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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. LAKE 80-129-M A/O No. 20-01012-05003
v.	Empire Mine or Empire Mill
CLEVELAND CLIFFS IRON COMPANY, RESPONDENT	
ERNEST RONN, SAFETY COORDINATOR, UNITED STEELWORKERS OF AMERICA, DISTRICT NO. 33, INTERVENOR	

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for the Petitioner; Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, Ishpeming, Michigan, for the Respondent; Paul Gravedoni, President, Local Union 4950, United Steelworkers of America, Negaunee, Michigan, and Ernest Ronn, Safety Coordinator, United Steelworkers of America, District No. 33, Marquette, Michigan, for the Intervenor.

Before: Judge Cook

I. Procedural Background

On January 10, 1980, the Secretary of Labor (Petitioner) filed a proposal for a penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act). The proposal charges Cleveland Cliffs Iron Company (Respondent) with one violation of mandatory safety standard 30 C.F.R. 55.12-16, as set forth in Citation No. 286902, which was issued pursuant to section 104(a) of the 1977 Mine Act. The Respondent filed an answer and an amended answer on February 1, 1980, and February 15, 1980, respectively. On October 6, 1980, Ernest Ronn, Safety Coordinator, United Steelworkers of America, District No. 33 (Intervenor), filed a written notice electing party status in the proceeding on behalf of the affected employees.

The Petitioner and the Respondent engaged in extensive prehearing discovery which entailed the filing and service of a request for production of documents, the filing and service of various sets of interrogatories, and the taking of several depositions.

Various notices of hearing were issued which ultimately scheduled the matter for hearing on the merits on November 18 and 19, 1980, in Marquette, Michigan. The hearing was held as scheduled with representatives of the three parties present and participating. The Petitioner interposed an objection to the receipt in evidence of Exhibit 0-2, one of the Respondent's exhibits. The parties were instructed to argue the materiality of Exhibit 0-2 in their posthearing briefs, and were informed that a ruling on its receipt in evidence would be made at the time of the writing of the decision. On April 3, 1981, the Petitioner informed the undersigned Administrative Law Judge, in writing, that it had withdrawn its objection to the receipt in evidence of Exhibit 0-2. Accordingly, an order was issued on April 6, 1981, receiving Exhibit 0-2 in evidence.

Following the presentation of the evidence on November 19, 1980, Mr. Ernest Ronn delivered a closing argument on the record in behalf of the Intervenor. In addition, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, certain difficulties experienced by counsel for the Petitioner and counsel for the Respondent required revisions thereof. The Petitioner and the Respondent filed posthearing briefs on April 2, 1981, and April 3, 1981, respectively. The Intervenor did not file a posthearing brief. None of the three parties filed reply briefs.

Additionally, when the transcript of the hearing was received by the undersigned Administrative Law Judge on December 12, 1980, it was discovered that the court reporting company had failed to forward in conjunction therewith three of the exhibits referenced in the transcript, i.e., Exhibits G-1, G-2, and G-8. A study of the transcript revealed that Exhibits G-1 and G-2 were photographs, and that Exhibit G-8 was referenced in the transcript but that it was never identified or shown as a specific item. By letter dated January 13, 1981, the three parties were apprised of this development and were instructed to take appropriate action.(FOOTNOTE.1) A stipulation resolving the

matter, and signed by the representatives of all three parties, was filed on February 23, 1981.

II. Violation Charged

Citation No.	Date	30 C.F.R. Standard
286902	May 21, 1979	55.12-16

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called as its witnesses Thomas Allen Fay, an apprentice electrician at the Empire Mine; Steven Samuel Etelamaki, a field electrician apprentice at the Empire Mine; William Waldemar Carlson, a supervisory mining engineer employed by the Department of Labor's Mine Safety and Health Administration (MSHA); and Richard Dean Breazeal, an MSHA health, safety and electrical inspector.

