

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

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July 21, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	(Judge Lewis)
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. SE 2010-566
	:	A.C. No. 40-02545-210961
v.	:	
	:	
CARMEUSE LIME & STONE,	:	
Respondent,	:	Mine Name: Lime Plant

**DECISION**

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, on behalf of the Secretary of Labor;  
R. Henry Moore, Esq., Jackson Kelly PLLC, on behalf of Carmeuse Lime and Stone.

Before: Judge John Kent Lewis

This case is before me on a petition for assessment of civil penalty, filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”) against Respondent, Carmeuse Lime and Stone, Inc., (“Respondent”), at its lime plant pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815 and 820 (“Mine Act” or “Act”). The case originally involved one docket with twelve (12) violations, and an assessed a total penalty of \$16,670.00. Prior to the hearing, the parties filed a motion to approve a partial settlement of six of the citations for a penalty of \$1,339.00.

This court has reviewed the documentation and representations submitted as to the aforementioned six citations.<sup>1</sup> I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly, an order approving the partial settlement and directing payment of those penalties is incorporated into this decision.

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<sup>1</sup> The following Citations are addressed pursuant to the settlement agreement: 6596509; 6596510; 6596513; 6596514; 6596519; 6596529.

As to the remaining six (6) citations, the parties presented testimony and documentary evidence at the hearing held on April 28, 2011 in Knoxville, Tennessee. The parties filed post-hearing briefs.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Carmeuse Lime and Stone operates the Luttrell Lime Plant in Union County, Tennessee. The Luttrell operation mines limestone from underground and surface mines. The Plant produces lime, hydrate, limestone, and aggregate products for sale into the environmental, chemical, metallurgical, construction, building materials, agricultural, and consumer product markets. *See, inter alia*, Wolfenbarger Affidavit, Respondent Exhibit (Res. Ex.) 1, at 1.

The parties have stipulated, *inter alia*, that the operator is medium in size, that its mine's operations affect interstate commerce, that it is subject to the jurisdiction of the Mine Act and that the proposed penalty will not affect the operator's ability to proceed in business. *See* Joint Motion to Approve Partial Settlement. *See also* stipulations at Government Exhibit (Gov. Ex.) 1.

At hearing the parties also stipulated as to Respondent's violation history as set forth at Gov. Ex. 27 based upon the Secretary confirming that "0" on said "assessed violation history report" meant a vacated citation. *See* Hearing Transcript (Tr.) 20. The Secretary confirmed this interpretation by letter, dated May 10, 2011.

#### A. Citation No. 6596503

On January 5, 2010, Inspector Joe Norwood issued Citation No. 6596503 to Carmeuse Lime and Stone for a violation of 30 C.F.R. §56.12034. The citation alleged:

The 208 volt light attached to and about 20 inches above the handrail. Located on the 113 head pulley platform was not guarded to protect miners from accidental contact. Possible contact with the light result in electrical shock, burns, and/or cuts.

Gov. Ex. 2.

The inspector found that an injury was unlikely to occur, that an injury could reasonably be expected to be fatal, and that the negligence was high. *See* Gov. Ex. 2. Although inspector Norwood had originally indicated in his citation that the violation was not significant and substantial, he averred in his pre-hearing affidavit that it was significant and substantial ("S&S"). Norwood Aff. Gov. Ex. 2A, at 7. At the hearing Norwood testified that, upon further reflection, he was of the opinion that the violation was not significant and substantial.<sup>2</sup> *Compare* Norwood Aff. Gov. Ex. 2A, at 7, *with* Tr. 18, *and* Gov. Ex. 2. The Secretary accordingly agreed not to

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<sup>2</sup> In its pre-hearing Order, this court, over objections of the Secretary and Respondent, requested that the parties submit all direct examinations of each witness in writing in the form of an affidavit.

pursue such as an S&S<sup>3</sup> designation. *See* Tr. 17.

The standard for citation 6596503, 30 C.F.R §56.12034, Guarding Around Lights, reads, “Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.” 30 C.F.R §56.12034 (2010).

