CCASE:
SOL (MSHA) V. BEECH FORK PROCESSING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
	:	Docket No. KENT 93-668
BEECH FORK PROCESSING, INC., Respondent	:	A. C. No. 15-16162-03579
	:	Docket No. KENT 93-669
	:	A. C. No. 15-16162-03580
	:	Docket No. KENT 93-699
	:	A. C. No. 15-16162-03581
	:	Docket No. KENT 93-709
	:	A. C. No. 15-16162-03582
	:	Docket No. KENT 93-780
	:	A. C. No. 15-16162-03583
	:	Docket No. KENT 93-781
	:	A. C. No. 15-16162-03584
	:	Docket No. KENT 93-903
	:	A. C. No. 15-16162-03586
	:	Docket No. KENT 93-904
	:	A. C. No. 15-16162-03587
	:	Docket No. KENT 93-992
	:	A. C. No. 15-16162-03588
	:	Mine No. 1

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Ted McGinnis, Mine Superintendent, Beech Fork Processing, Inc., Lovely, Kentucky for Respondent.

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against Beech Fork Processing, Inc. pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820. The petitions allege 40 violations of the Secretary's mandatory health and safety standards. For the reasons set forth below, I dismiss one citation, vacate and dismiss one citation and one order, modify three citations, find that Beech Fork committed the remaining violations as alleged and assess total penalties of $51,211.00.

A hearing was held in these cases on February 8 and 9, 1994, in Paintsville, Kentucky. Mine Safety and Health Administration (MSHA) Inspector Kellis Fields testified for the Secretary. Mr. Ted McGinnis, Superintendent of Beech Fork's Mine No. 1, testified on behalf of the Respondent. The parties have also filed post hearing briefs which I have considered in my disposition of these cases.

In his brief, the Secretary contends Beech Fork that committed all of the violations as alleged, including the level of gravity and degree of negligence. On the other hand, the Respondent admits that most of the violations occurred, but maintains that they do not rise to the level of being "significant and substantial" or result from "unwarrantable failures." Therefore, Beech Fork argues, the violations do not deserve the penalties proposed by the Secretary.

The cases involve ten dockets, 40 citations and orders and, at least, 15 different inspections or dates that citations or orders were issued. Therefore, in an attempt to discuss the violations in some sort of orderly fashion, the infractions will be addressed by docket.

Docket No. KENT 93-659

This docket involves Citation No. 3816646 and Order No. 3816647, both issued under Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1),(Footnote 1) and both alleging a violation of Beech

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1 Section 104(d)(1) provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the

(continued on next page)

Fork's Mine Ventilation Plan pursuant to Section 75.370(a)(1) of the Secretary's Regulations, 30 C.F.R. 75.370(a)(1). Inspector Fields testified that he inspected Beech Fork's Mine No. 1 on December 16, 1992, and issued the citation and order, which he later modified, at that time.

Inspector Fields stated that on entering the mine, he observed coal coming off of the conveyor belt for the 003 working section and when he arrived at the face of the No. 4 entry he saw a continuous mining machine loading coal from the face into a shuttle car. He related that no line curtain(Footnote 2) was installed in the entry and that when he attempted to take a reading of the amount of air moving at the face, he was unable to get a reading.

Inspector Fields said that he had measured the depth of the cut at approximately 52 feet. He further stated that the mine foreman was present while this occurred and admitted to him that a line curtain was supposed be installed when coal is being mined, cut or loaded and that the velocity of air at the face was supposed to be a minimum of 5200 cubic feet per minute (cfm).

Section 75.370(a)(1) requires, in pertinent part, that "[t]he operator shall develop and follow a ventilation plan approved by the district manager." Beech Fork's Methane and Dust Control Plan, which was tentatively approved on February 13, 1992, requires that the minimum air quantity "at working faces, where coal is cut, mined or loaded" shall be "5200 cfm" and that the "[m]aximum distance for line curtain to be maintained from the point of deepest penetration of the working face where coal

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> cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

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2 A "curtain" is "used to deflect the air from the entries into the working rooms and [is] used to hold the air along the faces." A Dictionary of Mining, Mineral, and Related Terms 292 (1968).

is being cut, mined or loaded shall be 20 Ft." (Gt. Ex. 2, p.3.)

Citation No. 3816646 was for the failure to install a line curtain and Order No. 3816647 was for the lack of air at the face. (Gt. Exs. 1 and 3.) Clearly Beech Fork did not comply with the requirements of its dust control plan and, therefore, violated Section 73.370(a)(1) of the Regulations.

Both violations were found by the Inspector to be "significant and substantial." A "significant and substantial" (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." 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 Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In 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 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> 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., 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 Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S.

Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (December 1987).

Inspector Fields testified that he believed these violations to be S&S because without ventilating the area where mining was taking place methane could be encountered which could result in an explosion and fire and excessive coal dust would be present which could lead to pneumoconiosis. The Respondent argues that no methane had ever been detected in this mine, that the scrubber on the continuous miner was working while coal was being cut and that the miner had only been operating a short time because it was being tested to determine if repairs performed on it were sufficient.

I find that the Secretary has the stronger argument in this instance. The fact that methane had never been encountered in the mine does not guarantee that it will never be present. The scrubber on the continuous miner does not sufficiently remove coal dust from the environment, by itself, to make the area conform to the dust standards and certainly would have no affect on methane. Finally, even if the continuous miner was only being tested, those present were subjected to the possible dangers of no ventilation while it was being tested. For these reasons, I conclude that the violations were "significant and substantial."

Inspector Fields also found these violations to have resulted from an "unwarrantable failure" on the part of Beech Fork because the foreman was present and admitted that he knew that a line current had to be installed and that 5200 cfm of air was required at the face. The Respondent implies that this was not done because the repaired continuous miner was only being tested; the implication being that the line curtain would have been installed and the face properly ventilated before full production began.

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987).

In Emery Mining, supra at 2001, the Commission stated that:

> "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (unabridged) 2514, 814 (1971) (Webster's). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness or inattention.

Beech Fork's position is undercut by the fact that enough coal was being conveyed on the belt line to lead Inspector Fields to believe that full production was already in progress. More significantly, the Beech Fork employees had to go over two entry ways, to the No. 6 entry, to find a curtain to install. This indicates that the foreman, knowing that a line curtain was required, was not prepared to install it. Therefore, I conclude that the violations resulted from Beech Fork's "unwarrantable failure."

