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October 18, 2010

TWENTYMILE COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS Docket No. WEST 2008-788-R Order No. 7622426; 03/12/2008
v.	:	Docket No. WEST 2008-1093-R Order No. 6686312; 05/06/2008
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 2008-1094-R Order No. 6685313; 05/06/2008 Foidel Creek Mine Mine ID No. 05-03836
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2009-333 A.C. No. 05-03836-169779-01
v.	:	Docket No. WEST 2009-579 A.C. No. 05-03836-175445-01
TWENTYMILE COAL COMPANY, Respondent	:	Docket No. WEST 2009-1174 A.C. No. 05-03836-189502-01 Foidel Creek Mine

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Twentymile Coal Company;
Jennifer A. Casey, Esq., and Kim R. Rogers, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Larry R. Ramey, Conference & Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on notices of contest filed by Twentymile Coal Company ("Twentymile") and petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA") 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. As discussed below, the parties settled many of the citations at issue in these cases. Order Nos. 7622381, 6686312, 6686313, 7622426, 8456774, and 8456778, issued under section 104(d)(2) of the Mine Act, were adjudicated at the hearing.

I. ORDER NO. 7622381; WEST 2009-579

A. Background.

On December 12, 2008, Inspector James Preece issued Order No. 7622381 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.360(a)(1) as follows, in part:

> A certified person designated by the operator did not make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which a miner was scheduled to work underground between the No. 2 to 3 entry crosscut, 7 Main North (60+56). The following conditions existed: (1) the last preshift examination (rock belt) was certified by date, time, and initials 12-10-2008; (2) a miner was working in the area taking down equipment doors between the entries and installing Kennedy stopping; (3) hazardous conditions existed in the crosscut . . . .

(Ex. G-1). The inspector determined than an injury was reasonably likely and that any injury would reasonably be expected to be permanently disabling. He determined that the violation was significant and substantial ("S&S") and that the company's negligence was high. Section 75.360(a)(1) provides, in part, that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." The Secretary proposes a penalty of $5,645.00 for this order.

Inspector Preece testified that he began his inspection in the area of the rock belt. Dianna Scott Ponikvar, a senior safety representative for Twentymile, accompanied the inspector. Ponikvar informed the inspector that the belt was not in operation. After his examination, they traveled to the 7 Main North between the Nos. 2 and 3 crosscut entries, where they encountered Tim Torres in a crosscut. Inspector Preece testified that Torres told him that he was in the area to

remove a set of equipment doors and install a Kennedy stopping. (Tr. 21; Ex. G-3, p. 3). The inspector noticed materials, including aluminum panels, a foam pack, and a hydraulic jack used to build a Kennedy stoppings were in the area. (Tr. 22-23).

Inspector Preece testified that he observed hazardous loose material, broken ribs, and the improper storage of the foam pack at this location. (Tr. 22-25; Ex. G-2). He stated that the ribs were broken in the area above the location of the stored building materials. The most recent preshift examination had taken place on December 10, 2008. (Tr. 30). Based on what he observed, the inspector immediately issued several citations for the hazardous conditions but he did not issue the subject order until he discussed the matter with Matt Wade, the mine foreman. Preece testified that Wade advised him that the building materials were placed in the crosscut by miners on the midnight shift. (Tr. 23). Because moving the materials into the area took some time and the construction of a ventilation device affects mine safety, Inspector Preece concluded that the delivery of materials in the crosscut was a scheduled activity and that mine management directed the work. (Tr. 55). Inspector Preece testified that Torres told him that he had been assigned by Wade to build the stopping doors. (Tr. 29; Ex. G-3, p. 2). Wade told the inspector that he had not examined the area and he did not check the books to see when the last preshift was performed. *Id.*

Ms. Ponikvar testified that the rock belt has not been used since November 29, 2008. (Tr. 70-71). In the course of the inspection, she entered the subject crosscut with the inspector. In the crosscut they observed the supplies that were being staged for the removal of an equipment door and the installation of a Kennedy stopping. (Tr. 72-74). While they were in the crosscut, Torres entered the area from the opposite side, *i.e.*, the 7 Main North travelway. (Tr. 77-78; Ex. TCC-1). Ponikvar testified that Torres entered the crosscut to confirm that the necessary supplies were present for the planned work. (Tr. 81).

Mr. Wade testified that he sent Torres to the crosscut to make sure that all equipment and supplies needed for the work to be performed were present. (Tr. 95-98, 101). He stated that Torres was not going to be working in the area and that the equipment doors were going to be removed and the Kennedy stopping was going to be installed the following day. *Id.* According to Wade, it takes an entire crew to perform this work; a solitary miner would be unable to do it. (Tr. 98).

B. <u>Summary of the Parties' Arguments Concerning the Violation.</u>

The Secretary argues that preshift examinations are critically important because it is the primary means of detecting developing hazards in a mine, such as a bad roof. The goal of preshift examinations is to protect miners from easily preventable accidents. Twentymile failed to comply with the safety standard because the last examination occurred two days earlier. Twentymile violated the safety standard on two separate occasions. First, Twentymile exposed miners to hazards when it assigned them to deliver supplies to the crosscut. It is highly unlikely that miners performed this work on their own without being ordered to do so by management.

Consequently, it was a scheduled activity that required a preshift examination. Second, Torres entered the area to begin the process of removing the equipment doors and installing the Kennedy stoppings. Management scheduled this activity as well.

At the hearing, the Secretary moved to plead in the alternative that Twentymile violated section 75.361(a). (Tr. 101). That provision, entitled "supplemental examination," states, in part, "before anyone enters an area in which a preshift examination has not been made for that shift, a certified person shall examine the area for hazardous conditions . . . ." The Secretary contends that in the event the court finds that no work had been scheduled in the subject crosscut that required a preshift examination, Twentymile was nevertheless required to perform a supplemental examination for hazardous conditions before anyone entered the crosscut. It is clear that mine management directed miners to enter the area to deliver the supplies and directed Torres to enter the area to check on the supplies. As a consequence, a supplemental examination was required.

Twentymile argues that no violation of section 75.360(a)(1) occurred. Preshift examinations are required three hours prior to an eight-hour cycle in areas of the mine (1) where miners are normally required to work or travel; or (2) where work or travel is scheduled prior to the beginning of the examination. A preshift was not required because no work or travel was scheduled to occur in the crosscut prior to the start of the examination period. No work was being performed in the crosscut at the time of the inspection. Torres was not actively working to remove the equipment door or to install the stopping at that time, nor was he scheduled to do so. Wade testified that he instructed Torres to drop off a scoop in the 7 Main North travelway Entry No. 2, adjacent to the crosscut, in anticipation of the performance of work the next day. (Tr. 95-96). Torres simply walked into the crosscut to make sure the supplies were present. It would take more than one miner to remove the equipment door and install the stoppings.

Twentymile maintains that the Secretary also did not establish a violation of the standard with respect to the dropping off of supplies in the crosscut. Wade testified that the persons who dropped off the supplies may have performed an examination and the Secretary did not prove otherwise. (Tr. 104). In any event, dropping off supplies is not work that requires a preshift examination.

Twentymile argues that the Secretary's attempt to plead in the alternative at the hearing after the testimony had been completed should be denied. No explanation was given for the unreasonable delay in seeking an alternative ground for recovery. The request was untimely. This attempt to change her theory of the case amounts to legally recognizable prejudice that merits denial of the motion to amend.

C. Discussion.

I find that the Secretary established a violation of section 75.360(a)(1). The evidence establishes that on the previous midnight shift, miners gathered supplies to be used in

constructing the stopping and delivered them to the subject crosscut. A preshift examination was not performed prior to the delivery of this material. The safety standard requires the operator to make a preshift examination within three hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. Although other areas of the mine were preshifted, the crosscut was not. Clearly, miners had to work or travel in the crosscut to perform this work. The miners would have delivered the materials upon the direction of management. Consequently, the work was scheduled by the mine operator. These miners would have been exposed to any hazards in the crosscut, as discussed below. Twentymile argues that a certified person may have performed a supplemental examination of the area. There is no proof that such an examination was performed, however.

In addition, Mr. Torres traveled through the crosscut in the presence of the inspector and Ms. Ponikvar. He went into the crosscut to make sure supplies were present to install the stopping. I credit the testimony of the company's witnesses that Torres did not intend to start the work of removing the equipment door or installing the stopping. Although his exposure to any hazards was not very great, he traveled to the area at the direction of his supervisor.[1]

D. Significant and Substantial.

Inspector Preece determined that a number of hazards were present in the crosscut, as listed in the order of withdrawal. He issued section 104(a) citations for these alleged hazards. The inspector alleged that the rib in one area of the subject crosscut was not being supported or controlled. He stated that the outby side of the crosscut had a loose hanging rib measuring 13 inches in thickness, 10 feet in height, and 8 feet in length. (Tr. 23; Ex. G-9). He also alleged that the presence of the foam pack violated the mine's ventilation plan because it was not in a designated storage area.

Inspector Preece was concerned that Torres would start removing the equipment door in the crosscut. Removing the door would create a significant hazard because the doors were secured by stoppings which were helping to support the loose rib. (Tr. 25). If the loose rib were to fall on a miner it could reasonably be expected to cause debilitating injuries. (Tr. 32-33). By not conducting a preshift exam, the operator and its miners would not know what hazards were present in the crosscut before work began.

