

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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May 31, 2016

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

KENTUCKY FUEL CORPORATION,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2015-575  
A.C. No. 15-19475-384304

Mine: Beech Creek Surface Mine

**DECISION AND ORDER**

Appearances: Latasha Thomas, Esq., U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner

James F. Bowman, Midway, West Virginia, for Respondent

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Involved are two alleged violations concerning a Cat 329 excavator: a section 104(d)(1) order, Order No. 8302707, citing 30 C.F.R. §77.404(a),<sup>1</sup> for failing to maintain equipment in safe operating condition, and a second (d)(1) order on the same piece of equipment, Order No. 8302708, citing 30 C.F.R. § 77.1606(a),<sup>2</sup> for an inadequate pre-shift exam of that excavator. For the reasons that follow, the Court affirms both violations, but, having determined that neither involved unwarrantable failures, reduces the civil penalties to appropriate amounts.

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<sup>1</sup> Section 77.404, titled, Machinery and equipment; operation and maintenance, provides:

(a) Mobile 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.

<sup>2</sup> Section 77.1606, titled, Loading and haulage equipment; inspection and maintenance, provides:

(a) Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator

## Findings of Fact

MSHA Inspector Melvin Keith Wolford testified for the Secretary. Inspector Wolford is a coal mine inspector service specialist. His employment with MSHA began in October 2006. Tr. 26. His prior experience in the mining industry includes working for a trucking company, taking care of coal trucks, and performing general maintenance. He has also operated bulldozers and end loaders. As an equipment operator, he was responsible for doing pre-operational checks on such equipment. *Id.*

The inspector was at Kentucky Fuels' Beech Creek Surface Mine on February 7, 2015 to complete an MSHA regular E01 surface mine inspection. Tr. 30. After arriving at the mine he traveled down to the open pit area, where he met the foreman, Bernie Harper, who was then operating the Cat excavator in issue. Tr. 31. On that day, Wolford inspected three pieces of equipment: an articulating truck, and two excavators. As noted, this matter involves the two orders issued on the Cat 329 excavator, No. 6024.

The first 104(d) order, Order No. 8302707, Sec'y Ex. 1, lists nine alleged safety defects.<sup>3</sup> Each of these defects will be discussed in turn.

### The loose handrail

The Order first listed that the handrail used to access the excavator's engine had mounting bolts missing and moved when pulled on to mount the machine. The inspector stated that when he went to mount the machine,

initially, with the first step and the first handrail, when I grabbed this thing and went to pull my weight up, where the mounting bolt was missing out of the upper part of the bracket, it just allowed the handrail to pull back with me, and I kind of went back down to the ground and had to refigure how I was going to mount the machine.

Tr. 32-33.

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<sup>3</sup> The nine alleged defects include the following: 1) the handrail used to access the excavator's engine had mounting bolts missing and moved when pulled on to mount the machine; 2) the lower step, used to mount the engine deck, was damaged; 3) the deck lids that are walked on to access the engine compartment were damaged and had shifted out of place because it was being held by a bungee cord; 4) the fuel tank mounting bolts were loose causing the fuel tank to wobble when stepped on; 5) the safety latch for the engine cover was out of the bracket; 6) the bottom windshield wiper blade was missing on the lower glass; 7) the handrail on the left side used to access the cab was loose and the bottom mount was damaged; 8) engine oil leaks were found on the engine compartment, turbo, valve cover gaskets, and running down the sides of the engine block onto the exhaust manifolds; and 9) the hydraulic pump compartment was covered with hydraulic oil due to a large crack located on the side of the aluminum filter housing (Tr. 32 Sec. Ex. 1).

Sec'y Ex. 3F is a photo of the subject handrail on the equipment. Tr. 52. It shows a black bar on the left third of the photo. The bar in issue turns out at an approximate 60 degree angle and it is away from a mounting point on the handrail. Tr. 52. One can visualize that if the bar was pulled up, it would be capable of being bolted into a threaded hole. *See* Sec'y Ex. 3F. The bar provides a hand hold for one ascending to the machine's deck. Tr. 55. The inspector's issue with this condition was:

[W]hen you first get up to mount the machine, that's the handrail that you would use to pull all your weight up initially to get up to the track, and this mounting bolt was loose, which would — when I grabbed the bar to mount it, it caused the handrail to kind of come back toward me, and I had to step back to the ground, and then mount the machine a second time.

Tr. 53. In short, the handrail moved when grabbed to ascend the excavator. Reduced to its essence, a single bolt to secure the handrail was missing. Tr. 59. The inspector stated that the type of injuries that could arise from the missing handrail bolt were:

Fall-related injuries, you know, whether you would've been on the ground level coming up, or stepping up from the track up to these other two steps to get up on top of the deck, you know, this is the rail you hold onto until you get up on the top of the machine.

Tr. 53.

The Court, noting that the condition would make the handrail, which was also described as a “grab bar” or “grab iron,” a little shaky, remarked that there would still be two bolts above that point, securing the handrail. The inspector agreed. Tr. 56. The Court commented that it did not appreciate the alleged safety hazard, as the rail was still secured by the two other bolts. Tr. 57. The inspector responded that, with the bolt missing, the iron would rotate, instead of being firm. He expressed that, alluding to a different alleged defect on the equipment, a bent step, if one were to “curl an ankle” on the damaged step and then grab the handrail, it would then rotate. Tr. 57-58.

On cross-examination, the inspector agreed that the preferred method for safely mounting and dismounting a machine is to use three points of contact. Tr. 113. The inspector, also agreeing that he had seen the operator's videos associated with the cited equipment, was then asked if the foreman safely mounted it.<sup>4</sup> Again, the inspector was reluctant to concede the point, initially responding only that the foreman “didn't fall.” Tr. 113. *Pressed, he then acknowledged that the foreman mounted the equipment safely.* Tr. 114. He then admitted that handrails will move a little, even when fastened securely. Nor could the inspector speak to the condition of the handrails on that morning when the pre-op exam was made. *Id.*

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<sup>4</sup> In addition to the testimony from witnesses, the evidence of record includes the Secretary's photographs and the operator's videos of the cited excavator.

The Court concluded that the inspector was reluctant to concede what was plain about the video involving the use of the handrails. When asked if there was support on both ends of the handrail leading to the engine compartment, he then conceded that,

[t]here was a mounting location down near the track, and then the one that we talked about in the photos where the rubber mount on the top part of where the bottom portion was at, yes. So you had one on top, and one on the bottom.

