

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 10, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-936-M
Petitioner	:	A.C. No. 35-00634-145767-01
	:	
v.	:	Docket No. WEST 2008-937-M
	:	A.C. No. 35-00634-145767-02
BAKER ROCK CRUSHING COMPANY,	:	
Respondent.	:	Mine: Farmington Pit

**DECISION**

Appearances: John Pereza, Conference & Litigation Representative, U.S. Department of Labor, Vacaville, CA, on behalf of the Secretary  
Todd Baker, Beaverton, OR, on behalf of Baker Rock Crushing Company

Before: Judge Barbour

This is a civil penalty proceeding brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. §§ 815, 820. The Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), petitions for the assessment of civil penalties totaling \$376.00 for 3 alleged violations of mandatory safety standards found at 30 C.F.R. Part 56, standards applicable to surface metal and nonmetal mines. The alleged violations are set forth in citations issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. § 814(a).<sup>1</sup>

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<sup>1</sup> Section 104(a) states in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a . . . mine subject to this Act has violated . . . any mandatory health or safety standard . . . or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator.

On February 12, 2008, a regular inspection of Baker Rock Crushing Company's Farmington Pit was conducted by MSHA Inspector Larry Orton.<sup>2</sup> (Tr. 19.) The Farmington Pit is a quarry operation consisting of primary and secondary crushing, screening, and stockpiling. Inspector Orton issued three citations based on alleged violations of section 56.2003(a), which requires workplaces to be kept clean and orderly; section 56.14112(a)(1), which requires guards preventing access to moving parts of equipment and machinery to be constructed and maintained to withstand the vibration of the shock and wear of which they are subjected during normal operation of the equipment; and section 56.12004, which requires electrical conductors to be protected if exposed to mechanical damage. After the penalties were assessed for the alleged violations, the company challenged the assessments. The matter was assigned to me by the Chief Judge and was heard in Salem, Oregon.

### **STIPULATIONS**

The parties have agreed to the following stipulations:

1. Baker Rock Crushing, Farmington Pit, is engaged in mining in the United States, and its mining operations affect interstate commerce, and is subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.
2. With regard to the company's history of violations, the Secretary agrees that the company's history of violations did not result in any additional penalty points.
3. With regard to timely compliance, the Secretary agrees that the conditions were abated in a timely manner.
4. For the calendar year 2008, Respondent reported 42,987 hours worked at the mine based on submitted MSHA quarterly reports.

(Joint Ex. 1.)

### **CONTENTIONS RELATING TO CITATION NO. 6438533**

Inspector Orton testified on behalf of the Secretary of Labor and stated that he issued Citation No. 6438533 after observing a violation of mandatory safety standard section 56.2003(a), which requires workplaces and passageways to be kept clean and orderly. 30 C.F.R. § 56.2003(a).

Orton inspected the rock breaker area at the upper deck of the crushing car and observed a build up of dirt and dust throughout the rock breaker area, specifically on the hand railing, boxes

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<sup>2</sup> Larry Orton is a mine inspector with more than 22 years of experience inspecting and working in mines. Inspector Orton has completed sessions of electrical training, and he is a certified electrician.

and walkways. (Tr. 20-21; Gov. Ex. 1.) Inspector Orton noticed a dark discoloration on the walkway and along the beams underneath the walkway from the build-up of dirt and material. (Tr. 23.) Orton determined that some of the buildup was from a previous spill of hydraulic fluid.<sup>3</sup> (Tr. 20-21; Gov. Ex. 1.)

Inspector Orton concluded that the accumulation of dirt and the spillage of hydraulic oil posed a slip hazard, a health hazard, and a fire hazard. (Tr. 23.) Orton discussed the possibility that the conditions of the rock breaker area could present a slip and fall hazard if a person tracked some of the excess hydraulic oil on his or her boots and walked into a room where the flooring had a smooth surface (such as the control booth located directly next to the rock breaker area). (Tr. 25.) Orton stated he assumed the control room would be accessed every day the plant was operational. (Tr. 27.) He found that at least one person would be affected by the slip and fall hazard. *Id.*

Nevertheless, Inspector Orton believed an injury was unlikely due to the fact that the walkway was clear of tripping hazards, a hand rail was provided, the area was level, and the grating on the floor provided traction. (Tr. 25, 28.) Orton determined that moderate negligence was present because the buildup of dirt and spillage was fairly obvious and the area was traveled regularly. (Tr. 28; Gov. Ex. 2.) However, he admitted that due to the numerous safety precautions (i.e., clear pathway, hand rail and the grated flooring), the area was probably not viewed as a hazard. (Tr. 28.) Although Inspector Orton determined that an injury was unlikely, he stated that if an injury occurred, it would result in lost workdays or restricted duty. (Tr. 26.) Therefore, he found the violation was not serious. (Tr. 27.)