Twentymile maintains that the evidence establishes that the rib was supported by wire mesh. (Tr. 74; Ex. G-2). Ponikvar testified that the rib did not create a hazard to miners working in the area. *Id.* The presence of the foam pack, while it might have been a technical violation, did not create a hazard. Twentymile also contends that the Secretary failed to establish that there was a reasonable likelihood that any hazard present would result in an injury. Mr. Torres was

[1] Because I find that the Secretary established a violation of section 75.360(a)(1), I do not resolve the issue whether it was appropriate for the Secretary to plead a violation of section 75.361(a) in the alternative after all evidence on this order had been presented.

going to be in the crosscut for a very short time and he was not scheduled to remove the doors or build the stopping. (Tr. 95-98). Due to the nature of the work, it would require a crew of men to remove the equipment door.

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." 30 U.S.C. § 814(d)(1). 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 that:

> [i]n 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*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Commission provided additional guidance with respect to the third element of the S&S test:

> 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) (emphasis added); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

U.S. Steel Mining Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985) This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the

time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 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).

Looking only at the activities of Mr. Torres on December 12, I find that the Secretary did not establish that the violation was S&S. Torres was simply walking into the crosscut to see if materials were present for the crew to perform the scheduled work the following day. But for the presence of the inspector, he would have been in the crosscut for an extremely short time. It is highly unlikely that he would have sustained any sort of injury. The inspector based the S&S determination, in part, on his belief that Torres was going to start removing the equipment door. As stated above, I find that the evidence establishes that Torres was in the area only because he was directed to park a scoop near the crosscut and then enter the crosscut to check if the necessary supplies were present. I cannot assume that Twentymile would not have conducted a preshift examination before a crew commenced the work of removing the equipment door the following day.

Nevertheless, the inspector also cited Twentymile because the materials to be used to construct the Kennedy stopping were delivered the previous shift. It is clear that a preshift examination was not performed. In addition, there is absolutely no evidence that a supplemental examination was conducted. Whenever a supplemental examination is conducted, the examiner must certify by initials, date, and time that the examination was made. 30 C.F.R. § 75.361(b). No such certification was found in the area. Preshift examinations had been performed in the 7 Mine North, but there is no evidence that the subject crosscut was examined.

I find that the Secretary established that the violation was S&S. There was a violation that created a discrete safety hazard. I find that it was likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. I base this finding on the fact that significant work had been performed on the previous midnight shift when supplies and materials were delivered to the crosscut. The miners would have been in the crosscut for some time dumping rather heavy material in the area. (Ex. G-2, p. 3). Such activities exposed the miners to any hazards that were present. The rib that was of concern to the inspector was partially supported by wire mesh. (Tr. 74-75; Ex. G-2, p. 2). Nevertheless, based on the testimony of the inspector, I find that much of the rib was not adequately supported.[2] "The preshift examination requirement is unambiguous and is of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (Jan. 1995).

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[2] Preece testified that the supplies for constructing the stopping had been placed directly under the loose rib he was concerned about. Ponikvar testified that the alleged loose rib was on the opposite side of the crosscut. The photographs do not resolve this conflict. My S&S finding is not dependent on a resolution of this conflict in the testimony.

E. Unwarrantable Failure.

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.

The Secretary argues that the violation was properly designated as an unwarrantable failure because Twentymile could have easily determined whether a preshift examination was conducted by reviewing the record books. When the shift foreman failed to determine whether the crosscut had been preshifted, he placed any miners who entered the crosscut into a potentially hazardous position. The Secretary also notes that Twentymile has been cited for violating the safety standard 13 times in the previous two years. (Tr. 37-38).

Twentymile contends that the violation should not have been designated as an unwarrantable failure. The extent and duration of the violation was very limited. Torres traveled to the crosscut by way of the 7 Main North No. 2 entry, which had been preshifted. The only area that he traveled through that had not been examined was the crosscut and he went there only to make sure that the supplies were present. In addition, no hazards were present in the crosscut. When Torres entered the crosscut, Ponikvar and Inspector Preece were already present. Under these circumstances, there was no aggravated conduct.

I find that the violation was not the result of Twentymile's aggravated conduct but was the result of its ordinary negligence. The violation existed for a short period of time and miners were only in an area that had not been preshifted for a short time. Although Twentymile has received previous citations for violations of section 75.360(a)(1), the circumstances here were unusual and I find that it had not been placed on notice that further efforts were necessary to ensure compliance. The violation was not particularly obvious. I agree with the Secretary that compliance with 75.360(a)(1) is critically important and that performing preshift examinations is a fundamental safety practice in the mining industry. I find that, in this instance, the failure of the company to perform the examination was a result of simple, ordinary negligence rather than reckless, intentional, or indifferent conduct. This order is **MODIFIED** to a section 104(a) citation with moderate negligence. A penalty of $2,000.00 is appropriate for this violation.

II. ORDER NO. 6686312; WEST 2009-333

A. Background.

On May 6, 2008, Inspector Barry Grosely issued Order No. 6686312 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400. The order alleges that:

> In the belt entry (#3-entry) of the Main North #1 and #2 main conveyor belt line, from the Portal to crosscut 34 and including the #2 tripper drive area of the #2 Main north belt, the operator allowed combustible material to accumulate. The affected area from the portal to crosscut 34 is about 3400 feet in length.

(Ex. G-10). The order goes on to state that the adjoining crosscuts also contained combustible material. The order states that in this delineated area, accumulations of float coal dust were on the ribs, roof, floor, belt hardware, pipes and hoses, drive motors, belt structures, and electrical control boxes. The order states that the float coal dust ranged in thickness from a couple of sheets of paper to as much as 1/16 of an inch thick or more. The float coal dust was described as being dry and dark grey to black in color. The inspector determined than an injury was reasonably likely and that any injury would reasonably be expected to be permanently disabling. He determined that the violation was S&S and that the company's negligence was high. Section 75.400 provides, in part, that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces . . . shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." The Secretary proposes a penalty of $50,700.00 for this order.

Inspector Grosely testified that coal was being produced when he arrived at the mine on May 6 but that there had been minimal production on the previous shift. (Tr. 115, 140-41). He reviewed the preshift examination books and noted that there were entries in the books regarding accumulations. Inspector Grosely started his inspection in the transfer building and drive building on the surface. He issued three citations for accumulations of float coal dust and coal fines in those areas. (Tr. 121-22). He then traveled into the mine through the portal for the No. 3 Entry. This entry was the main conveyor belt entry and it was on intake air. (Tr. 124). He testified that he immediately noticed accumulations of float coal dust and, as he traveled further inby, the accumulations became "more pronounced." (Tr. 123, 125-26). The accumulations existed from the portal to Crosscut 34, a distance of 3,400 feet. (Tr. 126).

Inspector Grosely stated that the accumulations were heavier in the crosscuts along the entry. (Tr. 123, 127). Air moves through the belt entry at a rate of 350 feet per minute and the inspector believes that this high velocity caused most of the rock dust that is injected into the entry to travel down the belt line. (Tr. 127-30). As a consequence, there was less rock dust in these crosscuts.

Inspector Grosely estimated that the float coal dust had accumulated to a depth of 1/16th of an inch in some locations. (Tr. 134-36). Inspector Grosely testified that when he rubbed his hand across the top of electrical installations, the float coal dust "flowed like water" and appeared to be very fine. (Tr. 127). He testified that he believes that these accumulations were more than what are typically generated during a normal production cycle at the mine. (Tr. 137). The inspector believes that the extensiveness of the accumulations, combined with the fact that minimal production had occurred on the immediately preceding shift, demonstrated that the conditions he observed had existed for more than one shift and that the accumulations in the crosscuts had existed for a very long period of time. (Tr. 140-41).

Grosely further testified that the accumulations were obvious and extensive. (Tr. 126, 151). He stated that a person without experience in the mining industry could have identified the seriousness of the condition. (Tr. 151, 156). On that basis, he determined that the violation was the result of Twentymile's unwarrantable failure to comply with the requirements of the safety standard. Inspector Grosely testified that the violation was S&S, because, if mining operations had been permitted to continue, it would have been reasonably likely that a fire or explosion would have occurred, resulting in at least permanently disabling injuries to miners. (Tr. 142, 150-51).

Allan Meckley, a mine foreman for Twentymile, testified that the company had established a rock dusting protocol that included a permanent pressurized bulk rock dusting line in the belt entry. (Tr. 233). Hoses connected to the dust line were used by rock dusting teams to rock dust the entry and the associated crosscuts. (Tr. 235). The belt is rock dusted two to three times a week. (Tr. 238). The company's preshift examination books reveal that the examiners did not note any hazards or violations from May 4 to May 6, 2008, in the cited entry. (Ex. G-13). Some of the examiners did insert comments indicating conditions which, while not rising to a violation or a hazard, would benefit from additional rock dust. *Id.* The company took action to address the conditions observed by the examiners. For example, in response to these comments in the preshift books, rock dusting was performed on May 5 from Crosscut 78 to the tail of the No. 2 belt, and was progressing toward Crosscut 55. (Tr. 237; Ex. G-13). Rock dusting continued on the morning of May 6. At the same time that Inspector Grosely was inspecting the mine on May 6, Fireboss Tim Bertram examined the No. 1 and No. 2 belts and indicated that the area from the portal to Crosscut 20 could use dust. (Ex. G-13). Mr. Bertram testified that he did not believe that the condition constituted a hazard or a violation of the safety standard. (Tr. 270). Six different mine examiners inspected the entry and, although they all suggested that more rock dust be applied, none of them believed that a hazard existed. (Ex. G-13).

