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INTRODUCTION

This case involves MSHA's interpretation of 30 C.F.R. § 56.12028, which requires continuity and resistance testing of grounding systems. At issue is whether trailing cables, power cables, and cords should be considered part of "grounding systems," and whether MSHA's application of Section 56.12028 to such cables and cords requires notice-and-comment rulemaking.

In a decision on cross-motions for summary decision, ALJ Paez affirmed two citations alleging violations of Section 56.12028 consisting of failure to test and record the continuity and resistance of cables and cords. Tilden Mining Company, LC ("Tilden") appealed, arguing that the ALJ's decision was legally erroneous.

For the reasons discussed below, the Secretary urges the Commission to affirm the ALJ's determination that MSHA's interpretation of Section 56.12028 is reasonable and entitled to deference. The Commission should also affirm the ALJ's determination that MSHA was not required to engage in notice-and-comment rulemaking to adopt its interpretation.

ISSUES

- I. Whether MSHA's interpretation of 30 C.F.R. § 56.12028 as applying to trailing cables, power cables, and cords is a reasonable interpretation of the standard and therefore entitled to deference.

II. Whether the Administrative Procedure Act ("APA") requires MSHA to go through notice-and-comment rulemaking before applying Section 56.12028 to trailing cables, power cables, and cords.

REGULATORY BACKGROUND

Pursuant to Section 101 of the Mine Act, 30 C.F.R. Part 56 establishes safety standards for surface metal and nonmetal mines. The overall purpose of Part 56 is "the protection of life, the promotion of health and safety, and prevention of accidents." 30 C.F.R. § 56.1. Part 56, Subpart K establishes mandatory standards to protect miners from electrical hazards. To that end, Section 56.12028 requires continuity and resistance testing of grounding systems. The standard 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 (2010). Neither the Mine Act nor Part 56 defines the precise term "grounding systems" used in Section 56.12028. See 30 U.S.C. § 802 (definitions); 30 C.F.R. § 56.2 (same). Part 56 does, however, define the related term "electrical grounding," stating that "[e]lectrical grounding means to connect with the ground to make the earth part of the circuit." 30 C.F.R. § 56.2.

MSHA has provided long-standing guidance regarding how it will enforce Section 56.12028 in its Program Policy Manual.

MSHA has interpreted the term "grounding systems" in Section 56.12028 by providing a non-exhaustive list of components that grounding systems "typically include." See IV U.S. Dep't of Labor, MSHA, Program Policy Manual, Parts 56/57 at 44-45 (Feb. 2003) ("2003 PPM"); see also U.S. Dep't of Labor, MSHA Program Policy Letter P94-IV-1, Testing Grounding Systems (Jan. 31, 1994) ("1994 PPL") (instituting changes reflected in 2003 PPM).

MSHA's guidance states that grounding systems typically include the following components: (1) "equipment grounding conductors"; (2) "grounding electrode conductors"; and (3) "grounding electrodes." 2003 PPM at 44. In relevant part, the 2003 PPM provides:

Grounding systems typically include the following:

1. equipment grounding conductors - the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor;
2. grounding electrode conductors - the conductors connecting the grounding electrode to the equipment grounding conductor; and
3. grounding electrodes - usually driven rods connected to each other by suitable means, buried metal, or other effective methods located at the source, to provide a low resistance earth connection.

Id.

The first two elements of "grounding systems" are both "conductors." Part 56 states that the term "conductor means a

material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." 30 C.F.R. § 56.2. Thus, both "equipment grounding conductors" and "grounding electrode conductors" are system components, such as cables, that permit the flow of electricity from the metal frame of the equipment itself to the final destination in the grounding system - the "grounding electrode." The third element identified in the PPM, the "grounding electrode," is typically a buried "rod" that provides the ultimate grounding connection to the earth. See 2003 PPM.

MSHA's guidance also identifies the tests that operators must conduct on each system element. It provides that mine operators must conduct continuity and resistance testing on both types of conductors, whereas grounding electrodes require only resistance testing. Id. at 44-45. Continuity testing ensures that a circuit is complete, whereas resistance testing measures the quality of the conductor in ohms. Leppanen Decl. at 2.

Finally, MSHA's guidance specifies how Section 56.12028 applies to grounding conductors in trailing cables, power cables, and cords (hereinafter, "cables and cords"):

Grounding conductors in trailing cables, power cables, and cords that supply power to tools and portable or mobile equipment must be tested as prescribed in the regulation. This requirement does not apply to double insulated tools or circuits protected by ground-fault-circuit interrupters that trip at 5 milli-amperes or less.

Id. at 45 (emphasis added).

MSHA adopted its current position regarding cables and cords in a Program Policy Letter in 1994. The 1994 PPL was incorporated verbatim into MSHA's 1996 PPM and was republished without change in the 2003 PPM, which is the most recent revision of the document. Order at 4.

Prior to 1994, MSHA emphasized the need for more frequent testing of cables and cords, resulting in confusion over whether Section 56.12028's testing and recording requirements applied to cables and cords. In the 1988 PPM, MSHA appeared to exempt cables and cords from annual testing, while stating that such cables and cords required more frequent testing than that required by the standard:

The annual test does not apply to grounding conductors in trailing cables, power cables and cords which supply power to portable or mobile equipment. The grounding conductors in these cables require more frequent testing.

IV U.S. Dep't of Labor, MSHA, Program Policy Manual, Parts 56/57 at 51-52 (July 1, 1988) ("1988 PPM").¹ Yet no other MSHA standard required the more frequent testing of cables and cords. Even though annual testing did not apply to cables and cords,

¹ Copies of the 1988, 1993, and 1996 PPMs, though not part of the record below, are attached to this brief for the convenience of the Commission and opposing counsel. The language quoted here is also quoted by opposing counsel with citations to Judge Hodgdon's decision in Hibbing Taconite. See Pet'r's Br. at 6.

the standard's requirement to test cables and cords "after installation, repair, and modification" did apply. Id.