The Secretary has proposed a penalty of $4,000.00 for the failure to install the line curtain and $6,000.00 for the lack of air quantity at the face. The Respondent argues that these are essentially one violation and, therefore, the second violation amounts to over charging. (Resp. Br. 4.) While it is true that two separate sections of Beechfork's dust control plan are cited as having been violated, as Inspector Fields noted in Order No. 3816647, "no air was provided due to no line curtain installed . . . ." (Gt. Ex. 3.) It stands to reason that if the line curtain is what guides the air to the face, if there is no line curtain, there will be no air at the face.

I agree with the Respondent that these two violations are multiplicious, that is, they are multiple offenses arising in the course of a single act or, in this case, failure to act. If the Act did not require that a civil penalty be assessed for each violation, 30 U.S.C. 820(a), I would assess a single penalty for both violations. Cf. Albernaz v. United States, 450 U.S. 333, 337-38, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Since I cannot assess a single penalty for both violations, I will consider the fact that the violations are multiplicious in assessing penalties for each. Taking into consideration the factors set out in Section 110(i) of the Act, 30 U.S.C. 820(i),

I assess a civil penalty of $2,000.00 for Citation No. 3816647 and $2,000.00 for Order No. 3816648.

Docket No. KENT 93-668

On January 25, 1993, Inspector Fields issued two S&S citations to Beechfork. Citation No. 3816654 was for a violation of Section 75.380(d), 30 C.F.R. 75.380(d), because the intake escapeway heading to the 003 section did not have a walkway or stairs provided to get over two overcasts.(Footnote 3) (Gt. Ex. 4.) Citation No. 3816658 alleged a violation of Section 75.333(b)(1), 30 C.F.R. 75.333(b)(1), because permanent stoppings used to separate the intake airway from the return airway were not being maintained up to and including the third open crosscut outby the face area between the No. 2 and No. 3 entries. (Gt. Ex. 5.)

Inspector Fields testified that the overcasts were 20 feet wide, that is, the width of the escapeway, and five or six feet high. He described that the only way to get over the overcast was to "jump up and try to get on top of the overcast." (Tr1. 46.)(Footnote 4)

Section 75.380(d)(6), 30 C.F.R. 75.380(d)(6), requires escapeways to be "[p]rovided with ladders, stairways, ramps or similar facilities where the escapeways cross over obstructions." In its brief, the Respondent admits that it violated this regulation. (Resp. Br. 16.) I agree and so find.

The inspector testified that he considered this violation to be "significant and substantial" because in trying to jump over the overcast someone could fall and break his arm or leg, or injure his back. In addition, he pointed out that in an emergency miners would be hindered in getting out of the mine using the escapeway and that it would make it very difficult to bring someone through the escapeway on a stretcher. The Respondent argues that the violation was not S&S because there were materials nearby from which someone could fashion some steps if he needed to.

Applying the Mathies test, I find that there was a reasonable likelihood that the lack of a way over the overcast would result in a reasonably serious injury. This would be

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3 An overcast is "[a]n enclosed airway to permit one air current to pass over another one without interruption." A Dictionary of Mining, Mineral, and Related Terms 780 (1968).

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4 The hearing was held on February 8 and 9 and there is a separate transcript, beginning with page one, for each day. Accordingly, the transcript for February 8 will be cited as "Tr1." and the transcript for February 9 will be cited as "Tr2."

particularly likely when the escapeway was being used in an emergency as it was intended to be used. Accordingly, I conclude that the violation was "significant and substantial."

Turning to the second citation, Inspector Fields testified that while inspecting the Elk View section of the mine he found that permanent stoppings between the No. 2 and No. 3 entries had only been installed up to and including the fourth open crosscut outby the face. There was no stopping in the third crosscut.

Section 75.333(b)(1) provides, in pertinent part, that:

> (b) Permanent stoppings or other permanent ventilation control devices . . . shall be built and maintained -- (1) Between intake and return air courses . . . . Unless otherwise approved in the ventilation plan, these stoppings or controls shall be maintained to and including the third connecting crosscut outby the working face.

Beech Fork admits this violation. (Resp. Br. 4.) Accordingly, I conclude that Beech Fork violated the section as alleged.

Inspector Fields found this violation to be "significant and substantial" because the missing stopping permitted the intake air to cross the entry and enter the return before reaching the face. As a result, he opined that "it's reasonably likely somebody in there [the face] can encounter, when they're in production and mining coal, they can always encounter any poisonous or noxious gases or methane or coal dust." (Tr1. 53.) Although Beech Fork incorporates this violation in a general statement in its brief concerning violations not being S&S, at the hearing Mr. McGinnis agreed that the violation was S&S. (Tr2. 152-53.) Accordingly, I find that the violation was "significant and substantial."

In a continuation of this inspection, Inspector Fields issued Citation Nos. 4029824, 4029826 and 4029828 on February 10, 1993. The first of these involved a defective, dry chemical fire fighting system on a shuttle car in violation of Section 75.1100-3 of the Regulations, 30 C.F.R. 75.1100-3. (Gt. Ex. 6.) The other two involved trailing cables from a continuous miner and a shuttle car that Inspector Fields found to be inadequately insulated in violation of Section 75.517, 30 C.F.R. 75.517. (Gt. Exs. 7 and 8.)

With regard to the firefighting system, Fields testified that he found that a hose was broken off of the chemical tank rendering the system inoperative since in the event of a fire no chemicals would be sprayed on the fire. He believed that this

violation was S&S because of the possibilities of smoke inhalation or burning if the machine caught on fire and the fire could not be extinguished because the system did not work.

Beech Fork argues that this violation was not "significant and substantial" because the shuttle car operator would not have to travel more than 300 feet to get into fresh air in the event of a fire. In addition, the Respondent maintains that a pressured water hose would never be more than 300 feet from the shuttle car anywhere in the mine and that the shuttle car has firefighting systems on both sides, so that at least one-half of the car would be covered in the event of a fire.

