FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC -5 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENTUCKY FUEL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket Nos. KENT 2015-383 A.C. No. 15-19475-375208 Mine: Beech Creek Surface Mine

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner

James F. Bowman, on behalf of Kentucky Fuel Corporation, Midway, West Virginia, for Respondent

Before: Judge William S. Steele

I. STATEMENT OF THE CASE

This case concerns an injury related to an alleged violation of 30 C.F.R. § 77.404(c), as well as the violation of an associated 30 U.S.C. 813(k) Order. The case was the subject of a May 18, 2016 hearing in Pikeville, Kentucky. A mechanic lying underneath a grease and oil truck attempted to start the stalled vehicle by banging on the starter with a hammer, while another miner in the cab of the truck was at the wheel assisting the mechanic. When the truck started, it rolled backward and over the mechanic, who suffered a punctured lung, several broken ribs, and was airlifted to the hospital. The Respondent was issued multiple citations arising out of the accident, but only two remain at issue here. The first, Citation No. 8299655, alleges that the Respondent failed to block the truck against motion in violation of 30 C.F.R. Section 77.404(c). The second, Citation No. 8299679, alleges that, following the accident, the Respondent allowed work to be done on the grease and oil truck in violation of the 103(k) Order No. 8289927.

II. STIPULATIONS

The Secretary of Labor and the respondent, Kentucky Fuel Corporation, jointly stipulate to the following facts as not being in dispute:

1. The respondent is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.

2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

3. Kentucky Fuel Corporation is an "operator" as that word is defined in Section 3(d) of the Mine Act, 30 U.S.C. Section 803(d), at the mine where the citations contested in this matter were issued.

4. The respondent has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.

5. The respondent has mine ID 15-19475.

6. The citations in this docket are complete, authentic, and admissible.

7. The respondent mined 114,647 tons of coal in 2013 and 148,741 tons of coal in 2014.

8. The citations in this docket were properly served on the respondent by a duly authorized representative of the Secretary on the dates stated therein.

9. The penalties proposed in this docket would not affect the respondent's ability to remain in business.

JX-1.[1]

III. LAW AND REGULATIONS

Burden of Proof and Standard of Proof

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by a preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

[1] The joint stipulations in this case are labeled JX-1. The Secretary's Exhibits are labeled S. Ex. The Respondent did not submit exhibits for consideration.

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877).

Assessment of Credibility

As trier of fact, this Court is free to accept or reject, in whole or in part, the testimony of any witness. In resolving any conflicts in testimony, this Court has taken into consideration the demeanor of witnesses, their interests in the case's outcome, or lack thereof, consistencies or inconsistencies in each witness's testimony, and any other corroborative or conflicting evidence of record. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Court's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

REGULATIONS

30 C.F.R. § 77.404(c), "**Machinery and equipment; operation and maintenance**," specifies:

> (c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

30 C.F.R. § 77.404(c).

Section 103(j) of the Mine Act, "**Accident notification; rescue and recovery activities**," provides that:

> In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j).

Section 103(k) of the Mine Act, "**Safety orders; recovery plans,**" provides that:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

IV. SUMMARY OF TESTIMONY AND EVIDENCE

The Rollover

On September 23, 2014, at about 8:30 p.m., Cody Dove, a rank-and-file miner employed by Kentucky Fuel Corporation at its Beech Creek Mine, discovered that his red Autocar Grease Truck would not start. Tr. 19, S. Ex. 1, S. Ex. 3. Dove called out for a mechanic, Jeremy Hensley, who arrived and asked Dove to try and start the truck while he was down at the front wheel of the truck. Tr. 19. This entailed Hensley lying horizontally underneath the vehicle, with his body just behind the driver's side front wheel and his legs sticking out from underneath the vehicle. Tr. 20, S. Ex. 6. Using a hammer, the mechanic began to bang on the starter of the truck, which is located underneath the vehicle. Tr. 20-1. Inspector Robinson[2] testified that banging on

[2] Brian Robinson was a surface specialist with MSHA. Tr. 13-4. Prior to this position, he was a general surface CMI for his first five years with MSHA. Tr. 14. Robinson had been employed variously as a highwall miner, electrician, foreman, and equipment operator in mining operations for almost 12 years when he began work at MSHA in October of 2006. Tr. 14-5. Robinson has certifications in low, medium, and high voltage electrical "cards," as well as a foreman's certification. Tr. 15.

the starter will, in some cases, start a truck up because "starters, sometimes they stop in a bad spot . . . sometimes you can bang them with a hammer and it'll move them just a little bit to get to a good place on them and [it'll] start." Tr. 20.

As a result of the mechanic striking the starter with the hammer, the truck started. S. Ex. 3, Tr. 20. Immediately afterward, the driver's side front tire rolled over the mechanic, who came within an inch of being completely rolled. Tr. 20. The rollover caused multiple rib fractures and Hensley's lung was punctured. Tr. 30. Inspector Wolford[3] represented that the operator of the truck told him that the truck was in reverse at the time of the accident.[4] Tr. 37. The mechanic was subsequently airlifted to receive medical attention. Tr. 30. He made a complete recovery and returned to work at the mine in less than six months. Tr. 30, 11.

Inspector Ralph Fannin verbally issued Section 103(j) Order No. 8289927 that evening at approximately 9:35 pm to Steve Ritz, foreman on site. S. Ex. 1. This stopped all work at the mine immediately. Tr. 92-3, S. Ex. 1. At approximately 11:15 pm that evening, Fannin modified the 103(j) Order to a written 103(k) Order. S. Ex. 1, Tr. 92. The 103(k) Order was modified the next day, September 24, 2014, at approximately 3:30 pm, to release all portions of the mine from the Order except the red Autocar grease truck that ran over the mechanic and the mechanic's personal blue International truck.[5] S. Ex. 1, Tr. 93. The Order was again modified on September 25, 2014, at around 3:00 pm, to release the mechanic's personal blue International truck. S. Ex. 1, Tr. 94.

Mark Huffman, employed at the time of the accident as Director of Health and Safety at the Beech Creek Surface Mine, was at home on the night of September 23, 2014.[6] Tr. 135.

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[3] Melvin Wolford is a surface specialist in the Pikeville, Kentucky field office and began work for MSHA in 2006. Tr. 62-3. Prior to that, Wolford had roughly 10 years of mining experience, beginning his career in 1995 before moving on to Massey New Ridge Mining, where he worked as a highwall miner and equipment operator. Tr. 61-2. While at Massey Wolford had the opportunity to operate and work on bulldozers, loaders, and rock trucks and left in 2000 to take work at Nice Winter Coal Group. Tr. 62. Wolford continued as an equipment operator, acquiring his foreman's card in 2005. Tr. 63.

[4] At hearing, Inspector Wolford ruled out the possibility that the truck was out of gear, in forward gear, or neutral at the time of the accident. Tr. 82. "If it would have been in neutral or would not have been in gear or would have been in forward gear, the truck would have went forward instead of backwards and went up on the guy." Tr. 82. Inspectors did not test whether the vehicle would remain stationary if the truck was shifted into neutral and then started. Tr. 83-5.

[5] At hearing, Inspector Robinson testified that the blue truck was also sequestered under the 103(k) Order as it was the mechanic's personal vehicle, supplied privately by him, and not the focus of any investigative work. Tr. 106-7.

[6] Huffman was employed by Blue Stone Industries, another mine operator, at the time of hearing. Tr. 133. He had 11 years of mining experience and a number of professional certifications,

Huffman was called by Steve Ritz, foreman on site at the time.[7] Tr. 135, Tr. 147. The phone call was short and relayed that an employee had been injured by a truck that had rolled back on the employee. Tr. 136.

Unsure of the severity of the employee's injuries, Huffman immediately called the Mine Safety and Health Administration (MSHA) and the Kentucky Office of Mine Safety and Licensing to report the accident. Tr. 136. After notifying MSHA and the Kentucky Office, Huffman placed a third call to Pat Graham, his superior and Vice President in charge of Health and Safety, relaying what details he had of the accident once more. Tr. 136.

By this time, Graham had already spoken to the mine superintendent, Perry Rider, regarding the accident. Tr. 136. Graham, upon hearing that the mechanic was talking to other miners, suggested to Rider that the incident was not a reportable accident. Tr. 136. Graham subsequently traveled to the mine after speaking with Huffman. Tr. 139. Huffman directed that the accident site be preserved in accordance with the Mine Act, then went to the hospital to see the injured employee. Tr. 137-8. The accident had occurred late in the day, too late to begin work in earnest, and it was decided the accident investigation would begin instead the next day. Tr. 138, S. Ex. 3.

The Accident Reconstruction and Investigation

Two inspectors involved in the accident investigation testified at hearing, as well as a representative of the Respondent who had conducted his own investigation of the accident.

