FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 19, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2018-0239 A.C. No. 01-00028-471366
v.	
VULCAN CONSTRUCTION MATERIALS, LLC, Respondent	Mine: Fort Payne Quarry

DECISION AND ORDER

Appearances: Thomas J. O'Donnell, CLR, U.S. Department of Labor, MSHA, Birmingham, Alabama, for Petitioner

Leslie P. Brody, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner

Misty Hillis, Vulcan Construction Materials LLC, Birmingham, Alabama, for Respondent

Before: Judge Moran

This matter, brought under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d), is before the Court upon a petition for assessment of a civil penalty. It involves whether the safety and health standard at 30 C.F.R. § 56.12025, titled, "**Grounding circuit enclosures**," which states in relevant part that "**All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection**...."[1] applies to a portable space heater located in an enclosed, elevated, surface mine operation's control room where that heater was equipped only with a two-prong plug. The Secretary of Labor ("Secretary") contends that the heater was neither grounded nor provided with equivalent protection. A hearing was held on March 21, 2019 in Birmingham, Alabama. For the reasons

[1] The standard also provides that "[t]his requirement does not apply to battery-operated equipment." Battery-operated equipment is not involved in this matter.

which follow, albeit with some misgivings, the Court concludes that the standard does apply in this instance.

Findings of Fact

Vulcan Construction Materials ("Respondent") is a large mining operation, with about 300 quarries nationwide. Tr. 7. The single citation involved was assessed a proposed civil penalty of $118.00 but the dispute is decidedly not about the proposed penalty. Rather, it is about the standard's applicability in this situation.

Secretary's Testimony

Testimony began with Inspector Robert Lance White, the inspector who issued the citation. He has been an MSHA inspector for about 11 years. Over his years of employment he has had safety responsibilities but regarding electrical, his experience has been limited. Tr. 19. With MSHA, he had limited training involving electricity, and that was 11 years ago. White is not an electrician, nor does he possess any degrees involving electrical work. Tr. 21. Apart from his MSHA training, his knowledge about electricity has been acquired through self-training. Tr. 22. The citation issued by White, Ex. C-1, was issued on July 16, 2018, and his notes related to that are reflected in Ex. C-2. Tr. 24, 29. The citation, under condition or practice states, "[m]etal encasing electrical circuit was not grounded on a personal heater in the secondary control room." Tr. 31. The inspector added that he "observed that the heater had a metallic casing, and there was no ground wire or ground prong, which is required by the standard [at least] as [he has] been trained and experienced it." Tr. 31.

The Court sought clarification of the condition observed by the inspector. The inspector agreed that he came upon a personal heater which was plugged into a wall socket. Tr. 31. The inspector found that the plug had two prongs, and no ground prong. Tr. 32. Photographs of the heater were introduced. Gov. Ex. C-3 and C-4. Tr. 33. White described the secondary control room where he observed the heater as a metallic structure that's raised up for viewing reasons so that one can view the operation of the plant. A set of stairs provides access to the elevated structure. There are multiple windows in the structure so that they can observe their process and control and most things can be turned on and off from that structure. Therefore, the Court concludes that it is in effect a control room tower. It is a relatively small structure, being somewhere around eight foot by eight foot or perhaps only eight foot by six feet. The structure is enclosed. Tr. 34. Inside the control room are chairs, a small refrigerator, control panels, switches and the heater, which is the subject of this matter. *Id.*

In his citation, the inspector wrote, "miners work in the control room daily when the plant is in operation. Contacting the metal surface when the metal is energized would likely result in strains, sprains, or broken bones when falling due to recoiling from the shock." Tr. 35. Electrical shock is the hazard White identified, and he expressed that multiple injuries could result from receiving a shock, including most probably "[b]urns probably from electrical shock and tissue damage, depending on the route taken of the electrical current through the body." Tr. 36.

The Court asked the inspector to explain what he meant by "metal encasing electrical circuits." The inspector responded that "[i]n this case it was the metallic outside of the heater. So all the parts you would touch normally if you were moving the heater or just incidental contact would be metallic, which is an electrical conductor." Tr. 37. Seeking clarification, the inspector agreed that the heater itself is the metal encasing electrical circuit. Tr. 37. The inspector stated that the heater had not been modified in any way. Thus, except for a little dirt, it was in its original condition. Tr. 38. Although it was plugged in when he observed it, it was not running. *Id.* The heater has an on/off switch but the inspector did not test it to see if it was operational. Tr. 39. He had no basis to conclude that there was anything wrong, anything malfunctioning, anything defective with that heater at all. Tr. 40. His only issue was the device not being grounded. Tr. 40-41.

Explaining his concern further, the inspector opined that his belief was that if one were to touch the metal casing he would receive a shock. The hazard would arise "[i]f there is damage on the inside where that metal casing can become energized because of damage wear and tear, anything like that, then the metal casing would be energized and you would receive a shock from touching it." Tr. 39. When a device is grounded, "if there's some damage internally in the heater to where maybe the electrical circuits or even the heating element has broken and is touching the metallic part or the internal electrical connections." Tr. 41. In such a situation, the metallic part would still be energized but if there is grounding, the current would be drawn through the ground wire and kick a breaker so that it would not remain energized. *Id.* Without a ground wire, if the metal casing became electrified, the "only path to ground would be through the body of the miner when they contacted it."[2] Tr. 42.

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[2] An attendant risk is called "hand-to-hand pathway," which the inspector described as where the current

> passes through the chest cavity, the heart, lungs. It can result in heart stoppage or thoracic [...] lung function stoppage. [...] hand-to-hand is [...] dangerous [as] [...] it's doing tissue damage as it goes, including electrical tissue damage to the heart. The heart has its own electrical system, and this current messes that up.

Tr. 42-43. However, more than one action would apparently have to occur, as the inspector offered the example of "[t]ouching this heater and having the other hand on this metallic refrigerator which is sitting on the metal floor and all that could be a path for hand-to-hand. It depends on circumstances, how the miner would touch it." Tr. 43. Another risk was described as "let-go current." The inspector advised that

> [l]et-go current is a common term for a particular amount of current that keeps a person from turning loose if they grab the heater. It's a muscle contraction, and they could not turn loose. So this increases the total amount of current because current is dependent upon time. So you're exposed to more current if you can't let go.

Tr. 43-44. For this 120 volt heater, let-go current would not be a certain event as it would depend "upon the conductivity of the person's skin, which can be affected differently by different individuals. The amount of perspiration, anything wet in the area, water spilled on the

The inspector marked the injury or illness for this alleged violation as "unlikely;" he stated this was based on the warm temperatures that day – 87 degrees – and therefore a room heater would be unnecessary. Tr. 46-47. Typically, there would be just one person in the control room. Tr. 47. Photo Ex. C-3 depicts the heater as the inspector observed it. It was located in front of a small refrigerator but the inspector did not determine if it was operating. Tr. 48. The inspector believed that the heater would need to be moved to open the refrigerator door. Tr. 49. Responding to his marking "lost workdays or restricted duty" for the alleged violation, the inspector described the hazard as electrical shock. A number of injuries can result from a shock.[3] The citation was terminated the same day as its issuance by removing the heater from the premises. Tr. 51.

