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SOL (MSHA) V. LYMAN-RICHEY SAND & GRAVEL  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-94
Petitioner	:	A.C. No. 25-00282-05503
	:	
v.	:	Plant No. 11
	:	
LYMAN-RICHEY SAND & GRAVEL	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Steven D. Johnson, Esq., Kennedy, Holland, DeLacy &  
Svoboda of Omaha, Nebraska, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA"), charges the Respondent, Lyman-Richey Sand & Gravel Company ("Lyman-Richey") with violating a mandatory safety standard promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., ("Mine Act" or "Act"). The violation is cited in Citation No. 2652922, a citation issued under section 104(a) of the Act, 30 U.S.C. 814(a). The citation asserts that Lyman-Richey's violation of 30 C.F.R.

56.12071 resulted in the death of one of the company's miner and in the severe injury of another miner when the boom of a rubber-tired crane was raised into high-voltage power wires.(Footnote 1) The citation also sets forth the MSHA inspector's finding that

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Part 56 contains the Secretary's safety and health standards for surface metal and nonmetal mines. Section 56.12071 states:

When equipment must be moved or operated near energized high-voltage power lines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken.

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the alleged violation was a significant and substantial contribution to a mine safety hazard (a "S&S" violation).

The Secretary, instituting his special assessment procedures found at 30 C.F.R. 100.5, proposed a civil penalty of eight thousand dollars (\$8,000) for the alleged violation.(Footnote 2) Lyman-Richey answered that the citation did not accurately reflect a violation of section 56.12071. A hearing on the merits was conducted in Omaha, Nebraska. At the close of the hearing, counsels presented helpful oral summations of their positions.

Section 104(a) Citation No. 2652922, 3/7/91, 30 C.F.R. 56.12071

The citation states:

An electrical accident occurred at the plant on March 5, 1991, at 1410 hours. The accident resulted in one employee being fatally injured, and another employee receiving serious burns. The injuries were the result of the boom of a rubber tired mobile crane being raised into bare high voltage conductors. The accident occurred at the top of inclined roadway leading from the stripping area to the main plant.

The crane, a Link-Belt HC-98A, had been disabled due to a problem in the tramming engine while moving from the stripping area to the upper main plant pond. The two injured employees contacted the tramming frame of the crane while attempting to gain access to the engine compartment. The tramming engine compartment was located

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Section 100.5 states in pertinent part:

MSHA may elect to waive the regular assessment formula( 100.3) and the single assessment provision ( 100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment. Although an effective penalty can generally be derived by using the regular assessment formula and the single assessment provision, some types of violations may be of such a nature of seriousness that it is not possible to determine an appropriate penalty under these provisions. Accordingly, the following categories will be individually reviewed to determine whether a special assessment is appropriate:

(a) Violations involving fatalities and serious injuries[.]

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directly under the boom of the crane while tramping. The crane operator had raised the boom to allow access to the tramping engine compartment. The boom of the crane contacted two phases of an energized three-phase 13.8 kilowatt circuit, which caused the frame of the crane to become energized.

A written company safety procedure had been established and was in effect prior to the accident. The procedure (policy) addressed the safeguards that must be taken when operating cranes near over-head power lines.

G. Exh. 7.

STIPULATIONS  
AND  
SEQUESTRATION OF WITNESSES

At the commencement of the hearing counsel for the Secretary, on behalf of herself and counsel for Lyman-Richey, stated that the parties agreed as follows:

1. Lyman-Richey is engaged in the mining and selling of sand in the United States, and its mining operations affect interstate commerce;
2. Lyman-Richey is the owner and operator of Pit No. 11, MSHA I.D. No. 25-00282;
3. Lyman-Richey is subject to the jurisdiction of the Mine Act;
4. The Administrative Law Judge has jurisdiction over this matter;
5. Citation No. 2652922 was properly served by a duly authorized representative of the Secretary upon an agent of Lyman-Richey on the date and place stated therein and may be admitted into evidence for the purposes of establishing its issuance but not for the truthfulness or relevancy of any statements asserted therein;
6. The exhibits to be offered by Lyman-Richey and the Secretary are authentic;

7. The proposed civil penalty will not affect Lyman-Richey's ability to continue in business;
8. Lyman-Richey demonstrated good faith in abating the alleged violation;
9. Lyman-Richey is a medium size operator with 215,416 tons of production in 1991;
10. The certified copy of the MSHA assessed violations reflects the relevant history of previous violations at this mine for the two years prior to the date of Citation No. 265292.

See Tr. 6-7.

Following the recitation of the stipulations and upon the agreement of counsels the witnesses were sequestered. Tr. 15-16.

THE SECRETARY'S EVIDENCE

JAMES SKINNER

James Skinner, the MSHA inspector who issued the subject citation, was the Secretary's sole witness. Skinner stated that prior to becoming an inspector he had worked for thirteen years in hard rock mining and that for eight of those years he was assigned to jobs relating to electricity. In addition, he testified he had worked for 1 1/2 years as an electrical line man for a power company and had three years experience as a journeyman electrician for a chemical company. Tr. 17-18. After joining MSHA in 1974, Skinner took specialized classes in electricity and he has had annual retraining. In his work for MSHA, Skinner has specialized in electricity. Tr. 17-19. In addition, Skinner is a member of the MSHA team that investigates fatal accidents in the agency's Rocky Mountain District.

Skinner explained that the Lyman-Richey sand and gravel operation located at Valley, Nebraska (Plant No. 11) is usually inspected out of MSHA's Topeka, Kansas office.(Footnote 3) However, on March 5, 1991, Skinner, whose home office is in Salt Lake City, Utah, was notified that an electrocution had occurred at the Lyman-Richey operation and that he was to be a member of the MSHA investigation team. Skinner stated that although he had been

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Skinner stated that the mine produces sand and gravel as the result of river bottom dredging. Tr. 20. The sand and gravel is also processed by Lyman-Richey.

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part of MSHA teams that investigated approximately 10 to 12 fatalities, none of these prior accidents involved cranes and overhead power lines. Tr. 95.

Skinner testified that he arrived at the mine on March 6, 1991, in the company of Eldon Ramage, an MSHA inspector from the Topeka office. Once at the mine, Skinner and Ramage spoke with Walter L. Dryden, the mine superintendent, and Stanley E. Benke, Jr., the mine safety assistant, in order to obtain "a synopsis . . . of the accident." Tr. 22. Then, they proceeded from the office to the accident site, which was located several hundred feet from the office. Tr. 22-23.

