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April 7, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2012-519 A.C. No. 11-03189-283857
v.	
M-CLASS MINING, LLC, Respondent.	Mine: MC #1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	Docket No. LAKE 2015-339 A.C. No. 11-03189-374209 A
v.	
MARK McCURDY, employed by M-CLASS MINING, LLC, Respondent.	Mine: MC #1 Mine

DECISION GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION AND DENYING THE SECRETARY'S CROSS-MOTION FOR SUMMARY DECISION

Before: Judge Rae

I. STATEMENT OF THE CASE

The above-captioned proceedings arise out of two petitions for assessment of civil penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). At issue are two orders issued by the Secretary of Labor under section 104(d)(2)[1] of the Mine Act: Order Number 8432252 and Order Number 8432253. The Secretary seeks penalties against mine operator M-Class Mining, LLC ("M-Class") for both

[1] The issuance of an order under section 104(d)(2) denotes that the alleged violation was caused by the mine operator's "unwarrantable failure" to comply with a mandatory health or safety standard and that the mine had previously received a section 104(d)(1) order without an intervening clean inspection. *See* 30 U.S.C. § 814(d)(2); *Lodestar Energy, Inc.*, 25 FMSHRC 343 (July 2003).

alleged violations. The Secretary also seeks a penalty under section 110(c)[2] of the Mine Act against M-Class employee Mark McCurdy solely for the violation alleged in Order Number 8432252. These matters were initially consolidated before a different judge and later reassigned to me for hearing.

After the completion of discovery but before a hearing was held, Respondents M-Class and McCurdy jointly filed a motion for partial summary decision asking me to vacate Order Number 8432252. (Resp. Mot., Feb. 8, 2017.) The Secretary filed a response in opposition and cross motion for summary decision asking me to uphold both violations and assess the penalties proposed by MSHA. (Sec'y Cross Mot., Feb. 27, 2017.) Respondents filed a response in opposition and further moved to vacate Order Number 8432253; in the alternative, they argued that even if either of the violations are upheld, summary decision is not appropriate on the issues of gravity, negligence, or the appropriate penalty amounts.[3] (Resp. Cross Mot., Mar. 7, 2017.) The Secretary then filed a response in opposition reiterating his position that he is entitled to summary decision on all issues. (Sec'y Response, Mar. 22, 2017.)

I have reviewed the parties' submissions at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the evidence. Based on the entire record, for the reasons discussed below and because no material facts remain in dispute, I vacate both orders.

II. FACTUAL BACKGROUND

The following facts are not in dispute.

These proceedings arise out of an incident in which McCurdy sustained an electrical shock injury while working as a maintenance foreman at the MC #1 Mine, a large underground coal mine in Illinois operated by M-Class. The accident occurred during the mine's third shift on May 23, 2011. On that night, McCurdy had been tasked with determining what was causing one of the continuous mining machines to "drop out" (intermittently lose power and stop working)

[2] Section 110(c) provides that a corporate mine operator's agent, officer, or director who knowingly authorizes, orders, or carries out a Mine Act violation may be subject to civil penalties in his individual capacity. 30 U.S.C. § 820(c).

[3] Respondents also objected to several exhibits the Secretary had filed in anticipation of hearing. Specifically, Respondents objected to admission of the mine's violation history report to the extent it was outside the relevant scope of section 110(i) and objected to use of the MSHA inspectors' field notes or interview notes for any purpose other than to refresh recollection. My decision here rests on the evidence and testimony the parties have submitted with their cross motions for summary decision, but I note that I have reviewed the entire file, including both parties' prehearing submissions, and I overrule Respondents' objections as meritless. The mine's violation history forms were never submitted. Moreover, the violation history data is a matter of public record, as it is available on MSHA's Mine Data Retrieval website, and I am capable of determining its relevance or lack thereof and weighing it appropriately. As for the inspectors' notes, I am permitted to consider relevant hearsay evidence under Commission Procedural Rule 63(a). 29 C.F.R. § 2700.63(a).

for no apparent reason. (McCurdy Depo. 10-11.)[4] Although two other maintenance workers were changing a tire on a shuttle car nearby, they did not see what caused the accident. McCurdy was working alone and was the only witness to the accident and the events leading up to it. (*Id.* at 18.)

McCurdy provided the following account of the night's events. First he tested the radio controller to the continuous miner and found no defects. Next he locked and tagged out the continuous miner so he could examine the radio circuitry outside the machine and then checked the internal components which included opening the control panel on the body of the machine to check all the wires and connections, then he restored power so he could check the fault log on the machine's computer system and "bump" the cutter head to see if there were any loose wires and if shaking the machine would make it drop out. (McCurdy Depo. 11-16.) He could not get it to drop out, so he locked and tagged it out again, rechecked the wires for a loose connection, restored power again, rebooted several times and tried bumping the head a second time, then tried walking the remote controller away from the machine to see if radio contact would be lost; he still could not find the source of the problem. (*Id.* at 15-19.) He then left and checked on the two men working on the shuttle car in a crosscut. (*Id.* at 18.) When he returned, he knelt in front of the continuous miner and looked at the electrical panel, trying to decide what to do next. (*Id.* at 19, 36.) "And then next thing I know I was beside the miner getting shocked," he stated. (*Id.* at 18.) He was not wearing gloves and he was touching an energized wire. (*Id.* at 21-22.) He could not pull his hand away, so he screamed, and the two miners working on the shuttle car came running over and tackled him and pulled him out of the current. (*Id.* at 22-23.) McCurdy was hospitalized overnight and returned to work on May 25. (*Id.* at 23-27.)

M-Class notified MSHA of the accident the morning after it happened. (Sec'y Cross Mot., Ex. 5 – Bretzman Decl.) MSHA inspectors Robert Bretzman and Keith Jeralds visited the scene of the accident, interviewed McCurdy at the hospital, and interviewed the two miners who had come to his aid. (*Id.*) As a result of their investigation, on May 24, Inspector Bretzman issued the two orders that are the subject of these proceedings. Order Number 8432252 alleges that McCurdy was performing work on the energized continuous miner at the time he was shocked, in violation of 30 C.F.R. § 75.509, which requires electric equipment to be deenergized before work is performed on it except when necessary for troubleshooting or testing. Order Number 8432253 alleges that McCurdy's failure to wear gloves while testing and troubleshooting the continuous miner violated 30 C.F.R. § 75.1720(c), which requires gloves to be worn whenever work is performed or materials are handled that could injure the hands.

III. LEGAL PRINCIPLES

[4] A complete copy of McCurdy's deposition is appended to Respondents' March 7, 2017 filing. (Resp. Cross Mot.) The parties also submitted portions of the depositions of three MSHA employees, which can be found in the following filings:

Resp. Mot, Ex. B – Bretzman Depo. 1-4, 57-68, 81-83
Resp. Mot, Ex. C – Jeralds Depo. 1-4, 17-24, 29-32
Sec'y Cross Mot., Ex. 4 – Bretzman Depo. 1, 58, 63, 67-68, 71-72, 74-76, 79-80
Sec'y Cross Mot., Ex. 6 – Wilcox Depo. 1, 8-9, 20, 26
Sec'y Cross Mot., Ex. 7 – Jeralds Depo. 1, 13-14, 18-19, 21-22, 24-25

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

Commission Procedural Rule 67, which is analogous to Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to grant summary decision when the entire record shows that "there is no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The record must be viewed in the light most favorable to the nonmoving party and the judge may not weigh the factual evidence or engage in fact-finding beyond those facts that are established in the record. *W. Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015); *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4 (Jan. 2007). Summary judgment should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Order Number 8432252 (Violation of 30 C.F.R. § 75.509)

Order Number 8432252 states:

> On May 23, 2011 a non-fatal electrical accident occurred. Maintenance Foreman Mark McCurdy was performing work on an energized Joy Continuous Miner, company number 003, located on the tailgate unit. McCurdy was working in the energized traction controller when he contacted an energized part with his right hand. All power circuits and electric equipment shall be deenergize [sic] before work is done on such circuits and equipment. Maintenance Foreman Mark McCurdy engaged in aggravated conduct constituting more than ordinary negligence in that he did not lock out and tag the continuous miner. This violation is an unwarrantable failure to comply with a mandatory standard.

Inspector Bretzman assessed the alleged violation as reasonably likely to cause a fatal injury to one person, S&S, and involving reckless disregard. The Secretary seeks penalties of $52,500.00 against M-Class and $8,000.00 against McCurdy for the alleged violation.

The mandatory safety standard alleged to have been violated is § 75.509, which provides: "All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing." 30 C.F.R. § 75.509. As noted above, McCurdy was the only witness to the May 23, 2011 electrical accident. The Secretary does not challenge his credibility or dispute his account of the night's events. The

parties' sole dispute is whether McCurdy's activities amounted to work on electrical equipment that required the continuous miner to be deenergized pursuant to § 75.509 at the time he was shocked.

Respondents argue that McCurdy was troubleshooting. (Resp. Mot. 6.) The Secretary's Program Policy Manual (PPM), which is his main source of policy guidance to MSHA inspectors and the mining industry, states that "troubleshooting or testing includes the work of locating electrical, hydraulic or mechanical problems on a machine." (Resp. Mot., Ex. D; Sec'y Cross Mot., Ex. 8.) It is undisputed that McCurdy's assigned task the night of the accident was to locate the problem on the continuous mining machine that was making it intermittently lose power. (McCurdy Depo. 10-11; Bretzman Depo. 65.) This task is consistent with the PPM's guidance on what sort of activities constitute troubleshooting, and indeed, all three of the Secretary's witnesses agreed that McCurdy was engaged in troubleshooting during at least part of the shift. (Wilcox Depo. 8; Bretzman Depo. 75-76; Jeralds Depo. 18-19.)

Nonetheless, the Secretary maintains that at the time of the accident, McCurdy's activities had deviated from troubleshooting to electrical work that required the continuous miner to be deenergized. (Sec'y Cross Mot. 2; Wilcox Depo. 8.) I reject this argument and conclude that McCurdy was still troubleshooting, for the following reasons.

First, it is undisputed that McCurdy was still trying to locate the problem on the miner at the time he was shocked. (Bretzman Depo. 66-67; Jeralds Depo. 19.) McCurdy asserted, "I feel the whole time I was troubleshooting because I never did figure out what was wrong with the machine." (McCurdy Depo. 37.) Inspector Jeralds agreed, stating, "As far as I know, yeah … he didn't know what was wrong with the miner yet, he was still troubleshooting." (Jeralds Depo. 19.) The Secretary contends that Jeralds simply misspoke. (Sec'y Cross Mot. 15.) But regardless of whether the witness meant to use the term "troubleshooting," he conceded McCurdy was still trying to locate the problem on the continuous miner, which is consistent with the PPM's definition and the plain meaning of the word.

The Secretary advances a different interpretation, arguing that in order for a miner's activities to constitute troubleshooting, the miner must be wearing gloves or using a meter to take readings. (*See* Sec'y Cross Mot. 7-8, 10-11.) This interpretation is based on testimony from Inspectors Bretzman and Jeralds. According to Bretzman, "to be testing or troubleshooting, [McCurdy] would have had to been taking voltage readings with a meter," and "once his hands crossed that imaginary line of the controller and he wasn't taking voltage or current measurements … he's not testing and troubleshooting, he's working." (Bretzman Depo. 65, 68.) According to Jeralds, "when he took his gloves off it became electrical work." (Jeralds Depo. 19.) Jeralds asserted that Title 30 of the Code of Federal Regulations defines troubleshooting as requiring both gloves and a meter, but he could not point to any specific code provision saying so. (*Id.* at 22-25.) Review of the CFR shows that no such provision exists. The Secretary has identified no other support for Bretzman and Jeralds' opinions except the PPM, which provides the following guidance on § 75.509:

> For the purpose of this Section, troubleshooting or testing includes the work of locating electrical, hydraulic or mechanical problems on a

> machine and the work of verifying that proper repairs have been performed. Troubleshooting or testing does not include the repair of the electrical, hydraulic, or mechanical problems. When troubleshooting and/or testing an energized machine, extreme caution must be taken to prevent inadvertent contact with energized parts in close proximity and assurance that equipment will not be accidentally started. Examples of tests which may be performed with equipment energized are:
>
> 1. Voltage and current measurements;
> 2. Pressure and volume measurements on hydraulic systems; and
> 3. Mechanical clutch setting.
>
> Sections 75.1720(c) and 77.1710(c) require that protective gloves be worn by miners when they are performing work "which might cause injury to the hands," unless the gloves would create a greater hazard by becoming entangled in the moving parts of equipment. As the accident and injury data associated with working on energized circuits and equipment clearly indicate, this type of work presents a significant risk of hand injury. Therefore, gloves, in accordance with Sections 75.1720(c) and 77.1710(c), are required whenever miners troubleshoot or test energized electric power circuits or electric equipment.

(Resp. Mot., Ex. D; Sec'y Cross Mot., Ex. 8.)

The Secretary's position fails for several reasons. The PPM discusses the meaning of troubleshooting and distinguishes it from making repairs. McCurdy was troubleshooting the machine as both inspectors acknowledged that he had not yet found the cause of the power failure and he was not engaged in making repairs. The PPM sets forth a non-exhaustive list of activities which might constitute testing; voltage and current measurements taken with a meter are mentioned as just one item in this list, not as a defining element of troubleshooting. The PPM does not, however, limit an experienced electrician from employing the means he determines necessary to identify the cause of an electrical power failure. Here, McCurdy employed the use of a Triplett meter as well as checked the fault log of the computer system in order to identify the problem, neither of which was successful. (McCurdy Depo. 14, 31.) He then followed a systematic, graduated approach to troubleshoot the problem which included means beyond the use of a meter. The Secretary's witnesses, neither of whom is a certified electrician as is McCurdy, did not identify his approach as unusual or unnecessary or outside the bounds of troubleshooting a problem. In fact, Jeralds testified that McCurdy was troubleshooting until he was corrected by counsel and Bretzman confirmed that McCurdy was tracing wires to find where the drop was and the way to do that would be by using a volt meter or by "using your hand to physically move the wires and trace them." (Bretzman Depo. 62; Jeralds Depo. 19, 21.)

Secondly, the second paragraph of the PPM addressing the use of gloves is not intended to be used to define the term "troubleshooting." Additionally, it recognizes the exception to wearing gloves contained in the mandatory standard when doing so would pose a greater risk of injury. This paragraph is best read simply as advising operators to be mindful of the separate

requirements of § 75.1720(c) and § 77.1710(c), which mandate gloves be worn when working on energized electric equipment. In short, the PPM does not support the Secretary's back door approach to defining troubleshooting, as used in § 75.509, by the use of gloves or a meter. Also, it would be illogical to hold that the nature of a miner's activities changes when he doffs or dons his gloves or to limit troubleshooting to taking readings with a meter when the Secretary's own witnesses agree that McCurdy was engaged in troubleshooting while undertaking other activities such as tracing wires and bumping the cutter head. (*E.g.*, Jeralds Depo. 18.)

I find the Secretary's reliance on the PPM to prove the violation is unsupportable and it is a position taken solely for the purposes of litigation. It is inconsistent with the PPM's plain and simple description of troubleshooting as the work of locating problems. I decline to defer to the Secretary's interpretation.[5]

The Secretary next posits that McCurdy reached his hand across an "imaginary line" into the energized control panel and therefore "was no longer performing any troubleshooting, but rather, was working." (Sec'y Cross Mot. 7, 13.) The Secretary relies solely on the fact that an accident occurred that led to McCurdy's pinky finger contacting a 110 volt wire. It contemplates that he intentionally did so. However, there is no evidence to support this conclusion. When McCurdy contacted the 110 volt wire, he was not purposefully or intentionally passing the imaginary line the inspectors identified. He had just traveled to a crosscut to check on miners who were working on a shuttle car, came back and stood before the miner machine to think. The next moment he was shocked by 110 volts. The point of contact was his pinky finger, not his thumb and first two fingers as one would expect if he were intentionally reaching in the control box to trace wires. (Bretzman Depo. 63; Jeralds Depo. 18.) McCurdy could not explain how the contact came about, but he is an experienced electrician familiar with the "imaginary line" principle and its underlying safety rationale, and he testified he did not intend to stick his hands into the machine. (McCurdy Depo. 34, 36.) The last thing he remembered was kneeling in front of it trying to collect his thoughts. (*Id.* at 22, 36.) Whether he lost his balance and fell against the machine or reached his hand out to regain his balance and accidentally made contact is immaterial. McCurdy testified that he is a certified electrician with significant experience. He is therefore trained in the National Electrical Code requirements as well as MSHA's standards and policies and clearly exhibited conscientious work habits. There is no evidence to contradict McCurdy's recount of the events and I find him to be credible. I find that the Secretary has failed to prove by a preponderance that McCurdy was engaging in work at the moment the accident occurred. It was a completely inadvertent and unforeseeable occurrence. I find, therefore, that the evidence is insufficient for the Secretary to prevail on this argument.

[5] The Secretary contends that his interpretation of "troubleshooting" as requiring gloves and a meter is entitled to deference as an exercise of his delegated lawmaking powers. (Sec'y Cross Mot. 9.) As a general rule, the Secretary's interpretation of his own ambiguous regulations is entitled to deference unless the interpretation is unreasonable, plainly erroneous, inconsistent with the regulation, or does not reflect the agency's fair and considered judgment. Christopher v. SmithKline Beecham Corp., 567 U.S. _, 132 S. Ct. 2156, 2166 (2012); Auer v. Robbins, 519 U.S. 452, 461-63 (1997); Hecla Ltd., 38 FMSHRC 2117, 2122 (Aug. 2016). In this case, however, I find that the Secretary's proffered interpretation of "troubleshooting" is unreasonable because it is illogical and legally unsupported, as discussed above. I also cannot conclude that it reflects the agency's fair and considered judgment.

The Secretary also raises the allegation that Respondents have not established it was necessary for the continuous miner to be energized at the time McCurdy was shocked. (Sec'y Cross Mot. 6-7, 11-14.) But the Secretary bears the burden of proof, and the case law suggests that a qualified electrician has latitude to determine how to troubleshoot equipment and whether it is necessary for it to be energized or not. *See, e.g.*, *Badger Coal Co.*, 6 FMSHRC 874, 895-900 (Apr. 1984) (ALJ) (finding no violation when qualified electrician was electrocuted while troubleshooting energized equipment); *Consolidation Coal Co.*, 2 FMSHRC 866, 867 (Apr. 1980) (ALJ) (noting that standard "prohibits troubleshooting with the power on only where it can be shown that the trouble encountered is reasonably susceptible of a fix or repair without the power on"). A determination that § 75.509 has been violated normally entails, at the very least, identification of what work was being performed on energized circuits or equipment. *See, e.g.*, *Am. Coal Co.*, 36 FMSHRC 1311, 1314-15 (May 2014) (ALJ) (moving electric wires with hand and shutting panel door), *aff'd on other grounds*, 39 FMSHRC 8 (Jan. 2017); *FMC Wyo. Corp.*, 16 FMSHRC 124, 129 (Jan. 1994) (ALJ) (tightening loose screw inside electric panel); *Peabody Coal Co.*, 13 FMSHRC 1308, 1312 (Aug. 1991) (ALJ) (taping electric leads). In past cases where the operator has argued it was troubleshooting, the Secretary has prevailed only on a specific showing that the operator's activities were directed toward making repairs rather than identifying a problem, that the operator had already identified the problem, or that it was not necessary for the equipment to be energized during that particular troubleshooting activity. *See Peabody W. Coal Co.*, 25 FMSHRC 293, 299 (June 2003) (ALJ); *Amax Coal Co.*, 3 FMSHRC 1975, 1982 (Aug. 1981) (ALJ); *Leeco Inc.*, 16 FMSHRC 1496, 1502-03 (July 1994) (ALJ); *cf. Badger Coal*, *supra*; *U.S. Steel Corp*, 2 FMSHRC 3220 (Nov. 1980) (ALJ). There is no such evidence here.

McCurdy is a qualified electrician who was engaged in troubleshooting a problem on the continuous miner at the time of the alleged violation. Section 75.509 permitted him to energize the machine as necessary in furtherance of this purpose so he could take actions such as checking the machine's computer fault log and bumping the cutter head. Although he was shocked, the injury does not prove the violation. No one saw how the accident happened and the Secretary cannot prove he put his hand in the panel or was performing work on it. I conclude that the Secretary cannot establish a violation of § 75.509 on this evidence and that the Respondent is entitled to summary decision on this issue.

B. Order Number 8432253 (Violation of 30 C.F.R. § 75.1720(c))

Order Number 8432253 states:

> Maintenance Foreman Mark McCurdy was testing and troubleshooting the traction controller, of the Joy Continuous Miner company number 003, located on the tailgate unit. McCurdy was not wearing gloves while performing testing and troubleshooting. Gloves are required when testing and troubleshooting energized electrical power circuits or electric equipment. This is an unwarrantable failure to comply with a mandatory standard.

The inspector assessed the alleged violation as reasonably likely to cause a fatal injury to one person, S&S, and involving high negligence. The Secretary seeks a penalty of $41,500.00 against M-Class for this alleged violation.

The cited safety standard is § 75.1720(c), which requires underground coal miners to wear "[p]rotective gloves when handling materials or performing work which might cause injury to the hands," unless gloves "would create a greater hazard by becoming entangled in the moving parts of equipment." 30 C.F.R. § 75.1720(c).

It is undisputed that Foreman McCurdy was not wearing gloves when he was shocked. However, M-Class argues that he was merely kneeling in front of the continuous miner at the time and that the Secretary cannot prove he was "handling materials or performing work which might cause injury to the hands." (Resp. Cross Mot. 10.) I agree. As discussed above, the Secretary's evidence is insufficient to establish exactly what McCurdy was doing at the time he was shocked or to rule out the possibility that his contact with the unidentified electrical component resulted from a loss of balance, a fall, or some other inadvertent motion that led him to accidentally contact the electrical panel. The regulation cannot have intended to punish him for accidentally contacting a live wire when the Secretary cannot prove he was taking the sort of foreseeable risk that would have obligated him to wear gloves.

The Secretary contends that the PPM requires a miner to wear gloves in accordance with § 75.1720(c) whenever he is troubleshooting or testing energized equipment. (Sec'y Cross Mot. 8; Sec'y Response 8.) But the regulation itself requires gloves to be worn only when handling materials or performing work which could injure the hands. Not all activities that constitute troubleshooting will necessarily pose a risk of injury to the hands, and in some circumstances it is safer *not* to wear gloves when troubleshooting. For example, McCurdy testified that when he was "bumping" the cutter head on the continuous miner, he took his gloves off to operate the miner's control because "I'm not a continuous miner operator, I'd just as soon have my hands on the remote, not hit the wrong button." (McCurdy Depo. 33.) This situation seems to fit the exception to § 75.1720(c) that allows a miner not to wear gloves when they would pose a hazard. Hitting the wrong button on the remote control is a legitimate concern, particularly for an electrician who is not a miner operator, because it creates a risk that the miner will be run over, pinned against the rib, or otherwise injured due to unintended movement of the machine, which has happened many times in underground coal mines. *See, e.g.*, *Pontiki Coal Corp.*, 15 FMSHRC 48 (Jan. 1993) (ALJ) (discussing incident where a troubleshooter who was trying to rotate the cutter head hit the wrong button and activated the conveyor chain instead, which pulled him under the machine and killed him). Thus, I reject the Secretary's suggestion that gloves must be worn at all times whenever a miner is troubleshooting because this would run counter to the Mine Act's safety-promoting purposes in some situations.

The Secretary's witnesses said that McCurdy was tracing wires before he was shocked, which is a type of troubleshooting that would pose a risk of injury to his hands. (Bretzman Depo. 61; Jeralds Depo. 17.) But McCurdy specifically denied tracing wires at the time he was shocked, stating, "I don't recall at that time tracing wires when I contacted. I traced the wires earlier when I had the miner locked out." (McCurdy Depo. 31.) Supporting this statement, he

provided a detailed account of all the actions he took that day to troubleshoot the continuous miner:

He started by locking the miner out at the power center then checking the radio circuitry, including the radio circuit connections for the antenna and receiver. (*Id.* at 11-12.) With the machine still deenergized, he opened the control panel and checked the various electrical components connected to the CCU and battery backup using a screwdriver and gloves. (*Id.* at 11, 13-15, 20-21.) When he still could not find the problem, he turned the power back on, "bumped" the cutter head with his gloves off, and checked the fault log on the machine's Jana computer system, which is controlled by a mouse on the outside of the machine just like a regular computer. (*Id.* at 13-15.) Next, he tried rebooting the Jana system using the control breaker, to no avail. (*Id.* at 15-16, 29.) He then went back to the power center, locked the machine out a second time, and went over the control wires again. (*Id.* at 16-17.) Then he reenergized the machine, bounced the head again, and tried starting the machine with the remote and backing away from it to see if it would drop out. (*Id.* at 17-18.) He also traced the wires to make sure they were hooked up during one of the two times he had the machine locked out, then he took voltage measurements with a Triplett meter after restoring the power. (*Id.* at 31, 33-34.) After all of his efforts failed to locate the problem, he left and checked on the men working on the shuttle car. (*Id.* at 18.) When he came back, he knelt beside the control panel, looking in it and "[t]rying to go through my head to figure out what else I could do to make this machine drop out" with his gloves sitting on top of the machine and his tools sitting on the machine and in his bibs; at that point he was shocked. (*Id.* at 18-22, 35-36.)

The Secretary does not challenge McCurdy's account and can produce no other evidence to show what he was doing when he was shocked. McCurdy's testimony indicates he was knowledgeable and trained in proper procedures, such as the convention against crossing the "imaginary line" into an energized electrical panel, and exhibited proper respect for them; he was an experienced electrician who would not be expected to intentionally or needlessly expose himself to potentially fatal injuries by reaching into an energized panel barehanded. (*Id.* at 8-10, 34, 36.) I find the evidence insufficient for the Secretary to prevail on an argument that McCurdy was tracing wires or performing other work that posed a risk of injury to his hands at any one time when he was not wearing gloves.

The Secretary bears the burden of proof, but has failed to produce evidence sufficient to establish a violation of § 75.1720(c). The Secretary has not identified any material facts remaining in dispute. M-Class is entitled to summary decision on this violation.

ORDER

Respondents' motions for summary decision are **GRANTED**, the Secretary's cross motion for summary decision is **DENIED**, and Order No. 8432252 and Order No. 8432253 are **VACATED**.

Because no issues remain for adjudication, these proceedings are hereby **DISMISSED**.

Priscilla M. Rae
Administrative Law Judge

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