The Respondent called as its witnesses James Philip Tonkin, the safety coordinator at the Empire Mine; Robert Douglas Kallatsa, Sr., a shift foreman in the electrical department on May 19, 1979, and a foreman in the electrical department as of the date of the hearing; and Dennis Roy Laituri, the electrical engineer in charge of the electrical department on May 19, 1979, and the operating engineer of the electrical department as of the date of the hearing.

The Intervenor did not call any witnesses.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

G-1 was a photograph of the ladder used by the apprentice electricians on May 19, 1979.

G-2 was a photograph of a light fixture similar to the one involved in the May 19, 1979, fatal accident.

G-3 is a diagram of a ballast and fixed hanger.

G-4 is a copy of Citation No. 286902, May 21, 1979, 30 C.F.R. 55.12-16.

G-5 is a copy of section 103(k) Order No. 286901, issued on May 19, 1979, and a copy of the termination thereof.

G-6 is a copy of a page from the Code of Federal Regulations containing mandatory safety standard 30 C.F.R. 55.12-16.

G-7 is a computer printout prepared by MSHA's Directorate of Assessments setting forth the history of violations at the Empire Mine or Empire Mill for which the Respondent had paid assessments, beginning September 1, 1977, and ending August 31, 1979.

2. The Respondent introduced the following exhibits in evidence: (FOOTNOTE.2)

O-1 is a copy of a page from a manual used by Federal mine inspectors setting forth the text of mandatory safety standard 30 C.F.R. 55.12-16 subsequent to the change published at 42 Fed. Reg. 57040 (October 31, 1977), and in effect on May 19, 1979; and setting forth an "application" of the standard used by Federal mine inspectors in enforcing such mandatory safety standard.

O-2 is a copy of a page from a manual used by Federal mine inspectors setting forth the text of mandatory safety standard 30 C.F.R. 57.12-16 prior to the change published at 42 Fed. Reg. 57040 (October 31, 1977); and setting forth an "application" of the standard used by Federal mine inspectors in enforcing such mandatory safety standard.

O-3 is a copy of a safety orientation report dated February 6, 1978, and signed by Thomas Fay.

O-4 is a copy of a safety orientation report dated August 6, 1975, and signed by Steven S. Etelamaki.

O-5 is a copy of a safety orientation report dated January 30, 1978, and signed by John W. Parkkonen.

O-6 is a three-page document styled "Safety Orientation, Electrical Department."

O-7 is a copy of a document dated May 18, 1979, and styled "Employee's Safety Meeting Report."

O-8 is a copy of a document styled "Supervisor's Safety Contact and Observation Log."

O-9 is a copy of a document styled "Supervisor's Safety Contact and Observation Log."

O-10 is a copy of a document styled "Supervisor's Safety Contact and Observation Log."

O-11 is a three-prong electrical plug.

O-12 is a copy of the inspector's statement, MSHA Form 7000-4, pertaining to G-4.

3. The Intervenor introduced the following exhibits in evidence:

U-1-A is a copy of the cover from the August 1, 1977, collective bargaining agreement between the Respondent and the United Steelworkers of America.

U-1-B is a copy of certain provisions from the August 1, 1977, collective bargaining agreement between the Respondent and the United Steelworkers of America.

U-2 is a copy of the Respondent's electrician (field) standard job classification and description.

U-3-A is a copy of the cover of the Respondent's safety rule book.

U-3-B is a copy of page 5 of the Respondent's safety rule book.

U-3-C is a copy of page 24 of the Respondent's safety rule book.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of mandatory safety standard 30 C.F.R. 55.12-16 occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The parties entered into the following stipulations during the hearing:

(a) The Respondent is subject to the provisions of the 1977 Mine Act (Tr. 3-4).

(b) The Administrative Law Judge has jurisdiction over the Respondent in this proceeding (Tr. 3-4).

> (c) Citation No. 286902 was issued to the Respondent; and such citation may be admitted into evidence, but not for any substantive purposes to prove the allegations contained therein (Tr. 3-4).

