FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

April 18, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2008-503-M A.C. No. 20-00422-151959-02
v.	:	
TILDEN MINING COMPANY, L.C., Respondent.	:	Mine: Tilden Mine

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

Appearances: Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, on behalf of the Secretary of Labor;
R. Henry Moore, Esq., Arthur M. Wolfson, Esq., and Jason P. Webb, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Paez

This case is before me upon the Secretary's filing of a petition for assessment of civil penalty, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815. The Respondent, Tilden Mining Company, L.C. ("Tilden Mining"), timely filed an answer, and the case was assigned to me for hearing and decision. Both parties have moved for summary decision pursuant to Commission Rule 67, 29 C.F.R. § 2700.67. Tilden Mining filed a motion for summary decision on August 31, 2010, seeking to vacate Citation No. 6400301, dated April 16, 2008, and Citation No. 6400312, dated April 20, 2008, and issued under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). (Tilden's Mot. for Summ. Decision.) The parties conferred, agreeing that all violations except Citation Nos. 6400301 and 6400312 could be settled, and set a briefing schedule. The Secretary timely filed her response to Tilden Mining's motion as well as her cross-motion for summary decision on October 6, 2010. (Sec'y Cross-Mot. for Summ. Decision.) Tilden Mining's response to the Secretary's cross-motion for summary decision was timely filed on November 1, 2010. (Tilden's Resp. to Sec'y Cross-Mot. for Summ. Decision.) Thereafter, on November 9, 2010, the Secretary filed her reply to Tilden Mining. (Sec'y Reply to Tilden's Resp.)

On October 28, 2010, I issued a Decision Approving Partial Settlement in Docket Nos. LAKE 2008-502-M and LAKE 2008-503-M in which all the citations were resolved, except the two now before me in Docket No. LAKE 2008-503-M. Both citations allege a violation of 30 C.F.R. § 56.12028 for failing to test and record the resistence of extension cords used as part of the grounding system at this surface mine. MSHA determined both citations did not significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The parties stipulate there is no genuine issue as to any material fact involving these citations.

I. Brief Summary of the Parties' Arguments

Tilden Mining argues in its submissions that 30 C.F.R. § 56.12028 does not apply to extension cords. (Tilden's Mot. for Summ. Decision ¶ 8.) It submits that I should apply Administrative Law Judge T. Todd Hodgdon's holding in *Secretary of Labor v. Hibbing Taconite Co.*, 21 FMSHRC 346 (March 1999) (ALJ), where he vacated 67 citations and held that § 56.12028 does not apply to extension cords, power cords, or cables. (*Id.* at ¶ 11.)[1] Tilden also argues that MSHA's Program Policy Manual provisions on § 56.12028, and 1994 Program Policy Letter No. P94-IV-1 on which they are based, are not interpretative guidelines but substantive rule changes to 30 C.F.R § 56.12028, requiring notice and comment rulemaking. (*Id.* at ¶¶ 11-16, Ex. 3.)

The Secretary argues in her submissions that § 56.12028 applies to extension cords, as "extension cords are part of the grounding system because they constitute equipment grounding conductors." (Sec'y Cross-Mot. for Summ. Decision ¶ 6.) The Secretary also argues that the Program Policy Manual and Program Policy Letter do not contain substantive rule changes but are interpretative rules that do not require notice and comment rulemaking. (*Id.* at 12-15, Ex. 4.) Finally, the Secretary argues that ALJ Hodgdon's decision in *Hibbing Taconite* is not binding precedent and that it is inconsistent with Sixth Circuit case law. (*Id.* at 10-12.)

II. Issue Statement

The dispositive issue is whether extension cords should be considered part of a grounding system subject to continuity and resistence testing under 30 C.F.R. § 56.12028, and if so, whether this constitutes a substantive change in the standard requiring notice and comment rulemaking.

III. Principles of Law

The safety and health standard promulgated under the Mine Act and applicable to this case is § 56.12028, which provides as follows:

> 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 h[er] duly authorized representative.

