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June 17, 2010

TWENTYMILE COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 2008-787-R
v.	:	Order No. 7610956; 03/12/2008
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Foidel Creek Mine Mine ID: 05-03836
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2008-352 A.C. No. 05-03836-134666
	:	Docket No. WEST 2008-1321
v.	:	A.C. No. 05-03836-155287-01
	:	Docket No. WEST 2008-1576
TWENTYMILE COAL COMPANY, Respondent	:	A.C. No. 05-03836-161331
	:	Foidel Creek Mine

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Twentymile Coal Company; Kristi L. Henes, 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 a notice of contest filed by Twentymile Coal Company ("Twentymile") and petitions for assessment of civil penalty filed by the Secretary of Labor, 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.

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 most of the citations at the start of the hearing, so only Order No. 7622519 and Citation No. 7622452 were adjudicated.

I. ORDER No. 7622519; WEST 2008-1576

A. Background

On July 8, 2008, Inspector Carol Miller issued Order No. 7622519 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.380(d)(7)(iv) as follows, in part:

> The lifeline in the escapeway of 22 Right at crosscut 62+50 in the No. 1 entry, crosscut 71+25 to crosscut 75+00 in the No. 2 entry was not located in such a manner for miners to use effectively to escape. The lifeline was covered by a pump cable in the No. 1 entry. In the No. 2 entry, the lifeline at crosscut 65+00 was covered by a communication cable. From 71+50 to crosscut 75+67 in two locations the lifeline was cut in half and tied to the mesh with 6 feet and 2.5 feet of continuous cable not intact plus the cable was hung from the roof with a snap link, cable hangers, and hooked in the roofing mesh throughout this location.

(Ex. G-1). The inspector determined than an injury was unlikely but that any injury would result in lost workdays or restricted duty. She determined that the violation was not significant and substantial ("S&S") and that the company's negligence was high. The unwarrantable failure determination was based, in part, on the fact that the mine was issued a citation on July 3, 2008, for a similar violation. Section 75.380(d)(7)(iv) provides that "[e]ach escapeway shall be – . . . (7) [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be – . . . (iv) [l]ocated in such a manner for miners to use effectively to escape." The Secretary proposes a penalty of $4,000.00 for this order.

Inspector Miller testified that as she inspected the mine she followed the route of the primary escapeway for the 22 Right longwall section. While traveling the route, she encountered two areas where the lifeline had been severed as well as other areas where the lifeline was not accessible to miners who may have needed it in the event of an emergency. (Tr. 13). The lifeline had been lifted up to the roof and hooked to the roof mesh by an assortment of snap links and high voltage cable hangers. (Tr. 13-14, 33). She testified that because the roof was nine feet high, the lifeline could not be reached by miners in those areas where it was hanging from the

roof. (Tr. 15). Inspector Miller further testified that pump cables and communication cables were also hung from the roof and crossed under the lifeline with the result being that a miner might not be able to pull down the lifeline during an emergency. (Tr. 14). Finally, she testified that the lifeline had been cut in two areas and the ends had been tied to the roof mesh creating a gap of six feet and another gap of two and a half feet in the lifeline. (Tr. 13-14, 21-22).

Inspector Miller testified that the violative conditions existed in several locations over about 1,300 feet of the lifeline. The lifeline was either not continuous or was not located in an area where it could be reached by miners. She testified that lifelines are designed to allow miners to use their hands to find their way out of the mine in the event of an emergency. (Tr. 39). The lifeline and attached cones provide a visual and tactile means of conveying the route and direction of the escapeway. (Tr. 41). In a smoke-filled environment, miners are trained to locate and follow the lifeline out of the mine as quickly as possible. (Tr. 17).