At hearing, Inspector Norwood testified that the unguarded light was a mercury light, which was alongside a metal walkway. It was located on the corner where a miner would go up and down the steps. Norwood Aff. Gov. Ex. 2A, at 6. The area where the light was located was traveled heavily, as it went to the head pulley. *Id.* Donnie Wolfenbarger, Respondent’s plant manager, had advised Norwood that one miner would use the walkway at least once per shift. *Id.* The line plant operated two shifts per day, five days per week, beginning at approximately 6:00 A.M. and lasting until 10:00 P.M. or 11:00 P.M. Norwood Aff. Gov. Ex. 2A, at 6; Tr. 26.

Norwood opined that, given the icy and wet weather conditions, a miner could easily slip and then stumble into the light, subjecting him to a shock or burn hazard. A person hitting the light could break the bulb and be exposed to the full 208 voltage, resulting in possible electrocution and death. Norwood Aff. Gov. Ex. 2A, at 7; Tr. 32.

At hearing Mr. Wolfenbarger disagreed that the unguarded light constituted a hazard in that the light was pointed toward stone piles away from the walkway where persons would travel. Tr. 46. Anyone stumbling into the light would be exposed to the back of the light, not to the bulb. Wolfenbarger further denied that there was any work order pertaining to the light in question. Wolfenbarger Aff. Res. Ex. 1, at 7; Tr. 47.

#### ANALYSIS

The record clearly establishes that the location of the unguarded light in question was a violation of §56.12034 in that a shock, burn or cut hazard existed. Given the location of the light on a walkway and the poor weather conditions, there was a risk that a miner could come into contact with the light and be exposed to a fatal shock. *See inter alia* Gov Ex. 3. The ALJ accepts the testimony of Inspector Norwood and the Secretary’s argument that a shock hazard, however remote, was existent and could reasonably be expected to result in death. Tr. 18; *See also* Secretary’s (Sec’y’s) Post-Trial (PT) Brief (Br.) 4-5.

I find, given the totality of the circumstances, including that the light was pointing away from any approaching miner, that it was “unlikely” that any injury could occur. Indeed, the Secretary conceded such. *See* Tr. 17.

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<sup>3</sup> “Significant and substantial” is a term included in section 104(d)(10) of the Act, which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a ...mine safety or health hazard.” (30 U.S.C. §814(d)(1)).

The Secretary's position was that the negligence associated with the violation was high, but I find that the negligence is moderate. I resolve the conflict in the record as to how long the hazardous condition existed and when Respondent had notice of such in favor of Respondent. *Compare* Tr. 39 (Inspector Norwood claims Mr. Wolfenbarger told him there was a work order placed during a plant shut down that occurred between December 18, 2009 to January 4, 2010), *with* Tr. 44 (Wolfenbarger denies memory or record of work order before January 5, 2010). Furthermore, Respondent had abated the violation within the time frame given. Norwood Aff. Gov Ex. 2A, at 8; Tr. 39. Therefore, I find that the Secretary has not carried the burden of proving a high level of negligence on the part of Respondent.<sup>4</sup> Accordingly, this court finds that Respondent's negligence was moderate.

Based upon the foregoing, including evaluation of the six statutory criteria set forth in Section 110(i) of the Act, I find that a reduced penalty of \$1,000.00 is warranted for this citation.

#### B. Citation No. 6596504

On January 5, 2010, Inspector Norwood issued Citation No. 6596504 to Respondent for violation of a mandatory safety standard at 30 C.F.R. §56.11002. This citation reads:

Seven sections of toe boards were removed on the top of the chat bin. The openings measured from about 56 inches to about 18 inches. The walkway on top of the bin is used each shift. Miners were observed walking and operating mobile equipment about 40 feet below. Miners being struck from falling material from this height could be seriously injured.

Gov. Ex. 4.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be permanently disabling, and that the negligence was high. *See* Gov. Ex. 4. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. Norwood Aff. Gov Ex. 2A, at 13.

The mandatory standard at §56.11002, "Handrails and toeboards" sets forth the following: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of a substantial construction provided with handrails, and maintained in good condition. Where necessary, toe boards<sup>5</sup> shall be provided." 30 C.F.R. §5611002.

