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SOL (MSHA) V. NATIONAL LIME AND STONE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. VINC 79-99-PM
A.O. No. 33-00127-05002

v.

NATIONAL LIME AND STONE COMPANY,
RESPONDENT

Carey Lime Plant-Quarry
and Mill

DECISION

Appearances: Linda Leasure, Attorney, Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for the
Petitioner
Ray E. Brandon, Findlay, Ohio, for the Respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. 56.12-37.

Respondent filed a timely answer contesting the civil penalty proposal and requested a hearing. A hearing was convened on July 31, 1980, in Findlay, Ohio, and the parties appeared and participated fully therein. The parties were afforded an opportunity to present oral and written arguments in support of their respective positions, and the arguments presented have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed in this proceeding; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon

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the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to jurisdiction, agreed that respondent's Carey Lime Plant-Quarry and Mill is a mine within the meaning of the Act, that it produces lime, limestone, and crushed stone, and they agreed to the admissibility of MSHA's computer printout reflecting respondent's prior history of violations (Exh. P-1, Tr. 6). The parties also agreed that respondent's mine size during the year 1978 consisted of 280,637 man-hours and that respondent's mining operation is a medium one (Tr. 6, 17), and they also agreed to the admissibility of all of the documents marked and received as part of the record in this case, including an agreement that the junction box which was the subject of the citation and produced in court as demonstrative evidence to acquaint the court with its physical characteristics, need not be made part of the official record in light of its rather cumbersome dimensions. Instead, the parties agreed that the exhibits describing and picturing this device is sufficient for any evidentiary purposes (Tr. 7). Respondent also stipulated that the proposed assessment will not adversely affect its ability to remain in business (Tr. 17).

Discussion

Citation No. 368657, June 21, 1978, citing an alleged violation of 30 C.F.R. 56.4-29, was vacated and dismissed on motion by the petitioner by my order of July 9, 1980. The hearing in this case concerns Citation No. 368661, initially issued on June 21, 1978, by MSHA inspector Michael J. Pappas, alleging a violation of 30 C.F.R. 56.12-37, and the condition or practice described on the face of the citation is as follows: "Fuse tongs were not being used to remove and replace fuses in the electrical

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circuit box for the overhead crane in the shop." Mandatory safety standard 30 C.F.R. 56.12-37, provides as follows: "Fuse tongs or hotline tools shall be used when fuses are removed or replaced in high-potential circuits." The term "high potential" as used in section 56.12-37, is defined by section 56.1, as "more than 650 volts."

The citation was subsequently amended by Inspector Pappas on November 17, 1980, to reflect a correction in the citation to the mandatory standard which Mr. Pappas intended to cite, namely section 56.12-36, which provides as follows: "Fuses shall not be removed or replaced by hand in an energized circuit, and they shall not otherwise be removed or replaced in an energized circuit unless equipment and techniques especially designed to prevent electrical shock are provided and used for such purpose."

At the hearing, the respondent conceded that it was aware of the modified citation, that it was served with a copy of same, and was not prejudiced in its ability to present a defense to the alleged violation of section 56.12-36, as reflected in the modified citation (Tr. 4-5).

Petitioner's Testimony and Evidence

MSHA inspector Michael J. Pappas confirmed that he conducted an inspection at the mine site in question on June 21, 1978, and while in the garage area one of the mechanics, a Mr. Feasal, brought to his attention a problem that he was having concerning the rails on the overhead crane. Before climbing up to the crane area, Mr. Feasal deenergized it by walking to the fuse box which supplied power to the crane, opening the box, and reaching in with his hand and pulling out one of the fuses. Mr. Pappas expressed concern over this act on the part of Mr. Feasal because the floor was wet and he did not use any fuse tongs to remove the fuse. After showing him the problem with the crane rails, Mr. Feasal replaced the fuse in the box by hand and turned the switch back on (Tr. 18-22).

Mr. Pappas stated that simply because the handle to the fuse box is turned or pulled down, this does not insure that the box is totally deenergized. Mr. Feasal removed the fuse so quickly, and it was done before he realized what had happened, and since he was standing on a wet floor and did not check to insure that the fuse knives were down, Mr. Pappas was concerned about a shock hazard and believed that a violation occurred. He also indicated that unless the main power switch is disconnected, part of the fuse box is still energized even though the door is open, and he determined that the main power switch had not been turned off because the garage lights were on and other electrical power was being used. He determined that fuse tongs were not used to remove the fuses, and he did so by asking the safety foreman and superintendent who informed him that fuse tongs were not used but that they would obtain them (Tr. 23-24).