The crane involved in the accident was still at the site. Skinner described it as a "large mobile crane with a large extended boom". Tr. 23. The crane was rubber tied and was diesel powered. The tramping engine was located at the front of the crane and the boom house was located at the rear. Id. In addition to viewing the crane, Smith stated that he interviewed employees of Lyman-Richey, as well as company officials. Tr. 24. He also went to the power company supplying electricity to the mine and interviewed power company officials "to get some pertinent facts on their substation as a supplier of the power." Id.

Skinner was shown and identified a copy of the MSHA accident report that sets forth the findings of the investigation. Tr. 25, G. Exh. 1. Skinner explained that he had prepared a rough draft of the report with some help from Ramage and that the report was then reviewed by his supervisor and the MSHA district manager for the Rocky Mountain District before it was issued. Tr. 24-25. He also explained that the report was based upon the notes, interviews and photographs that he and Ramage had gathered as the result of the investigation. Tr. 25.

Skinner was asked about conclusions he had reached regarding the cause of the accident. He stated that he believed the "direct cause" to be the physical contact of the boom of the crane with two phases of the high-voltage overhead power lines. The lines together carried approximately 13,800 volts of power or about 7,900 volts singly. Tr. 26-27, 39. According to Skinner, contributing factors included the victims' contact with the frame of the crane and damp ground in the area around the crane. Tr. 27. At the accident scene Skinner measured the distance from the ground to the power lines and found the lines to be 28 feet above the ground. Tr. 27-28, 29.(Footnote 4) Skinner stated that when the

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Skinner did not make a direct measurement, but rather determined the height of the lines by a "shadow cast factor." Tr. 99. Nonetheless, he was satisfied that a distance of 28 feet was accurate. Id.

boom was down and the crane was traveling there was more than 10 feet between the top of the crane and the power lines. Tr. 29.

Appendix I of the report is a sketch drawn by Skinner purporting to depict an overhead view of the accident scene.(Footnote 5) Using Appendix I as a reference, Skinner described how he believed the accident had occurred. Skinner explained that the crane, which was being trammed from the lower stripping area of the mine, had stalled and the miner who would be fatally injured in the accident, Earl N. Johnson, was preparing to "troubleshoot," that is to find out why the crane had stalled. Johnson was standing on the ground on the right hand side of the crane (the side opposite the crane operator's tramping cab) about half way between the front and back of the crane. Next to Johnson, on Johnson's right as Johnson faced the crane, was Harold McGhee, the miner who would be severely shocked in the accident. Tr. 31; G. Exh. 1, App. I. The crane operator, Frank Jirovsky, told Skinner that he had tried to restart the engine several times without success.

Skinner believed that Johnson and McGhee were trying to determine whether the crane had stalled due to a malfunction of the fuel filter. Tr. 32-33. The fuel filter was accessible from where Johnson and McGhee were standing and Jirovsky was not required to move any part of the crane to provide the miners access to the filter. However, should the problem not be with the filter, the miners would have to continue looking for the cause of the stall by inspecting the engine.

In order to access the crane's engine compartment, the boom of the crane had to be raised. As Skinner put it, "[the boom] sits directly over the engine compartment." Tr. 75. Jirovsky began to raise the boom to a point where it would be high enough to allow Johnson and McGhee to gain access to the engine compartment. Tr. 33, 102, 122.

As Jirovsky activated the boom it rose toward the high voltage power lines that crossed above it and contacted two of the lines. Tr. 34. (The lines were strung on poles and there were four lines in all. One line was a grounded neutral line, and the other three carried power. The boom touched the two power carrying lines closest to the crane. Tr. 34-35, see

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Under voir dire, Skinner stated that the wet areas he depicted on Appendix I were not drawn to scale but rather were meant to symbolize that "there were wet spots around the area." Tr. 44. Skinner amplified, "[T]he whole area was damp . . . and these were just some more . . . pronounced water." Id. However, Skinner was not certain whether there had been precipitation between the occurrence of the accident and his observation of the accident scene. Tr. 48. In addition, he did not know if water had been used to attempt to extinguish the fire that resulted when the rubber tires of the crane ignited. Tr. 72.

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G. Exh. 1, App. I.) Contact was made about 2 feet from the end of the boom.  
Tr. 77.

Skinner testified that when the boom contacted the two lines, a phase-to-phase short-circuit resulted. Each of the lines had fuses providing them with short-circuit protection. As the boom touched the lines, one of the fuses functioned as it should and the line lost power. However, the other fuse failed. It did not open and the line remained energized. Tr. 37. Because the circuit for one of the power lines remained in operation, the current flowed through the metal frame of the crane seeking a ground. Tr. 39. Johnson and McGhee became conductors for part of the current. Johnson was electrocuted and McGhee was burned, especially on his feet. Tr. 30-41.

In the meantime, as Skinner recalled, Jirovsky had jumped from the cab of the crane. Tr. 54. Almost immediately, a call was made to "911" for emergency aid and the power company was contacted as well. Power company representatives shut off the power, but it was too late. Tr. 65.

Skinner described the boom's touching of the power lines as the direct cause of the accident. Contributing factors were the victims being in the area of the crane, the fuse malfunctioning and causing one of the power lines to remain energized, and the failure to check whether the boom was clear of the power lines before it was lifted, even though Lyman-Richey's written policies indicated that this should have been done. Tr. 104-106.

As a result of the investigation, Skinner issued Citation No. 2652922. (Footnote 6) Skinner stated that he issued the citation as a result of the investigation and because "it was apparent that the crane had been operated in the vicinity of . . . high voltage lines and the boom was actually moved into contact position with the energized high voltage lines." Tr. 20-21. Skinner cited Lyman-Richey for a violation of section 56.12071 because he believed the standard required that when using equipment around high-voltage power lines, if the distance between the equipment and the lines was 10 feet or less, the lines had to be deenergized or other precautions had to be taken. Tr. 48-49. Here, the distance between the equipment and the power lines was less than 10 feet. Indeed, it was zero when the boom touched the lines. Tr. 52.