Section 75.1100-3 requires that "[a]ll firefighting equipment shall be maintained in a usable and operative condition." Clearly, the broken hose violated this regulation. Further, applying the Mathies test, I find that the violation was "significant and substantial."

Looking next at the cable violations, the inspector testified that the cable to the continuous miner had been spliced, but that when it was resealed the seal did not completely cover the cut in the cable. He stated that part of the outer jacket of the trailing cable for the shuttle car had been torn off, exposing the inner leads. Inspector Fields related that he found these violations to be S&S because the cables have to be handled by miners to move them from one place to another, that the section was wet and muddy and that because of the exposed inner leads, which carried 575 volts for the miner and 440 volts for the shuttle car, a person could be electrocuted.

The Respondent contends that there was no violation in either of these cases because the inner leads were themselves insulated sufficiently to prevent electrocution. In the Respondent's opinion, the outer jacket serves a dual purpose, to resist nicks, cuts and scrapes, as well as for insulation. Therefore, any openings in the outer jacket do not necessarily mean that the insulation is not sufficient. Furthermore, Beech Fork argues, if the insulation on the inner leads were inadequate, a circuit breaker would be tripped. (Resp. Br. 6.)

Section 75.517 provides that "[p]ower wires and cables . . . shall be insulated adequately and fully protected." I find that both the inner lead insulation and the outer jacket must be intact to meet this standard. Therefore, I conclude that Beech Fork violated the regulation in both of these instances. I further find that these violations were "significant and substantial." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 1984).

Inspector Fields issued six more citations to the Respondent on February 16, 1993. Citation No. 4027041 alleges a violation of Section 75.1102 of the Regulations, 30 C.F.R. 75.1102, because the slippage switch for the No. 3-A belt conveyor drive was inoperative. (Gt. Ex. 9.) Citations No. 4027042 and 4029840 are for violations of Section 75.1722(b), 30 C.F.R. 75.1722(b), due to inadequate guarding of belt conveyor drives.(Footnote 5) (Gt. Exs. 10 and 15.) Citations No. 4027043 and 4029839 are for accumulations of float coal dust in belt control boxes in violation of Section 75.400, 30 C.F.R. 75.400. (Gt. Exs. 12 and 13.) Citation No. 4027045 sets out a violation of Section 75.604(a), 30 C.F.R. 75.604(a), because a permanent splice in a trailing cable was not made mechanically strong. (Gt. Ex. 14.)

Beech Fork admits that the violations concerning the accumulations of float coal dust and the slippage switch occurred. (Resp. Br. 4 and 10.) However, it contests the remaining citations and Inspector Fields' S&S determinations on all of the citations.

Turning first to the guarding on the conveyor belt drives, the inspector testified that the guard to the 3-A belt conveyor drive was bent over and was not secured and that there was an opening on the sprocket chain housing. He further testified that the guard to the 2-A belt conveyor drive was also bent over. He stated that because the guards were bent over, they did not prevent people reaching in at the pinch point of the drive pulley and that the opening in the chain housing would permit someone to place a hand or finger in the sprocket chain. Finally, Inspector Fields testified that the guards were held in place by telephone wire which resulted in their bending over when loose coal, coal dust and mud piled up on them.

In the Respondent's opinion, the guards were properly secured with wire because the build-up of material on them required that they be frequently cleaned. Wiring them facilitated the cleaning, whereas bolting or welding them would make cleaning much more difficult.

Section 75.1722(b) provides that "[g]uards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley." Since the guards could be bent over by the accumulation of material on a frequent basis, exposing the pinch points of the pulleys, when secured by wires, I conclude that they were not

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5 On February 17, 1993, Inspector Fields issued Orders No. 4027047 and 4027048 pursuant to Section 104(b) of the Act, 30 U.S.C. 814(b), for failure to abate these two violations. (Gt. Exs. 11 and 16.)

sufficient to prevent someone from reaching behind them and becoming caught. Therefore, I find that the two guards discussed above violated the regulation.

With respect to the cable splice, Inspector Fields testified that the splice had been accomplished by tying a square knot in the cable. As a result, he opined that this would produce greater resistance to the electrical current flowing through the cable causing the cable to get hot.

Section 75.604(a) requires permanent splices in trailing cables to be "[m]echanically strong with adequate electrical conductivity and flexibility." Based on the inspector's testimony, I conclude that Beech Fork violated this regulation.

Inspector Fields found all six of these violations to be "significant and substantial." With regard to the slippage switch, he testified that the failure of the switch to work would mean that the belt could not be stopped when it became fouled, overloaded or had some other malfunction. He related that if the belt kept running in such a situation, the resulting friction could cause smoke or a fire.

The inspector stated that, in addition to the required daily inspection of the belt lines, spillage from the conveyors required recurrent shovelling and cleaning in the area of the pulleys. Thus, there was opportunity for someone to lose a limb or worse due to the inadequate guards on the belt drives.

The inspector testified with regard to the dust accumulations that arcing between the various electrical components inside the junction control boxes could ignite the accumulated coal dust thereby causing smoke and a fire. He explained further that electrocution could result from the defective cable splice in the same manner as that which he described could happen with the cable insulation violations above. Supra, at 9.

In addition to its conclusory statement that the violations are not S&S, Beech Fork argues with respect to the coal dust accumulations that the damp, wet and muddy conditions in the mine and the fact that the coal dust is composed, "in substantial part," of rock dust would make the likelihood of an ignition very remote. (Resp. Br. 5.) The Respondent argues concerning the defective slippage switch that the damp conditions and a fire suppression system on the belt line make a fire unlikely.

The Commission has held that a construction of Section 75.400 "that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." Black

Diamond Coal Mining Company, 7 FMSHRC 1117, 1121 (August 1985). It has further held that dampness is not determinative of whether a coal accumulation violation is "significant and substantial" or not. Utah Power & Light Company, 12 FMSHRC 965, 970 (May 1990). Accordingly, applying the Mathies standards and crediting the inspectors testimony, I conclude that these six violations were "significant and substantial."

