FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. SEQUOIA ENERGY, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. KENT 2008-1059 A.C. No. 15-12428-149534 Mine: Prep Plant

REMAND DECISION

Before: Judge Feldman

The Commission, in a decision with a majority and concurring opinion, has vacated the $8,300.00 total civil penalty assessed for the four citations adjudicated in this proceeding, and remanded this matter for reconsideration of the appropriate civil penalties. 36 FMSHRC __ slip op. (April 2014), *remanding* 32 FMSHRC 1361 (Sept. 2010) (ALJ). The four citations were issued at Sequoia Energy's ("Sequoia's") coal preparation plant located in Harlan, Kentucky. At the prep plant, rock material separated from coal is loaded into haul trucks from refuse bins. The refuse trucks then transport the rocks from the refuse bins to a refuse pile that is situated approximately one quarter of a mile from the preparation plant. 32 FMSHRC at 1362.

The Commission majority has directed that I revisit the appropriate civil penalties consistent with its decision. The Commission majority remanded this matter because it concluded that:

(1) I erred in assessing the penalties because I reduced the proposed penalties "based upon [my] consideration of prior penalties that were proposed pursuant to a different penalty regulation [in 30 C.F.R. Part 100];"[1] and

(2) the initial decision failed "to reconcile seemingly unsupported or inconsistent findings with respect to the four penalties."

Slip op. at 1.

[1] Specifically, the majority notes that the initial decision made reference to prior proposed penalties assessed under the Secretary's outdated penalty formula, rather than the revised formula contained in the March 2007 amendment of Part 100 of the Secretary's penalty regulations. 72 Fed. Reg. 13592 (Mar. 22, 2007).

The joint concurring opinion of two Commissioners did not assume that I had considered the amount of the Secretary's prior proposed penalties in my penalty assessment. Rather, the concurring opinion would have remanded for "clarification of the reason [the Judge] referred to prior [proposed penalties] and the use, if any, he made of them." Slip op. at 16 (Commissioners Young and Althen, concurring). In addition, the concurring Commissioners noted that they would have provided an opportunity "to explain whether [the Judge] was aware of and/or took into account the change in penalty regulations in referring to the prior penalties." *Id.* at n.10.

The genesis of this remand is the "principal argument advanced by the Secretary – that the Judge 'abused his discretion by considering a factor outside those listed in Section 110(i), [30 U.S.C. § 820(i),] i.e., the amounts of previous penalties.'" Slip op. at 11 (concurring), *citing* PDR at 11.[2] The Secretary's assertion is predicated on a parenthetical paragraph contained at the end of the initial decision, which states:

> I note parenthetically, that the previous penalties proposed by the Secretary for violations concerning Sequoia's failure to correct defects on mobile equipment ranged from $60.00 to $400.00 compared to the $3,996.00 to $5,503.00 range currently proposed by the Secretary for the four adjudicated citations. I recognize the Secretary's concern that Sequoia needs to display greater efforts to maintain its heavy duty refuse trucks regardless of their operation under adverse conditions. The imposition of civil penalties from $1,200.00 to $3,500.00 in this case, that are significantly greater than previous assessments imposed by the Secretary for similar violations, adequately address the Secretary's concern.

13 FMSHRC at 1372.

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[2] Section 110(i) states:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider 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. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. § 820(i).

I. Relevance of 30 C.F.R. Part 100

The Commission routinely remands matters involving civil penalty amounts for analysis of whether the civil penalty criteria in Section 110(i) were properly applied. However, in this case, the Commission has concluded that I impermissibly considered the Secretary's prior proposed penalty amounts in my civil penalty analysis.

Of course, as directed by the Commission, I will revisit the issue of the appropriate civil penalties by reconciling unsupported or inconsistent findings, and address their impact with respect to application of the traditional Section 110(i) framework.[3] However, it is difficult to discern whether the Commission majority found error because it believed I considered the old, rather than the new, civil penalty regulations promulgated by the Secretary, or, because it concluded that I should not have considered the Secretary's Part 100 criteria at all. In any event, as discussed below, I hope it is clear that I am incapable of correcting a perceived error in my analysis that has not occurred.