According to Skinner, MSHA regarded any line carrying over 650 volts of current as a "high-voltage power line" and thus the

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6 Skinner stated that Lyman-Richey personnel were "very cooperative" throughout the course of the investigation. Tr. 98. They were forthcoming with information and Skinner could not think of anything he requested that was denied. Id.



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lines contacted by the boom were definitely within that category. Tr. 49. The standard specifically applies to equipment that is being "moved or operated" and Skinner believed the crane was being "operated" in that the boom was being raised. Tr. 50. Skinner also stated that raising the boom to a point where it was within 10 feet of a high-voltage power line would not have violated section 58.12071 provided other precautionary measures had been taken. Skinner was asked if using a person to observe the relationship of the boom to the wires (a "spotter") would have constituted a "precautionary measure?" He indicated that when the power wires were overhead, the observer's perspective would have made it difficult to judge verticle distance and therefore this would not, in his opinion, have been an acceptable precautionary measure. Tr. 110-111. Skinner was asked his opinion as to the types of safety procedures the company could have undertaken? He observed that the power company should have been called and power should have been deenergized in the lines. Tr. 66.

Skinner stated that he had spoken with the superintendent, Walter Dryden, during the investigation and as Skinner recalled, Dryden said that he had gone to check on another crew before the accident and that he had just returned when the accident occurred. Skinner remembered Dryden telling him that immediately prior to the accident Johnson had come to Dryden's truck and requested a wrench. Tr. 101-102, 103.

When asked why he found the violation of section 56.12071 to be S&S, Skinner essentially responded his finding was based upon the fatality and the serious injury. Tr. 52-53.

With regard to his finding that the violation was due to Lyman-Richey's "moderate negligence," Skinner stated that the company had established written safety procedures for moving or operating equipment around high-voltage power lines, and he believed Lyman-Richey deserved credit for that. Specifically, he noted that the company safety manual instructed that all overhead power lines shall be considered energized unless the owner or electrical utility indicated otherwise. Tr. 58-60. However, he also believed that the company should have had management personnel evaluating the situation after the crane became disabled and while it was undergoing troubleshooting and possibly prior to moving the crane from the lower to the upper level. Tr. 56, 64-65, 114-115. With the exception of Dryden, who arrived on the scene just as the accident was about to occur, Skinner understood that no supervisory personnel were present. Tr. 116-117. Skinner also stated that he did not know whether the victims of the accident had been trained in proper procedures for operating a crane under energized power lines. Tr. 132.

LYMAN-RICHEY'S WITNESSES

JAMES WENDELL HOLMES

Holmes, who retired from the company less than one month after the accident, had a long history of involvement with Lyman-Richey. He began his career as a truck driver and dispatcher. He then was promoted to plant foreman, plant superintendent and safety director, the position from which he retired. As safety director, Holmes had responsibility for nine concrete plants and ten gravel pits. All of the gravel pits were similar to the pit at Plant No. 11, the pit where the accident occurred, in that all were places where sand and gravel was dredged, pumped, screened and shipped. Much, if not all, of the aggregate was shipped to the concrete plants. Tr. 138-141.

Holmes identified the company safety manual. Tr. 146, R. Exh. 1. He noted that pages 65-69 of the manual were in effect at the time of the accident. Tr. 148. He especially noted the manual provided that all power lines are to be considered energized unless someone says otherwise. Tr. 187, R. Exh. 1 at 66. Holmes testified that all of the manuals were numbered and that when a Lyman-Richey employee received a manual and read the part of the manual pertaining to the tasks and preventive maintenance for his or her particular job, the employee signed a statement to that effect. Tr. 149. (Holmes called it a "receipt." Id. (Footnote 7))

Holmes identified several such receipts -- those of Dryden, the plant superintendent; of Jirovsky, the crane operator; of the victims, and of Rex Schmitz and Richard Frye, who were members of the crew at the pit and who were witnesses to many of the events connected with the accident. Tr. 150-151, R. Exh. 2. Compliance with the manual was enforced by what Holmes described as intermittent observance and monitoring. According to Holmes, in the case of the accident, the persons conducting such observance and monitoring were Dryden, and possibly, the deceased victim as well. Tr. 178.

Holmes also described "task training" at the mine. He stated that before a particular job was undertaken the individuals who were going to perform the task met and reviewed the procedures required. The meetings were lead by the plant superintendent or a "lead person," usually the plant manager or assistant superintendent. Tr. 153-154. Holmes stated "whenever there is a task, there's always a meeting, because we don't want

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7 The "receipt" states: "I hereby solemnly state that I have read and understand the Lyman-Richey Corporation Safety Manual . . . and that I will comply with all regulations as set forth in the manual." Tr. 152, R. Exh. 2.

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any . . . slip ups." Tr. 154. He described a "task" as "a different assignment than your normal routine." Id. He agreed that moving the crane on the afternoon of the accident was a "task." Id. Holmes did not know if task training in the movement of the crane had occurred before the accident, but he stated that he would be "very surprised" if it had not, because movement of the crane under high-voltage power lines was "dynamite." Tr. 174, 196.

He agreed that conversation between Dryden, Jirovsky and the deceased should have occurred prior to working on the crane when it stalled in the vicinity of the power lines. Tr. 175. He stated that he did not know whether such a conversation had occurred but that he "assume[d] there was a breakdown in communications." Id. He stated that if there had been such a conversation, "Maybe this wouldn't have happened." Id.

Holmes also described safety procedures employed at the pit when a crane was moved under power lines. A spotter walked beside of the cane and observed clearances, including clearance with respect to the power lines. In addition, the crane operator was responsible to watch for power line clearance. These procedures were set forth in the company safety manual. Tr. 195, R. Exh. 1 at 66.

The spotter and the crane operator communicated orally and by hand signals. Tr. 155-156. On the day of the accident, the person who acted as both lead person and spotter was the deceased, Johnson. Tr. 158. Holmes was not sure if Johnson had been assigned the job as spotter. He believed that someone else also could have been assigned the job as well. If so, the other person would have been assigned by Johnson. Tr. 180. Holmes also did not know if someone else took Johnson's place as spotter when Johnson went to work on the fuel filter of the crane. Id. However, Holmes agreed that the normal policy was to have someone checking for clearance every time the boom was operated or the crane was moved. Tr. 181-182.