Finally, with regard to this docket, Inspector Fields issued two citations on March 5, 1993. The first, Citation No. 4026562, was for a violation of Section 75.515, 30 C.F.R. 75.515, because a cable entering the metal junction for the belt motor at the No. 7 drive did not have a proper fitting. (Gt. Ex. 17.) The second, Citation No. 4027060, alleged a violation of Section 75.352, 30 C.F.R. 75.352, because the No. 6 belt conveyor line was not separated from the return air course at Break 80 as about one-third of the stopping was "crushed out." (Gt. Ex. 18.)

Beech Fork admits that both of these violations occurred, (Resp. Br. 4 and 10-11), but argues that they were not "significant and substantial." Therefore, I conclude that Beech Fork violated both of these sections.

Concerning the improper fitting, the inspector testified that vibration from the belt drive could cause the cable to rub against the metal frame eventually exposing the power lines. If this occurred, anyone touching the metal frame could be electrocuted. With regard to the crushed stopping, Inspector Fields explained that return air could go through the hole in the stopping and mix with the intake air. He stated that if there was methane in the return air it could be ignited by electrical equipment in the belt line that was not "permissible." He further maintained that, with the stopping out, the air velocity could increase so that if a fire started, if would spread faster.

Based on Inspector Fields testimony, I conclude that these two violations were "significant and substantial."

The Secretary has proposed a total penalty for all of the violations in this docket of $18,637.00. Taking into consideration the requirements of Section 110(i) of the Act, particularly Beech Forks failure to abate the two guard violations, I conclude that a total penalty of $18,637.00 is appropriate.

Docket No. KENT 93-669

At the hearing, the Secretary moved to dismiss Citation No. 4026574 based on the Commission's decision in Keystone Coal. Keystone Coal Mining Corporation, 16 FMSHRC 6 (January 1994). The Respondent had no objection to the motion and it was granted.

Accordingly, the citation will be dismissed in the order at the end of this decision.

The only other citation in this docket was issued by Inspector Fields on March 10, 1993. It was for a violation of Section 75.523-3(a), 30 C.F.R. 75.523-3(a), because the automatic emergency-parking brakes on the 488-1934 S & S scoop did not hold the scoop or "lock up" when checked by the inspector. (Gt. Ex. 23.)

Inspector Fields testified that automatic emergency-parking brakes on the scoop were inoperative. The Respondent concedes that that was the case. (Resp. Br. 12.) Accordingly, I conclude that Beech Fork violated Section 75.523-3(a).

Inspector Fields testified that he believed this violation to be S&S because the brakes would not hold the scoop on an incline and it could, therefore, roll and seriously injure or kill someone. The Respondent argues that the probability of injury from this violation is very remote because the scoop also had a service brake which could be used to hold it.

I conclude that this violation was "significant and substantial." The service brake requires that the operator set it. The automatic brake does not. I find it reasonably likely that an operator, not knowing that the automatic brake did not work, would not set the service brake, assuming that the automatic brake would hold the scoop.

The Secretary has proposed a penalty of $690.00 for this violation. Taking into consideration the criteria in Section 110(i), I find this to be an appropriate penalty.

Docket No. KENT 93-699

This docket consists of four citations issued on various dates during Inspector Fields' inspections. Citation No. 4026561 is dated March 5, 1993, and sets out a violation of Section 75.400 because loose coal and float coal dust was allowed to accumulate under a belt in various locations and in crosscuts beginning at the air lock inby the No. 6 head and extending inby to the No. 7 belt drive. (Gt. Ex. 19.) Citation No. 3816644, dated December 10, 1992, is for a violation of Section 75.202(a), 30 C.F.R. 75.202(a), in that draw rock was sloughing from around resin roof bolts "in the intake air escapeway from 6 inches up to approximately 24 inches in several locations, ranging from 1 - 4 bolts up to approximately 20 bolts[,] starting approximately 600 feet inby the intake portal extending inby approximately 4,000 [feet] up to [the] seals on the intake." (Gt. Ex. 20.)

Citation No. 4029838, delineates another violation of Section 75.400 because float coal dust was allowed to accumulate in the No. 1-A belt control box on February 16, 1993. (Gt. Ex. 21.) Finally, Citation No. 4026568, dated March 10, 1993, outlines a violation of Section 75.1725(a), 30 C.F.R. 75.1725(a), alleging that a continuous miner was not maintained in safe operating condition because the foot control switch, commonly called the "deadman" switch, was taped in the down position.

In each of these cases, the Respondent concedes that a violation occurred. (Resp. Br. 4, 7, 15-16.) Consequently, I conclude that Beech Fork violated the sections of the regulations alleged.

With regard to the loose coal and coal dust accumulations, the Respondent makes the same argument concerning the gravity of the violations that it did in Docket No. KENT 93-668. Supra, at 11-12. I find the violations to be "significant and substantial" for the same reasons set out in that docket. Id.

Turning to the problems with the roof falling away from the installed roof bolts, Beech Fork argues that the likelihood of an injury is remote because the only person travelling the airway is a weekly examiner. It concludes by stating that "[i]t is admitted that it is a serious violation, but it is contended that it is not an eminent [sic] danger." (Resp. Br. 16.) The Respondent apparently misperceives the law. An imminent danger does not have to exist for a violation to be S&S. In fact, a "significant and substantial" violation is defined as something less than an imminent danger. Cement Division, supra at 828.

As Inspector Fields pointed out, the intake airway is also used as an escapeway. He also noted that while a roof fall could obviously result in death or serious injury, small pieces of the roof falling on someone could also involve reasonably serious injuries. Applying the Mathies test, I conclude that this violation was "significant and substantial."

Finally, in connection with the "deadman" switch, it is Beech Fork's position that this violation is not S&S because the miner operator has access to a panic switch, a switch which completely turns off the miner, a breaker which de-energizes the machine and spring loaded control levers. However, the "deadman" switch is clearly designed to stop the continuous miner from moving when the operator is prevented by unconsciousness, incapacitating injury or death from using any of the devices relied on by the Respondent. Considering the well known dangers in mining and applying the Mathies test, I also conclude that this violation was "significant and substantial."

The Secretary has proposed a total of $2,147.00 in penalties for these four violations. After reviewing the criteria in Section 110(i) of the Act, I find the proposed penalties to be appropriate.

