

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 27 2015

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

v.

JUSTICE ENERGY COMPANY,
INCORPORATED,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2012-940
A.C. No. 46-06578-282610

Mine: Red Fox Surface Mine

DECISION

Appearances: Emily O. Roberts, Esq., U.S. Dept. of Labor, Office of the Solicitor,
Nashville, Tennessee, for Petitioner;

James F. Bowman, Justice Energy Company, Incorporated, Midway, West
Virginia for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”), against Justice Energy Company, Incorporated (“Justice”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary seeks a total civil penalty in the amount of \$255,992.00 for nine alleged violations of his mandatory safety standards.¹

A hearing was held in South Charleston, West Virginia. The issues before me are: (1) whether Respondent violated 30 C.F.R. §§ 77.1608(a), 77.1605(k), 77.404(a), and 77.1104; (2) whether the violations were significant and substantial, where alleged; and (3) whether the violations were a result of Justice’s high or moderate negligence, as alleged. The parties’ Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the citations, as issued, assess penalties against Respondent, and approve the parties’ Partial Settlement.

¹ The parties reached a settlement on two of the nine contested citations. The total civil penalty proposed for the seven remaining alleged violations is \$220,008.00.

I. Stipulations

The parties stipulated as follows:

1. Justice Energy, Incorporated, owns and operates Red Fox Surface Mine, I.D. No. 46-06578. Red Fox Surface Mine is located in McDowell County, West Virginia;
2. Red Fox Surface Mine is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 803;
3. Justice Energy, Incorporated, is subject to the Federal Mine Safety and Health Act of 1977;
4. Justice Energy, Incorporated, is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision;
5. At all times relevant to this proceeding, Red Fox Surface Mine had an effect upon interstate commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803;
6. Red Fox Surface Mine is large, producing 751,359 tons of coal in 2011;
7. Copies of the citations in contest are authentic and were served on the Respondent by an Authorized Representative of the Secretary employed by the Mine Safety and Health Administration;
8. The Respondent timely contested these violations;
9. MSHA's Proposed Assessment Data Sheet and "Exhibit A-Docket Number WEVA 2012-940" accurately set forth: (a) the number of assessed penalty violations charged to the Respondent for the period stated; and (b) the number of inspection days per month for the period stated; and
10. The penalties proposed will not affect the Respondent's ability to continue in business.

Ex. P-1.

II. Factual Background

Justice Energy owns and operates the Red Fox surface mine ("Red Fox"), a highwall surface coal mining operation, located in McDowell County, West Virginia. Stip. 1. On the morning of January 11, 2012, MSHA Inspector Jeffrey Presley, prior to conducting a quarterly E-01 inspection of Red Fox, participated in a safety meeting held by mine managers at the mine

portal. Tr. 31-33. Presley was initially accompanied on the inspection by Justice's dozer operator, Todd Neely, and later joined by safety manager, Gilbert Witt. Tr. 34, 290, 297.

As Presley drove away from the mine portal, he observed rock trucks slipping on a roadway covered with mud and standing water. Tr. 38-39. Therefore, he issued a citation for the operator's failure to keep the haul road reasonably free of debris, posing a collision hazard. Tr. 39; Ex. P-3. Also, having observed that a roadside berm was constructed of mud and failed to reach the requisite mid-axle height of the trucks, Presley issued a citation for Justice's failure to maintain an adequate berm. Tr. 48-51; Ex. P-4.

On the second morning of Presley's inspection, January 13, he observed a school bus, being used by Justice as a mantrip, with motor oil accumulations on the engine, an inoperable fire extinguisher, and four inoperable rear lights; he issued three citations for these conditions. Tr. 59, 65-66, 71-72; Exs. P-5, P-6, P-7.

Presley also inspected highwall drill numbers 834 and 841. Tr. 76-77. On the 841 highwall drill, he observed a half inch of slack in the mast jack pin, and extensive oil leaks covering the engine, hydraulics, and electrical components.² Tr. 77-78, 89. Consequently, he issued a citation for the operator's failure to keep the drill in safe operating condition, and another for allowing accumulations of hydraulic oil where they created a fire hazard. Tr. 77-78, 96; Exs. P-8, P-9. While inspecting the 834 highwall drill, Presley cited Justice for failure to maintain the drill in safe operating condition, identifying nine defective conditions; he issued another citation for allowing accumulations of hydraulic and motor oil where they created a fire hazard. Tr. 100, 117; Exs. P-10, P-11.

III. Findings of Fact and Conclusions of Law

A. Citation 8144189

1. Fact of Violation

Presley issued 104(a) Citation No. 8144189, alleging a "significant and substantial" violation of section 77.1608(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Justice's "moderate" negligence.³ The "Condition or Practice" is described as follows:

When the haul roads were traveled they were covered in debris in the form of a large amount of mud. The roads were very slick due to the condition and pick-up trucks and large rock trucks were observed sliding and spinning tires for traction due to loss of traction. These are high traffic roads traveled all shift and these conditions can result in a wreck.⁴

² The mast jack pin holds the jack in place; the jack raises and lowers the mast. Tr. 79.

³ 30 C.F.R. § 77.1608(a) provides that "dumping locations and haulage roads shall be kept reasonably free of water, debris, and spillage."

⁴ Contrary to the wording in the narrative, the testimony makes clear that Presley cited one roadway on which multiple trucks were traveling.

Ex. P-3. The citation was terminated after the haul road was cleared of debris.

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred “by a preponderance of credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

Presley had worked for MSHA since 2007, and had inspected Red Fox over 50 times prior to 2012. Tr. 23-24, 27. He described the haul road as being covered with mud several inches deep and standing water forming puddles 30 by 50 feet, which caused rock trucks to lose traction. Tr. 38-39. In his opinion, given the heavy truck traffic, vehicles losing traction would collide, resulting in drivers sustaining broken bones, paralysis, or even death. Tr. 42. Presley concluded that Justice was moderately negligent because the muddy conditions had been discussed that morning in the safety meeting but, from his observation, no graders were being operated to clear the roadway. Tr. 33, 45.

