FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 10, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-942
Petitioner,	:	A.C. No. 12-01732-261005
	:	
	:	Craney Mine
	:	
v.	:	Docket No. LAKE 2011-1038
	:	A.C. No. 12-02234-264071
	:	
	:	Docket No. LAKE 2012-0231
SOLAR SOURCES, INC.,	:	A.C. No. 12-02234-272665
Respondent.	:	
	:	Docket No. LAKE 2012-0295
	:	A.C. No. 12-02234-275490
	:	
	:	Lewis Mine

DECISION

Appearances: Amber J. Tafoya, Esq., with Courtney Przybylski, Esq., on brief, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mary M. Runnells, Esq., Bloomington, Indiana and Jacqueline B. Ponder, Esq., Indianapolis, Indiana, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Solar Sources, Inc., ("Solar") pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Bloomington, Indiana, and submitted post-hearing briefs.

At the hearing, a total of seven citations were adjudicated and two citations were settled. The Secretary proposed a total penalty of $4,853.00 in these cases. All the citations were issued at surface coal mines.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Right To Perform Preoperational Examinations

I reject Respondent's argument that six of the seven citations at issue in this hearing should be vacated because the inspector refused Respondent's request to perform pre-operational examinations upon the cited equipment. Citing *Wake Stone Corporation*, Respondent asserts that if examinations are not permitted, section 77.1606 will be undermined, tenants of statutory construction will be violated, and an incentive for operators to perform pre-operational exams will be removed. *Wake Stone Co.*, 33 FMSHRC 1205 (May 2011) (ALJ), *petition for discretionary review granted* (June 9, 2011).[1]

Respondent's argument that the Act, read as a whole, requires the allowance of preoperational examinations ignores a requirement section 103(a) of the Act. 30 U.S.C. § 813(a). Section 103 explicitly states "no advance notice of an inspection shall be provided to any person. . . ." If I were to accept Respondent's argument, it would suggest that any mine operator could simply request that an MSHA inspector wait until it examined all equipment and other areas of the mine before the inspection could proceed. In these cases, Respondent actually attempted to do just that, as Troy Fields, a safety director, testified that Respondent instituted a policy that inspector escorts should request to perform a pre-operation examination upon any equipment an inspector requests to inspect before the inspector actually inspects that equipment. (Tr. 159). This would, in turn, effectively provide advance notice of an inspection to the mine operator and contradict section 103 of the Act.

Allowing operators to perform examinations immediately prior to an inspection does not strengthen section 77.1606 or enforce compliance, but would actually weaken compliance. Section 77.1606 requires pre-operational examinations before every use of equipment, not merely before inspections. Permitting operators to examine and repair equipment directly before inspections would allow operators to ignore section 77.1606 by not regularly examining equipment or fixing defects. An operator is not prompted to comply with section 77.1606 by significantly reducing the possibility of being cited for a violation of section 77.1606. This behavior would not only undermine section 77.1606, but also expose miners to safety hazards due to operators' failure to regularly examine or repair equipment. I therefore reject

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[1] In that case, the judge granted the operator's motion for summary decision, deciding not to impose strict liability upon an operator to comply with 56.14132(a). Instead, the judge ruled that the operator, who insisted upon performing pre-shift examinations upon the two cited vehicles immediately prior to inspection, had the right to do so. The operator could then tag out the vehicles if any conditions were found and avoid a citation. The judge held that "[s]ection 56.14100 and mandatory equipment safety standards need to coexist because of the importance of a harmonized and coherent treatment of all portions of the Miner Act and related regulations to miners' safety, overall." 33 FMSHRC at 1208.

Respondent's assertion that six of the citations at issue should be vacated because the inspector refused to allow Respondent to examine equipment before inspections. [2]

I also find that it is immaterial whether Respondent requested the opportunity to perform examinations of the cited equipment before the inspector performed his inspection. The witnesses of Respondent and the Secretary disagree whether Respondent requested to perform examinations prior to the inspection. As I find that the inspector was not required to allow Respondent to perform examinations, this argument is moot and I reject it.

B. Citation No. 8434044; LAKE 2011-942

On May 25, 2011, Inspector Douglas Herndon issued Citation No. 8434044 under section 104(a) of the Mine Act, alleging a violation of section 77.400(a) of the Secretary's safety standards. (Ex. G-1). The Secretary amended the citation to allege a violation of section 77.1605(b); the initial designation of 77.400(a) was a mistake. (Tr. 20). The citation stated that the parking brake of the 1190 Euclid End Dump would not function. *Id.* Inspector Herndon determined that an injury was unlikely to occur but any injury could reasonably be expected to be fatal. Further, he determined that the operator's negligence was moderate and one person would be affected. Section 77.1605(b) of the Secretary's regulations requires "front-end loaders shall also be equipped with parking brakes." 30 C.F.R. § 77.1605(b). The Secretary proposed a penalty of $807.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8434044.

