UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AIC MARIANAS, Respondent.	OSHRC DOCKET NO. 12-0484

Appearances:

Leon Pasker, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California
For Complainant

Michael Stewart, Vice President, AIC Marianas, Saipan, MP
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of an AIC Marianas ("Respondent") worksite in Saipan, Commonwealth of the Northern Mariana Islands ("CNMI"), on October 27, 2011. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging three violations of the Act. Respondent timely contested the Citation, and a trial was held on November 6, 2012 in Saipan. Both parties have filed post-trial briefs.

As noted in the Court's February 13, 2013 Notice of Receipt of Transcript and Order, the transcript is incomplete due to the digital recording device's failure to record all testimony at trial. In the aforementioned Order, the Court provided the parties the opportunity to address the

gaps in the transcript. Based on the parties' suggestions, the Court issued an Order on February 25, 2013, which directed the parties to file an additional set of joint stipulations and exhibits and also provided the parties with the opportunity to supplement their originally filed post-trial briefs with a five-page addendum. The parties submitted an additional set of Post-Hearing Joint Stipulations on March 27, 2013, to fill in the gaps in the transcript. Complainant submitted a supplemental brief; however, Respondent relied on its originally filed post-hearing brief. In addition to the Post-Hearing Stipulations, the Court has relied on the following to support its findings of fact: (1) the record; (2) pre-hearing stipulations; (3) admitted exhibits; and (4) the parties' briefs, insofar as the briefs rely on the same set of underlying facts. To the extent that the parties' briefs illustrate disagreement as to the basic underlying facts, the Court shall resolve any such dispute with resort to the exhibits and, if necessary, credibility determinations.

II. Jurisdiction

The parties have stipulated that the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). (Ct. Ex. 1). Further, Respondent also stipulated that, at all times relevant to this matter, it was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

III. Stipulations[1]

The parties submitted Joint Stipulations to the Court, which are set forth below:

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Occupational Safety and Health Act ("Act").

2. Respondent is engaged in a business affecting commerce within the meaning of Section

1. The stipulations presented here are the stipulations that were submitted prior to the hearing on November 6, 2012. The Post-Hearing Stipulations submitted in response to the Court's February 25, 2013 Order are too numerous to reprint here. Any references to the Post-Hearing Stipulations will be referenced by title and number, i.e., PHJS No. 1.

3(5) of the Act, 29 U.S.C. § 652(5).

3. Respondent admits Inspection No. 108185 occurred at Respondent's worksite beginning on October 27, 2011, located at Tun Pan Herman Road, Airport Road, Saipan, MP.

4. Respondent admits that at times prior to and during the inspection its employees performed work at the worksite to replace water line adjacent to a roadway, using equipment including a Caterpillar Loader/Backhoe Model 416, a Freightliner dump truck with a Rogers dump body, and a Caterpillar excavator.

5. Respondent admits that Cresencio Sumabat was the supervisor on the worksite at Tun Pan Herman Road, Airport Road, Saipan, MP.

6. With regard to Citation 1, Item 1, Respondent stipulates that the Caterpillar Loader/Backhoe Model 416 was not in use.

IV. Controlling Case Law

To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; she need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is

serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

V. Findings of Fact and Conclusions of Law

A. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 C.F.R. 1926.600(a)(3)(i): Bulldozer and scraper blades, end-loader buckets, dump bodies, and similar equipment were not either fully lowered or blocked when being repaired or not in use.
>
> Near the north side of the project (road shoulder), employees were working adjacent to the Caterpillar Backhoe Loader, model number 416. The end–loader rear bucket was not either fully lowered or blocked when not in use. The backhoe was used in the morning to lay bedding sand into the trench. Employees that walked in the area were exposed to the hazard of being struck by the backhoe.

The cited standard provides:

> Heavy machinery, equipment, or parts thereof, which are suspended or held aloft by use of slings, hoists, or jacks shall be substantially blocked or cribbed to prevent falling or shifting before employees are permitted to work under or between them. Bulldozer and scraper blades, end-loader buckets, dump bodies, and similar equipment, shall be either fully lowered or blocked when being repaired or when not in use. All controls shall be in a neutral position, with the motors stopped and brakes set, unless work being performed requires otherwise.