Rob Coop worked in Twentymile's safety department at the time of the inspection. Coop testified that the cited conditions existed because there had been a power move during the previous (graveyard) shift. A power move generally involves turning off and locking out power to the belts, disconnecting hydraulic equipment, removing the water lines from the pumps, disconnecting the power, moving the power train and pumps, moving the cables, and then reconnecting everything back together. (Tr. 48-49). He testified that snap links and cable hangers were used to put the lifeline up near the ceiling during the power move so that the equipment would not snag or cut the lifeline. (Tr. 51). Mr. Coop testified that, more than likely, the lifeline had been cut so that the hoses and cables could be dropped down during the power move. (Tr. 50). Coop assumed that the lifeline was not fixed after the power move because the crew "got busy and did not get back to it." *Id.* He did not believe that it was necessary for the crew to cut the lifeline during a power move but that the crew probably did not want to disconnect the power cables because they are large, heavy, and difficult to move. (Tr. 59-62). He stated that the cable connectors weigh between 90 and 100 pounds. (Tr. 62). Coop could not explain why the preshift examiner did not observe the conditions cited by Inspector Miller. (Tr. 59).

Tuck Timothy Walker was a scoop operator who was functioning as a step-up lead man for the outby areas at the time the order was issued. (Tr. 64). Walker testified that he conducted a preshift examination of the subject area on July 8, while Scott Simpson, the longwall foreman, conducted the preshift examination of the longwall face area. (Tr. 67-69). He testified that his shift started at 6:00 a.m. on July 8 and that he would have reached the cited area during his examination between 6:45 a.m. and 7:00 a.m. (Tr. 71-72). Walker said that he was not sure if he had traveled through the cited area before the order was issued by Inspector Miller, but that he would definitely have examined it at some point during his preshift on July 8. (Tr. 74).

Inspector Miller testified that on July 3, 2008, five days before the issuance of the subject order, she issued Citation No. 7622518 for a violation of the same safety standard. (Tr. 18-19; Ex. G-3). Miller cited a lifeline that had been rendered inaccessible because various cables

crossed under the lifeline and would have prevented miners from pulling the lifeline down from the roof and using it to guide them out of the mine. She said that a crew had completed a power move eight days before the citation was issued and it appeared that the condition had not been corrected during that time. (Tr. 36). Inspector Miller testified that she discussed the violation and what she perceived as a developing pattern of lifeline violations at the mine with Richard Conkle, Twentymile's safety manager, at the closeout conference during the July 3 inspection. (Tr. 20). His usual practice after receiving a citation is to make copies of the citation, place the copies in the supervisors' office, and then review the citation with these supervisors. (Tr. 85-86). The supervisors then review the citations with the crews before they go underground. Conkle was fairly certain that these steps were taken after the July 3 citation was issued. (Tr. 86). Conkle testified that it was very unlikely that there would be so much smoke in an escapeway that a miner would have to use a lifeline. (Tr. 87). Coop testified that he was aware of the July 3 citation. (Tr. 55).

Inspector Miller testified that she based her high negligence and unwarrantable failure finding on a number of factors. She said that she discovered the violation when she came to the mine to terminate the citation she issued on July 3 for a violation of the same standard. (Tr. 16, 25). Miller believed that the previous citation, as well as several other prior citations for similar conditions, put Twentymile on notice regarding the seriousness of the violation and that it needed to take greater efforts to comply with the lifeline standards. (Tr. 19-20, 23-24). She testified that at the time she arrived on July 8, coal was being mined but no efforts were being made to correct the violative condition. The crew had been in the mine for a little over an hour at the time she discovered the violation.

Inspector Miller also testified that the cited condition should have been detected during the preshift examination. (Tr. 16). The inspector did not talk to Walker, but she did talk to Simpson who told her that the area would have been preshifted by Walker. Inspector Miller recognized that while a preshift examiner should be looking for immediate hazards, such as dangerous rib conditions or methane accumulations, he should also be concerned with other conditions, such as the condition of the lifeline because it is important and easy to observe. (Tr. 43-44). Miller testified that the cited area was preshifted every eight hours and that, with a shift coming on after the power move, a foreman should have been aware of the condition. (Tr. 16).