On cross-examination, Mr. Pappas stated that when Mr. Feasal removed the first fuse he advised him that he should not do so,

but that Mr. Feasal proceeded to remove the remaining two fuses
by hand after he had warned him not

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to. Mr. Pappas confirmed that the floor was wet and he could not recall observing a rubber mat under the fuse box (Tr. 24-28). He also confirmed that he modified the citation after learning that the fuse box was less than 600 volts, and when he returned to the mine at a later time to look at the box in the company of a mine electrical inspector, he recalled that he stated that the back of the box was not deenergized (Tr. 28-29).

In response to further questions, Mr. Pappas indicated that abatement was achieved with the purchase of fuse tongs by the respondent, and he could not recall if the use or nonuse of such fuse tongs at the mine site was discussed with any of his fellow inspectors. He did recall that respondent advised him that tongs were never used, he observed none in use at the mine, and could not recall discussing the matter with any mine personnel (Tr. 34-35).

When called in rebuttal, Mr. Pappas stated that when he questioned Mr. Feasal about the procedure he normally used to deenergize the box in the event he had to perform mechanical work on the crane, Mr. Feasal told him that he never used fuse tongs and that he and another mechanic always removed them by hand (Tr. 75). Mr. Pappas also indicated that a fuse tong is an electrical tool not a mechanic's normal tool. He also questioned why an electrician would need a voltmeter if the box in question was in fact foolproof (Tr. 76). He also candidly admitted that if he observed a mechanic pull a fuse by hand with the switchbox in the OFF position, he would cite him for a violation, but if he observed an electrician checking the box with a voltmeter and it indicated no voltage, he would probably not cite the electrician if he pulled the fuse by hand. But in the instant case, Mr. Feasal expressed complete ignorance as to the use of a fuse tong and he was not an electrician (Tr. 77).

Respondent's Testimony and Evidence

Ronald Stapley, testified that he has been employed as an electrical supervisor for the respondent for 18 years, supervises a crew of five people in the mine electrical department, and that his department handles electrical installations and maintenance. He was called to the scene of the citation in question shortly after Mr. Pappas issued it. His people are equipped with all the necessary protective equipment required to perform their jobs, and fuse tongs were located in the electrical shop. All of his electricians are supplied with voltage-metering devices which they carry with them to determine whether any of the circuits they work on are electrically alive. He identified the fuse box in question (Exh. R-1) as the 450-volt Trumbull disconnect switch which is the subject of the citation in question, and indicated that it provides 440 volts to operate the crane in the garage. He also indicated that he tested the box after the citation issued and identified Exhibit R-5 as a memorandum dated November 19, 1979, which he prepared, and he read the following pertinent portion into the record (Tr. 43): "The Trumbull three-phase 30-amp fuse disconnect switch was checked from phase to phase and to ground on load side and was found to be zero voltage on both

checks with switch in OFF position. All points of access were checked and found to have zero voltage readings."

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Mr. Stapley testified that he tested every accessible area inside the opened switchbox with a voltmeter and he indicated that the switch is enclosed in a metal enclosure, that the live voltage area between the switch and the box itself could only be reached with great difficulty, and one would have to have "pretty small hands" to reach into that area. The box has a cover lid enclosing it and in order for the switch to be in an ON position the lid has to be closed and there is a mechanical interlock installed on it and one cannot gain access to the inside of the box until the switch is turned to the OFF position. He traced the path of any current entering the box with the switch in the ON position, and indicated that power enters the box at the upper lefthand corner through the first fuse, and in this position a spade at the bottom of the fuse position is in a closed position. When the switch is OFF, the spades are open, and no current passes through the box, but rather, stops at the top of the box where it is "alive." If the switch is in the OFF position, everything in the box itself is "cold", and if one were to reach in and grab one of the fuses he would not receive a shock. He identified Exhibit R-2 as a schematic of the current path to the box and indicated that current enters the box at the top left fuse and exits at the lower right end of the third fuse to the load (Tr. 44-50).

