

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 29, 2015

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

v.

PETRO CHEMICAL INSULATION INC.,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2014-606  
A.C. No. 15-00365-348946

Mine: Estill Co.

## DECISION

Appearances: Malia Lawson Holzberger, Office of the Solicitor, U.S. Department of Labor  
211 7<sup>th</sup> Avenue North, Suite 420 Nashville, TN 37219

Thomas Strong, Venable LLP  
750 East Pratt Street Suite 900  
Baltimore, MD 21202

Before: Judge Simonton

### I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), against Petro Chemical Insulation Inc. (Respondent), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This docket contains two 104(a) citations issued by MSHA Inspector Jamie Daniels on March 11, 2014 at the Respondent's Estill Co. mine.

At hearing, Inspector Daniels testified for the Secretary. Petro Chemicals supervisor Mauro Fernandez testified for the Respondent. Both parties filed post-hearing briefs. For the reasons that follow, Citation Nos. 8392133 and 8392134 are **AFFIRMED** as originally written and assessed for a total civil monetary penalty of **\$434.00**.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Citation No. 8392133

MSHA Inspector Daniels issued Citation No. 8392133 for an alleged violation of 30 CFR §77.1109(c)(1) on March 11, 2014. Daniels alleged within the citation that:

The fire extinguisher being provided for the Genie S-60 Man lift (C/N 24-ML-02) operating at this mine site has a indicator dial showing re-charge.

Sec'y Ex. 1, 1.

Daniels designated Citation No. 8392133 as a moderate negligence violation that was unlikely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. *Id.* Daniels determined that the failure to recharge or replace the fire extinguisher properly was not significant and substantial. *Id.* The Respondent abated the citation by installing a fully charged fire extinguisher approximately ten minutes after the citation was issued. Tr. 27. The Secretary has proposed a regularly assessed penalty of \$100.00 for Citation No. 8392133. Sec'y Petition, Ex. A. Prior to hearing, the Secretary filed a motion to amend the cited standard to 30 CFR § 77.1110. Sec'y Mot. to Amend, 1; Tr. 37.

#### 1. Testimony

##### a. The Secretary

Inspector Daniels testified that he had worked in the mining industry as a general laborer and then a section foreman in underground coal mines from 1994 to 2007. Tr. 7. Daniels stated that he had also received a bachelor's degree in industrial technology and a minor in mining technology. Tr. 6-7. Daniels testified that he started with MSHA in 2007 and has completed the standard inspector training courses, including classes regarding surface facilities and equipment. Tr. 9-10. Daniels stated that he has performed preoperational checks on underground mobile equipment as a miner and has inspected manlifts as an MSHA inspector on several occasions. Tr. 8, 20.

Daniels stated that he traveled to the Estill County mine on March 11, 2014 to perform a regular E 01 inspection. Tr. 14. Daniels described the Estill Co. mine as a surface coal mine that excavated previously abandoned refuge coal and processed the refuge coal for commercial markets. Tr. 15. Daniels explained that the mine site had several processing facilities, including a train load out area where processed coal was fed into train cars. Tr. 16.

Daniels stated that Bowie Refined Coal was the primary operator of the plant and that Petro Chemicals was one of a number of contractors working at the train load out facility. Tr. 15-16. Daniels explained that he checked in with the plant superintendent who declined to accompany him on the inspection. Tr. 19. Daniels stated that when he began inspecting the train load out facility there were at least six or eight employees working in the area performing rewiring and sheet metal installation. Tr. 17-18.

Daniels testified that he approached a Genie manlift at around 10:30 AM and performed a standard equipment inspection. Tr. 20-21. Daniels stated that in the course of inspecting the lift, he checked the fire extinguisher mounted at the base of the machine. Tr. 25-26. Daniels testified that he noticed that the dial for the provided fire extinguisher read “recharge.” Tr. 25. Daniels stated that when the dial reads recharge the fire extinguisher has been discharged or lost pressure and the operator cannot be sure the fire extinguisher will work for any length of time. *Id.* Daniels explained that he did not test the fire extinguisher as MSHA regulations do not permit an inspector to perform a destructive test on a mine operator’s equipment. Tr. 25-26.