The Judge is the most reliable source for identifying the scope of the civil penalty analysis considered in his decision. Slip op. at 11, 16 (concurring). The Commission's well-established framework for assessing civil penalties, upon which I solely relied, is set forth in the initial decision and need not be repeated. 32 FMSHRC at 1364-65. In this regard, the initial decision explicitly and repeatedly considered Section 110(i) criteria in determining the appropriate penalties. 32 FMSHRC at 1364-65, 1367, 1369, 1371, 1372.

My reference to prior penalty amounts in the initial decision was solely intended to illustrate that I was not trivializing the four violations in issue.[4] Significantly, the parenthetical paragraph appears at the end of the initial decision, after the civil penalties had already been assessed pursuant to Section 110(i).

While the penalties proposed by the Secretary in contested cases before an ALJ are always a focus, and the basis for any significant reduction in proposed penalties must be articulated, I have never, in more than two decades with the Commission, considered the history of the Secretary's proposed penalty amounts in my assessment analysis. *See* Slip op. at 9, *citing Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (holding that substantial deviations from the Secretary's proposed assessments must be adequately explained). It is significant that the

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[3] Although the deterrent purposes of the Mine Act are inherent in the Section 110(i) criterion concerning the appropriateness of the amount of the civil penalty compared to the size of the mine operator, the Commission did not explicitly articulate that deterrence was an appropriate consideration until *Black Beauty Coal Company*, 34 FMSHRC 1856 (Aug. 2012). As the Commission's decision in *Black Beauty* was issued after the penalties were initially assessed in this matter, I will not consider the effect of *Black Beauty*, if any, in my reassessment of the appropriate civil penalties.

[4] In its remand, the Commission majority also used comparisons of penalty amounts for illustrative purposes. Slip op. at 6, n.7.

Secretary also asserts that "an ALJ may not rely on such amounts [past penalties] to arrive at penalties for new violations." Slip op. at 13 (concurring), *citing* PDR at 11, *citing Jim Walter Resources, Inc.*, 28 FMSHRC 579 (Aug. 2006) (holding that although past penalties may be noted, they are not a determinative factor as they are outside the scope of Section 110(i)).

Moreover, the importance of insulating the Commission's exercise of its delegated authority to assess civil penalties independent from the Secretary's penalty proposals is consistent with both longstanding legislative history and caselaw. In this regard, the Conference Report for the Act states:

> The conference substitute provides for an independent Federal Mine Safety and Health Review Commission. This Commission is assigned all administrative review responsibilities and is also authorized to assess civil penalties. The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained as functions of the Secretary. *This separation is important in providing administrative adjudication which preserves dues process and instills confidence in the program.*

S. Conf. Rep. No. 95-461, at 58 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1360 (1978) (emphasis added).

The Court affirmed the Commission's firm belief in its independent role in assessing civil penalties in *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1152 (7th Cir. 1984) (holding that neither the Mine Act nor the Commission's regulations require Commission Judges to apply the Part 100 point system in assessing penalties). Thus, although relevant as a point of reference, Commission Judges are not beholden to the penalties proposed by the Secretary. In fact, it is not uncommon for Commission Judges to assess penalties greater than those proposed by the Secretary. *See, e.g.*, *Spartan Mining Company, Inc.*, 29 FMSHRC 465 (June 2007) (ALJ), *aff'd* 30 FMSHRC 699 (Aug. 2008); *F.R. Carroll, Inc.*, 26 FMSHRC 97 (Feb. 2004) (ALJ).

Although I did not distinguish between the Secretary's former and current Part 100 penalty regulations, implicit in my assessment of penalties higher than those previously proposed by the Secretary was a recognition of the increased penalties sought by the Secretary under his revised guidelines.[5] I agree with the Secretary that the history of proposed penalty amounts is a "factor outside" the Section 110(i) penalty criteria. Slip op. at 11 (concurring), *citing* PDR at 11. As such, since it is not a proper consideration in determining the appropriate penalty to be assessed, whether I referenced the old or new Part 100 regulations is immaterial.