Safety manager, Gilbert Witt, had worked at Red Fox since 2008. Tr. 282. Contrary to Presley’s testimony, Witt testified that, while accompanying Presley on his inspection, he observed graders working on the haul road, and that he did not see any conditions presenting a challenge to maneuverability of the trucks. Tr. 296-97. Witt also testified that he took photographs of the roadway, and he identified one photograph, showing a roadway free of mud and debris, as depicting the conditions observed by the inspector. Tr. 291; Ex. R-14. Dozer operator, Todd Neely, testified similarly, that the roadway was clear, and also attested to the photograph being a fair depiction of it at the time of inspection. Tr. 467-74.

Mine superintendent, Gregory Browning, had been employed at Red Fox for three years. Tr. 552-53. He explained that the mine’s normal practice is to run a 16G motor grader, unless it is out of service, in which case a rubber-tired dozer is used to maintain the roads; he testified that both were in use on the day of inspection. Tr. 557, 560. Nevertheless, Browning conceded that some mud was present a quarter of the way out of the pit; he described it, however, as only a light, tacky mud, which he would not consider to be debris. Tr. 554, 562. Michael Dale, 994 loader operator, essentially corroborated Browning’s testimony, explaining that, using the main loader, it only took him approximately 10 to 15 minutes to scoop the mud off the road. Tr. 495.

The photograph upon which Justice relies to support its contention that only an inconsequential amount of mud had accumulated on the roadway depicts pristine conditions that do not comport with its witnesses’ cumulative testimony. Ex. R-14. Witt initially testified that he had taken the collection of evidentiary photographs contemporaneous with Presley’s inspection. Tr. 291, 301-02, 350-51, 368, 391-92, 403, 405. The Secretary’s challenge to their authenticity, however, called into question the timing of the snapshots and who, in fact, had taken them. Justice’s safety director, Raymond Simpson, substantiated the Secretary’s contention that Witt was not the sole photographer, by pointing out that the snapshots were labeled either “Contemporaneous by Gilbert Witt,” or “Non-contemporaneous, illustrative, Mark Huffman.” Tr. 393, 397; Exs. P-15, P-16, R-14, R-15, R-16, R-17, R-18, R-19, R-20, R-21, R-22, R-23, R-24, R-25, R-26, R-27, R-28, R-29, R-30, R-31, R-32, R-33, R-34, R-35, R-36.

Furthermore, neither Witt nor Simpson was able to identify who had labeled the photographs. Tr. 397, 460. Indeed, Witt acknowledged that two photographs of the 834 highwall drill attributed to Huffman, depict warm weather conditions, and he reluctantly admitted that he had no knowledge of when they had been taken. Tr. 454-57; Exs. R-33, R-34. Finally, there is no evidence that establishes any of the photographs as an accurate depiction of the roadway on the date and time that Presley cited the alleged slippery conditions, nor are they authenticated as accurate depictions of other conditions cited during the inspection. Consequently, I find Justice's photographic evidence of no probative value in establishing any of the conditions encountered by the inspector and, in so finding, I also find Witt's testimony of his observations unsupported, and his assertion that graders were leveling the roadway at the time of inspection, largely unworthy of credence.

Presley, on the other hand, consistently testified that several of the alleged contemporaneous photographs were not illustrative of the conditions which he observed, and I fully credit his testimony that rock trucks were slipping on the muddy, debris-covered roadway, where no grader was operating. Tr. 578-79, 624. I also find Witt's, Browning's, and Neely's depiction of a relatively mud-and-debris-free roadway completely fabricated, considering their acknowledgement that they had attended the morning safety meeting addressing the hazardous conditions resulting from the overnight rainfall. Tr. 286, 467-68, 554-62. Therefore, I find that Justice violated section 77.1608(a) by failing to maintain the haul road reasonably free of mud and standing water.

2. Significant and Substantial

To prove that a violation is "significant and substantial" ("S&S") under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981), the Secretary must establish the four criteria set forth by the Commission in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984). The Secretary bears the burden of proving: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC 1, 3-4; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133,135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of the violation has been established. The second criterion of the *Mathies* test has been met, in that rock trucks losing traction and slipping due to the muddy roadway surface were likely to lose control and collide with other vehicles. Clearly, collisions between multi-ton

trucks are reasonably likely to result in serious musculoskeletal injuries such as strains, sprains and broken bones, head trauma, paralysis, and even death. Therefore, I find that the violation was S&S.

3. Negligence

The record establishes that Justice was aware of the muddy road conditions, as evidenced by the morning safety meeting held to address the matter, attended by Browning, Witt, and Neely. However, despite permitting commencement of mining operations prior to clearing the roadway, Justice's effort to alert its miners to the hazard mitigates its negligence. Therefore, I conclude that Justice was moderately negligent in violating the standard.

B. Citation 8144190

1. Fact of Violation

Inspector Presley issued 104(a) Citation No. 8144190, alleging a "significant and substantial" violation of section 77.1605(k) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Justice's "moderate" negligence.⁵ The "Condition or Practice" is described as follows:

When checked the elevated haul road at the Cat 994 pit has berms that are not adequate enough to prevent an accident. This pit is located over the active coal pit and large Cat 789 and 793 rock trucks haul from this location and the berms were not built up to the mid axle of these trucks. The partial berms that were there were constructed of muddy material and not substantial enough to prevent the large heavy trucks from running or sliding through the berms and falling 40 plus feet below. The area at this location was muddy and trucks were observed slipping and sliding. (See Citation No. 8144189).⁶

Ex. P-4. The citation was terminated after the berm was built up using overburden.

Presley explained that to provide protection against overtravel and overturning, the berm was required to extend higher than mid-axle height of the trucks or, if at mid-axle height, be constructed of a substantial material.⁷ Tr. 48-49. He testified that he positioned himself where he could see the truck axles passing the berm, and observed that the majority of the berm was significantly lower than the trucks' mid-axles, with some spots deficient by as much as two feet.

⁵ 30 C.F.R. § 77.1605(k) provides that "berms or guards shall be provided on the outer bank of the elevated roadways."