In addition, Holmes did not know if Johnson had told Jirovsky to raise the boom. Only Jirovsky would know that, he stated. Tr. 182. Nonetheless, Holmes was sure that employees around the crane were aware that they were under high-voltage power lines because they had to go under the lines in order to reach the place where they were going to repair the dredge and because all of those involved had worked at the pit for a long time. Tr. 184-185, 187.

In addition, signs usually were posted both inside the crane operator's compartment and on the outside of the crane to warning against operating the crane within 10 feet of the power line. Holmes assumed, but did not know for sure, that such signs were on the crane involved in the accident. Tr. 162.

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Holmes described training that company crane operators received. The training was conducted with the assistance of outside companies who operated large equipment, and the training included safety training. Tr. 163. The company kept records of such training and Holmes identified Jirovsky's certificate of training for the operation and maintenance of motorized cranes. Tr. 164, R. Exh. 3.

In addition to its training program, Lyman-Richey had a cash incentive program to further safety at its installations. Under the program, if a miner was found chargeable with an accident, his or her monthly cash bonus was denied. Tr. 159. Holmes stated that he did not know whether any miner was found chargeable with the subject accident because he resigned shortly after it had occurred. Tr. 159.

Finally, Holmes testified that in the two years prior to the accident Lyman-Richey had been assessed for three violations at the pit. Two of these violations were assessed at twenty dollars (\$20) and one was assessed at eighty-five dollars (\$85). Tr. 188-192. He noted that none of the previous violations involved injuries. Tr. 192.

LARRY S. CAMPBELL

Larry S. Campbell testified that around 1975, when Jirovsky was first hired, Campbell was a plant superintendent for Lyman-Richey and around 1978, when Jirovsky was first trained to run a crane, Campbell was the general superintendent. Tr. 202.

Campbell stated that Lyman-Richey has had its present facilities at Plant No. 11 since 1956. The power lines that run through the property provide electricity to the dredge, the pumps, and the preparation facilities on the property. The power lines are exclusively devoted to the Lyman-Richey operation. According to Campbell, 13,800 volts come into the preparation plant where the voltage is stepped down to make it usable by the equipment at the facility. Tr. 204. The lines are located away from the areas where activity is highest. The company chose to employ overhead lines rather than buried lines because it believed the overhead lines were safer. Tr. 205.

Campbell was in charge of deciding where the power lines would be located and he also was in charge of determining how high they would be. Campbell stated that he wanted them to be at least 30 feet above the ground. Tr. 209. All newly hired employees at the plant were shown where the power lines were located and advised that "they are hot." Id.

In addition, Campbell was on the Lyman-Richey safety committee at the time of the accident and he testified the

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committee had concluded the accident was chargeable to Jirovsky because, "Frank raised the boom of the crane into the wires." Tr. 206. No other employees were charged. Id. Campbell believed that Jirovsky raised the boom so that the victims could get into the engine compartment and that Jirovsky simply forgot the wires were there. Tr. 210-211.

STANLEY E. BENKE, JR.

Benke, who succeeded Holmes as safety director for Lyman-Richey, stated that he had been with the company about five and one-half years. At the time of the accident, Benke was the assistant safety director. Benke stated that the company initiated its own investigation of the accident immediately after it occurred. In addition, the company prepared a report (R. Exh. 7) based on information Benke obtained at the accident site and in discussions with those involved. Tr. 215. Benke also participated in conferences with MSHA concerning the accident, including the March 7 closing conference.

As Benke remembered it, MSHA representatives, including Skinner, had told him at the conference that they did not believe the penalty for violations connected with the accident would be "real severe" because of the company safety program. Tr. 216. He agreed, however, that Skinner never had indicated an amount that would be assessed. Tr. 222. Benke also mentioned that the MSHA officials were impressed by the fact that Lyman-Richey offered immediate counseling to employees who had witnessed the accident. Tr. 217.

Benke was asked if, based upon his investigation, he had an opinion regarding the cause of the accident? He replied that "what it really seems to boil down to is the fact that there was a serious breakdown in communication between [Johnson], who was acting as a spotter, and [Jirovsky], so that breakdown in communications is actually what caused the accident." Tr. 218. Benke believed that Jirovsky was looking at Johnson while the boom was going up. He stated that Jirovsky noticed an electric arc from the crane to Johnson and that Jirovsky thought that Johnson had touched an electrical device on the crane itself.

Benke was of the opinion that Jirovsky should have been watching Johnson and have been waiting for a hand signal from Johnson indicating that it was alright to raise the boom. Tr. 221. Benke speculated that Jirovsky did not realize the boom was under the wires due to the angle of his vision and that he raised the boom without communicating with Johnson. He believed that the two may have been preoccupied with trying to find out what was wrong with the crane. Tr. 221-222. As Benke put it, "somewhere something happened in . . . that there was no

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communication." Tr. 222. Footnote 8) Benke was asked if Jirovsky could have been looking to Johnson for a signal to stop raising the boom and Benke replied, "That's possible too, but actually he shouldn't be lifting the boom without being so instructed to do so." Id.

Benke stated that he knew that there were decals inside the cab of the crane warning about the danger of operating within 10 feet of high-voltage power lines. He emphasized that because of obstructed vision a crane operator should never lift materials with the boom without a spotter and that this also applied to raising the boom. Tr. 220.

Benke was sure that Dryden had instructed everyone about the job they were expected to do in moving the crane. However, from the time the crane had broken down until the time the accident occurred, Benke did not believe there had been any instruction or task training. He observed that while the crane was being moved Dryden had gone to another job site to evaluate the work situation at that site. Tr. 223-224. Dryden returned to the area where the crane had malfunctioned shortly before the accident. Once the crane had broken down Johnson, who had been acting as spotter, ceased functioning in that capacity, because as Benke explained, the crane was no longer being moved. For the same reason no one replaced Johnson as spotter. Tr. 229.

As Benke described it, Johnson and Jirovsky had a discussion (Benke did not know what it was about) and following the discussion Johnson went to Dryden's truck to get a wrench and mentioned to Dryden that he and McGhee were going to check the fuel filter. Then, Johnson returned to the crane. Meanwhile, Jirovsky had climbed into the cab of the crane and had begun to lift the boom. Benke stated that he was not certain what Dryden was doing at that time. Tr. 225.

WALTER L. DRYDEN

Walter Dryden testified that he has been the superintendent of Plant No. 11 for the past twelve years. He stated that he had twenty-one years of experience in total with the company. Tr. 231-232.

