FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 20, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2008-503-M
TILDEN MINING COMPANY, LC	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue is whether the Administrative Law Judge correctly determined (1) that extension cords should be considered part of a grounding system subject to continuity and resistance testing under 30 C.F.R. § 56.12028[1] and (2) that the Secretary's position requiring such testing did not constitute a substantive change in the standard requiring notice-and-comment rulemaking.

For the reasons that follow, we conclude that grounding systems include extension cords and power cables, and that the Secretary did not need to undertake rulemaking. Accordingly, we affirm the Judge's decision.

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[1] Section 56.12028 provides:

> 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.

30 C.F.R. § 56.12028.

I.

Factual and Procedural Background

Tilden Mining Company, LC, operates the Tilden Mine, a surface iron-ore mine in Michigan. On April 16, 2008, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) issued Citation No. 6400301 to Tilden, and on April 20, 2008, issued Citation No. 6400312 to Tilden. Both citations alleged a violation of 30 C.F.R. § 56.12028 for failing to test and record the resistance of extension cords used as part of the grounding system at the mine. Tilden subsequently contested the citations and proposed penalties before a Commission Administrative Law Judge.

On April 18, 2011, the Judge affirmed the citations in a decision on cross-motions for summary decision. 33 FMSHRC 876, 884-85 (Apr. 2011) (ALJ). The Judge ruled that extension cords and power cables must be tested for continuity and resistance because they are integral components of any grounding system. The Judge reasoned that a grounding system is only as protective as its weakest link, and that it is critical to ensure that all the necessary components of the grounding system are fully functional, including extension cords and cables. *Id.* at 881.

The Commission granted Tilden's petition for discretionary review.

II.

Disposition

On review, Tilden claims that the Judge's holding conflicts with *Hibbing Taconite Co.*, 21 FMSHRC 346, 355 (Mar. 1999) (ALJ), in which the Judge declined to require continuity and resistance testing on extension and power cords under section 56.12028. The operator further contends that the Judge in the instant case failed to recognize that grounding systems are stationary and involve ground beds and similar fixed facilities, while extension and power cords are mobile, scattered all over a facility, and capable of being plugged and unplugged routinely.

The operator also asserts that even if MSHA's new rule is interpretive in nature, rulemaking was required because the rule constituted a significant change in interpretation. The operator argues that MSHA's original 1988 Program Policy Manual (PPM) stated that continuity and resistance testing "do[...] not apply to grounding conductors in trailing cables, power cables, and cords which provide power to portable or mobile equipment" and that MSHA's 1994 Program Policy Letter (PPL) subsequently reversed its position on this issue. TM Br. at 13-14, *quoting* PPM at 52 (1988). The operator also argues that MSHA's allegedly inconsistent interpretations and lack of enforcement under its current interpretation render the Secretary's position unreasonable and unworthy of deference.

Finally, Tilden claims that it did not have notice that grounding systems could include extension cords without any notice-and-comment rulemaking because it reasonably relied upon the *Hibbing Taconite* decision to the contrary.

A. The Secretary's interpretation of section 56.12028 as including extension cords and power cables within the definition of "grounding systems" is reasonable and entitled to deference.

The term "grounding systems" is undefined in the standard, and the standard is silent with regard to whether extension cords and power cables are part of a "grounding system." Accordingly, we must defer to the Secretary's interpretation of the standard as long as it is reasonable. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678–82 (Dec. 2010) (examining whether Secretary's interpretation of own regulation is reasonable and entitled to deference); *Consolidation Coal Co.*, 14 FMSHRC 956, 966-69 (June 1992); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989).

Here, we conclude that the Secretary's interpretation is reasonable. In order for a grounding system to function, it is essential that extension cords and power cables work properly. Extension cords supply power to tools and to portable and mobile equipment. The cords, along with all other aspects of the grounding system, must be tested for continuity, in order to prevent electric shocks to miners. Conducting a continuity test assures that the equipment being used is connected directly to the ground prong, and that the grounding circuit is complete. A grounding system is only as protective as its weakest link, which is why it is critical to ensure that all the necessary components of the grounding system are fully functional, including extension cords and cables. Otherwise, the grounding system will cease to function. *Cf. Daanen & Janssen, Inc.*, 20 FMSHRC 189, 193 (Mar. 1998) ("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.").