The inspector testified that the power move was made on the previous shift and the miners who moved the power center and the foreman in charge of the move should have made it a priority to make sure that the lifeline was available for use after completion of the move. (Tr. 17, 18, 22). Further, if the mine was going to hang the lifeline from the roof, breakable ties should have been used that would have allowed miners to pull down the lifeline for use in the event of an emergency. (Tr. 33-34). Miller testified that the cited conditions were very obvious. (Tr. 17). She also believed that the violative condition was extensive because it was not isolated to a single area but existed over a distance of about 1,300 feet of the lifeline. (Tr. 17, 21). Miller acknowledged that there was a second escapeway that went inby the longwall and that this escapeway was completely isolated from the cited escapeway. (Tr. 29-30).

B. Summary of the Parties' Arguments.

The Secretary argues that the order should be affirmed as written. The Secretary contends that the unwarrantable failure and negligence findings are supported by the evidence. Inspector Miller issued an almost identical citation five days earlier and that citation put Twentymile on notice as to what was required. In spite of this notice, Twentymile created this condition on the previous shift and did not immediately correct it after the power move. The condition was extremely obvious, yet it was not recognized during the preshift or onshift examinations and it was not corrected. The condition was also rather extensive as it existed over about 1,300 feet of the lifeline.

Twentymile contends that the Secretary did not establish that the violation was the result of its unwarrantable failure to comply with the safety standard. A move of the longwall power center during the prior shift necessitated severing the lifeline in two areas and hanging the lifeline near the roof. These steps were taken to protect the lifeline from damage during the move of the power center. This condition lasted for a short period of time. Although the 8-hour cycle preshift examination for the day shift had begun, the examiner had not reached the area cited by Inspector Miller. The condition was not extensive and it was limited to a small area of the lifeline that extended through thousands of feet of escapeway. Further, the issuance of the citation for a similar violation on July 3 is not dispositive of an unwarrantable failure finding.

C. Analysis.

The plain language of the safety standard provides that a lifeline must be (1) "continuous," and (2) "located in such a manner for miners to use effectively to escape." *See Jim Walter Resources, Inc.*, 31 FMSHRC 1208 (Oct. 2009) (ALJ); *Cumberland Coal Resources*, 31 FMSHRC 1147 (Sept. 2009 (ALJ) (Pet. for disc. rev. granted by Comm. on Oct. 15, 2009). In the present case, the lifeline had been cut in half in two places and it was covered by a pump cable and by a communication cable in other locations. Thus, I find that Twentymile violated both of the requirements set forth in the standard. The lifeline was not continuous in several locations and it was not located where miners could use it for escape in other locations.[1]

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission restated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more

[1] Twentymile frequently hangs the lifeline from the roof with hangers so that it is not down on the ground and it can be easily reached by miners. In the case at hand, the lifeline was pulled up to the roof, or close to the roof, during the power move. In this state, miners might not be able to reach it. Because it was above power and communication cables, miners would also not be able to easily pull it down even if they could reach it.

> serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); see also *Buck Creek* [*Coal*, Inc. v. FMSHRC, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
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> Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as 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 is obvious or poses 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) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). 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. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

I find that the Secretary established that this violation was the result of Twentymile's unwarrantable failure to comply with the safety standard. The first aggravating factor to be addressed is the length of time that the violative condition existed. It appears that the violative condition first existed during the graveyard shift that began on July 7, 2008, during which a power move was conducted. The lifeline was severed and raised to the roof in order to prevent tearing the lifeline with the equipment that was being moved. It is not clear what time on July 7

the power move crew created the condition but, more than likely, it was one of the first tasks they completed. The condition was not abated until about 8:25 a.m. on July 8, 2008.