Daniels testified that he pointed out the uncharged fire extinguisher to Petro Chemicals foreman Mauro Fernandez and issued Citation No. 8392133. Tr. 26-27. Daniels stated that the Respondent replaced the uncharged fire extinguisher with a fully charged fire extinguisher ten minutes later. Tr. 27.

b. The Respondent

Petro Chemicals supervisor Mauro Fernandez testified that at the time of the inspection there was an additional fire extinguisher located approximately twenty to twenty five feet away from the Genie manlift. Tr. 70.

**2. The Violation**

The originally cited standard, 30 CFR §77.1109(c)(1), requires all mobile equipment to be equipped with at least one portable fire extinguisher. 30 CFR §77.1109(c)(1). 30 CFR § 77.1110 also mandates that, “firefighting equipment shall be continuously maintained in a usable and operative condition.” 30 CFR § 77.1110. The cited Genie manlift clearly qualifies as mobile equipment and was operating prior to the inspection. Tr. 20, 28. Although there was a fire-extinguisher mounted on the manlift, the pressure gauge indicated the fire extinguisher needed to be recharged. Tr. 25.

The Respondent argues that the Secretary failed to conclusively prove that the fire extinguisher was non-operative as Inspector Daniels did not attempt to discharge it after noting the pressure gauge indicated ‘recharge.’ Tr. 25-26; Resp. Br., 2. However, the Respondent did not present any rebuttal evidence indicating that the fire extinguisher was in fact operational. Furthermore, Inspector Daniels credibly testified that MSHA inspection policies prohibited him from ordering a possibly destructive test. Tr. 25-26. As the Respondent has conceded that the gauge indicated a recharge was necessary, the court concludes that the pressure gauge reliably indicated that the fire extinguisher was improperly charged. Resp. Br., 2; See *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153, 2154 (Nov. 1989); *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984)(Secretary may establish the occurrence of a violation when there is a rational connection between the evidentiary facts presented and the ultimate fact inferred). Thus, the court finds that the Respondent violated 30 CFR § 77.1110 in failing to keep the cited fire extinguisher fully charged.

The Commission has stated that gravity determinations for violations of emergency equipment standards must be made while assuming the occurrence of an emergency. *Spartan*

*Mining Co.*, 35 FMSHRC 3505, 3508-09 (Dec. 2013). However, Inspector Daniels testified that there were no flammable accumulations on the manlift and that the Respondent was able to replace the cited fire extinguisher within a matter of minutes. Tr. 27. Thus, the court finds that even in the event of a fire on the manlift, the violation was unlikely to contribute to the occurrence of an injury and was not significant and substantial.

As the pressure gauge indicated “recharge,” the Respondent should have identified that the fire extinguisher needed to be recharged during a pre-operational inspection. Tr. 39. However, the Respondent appears to have maintained other working fire extinguishers in the immediate area. Tr. 27, 70. Based upon these mitigating factors, the court finds that the negligence level for Citation No. 8392133 is moderate. Tr. 70.

### 3. Penalty

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

30 U.S.C. 820(I).

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. The Secretary has proposed a regularly assessed penalty of \$100.00 for Citation No. 8481807 based upon the 30 CFR 100.3 penalty tables. Sec’y Petition, Ex. A.

The Respondent is a large operator with a relatively low rate of total violations per inspection day and no indications of previous fire protection violations. Sec’y Pet., Ex. A. I have found that the Respondent acted with moderate negligence. The Respondent has stipulated that the proposed penalty will not affect its ability to continue in business. Resp. Pre-Hearing Report, 1. I have found that the violation was unlikely to result in an injury and any injury that occurred would result in lost workday/or restricted duty. The parties have stipulated that the Respondent promptly replaced the cited fire extinguisher with a fully charged fire extinguisher. Sec’y Prehearing Report, 2; Resp. Pre-Hearing Report, 2.

