FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 16, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2011-1557
Petitioner,	:	A.C. No. 15-19475-265136-01
	:	
v.	:	Docket No. KENT 2011-1558
	:	A.C. No. 15-19475-265136-02
KENTUCKY FUEL CORPORATION,	:	
Respondent.	:	Mine: Beech Creek Surface Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2013-698
Petitioner,	:	A.C. No. 15-19475-317227 A
	:	
v.	:	
	:	
LLOYD K. BRANHAM, employed by,	:	
KENTUCKY FUEL CORPORATION,	:	
Respondent.	:	Mine: Beech Creek Surface Mine

DECISION

Appearances: Latasha Thomas, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Allen Dudley, James C. Justice Companies, Roanoke, VA for Respondents.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA") against Kentucky Fuel Corporation and Lloyd Keith Branham as an agent of Kentucky Fuel, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. These dockets involve one 104(d) citation, two 104(d) orders, one 104(a) citation and an agent penalty assessed pursuant to section 110(c) of the Mine Act at Kentucky Fuel's Beech Creek Surface

Mine, located in Phelps, Kentucky.[1] The parties presented testimony and evidence at a hearing held on November 13, 2013 in Lexington, Kentucky.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Beech Creek Surface Mine is a surface coal mine, owned and operated by Kentucky Fuel Corporation. Beech Creek is a mine within the meaning of the Mine Act. Kentucky Fuel is a large operator and the penalties proposed in this case will not affect the company's ability to continue in business. The parties' stipulations, Jt. Ex. 1, indicate that there are no issues of jurisdiction. Moreover, the parties have stipulated to many of the penalty criteria as they relate to the citations and orders issued to the mine. Finally, the parties agree that Sec'y Ex. 9 accurately reflects the mine's history of assessed violations and that Branham has not been charged as an agent in the past. Sec'y Ex. 8.

MSHA Inspector Wanda McComas has been a surface mine inspector since 1997. On April 8, 2011 McComas traveled to Beech Creek to conduct an inspection after the local MSHA office received a complaint about defective equipment. As McComas approached the mine, a miner operating a dozer was told that an inspector was on the hill and that he was to bring the dozer to the "boneyard" for repair. McComas issued two citations related to the dozer; one for operating the dozer while in unsafe condition, and one for failing to correct the condition. In addition, following a 110(c) investigation, the mine foreman, Lloyd Keith Branham, was charged as an agent for the alleged violative condition of the dozer.

MSHA Inspector Larry Wolford was at the mine the same day to conduct an inspection after the local MSHA office received a complaint from a nearby resident that, after blasting at the mine, a number of rocks had rolled toward the homes at the bottom of the slope. Wolford, who has been an inspector for six years, issued a citation to the mine for failure to follow the mine's ground control plan, in that the catch bench was full of material and did not catch the rock and debris that was either blasted or rolled as a result of being moved by equipment. McComas assisted in the investigation of the ground control violation, took photographs, and issued a citation for the failure to conduct an adequate on-shift examination.

For the reasons that follow, I find that the citations and orders issued by both inspectors are valid as issued. However, I find that there is not sufficient evidence to demonstrate that Lloyd Keith Branham knew, or had reason to know, of the dozer's violative condition.

Each of the alleged violations described below has been designated as significant and substantial. A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts

[1] On September 10, 2012 the parties submitted a Joint Motion to Approve Partial Settlement of all but one of the alleged violations in Docket No. KENT 2011-1558. The settlement is addressed below.

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 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

> 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 a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). The Commission has explained that the third element of the formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation, and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). In addition, the question of whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Three of the four violations that were contested by the operator in these cases are designated as unwarrantable failure, and the fourth, while not unwarrantable, is alleged to be the result of high negligence. Unwarrantable failure has been defined by the Commission as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). The Commission has stated that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator's efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009).

a. Citation No. 8258770

On April 8, 2011, MSHA Inspector Wanda McComas issued Citation No. 8258770 pursuant to section 104(d)(1) of the Act to Kentucky Fuel for an alleged violation of section 77.404(a) of the Secretary's regulations. The cited standard 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." 30 C.F.R. § 77.404(a). The citation described the alleged violative condition, in pertinent part, as follows:

> The Cat D10N dozer, Co. #1, being used at this mine site to develop drill benches and pushing shot. The following defects were found: 1. The hand/grab rails (mounted onto the engine) on both the left and right sides are bent and twisted with the smaller grab rail on the left side completely missing. 2. The audible alarm (front horn) is inoperative. 3. The automatic warning device (back up horn) is inoperative. 4. The audible and visual fault warning system is inoperative. 5. The seat is broke and moves back and forward. 6. The latches to the windows are broke and will not allow the window to stay shut exposing the employee to dust and noise. 7. Both left and right side doors/handles are defective in that the left door is hard to open and the right door requires the employee to kick the door for it to open. 8. The decking on the right side of the dozer directly outside of the operator's compartment is covered in oil creating a slip and fall hazard. 9. The front and left and the right side windows are scored (hazed over where the wipers have scraped the window interfering with the operator's visibility. 10. The ignition switch is defective in that it took several tries for the operator to get the dozer to start. 11. The left jacks on the blade and the ripper are leaking and some blowing back onto the transmission. 12. The engine side panels on both the left and right sides are missing exposing persons to moving machine parts.[2] Management was well aware of the defects as they had been recorded in the pre-op book since 3-18-2011. Management made the decision and could not justify continual operation of the dozer without correcting the defects. The operator has engaged in more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

McComas determined that a permanently disabling injury was reasonably likely to occur, that the violation was significant and substantial, that one person was affected, that the negligence was high and that the violation was a result of an unwarrantable failure to comply. A civil penalty in the amount of $14,000.00 has been proposed for this violation.

[2] Item No. 12 was added via a subsequent modification to the citation.

The dozer cited in this violation was moving rock and dirt the day the inspector arrived at the mine. As soon as McComas reached the guard shack, the operator of the dozer was told to bring the equipment in for repair. After receiving the advance notice of the inspector's approach, the dozer was removed from the job it was doing and placed in an area for service. McComas examined the dozer and described the many defects mentioned in the citation, the hazards associated with the defects, and provided photographs of nearly half of the twelve defects that she recorded. (Tr. 61-66). She reviewed the pre-op inspection reports for the time period from March 18th until April 8th, the date of the inspection. She found many defects listed in the inspection reports that apparently had not been repaired during that period. She also reviewed the pre-op inspection report handed to her by the dozer operator on the day of the inspection.

The mine operator, and particularly Louis Hatfield, one of the mine's three dozer operators at the time, disputes that all of the twelve defects found by McComas are safety defects. Hatfield alleges that the broken window, the door, the seat and the oil on the step do not affect safety. Hatfield is confident that, if the dozer was not safe to operate, he could refuse to operate it and call the mine superintendent, who would determine if the equipment should be removed from service. Hatfield explained that none of the dozer operators wanted to run this particular dozer because it was old. He noted that one of the other dozer operators, Jack Gayhart, who he alleges was operating the dozer the day of the inspection, was always complaining about the equipment because it was old. According to Hatfield, Gayhart kept two sets of pre-op inspection reports; one that listed no defects, and one that he kept in the cab and later handed to the inspector that did list mechanical defects on the equipment.

Hatfield's view of what is safe varies from the inspector's, and his allegations against Gayhart, the allegedly errant dozer operator, are suspect. However, even if Hatfield is correct, he did not deny that the horn was not working, that the back-up alarm was not functioning, that the engine cover was missing, and that oil was leaking. Those alone are sufficient to find a violation, and taken together certainly do so. I find that a reasonably prudent person familiar with the mining industry and facts of this case would have recognized that Kentucky Fuel failed to both maintain the machinery and equipment in safe operating condition, and to remove the unsafe equipment from service. *See U.S. Steel Mining Co.*, 27 FMSHRC 435, 438-439 (May 2005). Hence a violation has been demonstrated as alleged.

The mine argues that the violation is not S&S. Hatfield testified that he did not see a defect that would, in his view, cause an injury. McComas, however, identified several defects that would cause an injury. The oil on the engine can create a fire hazard, there were several slip and fall hazards given the defective handrail and the oil on the step up to the cab, the door that could not be opened from the inside could result in entrapment in the event of an accident, and the window that would not be closed exposed the driver to silica dust. Further, according to McComas, the dozer normally operated in a lot of different areas of the mine, including congested areas like the boneyard where there were other vehicles or foot traffic, and both the front horn and backup alarm were inoperable, making it impossible to notify miners in the area that the dozer was moving. Finally, the ignition switch was being hot-wired which, in turn, caused a spark near where the oil was leaking and the missing engine panel left belts open to exposure.