Michael DeZeeuw, a respirable dust sampler in the company's safety department, testified that the mine has a concrete floor the first 400 feet into the mine and at the belt drives. (Tr. 209-10). Concrete is used in these areas to make it easier to keep the area clean of coal dust. He testified that the rock dust at the Foidel Creek Mine is often grey in color. He accompanied Inspector Grosely during the inspection. He observed the same conditions as the inspector. DeZeeuw testified that the dust in the area was light to dark grey in color. He believes that the

darker material was a mixture of rock dust and float coal dust. (Tr. 214). He did not consider these accumulations to present a hazard and he would not have described it as a hazard in the examination book. *Id.* There was no methane along the belt line.

DeZeeuw further testified that, in his opinion, an explosion or fire was highly unlikely along the belt. (Tr. 215). There were not any significant ignition sources. There was some dust inside electrical boxes, but not enough to propagate a fire or an explosion. The electrical boxes were not required to be permissible. The equipment the needed to be greased was in an area where the floor was concrete and the walls were covered with shotcrete. (Tr. 218). He admitted that there was a belt fire at the mine some time prior to 1999. (Tr. 233). The mine's carbon monoxide monitoring system will detect the presence of smoke and shut down the system. (Tr. 226). The mine contains about eight and a half miles of conveyor belts.

B. Discussion.

1. Significant and Substantial.

Twentymile is not contesting the violation in this instance, but it contends that the Secretary did not establish that the violation was S&S. The Secretary maintains that the conditions observed by Inspector Grosely met all four elements of the Commission's S&S test. Twentymile allowed float coal dust to accumulate over a large area of the No. 3 belt entry. A discrete safety hazard existed. The Secretary argues that Inspector Grosely reasonably determined, based on the particular conditions he observed, that there was a reasonable likelihood that miners working in the area would be injured and that such an injury would be of a reasonably serious nature.

The Secretary contends that ignition sources likely to propagate a mine fire or explosion were present in the belt entry. Rollers are spaced every six to ten feet along the top of the belt line and every ten feet along the bottom. (Tr. 132-33). About 65 rollers fail at the mine every working day. (Tr. 133, 144). Bearings on rollers can fail without any notice. (Tr. 133, 145, 224). When such a failure occurs, there is a potential for sparking and heating of the metal components. Sparking and heat can cause a fire or ignition. Indeed, the Secretary notes that Inspector Grosely observed a failed belt roller during his inspection and he shut down the subject belt line until the accumulations could be removed. (Tr. 133-34; Ex. G-12, pp. 4-5). He also testified that he observed areas where the belt was rubbing against belt hangers. (Tr. 142-43). The belt operates at a speed of 800 to 900 feet per minute. The Secretary argues that the speed of the belt, combined with defective belt rollers and the rubbing of belts against metal parts, has a potential to generate heat. The presence of float coal dust in this environment not only creates a fire hazard, but also enhances the probability of a mine explosion. (Tr. 142-43, 147-48).

Twentymile argues that the Secretary did not establish the third element of the Commission's *Mathies* test because the necessary preconditions for an explosion or fire did not exist. The presence of numerous monitoring and prevention systems further served to safeguard

the belt entry from fire or explosion. To propagate an explosion, float coal dust must be suspended in the air. This occurs as a result of a methane explosion. It is uncontested that there was no methane in the belt entry. The inspector admitted that, in the absence of detectable levels of methane, a methane explosion in the belt entry was unlikely. (Tr. 200-01). The belt entry was very humid, making it less likely that the float coal dust would go into suspension. Also, the inspector did not sample the dust to see what percentage was rock dust.

Twentymile contends that the absence of necessary preconditions for a fire also made any ignition of float coal dust very unlikely. The belt rollers are regularly inspected for damage and the air is regularly tested for the presence of oxygen, carbon monoxide and methane. The belt was equipped with belt slip monitoring devices that automatically shut down the drive belt if the belt malfunctions. Moreover, the belt line was equipped with a fire suppression system and water sprays to reduce the presence of float control dust in the event excessive heat is detected.

For the reasons set forth below, I find that the Secretary established that the violation was S&S. There is no doubt that float coal dust had settled over a large area. The float coal dust had settled throughout the entry for a distance of 3,400 feet. It covered every surface and had also settled into the crosscuts. I credit the inspector's testimony that the float coal dust accumulation was more than would be typically generated in one production cycle. The key issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury.

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990).

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

The float coal dust was disbursed over a wide area and was about as thick as a couple of sheets of paper. The accumulations were heavier in the crosscuts. Along the floor of the mine, the float coal dust was on top of rock dust. The rock dust used at the mine is often grey in color rather than white. It is not entirely clear when the float coal dust was deposited, but it was deposited over a number of shifts. The dust was very fine. Some of the accumulations were dry, but the environment in the entry was very humid.

It is important to understand that the area cited by the inspector was at the portal of the mine and was not near the longwall face. There was no methane detected in the area and, assuming continued mining operations, it was unlikely that methane would accumulate in this

area of the mine. The entries were on intake air and velocity of the air was quite high as it passed through this area.

When asked about ignition sources, the inspector testified that he saw several potential ignition sources. He saw evidence that the belt had been rubbing against the belt hangers for an extended period of time. A number of belt rollers had "belt string" wrapped around them. This string is produced as the edge of the belt becomes frayed from rubbing against the metal structure. He stated that float coal dust can saturate the string and burn if it gets caught in a defective belt roller. A belt roller can fail without much warning. Inspector Grosely also believed that the electrical components along the entry could become an ignition source. Finally, some of the bearings in the belt system had been over-greased and this grease could burn if it came in contact with defective rollers.

I find that it was unlikely that the electrical equipment would cause the float coal dust to burn. The cables, boxes, and other electrical components were in good operating order. There is no evidence that they were overheating or were likely to overheat. The fact that some dust was found inside electrical boxes does not help establish that it was likely to ignite.

Although there was a chance that a defective roller could ignite float coal dust, I find that it was unlikely it would start a fire that could create a hazard to miners. The belts used to convey coal and rock at mines today are fire retardant and will not burn under normal circumstances. There is no evidence that piles of loose coal and coal fines had accumulated under the belt, or under or near rollers such that a localized ignition of float coal dust could start a fire that would spread. The same is true where the belt was rubbing against metal components. If such a hot spot ignited a small amount of float coal dust at that location, it was unlikely that this event would start a mine fire. The rollers are checked during preshift examinations and are replaced on a frequent basis. A carbon monoxide monitoring system continuously monitors the belt entry. It is designed to detect any combustion or heat along the belt at an early stage. The belt is also equipped with a belt slip monitoring system that automatically shuts down the drive in the event of belt slippage.

The Secretary relies, in large part, on the belt fire at the Aracoma Coal Company's Alma No. 1 Mine. (Tr. 147). That fire presented a different situation from the present case, however. The water sprays at the belt drive, where the fire started, had been turned off and stoppings separating the escapeways from the belt entry were missing. (Tr. 185). These conditions did not exist in the present case. There have been no fatalities and no reportable injuries resulting from any reportable belt fire since at least 1979 other than the Aracoma fire. *See Cumberland Coal Resources, LP*, 31 FMSHRC 137, 149 (Jan. 2009) (ALJ) (*reversed on other grounds*, 32 FMSHRC 442 (May 2010)).

The key issue when evaluating a citation or order involving float coal dust is the possibility that the dust will be put into suspension in the mine atmosphere. By far the most common way for float coal dust to be put into suspension is from a methane explosion. The

methane explosion need not occur in the immediate area of the float coal dust. The explosion can occur at the working face, for example, and the force of the blast can travel a long distance along the entries of the mine. This force can then cause the float coal dust to fill the mine atmosphere. The force of a methane explosion can also severely disrupt the mine's ventilation system and cause the air to stop flowing through entries. If the air stops flowing, the float coal dust will not be disbursed or diluted, but will stay suspended in the air. When float coal dust is suspended in the air, the exposed surface area of the dust particles increases exponentially, thereby making the dust extremely volatile. The suspended float coal dust can then provide fuel for a methane explosion occurring at the face to continue down the entries for a considerable distance beyond the presence of the methane. In addition, other ignition sources in the immediate area of the coal dust can ignite the suspended float coal dust.