We find unpersuasive the operator's argument that the definition of "grounding systems" in the 1994 PPM, when read in conjunction with the three sections preceding section 56.12028, shows that extension cords and cables were not contemplated to be within section 56.12028. The three sections preceding section 56.12028 focus on *specific types of equipment* that must be *connected* to a grounding system, as opposed to the definition of "grounding system" itself.[2]

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[2] The three sections preceding section 56.12028 require the following:

> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment. 30 C.F.R. § 56.12025.
>
> Metal fencing and metal buildings enclosing transformers and switchgear shall be grounded. 30 C.F.R. § 56.12026.
>
> Frame grounding or equivalent protection shall be provided for mobile equipment powered through trailing cables. 30 C.F.R. § 56.12027.

Similarly unavailing is the operator's argument that "grounding systems" are stationary and involve ground beds and similar fixed facilities, and therefore do not include extension cords and power cables, which are mobile and scattered all over a facility and are capable of being plugged and unplugged routinely. This distinction is contradicted by the language of the standards. Section 56.12025 broadly requires grounding of any metal-encased electrical circuit. Furthermore, section 56.12027 applies to any *mobile* piece of equipment powered by trailing cables. Therefore, any distinction between the stationary nature of ground beds and the mobile nature of extension cords is unpersuasive.

We also reject the operator's argument that MSHA's application of extension cords to "grounding systems" imposes an undue burden on mine operators. Although Tilden asserts that, under the Secretary's interpretation, operators would be required to test thousands of additional cords, Tilden offers no factual support for this claim.[3]

Accordingly, we conclude that the Secretary's inclusion of extension cords within the definition of "grounding systems" is reasonable and deserves deference.

B. The Secretary's application of extension cords and power cables to "grounding systems" is an interpretive rule that did not require notice-and-comment rulemaking.

We find that the Secretary's approach did not require additional rulemaking. The Administrative Procedure Act (APA) has several exceptions to the mandatory proposed rulemaking procedures for administrative agencies. The relevant exception here is that notice-and-comment rulemaking procedures do not apply to "interpretative rules," as opposed to legislative rules, which would require notice-and-comment rulemaking. 5 U.S.C. § 553(b)(3)(A), (B). A legislative rule is one that substantively amends the language of a regulation, whereas an interpretive rule clarifies or explains the regulation's existing language. *See, e.g., Philips Petroleum Co. v. Johnson*, 22 F.3d 616, 619-21 (5th Cir. 1994); *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331-33 (D.C. Cir. 1952).

We agree with the Judge that the Secretary's application of extension cords to "grounding systems" clarifies and explains the language of the standard, and is thus an interpretive rule. 33 FMSHRC at 881-83. As stated above, the Secretary's approach is a reasonable interpretation of section 56.12028. Accordingly, it did not require notice-and-comment rulemaking.

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[3] The Secretary states that the term "installation" in section 56.12028 only requires that continuity and resistance testing be done when an extension cord or cable is first put into use, as opposed to every time the cord or cable is subsequently plugged in. He further states that this interpretation does not impose an undue burden. *See* Sec. Response Br. at 14.

C. The existence of the 1988 PPM does not require the Secretary to undertake notice-and-comment rulemaking.

The fact that the Secretary's interpretation is arguably inconsistent with his prior interpretation in the 1988 PPM does not require the Secretary to undertake notice-and-comment rulemaking. The operator argues that the 1988 PPM had expressly exempted "grounding conductors in trailing cables, powers cables, and cords which provide power to portable or mobile equipment" from continuity and resistance testing requirements, and that MSHA's 1994 PPL subsequently reversed its position on this issue. TM Opening Br. at 13-14, *quoting* PPM at 52 (1988). Tilden relies on the D.C. Circuit's decision in *Alaska Professional Hunters v. Federal Aviation Administration*, 177 F.3d 1030, 1034 (D.C. Cir. 1999), which states 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."

The operator's reliance on *Alaska Hunters* is misplaced. That decision is readily distinguishable from the present case.[4] *Alaska Hunters* has been interpreted by the D.C. Circuit narrowly. Under the decision, a requirement for notice-and-comment rulemaking was only triggered when an agency's previous interpretation was sufficiently definitive to justify a regulated party detrimentally relying on it. *See, e.g., Air Transp. Ass'n of America, Inc. v. FAA*, 291 F.3d 49, 56-58 (D.C. Cir. 2002); *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 579-80 (D.C. Cir. 2010). MSHA's original 1988 PPM was not definitive. Moreover, the operator cannot show substantial and justifiable reliance because it only alleges reliance on a non-precedential decision of an Administrative Law Judge rather than on MSHA's prior interpretation.