2. The parties filed the following stipulation on February 23, 1981:

> It is hereby stipulated and agreed by and between petitioner, Secretary of Labor, respondent Cleveland Cliffs Iron Company, and Local Union 4950 United Steelworkers of America, acting through their respective counsel or representative, the following:
>
> 1. The exhibits marked as G-1 and G-2 may be excluded from the record in this matter. Exhibits G-1 and G-2 have apparently been lost and negatives of the photographs are not available. The parties further stipulate that all testimony and references made in regard to the items depicted in the exhibits shall not be excluded and are part of the record.
>
> 2. Exhibit G-8 was introduced as an exhibit but was not offered into evidence by any of the parties. Therefore Exhibit G-8 is not part of the record in this matter.

B. Occurrence of Violation

On Saturday, May 19, 1979, a fatal electrical accident occurred at the Respondent's Empire Mine or Empire Mill while three of the Respondent's employees were relocating some previously installed 1,000-watt, high-pressure sodium "Halophane Prismpack" lights in the high bay of the mill. Federal supervisory mining engineer William W. Carlson and Federal mine inspector Richard D. Breazeal participated in the ensuing MSHA fatal accident investigation, which was conducted at the facility later that day. As a result of the investigation, Mr. Carlson issued Citation No. 286902 on May 21, 1979, charging the Respondent with a violation of mandatory safety standard 30 C.F.R. 55.12-16 in connection with the accident. The citation alleges, in pertinent part, that "[a]pprentice electricians were assigned to relocate 1000 watt, high pressure sodium "Halophane Prismpack' lights, powered by 480 volts alternating current, on the ceiling above the primary grinding section in the concentrator. The lighting equipment was energized during installation" (Exh. G-4). The cited mandatory safety standard provides as follows:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and

> signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

There is no substantial dispute amongst the parties as relates to the facts and circumstances surrounding the occurrence of the fatal accident. Rather, the dispute is principally confined to the following issues: (1) whether the light fixture involved in the accident was "electrically powered equipment" within the meaning of the regulation; and (2) whether the handling, hoisting, and hanging of the energized light fixture involved in the accident constituted "mechanical work" on electrically powered equipment within the meaning of the regulation. For the reasons set forth below, I answer both questions in the affirmative.

The evidence presented shows that on the morning of May 19, 1979, electrical apprentices Thomas Fay, Steven Etelamaki, and John Parkkonen reported for work at the Respondent's Empire Mine or Empire Mill on an overtime shift. The three men were assigned to the task of relocating previously installed 1,000-watt, high-pressure sodium "Halophane Prismpack" lights a distance of approximately 8 to 10 feet laterally from one support beam to another in the high bay of the mill.

In view of the location of the lights, the three men had to work approximately 80 to 100 feet above the floor of the mill. It was therefore necessary to use an overhead crane and trolley assembly as a work platform. It was also necessary to use a ladder in order to take down and to rehang the light fixtures, and in order to reach the electrical outlets.

While the men were still on the floor of the mill, Mr. Robert D. Kallatsa, Sr., the shift foreman in charge of the electrical crew, gave instructions as to where the lights were to be placed. Additionally, Mr. Kallatsa gave instructions to wear safety belts, to lock out the electrical power to the crane whenever anyone was on the ladder, and to secure the ladder. The three men acquired the necessary tools and equipment, and proceeded to the crane and trolley assembly.

It appears that each fully assembled light fixture consisted of at least a shade, a bulb, a ballast, a conduit, and a screw fitting. The screw fitting was shaped as an inverted "J" and was attached to the top of the conduit, a pipe-shaped stem. The screw fittings apparently served to suspend the fixtures from fixed hangers attached to the 6-inch "I" beams. It appears that the conduit and screw fitting assemblies were approximately 5 feet in length. The conduit, in turn, was attached to the ballast. Although the record is not entirely clear on this point, it appears that the bulbs and the shades were removed from the lights at all relevant times.

At some point in time prior to beginning the actual work, the three electrical apprentices conferred amongst themselves and determined the procedure to be used in relocating the lights.