Inspector Brian Robinson was briefed on September 24th, the day after the accident, and notified he would be participating in the accident investigation. Tr. 17. On September 24, Robinson and other MSHA personnel used the Phelps field office to review the mine file and coordinate their efforts. Tr. 18. As designated lead investigator, Robinson then traveled to the mine and assigned tasks for each member of his team in order to begin the investigation. Tr. 18. Robinson also took statements from Steve Ritz, foreman on site at the time of the accident, and Nicholas Dove, the driver of the truck at the time of the accident. Tr. 18-9, 147. It was decided Inspector Melvin Wolford would supervise the truck inspection. Tr. 18.

In their statements to Inspector Robinson, Ritz maintained the truck was not blocked against motion at the time of the accident, whereas Dove maintained the truck was blocked against motion. Tr. 20-1. At hearing, Jim Bowman, the Respondent's representative, offered that

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including in mine rescue, as an electrician, a surface and underground miner, as a first class mine foreman, MSHA instructor, and as a certified dust sampler. Tr. 133-4. At the time of the accident, Huffman had been Director of Health and Safety at Beech Creek, working for Kentucky Fuel Corporation. Tr. 134-5. Part of his duties included independent accident investigations. Tr. 134-5.

[7] At hearing, Huffman testified that Ritz was in the mine office at the time of the accident and was not in a position to observe the accident itself. Tr. 147.

the Respondent would stipulate the vehicle was not blocked against motion. Tr. 21. Steve Ritz told Inspector Robinson that a crib block was placed to block the truck against motion after the accident, but before the arrival of inspectors. Tr. 21.

In the course of the investigation, MSHA inspectors took multiple photographs of various portions of the affected truck, as well as the area of the accident generally.[8] Tr. 19, S. Exs. 5-17.The first photo, according to Inspector Robinson, depicts the area of the accident. Tr. 19, S. Ex. 5. The second photo depicts the accident scene, including the hammer used to start the truck. Tr. 20; S. Ex. 6. Robinson described the second photo as showing the victim's position as he lay beneath the truck. Tr. 20. The third and fourth photos depict the rear of the truck and its condition. Tr. 21. S. Ex. 7, 8.

The fifth photograph depicts the wheels of the truck blocked with chock blocks, which were placed there by MSHA personnel after their arrival. Tr. 22, S. Ex. 9. The sixth photograph depicts one of the rear wheels, showing how far the vehicle traveled after being started by the mechanic. Tr. 22, S. Ex. 10. Inspector Robinson asserted at hearing that the ruler placed in the frame of the photograph suggested the truck moved backwards approximately 2 feet before becoming stopped by the mechanic's body. Tr. 23. The seventh photograph depicts the front wheel demonstrating that it also moved backwards. Tr. 22, S. Ex. 11.

The eighth photograph depicts the starter on the affected truck. Tr. 23, S. Ex. 12. With a pen, Inspector Robinson circled places where the hammer struck and knocked mud off the starter. Tr. 24. The ninth photograph depicts the gross vehicle weight rating (GVR) of the truck, which is 48,000 pounds. Tr. 23, S. Ex. 13.

On December 1, 2014, Inspector Robinson issued Citation No. 8300622 on the affected vehicle for "not being maintained in a safe operating condition."[9] Tr. 25. Among the deficiencies alleged by the citation was a film or coating on the right rear and left front tandem, caused by oil and grease, that prevented the brake shoe from gripping the brake drum. Tr. 25. Two of the four parking brake units were rated as deficient, making the parking brake only 50% effective. Tr. 25.

Further, the backup alarm on the truck, designed to audibly warn those behind a truck when the truck is reversing, was unplugged. Tr. 26.

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[8] The Respondent's representative, James Bowman, objected at hearing to the admission of Secretary's Exhibits 3-17. The Respondent admitted that "[i]t certainly is the truck. It represents what was there," but the identity of the photographer was unknown. Tr. 88. Based on the Respondent's own admission, the photographs are a faithful representation of the vehicle and its situation around the time of the accident. The Court admitted the photographs into evidence at hearing. Tr. 88-9.

[9] Despite multiple alleged deficiencies with the truck's condition, Robinson issued one citation with multiple deficiencies listed on it, rather than multiple individual citations. Tr. 25. Citation No. 8300622 is not before the Court.

Robinson testified at hearing that if the parking brake had been adequate, absent any grease or oil, one could strike the starter from beneath the truck, and start the truck, and the truck would not move. Tr. 26. Further, Robinson testified that if the backup alarm had been operational, the victim would have been aware the vehicle was reversing and might have moved out of the way. Tr. 28.

Robinson also issued Citation No. 8299655, alleging that the Respondent "failed to block the affected grease truck from motion before getting under the truck to work on the starter," in violation of 30 C.F.R. Section 77.404(c). S. Ex. 3, T. 29. The citation also alleges that "suitable wheel chocks sited for the equipment being used on the job was not available at the mine site when this accident occurred." S. Ex. 3. The citation's gravity was marked "occurred," and the injury determined to be "lost work days, restricted duty," because the mechanic had actually been injured and lost work days as a result. Tr. 29-30.

The negligence on the citation was rated "high," because, according to Inspector Robinson, during his investigation and interviews, personnel could not identify where wheel chocks were stored, and told him that rocks and crib blocks were used.[10] Tr. 30. Robinson testified that a crib block or rock can be sufficient to satisfy the standard, but not always. Tr. 31. Robinson explained that, in this case, the diameter of the tires made it such that a single crib block was not enough to chock the wheels of the truck. Tr. 31.

At hearing, safety director Huffman testified that the mechanic kept wood crib blocks on his vehicle at all times. Tr. 146. Huffman reported personally seeing these blocks. Tr. 146-7. Huffman also contended wood blocks were very effective in blocking a truck, and, depending on the configuration, a number of crib blocks could block a Caterpillar 994 haul truck. Tr. 149, 161-2.

Inspectors attempted to reconstruct the accident itself the day after, September 24, 2014. Tr. 38-40. The inspector in charge of the truck, Melvin Wolford, performed a number of tests on the vehicle and its components. Tr. 61. A reconstruction involved testing the parking brake, putting the truck in reverse and hitting the starter.[11] Tr. 37-8. This was performed by putting chock blocks back "a couple feet," placing the truck in reverse, and starting the truck with the parking brake engaged. Tr. 71. The truck started and moved, despite the parking brake being engaged. Wolford testified at hearing that the parking brake "wasn't sufficient to hold the truck." Tr. 71.

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[10] Asked by the Solicitor how common manufactured wheel chocks are in surface mines, Robinson testified that they were on just about every mine-site he visited, located usually on mechanic's trucks for easy access. Tr. 49. Robinson also testified that it is the company's responsibility to purchase and supply wheel chocks. Tr. 49.

[11] Asked why this test was performed, Inspector Wolford explained that in order to perform a more traditional test, MSHA would be required to correct all the deficiencies on the brake system. To do so would've rendered the test itself of negligible investigatory value, as the test was designed to determine if the truck, in the condition it was in at the time of accident, would pull through its parking brakes in similar circumstances. Tr. 78.

Wolford inspected the vehicle, noting the position of the gear shifter and air pressures, and going underneath the truck and measuring brake strokes. Tr. 64. Wolford also examined the condition of the brakes, steering components, oil drums, brake canisters, and other parts of the truck. Tr. 64-5. Wolford observed a number of deficiencies on the truck. Tr. 64. Among these were steps and ladders bent on the truck, oil-covered walkways, malfunctioning brake canisters, suspension components with defective leaf springs, and grease contamination on two of the four brake drums. Tr. 65. A brake chamber suffered from an air leak, discovered when Wolford performed an audible test of the brakes to listen for any air pressure leaks. Tr. 65.

Like Robinson, Wolford documented his findings with photographs. Wolford's first photograph depicts, according to Wolford, grease and oil contamination on one of the truck's brakes. Tr. 66-7; S. Ex. 14. Wolford scratched on the surface of the brake to show the extent of the grease buildup, testifying that the buildup would not have occurred recently. Tr. 67. Wolford testified that dry braking surfaces are essential in order for a brake to properly function. Tr. 66-7. Wolford's second photograph is a picture of a brake drum visibly caked with grease or oil and similarly marked with a sharp object by Wolford to show the extent of the buildup. Tr. 67-8, S. Ex. 15. The brake drum shoe that was depicted is activated when the standard surface brake is engaged, but it is also activated when the parking brake is thrown. Tr. 68. Similarly, Wolford's third photograph shows a buildup of oil and grease on one of the truck's braking shoes. Tr. 68-9, S. Ex. 16. Wolford testified that oil and grease contamination on braking surfaces reduces the amount of friction within the brakes, in turn affecting the ability of the brakes to properly stop the vehicle from moving. Tr. 68.

Wolford's fourth photograph depicts a wheel on the driver's side of the truck, with the wheel assembly and brake drums removed, showing oil contamination on the uncovered brake shoes. Tr. 69, S. Ex. 17.