The Commission and courts have held that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999). I credit Inspector's McComas' description of the defects and associated hazards. I find that there is a violation, and that the many hazards, individually and/or together, would result in a serious injury. Therefore, the violation is significant and substantial.

McComas found this violation to be the result of high negligence and an unwarrantable failure to comply. She determined that the negligence was high based upon the amount of time the conditions existed and the mine's failure to correct any of the multiple defects even though they had been recorded on the pre-op inspection logs for several weeks. Further, the dozer was being operated on the day of the citation but was taken out of service as soon as the mine learned that an inspector was nearing the site. The many defects resulted in a high degree of danger to the dozer operator as well as those miners on foot and in other vehicles that traveled in proximity to the dozer. Given the many defects and the pre-op reports, one can safely conclude that the defects were obvious to the dozer operator and to management. As Hatfield indicated after each pre-op, the inspection sheets were picked up by the mine superintendent, David Ison, and were kept on file at the mine. McComas indicated that, while some of the pre-op sheets were missing from the file, it was not difficult to see that many defects went uncorrected for a number of weeks. I agree that the violation was a result of high negligence and an unwarrantable failure to comply. This violation is further aggravated by the fact that the dozer was being used earlier that day but taken out of service immediately when the inspector arrived on the property. For all of the reasons listed herein, I assess a penalty of $20,000.00.

i. 110(c) Agent Case Involving Lloyd Keith Branham

The Secretary, in conjunction with the issuance of Citation No. 8258770 to the mine, seeks a civil penalty of $3,000.00 against Lloyd Keith Branham pursuant to Section 110(c) of the Act. The Secretary alleges that Branham, acting as an agent of the mine, knowingly authorized, ordered or carried out the violation addressed by Citation No. 8258770.

Section 110(c) of the Act states that "[w]henever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties[.]" 30 U.S.C. § 820(c). In *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) the Commission outlined what is necessary to establish 110(c) liability:

> The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an

> individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp*., 402 U.S. 558, 563 (1971)).
>
> A knowing violation thus occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. The Commission has explained that "'[a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.'" *Id*. (citation omitted). In addition, section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

McComas testified that Branham was a foreman and one of his duties was to assure that the site was safe. McComas knows that Branham was in the area where the dozer was being operated on the day she arrived to conduct the inspection, but she does not know who ordered the dozer out of service. McComas asserts that because the dozer had been used prior to her arrival, and the unsafe conditions were obvious to anyone near the dozer, Branham would have been aware of the dozer's unsafe condition and allowed it to continue operating. Additionally, McComas contends that since the pre-op checks noted a number of safety defects with the dozer over a period of weeks, and those reports were in the mine office, Branham would have been aware of the conditions. Branham was in the position to take care of the employees and he was one of the direct supervisors, and McComas believes that he was also the supervisor of the dozer operator.

Branham has worked at the mine for the past four years as a foreman and, prior to that time, worked at various surface mines since 1996. He was a foreman on the day shift on the day the citation was issued. While Branham is familiar with and can operate all equipment at the mine, he asserts that he worked only with the coal, and had nothing to do with the equipment, such as the dozer, that was used to move the rock and spoils. Branham repeatedly stated that he took care of coal production, quality, and shipping. Branham had a crew of four miners who worked directly for him. None of those miners operated the dozer. He argues that he did not know, and had no reason to know, about the defects on the dozer for the many weeks they existed.

Branham was supervised by David Ison, who was the mine superintendent at the time of the violation. The duties at the mine were balanced between Ison and Branham. Branham explained that he did nothing with Ison, and worked solely on coal production and had no knowledge of the dozer or its condition. Branham asserts that Ison was responsible for all equipment at the mine, including the dozer that was found to be defective. Branham asserts that it was Ison's responsibility to gather all of the pre-op sheets each shift and take them to the office. The mine and Branham argue that, since Ison collected the pre-ops, and Branham was

not the management personnel responsible for the dozer, there is no reason to believe that Branham had viewed the pre-op sheet the day of the citation and knew, or had reason to know, of the defective conditions. While I do not find Branham to be a particularly credible witness, his testimony was supported by Hatfield.

