

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

March 16, 2022

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

v.

NORTHSHORE MINING COMPANY,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2021-0153
A.C. No. 21-00831-535125

Mine: Northshore Mining Company

DECISION AND ORDER

Appearances: Emelda Medrano, Esq., Office of the Solicitor, U.S. Department of Labor,
Chicago, Illinois, for the Petitioner

Arthur M. Wolfson, Esq., Fisher & Phillips LLP, Pittsburgh,
Pennsylvania, for the Respondent

Before: Judge Young

SUMMARY

Citation No. 6166190, 30 C.F.R. § 56.12028: Failure to conduct grounding and continuity tests. Required annual continuity and resistance testing of grounding systems was not conducted on six conveyors, two surface water pumps, and two counter hoist weights.

Facts		p. 2 (Slip Op.)
Fact of violation	Affirmed	p. 2–3
Gravity	Affirmed	p. 3–5
Negligence	Affirmed	p. 5–6
Penalty	\$530	p. 6

I. INTRODUCTION

This case is before me upon petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act” or “Act”), 30 U.S.C. § 815(d). At issue is one citation under section 104(a), issued to Respondent, Northshore Mining Company (“Northshore” or “Respondent”). The parties presented testimony and documentary evidence at a video conference hearing on November 18, 2021, and subsequently filed post-hearing briefs.

Northshore owns and operates the Northshore Mining Company mine site located in Silver Bay, Minnesota. Jt. Stip. 3; S. Post-Hearing Br. at 2 (Jan. 28, 2022) (“S. Br.”). On the mine site, taconite is processed to make iron pellets. S. Br. At 1, 3. The mine site is subject to the jurisdiction of the Mine Act and the Commission. Jt. Stips. 1, 2; S. Br. at 2. Citation No. 6166190 alleged that Respondent failed to conduct grounding and continuity tests as required

under 30 C.F.R. § 56.12028. For reasons set forth below, I **AFFIRM** this citation and assess the penalty as proposed.

II. FACTUAL FINDINGS

This citation was issued by Inspector Mindy Meierbachtol on April 7, 2021. Ex. P-3, 002. She assessed the gravity as “unlikely,” “fatal,” non-S&S, and one person affected. *Id.* She assessed negligence as “moderate.” *Id.* The inspector stated:

The continuity and resistance testing of grounding systems was not conducted on the 162 conveyor, 62 conveyor, 163 conveyor, 63 conveyor, 64 conveyor, 67 conveyor, North & South surface water pump, and 63/163 counter hoist weight. This condition exposed miners to electrical shocks and burns resulting in injury. The last recorded continuity and resistance test was 12/1/2018. Continuity and resistance tests are necessary to discover electrical problems and to correct them before an electrical shock can occur.

Id.

The inspector reviewed the electronic records for the continuity and resistance tests of six conveyors, two water pumps, and the two counter hoist weights. Tr. 41–42, 62–63, 77–78, 149; P-5. Respondent’s records revealed that the annual tests for the cited equipment had not been completed, and Respondent was unable to provide documentation of any recorded tests after 2018 for the conveyors and water pumps, and after 2019 for the counter hoist weights. *See* Tr. 42, 65, 84, 120–121, 125; Ex. P-4.

The violation was abated two days later, on April 9, 2021, when an electrician conducted and recorded the required tests. Tr. 74, 81–82; Ex. P-4, 010. The tests showed that the systems were properly grounded and would have tripped if necessary. Tr. 63–64, 78–79; Ex. P-4, 010.

At hearing, the Secretary testified that the counterweight hoists and water pumps had a voltage of 480 volts, while the conveyors had a voltage of 2,400 volts. Tr. 68–70, 137. Previous tests showed that the systems were functioning properly. *Id.* at 78–79. However, Respondent conceded that it could not have known if the grounding systems were working properly at the time the citation was issued. *Id.* at 125–26.

Respondent also testified that this citation was likely a “paperwork violation,” meaning that someone could have performed the tests without recording them. *Id.* at 138, 139. Respondent also contended that multiple redundant systems, including grounding through the system’s feeder cable and an external ground for motors, would lessen the Secretary’s gravity assessment. *Id.* at 143, 146–47.

A. Violation

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). Mine operators are generally strictly liable for

mandatory safety standard violations. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011).

The cited standard states, “Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.” 30 C.F.R. § 56.12028 (2022). The inspector issued this citation based on Respondent’s failure to perform annual continuity and resistance testing on six conveyors, two water pumps and two counterweight hoists. Tr. 65.

The Secretary provided credible testimony that Northshore violated the standard by failing to conduct annual continuity and resistance testing on grounding systems on the North and South surface water pumps, the No. 63 and 163 counter hoist weights, and the Nos. 62, 162, 63, 163, 64, and 67 conveyors. Tr. 65, 125, 137. There is sufficient evidence to find a violation because Respondent did not provide, and did not claim to have, records of the required tests. Tr. 123. Respondent’s records revealed that annual tests had not been completed since 2018 for the conveyors and the water pumps and 2019 for the counter hoist weights. Tr. 65.

Respondent argued that it was possible a test was conducted and went unrecorded. However, no evidence was provided in support of this argument. On the contrary, Keith Klemner testified that if a test had been performed, it should have been recorded. Tr. 139. The fact that post-citation testing revealed proper grounding does not itself support the argument that this violation was merely a “paperwork violation.”

This regulation is intended to protect miners—in this case, from the danger of electrocution or serious injury—by alerting mine operators to defects so that they can correct them to prevent serious injuries or fatalities from electrocution. Without performing these tests, Respondent had no way of knowing if there was a grounding failure that endangered miners.

Given these facts, I find that the Secretary has proven the violation by a preponderance of the evidence.

B. Gravity

The “likelihood” contemplated within the assessment of gravity is that of the injury that may result from the violation and the hazard to which it contributes. “Severity” is an assessment of the seriousness of a potential injury if it were to occur.

1. Likelihood

The Secretary concedes that injury is unlikely. I find that the violation was unlikely to cause injury, primarily because the inspector testified that during inspection, the cited equipment was stationary and no repairs were being performed. I credit that the inspector considered that there was no damage to the equipment, and that it was unlikely that a miner would be exposed to an improperly grounded circuit. Tr. 84–85. I therefore affirm the assessed likelihood.

2. Severity

In evaluating the severity of a potential injury, the Secretary defines “fatal” as “any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.” 30 C.F.R. § 100.3(e) (2022). Importantly, a severity evaluation at this stage assumes the occurrence of the hazard. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on “the reasonable likelihood of serious injury,” with gravity inquiry, which focuses on “the effect of the hazard *if it occurs*”) (emphasis added).

There is sufficient evidence to find that the severity of this violation is potentially fatal. Annual resistance and continuity testing is statutorily mandated to discover and correct hazardous conditions before miners are injured. Examiners bear the responsibility of protecting miners from identifiable hazards, and it is imperative that mine management ensure all required exams are conducted and reported so that the potential for accidents is minimized. *See Recon Refractory & Constr.*, 36 FMSHRC 2265, 2272 (Aug. 2014) (ALJ Paez) (citing IV MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 21, at 44 (2003)); *Yaple Creek Sand & Gravel*, 11 FMSHRC 1471, 1481 (Aug. 1989) (ALJ Morris).

In this case, the tests ensure that the ground will carry a fault back to the breaker causing it to trip rather than shock or electrocute¹ a miner. Tr. 63–64. Without the results of the tests, Respondent had no way of knowing whether the grounding systems were working properly for the cited equipment. Tr. 63–64, 73, 125–126.

The Inspector testified that she considered the high voltage of the water pumps, hoists, and conveyors in determining that the occurrence of the hazard had a reasonable potential to result in death. Tr. 70. She also testified that several other factors contributed to her gravity assessment, including Respondent’s failure to ensure the annual continuity and resistance tests, the high voltage in the cited equipment, the moist conditions at the conveyors, and the metal grating in the walkway between conveyors. Tr. 66–69. The violative systems were high voltage—either 480 or 2400 volts. Contact with improperly grounded systems with this high voltage could result in severe burns, shock, or electrocution.

Respondent argued that its redundant safety measures—grounding through the system’s feeder cable and external grounding for the motors—support a reduction in gravity. I find that these systems are insufficient justification for a severity reduction. The redundant safety measures mentioned are aimed at ensuring the systems are grounded. While these systems may

¹ “Electrocute” traditionally meant “to execute or put to death by electricity.” *See Electrocute*, WEBSTER’S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE BEING THE AUTHENTIC EDITION OF WEBSTER’S UNABRIDGED DICTIONARY: COMPRISING THE ISSUES OF 1864, 1879, AND 1884 (Noah Porter ed., 1898). However, common usage has broadened to embrace “kill[ing] or severely injur[ing] by electric shock.” *Electrocute*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/electrocute> (last visited Mar. 15, 2022). Because the hazard here includes both the potential for serious injury and death, I have noted each specifically.

reduce the likelihood of an electrocution, it does nothing to reduce the severity of the injury—electrocution—if the grounding failed.²

Additionally, potential hazards are not eliminated if post-citation testing finds that no hazardous condition exists. Respondent's evidence that the systems were operating as intended is irrelevant to the severity determination in this case. The fact that the annual continuity and resistance testing was not completed constitutes a violation regardless of these later findings.

I find that Respondent's failure to conduct annual continuity and resistance testing of grounding systems for the violative equipment exposed miners to a potentially fatal injury. I find that a fatality, while unlikely, could occur due to electric shock or burns resulting from contact with this high voltage. Therefore, I affirm the assessed severity.

3. Number of Persons Affected

The inspector assessed that only one miner would be affected by the hazard. Tr. 70–71. I agree that, logically, one miner would be performing the workplace exam or conducting maintenance along the conveyors. Further, I find it reasonable that another miner would not contact the equipment after finding that the other miner was injured during that activity. I affirm the assessed number of persons affected.

C. Negligence

Judges may use a traditional negligence analysis, rather than relying upon Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–02 (Aug. 2015) (citing *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151–52 (7th Cir. 1984)) (“Part 100 regulations apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way on Commission proceedings.”). The reasonably prudent person standard should be that of one “familiar with the mining industry, the relevant facts, and the protective purposes of the regulation.” *Id.* At 1702.

I find that negligence was properly assessed as “moderate.” Respondent is familiar with the mining industry and had knowledge that annual continuity and resistance tests were required. This knowledge was evidenced by the fact that Respondent had performed continuity and resistance tests prior to the issuance of this citation and on other equipment. Tr. 71. The operator should have been familiar with the protective purpose of running the annual tests, and a reasonably prudent person should have known about the violation and acted to remedy it. Nonetheless, Respondent failed to do so.

² Although Respondent's redundant safety measures may reduce the likelihood of electrocution, the Secretary has already conceded that injury was unlikely in this case. Because that is true, the respondent must effectively show that the potential for injury is not merely remote, but practically impossible.

Respondent's suggestion at hearing that this citation was likely a "paperwork violation" is not supported by any evidence. A paperwork violation exists if a test has been performed, but not documented. Here, Respondent's employees did not provide any evidence of annual testing and admitted that if there had been testing, it would have been recorded. Tr. 138, 149–150.

Under continued normal mining operations, miners would have continued to be exposed to the hazard of electrocution with a reasonable potential to cause death. Respondent had not implemented any system to ensure that annual testing was completed, allowing prior work orders to close with no plan in place for them to regenerate. Tr. 72.

Respondent did not offer any evidence of mitigating circumstances to justify its failure to conduct annual testing. Tr. 127. However, in establishing negligence, the inspector considered that tests had been performed on other equipment and that the work orders for the cited equipment had been closed before the tests were conducted. Tr. 71–73; P–4, 003. Because closed work orders do not regenerate every year, Respondent did not receive any reminders to conduct the annual tests. Tr. 72.

For these reasons, I affirm the assessed negligence.

D. Penalty

The Commission considers the following factors, from Section 110(i) of the Act, in assessing penalties under the Act:

[T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i) (2006).

The Secretary has entered Respondent's violation history [MSHA Directorate of Assessments, Assessed Violation History Report] into evidence. *See* Ex. P–2. I have reviewed Respondent's general and repeat violations, and I find that the Secretary has properly considered Respondent's minimal violation history in his calculation. I agree that the Secretary has properly evaluated the size of the mine in his calculation. The parties have stipulated that payment of the penalty will not affect Respondent's ability to continue in business. *Jt. Stip.* 8.

I affirm the negligence and gravity as assessed. I find that the violation was the result of "moderate" negligence, and that the likelihood of injury was "unlikely," the severity was "fatal," and one person would be affected. I found that Respondent's redundant safety measures did not alter the gravity assessment in this case.

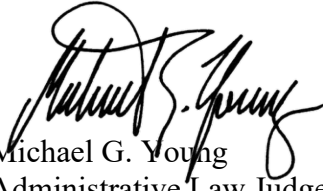
Following the citation, Respondent abated the citation by completing and recording the continuity and resistance test. Ex. P–3, 003. Considering this fact, I find that the operator demonstrated good faith in achieving rapid compliance after notification.

For the above reasons, I affirm the citation as written and assess a penalty of \$530.00.

III. CONCLUSION

It is **ORDERED** that Citation No. 6166190 be **AFFIRMED** as issued.

It is **ORDERED** that the Respondent pay the Secretary of Labor the assessed penalty of **\$530.00** within 30 days of the date of this decision.³



Michael G. Young
Administrative Law Judge

Distribution (First Class Mail and email):

Emelda Medrano, Esq., U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn St., Room 844, Chicago, IL 60604, medrano.emelda@dol.gov

Arthur M. Wolfson, Esq., Fisher & Phillips, LLP, Six PPG Place, Suite 830, Pittsburgh, PA 15222, awolfson@fisherphillips.com

³ Please pay penalties electronically at [Pay.Gov](https://www.pay.gov), a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.