Discussion and Analysis

I find that Respondent violated section 77.1605(b). Both Fields and Inspector Herndon testified that the cited parking brake was ineffective and Respondent does not argue the contrary. (Tr. 149, 20). The cited loader lacked a functional parking brake, which is a violation of section 77.1605(b).

I affirm the "unlikely" and "fatal" gravity designations of Citation No. 8434044. Respondent contends that the vehicle was parked in a parking berm and the likelihood that the truck could unintentionally roll would be "remote" and therefore there was no likelihood of an injury. The probability associated with the word "remote" is not zero; it means that an injury causing accident is unlikely, which matches the inspector's designation. Respondent also

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[2] Respondent also cites *Beverly Materials, LLC*, which is dissimilar from this case. 35 FMSHRC 88 (Jan. 2013) (ALJ). In *Beverly Materials*, the operator was cited for not performing a pre-operational examination, but at the time of the citation the operator was in the process of performing its examination. In the current case, the operator was cited for failing to correct equipment problems before using the equipment. Here, the operator's examination was not interrupted by the inspection; the operator requested to delay the inspection to begin its examination. Both of the cases cited by Respondent, furthermore, are not binding precedent in this case.

contends that the equipment would be examined and repaired before use. The inspector believed, however, that the equipment was operated in the cited condition. I credit Inspector Herndon's testimony that the brake was unlikely to fail while parked and parking brakes fail as a result of long-term use and ordinary wear and tear. (Tr. 31-32). The inspector appropriately designated Citation No. 8434044 as unlikely.[3]

I also find that the likely injury caused by the cited condition would be fatal. Respondent argues that the likely injury would be no lost workdays because the cited parking brake was unlikely to injure miners. I credit the inspector's testimony that the piece of equipment was large, used upon wet surfaces and grades and used in close proximity to miners. (Tr. 25). A vehicle without a functional parking brake that works around miners and contributes to an injury is likely to contribute to a fatal injury.

I find that Citation No. 8434044 was the result of Respondent's moderate negligence because Respondent knew or should have known about the condition.[4] As I stated before, I credit the inspector's testimony that parking brakes wear out over time. A penalty of $800.00 is appropriate for Citation No. 8434044.

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[3] The citations before me represent numerous alleged violations regarding equipment with ineffective service and parking brakes. By arguing that pre-operational examinations would have corrected all these issues, Respondent essentially asserts that each of these pieces of equipment was damaged the shift before the inspections occurred and would be repaired before use. This is unlikely. Respondent finished repairing the vehicle cited in Citation No. 8434074, discussed below, for an ineffective parking brake immediately before Inspector Herndon cited the vehicle for a violation of section 77.1605(b). The inspector delayed his inspection of the truck because it was being repaired. (Tr. 74). When Respondent informed the inspector that the vehicle had been repaired and was ready for inspection, the vehicle still had an ineffective parking brake. *Id*. Although it is possible that the brakes on the cited equipment may have become defective at the end of the previous shift, the preponderance of the evidence shows that Respondent's pre-operational examinations were ineffective and brake problems were not being corrected. This conclusion is especially important to my analysis of the violations of section 77.1606(c) because the standard requires defects to be corrected prior to operation instead of mandating that defects not exist at any time.

[4] The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d).

C. Citation No. 8434059; LAKE 2011-1038

On June 23, 2011, Inspector Herndon issued Citation No. 8434059 under section 104(a) of the Mine Act, alleging a violation of section 77.1606(c) of the Secretary's safety standards. (Ex. G-3). The citation stated that the air brake system for the 1327 Diamond fuel truck was not maintained because the front right air hose (airline) was completely broken away from the brake chamber. *Id*. Inspector Herndon determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and one person would be affected. Section 77.1606(c) of the Secretary's safety standards requires "[e]quipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c). The Secretary proposed a penalty of $745.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8434059.

