

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 12-2249

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NORTHSHORE MINING COMPANY,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

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

Respondents.

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ON PETITION FOR REVIEW OF A DECISION  
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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BRIEF FOR THE SECRETARY OF LABOR

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## SUMMARY OF THE CASE

The Secretary of Labor takes exception to Northshore Mining Company's argumentative Summary of the Case and therefore submits her own. This case arises under the Federal Mine Safety and Health Act of 1977, as amended. At issue is a citation issued to Northshore by the Mine Safety and Health Administration ("MSHA") alleging a violation of 30 C.F.R. § 56.12016. That standard requires that before mechanical work is done on electrically-powered equipment, the equipment must be deenergized and the power switches must be locked and tagged out to prevent the equipment from becoming energized without the knowledge of the persons working on it. The administrative law judge found that Northshore's opening and locking/tagging out of circuit breakers -- rather than opening and locking/tagging out the knife switch insisted on by MSHA -- violated the standard. The Federal Mine Safety and Health Review Commission denied discretionary review. Northshore seeks reversal of the ALJ's decision. The Secretary has no objection to Northshore's request for a 20-minute oral argument.

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## STATEMENT OF JURISDICTION

Northshore Mining Company's statement of jurisdiction is correct but incomplete. Northshore fails to include two facts essential to the Court's jurisdiction.

- First, Northshore neglects to identify where the violation at issue in this case was alleged to have occurred. One of the jurisdictional requirements of 30 U.S.C. § 816(a)(1), under which the Court has jurisdiction, is that the violation at issue was alleged to have occurred within the Court's geographical jurisdiction. The violation at issue in this case was alleged to have occurred in St. Louis County, Minnesota, which is within the geographical jurisdiction of this Court.

- Second, Northshore neglects to identify the date on which it filed its petition for discretionary review of the administrative law judge's ("ALJ's") March 20, 2012, decision with the Federal Mine Safety and Health Review Commission. A petition for discretionary review must be filed within 30 days of the date of the ALJ's decision. 30 U.S.C. § 823(d)(2)(A)(i). Northshore complied with this requirement, having filed its petition for discretionary review with the Commission on April 13, 2012. Consequently, the Commission had jurisdiction to review the ALJ's decision, although it declined to do so, and Northshore preserved its right to petition this Court for review.

## STATEMENT OF THE ISSUES

The citation at issue alleges that Northshore violated 30 C.F.R. § 56.12106, which requires an operator to “deenergize” electrically-powered equipment before performing mechanical work on it, and to lock and tag out the power switches so that the equipment cannot become energized without the knowledge of the persons working on the equipment.

1. Does Section 56.12016 apply when the hazard presented by mechanical work is movement of the equipment as opposed to electrical shock?

Most apposite cases and provisions: *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065 (2012); *Phelps Dodge v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982) (Boochever, J., dissenting); 30 C.F.R. §§ 56.12016, 56.14105.

2. Did Northshore violate Section 56.12016 as a matter of law when it neither visually confirmed that the flow of current was interrupted nor prevented the equipment from becoming energized without the knowledge of the person working on it?

Most apposite cases and provisions: *SmithKline Beecham, supra*; *Thomas & Wong General Contractor v. The Lake Bank*, 553 F.3d 650 (8th Cir. 2009); 30 C.F.R. §§ 56.12006, 56.12016.

## STATEMENT OF THE CASE

### A. Nature of the Case

This case arises under the Federal Mine Safety and Health Act of 1977 (“the Mine Act” or “the Act”). The Mine Act was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. § 801. The Act provides the Secretary, acting through MSHA, the authority to promulgate health and safety standards for mines, to conduct regular inspections, to issue citations and orders for violations of the Act or the standards, and to propose penalties for those violations. 30 U.S.C. §§ 811(a), 813(a), 814(a), 815(a), 820(a); *see generally Pattison Sand Co., LLC v. FMSHRC*, \_\_\_ F.3d \_\_\_, 2012 WL 3079200, \*3 (8th Cir. July 31, 2012).

At issue in this case is a citation alleging a violation of one of MSHA’s safety standards, *i.e.*, 30 C.F.R. § 56.12016. That standard states that before mechanical work is done on electrically-powered equipment, the equipment must be “deenergized.” The standard further states that the power switches must be locked out or other measures taken “to prevent the equipment from becoming energized without the knowledge of the individuals working on the equipment.”<sup>1</sup>

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<sup>1</sup> Section 56.12016 states in its entirety:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment

The citation alleges that a large electric shovel was not properly deenergized and locked out while mechanical work was being done on the shovel's bucket, thus exposing personnel to "moving machine hazards." Joint Appendix ("JA") 71.

B. Course of the Proceedings and Disposition Below

Subsequent to issuance of the citation, MSHA issued a proposed penalty assessment pursuant to Sections 105(a) and 110(a)(1) of the Act. 30 U.S.C. §§ 815(a), 820(a)(1). Northshore contested the citation and penalty pursuant to Sections 105(d) and 113(d) of the Act. 30 U.S.C. §§ 815(d), 823(d). A Commission ALJ held an evidentiary hearing and subsequently issued a decision affirming the citation and assessing a penalty. JA 5-17. The ALJ's decision became a final Commission decision when the Commission denied Northshore's petition for discretionary review. JA 18; 30 U.S.C. § 823(d)(1).