Tr. 114. He also admitted that one could stand with both feet on the ground and reach the handrail to the engine compartment, and that one could do the same thing to mount the cab compartment. Asked when a person stands on the ground with two feet and reaches up and grabs that handrail, when he pulls on it, whether he would know then if it was secure enough to pull his weight up on, he responded, “Yeah. I would say so.” Tr. 114-115. Similarly, he agreed that once one had mounted the machine, using the handrail that runs back to the engine compartment, it was stable enough for a person to hold onto and keep his balance: “Yeah. You could hold onto it as you climbed up the other steps, yeah.” *Id.* The inspector also acknowledged that there was a hasp near the top of the handrail with two bolts. Further, he found no problems with the how the bottom part of the handrail was attached. Tr. 116. He confirmed that the handrail would not fall off. Thus, his essential issue was that the rail would “give around” (i.e. move) when one tried to pull up on it, but couldn’t speak to whether it would support one’s weight when pulling up on it. He also conceded that, after letting go upon his initial effort to mount the rail, he started back and was able to mount the equipment. Tr. 117.

The foreman, Bernie Harper, who was operating the cited excavator, and was also the person who did the pre-op check, testified about both orders. Regarding the handrail, he stated that it supported his weight. Tr. 165. As to whether handrails are rigid, with no movement, he informed that some are rigid but that the cited handrail was

on the off side is mounted – the way it’s mounted, it goes to a rubber grommet, and then it – and it’s got a bushing, and then it’s bolted to the bottom. The support of it [is] a rubber bushing. It’s meant to give a little bit because this type of – this particular machine, when you move it in and out in tight areas with brush and so forth, it’s designed to just give a little bit or it’d break it completely off.

*Id.*

He described the mounting procedure: With both feet on the ground, there is

a step that’s on the undercarriage as your first step. You reach up, you mount it, you grab the handle with both hands, put your foot on the -- on the step that’s on the undercarriage, step up on the track, then the handrail proceeds on up the side of the machine, you hold onto that, and you go to step, and then it goes up, I think, onto the fuel tank, and then up onto the top.

Tr. 166. The foreman stated that there was nothing that would affect his safety that morning when mounting to ascend to the engine compartment. *Id.* Further, upon learning that the inspector would be issuing a violation, he told him:

Melvin, I said, This is not – these violations is not there. I can get on and off of this machine with no problem. The hazard is not there.

Tr. 168.

The Respondent, through the testimony of foreman Harper, described each of the nine videos, which were taken shortly after the alleged violations were issued. The first video, no. 0627, reflects accessing the equipment using the cited handrail. Harper stated that he ascended the equipment using the three points of contact. He added that the handrail was fastened at the bottom with a sleeve, and with a rubber bushing and two bolts and a bracket. At the top of the handrail, he was not sure how it was fastened, but believed it had the same arrangement as the bottom, bolted at the top. Tr. 176. In the Court's estimation, the video does show that the handrail functions and that the foreman was able to use it to step up on the vehicle. It is true that the handrail had some motion, but the Court cannot say that the amount of motion shown demonstrated that it constituted a hazard. Foreman Harper stated that when he mounted the machine, he *did* use the handrail to pull his body weight and used both hands in doing so. Tr. 178. When the video shows him shaking the rail, he was using one hand for the purpose of showing the amount of looseness in the rail. Tr. 178. Cross-examination noted that it was the top portion of the handrail which was cited.

Based upon the totality of the evidence, the Court concludes that the handrail, while not in perfect condition, was in safe operating condition.

### **The deformed lower step**

The second item listed on the order asserted that “the lower step, used to mount the engine deck is damaged. The step has been pushed back greatly reducing the footing area.” Sec’y Ex. 1. The inspector described the condition as “probably” the third step one would take, and also described it as the lower step, used to mount the engine deck. He stated that it was damaged in that the metal for that step was bent up and pushed back. Sec’y Ex. 3C fairly shows the deformed step from a view looking down from above. While there is a reduced surface area, the photo does not support that the surface area reduction was 50%, although the inspector asserted that it reduced the area for that step from what would have been about six inches to about half that distance. The reduced area was unevenly reduced. The step is used to ascend to a deck to get on top of the engine to perform pre-op checks. Tr. 46. He expressed that the safety hazard associated with the condition was the risk of missing a step when mounting the machine, creating the chance of rolling an ankle or perhaps falling due to the unsure footing. As the step area was reduced by about 50%, he noted that there is less footing available. If step area was wet or iced, this would increase the risk. Tr. 46. The next step up was fine. Tr. 49. To abate the condition, the lower engine access step was pulled out and straightened up to restore the full surface area. Tr. 87.

Upon cross-examination, the inspector continued with inadequate responses regarding basic questions. When asked at what point he considered the step to be unsafe, he responded, “Can you rephrase your question, sir? Tr. 118. He was then asked, “[i]n reference to the step that was cited that was bent in in the front, at what point d[id] you consider the step to be unsafe?” He responded:

Where I was at on this violation was you’ve got a step there that’s – and I’m just guessing – 12, 14 inches wide, and I think it was two, four, about six inches out, and it had been compressed back 50 percent or more. You get to where, going up, you don’t have a real good place to put your foot, and then coming back down, you’re trying to step with your heel, and you just have a real small area there to step on.

*Id.*

Asked if one “had a step that is bent in the front, and you can take both feet and stand on the step, is that safe,” the inspector responded, “Well, that would depend on, you know, how big of an area that you had to stand on, you know, if you’ve got two or three inches, or have you got six or eight inches, or what kind of area are we talking about?” *Id.* When asked if he knew the area of the step that was left, the inspector stated, “[j]ust looking at the photos, I was – I think I said that two, four, five-ish – four-ish inches, I think – I’d have to look again – was, you know, compressed back, leaving two, maybe three inches or so to put your foot on in that one area.” Tr. 119. Contradicting his earlier assertion that the step was also bent up, when asked if the compressed step was still flat, he stated: “[r]elatively flat, that I can remember, yes.” *Id.*

The same video, no. 627, demonstrating the handrail issue also shows the use of the deformed step. Foreman Harper’s video shows that he was able to place both of his feet on the step. As with the handrail, the step was not in pristine, showroom-like condition, but as the video shows, it was still serviceable, albeit with a diminished surface step area. It seems unreasonable to deem the step to be in an “unsafe condition” and the Court therefore declines to uphold the Secretary’s claim.

### **The deck lid**

The Order asserts that “the deck lids that are walked on to access the engine compartment are damaged. One is bent up several inches and one has the mounting brackets broke out and the lid is moved out of the intended location.” Sec’y Ex. 1. This condition is displayed in Sec’y Ex. 3A and 3B. The inspector stated that photo 3A shows, in the left bottom quadrant, a bungee cord securing the deck lid. The inspector stated that the deck lid should’ve been spun around to be positioned properly and bolted down. Persons walk on this deck lid. However, the inspector conceded that the bungee cord was keeping the lid secure, but “not secure where it’s supposed to be.” Tr. 36. The inspector stated that the lid was on top of another damaged lid “and it had probably a couple inch raised lip” that made it unstable or one could catch a toe, and it was unstable and the arrangement created a hole that one could accidentally step in. Tr. 36. Sec’y Ex. 3B, also shows the deck lid and the raised lip that concerned the inspector. The lid would wobble when one stepped on it.

