FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

September 5, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2006-531 A.C. No. 05-03836-94203
v.	:	
TWENTYMILE COAL COMPANY, Respondent	:	Foidel Creek Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Twentymile Coal Company.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Twentymile Coal Company ("Twentymile"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). An evidentiary hearing was held in Steamboat Springs, Colorado. The parties introduced testimony and documentary evidence, presented oral argument, and filed post-hearing briefs.

I. BACKGROUND AND FINDINGS OF FACT

This case involves the alternate escapeway in the 20 Right continuous miner development section. The citation at issue alleges that the alternate escapeway was not being maintained in a safe, travelable condition. The section had three entries, also called gate roads, that were being developed for longwall mining. The No. 1 entry was the alternate escapeway and was ventilated with return air. The No. 2 entry was the primary escapeway and was ventilated with intake air. This entry was used as the travelway for mine vehicles. The No. 3 entry was the belt entry.

As the 20 Right section was developed, mining progressed downhill into a syncline until the 65+00 crosscut and it proceeded back uphill with some flat areas along the way. Any water in the area tends to flow toward the bottom of the syncline. In the 20 Right section, the lowest point was in the No. 1 entry at the 65+00 crosscut. The mine had developed a pumping system to handle the water. First, a series of French drains were established in the crosscuts of the No. 2

entry to permit the collection of water for removal. Pumps operated with compressed air ("air pumps") were installed to remove the water from the drains. Because there is frequent vehicular traffic in the No. 2 entry, the presence of water creates difficult and muddy driving conditions. Twentymile also installed a series of electric pumps and water tanks in the No. 1 entry to remove water. A pump at the bottom of each tank pumps water through a hose to the next outby tank for removal from the mine. These tanks are known as "shark tanks."

Todd Croft, a fire boss, conducted the required weekly examination of the No. 1 entry on Wednesday, March 15, 2006. He testified that he did not see any significant or hazardous accumulations of water in the No. 1 entry during his examination. (Tr. 133-34). The area was muddy. He also testified that water tended to collect in areas where the syncline was present in other development panels.

On Friday, March 17, 2006, the power was turned off in the 20 Right section to advance the section. The power center was moved in an inby direction and the auxiliary fans in the No. 1 entry were moved from 67+00 to a point outby 72+50. The electric pumps in that entry did not operate during the time that the power was off. As a consequence, water began to accumulate in the No. 1 entry. In addition, the pump in the shark tank at crosscut 42+00 malfunctioned with the result that water entering the tank overflowed and ran back down to the 65+00 crosscut. Twentymile installed an electric pump at crosscut 65+00 on Friday evening to lower the water level. (Tr. 127, 131, 146). The belt in the No. 3 entry was advanced about 250 feet on Saturday, March 18.

On Sunday, March 19, MSHA Inspector Jeff Fleshman inspected the No. 1 entry. Doug Curtis, a fire boss, accompanied the inspector. They encountered some water in the entry at 65+00. They continued walking further inby up to 70+00. The area at 70+00 was flat and water was present there as well. Inspector Fleshman testified that the water extended a distance of 700 feet along the entry between 65+00 and 72+50. (Tr. 24). The inspector measured the water just outby the fans. He testified that the average depth was seven inches. He testified that the ground under the water was uneven with tire ruts throughout the area. The inspector did not measure the depth of the water in the ruts but Mr. Curtis estimated that the water was 13 to 15 inches in some locations. (Tr. 25, 129). The water in the entry did not extend rib-to-rib in all locations. A person could walk on a "meandering cow path" and stay relatively dry. (Tr. 25). The water was silted and murky. The inspector testified that there was "[n]o real distinct path to travel the escapeway in a reasonable and hasty fashion." (Tr. 28). He stated that as he approached the auxiliary fans, he "got a big piece of No. 9 wire wrapped around [his] feet" that was under the water and he tripped on it. *Id.* In addition, he stated that there were about six pieces of ventilation tubing in the entry that were each about 10 feet long.

Inspector Fleshman issued Citation No. 7636848 under section 104(d)(1) of the Mine Act alleging a violation of section 75.380(d)(1) as follows:

> The alternate escapeway (Entry 1 Return) for the 20-Right development working section was not being maintained in a safe travelable condition. Water accumulations, measured up to 7-inches deep, from rib to rib, existed from 40 feet outby crosscut No. 65+00 to 72+00 in Entry No. 1.