Docket No. KENT 93-709

This docket consists of three orders issued under Section 104(d)(2) of the Act, 30 U.S.C. 814(d)(2),(Footnote 6) and one 104(a) citation. Order No. 3816656 sets out a violation of Section 75.220, 30 C.F.R. 75.220, on January 25, 1993, charging that Beech Fork had violated its roof control plan by permitting work or travel under a roof that had not been permanently supported. (Gt. Ex. 24.) Order No. 3816657 was also issued on January 25 and relates a violation of Section 75.325(b), 30 C.F.R.
75.325(b), because there was not a minimum air velocity o 9,000 cfm in the last open crosscut on the 003 section between the No. 2 and No. 3 entries. (Gt. Ex. 26.)

Order No. 4026565 is dated March 5, 1993, and recites a violation of Section 75.334, 30 C.F.R. 75.334, because a roof fall had torn out a seal in the No. 4 entry in the return air course off of the 001 section, the seal in the No. 3 entry had been removed and the seals had not been reconstructed. (Gt.Ex. 27.)(Footnote 7) Finally, Citation No. 9980129 was issued on January 25,

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6 Section 104(d)(2) states:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

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7 This order originally cited a violation of Section "75.334-2." It was modified on March 8, 1993, to allege a violation of Section "75.344-a-2." It was modified again on February 3, 1994, "to show that correct section of law is 75.334-2." (Gt. Ex. 28.) There is no Section 75.344-2 or Section 75.344(2). There is, however, a Section 75.344(a)(2), 30 C.F.R.
73.344(a)(2), and it is clear that this was the sectio intended to be cited. In view of the fact that the Respondent did not question the section at the hearing or in its brief and does not appear to have been prejudiced

(continued on next page)

1993, detailing a violation of Section 70.207(a), 30 C.F.R. 70.207(a), because the Respondent only submitted four vali respirable dust samples for the bimonthly period of November-December 1992 instead of the five required. (Gt. Ex. 29.)

Section 75.220(a)(1) requires that "[e]ach mine operator shall develop and follow a roof control plan." Beech Fork's approved roof control plan provides that "[b]efore any other work or travel in or inby an intersection which has an unsupported opening, . . . the roof shall be permanently supported in accordance with the roof control plan." (Gt. Ex. 25, p. 7.) Inspector Fields testified that there were tracks across the floor indicating that the roof bolting machine had gone by the open crosscut into the No. 4 and No. 5 entries which had not been supported either temporarily or permanently.

The inspector stated that he found this violation to be S&S because if a roof fall occurred it would be reasonably likely that if it fell on someone they would suffer death or serious injury. He further averred that this violation was an unwarrantable failure "[b]ecause the roof bolter had drove [sic] by this open crosscut. This crosscut had been mined prior to the roof bolter coming into the area." (Tr1. 225.) He also stated that the safety director accompanying him on the inspection was aware that the roof control plan was being violated.

Beech Fork concedes the violation in its brief. (Resp. Br. 15.) Therefore, I conclude that Beech Fork violated Section 75.220. I further find that this violation was both "significant and substantial" and an unwarrantable failure on Beech Fork's part.

Turning to the next order, Section 75.325(b) requires:

> In bituminous and lignite mines, the quantity of air reaching the last open crosscut of each set of entries or rooms on each working section and the quantity of air reaching the intake end of a pillar line shall be at least 9,000 cubic feet per minute unless a greater quantity is required to be specified in the approved ventilation plan. This minimum also applies to sections which are not operating but are capable of producing coal by simply energizing the equipment on the section.

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either in abating the violation or preparing for hearing, I conclude that this violation was sufficiently specific to be allowed to stand. Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 1993); Jim Walter Resources, Inc., 1 FMSHRC 1827, 1829 (November 1979).

Inspector Fields testified that he attempted to take an air reading in the last open crosscut of the 003 Section and he could not get a reading on his anemometer. He further recounted that there were no ventilation controls at all on the section.

The Respondent admits the violation but contests the S&S designation. (Resp. Br. 4.) Consequently, I conclude that Beech Fork violated Section 75.325(b) of the Regulations.

This was essentially the same violation that the Respondent had been cited for in Docket No. KENT 93-659. For the reasons set forth in that docket, I conclude that this violation was "significant and substantial." Supra, at 5. Since this was the same section of the minethat had been cited a month earlier with the violations in Docket No. KENT 93-659, I conclude that this violation was the result of an unwarrantable failure on Beech Fork's part.

The next order is for a violation of Section 75.334(a)(2) which requires:

> (a) Worked-out areas where no pillars have been recovered shall be--
> (1) Ventilated so that methane-air mixtures and other gases, dusts, and fumes from throughout the worked-out areas are continuously diluted and routed into a return air course or to the surface of the mine; or
> (2) Sealed.

Beech Fork admits that it violated this regulation. (Resp. Br. 4.) Therefore, I conclude that it did.

In Inspector Fields opinion this violation was S&S because the missing seals could result in low oxygen and suffocation. The Respondent addresses this issue only by making the statement that there was not a reasonable likelihood that a reasonably serious injury would result from this violation. In addition to the reason cited by the inspector, Section 75.334(a)(1) indicates why the break in the seals is reasonably likely to result in a serious illness or injury, i.e. methane-air mixtures and other gases, dusts and fumes are not removed from the worked-out area or prevented from entering the working areas. Any one of these conditions is reasonably likely to result in a reasonably serious illness or injury. Hence, I conclude that this violation was "significant and substantial."

The inspector testified that he found this violation to be an unwarrantable failure because:

> the operator had told me back in January about the fall [which crushed out the seal]; when I approached him about it on the mine map [before beginning the inspection], he told me at that time that it had been taken care of, they had reconstructed the seals and they had not.

(Tr1. 240.) He further pointed out that the seals were supposed to be inspected on a weekly basis. Clearly, this is inexcusable conduct resulting from more than mere inadvertence. I conclude that Beech Fork unwarrantably failed to comply with this regulation.

The final citation involves the failure to take the required number of dust samples. Section 70.207(a) requires that:

> Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period . . . . Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.

The Respondent submits that this violation was inadvertent and not the result of high negligence on the part of Beech Fork. (Resp. Br. 10.) Based on this admission, I conclude that Beech Fork violated Section 70.207(a).