STATEMENT OF THE FACTS

Northshore Mining Company operates a surface iron ore mine in St. Louis County, Minnesota. *See* JA 5, 18. This case involves one of Northshore's large electric shovels, *i.e.*, a P&H Model 2800XPC Electric Cable Shovel. *See* JA 71;

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from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

30 C.F.R. § 56.12016.

*see also* JA 73, 101 (photographs). This massive shovel is approximately 55 to 60 feet in height, and sits on tracks that allow it to move forward or backward, and on a center pan that allows it to rotate clockwise or counterclockwise. JA 25 (Hearing Transcript (“Tr.”) at 34-35).<sup>2</sup> The shovel scoops ore and dumps it into trucks using a large bucket attached to the front of the shovel. JA 25-26 (Tr. 36-39). The shovel has four basic functions: propel (shovel forward/backward), swing (shovel clockwise/counter-clockwise), hoist (move bucket up/down), and crowd (move bucket in/out). JA 25 (Tr. 35).

Mechanical work was performed on the bucket frequently, as often as two or three times per day or 10 to 20 times per week. JA 50 (Tr. 136). In this case, mechanical work was being done on the “Dutchman,” which is the receiver that holds the latch that controls opening and closing of the bucket door, or “dipper door.” JA 25 (Tr. 36-37); *see* JA 74, 75 (photographs). The latch itself is operated by a cable that pulls the latch out of the receiver, *i.e.*, the Dutchman, thus allowing the dipper door to open. JA 25 (Tr. 36-37).

The shovel is powered by a 7200-volt trailing cable connected to the main switch house. JA 26 (Tr. 40). When the electricity reaches the shovel, it is distributed to a main transformer power line that controls the shovel’s work

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<sup>2</sup> Four pages of the hearing transcript appear per one page of the Joint Appendix. Consequently, citations to the transcript will contain both the JA page number and the transcript page number(s).

functions (*i.e.*, propel, swing, hoist, and crowd) and to an auxiliary transformer power line that controls the shovel's "housekeeping" functions, such as lights, heat, and air conditioning. JA 27, 37 (Tr. 44, 83-84). Electrical power to both transformers can be disconnected by opening a knife switch; electrical power to the main transformer can be disconnected, without affecting the auxiliary transformer, by opening a different knife switch. JA 37 (Tr. 83-84).<sup>3</sup>

Northshore, in consultation with the shovel's manufacturer, developed a written policy setting forth the procedures to be followed when various maintenance or repair activities were being performed on the shovel. JA 48 (Tr. 126-27). The policy provided that before work could be performed on the dipper, the control supply circuit breaker ("CSCB") and the relay supply circuit breaker ("RSCB") had to be opened, the shovel had to be test started to verify that it would not start, and the two circuit breakers had to be locked and tagged out. JA 48-49 (Tr. 127-30); JA 89 (policy). The policy was posted in the control room where the circuit breakers were located. JA 48 (Tr. 128-29); JA 104 (photograph).

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<sup>3</sup> The *Dictionary of Mining, Minerals and Related Terms* (2nd ed. 1997) defines a "knife switch" as "[a] switch that opens or closes a circuit by the contact of one or more blades between two or more flat surfaces or contact blades." A "knife switch" was described more vividly at trial by MSHA Electrical Engineer William Helfrich as resembling the devices seen in Frankenstein movies. JA 38 (Tr. at 87). Helfrich was describing a photograph of a simple knife switch (*see* JA 85), and explained that the knife switches involved in this case are "a little more complicated." JA 38 (Tr. at 87).

On January 11, 2010, MSHA Inspector John Koivisto observed an individual doing mechanical work on the Dutchman portion of the shovel's bucket. JA 23 (Tr. 29). Inspector Koivisto determined that Northshore had followed its posted procedure (described above). JA 24 (Tr. 30); *see also* JA 57 (Tr. 163-65). On January 19, 2010, Inspector Koivisto issued a citation to Northshore alleging a violation of 30 C.F.R. § 56.12016. JA 71-72. The citation alleged a failure to deenergize and lock-out the shovel while mechanical work was being done on it on January 11. JA 71. The citation further alleged that the cited condition exposed personnel to moving machine hazards. *Id.*

MSHA subsequently proposed a penalty of \$1,026. Northshore contested the proposed penalty, and a Commission ALJ conducted a hearing and subsequently issued a decision affirming the citation. JA 5-17.

#### THE ALJ'S DECISION

Initially, the ALJ found that the "plain, common-sense meaning" of Section 56.12016 is that "the equipment should be deenergized so that those working on it have no reason to fear movement that could result in their injury." JA 13. The ALJ noted the definition of "deenergize" contained in the *Dictionary of Mining, Minerals and Related Terms ("DMMRT")*, *i.e.*, "[t]o disconnect any circuit or

device from the source of power.” JA at 13.<sup>4</sup> That definition, the ALJ observed, was adopted by another ALJ in *Sec’y of Labor v. Youghioghny & Ohio Coal Co.*, 3 FMSHRC 1073, 1078 (ALJ 1981). JA 13. The ALJ further observed that the *DMMRT* definition was consistent with the definition found in the Dictionary of the Institute of Electrical and Electronics Engineers, as testified to by William J. Helfrich, MSHA’s Chief of Mine Electrical Systems Division. JA 13; JA 40 (Tr. 95) (“Deenergized means dead. Means that there’s no power there.”).

Finding that Northshore’s witnesses “seem[ed] to recognize” that the shovel was not “completely deenergized,” the ALJ found that Northshore violated Section 56.12016. JA 14. In particular, the ALJ stated that Northshore’s witnesses admitted that the shovel was receiving power and was not disconnected from the power source. The ALJ found it “telling” that Northshore’s expert witness, Brian Gsell, admitted that he would not touch the load-side of the circuit after the circuit breakers were locked out absent verification that there was no power. JA 14; JA 65 (Tr. 195-96). The ALJ also relied on Gsell’s testimony conceding that it was possible for the shovel to move despite the opening and locking out of the circuit breakers if enough things “went wrong.” JA 14 (citing Tr. at 194 (JA 65)). The ALJ also relied on testimony that she attributed to Northshore’s Electrical

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<sup>4</sup> The *Dictionary of Mining, Minerals and Related Terms* is available on-line at <http://xmlwords.infomine>.