Dryden described the safety training that usually preceded a particular job. "We usually get together and talk over how we are going to go about doing each job and, of course, then safety is entered into." Tr. 232. He also verified that employees are

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8 When asked whether he knew if there had been any communication between Jirovsky and Johnson regarding raising the boom Benke replied, "I'm not absolutely sure; and when I talked to [Jirovsky], he was not really sure himself." Tr. 224. Benke speculated that trauma may have caused Jirovsky's imperfect memory. Id.

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trained annually in operating equipment and in this regard identified Jirovsky's certificate of training for the crane. Tr. 233-234. According to Dryden, the training consists of the employee reading literature and training materials and safety procedures for the particular piece of equipment involved and of Dryden asking the employee if he or she has any suggestions or questions. Tr. 235. Dryden stated that the information given Jirovsky would have included a discussion of the safe operation of cranes around energized power lines. Tr. 236. Jirovsky also had on-the-job training in the operation of a crane from an already experienced crane operator. Tr. 237-238.

Dryden was asked about Lyman-Richey's policy regarding the safe operation of cranes in the vicinity of power lines. He stated that when a crane is being trammed, a "point man" or spotter goes ahead of the crane and when a crane is being operated the rule is no operation within 10 feet of power lines. "In other words," he added, "if we have equipment to work on, we don't do it anywhere near power lines." Tr. 239. In addition to the spotter, other members of the crew in the vicinity where the crane is being moved have a responsibility to watch for, among other things, clearance when the crane moves past power lines. Tr. 240. In Dryden's opinion, Jirovsky was well aware of the policy. Tr. 251.

Dryden stated that on the morning of the accident he had a discussion with the work crew about the jobs to be done that day. While he did not specifically recall discussing safety procedures to be undertaken in connection with the jobs, he was certain they were discussed because "that's just . . . normal procedure." Tr. 242. Later in the morning, Dryden discussed moving the crane with the victims, Jirovsky and one other employee. Tr. 243. The crane was to be moved to another part of the plant to repair some pumps. Dryden explained to the crew that he was going to that area to determine where to position the crane once it arrived and, according to Dryden, Johnson volunteered to act as spotter while the crane was moved. Tr. 244.(Footnote 9) Dryden then left in his truck for the other site. (It was located approximately 300 yards from where the crane then was located. Tr. 245.)

After surveying the scene, Dryden returned to where the crane had been moved. He saw that the crane had stopped and he drove approximately 30 to 40 feet past the crane and parked his truck, facing away from the crane. Tr. 246. Johnson walked to Dryden's truck and told him the crane had stalled, that Johnson thought something might be wrong with the fuel filter and that he needed to get a wrench from Dryden's tool box. Dryden responded

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9 Dryden estimated that during the previous four years the crane had been moved approximately 20 times under the particular portion of the high-voltage power lines involved in the accident. Tr. 252.

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he would call on the truck radio and try to get a replacement fuel filter for Johnson. The weather was cool and after Dryden finished his discussion with Johnson he left the window down only about 6 inches. At no time did Johnson indicate to Dryden that the boom was going to be raised. Tr. 248. Dryden stated that the crane involved was an older model and that he assumed the fuel filter was in the front part of the crane. He said, that is where most filters are located on the older models. Tr. 248. Dryden understood that the boom would not have to be raised to gain access to the filter. Tr. 249.

Dryden then called to see if he could obtain a fuel filter and the next thing he heard was Jirovsky yelling. Tr. 249. Dryden estimated that this was two to three minutes after Johnson had talked to him. Tr. 250. He did not see Jirovsky raise the boom. Nor did he caution Johnson that someone needed to act as a spotter if he was going to be working on the fuel filter. Tr. 255. Dryden stated, Johnson "was familiar with equipment and motors on equipment and so forth." Tr. 260.

When Dryden heard Jirovsky yelling he turned. Jirovsky had already jumped from the crane. The boom was in the wires. Dryden could not see McGhee but he could see Johnson. Dryden described what he saw and explained that there was nothing he could do to help Johnson. Tr. 257.

RICHARD L. FRYE

Richard Frye is a dispatcher at Plant No. 11. He has worked for Lyman-Richey for twelve years. At the time of the accident Frye was working as a welder and member of the maintenance crew. Frye described the training that he had received as a welder and member of the maintenance crew. Tr. 262-263. He felt that safety was a "very prevalent" part of that training; and he believed the training was ongoing, in that the company safety manual was undated periodically, and he had read the updates. Tr. 262-263.

Frye stated that on the morning of the accident he was part of a crew that was lifting parts off of the dredge with the crane. The crew knew that the crane would have to be moved to a different job site and there was only one route it could take, the same route it had traveled to reach the dredge. Tr. 266. The route passed under the power lines. Because the crane would have to travel up a 5 to 6 foot rise as it moved away from the dredge, and because the power lines ran above the edge of the rise, the crew knew the crane should be backed up rather than driven forward so that boom would not rise into the air under the lines as the crane traveled up the rise. Tr. 267. Frye believed that he had participated in previously moving the crane under the same power lines 10 to 15 times. Tr. 268.



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As Frye watched, the crane backed away from the dredge area and Johnson, acting as spotter, walked next to the crane. The crane backed up to level ground where it stopped. Frye explained that he thought the crane had stopped because it was on level ground and Jirovsky and others were going to have more discussions about what they were going to do next. Therefore, Frye left and went to the welding truck to get some materials he needed. He testified that the next thing that happened was that he heard Jirovsky yell. Tr. 269-270.

HAROLD L. MCGHEE

Harold McGhee stated that he had worked for Lyman-Richey for approximately 18 years and that he had started as a laborer. About six or seven years ago, he was assigned to operate a bin complex, a job that he has held since. Tr. 272-273. McGhee explained that the morning of the accident he was one of a crew working at the dredge. The work was concluded around noon after which a decision was made to move the crane to another work area. As the crane moved up the incline, McGhee stated that he was concentrating on looking out for any obstacles that would be in its way. Tr. 275. He testified that his concern was with things on the ground and that he "wasn't even thinking about power lines." Tr. 275. At the top of the incline the crane stalled, McGhee did not know why. However, a decision was made to change the fuel filter. McGhee testified that he did not approach the crane until Johnson started working on the filter. He stated that he was there to assist Johnson if he needed any help. Tr. 276. McGhee explained that he usually worked with Johnson. Tr. 281.

