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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

v.

AMAX CHEMICAL CORPORATION,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. SE 85-39-M
A.C. No. 08-00871-05505

Big Four Mine

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia,
for the Petitioner;
William B. deMeza, Jr., Esq., Holland and
Knight, Tampa, Florida, 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), seeking a civil penalty assessment of \$5,000, for an alleged violation of mandatory safety standard, 30 C.F.R. 55.11-1.

The respondent filed a timely answer and contest, and a hearing was conducted in Tampa, Florida, on July 30, 1985. The parties filed posthearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

Issue

The issue in this case is whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty which should be assessed for the violation. Additional issues raised by the parties are identified and discussed in the course of this decision.

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, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4-6):

1. Respondent operated the Big Four Mine, a surface phosphate mine producing products affecting commerce within the meaning of the Act.
2. The mine has been closed since October, 1984, and prior to that time worked 131,095 man-hours annually.
3. Payment of the proposed penalty assessment by the respondent will not affect its ability to continue in business.
4. The Big Four Mine is a subsidiary of the respondent Amax Chemical Corporation.
5. Petitioner's exhibit P-1, a computer print-out, reflects the respondent's prior history of paid civil penalty assessments for the period November 19, 1982 through November 18, 1984.

Discussion

This case concerns a fatal accident which occurred at the respondent's mine on August 28, 1984. The accident victim, John F. May, an electrician/line worker, was fatally injured at approximately 7:30 a.m., when he came in contact with an energized connector on top of an electrical substation. The substation was a portable, skid-mounted unit approximately 9 feet high, with an additional 10 feet of superstructure extending above the top of the station where high-voltage insulated connectors were mounted for power taps which supplied power to certain field slurry pumps.

The victim was electrocuted when he came in contact with an energized 4,160 volt energized power connector on top of the substation. The connector was approximately 12 inches from a deenergized connector where the victim was standing at

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the time of the accident. Although a truck equipped with a hydraulically-operated insulated bucket on an extendable boom was used to transport the victim and a fellow-worker, James Dickey, to the work site, and was parked in front of the substation, the victim did not use the bucket, and instead climbed the structure without the use of a ladder or other device.

MSHA Inspector Russell Morris conducted an accident investigation and prepared a report (exhibit P-6). In the course of his investigation, he issued a section 104(a) Citation, No. 2382719, with special "significant and substantial" findings, citing a violation of mandatory safety standard, 30 C.F.R. 55.11-1. The narrative description of the cited condition or practice is stated as follows in the citation (exhibit P-5):

A fatal accident occurred at this operation on August 28, 1984, at about 7:30 a.m., when an employee contacted an energized 4160-volt bushing, while performing electrical maintenance. A safe means of access was available, but was not used to reach the top of the skid-mounted 13,200/4160 volt substation and superstructure which is approximately fifteen (15) feet above the ground.

Inspector Morris issued another section 104(a) Citation, No. 2382720, that same day, and it charged the respondent with a failure to guard or deenergize the live connector contacted by the victim. The respondent did not contest the violation and paid a \$5,000 civil penalty assessment for this violation of 30 C.F.R.

55.12-66 (Tr. 147-148). Section 55.12-66 provides as follows "Where metallic tools or equipment can come in contact with trolley wires or bare power-lines, the lines shall be guarded or deenergized."

MSHA's Testimony and Evidence

James L. Dickey testified that in August, 1984, he was employed by the respondent at the Big Four Mine as a first class electrician. His duties included the service and maintenance of electrical equipment. He confirmed that John May, the accident victim, was also a first class electrician and that they worked together on the day shift. Mr. Dickey stated that on August 28, 1984, he and Mr. May were assigned by chief electrician Harold Jones to survey a job at the mobile sub-station used to supply power to the lift lines and

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water pumps. A "hot" 4160 volt power line connector reportedly had a problem, and he and Mr. May went to the substation to find the problem and to decide what had to be done to repair the malfunction.

Mr. Dickey identified photographic exhibits P-2 through P-4, as the substation in question, and he stated that he and Mr. May arrived there between 7:00 and 7:30 a.m. They drove there in the "bucket" truck (exhibit R-2). Since the problem was in one of the connectors, the circuit providing power to that connector line was deenergized and locked out, but the other circuits were not. Mr. Dickey stated that he suggested to Mr. May that he use the boom bucket on the truck to go up and look at the problem connector, but Mr. May declined, and instead climbed up onto the structure to visually observe the problem. Mr. Dickey believed that the first connector to the extreme left of exhibit P-3, was the defective connector, but he was not sure.

Mr. Dickey stated that when Mr. May climbed the structure, he had no tools with him and that he was simply to observe the defective connector to determine the necessary repairs. Mr. Dickey stated that when he last observed Mr. May he had climbed further up the structure and was standing on an I-beam below the connectors with his hands on the I-beam above him where the connectors were located (exhibit P-3). Mr. May had his back to him, and Mr. Dickey did not observe him performing any work.

Mr. Dickey stated that after observing Mr. May standing on the I-beam, acting chief electrician Harold Jones and electrician Rex Tadlock arrived at the scene, and they all discussed the proposed maintenance work to be performed. While this discussion was going on, electrical superintendent Raeburn Foster arrived and joined in the discussion. At that time, Mr. Dickey heard a "crackling" sound, and he turned and saw that Mr. May was "on the hot circuit" with his feet on the I-beam and his hands on top of the connectors. He then observed Mr. May fall backwards and land on top of the structure circuit breakers. In his opinion, Mr. May could not have fallen to the ground because the I-beam would have prevented him from falling to the rear of the structure to the ground.

Mr. Dickey estimated that the distance between the connectors was 2 feet, and he also estimated the other distances and dimensions of the structure. There was 4160 volts leaving the energized connector lines at the top of the structure, and he confirmed that while Mr. May was on the structure

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they were discussing the work which had to be done to repair the defective connector.

Mr. Dickey stated that Mr. May gave no reasons for not using the truck bucket. Mr. Dickey also indicated that the accident occurred within 5 minutes of Mr. Foster's arrival (Tr. 15-39).