The citation was terminated after the rock breaker area was steam cleaned and the dirt and excess hydraulic fluid was removed. (Tr. 28.) Inspector Orton found that the steam cleaning eliminated the hazardous conditions. (Tr. 28; Gov. Ex. 3.)

David Lemen, the quarry superintendent, testified on behalf of the operator.<sup>4</sup> Lemen stated that the floor of the walkway in the rock breaker area was made out of expanded metal grating. He explained that the metal grating was used instead of a screen cloth to provide better traction from slipping if fluid was spilled. (Tr. 65-66.) After looking at Government Exhibit No. 1, Lemen stated he believed the dark and discolored areas were shadows, not spillage from oil. (Tr. 66; Gov. Ex. 1.) Lemen admitted that there was a buildup of dirt on the beams underneath the walkway, but stated that they were not accessible to the miners. *Id.* Lemen stated that the rock breaker is operated through remote controls that are located in the control room next to the

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<sup>3</sup> The Secretary states Baker Rock Crushing Company “agreed . . . that a hydraulic hose had broken at some time prior to the inspection which resulted in [Citation No. 6438533].” (Pet’r’s Pre-hearing Report ¶ 2, August 4, 2009).

<sup>4</sup> David Lemen has worked for Baker Rock Crushing Company for 30 years and has been the superintendent for 17 years.

walkway. (Tr. 67.) He also stated that the control booth is accessed daily for inspections. *Id.*

### **CONTENTIONS RELATING TO CITATION NO. 6438534**

Inspector Orton testified that he issued Citation No. 6438534 after observing a violation of mandatory safety standard section 56.14112(a)(1), which requires guards preventing access to moving parts of equipment and machinery to be constructed and maintained to withstand the vibration of the shock and wear of which they are subjected during normal operation of the equipment. (Tr. 30-31); 30 C.F.R. § 56.14112(a)(1).

Orton inspected the primary screen unit where larger rocks are separated and sent to be shipped, stored, or re-crushed. (Tr. 30.) Orton stated that he noticed the fly wheel on the primary screen unit was not properly guarded. He observed that the guard was leaning outward exposing approximately two inches of the back side of the fly wheel. *Id.* Inspector Orton determined that the fly wheel was exposed because the braces mounting the guard in place were worn out. (Tr. 35.) Although Inspector Orton did not see the fly wheel operating during his inspection, he did test the guard to see if it was loose and found that it wiggled back and forth approximately four to six inches. (Tr. 43-44.)

Orton described the fly wheel as having a smooth top side with spokes and bolts protruding from its lower backside. (Tr. 33-34.) He noted that the fly wheel rotates at a high rate of speed. (Tr. 33.) Orton considered the poor guarding to be a hazard because a person could be exposed to a rapid moving piece of machine equipment. (Tr. 31.) Inspector Orton stated that if a person came into contact with the back side of the fly wheel, the person could become entangled and break, rip, or lose a limb. (Tr. 34.) He further stated that if a person came into contact with the smooth outer part of the fly wheel, “the shear force of the thing spinning would probably break a wrist, a finger, or something of this nature.” *Id.* Orton noted that the exposed fly wheel was less than seven feet above the walkway. (Tr. 34.) Orton acknowledged that there are handrails in the area, but stated that the handrails had no effect on a person’s exposure to the guard or the fly wheel. (Tr. 36.)