To show that the Respondent was highly negligent in connection with this violation, the Secretary put into evidence four other citations for the same violation. (Gt. Exs. 29A, 29B, 29C and 29D.) While all of these appear to be similar violations and may have put Beech Fork on notice that there was a problem with its submission of dust samples, they are not matters in aggravation in this instance since they were not received by Beech Fork until after it had submitted the dust samples in question. (Gt. Ex. 50.)

Furthermore, Mr. McGinnis testified that five samples were taken, that they were in contact several times with the Paintsville District Office in an attempt to find out what happened to the fifth sample and that they took this problem very seriously. Adding this testimony to fact that five samples have been required since at least November 1, 1980, and that nothing would be gained by an operator deliberately continuing to sent in only four samples, I accept Beech Fork's profession of diligence and conclude that at most Beech Fork was moderately negligent. Accordingly, the citation will be modified to indicate that and

the modification will be taken into consideration in assessing a penalty.

The Secretary has proposed total penalties in this docket of $20,300.00. I find that the proposed penalties for the three orders are appropriate. However, I am reducing the penalty for the dust sample violation to $50.00 in view of the reduced negligence I have found concerning it.

Docket No. KENT 93-780

This docket consists of a single citation, Citation No. 9980135, for a violation of the dust sampling requirements in Section 70.208(a) on February 12, 1993. (Gt. Ex. 30.) Once again, the Respondent admits the violation but challenges the degree of negligence.

Mr. McGinnis testified with respect to this violation that:

> This one occurred because of a clerical error. I have copies of the dust reports that are sent back to us. And it shows that we had an excessive sample for that cycling period on the 9020.
> We sent two samples in with the same number. One of them should have been 901, but both were--it was a clerical error. So we have got listed as an excessive sample for that site on that one. Corrective action was taken immediately once we were aware of that.

(Tr2. 176.) Again, I credit this testimony and find that although Beech Fork violated the regulation and was clearly negligent, it was not more than moderately negligent. Consequently, I will modify the citation and am reducing the penalty from the $1,100.00 proposed by the Secretary to $50.00.

Docket No. KENT 93-781

This docket consists of three citations. Citation No. 3816651, dated December 22, 1992, describes a violation of Section 75.523-3 in that the automatic brakes on the No. 2 shuttle car in the 003 section were inoperative when checked. (Gt. Ex. 31.) Citation No. 4029827 alleges a violation of Section 75.1100-3 because the fire suppression system installed on the continuous miner in the 002 section was not maintained in a usable and operative condition on February 10, 1993. (Gt. Ex. 32.) Lastly, Citation No. 4026564 sets out a March 5, 1993, violation of Section 75.400 for allowing loose coal and float coal dust to accumulate in various locations under the No. 7 belt conveyor line and in the entry and crosscuts starting at the head

drive and extending inby four crosscuts to about survey 4748. (Gt. Ex. 33.)

These violations involve the same type of violations found in Docket Nos. KENT 93-668, 93-669 and 93-699. The Respondent makes the same arguments concerning these violations that he did about the violations of the same sections in those dockets. (Resp. Br. 7-9, 12-13.) Supra, at 9, 11-14.

Hence, I found that Beech Fork committed each of these violations and that the violations are "significant and substantial" for the same reasons given in the previous dockets. Id.

The Secretary has proposed $1,881.00 in penalties for these three violations. I conclude that this is an appropriate penalty.

Docket No. KENT 93-903

Inspector Fields issued Citation No. 4026563 on March 7, 1993, for a violation of Section 75.202(a). The citation stated that additional roof support was needed in the No. 3 entry along the No. 7 belt line where a roof fall had occurred. (Gt. Ex. 34.) The inspector testified that he had been informed that the roof fall had occurred earlier that morning. The area had already been partially cleared and the equipment had been moved out of the area. However, he explained that there was no indication that any further roof support, other than the roof bolts put in prior to the fall, had been installed. Moreover, he said that the area had not been posted with danger signs.

Mr. McGinnis testified that this was the second roof fall in the area and that management was waiting to see if anything further developed. He related that some cribbing had begun after the first fall as additional roof support and that employees were instructed not to travel in that area. He admitted that no danger signs had been posted; in fact, he revealed that the danger signs put up after the first fall had been taken down by the time of the inspector's inspection.

Section 75.202(a) requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." I conclude that Beech Fork violated this regulation by failing to post danger signs in the area, i.e. by not "controlling" the area. Instructing the employees not to go through that area in which persons otherwise would have been working and traveling was not sufficient as some employees may have missed getting the warning and without out danger signs to reinforce it, it could be easily forgotten.

The hazards of roof falls are well known. Cyprus Empire Corporation, 12 FMSHRC 911, 920 (May 1990). Accordingly, I find that this violation was "significant and substantial."

Inspector Fields issued two citations on March 4, 1993. The first, Citation No. 4030141, alleged a violation of Section 75.400 because a roof bolting machine in the 001 working section had an accumulation of oil and grease as well as coal dust and loose coal on it. (Gt. Ex. 35.) The second, Citation No. 4030142, recited that the operator-side blower motor pulley and belt were not adequately guarded on the same bolting machine in violation of Section 75.1722(a), 30 C.F.R. 75.1722(a). (Gt. Ex. 36.)

At the hearing, Beech Fork's representative stated that they did not contest Citation No. 4030141. (Tr2. 72.) Hence, I affirm that citation as written.

With regard to the second citation, Inspector Fields testified that the belt and pulley in question are located about ten to twelve inches from the operators seat when the bolting machine is being steered. He stated that a guard was present, but the pinch point was still exposed so that someone could catch a finger or hand in it if his hands, for instance, slipped off of the steering wheel. He opined that a permanently disabling injury could result from such an incident.

Section 75.1722(a) requires that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." The inspector's testimony on this violation was unrebutted at the hearing and Beech Fork has not addressed it in its brief.

Based on the inspector's evidence I conclude that Beech Fork committed this violation. I further conclude that the violation was "significant and substantial."

Inspector Fields issued five citations on May 26, 1993. Citation No. 4030151 sets out a violation of Section 75.1725(a) in that a diesel power mantrip was not properly maintained since the throttle cable had broken and it was being operated by a piece of telephone cable. (Gt. Ex. 37.) Citation No. 4030152 alleges a violation of Section 75.370(a)(1) because coal was being mined on the third shift in the No. 2 entry face and no line curtain was being used within 20 feet of the face as required by the ventilation plan. (Gt. Ex. 38.)