On cross-examination, Mr. Dickey reiterated that Mr. May had no tools with him and did not plan to stay long on the structure. No supervisor's were present when he first climbed up the structure, and he believed that Mr. May must have known that the other circuit was "hot" because they only deenergized the one that he was observing.

Mr. Dickey stated that when Mr. Foster arrived, he asked whether or not the power was turned off, and that he (Dickey) told him that it was. Mr. Dickey could not recall whether Mr. Tadlock asked about the power.

In response to further questions, Mr. Dickey stated that the day of the accident was a maintenance day, and that the entire power-station could have been deenergized without disrupting work. Mr. Dickey stated that he and the other electrician's reported directly to Mr. Foster, and he considered Mr. Foster to be a very responsible individual who conducted regular safety meetings.

Mr. Dickey stated that he and Mr. May knew that the defective connector was loose because the condition had been reported to the third night shift foreman on the last working shift, and that he and Mr. May intended to visually observe what was necessary to repair the connector.

Mr. Dickey stated that there were no ladders on the bucket truck or at the substation. He was of the opinion that had he climbed the structure, he could have observed the connectors from on top of the circuit breakers. He also confirmed that there was no safety belts on the structure (Tr. 40-64).

Mr. Dickey was recalled as the court's witness, and he stated that the usual procedure was to disconnect or deenergize only the circuit which was going to be repaired. In the instant case, he explained that since he and Mr. May knew where the defective connector was located, they only deenergized that circuit. Since Mr. Dickey believed that Mr. May

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climbed the structure merely to visually observe the defective connector, they did not believe it was necessary to deenergize the other circuits.

Mr. Dickey conceded that when he and Mr. May advised Mr. Foster that the power was shut down, it was reasonable for him to assume that they had deenergized all of the circuits (Tr. 186-192).

MSHA Inspector Russell Morris testified as to his background and experience, and confirmed that he is an electrical inspector and that he conducted an investigation into the fatal electrocution of Mr. John May on August 28, 1984 (exhibit P-6, MSHA accident investigation report). Mr. Morris stated that he arrived at the accident site between 11:30 a.m. and 12:30 p.m., and he identified photographic exhibits P-2 through P-4 as the photographs of the substation which he took during his investigation.

Mr. Morris stated he used a ladder to climb to the top of the circuit breaker structure, but that he did not climb up onto the I-beam. He determined that the third connector from the left of photographic exhibits P-3 and R-3, was the defective connector. He also stated that the connector clamp and bushing had been removed, it appeared that the connector threads were stripped, and this indicated that Mr. May was having difficulty removing it. Mr. Morris estimated that the spacing between the connectors was 12 inches, and he confirmed that he took no measurements. He also confirmed that Mr. Dickey's other estimates concerning relevant distances and locations were fairly accurate. Mr. Morris also believed that the I-beam Mr. May was standing on was attached to the back of the structure up-right supports while the I-beam containing the connectors was attached to the front of the structure. Under these circumstances, he believed that Mr. May had to lean his body or hold onto the connector I-beam in order to reach the connectors with his free hand.

Mr. Morris identified exhibit P-6 as a copy of the citation which he issued, and he confirmed that he marked the citation as a "significant and substantial" violation because a fatality had occurred, and that it was the result of the violation (Tr. 64-74).

On cross-examination, Mr. Morris stated that he did not know for a fact that Mr. May had performed work on the connector or had removed the bushing. He assumed that this was the case, and he included this assumption in his accident report.

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He conceded that MSHA's "special assessment" narrative findings which state that Mr. May climbed the structure "to remove a defective electrical connection" and that he performed work on the connectors, were conclusions taken from his accident report.

Mr. Morris confirmed that he also issued a citation for failure to completely deenergize the entire substation, and it is his understanding that the penalty assessment was paid (Tr. 74-95).

Respondent's Testimony and Evidence

Raeburn Foster, testified that he was employed at the Big Four Mine in August, 1984, as the electrical superintendent. He stated that the mine processed raw phosphate but that it has been closed since October, 1984. When it was operating, he had 14 electrician's under his supervision. He identified Harold Jones as a union leadman, and while Mr. Jones was substituting for the regular leadman who was on vacation, Mr. Jones was not a "management" employee.

Mr. Foster stated that he conducted regular safety meetings with his men, and he confirmed that he has in the past issued verbal and written warnings for employee safety infractions.

Mr. Foster identified exhibit R-1 as a photograph of the substation in question, and he testified as to the dimensional heights of the structure and equipment shown in the photograph. He confirmed that he went to the site on August 28, 1984, as part of his routine site visits. He arrived at approximately 7:30 a.m., but was not sure whether he arrived before or after Mr. Jones and Mr. Tadlock. He also confirmed that the bucket truck and ladders are available to the electricians for their use in their maintenance and repair work.

Mr. Foster stated that when he arrived at the site, Mr. Dickey was "half-sitting" in and out of the truck and that Mr. May was standing on the I-beam below the connectors with one arm over the I-beam where the connectors were located. Mr. Foster stated that he asked Mr. Dickey and Mr. May whether the power was turned off, and that they both replied simultaneously "yes sir." Mr. Foster had no reason to believe that the power was not off.

Mr. Foster stated that shortly after he arrived at the site, and shortly after being advised that the power was off, he observed Mr. May "slide" or move along the I-beam on which

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he was standing. Mr. May had his back to him, and Mr. Foster observed him with his arms between the fourth and fifth connectors, heard him "grunt," and observed him fall backward off the I-beam.

Mr. Foster stated that he had never observed any of his men climb the substation structure without a ladder, and had he observed this, he would issue a verbal warning. He confirmed that Mr. May was an experienced electrician, and that he had never been issued any warnings for safety infractions.

Mr. Foster identified exhibit R-5 as a page from the employee safety handbook dealing with the proper procedures for line crews to follow while performing their work. He confirmed that when Mr. May and Mr. Dickey stated to him that the power was off, he assumed that all five of the substation cabinets had been deenergized. Mr. Foster confirmed that he was not present when Mr. May first climbed up the structure to the I-beam, and that when he arrived Mr. May was already on the I-beam. Mr. Foster stated that he was not concerned about Mr. May falling because he did not believe that he was "that far up." Mr. Foster believed that Mr. May had received safety training, and that this training included the use of the bucket truck.