Because float coal dust is highly explosive when it is suspended in the air, applying the Commission's S&S test to such accumulations presents a challenge. The third element of the test requires a showing that there is a reasonable likelihood that the hazard contributed to will result in an injury. At any given time in any given underground coal mine it is unlikely that there will be a serious methane ignition or explosion that will put an accumulation of float coal dust into suspension. It is reasonably likely, however, that there will be at least one serious methane ignition or explosion over the life of a gassy coal mine. If such an event occurs, the consequences are catastrophic and the presence of an accumulation of float coal dust can significantly increase the hazard to miners. The Secretary is not required to establish that it is more probable than not that an injury will result from a violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

It is undisputed that there was no methane present in the cited entries of the mine and there is no evidence that methane had ever been detected in these entries. It is also undisputed that the mine liberates significant quantities of methane. The mine typically liberates between 500,000 and 1,000,000 cubic feet of methane per day. As a consequence, the mine is usually on a 10-day spot inspection cycle.[3] Thus, there is always a potential for rapid buildup of methane in the mine, notwithstanding the mine's ventilation system and other controls, which could lead to an explosion.

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). I credit the testimony of Inspector Grosely in this regard. I also credit Inspector Grosely's testimony that there was insufficient rock dust in the cited area to mitigate this hazard.

It is important to note that, under the logic of Twentymile's argument, an accumulation of float coal dust would not be considered to be S&S so long as methane or other combustible

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[3] At the time of this inspection, the mine was on a 15-day spot inspection cycle because it was not liberating as much methane in the months proceeding the inspection.

materials, such as loose coal and coal fines, were not present along with an ignition source. This argument fails to recognize that the presence of such conditions would likely create an imminent danger. If, upon entering a mine, an MSHA inspector discovered extensive accumulations of float coal dust, detected the presence of more than a trace amount of methane, and found one or more ignitions sources, he would be justified in issuing an imminent danger order. A condition does not need to rise to the level of an imminent danger or anything close to an imminent danger to be considered S&S.

Considering the factors set forth in *Enlow Fork*, I find that the violation was S&S. The accumulations were extensive and obvious. Insufficient rock dust was present to render the float coal dust inert. Although there was no methane in the subject entries, the mine is a gassy mine subject to spot inspections. As a consequence, methane could build up rapidly and unexpectedly in an area of the mine closer to or at the longwall face. Such a rapid buildup of methane could reasonably be expected to be exposed to ignition sources that would detonate the methane. In addition, there were ignition sources in the area that could independently ignite float coal dust if it were suspended in the mine atmosphere by a methane explosion further inby. I find that the Secretary established the third and fourth elements of the *Mathies* S&S test. It is the *contribution* of a violation to the cause and effect of a hazard that must be S&S. It was reasonably likely that the hazard contributed to by the violation would result in an event in which there was a serious injury.

2. <u>Unwarrantable Failure</u>.

The Secretary maintains that the violation was caused by the operator's unwarrantable failure to comply with the safety standard. The conditions observed by the inspector were obvious and extensive. She argues that the deteriorating conditions along the entry would have been noticeable to a layperson. Twentymile applied more than nine tons of rock dust to abate the condition. In addition, the condition had existed for a considerable length of time. The operator also had ample notice regarding the need for greater efforts to comply with section 75.400. Twentymile was cited about 45 times for alleged violations of this standard during the 15 months preceding the issuance of the subject order. In addition, Inspector Grosely issued a citation for a similar violation along the No. 7 belt line in October 2006.

Twentymile contends that the violation was not the result of its unwarrantable failure to comply with the standard. Management was unaware of the extensive nature of the accumulation. The preshift examiners did not find any violations or hazards in advance of the May 6 inspection. Because the examiners did not mark the accumulation as a hazard, management was not aware of any hazard present. Some of the examiners noted in the remarks section of the preshift book that the area "could use" rock dust, but there were no hazards noted. The general mine foreman and a representative from the safety department visited the area and did not believe that a hazard existed. Actions were taken to address the dust in the entry. For example, rock dusting was performed from the 78 crosscut to the tail of the No. 2 belt on May 5. Rock dusting was continuing on the morning of the inspection. Thus, Twentymile diligently

followed up on any reports in the examination book that additional dusting was recommended. Twentymile had installed a permanent pressurized rock dusting system in the belt entry, which demonstrates the importance it places on keeping the belt entries safe.

The preshift examination reports contain the following information in the "remarks" section with respect to float coal dust in the cited belt entry. In all cases, the report states "Safe at time of exam" at the beginning of the remarks section.

> May 4 - 6:18 p.m. to 7:25 p.m., "Accumulations at Tripper #1, appears to need dust." On the same line it says, "Dusted XC 78 to tail 5-5-08 MSB"
>
> May 5 - 2:00 a.m. to 3:05 a.m., there were no entries noting the presence of float coal dust or recommending that rock dust be applied.
>
> May 5 - 10:00 a.m. to 10:55 a.m., "Need rock dust from portal to XC 23" and "XC 55 to tail could use dust." There is another notation stating, "5-5-08 in progress MSB." It is not entirely clear what area the "in progress" notation was referring to because there were other items needing correction noted in the remarks section of the examination book.
>
> May 5 - 6:10 p.m. to 7:02 p.m., there were no entries noting the presence of float coal dust or recommending that rock dust be applied.
>
> May 6 - 2:00 a.m. to 3:08 a.m., there were no entries noting the presence of float coal dust or recommending that rock dust be applied.
>
> May 6 - 10:00 a.m. to 10:43 a.m., "Could use dust portal to XC 20."

(Ex. G-13).

Inspector Grosely believes that the conditions he observed at about 10:10 a.m. on the morning of May 6 would have been present at the time of the 2:00 a.m. examination conducted by Charles Craig, yet nothing was noted in the preshift examiner's book.[4] (Tr. 169). Grosely also took into consideration that there had been little production during the graveyard shift that ended on May 6. As a consequence, he believes that the cited conditions had existed for more than one shift. (Tr. 140-41, 173).

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[4] Timothy Bertram started his examination some time before 10:00 a.m. on May 6, behind the inspector. That is, Bertram entered the portal after Inspector Grosely with the result that he had not yet examined those areas inspected by Grosely. (Tr. 270-71). He did not believe that the conditions he saw created a hazard to miners. (Tr. 270). He did note that rock dust should be applied from the portal to crosscut 20. He saw that as a condition that needed to be addressed rather than as a hazard to miners.

Allen Meckley, a mine foreman with Twentymile, testified that the "in progress" notation in the May 5 morning shift examination book means that the crew was in the process of applying rock dust in the areas noted in the examination book. (Tr. 237). He stated that the area cited by the inspector is dusted, on average, about two to three times per week.

Dennis Bouwens, an outby coordinator for Twentymile, testified that the order of withdrawal was inappropriate. (Tr. 249). He does not believe that the cited condition created a hazard. (Tr. 249-50). He testified that Twentymile was being "proactive" by applying rock dust along the belt further inby the area cited by the inspector. (Tr. 252). Once the order was issued, he had the crew that was rock dusting along the belt entry redirect their efforts further outby to address the area cited by the inspector. (Tr. 253).

I find that the Secretary established that the violation was the result of a serious lack of reasonable care by Twentymile. In the shifts prior to Inspector Grosely's inspection, none of the preshift examiners considered the accumulation of float coal dust to be hazardous and did not even note the condition in the examination book. Mr. Bertram noted that the belt entry "could use dust," but the person who examined the entry at 2:00 a.m. on May 6 before Inspector Grosely conducted his inspection did not enter anything in the preshift book. In addition, nothing was entered for the examination that took place at 6:10 p.m. on May 5. As stated above, I credit the testimony of Inspector Grosely that the float coal dust accumulated over several shifts. I find that the accumulation of float coal dust should have been noted by these examiners. Their failure to do so demonstrated a serious lack of reasonable care. A preshift examiner acts as the agent of a mine operator when he is performing his examinations and his conduct is imputable to a mine operator for unwarrantable failure purposes. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 197 (Feb. 1991).

As stated above, the accumulations were quite obvious and extensive. The conditions were hazardous and were S&S. The operator had been put on notice that greater efforts were necessary for compliance. Inspector Grosely issued Twentymile an unwarrantable failure citation in October 2006 for float coal dust along the No. 7 belt entry. (Tr. 154; Ex. G-10). He warned the operator that they must "remain vigilant to remedy this volatile condition." (Tr. 155). Twentymile was cited about 45 times for violations of section 75.400 in the 15 months prior to the issuance of the subject order.[5] *Id.* In addition, MSHA instituted a belt initiative in October 2006. MSHA notified Twentymile at that time that the agency intended to focus on belt lines during upcoming inspections. (Tr. 151-53). In examining an unwarrantable failure finding related to section 75.400, the Commission has recognized that:

> past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.,* 19

[5] About 13 of the citations and orders are final Commission orders. (Ex. G-23). It is not clear how many of these involve float coal dust accumulations.

> FMSHRC 5, 11-12 (Jan. 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has recurring safety problem in need of correction and the violation history my be relevant in determining the operator's degrees of negligence. *Peabody,* 14 FMSHRC at 1263-64.

Consolidation Coal Co., 23 FMSHRC 588, 595 (June 2001).

