CCASE:
SOL (MSHA) V. JIM WALTER
DDATE:
19860207
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS
	Docket No. SE 85-59 A.C. No. 01-00758-03626
v.	Docket No. SE 85-60 A.C. No. 01-00758-03627
JIM WALTER RESOURCES, INC., RESPONDENT	No. 3 Mine

DECISIONS

Appearances: George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner; Robert Stanley Morrow and Harold D. Rice, Esqs., Jim Walter Resources, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.   820(a), seeking civil penalty assessments for alleged violations of mandatory safety standard 30 C.F.R.   75.1403 and 75.1403Ä8(d).

The respondent filed timely answers contesting the proposed civil penalties and hearings were held in Birmingham, Alabama. The parties waived the filing of posthearing proposed findings and conclusions. However, all oral arguments made by counsel on the record during the course of the hearings have been considered by me in the adjudication of these cases.

Issue

The principal issues presented in these proceedings are (1) whether the safeguard provisions found in 30 C.F.R. 75.1403, and the criteria which follow in sections 75.1403Ä(b)(3) and 75.1403Ä8(d) are advisory or mandatory requirements, and (2) whether the respondent's failure to comply with the terms of the safeguard notices issued in these cases constitutes a violation of mandatory safety standards for which civil penalties may be assessed.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The respondent is the owner and operator of the subject mine.

2. The respondent and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in these cases.

4. The MSHA Inspectors who issued the subject orders or citations were authorized representatives of the Secretary.

5. A true and correct copy of the subject citations were properly served upon the respondent.

6. The copy of the subject citations and determination of violations at issue are authentic and may be admitted into evidence for purpose of establishing their issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

7 . Imposition of civil penalties in these cases will not affect the respondent's ability to do business.

8. The alleged violations were abated in good faith.

9. The respondent's history of prior violations is average.

10. The respondent is a medium-size operator.

Discussion

The violations in issue in these proceedings are as follows:

Docket No. SE 85Ä59

Section 104(a) "S & S" Citation No. 2310757, was issued at 10:00 a.m., on June 15, 1984, and it cites a violation of mandatory safety standard 30 C.F.R.   75.1403Ä8(d). The condition or practice is described as follows:

> The clearance along the section 007Ä0 track was obstructed by 2 timbers laying along the track and a material car loaded with timbers that was hanging out over the straight track over which men and materials are transported. The timbers on the supply car was (sic) hanging out over the man bus that was operating on the straight track. L.A. Holified park (sic) the timber car in the kick back under the direct supervision and instruction of supervisor Earnest Warren. This violation is a part of 107 A Order No. 2310756 so no abatement time is set.

Docket No. SE 85Ä60

Section 104(a) "S & S" Citation No. 2483944, was issued at 8:35 a.m., on January 22, 1985, and it cites a violation of mandatory safety standard 30 C.F.R.   75.1403. The condition or practice is described as follows: "The No. 7 man bus being used to transport seven miners from the No. 8 section was not equipped with an operative sanding device in that the reservoirs were empty and sand passed through the lines on the track when the bus was parked."

Petitioner's Testimony and Evidence-Docket No. SE 85Ä59

Luther McAnally testified that he is a retired former MSHA inspector, and he confirmed that he issued an imminent danger order and a citation in this case on June 15, 1984. He stated that a material car loaded with timbers was parked in a "kick back" along the track in question. The loaded timbers were protruding over the track and two timbers were lying on the ground and touching the ties over which the track was laid.

Mr. McAnally stated that he was in a track jeep with the company safety inspector, a mine safety committeeman, and the jeep operator, and as the jeep travelled along the track it passed close to the protruding timbers, and in fact "bumped" the timbers as the jeep came to a stop. Mr. McAnally stated that he had to scramble and move over in his seat to avoid being struck by the timbers, but that the jeep operator who was seated at the controls in an enclosed cab had no room to move in the event the jeep continued and struck the timbers. The operator's cab was approximately 6 to 7 inches off the rail, and Mr. McAnally believed that the operator would have suffered serious injuries had he been struck by the timbers. With respect to the two timbers lying by the track, Mr. McAnally believed they presented a hazard since they obstructed the rail and were not clear of the jeep travelway.