Hatfield agreed that Branham did not deal with the dozers, and that he, as a dozer operator, gave his pre-op sheets to Ison, who collected them within an hour or two after the pre-op was complete. There was no testimony regarding Branham's access to the pre-op sheets once they were in the office, and no evidence that Branham had been near enough to the dozer to observe the defects.

Branham does not deny that miners were given notice of the inspection, however, he does not know who ordered the dozer to stop working. McComas, also was not told and did not know who told the dozer operator to remove the dozer from service due to the inspector being nearby, nor can she say with any certainty that Branham had seen the defects on the dozer or otherwise had a reason to know of the defects.

If sufficient evidence had demonstrated that Branham knew, or at least should have known, about the safety defects, then this would have a different outcome. However, the evidence is simply not enough to demonstrate that he did know, or had reason to know, of the defects and failed to act on the information. Further, there is no evidence to indicate that Branham was the individual that gave advance notice and ordered the dozer out of service. Rather, the evidence seems to suggest that Ison, who is no longer at the mine and cannot be located, is the guilty party. Again, while it is likely that Branham saw some pre-op reports prior to the day of the inspection, I am not convinced that there is enough evidence to reach the conclusion that he did know, or had reason to know, of the defects on the dozer and failed to have them corrected. Accordingly, I vacate the Secretary's 110(c) penalty.

b. Citation No. 8258773

On April 8, 2011, MSHA Inspector Wanda McComas issued Citation No. 8258773 pursuant to section 104(a) of the Act to Kentucky Fuel for an alleged violation of section 77.1606(c) of the Secretary's regulations. The cited standard requires that "[e]quipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c). The citation described the alleged violative condition, in pertinent part, as follows:

> The operator at this mine site failed to correct equipment defects affecting safety prior to using the equipment. The operator of The Cat D0N dozer, Co. #1, has recorded numerous safety defects that needed to be corrected since 3-18-2011, and the operator failed to make any corrections.

McComas determined that a fatal injury was highly likely to occur, that the violation was significant and substantial, that one person was affected, and that the negligence was high. A civil penalty in the amount of $14,373.00 has been proposed for this violation.

This citation relies on many of the facts and findings discussed above. However, this citation, unlike the first, describes a violation based upon my finding that the dozer was being operated in an unsafe condition just prior to the inspector's arrival. Given my above finding that the dozer was not being maintained in a safe operating condition, and the undisputed fact that the dozer was being operated just prior to the inspector's arrival, I find that the Secretary has established a violation as alleged.

Operating this dozer with the many defects described above created a number of safety hazards, including, hitting other equipment or a miner on foot due to the inoperable front horn and back-up alarm. While the other safety hazards are notable in the context of an S&S analysis, the inability to signal as the dozer is moving creates a safety hazard that would lead to a very serious injury and, alone, is enough to sustain the Secretary's significant and substantial designation.

This dozer had so many hazards that operating it without correcting those hazards became extremely dangerous. The mine's failure to correct the hazards prior to operation created a hazard separate and apart from the general requirement that the safety defects be repaired. Not only had the defects been listed on the pre-op sheets for a number of weeks and no repairs undertaken, but the mine was operating the equipment right up until the time the MSHA inspector arrived. As McComas explained, some of the defects were "easy fixes" that could have been done as soon as they were reported. I find that Secretary has established that the violation was the result of high negligence given the easy fixes that could have been made and the fact that no action had been taken to correct these conditions while the dozer continued to be operated over an extended period of time. Accordingly, I assess a penalty of $15,000.00.

