FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

March 19, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-73-M
Petitioner	:	A.C. No. 21-01600-05657
v.	:	
	:	Docket No. LAKE 98-74-M
HIBBING TACONITE COMPANY,	:	A.C. No. 21-01600-05658
Respondent	:	
	:	Docket No. LAKE 98-75-M
	:	A.C. No. 21-01600-05659
	:	
	:	Docket No. LAKE 98-76-M
	:	A.C. No. 21-01600-05660
	:	
	:	Docket No. LAKE 98-77-M
	:	A.C. No. 21-01600-05661
	:	
	:	Docket No. LAKE 98-86-M
	:	A.C. No. 21-01600-05662
	:	
	:	Docket No. LAKE 98-87-M
	:	A.C. No. 21-01600-05663
	:	
	:	Docket No. LAKE 98-88-M
	:	A.C. No. 21-01600-05664
	:	
	:	Docket No. LAKE 98-89-M
	:	A.C. No. 21-01600-05665
	:	
	:	Docket No. LAKE 98-123-M
	:	A. C. No. 21-01600-05666
	:	
	:	Hibbing Taconite Company

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-90-M
Petitioner	:	A.C. No. 21-00282-05662
v.	:	
	:	Docket No. LAKE 98-101-M
USX CORPORATION-MINNESOTA	:	A.C. No. 21-00282-05663
ORE OPERATIONS,	:	
Respondent	:	Docket No. LAKE 98-102-M
	:	A.C. No. 21-00282-05664
	:	
	:	Minntac Mine
	:	
	:	Docket No. LAKE 98-91-M
	:	A.C. No. 21-00820-05869
	:	
	:	Docket No. LAKE 98-92-M
	:	A.C. No. 21-00820-05870
	:	
	:	Docket No. LAKE 98-94-M
	:	A.C. No. 21-00820-05872
	:	
	:	Docket No. LAKE 98-95-M
	:	A.C. No. 21-00820-05873
	:	
	:	Docket No. LAKE 98-96-M
	:	A.C. No. 21-00820-05874
	:	
	:	Docket No. LAKE 98-97-M
	:	A.C. No. 21-00820-05876
	:	
	:	Minntac Plant

DECISION

Appearances: Christine M. Kasak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against USX Corporation-Minnesota Ore Operations and Hibbing Taconite Company, pursuant to

section 105 of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. ' 815. The petitions allege 68 violations of section 56.12028, 30 C.F.R. ' 56.12028, of the Secretary=s mandatory health and safety standards. A hearing was held in Duluth, Minnesota. For the reasons set forth below, I vacate 67 of the citations and affirm one.

Background

USX operates the Minntac Mine and the Minntac Plant and Hibbing operates the Hibbing Plant in St. Louis County, Minnesota. Both operations are involved in mining taconite[1] and processing it into pellets for shipment.

MSHA Inspector James King went to Hibbing management personnel on February 1, 1994, to inform them that MSHA intended to begin examining mine records to determine whether grounding conductors in trailing cables, power cables, and cords that supply power to tools and portable or mobile equipment had been tested annually as required by section 56.12028. He gave them a copy of Program Policy Letter No. P94-IV-1, (Jt. Ex. 2), and advised them that they should develop a plan for complying with the regulation. He later furnished them with a copy of a

---

[1] ATaconite@ is

> [a] local term used in the Lake Superior iron-bearing district of Minnesota for any bedded ferruginous chert or variously tinted jaspery rock, esp. one that enclosed the Mesabi iron ores (granular hematite) . . . . The term is specif. applied to this rock when the iron content, either banded or disseminated, is at least 25%. . . . Since World War II, a low-grade iron formation suitable for concentration of magnetite and hematite by fine grinding and magnetic treatment, from which pellets containing 62% to 65% iron can be produced.

American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 560 (2d ed. 1997).

written report on the "Metal and Nonmetal Electrical Standards Interpretation Workshop" held at the National Mine Health and Safety Academy in Beckley, West Virginia, on February 23 - March 3, 1994. (Jt. Ex. 5.) On March 17, 1994, Inspector Alan Brandt paid a similar visit to the Minntac operations.