⁶ 30 C.F.R. § 77.2(d) defines "berm" as a pile or mound of material capable of restraining a vehicle. Contrary to the wording in the narrative, the testimony makes clear that Presley cited only one berm.

⁷ See, for example, 30 C.F.R. § 77.1605(l) which provides that "berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

Tr. 50-53, 168-70. Presley was able to see that mud had sloughed off the berm to the coal pit below. Tr. 51. He opined that given the slick roadway conditions, a truck could overtravel through the berm and overturn, resulting in a 40 to 50 foot plunge down to the pit. Tr. 54-55.

Witt testified that the berm was approximately eight to nine feet tall and, at first, averred that it was constructed of rock from the pit. Tr. 298-99. However, when viewing Justice's photographs, purportedly of the original berm and the berm that was constructed to abate the violation, Witt identified the original berm as being composed of smaller, finer, and more consolidated material than the one constructed later. Tr. 307-08; Exs. R-15, R-16. Witt also identified a pile of mud atop the berm which, he speculated, could have been dumped on the berm by the front-end loader; however, he added that this was not a normal practice. Tr. 309.

Neely testified that he had built the original berm the day before the inspection to a height of 72 to 74 inches. Tr. 477-79. He admitted that the combination of the previous night's rain and work in the pit had caused some of the berm to "slip off." Tr. 483. Ronald Starcher, loader operator, testified that on the morning of January 11, he used a front-end loader to repair the berm. Tr. 486-88. According to Starcher, the berm had "slagged off" in a couple of spots. Tr. 488. Viewing Justice's photographs of the berm, he admitted that the area that Witt had identified as the original berm was primarily composed of dirt with some rock, and that the rain would have been able to wash it away. Tr. 489-91. Loader operator, Michael Dale, explained that he was tasked with building the berm that terminated the citation, and he also admitted that the original berm had eroded due to rainfall and mining in the pit. Tr. 496-500. Furthermore, Dale testified that the original berm was constructed of rock with a little bit of dirt; however, after examining Justice's photograph, he stated that it looked like "a lot more dirt." Tr. 501-02; Ex. R-15.

I find that the original berm was constructed primarily of dirt rather than rock, and I credit the Secretary's contention that it did not rise to mid-axle height of the operating haul trucks. Even Justice's own photographs, although of dubious origin, show the berm to be constructed of consolidated material, including substantial amounts of dirt and mud. Obviously, inherent in the standard is a requirement that berms or guards be constructed of such material, and in such fashion, as to constitute an effective barrier. A berm primarily constructed of dirt, which does not rise, at least, to mid-axle height, is insufficient to stop multi-ton rock trucks from overtraveling into the pit and overturning. Therefore, I find that the Secretary has proven that Justice violated section 77.1605(k).

2. Significant and Substantial

The first two *Mathies* criteria have been met, in that the violation has been established, and it is apparent that the construction material and height insufficiency of the berm contributed to the danger of rock trucks overtraveling and overturning. Here, again, the S&S analysis is dependent upon the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious. Presley testified credibly that a truck operator was reasonably likely to be killed were his truck to slip on the steep, muddy roadway, overtravel through the berm, and likely overturn as a result of plunging 40 to 50 feet down to the pit. Tr. 54-55. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary contends that Justice was moderately negligent in its insubstantial construction of the berm and failure to timely repair it after it had deteriorated, before permitting miners to haul on the roadway. Sec’y Br. at 8. On the other hand, Justice contends that Starcher timely repaired the berm. Resp’t Br. at 18. Crediting the evidence that Starcher had repaired the berm on the morning of inspection, the evidence is also clear that Justice’s remediation was short-lived or entirely missed its mark in the first place. Therefore, I find that Justice was moderately negligent in violating the standard.

C. Citation No. 8144193

1. Fact of Violation

Presley issued 104(a) Citation No. 8144193, alleging a “significant and substantial” violation of section 77.404(a) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Justice’s “moderate” negligence.⁸ The “Condition or Practice” is described as follows:

The company’s bus used as a mantrip is not being maintained in safe operating condition. When checked none of the brake lights work and none of the backup lights work. This machine is operated in low light, foggy, and rainy conditions on high traffic haul roads in off road terrain.

Ex. P-7. The citation was terminated when the back-up lights and brake lights were repaired.

The Commission has found that section 77.404(a) requires an operator to maintain machinery and equipment in safe operating condition, and to remove unsafe equipment from service. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979).

The Secretary argues that operating the bus with non-functional back-up and brake lights was unsafe, because other vehicles or pedestrians traveling on mine roads would have no visual warning of the bus stopping or reversing, in order to avoid collision. Sec’y Br. at 9-10. Justice makes counter arguments that the bus was in safe operating condition, that it was examined prior to commencement of the shift and found to have no defects, and that it could be operated safely even with inoperative rear lights, since head lights, strobe lights, a back-up alarm, reflective tape, and a CB radio alerted miners to the bus’ mode of operation. Resp’t Br. at 18-19.

Presley testified that none of the bus’ back-up or brake lights was working. Tr. 71-72. He opined that while the bus’ headlights and strobe light were operational, a pedestrian or vehicle following the bus could lose sight of its rear, especially in low-light or foggy conditions, likely leading to a collision. Tr. 71-74. In the case of a collision, miners inside the bus could suffer sprains, broken bones, or whiplash, and a miner run over by the bus operating in reverse could be killed. Tr. 74-75. Presley testified that the bus was being operated in this hazardous

⁸ 30 C.F.R. § 77.404(a) provides that “mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

condition twice each shift, and that pickup trucks and large mechanic trucks were operating on the same roads, at the same time that the bus was transporting miners to different work areas. Tr. 73, 219-20.