As he summarized his concerns about the lid, the inspector stated:

So you could either step in the hole over here to the left where the deck lid should be, or trip on the lid itself, or step on the lid that's unstable because it's not over there in position and mounted down.

Tr. 39.

A better depiction of the inspector's concern about the lid appears in Sec'y Ex. 3D. It more clearly shows the lid in its out of position state, held by the bungee cord (the bungee cord was circled on the photo with the words "bungee cord" added on the photo), the hole that concerned the inspector, as well as the tripping hazard where the lid is shown to be resting atop two other plates. One standing on the plates would be about seven to eight feet above the ground. Tr. 41. The inspector stated that the bungee cord was not a good secure way to hold the lid in place. He expressed that the condition created "fall-related type" injuries, such as strains, sprains, and "maybe" broken bones. Tr. 42. The area beneath the hole has hydraulic components and these would be too hot to touch when the machine is running and under a load. Tr. 43. The inspector agreed, however, that the machine operator would *not* be on the deck lid when the excavator was running. Instead, that area would be examined *before* the machine was operated in order to check oil levels and perhaps clean the windows. Tr. 44.

Upon cross-examination regarding the deck lids, the inspector was asked whether the deck lids were safe to travel over when they were in place. The inspector replied that "[w]ith everything in place and everything bolted down, they would've been safe to travel." Tr. 120. The inspector also acknowledged that he traveled over the deck lids and that he did not need to put them back in place in order to travel over them. Instead, he simply stepped around the one lid over to the other lid and didn't need to step on the one that was out of position. Asked further whether he agreed that he traveled over the deck lid safely, the inspector responded: "I didn't fall. Yes, sir." Tr. 121.

It is clear that at the time of the inspection the deck lid was out of place and that the means to hold it was a bungee cord. In discussing the hazard presented by the condition, the inspector that with the deck lids "missing" one could step on it and turn, and possibly fall seven, eight feet down to the ground. Tr. 103. To abate the condition, the deck lid or plate was straightened and bolted down, no longer relying on the bungee cord to secure it. Tr. 87-88.

From his perspective, foreman Harper did not consider the condition to be a safety hazard because he still had safe access across it. Tr. 181. He also stated that the plate was not askew, but rather was in the correct position the morning that he got on the machine to perform his pre-operation inspection. Tr. 181. However, he agreed that the plate was out of position at the time the inspector viewed it. He maintained that there was the strap, the bungee cord, holding the plate in place. Later the mechanic "put it back in there." Tr. 182. Harper did not know why the plate was out of place, but guessed that he left the strap loose and when tramping the machine later, it turned. Tr. 182. Harper's contention was that the video reflects the position of the plate at the time he did his pre-shift that morning. Tr. 183. There is a small corner with the metal bent

up. As to the other plate, in this video, Harper testified and stated in the video that it was in place at the time he did his pre-op that morning. Video no. 628 shows the fuel tank and the handrail. This video pertained to item no. 3, the deck lids. Tr. 180.

The government's attorney then asked some additional questions about the deck lid, referring to Exhibits 3B and 3D. Harper agreed that the lid was lying loose. Tr. 194. The area had a six to eight inch opening. Tr. 195. He also agreed that his video shows the deck lid as it looked when he mounted the machine earlier that morning and did his pre-shift. Tr. 196. Harper acknowledged that when the mechanic addressed the issue, it was apparently corrected without use of a bungee cord. Tr. 197.

The Court accepts the testimony of foreman Harper that the plate was in place at the time he performed his pre-operational check that morning and it so finds that as the fact. Given that finding, while the bungee cord arrangement was hardly ideal, it is difficult to conclude that the method employed to hold the plate in place rendered the equipment in an unsafe operating condition, especially when one takes into account that no person would be on the plate while the equipment was being operated. Despite these observations, with the plate out of position, albeit post the pre-op inspection, the condition must be deemed to have constituted a violation when inspected. Finally, regarding the small portion of the decking material which was bent up,<sup>5</sup> and therefore not in perfect condition, the Court, having viewed the photographs and videos, along with the testimony, considered that defect as having only a *de minimus* effect on safety. Accordingly, the violation was established.<sup>6</sup>

### **Loose fuel tank mounting bolts, causing the tank to wobble**

The inspector stated that the "tank was actually fairly unstable, wobbly." Tr. 119. He added that the Respondent's video shows this condition. *Id.* However, he conceded that he did not examine the mounting bolts, as they were located under the tank. He also admitted that the tank was not at risk to fall through to the ground and that one traveling over the fuel tank *would not fall*. Tr. 120. The bolts were tightened to correct the condition. Tr. 87. Video no. 628 speaks to the fuel tank and the handrail issues. In that video foreman Harper, standing on top of the tank, clearly shows that the wobbling was minimal. Accordingly, the Court does not agree with the inspector's characterization that the tank was "fairly unstable." This minimal wobbling simply cannot be considered as evidencing an unsafe operating condition.

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<sup>5</sup> The inspector described the extent of it as: "it had a probably a couple inch raised lip." Tr. 36.

<sup>6</sup> Though as discussed later, it is important to distinguish that although the Court has found that the lid was not maintained in safe operating condition, in violation of 30 C.F.R. § 77.404(a), it has found that the condition was *not* present at the time of the foreman's pre-op exam. Accordingly, the parallel charge that the pre-op for deck lid was deficient, is *not* sustained. The lid *was* in place that morning when foreman Harper did his pre-op inspection.



## Safety latch to secure engine hood out of bracket

Inspector Wolford described this item as follows:

[T]he safety latch that, when you raise the hood to check oil, it locks it in place, and keeps that hood – just say you’re reaching down there grabbing the dipstick, maybe a gust of wind come through and catch the hood, and it could blow, you know, fairly – probably five foot by three or four foot wide hood back down on you while you were laying down in there pulling your dipstick to check your engine oil.

Tr. 32.

Elaborating, the inspector referred to Sec’y Ex. 3A, which depicts the hood safety latch. The engine hood is open in the photo. Wolford stated that the latch should have been in an upright position and locked to keep the hood from blowing back down, if there were a gust of wind, if one were checking engine oil. The latch apparently is to catch and go into a bracket hole on the hood, thereby preventing the hood from coming back down inadvertently. The Court sought clarification about the issue with the safety latch, noting that the latch was present. The inspector stated that his issue was that the latch was not *attached* to the hood bracket. Thus, it did not latch automatically. As it was, one would need to grab the latch and put it up in place. Tr. 37. When the Court inquired if it was possible for one to manually attach the safety latch to the hood, the inspector stated that he did not know the answer. Tr. 37. Later testimony established that the latch could be manually attached, thus securing the hood from accidentally coming back down.

