FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 26 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2012-519
v.	:	
M-CLASS MINING, LLC	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This 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 Order No. 8432253, issued to M-Class Mining, LLC ("M-Class") by the Department of Labor's Mine Safety and Health Administration ("MSHA").

The order alleges that a miner failed to wear gloves while performing work on energized electrical equipment, resulting in a violation of 30 C.F.R. § 75.1720(c).[1] The alleged violation was designated as significant and substantial ("S&S"), highly negligent, and a result of the operator's unwarrantable failure to comply with the safety standard. MSHA proposed a penalty of $41,500 for this violation.

M-Class and the Secretary of Labor each filed motions for summary decision regarding the validity of this order. The Judge granted M-Class's motion for summary decision, denied the Secretary's cross-motion for summary decision, and vacated the order. 39 FMSHRC 839, 849 (Apr. 2017) (ALJ). In doing so, the Judge drew an inference favorable to the movant, M-Class.

Upon review, the Commission vacates the Judge's summary decision in favor of M-Class and remands the case for further proceedings in accordance with this decision.

[1] Section 75.1720(c) requires a miner to wear "[p]rotective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment." 30 C.F.R. § 75.1720(c).

I.

Factual Background

On May 23, 2011, Mark McCurdy, a maintenance foreman and certified electrician, was working at M-Class's #1 Mine, a large underground coal mine in Macedonia, Illinois. During his shift, he tried to determine why a continuous mining machine intermittently stopped functioning. 39 FMSHRC at 841. McCurdy checked the machine's external radio circuits and internal wiring. He also checked it for loose parts, the range of the remote, and reviewed the machine's computer log. *Id.* While making these checks, McCurdy alternately turned the machine off and on several times.

After initially turning the machine off and locking out its power center, he checked its remote and external radio circuitry. He opened the cover of the control panel of the machine to check its internal wiring. McCurdy then restored power to the machine and turned the machine back on. After doing so, he operated the remote in order to bump the head of the machine, *i.e.,* shake the machine to cause a shutdown. McCurdy reviewed the machine's computer log for any record of malfunctioning components. He did not wear gloves while operating the remote because he testified that he thought that he might inadvertently press the wrong buttons on the remote.

McCurdy then used the control breaker to repeatedly reboot the machine. After rebooting, he again checked the computer log for any changes as a result of the reboot. He turned the machine off, again, and locked out the power center. After doing so, he rechecked the internal wiring, which had remained uncovered since he first turned off the machine. He then restored power to the machine and turned it back on, and again operated the remote to bump the head of the machine. In addition, he checked whether the limited range of the remote was causing the machine to intermittently stop functioning. After that check, McCurdy left the immediate area of the machine to talk with two other miners who were changing a tire on a shuttle car.

When he returned, the internal wiring of the machine remained exposed and energized since the last time he had examined the machine. McCurdy did not put on the gloves that were lying on the machine. He testified that he knelt down in front of it, and looked at the electrical panel, trying to decide what to do next. McCurdy Dep. at 19, 36. He testified, "then next thing I know I was beside the miner getting shocked." Dep. at 18. McCurdy stated that he could not remember how his finger contacted a live wire.

The Judge found there was no evidence to contradict McCurdy's recounting of the events, that McCurdy was credible, and that the Secretary did not challenge McCurdy's credible recounting of the events.[2] McCurdy was hospitalized for one day as a result of the electric shock.

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[2] During MSHA Inspector Robert Bretzman's deposition, however, he differentiated between troubleshooting and performing electrical work within the controller box. He testified that he believed that McCurdy inserted his hand into the controller box and, at that point, he was

MSHA Inspector Robert Bretzman subsequently investigated the accident. On May 24, 2011, MSHA issued Order No. 8432253 to the operator as a result of the accident. The order alleged a violation of 30 C.F.R. § 75.1720(c). This standard requires miners to wear "[p]rotective gloves when handling materials or performing work which might cause injury to the hands" unless such gloves "would create a greater hazard by becoming entangled in the moving parts of equipment." The order alleged that McCurdy was troubleshooting the energized traction controller without wearing gloves in violation of 30 C.F.R. § 75.1720(c). The order also asserted that the action was aggravated conduct constituting an unwarrantable failure.

