FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 16, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENTUCKY FUEL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2015-528 A.C. No. 15-19475-381445 Mine: Beech Creek Surface Mine

DECISION

Appearances: Dominique C. Gutierrez, Esq., U.S. Department of Labor, Nashville, Tennessee, for Petitioner

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

Before: Judge Moran

Introduction

This matter involves a single section 104(d)(1) order, Order No. 8296433, (hereinafter "Order 433"), issued on December 16, 2014, for an alleged violation of 30 C.F.R. § 77.1606(c). The standard, titled "Loading and haulage equipment; inspection and maintenance," provides in the cited subsection (c) that "[e]quipment defects affecting safety shall be corrected before the equipment is used."[1] For the reasons that follow, the Court affirms Order 433 and each of its associated findings, including that the violated standard was significant and substantial ("S&S") and constituted an unwarrantable failure. The Court further determines that the proposed specially assessed civil penalty of $21,900.00 represents an appropriate penalty upon application of the statutory criteria set forth at 30 U.S.C. §820(i).

[1] The predicate for correcting defects, namely finding them, is expressed in the same standard, at subsection (a), which requires that "[m]obile 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." 30 C.F.R. § 77.1606(a).

Findings of Fact

Order 433, issued on December 16, 2014, asserts:

> The John Deere 200C Excavator (SNFF200CX507060) in operation at this mine had defects affecting safety (Excessive oil leaks, Back-up Alarm) recorded in the pre-operational ["pre-op"][2] exam record book on 12-14-2014. No corrective action was taken to correct these conditions prior to the operator placing the equipment in service on this day. The pre-operational exams are turned in to the operator and filed on a daily basis. Failure to correct defects affecting safety prior to placing equipment into operation constitutes more than ordinary negligence and would reasonably likely contribute to a serious accident. Standard 77.1606(c) was cited 7 times in two years at mine 1519475 (7 to the operator, 0 to a contractor. This violation is unwarrantable.[3]

The events which led up to the issuance of Order 433 are important to understand as they involve three other violations involving the same excavator. Each of those three violations was issued on the same day as Order 433, and each was paid and each represents a final order. MSHA Inspector Douglas Rutherford, the inspector who issued the alleged violations in this case, testified in this proceeding. Inspector Rutherford is an experienced and knowledgeable inspector, with ten years' experience in the private mining sector. Tr. 28-30. He was at the Beech Creek Mine on December 16, 2014 to perform an E01, (i.e. regular), inspection. Tr. 32.

Testifying as to the matters which led up to the issuance of Order 433, the inspector first identified Ex. P4 as the citation he issued on December 16, 2014, Citation No. 8296430, (hereinafter "Citation 430"), for a non-functioning automatic backup alarm on an excavator, a John Deere 200C. Tr. 36. Moments later, Inspector Rutherford issued Citation No. 8296431, (hereinafter "Citation 431"), on the same equipment, this time for an insulator wire that was not properly bushed. The wire ran from the cab's roof. Tr. 36. Finally, again only minutes later, a third citation was issued on the same piece of equipment, Citation No. 82964342 (hereinafter "Citation 432"), "for accumulations of combustible material – oil, oil-soaked rags, leaves – that were present on the machine." Tr. 37; see also Exs. P6 A, B. As noted, all three citations involved the same piece of equipment, the John Deere excavator, and all three citations became final orders prior to the commencement of this proceeding. Tr. 37; Exs. P10, P11, P12, P13.

The inspector then testified about the order at issue in this proceeding, Order 433, which was issued the same day, on December 16, 2014. Ex. P7. Order 433, issued for the same John Deere excavator, alleged that "the two hazards [cited in Citation 430 and Citation 432 for a non-functioning backup alarm and accumulations of combustible material] were not corrected prior to putting the machine in service on December 14th, 2014." Tr. 39. Initially, Order 433 was issued

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[2] The pre-operational exam was more frequently referred to by the parties as the "pre-op" exam.

[3] The inspector recommended Order 433 for special assessment and the recommendation was adopted by MSHA. The Secretary then proposed a specially assessed civil penalty of $21,900.00.

as a citation for a violation of 30 C.F.R. §77.1606(a), but the inspector subsequently viewed the pre-op exam records for the equipment, which led him to conclude that the mine operator knew of the hazards on the excavator.[4] Tr. 40. Thus, he concluded that the operator put the machine in use, though aware of the defects. *Id.*

The inspector confirmed that, as to the same excavator, he later learned that the pre-op exam records that the operator provided to him applied to December 14th, 2014. Those records documented the hazards cited in Citations 430, 431, and 432, which were issued around noon. He concluded that the operator was aware of the hazards, as his initials were at the bottom of those pre-ops, noting the hazards. Tr. 41. Those exhibits and the associated testimony support the Court's finding of such operator awareness as to the backup alarm and excessive oil or hydraulic leaks.