Later, in the 1993 PPM, MSHA modified its interpretation to require annual testing of cables and cords in accordance with the standard, while still stating that such cables and cords required more frequent testing:

The grounding conductors in trailing cables, power cables, and cords which supply power to portable or mobile equipment should be tested more frequently than stationary grounding conductors. However, a record of such tests is only required in accordance with the standard.

IV U.S. Dep't of Labor, MSHA, Program Policy Manual, Parts 56/57 at 51-52 (April 1, 1993) ("1993 PPM"). MSHA did not change its position with regard to testing after installation, repair, or modification. Id.

Finally, in 1994, as discussed above, MSHA unambiguously required the annual testing of cables and cords. The adoption of the 1994 guidance, which is reflected in the current 2003 PPM, is the agency action Tilden challenges here.

STATEMENT OF FACTS

In April 2008, MSHA Inspector Robert Leppanen issued two citations at Tilden Mine in Michigan because of the mine operator's failure to conduct annual continuity and resistance testing of power and extension cords. The citations alleged that annual continuity and resistance tests were not performed

on specific equipment cables and cords. Citation No. 6400301 stated that Tilden had failed to test "the 110 volt emergency lighting and the twenty foot extension cord that supplies power for a halogen light . . . located in the elevator drive control room." Citation No. 6400312 stated that Tilden had failed to test "[t]he 480 volt Lincoln Invertec V-300 Pro welder and 25 foot 480 volt extension power cord located on the north side of the elevated walkway going up to the concentrator roof." The latter citation alleged that because of the voltage of the welder's power cord and extension cord, a miner would risk electrocution, i.e. death, if the grounding system were to fail.

After Tilden filed a timely notice of contest, both parties filed cross-motions for summary decision. In the motions, the parties disagreed about whether cables and cords fall within the regulatory term "grounding systems" and whether the interpretation of Section 56.12028 announced in 1994 required notice-and-comment rulemaking.

In support of the Secretary's motion for summary decision, trial counsel submitted evidence about how grounding systems operate in practice to protect miners from electric shock. As MSHA Inspector Leppanen explained in a supporting declaration, grounding systems prevent a miner from suffering injury or death from an electric shock when using metal-encased equipment. Leppanen Decl. at 2-3. If an electrical failure occurs when

equipment is properly grounded, the grounding system de-energizes the equipment circuit and shuts off the equipment before the current can shock the miner. Id. at 3. In contrast, when equipment is improperly grounded – for example, because the grounding conductor in an extension cord is defective or damaged – the equipment continues to operate even in the event of an electrical fault. Id. A miner who touches the faulty equipment is therefore shocked by the electrical current running through that equipment. Id. Tilden did not dispute this evidence. See Pet'r's Resp. in Opp. to the Sec'y's Cross-Motion.

THE ALJ'S DECISION

Judge Paez denied Tilden's motion for summary decision and granted the Secretary's cross-motion for summary decision, thereby affirming the two citations at issue. He first held that Section 56.12028 reasonably applies to grounding conductors in extension cords and that deference is owed to the Secretary's interpretation of the standard. Order at 6. He then held that the APA does not require notice-and-comment rulemaking because the Secretary's application of Section 56.12028 to cables and cords falls under the APA's "interpretive rules" exception at 5 U.S.C. § 553(b)(A). Order at 6-8.

In reaching his conclusion that Section 56.12028 reasonably applies to extension cords, the judge recognized the undisputed facts that (1) cords contain grounding conductors; (2) grounding

conductors in cords connect equipment to power sources and therefore are essential to the grounding function; and (3) testing of cords assures that the equipment is connected to a ground prong and that the circuit is complete. Order at 6.

ARGUMENT

I. MSHA's Interpretation of Section 56.12028 Is Reasonable and Entitled to Deference

A. Standard of Review

The Commission gives de novo review to an administrative law judge's conclusions of law. Contractors Sand & Gravel, Inc., 20 FMSHRC 960, 966-67 (1998). If a legal question turns on MSHA's construction of its own regulation, however, the Commission must apply the deferential standard of review required by Auer v. Robbins, 519 U.S. 452 (1997). Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2261 (2011). The Commission owes deference to MSHA's interpretation of an ambiguous regulation "unless the interpretation is plainly erroneous or inconsistent with the regulation." Id. (internal quotations and alteration omitted); see also Nolichecky Sand Co., 22 FMSHRC 1057 (2000). Moreover, in the statutory scheme of the Mine Act, the Commission owes deference to the Secretary's interpretation of a regulation even when the interpretation is presented in a litigation position before the

Commission. Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003); see also Talk America, 131 S. Ct. at 2261.

B. Viewing the Text, Structure, and Purpose Together, the Commission Should Read Section 56.12028 to Require the Testing of Cables and Cords

Utilizing all of the tools of regulatory construction, the Commission should read Section 56.12028 to unambiguously require the testing of cables and cords. Although the text of Section 56.12028 does not directly refer to cables and cords, the standard's use of the term "grounding systems" indicates that all component parts, including cables and cords, must be tested. Moreover, both the regulatory purpose and the structure underscore that cables and cords should be subject to testing.

Section 56.12028 deals with continuity and resistance testing of "grounding systems," but the term is not defined by the statute or the standard. The standard states:

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 (emphasis added). The regulatory text does not expressly exclude cables and cords from the undefined term; neither does the text expressly include cables and cords.

Although the plain text of Section 56.12028 does not directly speak to the issue of whether the term "grounding

systems" includes cables and cords, the term "grounding system" itself indicates that all parts of the system, including cables and cords, must be tested. Cf. Daanen & Janssen, Inc., 20 FMSHRC 189, 193-94 (1998) (holding in agreement with the Secretary that standards governing "braking systems" required the functionality of every system component, rather than merely the functionality of the system as a whole).

Here, "grounding systems" like the "braking systems" in Daanen, include all component parts necessary for the system to function. In Daanen, the Commission concluded that the common meaning of the word "system" suggests an interrelationship of component parts united in a common purpose:

The common usage of the term "system" contemplates "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose," and "an aggregation or assemblage of objects joined in regular interaction or interdependence."