The Secretary and M-Class each moved the Judge for summary decision relying upon deposition testimony. The Judge denied the Secretary's cross-motion for summary decision and granted summary decision in favor of M-Class. The Judge found that the Secretary had failed to prove a violation, *i.e.*, he had not shown by a preponderance of the evidence that McCurdy failed to wear gloves while performing work which might cause injury to his hands. As a result, the Judge vacated the order. 39 FMSHRC at 848-49.

The deposition testimony discussed an "imaginary line" that, when crossed, establishes a miner is "working" on energized equipment. From the testimony and exhibits, it is clear this "imaginary line" is a degree of proximity to a live wire, the crossing of which, according to the Secretary, requires use of personal protective equipment such as gloves.

The Judge concluded that the facts were undisputed and that the Secretary failed to carry his burden of proof. The core of the Judge's ruling was:

> McCurdy's testimony indicates he was knowledgeable and trained in proper procedures, such as the convention against crossing the "imaginary line" into an energized electrical panel, and exhibited proper respect for them; he was an experienced electrician who would not be expected to intentionally or needlessly expose himself to potentially fatal injuries by reaching into an energized panel barehanded. I find the evidence insufficient for the Secretary to prevail on an argument that McCurdy was tracing wires or performing other work that posed a risk of injury to his hands at any one time when he was not wearing gloves.

Id. at 848 (citations omitted).[3]

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no longer troubleshooting, but instead, was performing work within the box. Bretzman Dep. at 65-68.

[3] The Judge also found that:

> [T]he Secretary's evidence is insufficient to . . . rule out the possibility that [McCurdy's] contact with the unidentified electrical component resulted from a loss of balance, a fall, or some other inadvertent motion that led him to accidentally contact the

In addition, the Judge rejected the Secretary's interpretation of the standard "that gloves must be worn at all times whenever a miner is troubleshooting." *Id.* at 847. In doing so, the Judge stated that such an interpretation was contrary to an exception allowing miners to not wear gloves when doing so would pose a greater hazard.

II.

Standard of Review

The Commission reviews a summary decision de novo. *See Lakeview Rock Prods., Inc.* 33 FMSHRC 2985, 2988 (Dec. 2011). When reviewing a record on summary decision, a Judge must evaluate the evidence in the light most favorable to the non-moving party. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Consequently, "inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *see also Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962).

Summary decision should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (internal quotations omitted). Summary decision is appropriate only if there are no material facts in dispute and the movant's position is entitled to judgment as a matter of law. *West Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1886-87 (Sep. 2015). When the record before the Judge contains disputed material facts, the proper course of action is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining, Co.*, 17 FMSHRC 1313, 1316-17 (Aug. 1995). Cross-motions for summary judgment must be considered separately and on their own merits. *Hanson*, 29 FMSHRC at 10.

III.

Disposition

The Secretary presents three arguments on appeal. Two are disposed of easily. The third requires remand.

> electrical panel. The regulation cannot have intended to punish him for accidentally contacting a live wire when the Secretary cannot prove he was taking the sort of foreseeable risk that would have obligated him to wear gloves.

39 FMSHRC at 847.

A. The Secretary Wrongly Argues that the Standard Requires the Wearing of Gloves whenever a Miner is "Troubleshooting" an Electrical Problem.[4]

The Secretary sweeps too broadly in contending that, with one limited exception, all "troubleshooting" of electrical components requires a miner to wear gloves. An initial and obvious deficiency is that the Secretary does not attempt to define the nature of activities that constitute "troubleshooting." Use of a broad and completely undefined term to establish the parameters of a violation requiring imposition of a civil penalty raises immediate and insuperable notice difficulties. It is fair to state, for example, that the first step of troubleshooting is thinking about the problem and ways in which one might solve the problem. This could include looking at schematics and/or a host of other activities at a distance from a machine that do not present any danger to a person's hands. It would be entirely unnecessary, if not impractical, to require gloves under those circumstances. Certainly, that is not the aim of a standard intended to protect miners from the danger of touching exposed live wires.