Each of the four Pre-shift Safety Check List exhibits, Exs. P7 A, B, C, and D, which were admitted into the record, will now be discussed. Ex. P7 A is from the operator's pre-op book ("Equipment Operator's Pre-Shift Safety Check List") and it is the carbon (yellow) copy of the pre-op check that was performed by Ricky Justice on December 13, 2014 on the John Deere 200 excavator in issue. The box for "Back Alarm," has an "X" in it, signifying that "Repairs Required." It lists the equipment machine engine's hours as "75791."[5] Ex. P7 B is the second photo the inspector took of the pre-ops, and it shows the top (white) copy for Ex. P7 A. Thus, Exs. P7 A and P7 B involve the same pre-op: the white top copy and the yellow carbon copy for December 13, 2014 for the same equipment performed by Justice and initialed by superintendent Perry Ryder. As they are copies, the recorded machine hours of 75,791 are the same for Exs. P7 A and P7 B. The difference is that, for Ex. P7 B, superintendent Ryder's initials are on the white top copy and, oddly, the white copy had, admittedly, been wadded up.

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[4] As the inspector further explained:

> The pre-op examination record that the operator provided me with actually went back to December 14th of 2014. So it documented the hazards that I wrote at noon, you know, [at] 12[:]13 [p.m.], 12[:]14, [and] 12[:]15. So the operator was aware, due to the fact that he had initialed at the bottom of those pre-ops, the fact that the equipment operator had noted those hazards existing. So it wasn't until I was provided with those records that I knew that the operator actually knew that that had occurred.

Tr. 41.

[5] As the inspector explained, the equipment hours figure represents approximately the number of hours "that the engine has actually ran [sic]." Tr. 123. Those numbers indicate that the equipment ran about 10 hours between December 13th and 14th, 2014.

The third photo, Ex. P7 C, is a pre-op white copy made on December 14th for the same John Deere 200 excavator. This copy, as with the pre-op for the December 13th, also lists an "X" for the "Back Alarm," meaning "Repairs Required." Only the initials "BH," appear on Ex. P7 C, referring to foreman Bernie Harper. Tr. 127. It also reflects the machine's engine hours, this time recorded as 75,890.1.

Last, is Ex. P7 D. It is a photograph of another top, (i.e. white copy), pre-op for the same equipment, bearing the same date as Ex. P7 C, December 14th, 2014. As with Ex. P7 B, Ex. P7 D is another perplexingly "crumpled up" pre-shift safety pre-op. Ex. P7 D is signed by Ricky Justice and initialed by superintendent Ryder. Tr. 44-45.

The following is also noted regarding the first box for the pre-shift safety check list items. For Ex. P7 A, the top box on the form, which is designated for excessive oil or hydraulic leaks, is blank. Blanks are not allowed. One is to either leave a check mark, indicating the item is okay; a zero to indicate that repairs have been made, or an X to mark that repairs are required. The box for excessive oil or hydraulic leaks is also blank in Exs. P7 B and P7 C, but in P7 D, applying to the same date, December 14, 2014, an X is marked, indicating repairs required.

Accordingly, two of the photos deal with December 13th, and two deal with December 14th, yet there are other differences. Ex. P7 A, the yellow copy, and Ex. P7 B, the white copy, plainly represent *the same* pre-shift safety check for the John Deere excavator on December 13th. However, Ex. P7 C lists the backup alarm box as repair required, and the box for excessive oil or hydraulic leaks left blank, while Ex. P7 D lists the box for excessive oil or hydraulic leaks as "repairs required," but identifies the backup alarm as okay. Both are white top copies and therefore they are clearly different pre-shift safety checks for the day shift for that equipment. A comparison of the check marks on Exs. P7 C and P7 D obviously shows that, unlike Exs. P7 A and P7 B, they are not copies of the same safety check for December 14th. Further, Ex. P7 C has only Bernie Harper's initials on it, whereas Ex. P7 D, as noted, is signed by Ricky Justice and initialed by superintendent Ryder. What Exs. P7 A through D share is that, except for Ex. P7 D, the equipment's backup alarm box was marked as "Repairs Required." In addition, Exs. P7 A, P7 B, and P7 C leave the box for excessive oil or hydraulic leaks blank, but Ex. P7 D, dated December 16, 2014, lists "Repairs Required" for that topic.

As stated, Order 433, citing 77.1606(c), deals with correcting hazardous conditions prior to placing equipment in service. In sum, setting the stage for the alleged 77.1606(c) violation, there was Citation 430, dealing with the inoperative backup alarm, Citation 431 pertaining to the un-bushed insulated wire passing through the cab roof, and Citation 432, involving the accumulation of combustible materials. Tr. 49. With those predicate violations, there is then Order 433 – the charge at issue here – that the operator placed the vehicle back into service, knowing of those predicate violative conditions and failing to correct them.