After considering this evidence in light of all six statutory factors I uphold the Secretary's proposed penalty and assess a penalty of \$100.00 for Citation No. 8392133.

## **B. Citation No. 8392134**

MSHA Inspector Daniels issued Citation No. 8392134 for an alleged violation of 30 CFR §77.410(a)(1) on March 11, 2014. Daniels alleged within the citation that:

The audible alarm provided for the Genie S-60 Man Lift (C/N 24-ML-02) operating at this mine site is inoperable. This Man Lift operates in close proximity with miners on foot and in loud surrounding noises. Anyone hit by a moving Man Lift would receive crushing injuries.

Sec'y Ex. 1, 1.

Daniels designated Citation No. 8392134 as a moderate negligence violation that was likely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. *Id.* Daniels determined that the failure to maintain an audible alarm for the Genie S-60 manlift was significant and substantial. *Id.* The Respondent abated the citation by installing a new audible alarm. *Id.* The Secretary has proposed a regularly assessed penalty of \$334.00 for Citation No. 8392134. Sec'y Petition, Ex. A. Prior to hearing the Secretary filed a motion to cite 30 CFR § 77.410(c) in the alternative. Sec'y Mot. to Amend, 1.

### **1. Testimony**

#### **a. The Secretary**

Inspector Daniels testified that as part of his routine inspection of the S-60 manlift, he asked the operator to move the lift in reverse. Tr. 28. Daniels stated that when the operator put the lift in reverse, the alarm did not sound at all. Tr. 29. Daniels explained that for this lift, he considered forward motion to be towards the lift's work platform and reverse to be away from the work platform. *Id.* Daniels testified that he observed a welder and either a mechanic or electrician working in the area at the time he issued the citation. Tr. 21-22. He believed there would be ten to twelve people working in the area over the course of a shift installing metal sheeting. Tr. 33. Daniels stated that the lift did not make a lot of noise when it moved and that the lack of a backup alarm in the busy construction area made a serious crushing injury reasonably likely. Tr. 36, 41.

On cross-examination, Daniels testified that in his experience and training, the manlift could only be moved with the boom lowered. Tr. 44. However, Daniels confirmed that he had never operated that particular model lift. Tr. 44-45. Daniels also stated that he was not positive that the lift had been operated in reverse on the day of the inspection. Tr. 45. During redirect examination, Daniels clarified the operator would typically operate the manlift in reverse during a normal shift to reposition the work platform. Tr. 52-53. Daniels stated that he only asked the operator to move the lift in reverse while conducting his inspection. Tr. 58-59. Daniels testified that when he returned to the site two days after issuing the citation, the Respondent had replaced the alarm and the alarm sounded a clearly audible beep when operated in reverse. Tr. 53-54.

#### **b. The Respondent**

Petro Chemicals Supervisor Mauro Fernandez testified for the Respondent regarding the operation of the Genie S-60 manlift. He stated that operators were instructed to partially raise the operator basket before moving the lift and that the operator basket had good visibility in both directions but that he always looked behind him before moving the lift in reverse. Tr. 65-66. Fernandez stated that the lift had a movement alarm that sounded in both forward and reverse. Tr. 67-68, 75, 77.

Fernandez testified that the alarm made some noise before Inspector Daniels issued Citation No. 8392134 but that it was very low and could not be heard over the noise of even the lift's engine. Tr. 67, 76. Fernandez stated that after the alarm was replaced it was much louder. Tr. 67. Fernandez testified that the Respondent had designated an employee to act as a spotter in order to position equipment and direct traffic on the day of the inspection. Tr. 68. Fernandez stated that there were two Petro Chemical's employees in the area in addition to several other contractors at the time of the citation. Tr. 69-70.