In the termination notice issued by Inspector Fleshman on March 21, 2006, he stated:

> This 104(d)(1) citation is modified to include that mine examiners should have seen this condition which expressed more than ordinary negligence in failing to recognize the drowning hazard which existed immediately outby the auxiliary fans on the working section.

Inspector Fleshman determined that an injury was highly likely and that any injury could reasonably be expected to be permanently disabling. He determined that the violation was of a significant and substantial nature ("S&S") and that the negligence was high. The safety standard provides that "[e]ach escapeway shall be maintained in a safe condition to always assure passage of anyone, including disabled persons." The Secretary proposes a penalty of $7,800.00 for this citation. Twentymile constructed two bridges over the areas of concern to Inspector Fleshman to abate the cited condition, one over the area around 65+00 and the other around 70+00.

II. DISCUSSION WITH ADDITIONAL FINDINGS AND CONCLUSIONS OF LAW

A. Brief Summary of the Argument

The Secretary contends that the conditions found in the No. 1 entry would hinder miners when trying to escape the mine in an emergency. Miners should not face tripping hazards and should not have to find a cow path through water when there is an emergency. Miners carrying out a disabled person would be particularly impeded by the accumulation of water. The violation was S&S because it was reasonably likely that someone would be seriously injured in the event of an evacuation during an emergency. She argues that the facts in this case are quite similar to those in *Maple Creek Mining, Inc.*, 27 FMSHRC 555 (August 2005).

The Secretary argues that Twentymile knew that water would naturally accumulate in the syncline and that it was not doing enough to control this water. A similar citation was issued on the 16 Right development section. In addition, in the 19 Right development section, muddy conditions were found in the same area. As a consequence, Twentymile had notice of the problem and knew that more needed to be done. Twentymile's failure to act amounted to an unwarrantable failure to comply with the safety standard.

Twentymile argues that the safety standard does not require an escapeway be free of normal mining conditions. A mine floor is never smooth or free of ruts. It may contain debris and other tripping hazards. The term "passable" means "capable of being traveled." (T. Br. 7). A person could get out of the mine in an emergency, including disabled miners. The citation states that the only impediment to passage was water that was up to seven inches deep. Water that is so shallow that it does not go over the tops of miners' boots does not impede travel.

The citation does not mention ruts or other obstructions in the escapeway. In addition, there was no evidence that muck was present under the water. There was a lifeline along the escapeway, but the Secretary presented no evidence that water was present along the lifeline. Twentymile argues that the testimony of its witnesses clearly establishes that the escapeway was more than adequate for travel, including travel during an emergency for disabled persons.

In addition, Twentymile argues that the cited conditions were not S&S because Inspector Fleshman only said that the water in the escapeway *could* slow egress or cause someone to stumble. The remainder of his testimony addressed the nature of any injuries if such an event were to occur. Consequently, the Secretary did not establish the third element of the *Mathies* test. In addition, it was not reasonably likely that anyone would use the alternate escapeway in the event of an emergency.

Finally, Twentymile contends that it did not unwarrantably fail to comply with the safety standard. Twentymile installed drains and air pumps in the 20 Right Section as the section was developed. It installed the system of electric pumps with shark tanks to remove any water that was not removed by the air pumps. When water began accumulating on the evening of March 17, the company installed an additional electric pump in the lowest area. The water had not been present in the No. 1 entry for a significant length of time and it was not deep enough to create a hazard to miners.

B. Analysis of the Issues

1. The Violation

The safety standard requires that *each* escapeway be maintained in a *safe condition* to *always assure passage* of *anyone*, including disabled persons. Thus, both escapeways must be in a safe condition and must be travelable by anyone, including disabled persons, at all times. *Maple Creek*, at 561. I find that the Secretary established that the alternate escapeway was not in a safe condition and was not travelable by everyone who might need to use it in an emergency. Although the water was not extraordinarily deep and it did not extend from rib to rib in all areas, it would slow people down if they were trying to exit the mine using this escapeway. Any ruts that were obscured by the water would be stumbling hazards that would also slow people down trying to escape in the event of an emergency. Finally, the extra ventilation tubes, which are normally hung from the roof until needed, were in the water along with some of the wire used to hang these tubes. These obstructions would also tend to slow people down as they attempt to

exit the working section. I find that the alternate escapeway was not in a safe condition and, as a consequence, the passage of persons during an emergency could not be assured.