For the backup alarm citation, Citation 430, the inspector stated that he issued that violation upon observing the excavator's alarm not working. Tr. 57. This was not immediately obvious, as there was clearly an element of deception attempted about the alarm's operability. When the equipment operator was first directed to back up the equipment, an alarm sounded. However, the inspector then discerned that the alarm was triggered by a manual toggle switch,

not by an automatic backup feature. Thus, the inspector's take on the manual switch's presence did not place the operator in a good light, as he expressed that:

> the toggle switch where the [equipment operator] made it appear that the alarm was working as he traveled to [the inspector's] location[.] [However] when [the inspector] asked [the equipment operator] to push the lever, that hand was [then] being used to push the lever; [and] therefore, he couldn't reach over and flip that toggle alarm. That toggle alarm is actually illegal, and it's only there to make it appear that the machine was motion-activated.

Tr. 64.

The inspector noted this issue to the operator and the response was "that the equipment was leased and that the manual toggle alarm was present on the machine *when it was delivered to the mine*."[6] Tr. 58 (emphasis added). In contrast, the motion-activated backup alarm was not working. Tr. 58. The inspector reiterated that the mine superintendent, Perry Ryder, stated to him that the equipment was leased, and the manual toggle alarm *was present on the machine when it was delivered to the mine*. That is, the superintendent was initially contending to the inspector that the equipment had been leased and that the toggle alarm had been added to it *prior* to the machine's delivery to the mine. Tr. 50, 65, 69.

For Order 433, again with the standard at issue here requiring that safety defects be corrected before the equipment is used, the inspector listed the violation as reasonably likely, lost work days or restricted duty, and S&S. For the accumulation of oil, Citation 432, he marked the gravity as reasonably likely, lost work days or restricted duty and S&S. The latter concern was that, in the event of a fire, a miner could receive burns. Ex. P6 A shows the accumulations and the inspector pointed out oil and dust and oil-soaked leaves and materials. Ex. P6 B reflects the rags which were in the battery compartment. Tr. 52. Ex. P6 C shows the battery compartment with the dark areas showing oil accumulations too. Tr. 53. This was hydraulic oil, which the inspector stated has a flash point of approximately 400 degrees Fahrenheit. The insulating wire coming through the cab was identified as an ignition source for that oil. Tr. 53.

The inspector stated that he issued the 104(d) order because of "the extent of the cited conditions and the evidence that was provided . . . that the operator had initialed off on two separate pre-op examination records, that those existing hazards were marked on those records." Tr. 66. The inspector was first provided with "the actual record book itself with the carbon copy provided. That was dated for December the 13th, 2014." Tr. 66-67.

The mine superintendent told the inspector that the pre-op procedure involved the equipment operator performing the pre-op checklist and then tearing off the white copy and bringing that to the supervisor at the mine office at the start of the shift. The operator would then determine what hazards to correct. Tr. 67.

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[6] Whether the manual toggle switch was present when delivered to the mine, or installed later at the mine, it is hard to appreciate the value of such a non-automatic device.

The inspector stated that Order 433 was not duplicative of the previously-issued citations because it was not issued for the same standard on the same day for the same piece of equipment. Tr. 74. He explained the difference: his earlier issued citations were because of the obvious nature of the conditions he observed, namely the added manual toggle switch and the inadequate pre-op for safety hazards before putting the equipment in service. However, the inspector again acknowledged that at 4:16 p.m. that day the operator did provide a record, showing that those hazards had been listed.[7] Tr. 74. While thereby escaping a violation of section 77.1606(a) by showing that an inspection occurred, albeit an incomplete inspection since no entry was made for the oil leaks box in Exs. P7 A, B, or C, those three exhibits disclosed the defective backup alarm. By using the equipment in the face of the inoperative backup alarm, the operator's own pre-shift records disclosed that defect affecting safety and the operator's use of that equipment before it was corrected was established, per Citation 430.

In terms of the oil accumulations, considering the amount the inspector observed and that accumulations were observed on leaves, and further considering that, as it was December, such leaves had not fallen recently, the inspector modestly estimated that the condition had existed for "multiple shifts." Tr. 76. This was based on "the amount of oil in accumulation and the ability for the float dust to actually soak up in the oil on the machine, all stated that, you know, they had not cleaned that machine off prior to my inspection." Tr. 77. This translated into his opinion that the condition had existed for four or five days. Because the operator provided no mitigating circumstances, he deemed the negligence to be high for Order 433. The inspector also concluded that the operator knew of the condition, as it disclosed to him by the operator that the equipment was in that condition when it was brought to the mine.[8] Tr. 78.

