FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

September 21, 2010

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

DECISION

Appearances: Matthew Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
James Bowman, Midway, West Virginia, for the Respondent.

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Sequoia Energy, LLC, (Sequoia). The petition sought to impose a civil penalty of $40,029.00 for eleven alleged violations contained in 30 C.F.R. Part 77 of the Secretary's mandatory safety standards governing mining operations at surface coal mines.

Prior to the hearing, the Secretary moved to amend her civil penalty petition by vacating Citation Nos. 7496254, 7496257 and 7496261. The Secretary also moved to amend Citation No. 7496260 to include the cited condition in Citation No. 7496257, and to amend Citation No. 7496262 to include the cited condition in Citation No. 7496261. The Secretary's motion to amend was granted during an April 5, 2010, telephone conference with the parties.

This matter was heard in Richmond, Kentucky on May 4, 2010, at which time the parties stipulated that Sequoia is a mine operator subject to the provisions of the Mine Act. At the hearing, the parties proffered a joint motion to approve the settlement of four additional citations. Namely, Sequoia agreed to pay the $1,111.00 proposed civil penalty for Citation No. 7496253; the parties agreed to delete the significant and substantial (S&S)[1] designation from Citation No. 7496256 and Sequoia agreed to pay a $947.00 civil penalty instead of the $4,689.00

[1] Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum,* 3 FMSHRC 822, 825 (April 1981).

civil penalty initially proposed; Sequoia agreed to pay the $540.00 proposed civil penalty for Citation No. 7496259; and Sequoia agreed to pay the $745.00 proposed civil penalty for Citation No. 7496265. Thus, pursuant to the terms of their settlement, Sequoia has agreed to pay a total civil penalty of $3,343.00 for these four citations.

The remaining citations that are the subject of this proceeding are Citation Nos. 7496260, 7496262, 7496263 and 7496266 for which the Secretary proposes a total civil penalty of $18,877.00. All four of the cited conditions have been designated as S&S. The parties' post-hearing briefs have been considered in the disposition of this case.

I. Background

On February 8, 2008, Mine Safety and Health Administration (MSHA) Inspector Argus Brock inspected a coal preparation plant operated by Sequoia. The preparation plant is in Harlan, Kentucky. (Tr. 42). The inspection was in response to a complaint that had been filed with MSHA concerning reported defects on a D9N dozer. However this dozer is not a subject of the four citations in litigation in this proceeding. (Tr. 44, 96). The preparation plant is a large facility employing approximately thirty miners who work during two shifts. The first shift is from 6:00 a.m. until 5:00 p.m. The second shift begins at 5:00 p.m. and ends at 3:00 a.m. (Tr. 327).

Six refuse trucks are used during the day shift, and four refuse trucks are operated during the evening shift. Rock material that is separated from coal is loaded into haul trucks from refuse bins. Refuse haul trucks transport the rocks from the refuse bins at the plant to a refuse pile that is situated on a hill approximately one quarter of a mile from the preparation plant. (Tr. 37-38, 58-59).

There are lighting systems at the refuse bins and refuse pile sites. The refuse bins are illuminated with 250 watt white halogen bulbs that are located on each of the four corners of the refuse bins. The halogen bulbs are aimed towards 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).

Brock testified that he had previously met with Sequoia's safety director concerning Sequoia's failure to correct defects noted in Sequoia's pre-shift examination book. (Tr. 91). However, Brock conceded that these warning were never documented and Sequoia has denied that they were previously warned. (Tr. 100).

On February 8, 2008, Brock inspected several forty-ton refuse trucks that were in operation at the plant. Based on his observations, Brock issued the four citations that remain at issue for defects he observed on three of the refuse trucks. The truck defects noted by Brock concern inoperable front lights, a defective exhaust pipe, a cracked upper side view mirror, a missing lower side view mirror, an inoperable back-up alarm, and an accumulation of oil on a refuse truck hood. Although Brock reviewed the pre-shift examination reports for these three trucks, Brock did not make copies of the pre-shift reports and he did "[not] recall exactly what [they] said." (Tr. 104). Brock 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.

II. Significant and Substantial Framework

As a general proposition, 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 Division, National Gypsum*, 3 FMSHRC at 825. 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 significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [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.

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC at 1129, the Commission explained its *Mathies* criteria as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Co.*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

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*, 7 FMSHRC at 1130. 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).