Mr. Stapley stated that the switchbox in question is manufactured to provide maximum protection to an individual in that the box has a safety interlock and when the switch is on all three fuses are energized at the same time, and when it is off all three are deenergized simultaneously. In his opinion, the box is deenergized with the switch in an OFF position, and if the main plant switch were turned off all of the power in the plant would be shut down and the plant could not operate (Tr. 50-52).

On cross-examination, Mr. Stapley indicated that in the event of a mechanical failure within the switchbox, it is possible that the blades may not be completely pulled out when the box door is open, but this would happen if the bar actually broke and was stuck in the closed position. He conceded that in the event the secondary circuit within the box were deenergized, that portion of the circuit stopping at the first fuse would still be energized (Tr. 52-54).

In response to further questions, Mr. Stapley stated that an electrician would never reach in and pull out a fuse by hand as Mr. Feasal did, and that the usual procedure that an electrician would follow would be to turn the box switch off and lock it out before performing any maintenance work on the box. He could not explain why Mr. Feasal did what he did since lock-out procedures were in effect at the time the citation issued. The switchbox in question does not require frequent maintenance, and he speculated that the fuses were pulled by hand simply to turn off the power to the crane. He explained the procedure followed by his electricians in checking for bad fuses. An electrician would throw the switch to the OFF position, open the switch door, check it for power, turn the switch on and make a voltage check with a voltmeter to determine which fuse was bad, and he would then turn

the switch to the OFF position and remove the defective fuse by hand (Tr. 54-59).

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Mr. Stapley indicated that the fuse box is part of the circuit from the main power source to the box, but that it would only be energized up to the top of the box disconnect (Tr. 60).

Harold McKinnon, testified that he has been employed by the respondent for 32 years and that he is the safety supervisor for all of its plants. He was present at the facility on June 21, when the inspection took place and confirmed Inspector Pappas' recollection concerning Mr. Feasal pulling the fuses by hand, and recalled that the area was damp. A rubber mat was in place under the fuse box in question, and he indicated that one can determine whether the switchbox is "hot" by visually observing the knives on the foot bar from the side of the fuses. When the switch is in the ON position, the knives are up and insert themselves into the contact point, and when they are down, the switch is disconnected and OFF, and safe in that position. He was with Mr. Stapley when he tested the switchbox and confirmed his findings that "everything" was in order. When the switch is OFF, one would have to make an effort to reach around behind the box to touch an energized circuit, and the box itself is designed to preclude this from happening (Tr. 61-67).

On cross-examination, Mr. McKinnon stated that he never observed a mechanic remove a fuse by hand and that he was as surprised as Inspector Pappas was when Mr. Feasal did it (Tr. 67). In response to further questions, he candidly admitted that fuses were supposed to be removed by fuse tongs, that tongs were available long before the citation issued, "but there is probably not as much emphasis put on it as they are right now" (Tr. 68). When asked whether the box could become energized when it was in the OFF position, he answered as follows (Tr. 69):

No. That particular switch, if you know what to look for on there, I don't think you got any worries at all.

If you know what to look for. It is designed in such a manner that you can see the working parts in there and if that knife doesn't drop down out of there, you better stay out.

When asked whether the fuse knife could hang up and not completely close when the switch was in the OFF position, he answered: "I'm sure that there is a possible [sic] something might go wrong. It's not a hundred percent". If two of the knives closed and the other one did not, he indicated that "you are going to get poked on the one that the knife didn't drop down" (Tr. 70). When the fuse box switch is in the ON position, the circuit coming into the box would complete itself by going through all of the fuses and out to the load, and if the switch is OFF, current stops at the point where it enters the top of the box at the first fuse and there is no completed circuit through the box since the current would stop at that point (Tr. 71). Mr. McKinnon stated that in his capacity as safety director he always strives to educate his personnel to use proper safety procedures in their work, and that in dealing with the different types of switchboxes in the plant he would prefer that they use fuse tongs

when fuses are changed out, but that the switchbox in

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question is not the type of box where this is required, and when one is "troubleshooting" a box he may not have tongs readily available and he would simply reach in and remove a fuse (Tr. 72).