Although the inspector did not know if the latch could be disconnected, the Court inquired if the inspector’s concern was that the latch would not be secured automatically upon opening the hood. He confirmed that the automatic feature was his concern and therefore he was not contending that the latch would not secure the hood, if done manually. Tr. 123. He did not know if the mount itself was broken, as his focus was upon the latch not setting automatically. The inspector believed that another miner using the machine might open the hood, unaware that it did not latch automatically. He did not know the method for disconnecting the latch from its automatic set position. He conceded that if one knows about the latch, and one was to set it manually, there would not be a hazard. Tr. 124. He did not dispute that one could’ve manually set the latch, and thereby secure the hood and that, under those circumstance, there would not be hazard. Tr. 125. The inspector also agreed that many cars employ a manual method to secure a hood so that it will not come down. Tr. 124. However, it is true that this excavator had an automatic hood latch feature. *Id.* Thus, while “[t]he safety latch on the engine cover was out of its bracket and could not support the engine cover while leaning in to check the engine oil,” the hood could be secured manually. Although the Respondent presented a video of the hood latch issue, it only shows the latch in its secured position. Inspector Harper admitted that the latch was not in place when the excavator was inspected by inspector Wolford. Tr. 185; Resp. Ex. 3.

The Court cannot conclude that the hood latch issue constituted an unsafe condition. The entire assembly, both the support arm and the bracket, were present. There is no contest about that. The only question is whether if, as here, one can manually and fully set the support arm, but that it did not set automatically, such a situation constitutes an unsafe condition. The Court finds that there is no requirement that a hood latch must be automatically set. While a design feature, the inspector conceded that some equipment sets the hood latch automatically, while others are set manually. If there were no way to manually secure the hood latch, and thus no protection against the hood falling inadvertently, that would be a different matter.

### **Bottom wiper blade missing on lower glass**

The order for this condition states that the “bottom wiper blade is missing on the [excavator’s] lower glass.” Sec’y Ex. 1. There is no real challenge to this matter, but there are some mitigating considerations. The inspector identified Sec’y Ex. 3E, another photograph, and it shows, in the center of the photo, where a wiper arm should’ve been present, but was not. That wiper, also described as the “foot glass” wiper, had it been present, serves to wipe the lower portion of the glass on the front of the machine. Tr. 49-50. A separate wiper on the machine covers a larger area of glass on the machine’s front but there was no issue with that larger wiper, which wipes the main front glass for the machine operator’s eye level viewing. Simply explained, the machine’s front windshields have a lower and upper wiper, each covering a different area of glass. It was the lower glass that was missing a wiper blade. Tr. 50.

The Court inquired why viewing through the lower glass is important. The inspector stated that this becomes important when digging back or down low, that is to say, when digging close to the machine itself. Tr. 52. The inspector considered both wipers to be important. The Court agrees. The inspector described the safety issue with the missing lower blade: “This wiper blade, again, you’re running during foggy conditions, rain, snow, whatever.” With “stuff accumulating on your glass, you can hit your wiper blade and turn it on, and you continue to see.” Tr. 127.

However, he conceded that “individually, with that one little glass, you know, that’s a – that’s a totally separate scenario, but individually, that’s not what I would call a real serious condition.” Tr. 128. Further, at least on that morning, the inspector stated that the operator *could* see through the foot glass. *Id.*

It is apparent that the inspector viewed the various problems he perceived collectively. That means that to the extent that some number of the nine conditions have been determined by the Court either not to be an unsafe operating condition or *de minimus* conditions, the significant and substantial and unwarrantability determinations are undercut. In support of the conclusion that the inspector’s conclusions in this regard was a cumulative finding, resting on all nine conditions, he conceded that, with regard to the foot glass, on the same day as this inspection, he issued a wiper violation on another piece of equipment at this mine, also an excavator, Citation No. 83202706 for an inoperative wiper blade but found that it was unlikely to cause an injury. Tr. 128. Seeing a justifiable difference for his contrary conclusions, the inspector fell back on his approach that all nine conditions were taken together in reaching his conclusions about negligence and gravity, stating:

[w]ith the violation in question, you know, you've got, I can't take a violation that's got nine items and pick out the – say, the least likely item hazard in this violation, and evaluate my whole complete citation based on one little fact, versus if I only issued a violation, say, for – if that was the only thing wrong with it, it would be, say, an unlikely non-S&S violation versus I've got nine items, I can't just, like I say, pick out one and base my whole citation on it.

Tr. 129.

Thus, the inspector conceded that, taken alone, the wiper blade issue was unlikely in terms of the gravity. *Id.* Foreman Harper conceded that the foot glass wiper was not present.

Obviously, this missing lower wiper blade was a violation. However, taken by itself, as the inspector acknowledged, it was not S&S nor unwarrantable.

### **Loose handrail, left side of the cab access**

This involved a cab access handrail which had a loose top bolt and the inspector believed that, to abate the condition, the Respondent welded the lower portion of it back around to where it was supposed to be. The Order states “the handrail on the left side of the cab access is loose.” Sec’y Ex. 1. The cited condition is depicted in Sec’y Ex. 3H. This is the handrail used to mount the cab portion of the machine to facilitate the operator’s access to the cab seat. The issue involved the lower mount, which the inspector described as “pretty much tore [] all loose except for [a] little piece [] that’s attached to the rail still yet.” Tr. 64.

The inspector stated that the condition could cause fall-type injuries. He noted that he weighs some 230 pounds and stated that, in climbing to the three foot level of the cab, it was “real shaky and loose to mount the cab of the machine. The Secretary’s brief repeats the inspector’s claim, stating that “[t]he handrail on the left side used to access the cab was loose and the bottom mount was damaged.” Sec’y Br. at 4.

The Court agrees it does appear that a portion of the rail is not completely secured to the machine. However, the Court notes that the Respondent’s video refutes the inspector’s conclusion that the rail presently constituted an unsafe condition. The testimony from the Secretary regarding this condition was quite brief and when considered along with the Respondent’s videos of the condition, the condition was not established as being unsafe.

Importantly, when assessing the legitimacy of the order, the same testimony reinforces what the Court has already noted – the inspector’s findings in support of his order were arrived at cumulatively. Though the following pertains to the same issue, but as it relates to the order for an inadequate pre-op, the inspector revealed his thought process again in this exchange: Asked if he “[w]ould [] issue an inadequate examination for a pre-op examiner who missed a loose bolt,” he responded, “I wouldn’t think so.” Tr. 142. Pursuing that line of questioning, the inspector was then asked, “How many loose bolts would you have to have before you;d issue an inadequate pre-op exam?” He replied, he didn’t know how to answer such a broad question, but

he then added that he “questioned [Foreman Harper] if he done a pre-op for the morning because of *all the conditions that was on the machine.*” Tr. 145. The foreman replied that he had done a pre-op and that no conditions were listed because he believed that “[i]t didn’t look that bad to [him].” *Id.*

In the Court’s estimation, Respondent’s videos, numbers 633 and 635, demonstrate that the handrail, again while not in pristine condition, were still in safe operating condition. Foreman Harper established this to be the case in the videos, which show him safely ascending the cab, while using the handrail. Foreman Harper is not a slight man. The handrail was able to accommodate his ascending to the cab. This condition did not reflect an unsafe operating condition. However, while the evidence did not establish a present violation, the Court acknowledges that, at some point in the future, the lower rail could become further detached and at that point it would become an unsafe condition.