Inspector Orton found the guard violated the standard because he believed the guard could not withstand the vibration of the shock or wear from operation. (Tr. 36.) He issued a citation for the violation and found that it was a significant and substantial (“S&S”) contribution to a mine safety hazard. (Tr. 39.) Orton testified that the likelihood of an injury was high and reasonably likely to occur due to the fact that a person accessing the primary screen unit would have to travel passed the guard which is next to the walkway. (Tr. 37; *see* Gov. Ex. 5.) Orton explained that a person entering the walkway could slip and grab onto the guard for support and come into contact with the moving fly wheel which could leave behind “a ripping, crushing injury.” (Tr. 38.) Orton admitted that the primary screen unit is not accessed on a daily basis and stated that the area is accessed for maintenance and observation of the crushing cycle. *Id.* As such, Inspector Orton estimated that at least one person would be affected by the condition of the fly wheel’s guard. He also determined that the negligence was moderate because the area was

clear, the unit provided good handrails, and the toe boards were in place. (Tr. 40.) He further noted that the faulty guarding on the fly wheel was not something that would have been easily seen by others. *Id.*

The citation was terminated after Baker Rock Crushing Company remounted the guard properly and added rubber to the back of the guard to completely seal off any access to the fly wheel.<sup>5</sup> (Tr. 41-42.) Inspector Orton stated that after the guard was reinstalled and straightened, the potential for contact with moving machinery was eliminated. (Tr. 42.)

David Lemen, the quarry superintendent, described the fly wheel as smooth and stated that the fly wheel did not have any spokes or bolts. (Tr. 67.) Lemen stated that if a person came into contact with the fly wheel while it was operating it would result in a burn to the skin, yet admitted to the possibility that the force of the rotating fly wheel could cause a person's hand to bend backwards or break fingers. (Tr. 79.) Lemen also stated that he did not believe that a person could become entangled in the fly wheel because of its smooth surface. (Tr. 82.) Lemen explained that a person would have to reach behind the guard to make contact with the fly wheel. *Id.* Lemen further stated that he believed that the handrails in front of the guard would in fact protect a person from falling and touching the exposed fly wheel. *Id.* Lemen testified that he was not certain whether the company had actually reinstalled the guard or whether the company only added rubber to the guard. (Tr. 68.) Nevertheless, Lemen did admit the guard looked straighter after the remedial steps were taken. *Id.*

#### **CONTENTIONS RELATING TO CITATION NO. 6438535**

Orton testified that he issued Citation No. 6438535 after observing a violation of mandatory safety standard section 56.12004, which requires that electrical conductors be protected if exposed to mechanical damage. (Tr. 46); 30 C.F.R. § 56.12004.

Orton inspected the upper finish screen area and observed that the outer sheath of an electrical cord was worn through and exposed approximately three inches of the inner conductors. (Tr. 44.) Orton stated that this cable was located "off to the side on an access area" where a person could walk up to it. (Tr. 45.) He also testified that the cable was hanging off of a metal structure. *Id.* Inspector Orton determined that the damaged cable was a violation because the inner conductors were covered with insulation that was not mechanically protected. (Tr. 47.) Orton explained that vibrations and other outside conditions could easily breach the inner conductors' insulation which would lead to two metal conductors rubbing against each other. (Tr. 48.) This could result in an entire area being energized without kicking a breaker, *id.*, because all metals have the ability to conduct electricity (Tr. 55).

Inspector Orton stated the cable was a 277 volt cable that was previously used to power a

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<sup>5</sup> Adding rubber to the back of the guard was an additional precaution taken by the company to secure the area even more than what was required. (Tr. 41).

light. (Tr. 49-50.) Although Orton did not go to the power source site to check if the cable was connected (Tr. 58), he did ask a representative of the company who was in charge and present during the inspection whether the damaged cable was energized (Tr. 49-50). The company's representative told Inspector Orton the cable was not energized and Orton believed the cable was not energized from his own observations. (Tr. 49.) Orton did not recall whether the cable had been physically disconnected from its source. *Id.* Orton testified that he believed that the cable could and would be used in the normal course of mining operations at some time in the future. (Tr. 61.) He stated that the cable could be used to feed a motor or a pump (Tr. 62), but believed that it would most likely be used for a light (Tr. 63).