Section 56.12028, entitled "Testing Grounding Systems," requires that: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative." This requirement has been in effect, as worded, since at least November 30, 1977.[2]

Prior to the inspectors' visits to the companies, MSHA had not enforced section 56.12028 with regard to power cables, extension cords and cords supplying power to tools and portable or mobile equipment. The 1988 version of MSHA's *Program Policy Manual*, at pp. 51-52, stated, with regard to section 56.12028:

> Ground systems normally include all the following:
>
> 1. Grounding electrode - usually are driven rods, buried metal or other effective methods for connection to the earth located at the power source.
>
> 2. Grounding electrode conductor is the conductor from the grounding electrode extending to the equipment grounding conductor or the service entrance.
>
> 3. Equipment grounding conductors and bonding jumpers are the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor.
>
> The grounding system tests required are as follows:
>
> 1. Grounding electrode - resistance shall be tested immediately after installation, repair and/or modification, and annually thereafter.

[2] A final rule using this language was published on October 31, 1977. 42 Fed. Reg. 57038, 57039 (1977). The regulation was renumbered effective April 15, 1985. 50 Fed. Reg. 4048, 4073 (1985).

> 2. Grounding electrode conductor - continuity of this conductor and its connections shall be tested immediately after installation, repair, and/or modification, and annually thereafter.
>
> 3. Equipment grounding conductors and bonding jumpers - continuity of these conductors and their connections shall be tested immediately after installation, repair, and/or modification. Equipment grounding conductors and bonding jumpers which are exposed or subjected to vibration, flexing, corrosive environments or frequent lightning hazard shall be tested annually.
>
> A record of the most recent tests of items 1 and 2 directly above shall be made available on request to the Secretary or his authorized representative.
>
> *The annual test does not apply* to grounding conductors in trailing cables, power cables and cords which supply power to portable or mobile equipment. The grounding conductors in these cables require more frequent testing.

(Jt. Ex. 4)(emphasis added).

The 1993 edition of the *Program Policy Manual* contained some changes with regard to section 56.12028. The definition of grounding systems remained essentially the same, except the words Aand bonding jumpers@ were deleted from definition of Aequipment grounding conductors.@ The required grounding systems tests were changed to require Acontinuity *and* resistance@ testing for grounding electrode conductors and equipment grounding conductors. A record of the most recent tests for all three elements of the grounding system was required. With regard to cables, it stated: AThe grounding conductors in trailing cables, power cables, and cords which supply power to portable or mobile equipment should be tested more frequently than stationary grounding conductors. However, a record of such tests is only required in accordance with the standard. (Jt. Ex. 3.)

The 1994 Program Policy Letter changed the definition of grounding system from the 1993 manual by deleting the words Aor the service entrance@ from the definition of Agrounding electrode conductor@ and added Ato provide a low resistance earth connection@ to the end of the definition of Agrounding electrodes.@ The testing requirements remained the same, except that testing of grounding electrode conductors had to occur immediately after installation, repair, or modification, and Aannually if conductors are subjected to vibration, flexing or corrosive environments.@ With regard to cables, it stated: AGrounding 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.@ The record keeping requirement was also changed, requiring that a record of the most recent *resistance* tests be kept. (Jt. Ex.2.) The requirements for section

56.12028 set out in the Program Policy Letter are the same as those in the 1996 edition of the *Program Policy Manual*. (Jt. Ex. 1.)

Between September 1997 and January 1998 MSHA issued 38 citations to Hibbing and 29 to USX alleging violations of section 56.12028 with respect to assorted types of extension or power cords or cables. The citations contain various allegations of the violative condition. The following are examples of the types of allegations. Citation No. 7809804, issued to Hibbing, states: AAn annual continuity and resistance test of the grounding system of the power cord for the Miller welding machine, located on the fifth level of the #2 crusher, had not been performed. The cord appeared to be undamaged. This condition created a shock or burn hazard.@ (Govt. Ex. 3.) Citation No. 7808451, issued to Hibbing, states: AThe operator failed to provide a record of continuity and resistance test on the 110 volt pendant cable of the no.# [*sic*] 401 overhead crane. No damage to the cords was observed.@ (Govt. Ex. 6.) Citation No. 7810037, issued to USX, states: AAGGLOMERATOR: A 110 volt power cord for the portable air blower located on the east side of the line 5, step 2 grate was not tested for grounding continuity. No damage was observed to the power cord.@ (Govt. Ex. 8). Citation No. 7809683, issued to USX, states: AWest Pit: The 110 volt extension cord and 110 volt heater, located in the Port-a-John by the #21 sub station, had not received a ground test to insure that the cord and heater were properly grounded. The heater was on and the extension cord was suppl[y]ing power to the heater. The extension cord and heater appeared to be in good condition.@ (Govt. Ex. 10.)