Id. at 193 (internal citation omitted). Moreover, the Commission held, it logically follows from that definition that for any "system to be considered functional, each of its component parts must be functional." Id. Thus, when a standard requires testing of a "system," all component parts - including, here, cables and cords - must be tested.

In addition to this textual indication that cords and cables must be tested, the purpose of the standard strongly underscores that it should be read to encompass cables and

cords. The overall purpose of Part 56 is "the protection of life, the promotion of health and safety, and the prevention of accidents." 30 C.F.R. § 56.1. Within Part 56, Section 56.12028 serves to promote safety by ensuring that required "grounding systems" are functional when they are installed, and do not fall into disrepair over time.² For the standard to serve its purpose, the "grounding system" must therefore actually connect the equipment with the earth. See 30 C.F.R. § 56.2. As Judge Paez recognized, if equipment is connected to a power source via a faulty cord, the "grounding system" does not function, and there is no protective connection with the earth. Order at 6.

Interpreting "grounding systems" to include cables and cords is also consistent with the overall structure of Subpart K, which includes three additional grounding standards: Sections 56.12025, 56.12026, and 56.12027. Those three sections require mine operators to ensure the grounding of (1) electrical circuits enclosed by metal casing, 30 C.F.R. § 56.12025; (2) metal fencing and metal buildings around transformers and switchgears, 30 C.F.R. § 56.12026; and (3) "mobile equipment powered through trailing cables," 30 C.F.R. § 56.12027.

² MSHA's PPM suggests several ways in which a grounding system can become damaged over time, including damage from exposure to vibration, flexing, or corrosive environments. See 2003 PPM at 45.

It would be nonsensical for MSHA to require the grounding of mobile equipment powered through trailing cables in Section 56.12027, but to then exclude those trailing cables from the testing that would verify whether such equipment was actually grounded in Section 56.12028. Likewise, it would make little sense for MSHA to test a trailing cable for continuity and resistance, but to then exclude an attached extension cord from such testing, when the extension cord serves to lengthen the trailing cable - and therefore the electrical circuit.

Tilden's brief misreads Section 56.12027 when it argues that no other grounding standards address power cords. See Pet'r's Br. at 9. Section 56.12027 requires the grounding of "mobile equipment powered through trailing cables." 30 C.F.R. § 56.12027 (emphasis added). A "trailing cable" is a type of power cord. See, e.g., 30 C.F.R. § 18.2 (defining, in a different part, a "trailing cable" as "a flame-resistant, flexible cable or cord through which electrical energy is transmitted to a permissible machine or accessory"). Thus, Tilden's argument that "none [of the grounding standards] address extension or power cords" is simply incorrect.

Moreover, though it may be true that none of the other grounding standards address extension cords, both citations here note that Tilden failed to test both the equipment itself, i.e., the equipment's power cord, and the attached extension cord.

See Citation No. 6400301 ("The annual continuity and resistance test were not performed on the 110 volt emergency lighting and the twenty foot extension cord that supplies power for a halogen light."); Citation No. 6400312 ("The 480 volt Lincoln Invertec V-300 welder and 25 foot 480 volt extension cord . . . did not receive the annual continuity and resistance testing.")

(emphases added). Thus, even if the Commission were to conclude that Section 56.12028 covers non-removable power cords but not extension cords, both citations should still be affirmed.

Finally, interpreting Section 56.12028 to encompass cables and cords is consistent with the standard's requirement to test grounding systems "immediately after installation." The Secretary does not read Section 56.12028 to require testing of cables and cords every time a cable or cord is plugged into a power source. Rather, it is the Secretary's position that extension cords and equipment with trailing cables or power cords are "installed" when they are put into use at a mine for the first time.³ This is consistent with common usage of the word "installation," which is defined as "the setting up or placing in position for service or use." Webster's Third New

³ The term "installation" is only relevant here insofar as it informs the interpretation of the term "grounding systems." The mine operator was cited here for failure to conduct annual testing, not for failure to conduct testing "immediately after installation."

International Dictionary (Unabridged) 1171 (1986). It is also consistent with MSHA's enforcement practices.

The Secretary's interpretation of "installation" reasonably balances the need for initial and regular testing with the reality that cables and cords may often be repositioned within a mine. To allow the term "installation" to preclude all testing of cables and cords, as Tilden argues, would contradict the purpose of the standard because a grounding system is only as protective as its weakest link. Requiring testing when a cord or cable is first put into use gives meaning to the term while also recognizing the standard's underlying purpose.

Tilden's remaining argument that the Secretary's interpretation is incorrect because grounding systems are by nature "stationary" and involve only "ground beds and similar fixed facilities," see Pet'r's Br. at 10, is unpersuasive. Tilden relies on a single Commission case interpreting a different MSHA standard governing lightning arresters in underground coal mines. See id. at 10 (citing Wolf Run Mining Co., 32 FMSHRC 1669, 1672 (2010)). The case cited is inapposite. It does not use the term "grounding systems," let alone discuss its regulatory meaning. Moreover, Tilden's argument that "grounding systems" are stationary is contradicted by Section 56.12025, which broadly requires grounding of any metal-encased electrical circuit, and by Section 56.12027, which

requires grounding of mobile equipment powered through trailing cables.

Viewing the text, structure, and purpose of Section 56.12028 together, the term "grounding systems" should be interpreted to include the grounding conductors in cables and cords. MSHA's testing requirements for grounding systems would be ineffective if they ignored these grounding conductors, which are a critical part of the grounding function.

C. Even If Section 56.12028 Is Ambiguous, the Commission Should Defer to the Secretary's Reasonable Interpretation

Even if the Commission finds Section 56.12028's coverage of cables and cords to be ambiguous, the Secretary's interpretation is reasonable and entitled to deference.

The Secretary's interpretation of "grounding systems" is reasonable because, as discussed above, it is consistent with the standard's text, purpose, and structure.

The Secretary's interpretation is also reasonable because it is consistent with the Secretary's historical understanding that (1) cords and cables contain "grounding conductors," which make them an integral part of an "equipment grounding system"; and (2) cords and cables should be tested frequently, and certainly no less frequently than on an annual basis. See 1988 PPM; 1993 PPM; 1994 PPL. MSHA's only substantive change in 1993

and 1994 pertained to how often cords and cables require testing, not to whether they should be tested at all.