Kentucky Fuel argues that this citation alleges the same condition as in Citation No. 8258770, that the two alleged violations are duplicative and, accordingly, one should be vacated. I find no merit to the argument. In *Cumberland Coal Resources, LP*, the Commission explained that "citations are not duplicative so long as the standards involved impose separate and distinct duties upon an operator. 28 FMSHRC 545, 553 (Aug 2006), *aff'd*, 515 F.3d 247 (3d Cir. 2008) (citing *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) and *Cyprus Tonopah Mining Corp*., 15 FMSHRC 367, 378 (Mar. 1993)). In this case, one standard imposes a requirement that defects be repaired or the equipment be taken out of service, while the other standard requires that the equipment not be operated until they are repaired These are separate and distinct requirements and require different actions from the operator in order to comply. Accordingly, I reject Kentucky Fuel's argument.[3]

[3] Kentucky Fuel, in making its argument that the citation and order are duplicative, also asserted that MSHA's Program Policy Manual directs that section 77.404(a), the standard cited in the first violation addressed above, "should not be cited when any other safety standard applies." Kentucky Fuel Br. 17. I reject this argument. As the Commission recently stated, "it is well-established that the Secretary's PPM does not prescribe rules of law that are binding on the Secretary or the Commission." *American Coal Co.*, 34 FMSHRC 1963, 1970-71 (Aug. 2012).

Kentucky Fuel further argues that the cited standard applies only to "loading and haulage equipment" and that, because the dozer does not "load" or "haul" dirt, the standard is inapplicable. I note that Kentucky Fuel's argument relies not on language in the substantive subsection of standard, but rather the text of the subtitle, "Loading and haulage equipment; inspection and maintenance." I find that the dozer falls within the meaning of "loading and haulage equipment " as noted in the heading. *See Farco Mining Co.*, 10 FMSHRC 184, 187 (Feb. 1988) (ALJ). The Secretary's regulations do not define "loading and haulage equipment" but the term "haulage" is defined as the "[t]he drawing or conveying, in cars or otherwise, *or movement of* men, supplies, ore and *waste*, both underground and on the surface." *Dictionary of Mining Mineral and Related Terms* 255 (2d ed.1997) (emphasis added). I find that the dozer's act of "push[ing] dirt," Kentucky Fuel Br. 16, amounts to "moving . . . waste" and, as a result, brings it within the type of equipment contemplated by the standard. Therefore, there is no basis to agree with the argument made by the operator.

c. Order No. 8258801

On April 8, 2011, MSHA Inspector Larry Wolford issued Order No. 8258801 pursuant to section 104(d)(1) of the Act to Kentucky Fuel for an alleged violation of section 77.1000 of the Secretary's regulations. The cited standard states as follows:

> Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

30 C.F.R. § 77.1000. The order described the alleged violative condition, in pertinent part, as follows:

> The operator has failed to comply with the acknowledged ground control plan dated March 26, 2010 in the Pond Creek cut through area. The catch bench for this area is not sufficient to catch the loose material. Evidence of material, large rocks, trees, and spoil have not been contained within the permitted area. The material has been allowed to leave the mine property and roll toward dwellings at the bottom of the mountain. This condition exposes the occupants of the dwellings to the hazards of fly rock. When asked management was aware of this condition and has made no effort to correct this hazard. Management cannot give an excusable or justifiable reason for this condition to exist. This violation is an unwarrantable failure to comply with a mandatory standard.

The order was later modified to include language about the plan revisions for termination. Wolford determined that a fatal injury was highly likely to occur, that the violation was significant and substantial, that one person was affected, that the negligence was high and that the violation was a result of an unwarrantable failure to comply. A civil penalty in the amount of $47,200.00 has been proposed for this violation.

Larry Wolford, a mine inspector from MSHA's Phelps, Kentucky field office, has been an inspector for six and a half years. Prior to becoming an inspector he worked seven years in coal mines as, among other things, a foreman, continuous miner operator, shuttle car operator, and roof bolter.

Wolford traveled to the Beech Creek mine on April 8, 2011 to follow up on a complaint made by a homeowner in the area who reported that he heard a blast, and rock and debris came down the hill from the mine toward his home. Wolford met with Ison upon his arrival at the mine and explained that a complaint had been received by MSHA that rocks and debris were dangerously close to the homes below the area where the mine was working. Ison told Wolford that the rocks that had rolled over the hill were due to a dozer pushing material, and not from a blast as the complaint alleged. Ison acknowledged, and Wolford observed, that various size rocks had traveled down the hill toward the homes.