Citation No. 4030154 recites a violation of Section 75.1722(b) for inadequate guarding of the 003 section tail piece pulley because the guard was bent up and part of the guard was

down exposing the drive pulley on the left side and the guard was completely gone exposing the pinch point on the right side. (Gt. Ex. 40.) Citation 4030155 describes another violation of Section 75.1722(b), this time because the guards across the front of the drive pulleys and the right side of the discharge roller on the No. 3-B belt conveyor drive were missing. (Gt. Ex. 41.) Finally, Citation No. 4030156 is for a violation of Section 75.400 as fine coal and float coal dust was allowed to accumulate under the belt and around the No. 3-B belt conveyor line for approximately 400 feet. (Gt. Ex. 42.)

With regard to the mantrip, Inspector Fields testified that he saw it arrive at the surface with a load of miners, being operated with a piece of telephone wire running over the top of the mantrip as a substitute throttle cable. He indicated that the throttle cable, which was broken in this case, normally runs under the mantrip. He stated that the problem with using the telephone cable as it was was that the cable could become caught or fouled causing the throttle to stick open with no way to stop the mantrip. He further theorized that if this occurred the mantrip could run into something or throw someone off resulting in serious injuries.

Mr. McGinnis testified that the throttle cable broke as the crew started out of the mine. It was his opinion that the potential problems described by the inspector were not likely to occur.

Section 75.1725(a) requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." Since the mantrip throttle cable was not properly repaired and the mantrip was not immediately removed from service, I conclude that the Respondent violated the section in this case.

However, I find that the violation was not "significant and substantial." It is apparent that the telephone cable substitute was used only to complete the trip out of the mine. There is no evidence that the mantrip had been continuously operated in this manner and a new throttle cable was installed before it was used again. No accident had occurred on the way out of the mine. Thus, it was not reasonable likely that a reasonably serious injury would result from this violation. I will modify the citation accordingly.

The four remaining citations are similar to ones discussed in previous dockets. The Respondent makes the same arguments concerning these four that he did previously. Therefore, for the reasons set out concerning the earlier violations, I conclude that Beech Fork committed these four violations and that they were "significant and substantial." Supra, at 4-5, 11-12.

The last citation in this docket was issued by Inspector Fields on June 8, 1993. Citation No. 4034025 sets out a violation of Section 75.220(a)(1) because there was evidence that a scoop had been cleaning the ribs and roadways by the open crosscut and face of the No. 4 entry under unsupported roof in violation of the roof control plan. (Gt. Ex. 43.)

With regard to this citation, Inspector Fields testified that he observed evidence that a scoop had been in the area of the upper two sections of the face of the No. 4 entry and the right crosscut cleaning the roadways and ribs. He recounted that the coal had been cleaned through and cut and there were rubber tire tracks in the area. He stated that the area had not been roof bolted.

Beech Fork concedes the violation. (Tr2. 209.) Beech Fork's roof control plan prohibits work or travel in or inby an intersection which has an unsupported opening before the roof is permanently supported. (Gt. Ex. 44, p. 11.) Consequently, I conclude that the Respondent committed this violation and, because of the obvious dangers of a roof fall, that the violation was "significant and substantial."

The Secretary has proposed a total of $4,373.00 in penalties for these citations. With the exception of the proposed penalty for Citation No. 4030151, which I am reducing to $50.00, I find that the penalties proposed by the Secretary are appropriate.

Docket No. KENT 93-904

This docket consists of one Section 104(d)(2) order issued on May 4, 1993, for a violation of Section 75.370(a)(1) of the Regulations. Order No. 4030143 states "[t]he approved ventilation plan was not being complied with on the 001 section in the #4 entry face where the . . . roof bolter was observed bolting top and a line curtain had not been installed as required by the approved ventilation plan." (Gt. Ex. 45.)

Inspector Fields testified that the line curtain was required to be installed up to the rear of the roof bolting machine as set out in Item 1 of page D (also denominated as page 3A) of Beech Fork's ventilation plan. (Gt. Ex. 39.) He stated he saw the roof bolter at the No. 4 entry face, installing roof bolts and no line curtain was present. When asked how what he observed was a violation of the ventilation plan, he replied:

> Because this particular Ventilation Plan, the section had a dust sample there that showed quartz, and the plan was revised to require a line curtain to be

> installed up to the roof and the roof bolt machine for that purpose; they call it a DA.

(Tr2. 130.)

I can find nothing in the ventilation plan which requires that a line curtain be installed up to the rear of the roof bolt machine. I can find nothing in the plan concerning its revision in the event quartz is encountered. When I asked Inspector Fields if the line curtain was required because the velocity of the air in that area was not 3,000 cfm, he stated that the curtain "was needed because the Ventilation Plan was being revised due to the fact that where the quartz contents and the [silicone] contents could be chronologically [sic] installed, otherwise the Ventilation Plan wouldn't even be required to be any place." (Tr2. 134.) The following colloquy then took place:

> Judge Hodgdon: I don't see how you get from Page D, where it says roof bolting operating at 3,000 cfms, to the requirement based on quartz.
>
> The Witness: Well, the quartz comes from the samples which were sent to Pittsburgh to be analyzed, and that makes the determination as to where the silicone quartz is in the sample itself.
>
> Judge Hodgdon: Is there something in the plan that says, what you called a designated area, that there has to be a line curtain?
>
> The Witness: No. Once the roof bolt becomes a DA, the plan was revised to require a [line] curtain to be installed because a roof bolt becomes a DA and it's revised, or otherwise you wouldn't have it.
>
> Judge Hodgdon: Is there someplace in the plan it says that or is that [found in the] regulations?
>
> The Witness: As part of the regulation in which it conforms with the DA or the Ventilation Plan . . . .

(Tr2. 134-35.)

Surprisingly, the Respondent agreed that what the inspector described was a violation of the ventilation plan. (Tr2. 216.) It may well be that this was a violation of one or more of the Secretary's Regulations. However, it clearly is not a violation of the ventilation plan based on the evidence presented at the

hearing, nor is it readily apparent what other regulation may have been violated. Accordingly, I vacate the order.