Mr. McAnally stated that he issued a imminent danger order to isolate the cited hazardous kick back area where the timbers were located and to remove the occupants of the jeep from further exposure to the obstruction hazard. He confirmed that he issued the section 104(a) citation at the same time in order to cite a violation of section 75.1403 (8)(d), and to achieve abatement of the condition. He confirmed that he relied on a previously issued safeguard notice, No. T.J.I. issued by MSHA Inspector T.J. Ingram on July 27, 1976, to support his citation (exhibit GÄ1) (Tr. 18Ä24).

On cross-examination, Mr. McAnally confirmed that he and the other individuals in the man trip jeep were the only individuals exposed to the hazard resulting from the cited conditions. He stated that his principal duties as an inspector entailed the inspection of mines and the enforcement of mandatory safety standards. He denied that his duties included the rendering of advice to mine operators or miners.

Mr. McAnally stated that at the time of his inspection he was aware of the fact that Mr. Ingram had issued the previous safeguard notice, and he confirmed this by reviewing the official files in his office (Tr. 27Ä33).

Petitioner's counsel confirmed that the 1976 safeguard notice relied on by Inspector McAnally makes reference to several locations along the track haulageway where the clearance was less than 24 inches. The notice also makes reference to an obstructed clearance in a walkway in that refuse, loose rock, and supplies were present. He also confirmed that the conditions cited by Mr. McAnally must be substantially the same kind of conditions described in the original safeguard notice. His position is that since Mr. McAnally found there was no track clearance, or less than 24 inches of clearance because of the protruding timbers, his reliance on the prior notice was proper (Tr. 35Ä36). Inspector McAnally confirmed that there are no other specific mandatory standards covering the conditions he cited, and if there were, he would have cited another appropriate standard rather than relying on the safeguard notice (Tr. 36).

MSHA Inspector T.J. Ingram confirmed that he issued a safeguard notice at the No. 3 Mine on July 27, 1976, exhibit GÄ1, and stated that he did so after finding the main track haulageway cluttered along a tight curve going north along a track haulageway. The required track clearance was less than the required 24 inches. Mr. Ingram confirmed that he served the notice on Ken Price, the respondent's safety inspector, and that he discussed with him the cited conditions as well as what was required to abate the conditions (Tr. 40).

On cross-examination, Mr. Ingram confirmed that he has rendered advice to miners and management personnel in the mines with respect to safety practices. He also confirmed that he has pointed out violative conditions during his inspections, and that his advice and recommendations, while not mandatory, are freely given as part of his inspection duties (Tr. 40Ä43).

In response to further questions, Mr. Ingram stated that once a safeguard notice is issued, an inspector may rely on it in future inspections where he issues citations or orders. He confirmed that the notice he issued on July 27, 1976, is still in effect at the No. 3 Mine, and that in the event he finds an obstructed clearance on the track haulageway, he would issue a citation and rely on that notice. He confirmed that there is no way that a mine operator can be relieved of the requirements of a safeguard notice, and he believed that

the conditions cited in such a notice must be the same or similar to any condition which he might find on any given day (Tr. 45).

During the course of the hearing, I took note of the fact that subsequent to the time Mr. McAnally issued his citation of June 15, 1984, another MSHA inspector (Theron E. Walker) modified the citation on October 3, 1984, (copy in pleadings), to delete the "initial action" shown on item 14 of the citation form. Item 14 is the place on the form where Inspector McAnally made reference to Mr. Ingram's safeguard notice of July 27, 1975.