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[5] I have issued numerous penalty decisions concerning penalties proposed under the Secretary's March 2007 revised enhanced Part 100 penalty criteria. *See, e.g.*, *McCoy Elkhorn Coal Corp.*, 33 FMSHRC 2403, 2420, 2421-22 (Oct. 2011) (ALJ) (imposing the proposed penalty for one citation, and raising the proposed penalty for another); *Knox Creek Coal Corp.*, 31 FMSHRC 1422, 1434 (Dec. 2009) (ALJ) (assessing the Secretary's proposed penalties for two citations).

Rather, my goal was merely to ensure that the penalty reduction in the initial decision was viewed in the proper perspective. Having excluded consideration of the Secretary's previous penalty amounts from my initial penalty calculation, resolution of the question of whether Administrative Law Judges may now use prior proposed penalty amounts in assessing penalties, despite longstanding caselaw to the contrary, goes beyond the scope of this proceeding.

Finally, in a further effort to place the challenged parenthetical paragraph in perspective, it is helpful to view the May 4, 2010, hearing in context. The hearing was conducted in the midst of an unprecedented backlog of pending Mine Act cases. The approximate pending Commission caseload was 1,300 in September 2004; 1,600 in September 2005; 2,800 in September 2006; and 4,000 in September 2007. In contrast, at the time of the January 2010 hearing, the Commission's caseload had increased nearly fourfold to approximately 15,700.

At the end of the hearing, in an effort to preserve limited government resources by encouraging a settlement, I informed the parties that my initial inclination was to affirm the fact of the violations and their significant and substantial ("S&S") designations, and to impose a total civil penalty of $8,300.00 for the four citations in issue. As noted previously, my reference at the hearing to the Secretary's history of lower proposed penalties provided context, in that the comparatively higher penalties I was suggesting were consistent with the Secretary's revised policy of seeking enhanced penalties.[6] Alternatively, the parties were afforded the opportunity to file briefs if they wished to dissuade me of my tentative decision. Ultimately, the Secretary elected to have the parties file briefs rather than settle this matter. Suffice it to say, my efforts to seek an expeditious and efficient resolution of this case have been manifestly unsuccessful. However, I note, parenthetically, that I have no regrets.

II. Traditional Section 110(i) Penalty Analysis

The initial decision noted statutory penalty criteria that were essentially not in dispute. The initial decision stated:

> It has neither been contended nor shown that imposition of the civil penalties proposed in this case will adversely affect Sequoia's ability to continue in business, or, that the penalties proposed are disproportionate to the size of Sequoia's business. The cited conditions were abated in a good faith and timely manner. The Secretary has not specifically asserted that Sequoia's history of violations is an aggravating factor.

32 FMSHRC at 1365. My initial decision was based on my evaluation of the evidence and the credibility of the witnesses. In its remand, the Commission has directed that I reconcile seemingly unsupported or inconsistent findings with respect to negligence and gravity that impact the appropriate civil penalty to be assessed for each of the four citations.

[6] The concurring opinion recognized I was unlikely to have considered the Secretary's previous penalty criteria, as my assessed penalties were as much as five and a half times greater than those that would have been proposed under such criteria. Slip op. at 12, n.2 (concurring).

As a general matter, to the best of my recollection, I did not find the inspector's testimony with respect to Sequoia's awareness of the cited violative conditions entirely convincing. The initial decision made several references to the fact that the inspector's testimony was not supported by his contemporaneous notes. In this regard, the initial decision noted:

> Although [the inspector] reviewed the pre-shift examination reports for these three trucks, [he] did not make copies of the pre-shift reports and he did "[not] recall exactly what [they] said." (Tr. 104). [The inspector] did not take photographs of any of the cited conditions and he did not record any information from the pre-shift reports in his contemporaneous notes. (Tr. 107; Gov. Ex. 2). The pre-shift examination reports are not in evidence.

32 FMSHRC at 1363.

It is significant that the only relevant reference to a pre-shift examination in the inspector's notes concerns the inoperable backup alarm. (Gov. Ex. 2 at 32). The inspector's notes also reflect that two uncontested violative conditions that are not at issue in this matter were also noted in pre-shift examinations. (Gov. Ex. 2 at 16A, 29). In stark contrast, there is no contemporaneous documentation in either the inspector's notes, or the body of the citations, to support the inspector's testimony that the conditions cited in the three remaining contested citations were noted on pre-shift examinations. (Gov. Ex. 2 at 14-16, 19-27; Gov. Exs. 4, 5, 7, 8, 10). Consequently, I can give little weight to the inspector's testimony that all of the cited defects were noted in pre-shift examinations, yet went unaddressed. A further reevaluation of the issues of negligence and gravity for each of the citations follows.