I find that Twentymile's failure to apply rock dust in the cited area constituted aggravated conduct but it did not demonstrate reckless, intentional, or indifferent conduct. As the Secretary noted in her brief, Twentymile applies rock dust from the furthest inby position, with crews working outby against the flow of the air. (S. Br. 17; Tr. 235). Twentymile was applying rock dust further inby when Inspector Grosely entered the mine. Although it is not clear when or on what shift additional rock dust would have been applied in the area cited by the inspector, it is likely that the entries would have been rock dusted at some point after Mr. Bertram's entry in the examination book was noted by a foreman.[6] The violation was the result of Twentymile's serious lack of reasonable care. The negligence was high. A penalty of $50,000.00 is appropriate.

III. CITATION NO. 6686313; WEST 2009-333

A. Background.

On May 6, 2008, Inspector Barry Grosely issued Order No. 6686313 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.360(a)(1). The order alleges that:

> In regards to the pre-shift examination conducted on May 6, 2008, on the graveyard shift for the day shift during the hours of 02:00 hrs and 3:08 hrs along the Main North #1 and #2 main line conveyor belt from the head roller at the main transfer building to crosscut - 46 in the #3 belt entry, the operator failed to conduct an adequate preshift examination.

(Ex. G-11). The order goes on to state that hazardous conditions were present but that the examination book was "absent of any postings of hazardous conditions." The order further stated that allowing the condition to "go uncorrected would reasonably likely result in an accident causing serious injury or illness." The Secretary proposes a penalty of $50,700.00 for this order.

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[6] The Secretary criticized Twentymile's practice of noting the need for rock dust in the "remarks" section of the examiner's report rather than in the "hazardous conditions" section. I need not weigh in on this issue because it is clear that the most recent examiners' reports did not note the accumulations in either section of the record book.

At the hearing, the Secretary modified this order to a section 104(a) citation with high negligence. (Tr. 160).

Inspector Grosely testified that the failure of Twentymile's preshift examiner to recognize an obvious, hazardous condition during a preshift examination and to properly record this hazard violated the safety standard. (Tr. 163-65, 169). The hazardous condition the inspector was concerned about was the accumulation of float coal dust discussed above. He stated that the examiner who performed the examination at about 2:00 a.m. on May 6 did not perform an adequate preshift examination because the float coal dust was not noted in the book. (Tr. 169; Ex. G-13 p. 1). The float coal dust had been noted in the examination book for the examination that took place between 10:00 a.m. and 10:55 a.m. on May 5, however. (G-13 p. 4). It was obvious to the inspector in examining the conditions along the belt line that rock dust had not been applied to the cited area in response to the May 5 notation in the examiner's book. The inspector believed that the conditions would have been worse by 2:00 a.m. on May 6. (Ex. G-10).

The Secretary argues that the examination made by Charles Craig at 2:00 a.m. on May 6 was inadequate. Mr. Craig testified that the cited area did not need to be rock dusted. (Tr. 263). The Secretary points to his testimony that he would "possibly" report float coal dust as a hazard in the preshift book if the accumulations were "an eighth of an inch or greater" and "appeared black." *Id.* He admitted that the eighth of an inch guideline was one of his own making that other examiners might not use. (Tr. 266-67). Mr. Bertram, the examiner who conducted an examination soon after Inspector Grosely entered the mine on May 6, concluded that rock dust was needed from the portal to crosscut 20. (Tr. 270; Ex. G-13 p. 2). The Secretary contends that it was Twentymile's inability to recognize the hazardous condition and take steps to record the hazard that caused the inspector to issue the order of withdrawal.

Twentymile argues that the proper test is whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous conditions that the regulation seeks to prevent. *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990) *aff'd* 951 F.2d 292 (10th Cir 1991). Several experienced mine examiners, as well as Meckley, DeZeeuw, and Bouwens, all determined that the accumulation of float coal dust did not present a hazard to miners. These individuals all have extensive experience and they all walked through the cited area. In addition, the Secretary has not provided the mining community with any guidance to indicate how much float coal dust must be present in order to violate section 75.400 and how much rock dust is sufficient to eliminate the hazard. As a consequence, examiner Craig used an eighth of an inch as a guideline. Given Craig's experience and reasoned judgment and the subjectivity of the standard, it is Twentymile's position that no violation occurred.

B. Discussion.

1. Violation.

The Commission has determined that preshift examinations are fundamental in assuring a safe work environment for the miners. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). "The preshift examination is intended to prevent hazardous conditions from developing." *Id*. The preshift examiner must look for all conditions that present a hazard and this responsibility is not restricted to S&S conditions. *Id.* at 14. It is not violations that the examiner is required to find, but rather conditions that present a potential hazard to miners.

As stated above with respect to Order No. 6686312, I determined that the presence of the accumulations of float coal dust in the cited belt entry presented a hazard to miners. Rock dust had not been applied to the float coal dust to render it safe. The mine liberates extensive quantities of methane. For these same reasons, I find that the Secretary established a violation of section 75.360(a)(1). Given the obvious nature of the violation, I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard, would have recognized that this hazard needed to be recorded in the preshift examination book. The examiner who performed the preshift examination at 2:00 a.m. on May 6 did not note that there was float coal dust present or that rock dust was needed in the area. It is clear that the mine examiners at Twentymile had not all been sufficiently rigorous when inspecting areas of the mine for accumulations of float coal dust.

2. Significant and Substantial.

Twentymile contends that the S&S designation is unfounded because an injury causing event was unlikely. The Secretary bears the burden of proving the four elements of the *Mathies* S&S test and the Secretary failed to establish the fourth element. The Secretary maintains that the violation was S&S. Inspector Grosely was concerned that Twentymile's preshift examiners failed to conduct adequate examinations because of their inability to recognize the hazards presented by accumulations of float coal dust. She maintains that it is crucial for the preshift examiner to record hazardous accumulations in the log book because mine foremen use these records when scheduling work.

For the reasons set forth with respect to Order No. 6686312, I find that the Secretary established that the violation was S&S. By failing to perform an adequate examination and recording the hazard presented by the float coal dust, the subject preshift examiner contributed to a serious safety hazard. A foreman looking at the examiner's report for 2:00 a.m. on May 6 would not know rock dust was needed in the No. 3 belt entry because there was no such notation. I find that it was reasonably likely that the hazard contributed to by the violation would result in an accident in which there would be a serious injury.

3. Negligence

As stated above, the Secretary modified this order to a section 104(a) citation with high negligence. (Tr. 160). In support of the high negligence determination, the Secretary relies on Inspector Grosely's testimony that Twentymile has a history of citations for inadequate preshift examinations. In October 2006, Grosely issued a section 104(d)(1) order charging Twentymile with a failure to conduct a proper preshift examination after he discovered excessive coal accumulations along the No. 7 beltline. (Tr. 176-77). He testified that he advised mine management that the examiners needed to be more vigilant about identifying and correcting coal accumulations. (Tr. 155). Potentially hazardous conditions were either not identified at all or were listed in the "remarks" section of the report rather than in the "hazardous conditions observed" section. He was also concerned that it is often difficult to discern from the subsequent notations in the log book whether accumulation hazards had been corrected. The Secretary also relies on the five section 75.360 violations Twentymile received between February 2007 and May 2008. (Ex. G-7). Finally, the Secretary relies on the fact that Grosely testified that the conditions he observed on May 6, 2008, were obvious and extensive.

I find that the Secretary did not establish that the violation was the result of more than ordinary negligence. It is true that MSHA provided Twentymile with some notice that greater efforts were necessary to keep belt entries clear of accumulations. This action was taken as part of MSHA's belt initiative. As a result, Twentymile removed tons of material from the floor of its belt entries long before the present inspection. This belt initiative was not specifically directed to accumulations of float coal dust. I find that Twentymile's employees who were in the No. 3 entry in the days and hours preceeding Grosely's inspection genuinely believed, in good faith, that the accumulation of float coal dust that they observed did not present a hazard to miners. As a consequence, the preshift examiners, including Mr. Craig, did not believe that they needed to report it in the hazardous conditions section of the preshift record book. I find that Twentymile was negligent with respect to this violation but its negligence did not rise to the level of high negligence. A penalty of $5,000.00 is appropriate.

IV. ORDER NO. 7622426; WEST 2009-333

A. Background.

On March 12, 2008, Inspector Art Gore issued Order No. 7622426 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400. The order alleges that:

> Float coal dust was deposited on rock dusted surfaces in the longwall return (20 Right No. 1 Entry) from survey point 42+50 to 25+50, a distance of 1700 feet. The float coal dust was deposited on the floor, ribs, and supplemental supports. This entry was examined by a foreman on 3/08/2008 and documented in the weekly

> examination book under hazards as the location could use rock dust and no corrective action was documented.

(Ex. G-15). The order goes on to state that the entry was also examined on 3/11/2008 and 3/12/2008 and mining continued on the section. The Secretary proposes a penalty of $70,000.00 for this order.