Mr. McAnally had no knowledge of the modification issued by Inspector Walker (Tr. 46). When asked to explain this modification, MSHA Counsel Palmer stated that Mr. Walker probably intended to modify the section 107(a) order issued by Inspector McAnally at the time he issued his separate section 104(a) citation, but did not distinguish the two (Tr. 47). Counsel asserted that notwithstanding the deletion by Inspector Walker, the respondent had adequate notice of the requirements of the safeguard notice relied on by Inspector McAnally, and that the citation issued by Mr. McAnally specifically made reference to that safeguard notice. Counsel concluded that the deletion is immaterial to the issue presented in this case, and he maintained that the respondent had adequate notice as to what was required by the safeguard notice at the time it was issued by Mr. McAnally and up to and including the time of abatement (Tr. 48).

Respondent's counsel could offer no explanation for the deletion, and his position is that Mr. McAnally's citation must stand or fall on the question of whether the safeguard provided adequate notice to the respondent as to what was required to achieve compliance (Tr. 49). Counsel's position is that the safeguard notice is inadequate to change it into a mandatory standard requirement (Tr. 49).

Petitioner's Testimony and Evidence-Docket No. SE 85Ä60

Petitioner's counsel stated that the inspector who issued Citation No. 2483944, Steve J. Kirkland, was out of the State on other MSHA business and was not available to testify in this proceeding. However, the parties stipulated that the facts alleged in Citation No. 2483944 occurred as alleged. They also stipulated that the civil penalty factors as set forth in section III of the citation (negligence, gravity, and good faith), and on the second page of the proposed assessment (MSHA Form 1000Ä179), are properly evaluated.

MSHA Inspector Thomas Meredith confirmed that he issued safeguard Notice No. I T.L.M. on October 19, 1976, at the respondent's No. 3 Mine and that he served it on the respondent's mine safety inspector Ken Price. Mr. Meredith stated that he discussed the notice with Mr. Price, explained the conditions referred to therein, and advised him what had to be done to insure future compliance with the notice (exhibit GÄ1).

Mr. Meredith stated that the previous 1976 MESA safeguard notice form did not provide for a reference to the particular safeguard section, such as section 75.1403Ä6(b)(3), and that he simply referred to section 75.1403, Subpart O, and described the specific safeguard as "adequate and operative sanding devices."

On cross-examination, Mr. Meredith confirmed that in his capacity as an MSHA inspector he often gives advice to miners concerning mine safety conditions or practices. He also confirmed that he gave the respondent a reasonable amount of time to abate the conditions described in his safeguard notice and that he issued several extensions to afford the respondent an opportunity to correct the conditions (Tr. 75Ä77).

Petitioner's exhibit GÄ2, consists of copies of previously issued section 104(a) citations issued at the No. 3 Mine (Tr. 79), and they are as follows:

> Citation No. 0748974, September 26, 1979, 30 C.F.R. 75.1403. The No. 7 personnel carrier being used on material and mantrip haulage system was not provided with operating sanding device. Safeguard No. 1 T.L.M. dated 10Ä19Ä76.
>
> Citation No. 0748973, September 26, 1979, 30 C.F.R. 75.1403Ä6(b)(3). The No. 13 personnel carrier being used on material and mantrip haulage system was not provided with operating sanding device. Safeguard No. 1 T.L.M. dated 10Ä19Ä76.
>
> Citation No. 0748972, September 26, 1979, 30 C.F.R. 75.1403Ä6(b)(3). The No. 11 personnel carrier being used on material and mantrip haulage system was not provided with operating sanding device. Safeguard No. 1 T.L.M. dated 10Ä19Ä76.

The citations were subsequently abated after the respondent provided the cited personnel carriers with operating sanding devices.

Respondent's Arguments

The respondent's arguments with respect to the previously issued safeguard notices in these cases are as follows (Tr. 49Ä68):

1. The safeguard notice provisions found in section 75.1403, and the criteria which follow with respect to self propelled personnel carriers section 75.1403Ä6(b)(3), concerning properly installed and well-maintained sanding devices, and section 75.1403Ä8(d), concerning haulage road clearances are advisory rather than mandatory requirements.

2. The previously issued safeguard notices relied on by the inspectors in these proceedings are general and advisory in nature and fail to specifically put the respondent on notice as to what is required to insure compliance with any applicable mandatory safety standards.