A. Citation No. 7496260: Exhaust pipe and headlights[7]

The initial decision affirmed the alleged violation and S&S designation for Citation No. 7496260, which alleged a violation of the mandatory standard in 30 C.F.R. § 77.404(a). This standard requires mobile equipment to be maintained in safe operating condition, and that equipment in unsafe condition must be removed from service immediately.

Citation No. 7496260 was issued after the MSHA inspector observed a defect on the Volvo A40D No. T9 refuse truck's vertical exhaust pipe. The exhaust pipe was located behind the platform used to access the operator's compartment. The pipe was connected to a muffler with a clamp located at the approximate height of the operator's seat in the cab of the truck. The MSHA inspector noted that the muffler clamp was loose, which permitted exhaust fumes to escape. The citation also included an inoperable headlight on the right (passenger) side that was due to a short in the harness in which the headlight was mounted. 32 FMSHRC at 1365-66.

[7] The defective exhaust pipe was initially the sole subject of Citation No. 7496260. This citation was subsequently modified to include defective front lights. The defective lights were initially the subject of Citation No. 7496257, which has been vacated. (Gov. Exs. 4, 5).

The Secretary proposed a civil penalty of $4,689.00 for Citation No. 7496260. However, although the initial decision affirmed the fact of the violation, the S&S designation, and the Secretary's attribution of moderate negligence, the proposed penalty was reduced to $1,400.00 based on mitigating circumstances.

As noted by the Commission, de novo assessments of civil penalties by Commission Judges are accorded broad discretion. Slip op. at 4, *citing Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In this regard, a Judge is not required to impose the civil penalty proposed by the Secretary, even though the Judge has affirmed all elements of the subject citation. Rather, a Judge's civil penalty assessment must be supported by an articulation of the facts considered, with reference to the applicable penalty criteria in Section 110(i) of the Act. The de novo assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." 32 FMSHRC at 1364, *citing Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). In other words, an ALJ may give greater weight to facts related to a particular penalty criterion than the Secretary has chosen to give in his proposed penalty analysis.

Here, the focus is on whether there are circumstances that mitigate Sequoia's negligence. As noted in the initial decision, the condition of the exhaust pipe was not obvious, in that it could only be heard when the engine was started. 32 FMSHRC at 1366 (citing Tr. 146). Consequently, the defective exhaust was less noticeable from inside the operator's compartment. Additionally, the loose muffler clamp was not visible because it was located between the cab and the truck bed. *Id.* at 1365 (citing Tr. 143).

The inspector relied on a layer of soot on the side of the frame of the truck bed as an indication of a compromised exhaust system. *Id.* (citing Tr. 57). I do not view soot on a truck that is routinely operated in the muddy and dusty conditions in a coal preparation plant as an obvious byproduct of a loose muffler clamp. It is true that Sequoia's mechanic conceded that the exhaust leak caused soot to accumulate on the frame of the truck. *Id.* at 1366 (citing Tr. 145-46). However, the evidence is inadequate to reflect that the mechanic was aware of the soot caused by the loose muffler clamp prior to the issuance of the citation. Nor do I accept the Secretary's contention that the smell of fumes in the vicinity of an exhaust pipe is a clear sign that repair is required. (Tr. 118).

The inspector related that the truck operator complained to him about exposure to carbon monoxide when the truck was idling. 32 FMSHRC at 1365 (citing Tr. 54). However, this conversation was not documented in the inspector's contemporaneous notes. *Id.* I can give l ittle weight to the inspector's undocumented recollection of a conversation that occurred approximately two years prior to the hearing in this matter. Similarly, as discussed above, the inspector's testimony that the defective exhaust pipe had been noted in pre-operation

checklists is not reflected in the inspector's notes or the body of the citation. *See* pg. 6, *supra.* Moreover, it is surprising that the Secretary would only attribute the cited condition to a moderate degree of negligence if the defective exhaust was repeatedly noted, and/or complained about, yet remained unaddressed. While I have concluded that Sequoia's negligence remains in the moderate range, the Secretary has not satisfied his burden of demonstrating that the exhaust defect was obvious due to soot, was noted in pre-shift examinations, and that any alleged complaint was communicated to mine management.