McGhee was on Johnson's right and he testified that Jirovsky was watching Johnson. Tr. 279. McGhee recalled that Johnson was holding a wrench with one hand and his other hand was on what McGhee thought was the filter. McGhee had his left forearm and both hands on the crane. McGhee stated that he heard the crane's engine start and he thought "what's he starting the engine for when we're taking this filter off[?]" Tr. 277. The electric current hit McGhee and then it subsided and he slid backward away from the crane. Tr. 277. (McGhee also described what happened to Johnson. Id.)

McGhee testified that except for the sound of the engine starting he had no warning that the boom was going to be raised and that while he was with Johnson he never saw Johnson give a hand signal of any kind to Jirovsky. Tr. 278, 283. McGhee was airlifted to the hospital where he underwent about three weeks of treatment for the burn injuries. Tr. 280.

FRANK J. JIROVSKY

Jirovsky stated that he had been an employee of

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Lyman-Richey for seventeen years. During the period he had worked repairing, maintaining and operating equipment, including cranes. He was initially assigned to operate cranes during his first or second year of employment. He was trained by the then main crane operator and served as a backup operator. Tr. 288-289. He described the training he had received as "an apprenticeship" and stated it included training regarding the operation of cranes in the vicinity of power lines. Tr. 288. When he started working with cranes he began by signaling to the main crane operator, an assignment that required him to watch out for power lines. Jirovsky explained that "when he taught me how to run the crane, I was already aware of [power lines and their relationship to of the crane] because I had been watching for him as he ran it." Tr. 289. For as long as Jirovsky could recall, all of the equipment at the plant that had "height capabilities" carried stick-on signs stating that the equipment should not be operated within 10 feet of power lines. Tr. 290.

Jirovsky identified the Lyman-Richey safety manual (R. Exh. 1) and recalled receiving it. He also identified a receipt he had signed indicating that he had been given possession of the manual and had read it. Tr. 292, R. Exh. 2. Moreover, he noted the specific reference to the manual barring the operation and transit of cranes within 10 feet of power lines. Tr. 291.

In addition, Jirovsky stated that there usually was a discussion among Dryden and the crew regarding the bigger jobs that had to be done at the plant and that if there was an obvious hazard involved the discussions would include safety. Tr. 295. He identified the presence of power lines as an obvious hazard. Id.

Jirovsky described the day of the accident, how the crew had been working at the dredge, how the work had been finished after lunch and how the crew began moving its equipment, including the crane, to a new area to start a different job. Tr. 296. The route the crane had to travel passed under the power lines and, according to Jirovsky, they were the very same power lines he had passed under when he brought the crane to the dredge area. Tr. 297. He believed that he had trammed the crane to the dredge area the previous day. Id. The crane was taken into the dredge area by driving it forward -- that is with the boom pointing ahead of the crane toward the dredge. This was done in order to have clearance under the power lines. Therefore, the crane was also backed out -- with the boom pointing toward the dredge. Again, this was done to ensure clearance under the lines. Tr. 297-298.

As the crane began to move away from the dredge area Johnson acted as spotter. Tr. 299. Johnson was walking directly alongside, guiding Jirovsky as he backed away from the dredge

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area. Jirovsky and Johnson were in oral and visual contact as the crane moved. Tr. 299-300. Jirovsky also believed that Frye was watching from a distance. The crane approached another piece of equipment and Johnson had Jirovsky stop, drive it forward and then resume backing up to clear the equipment. When the crane reached level ground, the tramping motor ceased operation. Tr. 300. Jirovsky stated that the power lines were at the edge of the level ground and that the crane had traveled "quite a ways" after it reached level ground. Tr. 302. Therefore, Jirovsky thought that the boom was clear of the power lines. Id.

According to the Jirovsky, when the engine stopped Johnson asked what was wrong and Jirovsky said he did not know but that it might be the fuel. Johnson then took off the engine's fuel cap and checked the fuel level. He told Jirovsky that there was plenty of fuel. Then Johnson noticed the fuel filter and thought that it might be plugged so he went to Dryden's truck to get a tool to take the filter off.

Meanwhile, Jirovsky thought that the problem might be in the tramping engine itself, and he climbed back into the crane and started the engine that operated the boom. (In order to get into the engine compartment the boom had to be raised "a short distance." Tr. 301.) Jirovsky stated: "I was going to raise the boom to check . . . the engine compartment, because I figured that we would probably have to look in there to figure out what was going wrong with it; and at the same time Earl was going to take the filter off, and at some point in that period of time [the boom] came in contact with the power lines." Id.

Jirovsky stated that he knew the lines were there but that he believed that the crane was far enough away from them. Tr. 308. "It was," said Jirovsky, "a misjudgment in distance." Tr. 302. He estimated that from the time he started the boom's engine until the boom contacted the power lines perhaps fifteen to twenty seconds elapsed. Tr. 304. He did not recall whether or not he had looked at the lines prior to raising the boom. Tr. 308.

While the boom was being raised, Jirovsky looked at Johnson. He saw a spark fly off the wrench Johnson was holding. Jirovsky stated he realized that something had gone terribly wrong and that he jumped from the crane in order to try to help Johnson. Tr. 305. (Footnote 10)

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10 It was difficult for all of the witnesses, especially Jirovsky, McGhee, and Dryden, to testify about what had occurred to Johnson. All had known and worked with him for several years. Counsels are commended for their sensitivity in questioning the witnesses regarding the specifics of the accident.

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Jirovsky stated that he could not recall having any conversation with Johnson or with anyone else for that matter about raising the boom; and that Johnson did not give him a signal or speak with him about raising the boom. Tr. 302-303.

#### THE VIOLATION

Lyman-Richey is charged with a violation of section 56.12071. The standard requires that when equipment is operated within less than 10 feet of energized high-voltage power lines, the lines must be deenergized or other precautionary measures must be taken. "High-voltage" is not defined in Part 56 of the regulations. However, Skinner testified that MSHA regards any lines carrying over 650 volts as high-voltage lines.

Tr. 26-27, 39. This appears to be the general understanding in the mining industry as well. (Footnote 11) Skinner's testimony that the lines carried well over 650 volts was not disputed and I conclude that the power lines in question were high-voltage lines. Further, it is clear from the testimony of all of the witnesses that Jirovsky raised the crane's boom into the lines, thus operating the crane within less than 10 feet of them. The fact that the lines were not deenergized nor other precautionary measures taken is all too evident from the events that followed. I therefore find that Lyman-Richey violated section 56.12071 as charged.