Though no 110(c) violation charges were ever filed, the inspector did file the matter with MSHA as a possible knowing and willful violation. His recommendation was based on the wadded up sheets and "[t]he conditions themselves being as obvious as they were and the sheets being wadded up and no mitigating circumstances, you know, to be given, I would consider that – you know, I consider that constituting more than ordinary negligence," and also because the operator made no effort to correct the problems. [9] Tr. 80.

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[7] In issuing Order 433, the inspector listed that if an equipment fire were to occur, a miner (with one person affected) would be reasonably likely to receive a burn resulting in lost work days or restricted duty. Tr. 74-75. The involved standard, 77.1606(c), had been cited seven times in the last two years. Tr. 75.

[8] The inspector rejected the possibility that the condition had been repaired and that it then reoccurred because "if that was the case, it would have been documented by the equipment operator as repaired, which is a circle, on the pre-op records. . . . [and t]he extent of the accumulation, it had not been removed from the time that the machine had been dropped off." Tr. 78.

[9] Asked to explain why he marked the gravity and negligence as more severe in Order 433 than he had for the earlier issued citations, the inspector stated:

Respondent's cross-examination of the inspector began with Citation 431, in which the inspector asserted that there were bare wires exposed at the top of the excavator's cab. As noted, the deficiency was a failure to provide a rubber bushing. The wire was insulated except for the location where it entered the machine. This did not create an electric shock hazard. Rather, the hazard was an ignition source. Tr. 91. In terms of the accumulations, the inspector recalled that there was oil in the bottom of the battery compartment, and he maintained that in Ex. P6 B, though the rags had been moved to the front of the excavator for disposal, the cable wire itself was still touching the oily rags. Tr. 94. Regarding the location of the wire, it could not be simply described as on the exterior of the door. More accurately, "it was the exterior of the door above the compartment but it was *inside* the door in the compartment." Tr. 94-95 (emphasis added). Accordingly, "[i]t extended from the cab through that compartment over to the battery." Tr. 95.

Speaking to Citation 432, the inspector made it clear that he had not contended that he observed *oil leaks*, but rather that his citation was for accumulations of combustible material. Tr. 96. [10]

> [t]he underlying citations were issued at moderate negligence because the mine operator does train his miners to perform proper pre-operational exams prior to placing the machine in service. The reason I cited the order as high is because there were no mitigating circumstances after the operator was provided [with the] record from the equipment operator that those hazards existed, [ ] they weren't corrected.

Tr. 81-82. As noted, the matter was specially assessed at $21,900.00, per Ex. P15, versus the $4,600.00 figure that a regular assessment would have yielded under Part 100. Also, Ex. P14, the underlying "d" citation, was admitted into the record, as it had become a final order. Tr. 85.

[10] The Court did acknowledge that, in Order 433, the inspector referred to "[e]xcessive oil leaks." Tr. 106. Respondent made much of the description as an "oil leak." The problem is that it was not a legitimate or pertinent issue. The inspector did not dispute that oil leaks had been corrected prior to his issuance of the citation for the accumulations, stating that the "oil leaks would have been corrected or I would have physically seen oil leaks." Tr. 104. The inspector also agreed that for Order 433, the accumulations violation was abated in two minutes. Tr. 102. When he went back to the excavator at 18:02 or 18:04, (i.e. at 6:02 and 6:04 p.m.) he did not observe any oil leaks at that time. Asked to consider that if oil leaks had been previously written up two days earlier, and then to postulate that one subsequently sees the machine after that and that no leaks are then present, if the leaks could be considered to have been repaired, the inspector agreed with that hypothetical. Tr. 103. The inspector was asked, in light of that hypothetical, why he included excessive "oil leaks" in Order 433. His response was that "[t]hat is what the operator recorded on his pre-operational exam." Tr. 103. He agreed that there was no evidence of any leaks after the pre-op exam for the 14th, as his citation was issued for "accumulations of oil [which] were only there because of the preexisting oil leaks." Tr. 104. He discounted the notion that the oil could've been from a spill, because it was over the entire equipment. Tr. 104.

The inspector stated that he issued Order 433 based on what he saw in the pre-op records. Tr. 107. Those records were not provided when he was at the machine but only later that day, at 4:16 p.m. Tr. 107.

The inspector marked the backup alarm citation, Citation 430, as unlikely "because there was no visible foot traffic around the machine that day." Tr. 111. The negligence was marked as moderate because miners are trained by the operator to look for those defects prior to operating such machinery. *Id.* Ex. P4 A, is a photo of the manual toggle switch. Tr. 112. The Court would note that the toggle switch is not a subtle or miniscule addition to the excavator. The inspector did not inquire as to how the backup alarm was repaired, but he did require that the miner demonstrate to him that it had been repaired. Tr. 112.