Inspector Orton found the violation was not S&S. (Tr. 52.) He further determined the alleged violation was unlikely to cause an injury, because at the time of the inspection, there was no damage to the inner conductors (no bare wire of any kind was exposed) and the cable was not energized. (Tr. 50.) Inspector Orton discussed the seriousness of electrical shock hazards and explained that although unlikely, if an injury occurred, it could reasonably be expected to be fatal. (Tr. 51.) He determined that one person could be affected by the damaged cable during the course of inspections, maintenance, or simply observing the area. *Id.* Inspector Orton found the company's negligence was low because the cable was not energized, the company did not view the condition as a problem, and the condition was not one that could be easily noticed (the insulation was worn through exposing just three inches of the inner conductors). *Id.* He further supported his reason for determining the negligence to be low by describing some of the precautionary measures taken by the company to prevent an electrical injury. (Tr. 54.) Orton stated that the company installed phase lights which are used as a monitoring device to detect a potential problem with the electrical system. Inspector Orton admitted though, that the phase lights are merely preventative and will only detect a problem, but will not trip the circuit. *Id.*

The citation was terminated after the company removed the damaged portion of the cable that was exposing the inner conductors. (Tr. 52.) Inspector Orton stated the company's actions eliminated the potential electrical shock hazard. (Tr. 53.)

David Lemen stated that the cable was originally hard-wired into a light above and went down and fed another light, one that had been taken out of service. (Tr. 70.) Although, at the time of the inspection, the company only knew the cable was disconnected at one end, Lemen testified that the cable was in fact disconnected at both ends. (Tr. 69.) As a result, Lemen explained that in order for the cable to be reconnected, it would have to be rewired with the proper connections. *Id.* Lemen testified that because there was no plug on the end of the cord, it would be impossible to use the cable without rewiring it. (Tr. 70.)

Lemen testified that he believed there was no way the wire could have become energized on its own (Tr. 71) because the cable was disconnected from the light above and also disconnected from the light to which it supplied its power (Tr. 70). Lemen also noted that the inner insulation was never breached. (Tr. 71.) Lemen admitted that the damaged cable was within five feet of the light that had been taken out of service and was eight feet from the light

that had served as the cord's power source. (Tr. 80.) Nevertheless, Lemen explained that the damaged cable would not be used because the company keeps spare cable on-site in a storage area. (Tr. 71.) Lemen further stated that the employees are aware of this fact and have knowledge of where the spare cable is stored in the event that it is needed. *Id.*

## **RESOLUTION OF THE ISSUES**

### **CITATION NO. 6438533**

Citation No. 6438533 states:

The access way around the rock breaking hammer and oil pump on the upper deck of the crushing tower area was not maintained in a clean condition. A hydraulic hose had ruptured and fluid had spilled in the access area creating a slip and fall hazard. The flooring on the access way was made of expanded metal and provided with hand rails. The area is exposed to vibrating outside conditions. The hammer was controlled from inside the control booth. The only time the area was access [sic] was for maintenance on the hammer unit and hydraulics as stated by the crusher operator. If a person were to slip and fall they could be [sic] receive a lost time or restricted duty injury. The condition was not reported on the inspection of the work place.

(Gov. Ex. 2.)

Section 56.2003(a) states in pertinent part: "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." 30 C.F.R. § 56.2003(a).

## **THE VIOLATION**

I conclude the Secretary established a violation of section 56.2003(a). The evidence clearly shows that the walkway on the upper deck of the rock breaking area was not "kept clean and orderly" as required by the standard. Inspector Orton's testimony and the Government's photographs established the existence of an accumulation of dirt, dust and hydraulic fluid spillage throughout the rock breaker area. (Gov. Ex. 1.) Moreover, I do not find Lemen's testimony that he believed the dark and discolored areas were shadows instead of dirt and excess oil spillage convincing, especially after examining the Government Exhibit No. 3 which depicts the walkway without any buildup of dirt or fluid after the rock breaker area was steam cleaned. (Gov. Ex. 3.)

## **GRAVITY**

Inspector Orton properly believed the violation was not serious. Despite the presence of dirt, dust and hydraulic oil, I agree with Orton's determination that it was unlikely for an injury to occur because of the numerous safety precautions taken by the operator. Specifically, the

walkway had a hand rail, it was free of tripping hazards, and the metal grated flooring was level and provided adequate traction to prevent slipping. Therefore, like Orton, I conclude that the lack of a clean and orderly walkway was not a serious violation.

### **NEGLIGENCE**

Inspector Orton believed the company was moderately negligent. (Gov. Ex. 2.) I agree with this assessment. Looking at the Government's photographs it is clear that buildup of dirt, dust and hydraulic fluid was obvious. (Gov. Exs. 1, 3, 11.) The company had a duty to keep the entire rock breaker area clean and orderly, including the walkway on the upper deck of the crushing car. Nevertheless, due to the numerous safety precautions and the unlikely chance of an injury occurring, I conclude the company was moderately negligent.