With respect to the negligence attributable to the inoperable headlight, the inspector did not recall whether additional upper lights were installed on the refuse truck. *Id.* at 1365 (citing Tr. 61-62). Thus, the Secretary did not refute Sequoia's assertion that all of its refuse trucks were equipped with supplemental upper lights. Upon viewing a photograph of Sequoia's refuse truck at the hearing, the inspector conceded the upper lights depicted in the photograph were more powerful than headlights, stating that "they just light up the . . . [kind of] the whole area in front of you." *Id.* (citing Tr. 106; Resp. Exs. 4-6).

Moreover, the initial decision noted:

> There are lighting systems at the refuse bins and refuse pile sites. The refuse bins are illuminated with 250 watt while halogen bulbs that are located on each of the four corners of the refuse bins. The halogen bulbs are aimed toward the ground where the truck beds are positioned for loading from the bins located above. (Tr. 139-40). The refuse pile is illuminated by two sources of light each energized by two diesel-powered generators. Each light source consists of four halogen lights. One light source illuminates the refuse pile at the top of the hill. The other light source shines down from the top of the hollow to illuminate the access road to and from the refuse pile. (Tr. 140-41).

32 FMSHRC at 1362.

While I am not suggesting that an inoperable headlight does not constitute a violation, the evidence reflects there were three operable lights – two upper and one lower – and that the refuse bins and piles where the haul trucks operated within the preparation plant were extremely well lit. I view the evidence with respect to the issue of adequate lighting, as well as the absence of any documentation supporting relevant pre-shift examination notations, to be significant mitigating factors. Putting aside the supplemental lights installed on the refuse truck, while it is true that the truck could be used for other purposes, the truck was routinely operated between the refuse bins and the refuse piles, a distance of only several hundred yards to approximately one quarter of a mile. (Tr. 37-38).

In the final analysis, the term "moderate negligence" is not intended to be precise. While I have affirmed the Secretary's attribution of moderate negligence, I believe the mitigating factors discussed herein warrant the conclusion the Sequoia's culpability was not as high as the Secretary has alleged. However, in revisiting this issue, in recognition of the serious gravity created by the potential exposure to carbon monoxide fumes, and the impact of the failure to maintain both headlights in operable condition on the degree of negligence, I shall increase the initial $1,400.00 assessment that was vacated by the Commission to $1,900.00.[8]

B. Citation No. 7496262: Mirrors and headlights[9]

The initial decision affirmed the alleged violation and S&S designation for Citation No. 7496262, which also alleges a violation of the mandatory standard in 30 C.F.R. § 77.404(a). The citation was issued for a cracked upper left (driver's side) side view mirror, a missing left lower front side mounted mirror, and a non-functioning right headlight, on the Volvo A40D No. T7 refuse truck.

A refuse truck is normally equipped with two pairs of side view mirrors. The upper pair of mirrors are traditional side view mirrors that enable a truck operator to view the areas alongside of the truck. These side view mirrors are four inches wide and six inches long, and are capable of lateral adjustment. (Tr. 188). The refuse truck is also normally equipped on each side with bottom mirrors that are adjusted downward to enable the operator to view the rear wheels of the truck. (Tr. 189). These bottom mirrors serve two purposes. As a source of hazard prevention, they are used by the truck operator to avoid breaching a berm when backing into an elevated area. (Tr. 185). Pragmatically, as primarily used in this case, the lower mirrors also enable the truck operator to properly position his truck by viewing the rear tires as they approach berms which act as a reference point. (Tr. 158-59, 191).