## **2. The Violation**

30 CFR §77.410(a) mandates:

Mobile equipment such as front-end loaders, forklifts, tractors, graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that—

(1) Gives an audible alarm when the equipment is put in reverse;

30 CFR §77.410(a)(1).

The Respondent argues that since the standard does not list boomlifts as a type of mobile equipment, 30 CFR § 77.410(a)(1) does not apply to the Genie S-60 boomlift. Resp. Br., 4. The Respondent is incorrect. The cited standard applies to all mobile equipment not otherwise exempted and the examples given within the standard following "such as" are not a definitive list. 30 CFR §77.410(a)(1). The Respondent claims that the MSHA's Program Policy Manual (PPM) indicates that backup alarms are not required for equipment with unobstructed rear views. Resp. Br., 4. However, MSHA's PPM only exempts personal vehicle type equipment such as "automobiles, jeeps, pickup trucks, and similar vehicles" including "service vehicles" with unobstructed rear views from the standard. Sec'y Reply Br.,2; V MSHA, U.S. Dep't of Labor, Program Policy Manual, Part 77 Subpart E.

The Genie S-60 manlift moves under its own power. Tr. 29, 78. The Genie S-60 manlift is not an automobile, jeep, pickup truck, or similar service vehicle. Tr. 66. Thus, the Genie S-60 manlift is mobile equipment covered by the standard.

30 CFR § 77.410(c) further requires operators to maintain warning devices in a functional

condition. 30 CFR § 77.410(c). The Commission has held that the cited regulation<sup>1</sup> requires operators to continuously maintain backup alarms for all available mobile equipment regardless of how the equipment is used throughout a particular shift. *Wake Stone Corp.*, 36 FMSHRC 825, 827-28 (April 2014). A fellow ALJ has recently found that in order to be considered functional, a back-up alarm must be loud enough to be heard above the surrounding work environment. *Buckley Powder Co.*, 37 FMSHRC 2115, 2117-18 (Sept. 2015)(ALJ Miller). Additionally, none of the provisions of 30 CFR § 77.410 allow operators to substitute employee spotters in place of audible back-up alarms. 30 CFR § 77.410. As such, while I found Fernandez's testimony regarding the use of a traffic spotter credible, that practice is irrelevant to evaluating the alleged violation. Tr. 68.

Inspector Daniels testified he could not hear the back-up alarm at all while Supervisor Fernandez stated that the alarm did make some noise but that it was "very, very low" and he had to stand right next to the machine to hear it. Tr. 29, 67. Although Daniels only tested the alarm in one direction, Fernandez confirmed that the alarm was a uni-directional alarm and that it was very hard to hear during the operator's own re-test. Tr. 58, 74-76. Fernandez also testified that the view from the man basket was better than from a pick-up truck and that he always looked behind him before moving in reverse. Tr. 66. However, as noted above, the standard only exempts "*pickup trucks* with an unobstructed rear view" from the back-up alarm requirement. 30 CFR §77.410(a)(emphasis added).

Furthermore, the court notes that the Genie S-60 manlift basket had a continuous 360 degree range of horizontal motion in combination with over 90 degrees of vertical motion. Genie S-60 Service Manual, 2-1.<sup>2</sup> Although the Genie S-60 was equipped with a drive enable device that would prevent travel in certain positions, that function could be overridden with a simple toggle switch. Genie S-60 Service Manual, 4-16. Thus, it is reasonably likely that the Genie S-60 boomlift would be operated with significant blind spots beneath and behind the man-basket during ordinary continued mining operations.

The Respondent objected to Inspector Daniels's characterization of "reverse" and "forward" for the Genie S-60 manlift and his manner of testing the back-up alarm. Tr. 44-45, 58-59; Resp. Br. 8. The court finds the Respondent's objections unavailing on multiple grounds. The Respondent's own witness, Supervisor Fernandez, stated that the Genie S-60 boomlift had a movement alarm that was supposed to sound in both "forwards" and "reverse". Tr. 67-68, 75, 77.