All 67 citations indicate that the likelihood of injury from the violation is Aunlikely@ and that the violation is not Asignificant and substantial.@[3] Thirty-seven of the citations allege that the operator=s negligence is Alow@ and 30 allege that it is Amoderate.@ The parties stipulated Athat if the Judge determines that the standard applies to the types of equipment cited . . . he should uphold all 67 citations. If he should find that the standard does not apply . . . he should vacate all 67 citations.@ (Jt. Ex. 6, at 5.) The parties also stipulated Athat a $50 penalty is appropriate for all the citations should the Judge find that violations existed.@ (Jt. Ex. 6, at 4.)

Citation No. 7808522 in Docket No. LAKE 98-91-M alleges a violation of section 56.12028 because: AThe operator failed to provide a record of the fixed grounding systems visual inspections for the crushing department plant electrical equipment. This is a record violation.@ (Jt. Ex. 6, at 9.) The parties stipulated that a $50.00 penalty was appropriate for this violation and that USX would not contest it. (Jt. Ex. 6, at 10.)

Findings of Fact and Conclusions of Law

The Respondents argue that the citations should be vacated because MSHA was required to issue a notice of proposed rule making and an opportunity for public comment before applying section 56.12028 to extension and power cords and cables. They also argue that the equipment cited is not covered by the language of the regulation and that the regulation is unconstitutionally vague. As discussed below, I find that by not proceeding with Anotice and comment@ rule making,

[3] The Asignificant and substantial@ language is taken from section 104(d)(1) of the Act, 30U.S.C. ' 814(d)(1), which distinguishes as more serious any violation that Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.@

the Secretary has impermissibly changed the requirements of section 56.12028 to apply to equipment not covered by it.

Statutory Requirements for Rule Making

Section 101(a) of the Mine Act, 30 U.S.C. ' 811(a), requires that:

> The Secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

Section 551(4) of the Administrative Procedure Act (APA), 5 U.S.C. ' 551(4), defines a Arule@ as Athe whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . .@

Section 101(a)(2) of the Mine Act, 30 U.S.C. ' 811(a)(2), provides that: AThe Secretary shall publish a proposed rule promulgating, modifying, or revoking a mandatory health or safety standard in the Federal Register. . . . [and] shall afford interested persons a period of 30 days after any such publication to submit written data or comments on the proposed rule.@ Likewise, section 553(b) of the APA, 5 U.S.C. ' 553(b), requires that a notice of a proposed rule making be published in the Federal Register, and section 553(c), 30 U.S.C. ' 553(c), requires that there be an opportunity for interested persons to comment on the proposed rule.

Notice and Comment Rule Making was Required to Implement the Change

Trailing cables, power cables and cords are not explicitly mentioned in section 56.12028. As recently as 1988, MSHA was of the opinion that annual testing did not apply to them. Further, the evidence is that they were not even inspected, with regard to this section, until MSHA informed operators in 1994 that it intended to begin doing so.

It is undisputed that MSHA did not publish a notice of proposed rule making or provide a comment period with regard to including trailing cables, power cables and cords within the requirements of section 56.12028. However, that is not the end of the inquiry, because the APA provides four exceptions to the notice requirement: (1) Ainterpretive rules,@ (2) Ageneral statements of policy,@ (3) Arules of agency organization, procedure or practice,@ and (4) Awhen the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest.@ 5 U.S.C. ' 553(b)(3)(A) and (B).

While the exceptions appear explicit, as the courts have correctly observed:

> The distinction between those agency pronouncements subject to APA notice-and-comment requirements and those that are exempt has been aptly described as Aenshrouded in considerable

> smog,@ *General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984)(en banc) (quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); see also *American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (calling the line between interpretive and legislative rules Afuzzy@); *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting authorities describing the present distinction between legislative rules and policy statements as Atenuous,@ Ablurred@ and Abaffling@).

American Mining Congress v. MSHA, 995 F.2d 1106, 1108-09 (D.C. Cir. 1993).

Nonetheless, exceptions (2), (3) and (4) can be eliminated quickly. MSHA does not claim that the 1994 Program Policy Letter and its subsequent inclusion in the 1996 Program Policy Manual is a general statement of policy. Nor could it, since A[a] general statement of policy, the second exception set forth in section 553, is >merely an announcement to the public of the policy which the agency hopes to implement in future rulemaking, or adjudications.= *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).@ *Drummond Co., Inc.*, 14 FMSHRC 661, 685 (May 1992). In addition, it is obvious that the Program Policy Letter did not announce rules of MSHA organization, procedure or practice, nor does the letter state that MSHA is not publishing the rule because it finds Athat notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest,@ the third and fourth exceptions in section 553 of the APA.