MSHA's 1988 interpretation was not definitive because it was internally inconsistent and therefore ambiguous with respect to whether section 56.12028 required annual testing of cables and cords. The operator's assertion that the 1988 PPM excepted the cables at issue here, stating that the annual test "does not apply to grounding conductors in trailing cables, power cables and cords," was contradicted by the very next sentence in the PPM, which stated that the same cables "require[d] more frequent testing," even though such testing was not mandated under any other standard.[5] PPM at 52 (1998). MSHA's transition from the ambiguous interpretation in the 1988 PPM to the clarified interpretation in the 1994 PPL therefore did not require notice-and-comment rulemaking. In *Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Administration*,

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[4] The Commission notes that the Supreme Court has granted certiorari to decide the general validity of the *Alaska Hunters* doctrine. *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom. Perez v. Mortgage Bankers Ass'n*, 82 U.S.L.W. 3533 (U.S. June 16, 2014) (No. 13-1041). However, we need not reach this issue because, as stated above, *Alaska Hunters* does not apply here.

[5] To add to the ambiguity, although the 1988 PPM specifically stated that the "annual" test did not apply, it was silent as to whether testing nevertheless applied to trailing cables, power cables and cords under section 56.12028 when installed, modified or repaired.

296 F.3d 1120, 1126 (D.C. Cir. 2002), the D.C. Circuit held that prior regulatory guidance that "offer[ed] some support for the positions of both" parties could therefore "only be described as—at best—ambiguous." A change to ambiguous guidance does not require notice-and-comment rulemaking because it "cannot be said to mark a definitive interpretation from which the agency's current construction is a substantial departure." *Id.*

Furthermore, the operator cannot show substantial and justifiable reliance here because: (1) it does not allege any reliance on the prior interpretation, and any reliance it might allege would not be sufficiently substantial; (2) the operator's alleged reliance on *Hibbing Taconite* does not trigger the *Alaska Hunters* rule; and (3) even if the operator's alleged reliance on *Hibbing Taconite* triggered *Alaska Hunters*, such reliance would not be justifiable in light of later events.

In *Alaska Hunters*, the Court placed great emphasis on the fact that the Alaskan guide pilots substantially relied on the prior agency interpretation when they made capital expenditures and significantly altered business practices. 177 F.3d at 1035. *Alaska Hunters* does not apply here because the operator did not make any such investments or other significant business decisions in reliance on MSHA's prior interpretation. *Cf. Ass'n of Am. R.R. v. Dep't of Transp.*, 198 F.3d 944, 950 (D.C. Cir. 1999). Indeed, the operator does not assert that it made any business decisions in reliance on the interpretation prior to the interpretive change in 1994. Rather, the operator asserts only that it relied upon the Judge's ruling in *Hibbing Taconite* from 1999 onward to justify its non-compliance with MSHA's interpretation of the standard.

The operator's reliance on the Judge's decision in *Hibbing Taconite* does not trigger application of *Alaska Hunters*. It is clear that ALJ decisions have no precedential value. Commission Procedural Rule 69(d), 29 C.F.R. § 2700.69(d). Under the operator's theory of reliance, however, MSHA would nonetheless be required to engage in notice-and-comment rulemaking any time it enforced a regulation in a manner contrary to a non-precedential decision by a Judge. This theory has no support in the reasoning of *Alaska Hunters* or its progeny, which deal only with reliance on a definitive prior agency interpretation.

Even if, assuming arguendo, substantial reliance on a non-precedential adjudication could trigger *Alaska Hunters'* notice-and-comment rulemaking requirement, such rulemaking would still not be necessary here because the operator's reliance is unjustifiable in light of subsequent events. As the operator itself concedes, MSHA reiterated its 1994 interpretation of "grounding systems" when it published the revised PPM in 2003. PPM at 44-45 (2003). Thus, even if the operator had erroneously believed that MSHA had abandoned its 1994 interpretation when the Secretary decided not to appeal in the *Hibbing Taconite* decision, the 2003 PPM put the operator on notice that it had incorrectly perceived MSHA's position.

D. The operator had actual notice of MSHA's position regarding its interpretation of "grounding systems."

As stated above, MSHA reiterated its 1994 interpretation of "grounding systems" when it published the revised PPM in 2003, five years before the Secretary undertook the current enforcement action. Therefore, the 2003 PPM provided actual notice to the operator of MSHA's

enforcement position. Due process is satisfied when an agency gives actual notice of its interpretation prior to enforcement. *See, e.g., Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996) (holding that actual notice was provided by MSHA prior to issuance of citation); *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that agency's pre-enforcement warning to bring about compliance with its interpretation will provide adequate notice).

III.

Conclusion

For the reasons stated above, we affirm the Judge's denial of Tilden's motion for summary decision and his granting of the Secretary's cross-motion for summary decision.

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Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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