Twentymile asserts that the short duration of the violative condition necessitates a finding that the violation "cannot properly be considered an unwarrantable failure." (Twentymile Br. 2). Although the condition existed for less than a full shift, it was a condition that was knowingly created by the shift conducting the power move. This crew neglected to fix the condition upon the completion of the move or to make sure that the oncoming crew corrected the condition at the start of the following shift. Instead, Twentymile began mining coal the following shift without taking steps to repair the lifeline. Twentymile argues that the condition would have been discovered by Mr. Walker during his preshift. Assuming that to be true, it must be remembered that the purpose of a preshift examination is to look for hazardous conditions, not to make sure that work crews are doing their job. Twentymile should not rely on preshift examinations to make sure that lifelines are repaired after power moves. It should have been part of the crew's job to fix the lifeline after the power station was moved or, if the crew ran out of time, to take steps to ensure that it was repaired at the start of the following shift.

The second aggravating factor that must be looked at is the extent of the violative condition. Inspector Miller testified that this was not an isolated violation. Rather, it existed for approximately 1,300 feet of the lifeline. The lifeline had been severed in two places and was inaccessible to miners for an extended length. Twentymile argues that the violative condition only existed for a small portion of the total lifeline that extended for thousands of feet through the mine. This argument is troubling. A severed, inaccessible lifeline serves very little purpose in a smoke-filled environment, which is exactly the kind of environment that lifelines are designed to address. Inspector Miller found that 20 people were affected by the violative condition. An interruption in, or inaccessible portion of, a lifeline has the potential to render useless the remaining length of the lifeline that exists outby the violative condition. If a miner inby the violative condition begins to utilize the lifeline and comes upon an interruption or inaccessible portion, they may never have the chance to find and utilize the remainder of the lifeline that exists on the other side of the interrupted or inaccessible portion.

The third aggravating factor that must be addressed is whether the operator has been placed on notice that greater efforts are necessary for compliance. On July 3, 2008, Inspector Miller issued a citation for violation of the same standard that is the subject of the order in question. Twentymile argues that the citation issued on July 3, 2008, cannot be independently dispositive of the unwarrantable failure issue. That is true, but it is one of the factors that must be considered. The Commission has recently stated that, in addressing whether a violation is the result of an unwarrantable failure, "[w]hile an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge." *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009). The July 3rd citation was issued for cables and hoses passing under the lifeline, thereby making the lifeline inaccessible to miners who may have needed it in the event of an emergency. The subject order was issued in an area described as "some distance" from the area that was the

subject of the earlier citation. Be that as it may, the violative conditions are very similar. Inspector Miller spoke with Conkle during a closeout conference for the July 3rd citation and expressed her concern regarding a series of lifeline citations that had been issued. Conkle indicated that, generally, copies of citations are posted for all miners to see, placed in the supervisor's office, and reviewed and discussed with supervisors who then do the same with their crews. Coop indicated that he was aware of this violation. I find that Twentymile was on notice that greater efforts were necessary for compliance with the lifeline standard.

The fourth aggravating factor that must be addressed is the operator's effort in abating the violative condition. As discussed above, Twentymile was not in the process of eliminating the hazard when Inspector Miller encountered the condition and it had not been entered in the company's examination books. If the outby crew were in the process of repairing the lifeline when Inspector Miller arrived, then it could be said that the operator was attempting to correct the condition.

The fifth aggravating factor that must be addressed is whether the violation was obvious or posed a high degree of danger. According to Inspector Miller, the condition was very obvious. Coop testified that he observed the condition at the same time Miller did, but he was unable to offer an explanation as to why the condition was not recognized by a preshift or onshift examiner, or the foreman in charge of the power move on the July 7. Given the importance of lifelines in the event of an emergency, the fact that lifelines are designed with reflective tape to make them easily visible, and the fact that both Miller and Coop noticed the condition, I find that the violation was "obvious." As Miller noted, miners should always be conscious of the condition of the lifeline, which in some cases may be their only means of finding a way to safety.