3. The previously issued safeguard notices, on their face, particularly with respect to the printed language on the form (Specific Recommended Safeguards) supports a conclusion that those notices are advisory recommendations rather than mandatory enforceable standards.

4. On the facts presented in these proceedings, the previously issued advisory safeguard notices do not specifically refer to conditions or practices cited by the inspectors in the citations issued in these proceedings.

5. The use of the "advisory" word should rather than the "mandatory" word shall in the prior safeguard notices connote an advisory rather than a mandatory requirement for compliance.

With regard to the previously issued 1979 citations, exhibit GÄ2, where the inspectors relied on Inspector Meredith's safeguard notice of October 19, 1976, to support violations for the respondent's failure to provide operating sanding devices on its personnel carriers, respondent's counsel asserted that simply because these citations were issued, MSHA may not "bootstrap" the safeguard notice and transform it into a mandatory standard (Tr. 57). When asked whether or not these prior citations were contested, respondent's counsel replied that he was not in the respondent's employ at that time, and that mine management would rather pay the civil penalties rather than "make an inspector mad" (Tr. 58). He also asserted that citations are sometimes paid out of ignorance or "they get caught up in the paperwork" (Tr. 66).

Respondent's counsel conceded that an adequately written safeguard notice may become a mandatory standard on a mine-by-mine, case-by-case basis (Tr. 58). Counsel does not dispute the facts as stated on the face of the citations issued in these proceedings. His argument is that the safeguard notices used by the inspectors to support the citations are inadequate and do not put the No. 3 Mine on notice as to what is required to maintain compliance. Counsel is of the view that the safeguards are advisory opinions rather than mandatory standard requirements (Tr. 59). In support of these arguments, counsel cited the case of Secretary of Labor v. PittsburghÄDes Moines Steel Company and OSHRC, 584 F.2d 638 (3d Cir.1978), to support his argument that the use of the word "should" in regulatory safety and health rules are viewed only as recommendations and not as mandatory standards (Tr. 50, 59).

Counsel argues that since MSHA inspectors provide advice and recommendations to mine operators in the course of their inspections, the use of the word "should" in the safeguard notices fails to adequately put the operator on notice as to what is actually required of him in terms of compliance. In short, counsel argues that the inspectors failed to adequately differentiate what is mandatory and what is advisory (Tr. 51). Counsel conceded that had the inspectors who issued the safeguard notices used the word "shall" rather than "should," and made it clear that it was a mandatory requirement, he would concede that adequate mandatory notice has been given to the respondent (Tr. 59Ä60).

In further support of his arguments, respondent's counsel requested that I take judicial notice of my decisions in Monterey Coal Company v. MSHA, LAKE 83Ä67, LAKE 83Ä78, and

LAKE 83Ä84, decided February 23, 1984, 6 FMSHRC 424, as well as the following decisions: MSHA v. Jim Walter Resources, Inc., BARB 78Ä652ÄP, September 4, 1979, 6 FMSHRC 1317 (J. Michels); Consolidation Coal Company v. MSHA, WEVA 79Ä129ÄR, July 31, 1980, 2 FMSHRC 2021 (J. Cook; MSHA v. Jim Walter Resources, Inc. and Cowin and Company, BARB 77Ä266ÄP and BARB 76Ä465ÄP, November 6, 1981, 3 FMSHRC 2488 (Commission); and MSHA v. U.S. Steel Mining Company, Inc., PENN 82Ä13 and PENN 83Ä57ÄR, March 29, 1982, 4 FMSHRC 526 (J. Merlin).

Findings and Conclusions

30 C.F.R.   75.1403 repeates section 314(b) of the Act and provides as follows: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

Section 75.1403Ä1 provides:

> (a) Sections 75.1403Ä2 through 75.1403Ä11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Other safeguards may be required.
>
> (b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to section 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.
>
> (c) Nothing in the sections in the section 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of Imminent danger.