Mr. Foster stated that when he first arrived at the site there was some conversation among those present, including Mr. May, but he could not recall what was said. He conceded that he was aware of the fact that Mr. May was not using the bucket, and that he observed no ladder. Mr. Foster indicated that he did not want to yell at Mr. May at that time because he did not want to distract him from his position on the I-beam, but that he intended to reprimand him when he came down (Tr. 131).

On cross-examination, Mr. Foster stated that the spacing between the connectors was approximately 12 to 15 inches, and he believed that when he observed Mr. May on the I-beam, his left arm was between the No. 2 and No. 3 connectors. He confirmed that he did not observe Mr. May take the connector off, nor did he observe any tools in his possession (Tr. 136).

Mr. Foster stated that while he did not observe Mr. May perform any work while on the structure, he conceded that had he used the bucket he would have had more freedom to maneuver about.

Robert Phillips testified that he is employed by the respondent as the Director of Human Resources, and he

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explained the company's training procedures. He stated that Mr. Harold Jones was employed as a bargaining unit leadman electrician and was not considered part of mine management. At the time of the accident in August, 1984, Mr. Jones was substituting for the regular shift leadman who was on vacation.

Mr. Phillips stated that the bucket truck was purchased at a cost of \$150,000, and that it was purchased after the publication of the company's safety procedures handbook (exhibit R-5). He confirmed that Mr. May received safety training and that it included training in safe access. He also confirmed that the truck bucket was available for use by all electricians (Tr. 159-165).

Rex Tadlock testified that in August, 1984, he was employed at the respondent's Big Four Mine as an electrician. He stated that he reported "a hot spot" on the substation connector in question, and that this was done at the end of his shift on Sunday evening, August 26, 1984. He discussed the condition with Mr. Foster, and since Monday and Tuesday were maintenance days, Mr. Tadlock was asked to stay at work to repair the condition. Mr. Tadlock stated that Mr. Foster instructed him to open the primary circuit switch at the substation where the work was to be done, and that by cutting off the primary switch, the power to the top connectors would be cut off.

Mr. Tadlock stated that when he arrived at the substation with Mr. Jones, Mr. May was standing on the I-beam and was looking at the terminator and power wire. Mr. Tadlock could not remember seeing any tools in Mr. May's possession. Mr. Tadlock estimated that 2 to 3 minutes elapsed from the time Mr. Foster arrived and when the accident happened. He confirmed that Mr. Foster asked whether the power had been shut off, and that he was told that it was. He also confirmed that Mr. Foster conducted regular safety meetings with the men, and that he always informed the men to contact him or the chief electrician in the event they encountered any problems in their work (Tr. 166-172).

On cross-examination, Mr. Tadlock stated that he reported the connector condition by making a notation on his time card at the end of his Sunday shift, and that this was normal procedure. He stated that when he first observed Mr. May on the I-beam, he was standing in front of the third connector.

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Mr. Tadlock stated that he had never climbed the structure to perform any work, and that in the event he had to go to the top to perform work he would deenergize all of the circuit breakers, or the entire substation (Tr. 173-184).

MSHA's Arguments in Support of the Violation

MSHA argues that the workplace to which the respondent's electrician John May needed access was the faulty third connector at the electrical substation. Since the term "working place" is defined in section 55.2 as "any place in or about a mine where work is being performed," MSHA concludes that it is clear that on the day of the fatality in question, the faulty third connector was a "working place" within the meaning of the cited standard. MSHA points out that no one, including the respondent, argues that climbing the framework of the electrical substation is a safe means of access to the connectors. In addition to the potential electrical hazard, MSHA asserts that there is also the danger of falling as much as 15 feet to the ground or 5 feet to the top of the substation, and it points out that the respondent's own electrical superintendent agreed that the bucket truck or ladder should have been used.

Recognizing the fact that the "safe access" standard is broad in application, MSHA states that it has been found constitutional and not overbroad or ambiguous, citing former Commission Judge Vail's decision in UNC Mining & Milling, 5 FMSHRC 1164 (June 28, 1983). MSHA asserts that the requirement of "safe means of access" must be considered to be a basic requirement for the protection of an employee's health and safety, and it cites several cases as examples of the various circumstances, locations and different situations where "safe access" has been applied, e.g. Texas Architectural Aggregates, Inc., 2 MSHC 1169 (October 1980)--access to cutoff valve on diesel storage tank; Homestake Mining Company, 2 FMSHRC 2295 (August 1980)--low clearance in passage way; Ideal Basic Industries, Cement Division, 2 FMSHRC 1352 (June 1980)--an employee straddling a moving raw feed belt conveyor; and, The Hanna Mining Company, 3 FMSHRC 2045 (Rev.Comm. September 1981)--travel underneath an overhead belt.

MSHA argues that on the facts of this case, "safe means of access" must be viewed in light of the danger that existed in gaining access to a faulty electrical connector 15 feet above the ground, and that "safe access" is meant to include protection from any potential hazard to an employee in getting to his work place. MSHA concludes that the hazards

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associated with gaining access to the faulty connector clearly involved the possibility of falls and electrocution.

MSHA agrees that the bucket truck was the safest means of access to the connectors atop the electrical substation, and concedes that the truck was used by the electricians to get to the substation. However, since the truck bucket was not used to gain access to the faulty connector, MSHA asserts that the "safe access" required by section 55.11-1, was not provided or maintained, and that the respondent had a duty to assure the use of the bucket truck. MSHA maintains that the respondent's electrical superintendent, upon arrival at the site, was fully aware that the bucket truck was not being used by the electricians, and that he remained silent even though he knew that the accident victim was violating a company work rule requiring the use of a ladder or staging when working above ground.