### **CITATION NO. 6438534**

Citation No. 643854 states:

The fly wheel on the primary screen unit was not adequately guarded. The guard had broken loose due to vibration and was leaning out to words [sic] the walk way. This condition exposed about 2 inches of the back of the fly wheel. The open is about one foot wide and about three feet high. The unit is located next the [sic] walk way next to the screen and rotates at a high speed. Guards are require [sic] to be maintained in good conditions to prevent a person from contacting moving machine parts and becoming entangled. The walk way is about 40 inches wide and exposed to vibrating out side [sic] conditions. If a person was to be entangled they could be permanently disabled or seriously injured. The condition was not reported on the inspection of the work place. The company has established a system of inspecting the screen unit and documenting the defects. (Gov. Ex. 5.)

Section 56.14112(a)(1) states in pertinent part: "Guards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation." 30 C.F.R. § 56.14112(a)(1).

### **THE VIOLATION**

I conclude the Secretary established a violation of section 56.14112(a)(1). The evidence clearly shows that the fly wheel was not properly guarded. The photograph taken by Inspector Orton shows the guard was leaning away from the fly wheel and exposing approximately two inches of the moving machinery. (Gov. Ex. 4.) Therefore, I find the guard was not adequately maintained to withstand the vibration, shock and wear it was subjected to during normal operations.



## S&S & GRAVITY

Inspector Orton incorrectly believed the lack of proper guarding was serious and designated the violation as S&S. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). 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 (April 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co.*, 52 F.3d 133, 135(7th Cir. 1995); *Austin Power Co. v. Sec’y of Labor*, 861 F.2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

I have found the Secretary has established a violation of section 56.14112(a)(1) presenting a safety hazard if a person were to slip and contact the moving fly wheel. However, I find the violation was neither serious nor S&S because there is insufficient evidence to establish a reasonable likelihood of an injury. It is clear from the testimony that the primary screen unit is not accessed frequently. I credit Inspector Orton’s testimony that only individuals performing maintenance duties or observing the crushing cycle would be exposed to the hazard. Furthermore, the walkway is clear of any slipping or tripping hazards and the area has good handrails in front of the guard to provide support. Moreover, If a person were to slip and fall, in order to contact the moving fly wheel he would have to fall in such a way as to reach behind the guard. Thus, I find that it is unlikely that a person would slip and fall into the moving fly wheel under these circumstances.

## NEGLIGENCE

Inspector Orton believed the company was moderately negligent. (Gov. Ex. 5.) I agree with this determination. The company had a duty to maintain guards to withstand the vibration, shock and wear of the rock crushing operation. After viewing the photographs of the guarding before the violation was abated, I find that the condition was not one that would be easily noticed by others. Additionally, as previously discussed, the walkway was clear and provided a handrail for support. Based on the safe conditions of the walkway and the unlikely chance of an injury occurring, I conclude the company was moderately negligent.

## CITATION NO. 6438535

Citation No. 6438535 states:

The insulation on the 277v cable feeding the lights on the upper east deck of finish [sic] screen area was worn through exposing the inner conductor to mechanical damage. The area of out [sic] insulation damaged is about three inches long. The inner conductors did not appear to be damaged. The cable was not energized. The electrical system is monitored by a ground fault detector device (phase lights). There a [sic] person in the plant area daily contacting conductive materials. These conditions create a shock and electrocution hazard. If a person was to be shocked or electrocuted they could be fatally or seriously injured. The condition was not reported on the inspection of the work place. This area is not travel [sic] daily and the condition was not easily seen.

(Gov. Ex. 8.)

Section 56.12004 states: “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.

## THE VIOLATION

I conclude the Secretary did not establish a violation of section 56.12004. The purpose of section 56.12004 is to eliminate electrical shock hazards by requiring that all electrical conductors be protected. The importance of this standard is paramount because, as Inspector Orton testified, if an injury occurred it could be fatal. However, although the cable was worn through exposing three inches of the inner conductors, other facts reveal that no actual safety hazard existed. Both Inspector Orton and the company’s quarry superintendent, Lemen, testified that the cable was not energized. Moreover, Lemen’s testimony revealed the cable was disconnected at both ends at the time of the inspection. Therefore, although the damaged cable exposed approximately three inches of the inner conductors, it would have been impossible for the wire to become energized on its own because it was disconnected from both the light and its

power source. I find it would be unlikely that the company would rewire the cable without noticing the exposed inner conductors and remedying the hazard. Furthermore, the company had a designated area on-site for storing spare cable and had set up phase lights to monitor the electrical system.