Wolford traveled to the working area and observed that the safety bench, designed to catch errant rocks and debris, was full. The purpose of the bench is to catch material and prevent it from rolling down the mountain into the area where the homes are located. The catch bench is required by the mine's ground control plan. Sec'y Ex. 6 p. 10 item 8. The plan requires that the bench be cleaned after each blast so that there is room on the bench to catch rock and debris from above. Wolford explained that a full bench will not catch any more material, and should be cleaned to make certain that rocks, boulders and debris will not roll down the hill.

Wolford found the violation to be S&S and explained that, with the bench full, the large boulders he observed, along with the rock and debris, had nowhere to go but down the hill towards the homes. The large rocks, as well as the smaller ones, have the potential to crash into and through the side or roof of a home, or hit a vehicle or person. If a person were struck by a rock rolling down the hill, it was highly likely that the individual would be severely injured or killed by crushing injuries.

Inspector McComas, who was also in the area at the time, explained that she observed large rocks near the residences as she walked up the hill towards the catch bench from the area below. McComas testified that the homes, which sit in a valley at the bottom of the hill below the mine, are occupied. There is a major road in front of the homes. An old dirt road, some trees, and a small creek were located between the backs of the homes and mine. She agrees with Wolford that there were rocks and boulders that appeared to have recently rolled near the homes.

McComas took photos of the catch bench, Sec'y Exs. 10 and 11, and explained that, at the time the citation was issued, the catch bench was completely full and could no longer protect against rolling rock and debris. McComas, who is familiar with the ground control plan at this mine, explained that an outcrop shot, the kind of shot named in the ground control plan, is

normally the first shot and the catch bench is there to catch any flying or rolling material from that shot. The clean-up must be done right away so that the catch bench remains open and able to catch all debris. The catch bench, as she saw it and photographed it, shows that there is no room remaining to catch even a small rock.

The mine argues that the blast and spoil areas were far enough from the homes to prevent a problem. While McComas estimated the distance from the catch bench to the homes at 300 feet, Branham, using a map, estimated it at 1200 feet. In any event, I find that there were rocks and large boulders that had rolled over the full catch bench, down the hill, and were very near the occupied residences.

The mine also argues that it need not clean the bench immediately after each blast, but instead only clean the bench before the next blast. However, I find that the plan is clear and the bench must be cleaned after each blast. Logic dictates that, if the bench is cleaned after each blast, then there is room for rocks, boulders, and debris that may roll as the spoils are moved or other work is done after the blast. If the mine waits until immediately before the next blast, the catch bench has already become over-loaded and a hazard has been created. The condition of the bench was such that the safety of miners and those residents that lived below the mine was compromised to the point that a safe workplace was not provided.

I find that the Secretary has established a violation of the cited standard and ground control plan as alleged, and that the failure to clean the catch bench resulted in boulders, rock and debris flying or rolling very close to the occupied homes below the mine. The hazard of large rock flying and rolling into an area where people live, drive, and play, will result in an accident or injury to one of the residents or their guests. The injury will be very serious, if not fatal. Therefore, I find the violation to be significant and substantial.

I find this violation to be the result of the mine's high negligence and an unwarrantable failure to comply with the Mine Act and the ground control plan. Both inspectors understood that Ison, the superintendent and one of two supervisors working at the time, was aware that the rocks went over the hill, that the catch bench was full, and that it had been that way for several shifts. No effort had been made to clean the bench following the last blast. Ison freely admitted to the inspectors that nothing had been done to clear the bench after the last blast occurred a number of shifts prior to the inspection, and that the mine had no intention to clean the bench any time soon. The blasting records demonstrate that the last blast occurred on the morning of April 7th. The bench therefore contained rock, boulders, tree stumps and other material for at least the two shifts on April 7th and into the first shift on April 8th. Further, McComas credibly testified that it would have taken more than three shifts to accumulate so much rock and debris and it is her belief that several shots were set without cleaning the catch bench. I find that the condition of the catch bench, and the fact that it violated the mine's ground control plan, was obvious. The bench was full and, as can be seen from the photos, it was obviously overflowing with rock and debris. The bench should have been cleaned after every shot, but both Wolford and McComas explained that there was enough debris to indicate that it had not been cleaned for some time and the mine had probably had several shots since it had last been cleaned. The rolling rock and material created a very dangerous situation. McComas explained that MSHA has seen flyrock go through the roofs of houses, and roll into houses, vehicles and pedestrians. She believed that

the operator had no interest in cleaning up the bench or complying with the standard. I credit both McComas' and Wolford's testimony and find that the violation was a result of the mine's high negligence and unwarrantable failure. Accordingly, I assess a penalty of $50,000.00.