At hearing, Inspector Norwood described the area in question as an elevated walkway or travelway on top of the chat bin. *See* Gov. Ex. 5; Norwood Aff. Gov. Ex. 2A, at 11; Tr. 65.

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<sup>4</sup> 30 CFR § 100.3, in pertinent part, defines negligence as "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."

<sup>5</sup> A toe board is a vertical barrier at floor level that is erected along exposed opening, such as a floor opening, platform, or runway. Toe boards prevent objects such as tools and materials from falling from one level to the next.

Conversely, Mr. Wolfenbarger contended that the area in question was not a cross-over, walkway, ramp or stairway. Rather it was a platform not regularly traveled by individuals. Wolfenbarger Aff. Res. Ex. 4, at 7; Tr. 81. He did admit, however, that miners cleaned the platform once a week and performed maintenance on it on rare occasions. Tr. 79-80.

When a miner cleans the platform, Mr. Wolfenbarger testified that the road below was barricaded to protect miners underneath from falling gravel. Tr. 75. According to Inspector Norwood's testimony, however, the flagging he witnessed was not a barrier that would prevent miners from passing underneath. Tr. 71.

#### ANALYSIS

The Secretary has contended that this violation was significant and substantial in nature. 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). The Commission has explained that:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7<sup>th</sup> Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Respondent has essentially asserted that the Secretary has failed to prove any of the four prongs of *National Gypsum*.

At hearing sufficient evidence was provided by the Secretary to show that individuals walked in the area in question such that it can reasonably be found to be an "elevated walkway" within the meaning of §56.11002 provisions. Whether utilizing a "Chevron I or II analysis," this Court finds that the Secretary has properly construed the area in question as an elevated walkway. The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 US 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 US at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990) [FN4]. If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's

interpretation of a statute is a reasonable one. *See Chevron*, 467 US at 843-44; *Thunder Basin*, 18 FMHSRC at 584 n.2. Deference is accorded to “an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy West Mining Co. v. FMHSRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 US at 844). The agency’s interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 US at 843; *Joy Technologies, Inc. v. Sec’y of Labor*, 99 F.3d 991, 995 (10<sup>th</sup> Cir. 1996), *cert denied*, 520 US 1209 (1997). *See* Tr. 65 (Wolfenbarger takes Norwood to platform on chat bin).

This court further credits the testimony of Inspector Norwood that required toeboards were missing at various places in the elevated walkway. *See* Gov. Exhibits 7, 8, 9, 10, 11, and 12; Norwood Aff. Gov. Ex. 2A, at 12; Tr. 63.

Therefore, this court finds that there was an underlying violation of §56.11002.

Further, I credit the testimony of Inspector Norwood that this citation created a discrete safety hazard -- that is, exposure to falling objects, including chat and maintenance tools.

The challenge in finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations continued. *Elk Run Coal Co.*, FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

There is a reasonable likelihood that missing toeboards could allow falling debris to strike and injure miners. Inspector Norwood stated that he had observed miners walking and operating mobile equipment below the travel way. Norwood Aff. Gov. Ex. 2A, at 13. This fact undermines Respondent’s claims that the area was only traveled on an “as needed” basis or that barricading was erected to prevent individuals from traveling under the area. *See* Tr. 76; Wolfenbarger Aff. Res. Ex. 4, at 8. By bringing Norwood onto the chat bin with workers beneath, Wolfenbarger showed that people used the top of the chat bin without barricading the

area underneath.

It is reasonably likely that a miner on top of the chat bin could kick objects onto miners below, causing injury. Toeboards would stop tools or gravel from falling off of the edge of the chat bin. I find that the violation meets the third prong of the *Mathies* test for S&S.

Moreover, it is reasonable that falling chat or tools could injure a miner in a reasonably serious nature. Even small gravel falling 30 to 40 feet could cause severe injuries if it struck a miner. A falling tool striking a miner could cause a broken back, severe concussion, or other permanently disabling injuries. Thus, I conclude that there is a reasonable likelihood that the injuries caused by exposure to falling debris or tools would be of a reasonably serious nature so as to satisfy *Mathies*' fourth prong.