Basically, the steps employed, insofar as relevant to the issues presented, were as follows: On the first

light, the crane was moved into position under the electrical outlet, the ladder was put up so as to provide access to the plug, and the light was unplugged. Then, the ladder was taken down and turned around 180 degrees, and the crane trolley was moved to a location where the ladder could be put up to provide access to the light fixture. The light fixture was taken down, and its electrical cord was replaced with a longer one. The crane trolley was moved to a slightly different location, the ladder was put up, and the light fixture was rehung. Again, the ladder was taken down, turned around 180 degrees, and the crane trolley was moved back underneath the electrical outlet. The ladder was put up and the light fixture was plugged into the electrical outlet.

At this point, the three men conferred amongst themselves and decided to revise the procedure so as to eliminate one of the 180-degree ladder rotations. Under the new procedure, the light fixture remained plugged into the electrical outlet while being taken down and while being rehung. Basically, it entailed moving the trolley under the light fixture, putting up the ladder, and taking down the fixture. Then, the ladder was rotated, the trolley was moved to a location underneath the electrical outlet, the ladder was put up, and the fixture was unplugged. The fixture's electrical cord was replaced with a longer cord and the plug was reinserted into the outlet. The ladder was taken down and the trolley was moved to the location where the light was to be rehung. The ladder was put up and the light was placed in its new location. The second fixture was relocated in this manner without incident.

Following their coffee break, the three men began work on the third light fixture using the same procedure employed in relocating the second one. The fixture was taken down from its hanger and was then unplugged from the energized 480-volt electrical circuit. The fixture's electrical cord was then replaced with a longer one, and the Hubbell twist lock, three-prong electrical plug from the old cord was wired onto the new cord. Thereafter, the fixture was plugged into the energized 480-volt electrical circuit and then the three men began to rehang the fixture. Messrs. Fay and Etelamaki were standing on the work platform, hoisting or holding the ballast, conduit, and screw fitting assembly up to Mr. Parkkonen, who was standing on the aluminum ladder. Messrs. Fay and Etelamaki were wearing their leather work gloves, but Mr. Parkkonen was not wearing his. Mr. Parkkonen grabbed the stem and received a fatal electrical shock.

The evidence shows that Mr. Fay had miswired the three-prong plug by inadvertently wiring one of the electrical cord's phase conductors to the ground prong leg on the plug. When plugged into the energized electrical circuit, the miswiring caused the conduit, stem, and the outer casing on the ballast to energize to approximately 277 volts to ground, producing the attendant shock hazard which claimed Mr. Parkkonen's life.(FOOTNOTE.3)

The record clearly reveals that the light fixture was energized when the accident occurred in that it was plugged into a live 480-volt electrical outlet. The citation alleges that the installation or relocation of energized light fixtures violates that portion of mandatory safety standard 30 C.F.R. 55.12-16 which provides that "[e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment. "(FOOTNOTE.4) The terms "electrically powered equipment" and "mechanical work" are not defined by any provision of Part 55 of Title 30 of the Code of Federal Regulations.

The Petitioner maintains that the electrical lights in question were "electrically powered equipment" within the meaning of the regulation because:

> [C]ommon usage of the terms supports a conclusion that the electrical light fixtures were such equipment. The evidence supports a finding that the electrical lights were high pressure sodium lights powered by 480 volts alternating current. It is uncontroverted that the light was electrically powered and the Secretary therefore submits that the ballast of the light fixture meets the definition of electrically powered equipment for purposes of the standard.

(Petitioner's Posthearing Brief, p. 5).

The Petitioner further maintains that:

> [The] record is clear that the apprentices handled, hoisted, and hung the light fixture in the performance of their work on May 19, 1979. In order to accomplish this task, the apprentices used various tools and aids in relocating the electrical lights to their new locations. It is the Secretary's position that the movement and installation of the light fixtures constituted mechanical work for the purposes of 30 CFR 55.12-16.

(Petitioner's Posthearing Brief, p. 5).