III. Civil Penalty Framework

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" 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 of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 *citing* 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294, *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.,* 19 FMSHRC 1495, 1503 (Sept. 1997).

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.

IV. Findings and Conclusions

i. Citation No. 7496260 [2]

Brock inspected Sequoia's Volvo A40D No. T9 Refuse Truck. The Volvo A40D has a vertical exhaust pipe that is located behind the platform used to access the operator's compartment. The exhaust pipe is connected to the muffler at the approximate height of the operator's seat in the cab of the truck. (Tr. 143). The exhaust pipe is attached to the muffler with a clamp. Brock noted that the bottom portion of the exhaust pipe, in the area where the exhaust pipe was connected to the muffler, had a leak which allowed carbon monoxide to escape. (Tr. 50, 55). Although the source of the leak was not visible, as it was in between the cab and the bed, Brock opined the seepage of fumes was apparent because it created a layer of soot on the side frame of the truck bed behind the exhaust. (Tr. 57, 143). The leak was in close proximity to the operator's door. As a result, fumes entered the operator's compartment when the truck was idling. (Tr. 50). Brock testified that he recalled that the truck operator told him that he was exposed to fumes when he was sitting in the operator's cab while the truck was idling. However, Brock did not refer to this reported conversation in his contemporaneous notes. (Tr. 54).

The Volvo A40D Refuse Truck has a pair of high and low-beam lights located above the front bumper on each side of the front grille. (Resp. Ex 4). Each pair of high and low-beams is secured to the truck in a harness. Sequoia contends the truck had two large additional headlights attached to the frame of the truck at the top corners of the windshield. (*See* Resp. Ex. 4). Brock does not recall whether he observed additional headlights at the top of the windshield. (Tr. 61-62). However, based on his review of photographs of a refuse haul truck proffered by Sequoia at the hearing, Brock conceded that these upper lights are more powerful than the headlights as "they just light up the - - [kind of] the whole area in front of you." (Tr. 106; Resp. Exs. 4-6).

Brock noted that the right (passenger side) high and low-beams were not operational. (Tr. 64-65). Brock recalled that there was a reference to "lights" in the pre-shift examination records. However, Brock could not recall exactly what the pre-shift report said. Although the defective lights are noted in Brock's contemporaneous notes, the notes are devoid of any references to pre-shift examination reports. (Tr. 104-05; Ex. 2 at 14).

[2] As noted, a defective leaking exhaust pipe was initially the sole subject of Citation No. 7496260. (Gov. Ex. 4). This citation has been modified to include the defective front lights on the No. T9 refuse truck that was the subject of Citation No. 7496257 that now has been vacated. (Gov. Ex. 5).

As a result of his observations of the defective exhaust and the inoperable headlights, Brock issued Citation No. 7496260 alleging a violation of the mandatory safety standard in 30 C.F.R. § 77.404(a). This safety standard requires that "mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery in unsafe condition shall be removed from service immediately." Brock designated the defects as S&S in nature and he attributed the violative conditions to a moderate degree of negligence. The Secretary proposes a civil penalty of $4,689.00 for Citation No. 7496260.

Willie Fee, Sequoia's service mechanic, testified that he was not aware of any complaints from the operator of the Volvo A40D Refuse Truck. (Tr. 135-36). Fee examined the truck after it was cited by Brock. Fee determined the exhaust leak was caused by a broken muffler clamp. (Tr. 132). Fee confirmed that the leak caused soot to accumulate on the frame of the truck. (Tr. 145-46). Fee admitted that the leak could be heard when the engine was started. (Tr. 146). However, Fee claimed the operator was not exposed to fumes because, if the windows were closed, the operator's cab was a sealed air conditioned compartment. (Tr. 135).

Fee testified that all of the haul trucks are equipped with high and low-beams located above the front bumper and supplemental upper headlights that are factory installed. (Tr. 138, 153-54). Fee admitted that the right front high and low-beams were inoperable. Fee determined the defect was attributable to a wiring harness that was grounded against the frame causing blown fuses.