Citing a September 22, 1981, Commission decision in Secretary v. Hanna Mining Company, 3 FMSHRC 2045, where the Commission held that an operator is required to make each means of access to a working place safe, MSHA argues that the respondent was aware that the accident victim was climbing the framework of the substation to gain access to the faulty connector. Therefore, MSHA maintains that the respondent cannot claim that there is a reasonable possibility that a miner would not use the framework as a means of access, and that the respondent had an obligation to assure that ladders or other safe means of access were used at the site.

In response to the respondent's argument that it has already paid a \$5,000 civil penalty assessment for failing to deenergize the substation as required by mandatory safety standard 30 C.F.R.

55.12-66, MSHA points out that the accident resulted in the issuance of two separate violations, and that the respondent may not shield itself from liability for a violation of a mandatory safety standard simply because it violated a different, but related standard. El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981); Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982).

MSHA concludes that the violation in this case was "significant and substantial" within the test enunciated by the Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981). In support of this conclusion, MSHA argues that from the facts established at hearing, there was a reasonable likelihood that the electrician climbing the substation to repair the faulty connector could have received injuries from a fall or electrocution of a "reasonably

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serious nature." In fact, he was electrocuted after moving from in front of connector No. 3 which had been deenergized to connector No. 5 which had not been deenergized. Additionally, MSHA asserts that the victim was subject to a fall of as much as 15 feet to the ground or 5 feet to the top of the substation which also could be considered of a "reasonably serious nature." The effort exerted by the electrician in climbing the substation and his total reliance on his strength and sense of balance also made a fall reasonably likely.

MSHA asserts that its \$5,000 proposed civil penalty assessment is reasonable. Relying on Inspector Morris' testimony that the violation of section 55.11-1, may have contributed to the death of the electrician in question, MSHA concludes that the failure to deenergize the connector was the principal reason for his death. MSHA asserts that regardless of whether the substation had been deenergized, if the electrician had used the insulated bucket truck to gain access to the faulty connector, he would not have been placed in such a precarious position. His hands, which he had to use to remain on the I-beam, would have been free, and his shoulder would not be in close proximity to the energized connector. Thus, MSHA concludes that the gravity of the violation should be considered serious.

With regard to the question of negligence, MSHA asserts that the respondent's electrical superintendent was aware of the violative condition immediately prior to the accident but remained silent. Since management did nothing to insure that the violation was corrected, and since its failure to provide and maintain safe access may have contributed to the electrician's death, MSHA concludes that the violation resulted from the respondent's negligence.

Respondent's Arguments

The respondent maintains that the evidence adduced in this case demonstrates that it provided safe access to the job site within the meaning of section 55.5-11.1, and that the actions of the deceased electrician were unforeseeable violations of his training, the respondent's work rules, and common sense.

The respondent asserts that MSHA has admitted that safe access was furnished in this case, and it relies on the statement made by Inspector Morris on the face of his citation that "a safe means of access was available, but was not used" in support of its assertion. Respondent concludes that MSHA

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has conceded that safe access was provided at the time of the accident.

Respondent asserts that it has implemented every reasonable precautionary measure to ensure employees safe access to its electrical substations. First, it has required a comprehensive safety training program for its mine employees for a number of years. The program includes training and periodic retraining in safe access practices, particularly for employees in the electrical maintenance department, and the training encompasses operation of the bucket truck. Although the deceased electrician received that training, he ignored its precepts on the day of the accident.

Second, respondent maintains that it has enacted and enforced appropriate work rules requiring employees to utilize safe access procedures in their daily tasks. It routinely disciplines employees for violations of safety work rules and repeated violations of those rules have contributed to employee discharges. The deceased electrician received a copy of those work rules but ignored them on the day of the accident.

Third, respondent points out that it spent in excess of \$150,000 for an electrical maintenance "bucket" truck that employees were required to use to obtain safe access to elevated electrical maintenance work. The truck was driven to the substation on the day in question, but, contrary to respondent's work rules, his safety training and retraining, and common sense, the deceased consciously and knowingly refused to use the truck to reach the top of the substation.

In response to MSHA's assertion that respondent's superintendent Foster was present on the scene at the time of the accident, and should have assessed the situation immediately and ordered the deceased down from the substation superstructure and into the bucket truck, respondent points out that while Mr. Foster did arrive at the accident scene several minutes prior to the electrocution, it was after Mr. May climbed onto the superstructure. Since Mr. Foster was present only a few minutes prior to the electrocution, he could not have realized nor conducted a thorough investigation to determine that, contrary to the reports he had received, the substation's secondary circuit breakers were not totally deenergized.

Respondent asserts that Mr. Foster gave two logical reasons for not ordering Mr. May down from his position. First, the superintendent had observed that his rigid insistence

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upon safe procedures had previously caused his employees to become nervous in his presence. Rather than risk Mr. May's over-reaction to immediate criticism, Mr. Foster decided that he would wait until Mr. May completed his brief initial survey and returned to the ground before reprimanding him for failure to use the bucket truck. Second, Mr. Foster did not perceive any significant danger to Mr. May. Further, he had been assured that the substation electrical circuits had been deenergized and he could observe that Mr. May was only 4 1/2 feet above a solid surface, without any possibility of falling to the ground.

Citing Judge Carlson's decision in Secretary of Labor v. Climax Molybdenum Co., 2 MSHC 1752, 1753 (1982), vacating an alleged violation of mandatory standard section 55.11-1, respondent suggests that a "precautionary steps" test, as applied by Judge Carlson in Climax is applicable to the facts of the instant case. In Climax, Judge Carlson stated that "since some standards are necessarily broad and therefore vague, as here, the courts have devised a test for standards so that the question becomes what precautionary steps a conscientious safety expert would take to avoid the occurrence of the hazard." Citing the circumstances which existed on the day of the accident, the respondent argues that they clearly demonstrate that it could not have taken any additional precautions to provide safe access. Respondent provided equipment, training, work rules, and enforcement of work rules to ensure that its miners had the ability to implement safe access procedures. Respondent points out that there was testimony from all electrician witnesses that use of the bucket truck would not have prevented the accident, and Mr. May would have been electrocuted--even while standing in the bucket--if he had contacted a "hot" circuit.