Coodinator, Ryan Bush, that the shovel could be started with the circuit breakers locked out. JA 14.

The ALJ rejected Northshore's various contentions to the contrary. First, the ALJ rejected Northshore's contention that she was bound to apply *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). In *Phelps Dodge*, the majority held that Section 56.12016 was intended to apply only when the mechanical work to be performed on electrically-powered equipment presented an electrical shock hazard, as opposed to a mechanical movement hazard. The ALJ, however, stated that the Commission "has never explicitly followed the logic of this case." The ALJ found the dissenting opinion of Judge Boochever in *Phelps Dodge*, relying on the plain language of the standard, more persuasive. JA 14-15.

Second, the ALJ rejected Northshore's contention that the applicable standard was 30 C.F.R. § 56.14105, not § 56.12016.<sup>5</sup> Noting the "overlapping characteristics" of the two standards, the ALJ found that the existence of the

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<sup>5</sup> Section 56.14105 states:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

30 C.F.R. § 56.14105.

former did not preclude the Secretary from citing Northshore under the latter. JA 15.

Third, the ALJ rejected Northshore's contention that locking and tagging out the knife switch -- as MSHA insisted was necessary to comply with Section 56.12016 -- would reduce efficiency because a certified electrician was needed to perform that task whereas any experienced miner could lock and tag out the CSCB and the RSCB. The ALJ reasoned that efficiency must be sacrificed when the safety of miners is concerned. JA 16.

Finally, the ALJ assessed a penalty of \$500. JA 17. The ALJ's decision became a final Commission decision, appealable to this Court, when on April 30, 2012, the Commission denied Northshore's petition for discretionary review. JA 18.

### SUMMARY OF ARGUMENT

Section 56.12016 could hardly be clearer: it applies where, as here, mechanical work is performed on electrically-powered equipment. The Ninth Circuit's majority opinion to the contrary in *Phelps Dodge*, holding that Section 56.14105 applies instead of Section 56.12016 where the hazard is mechanical movement rather than electric shock, is not as persuasive as the dissenting opinion in that case. The majority opinion is flawed in several respects, most notably, that it:

- reads a requirement into Section 56.12016 that is inconsistent with the standard’s plain language;
- overlooks the principle of statutory and regulatory construction that a more specific provision takes precedence over a more general one; and,
- neglects the fact that other standards expressly indicate when they are intended to apply exclusively to electrical shock.

Moreover, Northshore’s attempt to characterize *Phelps Dodge* as representing a “uniform interpretation” of Section 56.12016 could hardly be further from the truth. No other court of appeals has addressed the issue and the Commission has declined for approximately thirty years to directly address whether it will apply *Phelps Dodge* outside of the Ninth Circuit. The Court should therefore hold that Section 56.12016 means what it plainly says: that the standard applies whenever mechanical work is performed on electrically-powered equipment.

Section 56.12016 imposes two requirements: an operator must first “deenergize” electrically-powered equipment before performing mechanical work on it, and second must lock and tag out the power switches in order to prevent the equipment from becoming energized without the knowledge of the individual(s) working on it. Northshore failed to either of those requirements as a matter of law. “Deenergization” necessarily requires visual confirmation that the flow of current has been interrupted, and the circuit breakers that Northshore opened functioned by

means of vacuum contacts that were enclosed within the circuitry and were not visible. Further, the vacuum contacts could have failed -- thus opening the circuit and permitting the flow of current to resume -- without the knowledge of the individual who was working on the equipment. Northshore's circuit breaker procedure, therefore, violated Section 56.12016, was a trap for its workers, and could have caused serious harm. Accordingly, the Court should hold that Northshore violated Section 56.12016 as a matter of law.

## ARGUMENT

### I.

#### *Section 56.12016 Applies When Mechanical Work is Performed on Electrically-Powered Equipment Regardless of the Nature of the Hazard Presented by the Mechanical Work*

##### *A. Standard of review*

When the meaning of a regulation is plain, there is no need for a court to interpret it. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000). When the meaning of a regulation is ambiguous, however, a court must defer to an agency's interpretation of its own regulation unless that interpretation is plainly erroneous or inconsistent with the regulation. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012); *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823 (8th Cir. 2009). The Secretary's litigating position before the Commission is entitled to deference because it "is as much an exercise of delegated lawmaking powers as is

the Secretary's promulgation of a . . . standard." *Pattison Sand Co., LLC v. FMSHRC*, 2012 WL 3079200, \*4 (quoting *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003) (quoting *Martin v. Occupational Safety and Health Rev. Comm'n*, 499 U.S. 144, 157 (1991))).

*B. Section 56.12016 plainly applies whenever mechanical work is performed on electrically-powered equipment*

The meaning of Section 56.12016 is plain. By its own terms, it applies whenever "mechanical work" is done on "[e]lectrically powered equipment." 30 C.F.R. § 56.12016. The standard contains no language even hinting that its application depends on whether the mechanical work to be done presents an electrical as opposed to a mechanical hazard. To hold that the standard applies only when the mechanical work to be done presents electrical hazards would impermissibly read "a limitation into the [standard] which has no basis in the [standard's] language." *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1280 (10th Cir. 1995) (quoting *Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 451 (10th Cir. 1990)).