Fact of the Violation

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. The cited mandatory safety standard in 30 C.F.R. § 77.404(a) requires mobile equipment to be maintained in safe operating condition. The Commission has concluded that equipment is unsafe if a reasonably prudent person, familiar with industry standards and the factual circumstances surrounding the condition and use of the equipment, would recognize that the cited hazard required corrective action. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). Here, Fee has admitted that there was a defect in muffler clamp causing a leak of carbon monoxide (CO) fumes from the exhaust pipe. The leak was in proximity to the operator cab compartment. The exposure of the operator to CO fumes constitutes a hazardous condition.

In addition, Sequoia concedes the right front high and low-beams were inoperable due to a short caused by contact of the wiring harness with the truck frame. Although there apparently were additional headlights mounted at the upper corners of the windshield, defective high and low-beam lights result in a diminution of nighttime visibility rendering the vehicle unsafe under 30 C.F.R. § 77.404(a). Consequently, the evidence supports the cited violation of this mandatory standard.

S&S

As noted, a violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. The degree of likelihood of serious injury or illness must be evaluated in the context of continued exposure to the hazardous condition during both the period prior to issuance of the citation as well as the time the violative condition would have existed if normal mining operations had continued. Obviously, continued exposure to CO fumes is dangerous, particularly in view of its odorless nature. It is reasonably likely that such continued exposure will result in CO poisoning causing serious physical injury or death. Consequently, the defective muffler clamp, alone, provides an adequate basis for designating the cited violation as S&S.

Degree of Negligence

Brock attributed the cited conditions to a moderate degree of negligence. I agree. However, there are several mitigating factors. Brock could not recall whether driving lights were installed at the top of the truck. (Tr. 67). Thus, Brock did not refute Fee's testimony that all of the haul trucks had upper lights installed. Significantly, Brock conceded that if he had realized that the upper lights were installed he might not have cited the inoperable right lower headlights. (Tr. 67). Although Brock recalled that the left headlights were working, he did not recall which, if any, additional lights on the truck were operational. (Tr. 61-62).

Although Brock testified that the pre-shift examination referred to "lights," as previously noted, the pre-shift report has not been proffered in evidence by the Secretary. Moreover, there is no reference to relevant pre-shift examination reports in Brock's contemporaneous notes. While the defective lights apparently existed for at least several shifts, there is no evidence that Sequoia ignored defects reported as a result of pre-shift examinations. Moreover, the lighted conditions at the refuse bins and refuse pile, along with the supplemental headlights mounted at the upper corners of the windshield, mitigate the hazard caused by the inoperative right headlights.

With respect to the condition of the exhaust pipe, Brock does not contend that the defective exhaust pipe was noted by pre-shift examiners. Although the defect was apparent when the truck engine was started, there was no visible hole in the exhaust system that made the condition readily apparent.

With respect to notice, although Brock asserts that Sequoia had been previously warned, the Secretary does not contend that Sequoia's history of violations reflects an inadequate emphasis on the importance of maintaining equipment in safe operating condition. Consequently, although the attribution of moderate negligence is affirmed, there are significant mitigating circumstances related to the degree of gravity of the cited violation that warrant a reduction in the civil penalty proposed by the Secretary. **Accordingly a civil penalty of $1,400.00 shall be assessed for Citation No. 7496260.**

ii. Citation No. 7496262[3]

Brock inspected Sequoia's Volvo A40D No. T7 Refuse Truck. The truck normally is equipped with two pairs of side view mirrors. The upper mirror is a traditional side view mirror that enables the truck operator to view side areas of the truck. It is approximately four inches wide and six inches long. It is capable of lateral adjustment. The bottom mirror is adjusted downward to enable the operator to view the rear wheels of the truck. This mirror is used by the operator to ensure that a truck does not breach a berm when backing into an elevated area. Although Brock stated there were berms on elevated roadways in the preparation plant and different levels at the refuse dump site, Brock did not describe discrete elevated areas at the refuse bins or the refuse pile where the refuse trucks maneuver to load and unload their contents. (Tr. 185-86).

Brock observed a crack in the upper left (driver side) side view mirror. Despite the crack, Brock testified that the upper mirror was still functional. (Tr. 188, 207). The lower left front mirror was missing. Similar to the No. T9 refuse truck, the right high and low-beam headlights were not functioning on the No. T7 truck.

As a result of his observations, Brock issued Citation No. 7496262 that now concerns the defective and missing mirrors and the inoperable right headlights. The citation alleges a violation of 30 C.F.R. § 77.404(a) for failure to maintain the truck in safe operating condition. (Gov. Exs. 7, 8). Brock designated the cited conditions as S&S in nature, and he attributed the violative conditions to a moderate degree of negligence. The Secretary proposes a civil penalty of $4,689.00.