In response to MSHA's assertion that the respondent failed to provide safe access because Mr. May encountered an energized high-voltage circuit while at his work station in the substation superstructure, respondent argues that since it has established that it provided safe access from the ground to the superstructure, the citation can only be sustained if respondent was required but failed to provide safe access in the superstructure. Respondent suggests that logic and the law both indicate that MSHA's position is untenable.

The respondent asserts that the term "access" is commonly defined as "a way or means of access" and "the action of going to or reaching." Webster's New Collegiate Dictionary. Respondent argues that the commonly-used definition, applied in light of the regulatory requirement that access be maintained

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"to" the working place, implies that the regulation addresses specific jobsite locations rather than specific jobsite hazards. Respondent concludes that the plain language of the regulation does not suggest that it covers hazards at the working place.

Citing *Secretary of Labor v. Hanna Mining Co.*, 1 MSHC 2488 (1980) (Broderick, J.); *Secretary of Labor v. Erie Blacktop, Inc.*, 2 MSHC 1251 (1981) (Koutras, J.) (Applying 30 C.F.R. 56.11-1); *Secretary of Labor v. Standard Slag Co.*, 2 MSHC 1145 (1980) (Koutras, J.) (same), as representative cases interpreting the "safe access" safety standards, respondent points out that in each case the standards have been applied to prohibit hazards encountered by miners on their way to the work station rather than hazards at the work station. Respondent maintains that these decisions are consistent with the regulatory scheme, for if an operator could be cited for failure to provide safe access every time a miner encountered a hazard at his working place, every hazard would generate two citations--one citation for failure to provide safe access and one citation for the "substantive" violation (e.g., failure to guard pinch points). Respondent concludes that neither the statute nor the regulations support that practice.

In response to MSHA's suggestion that the respondent was required to deenergize the substation pursuant to the safe access requirement of section 55.11-1, respondent argues that any such interpretation is an impermissible ex post facto amendment of that regulation. To the extent that MSHA seeks to impose a greater duty upon respondent than that required by the language of section 55.11-1, respondent maintains that MSHA must do so by amending the regulation. Respondent maintains that even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard.

With regard to the question of negligence, respondent cites the cases of *Secretary of Labor v. Marshfield Sand & Gravel, Inc.*, 1 MSHC 2475, 2476 (1980); *Secretary of Labor v. Warner Co.*, 1 MSHC 2446, 2447 (1980), and *Secretary of Labor v. Peabody Coal Co.*, 1 MSHC 1676 (1978), in support of its argument that miner misconduct will mitigate or eliminate any negligence chargeable to the mine operator.

Respondent asserts that Mr. May's actions on the day of the accident clearly fall within the rule set forth in Warner and Marshfield. Respondent points out that Mr. Mays' failure

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to use the bucket truck, his failure to deenergize all circuit breakers on the substation, and his knowing venture into the area of the energized circuits all constitute aberrational, inexplicable, and almost suicidal conduct which is not chargeable to the respondent. Respondent concludes that since there is no evidence indicating that it could have taken additional precautions to prevent the occurrence of Mr. May's actions, or the tragic consequences, respondent and its superintendent simply were not negligent. Respondent concludes further that since it has established that it did provide and maintain safe access to the electrical substation, access that was reasonable under all the circumstances existing on the day in question, and since it was not negligent, no violation has been established and the citation should be vacated.

Findings and Conclusions

Fact of Violation

In this case the respondent is charged with a violation of mandatory safety standard 30 C.F.R. 55.11-1, which provides as follows: "Safe means of access shall be provided and maintained to all working places."

The term "working place" is defined by section 55.2 as "any place in or about a mine where work is being performed."

On the facts of this case, I conclude and find that the location where Mr. May was standing at the time of the accident was a "working place" within the meaning of section 55.11-1. Although the testimony is not clear that any actual work was being performed by Mr. May when he was electrocuted, the fact is that he and other members of his work crew were at the scene to repair a defective connector, and that when Mr. May climbed the electrical substation structure he did so in order to evaluate the work which had to be performed to complete the necessary repairs. Accordingly, I conclude that he was performing work while he was on the structure in question.

In this case, the accident victim May climbed the structure and failed to use a truck bucket which was readily available for his use. He also failed to deenergize all of the connectors before climbing the structure. Mr. May was an experienced electrician, was trained in the use of a bucket, and had used such a bucket in the past. Although a safety belt or ladder were not available to Mr. May, since he

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decided on his own to climb the structure, one can only speculate as to whether he would have used a ladder or belt even if they were available or provided.

Respondent's view of section 55.11-1, is that its application is limited to situations where an employee has to have access to his work location. Once he arrives at that work location, respondent believes that what transpires after his arrival is not covered or encompassed within the parameters of section 55.11-1. On the facts of this case, respondent's counsel takes the position that the respondent believed that the hazard addressed by MSHA was the fact that Mr. May placed himself in danger of falling when he climbed the structure, rather than a danger of electrocution. Respondent's counsel argued that since electrical superintendent Foster was told that the power was off, it was unreasonable for the respondent to believe that at the point in time, when Mr. May climbed the structure and placed himself in close proximity to a live connector which had not been deenergized, that there was any possibility of his being exposed to an electrical hazard (Tr. 127). Conceding that section 55.11-1, was enacted for the protection of an individual employee, on the facts of this case, respondent's counsel takes the position that the hazard against which Mr. May is protected is one of falling rather than electrocution (Tr. 121).

Respondent's counsel suggests that in issuing his citation, Inspector Morris perceived an electrical hazard rather than a falling hazard, but counsel conceded that had Mr. May fallen from the structure before contacting the live connector, the citation would have been proper (Tr. 121). Since the inspector issued a separate citation for the respondent's failure to completely deenergize the live connector which resulted in Mr. May's electrocution, and since the respondent has paid a \$5,000 civil penalty assessment for this violation, counsel suggests that the respondent has already been penalized for any "safe access" violative condition connected with the accident.