### **Engine compartment oil leaks on the turbo and valve cover gaskets**

As listed in the Order, this item stated that “there are engine oil leaks in the engine compartment on the turbo and valve cover gaskets. Oil is running down the sides of the block and onto the exhaust manifolds.”

Sec’y Ex. 3I was introduced for the purpose of showing oil leaking next to the turbo and running down the bottom portion of it. Both the turbo and the oil leak were circled in the photo. The Court did not view the photo as particularly helpful to establishing the cited condition. The inspector considered it

. . . a fire-related hazard with the engine oil leaking around this turbo, and the – which, you know, leaks things get, you know, pretty hot temperatures if they’re worked under a load for an extended period of time, [adding that] . . . in some literature that I’ve looked at and read, you know, operating temperatures, 1,000, 1,200 degrees, and I’ve seen noted where some turbos can get up to 1,800 degrees.

Tr. 65.

The inspector could only speculate as to the source of the oil leak. Tr. 66. Sec’y Ex. 3L depicts the top portion of the engine’s valve cover area, and, according to the inspector, also shows a “coating of oil,” though he admitted it was “really not a good view.” Tr. 71. Still, he maintained that oils were “running all the way down the side of the head, down to these exhaust manifolds, and it’s starting to accumulate on the flanges of this exhaust manifold.” Tr. 71. The photo was taken atop the equipment where the previously discussed deck lids were located. The Court noted however, that per the photo, the area looked “pretty clean.” Tr. 73. It is also noted that the oil coating was not to a degree that one was unable to read the truck brand name “CAT” on that valve cover. Tr. 82-83. The inspector clarified that the area of concern had engine oil on it, and he circled the area on Sec’y Ex. 3L. Tr. 75-76. The essence of his issue was “a film of oil on [the] whole valve cover.” Tr. 76. His concern was:

[j]ust left uncorrected with the leaks continuing to leak and continuing to run down, and it would continue to build and accumulate, and go on down to even below the engine and accumulate, you get into your fire-related hazards, you know, in the engine compartment.

Tr. 78.

Sec’y Ex. 3M is another photo of the same area. The inspector believed that the photo more completely depicted the oil on the valve cover and showed that it was leaking down towards the manifold too. Tr. 78. The areas of his concern were similarly circled on Sec’y Ex. 3M. Because this condition and the next cited condition both deal with oil-type accumulations, the Court will discuss them together *infra*.

### **Hydraulic pump covered with oil due to broken filter housing**

Sec’y Ex. 3J, another photograph, depicts, according to the inspector

. . . the area of where that – that hydraulic fuel was kind of on over to the right . . . – you open up a lid into this what I’m going to call little hydraulic area, here, and this just shows, you know, where some of these components like this hose, and this big hose down here, this – where this has got the oil that’s been spraying and leaking down from the crack in that filter housing.

Tr. 67.

The inspector stated that the area was “wet” from the hydraulic oil from the leaky filter housing. Tr. 67. The hazard identified by the inspector was

[t]he machine function, you know, with the loss of oil related type hazards, and also, you know, with this oil continuing to run out and spray out, and as it accumulates more, you get into your fire hazard-type conditions.

Tr. 67.

Sec’y Ex. 3K, the inspector stated, shows a close-up view of the oil inside the compartment, though he conceded it was “kind of hard to tell from being back out of that panel that that stuff is, you know, getting sprayed with that oil.” Tr. 69. He stated that it shows “where the hoses and components are wet inside of there.” Tr. 69. The inspector circled the area, essentially the whole photo, which he identified as being wet. Although the inspector contended that everything in the photo had hydraulic oil on it, at least in terms of the photos, the Court did not find the inspector’s assertions to be supportive. Tr. 70. He was unable to state how long the hydraulic oil had been leaking, though he expressed his opinion that, at least while the equipment was running, the condition had existed probably for more than a shift. Tr. 70-71.

### **Further discussion of the oil leaks, alleged defects 8 and 9, as listed in Order No. 8302707**

The Court did inquire of the inspector, regarding the oil leaks and oil accumulations, whether those subjects had been part of his training at the Mine Safety Academy as safety issues and whether he was trained to be wary of such issues. The inspector affirmed that those subjects were part of his training and that such leaks and accumulations are deemed to be violations. Tr. 149. Further, addressing a subject raised during cross-examination, the inspector stated that he was never instructed that combustion points must first be determined before issuing such violations. Reinforcing that point, the inspector affirmed that accumulations of hydraulic oil, or engine oil, are a concern in and of itself, without any concern about determining the temperature at which a given fluid might combust. Tr. 150.

Though the photographs did not particularly aid the Secretary's case, at least in terms of presenting an obvious or extensive oil leak problem, the Court accepts that there were some accumulations of oil from engine and hydraulic sources. The Court also accepts that in establishing the presence of oil accumulations, it is not part of the Secretary's case to show that such accumulations present a hazard and therefore the Secretary is not obligated to produce testimony about the point at which such oils become combustible, or auto-ignite.

Accordingly, the Court rejects the contention that hydraulic oil or engine oil are not combustible materials. However, that determination does not end the inquiry in terms of whether the orders were justified. For example, the inspector agreed that most such accumulations are issued as non-S&S violations: "Yeah. Most of them are unlikely, if it's dealing with oils. Yes, sir." Tr. 129. Nor did he detect any evidence of misting of such oils. *Id.*

The inspector maintained that the accumulation of the engine oil is a hazard in itself. However, he distinguished that hazard, expressing that such accumulations did not create an unsafe operating condition. Tr. 133. Instead, the inspector expressed that hydraulic leaks pose a machine function hazard, in that, with oil loss, one starts losing machine function and if such oil sprays onto a hot engine component, it could vaporize and become a flame. Tr. 67-68, 135. However, it was fire, not machine function issues, cited by the inspector. The inspector affirmed his belief that the turbo and the exhaust manifolds temperatures are definitely high enough to ignite an oil mixture getting sprayed onto them, asserting that he has seen that happen "several times." Tr. 136. Thus, the Respondent's points about automatic machine shut-down when oil levels drop, are beside the point. Of greater significance, is the appropriate characterization of the gravity presented by these oils, especially given the generally unresponsive photographs, which again, do not evidence extensive accumulation conditions.