The Secretary argues that notice and comment were not necessary because the Program Policy Letter merely interprets section 56.12028, thus coming within the first exception to section 553. On the other hand, it is the Respondents= position that the letter changed section 56.12028 and was, therefore, a legislative rule requiring notice and comment. Although stating, as set out above, that the difference between an interpretive rule and a legislative one is far from clear, the Court of Appeals for the D.C. Circuit has provided a test for distinguishing between the two. The court said that the difference can be determined:

> on the basis of whether the purported interpretive rule has Alegal effect@, which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

American Mining Congress, 995 F.2d at 1112.

While the answer to the first three questions is Ano,@ I find that the fourth question must be answered Ayes.@ The application of section 56.12028 to trailing cables, power cables and cords,

effectively amends the rule. The rule clearly applies only to grounding systems. While the term Agrounding systems@ is not defined in the regulations, the Secretary has defined it elsewhere.

The Program Policy Letter and the 1996 version of the *Program Policy Manual*, which provide MSHA=s latest definition of grounding systems, state that:

> 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.

(Jt. Exs. 1 and 2.) As previously noted, this definition has remained essentially the same since, at least, the 1988 *Program Policy Manual*. When the regulation and this definition are read in conjunction with the three sections preceding section 56.12028, it is apparent that the grounding systems required in those sections are the grounding systems referred to in the regulation, not trailing cables, power cables and cords.[4] In this regard, I note particularly that mobile equipment powered through *trailing cables* must have *frame grounding* or equivalent protection.

Furthermore, it is evident that operators in the mining industry did not understand that grounding systems included trailing cables, power cables and cords. For example, the report of MSHA=s 1994 Electrical Standards Interpretation Workshop stated, in connection with section

---

[4] Section 56.12025, 30 C.F.R. ' 56.12025, requires that: AAll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.@ Section 56.12026, 30 C.F.R. ' 56.12026, states that: AMetal fencing and metal buildings enclosing transformers and switchgear shall be grounded.@ Section 56.12027, 30 C.F.R. ' 56.12026, provides that: AFrame grounding or equivalent protection shall be provided for mobile equipment powered through trailing cables.@

56.12028, that: AMSHA had determined that the majority of operators were testing and recording only the grounding electrode.@ (Jt. Ex. 5 at 5.) William Jankowski, an electrical engineer and Senior Engineer for U.S. Steel Minntac, testified that prior to MSHA=s 1994 Program Policy Letter it had never crossed his mine that Aa conductor in an extension cord or a Calorad heater cord had to be tested for continuity@ under the standard. (Tr. 606.)

That the grounding systems required to be tested are those systems in the preceding three sections of the regulations is further borne out by the requirement that the system be tested immediately after Ainstallation.@ AInstallation@ means, among other things, Athe setting up or placing in position for service or use . . . something that is installed for use.@ *Webster=s Third New International Dictionary (Unabridged)* 1171 (1986). Thus, a cord would be Ainstalled@ every time it is plugged in. But William J. Helfrich, MSHA=s electrical expert, was not sure when a cord is installed. When asked whether installation occurs every time a cord is plugged or just the first time it is put into service, he replied: AI guess you could rationalize that it would be the first time they were putting it in.@ (Tr. 123.) On the other hand, there is no such doubt as to when the grounding systems in sections 56.12025-56.12027 are placed in position for service.

The final, and most significant indication, that MSHA=s new interpretation amended the rule is that they have changed the requirements of the standard when it is applied to trailing cables, power cables and cords. The rule requires *continuity* and *resistance* testing, but it only requires that the measured *resistance* by recorded. Yet Helfrich testified that for trailing cables, power cables and cords, only the *continuity* needed to be tested and recorded, that resistance is something that has to be tested Amainly on the ground bed.@[5] (Tr. 342.)

In *Drummond*, the Commission, in determining that an MSHA program policy letter concerning the imposition of penalties was not an interpretive rule, but a substantive one, said: AThe PPL does not simply >remind= operators of existing penalty proposal formulas under the Part 100 scheme, but imposes new substantive formulas.@ 14 FMSHRC at 685. Here MSHA has not merely reminded operators of existing requirements under section 56.12028, but imposed new requirements. Trailing cables, power cables and cords, which had not been inspected for compliance with section 56.12028 prior to 1994, now had to be tested annually, but only for continuity, not resistance, and the continuity test had to be recorded in some way to show that it had been performed.