Ex. C-5 is a picture of the side of the heater, which reflects the model number, the voltage, amperage, watts, 60 hertz, which is typical AC, alternating current, electricity provided in the U.S., and the heater's serial number, L209017547. Tr. 53-54. UL 1278 also appears in the photo exhibit. White stated that he believed the UL number refers to heaters and its presence means that the heater was tested against the Underwriters Laboratories safety standards. Tr. 54-55. "Intertek ETL Listed" also appears in the photo, but White was not familiar with that reference. Tr. 55. White was then asked about the National Electrical Code or "NEC." He informed that NEC is a "code for manufacturing and constructing and building different electrical devices and meeting the code." Tr. 55-56. White did not consider either the NEC or the UL standard in deciding that there was a violation, since his training and experience was that equivalent protection, would be a ground fault circuit interrupter, better known as a "GFCI," or with double insulation. White saw no indication of either. He did ask Vulcan foreman Jeff Dean, who was the employee who accompanied him during the inspection, to see the breakers, but they saw no indication of any GFCI, nor any "square inside a square" symbol indicating there was double insulation. Tr. 56. Dean agreed with White that the heater casing was metallic. Tr. 57-58. White reiterated that GFCI is considered equivalent protection in lieu of a ground system or a ground wire. Tr. 58. As he indicated earlier in his testimony, he went down from the control room to the MCC, or motor control center, below that room but, while they found a breaker, they did not see a GFCI. Tr. 59. During his inspection, White found a second heater in the primary control room with the same issue.[4] While he noted it, he did not write a separate citation for that heater. Tr. 60. Both heaters were removed from the mine property. Tr. 61.

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refrigerator or the outside of the heater itself, a variety of factors." Tr. 44-45. Thus, the inspector could not say for certain if the "let-go" phenomena would apply in this instance. Tr. 45-46. In fact, he conceded that while it could occur for a 120 volt device, it's more common with higher voltage devices. Tr. 46. 120 volts is considered lesser voltage. *Id.*

[3] The inspector elaborated that the "response to the shock in the human body depends upon, [...] a variety of circumstances. Moisture in the skin. It can be electrical burns. It can be tissue damage throughout the body along the path. It can be muscle contractions to where people do fall down or whatever [and in this situation there was] [...] limited space." Tr. 49. Inspectors are trained to focus on the more likely results.

[4] The next day, he found a third heater, in the bathroom of the maintenance shop, but that heater did have a ground wire or ground system.

The Secretary introduced documents which had been provided by the Respondent during discovery. The government's purpose behind their introduction was to show the conditions in the control room in order to demonstrate the hazards and gravity associated with the condition. Tr. 64-65. Respondent pointed out that the photos were taken after the citation was issued and involve a different heater. Tr.65-66. *See also* Gov. Exs. C-6, C-7, and C-8. White, referring to the photos, identified them as from the same control room as the one where he found the allegedly defective heater. Tr. 67. White believed they were useful for the Court to consider, as the photos show the general layout of the control room and consequently may show the likelihood of incidental contact. Tr. 68. White also commented that the photo shows "the metallic floor plate, which is a conductor, and a metallic desk [...] and the controls themselves being metallic." Tr. 69.

The inspector explained that the term "double insulation" means "an extra layer of nonconductive material, frequently plastic, around the electrical contacts of the circuit so that if something becomes loose or damaged, it is more likely to hit a nonconductive surface rather than a conductive metallic surface." Tr. 70. If present, he stated that such double insulation can be considered to be equivalent protection. Tr. 70-71. Its presence is indicated on the device itself, either by simply stating that it is double insulated or with the square within a square symbol, which looks like a "D" within a square.[5]

Apart from MSHA's requirements under the standard, the inspector agreed that the manufacturer indicated that the heater was in compliance with the standards listed on the heater's label, such as UL Standard 1278. This included the inspector's admission that the heater was originally made as a two-prong outlet device. Tr. 78-79. He also agreed that there was nothing inherently unsafe about the heater. Tr. 79. The inspector offered that the MSHA requirements were more strenuous because

> the mining environment's tougher [than] [...] the heater in your grandma's house on a nice wooden floor. The heater in a control room where people with wet, muddy boots may knock it around, where you have a metallic floor, and just even the atmosphere, the mining environment, that floor plate that you see there, I believe that's that particular color because of dirt. What I'm saying is you drag stuff in. You expose the heater to more stringent situations. And I believe that's why the mine standard is a requirement above and beyond any UL standard or anything like that.

Tr. 79-80.

On cross-examination, the inspector again agreed that he did not see any obvious visual damage. However, he raised the possibility of internal damage, though he admitted that, as he did not open it, that was pure speculation by him. Tr. 81. He also agreed that he had no basis to believe that the heater case would be energized if it were switched on. Tr. 84. The inspector did

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[5] Gov. Ex. C-9, Respondent's violation history was admitted. Tr. 73.

not know if the inner workings of the heater were constructed so that there would be no way for the case to become energized. Tr. 84-85. He could not state that the entire case was metallic, but maintained that some parts of it were metal. Tr. 86. Similarly, he could not recall if the heater's handles were plastic, but added that, even if that were so, incidental contact with the metal parts of the heater could occur.[6] *Id.* The inspector did not know if the operating controls were metal or plastic. Tr. 87. Shown Ex. C-6, the inspector stated that there appeared to be a mat, possibly a rubber mat, beneath the control room chair. Tr. 91. However, he added that he did not see that the mat extended to the heater area. Tr. 92.

Shown Ex. C-4, the inspector identified the plug as a two-prong type. He agreed that one of the two prongs was wider than the other. Tr. 96. The inspector stated that the difference in the prong sizes involved polarity but he was unable to elaborate about that, other than remarking that polarity is positive and negative, but he did not believe that came into play for alternating current. He admitted that he did not know what polarity meant. Tr. 97. His view was that such two prong plugs were a hazard only where a device is metal-encased. *Id.* He reiterated his view that the only "equivalent protection" acceptable under the standard would be the GFCI, or double insulation." Tr. 97. The inspector was also unaware of any MSHA policy manual guidance on the subject but he would not use Underwriter Laboratories for guidance on this issue, as it was his understanding that such "UL" standards do not go above or beyond MSHA standards. Tr. 101.

Respondent's Testimony

The Respondent's defense began with the testimony of Misty Hillis, Vulcan's Safety and Health Manager for their Southern and Gulf Coast division. Tr.111-112. She has been in Vulcan's employ for 19 years, all of it in connection with safety and health matters. Tr. 113. Vulcan provides training regarding electrical hazards and hazard awareness for its miners and its electricians have in-depth training. Tr. 114. Their miners are trained to be alert to things such as damaged electrical cords, missing junction boxes, and missing knockouts. Tr. 115.

With regard to the control room where the cited heater was located, Hillis described it as "an office kind of room" as it has an office-type desk and chair, from which location they monitor the plant, having a bird's eye view to watch the conveyors and screens. Tr. 116. Those in the control room wear safety boots with rubber soles. The control room, which is indoors, has no sink, toilet or other water source sufficient to even partially immerse the heater. Tr. 117. Generally, there is only one person in the room. *Id.* In terms of the items in Vulcan's

[6] The inspector could not state how many amps represent the threshold for release current. Asked if it is a current at any voltage, or whether it is a combination of voltage and current, or whether it is only that voltage and resistance work together to create a certain current, the inspector responded that his understanding was that it's only about current, which would be affected by the amount of voltage, analogizing the voltage as the push or pressure involved, such as in a water system and the current being the amount of flow, such as gallons per minute, to continue the water analogy. Tr. 87. The particular conductivity can be affected by perspiration or if one were in contact with water, such as with a wet floor, or with wet, muddy boots, for example. Tr. 88.

control rooms Hillis stated that generally one would find heaters, fans, small dorm-style refrigerators, a radio and a clock, "things that you would find in a normal office." Tr. 118. These typical arrangements motivated Vulcan to challenge this citation because it has "all those different type of two-prong appliance, office-type things in those rooms, in most of our control rooms throughout the division." Tr. 118. In her years with Vulcan, there has never been a control room accident involving those devices. Tr. 119. Regarding the heater, she informed that the handles are plastic as are the control knobs including the on/off switch. *Id.* As for the mini-fridge, with the exception of a metallic hinge, the mini-fridge is not metal either. Tr. 119-120. Although Vulcan has received citations for this standard, those were quite different in nature, such as for a broken ground pin. Vulcan believes that, in this instance, the standard was misapplied. In that regard, it believes that an ALJ decision involving the same issue, a heater in a shop, but for a coal case, is applicable to this situation. There, a mine was cited for the two-prong plug issue. Tr. 120-121. Ex. V-2,[7] *San Juan Coal Co.*, 13 FMSHRC 1688 (Oct. 1991)(ALJ)("*San Juan*").