Witt initially testified to being very confident that the rear lights were working when the shift began, because the pre-operational examiner had not reported them as defective. Tr. 332-33. However, he later admitted that the pre-operational examination was inadequate, acknowledging that only one miner had been involved, while two are needed to check brake lights, and that the lights were not working when Presley inspected the bus. Tr. 346, 432. John Spencer, the bus driver but not the pre-operational examiner, testified that on the morning of January 13, prior to issuance of the citation, the bus had become stuck in a mud hole, which he offered as the cause of the lights failing; he admitted, however, that he had not checked the lights after that incident or prior to beginning his shift. Tr. 540-46. Spencer acknowledged encountering coal trucks, service trucks, and pickup trucks while running his route. Tr. 542-43. Browning attested to the bus using the same haul roads as tractor-trailer coal trucks, pickup, and mechanic trucks. Tr. 563-64.

While there is no evidence establishing that the bus' back-up lights were inoperative when the shift began, the unlikelihood of both lights failing simultaneously casts a shadow upon the thoroughness of the pre-operational examination, especially considering that the examination of the brake lights was shown to be inadequate - - if a check of the bus' rear lights was conducted at all. Operating the bus without functional rear lights, in close proximity to other multi-ton trucks and pedestrians, was highly unsafe and likely to result in vehicular collisions or pedestrians being struck. Therefore, I find that Justice violated section 77.404(a).

2. Significant and Substantial

The fact of the violation has been established. The second *Mathies* criterion has been satisfied, i.e., inoperative brake and back-up lights contributed to a collision hazard involving trucks or pedestrians. In analyzing the third and fourth *Mathies* criteria, I find that a collision between the bus and a mine truck would be reasonably likely to cause miners to suffer musculoskeletal injuries such as strains, sprains, and fractures and, if the bus were to strike a miner on foot, severe crush injuries or even death. Therefore, I find that the violation was S&S.

3. Negligence

Presley noted the unlikelihood of all rear lights failing at the same time, and concluded that the defective condition must have existed for quite some time and should have been discovered during the pre-operational examination. Tr. 76. Justice's argument, that an operator should be afforded a fair opportunity to correct reported pre-operational hazards, need not be addressed here, since it has been established that the bus' rear lights were not reported as defective in the first place. See Resp't Br. at 8. Because, at the very least, Justice failed to conduct a thorough pre-operational exam of the bus' rear lights, and also considering that the Secretary failed to establish the duration of their inoperative state, I find that Justice was moderately negligent in violating the standard.

D. Citation No. 8144194

1. Fact of Violation

Presley issued 104(a) Citation No. 8144194, alleging a “significant and substantial” violation of section 77.404(a) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Justice’s “high” negligence. The “Condition or Practice” is described as follows:

The company’s number 841 high wall drill is not being maintained in safe operating condition. When checked the operator side mast jack has almost ½" of slack near the pin on the barrel end and there are numerous oil leaks. These oil leaks are very excessive and can cause a function of the machine to malfunction or total loss of control. The oil leaks also cause and contribute to citation number 8144195.

These oil leaks were very obvious and listed in the pre-operational check list for this equipment. It’s obvious the equipment operator has done a good inspection but the operator failed to fix the conditions or remove the machine from service. These conditions have been cited numerous times in the past and violations issued today are placing management on notice of high enforcement action.

Ex. P-8. The citation indicates that it was terminated by Justice’s repair or replacement of the jack, and repair of the hydraulic hoses on the 841 highwall drill.

Arguing that excessive slack in the mast jack pin and leaking hydraulic hoses constituted defects affecting safety, the Secretary contends that since the drill is manufactured to allow for only an infinitesimal amount of slack in the pins, “no visible slack is safe.” Sec’y Br. at 12-13. Justice seems to be arguing that Presley could not determine any amount of slack without taking a measurement. Even if there were visible slack in the pin, Justice argues, Presley’s opinion that any visible slack is prohibited, without reference to the manufacturer’s specifications for the drill, is insufficient evidence for the Secretary to prove the violation. Resp’t Br. at 20-21.

Presley testified to two problems with the 841 highwall drill: visible slack in the pin on the barrel end of the mast jack, and numerous oil leaks. Tr. 78. He explained that the highwall drill mast is approximately thirty feet tall and supports a twenty-foot drill steel.⁹ Tr. 87. The mast is propped up by jacks which hinge to the bottom of the drill and provide support as it vibrates, changes heights, and cuts into the highwall. Tr. 78-79, 84-85. The jacks are secured to the mast by pins, which, according to Presley, are manufactured to fit snugly between the mast and the jack, without any visible slack. Tr. 80-85. However, he testified, when the operator raised and lowered the mast, he could see about a half inch of slack in the pin. Tr. 78-79, 230. He explained that a pin with any visible slack would be unable to effectively brace the mast against the pressure exerted by the continuously vibrating drill, and if the pin or the jack were to fail, the mast could fall and strike the operator or a bystander, resulting in broken bones and/or

⁹ A “drill steel” is a round or hexagonal steel rod for boring in coal, ore, or rock. It consists of a shank, a shaft, and a bit. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 171 (2d. ed. 1997).

sprains. Tr. 80-81, 87, 101-02. On cross-examination, Presley stated that in determining that the drill was unsafe to operate, he saw no need to consult the manufacturer's specifications, because ¼ or ½ inch of slack is clearly out of compliance; according to him, the specifications allow, at most, two or three thousandths of an inch of slack. Tr. 231-33.

Presley described the oil accumulated on the drill as "an area at least the size of this booth (the witness stand), the court reporter's and your (Judge's) bench, plum covered in hydraulic oil." Tr. 94-96. By his account, while he could identify the location of one leak, the drill was covered so extensively in hydraulic oil that he could not determine the other sources, stating that "it's like looking in a spider web of hydraulics and they're all covered with oil." Tr. 89-90. In his opinion, the leaks were likely to lead to loss of hydraulic pressure, which could result in the machine suddenly stopping or jerking sideways, causing the operator to be thrown about the cab. Tr. 90, 92-93. Additionally, if a hydraulic hose were to burst, it could strike a miner or spray him with hot oil. Tr. 90-91.

Witt testified that there was no slack in the mast jack pin but, if there were, the pin would have displayed obvious signs of wear. Tr. 348-52; Exs. R-22, R-23. Rodney Cox, the 841 drill operator, testified that he did not check for slack in the mast jack pin as part of his pre-operational examination, but that he had noted the oil leaks in his report, although he felt that the drill was safe to operate. Tr. 506-07, 515.