At hearing, Wolford testified that that the conditions he observed were also likely to be observed during a preoperational examination. Tr. 87. Wolford noted that a preoperational shift is performed on the truck twice a day. Tr. 87.

The Respondent also performed its own investigation into the accident. Tr. 138. Safety Director Mark Huffman checked both the service and parking brakes, the low air buzzers, and the warning and audible alarms on the vehicle. Tr. 139. The truck's parking brake was tested with the vehicle in forward gear at least twice. Both times the truck did not move. Tr. 139. Huffman contended that the result of the tests was that the service and park brakes were both working properly. Tr. 140. The Respondent's own investigation of the truck found no deficiencies except for a broken spring in a brake canister. Tr. 151.

The Alleged Violation of the 103(k) Order

Inspector Fannin's 103(k) Order on the truck remained in force following the accident investigation. Tr. 94. The 103(k) Order was modified multiple times after it was issued, including to allow equipment to be examined and to allow the operator to fill a diesel fuel tank. S. Ex. 1. A 103(k) Order is modified when an operator requests for a modification and provides sufficient reasoning to justify why the modification would not affect the primary purpose of the

103(k) Order. Tr. 95-6. If the modification is deemed appropriate, inspectors then travel on-site, review the 103(k) Order, modify it, and give the operator an updated 103(k) Order with the included modification. Tr. 96.

On November 7, 2014, Inspector Robinson traveled to the mine site. Tr. 96. Meeting a foreman and a mechanic at an access road, Robinson was surprised to hear from the mechanic that the mechanic had put the wheels and tires back on the sequestered truck and intended to adjust its brakes. Tr. 97. This was unusual as any work performed on the truck would require a modification of the 103(k) Order, and typically the Inspector in charge would do the modifying. Tr. 97.

Robinson tried to learn who had given the miners permission to perform work on the sequestered vehicle. Robinson asked mine superintendent Perry Rider who had given the order to perform work, and Rider identified Mark Huffman, the mine's safety manager. Tr. 97. Robinson called Huffman on speaker phone in the presence of Rider and Huffman denied remembering doing so. Tr. 97. (At hearing, Huffman also denied authorizing any work to be performed on the vehicle.) Tr. 158. Still with Inspector Robinson at the mine site, Rider then suggested it may have been MSHA Inspector Dustin Rutherford who gave them permission to work on the vehicle. Tr. 97. Dustin Rutherford was working at the nearby Phelps field office, and reached by phone there, denied permitting work to be done on the truck. Tr. 97. At hearing Robinson testified that he believed Rider was the person who gave the order for work to be performed on the vehicle. Tr. 100.

Once at the mine site, Robinson compared the photographs he had of the truck taken on September 24 with the condition of the vehicle in front of him on November 7. Tr. 97-8. He noted multiple differences between the condition of the truck on September 24 as compared to the condition on November 7. Among the things that had been modified or removed, two ladders had been taken off the side of the truck, a fuel hose reel had been removed, and multiple wheels and tires had been put back on. Tr. 99, S. Ex. 2.

As a result, Inspector Robinson issued Citation No. 8299679. S. Ex. 2. He assessed the likelihood of injury as "none," and expected injury as "no lost workdays," because the truck was immobile at the time. Tr. 100-1. Robinson assessed the negligence as "reckless disregard." Tr. 101. This was due to the fact that Robinson learned from Inspector Rutherford that the Respondent had requested and been denied a modification the 103(k) Order prior to Robinson's discovery of the violation. Tr. 101.

Robinson testified that the operator was well-aware of the procedure that modifying a 103(k) Order entails. Tr. 102-3, 130. Inspector Robinson testified that personnel knew that he was the lead investigator and therefore primarily responsible for its modification. Tr. 130. At hearing, Huffman testified that he did ask for a modification of the 103(k) Order but was unable to provide documentation supporting his testimony. Tr. 161.

The 103(k) Order was terminated when the vehicle was removed from the mine site by the operator's decision. Tr. 103.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 8299655

A. Contentions of the Parties

The Secretary contends that Kentucky Fuel Corporation violated 30 C.F.R. Section 77.404(c). Sec'y's Post-Hearing Br., 3. The Secretary further contends that Citation No. 8299655 was properly designated as Significant and Substantial (S&S), as the violation contributed to the risk of being crushed by unintended motion of a truck, that such an injury was reasonably likely to occur and that such an injury was of a reasonably serious nature. Id., at 4. The Secretary further maintains that Citation No. 8299655 was properly designated as high negligence, as the failure of the operator to properly supervise, train, and discipline employees contributed to the accident. Id., at 5. For evidence in support of the proposition, the Secretary notes the failure of the operator to discipline any miner involved in the accident, the alleged absence of suitable wheel chocks on the mine site, the truck's individual safety defects, and the failure of mine management to block the truck after the accident had occurred. Id., 6-8.

The Respondent stipulated that a violation of a mandatory safety standard did occur in this case. Resp't's Post-Hearing Br., at 6. The Respondent contends that the Secretary failed to sustain his burden of proof that Citation No. 8299655 was the result of the operator's high negligence. Id., 5. In support of this argument the Respondent cites the long-standing proposition that the conduct of rank-and-file miners is generally not imputable to the operator in determining negligence for penalty purposes. Id., 6. The Respondent also contends that Mr. Hensley was not directly supervised by any member of management and acted on his own initiative. Id., at 6. The Respondent notes that the sole foreman at the mine site at the time was far away and only reachable by radio contact. Id. Therefore, the Respondent argues, the operator did not have knowledge of the violation and the negligence was improperly designated as "High." Id. The Respondent contends that the operator provided wooden crib blocks for use to block trucks against motion, and that wooden crib blocks are an adequate type of blocking material. Id., at 8-9.

B. The Secretary Has Carried His Burden of Proving a Violation By a Preponderance of the Evidence

As stated *supra*, the Respondent stipulated to a violation of 30 C.F.R. § 77.404(c). Resp't's Post-Hearing Br., at 6. The regulation specifies that "repairs or maintenance shall not be performed on machinery unless the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." 30 C.F.R. § 77.404(c).

It is undisputed that there was a failure to block the truck against motion. Subsequently, the truck moved backward, rolling over and injuring a miner, who was engaged in "repairs or maintenance" at the time. Tr. 19-21. This Court therefore finds that the Secretary has carried his burden of proving a violation of 30 C.F.R. § 77.404(c) by a preponderance of the evidence. Beyond the Respondent's own stipulation there is ample evidence to substantiate the violation's existence, as discussed *supra*.

C. The Violation was Reasonably Likely to Cause a Fatality and was Properly Designated Significant and Substantial

The Secretary assessed the violation as reasonably likely to cause a fatality and Significant and Substantial (S&S).

The Commission's recent decision in *ICG Illinois, LLC*, __ FMSHRC __, slip op. at 3-4, LAKE 2013-160, elaborated on the traditional four-part S&S test:

> The Commission has recognized that a violation is S&S if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC at 3-4 (Jan. 1984), the Commission further explained:
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> > 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.
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> 6 FMSHRC 1, 3-4, (Jan. 1984), (footnote omitted); *accord Buck Creek Coal, Inc.., v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc., v. Secretary of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). In conducting the *Mathies* analysis, the focus now generally centers on the interplay between the second and third steps. *Newtown Energy, Inc.*, __ FMSHRC __, slip op. at 5, No. WEVA 2011-283 (Aug. 29, 2016).
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> The second step of *Mathies* addressed the contribution of the violation to a discrete safety hazard, i.e., the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed. *Newtown*, slip op. at 5, *citing Knox Creek Coal Corp.*, 811 F.3d 148, 162-63. (4th Cir. 2016) (citing *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741 n. 12 (Aug. 2012)). At this stage, it is essential that the Judge adequately define the hazard to which the violation allegedly contributes. A clear description of the hazard at issue provides context when determining the relative likelihood that the violation contributes to a hazard, and will also frame the potential source of injury for purposes of determining gravity in the third step of *Mathies*. The starting point for determining the hazard is the regulation cited by MSHA; the "hazard," for purposes of the *Mathies* analysis, is the danger which the cited safety standard is intended to prevent. *Newtown*, slip op. at 6.

> Having clearly defined the hazard, the next task in analyzing the second step of *Mathies* is for the judge to determine whether the Secretary has proven that the violation contributed to that hazard. That means the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. *Id.* We recognize that "reasonable likelihood" is not an exact standard measured in percentages, but rather a matter of degree, an evaluation of risk with a particular focus on the facts and circumstances presented. *Id.*, at 7.
>
> At this stage, the focus shifts from the violation to the hazard. The third and fourth steps are primarily concerned with gravity, i.e., whether the hazard identified in step two would be reasonably likely to result in serious injury. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2364-66 (Oct. 2011) (citing *Musser Eng'g, Inc., & PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *Knox Creek*, 811 F.3d at 162. If the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the hazard identified at step two, the Judge then assumed such occurrence and determines at step three whether, based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. At step four, the Judge determines whether any resultant injury would be reasonably likely to be reasonably serious.