Inspector Gore, who was accompanied by Inspector Carol Miller, began his inspection by traveling to the No. 1 Entry tailgate longwall return. He was at the mine for a methane spot inspection. He tested for methane during his inspection, but he did not detect any problems with methane. (Tr. 283). The inspection party traveled to the longwall face and entered the tailgate entry. He testified that he immediately noticed that the tailgate was black. (Tr. 284). The inspection party walked into the tailgate a few hundred feet and it was still black. He advised Dianna Ponikvar that he was probably going to issue a withdrawal order because of these conditions. (Tr. 284). Inspector Gore testified that there was dark coal dust everywhere. It was on the floor, on the ribs, and on the cans, which are used for supplemental roof support. Coal dust had also accumulated in the crosscuts. The inspector also observed that the trickle duster was not working at that time. This duster blows rock dust into the air current so that rock dust will mix with any coal dust that has accumulated. Gore testified that the float coal dust that he observed was "heavy." (Tr. 286). He said that it was "triple" the amount necessary to establish a violation. (Tr. 287). Inspector Gore walked up the tailgate in the direction of the air current for a distance of about 1,700 feet. Beyond that point he said that the conditions looked "pretty good." (Tr. 288).

Inspector Gore reviewed weekly examination records, preshift examination records, and the dates, times and initials ("DT & I") he found in the entry. The weekly examination book contained an entry dated March 8, 2008, that stated that the entire tailgate area for the No. 1 Entry needed rock dusting. (Tr. 291-93, 328-29; Ex. G-21). The examination book noted that corrective action was taken on March 11, but the area dusted did not include the area cited by the inspector. (Tr. 292-93, Ex. G-21). Inspector Gore concluded that Twentymile continued to mine for at least eight shifts between the time the need for rock dusting was noted in the examination book and the time of his inspection on March 12. The fact that the electric trickle duster was not operating at the time of the inspection also led the inspector to determine that the violation was the result of Twentymile's unwarrantable failure to comply with the safety standard. (Tr. 285-86).

Dennis Bouwens, outby coordinator, testified that he performed the weekly examination on March 8. He noted that he thought that more rock dust was needed but he did not believe that the conditions he observed created a hazard. (Tr. 327-29). The highest methane level he detected was less than one percent during his examination. (Tr. 328). Although he wrote "could use rock dust" in the examination book, the coal dust he found did not present a hazard. (Tr. 329). The area was very humid. He also testified that arrangements to rock dust the area had been made. (Ex. TCC-31). On March 6, a pallet of rock dust, which is about a ton, had been delivered to the tailgate. (Tr. 342; Ex. TCC-31). The night shift crew installed 40 supplemental support structures, known as "cans," from the location of the rock dust pallets in an outby direction. On

March 7, beginning where the night crew left off, the day shift installed 39 additional support cans. He further testified that the cans were installed in preparation for rock dusting. On March 10, additional rock dust was delivered to the tailgate and a slinger duster was filled. *Id.* He also said that the slinger duster was used during the day shift of March 11 and an additional load of rock dust was delivered to the area. Rock dusting continued during the night shift from survey station 27+00 outby. As a consequence, the tailgate was rock dusted from point 27+00 to the mouth of the section.

B. Discussion.

1. Significant and Substantial.

Twentymile is not contesting the violation, but it contends that the Secretary did not establish that the violation was S&S. The Secretary maintains that the testimony of Inspector Gore establishes that float coal dust had been in suspension in the tailgate and in sufficient amounts to propagate an explosion or fire. (Tr. 298-99). It is clear that the float coal dust did not accumulate during a single shift. Indeed, the Secretary argues that the conditions observed by Inspector Gore on March 12 were more hazardous than those noted in the March 8 weekly examination. Assuming continued normal mining operations, the hazard presented a risk of an ignition, fire, or explosion.

The Secretary contends that, although the longwall was not in operation at the time of the subject inspection, the longwall had operated for at least eight shifts between the reporting of the float coal dust hazard in the March 8 weekly examination book and Inspector Gore's inspection. As soon as Inspector Gore entered the tailgate entry from the longwall face, he noticed that the tailgate was black with float coal dust. (Tr. 284). Potential ignition sources existed in the longwall face, both during production shifts and at times when the longwall was down for repair. Moreover, the mine liberates a significant amount of methane during the normal production cycle. The roof strata at the Foidel Creek mine contains significant amounts of quartz, which can create a spark as the longwall shearer passes through it. (Tr. 317-18).

Twentymile contends that the Secretary merely established that an accident "could occur" and failed to establish that a serious accident was reasonably likely to occur. The Commission has explicitly rejected a finding of an S&S violation based on the "potential" that an injury could occur. *Texas Gulf, Inc*., 10 FMSHRC 498, 500-01 (April 1988); *Zeigler Coal Co.*, 15 FMSHRC 949, 953-54 (June 1993). Twentymile argues that the Secretary has failed to establish that an explosion or fire was more than a remote possibility. A necessary precondition to a float coal dust explosion is a methane gas ignition that puts the dust into suspension. The evidence establishes that there was very little methane in the area. Bill Bennett, the longwall coordinator, measured 0.1 percent methane in the tailgate. (Tr. 337). There was a methane monitor in the tailgate and a carbon monoxide monitor on the longwall.

Both Bouwens and Bennett testified that the float coal dust was grey because rock dust was mixed in with the coal dust. (Tr. 329, 348). Much of the rock dust was applied from the trickle duster located in the tailgate. Although Inspector Gore believed that the longwall shearer was a potential ignition source, Bennett testified that since he started working at the mine in 1991, there has not been a single methane ignition caused by the longwall shearer or by a rock fall. As a consequence, there was little if any chance of a float coal dust explosion borne of a methane ignition. Twentymile also discounts the other ignition sources cited by Inspector Gore. These included cutting torches, pumps, and failing roof bolts. The area was extremely humid, which acts to prevent suspension by making the coal dust particles adhere to each other. (Tr. 330).

For the same reasons as discussed above with respect to Order No. 6686312, I find that the Secretary established that the violation was S&S. Float coal dust is highly explosive when it is suspended in the mine atmosphere. I credit the inspector's testimony that the accumulations were heavy. The accumulations were in that part of the tailgate that is adjacent to the longwall face. As discussed above, the mine is on a spot-inspection schedule because of the amount of methane liberated.

The float coal dust had obviously been accumulating for some time because the report of the weekly examination made on March 8 notes that the tailgate "could use rock dust." (Ex. G-21). Bouwens, who performed the weekly examination, testified that he did not believe that the float coal dust he observed created a hazard to miners. (Tr. 328). He testified that the accumulations were not black in color at that time. The weekly examination book indicates that, while rock dust was applied to other areas in the tailgate, rock dust was not applied to the area cited by Inspector Gore until after he issued his order of withdrawal.[7] (Tr. 333; Ex. G-21).

There was clearly a discrete safety hazard contributed to by the violation and I find that there was a reasonable likelihood that the hazard contributed to by the violation would have resulted in a serious injury or fatality. 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.*, 18 FMSHRC at 865. The accumulation had existed in some form for several days. I believe that it was unlikely that the cited accumulations would have ignited on their own because there were no ignition sources in the tailgate. Nevertheless, it was reasonably likely that a significant methane ignition in the longwall face would cause the float coal dust in the tailgate to go into suspension thereby intensifying the explosion. I have taken into consideration the high humidity in the tailgate entry. The float coal dust was in the area of the tailgate closest to the longwall face. I credit the testimony of Inspector Gore that there are a number of ignition sources at the face. The fact that the mine has not experienced a significant methane ignition at the face is not dispositive. A sudden release of methane can occur at the face without warning. Such an event is reasonably

[7] The electrically operated trickle duster in the tailgate is designed to spray rock dust into the air during production shifts and maintenance shifts. It is not clear from the record how well this device was operating during the time between March 8 and March 12. (Tr. 300). The trickle duster was not required by the mine's ventilation plan.

likely at some point over the life of a mine. It is also reasonably likely that the mine's ventilation system will not be capable of rapidly diluting such a large buildup of methane and that the methane will be ignited by an ignition source along the longwall face.

2. Unwarrantable Failure.

The Secretary argues that her unwarrantable failure determination should be affirmed because float coal dust was distributed over a "vast area" and the dust had been present for a significant period of time without any abatement efforts. Mine management had knowledge of these conditions and ordered that rock dust be applied in other locations in the tailgate further away from the longwall face. The accumulations were present for a distance of ten crosscuts from the entrance of the tailgate at the longwall face. The operator had applied rock dust from that point to the outby end of the tailgate. Inspector Gore did not observe any evidence that rock dusting was in progress at the cited location. There were no pallets of rock dust present. (Tr. 316-17). The sling duster that the operator contends was being used to dust the area was not in the entry at the time of the inspection but was moved into the area after the order was issued. (Tr. 359). The Secretary also contends that the sling duster would not have been an effective means to apply rock dust in the affected area because the cans used as supplemental roof support were stacked in the center of the entry. (Tr. 358).

Twentymile contests the unwarrantable designation because it acted reasonably under the circumstances to ensure the safety of miners. The float coal dust observed by the inspector did not present a hazard. The area was grey in color, which reflected the presence of rock dust. The trickle duster was in operation most of the time and hand dusting typically occurs when center cans are installed. (Tr. 344-46, 350-52). Bouwens credibly testified that he would have taken immediate steps to have the cited area rock dusted if he believed that the accumulations were hazardous when he conducted his weekly examination on March 8. Twentymile also contends that most of the tailgate had been rock dusted by the time Inspector Gore conducted his inspection. The area cited by Inspector Gore had to be hand dusted because of the presence of the center cans. Rock dust had been brought into the area for this purpose. (Tr. 337, 342).