For this citation, the Secretary assessed a penalty of \$2,678.00. The Commission outlined its authority for assessing civil penalties in *Douglas R. Rushford Trucking*, stating that "the principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established." 22 FMSHRC 598, 600 (May 2000). While the Secretary's point system in 30 C.F.R., Part 100 provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id.* Thus, a commission judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The *de novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

Nevertheless, after reviewing all of the relevant facts and weighing the §110(i) factors applicable to such, I find no reason to depart upward or downward from the penalty amount arrived at by the Secretary. Accordingly the \$2,678.00 penalty is warranted.

### C. Citation No. 6596506

On January 5, 2010, Inspector Norwood issued Citation No. 6596506 to Respondent which averred as follows:

Toe boards were not provided for a 44 inch walkway at the pre-heater ram platform. Miners were observed working about 35 feet below. Miners travel this area each shift. Being struck from falling material from this height could cause serious injury.

Gov. Ex. 15.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be permanently disabling, and that the negligence was moderate. *See* Gov. Ex. 15. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. Norwood Aff. Gov Ex. 2A, at 18.

The mandatory safety standard at §56.11002 has already been cited *supra*.

At hearing, Mr. Wolfenbarger testified that the walkway in question, which led to a step to the platform, had a toeboard. Tr. 93. The cited toeboard or lip was a grated metal extension fabricated by Respondent which had approximately 1.5 inch designed height. *Id.*; *See inter alia* Wolfenbarger Aff. Res. Ex. 5, at 8. Although Inspector Norwood admitted that MSHA does not have a height requirement for toeboards, he did not feel that 1.5 inches was adequate to prevent miners from accidentally kicking objects off of the walkway. Tr. 84. Other sections of the walkway had toeboards with a height of about 4 inches. *See* Tr. 89.

Miners used the walkway both to access the step to the ram platform and as a work platform. *See* Tr. 86. According to Mr. Wolfenbarger, miners traveled this area each shift. Norwood Aff. Gov Ex. 2A, at 17.

Miners were working directly below this section of walkway. Inspector Norwood feared that they could be struck by falling objects. Tr. 85. Although Mr. Wolfenbarger did not deny that men were working below the walkway, he does not believe that they could be struck by falling objects. Tr. 91.

#### ANALYSIS

It was Respondent's position that the 1.5 inch toe board was of sufficient height to prevent tools or other items from falling off of the walkway. As there was no specific height requirement for toe boards in §56.11002, Respondent asserted that no violation had occurred. *See* Wolfenbarger Aff. Res. Ex. 5, at 7; Tr. 94.

I reject Respondent's argument that the 1.5 inch lip would be of sufficient height to prevent chat or tools or other objects from accidentally being kicked over the side. The toe boards in the immediately adjoining areas were several inches higher and plainly more suited to preventing injury from falling objects. Although there is no set statutory standard for the height of toe boards, I agree with Inspector Norwood's assessment that the lip of the grated area in question was clearly not of sufficient height to prevent chat or tools from accidentally being kicked over the top of such.

After careful review of the record, including a consideration of factors set forth in the previous citation analysis, I again find that a violation of §56.11002 took place as to this subject area, that a discrete safety hazard – exposure to falling objects – was created. There was a reasonable likelihood that the hazard contributed to would result in an injury, and that there was a reasonable likelihood that the injury in question would be of a reasonably serious nature. Thus, I conclude that the citation was properly designated S&S.

Accordingly, the assessed penalty of \$807.00 is appropriate for citation 6596506.

#### D. Citation No. 6596515

On January 5, 2010, Inspector Norwood also issued Citation No. 6596515 to Respondent,

reporting that: “The 120 volt power cord plugged into the Lincoln pull along welder had the outer jacket rotted and cut. The inner conductors were exposed to the sharp metal, vibration and weather.” Gov. Ex. 18.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be fatal, and that the negligence was moderate. *See* Gov. Ex. 18. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. Norwood Aff. Gov Ex. 2A, at 24.