d. Order No. 8258774

On April 8, 2011, MSHA Inspector Wanda McComas issued Order No. 8258774 pursuant to section 104(d)(1) of the Act to Kentucky Fuel for an alleged violation of section 77.1713(a) of the Secretary's regulations. The cited standard states as follows:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. §77.1713(a). The order described the alleged violative condition, in pertinent part, as follows:

> Management at this mine site failed to conduct and/or document the results of adequate on-shift inspections at this mine site. On this date, a D-order has been issued due to ground control. The on-shift books upon a visual review did not show any documentations of the conditions found justifying the D-order. The on-shift book stated that everything was ok at the times of the inspections when in fact, material had rolled off the mine permit to the areas around the dwellings located at the bottom of the Pond Creek cut through. The inadequate checks and or documentation will lead to someone being fatality injured. Management did not give an excuse or justifiable reason for the inadequate inspection/documentation. The operator has engaged in more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard

McComas determined that a fatal injury was highly likely to occur, that the violation was significant and substantial, that one person was affected, that the negligence was high and that the violation was a result of an unwarrantable failure to comply. A civil penalty in the amount of $15,971.00 has been proposed for this violation.

As discussed above, McComas traveled to the catch bench with Wolford as a result of a complaint made to MSHA by a resident that lived below the catch bench. McComas observed that the catch bench was full, that there was no room for any more material, and it appeared that it had been that way not only since the blast from the day before, but even longer. At a distance of about 100-200 feet behind the homes she found large rocks and boulders, some of which were

4-5 feet long. McComas reviewed the on-shift inspections and saw nothing to indicate that the catch bench was full and that rock and debris had rolled off the hill. After observing the catch bench and the area below, and noting that Ison had already conducted an on-shift inspection, as had an examiner on the two shifts prior, McComas issued this order for failure to conduct an adequate on-shift.

In addition to McComas' concern about the safety of the people living below the bench, she was also concerned that miners who were not aware of the hazard would be injured. Ison failed to note the condition in the on-shift report and, in doing so, failed to notify the miners that a hazard existed. The purpose of the examination is to find hazardous conditions and correct them prior to miners performing work in the area. Since the on-shift records did not note the rock, and Ison did not tell miners of the hazard that remained while they worked, he was placing them in danger. The bench was so over-loaded that other activities, aside from blasting, could have caused the rock and debris to fall and cause a serious injury.

The condition of the catch bench was readily apparent and, given the amount of material, had existed in that condition for a number shifts, if not a number of days. McComas reviewed the on-shift books and observed that no hazards were documented. However, given what she observed, the supervisor should have noted that the safety bench was full and needed to be cleaned. The mine, at a minimum, should have started the cleanup.

I agree that a violation has been shown and that the violation is a significant and substantial one. Hazards are noted in on-shift examination reports so that miners will not be assigned to work in unsafe areas, and so that work will begin to correct the conditions. When hazards are not listed, the workers are not aware, and may not be as careful around the unsafe area as they would have been if they had been warned. The hazard of not recording the condition of the catch bench, thereby not warning others of the condition so that it could be corrected and/or avoided, will lead to an injury or illness which will be serious or fatal. I agree with McComas that, as mining continues, failing to recognize and correct the hazard will result in someone being severely injured or killed. In this instance, failure to record and then remove a hazard threatened persons working at the mine as well as those living below the mine. The rocks observed by McComas and Wolford were large and, with the speed developed during a roll, would go through a house and kill an individual if it hit them. McComas explained that she has seen situations where rocks crashed through roofs or the backs of houses, barely missing the people inside. I find that, assuming the continued course of mining, it is likely that a fatal injury will occur. Accordingly, I affirm the S&S designation.