I reject Twentymile's argument that to "assure passage of anyone" only means that the escapeway must be "passable" in the sense of "capable of being traveled." There is no question that the alternate escapeway was capable of being traveled because Inspector Fleshman and Doug Curtis walked through the cited area. It is clear from the language of the safety standard itself, the purposes of the standard, and Commission precedent that an escapeway must be more than just "passable." *Maple Creek*, at 560. Miners would "likely need to move expeditiously through the area in order to seek safe passage away from what could be a dangerous underground environment." *Id.* The water and other obstructions would likely cause the miners, especially stretcher bearers or others assisting disabled persons, to slow their egress, to slip and fall, or to drop the stretcher. Consequently, I find that the Secretary established a violation.

2. Significant and Substantial

Whether the violation was S&S is a closer question. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). 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 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary established the first two elements of the test. It is the third element of the *Mathies* test that requires the most careful analysis. The Commission has held that judges should ordinarily not rely on presumptions when analyzing the third element. *Manalapan Mining Co.*, 18 FMSHRC 1375, (Aug. 1996). Nevertheless, it would be too simplistic to hold that the violation was not S&S because it was unlikely that there would have been an emergency evacuation of the section or it was unlikely that the miners would need to use the alternate escapeway in an emergency. The escapeway requirements in section 75.380 were promulgated to make sure that both escapeways are safe and readily available in the event of an emergency evacuation. As a consequence, I must analyze whether there was a reasonable likelihood that the hazards *contributed to* by the violation would result in an injury in emergency situations.

On one hand, the water was not so deep as to make the entry impassable. There is no evidence that the inspector or Mr. Curtis became mired in muck as they walked through the entry. Wire and ventilation tubing was present only at the extreme inby end of the alternate escapeway just outby the auxiliary fans at 72+50. It only took a few minutes for these obstructions to be moved to the side of the entry. The No. 1 entry is the alternate escapeway. Miners would always use the No. 2 intake entry to evacuate the section, either in vehicles or on foot, if that entry were available. The No. 2 intake entry was clear of water and other obstructions. On the other hand, the No. 1 entry had ruts under the water that could not be seen. Miners would have to meander through the entry to find those areas that were clear of water. Inspector Fleshman tripped over some wire in the water as he inspected the entry. (Tr. 28). The inspector saw water flowing under a stopping from the No. 2 entry into the No. 1. (Tr. 26).

I find that the preponderance of the evidence establishes that it was reasonably likely that the hazards present in the cited areas of the No. 1 entry would contribute to an injury in the event of an emergency evacuation. I rely on the testimony of Inspector Fleshman and Mr. Curtis in reaching this conclusion. (Tr. 33-34, 129-30). When Inspector Fleshman was asked to discuss the hazards that he believed were present in the escapeway, he testified:

> The tripping hazards. The blocked escapeway. Basically, you would have to move all the tubing out of the way coming out from the section. Tripping, slipping, falls. Not being able to see where you were walking in the muddy water if you are coming out of there in haste. You need a clean place to take off, not just guess where you are having to walk in the entry.

(Tr. 33). As the safety standard requires, I have taken into consideration the ability of miners to transport an injured miner out of the No. 1 entry. The uneven footing that was hidden under the murky water, as well as the other obstructions, would make it reasonably likely that someone would trip and fall. Although miners may be able to mitigate the risk of injury through the exercise of caution when exiting the mine, the ability of miners to walk cautiously through hazardous areas in the event of an emergency is not part of the analysis under the third element of the *Mathies* test. *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). I also find that it is reasonably likely that any injury would be of a reasonably serious nature. The injuries would range from a twisted ankle to broken bones. I reject Inspector Fleshman's conclusion, set forth in the termination notice, that the conditions presented a drowning hazard. It was highly unlikely that anyone would drown in the No. 1 entry in the event of an emergency evacuation.

3. <u>Unwarrantable Failure</u>

I find that the Secretary did not establish that the violation was the result of Twentymile's unwarrantable failure to comply with the safety standard. The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as

"reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *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).

Twentymile knew that the syncline presented a challenge because water tended to accumulate in the area. When it developed the entries in each section that crossed the syncline, it blasted a hole in the floor at a number of crosscuts and installed French drains. It removed the water from the drains using air pumps that continue to operate even when the power is off during a power move. Such power moves are required every three or four days when a longwall section is being developed. Twentymile installed a series of shark tanks with electric pumps in them to remove any water that was not being removed by the system of French drains. When excess water was discovered in the No. 1 entry on March 17, an additional electric pump was brought in and installed to remove the water.

