traditionally accepted construction methods. As the Respondent sealed the perimeter of the subject stopping with non-strength enhancing Touch N Seal U-200/600FR and did not submit this assembly type for laboratory testing, the court finds that the Respondent failed to comply with 30 CFR § 77.333(e)(1). Tr. 86-87.

B. Gravity

MSHA Inspector Akbarzadeh and Assistant District Manger Preece did not perform any strength testing or attempt to isolate any air leaks at the cited stopping. Tr. 95. Inspector Preece did testify that the cited spray foam lacked ANSI strength and fire ratings. Tr. 63. On cross-examination, the Secretary questioned former Safety Manager Derick regarding a NIOSH report on the effectiveness of polyurethane spray as a ventilation sealant. Tr. 147-48. However, as the Secretary failed to provide the report to the Respondent prior to the pre-hearing conference as required by the court's initial prehearing order, the court excluded the report from evidence. Tr. 151-52.

Given the above, the court affirms Inspector Akbarzadeh's gravity findings for Citation No. 8481807 as unlikely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty and non-significant and substantial.

C. Negligence

The regulation preamble and subsequent MSHA approved sealant lists notified the Respondent that the perimeter of block stoppings must be sealed with strength enhancing sealants and that Touch N Seal U-200/600FR was non strength enhancing. MSHA June 2014 List of Suitable Sealants; MSHA 2013 List of Suitable Ventilation Controls; MSHA 2010 Suitable Sealant List; 61 FR, 9783. Additionally, MSHA Inspector Grosley credibly testified that he informed Peabody Safety Manager McLaughlin that polyurethane spray foam should not be used as a primary sealant at blocks toppings in October of 2012. Tr. 78. Although none of the Respondent's witnesses had any prior knowledge of Mr. Grosley's October 2012

conversation with McLaughlin, they did not specifically rebut Mr. Grosley's testimony regarding that verbal warning.[5] Tr. 94, 120-21.

However, the testimony of both parties indicates that MSHA inspectors failed to issue citations for using spray foam at the perimeter of block stoppings at hundreds of different block stoppings despite a system of full-mine quarterly inspections. Tr. 107-08, 157. Accordingly, the court finds that the Respondent acted with moderate negligence in violating the cited standard.

D. Penalty

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

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

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. The Secretary has proposed a regularly assessed penalty of $162.00 for Citation No. 8481807 based upon the 30 CFR 100.3 penalty tables. Sec'y Petition, Ex. A.

The Respondent is a large operator with a relatively low rate of total violations per inspection day and a minimal number of repeat violations of 30 CFR 75.333(e)(1) in the 15 months prior to the citation at issue. I have found that the Respondent acted with moderate negligence. The Respondent has stipulated that the proposed penalty will not affect its ability to continue in business. Resp. Pre-Hearing Report, 5. I have found that the violation was unlikely to result in an injury and any injury that occurred would result in lost workdays/or restricted duty. The parties have stipulated that the Respondent promptly removed the block stopping and installed a permissible metal stopping with polyurethane spray foam perimeter sealant. Sec'y Ex. 1, 4: Tr.

After considering this evidence in light of the six statutory factors I uphold the Secretary's proposed penalty and assess a penalty amount of $162.00.

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[5] The Respondent did not offer Mr. McLaughlin as a witness and Safety Manager Patterson testified that McLaughlin retired from Peabody Mining one week before the date of the hearing. Tr. 102.

IV. PARTIAL SETTLEMENT

The Secretary has filed a motion to approve settlement of the five remaining violations contained in this docket. Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission.[6] The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

Instead, I have considered the provided specific factual explanations for the agreed upon settlement per sections 110(i) and 110(k) of the Act. I acknowledge and accept the explanation for the agreed upon settlement contained in the parties' settlement motion and amendments. The originally assessed amount was **$3,457.00** and the proposed settlement is for **$2,858.00.** The parties have agreed to bear their own legal fees associated with this matter, including costs which may be available under the Equal Access to Justice Act. The parties have moved to approve the proposed settlement as follows:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
WEST 2015-64			
8479229	$1,203.00	$950.00	Modify Cited Standard from "30 CFR §75.1103-1" to "30 CFR §75.1101-10" Modify language in Section 8 to read, "At the belt drive on the 4 main north belt at cross cut 38 plus 49 the fire suppression system did not stop the belt from running while water was flowing." Modify Chance of Injury or Illness from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation

[6] The Secretary's Motion for Decision and Order Approving Settlement reads in pertinent part:

3. In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citation as indicated above.

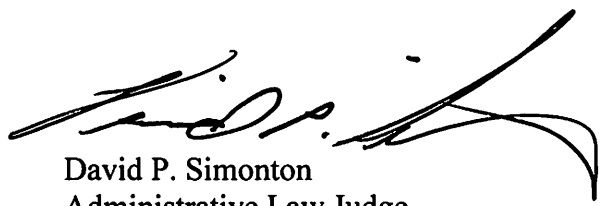
4. Consistent with the position the Secretary has taken before the Commission in The American Coal Company, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

8481806	$634.00	$571.00	Reduce Monetary Penalty
8479230	$585.00	$475.00	Reduce Negligence from "Moderate" to "Low"
8479232	$873.00	$700.00	Modify Chance of Injury or Illness from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
8484028	$162.00	$162.00	Accept as written
Total	**$3,457.00**	**$2,858.00**	

I have considered the representations and documentations submitted 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**, the citations contained in this docket are **MODIFIED** as set forth above.

V. ORDER

The Respondent, Peabody Twentymile Mining, LLC is **ORDERED** to pay the Secretary of Labor the sum of **$3,020.00** within 30 days of this order.[7] The associated notice of contest proceeding WEST 2014-930 is **DISMISSED**.



David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Michele A. Horn, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

R. Henry Moore, Jackson Kelly, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

[7] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390