Findings and Conclusions

Fact of Violation

The citation in this case concerns a Trumbull 30-amp, 450-volt fuse interlock switch box located at respondent's plant garage. The box serves as the only source of electrical power to an overhead crane located nearby in the garage through which electrical energy passes to service the crane. The critical question presented is whether the box in question constituted an energized circuit on the day the citation issued. Petitioner takes the position that while the box may have been disconnected and deenergized at the point where the power cable enters the top of the box where it is normally connected to the first fuse inside the box, the failure to deenergize and lock out the box at the main plant power switch constituted a deenergization of a portion of the circuit but not of the entire circuit itself. Since a portion of the circuit was still energized at the time the fuse was pulled and replaced by hand, the petitioner asserts that the situation presented a potential danger in the event of a mechanical failure in the box itself. In short, petitioner's view is that the entire circuit consisted of a "primary side," consisting of the main power cable which entered the box at the top, and a "secondary side," which consisted of the fuses and wiring inside the box. Further, notwithstanding the fact that the circumstances presented posed an unlikely probability of an actual accident and that the hazard presented was minimal, petitioner nonetheless maintains that the failure to deenergize the entire circuit at the plant main power source constitutes a violation of the cited safety standard (Tr. 9-12).

Respondent takes the position that the term "energy" is defined by Webster's Third New International Dictionary at pages 751 and 408 as "To impart energy; make active; to make energetic or vigorous; to make an electric circuit alive electrically by applying voltage," and "the complete path of an electric current including any displacement current." Respondent argues that the box in question is fed by electric current, but that when the box is opened to expose the inner accessible parts which are within reach of someone placing their hand into the box, the box is deenergized and therefore no circuit or flow of current passes through the fuse holders to the load side of the box. Conceding that there is current to the backside of the box, respondent asserts that any access to this area is protected by insulation and a person cannot be electrically shocked by the current flow itself, and suggests that the standard on its face provides an exception which states "unless equipment and techniques especially designed to prevent electrical shock are provided and used for that purpose" (Tr. 12-13). In this regard, respondent asserted that the box in question was specifically purchased and installed to provide maximum protection to personnel and that one

cannot have access to the inside of the box unless the switch is off and covered up, and that at the time the fuse was pulled by hand the circuit

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was deenergized through the mechanical function of the box itself and that testing of the box at the time the citation issued established that fact (Tr. 15-16).

Petitioner's initial view of the language of the standard, which provides for an exception, was that only fuse tongs or similar devices for removing and replacing fuses are acceptable and that MSHA would object to the existence of any mechanism within the box itself as an absolute defense to the standard. As an example, MSHA counsel stated that in the event of a mechanical failure in the box an employee opening it may not notice that the "knives" behind the fuses had not disengaged and that this presents a chance that the employee will be shocked (Tr. 15). However, during closing arguments, counsel candidly admitted that while the first phrase of the language of section 56.12-36 is direct and absolute in that it proscribes the removal of fuses by hand, the remaining portion dealing with an exception which states "unless equipment and techniques especially designed to prevent electrical shock are provided and used for such purposes" is ambiguous (Tr. 84).

On the facts presented in this case, it could be argued that the switchbox in question is engineered in such a fashion as to provide maximum safety protection. The manufacturer's specifications (Exh. R-3), reflect that the box contains some rather sophisticated interlocking safety devices, including a locking mechanism that locks the switch into a full OFF position when activated, has visible fuse contact blades, and is enclosed in a heavy gauge steel container provided with fixtures to facilitate padlocks. In addition, while it is true that the voltmeter test conducted by Mr. Stapley and Mr. McKinnon (Exh. R-5), was conducted sometime after the citation issued, the fact remains that the test was conducted on the identical box cited and it confirmed that access to the fuses cannot be made unless the switch is in the OFF position, and in that position, the voltage meter indicated no voltage when checked from phase-to-phase and to ground on the load side.

The first question to be addressed is whether or not the switchbox mechanism in this case, while in the OFF position, constitutes an energized circuit within the meaning of the standard. Respondent's position is that under the definition of an electrical energized circuit, a switchbox which is turned off simply is not an energized circuit, even though the power cable feed line to the top of the box is energized to that point. Although respondent agrees that the practice of removing fuses by hand is not a good one, and that as a result of the citation, fuse tongs are now provided wherever there is an electrical box containing fuses, it still maintains that no current passes through the box when the cover lid is opened and is in the OFF position, and the result is that there is no energized circuit within the box (Tr. 86-87).