In Southern Ohio Coal Company, (SOCCO), 7 FMSHRC 509 (April 1985), the Commission noted that the safeguard provisions of the Act confer upon the Secretary "unique authority" to promulgate the equivalent of mandatory safety standards without resort to the otherwise formal rulemaking requirements of the Act. The Commission held that safeguards,

unlike ordinary standards, must be strictly construed, and a safeguard notice "must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." In short, the operator must have clear notice of the conduct required of him.

In SOCCO, an inspector issued a citation after finding water 10 inches in depth from rib to rib at a stopping located along a belt conveyor. Because of the presence of the water, the inspector believed that a clear travelway of 24 inches was not provided along the conveyor belt as required by a previously issued safeguard notice. The safeguard notice was issued after the inspector found fallen rock and cement blocks at three locations along a conveyor belt. Addressing the question as to whether the safeguard notice referencing "fallen rock and cement blocks at three locations," and requiring 24 inches of clearance on both sides of the conveyor belt, should have put SOCCO on notice that conditions such as the water described in the citation fell within the safeguard's prohibitions, the Commission concluded that it did not. In this regard, the Commission stated as follows at 7 FMSHRC:

> Given the frequency of wet ground conditions in the mine, and the basic dissimilarity between such conditions and solid obstructions such as rocks and debris, we find that SOCCO was not given sufficient notice by the underlying safeguard notice issued in 1978 that either wet conditions in general or the particular conditions cited in 1983 by the inspector in this case would violate the underlying safeguard notice's terms.
>
> We do not hold that a safeguard notice pertaining to hazardous conditions caused by wetness could not be issued. Conditions such as just as readily be eliminated by issuance of safeguard notices specifically addressing such conditions. By taking this approach rather than bootstrapping dissimilar hazards into previously issued safeguard notices, the operator's right to notice of conditions that violate the law and subject it to penalties can be protected with no undue infringement of the Secretary's authority or loss of miner safety.

In a footnote at 7 FMSHRC 512, the Commission made the following observation: "The requirements of specificity and narrow interpretation are not a license for the raising or acceptance of purely semantic arguments.... We recognize that safeguards are written by inspectors in the field, not by a team of lawyers."

In Secretary of Labor v. U.S. Steel Mining Company, Inc., 4 FMSHRC 526, 529Ä530, (March 1982), Chief Judge Merlin made the following observations with respect to section 75.1403 safeguard notices:

> * * * Safeguards are designed to cover situations where conditions vary on a mine-to-mine basis. Mandatory standards cannot anticipate every possible physical condition in every mine and therefore with respect to the transportation of men and materials the Act allows flexibility. By means of a safeguard MSHA can impose certain requirements on a particular mine which are peculiar to that mine because of its physical configuration and circumstances. However, in order to be fair to the operator by giving due notice, the requirements being imposed upon its mine are set forth first in the safeguard notice which carries no civil penalty. Only in the subsequent citation based upon the safeguard can a penalty be imposed. In the area of transportation of men and materials, safeguards embody and effectuate flexibility and adaptability to individual circumstances in the administration of the Act. However, the potential scope of safeguards is very broad and accordingly, care must be taken to ensure that they are employed only in the proper context and do not become a means whereby the normal rule-making process is ignored and circumvented.

In Secretary of Labor v. Jim Walter Resources, Inc., Docket No. SE 84Ä23, 6 FMSHRC 1815, July 30, 1984, Chief Judge Merlin affirmed a citation issued to the respondent for a violation of section 75.1403Ä8(d), for failing to keep its track clearance free of rails, crib blocks, and timbers. The inspector who issued the violation relied on the same safeguard notice used by the inspector in the instant Docket No. SE 85Ä59. In affirming the violation, Judge Merlin ruled that the cited safeguard criteria "is plainly mandatory and the

language used is easily susceptible of objective interpretation and uniform application," 6 FMSHRC 1818. Judge Merlin's decision with respect to the citation was not appealed. His ruling vacating another citation involving a safeguard notice for a belt conveyor was reversed by the Commission in a decision issued on April 29, 1985, 7 FMSHRC 493.