29 C.F.R. § 1926.600(a)(3)(i).

On October 27, 2011, CSHO Anthony Sholing conducted an inspection of Respondent's worksite, which was located at Tun Pan Herman Road, Airport Road, Saipan, MP. (Ct. Ex. 1). During the course of his inspection, he observed a Caterpillar Loader/Backhoe Model 416 parked on the shoulder of Airport Road with the rear bucket suspended a couple of feet above the ground. (Ex. C-4). Respondent had placed a cone to the left side of the backhoe to warn its employees not to enter the area. (Ex. C-4, PHJS No. 5). CSHO Sholing testified that the backhoe comes with two safety features to prevent movement of the rear boom and bucket: (1) a

locking pin to prevent the boom from moving from side to side; and (2) a locking device to hold the boom in place. (Tr. 38–39). At the time of his inspection, CSHO Sholing did not observe the second locking device. (Tr. 39).

Respondent contends that: (1) the second locking device was in place and that the backhoe was parked according to the operation manual ("Manual"); and (2) there was no hazard. Complainant contends that the rear bucket was neither blocked nor lowered as required by the standard and that Respondent's failure to do so presented a hazard to employees working in the area. Based on what follows, the Court finds that Respondent violated 29 C.F.R. 1926.600(a)(3)(i) and that the violation was serious.

The standard requires that end loader buckets and similar equipment shall be lowered or blocked when not in use. The piece of equipment at issue here is a backhoe with a rear-loaded bucket that was not in use at the time of the inspection. (Ct. Ex. 1, Stip. 4 & 6). Thus, the standard applies. The Court also finds that the terms of the standard were violated. Respondent contends that the Manual indicates that the backhoe was properly parked. (Ex. R-1). In particular, Respondent relies on the testimony of William Shippey, Respondent's Safety Manager, who stated that, based on his review of the photograph of the backhoe taken the day of the inspection, the position of the backhoe indicated that it was in the locked position because it was in the vertical position. (Tr. 50). Respondent's contention, however, is belied by its own evidence. On the second page of Respondent's Exhibit No. 1 (labeled as page 10 of the Manual) under the heading "Machine Parking," the Manual specifically states: "Lower the loader bucket to the ground and apply slight down pressure." (Ex. R-1). This requirement of the Manual is almost identical to the requirements of the standard, and there is no indication in the Manual that

there is an alternative method of parking the backhoe when it is not in use.[2] Thus, Respondent failed to comply with the terms of the cited standard.

The Court also finds that one or more employees had access to the hazard. According to the Commission, Complainant may prove employee exposure by showing that, during the course of their assigned working duties, their personal comfort activities on the job or their normal ingress-egress to and from their assigned workplaces, there has been either actual employee exposure or that it is reasonably predictable that they will be in the zone of danger. The zone of danger is determined by the hazard presented by the violative condition and is normally that area surrounding the violative condition that presents a danger to employees. It is this hazard that the standard is intended to prevent. *RGM Construction, Co*., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995); Gilles *& Cotting, Inc*., 3 OSHC 2002, 2003 (No. 504, 1976). The test for whether an employee would have access to the "zone of danger" is "based on reasonable predictability." *Id.*; *Kokosing Constr. Co. Inc*., 17 OSHC 1869, 1870 (No. 92-2596) (citing *Capform, Inc*., 16 OSHC 2040, 2041 (No. 91-1613, 1994)). The backhoe was located on the shoulder of the road where Respondent was replacing a water line. There was foot traffic in the immediate area surrounding the suspended bucket, and employees worked near the suspended bucket when it was not in use. (Ex. C-4, PHJS No. 4). Although Respondent had placed a cone to the left side of the backhoe, there was a clear area of ingress to the rear and opposite side of the backhoe, and there was nothing to prevent access into that area or provide warning to passersby. (Ex. C-4). In light of the foot traffic in the area, employees working in proximity to the bucket, and the lack of

2. Respondent also contends that CSHO Sholing failed to prove that the second locking device was not in place. (Resp't Br. at 2). This is contrary to the evidence. CSHO Sholing testified that he did not observe the second locking device on the backhoe at the time of the inspection. (Tr. 39). Although Shippey testified that, based on the position of the hydraulic system (i.e., that it was in the vertical position), he believed that the backhoe was in a locked position, he was unable to identify the second locking device in any of the exhibits. (Tr. 50). Rather, he based his testimony on the position of the hydraulic system in the photographs taken on the day of the inspection. The Court is not persuaded by this argument and finds the testimony of the CSHO to be credible and supported by the evidence that the second device was not in place. Under this scenario, the standard has been violated.

adequate warning, the Court finds that it is reasonably predictable that an employee would be exposed to the hazard presented by the suspended bucket of the backhoe.