Northshore's contentions to the contrary lack merit. Northshore relies on *Phelps Dodge*, in which the majority opinion held that what is now Section 56.12016 applied only to activities presenting the hazard of electric shock, and not to activities presenting the hazard of machinery movement. *See* Northshore's Brief ("NB") at 24. The Ninth Circuit reasoned that: (1) the standard was placed under

the heading “Electricity”; (2) the standard was sandwiched between standards whose purpose is “manifestly to prevent the accidental electrocution of mine workers”; (3) the standard’s “main concern” was protection from electrical shock; and, (4) when the hazard is “machinery motion,” a different standard -- what is now 30 C.F.R. § 56.14105 -- applies. 681 F.2d at 1192. (*See* fn. 5, *supra*, for text of Section 56.14105.)

Judge Boochever’s dissent is more persuasive. Judge Boochever opined that the meaning of what is now Section 56.12016 is plain and contains nothing that would limit the standard’s scope to electrical as opposed to mechanical hazards. 681 F.2d at 1193-94. By its terms, Judge Boochever observed, the standard applies to mechanical work performed on electrical equipment “irrespective of whether there is a specific danger of electrical shock.” *Id.* at 1194. Additionally, Judge Boochever noted that the Secretary’s application of Section 56.12016 was “consistent with [her] position in other recent cases,” citing two previous ALJ decisions. *Id.*<sup>6</sup>

The majority’s reasoning is triply flawed. *First*, neither the heading, the placement, nor the purported “main concern” of a statutory or regulatory provision can override the provision’s plain meaning. *Pennsylvania Dep’t of Corrections v.*

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<sup>6</sup> The two ALJ decisions cited in Judge Boochever’s dissent were: *Sec’y of Labor v. Freeport Kaolin Co.*, 2 FMSHRC 233, 241-42 (ALJ 1980), and *Sec’y of Labor v. Warner Co.*, 2 FMSHRC 972 (ALJ 1980).

*Yeskey*, 524 U.S. 206, 212 (1998) (“[t]he title of a statute . . . cannot limit the plain meaning of the text”); *Nat’l Center for Mfg. Sciences v. Dep’t of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000) (“there is no reason to cloud the plain meaning of [a statutory provision] because of its placement”); *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1048-50 (D.C. Cir. 1997) (rejecting reliance on provision’s purpose to establish its plain meaning, where there was no evidence other than the provision’s language to show the provision’s purpose).<sup>7</sup> Nor does the fact that another standard, *i.e.*, Section 56.14105, might have applied preclude Section 56.12016 from applying. *See Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1183 (9th Cir. 1998) (the applicability of one standard does not preclude another standard from applying).

*Second*, the other standards to which the majority compared Section 56.12016 do not shed light on its meaning in any event. The fact that Section 56.12016 is placed under the heading "Electricity" and between other electricity-related standards merely reflects the fact that Section 56.12016, like the other standards, addresses actions operators are required to take with respect to the use of electricity. *See Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 538-29 (1947) ("headings and titles can do no more than

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<sup>7</sup> The majority in *Phelps Dodge* conceded that neither the legislative nor the regulatory history shed light on the meaning of what is now Section 56.12016. 681 F.2d at 1193.

indicate the provisions in a most general manner," and "matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles"). Nor is there any support for the notion that the "main concern" of Section 56.12016 is to protect miners specifically when the hazard is electric shock. The majority itself admitted that there was no relevant legislative or regulatory history, 681 F.2d at 1193, thus leaving the language of Section 56.12016 itself as the only indicator of intent. Moreover, even if the "main concern" of Section 56.12016 was to protect against electrical shock, that does not preclude the possibility that an additional concern was to protect against mechanical movement.

*Third*, the majority opinion failed to consider other standards, or aspects of them, that do in fact shed light on the plain meaning of Section 56.12016. The majority failed to recognize that Section 56.12016 is more specific than, and therefore takes precedence over, Section 56.14105. *See, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (where two standards could arguably apply, the more specific standard takes precedence over the more general). Section 56.12016 applies specifically to "mechanical work" being performed on "electrically powered equipment," whereas Section 56.14105 applies generally to "repairs or maintenance of machinery or equipment." Additionally, where the Secretary intended a standard to apply specifically when

there was a hazard of electric shock, the standard says so. *See, e.g.*, 30 C.F.R. §§ 56.12034 (requiring guarding around lights “that by their location present a shock or burn hazard”); 56.12035 (requiring weatherproof lamp sockets where a lamp is “exposed to weather or wet conditions that may interfere with illumination or create a shock hazard”). Finally, although some standards expressly condition their applicability on the presence of a particular hazard, Section 56.12016 is not one of them. *See, e.g.*, 30 C.F.R. §§ 56.15003 (requiring persons to wear protective footwear “where a *hazard* exists which could cause an injury to the feet”); 56.14105 (during repairs or maintenance, machinery or equipment must be “blocked against *hazardous* motion”); 56.15020 (“[I]ife jackets or belts shall be worn where there is a *danger* from falling into water”) (emphases added). Thus, the absence of an electrical hazard does not mean that Section 56.12016 does not apply.