Discussion and Analysis

I find that the Secretary did not satisfy his burden to show that Respondent violated section 77.1606(c). The Secretary is required to show the existence of a violation by a preponderance of the evidence. *RAG Cumberland Resources Co.*, 22 FMSHRC 1066, 1070 (Sept. 2000). The Secretary did not show that the cited brake defect would not be corrected before the cited equipment was used or that the equipment was used in the cited condition. The Secretary argues that the weathered and tattered condition of the airline suggested that the condition had existed for more than one operating shift and asserts that the testimony of Respondent's witnesses was unreliable. The Secretary bases his argument upon the inspector's testimony that the airline was "tattered" but not completely broken away from the brake chamber. (Tr. 51).[5] The testimony of Kenneth Seib, the former pit boss at Lewis Mine, corresponds with the citation itself, which states that the "air hose was completely broken away." (Tr. 257; Ex. G-3). The inspector's testimony conflicts with the citation that he wrote and issued. (Tr. 51-52). The vehicle sat unused for "approximately more than three days," but most likely the vehicle had not been used since April 24, 2011. (Tr. 52; Ex. R-B). This period of inactivity makes a violation of section 77.1606(c) less likely and harder to prove. The damage could have occurred due to a miner stepping upon the airline at any time during its long inactivity. The Secretary did not present evidence to show that the cited equipment was or would be used in this condition.[6] I hereby VACATE Citation No. 8434059.

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[5] Gerry Hargus, a mechanic and shop foreman for Respondent, did not testify concerning the condition of the cited airline as the Secretary incorrectly states; he affirmed that the airline could appear to be in poor condition but still function properly, which undermines the argument that the appearance of the airline alone proves how long the cited condition existed. (Tr. 230-31).

[6] Respondent argues, furthermore, that based upon the position and location of the cited vehicle, the airline could not have broken before being placed in that position because the brake system would not allow the movements required to do so. (Respondent's Br. at 10; Tr. 258, 241-42).

D. Citation No. 8434060; LAKE 2011-1038

On June 23, 2011, Inspector Herndon issued Citation No. 8434060 under section 104(a) of the Mine Act, alleging a violation of section 77.1606(c) of the Secretary's safety standards. (Ex. G-4). The citation stated that the air brake system for the 1334 Ford fuel truck was not maintained because the front brake chamber was "blown allowing air to leak freely." *Id.* Inspector Herndon determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and one person would be affected. The Secretary proposed a penalty of $745.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8434060.

Discussion and Analysis

I find that the conditions cited in Citation No. 8434060 violated section 77.1606(c) because the cited vehicle was used before Respondent corrected the cited hazardous defect. The parties do not dispute that the diaphragm in the brake chamber was damaged and I find that this condition affects safety because it would reduce the braking and stopping capacity of the cited vehicle, making collisions more likely. Although the cited fuel truck was not used the day that the inspector issued the citation, I find that it had been used in the cited condition. (Tr. 245). Hargus testified that splatter marks could occur on the vehicle due to "a little bit of oil" coming out of the brake system. (Tr. 235). The splatter marks, however, were noticeable according to the inspector's description, which suggests that the condition existed before the vehicle was put into operation during the previous night shift. (Tr. 66-67). I credit the inspector's testimony that the condition existed for "some time" due to the splatter of internal lubrication and I find that the equipment was put into operation the day before the inspection without correcting the defect. (Tr. 67).

I find that the violation was S&S[7] because it was reasonably likely that someone would be seriously injured due to the cited condition. I find that the brakes operating at less than full capacity due to the failure of a front brake is reasonably likely to lead to a serious injury due to a collision. To prevent this likely hazard, front brakes are required upon all trucks, not merely in

[7] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

the mining industry, according to Hargus. (Tr. 238-39). Hargus also testified that the rear brakes would stop the vehicle even in an emergency, but that the vehicle could slide. (Tr. 242). The cited vehicle, furthermore, operates in areas of the mine where other mobile equipment and pedestrians travel. (Tr. 68). Although I find that it is unlikely the cited condition would cause the vehicle to violently pull to one side as Inspector Herndon testified, slight pulling to one side, slipping, or stopping slower are all possible and all reasonably likely to lead to an injury causing accident. Citation No. 8434060 is S&S.

I find that Citation No 8434060 was the result of Respondent's moderate negligence. Hargus testified that splatter on a vehicle did not mean that the brake system was defective, only that "it would warrant looking at." (Tr. 235). Respondent should have "looked at" this equipment before using it. Respondent knew or should have known of the cited condition. A penalty of $750.00 is appropriate for Citation No 8434060.

E. <u>Citation No. 8434074; LAKE 2011-1038</u>

On July 5, 2011, Inspector Herndon issued Citation No. 8434074 under section 104(a) of the Mine Act, alleging a violation of section 77.1605(b) of the Secretary's safety standards. (Ex. G-6). The citation stated that the parking brake of the 1175 Euclid R50 end dump did not function. *Id.* Inspector Herndon determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and one person would be affected. The Secretary proposed a penalty of $127.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8434044.