I believe a reading of the Commission's "safeguard notice" decisions makes it clear that adequately written safeguards are mandatory standards or requirements which are enforceable on a mine-by-mine basis, and the respondent concedes that this is the case (Tr. 58). Respondent's argument that safeguard notices are "advisory opinions" by an inspector and therefore unenforceable is rejected. Simply because an inspector may give advice or make recommendations to a mine operator while in the mine during an inspection does not mean that the subsequent use of the word "should" on the face of any safeguard notice that he may issue renders the safeguard less than mandatory or unenforceable.

In the instant cases, the inspectors who issued the safeguards simply included the specific language of the regulatory criteria found in sections 75.1403Ä6 and 75.1403Ä8, as part of the safeguard notice. Since the criteria use the word "should," it was included as part of the safeguard. However, the safeguard form makes it clear to me that the respondent was required to comply with its terms, and I construe it to be a directive and not simply advice. Although the form contains the words "recommended safeguards," the words "Notice to Provide Safeguards" is in bold print, and the operator is put on notice that the inspector who inspected his mine directs him to comply with the safeguards as stated on the face of the form. The operator is also put on notice that his failure to comply with the safeguard will result in the issuance of a withdrawal order. Under the circumstances, the respondent's assertion that the safeguards issued in these cases were simply advisory recommendations by the inspectors rather than enforceable mandatory requirements is rejected.

The respondent's suggestion that the use of the word "should" in the regulatory criteria found in sections 75.1403Ä6 and 75.1403Ä8 render them advisory and unenforceable as mandatory standards is rejected. Section 75.1403, which is a statutory provision, mandates that adequate safeguards to minimize transportation hazards shall be provided, and section 75.1403Ä1 provides the mechanism and framework for notifying an operator as to the specific safeguard requirements which it is expected to follow for its mine. I conclude and find that the regulatory safeguard criteria in

question are intended to be construed as mandatory rather than advisory requirements.

In Secretary of Labor v. Jim Walter Resources, Inc. and Cowin and Company, 3 FMSHRC 2488 (November 1981), the Commission held that 30 C.F.R. 77.1903(b), was not a mandatory safety standard imposing a mandatory duty o a mine operator. The standard required that certain ANSI specifications wire ropes used for hoisting in a mine be followed, and it mandated that these specifications shall be used as a guide in the use, selection and maintenance of such ropes. The Commission determined that the phrase "shall be used as a guide" was, at best, ambiguous. It noted that the standard contained mandatory language, i.e., "shall be used," but took note of the fact that the requirement imposed was the use of ANSI standards "as a guide." The Commission concluded that in common usage a "guide" was something less than a mandatory requirement to be followed, and in view of the ambiguous regulatory language, as well as the ambiguous nature of many of the underlying ANSI standards, it concluded that the Secretary's attempt to derive an enforceable mandatory duty from the standard to be unreasonable. The Commission found fault with the wording of the standard and concluded that it did not adequately inform an operator of a duty that must be met.

While it is true that the language found under the general safeguard regulatory criteria found in section 75.1403Ä1(b), states that an inspector relying on the criteria set out in sections 75.1403Ä2 through 75.1403Ä11, will be guided by those criteria in requiring other safeguards on a mine-by-mine specifically delineate what is required for compliance. Unlike the ambiguous ANSI standards, I cannot conclude that the safeguard criteria suffer from any ambiguity. They specifically address the particular subject matter covered by each of the criteria sections.

Fact of Violation-Docket No. SE 85Ä60-Citation No. 2483944

In this case, the respondent is charged with a failure to maintain an operative sanding device on a man bus used to transport seven miners from the section. The safeguard criteria for personnel carriers found at 30 C.F.R. 75.1403Ä6(b)(3), requires that such carriers be equipped with properly installed and well-maintained sanding devices. The inspector found that the sanding device reservoirs for the cited bus were empty and that the sand passed through the

lines onto the track while the bus was parked. The respondent does not dispute these facts, and the citation was abated when the bus was removed from the mine in order to repair the sanding device.