With respect to the missing left lower mirror, the inspector easily could have, but did not, credibly identify any areas within the preparation plant where the refuse trucks could be exposed to the hazard of breaching a berm and falling down an embankment while maneuvering in reverse. While the inspector did testify that there were berms on elevated roadways (Tr. 185), such berms are a safety precaution in the event a truck operator loses control while traversing the road. Lower side mirrors, which are used when maneuvering in reverse, are not intended to prevent a breach of such roadway berms. Rather, as discussed, lower mirrors are intended to assist the truck operator in utilizing berms that have been constructed to aid in properly positioning the truck.

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[8] It is difficult to assess an appropriate civil penalty, with respect to the cumulative effect of negligence, when the subject citation deals with two unrelated violative conditions. For example, if the negligence attributable to one condition is greater than the other, should the overall negligence attributed be in the higher or lower range?

[9] As with Citation No. 7496260, Citation No. 7496262 initially only involved defective mirrors, but was subsequently modified to include defective lights. The defective lights were initially contained in Citation No. 7496261, which has been vacated. (Gov. Exs. 7, 8).

The testimony reflects that the general area around the refuse pile is relatively flat, having been crushed by the dozers. 32 FMSHRC at 1368 (citing Tr. 165). The inspector did not identify any elevated hazards in the area of the refuse pile, and Government Exhibit 13 clearly depicts a refuse area that is relatively level. In essence, the inspector's testimony reflects that the lower mirror is relied on by the truck operator to view the rear tires, enabling him to use a berm as a reference point to determine how close the bed of the truck is when backing up to dump material at the refuse pile. In this regard, the relevant testimony was:

> Q: [W]hy is this condition [c]ited in Citation [No. 749]6262 hazardous?
>
> A: The fact [of] the visibility backing up. When you - - when you're backing up this truck, if it was backing up to a berm and whatever, it was backing under the refuse bin, whatever, you need to be able to see the back - - the bottom back of his tires where they're located.
>
> Q: And why is that important?
>
> A: Well, you need to know where you're at and where you're located at, how close you are to the - - how close you are to the berm. *A berm is just used for a reference point.* You know, they help you stop your vehicle. You back up to it and then dump. You need to know where you're at.

(Tr. 158-59) (emphasis added). The inspector's testimony further unequivocally reflects that it was not uncommon for refuse trucks to back into previously dumped material, and that the "purpose for a berm at the end dumps" was to act as a "warning device" to prevent the truck from reversing into the material that had been previously dumped. (Tr. 191).

Thus, having concluded that the evidence fails to reflect any relevant elevated hazards at the refuse piles, we turn to a consideration of the refuse bins. The material dumped at the refuse sites is loaded onto the refuse trucks from two bins. The trucks are loaded from the first bin by driving the truck under the bin, and then directly through the bin area, without the need to use any mirrors. (Tr. 159-60, 192). The second bin requires the truck operator to maneuver the truck by backing the truck under the bin between two beams, primarily relying on the side view mirrors to avoid striking the beams. (Tr. 159-60, 192). In either case, the refuse truck is not on an elevated structure. In the final analysis, the evidence does not reflect that the missing lower mirror posed a hazard, at either the refuse pile or the bins, with respect to potentially breaching a berm constructed to prevent descent to the area below.

Turning to the cited upper left side mirror, it is significant that the inspector testified that the mirror was functional despite the cited crack. 32 FMSHRC at 1368 (citing Tr. 188, 207). Thus, the evidence does not reflect that the crack created a distortion that prevented the truck operator from using it for its intended purpose. The Commission has directed me to reconcile my initial reduction of the Secretary's proposed penalty with the initial decision's finding that a cracked side view mirror could contribute to an injury to individuals in the vicinity of the truck,

and that the missing lower mirror could contribute to a truck driving through a berm in an elevated area. Slip op. at 8. These findings were made to support the Secretary's designation of the violation as S&S. As such, the findings were made in the context of continued mining operations and the myriad of circumstances under which a truck may be operated. Such findings were not intended to elevate the level of Sequoia's culpability, as S&S and degree of negligence are independent elements of a civil penalty analysis that must be considered based on the totality of circumstances.