ICG Illinois, LLC, __ FMSHRC __, slip op. at 3-4, LAKE 2013-160 (Oct. 21, 2016) (footnotes omitted).

This Court finds that the Secretary has proven an underlying violation of a mandatory safety standard. *Mathies*, 6 FMSHRC at 3-4 (footnote omitted), *see supra.*

The second step "addresses the extent to which the violation contributes to a particular hazard. This step is primarily concerned with the likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, slip op. at 5. The Commission in *Newtown, Inc.*, observed that "it is essential for the Judge to adequately define the particular hazard to which the violation allegedly contributes." *Newtown, Inc.*, at 6. The hazard, according to *Newtown, Inc.*, is defined "in terms of the prospective danger the cited safety standard is intended to prevent." Id.

The hazard that 30 C.F.R. § 77.404(c) was promulgated to guard against, plainly, is injury to a miner by heavy machinery that has not been blocked against motion. In other words, getting crushed by a truck is made significantly more likely by a failure to block that truck against motion. Such an injury did occur in this case, which is an illustration that this contemplated hazard is more than a hypothetical concern. Thus this Court finds that this violation was reasonably likely to lead to the hazard described *supra.*

The third step concerns the gravity, or reasonable likelihood that the hazard contributed to will result in an injury. Given the Commission's instruction that this third step requires a

nuanced examination of the relevant facts peculiar to this case, the Court now considers the factual situation vis-à-vis the reasonable likelihood that this hazard would contribute to an injury.

The following facts in the record are uncontested: that a miner was beneath the truck performing maintenance when it was not blocked against motion, that the truck moved while the maintenance was being performed, that the truck ran over the miner, and that the miner had to be airlifted to the hospital. Tr. 12, Tr. 20, Tr. 30, Tr. 41.

Regarding the severity of the miner's injuries, Mark Huffman, director of health and safety at the Beech Creek Surface mine, testified that "if [a truck] rolled all the way over them, yes, it could [kill a miner]." Tr. 154. Brian Robinson, an inspector with nine years' experience at the time of citation testified that the victim was "within an inch of being completely rolled," and if that had occurred, the consequences would've been "probably fatal." Tr. 30. As it happened, the miner suffered cracked ribs and a punctured lung. Tr. 154.

In the instant matter, the truck was not blocked against motion. This violation led to the increased likelihood that the foreseeable hazard, getting run over by the truck, would manifest. The particular facts in this case also require consideration of the miner's location underneath the vehicle, which put the miner at obvious risk of being run over. When the truck did start, the miner was run over. Both the Secretary and Respondent concede that if the truck had moved backward a few more inches, the miner would likely have been killed.

Therefore, this Court finds it was reasonably likely that the hazard contemplated would lead to a reasonably serious injury. Indeed, in this instance, a reasonably serious injury did occur. The miner was fortunate that he sustained injuries less than fatal. This Court finds that the most likely injury to result from being run over by a truck to be a fatality. S. Ex. 13. As a result, the third and fourth steps of *Mathies* have been satisfied. The violation was properly designated Significant and Substantial (S&S).

D. The Violation was the Result of the Respondent's High Negligence

Section 110(i) of the Mine Act authorizes the Commission to assess penalties for violations of the Act, and includes the operator's negligence as one of the criteria the Commission is required to consider in assessing a penalty. To start the process, MSHA proposes a penalty pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a). MSHA has published regulations explaining its role in the penalty process, including how it arrives at proposed penalty amounts. *See* 30 C.F.R. Part 100.

The Part 100 regulations address how MSHA calculates most proposed penalties in light of the statutory criteria the Commission must consider, and explains how MSHA views each of the criteria. *See* 30 C.F.R. § 100.3. With regards to the negligence criteria, MSHA has adopted a formulaic approach, categorizing negligence into five different levels, from "no" negligence to "reckless disregard," based on the existence of a mitigating circumstance, or multiple such

circumstances, for the violation. 30 C.F.R. § 100.3 (d); *see generally Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3106 (Dec. 2014) (Comm'r Cohen, concurring.)[12]

The Commission has recently explained that judges are not required to apply the level of negligence definitions in Part 100 and may evaluate negligence from the starting point of a traditional negligence analysis[13] rather than the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 804 F.3d 1259, 1263-4 (D.C. Cir. 2016).

Moreover, the Commission in *Brody* held that judges in making their negligence determinations were not to be limited to an evaluation of potential mitigating circumstances but should instead consider "the totality of the circumstances holistically." *Brody*, 37 FMSHRC at 1702.

In determining the existence and degree of negligence associated with an alleged violation, a Commission judge must consider the duty of care accompanying the mandatory standard at issue.

Negligence is not defined in the Mine Act. The Commission has, however held:

> "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).
>
> > *JWR*, 36 FMSHRC at 1975; *see, e.g., id.* at 1976-77 (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC

[12] *See also* § 100.3, Table X- Negligence, which provides for 0 penalty points where there is "no negligence" (the operator exercised diligence and could not have known of the violative condition or practice); 10 penalty points for "low negligence" (the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances); 20 penalty points for "moderate negligence," (the operator knew or should have known of the violative condition or practice but there are mitigating circumstances); 35 penalty points for "high negligence" (the operator knew or should have known of the violative condition or practice and there are no mitigating circumstances); 50 points for "reckless disregard" (the operator displayed conduct which exhibits the absence of the slightest degree of care).

[13] Under a traditional negligence analysis the operator is negligent if it fails to meet the requisite standard of care – a standard of care that is *high* under the Mine Act. *Brody*, at 1702.

> 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated.)

Brody, 37 FMSHRC at 1702.

Traditionally, the Commission has held that the conduct of a rank-and-file miner cannot be imputed to the operator for penalty purposes within the context of negligence. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112 (July 1995). The Commission observed in its recent decision, *Leeco, Inc.*, 38 FMSHRC ___ No. KENT 2012-166 (July 18, 2016), determining an operator's negligence includes considerations beyond whether that operator had actual knowledge of a violation:

> In cases where a rank-and-file miner has violated the Act or its mandatory standards, the Commission examines the operator's supervision, training, and disciplining of its employees to determine whether the operator had taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("SOCCO"), *citing Nacco Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981). The Commission also considers the foreseeability of the miner's conduct and the risks involved when determining whether the operator was negligent. *A. H. Smith*, 5 FMSHRC at 15, *citing SOCCO*, 4 FMSHRC at 1463-64; *Nacco*, 3 FMSHRC at 850-51.

Leeco, Inc., at 3.

To determine if the operator has met its duty of care, the Court considers what a reasonably prudent person, familiar with the mining industry, the relevant facts, and the protective purpose of the 30 C.F.R. § 77.404(c), would have done. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

1. The Respondent's Supervision, Training, and Provision of Materials Failed to Meet the Required Standard of Care

The Court examines first the operator's supervision, training, and disciplining to determine whether the operator had taken reasonable steps to prevent the rank-and-file miner's violative conduct. The Court then examines the foreseeability of the miner's violative conduct, given the condition of the truck, as well as the apparent absence of proper blocking materials (or proper training on blocking techniques). Finally, the Court concludes by finding that, under *Brody*'s reasonably prudent person standard, the operator's conduct was a product of its own high negligence. The Court can find no mitigating circumstances to balance the negligence determination.

The supervision and training of miners, a factor of consideration under *Leeco, Inc.*, in this instance relates to the supervision and training the miners received in the performance of blocking vehicles against motion. *Leeco, Inc.*, 3.

Regarding supervision, this Court notes that one foreman, Steve Ritz, was on-site during the evening shift. Resp't's Post-Hearing Br., 7 However, Respondent's assertion that Kentucky Fuel Corporation could not predict the mechanic's conduct goes too far. Resp't's Post-Hearing Br., 7. The Respondent's deficiencies in either training or supply of materials for use in blocking, as well as the truck's damaged brakes and inoperative safety features, made the mechanic's conduct reasonably foreseeable.

The Respondent's conduct in this case suggests a deficiency either in the supply of training and/or materials regarding the blocking of vehicles against motion. It is undisputed that the Respondent failed to block the truck against motion. It is also undisputed that an accident subsequently occurred as a result of such. Arriving on the scene of the accident, Steve Ritz, the sole mine foreman on site at the time, rescued the mechanic from under the truck, arresting the truck's movement with a single crib block. Tr. 20-21. The Court finds that blocking a truck capable of a gross-weight rating of 48,000 pounds with a single crib block is unsafe, and essentially a continuing violation of 30 C.F.R. § 77.404(c). This is because the diameter of the tires of the truck in question were too large for a single crib block to effectively arrest the truck's motion, according to Inspector Robinson's persuasive testimony. Tr. 31.