The inspector admitted that on the same day at the Beech Creek Surface Mine, he issued other citations for oil accumulations on equipment involving a truck and another excavator. For both, he listed the gravity as unlikely. Tr. 139. Yet the inspector did not find this to be inconsistent, stating:

Again, with the accumulations being part of the not maintained, safe to operate violation, you know, I can't just, say, single out the one item and say, well, it's going to be unlikely because of this one, and look over the other things that were more reasonably likely to happen, so that's where you get your difference at between the three.

Tr. 139.

Thus, this is a further example to show that the inspector's evaluation of the gravity and negligence was a determination made collectively upon *all* nine cited conditions.

### **Conclusions about Order No. 8302707**

As per the discussion above, the Court has found that at least some of nine items (four of nine) listed in Order No. 8302707 constituted unsafe operating conditions. Therefore, the 30 C.F.R. §77.404 violation is affirmed. More significant to this case is whether a section 104(d)(1) order was justified, a finding which requires establishing that the violation was the result of an unwarrantable failure. The Court finds that there was no unwarrantable failure.

The Commission has spoken definitively on the subject of unwarrantable failure. In *ICG Hazard, LLC*, 36 FMSHRC 2635 (Oct. 2014), it modified a judge's finding of unwarrantable failure to a section 104(a) citation, holding that such a finding must be based on an examination of specific criteria. Noting that it has "defined 'unwarrantable failure' as 'aggravated conduct constituting more than ordinary negligence,'" *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987)), "it reviewed that the criteria for determining whether conduct is "aggravated," includes

(1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd* on other grounds, 195 F.3d 42 (D.C. Cir. 1999).

*Id.* at \* 2637. Though the Commission acknowledged that "not all factors may be relevant to every case, all relevant factors must be examined." *Id.*

Similarly, in *Mach Mining, LLC*, 34 FMSHRC 1769 (Aug. 2012), the Commission earlier noted that

. . . the 'unwarrantable failure' terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated

conduct constituting more than ordinary negligence, and we characterized it in such terms as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2003-04. The Commission has further recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Factors relevant to that consideration include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) (“*Consol*”); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev’d on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). \*\*6 The Commission has repeatedly made clear that it is necessary for a judge to consider all relevant factors in determining whether an unwarrantable failure to comply with a standard has occurred. *Coal River Mining, LLC*, 32 FMSHRC 82, 89 (Feb. 2010); *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-31 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

*Id.* at 1775.

The Commission found the judge’s assessment of unwarrantability to be insufficient. It noted that while the judge considered three of the factors—obviousness, the operator’s knowledge of the existence of the violation, and the length of time the violation existed—in considering the operator’s knowledge of the violation, and by adopting the Secretary’s argument that the violative act itself outweighed the short period of time between action and discovery, the judge failed to adequately consider and address mitigating evidence relevant to that factor. *Id.* at 1775-76.

### **Determination of unwarrantability issue for Order No. 8302707**

Applying the Commission’s test for determining unwarrantability, a recap of the nine alleged defects is useful. They were: the loose handrail, the deformed lower step, the deck lid, the loose fuel tank mounting bolts, the safety latch to secure engine hood, the missing bottom wiper blade, the loose handrail on the left side of the cab access, the engine compartment oil leaks on the turbo and valve cover gaskets, and the hydraulic pump covered with oil due to a broken filter housing.



As referenced several times in the discussion above, the issuing inspector's determination that this matter was an unwarrantable failure was predicated on *all* of the violations together. In the Court's estimation, by virtue of the fact that it has found that several of the nine conditions were not established as violations, the unwarrantability determination collapses. Despite that finding, the Court will proceed to examine each of the conditions to determine if any were individually unwarrantable failures.

Again, those considerations are: (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. In addition, while there is some overlap, whether reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care, were involved are to be discussed in the analysis.

To avoid utterly wearing out the reader, the discussion of unwarrantability for each of the cited conditions will be brief.

### **The loose handrail**

As noted, the Court found that this did not constitute an unsafe condition. However, even if the Commission were to disagree, it was not unwarrantable, because the extent was limited, had not existed for more than a shift, definitely did not pose a high degree of danger, (as the video demonstrates) was not obvious in the sense that the foreman used the handrail to ascend without a problem, was not known to the foreman prior to the day the condition was cited, as the foreman was filling in for the usual equipment operator, was abated to more securely attach the handrail, though it was previously secure enough to perform its function, and there was no notice to the operator that greater efforts were necessary for compliance. Thus, terms such as reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care, were totally inapplicable. Further, as a significant mitigating factor, the foreman performed the pre-check in pre-dawn hours.

### **The deformed lower step**

The Court determined that this also did not constitute an unsafe condition. As discussed earlier, the Respondent's video shows this to be the case. Even if the Commission were to disagree with the Court's finding, in the Court's estimation it was not unwarrantable. After all, the step, while compressed, fully accommodated the foreman's use of it, so the extent of the step's insufficiency must be considered minimal. It still functioned, fully, as a step, albeit with a reduced surface step area. There was no evidence of record that the deformed step had so existed for a prolonged period of time. It did not pose any high degree of danger by any stretch. If accepted to be a violative condition, it was obvious, but again still fully functional. The foreman did, after all, use the step without incident in the pre-dawn hour that day. There was no evidence that the foreman knew of the condition prior to spelling the usual equipment operator that

morning. The step was returned to its uncompressed state promptly. No evidence of greater efforts for compliance was presented. It cannot be fairly claimed that reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care, were involved. The same mitigation factor, as described next above and which applies to each of the cited conditions, was present. On these grounds the Court finds that there was no unwarrantable failure associated with the step deformity.

### **The deck lid**

As noted above, the Court accepted as credible the foreman's testimony that the deck lid was in place at the time he conducted his pre-shift exam. This conclusion is bolstered by the fact that a bungee cord had been employed to secure the lid. While true that the bungee was a sub-optimal method to hold the deck lid, it is not unreasonable to conclude that use of the excavator prior to the inspection could've dislodged the lid. Along the continuum of unsafe conditions however, it was deemed to be have only a *de minimus* effect on safety. The equipment operator would not be on the deck while operating the machine, the plate was present, not absent, and it could be secured, insufficiently, by the bungee cord. The foregoing describes the extent of the condition. The length of time the lid was out of place was not established to be longer than the period of time following the foreman's pre-op inspection until the inspector performed his review of the machine. Given that the plate was in place at the time of the pre-op and that no one would be on top of the deck during machine operation, it did constitute a high degree of danger. It was not obvious either, if one accepts, as the Court did, that the foreman was credible in his assertion that the lid was in place when he performed his pre-op. The foreman's knowledge is the same as for the previous conditions – he did not operate the machine as part of his duties – he was filling in for the customary machine operator that morning. The condition was promptly corrected and the inadequate bungee cord arrangement abandoned in favor of a more secure method to keep the lid in place. No notice of greater efforts for compliance to maintain safe operating conditions for equipment is part of this record. The fact that a bungee cord was employed is viewed as a mitigating factor, when compared with a hypothetical arrangement where no method of securing was present at all. There was no unwarrantable failure associated with the deck lid.