The inspector indicated that this violation was the result of high negligence and an unwarrantable failure to comply. The violation was obvious, that is the rock and debris on the catch bench was plainly evident and should have been noted in the examination report, which it was not. It is the responsibility of the supervisor to look for and record these kinds of hazardous conditions in an effort to warn and protect miners from harm. The violation was extensive in that it was not noted in a preshift for an extended period of time in spite of its obviousness. The hazard of failing to report the condition of the bench was readily apparent to management, yet no action was taken to warn miners, or correct the condition. Supervisors must look at the on-shift reports and recognize what should or should not be noted, as well as what should be done to

warn miners. The condition was obvious, existed for a long period of time, and there was no plan to clean the bench. I credit McComas observation that it would have taken several shots to fill the bench to the extent that it was filled. In spite of such, neither Branham nor Ison had attempted to record it, warn miners, or see that it was cleaned up. I find that the evidence supports that the violation was a result the mine's high negligence and unwarrantable failure to comply. Accordingly, I assess a penalty of $16,000.00.

II. SETTLED CITATIONS

Prior to hearing, the parties filed a Joint Motion to Approve Partial Settlement of the remaining citations in Docket No. KENT 2011-1558. The originally assessed amount for those citations was $3,015.00 and the proposed modified penalty amount is $2,200.00.

Respondent, Kentucky Fuel, has agreed to accept Citation Nos. 8259226, 8259227, 8259228, 8259229, 8259233, 8259239, 8259240, 8259241, 8259242, 8259243 and 8259244 as issued and pay the originally proposed penalties.

The parties represent that, with regard to Citation No. 8259225, at hearing, the Respondent would have presented evidence that the berm provided from the parking lot to the working pits was capable of impeding travel and deflecting a truck's path should there be a loss of control. Therefore, it contends that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization. The Secretary recognizes that Respondent raises factual and legal issues. Accordingly, in the interest of settlement, the Secretary agrees to accept, and Respondent, Kentucky Fuel, agrees to pay a reduced penalty of $210.00.

The parties represent that, with regard to Citation No. 8259245, at hearing, the Respondent would have presented evidence that a crew was in the process of cleaning the loose material that remained on the highwall face in the Cedar Grove 992C Pit. Therefore, it contends that this citation should be modified to "low" negligence and that the proposed penalty should be reduced in light of this characterization. The Secretary recognizes that Respondent raises factual and legal issues. Accordingly, in the interest of settlement, the Secretary agrees to accept, and Respondent, Kentucky Fuel, agrees to pay a reduced penalty of $145.00.

The parties represent that, with regard to Citation No. 8259246, at hearing, the Respondent would have presented evidence that a berm was being constructed to prevent over travel and overturning on the WA 900 loader pit dump. Therefore, it contends that this citation should be vacated. The Secretary recognizes that Respondent raises factual and legal issues. Accordingly, in the interest of settlement, the Secretary agrees to accept, and Respondent, Kentucky Fuel, agrees to pay a reduced penalty of $210.00.

The settlement amounts are as follows:

Citation Number	Assessment	Settlement Amount
8259225	$460.00	$210.00
8259226	$100.00	$100.00
8259227	$100.00	$100.00
8259228	$100.00	$100.00
8259229	$100.00	$100.00
8259233	$207.00	$207.00
8259239	$207.00	$207.00
8259240	$100.00	$100.00
8259241	$207.00	$207.00
8259242	$100.00	$100.00
8259243	$207.00	$207.00
8259244	$207.00	$207.00
8259245	$460.00	$145.00
8259246	$460.00	$210.00
Total:		$2,200.00

I accept the representations of the Secretary as set forth in the motion to approve partial settlement. I have considered the representations and documentation submitted, and I conclude that the proposed partial settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **GRANTED.**

III. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone*

Co., 5 FMSHRC 287, 292 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] … [of] the Act. *Id*. at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a medium-sized operator. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence of the violations are discussed above. The operator demonstrated good faith in abatement but I find it troubling that in at least one instance, the mine was given advance notice of the inspection as the inspector approached and was therefore able to take the equipment out of service prior to the inspection. Based on my findings set forth above and the criteria in section 110(i), I assess a penalty of $101,000.00 for the citations and orders addressed at hearing

Given my above findings, I assess a total penalty of $103,200.00 for the settled citations and orders and those citations and orders that were addressed at hearing. Kentucky Fuel is hereby **ORDERED** to pay the Secretary of Labor the sum of $103,200.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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