MSHA's view is that section 55.11-1, has a broad application which encompasses any hazards to which an employee may be exposed once he is at his work location, and that the standard is not limited to falling or tripping hazards (Tr. 123). Had all of the connectors been deenergized, and had Mr. May used a bucket, safety belt, or ladder to gain access to the connector which he contacted, MSHA's counsel conceded that no violation would have been issued (Tr. 126). Counsel believes that on the facts of this case, safe access to Mr. May's work location was not provided and maintained because he was

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exposed to both a fall and electrocution hazard, and that section 55.11-1, is intended to preclude exposure to both of these hazardous conditions (Tr. 127).

While it is true that the respondent has paid a civil penalty for a violation of mandatory safety standard section 55.12-66, for failure to guard or deenergize the connector located adjacent to the troubled connector which prompted Mr. May to climb the structure in the first place, and which resulted in his electrocution when he contacted the live connector, I take note of the fact that section 55.12-66, requires guarding or deenergization only in instances where metallic tools or equipment can contact a bare powerline. On the facts of this case, the testimony is unclear as to whether or not Mr. May had any tools with him at the time he contacted the live connector, and the witnesses were unclear as to whether Mr. May was actually performing any work on the faulty connector when he came in contact with the adjacent live connector. What is clear is that he used no safety belt, ladder, or bucket to observe or evaluate the work which had to be done. What is also clear is that by standing on the I-beam he had to maintain his balance by holding onto the beam to which all of the connectors were affixed with his hands and arms and could not maneuver along the beam with both hands free. Had he used the bucket, I believe it is reasonable to assume that he could have observed the defective connector from a safe distance without the necessity of placing his hands or body in close proximity to the adjacent connectors which were not deenergized.

Although section 55.11-1, is found under a general regulatory section dealing with travelways, and has been applied in instances dealing with the means made available to a miner to reach his work station or location, and is not among the regulatory sections found in section 55.15 which cover such personal protection requirements such as safety belts and lines, the intent of section 55.11-1 is that an individual be protected not only from hazards which may be encountered while he is on his way to perform some work, but also to protect him from hazards which may be encountered while he is about to perform this work. The use of the phrase "maintained" in section 55.11-1, suggests that a miner be kept or preserved from exposure to dangerous or hazardous situations while he is performing his work duties. Since Mr. May's access to the faulty connector in question was a necessary and integral part of the work which he was required to perform, I conclude that the standard is broad enough to require that safe access to the connector be provided to him, and continued, until such time as his work is completed.

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I recognize the respondent's fears that any interpretation or application of section 55.11-1, prohibiting hazards encountered by a miner at his work station, rather than on his way to his work station will leave an operator vulnerable to two citations--one for failure to provide safe access and one for the "substantive" violation, e.g. failure to guard pinch points. Theoretically, one could probably argue that the failure to guard a piece of equipment could result in two citations--one for the failure to provide a guard to preclude anyone from contacting a pinch point, and one for failure to provide "safe access" on the theory that failure to provide such a guard does not ensure safe access to the unguarded equipment. However, I believe that such determinations should be made on a case-by-case basis and on the basis of the specific facts and circumstances presented in any given case. Further, practically all of the promulgated mandatory standards address specific hazardous situations covered by substantive regulatory standards. On the facts of this case, while it may have been more appropriate for the inspector to cite the safety belt requirements of section 55.15-5, if he believed that Mr. May was in danger of falling, the fact that MSHA seeks to rely on a broad and general standard such as section 55.11-1, in support of the citation is not inappropriate.

The respondent's argument that MSHA's suggestion that it was required to deenergize the substation pursuant to the safe access requirements of section 55.11-1, is an impermissible ex post facto amendment of the regulation because such an interpretation was not communicated to the respondent and fails to inform a reasonably prudent person that such conduct was prohibited is rejected. I agree with the respondent that the test to be applied in interpreting a broad and general standard is the test enunciated by Judge Carlson in *Secretary of Labor v. Climax Molybdenum*, 2 MSHC 1752, 1753 (1982), that "since some standards are necessarily broad and therefore vague, * * * the courts have devised a test for standards so that the question becomes what precautionary steps a conscientious safety expert would take to avoid the occurrence of the hazard." The Commission followed this approach in *Alabama By-Products Corp.*, 4 FMSHRC 2128 (December 1982); *U.S. Steel Corp.*, 5 FMSHRC 3 (January 1983); and *Great Western Electric Company*, 5 FMSHRC 840 (May 1983).

Relying on the inspector's statement on the face of the citation that "a safe means of access was available, but was not used," respondent takes the position that since it provided Mr. May with safe access to his workplace on top of the

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substation structure, it was not obligated under the law to do more than that. Although I agree that the conduct of Mr. May in climbing the substation structure and failing to deenergize all of the connectors were contributing factors which led to his own demise may be considered in assessing the question of negligence, I cannot conclude that these factors absolve the respondent from liability in this case. The Commission has held that an operator is liable for a violation of a mandatory standard without regard to fault, and that when an employee fails to comply with the standard the operator's efforts towards enforcement or compliance are irrelevant with respect to the issue of liability.

Mr. Tadlock testified that he discovered the defective "hot spot" on one of the connectors at the end of his shift prior to the accident and that he discussed this with Mr. Foster. Since the following days were maintenance days, Mr. Foster asked him to work the day of the accident in order to repair the defective connector. Thus, it seems clear to me that Mr. Foster was aware of the fact that work was to be done at the substation in question, and in fact, he instructed Mr. Tadlock to deenergize the substation primary circuit switch feeding power to the top connectors.

James Dickey, Mr. May's fellow worker, testified that Mr. May decided to climb the substation structure in order to survey the work which had to be accomplished, and at that point in time no supervisory employees were at the scene. Mr. May climbed to the top of the transformer and was standing on the circuit breakers when chief electrician Harold Jones and electrician Rex Tadlock arrived on the scene. While Mr. May was on the structure, Mr. Dickey, Mr. Jones, and Mr. Tadlock were discussing the work to be performed. While these discussions were taking place, electrical superintendent Foster drove up in his truck and joined in on the discussion. At that point in time, Mr. Dickey was unaware of what Mr. May was doing, but when he heard a "crackling sound," everyone turned and observed Mr. May "on the hot circuit." Mr. Dickey assumed that Mr. May had climbed up further to the top of the grid cage itself and had positioned himself on the angle iron beneath the connectors. Mr. Dickey estimated that the accident occurred within 5 minutes, and possibly less, of Mr. Foster's arrival (Tr. 44). Mr. Dickey and Mr. Foster confirmed that Mr. Jones and Mr. Tadlock were not company supervisors.