Similarly, the Genie S-60 service manual also states that the "travel" alarm should sound whenever the "drive controller is moved off center in either direction." Genie S-60 Service Manual, 4-47. As both Inspector Daniels and Supervisor Fernandez credibly testified that the alarm could not be heard when the boomlift was put in drive, it is apparent that the "travel"

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<sup>1</sup> *Wake Stone Corp* analyzed a citation issued under the Secretary's Surface Metal/Non-Metal standards, specifically, 30 CFR §56.14132, which contains a nearly identical command to equip and maintain functional back-up alarms on mobile equipment.

<sup>2</sup> Prior to issuing this decision, the court notified the parties of his intent to take judicial notice of the publically available service manual for the Genie S-60 manlift. *Union Oil*, 11 FMSHRC 289, 300 n.8 (March 1989)(Stating that judicial notice can be taken of the existence or truth of a fact or other extra record information that is not the subject of testimony but is commonly known, or can safely be assumed to be true).

alarm was not functioning properly. Tr. 29, 67, 76. Furthermore, as outlined above, the multiple configurations and drive directions of the Genie S-60 boomlift would result in shifting blindspots and relative directions of “forwards” and “reverse.” For these reasons, having demonstrated that the travel/back-up alarm did not function properly when tested by Inspector Daniels, the Secretary has properly shown that the Respondent violated 30 CFR § 77.410(c).

a. Gravity

A violation is Significant & Substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

In this case, the Respondent violated a mandatory safety standard, 30 CFR 77.410(c), by failing to repair the faulty back up alarm on a mobile manlift. The violation exposed workers to the hazard of a ten ton lift operating in reverse without an audible alarm that would alert workers of the approaching vehicle. Tr. 23. The manlift was operating in an active construction area with at least two workers on the ground in the immediate vicinity. Tr. 21-22, 69. Although Supervisor Fernandez credibly testified that the Respondent designated traffic spotters, the Commission has held that employee diligence does not mitigate the seriousness of an established hazard. Tr. 68; *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123

Accordingly, I find that there was a reasonable likelihood that the safety hazard created by the faulty back up alarm would result in a struck-by injury to workers at the train load-out facility. Given the heavy weight of the manlift, I find that the violation created the risk of at least a lost time injury to one worker. For all these reasons, I affirm the designation of Citation No. 8392134 as a Significant and Substantial violation.

b. Negligence

The operator should have identified that the back-up alarm was not functioning properly during a diligent pre-operational inspection. Tr. 39. However, as Supervisor Fernandez credibly testified that the alarm did make some minimal noise, it appears that the alarm may have been damaged shortly before the MSHA’s inspection or not flagged during routine pre-operational



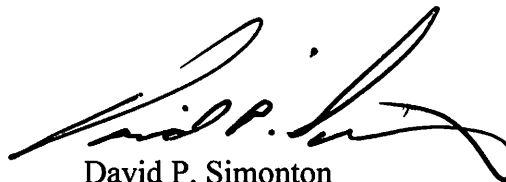
checks. Additionally, Fernandez credibly testified that the Respondent attempted to prevent equipment collisions within the work-site by employing a traffic spotter. Tr. 68. For these mitigating factors, I find that the operator acted with moderate negligence for Citation No. 8392134.

### 3. Penalty

The Respondent is a large operator with a relatively low rate of total violations per inspection day and no repeat violations of 30 CFR 77.410(c) in the 15 months prior to the citation at issue. I have found that the Respondent acted with moderate negligence. The Respondent has stipulated that the proposed penalty will not affect its ability to continue in business. I have found that the violation was reasonably likely to result in at least a lost-time injury. The parties both testified that the Respondent promptly installed a new back-up alarm that gave off a much louder alarm. Tr. 32, 67. Accordingly, I find that the originally assessed penalty of \$334.00 is an appropriate civil penalty.

### III. ORDER

The Respondent, Petro Chemical Insulation Inc., is **ORDERED** to pay the Secretary of Labor the total sum of **\$434.00** within 30 days of this order.<sup>3</sup>



David P. Simonton  
Administrative Law Judge

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<sup>3</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390