#### THE SPECIAL ASSESSMENT

Following the issuance of Citation No. 2652922, the Secretary, pursuant to 30 C.F.R. 100.5, specially assessed the alleged violation of section 56.12071 at eight thousand dollars (\$8,000). Lyman-Richey, requested subpoenas be issued to require MSHA's director of the Office of Assessments to appear at the hearing along with other officials of the office in order to explain how the proposed special assessment was determined and to provide documentary evidence of the basis for the assessment. I issued the subpoenas, but in a letter to counsel for Lyman-Richey stated that if the company intended to challenge the special assessment, the challenge would, of necessity, be limited.

I explained the Commission had made clear that under the bifurcated nature of the Mine Act's civil penalty scheme the Commission and its judges had authority to assess civil penalties based upon the record developed in an evidentiary hearing and that when such a proceeding had taken place Commission judges were not bound by penalties proposed by the Secretary thought his Office of Assessments but rather were required to assess a

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11 "High voltage" is defined as "[t]hat which is greater than 650 volts." U.S. Department of the Interior, A Dictionary of Mining, Mineral and Related Terms (1968) at 543.

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penalty after considering the statutory civil penalty criteria in light of the evidence. I further explained that while an operator might argue that the Secretary, in proposing a civil penalty, had not complied with his own regulations and thus had to re-propose the penalty, the operator could prevail only by establishing that the Secretary had acted arbitrarily and that a remand was appropriate under all of the relevant circumstances of the case. Drummond Coal, Inc., 14 FMSHRC 661,690 (May 1992); Youghiogheny & Ohio Coal Co., 9 FMSHRC 673,678 (April 1987).

Prior to the hearing Lyman-Richey deposed Roderick Breland, the MSHA district manager for the Rocky Mountain District. Breland was questioned regarding his recommendation that the subject citation be specially assessed. However,

Lyman-Richey did not call Breland to testify at the hearing nor did it call MSHA Assessment Office officials as witnesses. Although there was limited testimony by Skinner regarding his recommendation for and knowledge of the special assessment of the violation of section 56.12071, Lyman-Richey did not offer evidence tending to show that the proposal was arbitrary nor did its counsel advocate that position in his closing argument.

Tr. 317-324. Therefore, in assessing a civil penalty for the violation of Section 56.12071, I will only consider the evidence of record.

#### S&S AND GRAVITY

Skinner found that the violation was S&S. The Commission has held that a violation is "significant and substantial" if, based on the particular facts surrounding the violation, there exists a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). Further, the Commission has offered guidance upon the interpretation of its National Gypsum definition by explaining four factors the Secretary must prove in order to establish that a violation is S&S. Mathies Coal Co., 6 FMSHRC 1 (January 1984). (Footnote 12) I have found a violation of section 56.12071

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12 In Mathies the Commission stated:

[T]o establish that a violation of a mandatory standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies, 6 FMSHRC at 3-4.

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and given the fact that the violation was the proximate result of a fatality and serious injury, I conclude the other three factors are established as well.

In assessing the gravity of the violation both the potential hazard to the safety of miners and the likelihood of the hazard occurring must be analyzed. Here, the potential hazard was extremely serious. What happened to Johnson and McGhee is exactly the sort of accident section 56.12071 was designed to prevent. Given the violation, the death and injuries that resulted were likely to occur. Miners do work in, on or adjacent to equipment while it is being moved or operated. When equipment is moved or operated within less than 10 feet of energized high-voltage power lines and precautions have not been taken to prevent contact with the lines, the margin for error is reduced to an unacceptable minimum -- especially when a large piece of equipment is involved, for then even a proportionally small movement of the equipment can lead to contact with the lines and resulting disaster to those in its immediate vicinity. Therefore, I find that this was a violation of the utmost gravity.

#### NEGLIGENCE

Skinner found that Lyman-Richey exhibited a "moderate" degree of negligence in allowing the violation to exist. G. Exh. 7. In reaching this finding Skinner credited Lyman-Richey for the written safety procedures it had prepared and given to its employees concerning work under high-voltage power lines. Tr. 58-60, 114, 132. Nonetheless, he believed Lyman-Richey's management personnel exhibited fault in that they should have evaluated the situation once the crane had become disabled. Tr. 64-65. Skinner was of the opinion that someone from management should have assessed the situation prior to Dryden's arrival and before any action was taken with respect to the attempted repair of the crane. Tr. 114-116. He stated, "[E]ven though . . . Dryden was not there to make the determination, I feel somebody should have been in charge of that procedure there, from the company." Tr. 117. What Skinner had in mind was the presence of a supervisor to monitor safety procedures while repair work was undertaken on the tramming engine.

[T]he central point was the tramming engine and getting the tramming engine back into operation; and that 's where everything was pinpointed . . . and that's the reason for someone to safety check it per se.

Tr. 119.

Counsel for the Secretary essentially argued that Skinner's assessment was right, that Lyman-Richey's management personnel

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failed to exercise the care required by the situation, even though there were some factors in mitigation of its lack of care. Tr. 314-316. On the other hand, counsel for Lyman-Richey argued that the employees involved in the accident were adequately trained regarding safety procedures and power lines and that the accident represented a type of judgmental lapse on Jirovsky's part to which all of us are heir and which no amount of training, vigilance or care can completely eliminate. Tr. 319. Counsel emphasized that Dryden was in the area for only a brief period before the accident occurred, that he did not know the boom was going to be raised and that things happened so quickly there was simply no time for him to intervene in the situation. Tr. 320-321. Moreover, Dryden had made a perfectly reasonable judgement that there was no need for him to intervene:

He did that based on [Johnson's] description to him of what was to be done next; and that is, change the fuel filter . . . and in . . . Dryden's understanding, and his correct understanding, . . . the boom needn't be raised in order to access the fuel filter; and I think it's fair to say that there [was] an evaluation made by him that he need not intervene.

Tr. 234.