The Secretary's regulations define the term "conductor" as "a material, usually in the form of wire, cable, or bus bar, capable of carrying an electrical current." 30 C.F.R. § 56.2. The record shows that because the damaged cable had no plug on the end of the cord and was disconnected at both ends, in order for it to be used, the cable would need to be rewired with the proper connections. Therefore, the cable was not capable of carrying an electrical current at the time of the inspection. Consequently, I find the cited cable was not an electrical conductor for purposes of the safety standard set forth in section 56.12004. Because there was no possibility of an electrical shock hazard without rewiring the cable, I conclude that these circumstances did not present a safety hazard and the Secretary has not met her burden of proving a violation occurred.

### **REMAINING CIVIL PENALTY CRITERIA**

The Act requires that I assess a civil penalty for each violation. It also requires that in doing so, I consider the statutory civil penalty criteria. 30 U.S.C. § 820(i). Several of the civil penalty criteria are equally applicable to all of the violations.

### **HISTORY OF PREVIOUS VIOLATIONS**

The parties agree that the company's history of violations did not result in any additional penalty points. (Joint Ex. 1.) I find, based on the record in this case, the applicable history of previous violations is not an aggravating factor. Therefore, when assessing penalties I will not increase them on account of Baker Rock Crushing Company's prior history.

### **SIZE**

The parties stipulated to the fact that there were 42,987 hours worked at the mine in 2008. (Joint Ex. 1.) This means Baker Rock Crushing Company's facility is characterized by MSHA as a small mine. *See* 30 C.F.R. § 100.3. As there is no evidence to contradict this, I find the mine to be small in size. Therefore, when assessing penalties, I will assess lesser amounts than I would for medium or large operations.

### **ABILITY TO CONTINUE IN BUSINESS**

There is no evidence the size of any penalties assessed will adversely affect Baker Rock Crushing Company's ability to continue in business, and I find they will not. Therefore, when assessing penalties, I will neither increase nor decrease them on account of this criterion.

**GOOD FAITH ABATEMENT**

Finally, the parties agree that the alleged violations were abated in good faith by Baker Rock Crushing Company and in a timely manner. (Joint Ex. 1.)

**CIVIL PENALTY ASSESSMENTS**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6438533	2/12/08	56.20003(a)	\$100.00

I have found the violation occurred, it was not serious, and it was due to Baker Rock Crushing Company's moderate negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its numerous safety precautions, I conclude a civil penalty of \$100.00 is appropriate.

**CIVIL PENALTY ASSESSMENTS**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6438534	2/12/08	56.14112(a)(1)	\$176.00

I have found the violation occurred, it was not S&S, and it was due to Baker Rock Crushing Company's moderate negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its numerous safety precautions, I conclude a civil penalty of \$100.00 is appropriate.

**CIVIL PENALTY ASSESSMENTS**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6438535	2/12/08	56.12004	\$100.00

I have found the Secretary did not establish a violation. The damaged cable was not energized and was disconnected at both ends. Based on the record, I conclude the cable was not capable of carrying an electrical current at the time of inspection. Thus, the conditions presented did not violate the safety standard. For the reasons set forth above, Citation No. 6438535 shall be vacated.

**ORDER**

Consistent with this Decision, **IT IS ORDERED** that Citation No. 6438533 **IS AFFIRMED**.

**IT IS ORDERED** that Citation No. 6438534 **IS MODIFIED** to reduce the likelihood of injury from “reasonably likely” to “unlikely” and to delete the significant and substantial (S&S) designation.

**IT IS ORDERED** that Citation No. 6438535 **IS VACATED**.

Within 40 days of the date of this decision, Respondent **IS ORDERED** to pay civil penalties totaling \$200.00 for the violations found above. Upon payment of the penalties and modification of the citation and orders, these proceedings **ARE DISMISSED**.

David F. Barbour  
Administrative Law Judge

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