Separately, although the facts of a given situation may cause application of the standard to be a close case, the standard itself is quite clear. It requires the wearing of gloves "when handling materials or performing work which might cause injury to the hands." Clearly, this standard may present disputed issues of whether a miner is performing work fairly determined to be within the scope of the standard. However, the standard provides clear notice to the regulated parties and a standard against which to judge a Respondent's actions. The Judge correctly rejected the Secretary's contention that section 75.509 in Volume 5 of MSHA's Program Policy Manual means that all troubleshooting requires use of gloves.[5] V MSHA, U.S. Dep't of Labor, Program Policy Manual Part 75, at 53 (Feb. 2003).

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[4] As a second argument, the Secretary contends that the Judge misinterpreted the standard because the Judge read an exception into the standard that the standard does not contain. The Judge's observation regarding the removal of gloves to facilitate handling of the remote was only for rejecting a contention that the nature of troubleshooting could be determined on the basis of whether the miner was or was not wearing gloves. 39 FMSHRC at 847. The Judge's reference to the exception did not read an additional exception into the standard. It merely directed attention to the fact that the focus of the standard is on whether the miner's actions create a danger of injury to his hands.

[5] As noted above, Inspector Bretzman differentiated between troubleshooting and performing electrical work within the controller box. Bretzman Dep. at 20. Bretzman's belief was that McCurdy inserted his hand into the controller box and, at that point, he was no longer troubleshooting but performing work within the box. Apparently, MSHA's position before the Commission is that a miner must always wear gloves during "troubleshooting" even if that person is just thinking about the problem or not close to the electrical source. This makes no practical sense. Our dissenting colleagues apparently draw the same illogical conclusion in asserting "[t]his type of intellectual deliberation occurring next to energized equipment counts as work as much as any physical labor McCurdy undertook in his attempt to repair the miner–in fact, it is an integral part of the repair process." Slip op. at 2. On summary judgment, the record was devoid of evidence to support our colleagues' conclusory inference that the intellectual deliberations, in this case, constituted not merely "work" but "work which might cause injury to

We cannot vary from the plain words of the standard because parties may sometimes disagree whether the work presented a danger of injury to the hands. Such factual disputes are the gravamen of many Mine Act hearings.[6]

B. The Judge Impermissibly Drew an Inference Favorable to the Movant in Granting Summary Decision.

The Secretary contends that the Judge erred at the summary decision stage by making an inference favorable to the Respondent—namely, that the Secretary could not prove McCurdy was performing work that created a foreseeable risk of injury to his hands. We agree.

Section 75.1720(c) is a broad standard. The Commission has consistently applied the reasonably prudent person test to broadly-worded standards. *See, e.g., U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005). In *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1626-27 (July 2016), the Commission stated that certain standards are "drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine." It ruled that such broadly-worded standards are appropriate for application of the reasonably prudent person test.

Under this test, an alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard within the purview of the applicable regulation. *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 711 (Aug. 2008); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). In this case, the miner was a certified electrician. Consequently, the outcome-determinative issue is whether a reasonably prudent certified electrician, familiar with the hazard, should have recognized a risk of injury to his hands, thus requiring the use of gloves.

The record before the Judge did not present a sufficient basis for a final determination of this issue. The Judge's finding that the Secretary could not prove his case amounts to an

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the hands." Indeed, the purpose of remand is to allow presentation of evidence on this outcome-determinative point. We simply do not give either party the benefit of a conclusory inference.

[6] Excising one sentence from the Judge's decision, our colleagues suggest that the gravamen of the Judge's decision was a finding that McCurdy was not "performing work." Slip op. at 2. That is incorrect. The Judge found that the Secretary did not prove by a preponderance of the evidence that McCurdy was engaged in work that might cause injury to his hands. The Judge held "[t]he regulation cannot have intended to punish him for accidentally contacting a live wire when the Secretary cannot prove he was taking the sort of foreseeable risk that would have obligated him to wear gloves." 39 FMSHRC at 847. Thus, rather than inserting an "intent" requirement into the regulation, the Judge applied the burden of proof standard to the Secretary's obligation to prove McCurdy was engaged in work "which might cause injury to the hands . . . ." 30 C.F.R. § 75.1720(c). Similarly, the operator did not rely upon an absence of any work but rather absence of proof that the miner's specific activity might cause injury to his hand. Resp't's Resp. in Opp. to PDR at 5, 8-9.