Respondent also had knowledge of the condition. First, the parties stipulated that Respondent's supervisor, Cresencio Sumabat, was present at the worksite (Ct. Ex. 1, Stip. 5) and was aware of the condition of the backhoe, which had been in that position for at least since the beginning of the shift. *See Revoli Const. Co.*, 19 OSHC 1682 (No. 00-0315, 2001) (knowledge of supervisory personnel generally imputed to their employers). Second, the condition was open and obvious, as illustrated by Complainant's Exhibit No. 4. (Ex. C-4). Finally, Respondent made the effort to warn employees of this condition by placing a cone next to the backhoe, which not only indicates knowledge of the condition but also illustrates that Respondent was aware of the potential hazard presented by the hanging bucket.[3] (Ex. C-4).

Contrary to the argument of Respondent, the Court does not find that an individual would have to crawl underneath the bucket to be exposed to the hazard. (Resp't Br. at 2). Rather, if an employee were standing in close proximity to the backhoe when the hydraulics failed, that person would be exposed to potential crushing injuries to the feet or legs.

Based on the foregoing, the Court finds that Complainant proved a serious violation of 29 C.F.R. 1926.600(a)(3)(i). Accordingly, Citation 1, Item 1 shall be AFFIRMED.

B. <u>Citation 1, Item 2</u>

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 C.F.R. 1926.601(b)(6): Haulage vehicle(s) were not equipped with a cab shield and/or canopy adequate to protect the operator from shifting or falling materials.
>
> Near the north side of the project (road shoulder), the operator of a Flin dump truck, license number HE2714, was in the cab while the excavator operator loaded spoil into the end dump. The operator of the dump truck

3. Further, the fact that Respondent had the Manual in its possession, which also indicates that the bucket is supposed to be placed on the ground, indicates, at the very least, that Respondent should have been aware that the condition was hazardous.

was exposed to the hazard of being struck by falling spoil.

The cited standard provides:

> All haulage vehicles, whose pay load is loaded by means of cranes, power shovels, loaders, or similar equipment, shall have a cab shield and/or canopy adequate to protect the operator from shifting or falling materials.

29 C.F.R. § 1926.601(b)(6).

While at the worksite, CSHO Sholing observed Respondent's Flin[4] dump truck being loaded with spoil materials from the worksite. (Ex. C-6, C-7). These materials would be transported from the worksite, along Airport Road, to a dump location. (Tr. 36). Consistent with the exhibits introduced by Complainant, Respondent introduced evidence that the dump truck was only loaded from the side or from the rear. (Ex. C-6, C-7, PHJS Nos. 19). Respondent's dump truck had a cab shield that extended approximately half-way over the top of the cab. (Ex. C-8). While the dump truck was being loaded, the operator/driver was sitting in the cab of the truck. (Ex. C-6).

Complainant contends that the cab shield on Respondent's dump truck was inadequate to protect the driver from shifting or falling materials. Respondent counters by pointing out that the dump truck is only loaded from the side and/or the rear of the truck, which prevents the driver from being exposed to falling material during the loading process. Complainant also argues that the materials could shift or fall onto the cab of the vehicle while spoil materials were being transported away from the worksite. The Court finds that Complainant has failed to prove a violation of the standard.

According to 29 C.F.R. § 1926.601(a), "Motor vehicles as covered by this part are those vehicles that operate within an off-highway jobsite, not open to public traffic." Although the

4. The record is somewhat unclear as to the make of the dump truck at issue. In the stipulations and in the photographs, the dump truck is referred to as a "Freightliner," whereas in the body of the Citation and in Complainant's brief, it is referred to as a "Flin" dump truck. Because there is no disagreement as to the specific truck that is referred to, the Court will disregard the inconsistency.

worksite was adjacent to a public roadway, the area where work was taking place was cordoned off from the road with cones. (PHJS No. 22). There was no public traffic within the designated worksite, and there is no question that the Flin dump truck is a motor vehicle. Accordingly, the Court finds that the standard applies.

The Court does not find, however, that the terms of the standard were violated. The key question with respect to this citation is whether the cab shield on Respondent's dump truck was "*adequate* to protect the operator from shifting or falling materials." *See* 29 C.F.R. § 1926.601(b)(6) (emphasis added). First, as shown in Complainant's Exhibit No. 8, the cab shield covered the back half of the cab. The driver's seat (and the driver) was positioned directly underneath the shield. Second, the parties agree that the dump truck was only loaded from the rear and side of the haulage portion of the truck and not from over the top of the cab. (PHJS Nos. 19, 24). Thus, during the loading process, there was virtually no possibility that materials would shift or fall onto the cab. Even in the event that materials may have shifted during loading, the Court would still find that the shield was adequate because the driver was located directly beneath the cab shield.