Understandably, the inspector did consider the wadded up pre-ops as reflecting high negligence, taking note that both of the wadded up pre-ops were the only ones initialed by the foreman. Tr. 114-15. As he stated: "I have no way of knowing why they were wadded up, but both of the wadded-up pre-ops were initialed off of by the superintendent. That was the proof that he knew of those conditions existing prior to my order." Tr. 115.

Respondent later presented a claim to justify wadding up the pre-ops. Respondent suggested to the inspector that the respondent will contend that "when he goes to the machine, they leave the . . . yellow copy on the machine, they take the white copy and they wad it up so they can toss it down to him so it doesn't blow back under the machine." Tr. 116. The inspector was not persuaded by the contention, because, as it was explained to him, "the operator stated that the original, which would be the white copy you're referring to, is turned in to the foreman at the mine office." *Id.* Noting that he found no wadded up yellow copies, the inspector also rejected the notion that the yellow copy is the one that is kept, as the yellow copy is "the one that's retained normally at the piece of equipment, but at this piece of equipment this day, there were no records of any kind [on the equipment]. That's why we traveled back to the mine office, because the operator referred to me that they were located at the mine office." *Id.*

Again, the inspector did not dispute that the oil leaks were corrected at some point prior to his issuing the order on the 16th. Tr. 104. The inspector expressed that the photos in Exs. P6 A-D, are supporting documentation for Citation 432. They relate to Citation 432, he explained, as contributing to the issuance of that order. As Respondent continued to refer to the problem as "oil leaks," though that was never the inspector's contention, the Court finally pointed this out: "Mr. Bowman, you've hit this like three times now. . . . [h]e said there was no oil leak . . . . [h]is focus was accumulation of combustible materials . . . ." Tr. 106. The inspector stated that he wrote excessive oil leaks instead of accumulation of oil-soaked material because that is the condition miners are trained to look for, not accumulations of combustible materials, and therefore he was documenting the defects that the miner was recording for the operator to address, using the term employed in the pre-shift check list. *Id.*

As to the claim that the violations in Citation 430 (citing section 77.410, for the manual motion switch) and Order 433 (citing section 77.1606(c)), for a defect affecting safety), were duplicative, the inspector noted that they cited different standards. Tr. 117. Despite attempts to muddle the issue by the Respondent, the inspector made it clear that he did not cite the same condition in Citation 430 and Order 433. In Order 433 he was citing section 77.1606(c) for putting the machine in service prior to correcting a safety defect. Tr. 129. The Court agrees there is no duplication.

The key consideration in this matter is that the defective conditions had been noted in the December 13th and 14th pre-ops, yet the operator placed the machine in operation prior to correcting those conditions. Tr. 118.

Trying to paint a different picture, Respondent's representative asked the inspector about Ex. P7 A , the yellow copy of the pre-op check in which the backup alarm was marked with an "X." Tr. 119. That pre-op check was made by Ricky Justice. Accordingly, the inspector noted that the pre-op marked the alarm as defective. Tr. 120. When that occurs, the equipment operator is obligated to inform his immediate supervisor of the issue and, following that, the equipment is to be repaired or taken out of service. *Id.*

The Court, with witness Inspector Rutherford agreeing, noted that Exs. P7 A and P7 B are *not* the same. The foreman's initials are at the bottom of Ex. P7 B, the crumpled up copy, whereas those initials are not present on Ex. P7 A. Tr. 121. Further, while Respondent made a claim that the photo of one sheet, Ex. P7 A, was incomplete, critically, the line for the foreman's signature is visible in all four photos of the pre-shift check list. Thus, that empty claim is inconsequential and the respondent did not attempt to introduce, as it could have, its own copy of that exhibit. The inspector stated that Ex. P7 A reflects the full sheet and Court finds that to be the fact. That is to say, there are no lines or room for additional information below the line for "Mine Foreman." Tr. 124. Per the testimony, the line for the initials or signature for the mine foreman would only be on the white copy. *Id.*

The Court has noted that the record reflects two white copy pre-shift safety check lists for December 14th. Exs. P7 C, D. There would be two pre-ops performed if the equipment were used on two shifts. Tr. 126. This was the starting point for Respondent's farfetched theory that during the day shift somebody did a pre-op and found something wrong and that it was then corrected. This claim rests on the idea that foreman Harper did a pre-op on December 14th, and then employee Ricky Justice did another pre-op that same day. Tr. 127. The Ricky Justice-signed pre-shift check was one of the two crumbled up sheets. Ex. P7 D. That pre-shift check has a check beside the back alarm category, indicating that the alarm was okay. Tr. 128. Thus, Respondent contended that those two pre-ops support its claim that after Harper noted the condition it was repaired and that Justice's failure to note a problem shows it was repaired by the time of his inspection. Tr. 128. The inspector's answer to this is that the mine superintendent, Perry Ryder, admitted to him that the machine was in the cited toggle-switch-installed condition when it was dropped off on December 13th. Tr. 128. Further, the two sheets both list the safety check list as applying to the day shift for the same day.