As has previously been discussed, Justice's photographs are of no probative value in determining the condition of the drill at the time of inspection. I credit Presley's testimony that he observed slack in the pin. Where the Secretary goes out on an unsupported limb, however, is by contending that no visible slack in the mast jack pin is permissible for safe operation of the drill. The Secretary provided no evidence of the manufacturer's specifications, which may be dispositive in determining whether operating the drill with ½ inch of slack is unsafe. As pointed out by the judge in a similar fact situation involving the same operator, the Secretary cannot carry his burden by simply asserting that any visible slack is unsafe operationally, absent objective evidence of manufacturer or industry specifications. *Justice Energy Company*, 36-37 FMSHRC ___, slip op. at 18-23, No. WEVA 2012-375 (January 20, 2015) (ALJ). Consequently, I find that the Secretary has not met his burden of proving that the visible slack in the mast jack pin constituted an unsafe operating condition.

Presley's observation of hydraulic oil leaks on the drill, however, was corroborated by Justice's own witness, and Cox's reporting of the condition lends credence to the inspector's contention that it was extensive. A ruptured hydraulic hose would likely result in broken bones from a miner being struck or thrown about the cab, or burns resulting from the miner's contact with hot oil. Consequently, I find that the Secretary has proven that Justice operated the 841 highwall drill in unsafe condition and, therefore, violated section 77.404(a).

2. Significant and Substantial

The first two *Mathies* criteria have been met, in that the violation has been established, and hydraulic oil leaks contributed to the hazards of sudden mast movement and hose failure. The third and fourth *Mathies* criteria, the reasonable likelihood of injury and its seriousness, have

also been met. A miner being thrown about the operator's compartment would be reasonably likely to suffer musculoskeletal injuries such as strains, sprains, or fractures, and a ruptured hose would likely result in burns or broken bones. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary contends that Justice should have been aware of the unsafe condition of the highwall drill, given the obviousness and extensiveness of the hydraulic oil leaks, and the operator's extensive history of section 77.404(a) violations. Sec'y Br. at 14. On the other hand, Justice contends that it was unaware of the condition, since Cox proceeded to operate the drill despite having reported the oil leaks, and the pre-operational report was not retrieved by management until after the citation had been issued. Resp't Br. at 10-12.

Presley testified that the oil leaks were obvious, considering that they were readily apparent as soon as he stepped out of his vehicle. Tr. 94. He also noted Justice's history of section 77.404(a) violations at Red Fox, and that he has discussed these issues with management officials during previous inspections. Tr. 95. Cox's pre-operational report of oil leaks totally discredits Superintendent Browning's testimony that the leaks were not reported and that management was not aware of the condition. Tr. 567-68. I find that the hydraulic oil leaks were extensive and obvious and, given the history of discussions between Presley and Red Fox's management about recurrent violations of a similar nature, that Justice should have been aware of the need to maintain the 841 highwall drill in safe operating condition, free of this defect. Therefore, I find that Justice was highly negligent in violating the standard.

E. Citation 8144195

1. Fact of Violation

Presley issued 104(a) Citation No. 8144195 alleging a "significant and substantial" violation of section 77.1104 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Justice's "high" negligence.¹⁰ The "Condition or Practice" is described as follows:

The company's number 841 high wall drill is not being maintained free of accumulations of combustible materials. When checked the excessive oil leaks cited in citation number 8144194 has caused oil to saturate the area under the operator's compartment, on and around the valve chests and area between the oil tank and operator's compartment, and all around the center section of the machine.

These oil leaks were very obvious and listed in the pre-operational check list for this equipment. It's obvious the equipment operator has done a good inspection but the operator failed to fix the conditions or remove the machine from service. These conditions have been cited numerous times in the past and violations issued

¹⁰ 30 C.F.R. § 77.1104 provides that "combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

today are placing management on notice of high enforcement action. This mine has had fires on equipment in the recent past.

Ex. P-9. The citation was terminated when the oil leaks were repaired and the drill was washed.

In establishing a violation of section 77.1104, the Secretary must demonstrate: (1) the presence of combustible material; (2) that the combustible material was allowed to accumulate; and (3) that the accumulations is located in an area where it can create a fire hazard. *See Maxxim Rebuild Co., LLC*, 35 FMSHRC 3261, 3268 (Oct. 2013) (ALJ); *Northwestern Resources*, 21 FMSHRC 431, 438 (Apr. 1999) (ALJ).

The Secretary argues that hydraulic oil is a “combustible liquid,” as defined by MSHA’s regulations, because it is a liquid mixture with a flashpoint of 374 degrees Fahrenheit.¹¹ Sec’y Br. at 20. Justice makes the counter-argument that the hydraulic oil on the drill was not combustible, and that the motor did not reach sufficient temperatures to cause an ignition. Resp’t Br. at 23. In support of its argument, Justice asserts that hydraulic oil is classified by OSHA as “not combustible,” and that the Material Safety Data Sheet (“MSDS”) for hydraulic oil states that it is not a fire hazard.¹² Resp’t Br. at 23; Ex. R-11 at 3, 6.

Presley testified that MSHA classifies hydraulic oil as combustible, and that it had accumulated in close proximity to the motor near the exhaust, and around electrical components near the operator’s cab. Tr. 96-98. He opined that the motor and electrical components were hot surfaces and that, if a hydraulic hose were to burst, it could squirt 3,000 pounds per square inch of oil onto the motor and turbo.¹³ Tr. 273. According to him, if the oil were to contact the turbo, which can reach temperatures over 1,000 degrees, a fire would occur. Tr. 267.

Witt testified that Justice used Chevron hydraulic oil in the 841 highwall drill and, according to the MSDS, it has a flashpoint of 374 degrees. Tr. 373-75; Ex. R-11 at 3. He stated that he took the temperature of the turbo and the engine block on the day of inspection, and observed that the turbo started out at about 800 degrees; when he excited the engine, the turbo temperature increased to 1200 degrees, and the temperature of the engine block was 295 degrees. Tr. 373. He added that no more than a light film of oil was visible, that it was at least two feet away from the turbo, and that there was no oil under the operator’s compartment. Tr. 367-69, 372; Exs. R-18, R-19, R-20, R-21.