<u>Discussion and Analysis</u>

I find that the conditions described in Citation No. 8434074 violated 30 C.F.R. § 77.1605(b). The safety standard requires that all trucks and loaders be equipped with a parking brake. I credit the testimony of Inspector Herndon, Fields, and Seib that the parking brake could not hold the cited vehicle upon a grade, which is a violation of the standard. (Tr. 77, 173, 260).

Respondent acknowledges that the cited parking brake did not function, but argues that the inspector tested the parking brake inappropriately; I reject Respondent's argument. The cited standard requires a functional parking brake, not merely functional service brakes; Respondent's assertion that the cited equipment could be held using its service brakes is therefore immaterial. Respondent also asserts that the inspector tested the brake improperly, possibly damaging it, by having the vehicle pull through the brake upon a flat surface before testing it upon a grade. (Tr. 80). I credit the inspector's judgment and reject this argument because the test implemented by Inspector Herndon is widely used and accepted. The parking brake cited in Citation No. 8434074 violated 30 C.F.R. § 77.1605(b).

I find that Citation No 8434074 was the result of Respondent's moderate negligence because Respondent knew or should have known about the condition. Respondent was aware that the cited piece of equipment would be inspected before the inspector did so. Mechanics

were working on the vehicle when the inspector entered the mine and later informed the inspector that the vehicle was ready to be inspected. (Tr. 74-75). The inspector's moderate negligence determination is appropriate. A penalty of $125.00 is appropriate for Citation No 8434074.

F. Citation No. 8437659; LAKE 2012-231

On October 3, 2011, Inspector Herndon issued Citation No. 8437659 under section 104(a) of the Mine Act, alleging a violation of section 77.1605(b) of the Secretary's safety standards. (Ex. G-8). The citation states that the parking brake of the 1148 Euclid end dump did not function when tested. *Id*. Inspector Herndon determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and one person would be affected. The Secretary proposed a penalty of $334.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8437659.

Discussion and Analysis

I find that the conditions described in Citation No. 8437659 presented a violation of 30 C.F.R. § 77.1605(b). I credit the inspector's testimony that the parking brake did not function when tested. (Tr. 84, 89-91).

I find that the violation was S&S because it was reasonably likely that someone would be seriously injured if the operator used the cited equipment with an inoperable parking brake. The vehicle presented a crushing hazard if the vehicle collided with a person or another vehicle as a result of the defective parking brake. The defective parking brake was reasonably likely to contribute to an injury because the vehicle was used in various areas of the mine around other equipment and miners, was parked upon a grade, not chocked, and was available for use. (Tr. 90-91). The condition cited in Citation No. 8437659 was reasonably likely to lead to a serious injury; the citation was therefore S&S.

I find that Citation No 8437659 was the result of Respondent's moderate negligence because Respondent knew or should have known about the condition. Steve Edwards, a Safety Director for Respondent, told the inspector that Respondent had trouble with equipment parking brakes "quite often." (Tr. 89). The fact that the safety director acknowledged that parking brakes upon trucks frequently do not work suggests that the company should have more carefully maintained the parking brakes and should have known of the cited condition. Respondent's moderate negligence caused Citation No 8437659. A penalty of $335.00 is appropriate for Citation No 8437659.

G. Citation No. 8437672; LAKE 2012-295

On October 25, 2011, Inspector Herndon issued Citation No. 8437672 under section 104(a) of the Mine Act, alleging a violation of section 77.410(a) of the Secretary's safety standards. (Ex. G-10). The citation states that the 1014 Hitachi shovel was readily available for

use but did not have a backup alarm. *Id*. Inspector Herndon determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and one person would be affected. Section 77.410(a) requires that "[m]obile 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 [g]ives an audible alarm when the equipment is put in reverse or [u]ses…other effective devices to detect objects or persons at the rear of the equipment, and sounds an audible alarm when a person or object is detected." 30 C.F.R. § 77.410(a). The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8437672.

<u>Discussion and Analysis</u>

I find that section 77.410(a) covers the equipment cited in Citation No. 8437672. Respondent argues that the cited equipment, a shovel, is not covered by section 77.410(a) because the regulation does not explicitly include shovels. Where a regulatory provision is clear and unambiguous, the provision must be enforced as written. *Wolf Run Mining Company*, 32 FMSHRC 1669, 1678 (Dec. 2010); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997); *Peabody Coal Co.,* 18 FMSHRC 686, 690 (May 1996); *Nolichuckey Sand Company, Inc.*, 22 FMSHRC at 1062. The "starting point" is the language of the regulation itself. *Dyer v. U.S.*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Nolichuckey Sand Company, Inc.*, 22 FMSHRC 1057, 1062 (Sept. 2000). The safety standard does list numerous types of equipment, but also includes "mobile equipment[.]" The only exception to the standard is "pickup trucks with an unobstructed rear view[.]" 30 C.F.R. § 77.410(a). The cited equipment is mobile, has rear view obstructions, and is not a pickup truck. (Tr. 108-09, 185). The plain language of section 77.410(a) is clear and unambiguous; section 77.410(a) covers the cited shovel.