In addition, the Secretary's interpretation of the term "grounding systems" is reasonable because the content of the PPM, which interprets the term, is internally consistent. The PPM sets forth three elements that grounding systems "typically include": equipment grounding conductors, grounding electrode conductors, and grounding electrodes. 2003 PPM at 44. Cables and cords fall within the category of "equipment grounding conductors" because they are "the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor." Leppanen Decl. at 3-4; 2003 PPM.

For all of the above reasons, the Commission should affirm the judge's conclusion that the Secretary's interpretation of Section 56.12028 is reasonable and entitled to deference.

II. The APA Does Not Require Notice and Comment Here Because, At Most, MSHA Changed an Interpretive Rule

A. At Most, MSHA's Interpretation, As Expressed in the 1994 PPL and Subsequent PPMs, Is a Change to an Interpretive Rule

The APA distinguishes between "substantive" or "legislative" rules – which are binding on courts as an extension of legislative power – and "interpretive" rules, which have only the effect courts choose to give them. 5 U.S.C. § 553(b) (A); Charles Alan Wright & Charles H. Koch, Jr., 32 Fed.

Prac. & Proc. Judicial Review § 8154 (1st ed.). Courts primarily consider four factors when distinguishing between legislative and interpretive rules:

(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, and (4) whether the rule effectively amends a prior legislative rule.

Am. Mining Congress v. MSHA, 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("AMC"). If the answer to the first, third, or fourth AMC factors is affirmative, the rule is legislative rather than interpretive. Id.; Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994) (publication in C.F.R. not determinative).

Tilden invokes only the fourth AMC factor, arguing that the rule at issue is legislative because the "1994 PPL and the subsequent PPM statements . . . had the effect of amending the prior legislative rule." Pet'r's Br. at 19.

The Secretary contends that the 1994 PPL did not "amend" the interpretation of the term "grounding systems" in the 1988 and 1993 PPMs. Though the wording of the guidance evolved from 1988 to 1994 to clarify that cables and cords were subject to annual testing, the thrust of the PPM from 1988 onward remained the same: cables and cords should generally be tested because

the grounding conductors they contain constitute an integral part of any grounding system.

Even if the 1994 PPL constituted an "amendment" to the 1988 interpretation of the annual testing requirement, the Secretary contends that the 1994 PPL amended the agency's prior interpretation of Section 56.12028, not Section 56.12028 itself. As discussed above, Section 56.12028 requires annual testing of "grounding systems" – of which cables and cords are a part. Thus, when MSHA enforces the standard with regard to cables and cords, it is simply enforcing the existing regulatory requirement, not creating a new one. This distinction is important because an interpretation that amends a prior legislative rule requires notice and comment, whereas an interpretation that amends a prior interpretive rule (in the majority of judicial circuits) does not.

Tilden cites two Commission cases in support of its contention that the 1994 PPL effectively amended Section 56.12028. See Pet'r's Br. at 19-21 (citing Hibbing Taconite, 21 FMSHRC 346 (1999), and Drummond Co., 14 FMSHRC 661, 685 (1992)). Neither case persuasively establishes that the Secretary amended a prior legislative rule rather than a prior interpretive one.

Hibbing Taconite is unpersuasive because its determination that notice-and-comment rulemaking was required relies on an erroneous interpretation of the term "grounding systems." In

his non-precedential decision, Judge Hodgdon vacated 67 citations under Section 56.12028 after rejecting the Secretary's interpretation of the standard. Judge Hodgdon first held that the term "grounding systems" does not encompass trailing cables, power cables, and cords. 21 FMSHRC at 354. He then held that notice and comment were required for the Secretary to change the PPM to require testing of cables and cords because the change served to expand the regulation itself, not the prior interpretation. Id.

If the Commission concludes, contrary to Judge Hodgdon's first holding, that the Secretary's interpretation of Section 56.12028 is reasonable and therefore entitled to deference, it follows that the Commission must also reject Judge Hodgdon's second holding that notice and comment are required. If, on the other hand, the term "grounding systems" encompasses cables and cords, it follows that enforcing the regulation does not change it.

Drummond is not persuasive because the facts in that case were different from those presented here. In Drummond, the Secretary had announced a new penalty formula in a PPL without utilizing notice and comment. 14 FMSHRC at 685. The Commission held that the PPL at issue did not interpret, explain, or clarify existing regulations; notice and comment was therefore required because the Secretary had modified a legislative rule. Id. Here, the PPM statement that "[g]rounding conductors in

trailing cables, power cables, and cords that supply power to tools and portable or mobile equipment must be tested as prescribed in the regulation” does serve to interpret, explain, and clarify: it gives notice that the Secretary interprets the undefined term “grounding systems” to include cables and cords, and clarifies that those grounding system components must be tested on an annual basis as prescribed.

For all of the foregoing reasons, the Commission should either hold that the 1994 PPL did not amend the Secretary’s interpretation of “grounding systems,” or hold that the 1994 PPL amended the prior interpretive rule found in the 1988 and 1993 PPMs. Either holding would be consistent with Judge Paez’s conclusion that the PPM and the PPL contain interpretive rules. See Order at 8.

B. The APA Does Not Require Notice-and-Comment Rulemaking When an Agency Changes an Interpretive Rule

The APA contains a limited set of provisions governing notice-and-comment rulemaking. First, the APA defines the term “rule making” as the “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). Second, the APA sets forth procedures that an agency must follow when conducting covered rulemakings, including notice of a proposed rule in the Federal Register, opportunity for public comment, and agency consideration of the views presented. Id. § 553(b)-(c).

Finally, the APA specifies the universe of rules subject to the notice-and-comment requirements. Id. § 553(b).

The APA sets forth four situations in which the notice-and-comment requirements do not apply: (1) "interpretive" rules; (2) "general statements of policy," (3) "rules of agency organization, procedure or practice," and (4) when notice-and-comment rulemaking would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(A) and (B).