Fee, an experienced refuse truck operator, testified that the upper rather than lower side view mirror normally is used to dump at the refuse site. (Tr. 209, 216). In this regard, Brock testified the rock material dumped at the refuse site is crushed and flattened by a dozer. (Tr. 165). The level nature of the refuse pile area negates a truck operator's reliance on the lower side view mirror. (See Gov. Ex. 13). Moreover, Brock conceded that the side view mirrors were not needed at the refuse bins where the trucks are driven directly under and through the bins. (Tr. 192).

[3] As noted , the defective and missing left side mirrors were the sole subject of Citation No. 7496262. (Gov. Ex. 7). This citation has been modified to include the defective right front lights on the No. T7 refuse truck that was the subject of Citation No. 7496261 that now has been vacated. (Gov. Ex. 8).

Fact of the Violation

As previously discussed, mobile equipment is properly characterized as unsafe if a reasonably prudent person familiar with the operation and maintenance of the equipment would recognize that the condition of the equipment creates a hazard. *Alabama By-Products, supra.* Properly maintained side view mirrors are essential for safe operation of mobile equipment. The factory installation of both upper and lower side view mirrors is a recognition of their contribution to the safe operation of this heavy duty haulage vehicle.

At the hearing it was noted that the testimony and evidence with respect to the inoperable high and low-beam headlights on the No. T9 truck are incorporated by reference to the No. T7 truck. As discussed above, the absence of operable right side headlights, despite the presence of supplemental lights mounted on the top of the truck, constitutes an unsafe condition. Consequently, the evidence supports the fact of the violation of the mandatory standard in 30 C.F.R. § 77.404(a).

S&S

Analysis of the S&S issue in this instance requires a recognition of the unanticipated variable circumstances during the course of continued mining operations under which this forty-ton haulage truck will be driven. Side view mirrors protect both the truck operator and miners who may be exposed to the risk of being struck while working in proximity to this moving vehicle. It is reasonably likely that the diminution of visibility resulting from the cracked and missing mirrors will result in an event, i.e., a truck accident, that results in serious or fatal injuries. In addition, while not currently contemplated, it is likely that this haulage truck will be operated under circumstances that require a lower side view mirror to ensure that the vehicle does not back through a berm installed in an elevated area. Consequently, the cracked and missing side view mirrors, alone, provide an adequate basis for designating the violation as S&S in nature.

Degree of Negligence

Brock attributed the cited conditions to a moderate degree of negligence. Again, I agree. However, there are also mitigating factors. Although the upper mirror was cracked, Brock conceded that it was still functional. Although the missing lower side view mirror is not trivial, it is true that these haulage trucks are not dumping in the vicinity of elevated areas. Thus, the lower mirror, adjusted to view the position of the rear tires, is not normally relied on. The same mitigating circumstances concerning the inoperable headlights on the No. T9 truck discussed above apply to the defective headlights cited on the No. T7 truck.

Consequently, although the attribution of moderate negligence is affirmed there are significant mitigating circumstances related to the degree of gravity of the cited violation that warrant a reduction in the civil penalty proposed by the Secretary. **Accordingly a civil penalty of $1,200.00 shall be assessed for Citation No. 7496260.**

iii. Citation No. 7496263

In addition to the cracked and missing left side view mirrors and the inoperable right side headlights, Brock observed an accumulation of hydraulic oil in an area located on the right side of the hood of the Volvo A40D No. T7 Refuse Truck. Brock testified that hydraulic oil is combustible at temperatures in excess of 700 or 800 degrees. (Tr. 227, 250-51).

Brock noted that a turbocharger, approximately eight to ten inches in diameter, was located on the right upper side of the engine of the T7 truck. A turbocharger supplies fuel to the engine in a method that increases engine performance. Brock stated the operational temperature of a turbocharger can be in excess of 1,400 degrees. (Tr. 227, 251). Brock conceded the temperature on the surface of the hood was not adequate enough to ignite the hydraulic oil. (Tr. 246). Brock also admitted that he did not know if the source of the hydraulic oil was spraying the oil under the hood in the direction of the turbocharger. (Tr. 244). However, Brock was concerned that a fire or explosion could result if the oil leak came into contact with the hot turbocharger that constituted a source of ignition.