The Commission has afforded its judges extensive guidance in evaluating negligence. Among other things, it has long held that the negligence of a rank-and-file miner is not attributable to the operator for civil penalty purposes. Southern Ohio Coal Company, 4 FMSHRC 1463-1464 (August 1982). Therefore, while I accept the statement of Jirovsky that he raised the boom into the wires because of a "misjudgment of distance" and conclude that he was obviously negligent so doing I do not attribute his lack of care to Lyman-Richey. Tr. 302. Rather, I look beyond Jirovsky, to acts of commission or omission by Lyman-Richey itself.

Again, the Commission has provided guidance.

The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training and disciplining of its employees to prevent violations of the standard in issue.

A.H. Smith Stone, 5 FMSHRC 13, 15 (January 1983).

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Starting with Lyman-Richey's supervision, training and disciplining of its employees, I conclude that Skinner properly credited the company for its training. As the testimony of Skinner and of Lyman-Richey's witnesses makes clear, the company had a written training program in place that fully apprised its employees of the hazards of moving and operating equipment in the vicinity of high-voltage power lines. Moreover, it had a disciplinary program to enforce its training, a program relying on that most powerful of incentives -- money. I conclude from Jirovsky's testimony that he read and understood the company safety manual with respect to its prohibition of operating or moving the crane within less than 10 feet of power lines.

Tr. 291-292. I also conclude from the testimony that not only was Jirovsky adequately trained regarding the hazards of power lines, but that the company had taken the additional precaution of placing signs inside the equipment's cab to remind him of such hazards. Tr. 220, 290.

I further find that Lyman-Richey had a policy of discussing particular jobs and the safety hazards they entailed prior to undertaking the jobs (a policy that was referred to generally as "task training" during the testimony) and that this policy was usually implemented at the mine, at least with respect to the "bigger jobs." Tr. 295. I conclude from Dryden's testimony that in response to this policy a general discussion among the crew was held prior to the crane being moved and that the discussion involved safety, at least to the extent that Johnson volunteered to serve as spotter. Tr. 244-245.

Thus, this is not a situation where the operator can be faulted for the training and discipline of its employees to prevent violations of the standard in issue. It does not follow, however, that I find that Lyman-Richey was fault free. Rather, I agree with what seems to have been the essence of Skinner's reasoning for finding Lyman-Richey negligent -- that when the risks involved are considered together with the circumstances under which the crane had broken down, the supervision provided by Lyman-Richey fell far short of the standard of care required.

The risks involved of moving the crane under the energized high-voltage power lines were clearly very serious. Holmes accurately describe the situation as "dynamite." Tr. 174, 196. Lyman-Richey responded to the danger by having the crane back away from the dredge. Jirovsky and Frye explained that given the length of the boom and the rise in the ground that the crane had to negotiate, the decision to back away from dredge was made in order to assure clearance under the lines. Tr. 268, 297-288. It also responded by having Johnson acted as spotter.

These steps, while commendable, were not enough, for Dryden left the area and in so doing left his miners without supervision. Obviously, a foreman cannot be with his crew at all



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times and I do not fault Dryden for wanting to survey the next work area in order to determine where the crane should be located. However, so potentially hazardous were the power lines to the safety of the crane operator and to those miners in the vicinity of the crane that in my view managerial supervision was required until the crane was clear of wires.

The crane's stall triggered a confluence of events that on-site supervision might well have prevented. As Benke noted, once attention shifted to repairing the trammig engine, Johnson ceased to act as spotter, and no one was on-hand to ensure he was replaced. Tr. 229. (Footnote 13) To argue, as Lyman-Richey does, that once Dryden arrived on the scene there was no time within which to intervene to prevent the accident misses the point. He or his delegate should have been there all along.

It is appropriate to evaluate the foreman's actions or lack thereof in gauging the negligence of the operator. Here, where the potential danger to miners dictated a very high standard of care, the foreman did not meet that standard. Therefore I find that Lyman-Richey was commensurately negligent.

#### OTHER CIVIL PENALTY CRITERIA

The parties stipulated the certified copy of the MSHA assessed violations history accurately reflects the violations at the mine for the two years prior to March 7, 1991. The copy, which was not introduced into evidence, reveals three violations cited and assessed during this period. None of the violations were of section 56.12071. This is a small history of previous violations. The parties also stipulated that Lyman-Richey is a medium size operator, that the proposed penalty of eight thousand dollars (\$8,000) would not affect Lyman-Richey's ability to continue in business and that Lyman-Richey demonstrated good faith in abating the violation.

#### CIVIL PENALTY ASSESSMENT

In assessing a civil penalty for the violation of section 56.12071, I have found instructive the case of Warren Steen Construction, Inc., 14 FMSHRC 1125 (July 1992). In that case Commission Administrative Law Judge James Broderick assessed a civil penalty of eight thousand dollars (\$8,000) for a violation of section 56.12071, a violation that like the one at issue had resulted in the electrocution of a miner. 13 FMSHRC 256 (February 1991)(ALJ Broderick). The company appealed and the

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<sup>13</sup> Dryden recognized the dangers inherent in the situation. He acknowledged that if equipment has to be worked on, the work is never preformed any where near a power line. Tr. 239

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Commission affirmed the judge's assessment. 14 FMSHRC 1125 (August 1992).

A comparison of Warren Steen with the present case establishes substantial differences in culpability and other penalty criteria. In Warren Steen the Commission concurred with the judge that Steen, an individual who personally directed the operation and the company, acted with a high degree of negligence. 14 FMSHRC at 1133. Unlike Dryden and Lyman-Richey, Steen and the company purposefully and knowingly placed equipment within 10 feet of energized high-voltage power lines. Also unlike the present case, the company offered no evidence that it disciplined its employees to prevent violations and the company did not train the victim to be aware of the hazards involved. Moreover, unlike Lyman-Richey the company did not demonstrate good faith in attempting to achieve rapid compliance after having been notified of the violation.

The absence here of the factors which the Commission found supported an eight thousand dollars (\$8,000) assessment, strongly suggest that in this matter a lower assessment is warranted. Therefore, I conclude that an appropriate penalty for the violation is three thousand dollars (\$3,000).

ORDER

Based on the foregoing it is ORDERED:

1. Citation No. 2659299 is AFFIRMED.

2. Lyman-Richey shall, within thirty (30) days of the date of this decision, pay to the Secretary three thousand dollars (\$3,000) for the violation found herein and upon receipt of payment, this matter is DISMISSED.

David F. Barbour  
Administrative Law Judge

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