The Respondent disagrees, contending that mandatory safety standard 30 C.F.R. 55.12-16 does not apply to electrical lights. The Respondent argues that the regulation applies only to electrically powered equipment which performs a mechanical function through the use of moving or actioning parts, and, in support of its position, points to definitions of the words "mechanical," "machine," and "mechanism" appearing in the 1966 unabridged

edition of The Random House Dictionary of the English Language. The Respondent maintains that the regulation is directed solely toward the prevention of injuries caused by moving or actioning machine parts while the miners are performing mechanical work on electrically powered equipment, and appears to maintain that protection against the electrical shock hazards presented on the facts of this case is addressed exclusively by mandatory safety standard 30 C.F.R. 55.12-17 (Respondent's Posthearing Brief, pp. 14-16). The latter regulation provides, in part, that "[p]ower circuits shall be deenergized before work is done on such circuits unless hot-line tools are used."

The Respondent also argues that the Petitioner's interpretation renders the 1977 amendments to the regulation meaningless (see 42 Fed. Reg. 57038, 57040 (October 31, 1977)), because the drafters of the amendments did not intend that the regulation, as amended, apply to all work performed on all electrical equipment. Significantly, however, the Respondent concedes that the cited condition would have been covered by the regulation in its preamendment form (Respondent's Posthearing Brief, pp. 18-20).

The initial question presented is whether mandatory safety standard 30 C.F.R. 55.12-16 is directed, as the Respondent contends, solely toward the prevention of injuries caused by moving or actioning machine parts, or whether the regulation also provides protection against electrical shock hazards. The rules of statutory construction provide the governing principles for decision.

As a general proposition, the rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland on Statutory Construction, 31.06, p. 362 (1972). According to 2 Am. Jur.2d, Administrative Law, 307 (1962), "rules made in the exercise of a power delegated by statutue should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." Remedial legislation directed toward securing safe and healthful work places must be interpreted in light of the express congressional purpose of providing a safe and healthful work environment, and the regulations promulgated pursuant to such legislation must be construed so as to effectuate Congress' goal of accident prevention. Brennen v. Occupational Safety and Health Review Commission, 491 F.2d 1340 (2d Cir. 1974). "[R]emedial legislation and its implementing regulations are to be construed liberally. Consolidation Coal Co., 1 FMSHRC 1300, 1309 [sic] (1979)," Cleveland Cliffs Iron Company, Inc., 3 FMSHRC 291, 294, 2 BNA MSHC 1138, 1981 CCH OSHD par. 25,163 (1981), and "[s]hould a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, United Mine Workers of America v. Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260 (D.C. Cir. 1972).

Applying these principles of construction, I conclude that mandatory safety standard 30 C.F.R. 55.12-16 provides miners performing mechanical

work on electrically powered equipment with protection against injuries caused by moving or actioning machine parts or equipment, and with protection against electrical shock hazards. The Respondent's proffered interpretation would promote an objective at odds with mine safety and is therefore not to be preferred. There is no indication that the drafters of the regulation intended that it provide only the limited protection advocated by the Respondent. In fact, the plain wording of the regulation provides no support for the limitation advocated by the Respondent.

The Respondent's position that the electrical shock hazards presented on the facts of this case are addressed exclusively by mandatory safety standard 30 C.F.R. 55.12-17 is without foundation. That regulation applies only when work is being performed on "power circuits," and is not directed toward the performance of "mechanical work" on "electrically powered equipment."

The second question presented is whether mandatory safety standard 30 C.F.R. 55.12-16 provides the miners with protection against electrical shock hazards associated with the relocation of energized lighting fixtures of the type involved in this case, i.e., whether the handling, hoisting, and hanging of such energized light fixtures is "mechanical work" on "electrically powered equipment" within the meaning of the regulation. For the reasons set forth below, I answer this question in the affirmative.