The sixth, and final, aggravating factor that must be considered is the operator's knowledge of the existence of the violation. There is no dispute that the lifeline was severed and raised to the roof by the crew that conducted the power shift. It is clear that Twentymile's employees was aware of the cited conditions because they created them. The conditions were not remedied because the crew got busy and did not get back to it. Thus, Twentymile was aware of the condition, but it decided to not fix it and instead concerned itself with resuming production.

The above analysis of aggravating factors, combined with the lack of substantive mitigating factors, demonstrates that Twentymile engaged in aggravated conduct constituting more than ordinary negligence. In this particular case, the aggravated conduct is most accurately characterized as "indifference" or "a serious lack of reasonable care" on the part of Twentymile. The cited condition was created in order to more easily conduct the power move. Further, the violative condition was not timely addressed after the power move was completed. For the same

reasons, Inspector Miller's finding of high negligence is appropriate.[2] I find that a penalty of $5,000.00 is appropriate for this violation.

II. CITATION No. 7622452; WEST 2008-1321

A. Background

On April 11, 2008, Inspector Art C. Gore issued Citation No. 7622452 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.380(d)(2) as follows:

> Each escapeway in the mine shall be clearly marked to show the route and direction of travel to the surface. The red reflectors in the alternate escapeway located in 20 Right #3 entry from crosscut 15+00 outby were completely covered with dust and could not be seen.

(Ex. G-5). The inspector determined than an injury was unlikely but that any injury would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was moderate. Section 75.380(d)(2) provides that "[e]ach escapeway shall be – . . . (2) [c]learly marked to show the route and direction of travel to the surface." The Secretary proposes a penalty of $946.00 for this citation.

While at the mine, Inspector Gore traveled through the 20 Right No. 1 entry.[3] He noticed that there was dust on the reflectors hanging from wires attached to the center of roof. The mine uses reflectors to mark ecapeways and different colors are used to designate different escape routes. Inspector Gore testified that the red reflectors in the entry used as the alternate escape route were caked with a combination of rock dust and coal dust. (Tr. 95, 100). He stated that no reflective material could be seen on the reflectors when a light was shined down the entry because they were covered with dust. Gore testified that it is crucial for mine operators to keep reflectors clean so that miners will know where to go in the event of an emergency that requires escape from the mine. He further testified that the Secretary's safety standard requires escapeways to be clearly marked and that the reflectors in the present entry were too dirty to provide guidance to miners in the event of an emergency. This condition existed for about 1,000

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[2] Twentymile also argues that the gravity of the violation was improperly evaluated under the assumption that an emergency had occurred and the lifeline needed to be used. Inspector Miller determined that an accident or injury was unlikely and that the violation was not S&S. She determined that, if there were an injury, it would likely result in lost workdays or restricted duty. She determined that 20 people were affected by the violation based on the number of people on the longwall crew. I find that the inspector's gravity determination is supported by the evidence.

[3] At the hearing, Inspector Gore admitted that the reference in the citation to the No. 3 entry was incorrect and that the condition he cited was actually in the No. 1 entry. (Tr. 93).

feet in the alternate escapeway, which is the tailgate entry for the longwall section and is a return air course. (Tr. 95, 97, 102).

Gore acknowledged that, otherwise, the escapeway was well maintained, the miners were well trained, and the operator has effective training policies for underground escape routes. (Tr. 96-97). He noted that he has previously issued similar citations to Twentymile. (Tr. 99-100). Inspector Gore testified that the reflectors were cleaned during the weekly examination and that six days had passed since the last examination. (Tr. 101). He said that six days would have allowed enough time for dust to build up on the reflectors but it was not enough time for a person to become aware of it. *Id.* Loren Young, a former Twentymile employee, testified that he would regularly clean off the reflectors during his weekly examinations of the escapeways. (Tr. 114).