Following this, Pat Graham, a member of mine management, visited the accident scene without directing that proper blocking materials be put down. As the Solicitor notes in his brief, "no member of mine management adequately blocked the truck even after the accident occurred." Sec'y's Post-Hearing Br., at 6.

This is highly persuasive evidence that even the Respondent's own management were not properly trained in the blocking of vehicles against motion. The Court rejects the Respondent's contention that there was no evidence in the record of improper training regarding blocking procedures with the above information in mind. Resp't's Post-Hearing Br., at 8.

In its brief the Respondent argues that wooden crib blocks are a time-tested blocking material and rightly points out that the regulation does not require wheel chocks to be employed as blocking material. Resp't's Post-Hearing Br., at 9. Whether or not wooden crib blocks *can* be an adequate source of support to block a truck against motion is not a question before this Court. Nor is the question of whether 30 C.F.R. § 77.404(c) requires the use of wheel chocks on every mine site. While 30 C.F.R. § 77.404(c) does not specify what kinds of materials are necessary, it does require that in order for work to be performed, the vehicle must be powered off, and blocked against motion.

The Respondent's contention that wooden crib blocks are an adequate form of support is too broad. It may be true that in some cases, with proper training and the right crib blocks, crib blocks can be used to satisfy 30 C.F.R. § 77.404(c)'s requirements. However, that question is not before this Court.

In the instant case, both the material (one crib block, or a rock, it is unclear), as well as the training involved in placing these materials, were inadequate. Tr. 20-1. Wheel chocks are almost always likely to fall in the category of safe blocking materials; crib blocks, rocks, and other ad hoc materials, if deployed improperly as a result of poor training, are inappropriate.

Examining the materials and techniques used to block vehicles against motion, as well as the defective conditions of the vehicle in question, the Court finds that the mechanic's conduct was a reasonably foreseeable result of the Respondent's conduct.

The evidence suggests that if chock blocks were available on the mine site, they were not readily available to the mine mechanic. The mechanic in this case traveled with crib blocks in his truck and possibly used rock to block the red Autocar grease truck. Tr. 31. Thus, if they were available on the mine site, wheel chocks were not practically available to the mechanic, or the mechanic was not properly trained in their use. The responsibility of the operator is the same: supplying proper training and materials is part of the Respondent's high duty of care. At hearing, the Court heard persuasive testimony from Inspector Robinson that wheel chocks are on nearly every mine site he visits. Tr. 49. Inspector Robinson also testified that wheel chocks are easy to transport and deploy. Tr. 49. Finally, Inspector Robinson testified that a miner would not commonly use rocks instead of wheel chocks. Tr. 50.

Testimony offered at hearing by Mark Huffman suggested that mechanics at the mine routinely carry crib blocks to use in the back of their truck. Tr. 153. Huffman also testified that he witnessed crib blocks in the rear of the mechanic's truck. Tr. 153. If this were true, then why would a mechanic choose to block a truck with a rock when he could just as easily use a safer crib block? Or, if the truck was actually unblocked, why would a mine mechanic choose to leave the truck unblocked with blocking materials so conveniently at hand?

The mechanic's conduct in this case suggests the absence of readily available blocking material on the mine site, or the absence of proper training on blocking techniques.

Beyond the operator's training and materials, the Court considers the mine mechanic's own interests. Choosing to block a truck against motion with rocks is less safe, and exposes one to greater risk, than using chock blocks or crib blocks. In order for the Respondent's position to be credible, the Court would have to accept that the mechanic willingly exposed himself to fatal injury when materials may have been at hand that could've substantially mitigated this risk.

While the presence of wheel chocks on a mine site may not be required by 30 C.F.R. § 77.404(c), plainly the training and materials supplied in this case were inadequate to meet the requirements of the safety standard and fell far short of the operator's high duty of care under *Brody*.

The operator's discipline of the mechanic's violative conduct consisted of an admonishment, according to the Respondent's brief. Resp't's Post-Hearing Br., 7. The Respondent's representative argues that the mine mechanic was sufficiently punished by his injuries in his brief. Resp't's Post-Hearing Br., 7. There is no more evidence in the record regarding the disciplining of the mine mechanic.

2. <u>The Mechanic's Conduct Was Reasonably Foreseeable</u>

By examining *in toto* the operator's training, provision of materials, and discipline of errant miners, the Court finds that the Respondent cannot defend against the Secretary's

negligence determinations simply because its sole foreman was not present when the accident occurred. This is due not just to the failure in either training and/or the provision of materials, but also due to the foreseeability of the mechanic's conduct.

Taking the specific deficiencies of the truck together with the inadequate training and/or materials provided to the miners in this case, the Court finds that the mechanic's conduct was reasonably foreseeable. A reasonably prudent person, familiar with the peculiar facts and circumstances of this case as well as the protective purpose of the 30 C.F.R. § 77.404(c), would have foreseen the mechanic's conduct as a possibility and moved to prevent it. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (finding that determining whether an operator has met its duty of care requires considering the actions that a reasonably prudent person, familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would take in the same circumstances).

Part of why this accident was reasonably foreseeable is due to the bad condition of the truck in question. The tests performed by the Secretary and the tests performed by the Respondent, as described *supra*, produced different conclusions regarding the safety and functionality of some of the truck's key safety features: its backup alarm, its parking brake, and its service brake. Tr. 64-6, Tr. 139-140. In assessing the validity of the tests conducted by both parties, the Court finds the results of the Secretary's tests to be more credible than the results of the Respondent. The Court finds that the truck was in such a deficient state that a reasonably prudent person, familiar with the mining industry, the protective purpose of the regulation, and the peculiar facts of this case, would have repaired the numerous deficiencies in the vehicle before returning it to work. *Brody*, at 1702.

The Court finds the Secretary's tests to be more credible primarily due to methodology. The Secretary's witnesses offered more detail, described *infra*, and presented independent corroboration of their findings in the form of photographs. Tr. 64-6, S. Ex. 5-17.

The methodology of the Respondent's testing is less clear, and its results were unsupported by any evidence beyond testimony. Indeed, based on the testimony, it is difficult to determine whether the Respondent's tests found no deficiencies, or if the test results were not explained in detail. For example, Mr. Huffman, the Respondent's witness who was in charge of accident reconstruction, testified at hearing:

> We checked both the service and the park brake... we checked the low air buzzers, the warning and audible alarms on it. We checked the truck with the park brake set in the forward and reverse positions. We tried to pull it forward, pull it out backwards, and stall the engines. We did that with both the service brake and with the park brake set . . . the truck didn't move.

Tr. 139.

It unclear from the testimony offered here whether "checking" the warning and audible alarms on the vehicle confirmed they were operational. It is also unclear whether the brake chambers were examined beyond checking the low air buzzers; Inspector Wolford's own tests

revealed an air leak within the brake chamber. Tr. 65. The Respondent, in describing the testing, did not detail the grade of the slope, the condition of the truck and its parts during the test, and the weight of the truck itself during the test. Ultimately the Respondent's witness testifies that the parking brake and service brake were "working properly."[14] Tr. 140.

But as Inspector Wolford testified at hearing, merely having the brakes work properly does not necessarily mean a truck's braking *system* is working properly. Bad braking components, oil and grease contamination, and air leakage could render a working brake effectively inoperative. Tr. 68. The paucity of description regarding the condition and function of both brakes renders much of Huffman's testimony merely conclusory statements. This testimony is difficult to reconcile with the Respondent's conduct with regard to a previous citation arising out of the same facts and circumstances.

As the Secretary notes in his brief, Citation No. 8300622 was issued for various defects associated with the vehicle. Among these defects were the unplugged back-up alarm and the oil and grease build-up on the rear brakes. Sec'y's Post-Hearing Br., 7. The Respondent did not contest this citation.

The Secretary's photographic exhibits in this case appear to depict brakes covered in a thick build-up of grease and dirt. S. Ex. 14, 15, 16. The Respondent's description of the 'check' of the back-up alarm does not clarify whether it was operational. Further, the thick build-up of grease and dirt visible in the Secretary's photographs apparently had no effect on the truck's braking capacity during the Respondent's tests. Altogether, the Respondent's testing lacks sufficient indicia of reliability to persuade.

The tests performed by the MSHA inspectors possess greater indicia of reliability, and are therefore more credible. In his description of the testing performed, Inspector Wolford identified not only what he tested, but what he determined from the testing. Tr. 64-6, 70. This is not so of the Respondent's testimony, where details essential for credibility determination were not introduced into evidence. Moreover, Wolford tested the truck in a reenactment of the accident, placing the parking brake on and the gear in reverse, and as a result reproduced the same outcome as occurred in the accident: the truck pulled through its brakes on the slope and moved backward once started. Tr. 71.