Perry Ryder, mine superintendent, was called by the Respondent. He stated that on December 16, 2014, the day the citations were issued, he was at the mine. Tr. 133-134. He stated that the job was shut down, in idle status, on the day the inspector arrived. Present were foreman Harper, Justice, the machine operator, and Greg Wyatt, a mechanic. The equipment in issue had arrived at the mine site around December 11th. Tr. 135-136. Ryder stated that on that day he arrived at the mine site and looked at the excavator with foreman Harper. On that day, he found no problem with that equipment and proceeded to tram it to the top of the hill, a four to five hour process because the equipment moves so slowly. Tr. 136-137. Ryder stated that the excavator's backup alarm was "definitely working" that day. Tr. 137. He acknowledged that the backup alarm is automatic; it is to alarm automatically whenever the foot pedal is used. Tr. 137-38.

However, Ryder also conceded that there was a point in time when the alarm was not working. The fix, he stated, was simple: a mechanic only had to clean the switch, as it was only occasionally not making contact. Tr. 139. As to the other switch on a mounted bracket, Ryder asserted at the hearing that the manual toggle switch was *not* on the equipment when he first got the excavator.[11] Tr. 140-141. Referring to that other switch, Ryder stated: "there's a – a mounted bracket there with a switch on it. That is the one that – that the inspector said the backup alarm was hooked to, but, now, that switch was not on there when I got the excavator." Tr. 140. Ryder asked Justice if he installed the additional, (i.e. manual), toggle switch on the machine and Justice told him he did not. Justice did not know who installed the switch. Very oddly, given the small number of personnel at the operation, while asserting at the hearing that the switch had been installed after the excavator arrived at the mine, no one knew who installed the switch. This claim, in the Court's estimation, is hard to accept as true and it is not accepted as credible. Ryder reaffirmed his version of the events, affirming that "between the time that [he] took the excavator up the hill and the time that the inspector saw this condition, this switch had been added to it." Tr. 141-42. Again, the Court would comment that this story does not make sense and further it doesn't explain why anyone would add a manual backup switch to the equipment, especially if the automatic switch was really working.

Ryder stated that he didn't challenge the 104(a) citation but took issue with the 104(d) order, stating:

> I didn't argue with the 104, because evidently when I got to the machine, when I told him that the backup alarm did work, it did work, because I'd had a problem with the operator telling me one time that it didn't work, and then when I went to the machine, it was working. I had no problem with the 104 on that. But when he come back and abated the one – the second citation as a (d) order, I thought personally that was ridiculous, because we was working on the machine, doing our best to get it right to get it fixed, because if something don't work, it's hard to find out what it is unless you can work on it when it ain't working. But when it is working, you don't know where the problem's at.

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[11] Ryder confirmed that, per Ex. P4 A, the two red wires which connect to the toggle back up switch, is the manually operated backup switch. Tr. 142.

Tr. 145.

In this regard, Ryder noted that the negligence regarding the backup alarm, Ex. P4, was marked as moderate but that for Ex. P7, it was marked as high. Tr. 145-46. Regarding the pre-ops, for Ex. P7 A, performed on the 13th, Ryder agreed that there is an X marked for the backup alarm and he admitted that meant the alarm was not working. Tr. 147-48. Ryder stated that he took possession of that pre-op exam form. Tr. 148. On that day, he asserted that, upon noting the non-working backup alarm notation, he inquired about it with Mr. Justice, asking him to move the equipment forward and back, and that the alarm worked when he did that. Therefore, he agreed that Justice "went ahead and operated the machine." Tr. 150.

A more fantastic claim accompanied that story, as Ryder attempted to explain why the pre-op form was crumpled up. Ryder stated that he picks up the pre-ops. The procedure for transferring those pre-ops forms from the operator who performed the pre-op to him is unusual, to say the least.

Asked how the machine operator transfers his pre-op report from his machine down to him, Ryder asserted:

> [w]ell, it all depends on the location that he's in. If he's working in a ditch where there's mud and there's water and he's a-digging a ditch, a lot of times they'll just fold it up in their hand and swing that machine around, and I'm standing there, and they'll pitch it on the ground to me, and I get it. But I always straighten them back out.

Tr. 150-51. Thus, he asserted that the pre-op is delivered to him as a crumpled up ball of paper. This method, he contended, prevents the pre-op report from landing in a mudhole. Tr. 151. Again, Ryder reasserted that the backup alarm was "absolutely" working. Tr. 151.