The Secretary contends that the extra pump that was brought in was raised up too high with the result that it was "sucking air" rather than removing water. The pump was not installed in a sump, but was placed on the floor of the entry. I credit the testimony of Twentymile's witnesses that this electric pump was removing water from the No. 1 entry. (Tr. 93-94, 109-110, 121-22).

I find that the evidence establishes that the shark tank at 42+00 was not operating properly. Shift Foreman Allen Meckley wrote in his notes on March 18 "Shark Tank 42 running over - pump kicking power." (Tr. 105-06; Ex. R-2). He testified that he asked the fire boss to check the pump out and reset the power. (Tr. 106). The improperly operating pump at 42+00 allowed water to recirculate back to the area around 65+00. The shift foreman believed that the problem with the shark tank had been corrected.

I find that Twentymile's conduct amounted to ordinary negligence rather than aggravated conduct. It was not ignoring the water problem created by the syncline and it was not indifferent to the problem. It had taken several measures to remove the water from the mine, as described above. If the shark tank pump at 42+00 had not continued to kick out, it is likely that most if not all of the water would not have been present on March 19. In looking at the factors set forth in *Mullins & Sons Coal*, I find that the evidence establishes that the condition only existed for about two days. (Tr. 97, 121, 127-28, 155). Twentymile had knowledge of the cited condition and had been taking steps to remove the water, as described above. On direct examination, Inspector Fleshman testified that there was water present from "just outby crosscut 65 to just outby

crosscut 72+50" for a distance of 700 feet. (Tr. 24; Ex. J-2). The evidence establishes, however, that water was mostly present around 65 and outby the auxiliary fans. (Tr. 54, 122-23). The No. 1 entry between these two locations was dry with water in some locations. Inspector Fleshman did not measure the depth of the water in these areas. As a consequence, I find that the violative condition was not particularly extensive. As described above, Twentymile had undertaken several initiatives to eliminate or reduce the water problem in the area of the syncline.

The Secretary contends that Twentymile had been put on notice that greater efforts were necessary for compliance. I disagree. The Secretary points to a citation that had been issued two years earlier when there was 16 inches of water in the No. 1 entry of the 16 Right development section. (Ex. G-3). Twentymile upgraded its pumping systems after that citation was issued. She also relies on the discussion between Inspector Fleshman and the mine's safety director at the onset of the instant inspection during which he informed the company that escapeways were going to be given "heightened scrutiny" during MSHA inspections. (Tr. 17-18, 154-55). The inspector started his inspection two to three days before he issued the citation. This notice did not put Twentymile on notice that greater efforts were needed to comply with the standard. Inspector Fleshman simply told Twentymile that MSHA would be looking more closely at escapeways as a result of the Sago accident. Finally, the Secretary relies on muddy conditions that the inspector observed in the 19 Right gate road earlier in the inspection. (Tr. 18-19). He advised the company's safety director at that time that mud can impede passage during an emergency evacuation. Again, the muddy conditions and the inspector's statement did not put Twentymile on notice that greater efforts were necessary in the 20 Right section.

Although the violation was present for anyone to see, mine management genuinely believed that it had taken steps to eliminate the hazard. Although I determined that the violation was S&S, it did not pose a high degree of danger to miners. Violations of the standard often involve situations in which 16 inches or more of water is present or there is a blockage in the escapeway. In this instance, there was an S&S violation of the standard, but I do not find that the facts presented "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care" on the part of Twentymile management.

III. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation. The parties stipulated that Twentymile is a large operator. MSHA issued about 271 citations and orders at the Foidel Creek Mine in the two years preceding March 19, 2006. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect on Twentymile's ability to continue in business. My findings on gravity and negligence are discussed above. The penalty was reduced because I determined that the violation was the result of Twentymile's moderate negligence rather than its unwarrantable failure to comply with the safety standard. In addition, as discussed above, I find that the violation was not quite as serious as Inspector Fleshman believed it to be.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $3,000.00 for this violation. Accordingly, Citation No. 7636848 is **MODIFIED** to a section 104(a) significant and substantial citation with moderate negligence. Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $3,000.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor,1999 Broadway, Suite 1600, Denver, CO 80202-5710 (Certified Mail)

R. Henry Moore, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222 (Certified Mail)

RWM