I find that the conditions described in Citation No. 8437672 violated section 77.410(a). Mobile equipment must be equipped with a warning device for when the equipment is reversed. The cited piece of mobile equipment operated in reverse, but lacked a backup alarm or other warning device in violation of section 77.410(a). (Tr. 209-10). Although the operator of the cited shovel can move the cab in a 360 degree circle, Keith Lutgring, Respondent's vice president of maintenance and equipment, testified that the shovel does reverse short distances. (Tr. 183, 209-210).

I find that Citation No 8437672 was the result of Respondent's moderate negligence. Although the shovel was previously inspected without being cited, Respondent had other shovels with alarms and should have known of the conditions. (Tr. 113). A penalty of $100.00 is appropriate for Citation No 8437672.

H. <u>Citation No. 8437673; LAKE 2012-295</u>

On October 25, 2011, Inspector Herndon issued Citation No. 8437673 under section 104(a) of the Mine Act, alleging a violation of section 77.1140 of the Secretary's safety standards. (Ex. G-11). At hearing, the Secretary modified the citation to a violation of section

77.1104 to correct the inspector's clerical error. (Tr. 120). The citation states that combustible accumulations of oil and grease covered the lower section of the engines, engine compartment, boom, and pivot section of the 1014 Hitachi shovel. (Ex. G-11). Inspector Herndon determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and one person would be affected. Section 77.1104 requires that "[c]ombustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard." 30 C.F.R. § 77.1104. The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8437673.

Discussion and Analysis

I find that the conditions described in Citation No. 8437673 presented a violation of 30 C.F.R. § 77.1104. Respondent does not dispute that grease and oil accumulated upon the cited piece of equipment, but it does argue that the accumulation did not create a fire hazard. (Tr. 127-29).[8] I find that the accumulated materials were flammable and covered an engine that was a heat and ignition source, which constitutes a violation of section 77.1104.

I also find that Citation No. 8437673 was the result of Respondent's moderate negligence. Respondent should have known of the cited condition because the accumulations were up to .25 inches thick and covered a considerable area of the cited vehicle. (Tr. 121). A penalty of $100.00 is appropriate for Citation No 8437673.

II. SETTLED CITATIONS

The parties settled two of the citations in these dockets at the hearing. (Sec'y Br. 1). In LAKE 2011-942 the parties agreed to settle Citation No. 8434040 by deleting the S&S determination and reducing the likelihood of an injury from "reasonably likely" to "unlikely." For LAKE 2012-295, Solar Sources agreed to accept Citation No. 8437674 as written.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The Craney Mine had a history of 58 violations (21 S&S violations) and the Lewis Mine had a history of 14 violations (1 S&S violation) in the 15 months preceding May 23, 2011. (Ex. G-16). At all pertinent times, Solar was a moderately large coal mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Solar Sources, Inc., to continue in business. The gravity and negligence findings are set forth above.

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[8] Respondent argues that a fire was not reasonably likely to ignite, citing *Eastern Associated Coal Corp.,* 13 FMSHRC 178 at 184 (Feb. 1991). This argument, however, does not relate to the fact of violation, only an S&S designation. Citation 8437673 was not S&S and therefore this argument is immaterial.

IV. ORDER

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
LAKE 2011-942		
8434040	72.620	1,300.00
8434044	77.1605(b)	800.00
LAKE 2011-1038		
8424059	77.1606(c)	VACATED
8434060	77.1606(c)	750.00
8434074	77.1605(b)	125.00
LAKE 2012-231		
8437659	77.1605(b)	335.00
LAKE 2012-295		
8437672	77.410(a)	100.00
8437673	77.1104	100.00
8437674	77.1104	100.00
TOTAL PENALTY		$3,610.00

For the reasons set forth above, I **VACATE** Citation No. 8434059 and **AFFIRM** Citation Nos. 8434044, 8434060, 8434074, 8437659, 8437672, 8437673, and 8437674. Citation No. 8434040 is **MODIFIED** as set forth in the settlement of the parties. Solar Sources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $3,610.00 within 30 days of the date of this decision.[9]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

[9] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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