Gore acknowledged that he believed that there was a lifeline in the alternative escapeway, but he did not know whether the lifeline was color coded in order to distinguish the alternate escapeway from the primary escapeway. (Tr. 102, 109). Gore was accompanied by an MSHA trainee inspector. His notes reflect that a lifeline was present in the escapeway. (Tr. 102-103). Inspector Gore stated that lifelines are to be used in combination with reflectors and not to replace them. (Tr. 106).

Dick Conkle testified that there was a lifeline in the cited escapeway and that it met all of the requirements of the cited safety standard. (Tr. 121). He testified that the lifeline had reflective material on the directional cones and that these cones clearly marked the escapeway. (Tr. 123).

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

The Secretary argues that Twentymile violated section 75.380(d)(2) when it failed to maintain a clearly marked escapeway which would show the route and direction of travel to the surface. Specifically, the Secretary asserts that the dust-covered reflectors were too dirty to clearly mark the alternate escapeway. (Tr. 129). The Secretary argues that, in evaluating whether there is a violation of the cited escapeway standard, the judge must assume the existence of an emergency. (Tr. 128).

The Secretary argues that the issuing inspector, as well as other MSHA inspectors, had cited this condition on multiple occasions prior to the issuance of the citation in question, thereby placing Twentymile on notice of what was required for compliance. (Tr. 129). Further, the Secretary contends that the presence of a lifeline, which may satisfy lifeline standards added by the 2006 MINER Act, does not satisfy the cited standard and Twentymile must still maintain the reflectors in the escapeway. (Tr. 128-130) (*citing Spartan Mining Co.*, 30 FMSHRC 699 (Aug. 2008)).

Twentymile argues that the citation should be vacated given that the lifeline clearly marked the alternate escapeway. There is little to no guidance regarding what "clearly marked"

means within the cited standard. (Tr. 132). Further, reflectors are not required, nor are they the only means of "clearly marking" an escapeway. (Tr. 132). The cited standard is general and utilizes vague language. (Tr. 133). On the other hand, the lifeline standard at Section 75.380(d)(7) is specific and necessarily satisfies the more general standard that the Secretary alleges was violated. (Tr. 133; Twentymile Br. 2). Where two associated standards exist, the rules of statutory interpretation dictate that the more specific standard controls the more general. (Tr. 133; Twentymile Br. 3 (*citing Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

Reflectors, while beneficial in marking a smoke-free escapeway, provide little assistance in a smoke-filled escapeway and don't provide a directional component, regardless of whether they are covered in dust. (Tr. 133). A lifeline with reflective materials and directional cones clearly marks the escapeway in a smoke-free environment in addition to providing tactile directional input to a miner in a smoke-filled environment. (Tr. 133).

C. Analysis

Neither the Commission nor its ALJs have directly addressed the issue of what is required to "clearly mark" an escapeway such that it shows the "route and direction of travel to the surface." There is no direct guidance regarding the use of a lifeline to satisfy the cited standard's requirement that escapeways be "[c]learly marked to show the route and direction of travel to the surface." The Secretary contends that the presence of a lifeline does not satisfy the cited standard. Moreover, she argues that the two standards, i.e., 75.380(d)(2) and 75.380(d)(7), are not duplicative requirements and, therefore, require different means of satisfaction. As support for her argument she references *Spartan Mining Co.*, 30 FMSHRC 699 (Aug. 2008). The *Spartan* case cited by the Secretary addresses the issue of whether two citations are duplicative of each other, thereby punishing the operator twice for the same violation. That is not the issue here. Here, the issue is whether a lifeline is capable of "clearly marking" an escapeway "to show the route and direction of travel to the surface." Only one citation was issued in this instance and, therefore, duplication is not an issue. The lifeline was not cited nor was it referenced in the citation as a possible way of marking the escapeway. Nevertheless, Inspector Gore acknowledged that reflectors were not the only way of marking an escapeway and, further, that a lifeline is capable of marking an escapeway. (Tr. 103-105). For that reason, an analysis must be undertaken that asks whether the particular lifeline present in the alternate escapeway at the Foidel Creek Mine "[c]learly marked [the escapeway] to show the route and direction of travel to the surface."