In light of the fact that the dump truck was loaded from the side or rear, Complainant also contends that the spoil materials could shift or fall onto the unprotected portion of the cab while the material was being transported offsite. The Court finds that this scenario is extremely unlikely and also finds that Complainant's argument is based on unfounded speculation.[5] First, there was no evidence to suggest that the dump truck was overloaded such that it would be possible for shifting material to tumble forward out of the bed and onto the top of the cab. Second, in the event that material could have come out of the bed during transit, Complainant

5. Additionally, the standard itself appears to be directed to the hazard created by shifting or falling materials while loading the vehicle. The first clause of the standard specifically refers to the process of loading a haulage vehicle. This construction makes the most sense considering that it is during the loading process when shifting or falling materials would pose the greatest hazard to the occupant of the cab of the haul truck.

failed to show how the existing cab shield was inadequate to protect the driver. There was no evidence to suggest how heavy the spoil was nor was there evidence regarding the payload capacity of the cab shield or the roof of the cab itself. Finally, in the unlikely event that spoil material came out of the bed of the truck and onto the cab, it would have to occur when the driver suddenly applied the brakes. This would cause the spoil to have forward momentum, which, in all likelihood, would cause the spoil to tumble over the front of the cab as opposed to the direct downward force that would result from material falling during the loading process.

Ultimately, Complainant failed to introduce evidence sufficient for the Court to find that the existing cab shield was insufficient to protect the driver of the Flin dump truck from falling or shifting materials. Because Complainant failed to prove that the terms of the standard were violated, the Court need not address the remaining elements of its *prima facie* case. Accordingly, Citation 1, Item 2 shall be VACATED.

C. <u>Citation 1, Item 3</u>

Complainant alleged a serious violation of the Act in Citation 1, Item 3 as follows:

> 29 C.F.R. 1926.601(b)(14): All vehicles in used were not checked at the beginning of each shift to assure that the following parts, equipment, and accessories were in safe operating condition and free of apparent damage that could cause failure while in use: service brakes, including trailer brake connections; parking system (hand brake); emergency stopping system (brakes); tires; horn; steering mechanism; coupling devices; seat belts; operating controls; and safety devices. All defects were not corrected before the vehicle was placed in service. These requirements also apply to equipment such as lights, reflectors, windshield wipers, defrosters, fire extinguishers, etc., where such equipment is necessary:
>
> Near the Airport Rd, the passenger side (outer rear) tire of the Flin Dump truck, License Number HE2714, was worn. The dump truck was used to haul soil from the worksite to a designated area. Employees were exposed to struck-by hazards.

The cited standard provides:

> All vehicles in use shall be checked at the beginning of each shift to assure that the following parts, equipment, and accessories are in safe operating

> condition and free of apparent damage that could cause failure while in use: service brakes, including trailer brake connections; parking system (hand brake); emergency stopping system (brakes); tires; horn; steering mechanism; coupling devices; seat belts; operating controls; and safety devices. All defects shall be corrected before the vehicle is placed in service. These requirements also apply to equipment such as lights, reflectors, windshield wipers, defrosters, fire extinguishers, etc., where such equipment is necessary.

29 C.F.R. § 1926.601(b)(14).

On the same dump truck referenced in Citation 1, Item 2, CSHO Sholing observed that the outer rear tire on the passenger side of the truck was worn.[6] (Ex. C-12). The tire is completely devoid of tread and shows multiple cracks on its surface. (Ex. C-11, C-12, C-13). CSHO Sholing opined that the state of the tire was such that the increased load from the spoil, in addition to regular trips to unload the spoil, created a hazard that the tire would explode. The failure of the tire could result in injuries to the driver and/or employees, who could be struck by fragments of an exploding tire. In light of the state of the tire, CSHO Sholing determined that Respondent either (a) failed to conduct a pre-operation inspection; or (b) failed to correct the tire defect prior to the vehicle being placed in service. Respondent argues that it conducted an inspection; however, it failed to produce any record of that inspection even though it claims that such records would be kept at its Airport Road-Dandan Office. (Resp't Br. at 3).