30 C.F.R. § 56.12028 (2010).

Program Policy Letter No. P94-IV-1, first issued in 1994 and cited by both parties, recites

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[1] Although Tilden Mining advocates following ALJ Hodgdon's decision to vacate these two alleged violations of § 56.12028, another ALJ had affirmed a violation of the same standard after publication of PPL No. P94-IV-1. *Sec'y of Labor v. Bob Bak Construction*, 19 FMSHRC 582, 590-91 (Mar. 1997) (ALJ Fauver) (finding a violation of § 56.12028 for failing to perform continuity and resistence testing of grounding systems on "portable extension cords").

the language of § 56.12028 and provides, in relevant part, as follows:

> [56/57.12028 Testing Grounding Systems]
>
> The intent of this standard is to ensure that continuity and resistance tests of grounding systems are conducted on a specific schedule. These tests will alert the mine operator if a problem exists in the grounding system which may not allow the circuit protective devices to quickly operate when faults occur. With the exception of fixed installations, numerous fatalities and injuries have occurred due to high resistance or lack of continuity in equipment grounding systems. These accidents could have been prevented by proper testing and maintenance of grounding systems.
>
> Grounding systems typically include the following:
>
> 1. equipment grounding conductors – the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor;
>
> 2. grounding electrode conductors – the conductors connecting the grounding electrode to the equipment grounding conductor; and
>
> 3. grounding electrodes – usually driven rods connected to each other by suitable means, buried metal, or other effective methods located at the source, to provide a low resistance earth connection.
>
> Operators shall conduct the following tests:
>
> 1. equipment grounding conductors – continuity and resistance must be tested immediately after installation, repair, or modification, and annually if conductors are subjected to vibration, flexing or corrosive environments;
>
> 2. grounding electrode conductors – continuity and resistance must be tested immediately after installation, repair, or modification, and annually if conductors are subjected to vibration, flexing or corrosive environments; and
>
> 3. grounding electrodes – resistance must be tested immediately after installation, repair, or modification, and annually thereafter.
>
> . . . .
>
> Grounding conductors in trailing cables, power cables, and cords that supply power to tools and portable or mobile equipment must be tested as prescribed in the regulation. This requirement does not apply to double insulated tools or circuits protected by ground-fault-circuit interrupters that trip at 5 milli-amperes or less.

. . . .

> A record of the most recent resistance tests conducted must be kept and made available to the Secretary or his authorized representative upon request. When a record of testing is required by the standard, MSHA intends that the test results be recorded in resistance value in ohms.

MSHA Program Policy Letter ("PPL") No. P94-IV-1, at 2-3 (U.S. Dep't of Labor, 1/31/1994). Two years after issuing PPL No. P94-IV-1, MSHA reiterated it verbatim in its 1996 Program Policy Manual which it republished, verbatim, in 2003. *See* IV MSHA, U.S. Dep't of Labor, *Program Policy Manual* ("PPM"), Parts 56/57, at 44-45 (Release IV-21, Feb. 2003).

Finally, Commission Procedural Rule 69(d), provides that, "[a] decision of an Administrative Law Judge is not binding precedent upon the Commission." 29 C.F.R. § 2700.69(d).

IV. Discussion and Conclusions of Law

Tilden Mining relies on ALJ Hodgdon's decision in *Hibbing Taconite*[2] as support for its argument that 30 C.F.R. § 56.12028 does not apply to extension cords. It states, "First and foremost, the ALJ determined that the standard did not apply to extension cords, power cords, and cables . . . the ALJ found[,] instead[,] that if the Secretary wanted to apply this standard to extension cords, power cords, and cables, she would have to proceed with notice and comment rulemaking." (Tilden's Mot. for Summ. Decision ¶ 4.)

Tilden Mining argues that, "The ALJ further found that the Secretary had inappropriately tried to characterize a 1994 Program Policy Letter, which declared that [§] 56.12028 applied to extension cords, power cords, and cables, as an interpretative rule. The ALJ determined that the 1994 Program Policy Letter was not an interpretative rule because it had the effect of amending a prior legislative rule." (Tilden's Mot. for Summ. Decision ¶ 4.)

A. Deference to the Secretary's interpretations of her regulations

Tilden Mining contends that when the Secretary has made a policy decision for some years, in this case, not including extension cords in the definition of grounding systems from 1978 through 1993, and then changes her mind to include them within the definition by issuing a Program Policy

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[2] Under Commission rules, ALJ Hodgdon's decision in *Hibbing Taconite* is not binding in this matter. 29 C.F.R. § 2700.69(d). I do agree with ALJ Hodgdon regarding the law he found applicable in *Hibbing Taconite*, including citation to the case law, the Administrative Procedure Act, the Mine Act, and the standard. They are also applicable here. However, for the reasons stated herein his conclusions in that matter – that § 56.12028 does not include extension cords and that notice and comment rulemaking is required for the changes brought by the PPL – do not apply in this case.

Letter in 1994, this violates the notice and comment procedures of the Administrative Procedure Act. Tilden Mining further argues that the Secretary made explicit in her 1988 PPM that "the annual test does not apply to grounding conductors in trailing cables, power cables, and cords which provide power to portable or mobile equipment." (Tilden's Resp. to Sec'y Cross-Mot. for Summ. Decision ¶ 10.)

However, the United States Supreme Court has ruled that the Secretary can change her interpretation, if the new interpretation as reviewed by a court, fits within the Secretary's original understanding of the statute. The Supreme Court has stated, "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB v. Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978). The Supreme Court cautioned that the "task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). The Commission historically gives deference to the Secretary's interpretation of her regulations and has stated, "[it is] mindful that the Commission and the courts are obliged to give weight to the Secretary's interpretation of [her] regulations." *Sec'y of Labor v. Dolese Bros.*,16 FMSHRC 689, 692 (Apr. 1994); *see also Sec'y of Labor v. Daanen & Janssen, Inc.*, 20 FMSHRC 189, 193-94 (Mar. 1998) (citing to *Dolese Bros.* and noting "the Commission long has recognized [the PPM] as evidence of MSHA's policies and practices."). Indeed, the Commission's decision in *Daanen & Janssen* is instructive, as the Commission discussed the term "system" as it relates to braking systems to find the standard ambiguous, thus deferring to the Secretary's long-held interpretation in the PPM as a reasonable interpretation of the standard's plain language. *Daanen & Janssen*, 20 FMSHRC at 191-94.

Notwithstanding the Secretary's prior interpretation to exclude extension cords from such testing, the Secretary provided notice to the regulated community through her 1994 PPL when she began to include grounding conductors in extension cords within the definition of grounding electrode conductors, and when she started requiring continuity and resistance testing immediately after repair, modification, and annually thereafter if the conductors were subjected to vibration, flexing, or corrosive environments. *See* PPL No. P94-IV-1 (1/31/1994). Section 56.12028, as written, is broad enough to include grounding conductors in extension cords within the definition of "grounding systems." Under a reasonable reading, the inclusion of grounding conductors in extension cords within the definition of grounding systems would not be considered a substantive change to the standard unless it was inconsistent with the standard or went beyond the standard to create a new requirement. *Cf. Daanen & Janssen*, 20 FMSHRC at 193 ("Because the definition of the term 'system' entails an interrelationship of component parts, it follows that for the system to be considered functional, each of its component parts must be functional."). Neither of those situations is present here, as it is reasonable to conclude that the grounding conductors in extension cords can be used as a component in grounding systems. Because the 1994 PPL requirements are consistent with § 56.12028, I determine that the Secretary's interpretation of this standard is reasonable and should be given weight here.

B. Extension cords fall under § 56.12028

Grounding conductors in extension cords are part of the grounding system because they are the grounding electrode conductors that connect the equipment in a mine to power outlets. Due to this function, they are an essential part of a grounding system. According to Inspector Leppanen, "Extension cords are the means by which metal-encased equipment, including portable, hand-held equipment such as a welder, is tied into the grounding system and thus are integral parts of the grounding system." (Sec'y Cross-Mot. for Summ. Decision, Ex. 3.) According to the PPM, extension cords supply power to tools and to portable and mobile equipment. Due to their function and the importance of preventing electric shock to miners, continuity testing must be performed on all aspects of the grounding system, including grounding conductors in extension cords. Extension cords can and have been tested utilizing a continuity test. (*Id.*) According to Leppanen, "Conducting a continuity test assures . . . that the equipment being used is connected directly to the ground prong, and thus the grounding circuit is complete." (*Id.*)

In determining whether grounding conductors in extension cords fall under the standard, first, I find that extension cords and the grounding conductors they contain are part of the grounding system and can be tested. Second, I give deference to the Secretary in her interpretation of her standard because the standard is broad enough to include a change that is neither substantive nor contradictory. Due to the deference given to the Secretary and the fact that this inclusion is not contradictory to the standard, I determine that 30 C.F.R. § 56.12028 applies to grounding conductors in extension cords.

C. Notice and comment rulemaking proceedings

The United States Court of Appeals for the District of Columbia Circuit has stated in *Alaska Professional Hunters v. FAA* that, "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." 177 F.3d 1030, 1034 (D.C. Cir. 1999). In *Syncor International Corp. v. Shalala*, the D.C. Circuit held that a modification of an interpretative rule that changes the agency's substantive regulation will "likely require a notice and comment procedure." 127 F.3d 90, 94-95 (D.C. Cir. 1997). In this case, Tilden Mining argues that when the Secretary issued the 1994 PPL, and later the 1996 PPM, it was a substantive rule change requiring notice and comment rulemaking.

I must first determine whether the PPM's provisions are substantive rules and then assess if notice and comment rulemaking was required for both the PPL and the PPM. The Commission has held that, "the Enforcement Guidelines and the PPM are not binding on the Secretary or the Commission," and in citing to *King Knob Coal Company* noted that "the Manual's 'instructions are not officially promulgated and do not prescribe rules of law binding upon this Commission.'. . . [T]he express language of a statute or regulation 'unquestionably controls' over material like a . . . manual." *Sec'y of Labor v. D.H. Blattner & Sons*, 18 FMSHRC 1580, 1586 (Sept. 1996) (quoting *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981) (citations omitted)). Here, the PPM and the PPL are not rules of law but are the Secretary's interpretations of § 56.12028. Neither the PPL nor the PPM are binding on the Commission or the Secretary. Rather, the PPM and the PPL give

mine operators detailed notice of how MSHA inspectors will enforce the Secretary's regulations. However, neither the PPM nor the PPL have the force of law that a standard or a statutory provision would have.

To determine if notice and comment rulemaking is required in this instance, I must examine the provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq. According to the APA, "[g]eneral notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b). The APA has several exceptions to the mandatory proposed rulemaking procedures for administrative agencies. The notice and comment rulemaking procedures do not apply "to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice; or [] when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(A), (B).

The Secretary argues that the PPM and the PPL are interpretative rules that do not require notice and comment rulemaking.[3] According to the D.C. Circuit, an interpretative rule "typically reflects an agency's construction of a statute that has been entrusted to the agency to administer." *Syncor Inter'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). The Supreme Court defined an interpretative rule as one "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' Interpretative rules do not require notice and comment, although . . . they also do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (citations omitted).

Here, the requirements presented in the PPM provisions cited above do not result in a substantive rule change to the provisions of 30 C.F.R. § 56.12028. If the 1996 and 2003 PPM provisions and the 1994 PPL had adopted a new position inconsistent with the Secretary's existing regulations or significantly revised the existing regulations, then notice and comment rulemaking would be required. As set forth, however, the PPL and PPM provisions are not inconsistent with § 56.12028, nor did they significantly revise § 56.12028 when grounding conductors in extension cords were included within the definition of "grounding systems." If anything, the PPL and PPM provisions provide a clearer explanation of the requirements of § 56.12028 to mine operators than the ambiguous term "grounding systems" alone provides. Supplementing a previous provision with a consistent interpretation does not create an APA notice-and-comment procedural violation. In fact, § 56.12028 is broad enough to include grounding conductors in extension cords within the definition of grounding systems.

[3] The Secretary does not argue that the PPM and PPL are general statements of policy, rules of agency organization, procedure, or practice. Nor does she argue this is an instance where MSHA, for good cause, found that notice and comment procedures were impracticable. Therefore, I will not analyze the PPM or PPL under these exceptions.

I reject Tilden Mining's argument that notice and comment rulemaking is required for the Secretary's new interpretation to include extension cords in the definition of grounding systems contained in the PPL and subsequent iterations of the PPM. Therefore, I conclude the PPM and PPL are interpretative rules of the regulatory standard at 30 C.F.R. § 56.12028 and fall under the "interpretative rules" exception to the notice and comment requirements of the APA at 5 U.S.C. § 553(b)(3)(A).

D. Prior notice of the interpretative rules at the Tilden Mine

The interpretative rule change was implemented in the 1996 version of the PPM and reiterated in the 2003 version, which to date remains MSHA's current interpretative rule. Thus, Tilden Mining has been on notice since the issuance of the 1994 PPL (and the later iterations of the PPM) that the Secretary interprets extension cords to be electrode grounding conductors, which are a part of the grounding system and subject to the testing and recordkeeping requirements of § 56.12028. Although the notice argument made by the operator in the *Hibbing Taconite* decision may have been persuasive at that time, given that the interpretative rule change had only been recently implemented, I cannot apply the facts of *Hibbing Taconite* to the facts of this case. *See Hibbing Taconite Co.*, 21 FMSHRC 346 (March 1999) (ALJ). Here, Tilden Mining has had fourteen years notice of the Secretary's change in interpretation (and at least five years notice since republication of the 2003 PPM after the 1999 *Hibbing Taconite* ALJ decision) until the issuance of Citation Nos. 6400301 and 6400312.[4]

In fact, Robert Leppanen, the MSHA inspector assigned to the Tilden Mine, stated in his declaration that he has enforced § 56.12028 to include "trailing cables, power cables, and extension cords" at the Tilden Mine since 2004. (Sec'y Cross-Mot. for Summ. Decision, Ex. 3.) Given this unrefuted statement as well as the fact that the 1996 PPM requirements were republished in the 2003 PPM, I find Tilden Mining had ample notice of the Secretary's interpretation of how she would enforce the requirements of § 56.12028. Tilden violated that standard by not conducting continuity and resistence testing on the cited extension cords and recording it.

E. Drummond's application to this case

Tilden Mining cites to *Secretary of Labor v. Drummond Company*, 14 FMSHRC 661 (May 1992), as support for its proposition that the 1994 PPL at issue in this case resulted in a substantive change to the standard. In *Drummond*, the Commission heard an appeal from a mine operator that argued the Secretary's proposed penalty assessments were improper because they were not based on the Secretary's civil penalty regulations, as set forth under 30 C.F.R. Part 100. Instead, the penalties were computed using the Secretary's excessive history program that she set forth in a 1990 Program Policy Letter. The mine operator argued that the new excessive history program was unlawfully implemented in violation of the APA notice-and-comment requirements.

[4] The PPL was issued in 1994 and the new PPM language was published in 1996 and republished in 2003; the citations in this case were issued in 2008.

Drummond is distinguishable from this case because the Secretary in *Drummond* created a completely new category for designating points to mine operators that had a history of prior violations. This new category created steeper penalties for these mine operators for any future violations. This was a substantive change from the previous civil penalty regulations set forth in 30 C.F.R. Part 100, as the mine operators would now incur more monetary liability than before without the ability to comment on the new proceedings. *Drummond*, 14 FMSHRC at 681-90. The Commission determined the PPL in *Drummond* established a new category of special history assessment for significant and substantial violations, and that notice and comment proceedings were required before such substantive changes which greatly effect private interests could be imposed. The Commission held that the PPL was issued in contravention of the APA and would be accorded no legal weight or effect. *Id.* at 690.

The main difference between this case and the *Drummond* decision is that in *Drummond*, the Secretary attempted to implement a substantive rule change. Here, including extension cords within the definition of "grounding systems" and finding them to be grounding electrode conductors is not a substantive rule change. In fact, it is an interpretative rule change that does not require notice and comment procedures. As stated previously, the Secretary is not prohibited from changing her interpretation, as long as her new requirements do not greatly derogate from her previous interpretation. Here, the Secretary's inclusion of extension cords as part of a grounding system is a reasonable and consistent interpretation of § 56.12028. Therefore, after comparing the case at hand to the facts in *Drummond*, I find that *Drummond* is inapplicable to the facts in this case.

For all of the reasons discussed above, I conclude that extension cords and the grounding conductors within them are part of the grounding system and that the Secretary properly issued Citation Nos. 6400301 and 6400312. Additionally, I conclude that Tilden Mining has failed to establish that the PPM's provisions violate the APA's requirements of notice-and-comment proceedings. Pursuant to Commission Rule 67(b), 29 C.F.R. § 2700.67(b), I conclude that the Secretary is entitled to summary decision as a matter of law.

V. Order

In view of the conclusions above, it is hereby **ORDERED** that Tilden Mining's Motion for Summary Decision is **DENIED**. It is further **ORDERED** that the Secretary's Cross-Motion for Summary Decision is **GRANTED**. Citation Nos. 6400301 and 6400312 are hereby **AFFIRMED**.

WHEREFORE, the Respondent is **ORDERED** to pay the penalty assessment of $1,050.00 within 40 days of this decision.[5] Upon receipt of full payment, this case is **DISMISSED**.

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

Alan G. Paez
Administrative Law Judge

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