As noted previously, the terms "electrically powered equipment" and "mechanical work" are not defined by any provision of Part 55 of Title 30 of the Code of Federal Regulations. The words are not used in a narrow, technical sense, and should therefore be given their common meaning in determining what the drafters of the regulation intended. C. D. Sands, 2A Sutherland on Statutory Construction, 47.27 and 47.28 (1973). "It is axiomatic "that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary.' Burns v. Alcala, 420 U.S. 575, 95 S. Ct. 1180, 43 L.Ed.2d 469 (1975)." Chrobak v. Metropolitan Life Insurance Company, 517 F.2d 883, 886 (7th Cir. 1975). Additionally, the regulation must be interpreted liberally in view of its remedial purpose. Cleveland Cliffs Iron Company, Inc., 3 FMSHRC 291, 2 BNA MSHC 1138, 1981 CCH OSHD par. 25,163 (1981); Local Union No. 5429, United Mine Workers of America v. Consolidation Coal Company, 1 FMSHRC 1300, 1 BNA MSHC 2148, 1979 CCH OSHD par. 23,850 (1979). Also applicable is the principle previously cited from the District 6, UMWA case that if a conflict develops between an interpretation of the regulation that would promote mine safety and an interpretation that would serve another purpose at a possible compromise of mine safety, the first should be preferred.

As relates to whether light fixtures are electrically powered equipment, the evidence clearly shows that the light fixtures in question were 1,000-watt, high-pressure sodium lights

powered by electricity rated at 480 volts. The adjective "power" is defined, amongst several definitions, as "operated by electricity, a fuel engine, etc." David B. Guralnik (ed.), Webster's New World Dictionary of the American Language (2nd College Edition)

(New York: The World Publishing Company) (1970) at pp. 1116-1117. The noun "equipment" is defined, amongst several definitions, as "the special things needed for some purpose; supplies, furnishings, apparatus, etc." David B. Guralnik (ed.), Webster's New World Dictionary of the American Language (2nd College Edition) (New York: The World Publishing Company) (1970) at p. 473. A light fixture is an apparatus operated by electricity. Accordingly, I conclude that a light fixture is electrically powered equipment within the meaning of the regulation.

As relates to whether mechanical work was being performed on the light fixtures, the evidence shows that the May 19, 1979, relocation work entailed the handling, hoisting, and hanging of light fixtures. The word "mechanical," when used as an adjective, has a range of common meanings which includes the following: (1) "Pertaining to, produced by, or dominated by physical forces," and (2) "[o]f or pertaining to manual labor, its tools, and its skills." William Morris (ed.), The American Heritage Dictionary of the English Language (Boston: Houghton Mifflin Company) (1976) at p. 813. The relocation work involved the tools and skills of manual labor, and the work was dominated by the physical forces associated with the handling, hoisting, and hanging of light fixtures. Accordingly, the handling, hoisting, and hanging of light fixtures of the type involved in this case, during their relocation, is the performance of "mechanical work" on the fixtures within the meaning of the regulation.

The Respondent's position to the contrary is not well founded. As noted previously, the Respondent maintains that the regulation does not apply to electrical lights because, in the Respondent's view, the regulation applies only with respect to electrically powered equipment which performs a mechanical function through the use of moving or actioning parts. The strongest support in the record for this position is found in the testimony of Mr. Dennis R. Laituri, an electrical engineer employed by the Respondent. According to Mr. Laituri, the regulation applies only to electrically powered equipment which performs some type of mechanical work, a position which by definition excludes electrically powered lights from the regulation's coverage. He testified that no mechanical work is involved in changing a light fixture because a person cannot perform mechanical work on a device which has no mechanical function (Tr. 350). His testimony on this point is considered unpersuasive because he later admitted during cross-examination by the Intervenor that a person removing the shade and the light bulb would be performing mechanical work on the fixture (Tr. 371), a position which is inconsistent with his previous testimony. Removing the shade and the light bulb does not alter the fact that a light fixture performs no mechanical function.

Of even greater significance is the fact that the Respondent's position, if adopted, would amount to a rewriting of the regulation under the guise of interpreting it. Under the regulation as written, the adjective "mechanical" modifies the

word "work." The Respondent's interpretation would have it modify the word "equipment," and thereby effectively rewrite the regulation to apply only to "electrically powered mechanical equipment."