inference that, upon a hearing on a full record, the Secretary could not prove a violation. The drawing of such an inference constituted error. There remain disputed and/or unresolved facts and issues, the resolution of which could be outcome-determinative. To be clear, the issue is *not* the specific act McCurdy was doing when he was shocked. It is not a matter of differentiating between whether he was thinking about what to do next, versus whether he was inserting his hands into the equipment. The miner need not be intentionally working on the equipment itself if the task he is performing poses a risk of injury.

Inferentially, the Judge concluded that the evidence did not prove McCurdy inserted his hand into the controller box to trace wires, but only that he was kneeling before the controller box and thinking about what to do next when an accident occurred. That is not the end of the case if, under the specific circumstances at the site, a reasonable certified electrician kneeling before the controller box would have put on gloves to mitigate a risk of injury.

From the deposition testimony and briefing of the parties, it appears that three interrelated facts bear on whether McCurdy should have recognized a risk of injury to his hands requiring the donning of gloves. These are: (1) the positioning of the miner's hands, (2) the electrical source of potential danger, and (3) the entire range of mine-specific circumstances that might affect the risk of danger in light of the source of danger and actions of the miner.

Without doubt, an immediate question that arises in this case is the proximity of the miner's hands to the power source as he knelt before the controller box. The regulation does not seek to prevent only intentional contacts with live wires but also contacts that might result from an inadvertent movement. Therefore, the miner must keep his hands at a distance from the power source sufficient to mitigate the likelihood of touching an exposed wire. At the same time, this does not mean that every accidental contact is a per se violation of the standard. Again, the standard requires an examination of the actions of a miner under the specific circumstances unique to the facts of the case. If, here, the miner was acting reasonably, an inadvertent action would not give rise to a violation.

This leads to a second important consideration. In addition to the deposition testimony about an imaginary line, the Secretary's Petition for Discretionary Review refers to a number of reports by safety agencies and institutions regarding the risk of shock. These reports discuss and advise upon the distance at which a person should put on personal protective equipment when approaching a live electric power source. These include a manual published by the National Institute for Occupational Safety and Health ("NIOSH"). NIOSH, *Electrical Safety, Safety and Health for Electrical Trades, Student Manual Revised Edition* Pub. 2009-113 (April 2009), https://www.cdc.gov/niosh/docs/2009-113/pdfs/2009-113.pdf. The publication discusses "approach boundaries" characterized as a key to protecting oneself from electric shock.[7]

[7] The NIOSH manual states that the boundaries are drawn from the National Fire Protection Association's NFPA 70E. NFPA, *Standard for Electrical Safety in the Workplace*, 70E (2018 Ed.). That publication defines a "limited approach boundary" as "[a]n approach limit at a distance from an exposed energized electrical conductor or circuit part within which a shock hazard exists." *Id.* at 70E-10. In turn, "a restricted approach boundary" is "[a]n approach limit

From these sources, it is clear even to laymen that an important consideration of the danger to hands is the source of the possible shock, including the voltage at such source. The strength of the source of the danger is an element of the distances to which trained and qualified persons may approach the electric source without personal protective equipment.

Here, McCurdy testified that he was kneeling in front of the controller thinking about what to do. Essentially, therefore, McCurdy testified he was not working on the controller box but simply thinking about what he would do next. However, that testimony does not provide any information at all about the danger of electrical components in the control box or the distance of his hands from the box as he, according to his testimony, considered a next step. With McCurdy having testified to an absence of memory, and two more years having passed, it may be unlikely that a hearing will produce much more evidence on this subject. However, evidence, including testimony about prior troubleshooting instances and/or about the strength and danger of the electrical components in the box, may be helpful in deciding the reasonableness of McCurdy's decision not to don the gloves.