Northshore’s attempt to paint the majority decision as settled law is misleading. Although it is true that no other court of appeals “has come to a different conclusion” than the Ninth Circuit, *see* NB at 25, the fact is that no other court of appeals has addressed the issue. Neither the Secretary, the ALJ, nor the Commission was bound by the Ninth Circuit’s decision. *See Johnson v. United States Railroad Retirement Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992) (one circuit’s decision “need not be taken by [an agency] as the law of the land”). The

Commission itself has not decided whether to follow *Phelps Dodge* in cases arising outside the Ninth Circuit. In *Sec’y of Labor v. James M. Ray, employed by Leo Journagan Constr. Co., Inc.*, 20 FMSHRC 1014, 1025 (1998), for example, the Commission declined to express a view on whether *Phelps Dodge* was correctly decided, but did state that there was no reason why the Secretary “should refrain from attempting to persuade other Courts of Appeals that *Phelps Dodge* was wrongly decided.” More recently, in *Sec’y of Labor v. Empire Iron Mining Partnership*, 29 FMSHRC 999 (2007), the Commission declined to resolve the issue where the Secretary pled violations of Section 56.12016 and 56.14105 in the alternative, affirming the citation under the latter standard instead. Two of the three participating commissioners, however, stated in *dictum* that they agreed with Judge Boochever’s plain language reading of Section 56.12016. 29 FMSHRC at 1005 fn.8. Commission ALJs have not uniformly interpreted Section 56.12016 either. *See, e.g., Sec’y of Labor v. Leo Journagan Constr. Co.*, 18 FMSHRC 892, 897 (ALJ 1996).

Northshore’s contention that Section 56.14105 does not require a lockout is irrelevant. *See* NB at 26-27. The Secretary did not cite Northshore for violating Section 56.14105. Similarly, Northshore’s reliance on *Sec’y of Labor v. Island Creek Coal Co.*, 22 FMSHRC 823 (2000), and *Sec’y of Labor v. Mettiki Coal Corp.*, 13 FMSHRC 760 (1991), is misplaced. *See* NB at 26-27. Neither case

involved Section 56.12016. *Island Creek* was a non-precedential split decision. *See, e.g., Sec’y of Labor v. PCS Phosphate Co., Inc.*, 33 FMSHRC 5, 7 (2011) (the effect of a split-decision by the Commission is to allow the ALJ’s decision “to stand as if affirmed”); *see also Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176, 1179 (3rd Cir. 1980) (the precedential value of a split-decision of the Occupational Safety and Health Review Commission is no greater than that of an unreviewed ALJ decision).<sup>8</sup> At most, it stands for the proposition that an underground coal mine standard analogous to Section 56.14105 (*i.e.*, 30 C.F.R. § 75.1725(c)) does not require locking and tagging out. *Mettiki Coal* did not even involve electrically-powered equipment. *See Mettiki Coal*, 13 FMSHRC at 766 n.5.

Although Northshore’s interpretation would enable it to avoid liability in this case, its interpretation would make it far more difficult for mine operators to determine prospectively whether Section 56.12016 applies. Under Northshore’s interpretation, the operator would have to determine not merely whether mechanical work was being performed on electrically-powered equipment, but also whether the hazard posed by the work was mechanical movement or electrical shock. That determination is inherently difficult -- all the more so in a case where both hazards are present -- often subjective, and frequently can be made only after

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<sup>8</sup> Northshore’s characterization of a quotation from *Island Creek* as the Commission’s “holding” is therefore incorrect. *See* NB at 27.

the fact. In contrast, under the plain language of Section 56.12016, the standard's applicability can be determined easily and objectively: if mechanical work is being performed on electrical equipment, Section 56.12016 applies.

Accordingly, the Court should hold that the plain language of Section 56.12016 requires the application of that standard whenever mechanical work is performed on electrically-powered equipment.

*C. Even if the scope of Section 56.12016 is ambiguous, the Secretary's reasonable interpretation is entitled to deference*

Even if Section 56.12016's applicability where there is no electrical hazard is ambiguous, the Secretary's interpretation is entitled to deference. *See SmithKline Beecham Corp.*, 132 S. Ct. at 2166; *Summit Contractors, Inc.*, 558 F.3d at 823. For the reasons discussed above, the Secretary's interpretation is neither plainly erroneous nor inconsistent with the standard's language.

Northshore's assertions to the contrary are devoid of merit.<sup>9</sup> First, Northshore asserts that the Secretary's interpretation is undeserving of deference

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<sup>9</sup> Northshore's assertions are not even properly before the Court. Although Northshore made the same assertions before the ALJ regarding deference, Northshore neglected to do so in its petition for discretionary review to the Commission. Under Section 106(a)(1) of the Mine Act, "[n]o objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 30 U.S.C. § 816(a)(1); *see, e.g., Ames Constr. Inc. v. FMSHRC*, 676 F.3d 1109, 1113 (D.C. Cir. 2012). Consequently, the Court may decline to address to Northshore's objections to according deference to the Secretary's interpretation of her own regulation.

because it is “inconsistent,” based on MSHA Electrical Engineer Helfrich’s testimony concerning the meaning of the term “deenergization” in Section 56.12016. NB at 30 (citing JA 68 (Tr. at 207)). That assertion is illogical.

Helfrich’s testimony concerning the meaning of the term “deenergization” has no bearing on the entirely separate question of whether Section 56.12016 applies when the hazard is mechanical as opposed to electrical. On that question, Helfrich’s testimony was entirely consistent with the Secretary’s position: Section 56.12016 applies when mechanical work is performed on electrical equipment regardless of whether the hazard is electrical or mechanical. *See* JA 37 (Tr. at 82). Moreover, the Secretary has consistently taken that position in litigation, as illustrated by, *e.g.*, *Phelps Dodge*, *Leo Journagan Constr. Co.*, and *Empire Iron*, all cited above. Northshore does not cite a single case in which the Secretary took a different position.