The Respondent's reliance on the 1977 amendments to mandatory safety standard 30 C.F.R. 55.12-16 in support of its position is misplaced. Prior to November 30, 1977, mandatory safety standards 30 C.F.R. 55.12-16, 56.12-16, and 57.12-16, provided, in part, that "[e]lectrical equipment shall be deenergized before work is done on such equipment." Effective November 30, 1977, the regulations were revised so as to provide, in part, that "[e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment." 42 Fed. Reg. 57038-57044 (October 31, 1977). The supplementary information published in conjunction with the amended regulations commented on the change as follows:

> Mandatory standard 57.12-16 is revised by substituting "Electrically powered equipment * * *' for "Electrical equipment * * *,' and the words "* * * mechanical work * * *' for "* * * work * * *' so as to clarify the intent and application of the standard in response to comments. Work on electrical circuits of such equipment is covered under mandatory standard 57.12-17.

42 Fed. Reg. 57038, 57039 (October 31, 1977). These comments are considered equally applicable to mandatory safety standards 30 C.F.R. 55.12-16 and 56.12-16, as amended or revised.

It is therefore clear that the 1977 amendments simply revised mandatory safety standard 30 C.F.R. 55.12-16 so as to clarify its intent and application as excluding from coverage work performed on the electrical circuits of electrically powered equipment. The amendments were not intended to change, and did not change, the scope of the regulation so as to exclude from coverage the type of activities involved in this case. It is therefore highly significant that the Respondent concedes, as noted above, that the cited condition was covered by the regulation in its pre-amendment form.

In view of the foregoing, I conclude that Citation No. 286902 properly charges a violation of mandatory safety standard 30 C.F.R. 55.12-16. I further conclude that the violation charged has been established by a preponderance of the evidence.

C. Negligence of the Operator

The Respondent admits that it demonstrated negligence in connection with the violation, but maintains that its negligence was minimal (Respondent's Posthearing Brief, pp. 20-21).

The record contains no probative evidence which shows that Mr. Kallatsa, the shift foreman, had actual or constructive knowledge that the handling, hanging, or hoisting of the light fixtures was being performed while such fixtures were energized. Additionally, the record shows that the three

electrical apprentices were sufficiently qualified to perform the relatively simple job of relocating the light fixtures without a supervisor being present at all times.(FOOTNOTE.5) The three men received certain safety instructions from Mr. Kallatsa prior to beginning their work, as set forth previously in this decision.

Accordingly, the record supports a finding that the negligence demonstrated by the Respondent was of a minimal nature.

D. Gravity of the Violation

The violation, coupled with the accidental miswiring of the three-prong electrical plug, resulted in the occurrence of the fatal electrical accident which claimed Mr. Parkkonen's life. The violation was a substantial contributing cause of the fatal accident and was therefore extremely serious. Additionally, the Respondent concedes that the violation was serious (Respondent's Posthearing Brief, p. 21).

E. Good Faith in Attempting Rapid Abatement

Both Mr. Carlson and Inspector Breazeal testified that the Respondent demonstrated good faith in rapidly abating the violation. Accordingly, it is found that the Respondent demonstrated good faith in rapidly abating the violation.

F. Size of the Operator's Business

The Respondent concedes that it is a large operator (Respondent's Posthearing Brief, p. 20).

G. History of Previous Violations

Exhibit G-7 is a computer printout prepared by the Directorate of Assessments setting forth the history of violations for which assessments have been paid at the Respondent's Empire Mine or Empire Mill, beginning September 1, 1977, and ending August 31, 1977. The exhibit reveals that the Respondent has no history of previous violations prior to December 8, 1978. However, the Respondent had 23 violations of various provisions of the Code of Federal Regulations at the facility for which assessments have been paid, beginning December 8, 1978, and ending May 19, 1979. Of these, one was for a violation of mandatory safety standard 30 C.F.R. 55.12-16.

H. Effect of a Civil Penalty on the Respondent's Ability to Remain in Business

In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972), the Federal Mine Safety and Health Review

Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty.