Finally, other circumstances specific to the particular event may come into play. As noted, the Judge may seek testimonial evidence regarding McCurdy's past practice when troubleshooting energized electrical components, relevant industry and his own practices regarding the use of protective gloves in close proximity to energized electrical wiring of continuous mining machines, and ground and lighting conditions at the time of the shock. For example, were the ground conditions at the site stable, dry, wet, rough, or otherwise relevant to any danger? Was the current on the machine direct or alternating?[8] Could McCurdy's hand have been attracted to the wire?[9] Where in the controller box was the wire located that was touched by McCurdy? Was it located in an area prone to incidental contact or does its position make an inadvertent contact unlikely?

Although there were cross-motions for summary decision, from the foregoing, it is clear that summary decision was inappropriate. The Judge inferred that McCurdy never intentionally touched the energized wires barehanded, even though an inspector's notes suggested that McCurdy did so. 39 FMSHRC at 848; *see also* Inspector Bretzman's notes on May 23, 2011 at

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at a distance from an exposed energized electrical conductor or circuit part within which there is an increased likelihood of electric shock, due to electrical arc-over combined with inadvertent movement." *Id.* The "prohibited approach boundary" is the distance you must stay from exposed live parts to prevent flashover or arcing in air. We do not delve into the specific of these texts. It is sufficient to note that such manuals contain discussions of the location of a qualified person's hand vis-à-vis the need for personal protective equipment in light of the source of a potential shock. They may provide a basis for expert testimony or analysis.

[8] Inspector Robert Bretzman testified in his deposition that he was trying to determine whether McCurdy "was into something other than the 110." Bretzman Dep. at 64.

[9] Inspector Bretzman testified that he was concerned "because [McCurdy] was locked into the power and it was not—it's not my experience that 110 will lock you in that hard to where you can't get out." *Id.* at 63.

16 (stating that McCurdy traced energized wires immediately prior to the shock). Further, the Judge assumed that McCurdy, as an experienced electrician, would never have exposed himself to potentially fatal injuries by reaching into the energized panel barehanded. 39 FMSHRC at 848.

In short, on M-Class' motion, the Judge viewed critical evidence in the light most favorable to M-Class, the party that moved for summary decision—not the Secretary. This was erroneous. The finding that the Secretary did not present sufficient evidence to prevail, however, does not mean that the Secretary could not prevail at a hearing where evidence is presented on such matters, as discussed above.

IV.

Conclusion

We hereby vacate the Judge's decision and remand this case for further proceedings in accordance with this decision.

Marco M. Rajkovich, Jr., Chairman

Michael G. Young, Commissioner

William I. Althen, Commissioner

Commissioners Jordan and Traynor, concurring in part and dissenting in part:

Although we agree with our colleagues that the Judge erred in granting summary decision to M-Class, we believe no remand is required regarding the issue of whether a violation of 30 C.F.R. § 75.1720 occurred. On that question, we conclude that summary decision for the Secretary is appropriate. Remand is only necessary to determine whether the citation was properly designated significant and substantial and resulted from the operator's unwarrantable failure, and to determine the level of negligence and the amount of the penalty.

The cited standard requires miners to wear protective gloves when handling materials or performing work which might cause injury to the hands.[1] Notably, the standard at issue does not require a *likelihood* of injury to the hand–it only requires a *possibility* of injury to the hand. Here, of course, there is no need to consider the possibility that McCurdy's actions might result in injury; it is undisputed that McCurdy's hand *was* injured. The relevant question is therefore would a reasonable miner have foreseen that possibility of injury and therefore understood the corresponding need to wear gloves?

McCurdy's injury occurred during his attempts to fix the continuous miner. After taking a number of steps to figure out why the machine was intermittently losing power, McCurdy left to check on two miners working on a shuttle car in the crosscut. When he returned, he paused momentarily, kneeling in front of the energized continuous miner and its open electrical panel. He was thinking about what to do next, with his gloves sitting on top of the machine and his tools sitting on the machine and in his bibs. *Id.* at 848. He testified that he was "[l]ooking in the panel" and specified: "I was knelt down beside the miner . . . . I remember kneeling down beside the panel." McCurdy Dep. at 18-19.