The APA's exclusion of interpretive rules from notice-and-comment rulemaking requirements is unambiguous: "Except when notice or hearing is required by statute, this subsection does not apply . . . to interpretive rules." Id. § 553(b)(A) (emphasis added).

Under the plain text of the APA, there is no indication that a change to an interpretive rule should be treated any differently than an interpretive rule adopted in the first instance. Section 551(5) suggests that new rules, amendments, and repeals should all be treated similarly. Thus, if a new rule requires notice and comment, an amendment to that rule, or a repeal of that rule, would also require notice and comment. Conversely, because new interpretive rules do not require notice and comment, an agency would not need to engage in notice and comment when later amending or repealing the interpretive rule. As the First Circuit has summarized:

The legal point is clear enough: in order for notice and comment to be necessary [when an agency changes a rule], the later rule would have to be inconsistent with another rule having the force of law, not just any agency interpretation regardless of whether it had been codified.

Warder v. Shalala, 149 F.3d 73, 81 (1st Cir. 1998) (internal quotation and alteration omitted).

C. To the Extent Alaska Hunters Holds Otherwise, the Secretary Urges the Commission to Reject That Flawed Doctrine

Despite the APA's clear exclusion of interpretive rules from notice-and-comment requirements, some circuit courts have judicially imposed notice-and-comment requirements on agencies seeking to change interpretive rules that interpret agency regulations. See, e.g., Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999) ("Alaska Hunters") (adopting rule first articulated in Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997)); see also Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 629 (5th Cir. 2001) (following Alaska Hunters without additional analysis).

At least four circuits have held, contrary to Alaska Hunters, that notice-and-comment procedures are unnecessary when an agency changes a regulatory interpretation because the APA's interpretive rules exception applies. See Haas v. Peake, 525 F.3d 1168, 1195-97 (Fed. Cir. 2008); Miller v. Cal. Speedway Corp., 536 F.3d 1020, 1033 (9th Cir. 2008); St. Francis Health

Care Ctr. v. Shalala, 205 F.3d 937, 946-47 (6th Cir. 2000); Warder, 149 F.3d at 79-83.⁴ Three other circuits, noting the controversy, have avoided the issue by deciding the case before them on other grounds. United States v. Magnesium Corp. of Am., 616 F.3d 1129, 1141 (10th Cir. 2010); Warshauer v. Solis, 577 F.3d 1330, 1339 (11th Cir. 2009); Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141, 1147 n.4 (7th Cir. 2001).

The Sixth Circuit, which potentially possesses appellate jurisdiction over this case, has squarely held that an agency may change its interpretation of a regulation without notice and comment. See St. Francis, 205 F.3d at 946-47. In St. Francis, the Sixth Circuit held that changes to regulatory interpretations in the Department of Health and Human Services' Medicare Provider Reimbursement Manual were not subject to notice-and-comment requirements because the APA's exception for interpretive rules applied. Id. The Sixth Circuit has not yet recognized, however, that its controlling law conflicts with

⁴ The Alaska Hunters doctrine has also been widely criticized in the academic literature. E.g., Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 Admin. L. Rev. 803, 846 (2001); William Funk, A Primer on Nonlegislative Rules, 53 Admin. L. Rev. 1321, 1329-30 (2001); Richard J. Pierce, Jr., Distinguishing Legislative Rules from Interpretive Rules, 52 Admin. L. Rev. 547, 573 (2000). But see e.g., Ryan DeMotte, Note, Interpretive Rulemaking and the Alaska Hunters Doctrine: A Necessary Limitation on Agency Discretion, 66 U. Pitt. L. Rev. 357, 360-61 (2004).

that of the D.C. Circuit. See Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 682 (6th Cir. 2005) (favorably citing to both St. Francis and Alaska Hunters in case involving change to a statutory, not a regulatory, interpretation).

The Secretary urges the Commission to reject the flawed Alaska Hunters doctrine.⁵ Where, as here, the federal Courts of Appeals to which the parties may subsequently appeal have adopted conflicting answers to the same question, the Commission may use its own judgment to interpret the provision, while applying any controlling Supreme Court authority. See Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 705-18, 764-70 (1989) (discussing various agencies' approaches to venue uncertainty in the Courts of Appeals). In such cases, the conflicting decisions of the Courts of Appeals are persuasive authority only. Johnson v. U.S. R.R. Ret. Bd., 969 F.2d 1082, 1093 (D.C. Cir. 1992) ("Although the decision of one circuit deserves respect, we have recognized that it need not be taken by [an

⁵ Though the Commission has previously cited Alaska Hunters, the Commission did not adopt the doctrine after a reasoned consideration of contrary authority. See RAG Shoshone Coal Corp., 26 FMSHRC 75, 83 (2004). Moreover, in RAG Shoshone, the Commission did not actually rely on Alaska Hunters because it determined that MSHA lacked an adequate legislative basis for the citations in the absence of the rule, and that MSHA had effectively amended the regulation itself, rather than a prior interpretive rule. See 26 FMSHRC at 83-84. Both determinations would qualify the rule as legislative under the AMC factors even without applying Alaska Hunters.

administrative agency] as the law of the land.") (internal quotation omitted); Bethlehem Steel Corp., 9 O.S.H. Cas. (BNA) 1346, 1349 n.12 (1981) (recognizing dilemma created by venue uncertainty and choosing to follow Commission precedent in light of conflicting circuit law).

There are many compelling reasons for the Commission to join the majority of courts that have rejected or questioned Alaska Hunters. First and foremost, the Alaska Hunters doctrine contravenes the plain text of the APA. As noted above, the APA's exclusion of interpretive rules from notice-and-comment requirements in APA Section 553(b)(A) logically extends to changes in interpretive rules.

Second, the doctrine conflicts with controlling Supreme Court precedent. See FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009); Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978).

The Supreme Court's 2009 decision in Fox effectively overruled the Alaska Hunters principle because it recognized that the APA does not treat changes to prior agency action any differently from new agency action. See Fox, 129 S. Ct. at 1810-11. The Second Circuit in Fox had rejected an FCC order modifying the agency's interpretation of a statutory ban on profanity because the agency had inadequately explained the

change in position. The Supreme Court reversed, holding that “the statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.” Id. at 1811. The Supreme Court’s reasoning in Fox applies equally here: the text of the APA provides no more basis for distinguishing between new and changed regulatory interpretations than it does for distinguishing between new and changed statutory interpretations.