In *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 651-652 (2008), the Commission outlined the means of interpretation of a regulatory term as follows:

> Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different

> meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation' ") (quoting *Bowles v. Seminole Rock & Sand Co.*,325 U.S. 410, 414 (1945) (other citations omitted)).
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> The "language of a regulation . . . is the starting point for its interpretation." *Dyer* [*v. United States*], 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning of the word. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); Peabody Coal Co., 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table).

(Footnote omitted). The cited standard is somewhat ambiguous. The plain meaning of the language is instructive. "Clear," the adverb form of the adjective in question, is defined as "easily visible : PLAIN [,] . . . free from obscurity or ambiguity : easily understood : UNMISTAKABLE." *Webster's New Collegiate Dictionary* 205 (1979). "Marked" is defined as "having an identifying mark." *Id*. at 697. "Mark" is defined as "a conspicuous object serving as a guide for travelers." *Id*. Based on the plain meaning of these words, the cited standard requires that escapeways be equipped with easily visible or understood, conspicuous objects, that show the route and direction of travel to the surface.

Inspector Gore agreed that a lifeline is capable of marking an escapeway. (Tr. 103, 105). When presented with a sample of a lifeline at the hearing, Inspector Gore also agreed that it included reflectors and that the lifeline with cones installed would mark the escapeway. (Tr. 103-105; Ex. G-2, Ex. TM-3). The inspector agreed that the safety standard does not required reflectors, it only requires that escapeways be clearly marked. (Tr. 104).

There is no pertinent legislative history that discusses either the regulatory or statutory language that requires escapeways to be "properly" or "clearly" marked. However, given the facts of this case, and the argument raised by the operator regarding lifelines, the legislative history of the 2006 MINER Act and its requirement that lifelines be installed in escapeways may

be helpful. A Senate Report on the MINER Act included the following language regarding lifelines:

> Providing underground personnel with assistance in locating and following escape routes, particularly in circumstances of diminished visibility, is an important feature in any emergency plan. Flame-resistant directional lifelines are likely the most common method for achieving this end, and are the most reasonably calculated to remain usable in a post-accident setting.

S. REP. NO. 109-365 (2006).

There is little to no dispute regarding the facts in this matter. The dust-covered reflectors were not easily visible. Coal and rock dust were caked on the reflectors hanging from the roof such that, when a light was shined down the entry, no reflective material could be seen. Inspector Gore testified that, while it was obvious to him that the round, dust-covered objects hanging from the roof were reflectors designed to mark the escapeway, the reflectors were nevertheless difficult to see. (Tr. 106-107). Further, both parties acknowledged that, in a smoke-filled entry, the dust-covered reflectors would be nearly impossible to see. In an emergency, a miner should not have to spend too much effort searching for his escapeway. Operators must take more than general precautions to ensure that miners can quickly and safely exit the mine in an emergency. The plain meaning of the cited standard requires that escapeways be equipped with easily visible or understood, conspicuous objects, that show the route and direction of travel to the surface.

Inspector Gore testified that reflectors were not the only means of marking an escapeway. Gore acknowledged that white signs with black lettering were capable of marking escapeways. Further, he acknowledged that lifelines were capable of marking escapeways. He qualified that statement by saying that lifelines should only be used to "enhance" the reflectors, yet he could not point to any formal guidance or policy that indicated such. I see no reason why a lifeline should *per se* be incapable of satisfying the cited standard. To say that something is incapable of satisfying one standard because it satisfies another standard defies logic and finds no support within Commission case law. Therefore, it becomes necessary to analyze whether the lifeline in the alternate escapeway at the Foidel Creek Mine satisfied the cited standard.