Whether this violation was the result of the operator's unwarrantable failure is a close issue. On one hand, the float coal dust was relatively heavy and was present over a large area in the tailgate near the longwall face. Float coal dust had been accumulating in this area since at least March 8 without being abated. On the other hand, Twentymile had applied rock dust to the vast majority of the tailgate. It had to install supplemental support along the center of the entry and then apply rock dust by hand in the cited area. I credit Twentymile's witnesses with respect to the preparations that had been made.

As stated earlier in this decision, factors to be considered include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been put on notice that greater efforts for compliance are necessary, 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. Based on these factors, I find that the violation was the result of a serious lack of reasonable care by Twentymile and was therefore unwarrantable. I base this conclusion on the fact that the violation was serious, it existed in a large area of the tailgate, it had been in existence for several shifts, management was aware of the condition, and management had been put on notice that greater efforts to comply with the standard were necessary. Twentymile's failure to apply rock dust in the cited area constituted aggravated conduct but it did not demonstrate reckless, intentional, or indifferent conduct. The negligence was high. A penalty of $50,000.00 is appropriate.

V. ORDER NO. 8456778; WEST 2009-1174

A. Background.

On May 7, 2009, Inspector Art Gore issued Order No. 8456778 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.1507(a)(11)(ii) as follows:

> The 23 Right Section MMU 009-0 refuge alternative is placed just outby Crosscut No. 7+80, in the No. 1 entry, close to the right side rib looking inby. In the crosscut is approximately 8.19 tons of loose coal and debris that have been pushed against the stopping. This condition would place the deployed chamber directly against these combustible materials.

(Ex. G-17). The inspector determined than an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was high. Section 75.1507(a)(11)(ii) provides, in part, that a mine's "Emergency Response Plan (ERP) shall include the following for each refuge alternative and component: (11) suitable locations for the refuge alternatives and an affirmative statement that the locations are – (ii) where feasible, not placed in areas directly across from, nor closer than 500 feet radially from, . . . fuel, oil, or other flammable or combustible materials storage." The Secretary proposes a penalty of $4,000.00 for this order.

Inspector Gore testified that he examined the refuge alternative (the "chamber") for the 23 Right Section MMU 009-0 during his quarterly inspection. (Tr. 363, 400). The longwall section was close to being completed and the chamber was located in the No. 1 entry just outby crosscut 7+80, which was not far from the Six Main North Shaft, an escape shaft. (Tr. 363, 392, 397). Gore testified that the chamber was a Strata refuge chamber. In order to deploy this type of chamber, a miner must break the seal on the door, loosen the latches, open the door about 180 degrees, unroll the deflated tent inside so that it is extended to its full length of 45 feet, and inflate the tent. (Tr. 366-368, 399). The optimal way to deploy the tent is straight out from the door. (Tr. 368). Gore testified that the chamber, when not deployed, is about 25 feet long, 5 to 6 feet wide, and 4 feet tall. (Tr. 387). The chamber weighs at least a couple of tons and must be moved

with heavy equipment. (Tr. 375, 387). The chamber is frequently moved as the longwall retreats out of the section. (Tr. 387-88).

Inspector Gore indicated that the chamber at issue was located on the right side of the entry, about three feet from the rib, as one looked inby. He testified that the proximity of the chamber to the rib would have prevented a miner from opening the chamber door the last 10 to 20 degrees necessary to open the door to its full extent. (Tr. 367). As a result, Gore believed that the tent, when deployed, would come in contact with the chamber door and have to be deployed at an angle rather than straight out from the door. (Tr. 367-69). He acknowledged on cross-examination, however, that the tent could be rolled out of the chamber while the door was only open 90 degrees. (Tr. 393). The door to the chamber was facing inby and the lifeline, which should normally go to the door, went from the back of the chamber, over the top, and was connected to the door. (Tr. 364-65). According to the inspector, if a miner were using the lifeline, he would run into the back of the chamber before finding the door. *Id.*

Gore testified that refuge chambers are normally put in crosscuts rather than in entries, but he acknowledged that this is not a regulatory requirement. (Tr. 365, 393-94). The inspector estimated that about 8.9 tons of loose coal were piled against a stopping and that this pile would have been adjacent to the refuge tent if it were deployed at an angle. (Tr. 365-66, 369, 371). He did not know whether the coal was wet. (Tr. 388-89, 393).

Gore testified that he issued the subject order based on the conditions he observed. He said that the chamber was not in a suitable location because the door could not be opened all the way, the chamber was in a roadway rather than in a crosscut, and the tent would be immediately adjacent to combustible materials. (369-70, 373-75, 395). He agreed that, no matter where the chamber was placed, it would be immediately adjacent to coal. Gore testified that he issued an unwarrantable failure order because of the numerous refuge chamber citations he had previously issued, the public meetings that were held to discuss the critical nature of refuge chambers, and what he termed as a "total lack of reasonable care" demonstrated by the operator. (Tr. 370-71).

Inspector Gore testified that the chamber should have been placed in a crosscut that was otherwise empty and that the location should have been selected based on the condition of the ribs and roof, the likelihood of damage caused by other equipment, and the presence of accumulations or fire hazards. (Tr. 373). He determined that the violation was not S&S because the mine had two fresh air escapeways and it was unlikely that both of these escapeways would become unusable during an emergency. (Tr. 376). Gore determined that the operator's negligence was high because he had discussed refuge chambers with mine management and he does not believe that they take these chambers seriously. (Tr. 377). Based on conversations he had with miners, he did not believe that the chamber had been in the cited location for a long period of time. (Tr. 375).

Jack Reed, a longwall utility foreman, testified for Twentymile. He testified that in May 2009, the subject longwall panel was just about completed and preparations had begun to move

the longwall to a new section. (Tr. 405). Due to the lack of room in the Nos. 2 entry, a scoop was used to move the chamber from the No. 2 entry to the No. 1 entry. (Tr. 405-06). This move occurred between 6:00 and 8:00 a.m. on May 6. Once moved, the chamber was about 700 feet from the Seven Main North entries. (Tr. 406). Prior to the move, a loader was used to clean up the area where the chamber was going to be placed. This cleanup was necessary because the area was very wet and muddy. (Tr. 409-10). As a result of this cleanup, material was piled up inby the new location of the chamber. Reed testified that the piles were not coal or any other combustible material but were chunks of mud and debris. (Tr. 409, 415). A scoop was used for this work because the area was too small to use a loader to transport the material to a belt. (Tr. 410). Reed also testified that the door on the chamber only needs to be opened 90 degrees to pull the tent out, but he was not sure if the door needed to be opened wider to inflate the tent. (Tr. 410-11).

Chad Day, a longwall utility manager, testified for Twentymile. He testified that he worked at the mine on the preceding shift. He noted that a large amount of water had collected in front of the chamber. (Tr. 419). He was concerned that the presence of the water could prevent miners from deploying the tent in the event of an emergency. (Tr. 410). As a consequence, he instructed the scoop operator to move the chamber outby 50 feet from its location. (Tr. 419-20). Moving the chamber took about an hour. The chamber was moved to the side of the entry so that the entry could still be used for passage. After the move, the muddy muck in the crosscut was just inby the new location for the chamber. (Tr. 420). He did not believe that the muddy material would interfere with the chamber being deployed and the tent inflated. (Tr. 421). He did not know whether the piled material was roadway muck or coal. (Tr. 425-26).

Dianna Ponikvar testified that the refuge chamber cited by Inspector Gore could have easily been deployed and inflated in the location it was found at the time of the inspection. (Tr. 428-29). She accompanied the inspector and she testified that the chamber was situated in a position that, when deployed, the door to the tent would have been on the inby end of the tent on the corner and not close to the rib. *Id.* She testified that, although refuge chambers are to be used as a last resort, Twentymile takes these chambers very seriously. Mine examiners and face bosses examine the chambers five to six times a day; mine personnel receive rescue chamber training annually; and the chambers in the Three North Main are protected with cribbing and barricades. (Tr. 429-30). She admitted that miners commonly refer to refuge chambers as "coffins" and she said that, in the event of an emergency, she would exit the mine using a designated escapeway. (Tr. 432-33).

The Secretary argues that Twentymile violated the cited regulation by placing the chamber in a position that would have prevented proper deployment of the tent in the event of an emergency. The order should be affirmed because the chamber was in a roadway rather than in a crosscut, loose coal was piled in an area adjacent to the chamber that would interfere with the deployment of the tent, and the door to the chamber could not be fully opened due to the chamber's proximity to the rib.

Twentymile argues that the order should be vacated. First, section 75.1507(a) merely establishes what must be included in a mine's ERP. The cited subsection contains a requirement for a plan provision that, as applicable here, chambers not be placed in areas directly across from, no closer than 500 feet radially from "fuel, oil, or other flammable or combustible materials storage." This regulation does not provide an independent basis for liability. Second, the accumulated material referred to by the inspector was actually mud and other roadway material that had been piled up. It was not coal or any other combustible material. Third, in the alternative, if the material is found to be coal, it is clear that the regulation's reference to "combustible material" does not include coal or coal storage, but rather contemplates other more volatile materials for which there are specialized underground storage procedures. Finally, contrary to the Secretary's position, the cited regulation does not contemplate that, in determining suitable locations, the mine should address the potential for interference with deployment of the chamber. The chamber could be properly deployed given the position of the chamber in the entry.