¹¹ The term “flashpoint” is defined as “the minimum temperature at which sufficient vapor is released by a liquid or solid to form a flammable vapor-air mixture at atmospheric pressure.” 30 C.F.R. § 77.2(r).

¹² The MSDS, required for each hazardous chemical used by mine operators, lists flashpoints and autoignition temperatures. 30 C.F.R. § 47.51. There is no evidence in the record that the cited oil accumulations were exposed to temperatures sufficient for autoignition.

¹³ Testifying respecting the 834 drill, Presley explained that the turbo is housed in the exhaust. Tr. 264. A “turbocharger,” also known as a “turbo,” is a device that supplies air to an engine at a higher pressure than normal to increase the engine’s power. *Merriam-Webster Online Dictionary*. 2015. www.merriam-webster.com. (2 Feb. 2015).

The Commission has recognized the definition of “combustible” as “capable of being ignited and consumed by fire.” *FMC Corporation*, 6 FMSHRC 1566, 1567 (July 1984). Several judges have applied this or a similar definition in addressing underground coal violations. *Garden Creek Pocahontas Company*, 15 FMSHRC 2126, 2140 (Oct. 1993) (ALJ); *Shamrock Coal Company*, 12 FMSHRC 2098, 2102 (Oct. 1990) (ALJ); *Eastern Associated Coal Corporation*, 12 FMSHRC 239, 244 (Feb. 1990) (ALJ).

The Secretary’s position that hydraulic oil is combustible is supported by the MSDS, which states that “[t]his material will burn although it is not easily ignited.” Ex. R-11 at 3. Although Justice argues that there was no possibility of an ignition given that the engine temperature did not reach the flashpoint of hydraulic oil, it fails to rebut the evidence that a burst hydraulic hose could spew oil onto the turbo, which, according to Witt’s measurement, reached 1200 degrees, a temperature far exceeding the oil’s flashpoint. As noted in *Justice Energy Company*, affirming similar violations of section 77.1104 for accumulations of hydraulic oil on highwall drills at the Red Fox mine, a failure of a hydraulic hose is reasonably likely to atomize the oil and spray it onto hot engine surfaces, including the exhaust and the turbo. 36-37 FMSHRC ___, slip op. at 9-12, 17. Accordingly, I find that, given continued drilling, hydraulic oil would be reasonably likely to spew onto the exhaust and turbo, resulting in an ignition. Therefore, I find that section 77.1104 was violated.

2. Significant and Substantial

The fact of violation has been established, and the violation contributed to the hazard of an engine fire. Again, the focus here is the likelihood and seriousness of injury. I find that ignition of the hydraulic oil is reasonably likely to cause burns or smoke inhalation of a serious nature, which would be reasonably likely to result in, at least, lost workdays or restricted duty. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary reiterates that the extensiveness of the accumulations indicates that they had developed over an extended period of time and were obvious, and that Justice’s history of highwall drill violations should have put the operator on notice of the need to maintain them free of combustible accumulations. Sec’y Br. at 14. Justice, again, argues that that Cox operated the drill despite noting the oil leaks in his pre-operational report, and that management was not made aware of the report until after the citation was issued. Resp’t Br. at 12. The volume of oil that Presley observed indicates that the accumulations developed over multiple shifts, and Justice’s management, having been put on notice of drill maintenance issues, should have had a heightened awareness of this condition. Therefore, I find that Justice was highly negligent in violating the standard.

F. Citation No. 8144196

1. Fact of Violation

Inspector Presley issued 104(a) Citation No. 8144196, alleging a “significant and substantial” violation of section 77.404(a) that was “reasonably likely” to cause an injury that

could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Justice’s “high” negligence. The Condition or Practice” is described as follows:

The company’s number 834 high wall drill is not being maintained in safe operating condition. When checked the following conditions exist: 1. There is better than ¼" of slack in the fits at the mast jack on the off side. 2. There is ¼" or more of slack in the fit at the hinge pin for the mast on the off side. 3. The frame work for the mast has too many cracks and breaks to list all the locations. 4. Both pull down chains are so loose they have cut into the gussets for the framework on the mast. 5. There is no cab filter. 6. The mat on the floor of the cab has the tread wore out causing a slip, trip, or fall hazard. 7. The machine has numerous oil leaks that affect the function ability of the machine. 8. The mast pin lights do not work. 9. The framework for the elevated walkway has several cracks and breaks.

The oil leaks were very obvious and listed in the pre-operational checklist for this equipment. It’s obvious the equipment operator has done a good inspection but the mine operator failed to fix the conditions or remove the machine from service. These conditions have been cited numerous times in the past and violations issued today are placing management on notice of high enforcement action.

Ex. P-10. The citation was terminated after the conditions were addressed.

Presley described for the record the nine defects that he observed on the highwall drill and cited. Tr. 100-12. He testified that slack in the mast jack pin and hinge pin contributed to the hazard of a mast failure, and that a falling mast could strike the drill operator or a pedestrian, or jar the machine, throwing the drill operator around the cab. Tr. 102. Addressing the mast, Presley stated that it had at least 30 cracks and breaks in the supports, and that it was in “horrible shape.” Tr. 104-05. He described the pull-down chains as having so much slack that they were sawing into the framework of the mast. Tr. 106. Addressing the absence of a cab filter, he stated that operation of the drill generates dust. Tr. 107. He recalled slipping when he entered the cab and noticing a hole in the mat exposing the metal underneath; he opined that since the machine was covered in oil, a miner moving about the cab in rubber-soled boots could slip, trip, or fall, causing a broken ankle or wrist, or head injuries. Tr. 108-09. Focusing on the oil leaks, he testified that hydraulic and motor oil leaks were so numerous that he could not determine their origin. Tr. 110, 117. Addressing the mast pin light, he pointed out that the light indicates that the mast is locked in place for drilling and, without that indicator, the operator could be unaware that the mast has become unlocked. Tr. 111-12. Finally, Presley testified that there were more broken than unbroken cross-braces in the framework of the elevated walkway, and that he could lightly “bounce up and down the catwalk and sit there and watch the cracks separate.” Tr. 112-13. He opined that should the walkway collapse, a miner could fall to the rocky ground below. Tr. 113-14. On rebuttal, Presley testified that Justice’s photographs, purporting to show the condition of the 834 drill at the time of his inspection, did not depict the violative conditions that he had observed. Tr. 603-620; Exs. R-24, R-26, R-28, R-29, R-30, R-31, R-32, R-35, R-36.