Alaska Hunters also conflicts with the Supreme Court’s long-standing holding in Vermont Yankee because it adds a judicially created procedural requirement beyond the requirements enumerated in the APA. See 435 U.S. at 524. The Court held in Vermont Yankee that the APA established the maximum, rather than the minimum, procedural requirements that courts may impose on administrative agencies. Id.; see also Fox, 129 S. Ct. at 1810 (reaffirming Vermont Yankee’s holding that the APA “sets forth the full extent of judicial authority to review executive agency action for procedural correctness”). Because the APA does not require notice and comment for changes to regulatory interpretations, the Alaska Hunters doctrine is an unauthorized judicial imposition of additional requirements.

The Supreme Court’s decision in Guernsey, though cited by the D.C. Circuit in Alaska Hunters, actually supports the Secretary’s position here. Guernsey, which reviewed the

Secretary of Health and Human Services' interpretation of Medicare reimbursement regulations, unequivocally stated that "[i]nterpretive rules do not require notice and comment." 514 U.S. at 99. Guernsey acknowledged that notice-and-comment rulemaking would be required if an agency adopted a position contrary to existing regulations. See id. at 100. It did not in any way suggest, however, that notice and comment would be required where an agency changed an interpretation of a regulation, rather than the regulation itself. See id.

Finally, in addition to the compelling textual and doctrinal reasons for the Commission to reject Alaska Hunters, important policy considerations weigh in favor of allowing agencies to change regulatory interpretations without notice and comment. Imposing notice-and-comment requirements every time an agency wishes to change a regulatory interpretation diminishes agency flexibility, discourages informal agency guidance, and deters agencies from interpreting their regulations. Strauss, supra, at 807; Connolly, supra, at 169-71.

For all of these reasons, the Secretary urges the Commission to decline to adopt the Alaska Hunters doctrine.

III. In Any Event, Alaska Hunters Does Not Require Notice-and-Comment Rulemaking Here Because Tilden Did Not Substantially or Justifiably Rely on a Definitive Prior Agency Interpretation

Recent applications of the Alaska Hunters principle have overwhelmingly limited, rather than expanded, the disputed doctrine. See, e.g., Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n, 628 F.3d 568, 579-80 (D.C. Cir. 2010) (recognizing exception to Alaska Hunters where original agency interpretation was conditional, and where reliance on original agency interpretation was insubstantial or unjustified); Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Admin., 296 F.3d 1120, 1125-28 (D.C. Cir. 2002) (recognizing exception where original agency interpretation was ambiguous); Monmouth Med. Ctr. v. Thompson, 257 F.3d 807, 814 (D.C. Cir. 2001) (recognizing exception where original agency interpretation was invalid); Hudson v. FAA, 192 F.3d 1031, 1035-36 (D.C. Cir. 1999) (recognizing exception for policy statements).

The D.C. Circuit has recognized that Alaska Hunters only requires notice and comment when the regulated entity can show "substantial and justifiable reliance on a well-established agency interpretation." MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 511 (D.C. Cir. 2009). To succeed with this argument, Tilden must show that "the agency has given its regulation a definitive interpretation, and later significantly revised that

interpretation." Darrell Andrews, 296 F.3d at 1126 (internal quotation and alteration omitted).

Thus, even if the Commission adopts the Alaska Hunters doctrine, notice and comment would not be required here because MSHA's prior regulatory interpretation was not definitive. Moreover, Tilden 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.

A. MSHA's Prior Interpretation Was Not Definitive

MSHA's 1988 interpretation was not definitive because it was ambiguous with respect to whether Section 56.12028 required annual testing of cables and cords. In Darrell Andrews, the D.C. Circuit held that the prior regulatory guidance "offer[ed] some support for the positions of both" parties and could therefore "only be described as - at best - ambiguous." Id. at 1126. 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.

The 1988 PPM was internally inconsistent and therefore ambiguous. The 1988 PPM's initial statement that the annual test "does not apply to grounding conductors in trailing cables, power cables and cords" was contradicted by the very next

sentence, which stated that the same cables "require[d] more frequent testing," even though such testing was not mandated under any other standard. See 1988 PPM. MSHA recognized the ambiguity and clarified the guidance in the 1993 PPM, which stated that more frequent testing was desirable, but only annual testing was required. See 1993 PPM.

MSHA's transition from the ambiguous interpretation in the 1988 PPM to the clarified interpretations in the 1993 PPM and 1994 PPL therefore did not require notice and comment.

B. Tilden Does Not Allege Substantial or Justifiable Reliance on MSHA's Prior Interpretation

Tilden cannot show substantial and justifiable reliance here because: (1) Tilden does not allege any reliance on the prior interpretation and any reliance Tilden might allege would not be sufficiently substantial; (2) Tilden's alleged reliance on Hibbing Taconite does not trigger the Alaska Hunters rule; and (3) even if Tilden'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. As a result of the prior interpretation, "[p]eople in the lower 48 states had

pulled up stakes and moved to Alaska." MetWest, 560 F.3d at 511. The Court further noted that the Alaskans "opened lodges and built up businesses dependent on aircraft" because they believed, based on consistent and long-standing FAA advice, that the regulations at issue did not apply to them. Alaska Hunters, 177 F.3d at 1035.

Alaska Hunters does not apply here because Tilden did not choose a location for its operations or make any new capital investments in reliance on MSHA's prior interpretation. Cf. Ass'n of Am. Railroads v. Dep't of Transp., 198 F.3d 944, 950 (D.C. Cir. 1999). Indeed, Tilden does not assert that it made any business decisions in reliance on the interpretation prior to the interpretive change in 1994.⁶ Rather, Tilden asserts only that it relied upon ALJ Hodgdon's non-precedential ruling in Hibbing Taconite from 1999 onward to justify its non-compliance with MSHA's unambiguous interpretation of the standard. See Pet'r's Br. at 2.