### **The loose fuel tank mounting bolts, causing the tank to wobble**

This cited condition was found by the Court as in safe operating condition. As the video demonstrates it was clearly safe. Taken as a whole, the Court viewed some of the conditions cited, this being one, as larding up the alleged unsafe conditions on the equipment, the next cited condition is another such example.

### **The safety latch to secure engine hood out of its bracket**

The problem with this cited condition was that the latch and bracket were present and functional. The shortcoming was that it did not automatically engage. That being said, it is hard for the Court to conclude that the manual activation method, a method which completely served the function of keeping the engine hood secured in an upright position, was a violation. The corrective action was to reinsert one end of the latch into the bracket, an effort which can barely

be described as “abatement.” However, if the Commission were to disagree and find that the inoperative automatic engagement feature of the safety latch constitutes an unsafe operating condition, the Court still finds that it was not an unwarrantable failure. The extent of the condition was the automatic engagement of the latch, as the latch could be secured manually. Given that, it did not present a high degree of danger. There was no evidence as to the length of time the automatic feature was not engaged. If the automatic feature itself constitutes an unsafe condition, then it was obvious to anyone who tried to secure the hood upon raising it. If, as the evidence suggests, raising the hood of the equipment is essentially no different than raising the hood of the typical car, one realizes immediately that the hood will not stay up until the support arm is locked into the bracket. Given the real world application that the task of raising an engine hood requires a support to keep it up, it is additionally hard to conclude that a high degree of danger was present. There was no evidence about the length of time the latch had been out of the bracket and, as is obvious, abating the problem took seconds to reinsert the latch into the bracket. No notice of greater needed abatement efforts was presented for this, or for that matter, for any of the nine conditions listed. Words like reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care cannot be employed with respect to this condition. Mitigation, if it need be mentioned at all, again is that the foreman was using this equipment on the day the order was issued to spell the usual driver. Using the equipment was not part of his customary duties.

#### **The bottom wiper blade missing on lower glass**

This was an unsafe operating condition violation, as the Court so found. However, the inspector admitted that taken by itself, as the inspector acknowledged, it was neither S&S nor unwarrantable. Thus, standing alone, the Secretary relinquished the claim that this was an unwarrantable violation. The Court finds that the evidence is in line with the inspector’s admission. The testimony of record was that the foreman only needed to use the forward, eye-level view that morning for the equipment and that the bottom glass was sufficiently clear in its own right on that day. Under those circumstances, no “high degree of danger” was present. There was no evidence about the length of time of the violative condition. However, it was an obvious deficiency. The foreman’s knowledge about the condition, at most, began in the pre-dawn hour when he did his pre-op and apparently overlooked seeing the missing lower wiper blade. No notice that greater efforts were necessary for compliance was part of this record. Again, the terms reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care are foreign to the facts here. The mitigation, as discussed above, remains. Accordingly, the Court finds that there was no unwarrantable failure associated with this condition.

#### **The loose handrail, on the left side of the cab access**

The Court found that, at the time the loose cab access handrail was cited, it remained functional and not in an unsafe operating condition. The Respondent’s video establishes this, supporting the foreman’s view about its safety. However, should the Commission take a different view of the findings about the functionality and then-present safety of the handrail, the Court would still find that the condition did not constitute an unwarrantable failure on the mine’s part. The extent of the condition has been described above, and even the inspector conceded that

the lower mount still was attached, though he described it as “that little piece . . . that’s still attached to the rail yet.” Tr. 64. There was no evidence about the length of time the loose lower mount had been in that condition. Given the foreman’s demonstration using the handrail, the condition did not pose a high degree of danger. The looseness of the rail was obvious; that it created a present hazard was not. Evidence of operator knowledge was limited to the morning that the foreman used the rail to ascend to the cab access, a task he performed successfully at least twice that morning—when he did his pre-op check and later when he demonstrated its safe function in the video. The condition was abated promptly. No notice was given to the operator that greater efforts at compliance were necessary. The terms reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care, do not fit with the facts. The mitigating circumstances, as described above, apply equally to this alleged unsafe condition.

### **The engine compartment oil leaks on the turbo and valve cover gaskets and the hydraulic pump covered with oil due to broken filter housing**

As these two conditions involved similar concerns—accumulations of combustible materials—and because the Court discussed them together in the findings of fact section, concluding that both constituted unsafe conditions, the unwarrantability issue is similarly discussed jointly here. The essential problem with the inspector’s testimony and the photographic evidence in support of that testimony is that the former did not particularly support the later. The Respondent’s testimony and its own video were more consistent with the Secretary’s photographic evidence.

The extent, but only in terms of the extent of time of the two violative conditions, has been described above. In contrast the degree of the violative condition was far less than the inspector contended. The inspector’s testimony that the “extent” was present for more than a shift is accepted. Given the degree found by the Court based on the record evidence, it cannot be concluded that the accumulations posed a high degree of danger. Based on the photos and video, the Court cannot conclude that the conditions, in terms of a reasonable conclusion that the accumulations presented a high degree of danger, were present. The most serious shortcoming was the cracked filter housing which had to be repaired. The breather for the blow-by gases needed to be replaced, but beyond that apparently only a good steam cleaning of the engine compartment was needed, hardly an indication of a serious leakage issue. In terms of obviousness, it must be recalled that the pre-op, performed in the pre-dawn hours, is not akin to the “160 point safety checks” advertised for *pre-owned*, (formerly known as “used”) car sales. The foreman, based on his credible testimony, did perform an adequate, although imperfect, check of the excavator prior to beginning its use during the shift. The factors of knowledge of the existence of the violation, the operator’s efforts in abating the violative condition, and whether the operator had been placed on notice that greater efforts were necessary for compliance, remain as described above for the other cited conditions. The terms reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care have no descriptive applicability to the cited conditions. The place overarching mitigation element, also as discussed above, remain applicable here.

**Assessment of a civil penalty for Order 8302707, now determined as, and modified to be, a section 104(a) citation**

In *Brody Mining, Inc.*, 37 FMSHRC 1687 (Aug. 2015), the Commission, while remanding the matter to the presiding judge to reexamine the degree of negligence involved, took pains to note that

. . . the Part 100 regulations apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings [and that] [i]n light of the Commission holding that Commission judges are not required to apply the definitions of Part 100, judges may evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care – a standard of care that is high under the Mine Act.

*Id.* at 1701.

Elaborating, the Commission added:

[i]n 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.” It also stated that “in making a negligence determination, a Judge is not limited to an evaluation of allegedly “mitigating” circumstances. Instead, the Judge may consider the totality of the circumstances holistically.

*Id.* at 1703.