A second issue which needs to be addressed is the question of interpretation and application of that part of the standard which seems to provide for an exception to the requirement that

fuse tongs be used when removing and replacing fuses. The question is whether or not the exception relates to, or is limited to, methods for removing and replacing fuses and whether the

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asserted built-in safety features of the box itself, coupled with the testing procedures followed by trained electricians, are sufficiently reliable so as to come within the exception. In this regard, and in response to my questions, the respondent conceded that the switchbox in question has not been designated as a "fail-safe" device by MSHA, and neither the inspector or the respondent were aware of any MSHA approval labels affixed to the box (Tr. 81).

An inherent basic problem presented in this case lies with the ambiguity of the language used in section 56.12-36 as it relates to the exception and the requirement for the use of fuse tongs. The term "energized circuit" is not further defined by the definitions found in section 56.1, and I take note of the fact that while section 56.12-36, uses the phrase energized circuit, section 56.12-37, which requires the use of fuse tongs or hotline tools with no exceptions, does not use the phrase energized. It simply refers to high-potential circuits without qualification, and "high-potential" is defined as "more than 650 volts", while "low-potential" is defined as "650 volts or less".

The Dictionary of Mining, Mineral, and Related Terms, published by the U.S. Department of the Interior, 1968 Edition, defines the term "circuit" in pertinent part as follows at page 210: "A conducting part of a system of conducting parts through which an electric current is intended to flow. The course followed by an electric current passing from its source through a succession of conductors and back to its starting point."

The term "switch" is defined in pertinent part at page 1111 of the Mining Dictionary as: "[M]echanical device for opening and closing an electric circuit." The term "fuse" is defined in pertinent part at page 471 as: "An overcurrent protective device with a circuit-opening fusible member directly heated and destroyed by the passage of overcurrent through it."

Upon consideration of the language contained in sections 56.12-36 and 56.12-37, it occurs to me that if these standards are intended to provide protection against accidental electrical shocks or accidents, or to absolutely require the use of fuse tongs or other mechanical devices when removing or replacing fuses, it would have been a simple matter for the standards writers to state that proposition by specifically requiring the use of such mechanical devices for both high and low potential circuits. However, by including an exception as part of section 56.12-36, I can only assume that the drafters of the standards may have believed that a low-potential circuit is not as critical, in terms of safety as a high-potential circuit, and therefore provided for an exception for the removal and replacement of fuses as long as "equipment and techniques especially designed to prevent electrical shock are provided and used for such purposes." As an alternative, and in order to dispel any ambiguity that arises from the language of the two standards, I suppose that the Secretary could have promulgated a standard requiring that all power in a mine be turned off when fuses are removed and replaced.

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Petitioner offered no expert testimony from any of its electrical personnel to explain the distinctions made by the standards in question. On the other hand, respondent's testimony and evidence reflects that company safety policy and procedure dictates that only trained electricians are authorized to perform maintenance on electrical equipment such as the box in question. Aside from the interlocking safety device on the box itself, which automatically triggers an OFF switch when the box cover lid is opened, respondent asserts that a trained electrician would normally look into the box to insure himself that the fuse knives are disconnected, and he would also apply a voltmeter to the box to satisfy himself that there is no "live" current in the box before proceeding to remove a fuse or otherwise perform maintenance on the box. I conclude that the use of the voltage meter and the visual inspection procedure by trained electricians is to prevent electrical shock, and if such procedures were used they would fall within the exception language noted in section 56.12-36. Further, there is an inference in this case that the inspector who issued the citation is in agreement with my conclusion in this regard since he candidly admitted that had he observed an electrician checking the box with a voltage meter he would not have cited him for pulling out the fuse by hand. His concern was the fact that he observed a non-electrician mechanic doing this without making any additional tests or observations.

It seems clear to me that the switchbox in question, including the three fuses and wiring inside the box are incorporated as part of the total electrical circuit providing power to the crane. The path of current within the circuit is from the main plant power source to the top of the switchbox, through the fuses and switching circuit inside the box, and out to the load. It also seems clear to me that the current passing through the completed circuit may be interrupted in several ways.