As for Ex. P7 C, Ryder stated that Harper made that pre-op, finding that the alarm was not working. Tr. 152. Ex. P7 D reflects another pre-op exam on the same day and also for the day shift made by Ricky Justice. It was stated that this second pre-op was done because Justice was a new operator of the equipment that day and each new operator must perform his own pre-shift. Justice found oil leaks, but recorded nothing about any backup alarm problem. Tr. 153. This led Ryder to conclude that, while the alarm was not working on the 13th, it was working on the 14th. Further, Ryder stated that no backup alarm issues were reported to him on the 15th or 16th. Tr. 154. As to the "oil leak" issue, Ryder maintained that there were no such leaks on the equipment. Rather, there were only "oil spots" from the O-ring that had blown. Tr. 154. However, this claim is also doubtful as he admitted that the O-ring is located in an entirely different area of the equipment than the area depicted in photograph in Ex. P6 A, and further Ryder agreed that any oil depicted in Ex. P6 A would not be due to a blown O-ring. Tr. 163. On cross-exam, Ryder agreed that the excavator was available for use on the 16th as it was not tagged out. As to his procedure, he was asked if, per his deposition testimony, his practice is to write "corrected" when equipment has been repaired, at the hearing he stated, "[n]ot always." Tr. 158. The Court inquired about the repair of the backup alarm. Ryder confirmed that a mechanic came out from Wayne Equipment to fix the alarm, but he couldn't give the name of the

individual, nor the date that the work was done. Tr. 160. Nor did he know if there was a bill for that work, as the mechanic worked full-time for Bevins Branch, which is part of the same company as Kentucky Fuel. Tr. 161.

Discussion

One must not lose sight of the fact that each of the predicate citations, identified in this proceeding as Citations 430, 431 and 432, were all conceded as violations. That left the one matter in this litigation – whether 30 C.F.R. §77.1606(c) was violated in Order 433. The Court concludes that the preponderance of the credible evidence clearly establishes that standard 77.1606(c) was violated and that Order 433 was both an unwarrantable failure and an S&S violation, though, technically, to sustain the order, only the unwarrantable failure finding must be explored, as the underlying section 104(d)(1) citation was not contested and had become a final order. The evidence shows that the backup alarm was not working on December 13th and 14th, and that excessive oil or hydraulic leaks were also present, at least on December 14th. The bushing issue, in Citation 431, found by the inspector on December 16th, and later conceded to be a violation and a final order, also presented a risk of fire.

The credible evidence establishes that the backup alarm and oil accumulation defects were recorded and the operator continued to use the excavator in contravention of section 77.1606(c). The Respondent's claims in defense are too tall to be believed. Whether one considers – either the story that the excavator came with the toggle switch, or the alternative story that it did not, but instead that some unknown person at the mine later installed the switch, for purposes unknown; or the story that the operator employed the highly unusual method of delivering pre-shift reports by wadding them up into a ball, though a more plausible method of delivery was first presented to the inspector; or the story that the backup alarm was not working on December 14th, per Ex. P7 C, but must have been fixed by someone that same day, as the other pre-shift box for that category, per Ex. P7 D, was checked as okay – all of these stories are too much to be deemed credible, collectively or individually. Very simply, the evidence establishes that the equipment, though defective, continued to be used on December 16, 2014, in violation of 30 C.F.R. § 77.1606(c).

Significant and substantial determination

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is [S&S] 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4; *see also Austin Powder Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). With respect to the third element of *Mathies*, an S&S finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984). Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 1 FMSHRC 1125, 1130 (Aug. 1985). Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986). In the final analysis, the essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. *Bellefonte*, 20 FMSHRC at 1254-55.

For the reasons discussed above, the Court finds that the cited standard, section 77.1606(c), was violated. The Court agrees with the Secretary's identification of the several discrete safety hazards as

> [t]he accumulations of oil and other combustible materials, rags and leaves soaked in oil, combined with a bare wire at one location not secured by a bushing and touching the metal frame of the cab of the excavator created a safety hazard of an ignition. Exhibits P-6 and P-5. The motion-detector back-up alarm being inoperative while in reverse created another hazard of a collision. Exhibit P-4.

Sec'y Br. at 12.