Gore testified that he thought there was a lifeline in the escapeway. MSHA trainee Paulson's notes indicate that there was a lifeline. Gore offered no testimony that the lifeline in the alternate escapeway failed to "clearly mark" the escapeway. The testimony of Inspector Gore and Conkle indicates that the lifeline had reflective material attached, as well as directional cones with reflective material on them. No testimony was offered to contradict this testimony or to establish that the lifeline was obscured or otherwise rendered ineffective by the dust. The lifeline was a continuous line with directional cones to lead miners from the section, through the

escapeway, and out to the surface. The lifeline provided an easily understood or visible, conspicuous object, that showed the route and direction of travel to the surface.

In addition, a lifeline, in many situations, may provide an even better means of "clearly marking" the escapeway than reflectors hung from the roof. First, once a lifeline is found, either by sight or feel, a miner need only locate a directional cone and follow the line to the surface. Once located, the lifeline and attached cones provide the direction and route to the surface, and require little of the miner beyond holding on to the line and continuing to move. This, in turn, allows the miner to direct more of his attention to avoiding trip and fall or other hazards. On the other hand, reflectors, or other purely sight-driven means of identifying the escapeway, hanging from the roof of the entry require a miner to continually scan the roof as he makes his way to the surface. This, in turn, takes the miner's eyes off of the floor, thereby making him more susceptible to potential trip-and-fall or other hazards.

Second, in a smoke-filled environment reflective materials provide little to no assistance. On the other hand, lifelines may be located by touch/feel in a smoke filled environment, and would provide a direction and route out of the mine.

Third, in a smoke-free environment the lifeline appears to provide just as clear a marking of the escapeway as clean reflectors would. Nothing in the record indicates that the lifeline would be any less visible in a smoke-free environment. All of these factors, combined with Inspector Gore's testimony that the miners at this mine are well trained and that the operator had effective escapeway policies, lead me to believe that the lifeline clearly marked the route and direction of travel to the surface, thereby satisfying the cited standard in spite of the fact that the roof reflectors may not have done so.

Based on the above, I find that this citation should be vacated.

III. SETTLED CITATIONS

At the hearing, the parties proposed to settle the remaining citations in these cases. In WEST 2008-352, the parties propose to settle Citation No. 7621461. (Tr. 137). The parties propose that the penalty be reduced to $5,390.00 and that the negligence remain "high." The penalty was originally specially assessed under 30 C.F.R. § 100.5. In WEST 2008-1576, the parties seek to reduce the level of negligence in Citation No. 7610949 and to reduce the gravity in Citation Nos. 7610950 and 7610952. (Tr. 136-138). They also propose modifying Order No. 7610956 to a section 104(a) moderate negligence citation. *Id.* They propose that the total penalty be reduced to $36,818.00 for these citations. 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**.[4]

[4] At the hearing, the Secretary also agreed to vacate Citation No. 7621738 in WEST 2008-0989 and Citation No. 7621766 in WEST 2008-1124, which were also noticed for hearing. (Tr. 5-6). I granted the motion and these cases were dismissed by my written order dated April 7, 2010.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Twentymile had about 502 paid violations at the Foidel Creek Mine during the two years preceding July 8, 2008. (Attachment to Stipulations). 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 are discussed above.

V. ORDER

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

Citation/Order No.	30 C.F.R. §	Penalty
WEST 2008-0352		
7621461	75.400	$5,390.00
WEST 2008-1321		
7622452	75.380(d)(2)	Vacated
WEST 2008-1576 & WEST 2008-0787-R		
7284492	75.403	1,111.00
7610949	75.517	4,690.00
7610950	75.503	4,690.00
7610952	75.503	7,000.00
7610956	75.512	18,742.00
7622519	75.380(d)(7)(iv)	5,000.00
7622520	75.380(d)(1)	585.00
	TOTAL PENALTY	47,208.00

For the reasons set forth above, Order No. 7622519 is **AFFIRMED** and Citation No. 7622452 is **VACATED** as set forth above. The settlement of the remaining citations is **APPROVED**. Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the

sum of $47,208.00 within 30 days of the date of this decision.[5] Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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RWM

[5] 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.