The decision to not perform a so-called "function test" does not affect the Court's credibility calculus. As noted *infra*, a function test as described by the Respondent's representative, Jim Bowman, would require the tester to repair defects that had made a material difference in the truck's performance in order for the vehicle to travel to a testable slope. To perform such a test would require altering the condition of the truck, which would create testing difficulties.

[14] Huffman could not recall any additional defects on the truck at hearing, but for a broken spring. Tr. 151.

The Secretary's witnesses, both experienced inspectors, were supported in their testimony by the photographic evidence described *infra*. The Respondent's tests are not similarly supported by independent evidence.

A truck with a malfunctioning parking brake, no working back up alarm, and two of its four brake drums caked in grease is far more likely to slip its brakes and move of its own accord. Tr. 65, 67. Once in motion, the lack of a back-up alarm would expose miners to the risk of being run over. Tr. 28. Preventing and remediating these dangerous defects was part of the Respondent's duty of care.

It is a long-standing principle of Commission caselaw that the Mine Act's strict liability regime is meant to encourage greater operator vigilance in locating and correcting health and safety violations. See, e.g., *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2nd Cir. 1999). Over time, the operator's conduct allowed the truck's condition to degrade until it was unsafe. The operator knew or should have known the truck was unsafe. The training and supply of blocking materials was inadequate. The operator knew or should have known this.

Accordingly, this Court finds a reasonably prudent person, familiar with 30 C.F.R. § 77.404(c) and the facts and circumstances of this situation, would have provided proper blocking training and materials.

Citation No. 8299655 was properly assessed as High negligence.

Citation No. 8299679

A. Contentions of the Parties

The Secretary contends the underlying 103(k) Order was validly issued. Further, the Secretary contends that the 103(k) Order was violated. The Secretary contends there are no mitigating circumstances for the violation. The Secretary contends that the Respondent displayed reckless disregard in violating the 103(k) Order.

The Respondent contends that the Secretary failed to prove a violation of Section 103(k) by substantial evidence. The Respondent contends that the initial 103(j) Order issued in this matter was not validly issued.[15] The Respondent contends that the accident did not have the

[15] The Respondent's representative, in a section of the Post-Hearing Brief titled "The Secretary failed to sustain her burden of proving by substantial evidence that Citation No. 8299679 was a violation of Section 103(k)," appears to conflate 103(j) and 103(k) control orders in his brief. The Respondent's representative cites throughout to *Big Ridge, Inc.*, 37 FMSHRC 1860 (Sept. 2015), in support of his assertion that "[w]hen MSHA issues a 103 (j) Order there should be some rescue or recovery work that needs to be performed . . . there was no rescue or recovery work performed[.]" Resp't's Post-Hearing Br., 10. In *Big Ridge, Inc.*, the Commission ruled that the definition of "accident" under sections 103(j) and 103(k) is to be found in *Revelation Energy*, discussed *infra*. The Respondent failed to address the Commission's explicit rejection of its

reasonable potential to cause a fatality. The Respondent contends that the accident was therefore not a reportable one under the Mine Act. Further, the Respondent contends that the Secretary failed to prove, if a violation did occur, that that violation was one of reckless disregard by substantial evidence.

B. The Underlying (k) Order was Valid

To challenge the citation's validity, the Respondent disputes whether a qualifying accident occurred in this matter. The Respondent also attacks the validity of the 103(k) Order because it "exceeded the authority granted MSHA." Resp't's Post-Hearing Br., 13.

As noted *supra*, the period of time between when Inspector Ralph Fannin issued his 103 (j) Order on September 23, 2014, and when he modified that order into a 103(k) Order, was approximately 90 minutes.[16] S. Ex. 1. Section 103(k) of the Mine Act provides that "in the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine." 30 U.S.C. § 803(k).

There is no dispute that Inspector Fannin qualified as an "authorized representative of the Secretary" when he issued his 103(k) Order.

The Respondent argues in its brief that no qualifying accident occurred in this matter, as there is no way to reasonably conclude the accident required rescue or recovery work. Resp't's Post-Hearing Br., 10. In support of this position the Respondent contends that the Secretary failed to introduce any evidence of labored breathing or severe pain. Id, at 11. The Respondent further argues that there should be an inference drawn, in the absence of hospital records, that those records would not support a finding of a life-threatening injury. Id.

These arguments fundamentally misconstrue Commission precedent. A truck rolled over a mechanic, shattering multiple ribs and puncturing a lung. This was an accident that had a reasonable potential to cause death: indeed, the miner was lucky to survive such a rollover. There will not be any inferences drawn regarding records not admitted by this Court. Even if the Respondent was correct in arguing that this accident did not, on its face, present a danger to a miner's life, it would still be incorrect in its definition of qualifying accident, according to Commission precedent.

The definition of accident, as relevant for 103(k) purposes, was articulated by the Commission in *Revelation Energy, LLC,* 35 FMSHRC 3333 (Nov. 2013). In *Revelation Energy,*

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argument regarding the definition of accidents, despite citing to the decision in support of the proposition that the 103(k) Order in this case did not concern the rescue or recovery of miners.

[16] Within this time period Inspector Fannin permitted work to be done on an unrelated vehicle suggesting that the operator and its agents were well aware- even within hours of a control order's issue- of the procedures regarding control orders. Tr. 92-3.

the Respondent propelled a two-ton rock off the mine property while performing blasting operations. The rock rolled through a residential yard and came to rest near a local home. Id., at 3334-5. No one was injured. Id. The Respondent argued in that case that the blasting incident did not constitute an accident for Section 103(k) purposes, as it did not fit within the definition of accident set forth in Section 3(k) of the Mine Act or 30 C.F.R. § 50.2(h).[17] Id., at 3335-6.

The Commission rejected that argument, reasoning that the list provided in 30 C.F.R. § 50.2(h) was designed to be non-exhaustive, as it begins the list with the word, "includes." Id., at 3337. Instead, the Commission reasoned that:

> the plain meaning of "accident" in section 3(k) includes more than the specific events enumerated in section 3(k) and that the scope of section 3(k)'s definition of "accident" is ambiguous. We accord deference to the Secretary's reasonable interpretation of "accident" as including events that are similar in nature to, or have a similar potential for injury or death as, the events specifically listed in section 3(k).

Revelation Energy, LLC, at 3336.

This Court finds that an accident did take place that falls within the scope described by the Commission in *Revelation Energy, LLC*, as this accident had a similar potential for injury or death as ones described in 30 C.F.R. § 50.2(h).

The Respondent's apparent confusion of 103(j) and 103(k) control orders necessitates some explanation of the differences between the two types of control orders. 103(j) and 103(k) Orders are both typically described as control orders in Commission decisions. See, e.g., *Small Mine Development*, 37 FMSHRC 1892 (Sept. 2015) (referring to 103(j) orders as "control orders,"); *Pocahontas Coal Co.*, 38 FMSHRC 157 (Feb. 2016) (referring to 103(k) orders as "control orders.")

The Commission has stated that "Section 103(k) ... empowers an authorized representative of the Secretary to issue such orders as he deems appropriate to insure the safety of any person in a mine in the event of an 'accident' at the mine." *Revelation Energy*, at 3336. Continuing, the Commission observed that "Section 103(k) constitutes a broad grant of discretionary authority to the Secretary to protect miners in the event of a mine accident." Id., at 3338.[18] The Commission quotes the Senate Report, detailing that "[t]he grant of authority . . . in Section [103(k)] to issue orders is intended to provide the Secretary with flexibility in responding

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[17] 30 C.F.R. § 50.2(h), also known as the "dirty dozen," contains a non-exhaustive list of twelve types of reportable accidents.

[18] Citing to the opinion of *Miller Mining Co. v. FMSHRC*, the Commission quotes the 9th Circuit's reasoning that "Section 103(k) gives MSHA plenary power to make *post-accident* orders for the protection and safety of all persons." *Revelation Energy, LLC*, 35 FMSHRC 3333, citing *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983).

to accident situations." *Revelation Energy*, 35 FMSHRC 3333, 3338, *citing* S. Rep. No. 181, at 29 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 617 (1978).[19]

In contrast, 103 (j) Orders are strictly cabined to those circumstances involving active rescue and recovery of miners. Indeed, the Commission has found that 103 (j) Orders are invalid "in the absence of rescue and recovery work." *Big Ridge Inc.*, 37 FMSHRC 1860, 1864 (Sept. 2015). In other words, "the Secretary's authority to issue any section 103(j) control order ... occurs in the event of an accident where there is 'rescue and recovery work.'" Id. In other circumstances concerning safety, if the Secretary of Labor or his agent seeks to control a mine under the Act, the proper vehicle is the 103(k), not the 103(j), Order. There is no "rescue and recovery" requirement for 103(k) control orders.