Tilden's alleged reliance on the ALJ's non-precedential decision in Hibbing Taconite does not trigger the Alaska Hunters doctrine. Under Tilden's theory of reliance, MSHA would be

⁶ Even if Tilden were to assert that it had relied on the prior interpretation itself, it is hard to imagine that such reliance would rise to the "substantial" level found in Alaska Hunters. In that case, the practical effect of the interpretive change was to apply entire parts of the Code of Federal Regulations to a new constituency that had no opportunity to participate in their development. 177 F.3d at 202-03.

required to engage in notice-and-comment rulemaking any time it enforced a regulation in a manner contrary to a non-precedential decision by an ALJ. This theory has no support in the reasoning of Alaska Hunters or its progeny, which deal only with reliance on the prior agency interpretation.

In addition, Tilden's theory would be an impermissible infringement on the Secretary's prosecutorial discretion. See United States v. Mendoza, 464 U.S. 154, 573-74 (1984) (recognizing the government's discretion regarding whether to seek review of unfavorable judgments). When deciding whether to pursue an appeal, the government must consider a variety of factors, including limited enforcement resources and policy choices that may vary by Administration. Id. at 573. Because the Secretary exercises her discretion on a case-by-case basis, multiple ALJs may often pass on the same legal issue before the issue is decided by the Commission, the Courts of Appeals, or the Supreme Court. Commission Procedural Rule 69 recognizes that reality: "A decision of a Judge is not a precedent binding upon the Commission." 29 C.F.R. § 2700.69(d). A mine operator thus cannot point to a favorable but non-precedential ruling and expect immunity from consequences in future adjudications when it violates the same safety standard.

Even if substantial reliance on a non-precedential adjudication could trigger Alaska Hunters' notice-and-comment

requirement, notice and comment would still not be necessary here because Tilden's reliance would be unjustifiable in light of subsequent events. As Tilden itself emphasizes, MSHA stood by its 1994 interpretation of "grounding systems" when it published the revised PPM in 2003. Pet'r's Br. at 2. Thus, even if Tilden had erroneously believed that MSHA had abandoned its 1994 interpretation when the Secretary decided not to appeal in Hibbing Taconite, the 2003 PPM should have put Tilden on notice that it had incorrectly perceived MSHA's position.

Moreover, if Tilden had believed in 2003 that "rulemaking was required for the reapplication" of the interpretation, see Pet'r's Br. at 8 n.8, any mine operator could have brought a procedural challenge at that time. See Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (permitting challenge to EPA guidance document over agency objection for agency's failure to utilize notice and comment). Five years' notice of the interpretation's reapplication is more than adequate in light of the time limits for procedural challenges when MSHA does utilize notice-and-comment rulemaking: Section 101(d) of the Mine Act requires aggrieved parties to file procedural challenges to rules promulgated through notice-and-comment rulemaking within 59 days. See 30 U.S.C. § 811(d).

CONCLUSION

For all of the foregoing reasons, the Secretary urges the Commission to affirm the judge's conclusions that the Secretary's interpretation of Section 56.12028 is reasonable and entitled to deference, and that the APA does not require notice-and-comment rulemaking here because the Secretary's application of Section 56.12028 to cables and cords falls under the APA's interpretive rules exception at 5 U.S.C. § 553(b)(A). The Commission should affirm the judge's finding of a violation and assessment of a penalty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a correct copy of the Secretary's response brief was served by first-class U.S. mail on August 26, 2011, upon the following:

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3. The older type switchgear, regardless of voltage rating, which has exposed energized parts should have an insulating platform or mat with an insulation rating not less than the phase-to-phase voltage of the circuit.

56/57.12028 Testing Grounding Systems

This standard requires that continuity and resistance of grounding systems shall be tested immediately after installation, repair, and/or modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative.

Ground systems normally include all the following:

1. Grounding electrode - usually are driven rods, buried metal or other effective methods for connection to the earth located at the power source.
2. Grounding electrode conductor is the conductor from the grounding electrode extending to the equipment grounding conductor or the service entrance.
3. Equipment grounding conductors and bonding jumpers are the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor.

The grounding system tests required are as follows:

1. Grounding electrode - resistance shall be tested immediately after installation, repair and/or modification, and annually thereafter.
2. Grounding electrode conductor - continuity of this conductor and its connections shall be tested immediately after installation, repair, and/or modification, and annually thereafter.
3. Equipment grounding conductors and bonding jumpers - continuity of these conductors and their connections shall be tested immediately after installation, repair, and/or modification. Equipment grounding conductors and bonding jumpers which are exposed or subjected to vibration, flexing, corrosive environments or frequent lightning hazard shall be tested annually.

A record of the most recent tests of items 1 and 2 directly above shall be made available on request to the Secretary or his authorized representative.

The annual test does not apply to grounding conductors in trailing cables, power cables and cords which supply power to portable or mobile equipment. The grounding conductors in these cables require more frequent testing.

Continuity tests shall not be required if a fail-safe ground check circuit is utilized to monitor continuously the grounding circuit to assure continuity, and which shall cause the circuit breaker to open when the grounding conductor is broken.

56/57.12042 Track Bonding

This standard requires that both rails shall be bonded or welded at every joint, and rails shall be crossbonded at least every 200 feet if the track serves as a return trolley circuit. When rails are moved, replaced or broken bonds are discovered, they shall be rebonded within three working shifts.

A citation for a violation of this standard should not be issued until the end of the third working shift after rails are moved, replaced or a broken bond is discovered. That is, assuming a three shift operation, if a broken bond is discovered on a day shift, the citation shall be issued at the end of the next day shift if the broken bond is still unrepaired. A citation shall not be issued if the bond has been repaired within this period of time.

The bonding (or welding) of the rails shall be completed before any new installation of track is placed in regular or production operation. In a new area of the mine or major track installation, the bonding of both rails shall be completed in conjunction with, and progress with, the laying of rail lengths.

56/57.12082 Isolation of Powerlines

This standard requires that powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines. Additional insulation is not required between powerlines and waterlines, telephone lines, and air lines if the insulation of the powerlines, as provided by the manufacturer, is in its original condition.