An overload or mechanical failure on the circuit would obviously cause a fuse to blow and interrupt the flow of current. The circuit is also interrupted when the switchbox is turned to the OFF position and this is accomplished by opening the cover lid to the box.

In its posthearing arguments filed August 18, 1980, respondent asserts that when the fuse box in question is in the OFF position there is no complete path of electric current and that the box includes a roller cam action and a multiplying linkage design with a powerful spring action that always throws to full OFF or ON and that there is no halfway position because there is no dead center. In these circumstances, respondent maintains that since the box is especially designed to prevent electrical shock and used for that purpose, the exception provided in section 56.12-36 is applicable in this case and that an energized circuit was not present.

In addition to the foregoing, respondent states that MSHA has accepted a lock-out procedure wherein respondent is permitted to throw a switch to the OFF position, lock it out and proceed with repairs since the current is deenergized. Yet, in this

case, MSHA insists that the power must be shut off at its source in order to have the circuit deenergized. Respondent fails to perceive any difference as the fuses are deenergized when the interlock doors of the switchbox in question are opened.

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Respondent's assertion that it is unreasonable and somewhat inconsistent to require it to shut off the main plant power source when performing work or changing fuses in the box is not really the critical issue in this case. In this regard, I reject the petitioner's argument made during the hearing that the failure to turn off the main power supply, thereby deenergizing the complete circuit, including the box and fuses, constituted a violation of the cited standard. Failure to deenergize or to lock out circuits and equipment while performing maintenance work are separate conditions or practices covered by sections 56.12-16 and 56.12-17, and if the inspector believed that these sections were violated it was incumbent on him to specifically cite the respondent accordingly.

The critical issue presented in this case is not the fact that the main power switch was not turned off, but rather, the fact that an employee was observed removing and replacing fuses by hand contrary to the stated requirements of section 56.12-36. On the facts presented in this case, it is clear that the fuses in question were in fact removed from the box by hand and replaced by hand contrary to the clear prohibition against such a practice. The critical question is whether the box and fuses constituted an energized circuit. If the answer to this question is in the affirmative, then the citation must be affirmed unless the respondent can establish that "equipment and techniques especially designed to prevent electrical shock" were provided and in fact used at the time the fuses were pulled and replaced by hand, thereby making the exception found in section 56.12-36 applicable.

Respondent's reliance on the exception found in section 56.12-36 is based on the following factors:

1. The switchbox is manufactured to provide maximum protection in that the fuses are automatically deenergized simultaneously when the box is opened, thereby resulting in the switch being placed in a complete OFF position. With the switch in this position, the circuit is interrupted and that portion within the confines of the box itself is "cold" and completely deenergized.
2. A test conducted on the identical box in question with a voltmeter confirmed the fact that no current flows through the box circuitry with the switch in the OFF position.
3. With the switchbox opened and in the OFF position, one can visually observe whether the fuse spades are opened and not engaged, thereby confirming the fact that they are deenergized.
4. Trained electricians perform maintenance on the boxes and check them out with voltmeters before attempting to remove fuses.

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After a careful review and consideration of all of the arguments presented in this case, I conclude and find that the facts presented support a finding of a violation of section 56.12-36, and the citation is AFFIRMED. Although the respondent has advanced several meritorious arguments in support of its case, and particularly with regard to the exception noted in section 56.12-36, the fact is that at the precise moment Inspector Pappas observed Mr. Feasal reach in and pull the fuses by hand, none of the aforementioned factors cited by respondent in support of the proposed application of the exception were present. On the facts presented in this case, it seems clear that at the time Mr. Feasal pulled the fuses out of the box by hand, he had conducted no tests with any meters to ascertain whether the box was hot or cold.