As a result of his observations, Brock issued Citation No. 7496263 alleging a violation of 30 C.F.R. § 77.1104 for allowing combustible material in the form of hydraulic oil to accumulate on the hood of the truck. (Gov. Ex. 10). Brock noted that this condition had been entered in the pre-shift examination book. (Tr. 233-36). The mandatory safety standard in 30 C.F.R. § 77.1104 prohibits the accumulation of combustible materials in areas where they can create a fire hazard. Brock designated the oil accumulation as S&S in nature, and he attributed the violative condition to a moderate degree of negligence. The Secretary proposes a civil penalty of $5,503.00.

Fact of the Violation

Fee testified that the source of the hydraulic oil was a broken O-ring on the hose that supplied hydraulic oil to the radiator fan. (Tr. 269-71). At the trial, Sequoia's representative stipulated to the fact of the violation although the S&S designation remains in dispute. (Tr. 252-53; *Resp. Br.* at 7).

S&S

The thrust of the Secretary's S&S assertion is that it is reasonably likely that the unpredictable nature and extent of a spraying oil leak caused by a deteriorating O-ring under a hood in proximity to a turbocharger will result, given continued operation of the truck, in a fire or explosion resulting in serious injury to the operator. (Tr. 252). Fee on the other hand asserted that the radiator was positioned between the oil leak and the turbocharger. Consequently, Fee opined that the "oil would have to come through the radiator into the engine compartment . . . to get to the turbo." (Tr. 267).

Fee's speculation concerning the path of the leaking oil spray misses the point. The fact remains that leaking combustible hydraulic oil in proximity to very hot engine components constitutes a hazardous condition. The unpredictability of the directional flow of this leaking oil accentuates the degree of hazard. This condition creates the circumstances for the proverbial "accident waiting to happen." Consequently, it is reasonably likely that the ignition hazard created by the presence of this hydraulic oil as a source of fuel will result in an event, *i.e.*, fire or explosion, causing serious or fatal injury to the operator of the refuse truck. Accordingly, the cited violation is properly characterized as S&S in nature.

Degree of Negligence

The Secretary alleges that this condition existed for several shifts as the condition was noted in the pre-shift examination book. Moreover, this condition was obvious in that it was readily observable on the hood of the truck. Consequently, the evidence reflects at least a moderately high degree of negligence. **Given the serious gravity associated with the cited condition, a civil penalty of $3,500.00 shall be assessed for Citation No. 7496263.**

iv. Citation No. 7496266

Brock inspected Sequoia's Volvo A40D No. T10 Refuse Truck. Brock tested the back-up alarm and determined that it was inoperable. (Tr. 287). The back-up alarm is a device that sounds when the refuse truck is operated in reverse. (Tr. 288). The back-up alarm is intended to alert miners who are in the path of a truck traveling in reverse. (Tr. 288). The No. T10 truck is operated throughout the preparation plant in proximity to people and equipment. (Tr. 289). Brock was concerned that the absence of an audible back-up alarm will result in a miner sustaining serious or fatal crushing injuries as a result of being struck by the truck. (Tr. 293).

Brock testified that the inoperable back-up alarm was noted in the pre-shift examination and that Rodney Collett, Sequoia's foreman, told him that he was aware of the defect. Although Brock's notes reflect a variety of mobile equipment defects "that existed for several months," the duration of the back-up alarm malfunction is unclear. (Tr. 291; Gov. Ex 2 at 28-30).

As a result of his inspection, Brock issued Citation No. 7496266 citing a violation of the mandatory safety standard in 30 C.F.R. § 77.410(c) that requires warning devices on mobile equipment. Brock designated the violation as S&S in nature and he attributed the violation to a high degree of negligence. The Secretary proposes a civil penalty of $3,996.00.

Fact of the Violation

Sequoia has stipulated to the fact of the cited violation although the S&S designation remains in dispute. (*Resp. Br.* at 8). Fee testified that the back-up alarm was muted because it was covered with mud. Fee opined that the alarm could be heard from ground level although it was very low. (Tr. 317-18). The condition was abated by cleaning the mud that had accumulated around the alarm and washing the alarm with water. (Tr. 318-19).