Witt testified that Presley visually inspected the mast jack pin, and told him that the pin was moving. Tr. 377. While he admitted that there were some cracks in the webbing of the mast, he stated that none had broken all of the way through the metal, and that they did not pose a hazard. Tr. 382-83, 390. Witt also opined that the amount of slack in the pull-down chains was the machine's regular operational state. Tr. 402-03. According to him, the cab had an air filter, and no metal was showing through the floor mat, as evidenced by a photograph, taken three and a half or four hours after the citation was issued, showing wear, but no hole in the floor mat. Tr. 404-06; Ex. R-36. Addressing the inoperative mast pin light, Witt stated that more experienced drill operators can use alternative methods to ensure that the mast is locked, and that these lights were only developed several years ago. Tr. 408-09. Finally, Witt acknowledged that there was a crack in the metal frame of the walkway, but stated that it was "rigid and still . . . we was all up there walking around on it." Tr. 409.

John Spencer, operator of the 834 drill, essentially corroborated Witt's testimony, and disagreed with nearly all of Presley's contentions. Tr. 529-45, 548-50. He testified that during his inspection of the drill, Presley became angry after he stepped into the cab and slipped. Tr. 526. Spencer admitted that the floor mat was worn, but opined that the mat would prevent him from slipping and falling. Tr. 529, 538-39. He also admitted that the drill had oil leaks, but contended that it was safe to operate. Tr. 529. Spencer added that the mast pin light consists of two bulbs: green indicating that the mast is locked, and red indicating that it is unlocked. Tr. 530-31. According to him, one of the bulbs was not functioning, although he could not remember which one, but he was able to determine whether the mast was locked based on whether the functional bulb was illuminated. Tr. 530-31.

The evidence establishes that the cited defects, with the exception of slack in the mast jack and hinge pins, rendered the drill unsafe to operate. As discussed previously respecting the 841 highwall drill, the Secretary has not established that ¼ inch of slack in the pins renders the drill unsafe to operate, absent evidence of manufacturer or industry specifications. Regarding the other defects, however, Justice does not dispute that there were cracks in the framework of the mast and walkway, slack in the pull-down chains, hydraulic and motor oil leaks, and a defective mast pin light. Justice's photograph, purporting to depict the cited mat, is of no probative value, as has been previously discussed. Moreover, with the exception of the pins, the evidence as a whole establishes the defects that Presley cited, and I find that the drill was unsafe to operate in that condition. Therefore, based on the fact that the 834 highwall drill was operating with a combination of numerous defects, I find that section 77.404(a) was violated.

2. Significant and Substantial

The first two *Mathies* criteria have been met, in that the violation has been established, and the violation heightened the danger of sudden mast movement, mast failure, and walkway failure. The third and fourth *Mathies* criteria, the reasonable likelihood of injury and the seriousness of injury, have also been met. Sudden mast movement and hose rupture would likely result in the operator being thrown about the cab, struck by a hydraulic hose, or sprayed by hot oil. Mast failure would likely result in the mast toppling onto a miner, and walkway failure would likely result in a miner falling to the ground. Any of these hazards would cause serious

injuries ranging from broken bones and sprains to potentially fatal crush injuries. Consequently, I find that the violation was S&S.

3. Negligence

At the very least, loose pull-down chains and oil leaks were defects noted in the pre-operational report. Indeed, Presley's contention, that the drill was in such poor shape that the operator should have known of its defective condition just by driving around on-site, is supported by the record. Tr. 117. Therefore, due to Justice's operation of the 834 highwall drill with numerous, obvious and extensive serious defects, I find that it was highly negligent in violating the standard.

G. Citation 8144197

1. Fact of Violation

Presley issued 104(a) citation No. 8144197 alleging a "significant and substantial" violation of section 77.1104 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Justice's "high" negligence. The "Condition or Practice" is described as follows:

The company's number 834 high wall drill is not being maintained free of combustible materials. When checked there is a leak at one of the pumps, and there is a leak on the off side of the hot running motor behind the hot running exhaust. The company has been cited for this condition before and removed the heat shield and factory equipment that was designed for the location around the exhaust.

These oil leaks were very obvious and listed in the pre-operational check list for this equipment. It's obvious the equipment operator has done a good inspection but the operator failed to fix the conditions or remove the machine from service. These conditions have been cited numerous times in the past and violations issued today are placing management on notice of high enforcement actions. This mine has had fires on equipment in the recent past.

Ex. P-11. This citation was terminated when the leaks were repaired and the drill was washed.

Presley described the oil accumulations on the 834 drill as twice as bad as the accumulations on the 841 drill, explaining that the drill had strings of hydraulic oil running down the machine and motor oil leaking directly behind the turbo. Tr. 117-19, 264. Presley observed a hydraulic hose leaking oil, and opined that it could have burst at any time and sprayed oil onto the turbo, causing an ignition. Tr. 266, 274. He testified that motor oil is also combustible and given its proximity to the turbo, it was reasonably likely to catch fire. Tr. 119, 264-67, 274. In his opinion, were oil to contact the turbo, "we'd have been fighting a fire, not citing the conditions that could have caused a fire." Tr. 267. He also noted that Justice had removed the heat shield, a manufacturer's safety feature designed to protect the motor from the extreme heat of the turbo. Tr. 119-120, 274.