With regard to the test conducted by the respondent subsequent to the issuance of the citation, the record reflects that the box was tested with a voltmeter well over a year later and the fact that the tests indicated a "cold" circuit inside the box is of little value in determining the condition of the box at the time the citation issued. As for the asserted built-in safety features of the box in question, while it is true that it is engineered in such a way as to provide maximum protection against accidental electrocution or shock, the fact is that respondent's own testimony indicated that the box is not an absolute failsafe device and that it can malfunction. For example, Mr. Stapley testified that while the box is normally deenergized when the switch is in an OFF position, it was possible that in the event of an accident, the fuse bar blades could remain engaged even with the box door opened, and if this occurred, current would continue flowing through the first engaged fuse. Mr. Stapley also testified that while the current stopped at the top of the box when the switch was in the OFF position with the box door opened, there was an area between the switch and the box itself which remained energized and accessible to a person with small hands. Mr. McKinnon conceded that someone could conceivably reach behind this area, but that it would take some effort. And, while he believed the box in question presented no problems when it was in the OFF position, he tempered his statement by indicating that this was true only if one "knew what to look for," and he conceded that it was possible for a fuse knife to remain open and not fully engage, and that if this occurred the circuit through the fuse would still be "hot." Finally, both Mr. Stapley and Mr. McKinnon expressed surprise over the fact that a nonelectrician such as Mr. Feasal would reach in and pull fuses by hand contrary to company policy and procedure.

With regard to the question as to whether the fuse box in question constituted an "energized circuit" at the time Mr. Feasal was observed pulling the fuses by hand, on the facts presented in this case it seems clear that even though the box was opened and the switch was in the OFF position, current flowed to the top of the box and into the small area characterized as somewhat inaccessible between the switch and the box. In the event the fuse blades failed to disengage, current would continue

to flow through the fuses. The standard, on its face, does not differentiate between a completed and partial energized circuit, and respondent urges a restrictive interpretation which would terminate the energized circuit at the point where it enters the

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box, while petitioner urges a broad interpretation which would take into account possible accidents and failures within the box itself, thus permitting the circuit to remain open and completed. On balance, I believe that petitioner has the better part of the argument, particularly on the facts and circumstances presented in this case, where a nonelectrician acting on his own volition, either out of total ignorance or lack of concern for his own safety, places himself in jeopardy. I believe that the standard was intended to preclude just such an occurrence.

Negligence

Petitioner conceded that the facts presented in this case do not indicate that the respondent had any prior knowledge concerning Mr. Feasal's pulling the fuses by hand or that the respondent condoned such a procedure by its mechanics when the switchbox was required to be turned off for maintenance purposes. Petitioner suggests that if any negligence were present, it was minimal (Tr. 78). On the facts and circumstances here presented, I cannot conclude that Mr. Feasal's unexplained and foolhardy act of reaching into the box and removing the fuses by hand with no apparent examination of the fuse knives or testing of the box to make sure that it was in fact "cold" can be attributed to the respondent. I find that the respondent was not negligent.

Good Faith Compliance

Petitioner concedes that the citation was abated in good faith by the respondent (Tr. 78), and I adopt this as my finding in this proceeding.

Gravity

Although one can conclude that the practice of a mechanic, who is not a trained electrician, reaching into a switchbox to remove a fuse by hand without conducting any tests to insure that the box is not alive with current is a serious matter. While it has not been established that the switchbox in question was in fact failsafe, there was a potential, although somewhat remote, of someone being electrocuted by pulling the fuses by hand (Tr. 84). Petitioner conceded that it was extremely remote that someone could have been injured on the day the citation issued (Tr. 85). Even so, I cannot overlook the testimony of Mr. McKinnon who candidly admitted that the area behind the box was still energized even though the switch was off, that it was possible for a mechanical failure to occur which may have prevented the fuse knives from completely closing, thereby permitting current to continue through the circuit inside the box, and that a novice who opens the box without examining it closely to ascertain whether the knives are open or fails to test it with a voltmeter could be subjected to a potential hazard. Under these circumstances, I find that the condition cited was a serious violation.

History of Prior Violations

Petitioner conceded that respondent's history of prior violations is a good one and does not warrant any increased assessment (Tr. 82), and I adopt this as my finding on this issue.

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Size of Business and Effect of Penalty on Respondent's Ability to Remain in Business

The parties stipulated that respondent is a medium-sized operator and that the proposed civil penalty assessment will not adversely affect its ability to remain in business, and I adopt this stipulation as my finding in this regard.

Penalty Assessment

On the basis of the foregoing findings and conclusions made in this proceeding, a civil penalty of \$50 is assessed for Citation No. 368661, June 21, 1978, for a violation of 30 C.F.R. 56.12-36

ORDER

Respondent IS ORDERED to pay the civil penalty assessed by me in the amount of \$50 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge