FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 26, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. RECON REFRACTORY & CONSTRUCTION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2010-450-M A.C. No. 02-03243-203823 (NWB) Mine: Drake Quarry

AMENDED DECISION AND ORDER

Appearances: Douglas L. Sanders, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Eugene F. McMenamin, Esq., Atkinson, Andelson, Loya, Ruud & Romo, Cerritos, California, for Respondent.

Before: Judge Paez

The decision and order issued August 28, 2104, is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. § 2700.69(c), to read as set forth below.[1]

This case is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). In dispute are five section 104(a) citations issued by the Mine Safety and Health Administration ("MSHA") to Recon Refractory & Construction ("RECON" or "Respondent") as a subcontractor at Drake Cement Company's

[1] On September 24, 2014, the Secretary filed a Motion to Approve Penalty and Order Payment for Citation No. 6453944. In his motion, the Secretary explained that RECON had withdrawn its contest to the citation in its initial Answer to the Petition and agreed to pay the proposed penalty of $263.00. (Sec'y Mot. at 1.) Although the withdrawal of contest for Citation No. 6453944 was noted on the record at hearing (Tr. 6:25–7:2), through clerical error, the citation was not addressed or dismissed in the August 28, 2014, Decision and Order. Accordingly, I approve this penalty under 30 U.S.C. § 110(i) and amend the August 28 decision *sua sponte* to rectify this clerical omission.

Drake Quarry mine. Respondent withdrew its contest to a sixth section 104(a) citation issued by MSHA. (Resp't Answer at 2.) To prevail, the Secretary must prove the cited violations "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom. SOL v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998). This standard requires the Secretary to demonstrate that "the existence of a fact is more probable than its non-existence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

I. STATEMENT OF THE CASE

Four of these alleged violations involve electrical equipment at Drake Quarry, and the fifth alleged violation involves workplace examination procedures at the site. First, Citation No. 6453940 charges RECON with a violation of 30 C.F.R. § 56.12025 for the failure to install a grounding rod on a power generator. Second, Citation No. 6453941 charges RECON with a violation of 30 C.F.R. § 56.12028 because continuity and resistance testing had not been performed on the aforementioned power generator. Third, Citation No. 6453945 charges RECON with a violation of 30 C.F.R. § 56.12004 for leaving 13 damaged electrical extension cords unprotected. Fourth, Citation No. 6453946 alleges a violation of 30 C.F.R. § 56.12025 because the ground prongs on five electrical extension cords and one grounding device were broken or missing. Finally, Citation No. 6454808 charges RECON with a violation of 30 C.F.R. § 56.18002(a) for a failure to perform and document required workplace examinations. The Secretary designated each violation as significant and substantial ("S&S").[2] The Secretary proposed a total civil penalty of $2,535.00 for these five citations.

A hearing was held in Riverside, California. The Secretary presented testimony solely from MSHA Inspector Enrique Vidal. (Tr. 16:17–101:9; Sec'y Preh'g Statement at 4.) RECON called three witnesses: Joseph Longstreet, Vice President of RECON; Benjamin Allen, RECON's Cost Controls Manager; and Gregory Howearth, RECON's Corporate Health and Safety and Environmental Manager. (Tr. 103:8–108:11; 110:17–117:6; 118:4–133:15.)

II. ISSUES

The Secretary argues that the conditions were properly cited as violations and that the allegations underlying the citations are valid. (Sec'y Post Trial Br. at 15.) RECON denies each violation, arguing that the Secretary has failed to meet his burden of proof for each citation. (Resp't Post Trial Br. at 5.)

Accordingly, the following issues are before me: (1) whether, for each citation, the Secretary proved that a violation of a mandatory safety or health standard occurred at Drake

[2] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

Quarry; (2) whether the Secretary proved that each alleged violation was S&S; (3) whether the Secretary proved that RECON acted with moderate negligence regarding each violation; and (4) whether the Secretary's proposed penalties are appropriate.

For the reasons that follow, I **AFFIRM** as written Citation Nos. 6453940, 6453941, 6453945, and 6453946, and I **VACATE** the fifth, Citation No. 6454808.

III. FINDINGS OF FACT

A. Operations at Drake Quarry

Prior to hearing, the Secretary filed a motion for partial summary decision to establish that RECON was subject to MSHA jurisdiction. (Sec'y Mot. for Partial Summ. Dec.) I held that the Drake Quarry site was a "mine" under the Mine Act, that the quarry was subject to MSHA jurisdiction, and that the MSHA inspectors had the authority to issue RECON the citations at issue in this case. *Recon Refractory & Constr., Inc.*, 34 FMSHRC 1722, 1731 (2012) (ALJ). Accordingly, I granted the Secretary's motion for partial summary decision solely on the issue of jurisdiction. *Id.* My findings of fact from that order are reproduced below:

> On April 6, 2009, MSHA assigned a mine identification number to Drake Quarry, a surface metal/nonmetal mine owned by Drake Cement Company ("Drake") and located near Paulden, Arizona. On October 6 and 7, 2009, MSHA Inspector Enrique Vidal conducted a routine health and safety inspection of the Drake Quarry site. On October 8, 2009, MSHA Inspector Kyle Griffith continued the inspection of the Drake Quarry site.
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> RECON was hired as a subcontractor by CCC Group to build a facility on the Drake Quarry construction site. During the October 2009 inspections, the Secretary's inspectors issued RECON seven citations, five of which are before me.

Recon Refractory & Const., Inc., 34 FMSHRC 1722, 1724 (2012) (ALJ).

B. October 6–7, 2009 Inspection

Upon arriving at Drake Quarry on October 6, Inspector Vidal noticed a power generator ("Gen-set"). (Tr. 20:18–20.) Vidal discovered that the Gen-set did not have a grounding rod. (Tr. 20:20–21.) A grounding rod is required to prevent the metal generator from becoming electrified. (Tr. 23:24–24:4.) Inspector Vidal stated that miners regularly came into direct contact with the generator, which placed them in danger of fatal electrocution. (Tr. 24:5–25:2.) Based on his observations, Vidal issued Citation No. 6453940 alleging a violation of 30 C.F.R. § 56.12025. (Ex. G–2.) He determined that this violation was reasonably likely to result in a

fatal injury to one miner due to the operator's moderate negligence. *Id.* MSHA proposed a penalty of $873.00 for this violation.

Moreover, because the grounding rod was not installed, testing on the rod could not be performed. (Tr. 34:21–22.) Accordingly, Vidal also issued Citation No. 6453941 alleging a violation of 30 C.F.R. § 56.12028. (Ex. G–5.) He determined that this violation was reasonably likely to result in a fatal injury to one miner due to the operator's moderate negligence. *Id.* MSHA likewise proposed a penalty of $873.00 for this violation.

Thereafter, during the inspection of the lay-down area[3] in Drake Quarry, Vidal saw a gang box and asked one of Drake Quarry's employees about its contents. (Tr. 42:16–17.) The unidentified employee told Vidal that the gang box contained extension cords available for use by the miners. (Tr. 42:15–24.) Vidal further observed that out of 13 electrical extension cords, 11 had compromised outer protective jackets along with some damage to the inner conductors. (Tr. 46:7–11;49:4–17.) In addition, two of the electrical extension cords had completely exposed bare wiring that could expose miners to 110 volts of electricity. (Tr. 46:7–11;49:4–17.) Vidal testified that the unidentified employee told him the gang box containing the wires was unlocked and accessible by any miner. (Tr. 43:22–44:9.) As a result of his observations, Vidal issued Citation No. 6453945 alleging a violation of 30 C.F.R. § 56.12004. (Ex. G–8.) He determined that this violation was reasonably likely to result in lost workdays or restricted duty to one miner due to the operator's moderate negligence. *Id.* MSHA proposed a penalty of $263.00 for this violation.

While inspecting the gang box, Vidal also noticed that the ground prongs on five of the extension cords were either removed, missing, or broken. (Tr. 51:21–52:8.) Further, an on-site ground fault current interceptor ("GFCI")—which is a device intended to prevent electrocution—was damaged. (Tr. 52:16–53:8.) Based on his observations, Vidal issued Citation No. 6453946 alleging a violation of 30 C.F.R. § 56.12025. (Ex. G–11.) He determined that this violation was reasonably likely to result in lost workdays or restricted duty to one miner due to the operator's moderate negligence. *Id.* MSHA proposed a penalty of $263.00 for this violation.

C. October 8, 2009 Inspection

On October 8, 2009, Inspector Kyle Griffith issued Citation No. 6454808 at Drake Quarry alleging a violation of 30 C.F.R. § 56.18002(a). (Ex. G–14.) The citation has boxes checked noting that the violation was reasonably likely to result in lost workdays or restricted duty to one miner due to the operator's high negligence. *Id.* MSHA proposed a penalty of $263.00 for this violation. The citation alleges that RECON failed to perform or document such workplace examinations. (Ex. G–14.) However, neither Inspector Griffith nor any other authorized representative of the Secretary testified regarding the issuance of this citation.

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[3] The "lay-down area" consists of an office, fabricating area, and shop-area covered by a tarp. (Tr. 42:25–43:3.)

IV. PRINCIPLES OF LAW

A. Independent Contractors

The Commission has held that an independent contractor performing services at a mine is an operator of the mine within the meaning of section 3(d) of the Mine Act. *Ames Construction, Inc.*, 33 FMSHRC 1607 (July 2011), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012) ("independent contractors who exercise supervision and control—in other words, ones also covered by the production-operator portion of § 3(d)—are [strictly] liable"). Moreover, the Commission has a "longstanding view that the purpose of the [Mine] Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed." *Old Dominion Power Co.*, 6 FMSHRC 1886 (Aug. 1984) (citing *Phillips Uranium Corp.*, 4 FMSHRC 549 (Apr. 1982)).

B. Significant and Substantial

A violation is S&S if, "based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—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 Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc.* v. *FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

Aside from specifying the elements I must consider in examining an S&S designation, the Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission found that "an inspector's judgment is an important element in an S&S determination." *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting the opinion of an experienced inspector). The Commission has also observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present a *measure* of danger." *U.S. Steel Mining Co.*, 3 FMSHRC 822,827 (Apr. 1981). Moreover, the Commission has indicated "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742–43 & n.13 (Aug. 2012). Finally, the Commission indicated an evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

C. Regulatory Interpretation

Interpreting the Secretary's regulations that implement the Mine Act is a two-step process. First, unambiguous regulatory provisions "must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results." *Jim Walter Res., Inc.*, 28 FMSHRC 578, 587 (Aug. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987), and *Utah Power & Light Co.*, 11 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004)). Second, if the meaning of the regulation is ambiguous, the Secretary's reasonable interpretation of the regulation is entitled to deference. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012).

V. ADDITIONAL FINDINGS OF FACT — ANALYSIS — CONCLUSIONS OF LAW

A. Electrical Violations

1. Citation No. 6453940 – The Grounding Rod

Section 56.12025 requires operators to ensure that all metal used to enclose or encase electrical circuits be grounded or provided with equivalent protection.[4] 30 C.F.R. § 56.12025. Moreover, section 56.12025 is a performance standard; thus, it does not specify or require that the operator ground the metal in a specific manner. *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 387 (Mar. 1996) (ALJ). Accordingly, an operator violates section 56.12025 when it fails to ground the metal that encloses electrical circuits. *See Brown Bros. Sand Co.*, 17 FMSHRC 578, 584 (Apr. 1995).

a. *Contractor Liability*

Inspector Vidal issued Citation No. 6453940 for RECON's failure to install a grounding rod on the power generator he observed. (Ex. G–2.) RECON does not dispute that a grounding rod was absent but instead argues that the Secretary should have issued this citation to the general contractor, CCC Group, which brought the power generator to the Drake Quarry but failed to install it properly. (Resp't Preh'g Report at 3.) Joseph Longstreet, RECON's Vice President, testified that, under the contract with CCC Group, RECON was not allowed to maintain any equipment provided by CCC Group, including the power generator. (Tr. 104:15–22.) However, despite this testimony, RECON failed to provide a copy of the specific contract provision that spelled out the prohibition it alleges.

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[4] Section 56.12105 provides: "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment." 30 C.F.R. § 56.12025.

Nevertheless, Respondent's argument misses the mark. The Mine Act is a strict liability statute that imposes liability without fault for things within one's control or supervision. *See Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F. 3d 788, 795 (D.C. Cir. 2009). It is undisputed that the power generator was located on RECON's work site. (Tr. 76:25–77:6.) Therefore, the power generator was under RECON's control and supervision at the time the citation was issued.

Although CCC Group installed the power generator, RECON—as a subcontractor hired to perform work at the mine—is deemed an operator of the mine within the meaning of section 3(d) of the Mine Act. *Ames Construction, Inc.*, 33 FMSHRC 1607 (July 2011), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012). Consequently, RECON is strictly liable for the cited condition that occurred in connection with the power generator. Further, Respondent does not dispute that the power generator lacked a grounding rod. Accordingly, I conclude that RECON violated 30 C.F.R. § 56.12025.