Accordingly, I conclude that the 1994 Program Policy Letter announced a substantive change in section 56.12028, and that, therefore, notice and comment rule making was required before it could be implemented. As noted at the beginning of this discussion, the difference between legislative, or substantive, rules and interpretive, or clarifying or explanatory, rules is not always obvious. While I find that MSHA made a substantive change in the rule in this case, I have also considered the guidance of the Court of Appeals for the D.C. Circuit that:

---

[5] Helfrich also testified that performing continuity and resistance testing on trailing cables, power cables and cords Awould be very burdensome.@ (Tr. 346.)

> Congress intended the exceptions to ' 553's notice and comment requirements to be narrow ones. The purpose of according notice and comment opportunities were twofold: Ato reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,@ *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980), and to Aassure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.@ *Guardian Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978). In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in ' 553 to swallow the APA=s well-intentioned directive. *See, e.g., Alcaraz v. Block*, 746 F.2d 593, 612 (D.C. Cir. 1984) (AThe exceptions of section 553 will be >narrowly construed and only reluctantly countenanced=@) (citation omitted); *National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205, 103 S.Ct. 1193, 75 L.Ed.2d 438 (1983) (exceptions to the notice and comment provisions of ' 553 are to be recognized Aonly reluctantly,@ so as not to defeat the Asalutary purposes behind the provisions@); *see also American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *American Bus Association v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980); *New Jersey Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

American Hosp. Ass=n v. Bowen, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987). Clearly, if there is doubt as to whether a rule is legislative or interpretive, it should be resolved in favor of notice and comment rule making.[6]

As expressed in the quotation above, one of the reasons notice and comment rule making is favored is to permit the agency to have before it all the facts and information it needs to solve a problem. For example, in this case, the Respondents presented evidence that in attempting to comply with MSHA=s new policy concerning trailing cables, power cables and cords it takes them as many as 2180 man-hours a year to complete the process, at a cost of $35-$40 an hour.[7] Such evidence has little relevance in a proceeding to determine whether or not a regulation has been

---

[6] *See Drummond*, 14 FMSHRC at 682-83, for a discussion of the important purposes served by notice and comment rule making.

[7] It takes USX 600 man-hours a year to check the cables and cords in its Minntac shop and 1000-1200 man-hours per year to perform the process in its agglomerator. (Tr. 614-15, 650.) It takes Hibbing 200-300 man-hours in its concentrator and 60-80 man-hours in the pit area.
(Tr. 544-45, 549.)

violated. However, it is exactly the type of information that should be considered when a rule is being adopted.

Finally, it does not appear that requiring MSHA to go through the rule making procedures to adopt this rule will have an adverse affect on the safety of miners. All 67 of the citations in this case stated that an injury was unlikely as a result of the violation and that the violations were not Asignificant and substantial.@ Testing for continuity and resistance of trailing cables, power cables and extension cords is not required in coal mines, which indicates that, although they are not used as extensively in coal mines, failure to test them is not considered a safety hazard. Lastly, section 56.12030, 30 C.F.R. ' 56.12030, requires that: AWhen a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.@ This would seem to require that trailing cables, power cables and cords be examined for potentially dangerous conditions before they are used, thus affording protection to miners.

Civil Penalty Assessment

The Secretary has proposed a penalty of $50.00 for Citation No. 7808522 in Docket No. LAKE 98-91-M. However, it is the judge=s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. ' 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that the Minntac Plant worked over 1.6 million hours in 1996, making it a large mine. The Assessed Violation History Report shows that the plant had 732 violations in the two years preceding the violation. (Govt. Ex. 1c.) This is not a good history of violations. The parties have also stipulated that both the gravity and the negligence for this violation is Alow@ and that a $50.00 penalty is appropriate. I agree.

Order

In view of my conclusion that notice and comment rule making was required before section 56.12028 could be applied to trailing cables, power cables and cords, all of the citations in the captioned dockets, with the exception of Citation No. 7808522 in Docket No. LAKE 98-91-M, are **VACATED** and the captioned dockets, with the exception of Docket No. LAKE 98-91-M, are **DISMISSED**. Citation No. 7808522 in Docket No. LAKE 98-91-M is **AFFIRMED** and USX Corporation - Minnesota Ore Operations is **ORDERED TO PAY** a penalty of **$50.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

/nj