Northshore’s second objection to deference fails for the same reason. Northshore contends that the Secretary’s interpretation is not entitled to deference because the Secretary “prevented Northshore from offering evidence as to the safety disadvantages of her method of removing power.” NB at 30. The excluded evidence referenced by Northshore -- like the Helfrich testimony cited by Northshore -- related to the issue of how deenergization is accomplished under

Section 56.12016. That evidence has no bearing on the issue of whether Section 56.12016's applicability depends on the nature of the hazard.

Accordingly, even if Section 56.12016 is ambiguous, the Secretary's interpretation of her own standard is neither plainly erroneous nor inconsistent with the standard's language, and is therefore entitled to deference.

## II.

### *Northshore's Circuit Breaker Procedure Was Insufficient to Comply With Section 56.12016 as a Matter of Law*

#### *A. Standard of review*

When the meaning of a regulation is plain, there is no need for a court to interpret it. *See Harris County*, 529 U.S. at 588. When the meaning of a regulation is ambiguous, however, a court must defer to an agency's interpretation of its own regulation unless that interpretation is plainly erroneous or inconsistent with the regulation. *SmithKline Beecham Corp.*, 132 S. Ct. at 2166; *Summit Contractors, Inc.*, 558 F.3d at 823. The Secretary's litigating position before the Commission is entitled to deference. *Pattison Sand*, 2012 WL 3079200, at \*4. An ALJ's factual findings must be affirmed if supported by substantial evidence. *Id.*

- B. *Section 56.12016 requires both: (i) “deenergization,” and (ii) “locking out” such that the equipment cannot become “reenergized” without the knowledge of the individuals working on it*

Section 56.12016 imposes two distinct requirements: first, the operator must “deenergize” the equipment; second, the operator must prevent the equipment from becoming reenergized without the knowledge of the individual(s) working on it. *Sec’y of Labor v. Ozark-Mahoning Co.*, 12 FMSHRC 376, 379 (1990) (construing 30 C.F.R. § 57.12016, which is identical to Section 56.12016 and applies to underground non-coal mines). In order to “deenergize” equipment in compliance with the first sentence of the standard, there must be a visually-confirmed disconnection from the source of power.<sup>10</sup> In order to lock out the power switches in compliance with the second sentence of the standard, the lock out must “prevent the equipment from becoming energized without the knowledge of the persons working on it.” 30 C.F.R. § 56.12016. In opening and locking and tagging out the two circuit breakers, Northshore failed -- as a matter of law -- to comply with either of those two requirements.<sup>11</sup>

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<sup>10</sup> Northshore’s definition of “deenergize,” *i.e.*, “to prevent the flow of current,” NB at 17, is fine as far as it goes but, as will be discussed in the text, fails to include the element of visual confirmation.

<sup>11</sup> Most of Northshore’s argument on this issue focuses on what it asserts was the ALJ’s misinterpretation of the term “deenergize” to mean “to disconnect from the source of power.” NB at 16-20. According to Northshore, that definition would require that the shovel’s trailing cable be disconnected from the electrical substation. The ALJ, however, did not adopt the definition attributed to her by

The ALJ failed to address these two issues, although they were presented to her.<sup>12</sup> The issue of whether visual confirmation is required, however, is a legal one which this Court reviews *de novo*. *Pattison Sand*, at \*4. The issues of whether Northshore provided visual confirmation and properly prevented the equipment from becoming reenergized are factual and, although they were not addressed by the ALJ, the record evidence supports only one conclusion, as discussed below.

C. “*Deenergization*” requires visual confirmation that the flow of current has been interrupted

Although visual confirmation is not mentioned explicitly in Section 56.12016, other electrical standards make clear that visual confirmation is an essential element of deenergization. *See, e.g., Thomas & Wong General Contractor v. The Lake Bank*, 553 F.3d 650, 653 (8th Cir. 2009) (“[e]ach part of a statute should be construed in connection with every other part and in the context of the

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Northshore, but rather merely took “note” of it because it was contained in the *DMMRT* and because another ALJ had applied that definition. JA 13. Additionally, Northshore mistakenly reads that definition as if it said “to disconnect *at* the source of power,” not “*from* the source of power.” In any event, as Northshore ultimately recognizes, neither the ALJ nor MSHA read Section 56.12016 to require disconnection of the trailing cable from the substation. *See* NB at 19, 21-22.

<sup>12</sup> The ALJ found that Northshore’s witnesses “seem[ed] to recognize” that the shovel had not been completely deenergized, and conceded that they would not touch the load side of the circuit, despite the circuit breakers having been opened, without first verifying that there was no power on the load side. JA 14. The Secretary is constrained to admit that that finding, although supported by substantial evidence, failed to fully resolve the issues before the ALJ. That is because the ALJ failed to address Northshore’s allegation that it did, in fact, provide such verification.

statute as a whole”); *see also Charles Schwaab & Co., Inc. v. DeBickero*, 593 F.3d 916, 921 (9th Cir. 2010) (a regulation must be construed as a whole rather than construing subparagraphs thereof in isolation). For example, Section 56.12006 states that “disconnecting devices shall be equipped or designed in such a manner that it can be determined by visual observation when such a device is open and that the circuit is deenergized.” 30 C.F.R. § 56.12006. Similarly, a surface coal mine standard states that disconnecting devices for a trailing cable “shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected.” 30 C.F.R. § 77.600. The central importance of visual confirmation to deenergization flows from the purpose of deenergization, which is to allow a worker to proceed safely with work. *See Sec’y of Labor v. Pittsburg & Midway Coal Mining Co.*, 14 FMSHRC 346, 354 (ALJ 1992). The very purpose of a disconnecting device is “to enable visual verification of deenergization prior to maintenance.” *Id.*

The term “deenergize” therefore plainly includes an element of visual confirmation. Section 56.12016 explicitly states both the conditions it is meant to regulate (mechanical work on electrically-powered equipment) and the objective it is meant to achieve (*i.e.*, to “prevent the equipment from being energized without the knowledge of the individuals working on it”). Consequently, any reasonably prudent person familiar with the mining industry and the MSHA standards would

have, or at least should have, understood that visual confirmation was essential to complying with Section 56.12016. *See, e.g., Mainline Rock & Ballast, Inc. v. Sec’y of Labor*, \_\_\_ F.3d \_\_\_, 2012 WL 3264068, \*5 (10th Cir. 2012 Apr. 4, 2012) (regulations provide adequate notice of the conduct regulated so long as a “reasonably prudent person familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require”).