Both sides agreed that there is no program policy manual or other instruction from MSHA offering guidance or further explanation for this standard. Tr. 128. Vulcan has never interpreted the standard and its reference to "metal encasing circuits" to apply to an appliance in a control room. Tr. 129. At least for Ms. Hillis, she associated breaker boxes and junction boxes and equipment out in the plant with the grounding requirement, not appliances in an office kind of room. Tr. 129.

Respondent then called Mr. Andy Hill, Vulcan's electrical maintenance manager for its Southern Gulf Coast division. He has been employed with Vulcan for 39 years and he has 42 years of experience as an electrician. Tr. 133. Hill described the control room as an office-type environment area with usually a desk with a set of controls, noting that Vulcan calls it the operator house. It is from that location that the plant is operated as the control room operator watches and controls the plant to produce the plant's product, limestone. Except for incidental track-in wetness from outside, the control room is not wet. Tr. 136.

Referring to Ex. C-5, Hill identified it as the tag which was affixed to the heater. The UL listing on the tag reflects that it conforms to UL 1278. Tr. 138. The UL listing informs that the product is deemed as to "mechanical strength or electrical strength, to be a safe product to be used in the area where it was designed for." Tr. 138. Hill informed that UL 1278 recommends "not using it in a wet location, bathroom area, laundry rooms, stuff of that nature." Tr. 139. There is a risk in those situations of electrical shock but from "[b]eing knocked over into water or something of that type of incident ... [a] tub or something." *Id.* Hill made the point that the control room presents no such risks. Tr. 140. Respondent's Ex. V-3, representing portions from UL 1278, dated March 21, 2014 was admitted.

Hill's interpretation of UL 1278 is that no three prong plug is required in the control room, because the control room is not located in a wet area. Tr. 142. Hill noted that another heater owned by Respondent does have a three prong plug, because it is located in a bathroom where the floor can become wet. Tr. 141-42. Hill read into the record that Section 36.3 of

[7] There is no Exhibit V-1 in the record, because it is duplicative of an exhibit already entered by the Secretary.

Ex. V-3 provides "[i]f a heater intended for operation on a circuit involving a potential of 150 volts or less to ground has provision, although not required, for grounding noncurrent-carrying metal parts by means of a conductor of the cord, a directly attached flexible cord or cord set provided with the heater shall comply with the requirement in 36.2." Tr. 142-143.

The Court asked Hill to explain the significance of the provision he just read and he responded

> Section 36 of UL standard 1278, is grounding. And under that section [if] you have ... [a] heater intended for operation on a circuit involving potential of more than 150 volts to ground ... [then one] shall have provision for grounding in accordance with 36.2, of all exposed noncurrent-carrying parts, and all noncurrent-carrying metal parts exposed during any servicing operation, including maintenance and repair, that are likely to be energized.

Tr. 144. Hill added that the provision would not apply to "the heater in question because it's working at a voltage of 120 volts to ground." *Id.*

After providing a more lengthy explanation of his interpretation,[8] Hill summed up that the provision in his view provides that if one is dealing with a heater of 150 volts or less , "then

[8] In attempting to clarify his view, Hill then added,

> [s]o it's saying in that you have to have provision for grounding. 36.2 says, on a heater where grounding is required ... or provided, the power supply cord or cord set shall include a grounding conductor which shall be -- and it's telling you green coated, which is a recognized identification of a ground conductor or with a yellow stripe -- green with a yellow stripe and connected to the grounding pla[t]e of an attachment plug of a grounding type, which would be a three-pronged plug, and connected to the enclosure of the appliance.

Tr. 145. Hill interpreted that to mean that,

> right there under definition, enclosure, they're implying that an appliance is an enclosure. So by connected to the enclosure of the appliance, that means it was not likely to be removed during the ordinary servicing or equivalent means. Solder alone is not acceptable for making this connection. [...] [t]hen Section 3 comes up [...] [and informs] [i]f a heater intended for operations on a circuit involving a potential of 150 volts or less to ground [ ] 36.1 says a potential of 150, more than 150 to ground, so now they're at 150 volts to ground, which is what the circuit – [the] voltage the heater was operating on -- in question was operating. [...] Involving potential 150 volts or less to ground has provisions although not required for grounding noncurrent-carrying metal parts by means of a conductor of the cord. A directly attached flexible cord or cord set provided with the heater shall comply with the requirements in 36.2, which said you had to have -- if you had a carrying conductor, it had to be green with a yellow stripe.

whatever cord comes with it is acceptable under UL 1278." Therefore, the cited heater falls under 36.3 as it had a directly attached flexible cord or a cord set. Tr. 146-147. The voltage in the control room is 120 volts, applying to appliance items and therefore less than 150 volts. Tr. 147.

Respondent's Ex. V-4, pertaining to certain pages from the 2017 National Electric Code, was admitted. Hill, referring to that exhibit, and within that, to Section 110 in the National Electric Code which sets forth the chapter definitions. He explained that section 110.3 states that UL is used in listings of product certifications of equipment. NEC he stated is akin to his Bible. NEC, he noted, recognizes UL listing. And "NEC requires equipment that's installed safely to operate safely in people's protection to be a listed product." Tr. 150. Further, regarding the plug for the heater, section 420.4[9] allows that:

> [i]f the appliance is provided with a manually operated inline single pole switch for appliance on/off operation, an Edison-base lampholder, or a 15- or 20-amp receptacle, the attachment plug shall be of polarized or grounding type. Two-wire nonpolarized attachment plug shall be permitted to be used on a listed double-insulated shaver.

Tr. 151. Hill admitted the provision was vague and therefore required interpretation. However, in his view, the heater in issue was "a recognized ," that is to say, "a listed device" and as such it is factory installed with a two polar plug. Tr. 151-152. The heater in issue was equipped with such a polarized plug. Tr. 152.

Therein is the critical distinction applicable to this heater's polarized plug, in Hill's view. He explained that:

> [t]he purpose of the polarized plug[ ] is to identify the grounded conductor. In this case, [involving] a 120-volt circuitry, [there is] [...] a current-carrying leg. And in a grounded circuit, even though [it's] grounded at the power source, it's still considered a current-carrying conductor, *but it is a grounded conductor.*

Tr. 152 (emphasis added). The Court inquired further about this assertion asking, whether, because the heater had a polarized plug, it was a grounded conductor. Hill responded, "[i]t's not *equipment* ground conductor. It is a grounded conductor by NEC." *Id.* (emphasis added). He added, "[g]rounded and grounding are two different things. Grounded means at the system potential voltage, that there's an intentional ground to that system to the earth. [...] [and as such] that is a safety factor. Among other things, it actually stabilizes the voltage." Tr. 153. The system in this case is a "grounded system." *Id.* The polarized plug does not make it a "grounded system." Rather, it is the 120 voltage rating that makes it a grounded system. *Id.*

Tr. 145-146.

[9] Ex. V-4, at the first page of that exhibit, page 468, NEC recognizes polarity in cord and plug-connected appliances.

That being the case, the Court then asked what, if anything, was the value of having a polarized plug. Hill responded that with the polarized plug, with one prong being larger than the other, one "cannot reverse the internal wiring of that. You've got it always plugged into the grounding conductor." Tr. 154. The Court, perplexed by some of Hill's responses, pressed him on whether a polarized plug has any effect on shock hazards. Hill responded that, under his interpretation of UL 1278, and the testing required for that, it would take something catastrophic before a hazard would occur. Tr. 156. Pressing him further, Hill expressed that there is an increased chance of a shock hazard for a non-polarized plug. Tr. 156-157. He added that, without being polarized, it would fall out of the UL design and testing. Tr. 157.

The Court then inquired about the inspector's concern that if there were an internal defect in the heater, there could be a hazard where the plug is only two-pronged. From that, the Court inquired whether there was less of a chance that you could get hurt because the plug is polarized, if there was something internally wrong with it. Hill responded that the hazard would be reduced but only in comparison to a non-polarized two-pronged plug. He explained further,

> [b]ecause of the design of the heater itself and the amount of testing and how they test it, it's designed that if there was a fault to the case or enclosure, that with it being a grounded conductor, basically it's going to do the same thing. That's the reason why if you go back in the UL standards, that's why they say 150 volts or less.

Tr. 158. Thus, Hill's major reasoning stemmed from the 120 volts involved with the heater.

Hill reaffirmed that "the heater in question [was] compliant for use in the environment it was [being used] in ... consistent with its UL listing and with the National Electric Code requirements." Tr. 162. Turning back to Exhibit V-3, Respondent revisited the inspector's concern for the "potential for an energized conductor inside the box to somehow contact the metal case thereby energizing the metal case but not having a direct path to ground and thereby tripping the breaker and isolating hazard." Tr. 162-163. Hill's answer was that the testing standards are rigorous and this includes that such devices have to withstand 50,000 ohm, potential test to the housing, meaning that there has to be a minimum of 50,000 ohms of resistance between the intended conductors and the housing. Tr. 163. The testing associated with meeting the standard to be so listed includes "drop tests, crush tests, dielectric testing. ... they even do abuse testing. They spray it with water. They do multiple testing. ... They first operate the heater, and while it's still at operating temperature, they test it at the 50,000 ohm value." Tr. 164. After all that abuse testing, based on UL 1278, the device must still measure a minimum of 50,000 ohms of resistance. Tr. 164.

Referencing the abnormal operation tests, which are part of UL 1278, Hill referred to the overvoltage, tip-over, and drop tests that a device must satisfy to achieve the UL 1278 listing. Tr. 166-167. Ex. V-3. Hill expressed his view that the UL listing should be considered "equivalent protection" because the standard is basically almost word for word out of the NEC." Tr. 170.

Upon cross-examination, Hill agreed that the heater has metal parts on the outer casing and that the two-pronged plug for the heater had no ground wire. Tr. 172. Asked what would happen if the metal part of that heater were to become electrified with 120 volts, Hill responded that "[i]t would probably trip the overcurrent device." Tr. 173. He acknowledged that if the circuit had a ground wire connected to the case it would definitely trip. Tr. 174. Thus, he agreed that "when [the heater] has a ground attached to the metal cabinet, it is really an insurance that no one will be shocked with an energized cabinet." Tr. 174.

The Court then asked additional questions of Hill. Asked if considered the heater to be a metal *enclosing* electrical circuit and a metal *encasing* electrical circuit, he affirmed that it was. Tr. 180. He was then asked if he considered the heater's polarized plug arrangement to constitute grounding, Hill answered, "it's not grounded with an equipment ground, no. But by UL standard, it was safe enough to use on a grounded system of 120 volts that wouldn't pose electrical shock... [based on] the UL standards." *Id.* Hill reiterated that the heater was not grounded "with a[n] equipment-grounding conductor." Tr. 181. However, he did reaffirm his view that the heater had equivalent protection. *Id.* The Court then asked him to identify the equivalent protection to which he answered, "[t]he equivalent protection, in my professional opinion, based on standards or the listing, that there has been vigorous steps in the design of this piece of equipment that UL standard put -- they went through these tests they put their stamp on, and NEC, which is a safety electrical code that protects people, approves, said it's okay to use as it's designed. So yes, I do think it's equivalent." Tr. 182.

The Court inquired further, as to whether Hill was addressing "equivalent protection" to grounding, not just equivalent protection. Hill answered, "in my professional opinion, based on my training of the code, they recognize it as being equivalent." Tr. 182-183. Pressed further, the Court asked, if that meant "being equivalent protection to grounding," Hill responded, "Yes."

After Hill testified, the Respondent rested its case. As the Secretary did not elect to recall any witnesses, the hearing was concluded.

The Parties' Post-hearing Briefs

The Secretary of Labor's Initial Brief

The Secretary contends that by the "plain and unambiguous language, section 56.12025 applies to the personnel heater at issue," adding that "when the language of a regulation is clear, the Commission has recognized that the terms of that regulation "must be enforced as they are written' ..." Secretary's Post Hearing Brief ("Sec. Br.") at 12-13.

The Court does not believe that the words and application of the standard are so clear. As the Secretary acknowledges, "the plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* This is the approach the Court has taken, analyzing the specific context in which that language was applied here.

As the Secretary concedes, "[n]either the Mine Act nor the regulation define the phrase 'metal used to enclose or encase electrical circuits' ; however, the NEC defines the term 'enclosed' as 'surrounded by a case, housing, fence or wall(s) that prevents persons from accidentally contacting energized parts.'" *Id.* at 13, citing NFPA 70-2017, Article 100 Definitions, p. 70-36.

The Secretary asserts that the heater was neither grounded nor provided with equivalent protection. The focus is upon whether the heater was provided with equivalent protection. He notes that the Inspector stated that equivalent protection would only be through a Ground Fault Circuit Interrupter ("GFCI") or through double insulation. *Id.* at 16. The Secretary takes issue with Respondent's contention that reliance upon UL 1278, which the Secretary concedes "appears to exempt electric heaters of 150 volts or less from being grounded." *Id.* The Secretary counters that the standard requires all metal enclosing or encasing electrical circuits to be either grounded or provided with equivalent protection; and consequently it does not provide for exemptions. *Id.*

The Secretary then asserts that, even if the meaning of the regulation is ambiguous, the Secretary's interpretation of the regulation is entitled to deference. *Id.* at 17. Among other cases cited in support of such deference, the Secretary cites to *American Coal Co. v. Fed. Mine Safety & Health Rev. Com'n*, 796 F.3d 18, 24 (D.C. Cir. 2015) and *Hecla Limited*, 38 FMSHRC 2117, 2122 (Aug. 2016). The Secretary asserts that his "interpretation of section 56.12025 is entitled to deference because it is consistent with the plain words and purpose of the regulation, as well as the broader purpose of the Mine Act to protect the safety and health of miners." *Id.* at 18, citing *Emery Mining Co., v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984).[10]

The Secretary's Reply Brief

In its Reply Brief ("Sec Reply"), the Secretary urges that the Court should not adopt Vulcan's interpretation of what constitutes "equivalent protection" because it does not comport with the plain meaning of the standard, does not promote safety, and would lead to the absurd result of defeating the purpose of the standard. Sec. Reply at 2. The Secretary distinguishes the cited standard from 30 C.F.R. § 56.12045 and 30 C.F.R. § 56.12048, as both those standards specifically reference the NEC, whereas 30 C.F.R. § 56.12025 does not. He reasserts that the plain language of the standard requires the heater to be grounded or provided with protection that

[10] The Secretary also cites to *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 970 (Sept. 1998) for the proposition that the Commission recognized that "[t]he protective purpose of [56.12025] is to prevent injury from electrocution caused by a malfunctioning or improper grounding system." However, the Secretary neglects to mention that the Court of Appeals for the District of Columbia Circuit *reversed* the Commission's decision in *Contractors Sand and Gravel*, specifically because it determined that, as a matter of law under the Equal Access to Justice Act, the Secretary's litigating position "lacked substantial justification." *Sec'y of Labor v. Contractors Sand and Gravel, Inc.*, 199 F.3d 1335, 1340-41 (D.C. Cir. 2000). To be sure, the D.C. Circuit specifically rejected a contention that the standard proscribes a specific method for grounding electrical equipment, which is not at issue in this matter. But the principle that the commitment to protecting the health and safety of miners entitles the Secretary to deference is not borne out by *Contractors Sand and Gravel* in light of the D.C. Circuit's reversal.

is equivalent to grounding. He maintains that the intent of the standard is to protect miners against electric shock and electrocution but that the UL tests identified by Vulcan do not protect miners against those hazards. *Id.*

As for Vulcan's claim that the standard does not apply to the control room, the Secretary responds that "no matter the dimensions of the control room, or terms Vulcan uses to describe the control room, it is part of the mine and consequently, under MSHA's jurisdiction; therefore, the standard applies." *Id.* at 3.

Addressing Vulcan's vagueness claim, that the meaning of the terms "equivalent protection" and "metal enclosing or encasing electrical circuits" are not specified, the Secretary responds that a standard's use of general terms does not mean that it suffers from vagueness. Standards may be drafted in general terms "in order to be adaptable to the myriad of circumstances in a mine" as long as "a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would recognize the hazardous condition that the standard seeks to prevent." *Id.* The hazard addressed by the standard is electric shock. Further, both Inspector White and Mr. Hill stated that that the cited heater had metal enclosing or encasing electrical circuits. The inspector stated that for equivalent protection, there would need to be either a Ground Fault Circuit Interrupter ("GFCI") or double insulation. *Id.* at 4.

Last, the Secretary contends that the administrative law judge's decision in *San Juan* is distinguishable from this matter. After correctly noting that administrative law judge decisions have no precedential effect, the Secretary distinguishes 30 C.F.R. § 77.701 from the standard in this matter. It notes that section 77.701 requires metallic frames, casings, and other enclosures of electric equipment that can become alive through failure of insulation or by contact with energized parts are to be grounded by methods approved by an authorized representative of the Secretary. *Id.* at 4-5. Although the judge in *San Juan* concluded that the two toasters and a portable heater were not "electric equipment", and therefore section 77.701 did not apply, and that the UL listing amounted to a certificate that the heater had an equivalent means of shock protection, the Secretary contends that the standard in this litigation, 56.12025, is broader, as it is not limited to electric equipment. *Id.* at 5. Instead, it applies to all metal enclosing or encasing electrical circuits. A further distinction, the cited standard "requires shock protection equivalent to being grounded, not to double insulation." *Id.* An additional distinction, Further, § 77.701 requires electric equipment enclosures be grounded by methods approved by an MSHA inspector. [11] *Id.*

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[11] Alternatively, the Secretary urges that if this Court were to conclude that the coal standard is useful in construing the cited standard, it should look to the rationale in *Pittsburg & Midway Coal Mining Co.*, 9 FMSHRC 1908 (November 1987) (ALJ)("*Pittsburg*"). In *Pittsburg*, the ALJ concluded that section 77.701 applied to a 110-volt space heater located in the electrical supervisor's office. That heater was metal-cased, lacked a three-prong plug or any other type of grounding, and had a "UL" stamp of approval on it. *Id.* at 1911-1912. The judge recognized, "[f]ailure to ground this type of heater could cause shock, serious burns or a fatality. If this condition [of the heater not being grounded] continued and a fault occurred you could reasonably expect a shock or serious burn." *Id.* The judge also noted that the inspector did not know whether MSHA had a policy concerning the grounding of appliances. The inspector opined about the different ways the heater in *Pittsburg* could have been grounded. Respondent,

Vulcan's Initial Brief

Vulcan summarizes its factual position in its initial post-hearing brief ("R's Br.") as follows:

> The heater at Fort Payne was used only in the control room. The control room is a low-traffic area that is dry and orderly. The heater has been used for years in this room and has never been cited by MSHA for not having a ground prong. The heater was not damaged and was not in use at the time of the inspection. In order for the heater to case a shock, it would have to develop an electrical fault. This is extremely unlikely due to the extensive tests that are required for the heater to be UL listed. In addition, the heater was used in a clean, low-traffic, dry room and was very unlikely to suffer any damage that would result in an electrical fault.

R's Br. at 5.

Though elaborated below, Vulcan's legal argument is that,

> [t]he standard cited allows for grounding or 'equivalent protection'. The only guidance for 'equivalent protection' provided by MSHA is double insulation. The actual definition of 'equivalent protection' is not available to the general public. Based on the evidence provided, the UL listing on the heater should be considered 'equivalent protection' and appliances used in office-type environments should not be considered 'electrical circuits' thus rendering this citation invalid.

Pittsburg argued that as MSHA had not issued a policy or interpretation requiring the replacement of two-prong plugs, the inspector's requirement that the operator abate the hazard with a three-prong plug was just the inspector's personal preference. However, the judge disagreed and affirmed the citation against P&M holding that "several methods of grounding were available but . . . a three way plug was required." *Id.* at 1914. The judge also found that *Pittsburg* "was negligent as to the ungrounded space heater inasmuch as this condition was open and obvious" and that the gravity of the violation was high because "[a] miner could have been burned or electrocuted by the electrical space heater." *Id.* at 1919-1920. The judge then assessed a penalty of $150 for P&M's violation of section 77.701. The facts of the Pittsburgh case are very similar to those of the instant case; therefore, *Pittsburg*, and not *San Juan*, should have persuasive weight with this Court.

The Court did review *Pittsburg.* However, it does not find the decision to be helpful in that the judge there simply upheld the Secretary's authority to enact general regulations relating to equipment and to impose stricter limitations than the NEC. No one disputes that the Secretary may do that, but the question is whether the language employed in the standard is unenforceably vague such that *a reasonably prudent person* familiar with the mining industry and the protective purposes of the standard *would have recognized the specific requirement of the standard* and that, applying the reasonably prudent person test to the subject standard, such a person would have considered the heater to be *a metal enclosing or encasing electrical circuit.*

Id.

Vulcan notes that:

> [t]he heater is UL1278 listed. UL1278 details standards for moveable and wall or ceiling-hung electrical room heaters. In order for an appliance to have the UL listing, it must comply with the National Electric Code. Section 68.2 of the UL1278 standards states that 'This heater is not intended for use in bathrooms, laundry areas and similar indoor locations. Never locate the heater where it may fall into a bathtub or other water container.' In order to achieve an U1278 listing the heater must be subjected to many abusive tests and still maintain at least 50,000 ohms of resistance.

Id. at 1.

Vulcan also remarks that "[t]he control room where the heater was located is an indoor location where the plant can be controlled and observed." *Id.* at 2. It observes that while "MSHA emphasized that the heater was used in a mining environment" and suggested "that the control room was more likely to cause a condition that would damage the heater and lead to an electrical fault," *Id.* Vulcan submits that is unsupported, as "the control room is less likely than a home environment to cause damage since the control room generally has one qualified, trained miner inside." *Id.* In fact, Vulcan submits that "the control room is much less likely to cause damage to the heater than a residence." Beyond those contentions, Vulcan adds that since "the circuit breaker the heater was plugged into had a 20 amp overcurrent protection [...] the breaker would most likely have tripped if the heater had encountered a fault." *Id.*

Beyond the particular facts attendant to the citation, Vulcan contends that the standard 30 C.F.R § 56.12025, does not define "metal enclosing or encasing electrical circuits," nor does MSHA's metal/non-metal program policy manual offer guidance on that phrase. The National Electric Code does not define it either. Vulcan submits that "[i]n the absence of a definition, a reasonable assumption of the term could be that the term refers to electrical installations such as: breaker boxes, junction boxes, starters or electrical disconnects." *Id.* at 3.

Vulcan believes that the parallel MSHA coal standard, 30 C.F.R. § 77.701[12] supports its view. Vulcan contends that the MSHA program policy manual[13] associated with that standard, also offers support for its view.

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[12] § 77.701, titled, "Grounding metallic frames, casings, and other enclosures of electric equipment," states "[m]etallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary."

[13] MSHA's coal program policy manual addressing standard 77.701, Grounding Metallic Frames, Casings, and Other Enclosures of Electric Equipment, provides:

The significance of the absence of any definition comes to the fore, because Vulcan asserts that the standard itself is fatally vague. It points to the need for a standard to "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and it cannot be so incomplete, vague, indefinite, or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application" R's Br. at 3, citing *San Juan.*

Vulcan contends that "[s]ince MSHA does not define either "metal enclosing or encasing electrical circuits" or "equivalent protection", the industry is left to guess at its meaning. *Id.* at 4. It asserts that:

> [a] reasonable person would likely not guess that a portable heater would be considered a 'metal enclosing or encasing electrical circuit.' Also, a reasonable person could infer that a UL listed heater used in a UL approved location would be considered 'equivalent protection.' In fact, because the heater has been in the control room for many years, it is reasonable to assume that past MSHA inspectors have also not considered the heater an electrical circuit and considered that it had equivalent protection.

Id.

> Certain moveable electric equipment, e.g., rail-mounted and pivoting coal stackers, traveling shop cranes on track rails, small traveling hoists on I beams, etc., cannot be strictly classified as portable, mobile or stationary equipment. For the purposes of frame grounding, such equipment shall be considered stationary. Consequently, the grounding requirements of Subpart H apply to such equipment.
>
> This Section requires that metallic frames of electric equipment be grounded by methods approved by an authorized representative of the Secretary. Therefore, rail-mounted and pivoting coal stackers, traveling shop cranes on track rails, small traveling hoists on I beams, and similar equipment shall be grounded in accordance with the following: All tracks shall be bonded or welded at each joint, and each individual track rail or I beam shall be solidly grounded through a grounding conductor which meets the requirements of Section 77.701-3 to an acceptable grounding medium. In instances where the conveyor, hoisting and/or tramming motors receive power through a trailing cable, the moving frame shall be grounded to an acceptable grounding medium through a proper size grounding conductor inside the cable. In instances where the conveyor, hoisting and/or tramming motors receive power through a trolley system, the moving frame shall be grounded to an acceptable grounding medium through an additional grounding trolley contact.

Program Policy Manual, Volume V – Coal Mines, U.S. DEP'T OF LABOR, MINE SAFETY & HEALTH ADMIN., https://arlweb.msha.gov/REGS/COMPLIAN/PPM/PMVOL5R.HTM (last visited July 16, 2019).

Vulcan also takes note that,

> MSHA relies on the NEC and UL to determine if a device is double-insulated and thereby meeting the test for 'equivalent protection' per Inspector White's testimony. The heater in question is also UL listed and certified as safe for the application in which it was being used. In this citation, MSHA chose to rely on one UL listing but not the other. The list of MSHA-accepted UL listed devices is not available to the industry or general public. In addition, this heater would be acceptable in an equivalent OSHA location due to its UL listing. Without a written interpretation from MSHA, the mine operator is left to guess at what is acceptable.

Id.

Vulcan's Reply Brief

Vulcan points in its reply brief ("R's Reply Br.") to the National Electric Code, Underwriters Laboratories, and OSHA regulations that support its position. It notes that Inspector White acknowledged that UL standards provide assurance that such approved products, if correctly used, would be safe. R's Reply Br. at 1. It points to Inspector White's acknowledgement that the NEC is a code for manufacturing and constructing and building different electrical devices and meeting the code. Vulcan adds that OSHA drew heavily from the NEC in revising its electrical hazards standards and it asserts that "OSHA incorporates the National Electric Code and recognizes that the UL listing complies with the product safety test standards. Therefore, the UL and NEC codes are much more than simply 'codes to limit a company's liability.'" *Id.* at 2.

Challenging the inspector's claim that the cited heater was subject to more stringent conditions, Vulcan notes that the applicable UL standard, 1278, makes plain that the heater is not intended for use in bathrooms, laundry areas and similar indoor locations nor where it may fall into a bathtub or other water container. The cited heater is not used in, nor subject to, such conditions and the UL standard does not limit it to residential use. *Id.* Vulcan adds that the control room at Ft. Payne has much less traffic and more stringent conditions than a normal household and that a typical household is subject to children, pets and more visitors than the control room. *Id.*

Vulcan response to Inspector White's concern that electrical shock could result if there was some internal damage to the heater and its electrical circuits or if the heating element were to touch the metallic parts of the heater, is that such an event would be extremely unlikely. In fact, Vulcan contends that for that to happen the heater would have to be crushed. *Id.* at 3. In that regard, Vulcan points out that the Inspector acknowledged that the heater was not damaged in any way. *Id.* Vulcan adds that for the heater to qualify for UL 1278 approval, rigorous testing is required. This includes tests on the heater involving overvoltage, tip-over,

stalled fan, dropping the heater three times from a height of three feet and a strain relief test on the cord. *Id.* at 3-4.

As for the Secretary's reference to past citations, Vulcan remarks that none of them involved "heaters located in a dry, office-type control room."[14] *Id.* at 4. Vulcan notes that Citation 6127272 was written for a two-prong heater in use inside a water pump building, with the inspector's notes remarking that the room was very wet. *Id.* at 5.

Vulcan sums up that it is extremely unlikely that the cited control room heater would develop an electrical fault to cause a shock. It characterizes such an event as extremely unlikely due to the extensive tests that are required for the heater to be UL listed. Further, it notes that OSHA incorporates the National Electric Code and recognizes that the UL listing complies with the product safety test standards. From that it contends that since the heater has the UL listing and was in compliance with the NEC, it should be considered as having "equivalent protection" under the cited standard. This is especially true, it argues, since the definition of "equivalent protection" is not available to the general public. Vulcan maintains that appliances used in office-type environments should not be considered "electrical circuits." *Id.* at 6.

Discussion

For the reasons explained below, the Court must affirm this citation. As noted, the standard cited, 30 C.F.R. § 56.12025, titled, "Grounding circuit enclosures," provides: "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection." Although the terms "metal enclosing or encasing" electrical circuits and "equivalent protection" are not defined, Mr. Hill affirmed that the heater was a metal enclosing electrical circuit and a metal encasing electrical circuit. Hill's concession fits with the common understanding of an electrical circuit, that is defined as "an electrical device that provides a path for electrical current to flow."[15]. Certainly the heater in question fits the definition. As noted, Hill also conceded that the heater is a metal encasing/enclosing *appliance*. There is no serious dispute about these two issues.

There is next the issue whether the heater was grounded or provided with equivalent protection. Respondent's Hill, who must be complimented for his frank and credible testimony, stated that the heater was not grounded. He did, however, express his honest view that

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[14] Vulcan adds that for one of the citations mentioned by the Secretary in his post hearing brief as written for an ungrounded heater, and identified by the Secretary as Citation No. 6523834, there is no information on the citation to indicate if the heater was manufactured as a two-prong or three-prong heater, nor information about where the heater was located. Vulcan remarks that it is possible that the heater was located in a wet area. The Court notes that the citation number was actually No. 8631815. The number given by the Secretary as the citation, 6523834, is actually the "Event No."

[15] ELECTRICAL CIRCUIT, https://www.vocabulary.com/dictionary/electrical%20circuit (last visited July 18, 2019).

equivalent protection was provided. As described above, his view relied upon the rather strenuous requirements provided through the UL approval process.

It is at that juncture that matters become more complicated, because the Secretary has some deference afforded to its interpretation of safety standards. As described above, the Secretary has set forth the basis for this claim of deference in his post-hearing briefs.

Challenging the Secretary's claim that the standard applies to the cited portable heater, Vulcan has pointed to an administrative law judge's decision in *San Juan*. Exhibit V-2. In *San Juan* the judge was dealing with 30 C.F.R. § 77.701, a coal mining standard pertaining to grounding. Titled "Grounding metallic frames, casings, and other enclosures of electric equipment," it provides that "[m]etallic frames, casings, and other enclosures of electric equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary." Two toasters, that is, simply appliances to toast bread, and a portable heater were involved in that case.[16] The inspector noted that the appliance "was located on a formica-topped metal table sitting in an eating area in a warehouse with a concrete floor. ... it had no external ground, had a metal housing, and was equipped with a size 16 cord (four feet long) with two conductors." *Id.* at 1693.

As in this matter, the inspector in *San Juan* was concerned that "people could become the 'ground' themselves, if '*something happened to the internal wiring*' and the insulation failed and a person walked up and touched it. *Id.* (emphasis added). The judge referred to the toaster's UL approval and a National Electric Code (NEC) provision stating that such a toaster can be used in areas which are not damp or wet. The evidence included information from Underwriters Laboratories, Inc., ("UL") which informed that "Underwriters Laboratories Listed electrical equipment for ordinary locations has been evaluated for use in accordance with the National Electrical Code and to determine that the design of such equipment provides for the reduction of the risk of injury to life and property." *Id.* at 1695. UL also stated that:

> [e]lectric toasters are not among the appliances in residential occupancies required to be grounded by Section 250-45(c). Additionally, in other than residential occupancies, cord-and-plug connected appliances not used in damp or wet locations or by persons standing on the ground or on metal floors or working inside metal tanks are not required to be grounded. ... UL considers Listed electric toasters, although not grounded, to comply with the NEC whether used in residential occupancy or the type of premises you described which I understand is a dry location.

Id. Interestingly, UL advised that "[m]odifications to toasters to replace the power cord with a grounding type cord, which you indicate is required by the inspector, can introduce risks of electric shock or fire." *Id.*

[16] The parties stipulated that the judge's determination for one of the toasters would control the outcome for the other toaster and the portable heater. *Id.* at 1692.

Judge Lasher observed that "[a] safety standard must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and it 'cannot be so incomplete, vague, indefinite, or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.* at1699 (emphasis in original). That being the case, the judge concluded that the standard, 30 C.F.R. § 77.701, was "sufficiently indefinite and unclear in its application here as to cause disagreement among Petitioner's own hierarchy [...] as well as failing to communicate that it could be intended to apply to small toaster-ovens and a small portable heater manufactured for use without a grounding conductor in the cord and plug." *Id.*

Judge Lasher also noted that "MSHA's own Program Policy Manual, (hereafter, "Manual") [...] appears to exempt U.L. approved cord-and-plug appliances such as the toaster ovens and heater involved here [as it provides that] [p]ortable tools and appliances that are protected by approved systems of double insulation, or its equivalent, need not be grounded." *Id* (emphasis in original). The judge concluded that "the U.L. listing is in effect a certificate that the three listed appliances have means of shock protection equivalent to double insulation." *Id.* at 1700.

The judge looked to the Manual for additional guidance, as it:

> appears to give some idea of the type of 'electric equipment' 30 C.F.R. § 77.701 is intended to encompass, i.e., 'Certain movable electrical equipment, e.g., rail-mounted and pivoting coal stackers, traveling shop cranes on track rails, small traveling hoists on I beams, etc.' The types of clear-cut mining equipment mentioned as examples by MSHA as a minimum delivers considerable weight to Respondent's contention that the subject standard is unenforceably vague when applied to the three appliances in question.

Id. Thus the judge concluded that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific prohibition or requirement of the standard [and that] [a]pplying the 'reasonably prudent person' test to the subject standard, such a person would not consider the term 'electric equipment' used in 30 C.F.R. § 77.701 to apply to the three UL approved appliances in question and have recognized a requirement to modify each appliance by grounding it externally [and thus that] [t]he three appliances involved--the two toasters and the portable heater-- are not "electric equipment" as that term is used in 30 C.F.R. § 77.701."[17] *Id.*

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[17] The Court did review *Pittsburg & Midway Coal Mining Co.*, 9 FMSHRC 1908 (November 1987) (ALJ), cited by the Secretary as offering a rationale worthy of adopting. Sec. Reply at 5. The decision affirmed the Secretary's authority to enact general regulations relating to equipment and may impose stricter limitations than the NEC. No one disputes that the Secretary may do that, but the question at hand is whether the language employed in the cited standard, 30 C.F.R. § 56.12025, is unenforceably vague such that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific requirement of the standard and that, applying the reasonably prudent person test to the subject standard, such a person would have considered the heater to be a metal enclosing or encasing

Although the Court agrees that there are some similarities between this matter and the *San Juan* decision, the Court finds that they are distinguishable for several reasons. First, it is true that the decision of another administrative law judge has no precedential effect. Further, the language of the two standards is not identical. In addition, at least for the coal standard, MSHA issued a program policy statement, which the judge in *San Juan* construed to support his position. Beyond those observations, the Court does not agree that the term "equivalent protection" is unenforceably vague. The phrase must be measured against the object of the standard – to achieve grounding. Therefore the equivalent protection must afford equivalent *grounding* protection.

When the Court asked Mr. Hill if he considered the heater's polarized plug arrangement to constitute grounding, he admitted it wasn't grounded with an equipment ground, but he believed that, due to the UL standard, it was safe enough to use on a grounded system of 120 volts. It can't be that each mine operator gets to opine about what constitutes equivalency. If reasonable, it is within the Secretary's purview to make those calls and deference is due in these circumstances. *Kisor v. Willkie*, 588 U.S. ___, ___ (2019)(slip. op. at 14)("[i]f genuine ambiguity remains, moreover, the agency's reading must still be reasonable.")(internal quotations omitted).

This does not mean that deference to the Secretary's position is unbounded. Deference is not automatically, nor blindly, given. A regulation must actually be ambiguous before the Secretary's interpretation is entitled to deference. *Kisor*, 588 U.S. at ___ (slip. op. at 13-14)("[b]efore concluding that a rule is genuinely ambiguous, a court must first exhaust all the traditional tools – the text, structure, history, and purpose – of construction.")[18] In *Drilling and Blasting Systems, Inc.* 38 FMSHRC 190, (Feb. 2016), the Commission addressed an Administrative Law Judge's determination that deference was not due, as it was "plainly erroneous." *Id.* at 193. The Commission, noting that the term "attended" as it appears in section

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electrical circuit. As explained, the Court finds that the standard is not unenforceably vague and that equivalent *grounding* protection was not provided.

[18] In *Brown Bros. Sand Co.*, 17 FMSHRC 578, 584 (Apr. 1995), cited by the Secretary, the administrative law judge was dealing with the same standard involved in this matter but there were significant factual differences involved as it pertained to metal frames on disconnect boxes for a conveyor and two shaker screens and light switch boxes, none of which were grounded. These items were outdoors and the inspector stated that the absence of grounding exposed miners to potential electrocution. The judge simply stated that the cited standard requires the grounding of all metal enclosures encasing electrical circuits. The case is of negligible value, as the applicability of the standard was not challenged; issues of negligence and whether the violation was significant and substantial were the focus of the decision. Similarly, *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384 (Mar. 1996) (ALJ), cited by the Secretary is of minimal value. While the judge did hold that the cited standard, 30 C.F.R. § 56.12025, is specific and not broadly worded and is a performance standard, the citation was vacated as an attempt to expand the standard beyond its plain meaning, by trying to proscribe the method of grounding employed by the operator, constituting an impermissible expansion of the plain meaning of the standard.

56.7012 and section 56.2 is ambiguous vis-à-vis the issue presented, acknowledged that "[o]rdinarily, [it] must defer to the agency's interpretation of its own ambiguous regulation. ... However, deference is inappropriate if the agency's interpretation is not reasonable or when it is 'plainly erroneous or inconsistent with the regulation' ... or 'when there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter.'" *Id.* at 194. As in this case, the decision rested upon the particular facts involved. Examining those particular facts, the Commission concluded that the Secretary's interpretation was not the most natural reading of the safety standard, and accordingly concluded that there plainly was no basis for deference. *Id.* at 197.

The text of the standard at issue in this case does not define "metal enclosing or encasing electrical circuits," nor does it define protection equivalent to grounding, nor are those terms otherwise defined Part 56. In such instances however, as long as the Secretary's interpretation is not plainly erroneous or inconsistent with the standard, it is the Secretary's call to set forth the basis for determining that the appliance in issue is captured by those terms and whether protection equivalent to grounding was present. In this instance, the Court cannot conclude that the Secretary's interpretation of "metal enclosing or encasing electrical circuits" is unreasonable, separate and apart from the Respondent's noteworthy concession that the heater fits those terms. Nor can the Court conclude that it is plainly erroneous or inconsistent with the standard at issue for the Secretary to set out what constitutes "equivalent protection" for purposes of meeting the regulation's requirement that the protection be equivalent to grounding, which the Secretary's authorized representative determined the electric heater lacked. In this instance, the Secretary established that such equivalent protection was not provided.[19]

In light of the above considerations, the Court concludes that the Secretary established by a preponderance of the evidence all of the elements necessary to sustain a violation of 30 C.F.R. § 56.12025.

Penalty Determination

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

[19] Even when considering Vulcan's view that the control room is akin to a residence, the room's metallic floor makes it unlike any office or residence. While the Court agrees that the UL approval makes it *extremely* unlikely that a miner would be shocked by the portable heater, that consideration is taken into account in assessing an appropriate penalty, not in determining whether the standard was violated.

30 U.S.C. § 820(i).

As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act." *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). A Commission Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601(May 2000); *see also Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary's burden to provide sufficient evidence to support the proposed assessment; and the Court's obligation to explain the basis for any substantial divergence from the proposed amount. The Commission has noted that:

> [The] Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary's proposed penalty cannot be glided over, as the Commission also stated, 'Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. ... If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

The American Coal Co., 38 FMSHRC 1987, 1993-1994 (Aug. 2016), citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984).

Section 110(i) Penalty Factors As Applied to This Case

History of Previous Violations

Respondent's Violation History was admitted without objection. Tr.72, Gov. Ex. C-9. It reflects that Vulcan had been cited for this standard, but not at its Fort Payne Quarry. *Id. See also* Tr. 106. The Secretary acknowledged that Vulcan's "violations of the standard at issue were on the low end." Sec. Br. at 20. The Court concludes that the history of previous violations of this sort at this mine is minimal.

Good Faith Abatement

The parties stipulated that Vulcan demonstrated good faith in attempting to achieve rapid compliance after notification of a violation. Sec. Br. at 20.

Operator's Ability to Remain in Business

There has not been any assertion by Vulcan that the Secretary's proposed assessment of a civil penalty of $118.00 will affect its ability to remain in business. The Respondent did not

raise this assertion in its post-hearing briefs and the Court concludes that a penalty of the amount proposed would not affect the Respondent's ability to remain in business.

Size of the Business

Vulcan is a large mine operator, with approximately 300 quarries nationwide. Tr. 6-7.

Negligence

Without endorsing his view, the Secretary declares that "[l]ow negligence is appropriate when '[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.'" [...] Inspector White testified that he evaluated the negligence as low because "no one had reported a safety hazard and [told the managers], [w]e've got a heater that's not in compliance [and] the management [Jeff Dean, Vulcan's foreman and George Grguric, Vulcan's plant manager] was not aware of either [...] the requirement [that the heater be grounded or provided with equivalent protection] or the violation [of the cited standard]." Sec. Br. at 21, citing Tr. 30, 63; Ex. C-2.

Gravity of the Violation

As the Secretary has noted, "[u]nder section 110(i) of the Mine Act, 30 U.S.C. §820(i), the gravity penalty criterion 'is often viewed in terms of the seriousness of the violation.' [citing] *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) [...]The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected. Here, Inspector White evaluated the likelihood of injury as "unlikely" because at the time of the inspection, no one was in the control room; the heater was not turned on; and it was 87 degrees outside. Tr. 46-47; Ex. C-2. He assessed the injury expected as lost workdays or restricted duty due to a miner receiving electrical burns or falling while recoiling from shock. Tr. 49; Ex. C-2. He noted that the exact injury would depend on a variety of factors and circumstances. Tr. 49. He assessed the number of persons affected as one because "[i]t's a likely thing that only person would be hurt. Even if it's crowded in [the control room]." Tr. 50, Sec. Br. at 20-21.

Conclusion

Of the six penalty factors set forth in Section 110(i), the negligence and gravity are the most significant considerations, and they point to a reduced penalty from that proposed by the Secretary. Taking into account all of the preceding findings and observations, the Court concludes that while the violation occurred, it presented a very "unlikely" risk of an expected injury of lost workdays or restricted duty. The Court also finds that one person would be affected by the violation, the violation was not significant and substantial, and that the negligence of the operator was less than moderate, approaching low negligence. In light of the inherent power of Commission Judges to independently assess penalties based on their reasoned judgment of all the facts, the Court finds that given the Secretary's admission that this was a non S&S violation, unlikely to occur, of low negligence, and the Court's independent determination that the negligence was less than low, approaching no negligence, in this particular near-office

environment, and that it was unlikely in the extreme to occur in that environment, particularly considering the rigorous UL requirements for the heater, independently support the Court's imposition of a civil penalty of $59.00 for this violation.

ORDER

It is hereby **ORDERED** that Respondent is **ORDERED** to pay a civil penalty in the total amount of **$59.00** ("fifty-nine" dollars) within 30 days of this decision.[20]

William B. Moran

William B. Moran
Administrative Law Judge

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[20] Payment is to be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.