Finally, the remand directed that, in reconsidering the civil penalty assessment, I revisit the inspector's testimony that the cited refuse truck "traveled at night, on steep grades, up and down hills, and around other equipment and miners." Slip op. at 8. Although a defective headlight would ordinarily significantly interfere with operation of a truck on dark roads with steep grades, as previously discussed, the hazard is mitigated by the supplemental floodlights that apparently were installed on the subject refuse truck. *See* pg. 8, *supra.* In addition, while it is true that the refuse trucks could be operated anywhere within the prep plant, their primary purpose was to transport rock material to and from the well-lit areas of the refuse bins and refuse piles, which were located between approximately several hundred yards and one quarter of a mile from each other. (Tr. 37-38, 58, 139-41).

In retrospect, although I have concluded that the degree of negligence, while moderate, is lower than that alleged by the Secretary, in recognition of the fact that refuse trucks are multi-purpose vehicles that can be used in a variety of circumstances, I have concluded that there is a basis for assessing a civil penalty greater than the initial assessment. Consequently, I shall increase the initial $1,200.00 assessment that was vacated by the Commission to $1,800.00.[10]

C. Citation No. 7496263: Accumulation of oil on hood

The initial decision affirmed the fact of the violation and S&S designation for Citation No. 7496263 that concerned a violation of the mandatory safety standard in 30 C.F.R. § 77.1104, based on an accumulation of hydraulic fluid on the Volvo A40D No. T7 refuse truck. This safety standard prohibits the accumulation of combustible materials or flammable liquids that can create a fire hazard. The violation was attributed to a moderate degree of negligence, and a penalty of $5,503.00 was proposed by the Secretary.

The initial decision reduced the proposed penalty to $3,500.00, despite my conclusion that the evidence reflected at least a moderately high degree of negligence, rather than the moderate degree of negligence claimed by the Secretary. 32 FMSHRC at 1371. The condition was readily observable and, given its nature, apparently existed for several shifts. The increase in the degree of negligence was based on the degree of hazard posed by a leak in pressurized hydraulic oil that accentuated the unpredictability of its directional flow with respect to potential contact with extremely hot surfaces. *Id.* The degree of negligence was also raised because

[10] It is difficult to assess a penalty with respect to determining degree of negligence when the citation contains unrelated violative conditions. *See* n.9, *supra.*

I initially credited the inspector's testimony that the condition had been noted in the pre-shift examination records. *Id.* However, I now realize that this testimony is neither supported by the inspector's contemporaneous notes, nor his summary of the violation in the body of the citation. Consequently, despite its obviousness, the claimed prior identification of the condition in pre-shift examinations that would have surely alerted Sequoia maintenance personnel that repair was necessary cannot be considered as an additional aggravating factor.

In the final analysis, the obvious nature of the condition, as well as the fact that it apparently existed for several shifts, support the conclusion that Sequoia's negligence was moderately high. Absent any relevant pre-shift examination notations, the other aggravating factors are inadequate to warrant a penalty in the range the Secretary has proposed. In view of the increase in the degree of negligence over that alleged by the Secretary, the initial $3,500.00 assessed civil penalty that has been vacated by the Commission shall be reassessed at $4,200.00 for Citation No. 7496263.[11]

D. Citation No. 7496266: Inoperative backup alarm

Citation No. 7496266 alleges that a backup alarm on the Volvo A40D No. T10 refuse truck was not maintained in functional condition, in violation of the mandatory safety standard in 30 C.F.R. § 77.410(c). This safety standard requires warning devices to be maintained in functional condition. The cited condition was designated as S&S, and attributed to a high degree of negligence because the pre-shift examination reports reflected that the backup alarm was non-functional for several months. (Gov. Ex. 2 at 32). The Secretary proposed a civil penalty of $3,996.00 for Citation No. 7496266.

Sequoia stipulated to the fact of the violation at the hearing. 32 FMSHRC at 1371. Sequoia's service mechanic testified that the backup alarm was functional, but its sound was muted because it was covered with mud. *Id.* (citing Tr. 317-18). As mud was the underlying cause, Sequoia abated the citation by cleaning the mud that had accumulated around the alarm, and washing the alarm with water. *Id.* (citing Tr. 318-19). The mechanic testified that the periodic washing of the backup alarm to restore its functionality was not noted in the pre-shift notes because it was a recurring problem caused when the rear of the refuse truck came into contact with muddy refuse piles. *Id.* at 1372 (citing Tr. 319-20). The issuing inspector conceded it was not uncommon for refuse trucks to back into previously dumped material that was muddy, thereby preventing the backup horn from working. *Id.* (citing Tr. 307). Significantly, in abating the citation, the inspector did not note that any significant repairs were made, noting only that "the back up horn [was] now working on the on the Volvo A40D refuse truck, Co No. T10." (Sec'y Pet., Ex. A at 27).