Even if the meaning of “deenergize” is not plain, the Secretary’s interpretation is entitled to deference unless it is plainly erroneous or inconsistent with the language of the standard. For the reasons discussed above, the Secretary’s interpretation is neither plainly erroneous nor inconsistent with the language of the standard.<sup>13</sup> Northshore’s two contentions to the contrary have no merit. *See* NB at 29-30.<sup>14</sup> First, contrary to Northshore’s contention, MSHA Electrical Engineer Helfrich’s testimony on this point is entirely consistent with the Secretary’s position. *See* JA 37 (Tr. at 84). Second, Northshore’s reliance on proffered evidence concerning alleged “safety disadvantages” associated with MSHA’s knife

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<sup>13</sup> Northshore asserts cursorily, in a footnote, that Section 56.12016 does not require visual confirmation. *See* NB at 20 n.6. Even Northshore’s expert, Brian Gsell, however, admitted that “verification” was a necessary element of deenergization. JA 65 (Tr. at 194).

<sup>14</sup> Northshore’s contentions are not even properly before the Court, for the reasons discussed in fn. 9, above.

switch procedure is misplaced. Such evidence was of no relevance to whether Northshore's circuit breaker procedure complied with the standard.

D. *Northshore failed both to: (i) visually confirm that the circuit breakers in fact interrupted the flow of current, and (ii) "lock out" such that the shovel could not become "reenergized" without the knowledge of the individual working on it*

It is undisputed that opening the knife switch, as MSHA insisted, would have provided visual confirmation that the power was disconnected. The testimony of the Secretary's expert, William Helfrich, on this point is uncontradicted. *See* JA 41 (Tr. at 98) ("that's why the knife blade switches are on there, for visual confirmation that the machine is deenergized"); *see also* JA 68 (Tr. at 207).<sup>15</sup>

In contrast, the only conclusion that can be reached based on the record evidence is that Northshore's circuit breaker procedure failed to provide visual confirmation. The circuit breakers that Northshore opened and locked out functioned via mechanisms called vacuum contacts, which prevented the flow of current when they were open. JA 60-61 (Tr. at 177-78). The vacuum contacts

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<sup>15</sup> A knife switch is manually operated by an insulated lever that, when pushed down, connects prongs to the stationary prongs of the circuit and thereby closes the circuit, allowing the power to flow. *See* JA 38 (Tr. 87). Conversely, when the lever is pulled up, the prongs are removed from the stationary prongs of the circuit, thus opening the circuit and cutting off the flow of power. *Id.* Once a knife switch is opened, locking and tagging it out guarantees that in order for it to be closed -- permitting resumption of the flow of current -- the worker who locked it out must unlock his or her lock on the knife switch. Thus, short of someone using bolt cutters to open the lock, it is impossible for the equipment to become energized without the knowledge of the worker who locked it out.

interrupted the flow of current by means of a vacuum -- in the form of a small bottle -- interrupting the circuit. JA 38 (Tr. at 86). The vacuum contacts, however, were enclosed within the circuitry and therefore were not visible. JA 38 (Tr. at 86). Consequently, Northshore failed to provide visual confirmation that the flow of current was interrupted.

Additionally, Northshore failed to prevent the shovel from becoming energized without the knowledge of the individual working on it. The vacuum contacts could have failed, closing the circuit and permitting the flow of current, without human intervention, as Inspector Koivisto testified -- and even Northshore's expert, Brian Gsell, conceded. *See* JA 38, 64 (Tr. at 86, 190-91). Faults in the circuit breakers could have been caused by a lightning strike, water, rodents, a failure of insulation, or vibration or movement of the shovel -- especially because the circuit breakers were not shock-mounted (*i.e.*, the boards on which they were mounted could have become disconnected and defeated any of the lock-out procedures). JA 38 (Tr. at 89).<sup>16</sup> Because the vacuum contacts could have failed without human intervention, Northshore failed to prevent the equipment from becoming energized without the knowledge of the individual working on it.

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<sup>16</sup> In contrast, none of those faults could have caused power to flow if MSHA's knife switch procedure was used, *see* JA 39 (Tr. at 90), as even Northshore's expert witness admitted. JA 65 (Tr. at 195-97). Gsell disagreed that any of those conditions could have occurred or could have caused the vacuum contacts to fail, but as already mentioned, he nevertheless conceded that the contacts could fail.

Northshore took two actions that it contends effectively provided visual confirmation and prevented reenergization. First, Northshore test-started the shovel after opening the circuit breakers, prior to locking and tagging out. Second, Northshore observed a computer screen in the operator's cab indicating that the circuit breakers were open. NB at 20 n.6. Both of Northshore's actions were patently insufficient.