Similarly, in *Wade Sand & Gravel Co.*, 37 FMSHRC 1874 (Sept. 2015), citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), the Commission noted that:

‘neither the ALJ nor the Commission is bound by the Secretary’s proposed penalties;’ also, ‘neither the Act nor the Commission’s regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3’

*Id.* at 1877.

Of course, the authority is not unfettered. As fellow Administrative Law Judge Zane Gill took note:

substantial deviations from the Secretary's proposed assessments must be adequately explained using the Section 110(i) criteria. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) [and that although] [a] judge need not make exhaustive findings [the court] must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

*Oil Dri Production*, 2016 WL 2619895, at \*4 (May 3, 2016) (ALJ).

Had it not been for the special assessment calculation, the violation identified in Order No. 8302707, would have been assessed at \$9,122.00. Tr. 19. This, not the \$41,500.00 special assessment figure, represents an appropriate starting point. In using that phrase, "starting point," the Court does not imply that \$9,122.00 represents a penalty floor.

Under section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (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 in abatement of the violative condition. 30 U.S.C § 820(i).

As to the demonstrated good faith in abatement of the violative condition, the Secretary concedes such good faith was present. Sec'y Br. at 16. Speaking to the history of previous violations, the Beech Creek Surface violation history is reflected in Ex. 4, known as the "R 17." Tr. 13. The Secretary states, without elaboration, that the Respondent "had received violations for the standards violated in this case." Sec'y Br. at 16; Sec'y Ex. 4. The Part 100 table offers no basis or information as to how to translate the number of repeat violations for the 15 months covered (November 1, 2013 through February 1, 2015) by Ex. 4. The Court can only note that nine violations are in that history for 30 C.F.R. §77.404(a) and no violations for the same period of history for 30 C.F.R. §77.1606(a).

Regarding the size of the Beech Creek Surface Mine, the mine produced 148,741 tons of coal in 2014. Parties' Stip. No. 5. That tonnage places the mine in the upper mid-range, with nine (9) points assessed under Part 100 out of a possible 15 points for that category. According to the Special Assessment Narrative Form, the controller size points, mine size points, violation history points and repeat violation history points are the same under the regular and special assessment points. While admittedly only a partial analysis, the combined point total for those categories is 44 points for the section 77.404(a) violation and 29 points for the 77.1606(a) violation. A point total of 60 points or less yields a penalty of \$112.00. Of course, here such a total must then evaluate the gravity and negligence criteria. The point of this discussion is not to inferentially heel to the Secretary's Part 100 penalty calculation but to highlight that the other factors, that is factors other than the negligence and gravity, even under the Secretary's system, have only a minor influence on the appropriate penalty. Restated, at least with regard to the Beech Creek Mine, the attendant negligence and gravity are the dominant, but not exclusive,

penalty elements. These factors have largely been discussed above but a few additional remarks are here made.

For item 1, the loose handrail, even if the Commission were to find that it constituted a safety defect, the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 2, the deformed lower step, as with item 1, even if the Commission were to find that it constituted a safety defect, the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 3, the deck lid, the same analysis for gravity and negligence applies as for items 1 and 2: the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 4, the fuel tank mounting bolts, yet again the previous analyses apply.

For item 5, the safety latch to secure engine hood out of bracket, yet again, even if the Commission were to find that it constituted a safety defect, the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 6, the bottom wiper blade missing on lower glass the Court did find this to be a violation of the standard as it constituted an unsafe operating condition. Still, per the evidence, as described above, there were mitigating circumstances. Assessing the evidence for this violative condition, the gravity was unlikely, no lost workdays would be likely, and the negligence was low.

For item 7, the loose handrail, left side of the cab access, the Court found that it did not then constitute an unsafe condition. Nevertheless, even if the Commission were to find that it constituted a safety defect, the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 8, the engine compartment oil leaks on the turbo and valve cover gaskets, the condition was found to be an unsafe operating condition, but even the issuing inspector conceded that, viewed as singular condition (that is not premised on the inspector's theory that one may total up a number of alleged safety issues and have that total number, as opposed to the underlying facts for each condition, determine the gravity and negligence), he would have viewed the gravity as unlikely. The Court agrees that the gravity was unlikely and, as discussed above, the negligence on the foreman's part was, at most, low.

For item 9, the hydraulic pump covered with oil due to broken filter housing, the same analysis applies as for item 8. The Court's earlier described findings about this and the other accumulation condition, next above, stand.

In summary, the Court upheld only four of the nine cited conditions: the deck lid, the lower wiper and the two oil accumulations conditions. Given those determinations, upon consideration of the statutory penalty criteria, **the Court finds that a civil penalty of \$2,000.00 is appropriate.**<sup>7</sup>

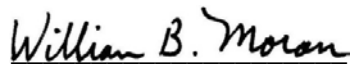
### **Conclusions about Order No. 8302708**

The analysis for this Order, a claim of an inadequate pre-operational inspection, being so completely related to and predicated upon the inspector's conclusions about nine claims made in the unsafe operating conditions Order, may be briefly discussed. The inadequate pre-op claim arose following the inspector's determination of those purportedly unsafe operating conditions. With five of those determinations found by this Court to be unsupported, obviously the inadequate pre-op claim collapses, because the claim was built upon the premise that, collectively, those nine conditions demonstrated an inadequate exam. However, since four of the conditions were upheld, (though the two fuel accumulations were affirmed on a technical basis), the violation of 30 C.F.R. §77.1606(a) was established. As mentioned, when the subject involves the pre-op exam, the Court finds that three, *not four*, of the conditions should have been detected, as it has been found that the lid was in place at the time of the pre-op and either came loose or was not fully re-secured by the bungee cord, following the pre-op. It is important to note however that even if the Commission were to conclude that some of the others, or even all, of the remaining six conditions should have been noted in the pre-op, unwarrantability, per the Commission's test for such a finding, would not be established.

The second order, inadequate pre-shift, would have been assessed at \$2,748.00 under a Part 100 regular assessment. Tr. 19. As with the equipment defects violation, that figure also represents an appropriate starting point, not the \$12,500.00 under the special assessment. Given the marginal amount of oil established by the record as being present and because those conditions were difficult to discern during the pre-op, leaving only the missing lower wiper blade as the only readily apparent defect, **a penalty of \$1,000.00 is imposed for this non-unwarrantable violation.**

### **ORDER**

**Wherefore**, it is **ORDERED** that Kentucky Fuel Corporation pay a total civil penalty of **\$3,000.00** (three thousand dollars) within 30 (thirty) days of the filing of this Decision. It is further **ORDERED** that Order No. 8302707 and Order No. 8302708 each be modified from section 104(d)(1) orders to section 104(a) citations.

  
William B. Moran  
Administrative Law Judge

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<sup>7</sup> If the Commission were to find that *all nine* conditions constituted unsafe operating conditions, based on the evidence of record, the Court would impose a \$4,000.00 civil penalty.



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