McCurdy's testimony as to what happened immediately prior to his injury is very sparse. McCurdy states that the only thing he recalls after kneeling down beside the panel is that he was "beside the [machine] getting shocked." McCurdy Dep. at 18. He had touched an energized wire without wearing gloves, and could not pull his hand away. Two miners pulled him out of the current. He was hospitalized overnight. 39 FMSHRC at 841.

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[1] The standard states in relevant part:

> [E]ach miner regularly employed in the active workings of an underground coal mine shall be required to wear the following protective clothing and devices:
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> . . .
>
> (c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.

30 C.F.R. § 75.1720.

The operator speculates that McCurdy tripped or fell in the control panel when getting up from his kneeling position. Resp't's Resp. in Opp. to PDR at 8. Even assuming this to be the case, a miner who positions himself in such proximity to energized wires so that a loss of balance could result in an inadvertent contact should have foreseen the possibility of injury and the corresponding need to wear gloves.

This is so because any miner knows that working on energized electric equipment is the exception, not the rule, and as the Secretary notes, should be viewed as a "situation of last resort." S. Reply Br. at 5. Section 75.509 mandates that electric equipment be de-energized before work is performed, except when necessary for troubleshooting or testing. If this exception is invoked and the machinery is not de-energized, section 75.1720 then requires that protective gloves must be worn when performing work that might cause injury to the hands.[2] McCurdy himself acknowledged, in an interview with an MSHA inspector at the hospital after the accident, that he realized he should have left his gloves on. Inspector Bretzman's Declaration at 4.

Noting that the standard in question requires gloves to be worn only when "*performing work* that might cause injury to the hands" (emphasis added), M-Class seeks to avoid liability by contending that McCurdy's action of pausing and kneeling by the mining machine to consider what steps he needed to take to repair it cannot be considered "performing work."[3] However, in light of the undisputed facts in this case, the only reasonable inference that can be drawn is that McCurdy was performing work. It appears that our colleagues in the majority agree. Slip op. at 7. McCurdy was assigned a job–to repair the continuous miner–and took a variety of steps to complete it. He was engaged in an activity performed every day by miners–fixing machinery. His painstaking efforts to discover why the continuous miner was broken show that he was diligently trying to complete his assigned task.

When McCurdy knelt by the machine and paused to consider what steps he needed to take to repair it, he was still "performing work." As he stated: [I was] [t]rying to go through my head to figure out what else I could do to make this machine drop out." Dep. at 19. This type of intellectual deliberation occurring next to energized equipment counts as work as much as any physical labor McCurdy undertook in his attempt to repair the miner–in fact, it is an integral part of the repair process. Moreover, rather than considering each of his actions separately as he tried to figure out what was wrong with the continuous miner, we must take into account the totality of his conduct leading up to the moment he was shocked. Clearly, his numerous attempts to

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[2] The Commission has acknowledged the importance of wearing protective gloves. In a case involving a violation of 30 C.F.R. § 75.509 (requiring that equipment be de-energized before work is done, except when necessary for troubleshooting or testing), we noted that although the miner wore gloves in performing repairs, when he used his bare hand to lift stray wires inside an energized electrical panel and out of the way, he "made a serious error in taking the gloves off prematurely." *American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017).

[3] The operator claims that there is no violation of section 75.1720(c) if a miner accidentally falls into an energized control panel without wearing gloves, because "[t]hat is an accident, not 'handling materials or performing work.'" Resp't's Resp. in Opp. to PDR at 9.

discover why the machine was not properly operating–including his effort, just prior to being shocked, to think through the process and figure out his next steps–constitute "performing work."

The Judge's ruling that McCurdy was not "performing work" was erroneous. She stated that:

> I find that the Secretary has failed to prove by a preponderance that McCurdy was engaging in work at the moment the accident occurred. It was a completely inadvertent and unforeseeable occurrence. I find, therefore, that the evidence is insufficient for the Secretary to prevail on this argument.
> . . .
>
> [t]he Secretary's evidence is insufficient to establish exactly what [the miner] was doing at the time he was shocked or to rule out the possibility that his contact with the unidentified electrical component resulted from a loss of balance, a fall, or some other inadvertent motion that led him to accidentally contact the electrical panel. The regulation cannot have intended to punish him for accidentally contacting a live wire when the Secretary cannot prove he was taking the sort of foreseeable risk that would have obligated him to wear gloves.