Standard 30 C.F.R §56.12004, electrical conductors, reads: “Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected.” 30 C.F.R §56.12004.

At hearing, Inspector Norwood testified that although the 120 volt cord carried the same voltage as in a residential home, it could still provide a fatal shock. Tr. 96. At the time of the inspection, the cord was not in use. Moreover, Mr. Buck testified that he did not know how long the cord was there or when it had last been used. Tr. 106.

Harold Hoskins, an employee of Respondent, does not believe that the inner conductor of the cord was damaged and, therefore, the cord was unlikely to shock any miners. Tr. 110.

Mr. Hoskins and Inspector Norwood disagree as to whether a 20 amp breaker providing overcurrent protection would protect a miner from receiving a shock from the cord. Hoskins suggested that it would, while Norwood was adamant that it would do nothing to protect a miner from a fatal injury. *Compare* Tr. 109 (Hoskins), *with* Tr. 118 (Norwood).

#### ANALYSIS

Respondent does not contest the violation of the mandatory safety standard at §56.12004. Respondent, however, does contest the designation of the violation as S&S.

The condition of the inner circuits of the cord is immaterial because the discrete safety hazard of exposure to electric current existed due to the damage to the outer jacket. I agree with the Secretary that the inner insulation did not provide protection from mechanical damage. The same work conditions that damaged the outer jacket could also damage the inner insulation, leading to the immediate exposure of a miner to electric current. The mandatory safety standard at §56.12004 specifically requires protection from mechanical damage to prevent this scenario. Damage to the outer jacket of the power cord would expose miners to electric current under normal working conditions, creating a discrete safety hazard.

Although the cord was deenergized during the inspection, it could be reenergized and used at anytime. Thus, it is reasonably likely that the hazard of exposure to electric current could contribute to an injury. The damage to the outer jacket of the power cord could injure any miner who came in contact with it, and every time the welder was used, there was a risk that a miner

could come into contact with the cord. The discrete safety hazard of exposure to electric current was reasonably likely to contribute to an injury.

Furthermore, I credit Inspector Norwood's testimony that the 20 amp breaker would not protect a miner from injury. I likewise reject Respondent's argument that the conductor was not powerful enough to be a hazard and find that the power cord could reasonably cause a fatality. Respondent argues that because the electrical conductor in question only carried a level of voltage common to residential dwellings (120 volts), it would not pose a significant safety hazard to miners if exposed to mechanical damage. Res. PT Br. 22. Inspector Norwood testified that exposure to 120 volts of electricity kills more people than exposure to any other voltage. Tr. 101. Mr. Hoskins also testified that 120 volts can kill a person. See Tr. 112. It is reasonable that exposure to 120 volts could cause an injury of a reasonably serious nature.

It is reasonably likely that the discrete safety hazard of exposure to electric current caused by the damaged power cord could injure a miner, and it is reasonable that the injury could prove fatal. Accordingly, I find that the violation was S&S. I likewise agree with the Secretary's rationale as to gravity and negligence. Thus, I find that the penalty of \$1795.00 is warranted.

#### E. Citation No. 6596516

On January 5, 2010, Inspector Norwood also issued Citation No. 6596516 to Respondent, reporting the following:

The portable work light being used on the firing floor was not guarded. The light was in use and about 4 feet from the floor. Duct tape was being used from the top of the light. Contact with the hot energized lamp could cause electrical shock, burns, and or cuts.

Gov. Ex. 21.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be fatal, and that the negligence was moderate. See Gov. Ex. 21. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. Norwood Aff. Gov Ex. 2A, at 29.

The mandatory safety standard at §56.12034 has already been cited *supra*.

At hearing, Inspector Norwood said that there was glass over the bulb, but the glass became hot enough to cause burns. Although there were three pieces of metal over the glass, Norwood did not believe that the metal could prevent someone from coming into contact with the glass. Tr. 119. Mr. Wolfenbarger insisted the pieces of metal constituted a guard; however, he did admit that the metal could not prevent someone from touching the glass. See Tr. 128. Mr. Hoskins further admitted that he would replace the light due to a missing lens. Tr. 131.