b. *S&S*

RECON's violation of 30 C.F.R. § 56.12025 establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* test requires that the violation contribute to a safety hazard. In this case, Inspector Vidal testified that the power generator's lack of a grounding rod would expose anyone who came into contact with the energized generator to approximately 240 volts of electricity. (Tr. 23:24–24:4.) Further, Vidal testified that the power generator was located right next to where miners worked, and thus miners could come in direct contact with the generator. (Tr. 24:21; 25–2.) Moreover, Vidal indicated that 240-volt electrocution would likely be fatal. (Tr. 25:14–17.) I give great weight to Inspector Vidal's testimony based on his 15 years as a MSHA inspector. Therefore, given Vidal's testimony, I determine that the third and fourth *Mathies* elements are established and, thus, conclude that this violation was appropriately designated as S&S.

c. *Negligence*

The Secretary's regulations define negligence as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risk of harm." 30 C.F.R. § 100.3(d). Moderate negligence is appropriate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Inspector Vidal stated that looking for a grounding rod is a "very basic" practice (Tr. 20:20) and information regarding grounding rods is readily available on the Internet. (Tr. 30:1–3.) Thus, RECON knew or should have known that the power generator required a grounding rod. Nevertheless, I note that RECON's status as an independent subcontractor in conjunction with its understanding that CCC group, as the general contractor, was responsible for the installation of the power generator somewhat mitigates RECON's negligence in this case. Thus, I agree with Inspector Vidal's determination and conclude that Citation No. 6453940 was properly designated as "moderate" negligence.

Based on the above analysis, I conclude that RECON violated section 56.12025, that the violation was S&S, and that the violation occurred as a result of RECON's moderate negligence.

2. Citation No. 6453941 – Continuity Testing

Section 56.12028 states the following: "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.

Inspector Vidal issued Citation No. 6453941 for RECON's failure to perform continuity and resistance testing on the same power generator cited in Citation No. 6453940. Respondent argues that the absence of a grounding rod forecloses a claim for failure to perform the required continuity and resistance testing. (Resp't Reply to Sec'y Post-Trial Br. at 2.) Essentially, Respondent argues that Citation No. 6453941 cannot be sustained if I affirm Citation No. 6453940. Curiously, Respondent cites no case law for the proposition that its duty to comply with section 56.12028 depends on whether it has satisfied its duty to comply with section 56.12025. Notwithstanding Respondent's efforts to make compliance with section 56.12025 a necessary element of section 56.12028, I note that the Mine Act is a strict liability statute, and it requires operators to comply with the Secretary's safety and health standards. *Cf. Rock of Ages Corp.*, 20 FMSHRC 113–14 (Feb. 1998) (stating that the Mine Act imposes strict liability and refusing to insert an unwritten element into the text of a regulation). Moreover, the Secretary argues that Respondent misinterprets the phrase "immediately after installation" in 30 C.F.R. § 56.12028 by reading it narrowly to mean "immediately after installation of the grounding rod." (Sec'y Post-Trial Br. at 8.) Instead, the Secretary claims that "installation" refers to installation of the equipment, rather than the grounding rod. (*Id.*) In addition, the Secretary asks that I defer to his interpretation of the regulation. (*Id.* at 9.)

a. *Ambiguity of the Phrase "Immediately After Installation"*

As explained above, the parties interpret the phrase "immediately after installation" differently. Neither the Mine Act nor the regulation provides a definition for the phrase. Looking at the text of the regulation and the parties' alternative interpretations, I conclude that it is in some respects ambiguous. *Island Creek Coal Co.*, 20 FMSHRC 14 (Jan. 1998) (citing *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992)); Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 6 (5th ed. 1992) ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."). As the Supreme Court stated in *Boston & Maine*, "[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context." 503 U.S. at 418.

b. *Reasonableness of Secretary's Interpretation*

Given my conclusion that the phrase "immediately after installation" is ambiguous as applied to the installation of a grounding rod on a power generator, I must decide whether the Secretary's interpretation of the provision is reasonable. The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *Gen. Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citing *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir.1991)). Moreover, a policy favoring deference is particularly important where, as here, a technically complex statutory scheme is backed by an even more complex and comprehensive set of regulations. *Id.* Under such circumstances, "the arguments for deference to administrative expertise are at their strongest." *Gen. Electric Co.*, 53 F.3d at 1327 (citing *Psychiatric Inst. of Washington, D.C. v. Schweiker*, 669 F.2d 812, 813–14 (D.C. Cir.1981)); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) (finding that the Administrator's interpretation represented a reasonable accommodation of manifestly competing interests and was entitled to deference because the regulatory scheme was technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involved reconciling conflicting policies.).

The Secretary interprets "immediately after installation" in section 56.12028 to mean immediately after the installation of the *equipment* that needs to be grounded. (Sec'y Post-Trial Br. at 8.) This interpretation focuses on the purpose of the regulation, which is to ensure that regular testing prevents fatalities and other injuries. *See* IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 21, at 44 (2003) ("PPM") ("The intent of this standard is to ensure that continuity and resistance tests of grounding systems are conducted on a specific schedule. [N]umerous fatalities and injuries have occurred due to high resistance or lack of continuity in the *equipment* grounding systems. These accidents could have been prevented by proper testing and maintenance of grounding systems.") (emphasis added); *see also* 30 C.F.R. § 56.1 ("This part 56 sets forth mandatory safety and health standards for each surface metal or nonmetal mine, including open pit mines, subject to the Federal Mine Safety and Health Act of 1977. The purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents."). Testing "will alert the operator if a problem exists in the grounding system, which may not allow the circuit protective devices to quickly operate when faults occur." IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 21, at 44 (2003). The Secretary's interpretation does not deviate significantly from the language of the regulation. Furthermore, this interpretation is consistent with the purpose of the regulation reflected in MSHA's PPM for 30 C.F.R. § 56.12028. As I noted, the preservation of safety is at the core of the regulation's purpose. Testing the grounding system immediately upon installation of the equipment provides greater miner safety because it ensures the grounding rod and other elements of the grounding system are employed and tested. This provides the intended protection, especially if the generator is later energized. In contrast, allowing the generator to be installed without immediately testing the grounding system, as RECON suggests, provides less safety for miners from accidental electrocution. Thus, the Secretary's interpretation serves a permissible

regulatory function. Accordingly, I conclude that the Secretary's interpretation is reasonable and, thus, entitled to deference.

c. *Violation*

Respondent admits that it did not perform continuity and resistance testing on the power generator. (Resp't Reply to Sec'y Post-Trial Br. at 2.) Therefore, I conclude that RECON violated 30 C.F.R. § 56.12028.

d. *S&S*

RECON's violation of 30 C.F.R. § 56.12028 establishes the first element for an S&S violation under the *Mathies* test. The second element of the *Mathies* test asks whether the violation contributed to a discrete safety hazard. Here, Inspector Vidal testified that the power generator's lack of a grounding rod exposed anyone who came into contact with the generator to approximately 240 volts of electricity (Tr. 23:24–24:4) and that miners could come in direct contact with the generator. (Tr. 24:21; 25–2.) Vidal has significant experience inspecting mines (Tr. 17:17–25), and I accord his experience great weight. Accordingly, I determine that the violation contributed to the discrete safety hazard of electric shock. The Secretary has therefore met his burden of proof on the second element of *Mathies*.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Here, Inspector Vidal testified that 240-volt electrocution would likely be fatal. (Tr. 25:14–17.) Given Vidal's credible testimony, I determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur. Thus, the Secretary has satisfied *Mathies*' third and fourth elements.

Based on my above determinations, I conclude that RECON violated section 56.12028, that the violation was S&S, and that it was the result of RECON's moderate negligence.

3. Citation No. 6453945 – The Gang Box

Section 56.12004 requires operators to protect electrical conductors that are exposed to mechanical damage.[5] 30 C.F.R. § 56.12004. An operator violates section 56.12004 when exposed cable or wiring that is capable of carrying an electrical current, thus creating a shock hazard, lacks an outer protective jacket or structure of some sort. *See Northshore Mining Co.*,

[5] Section 56.12004 provides: "Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected." 30 C.F.R. § 56.12004.

35 FMSHRC 1889, 1893 (June 2013) (ALJ); *Baker Rock Crushing Co.*, 32 FMSHRC 968, 977 (Aug. 2010) (ALJ).

a. *Additional Findings of Fact*

Inspector Vidal issued Citation No. 6453945 because 13 damaged electrical extension cords with compromised outer protective coverings and exposed bare wiring were left in a gang box and available for use by miners. Specifically, Vidal testified that an unidentified employee told him that the gang box was unlocked and accessible by any miner. (Tr. 43:22–44:9.) Inspector Vidal also stated that two of the cords had completely exposed bare wiring, potentially exposing miners to 110 volts of electricity. (Tr. 49:6–12.) He indicated that the injuries resulting from 110-volt electrocution could range from a fatality to lost work days and restricted duty. (Tr. 49:18–22.)

Respondent does not dispute the condition of the cords; indeed, RECON's Cost Controls Manager, Benjamin Allen, admitted that at least some of the contents of the box were intended for use by miners (Tr. 112:21–113:1), and that the cords inside the box were unsuitable for use. (Tr. 116:4–8.) Instead, RECON alleges that the gang box was locked and, thus, the cords were unavailable for use. (Resp't Reply to Sec'y Post-Trial Br. at 3.) Specifically, Allen testified that the box was usually locked and was only unlocked for the inspection. (Tr. 113:3–114:3.) Allen also stated that there was only one key to the gang box and it was kept in a separate office. (Tr. 114:4–5.) Finally, Allen testified that equipment from the gang box had to be distributed to the miners by a supervisor per RECON's safety manual, which they provided as evidence. (Tr. 114:20–24; 115:14–16; Ex. R–2.)

I do not find Allen's testimony regarding the locked gang box persuasive for three reasons. First, operators are not given advance notice of MSHA inspections; it is unlikely that the box was unlocked in anticipation of Inspector Vidal's visit. Second, Respondent presented no evidence at the hearing indicating that Vidal "ordered all locked receptacles on site to be opened for his inspection," as it alleges in its reply brief (Resp't Reply to Sec'y Post-Trial Br. at 3.) Finally, Allen is RECON's Cost Controls Manager. (Tr. 110:21–22.) Allen did not explain how his duties as a cost control manager provided a basis for explaining the actual day-to-day operations of the rank-and-file miner. On the other hand, an actual miner told Inspector Vidal that the gang box was openly accessible by miners and that miners could use the equipment within as needed. (Tr. 42:15–24.) Therefore, I find that the gang box was unlocked and the items inside, including the extension cords, were accessible by any miner.

Inspector Vidal observed that 11 of the 13 extension cords had missing or damaged outer protective jackets (Tr. 47:16–19) and the remaining two were so damaged that bare wiring was visible. (Tr. 46:10–11.) Moreover, Vidal explained that, even with the bare wiring exposed, the extension cords were still capable of carrying a current. (Tr. 47:5–8.) Based on the evidence before me, I find that the 13 damaged extension cords were still functional and capable of carrying an electrical current.

b. *Violation*

Respondent does not dispute that the outer protective jackets of the extension cords were damaged thus exposing the bare wiring. Given my finding that the cords were available for use, I conclude that RECON violated 30 C.F.R. § 56.12004 because the extension cords in the gang box were capable of carrying an electrical current and left with damaged or missing protective coverings.

c. *S&S*

RECON's violation of section 56.12004 establishes the first element for an S&S violation under the *Mathies* test. As for the second *Mathies* element, Inspector Vidal credibly testified that the bare wiring on the extension cords exposed the miners to a safety hazard of 110-volt electric shock. (Tr. 46:7–11; 49:4–17.) As I have noted, I accord great weight Vidal's testimony based on his significant experience as an inspector. I therefore determine that the violation contributed to a discrete safety hazard of 110-volt electric shock. Thus, the Secretary has met his burden of proof on *Mathies*' second element.

Regarding the third and fourth elements of *Mathies*, Inspector Vidal credibly testified that the result of 110-volt electric shock would likely range from lost workdays to death. (Tr. 49:18–22.) I find his testimony regarding the electric shock hazard posed by the damaged extension cords credible and persuasive. Therefore, I determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, and thus has satisfied the third and fourth elements of *Mathies*.

d. *Negligence*

Vidal designated RECON's negligence regarding this violation as "moderate" because the company is responsible for ensuring that any equipment that it brings on-site for use is checked daily. (Tr. 50:4–6.) Allen testified that, at some point, the gang box and access to the sole key was restricted. (Tr. 114:1–6.) Although RECON's written safety policy was not followed here, I note that RECON's safety manual requires that equipment such as the extension cords in the gang box be issued from a designated tool room attendant or supervisor. (Tr. 115:10–16; Ex. R–2.) That policy somewhat mitigates RECON's negligence in this case. Thus, I agree with Inspector Vidal's determination that Respondent's negligence is properly designated as moderate.

Based on the above determinations, I conclude that RECON violated § 56.12004, that the violation was S&S, and that it was the result of RECON's moderate negligence.

4. Citation No. 6453946 –The Ground Prongs

Inspector Vidal issued Citation No. 6453946 because five cords in the same gang box had damaged or missing ground prongs. Moreover, a GFCI which is used to prevent electrocution was also damaged.

a. *Evidentiary Weight of The 2008 National Electrical Code*

At trial, and without prior notice to the Secretary, Respondent introduced evidence regarding the 2008 version of the National Electrical Code ("the Code")—a 600-page document. (Tr. 121:25–122:1.) Respondent admitted that it did not prepare this aspect of the hearing until a day prior. (Tr. 122:25–123:3.) RECON's Corporate Health and Safety and Environmental Manager, Gregory Howearth, testified that some unidentified "MSHA documents" referenced the code. (Tr. 121:25–122:1.) Respondent contends that it is not a hazard to use GFCIs in conjunction with extension cords. (Resp't Reply to Sec'y Post-Trial Br. at 3.) Further, Respondent claims that the Code supports its position. *Id.*

Respondent's eleventh hour introduction of the Code left the Secretary unable to adequately cross-examine Howearth on the document. At the hearing I had no reason to believe Respondent's action was anything more than a mere oversight, so I admitted the Code into evidence. (Tr. 123:22–24.) Regardless, I do not find Respondent's position on the Code persuasive. Respondent never identified the MSHA documents that purportedly reference the Code either at the hearing or in its post-hearing brief, and neither did Respondent establish their significance. Indeed, a miner using a damaged GFCI with a cord that has no grounding would be exposed to the hazard of electrocution. Therefore, I conclude that Howearth's testimony regarding the 2008 version of the National Electrical Code is irrelevant to 30 C.F.R. § 56.12025.

b. *Violation*

Section 56.12025 states that "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection." 30 C.F.R. § 56.12025. As I found above, the damaged extension cords in the gang box were capable of carrying an electrical current and left unprotected and accessible by miners. Therefore, I conclude that RECON violated 30 C.F.R. § 56.12025.

c. *S&S*

Respondent's violation of 30 C.F.R. § 56.12025 establishes the first element of the *Mathies* test. As for the second element, Vidal credibly testified that the use of an extension cord without a ground prong exposed miners to the safety hazard of electric shock. (Tr. 54:8–15.) In concluding that leaving extension cords with damaged or missing ground prongs available to miners constituted a violation, I have determined that a reasonably prudent person would recognize that allowing miners to use such damaged cords constituted a defect in safety. Likewise, I determine that the violation contributed to a discrete safety hazard of electric shock. Therefore, the Secretary has met his burden of proof on *Mathies*' second element.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. The Secretary claims that injuries in this case are reasonably likely to result in lost workdays or restricted duty. (Ex. G–11.) Noting that these cords would likely carry 110 volts of electricity, Vidal described the potential injuries as a burn

hazard, and heart defibrillation that could put a miner in the hospital. (Tr. 57:4–13.) Vidal determined this would reasonably likely result in lost workdays or restricted duty. As I noted, Inspector Vidal has significant experience inspecting mines. (Tr. 17:17–25.) Accordingly, given Vidal's significant experience as an inspector, I give his testimony great weight and determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, and has thus satisfied *Mathies*' third and fourth elements.

d. *Negligence*

Vidal designated RECON's negligence regarding this violation as "moderate" due to the company's obligation to ensure that any equipment it brings on-site for use is checked daily. (Tr. 50:4–6.) Allen testified that he believed access to the gang box was restricted at some point. (Tr. 114:1–6.) Moreover, RECON, through its safety manual, had contemplated procedures to monitor distribution of the equipment. (Tr. 115:10–16; Ex. R–2.) I find these factors to be somewhat mitigating and, thus, I agree with Vidal's determination that Respondent's negligence is properly designated as moderate.

B. Citation No. 6454808 – Workplace Examination Violation

1. Parties' Arguments

The Secretary argues that the text of Inspector Griffith's citation itself, as well as his notes, establish a facial violation of 30 C.F.R. § 56.18002(a). (Sec'y Post-Trial Br. at 19.) Specifically, the Secretary points out that Citation No. 6454808 and Griffith's notes mention that the alleged failure to perform and document a workplace examination contributed to the issuance of three S&S violations during the same inspection. (*Id.*) Although counsel for the Secretary acknowledges that the Secretary has the burden of proof, counsel nevertheless highlights Respondent's failure to introduce any evidence regarding this citation. (*Id.*)

In contrast, Respondent argues that the Secretary has failed to meet his burden of proof regarding this citation. (Resp't Reply to Sec'y Post-Trial Br. at 4.) Respondent further argues that RECON has no obligation to present evidence given its position that the Secretary failed to meet his burden of proof. (*Id.*)

2. Analysis and Conclusions of Law

To establish the violation alleged in Citation No. 6454808, the Secretary must meet his burden of proof, which is by a preponderance of the evidence. To meet his burden of proof, the Secretary must demonstrate that "the existence of a fact is more probable than its non-existence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted). Put simply, "the evidence must be sufficient to convince the trier of fact that the proposition asserted is more likely true than not true." *Keystone Coal Mining Corp.*, 16 FMSHRC 857,896 (1994) (ALJ). Here, the Secretary presented only copies of Inspector Griffith's citation and notes. Yet, in his prehearing report, the Secretary stated that he would call Inspector Griffith to testify

regarding this citation. (Sec'y Preh'g Statement at 8.) Thereafter, at the hearing, the Secretary indicated that a MSHA field office supervisor was supposed to testify regarding Citation No. 654808 but fell ill. (Tr. 14:14–17.) The Secretary could have asked for a continuance or, at a minimum, asked that the record be left open to introduce later deposition testimony from the then-ill MSHA supervisor. The Secretary pursued none of these options.

Instead, the Secretary chose to move forward with the hearing and circumvent the deficiencies in his presentation by attempting to introduce Inspector Griffith's citation under the business records exception to hearsay evidence through the testimony of Inspector Vidal, who could provide no information on Citation No. 6454808 itself. (Tr. 14:12–20.) The Secretary's attempt to use the business records exception is a red herring. It is a basic principle of administrative law that hearsay is admissible in federal and state administrative hearings. *See Richardson v. Perales*, 402 U.S. 389 (1971). Moreover, Commission Procedural Rule 63(a) specifically permits hearsay evidence in Commission proceedings. 29 C.F.R. § 2700.63(a).

I understand why the Secretary wants to introduce the citation into evidence under the business records exception to hearsay evidence, as I may then conclude that the text contained in the citation is somehow more reliable and should be taken at face value. However, Inspector Vidal did not issue Citation No. 6454808, did not speak to Inspector Griffith about this citation, and was not at Drake Quarry on the date the citation was issued. Moreover, it was not his job to be the custodian of records. The Secretary's attempt to introduce the citation as a business record is unconvincing and inapposite. Nevertheless, the Commission's Procedural Rules allow for the introduction of hearsay evidence, and I duly admitted the citation and notes at the hearing. Their admission, however, does not determine the weight I give such evidence.

Indeed, the Secretary hopes to buttress his case by using the business records exception to the hearsay rule. Yet, in the end, it is still hearsay. With no foundation for the documents and no testimony to support the allegations and determinations contained in Citation No. 654808, I am left with little more than bald allegations to consider. In fact, I know nothing about the inspector who issued this citation or his qualifications, and nothing was admitted at hearing as evidence, such as an affidavit or deposition testimony, regarding Inspector Griffith or the issuance of this citation. As the Secretary well knows, MSHA vacates citations from time to time based on its view that the inspector erred in issuing a citation or in finding a violation, and Commission Judges have done the same. Without testimony from an inspector or witness who can substantiate the claims made in this citation, I have no way of determining the veracity of the charges contained in the citation. Thus, I am precluded from making any credibility determinations.

In my view, what the Secretary asks me to do here offends the basic tenets of due process. Moreover, it offends basic concepts of fairness, inasmuch as the operator cannot cross-examine a sheet of paper. The Secretary's attempt to find fault with Respondent's refusal to put on a case against this citation is also dubious. It is a failed attempt to draw attention away from the deficiencies in the Secretary's own case. All the Secretary has here is hearsay evidence, which I

do not credit given the circumstances described and which I determine is insufficient to carry the Secretary's burden of proof. Consequently, I vacate Citation No. 654808.

VI. CIVIL PENALTIES

Under section 110(i) of the Mine Act, the Administrative Law Judge must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Prior to the violations at issue, RECON has had no recorded history of violations. (Ex. G–1.) Of the five citations before me, I affirmed all but Citation No. 6454808. The Secretary has proposed a penalty of $2,272.00 for the remaining four citations. Nothing in the record suggests that this penalty is inappropriate for the size of RECON's business or that it would infringe on RECON's ability to remain in business. Moreover, after these citations were issued, nothing suggests that RECON failed to make a good faith effort to achieve rapid compliance with the safety standards. RECON was moderately negligent in all four violations, and each affirmed violation exposed miners to a reasonable risk of fatal injuries. In considering all of the facts and circumstances of this matter, I hereby assess a civil penalty of $2,272.00.

VII. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 6453940, 6453941, 6453945, and 6453946 are **AFFIRMED**. It is further **ORDERED** that Citation No. 6454808 is **VACATED**. It is further **ORDERED** that Respondent's request to withdraw its contest of the civil penalty for Citation No. 6453944 is hereby **GRANTED**.

WHEREFORE, Respondent is **ORDERED** to pay a penalty of $2,535.00 within 40 days of this decision.

Alan G. Paez
Administrative Law Judge

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