[11] I do not view a reduction of the Secretary's proposed penalty of $5,503.00 to an assessed penalty of $4,200.00 as a substantial deviation that requires a more detailed explanation than provided in this decision. *See Cantera Green*, 22 FMSHRC at 620-21.

The truck mechanic testified that minimizing the deleterious effects of mud was ultimately accomplished by repositioning the backup alarm so that the sound was directed in a downward position. (Tr. 319). Specifically, the mechanic testified that:

> [A]fter we just cleaned it and got the backup alarms where they worked, at a later time, me and another mechanic went back as we got time and took each of the trucks . . . and we took - - instead of facing the horn outward, we faced it downward where the mud wouldn't shove into the horn part of the backup alarm.

(Tr. 319-20). To achieve this repositioning, the mechanic "made us a bracket and turned [the horn] upside down where the horn would still be loud, but it'd keep the mud from pushing up inside of it." (Tr. 322). Notably, multiple trucks were modified in this manner, and the repairs were made after the horn on the cited No. T10 truck had already been cleaned for abatement purposes. (Tr. 319, 323). This indicates that Sequoia made an effort beyond that minimally required to satisfy the inspector in order to correct the underlying problem.

The initial decision lowered the degree of negligence from high to moderate. While Sequoia is required to maintain the backup alarm in functional condition, the reduction in negligence was based on testimony that the refuse trucks were operated in adverse muddy conditions, and that periodic cleaning of the backup alarm had occurred. 32 FMSHRC at 1372. I viewed the efforts to achieve compliance, albeit unsuccessful because of periodic contact with the muddy refuse piles, to be a mitigating factor. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (Jan. 1997) (holding that an operator's compliance efforts made prior to the issuance of a citation is a factor when assessing culpability). The Commission has concluded that the reduction in negligence is not a subject for further review, because it was not challenged by the Secretary. Slip op. at 9, n.11.

However, the Commission has directed that I may not consider the muddy conditions as a factor in recalculating the appropriate civil penalty. Slip op. at 9. In view of the Commission's directive, the initial penalty of $2,200.00 that has been vacated by the Commission shall be reassessed at $3,100.00 for Citation No. 7496266. In assessing this penalty, I have imposed a civil penalty less than that proposed by the Secretary, as I consider the construction of a bracket to effectuate the repositioning of the backup alarm as a demonstration of good faith to achieve compliance after notification of the violation, a civil penalty criterion contained in Section 110(i).

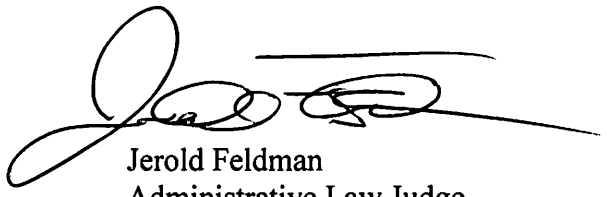
ORDER

Consistent with this Decision, **IT IS ORDERED** that Sequoia Energy, LLC, shall pay a total civil penalty of $11,000.00 in satisfaction of Citation Nos. 7496260, 7496262, 7496263 and 7496266.

IT IS FURTHER ORDERED that the parties' motions to approve partial settlement **ARE GRANTED**. Consistent with the parties' settlement terms, **IT IS ORDERED** that Sequoia Energy, LLC, shall pay a total civil penalty of $3,343.00 in satisfaction of the remaining citations that are at issue in this proceeding.

Accordingly, **IT IS ORDERED** that Sequoia Energy, LLC, pay, within 30 days of the date of this decision, a total civil penalty of $14,343.00 in satisfaction of the eleven citations that are the subject of this proceeding.

IT IS FURTHER ORDERED that, upon receipt of timely payment, the civil penalty proceeding in Docket No. KENT 2008-1059 **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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