Mr. Tadlock testified that on the morning of the accident Mr. Foster was aware of the fact that he, Mr. May,

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Mr. Dickey, and Mr. Jones were going to work at the substation. Rather than knocking out all of the mine power, Mr. Foster suggested that they cut the power only from the primary substation switch where they would be working (Tr. 168-169). Mr. Tadlock did not actually determine whether all the circuits had been in fact deenergized by Mr. May and Mr. Dickey before he arrived at the scene, and he simply asked them whether the power was off (Tr. 183). When Mr. Foster arrived, he simply asked whether the power was off, and Mr. Tadlock believed that it was reasonable for Mr. Foster to assume that the power to all circuits had been shut down (Tr. 171-172). Mr. Dickey confirmed that Mr. Foster did not specifically ask whether the power to all of the circuits had been shut off, but simply asked whether the power was off (Tr. 183). Mr. Dickey admitted that he and Mr. May cut the power from only the first circuit because they suspected that it was the source of the problem. Since Mr. Dickey believed that Mr. May was simply going to observe the suspected trouble area, the live connectors adjacent to the suspected defective one were not deenergized, and Mr. Dickey stated that in hindsight, Mr. May apparently forgot that only one circuit had been deenergized (Tr. 187).

While it is true that Mr. May had already climbed the structure when Mr. Foster arrived on the scene, and that the accident occurred within minutes of his arrival, the respondent's suggestion that Mr. Foster had no time to react or to conduct a thorough investigation is rejected.

Mr. Foster admitted that when he arrived at the substation he observed Mr. May on the structure, and that at the time he (Foster) was aware of the fact that Mr. May was in violation of the proper safety procedures by not using the truck bucket (Tr. 131, 144). Mr. Foster saw no ladder present, and he confirmed that he engaged in a conversation with Mr. Dickey, Mr. Jones, and Mr. Tadlock concerning the work to be performed, and that he also spoke with Mr. May. Mr. Foster confirmed that from his position on top of the structure, Mr. May could hear the conversation taking place and in fact joined in on the conversation among the group who were on the ground (Tr. 143). Mr. Foster also stated that at one time he observed Mr. May moving along the I-beam in the direction of the connectors (Tr. 102-103), and that he also observed him with his arm over an overhead beam and leaning back, and that Mr. May was either engaged in conversation with the group of simply looking back (Tr. 153).

Mr. Foster conceded that had Mr. May used the truck bucket he would have had more freedom to maneuver about and

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would not have had any need to place his hand over the contactor beam to support himself, and he would have had both hands free (Tr. 152). Although Mr. Foster stated that he was not concerned that Mr. May would be seriously injured if he fell from the structure, he did not rule out the possibility of a fall. As a matter of fact, he testified that the reason he did not order Mr. May down from the structure when he first observed him was that he did not want to upset him or make him nervous. Mr. Foster stated "if I'd said something, he might have fell; I might have contributed to him falling by jumping on him right there" (Tr. 131). Mr. Foster also believed that Mr. May would not have been seriously injured in a fall because he was not that far up the structure and that in the event of a fall Mr. May would probably have struck a part of the structure rather than falling straight to the ground (Tr. 132).

After careful review of the testimony and evidence adduced in this case, including a review of the photographic exhibits of the structure, I conclude and find that by climbing the structure and positioning himself on the I-beam, Mr. May placed himself in a dangerous position. By positioning himself on the structure without the use of a bucket or safety ladder, he placed himself in danger of falling. I also conclude and find that by failing to completely deenergize the entire substation and connector circuit breakers before climbing the structure, Mr. May placed himself in a hazardous position of being electrocuted in the event he contacted a live connector. While it may be true that the use of the bucket would not have prevented the electrocution which did occur, I believe it is reasonable to conclude that the use of the bucket would have substantially lessened the chances of Mr. May contacting the live connector. Had he been in the bucket, it would not have been necessary for him to hold on to the beam on which the connectors were located, nor would it have been necessary for him to place his hands and shoulders between the live connectors to keep his balance or to prevent his falling from the beam on which he was standing.

The respondent's suggestion that Mr. Foster did not have enough time to react to the situation when he first arrived at the scene of the accident and that Mr. Foster was afraid to chastise Mr. May for fear of upsetting him is rejected. On the facts here presented, I conclude and find that Mr. Foster had ample time to assess the situation and immediately order Mr. May down from the structure. Mr. Foster had prior knowledge that work was required at the substation. After his arrival, he joined in on the conversation with the

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work crew, including Mr. May. He observed Mr. May moving about on the I-beam while the conversation was taking place, and he knew that Mr. May was in violation of at least one company safety rule. Under these circumstances, I believe that a reasonably responsible supervisor would have immediately ordered Mr. May off the structure.

I reject any suggestion that Mr. Foster's arrival and the accident took place simultaneously, or that Mr. Foster had no time to react. Given the conversations which took place, and Mr. May's movements while on the I-beam, in full view of Mr. Foster, I believe that Mr. Foster had a duty to order Mr. May down immediately. Since the normal conversational tone used by Mr. Foster during his discussion with the crew and Mr. May apparently did not upset Mr. May, I reject any suggestion that a directive by Mr. Foster in his normal tone of voice would have upset Mr. May to the point of causing him to fall. It is just as reasonable to conclude that had Mr. Foster ordered Mr. May down when he first arrived at the scene and before engaging in conversation with the crew, Mr. May would not have had the opportunity to maneuver down the beam on which he was standing, or to position himself dangerously close to the live connectors.