S&S

Similar to the previous S&S analysis regarding the broken side view mirrors, the hazard of exposure of unwitting victims to a truck without an adequate back-up alarm requires a recognition of the unanticipated variable circumstances under which this forty ton haulage truck will be driven during the course of continued mining operations. The obvious purpose of a back-up alarm is to warn persons positioned behind the truck who cannot be seen by the truck operator. Given the vagaries of human conduct with respect to inattention and carelessness, it is reasonably likely that the hazard created by a non-functioning back-up alarm will result in serious or fatal injuries to someone positioned behind the truck. Consequently, the inaudible condition of the back-up alarm is properly designated as an S&S violation.

Degree of Negligence

The Secretary alleges that this condition existed for a significant period as the condition was noted in the pre-shift examination book. Fee testified that he did not report the back-up alarm as being repaired, although it was periodically cleaned, because it was a recurring problem. (Tr. 319-20). Fee reported that he ultimately moved the alarm so that the horn was not facing outward and exposed to piles of mud when the truck was backed up to dump its load. Specifically, the horn was positioned in a downward direction to avoid mud from muting the horn. (Tr. 323-23). Brock conceded that it was not uncommon for the truck to back into previously dumped material that was muddy and wet thereby preventing the back-up horn from working. (Tr. 307-18).

The admitted muddy conditions are a mitigating factor, however Sequoia is responsible for maintaining the alarm in functioning condition. Accordingly, the violation is attributable to a moderate degree of negligence. **Given the serious gravity associated with the cited condition, a civil penalty of $2,200.00 shall be assessed for Citation No. 7496266.**

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.

As a final note, this decision formalizes the tentative bench decision that was issued at the culmination of the hearing. (Tr. 336- 60). At that time, I urged the parties to settle these four citations by incorporating the terms of the tentative decision in their settlement agreement. (Tr. 337- 40). This approach would have avoided the expenditure of the limited resources of the Commission and the Secretary in the light of an unprecedented backlog of mine safety cases by obviating the need for filing briefs and issuing a formal written decision.

Specifically, at the completion of the hearing, the parties were advised:

> . . . We have four citations that we heard today and I will issue a preliminary decision. . . . I will leave it to the parties to either file briefs agreeing or disagreeing with the preliminary decision, or, the parties, in the alternative, could agree to settle the case based on what my recommendations are in the preliminary decision. . . . By settling the case, neither party has to file a brief and, therefore, they can spend their energies with regard to other cases that are pending. . . . [If] the briefs are filed, if [the parties] decide not to accept my recommendation, I can be convinced that maybe my preliminary decision is wrong . . . [and] I'll change my decision accordingly.

(Tr. 337-39).

At the hearing, Sequoia agreed to settle by adopting the terms of the tentative decision. (*See* Resp. Br. at 1). Subsequent to the hearing, the Secretary, however, declined to settle by adopting these terms. Although advised to do so, the Secretary's brief did not even address the preliminary decision. While I recognize the Secretary's right to a written decision, particularly if there is a desire to raise significant issues on appeal, the tentative decision affirmed the four citations in issue in virtually every respect with the exception of a reduction in the total civil penalty, from to $18,877.00 to $8,300.00.[4] (*See* Tr. 338). Resolution of the appropriate civil penalty to be assessed is committed to the Commission's discretion. 30 U.S.C. § 820(i). In this regard, the Secretary's brief acknowledged "[the] Administrative Law Judge is accorded broad discretion in assessing civil penalties under the Mine Act." (Sec'y Br. at 15 *citing Cantera Green*, 22 FMSHRC at 620). Yet the Secretary insisted on briefing this matter. I urge the Secretary to reconsider whether the pursuit of this matter was a judicious use of government resources.

[4] As a matter of perspective, the Secretary agreed to settle four other citations in this docket proceeding for a total civil penalty of $3,343.00 rather than the $7,085.00 civil penalty initially proposed.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 7496260, 7496262, 7496263 and 7496266 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Sequoia Energy, LLC, shall pay a total civil penalty of $8,300.00 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 in issue in this proceeding.

Consistent with the total civil penalty assessment of $8,300.00 for the four citations that were adjudicated in this matter, as well as the parties' settlement terms, **IT IS ORDERED** that Sequoia Energy, LLC, pay, within 30 days of the date of this decision, a total civil penalty of $11,643.00 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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/rps