At most, test starting the shovel confirmed only that there was no current flowing at that moment.<sup>17</sup> As even Northshore's own expert, Brian Gsell, admitted, the vacuum contacts could have failed after being locked out. JA 64 (Tr. at 191).<sup>18</sup> Although Gsell testified that it would take three to five minutes, and human intervention, to start the shovel after such a failure, *id.*, the human who intervened would not have to be the worker who locked out the circuit breakers. Thus, it was

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<sup>17</sup> The test start arguably did not even confirm that much because the shovel's failure to start may have resulted from any number of reasons other than the absence of electric current, such as mechanical defects.

<sup>18</sup> Northshore asserts that even if the vacuum contacts failed, "there are several other switches that are also deenergized by locking and tagging out those two circuit breakers that preclude inadvertent energization of the equipment." NB at 21. Northshore neither identifies the "several other switches" nor cites any evidence to support its claim in the argument section of its brief. Northshore's statement of the facts seems to supply at least some of the missing information. *See* NB at 7 (last paragraph). In any event, Northshore's deenergization of those "other switches" was also accomplished via opening a circuit breaker and, therefore, was just as susceptible to reenergization if the vacuum contacts failed.

possible or the flow of current to resume without the knowledge of the worker who locked out the circuit breakers and, consequently, for the shovel to move.

Nor was Northshore's observation of the computer screen data sufficient. The computer screen did not show the vacuum contacts interrupting the flow of current, but rather showed only a list of faults, one of which indicated that the circuit breakers were open. JA 64 (Tr. at 193). The computer screen data represented merely secondary information, not true visual confirmation of disconnection. More importantly, even if the computer screen streamed live video of the interruption in the circuit, failure of the vacuum contacts could have permitted the flow of current to resume without the knowledge of the individual who was working on the equipment, as discussed in the preceding paragraph.

Northshore's contention that "there is a series of interlocks which preclude[d] movement of the equipment without human intervention" is both beside the point and factually inaccurate. *See* NB at 21. The contention is beside the point because blocking the equipment against motion is not a requirement of Section 56.12016, and therefore is not a defense to the citation at issue in this case. The contention is factually inaccurate because substantial evidence supports the ALJ's finding that Northshore's expert witness, Brian Gsell, conceded that in certain circumstances "movement could occur." JA 14 (citing Tr. at 194 (JA 65)). Gsell also conceded that the brakes, which might otherwise prevent movement in

the event of inadvertent energization, could fail. JA 66 (Tr. at 198). Similarly, Northshore's Electrical Coordinator, Ryan Bush, conceded that various interlocks, which might otherwise prevent movement in the event of inadvertent energization, could fail. JA 54 (Tr. at 151). Further, even if the interlocks prevented movement of the shovel without human intervention, they did not prevent movement of the shovel without the intervention of the human who locked out the circuit breakers.

Northshore contends that the ALJ erred in ignoring the fact that there is a hazard of arc flash with MSHA's knife switch procedure. *See* NB at 21.

Northshore adduced that evidence in an attempt to show that its circuit breaker procedure was safer. That evidence, however, is irrelevant to the issue of whether opening the two circuit breakers satisfied Northshore's obligation to deenergize under Section 56.12016. For that reason, contrary to Northshore's assertion, the ALJ did not abuse her discretion in limiting evidence on that issue. *See* NB at 21 n.7; *see also Cintas Corp v. NLRB*, 589 F.3d 905, 913 (8th Cir. 2009) (ALJ's evidentiary rulings reviewed under "abuse of discretion" standard); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (2000) (same).

Finally, Northshore argues that the ALJ erred in relying on testimony that she attributed to Electrical Coordinator Bush that the shovel could be started with the circuit breakers locked out. NB at 21. Northshore correctly observes that the ALJ did not provide a record reference for that testimony, and that Bush did not in

fact so testify. *Id.* at 21-22. As Northshore apparently recognizes, however, the ALJ obviously intended to refer to testimony by Gsell. *See id.* at 22. Northshore claims that Gsell gave no such testimony either. *Id.* at 22 (citing JA 63) (Tr. at 186-88). Northshore, however, overlooks Gsell’s testimony on cross-examination, during which he admitted that during a test of the shovel’s brakes, the testers were “able to defeat the protection and allow the crowd motor to be energized without the fault showing” on the computer screen in the operator’s cab. JA 66 (Tr. at 198). Moreover, because the brake test was performed after the cited violation occurred, *see* JA 65 (Tr. at 197), Northshore cannot claim that, at the time of the violation, it reasonably believed the brakes would prevent any movement of the shovel in the event of inadvertent energization.

For the reasons discussed above, Northshore violated Section 56.12016 as a matter of law. Northshore’s failure to comply with Section 56.12016 created, in Inspector’s Koivisto’s words, a “trap” for its employees with the potential for “a very serious accident.” JA 27 (Tr. at 42-43). Accordingly, the Court should affirm the ALJ’s decision.

CONCLUSION

For the reasons set forth above, the Court should hold that 30 C.F.R. § 56.12016 applies and that Northshore violated that standard as a matter of law. Accordingly, the Court should affirm the ALJ's decision.

Respectfully submitted,

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Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the rules of this Court, the Secretary hereby certifies that the Brief for the Secretary of Labor is in compliance with the applicable type volume and typeface limitations. This brief contains 7,888 words as determined by Microsoft WORD, the processing system used to prepare this brief, and was prepared in proportional Times New Roman 14 point type.

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CERTIFICATE OF SERVICE

I certify that on August 20, 2012, I electronically filed the foregoing response brief for the Secretary of Labor with the Clerk of the Court of the United States Court of Appeals for the Eight Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished through the CM/ECF system. Those participants are:

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