Respondent's suggestion that Mr. Foster could not have realized that only one circuit had been deenergized is also rejected. Mr. Foster had specifically instructed Mr. Tadlock to deenergize all of the circuits, and when he arrived at the scene he assumed that this was done, and he simply accepted the word of those at the scene that the power was off. However, Mr. Dickey knew that all of the circuits were not deenergized, and Mr. Tadlock did not specifically determine whether or not this had been done before Mr. Foster's arrival. Although Mr. Foster had previously instructed Mr. Tadlock to cut the power from all of the circuits, he did not specifically ask whether this had been done, nor did he personally verify that this had been done (Tr. 155-156). Although he could have determined that all circuits had been locked out by simply observing the positioning of the cabinet handles, he did not look at or observe the handles until after the accident occurred (Tr. 157). Under the circumstances, I believe that Mr. Foster acted less than reasonably when he accepted the word of those assembled at the scene that the power was off. To the contrary, I conclude that a reasonable and prudent person in Mr. Foster's position would have personally verified that all circuits were deenergized. On the facts here presented, I cannot conclude that Mr. Foster had to conduct any extensive or thorough investigation to ascertain that his instructions to Mr. Tadlock had been carried out. All

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that was required was a specific inquiry by Mr. Foster, or a visual observation of the cabinet handles.

On the facts of this case, I conclude and find that section 55.11-1 was properly applied to Mr. May's situation. The failure by Mr. May to avail himself of the truck bucket placed him in a precarious position approximately 15 feet off the ground, and by positioning himself on the I-beam and maneuvering about without the use of the bucket or a safety line, in full view of a supervisor, Mr. May exposed himself to a danger of falling. The fact that he may not have fallen completely to the ground is irrelevant. Further, the fact that Mr. May had the bucket available for his use before he climbed the structure is no defense to the violation. Once Mr. May climbed the structure and exposed himself to a danger of falling, superintendent Foster had a duty to insure that he obtain a safety line or use the bucket. By failing to do this, I conclude that Mr. Foster acted less than a reasonably prudent superintendent would act under the circumstances.

On the facts of this case, I also conclude and find that it was not unreasonable for MSHA to rely on the fact that all of the circuits were not deenergized to support a violation of section 55.11-1. I conclude that the failure by the respondent to insure that all of the circuits were deenergized provided Mr. May with something less than a safe means of access to his work location, and that a safe means of access was not maintained while Mr. May was on the I-beam maneuvering himself in such a position as to enable him to evaluate the work which he had to perform to repair the defective connector. By failing to personally verify that all of the power was off, I believe that Mr. Foster acted less than a reasonably prudent superintendent would act under the circumstances.

In view of the foregoing findings and conclusions, the citation IS AFFIRMED.

History of Prior Violations

Exhibit P-4, is a computer print-out listing the respondent's mine civil penalty assessment record for the period November 19, 1982 through November 18, 1984. That record reflects that the respondent paid civil penalty assessments for 12 citations, none of which are for violations of section 55.11-1. For an operation of its size, I conclude that the respondent has a good compliance record, and I have taken this into account in assessing the civil penalty for the citation in question.

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Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

I conclude that the respondent's Big Four Mine was a moderately sized phosphate operation, and take note of the fact that the mine has been closed since October, 1984. Respondent has stipulated that the proposed civil penalty assessment will not adversely affect its ability to continue in business. Under the circumstances, I conclude that the civil penalty assessment I have imposed will not adversely affect the respondent's ability to continue in business.

Negligence

I conclude that the violation resulted from the respondent's failure to take reasonable care to insure compliance with the safe access requirements of section 55.11-1, and that this failure on its part constitutes ordinary negligence. As stated earlier in my findings and conclusions, superintendent Foster had a duty to insure safe access to Mr. May's work location, and Mr. Foster acted less than a reasonably prudent superintendent would act under the circumstances. In making this negligence finding, I have taken into consideration Mr. May's unexplained conduct in putting himself in such a hazardous position by failing to use the truck bucket which was readily available for his use. I have also taken into account the conduct of Mr. May, as well as his fellow-worker Dickey, in failing to completely deenergize the connector circuits before attempting to "troubleshoot" or perform work on the suspected defective connector. I have also considered these factors in mitigating the civil penalty assessment that I have made for the violation.

I have taken into account the respondent's arguments concerning its safety work rules, and the fact that Mr. May received safety training. Mr. Foster quoted from a portion of the respondent's Employee's Accident Prevention Manual, exhibit R-5, pg. 67, which reads as follows (Tr. 112): "One of the most hazardous parts of your job in working above ground; therefor, always use a good ladder or staging that is properly set up. Never use makeshift arrangements."

Mr. Foster stated that the quoted work rule addresses the situation presented in this case, but I take note of the fact that the work rules are silent as to the use of a truck bucket, and aside from the quoted reference by Mr. Foster, the shop work rules appearing on page 68 require the use of

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non-conductive ladders for electrical work, and caution against an employee contacting ground wires or other attachments having ground potential.

Gravity

I conclude and find that the failure by the respondent to insure safe access to Mr. May's work location constituted a serious violation of the cited standard. Although Mr. May's conduct contributed to his own demise, I conclude and find that the failure to insure compliance with the standard was also a contributing factor to the accident.

Good Faith Compliance

The violation was abated after the respondent conducted safety meetings with all of its electrical personnel and discussed in detail safe work practices. I conclude that the violation was abated in good faith.

Significant and Substantial Violation

I agree with MSHA's posthearing proposed arguments that the violation in this case was significant and substantial (S & S). The violation resulted in a fatal accident, and I adopt as my finding and conclusion MSHA's arguments that the facts here establish that there was a reasonable likelihood that the electrician climbing the substation to repair the faulty connector could have received injuries from a fall or electrocution of a "reasonably serious nature." Although the facts establish that a fall did not result in the electrician's death, it has been established that he was electrocuted. Accordingly, the inspector's S & S finding IS AFFIRMED.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of \$2,500 is appropriate and reasonable for the section 104(a) Citation No. 2382719, issued on August 28, 1984.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$2,500 for the violation in question, and payment

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is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge