

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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UNITED STATES STEEL
CORPORATION – MINNESOTA ORE
OPERATIONS,

Contestant,

v.

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

CONTEST PROCEEDING:

Docket No. LAKE 2016-193-RM
Citation No. 8896708; 02/01/2016

Mine: Minntac Mine

Mine ID: 21-00282

ORDER ON

CROSS MOTIONS FOR SUMMARY JUDGEMENT

Before: Judge Barbour

This case is before the court upon a notice of contest filed by United States Steel Corporation – Minnesota Ore Operations (“the company”) challenging the validity of a citation (No. 8896708) issued at its Minntac Mine, a surface iron ore operation located in St. Louis County, Minnesota. The citation is dated February 1, 2016, and it charges the company with a violation of 30 C.F.R. § 56.12028, a mandatory safety standard for the nation’s surface metal and nonmetal mines. The standard requires:

Continuity and resistance of grounding systems
shall be tested immediately after installation,
repair and modification; and annually thereafter.
A record of the resistance measured during the
most recent tests shall be made available on a

request by the Secretary or [his inspector].

The citation states in part:

When requested, the . . . operator was unable to produce current documentation that the annual continuity and resistance test of [its] portable electric welders had been conducted. The continuity/ground resistance test ensures The portable welders are properly grounded. This condition exposes the miners using the portable welders to burns, shock and/or electrocution.

Notice of Contest, Exh. A.¹

Shortly after receiving the citation the company contested its validity asserting the issue of whether section 56.12028 is applicable to the equipment in question (the portable welders, including their power cables) previously was decided against the Secretary and that the citation should be vacated on *res judicata* grounds.² Notice of Contest (February 26, 2016).

The prior decision to which the company refers is *USX Corporation –Minnesota Ore Operations*, 21 FMSHRC 346 (March 1999) (ALJ), a case that arose at the Minntac Mine and that involved the same company as the subject case, albeit under the name of its holding company (USX Corporation). In the decision, now retired Commission Administrative Law Judge, T. Todd Hodgdon held that section 56.12028 does not apply to grounding conductors in trailing cables, power cords and cords supplying power to tools and portable or mobile equipment. Although the Secretary of Labor’s Mine Safety and Health Administration issued a policy statement interpreting the standard as applicable to such cables and cords, Judge Hodgdon, for several reasons, held that the policy statement constituted a substantive change in section 56.12028 and that notice and

¹ The citation also contains findings that the cited condition was unlikely to cause a fatal injury and was the result of the company’s low negligence. Notice of Contest, Exh. A.

² Although Citation No. 8896708 refers to a failure to document resistance testing of portable welders, it is clear that the citation was issued for a failure to test the power cables or cords supplying power to the welders. The court reaches this conclusion because the parties essentially agree that the issue before the court is the applicability of section 56.12028 to cords supplying power to the welders. *See*, Secretary’s Response 13; Company’s Reply Br. 3

comment rulemaking, which the Secretary did not institute, was required before the change could be implemented. 21 FMSHRC at 355. The decision was not appealed by the Secretary.

Despite the lack of an appeal, the *USX* case is not the end of the story regarding the courts and section 56.12028 because in a subsequent proceeding in which an operator contested the application of the standard to the cables and cords of its electrical equipment and power tools, a case decided on cross motions for summary decision, Commission Administrative Law Judge Alan Paez reached a different conclusion. *Tilden Mining Company, LC*, 33 FMSHRC 876 (April 2011). Unlike Judge Hodgdon, Judge Paez found the Secretary's interpretation that the standard applied to such cables and cords to be both reasonable and entitled to deference. 33 FMSHRC at 880-881. Judge Paez concluded that rulemaking was not required (33 FMSHRC at 880-883), and he therefore affirmed the contested citations and granted the Secretary's cross motion for summary decision. 33 FMSHRC at 885. The matter was appealed to the Commission, which affirmed Judge Paez in all respects. 36 FMSHRC 1965 (Aug. 2014). The Commission's decision then was appealed to the United States Court of Appeals for the District of Columbia Circuit, which has yet to rule. D.C. Cir. 14-1170 (2014).

In the case before the court, U.S. Steel asserts the primacy of the *USX* decision and seeks to foreclose re-litigation of an issue it contends was tried and decided as to U.S. Steel and its mine in a final judgment on the merits, a judgement that involved the same parties as the subject case. The company argues that the "issue of the applicability of the standard is a matter of *res judicata* between the parties and that the issuance of the [c]itation is improper and illegal." Company's Mot. For Sum. Dec. 2.

The doctrine of *res judicata* encompasses limits on both the claims and the issues that may be raised in subsequent proceedings, and the company essentially contends that both forms of preclusion apply in this case. *Id.* 3-7. The Secretary asserts they do not, and the parties argue at length about it. *See* Company's Mot. for Sum. Dec.; Company's Mem. of Law In Support of Mot. for Sum. Dec.; Company's Reply Br.; Sec.'s Response to [Co.'s] Mot. for Sum. Dec. and Sec.'s Cross Mot. for Sum. Dec. While the court appreciates the parties' efforts, it concludes that a more fundamental concept compels the court to short circuit the issue of preclusion and succinctly rule in the Secretary's favor.

RULING

Summary judgement on behalf of the company is inappropriate because the court is compelled to follow the Commission, which has spoken on the issue. Unless and until the D.C. Circuit reverses the Commission's holding, the court **must** conform to the Commission's decision. As the Secretary notes, "[*Tilden*] is binding precedent."³ Resp. to [Co.]'s Mot. For Sum. Dec. 8.

³ Moreover, and again as the Secretary points out, *Tilden* represents a change in controlling legal principles and therefore cautions against the application of *res judicata*. "[A] subsequent modification in controlling legal principles . . . may make [a] prior determination obsolete for future purposes." Sec.'s Resp. to Contestant's Mot. For Sum. Dec. 11 (*citing Commissioner v. Sunnen*, 333 U.S. 591, 598-599 (1948)).

Were the court to rule in favor of the company and follow Judge Hodgdon, the court would allow the preclusions argued for by the company to trump *res judicata*, and the result would be to grant U.S. Steel a variance from a requirement that governs all other of the nation's metal and nonmetal mine operators.⁴ *See*. Sec.'s Resp 11 ("To . . . allow [the company] to abide by the 1999 decision rather than current law would accord [the company] different treatment from that given to other miner operators. *Id.*) Section 101(c) of the Mine Act, 30 U.S.C. §, 811(c), provides a way to obtain a variance, but the Act does not allow an operator to end run a principal that assures even handed uniformity in the application of the law.

For these reasons the court holds that the cited standard applies to the cited equipment. Therefore, the company's motion for summary judgement **IS DENIED**. While it is clear from the record that the company did not annually test the grounding systems for its electric welders and hence did not (and indeed, could not) produce documentation that the annual tests were conducted, the company asserts this proceeding should continue so there can be "a full record surrounding the issuance of the [c]itation." Company's Rep. Br. 10. In arguing for further proceedings, the company is not taking a new position. In its notice of contest the company raised reasons other than *res judicata* as to why the contested citation is invalid. Notice of Contest 2 at 3 (a) – 3(c). The company is entitled to prove these reasons. Accordingly, the Secretary's cross motion also **IS DENIED**. This proceeding **IS STAYED** pending a ruling by the United States Court of Appeals for the District of Columbia Circuit in *Tilden* and/or the assessment of a proposed civil penalty for the violation alleged in Citation No. 8896708 followed by the subsequent filing of a civil penalty petition by the Secretary.

David F. Barbour
David F. Barbour
Administrative Law Judge

⁴ The company and the court clearly hold opposite views as to whether the Commission's decision in *Tilden* is controlling. As stated, the Secretary and the court believe a Commission decision must be followed until it is reversed or otherwise nullified and that carving out exceptions based on a prior contrary decision is not allowed. The company finds this belief to be "without merit." Company's Reply Br.3 n. 3.

Distribution: (1st Class U.S. Mail)

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