The Respondent's brief contains the following line of argument:

> A 103(j) Order gives MSHA authority to take control of rescue and recovery work to see that the work is performed safely and miners are not put at risk. There is no evidence that the operator should have been limited in immediately releasing Mr. Hensley from the grip of the tire. When MSHA issues a 103 (j) Order there should be some rescue or recovery work that needs to be performed.

Resp't's Post-Hearing Br., 10.

It must be noted that Citation No. 8299679 alleges a violation of Section 103(k) of the Mine Act. S. Ex. 2. The Secretary has not alleged a violation of Section 103(j) of the Mine Act.[20]

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[19] The Senate Report continues, "Further, the circumstances surrounding the accident may be such that [an] order necessary to preserve evidence may be appropriate. It is intended that by preventing possible destruction of evidence, the Secretary may be better able to determine the cause of the accident and thereby prevent the future occurrence of a similar accident." S. Rep. No. 95-181, at 29.

In other words, the Respondent's contention that the 103(k) Order was improper due to the length of time it was in place conflicts with the legislative aims of the 103(k) Order, which include the preservation of evidence.

[20] 103(j) Orders are not predicates of 103(k) Orders. Even if the (j) Order were invalid, it would have no bearing on the validity of the 103(k) Order. This point was made clear in *Jim Walter Resources*, 37 FMSHRC 1868 (Sept. 2015), by the Commission: "JWR further challenges the section 103(k) order on the basis that the Mine Act does not permit the Secretary to convert a section 103(j) order to a section 103(k) order. The Mine Act permits an inspector present at the mine to issue a 103(k) order to protect persons in the mine. We will not exalt form over substance by finding a 103(k) order invalid because it was issued as a conversion of a 103(j) order. *Thus, although we determine that the section 103(j) order is invalid, the (k) order meets all the requirements of the Mine Act and is an independently valid order.*" *Jim Walter Resources, Inc.*, 37 FMSHRC 1868, at 1871 (Sept. 2015), emphasis added.

In essence, the Respondent asks this Court to invalidate a 103(k) Order because it would be invalid if it were a 103(j) Order. But the rescue and recovery requirement applied to 103(j) Orders is not relevant toward determining the validity of this 103(k) Order.

On this basis, the Respondent's argument that the Secretary's failure to perform rescue or recovery work vitiates the 103(k) Order in this case is not relevant. While similar, 103(j) and 103(k) Orders are distinct from one another and concern separate legislative goals.

Under 103(k), MSHA possesses plenary power to issue orders after an accident to protect the safety of all persons in the affected area. This 103(k) Order was a proper exercise of the Secretary's broad discretionary authority. It was issued consistent with the primary purpose of the Mine Act: safeguarding the health and safety of the nation's miners.

This Court finds the 103(k) Order in this matter was lawfully issued by a duly authorized representative of the Secretary after a qualifying accident.

C. The Respondent Violated the Terms of the (k) Order

On September 25, 2014, the 103(k) Order at issue before the Court was modified to release the blue International mechanic's truck; the same 103(k) Order stated that "the red Autocar grease truck #7175 still remains under the affected 103(k) Order." S. Ex. 1.

When Inspector Robinson returned to the mine on November 7, 2014, he was informed by a mine mechanic that wheels and tires had been reattached to the grease truck. Tr. 96-7. Robinson, as MSHA's designated accident inspector for this matter, would typically permit or deny 103(k) Order modifications. Tr. 97. In an effort to get to the bottom of this apparent 103(k) Order violation, Robinson was told first that Mark Huffman, safety director of the mine, had permitted work to be done on the affected vehicle. Tr. 97. Mark Huffman was not authorized to issue, modify, or disregard 103(k) Orders. Mark Huffman denied authorizing the work. Robinson was then told that the anonymous authorizer was possibly Inspector Dustin Rutherford. Tr. 97. Inspector Rutherford, while authorized to issue and modify 103(k) Orders, denied allowing work to be done on the truck. Tr. 97.

At hearing, Inspector Robinson testified that, in conversation with Inspector Dustin Rutherford, he learned that Rutherford had denied the Respondent's verbal request to modify the 103(k) Order some time earlier. Tr. 101.

Beyond the multiple tires and wheels reattached to the vehicle, a grease drum, two ladders, and a fuel hose were removed. S. Ex. 2., Tr. 98. At hearing, the Respondent offered no evidence to suggest that MSHA personnel had permitted this work to be done. The Respondent offered no evidence of mitigation or justification for the actions of the operator and its agents. The fact that personnel at Beech Creek sought to justify their actions by claiming an Inspector had authorized those actions demonstrates they were aware of the procedures for modifying a 103(k) Order. It appears that the operator's agents, perhaps frustrated over the truck's lengthy sequestration under the control order, simply cannibalized the truck for parts.

The Respondent therefore violated the terms of the 103(k) Order.

D. The Violation was Properly Designated as "Reckless Disregard."

"Reckless disregard" is described in Part 100 as constituting those circumstances where "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3.

Judge McCarthy summarized Judge Paez's analysis of the words "reckless disregard" in the absence of any statutory definition:

> As Judge Paez recently noted in *Stillhouse Mining*, supra, Slip op. at 7, the term "reckless" is commonly understood as "without thinking or caring about the consequences of an action [or inaction]," *citing The New Oxford American Dictionary*1414 (Erin McKean ed., 2d ed. 2005). As a legal term, "reckless" conduct is "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard or indifference to that risk; heedless; rash .... more than mere negligence: it is a gross deviation from what a reasonable person would do." *Black's Law Dictionary* 1298 (8th ed. 2004). The term "disregard" is commonly understood as "to treat without fitting respect or attention: to treat as unworthy of regard or notice: to give no thought to: pay no attention to. *Webster's Third New International Dictionary (Unabridged)* 665 (1993). I note that for civil penalty purposes, 30 C.F.R. §100.3, Table X, defines "reckless disregard" as "conduct which exhibits the absence of the slightest degree of care."

Pine Ridge Coal, 33 FMSHRC 987, 1027 at n. 42 (Apr. 2011).

The Secretary's evidence in support of its reckless disregard designation is persuasive. First, the Secretary argues that an inspector verbally refused a request to modify a 103(k) Order but work was nevertheless performed on the sequestered vehicle. Sec'y's Post-Hearing Br., 12. The Secretary argues the negligence here is aggravated by the ease with which an unsatisfied Respondent could seek out a modification from the inspector. Id., at 13.

In *DQ Fire & Explosion*, the Commission found that an operator's actual knowledge of a violation of a 103(k) Order, and failure to act in compliance with federal regulations and orders, constituted high negligence.[21] *DQ Fire & Explosion*, 36 FMSHRC 3090, 3096-7 (Dec. 2014),

[21] *DQ Fire & Explosion* also saw the Commission consider whether an alleged informal process of modification could mitigate a Respondent's negligence in violating a 103(k) Order. In that case, the Commission affirmed the ALJ's reasoning that DQ offered no evidence why a belief in an alleged informal modification process was reasonable. *DQ Fire & Explosion*, at 3094. The Respondent argues in its brief that because Inspector Robinson apparently allowed work to be done on the affected truck once during accident reconstruction without a formal modification, the

aff'd, 632 F. App'x 622, 625 (D.C. Cir., 2015). In this case, there is evidence in the record that the Respondent's agents knew how to modify a 103(k) Order. Tr. 129-130. Moreover, when Inspector Robinson arrived on the mine site on November 7, 2014, he met Terry Young, the mine mechanic, and *foreman* Bernie Harper. Tr. 96. A foreman's presence, and apparent supervision, of the violation of a 103(k) Order is evidence that the operator, through its agent, was aware of work being done on the sequestered vehicle.

The 103(k) Order, already having been modified in the past at the request of Kentucky Fuel Corporation personnel, is itself evidence that the Respondent was familiar with the procedures for modifying a 103(k) Order. Nevertheless, after a request for modification was denied, work was still performed. If the Respondent was concerned that the terms of the 103(k) Order were overly burdensome, a formal request to modify the 103(k) Order would have been a logical next step. There is no evidence the Respondent sought to modify the 103(k) Order through written communication. The Respondent's actions suggest another decision was made. In the words of Inspector Robinson, "They asked, and we said 'No,' and they did it anyway." Tr. 101.

The fact that work was performed *after* a requested modification was denied is indicative of reckless disregard, perhaps even "a conscious (and sometimes deliberate) disregard." *Black's Law Dictionary* 1298 (8th ed. 2004). The operator's inability to name *who* authorized work on the sequestered vehicle, despite a mine foreman's knowledge of the performance of that work, is evidence the operator failed to exhibit even "the slightest degree of care." 30 C.F.R. § 100.3.

This Court finds the violation was one of reckless disregard.

VI. PENALTY

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after

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Respondent's agents were justified in later violating the 103(k) Order. Resp't's Post-Hearing Br., 12.