The Court further agrees that the violation presented a reasonable likelihood of injury. Though there was no foot traffic on that day, it is undeniable that foot traffic would occur during continued normal mining operations. Further, the excavator could strike one of the other pieces of equipment at the site. A manually operated toggle switch contravenes the essential purpose of backup alarms – *they are to operate automatically*, as the standard, 30 C.F.R. §77.410(a)(1), provides that mobile equipment with an unobstructed rear view shall be equipped with a warning device that gives an audible alarm when the equipment is put in reverse. And, though the backup alarm issue was sufficient in its own right, there was the improperly bushed wire and the accumulations of combustible materials, each independently presenting an S&S violation. Nor can those findings be collaterally attacked now, as the backup alarm, the bushing deficiency, and the accumulations of combustible material are all final orders, with their special findings included. The failure to correct those defects listed in the pre-shift check list, and those not listed or left blank, each constituted equipment defects affecting safety and they were to be corrected

before the equipment is used. Testimony also supports the Court's conclusion that any injury which might occur would be reasonably serious. The cited standard, requiring that equipment defects affecting safety shall be corrected before the equipment is used, is inextricably tied to the hazardous conditions found on the excavator by the inspector and cited in the predicate citations, each of which were affirmed and became final orders of the Commission.

Unwarrantable failure determination

The Commission has spoken definitively on the subject of unwarrantable failure. In *ICG Hazard, LLC*, 36 FMSHRC 2635 (Oct. 2014) ("*ICG Hazard*"), 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) ("*Mach Mining*"), 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.

Here, upon weighing the factors relevant to a finding of an unwarrantable failure, the Court concludes that the operator's conduct in using the excavator without correcting the recorded defects amounted to aggravated conduct constituting more than ordinary negligence.

Specifically, the very nature of the operator's conduct – that is, the decision to place the excavator into service with explicit knowledge of existing hazardous defects – based on previously-issued citations and pre-op hazard reports – is demonstrative of the obviousness of the conditions, and its knowledge of them. It is also noteworthy that there was more than one defect that was allowed to exist on the excavator and that these various defects presented discrete hazards, thus increasing the degree of danger from the Respondent's conduct. Additionally, the evidence reflects that the subject excavator had been periodically operated from at least the time the December 13th pre-op examinations identified hazards, until the time Order 433 was issued three days later. In view of these aggravating factors, the Court finds that the violation was an unwarrantable failure. When one also considers the toggle switch installation, and the varying stories about its origination, the attempt to mislead the inspector about the backup alarm's functioning, the wadded up pre-shift check lists, those all add up to indifference or a serious lack of reasonable care.

Penalty Determination

The Mine Act sets forth a bifurcated penalty scheme under which the "Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses [the] penalty." *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101 (Dec. 2014) (quoting *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1151-52 (7th Cir. 1984)). Under this bifurcated scheme, "[t]he Secretary's regulations at 30 C.F.R. Part 100 apply only to the Secretary's penalty proposals, while the Commission exercises independent 'authority to

assess all civil penalties provided [under the Act]' by applying the six criteria set forth in section 110(i) [of the Mine Act]." *Id.* (quoting 30 U.S.C. § 820(i)). The six section 110(i) factors are: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). *Original Sixteen to One Mine, Inc*., 38 FMSHRC __, slip op. at 6 (May 3, 2016) (ALJ).

Findings on the Statutory Penalty Criteria

History of previous violations[12]

Kentucky Fuel Corporation's history of violations is reflected in Ex. P2. With the mine history assessed at 10 points, that translates to a medium history, as does the 9 points given for its repeat violation history. Apart from the point structure, the Court finds that the Respondent's violation history may be fairly described as medium.

Mine Size

Under the Part 100 point system, the mine was awarded 9 points, which characterizes it to be in the medium range and the controlling entity category, at 8 points, was determined to be in the high medium range. Apart from the point structure, the Court finds that the Respondent's mine size may be fairly described, at the least, as medium.

Ability to continue in business

There was no claim that the proposed special assessment amount would impair the mine's ability to continue in business.

Good Faith

This was a non-factor under the Part 100 calculation. The operator did tag out the equipment but this occurred in the context of order being issued. The Court also finds that the good faith factor does not impact the penalty determination.

Negligence

As set forth above, the Court agrees that, in light of the pre-shift safety check list, the negligence was properly characterized as high. The Court has found that the violation was unwarrantable.

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[12] The mine size, its history of violations, and its good faith, were all calculated the same under the regular and special assessment. That is, under the special assessment for those categories, there was no increase in the point calculations over the points awarded under the regular assessment.

Gravity

The Court, having found that the violation was significant and substantial, agrees that the injury was reasonably likely to occur, that, at a minimum, lost workdays or restricted duty is the injury that could be reasonably expected, with one person affected.

Based on the application of the statutory criteria, as set forth at 30 U.S.C. §820(i), the Court imposes a civil penalty of $21,900.00 for the violation of 30 C.F.R. §77.1606(c).

ORDER

For the reasons set forth above, Order No. 8296433 is **AFFIRMED**. Respondent is **ORDERED TO PAY** the civil penalty of $21,900.00 for that violation. Upon **PAYMENT** of the full civil penalty hereby imposed, the captioned proceeding is **DISMISSED**.

William B. Moran

William B. Moran
Administrative Law Judge

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