Based on the record, the Court finds that the standard applies and was violated. The standard applies for the same reasons provided above with respect to Citation 1, Item 2. The Court also finds that the terms of the standard were violated. First, the state of the tire is such that either (a) nobody performed an inspection as required by the standard, or (b) the inspection performed was so deficient that it fails to meet the bare minimum required by the standard. The Court calls into question whether an inspection was performed in the first place. Whether, as Respondent argues, CSHO Sholing failed to ask for the inspection record during his inspection,

6. The briefs reflect some confusion as to the tire at issue; however, the citation itself specifically references the "passenger side (outer rear) tire" and the Court shall focus its analysis on that tire.

Respondent failed to introduce a record of that inspection at trial in order to rebut CSHO Sholing's testimony that he had not received written evidence of the inspection. Surely, if an inspection of the dump truck took place, Respondent would have attempted to introduce documentation of that inspection. Second, even if Respondent did perform an inspection, that is only half of what the standard requires. Once an inspection is performed, any and all defects must be remedied prior to the vehicle being placed into service. *See* 29 C.F.R. § 1926.601(b)(14). The tire at issue was clearly defective, but Respondent chose to put the dump truck into service regardless. Thus, the terms of the standard were violated.

Respondent's employees were also exposed to the hazard.[7] Not only was the operator of the vehicle exposed to the hazard while operating the vehicle, but other employees who worked in the vicinity of the dump truck were also exposed to the potential of the tire exploding. Based on the location of the tire, and the truck's position at the worksite, employees both walked past the defective tire and worked in close proximity to it while loading the dump truck from the passenger side. (Ex. C-6). This determination is supported by the evidence because the pictures clearly show the dump truck being loaded from the passenger side.

Respondent also knew or should have known of the violative condition. The condition of the tire was open and obvious and was immediately recognized by CSHO Sholing. When compared with the other tires on the truck, it is clear that the cited tire was defective. As noted previously, Respondent's supervisor, Cresencio Sumabat, was present at the worksite and should have known about the condition of the vehicles at the worksite. Thus, his knowledge is properly imputed to Respondent. Further, to the extent that Respondent's claim that the vehicle was inspected prior to being put into operation is true, this further supports the knowledge element of

7. Respondent's primary argument is that the condition of the inside tire did not present a hazard because the outer tire would have acted as a barrier against any flying materials resulting from an explosion. (Resp't Br. at 4). The Court rejects this argument on two bases: (1) the citation was issued with respect to the outer tire; and (2) even if the inner tire was the focus of this citation, the Court would find that the outer tire was not sufficient to serve as a barrier against flying materials.

Complainant's *prima facie* case.

The Court also finds that the violation was serious. Respondent's employees were exposed to the possibility of an exploding tire, which could cause serious physical harm and potentially death. (Ex. R-1); *see also Montgomery Wards, Inc.*, 8 BNA OSHC 2203 (No. 79-0199, 1980) (ALJ Goldstein) (discussing the hazards associated with exploding tires).[8]

Based on the foregoing, the Court finds that Complainant has established a violation of 29 C.F.R. § 1926.601(b)(14). Accordingly, Citation 1, Item 3 shall be AFFIRMED.

VI. PENALTY

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

With respect to Citation 1, Item 1, the Court finds that, while the possible injury from exposure to the hanging bucket was severe, the likelihood of that injury was relatively low. Respondent at least took the precaution of placing a cone near the backhoe, which probably warded off most of the employees at the worksite. That said, even though the backhoe was not in use at the time of the inspection, the condition had existed for at least four hours (the backhoe

8. Although Ex. R-1 was not discussed with respect to Citation 1, Item 3, the Court references it here for the purposes of illustrating that tire explosions can cause serious injury and death.

was used that morning), and employees still had access to the condition from the rear and opposite side of the backhoe. Respondent is a medium-sized employer, and evidence was introduced to indicate that it had received a citation for a similar violation in the past. In light of these considerations, the Court will assess a penalty of $1200.

With respect to Citation 1, Item 3, the Court again finds that the consequences of an exploding tire can be severe; however, the Court also finds that the probability of an injury occurring due to that hazard was low. Considering all of the relevant facts, the Court will assess a penalty of $1200.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED and a penalty of $1200 is ASSESSED.
2. Citation 1, Item 2 is VACATED.
3. Citation 1, Item 3 is AFFIRMED and a penalty of $1200 is ASSESSED.

Date: April 17, 2013
Denver, Colorado

/s/
Patrick B. Augustine
Judge, OSHRC