The Respondent asserts in its posthearing brief that the imposition of a reasonable penalty will not affect the ability of either the operator or the mine to continue in business, but maintains that "consideration should be given to the fact that the Empire Mine operation was shut down for three months last fall as was [the Respondent's] Republic Mine on the Marquette Iron Range which is still not back to full operation" (Respondent's Posthearing Brief, p. 20).

The evidence presented shows that the Respondent operates the Empire Mine, the Tilden Mine, the Republic Mine, and three of the larger taconite operations in the area (Tr. 142). The evidence further shows that no production occurred at the Empire Mine for 3 months during the summer of 1980; and that the Republic Mine ceased production at about the same time and that production had not resumed as of the date of the hearing. However, both facilities were shipping from their stockpiles, at least as of the date of the hearing (Tr. 153-154). The record contains no other evidence material to the issue as to whether the assessment of a civil penalty will affect the Respondent's ability to remain in business.

Business and tax records are the type of evidence necessary to establish a claim of financial impairment. Hall Coal Company, 1 IBMA 175, 180, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972) see also, Davis Coal Company, 3 FMSHRC 619, 1 BNA MSHC 2305, 1980 CCH OSHD par. 24,291 (1980) (Lawson, C., dissenting). The record does not contain such evidence. The evidence in the record is insufficient to rebut the aforementioned presumption. Accordingly, I find that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to remain in business.

VI. Conclusions of Law

1. Cleveland Cliffs Iron Company and its Empire Mine or Empire Mill have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal supervisory mining engineer William W. Carlson was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation No. 286902, May 21, 1979, 30 C.F.R. 55.12-16.

4. The violation charged in Citation No. 286902, May 21,

1979, 30 C.F.R. 55.12-16 is found to have occurred as alleged.

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The Intervenor made a closing argument at the conclusion of the hearing on November 19, 1980. The Petitioner and the Respondent filed posthearing briefs on April 2, 1981, and April 3, 1981, respectively. Such closing argument and briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a civil penalty is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
286902	May 21, 1979	55.12-16	$3,000.00

ORDER

The Respondent is ORDERED to pay a civil penalty in the amount of $3,000 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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~FOOTNOTE_ONE

The letter of January 13, 1981, stated, in part, as follows:

"The matter of the missing exhibits must be resolved at this time. Specifically, Exhibits G-1 and G-2 must be located and forwarded to the undersigned for inclusion in the record, and must be accompanied by a stipulation signed by the representatives of all three parties stating that the exhibits forwarded to me are the same ones placed in evidence during the hearing. Additionally, you are requested to determine whether G-8 was an exhibit and, if it was, to submit either the original or a copy and a stipulation signed by the representatives of all three parties stating that it can be placed in the record either as the original or as a substitute for the original, whichever is applicable. If G-8 was not an exhibit, then please so state.

~FOOTNOTE_TWO

Exhibit O-13 is a copy of the narrative findings for a special assessment prepared by MSHA's Office of Assessments in connection with Citation No. 286902. The exhibit was ruled

inadmissible during the hearing and, accordingly, has not been considered in deciding this case. However, in accordance with the ruling made during the hearing, the exhibit has been placed in a separate envelope in the official case file.

~FOOTNOTE_THREE

The crane was grounded and the air was moist and humid. Placing the aluminum ladder against the structural steel made a solid continuity and provided a path for the current to flow to ground. The human body will restrain 277 volts to ground for approximately .86 to .87 of a second before the heart goes into fibrillation (Tr. 152, 211-212).

~FOOTNOTE_FOUR

It appears from the testimony of Mr. Carlson and Mr. Breazeal that this portion of the regulation would have been complied with if the circuit breaker on the main control panel had been opened, or if the fixture had remained unplugged during the relocation operation (Tr. 162-163, 212).

~FOOTNOTE_FIVE

The Intervenor took the position during the hearing that a standard electrician should have been assigned to work with the apprentices on May 19, 1979. No opinion is expressed on this subject.