It is not clear from the transcript whether what Robinson did constituted a modification of the 103(k) Order. Tr. 120-2. The Respondent argues that because the violation of the 103(k) Order did not change the scene of the truck at time of accident, it was therefore reasonable for the operator's agents to violate that Order. Resp't's Post-Hearing Br., 12. This rationale was apparently derived from Robinson's willingness to remove tires from the truck on September 24 without a 103(k) Order modification, in order to facilitate accident investigation. Tr. 120. However, the 103(k) Order was modified numerous times on September 24, according to Inspector Robinson. Tr. 93-4. It is unreasonable to assume that the multiple modifications on September 24 were trumped by a single alleged informal modification made on the same day. The Respondent could not reasonably rely on this single day occurrence to justify violating the 103(k) Order.

notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

The Secretary proposed two special assessments in this matter. For Citation No. 8299679, the Secretary proposed a penalty of $3,000. Sec'y's Post-Hearing Br., 14. For Citation No. 8299655, the Secretary proposed a penalty of $52,500. The Court finds that the Secretary's penalty assessments are fair and necessary in this case. The Court examines both of the penalty assessments through the statutory list of criteria provided in Section 110(i) of the Mine Act.

Citation No. 8299655

History of previous violations

The Secretary notes that while the mine has seen no past violations of 30 C.F.R. § 77.404(c) of the Mine Act, the mine did have 18 violations of 30 C.F.R. § 77.404(a) in the fifteen months prior to the issuance of the citations in this case. Sec'y's Post-Hearing Br., 14. This factor is aggravating, as 30 C.F.R. § 77.404(a) concerns the proper maintenance of vehicles, and improper maintenance of a vehicle exacerbated the risk in this violation.

The size of the operator

As the Secretary notes in his brief, the Respondent stipulated that it mined 114,647 tons of coal in 2013 and 148,741 tons of coal in 2014 at this mine. J.X. 1.

Negligence

The operator's negligence in violating 30 C.F.R. § 77.404(c) was high, as described *supra*. This is a significantly aggravating factor, given the apparently mine-wide deficiencies in training in and or supply of proper blocking materials. This Court also considers the length of time it would take for the truck's deficiencies to accumulate to the point as depicted in the Secretary's photographs.

Effect of penalties on operator's ability to remain in business

As the Secretary notes in his brief, the operator has stipulated the penalties in this case will not affect the operator's ability to remain in business. This is a neutral factor.

Gravity

The gravity of Citation No. 8299655 was assessed as "reasonably likely to cause a fatality." See *infra*. The miner's actual injuries in this case do not constitute mitigation, as the condition of the vehicle, as well as the deficient training and or supply of blocking materials, made a fatal injury more likely than the actual injury suffered by the mechanic. Both the Secretary and the Respondent's witnesses testified that being completely rolled over by a truck

has a "reasonable potential to cause death." The fact that the mechanic was not completely rolled over was a matter of happenstance and the gravity in this citation is a significantly aggravating factor.

The operator's efforts at good faith abatement

The record is bare of evidence that the Respondent moved in good faith to abate these citations before MSHA's intervention.

Citation No. 8299679

History of previous violations

The Secretary notes that the mine has seen no past violations of Section 103(k) of the Mine Act. Sec'y's Post-Hearing Br., 14. This is a neutral factor.

The size of the operator

As the Secretary notes in his brief, the Respondent stipulated that it mined 114,647 tons of coal in 2013 and 148,741 tons of coal in 2014 at this mine. J.X. 1.

Negligence

The operator's negligence in violating Section 103(k) of the Mine Act was evaluated properly as reckless disregard. Two possibilities obtain: either the Respondent's management ordered miners to disregard a 103(k) Order, or mine management was so unconcerned with the requirements of the 103(k) Order that it allowed work to be done. Regardless, the operator's conduct was inexcusable and no reasonable mitigation was offered by the Respondent to alter the negligence calculus. This is a significantly aggravating factor.

Effect of penalties on operator's ability to remain in business

As the Secretary notes in his brief, the operator has stipulated the penalties in this case will not affect the operator's ability to remain in business. This is a neutral factor.

Gravity

The gravity of Citation No. 8299679 was rated as "No Lost Workdays" as no miner was injured, or reasonably could have been injured, when the Respondent violated the 103(k) Order. Nevertheless as the Secretary notes in his brief, the Respondent's violation "could have compromised MSHA's investigation into the accident." Sec'y's Post-Hearing Br., at 15. The purpose of 103(k) is, at least partially, to preserve evidence of a violation for future or continuing investigation. S. Rep. No. 95-181, at 29. The gravity of the Respondent's violation, therefore, is aggravating.

The operator's efforts at good faith abatement

The record is bare of evidence that the Respondent moved in good faith to abate these citations before MSHA's intervention.

Delinquency

The Secretary's brief offers a somewhat novel argument for applying another criterion of assessment to the penalties in this case. The Secretary argues that in order to deter future violations, when analyzing special assessments, the Commission is not restricted to the criteria contained within 110(i). Sec'y's Post-Hearing Br., 16-7. Noting that Kentucky Fuel Corporation has been delinquent in paying a large number of final citations and orders, the Secretary argues that this pattern of delinquency should act as an aggravating factor. Id., at 17, *citing Kentucky Fuel Corporation*, 38 FMSHRC 632 (Apr., 2016) and *West Alabama Sand & Gravel, Inc.*, 38 FMSHRC 1532 (June 28, 2016). According to the Secretary's evidence, the Respondent owes at least $8,000 in delinquent payments for violations that became final orders over two years ago. Sec'y's Post-Hearing Br., at 17.

The Commission recently described the operator's history of payment of penalties as "abysmal." *Kentucky Fuel Corporation*, 38 FMSHRC 632, at 633. (Apr. 2016). In that decision the Commission noted that the operator had an outstanding penalty balance of $351,696.00. Id.

In his brief, the Secretary contrasts the language of *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 841 (June 1996), and *Black Beauty Coal Co.*, 34 FMSHRC 1856 (Aug. 2012). Sec'y's Post-Hearing Br., at 16.

In *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, the Commission held that "the judge abused his discretion . . . in basing the assessment, in part, upon JWR's alleged delinquency in the payment of penalties. An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) for consideration in the assessment of penalties." *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 841, at 850 (June 1996).

In *Black Beauty Coal Co.*, however, the Commission reasoned that "[s]imply put, we refuse to require our Judges to apply blinders . . . and to ignore the central and most obvious purpose of civil penalties – to ensure operator compliance with safety measures – when deciding whether such penalties are appropriate. Deterrence is a principle basic to and underlying the entire statutory scheme of imposing civil penalties." *Black Beauty Coal Co.*, 34 FMSHRC 1856, at 1869 (Aug. 2012).

The Court agrees with Judge Feldman that including delinquency of payment when considering the Secretary's penalty assessment is consistent with the protective purpose of the Mine Act. *West Alabama Sand & Gravel, Inc.*, 38 FMSHRC 1532, at 1540 (June 2016). The Court also agrees with Judge Feldman's reasoning that refusing to consider the broader deterrent purpose of civil penalties is an elevation of form over substance, and inconsistent with the original purpose of civil penalties. Id. In *Black Beauty Coal Co.*, the Commission rejected the

elevation of form over substance, and reminded ALJs that "the central and most obvious purpose of civil penalties" is to ensure operator compliance. *Black Beauty Coal Co.*, at 1869. As Judge Feldman reasoned, consideration of delinquency during a penalty assessment may induce operators' toward further compliance:

> I am cognizant that increasing the civil penalty in view of West Alabama's pattern of delinquency raises an obvious question: How will raising the civil penalty foster compliance in view of West Alabama's apparent disinclination to pay? Encouraging compliance is a two-step process. As noted, compliance is achieved through the payment of civil penalties. Thus, step one involves motivating delinquent mine operators to pay civil penalties by increasing future assessed penalties that, if not paid, become a debt owed to the federal government, collectable through an action brought by the Department of Justice. In step two, by encouraging the payment of civil penalties, the Mine Act's goal of deterrence and future compliance hopefully will be achieved.

West Alabama Sand & Gravel, Inc., at 1540.

This Court will not close the door on considering delinquency in payment for penalty purposes in a future decision. However, the Secretary's penalty assessments are fair without considering Kentucky Fuel Corporation's history of delinquency in payment. The gravity of Citation No. 8299655 was significantly aggravating. The negligence exhibited by the Respondent in each of these citations was inexcusably high, but in particular, Citation No. 8299679 was the product of reckless disregard. In both cases, the addition of another aggravating factor is unnecessary. The Court therefore did not consider delinquency of payment in affirming the Secretary's penalty assessments.

VII. ORDER TO PAY

Citation No. 8299655 is affirmed as issued. Citation No. 8299679 is affirmed as issued.

Accordingly, it is hereby **ORDERED** that the operator pay a penalty of $55,500.00 within 30 days of the issuance of this order.[22]

William S. Steele

William S. Steele
Administrative Law Judge

[22] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

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