Justice's witnesses, Witt and Spencer, did not dispute that some hydraulic and motor oil had leaked on the 834 drill. Witt testified that there was no oil on the turbo, but that there was a film of motor oil ten inches from the top of it, and oil residue behind the exhaust. Tr. 412. He measured the temperature of the engine block at 195 degrees, and the exhaust at 295 degrees. Tr. 412. Spencer characterized the drill as only having "normal" oil leaks. Tr. 529.

The MSDS for Chevron motor oil states that it will burn, and that it has a flashpoint of 399 to 446 degrees. Ex. R-9 at 3. To reiterate, according to the MSDS for hydraulic oil, it will burn and has a flashpoint of 374 degrees. Justice applies the same defenses to the citations on the 834 drill that it argued for the 841. Resp't Br. at 23-24. According to the evidence, the temperature of the turbo was not taken during the inspection of the 834 drill. By analogy, then, given that Justice has made no distinction between the model of the drills, it is reasonable to conclude that they are similar and that the turbo on the 834 drill also reaches the temperature extremes measured by Witt on the 841 drill, which far exceed the flashpoints of hydraulic and motor oil. The evidence demonstrates that Justice permitted combustible oils to accumulate in close proximity to the hot turbo and, were either oil to make contact, an ignition would have occurred. Therefore, I find that Justice violated section 77.1104.

2. Significant and Substantial

The S&S analysis respecting the 834 highwall drill follows the same reasoning applied to the 841 drill. I find that this hazardous condition was very dangerous, and that a miner would be reasonably likely to suffer serious burns and smoke inhalation were an ignition to occur. Therefore, I find that this violation was S&S.

3. Negligence

Considering that oil accumulations on the 834 highwall drill were twice that of the accumulations on the 841, it is readily apparent that this condition had existed over an extended period of time and was extensive. Moreover, Justice's negligence was heightened by its removal of the manufacturer's protective heat shield. Consequently, I find that Justice was highly negligent in operating the drill with significant oil accumulations in close proximity to the turbo, posing a serious fire hazard.

IV. Penalties

While the Secretary has proposed civil penalties totaling \$220,008.00, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

I find, and the parties have stipulated, that Red Fox is a large mine, and that the proposed penalties will not affect the operator's ability to continue in business. Stips. 6, 10. In reviewing Justice's Assessed Violation History Report for the fifteen-month period preceding the subject inspection, twenty-six violations of section 77.404(a) had become final orders of the

Commission; eight violations of section 77.1104 had become final; and one violation of section 77.1608(a) had become final. Ex. P-14. Presley testified that Justice has consistently received section 77.404(a) violations for inadequate highwall drill maintenance, and that he has personally discussed this problem with the operator on numerous occasions. Tr. 95, 99. Justice makes no argument respecting its violations history, and I find it to be a significant aggravating factor in assessing appropriate penalties. I also find that Justice demonstrated good faith in achieving rapid compliance after notice of the violations.

The remaining criteria involve consideration of the gravity of the violations, and Justice's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 8144189

It has been established that this S&S violation of section 77.1608(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$3,143.00, as proposed by the Secretary, is appropriate.

B. Citation No. 8144190

It has been established that this S&S violation of section 77.1605(k) was reasonably likely to cause an injury that could reasonably be expected to be fatal, that Justice was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$10,437.00, as proposed by the Secretary, is appropriate.

C. Citation 8144193

It has been established that this S&S violation of section 77.404(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$40,180.00, as proposed by the Secretary, is appropriate.

D. Citation No. 8144194

It has been established that this S&S violation of section 77.404(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was highly negligent, and that it was timely abated. Therefore, in consideration of the hazardous condition of the drill, but the Secretary's failure to establish visible slack in the mast jack pin as inherently hazardous, I find that a penalty of \$35,000.00 is appropriate.

E. Citation No. 8144195

It has been established that this S&S violation of section 77.1104 was reasonably likely

to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was highly negligent, and that it was timely abated. Therefore, I find that a penalty of \$37,416.00, as proposed by the Secretary, is appropriate.

F. Citation No. 8144196

It has been established that this S&S violation of section 77.404(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was highly negligent, and that it was timely abated. Therefore, in consideration of the hazardous condition of the drill, but the Secretary's failure to establish visible slack in the mast jack and hinge pins as inherently hazardous, I find that a penalty of \$35,000.00 is appropriate.

G. Citation No. 8144197

It has been established that this S&S violation of section 77.1104 was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was highly negligent, and that it was timely abated. Therefore, I find that a penalty of \$37,416.00, as proposed by the Secretary, is appropriate.

V. Approval of Settlement

The parties have filed a Joint Motion to Approve Partial Settlement respecting two of the nine citations involved in this docket. A reduction in penalty from \$35,984.00 to \$25,189.00 is proposed. The citations, initial assessments, and proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Initial Assessment</u>	<u>Proposed Settlement</u>
8144191	\$31,988.00	\$23,000.00
8144192	\$ 3,996.00	\$ 2,189.00
TOTAL:	\$35,984.00	\$25,189.00

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act. Specifically, regarding Citation No. 8144191, the Secretary has credited Respondent's contentions that the motor oil accumulated on the engine of the bus would not likely rise to a temperature that would cause combustion during short periods of operation and, in the event of an ignition, fewer than eight persons would likely be affected. Regarding Citation No. 8144192, the Secretary has credited Respondent's contentions that the fire extinguisher on the bus was full and, in the event of an ignition, fewer than eight persons would likely be affected. I conclude that the proffered settlement is appropriate under section 110(i) of the Act.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 8144189, 8144190, 8144193, 8144194, 8144195, 8144196 and 8144197 are **AFFIRMED**, as issued; that the Secretary **MODIFY** Citation Nos. 8144191 and 8144192 to reduce the level of gravity to “unlikely,” “non-significant and substantial” and “two persons affected;” and that Justice Energy Company, Incorporated, **PAY** a civil penalty of \$223,781.00 within 30 days of the date of this Decision. ¹⁴



Jacqueline R. Bulluck
Administrative Law Judge

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/ss

¹⁴ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.