When powerlines are found to be in contact with water, telephone, or air lines, a careful check must be made of the condition of the insulation of the entire cable. If the cable contains

3. The older type switchgear, regardless of voltage rating, which has exposed energized parts should have an insulating platform or mat with an insulation rating not less than the phase-to-phase voltage of the circuit.

56/57.12028 Testing Grounding Systems

This standard requires that continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

The intent of this standard is to ensure low resistance grounding systems. It is of vital importance to quickly open circuit breakers or fuses when faults occur. Many fatalities and injuries have occurred due to high resistance in equipment grounding systems. These fatalities and injuries could have been prevented by proper testing and maintenance.

Grounding systems typically include the following:

1. equipment grounding conductors - the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor;
2. grounding electrode conductor - the conductor connecting the grounding electrode to the equipment grounding conductor or the service entrance; and
3. grounding electrodes - usually driven rod(s), buried metal, or other effective methods located at the source, for an earth connection.

The following grounding systems tests are required. The results of these tests will be resistance values in ohms.

1. Equipment grounding conductors - continuity and resistance of these conductors and their connections shall be tested immediately after installation, repair, and/or modification, and annually thereafter.
2. Grounding electrode conductor - continuity and resistance of this conductor and its connections shall be tested immediately after installation, repair, and/or modification, and annually thereafter.

3. Grounding electrodes - resistance shall be tested immediately after installation, repair, and/or modification, and annually thereafter.

A record of the most recent tests shall be made available on request by the Secretary or his/her authorized representative.

The grounding conductors in trailing cables, power cables, and cords which supply power to portable or mobile equipment should be tested more frequently than stationary grounding conductors. However, a record of such tests is only required in accordance with the standard.

Continuity tests shall not be required if a fail-safe ground check circuit is utilized to continuously monitor the grounding circuit. The ground check monitor shall cause the circuit breaker or fuses to open when the grounding conductor is broken.

The testing and recordkeeping satisfy the requirements of 56/57.12028. However, if the record of the most recent tests indicates that the resistance level of the grounding system is too high to produce the fault current necessary to open the circuit breaker or fuses, a citation/order should be issued under 30 CFR 56/57.12025 "Grounding circuit enclosures."

56/57.12042 Track Bonding

This standard requires that both rails shall be bonded or welded at every joint, and rails shall be crossbonded at least every 200 feet if the track serves as a return trolley circuit. When rails are moved, replaced or broken bonds are discovered, they shall be rebonded within three working shifts.

A citation for a violation of this standard should not be issued until the end of the third working shift after rails are moved, replaced or a broken bond is discovered. That is, assuming a three shift operation, if a broken bond is discovered on a day shift, the citation shall be issued at the end of the next day shift if the broken bond is still unrepaired. A citation shall not be issued if the bond has been repaired within this period of time.

The bonding (or welding) of the rails shall be completed before any new installation of track is placed in regular or production operation. In a new area of the mine or major track installation, the bonding of both rails shall be completed in conjunction with, and progress with, the laying of rail lengths.

3. The older type switchgear, regardless of voltage rating, which has exposed energized parts should have an insulating platform or mat with an insulation rating not less than the phase-to-phase voltage of the circuit.

56/57.12028 Testing Grounding Systems

The intent of this standard is to ensure that continuity and resistance tests of grounding systems are conducted on a specific schedule. These tests will alert the mine operator if a problem exists in the grounding system which may not allow the circuit protective devices to quickly operate when faults occur. With the exception of fixed installations, numerous fatalities and injuries have occurred due to high resistance or lack of continuity in equipment grounding systems. These accidents could have been prevented by proper testing and maintenance of grounding systems.

Grounding systems typically include the following:

1. equipment grounding conductors - the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor;
2. grounding electrode conductors - the conductors connecting the grounding electrode to the equipment grounding conductor; and
3. grounding electrodes - usually driven rods connected to each other by suitable means, buried metal, or other effective methods located at the source, to provide a low resistance earth connection.

Operators shall conduct the following tests:

1. equipment grounding conductors - continuity and resistance must be tested immediately after installation, repair, or modification, and annually if conductors are subjected to vibration, flexing or corrosive environments;
2. grounding electrode conductors - continuity and resistance must be tested immediately after installation, repair, or modification, and annually if conductors are subjected to vibration, flexing or corrosive environments; and
3. grounding electrodes - resistance must be tested immediately after installation, repair, or modification, and annually thereafter.

Conductors in fixed installations, such as rigid conduit, armored cable, raceways, cable trays, etc., that are not subjected to vibration, flexing or corrosive environments may be examined annually by visual observation to check for damage in lieu of the annual resistance test. When operators elect to conduct this visual examination as a method of compliance with 30 CFR 56/57.12028, MSHA will require that a record be maintained of the most recent annual visual examination.

Grounding conductors in trailing cables, power cables, and cords that supply power to tools and portable or mobile equipment must be tested as prescribed in the regulation. This requirement does not apply to double insulated tools or circuits protected by ground-fault-circuit interrupters that trip at 5 milli-amperes or less.

Testing of equipment grounding conductors and grounding electrode conductors is not required if a fail-safe ground wire monitor is used to continuously monitor the grounding circuit and which will cause the circuit protective devices to operate when the grounding conductor continuity is broken.

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

56/57.12042 Track Bonding

This standard requires that both rails shall be bonded or welded at every joint, and rails shall be crossbonded at least every 200 feet if the track serves as a return trolley circuit. When rails are moved, replaced or broken bonds are discovered, they shall be rebonded within three working shifts.

A citation for a violation of this standard should not be issued until the end of the third working shift after rails are moved, replaced or a broken bond is discovered. That is, assuming a three shift operation, if a broken bond is discovered on a day shift, the citation shall be issued at the end of the next day shift if the broken bond is still unrepaired. A citation shall not be issued if the bond has been repaired within this period of time.

The bonding (or welding) of the rails shall be completed before any new installation of track is placed in regular or production operation. In a new area of the mine or major track installation, the bonding of both rails shall be completed in conjunction with, and progress with, the laying of rail lengths.