I find that the Secretary failed to establish a violation of the cited regulation. First, the regulation, entitled "Emergency Response Plan; refuge alternative," is simply a list of what must be included in a mine's ERP. There has been no showing that the ERP adopted and approved by MSHA for the Foidel Creek Mine violated section 75.1507 in any way.[8] In addition, assuming that the regulation can be directly applied as a mandatory safety standard, it has not been established that the chamber was near "fuel, oil, or other flammable or combustible storage." Whether the material near the chamber contained coal or not, it cannot be construed as "flammable or combustible *storage*." It was a pile of material that was scooped up from the bottom of the roadway to provide a flat place to place the chamber. More importantly, I find that it was not established that the material was flammable or combustible. Although it is likely that some coal was in the material, I credit the testimony of Twentymile's witnesses that the pile of material was mostly mud and debris scooped up from the mine floor. I credit the testimony of Twentymile's witnesses that the chamber could be deployed at the location cited by the inspector. Consequently, this order is vacated.

VI. ORDER NO. 8456774; WEST 2009-1174

A. Background.

On May 7, 2009, Inspector Art Gore issued Order No. 8456774 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.360(d) as follows:

> There is no initials, date and time to certify that the required examination was conducted for the refuge alternative for 23 Right Section MMU 009-0 for the day shift. The last DT & I entry in the

[8] The cited section states that an ERP shall prohibit refuge chambers from being placed in the vicinity of "belt drives, take-ups, transfer points, air compressors, explosive magazines, seals, entrances to abandoned areas, and fuel, oil, or other flammable or combustible storage."

> book provided at the refuge chamber is 05-06-2009 by JR, however there is no time notation. The next entry is 05-06-2009 at 2:25 PM by LM.

(Ex. G-16). The inspector determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was high. Section 75.360(d) states that the "person conducting the preshift examination shall check the refuge alternative for damage, the integrity of the tamper-evident seal and the mechanisms required to deploy the refuge alternative, and the ready availability of compressed oxygen and air." The Secretary proposes a penalty of $4,000.00 for this order.

Inspector Gore testified there was a logbook at the chamber where examiners recorded the results of their examinations. As amended, the logbook showed that an examination had been made at 10:00 p.m. on May 6, 2009, but that no examination had been made during the day shift on May 7. (Tr. 377, 381-82; Ex. G-19 p. 2). These examinations are required to be made on the same time intervals as regular preshift examinations. Gore testified that the person conducting the examinations should check to make sure that nothing would interfere with the deployment of the chamber and should also make sure that the chamber is in a suitable location. (Tr. 383-84). Gore also stated that he checked the examination books for the mine and could not find any notation that indicated that this examination had been made. (Tr. 400-02; Ex. TCC 44).

Mr. Reed testified that he conducted an examination of the chamber on May 6 and placed the date and his initials in the logbook, but that he forgot to put the time of his examination, which was 10:00 p.m. (Tr. 411-12; Ex. G-19 p. 2). He did put the date, time, and his initials at other areas that he examined along the entry. (Tr. 412-13). Mr. Day testified that he conducted an examination of the chamber on May 7, but he did not put an entry in the logbook for the chamber because he got distracted by moving the chamber away from the water hazard. (Tr. 423, 425-26; Ex. G-19, p. 2). He testified that he also forgot to enter his examination into the prehsift examination book. (Tr. 424, 427; Ex. TCC 44). He admitted that he "just spaced it." (Tr. 426). Day testified that he did put the date, time and his initials at other locations in the area, such as at the support cans, the longwall recovery chute, and the crib storage area. (Tr. 424). Ms. Ponikvar testified that mine examiners and face bosses examine the chambers five to six times a day. She agreed that on this occasion no examination of the chamber was recorded in either the chamber log book or the preshift book. (Tr. 431-32).

The Secretary contends that the lack of an entry in the logbook at the refuge chamber demonstrates that Twentymile did not conduct the required preshift examination of the chamber prior to the beginning of the day shift. Based on the surveyor's manual, the last preshift was conducted on May 6, 2009, at 2:25 p.m., almost 18 hours prior to Inspector Gore's inspection. Section 75.360 requires that a preshift examination be conducted within three hours preceding the beginning of the shift. She argues the preshift examinations are critical to ensure that the chamber is in safe operating condition.

Twentymile argues that it did not violate section 75.360(d). Although the examinations were not certified in the record book, it is undisputed that Jack Reed performed an examination of the refuge chamber at 10:00 p.m. on the night of May 6, 2009. His testimony should be credited in this regard. His testimony is corroborated by his entry in the log maintained on the surface that he conducted the examination between 9:35 p.m. and 10:03 p.m. in 23 Right. He wrote that he preshifted the "barricade chamber," remarking that "area safe at time of exam." (Ex. TCC-44). Mr. Day testified that he performed an examination on May 7 and had the chamber moved because it was in a wet area. He admitted that he did not record his examination at the refuge chamber or in the preshift examiner's report on the surface.

The Secretary relies on the log books to establish that no examinations were conducted. Inspector Gore's order of withdrawal states that the last DT & I entry in the book provided at the refuge chamber is "05-06-2009 by JR;" however, there is no time notation. A time "10:00 p.m." was subsequently placed by this entry without an objection from the inspector. (Tr. 382; Ex. G-19 p. 2). "JR" refers to Jack Reed. The order goes on to state that the next entry is "05-06-2009 at 2:25 PM by LM." At the hearing, the inspector indicated that this "next entry" was actually the previous entry. (Tr. 378). He stated that he was at the mine at 8:05 a.m. on May 7, so more than 12 hours had passed since the refuge chamber had been examined. The refuge chamber should have been preshifted at 3:00 a.m. on the morning of May 7. (Tr. 379). The inspector testified that he did not see dates or initials at any other location near the chamber. Chad Day testified that he did conduct an examination early in the morning of May 7, but he failed to enter the DT & I in the logbook. (Tr. 423, 425-26).

I credit the evidence that shows that Mr. Reed conducted an examination at 10:00 p.m. on May 6. Thus, the only issue is whether an examination was made prior to the day shift on May 7. There are no written records showing that such an examination was made. Mr. Day testified that he, in fact, made the examination but that he forgot to record it because he got involved in moving the refuge chamber to a location that was not so wet. (Tr. 423). He testified that "during my preshift exam, I walked up to the refuge chamber and saw water in front and sloughage off to the side, that would inhibit the refuge chamber from being extracted due to the water hole." (Tr. 419). He stated that he did conduct an examination of the chamber. (Tr. 421-22, 423). I found his testimony to be entirely credible.

The cited safety standard requires that the person conducting the preshift examination check the refuge alternative for damage, the integrity of the tamper-evident seal and the mechanisms required to deploy the refuge alternative, and the ready availability of compressed oxygen and air. There is no question that he conducted a preshift examination of the area in the early morning hours of May 7, 2009, and I credit his testimony that his examination included the refuge chamber. I also find that his examination included the items set forth in the safety standard. The standard requires that an examination be performed and does not require that the results of the examination be recorded. Consequently, I vacate this order of withdrawal.

VII. SETTLED CITATIONS

At the hearing, the parties proposed to settle the remaining citations in these cases. In WEST 2009-333, the parties propose to settle five section 104(a) citations. The parties propose to reduce the negligence in Citation Nos. 7622564 and 7622565 to "moderate." The remaining citations remain unchanged. In WEST 2009-1174, the parties proposed to settle Order No. 8460288, which remains unchanged. 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**.

VIII. 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. (Ex. G-23). Twentymile had about 281 paid violations at the Foidel Creek Mine during the 15 months preceding March 11, 2008, about 196 paid violations in the 15 months preceding May 5, 2008, about 355 paid violations during the 15 months preceding December 11, 2008, and about 514 paid violations in the 15 months preceding May 6, 2009. 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.

IX. 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:

Citation/Order No.	30 C.F.R. §	Penalty
WEST 2009-0333		
6686312	75.400	$50,000.00
6686313	75.360(a)(1)	5,000.00
7622426	75.400	50,000.00
7291922	77.1605(k)	1,657.00
7284349	70.101	3,143.00
7284351	70.101	2,473.00
7622564	75.403	705.00
7622565	75.403	601.00
WEST 2009-0579		
7622381	75.360(a)(1)	2,000.00

WEST 2009-1174

8456778	75.1507(a)(11)(ii)	Vacated
8456774	75.360(d)	Vacated
8460288	75.1725(a)	27,959.00
	TOTAL PENALTY	$143,538.00

For the reasons set forth above, I enter the following: Order No. 7622381 is **MODIFIED** to a section 104(a) citation with moderate negligence; Order No. 6686312 is **AFFIRMED**; Citation No. 6686313 is **MODIFIED** to a moderate negligence citation; Order No. 7622426 is **AFFIRMED**; Order No. 8456774 is **VACATED**; and Order No. 8456778 is **VACATED**. Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $143,538.00 within 40 days of the date of this decision.[9] Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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RWM

[9] 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.