#### ANALYSIS

The unguarded light was only 4 feet tall and a worker was using the light as a stand during the inspection. Sec'y's PT Br. 18. Coming in contact with the light could cause burns. Tr. 120. The light was unguarded, hot, and in the middle of a work area; thus, Respondent violated §56.12034 and clearly exposed miners to a discrete safety hazard in the form of burns.

However, it was unlikely that a miner could trip on a chain, fall, and contact the light at the precise angle to cause a burn. Thus, I conclude that a miner was not reasonably likely to sustain an injury from the light, precluding an S&S designation.

I further find that any injury actually suffered would not be fatal or permanently disabling in nature and would reasonably be expected to result in lost work days or restricted duty.

The negligence associated with this violation was only "low" in nature. Given the foregoing, the penalty of \$250.00 is appropriate.

#### F. Citation No. 6596533

On January 6, 2010, Inspector Norwood issued Citation No. 6596533 to Respondent, reporting: "The flex conduit was pulled from the 527 screw motor junction box. The motor wiring was exposed to vibration and the sharp metal. Electrical shock is reasonably likely if this condition continues to go uncorrected." Gov. Ex. 24.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be fatal, and that the negligence was moderate. *See* Gov. Ex. 24. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. *See* Norwood Aff. Gov Ex. 2A, at 34.

The mandatory safety standard at §56.12004 has already been cited *supra*.

Inspector Norwood testified that a conduit meant to protect inner conductors became detached, exposing the conductors to sharp edges that were moving due to vibration from the attached motor. Tr. 146.

The Respondent's witnesses disagreed that the inner conductors could be damaged due to the loose conduit. Tommy Buck, Respondent's Plant Supervisor, testified that the motor vibrates very little and that there are no sharp edges to damage the conductors. Tr. 148. Agreeing with Mr. Buck, Mr. Hoskins testified that there are no sharp edges on the conduit or near the area that attaches to the conduit. Tr. 151. Although he admitted that the conduit should be reattached, Hoskins also testified that the insulation of the inner conductors was unharmed and therefore, contacting the inner conductors would not shock a miner. Tr. 152.

#### ANALYSIS

I credit the testimony of Respondent's witnesses that the loose flex conduit and exposed

wires were sufficiently insulated and safe from mechanical damage. The approximately two inches of wire exposed when the flex conduit moved were insulated and were of sufficient size and carrying capacity to prevent damage to the insulation under normal circumstances. Due to the low amount of vibration, the insulation and the location of the wires, they were protected from mechanical damage. Thus, I conclude that the cited condition did not violate the mandatory safety standard at §56.12004.

Accordingly, Citation No. 6596533 is hereby **VACATED**.

**GRAVITY AND NEGLIGENCE FINDINGS**

The Gravity and Negligence findings as to all citations, where applicable, are set forth *supra*.

**ORDER**

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(i), the ALJ decides the following:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
6596503	§56.12034	\$1,000.00
6596504	§56.11002	\$2,687.00
6596506	§56.11002	\$807.00
6596515	§56.12004	\$1,795.00
6596516	§56.12034	\$250.00
6596533	§56.12004	<b>VACATED</b>

**TOTAL: \$6,539.00**

For the reasons set forth above, citation No. 6596533 is hereby **VACATED**. The remaining citations are affirmed or modified as set forth herein. Respondent is **ORDERED** to pay the Secretary of Labor the sum of \$6,539.00.

Respondent is further **ORDERED** to pay the additional sum of \$1,339.00 it previously agreed to pay pursuant to its partial settlement agreement for Citation/Order Nos. 6596509, 6596510, 6596513, 6596514, 6596519 and 6596529.

Accordingly, Respondent shall pay a total penalty of \$7,878.00 within 40 days of the date of this Order.<sup>6</sup>

John Kent Lewis  
Administrative Law Judge

Distribution:

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/BJR

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<sup>6</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. BOX 790390, St. Louis, MO 63179-0390.