Docket No. KENT 93-992

The last docket consists of one citation for a violation of Section 75.1725(a) of the Regulations issued on March 17, 1993. Citation No. 4026571 states that a diesel scoop was not being maintained in safe operating condition because the automatic brakes were inoperative.

Inspector Fields testified that on March 17 he investigated an accident which had occurred on March 16. He determined that the engine had died on the scoop, that the scoop then rolled down an incline and onto the side of an embankment where it turned on its side. The scoop operator was taken to the hospital with minor bruises. The inspector related that the scoop was still on its side when he made his investigation and that at that time he was able to turn the tires by hand leading him to believe that the automatic braking system was inoperative.

Inspector Fields further reported that the operator told him that the braking system had been working prior to the accident. The inspector also talked to the Beech Fork mechanic who inspected the scoop and was informed that the brake caliper had ruptured and split open.

It is Beech Fork's position that the caliper was destroyed during the incident because the caliper could not sustain the sudden load placed on it when the automatic braking system was engaged after the scoop started rolling down the incline. I conclude that the Secretary has not proved this violation by a preponderance of the evidence presented at the hearing.

There is no direct evidence as to when the caliper broke, but there is circumstantial evidence that it was functioning just prior to the accident. If it broke without prior warning during the accident, as the evidence seems to indicate, then it cannot be said that Beech Fork did not maintain the scoop in safe operating condition. Accordingly, I vacate the citation.

CIVIL PENALTY ASSESSMENTS

In arriving at appropriate civil penalty assessments in these cases, I have taken into consideration the statutory criteria set out in Section 110(i) of the Act. In the two years preceding these violations, Beech Fork had accumulated 227 violations. (Gt. Ex. 48.) That does not seem to be excessive for a company of Beech Fork's size. The pleadings indicate that Mine No. 1 produces 843,785 tons of coal per year and that, in all, Beech Fork produces 1,777,147 tons per year. Consequently,

I conclude that the assessed penalties are appropriate for a company the size of Beech Fork and will not effect its ability to remain in business. I have also considered that most of the violations were "significant and substantial" and that most of the violations involved only moderate negligence on Beech Fork's part. Finally, I have considered that on at least two occasions, Beech Fork did not abate the violations as rapidly as it should or could have and that many of the violations were repeated.

Accordingly, I have assessed a penalty for each citation or order as follows:(Footnote 8)

Docket No. KENT 93-659	
Citation No. 3816646	$2,000.00
Order No. 3816647	$2,000.00
Docket No. KENT 93-668	
Citation No. 3816654	$ 595.00
Citation No. 3816658	$1,155.00
Citation No. 4029824	$ 595.00
Citation No. 4029826	$1,450.00
Citation No. 4029828	$1,450.00
Citation No. 4027041	$ 595.00
Citation No. 4027042	$4,600.00
Citation No. 4027043	$ 595.00
Citation No. 4027045	$1,450.00
Citation No. 4029839	$ 595.00
Citation No. 4029840	$4,600.00
Citation No. 4026562	$ 690.00
Citation No. 4027060	$ 267.00

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8 Without explanation or rationale, the Secretary has submitted in his brief that all but one of the civil penalties be double the amount that he originally proposed in these cases. My review of the record provides no basis for such punitive action. Therefore, I have not followed the Secretary's suggestion.

Docket No. KENT 93-669	
Citation No. 4026569	$ 690.00
Docket No. KENT 93-699	
Citation No. 4026561	$ 267.00
Citation No. 3816644	$ 595.00
Citation No. 4029838	$ 595.00
Citation No. 4026568	$ 690.00
Docket No. KENT 93-709	
Order No. 3816656	$8,000.00
Order No. 3816657	$7,000.00
Order No. 4026565	$4,600.00
Citation No. 9980129	$ 50.00
Docket No. KENT 93-780	
Citation No. 9980135	$ 50.00
Docket No. KENT 93-781	
Citation No. 3816651	$1,019.00
Citation No. 4029827	$ 595.00
Citation No. 4026564	$ 267.00
Docket No. KENT 93-903	
Citation No. 4026563	$ 903.00
Citation No. 4030141	$ 50.00
Citation No. 4030142	$ 431.00
Citation No. 4030151	$ 50.00
Citation No. 4030152	$ 431.00
Citation No. 4030154	$ 431.00
Citation No. 4030155	$ 690.00

Citation No. 4030156	$ 267.00
Citation No. 4034025	$ 903.00
Total Penalty	$51,211.00

ORDER

Order No. 4030143 in Docket No. KENT 93-904 and Citation No. 4026571 in Docket No. KENT 93-992 are VACATED and DISMISSED. Citation No. 4026574 in Docket No. KENT 93-669 is DISMISSED. Citation No. 9980129 in Docket No. KENT 93-709 and Citation No. 9980135 in Docket No. KENT 93-780 are MODIFIED by reducing the level of negligence from "high" to "moderate." Citation No. 4030151 in Docket No. KENT 93-903 is MODIFIED by deleting the "significant and substantial" designation.

Order Nos. 3816646 and 3816647 in Docket No. KENT 93-659; Citation Nos. 3816654, 3816658, 4029824, 4029826, 4029828, 4027041, 4027042, 4027043, 4027045, 4029839, 4029840, 4026562 and 4027060 in Docket No. KENT 93-668; Citation No. 4026569 in Docket No. KENT 93-669; Citation Nos. 4026561, 3816644, 4029838 and 4026568 in Docket No. KENT 93-699; Order Nos. 3816656, 3816657 and 4026565 and Citation No. 9980129 in Docket No. 93-709; Citation No. 9980135 in Docket No. KENT 93-780; Citation Nos. 3816651, 4029827 and 4026564 in Docket No. KENT 93-781; Citation Nos. 4026563, 4030141, 4030142, 4030151, 4030152, 4030154, 4030155, 4030156 and 4034025 in Docket No. KENT 93-903 are AFFIRMED.

Beech Fork Processing, Inc. is ORDERED to pay civil penalties in the amount of $51,211.00 for these violations within 30 days of the date of this decision. On receipt of payment, these proceedings are DISMISSED.

T. Todd Hodgdon
Administrative Law Judge

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