39 FMSHRC at 846-7.

In so holding, the Judge improperly inserted an intent requirement into the Secretary's burden of proof.[4] As previously discussed, the Secretary did not need to prove that McCurdy deliberately touched the wire. The health and safety standards promulgated under the Mine Act protect miners from harm resulting from accidents and unintentional acts as well as from intentional conduct that is unsafe. Consequently, inadvertent contact with an energized panel is encompassed in the protection afforded by this safety standard.

Despite the Judge's errors, we fail to see the need to remand this eight-year old case to the Judge for a hearing. The majority states that there are disputed facts that must be resolved before one can determine that a reasonably prudent miner would have worn gloves under the circumstances presented here. We disagree.

Let us examine the three factual areas that the majority suggests should be considered on remand:

First, our colleagues request information on "the proximity of the miner's hands to the power source as he knelt before the controller box." Slip op. at 7. As discussed above, it is undisputed that McCurdy was kneeling by an energized panel on the continuous miner, and this alone, in our view, places his hands in a location where they might be injured (and thus gloves

[4] We would submit that nobody intends to touch an energized wire.

were required). Moreover, as a practical matter, we are hard-pressed to see how this evidence would be obtained on remand. As the majority recognizes, in his deposition (taken two and a half years ago), McCurdy stated that he remembered kneeling down beside the panel and looking at it. McCurdy Dep. at 19. When asked what happened next, he stated that "[s]omehow I touched the 110 wire or touched an energized wire." McCurdy Dep. at 22. McCurdy testified that he had no explanation of how he went from kneeling in front of the machine to being caught by the power. McCurdy Dep. at 36. The majority nonetheless remands to determine the distance of his hands from the box as McCurdy considered his next step. Slip op. at 8. Given that he was kneeling by the machine, we consider this specific inquiry immaterial–and we would be surprised if McCurdy (the only witness to the event, prior to his rescue by his fellow miners) would be able to supplement his deposition testimony with more elaborate detail as to where exactly his hands were positioned. In fact, our colleagues appear to share this concern. *Id.*

Second, our colleagues remand for a determination of the electrical source of potential danger–that is, the danger of the electrical components in the control box. *Id.* They state that this evidence may be useful in deciding whether McCurdy was reasonable when he failed to wear the protective gloves.

Again, we do not consider this a material fact for the inquiry at hand. Here is what we already know: McCurdy touched a wire and tried to pull his hand away. He "screamed" and "tried to pull back." Dep. at 22. Two hourly mine workers responded to his screams and pulled him out of the electrical current. Inspector Bretzman's Declaration at 2. Clearly, whatever the magnitude of the electrical components in the box, they were strong enough to shock McCurdy and send him to the hospital. No further evidence is needed–and we suspect none can be developed, given McCurdy's hazy memory of this long-ago event.

In addition to these concerns, we would be reluctant to remand this case for the remaining reasons set forth by the majority–so that the Judge may examine "the entire range of mine-specific circumstances that might affect the risk of danger in light of the source of danger and actions of the miner." Slip op. at 7. The majority fails to explain why, given the fact that McCurdy received a severe shock, the Judge on remand should examine ground conditions at the site, the type of current on the machine, and the exact location of the wire that McCurdy touched. Given what we already know, this appears to be extraneous evidence that probably will be difficult, if not impossible to obtain. Indeed, in terms of pinpointing the location of the wire, the inspector's notes indicate that McCurdy told him that he did "not remember what he touched, everything is a blur. . . . McCurdy was not able to provide evidence to conclude what he touched in [the] panel." Inspector Bretzman's notes on May 23, 2011 at 16-17.

In conclusion, in light of the undisputed facts, and as a matter of law, M-Class violated section 75.1720. Thus summary decision for the Secretary is appropriate. The Judge's ruling should be reversed, summary decision granted for the Secretary, and the case remanded for a determination regarding whether the violation was "significant and substantial," the level of negligence, unwarrantable failure, and the penalty.

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