The previously issued safeguard notice, 1 T.L.M., issued by Inspector Meredith on October 19, 1976, states as follows:

> The BÄ1 mantrip bus and the JÄ1 also (sic) JÄ2 Jitneys used to haul men as mantrip jitneys were not provided with operative sanding devices.
>
> Self-propelled personnel carriers should be equipped with properly installed and well maintained sanding devices, except that personnel carriers (Jitneys), which transport not more than 5 men, need not be equipped with such sanding devices.

The requirements of the safeguard criteria found in section 75.1403Ä6(b)(3), for personnel carriers provides as follows:

> (b) * * * [E]ach track-mounted self-propelled personnel carrier should:
>
> * * * * * * * * * *
>
> (3) Be equipped with properly installed and well-maintained sanding devices, except that personnel carriers (jitneys), which transport Not more than 5 men, need not be equipped with such sanding device; * * *

In issuing the citation in this case, the inspector relied on a previously issued safeguard notice issued by Inspector Meredith on October 20, 1976, at the No. 3 Mine. The inspector who issued the citation cited a violation of the general safeguard provisions of 30 C.F.R. 75.1403, and he did not include any reference to the specific criteria requirements found in section 75.1403Ä6(b)(3). However, he did describe in detail the specific condition for which the citation was issued, and as indicated earlier, the man bus was removed from service so that the sanding device could be repaired.

When the original safeguard notice was issued in 1976, Inspector Meredith noted that one man bus and two jitneys

used as mantrips "were not provided with operative sanding devices." Mr. Meredith did not specify the specific conditions which rendered the sanding devices less than operative, and while his notice makes no regulatory reference to section 75.1403Ä6(b)(3), and simply cited section 75.1403, Mr. Meredith included a verbatim quote of the criteria requirements on the face of the notice. Mr. Meredith explained that he omitted any reference to section 75.1403Ä6(b)(3), because the citation forms in use in 1976 did not provide a space for this reference, and only provided for a citation to the regulatory section and subpart i.e., Sec. 75.1403, Subpart O.

During the course of the hearing, MSHA's counsel conceded that the conditions cited in the citation issued in this case must be substantially the same kind of conditions that were described in the original safeguard notice (Tr. 35). He stated that the only issue presented here is whether or not the citation provided the respondent with adequate notice as to what he had to do to maintain compliance. As long as the respondent is on notice that a safeguard notice is in effect, the requirements of the law have been met (Tr. 48).

With regard to the lack of reference to the specific safeguard criteria dealing with mantrips as found in section 75.1403Ä6(b)(3), MSHA's counsel asserted that anyone in the mining industry is presumed to be familiar with the general mandatory requirements of sections 75.1403 and 75.1403Ä1, as well as the enumerated criteria which follow, and that these must be considered collectively as mandated requirements which must be followed. In support of his position, MSHA's counsel pointed out that the respondent had previously eceived citations in September 1979, for violations of section 75.1403, because of the lack of operative sanding devices on its personnel carriers in the No. 3 Mine, and in each instance the inspector who issued those citations made reference to the previously issued October 19, 1976, safeguard notice issued by Inspector Meredith. Since those citations were not contested by the respondent, counsel argued that respondent was on notice as to the mandatory requirements of the safeguards, and had adequate notice as to the requirements in question (Exhibit GÄ2, Tr. 55).

I take note of the fact that in each of the previously issued citations in 1979, the inspector initially failed to cite a violation of section 75.1403Ä6(b)(3), and simply cited section 75.1403 as the violative regulatory section. However, he subsequently modified the citations to show a violation of section 75.1403Ä6(b)(3), rather than section 75.1403. I also note that in all three instances, the inspector failed

to detail what was wrong with the sanding devices and simply stated that the mantrips were not provided with an operating sanding device. Further, in his narrative findings concerning the gravity of the violations, the inspector indicated that in the event the personnel carriers "hit a wet rail or slick spot it needed something to slow it down," and that if it hit a slick spot it could "get out of control." Abatement was achieved by providing the cited carriers with "operating sanding devices."

In Secretary of Labor v. Mathies Coal Company, 4 FMSHRC 1111 (1982), Judge Lasher affirmed a citation which was issued for a violation of 30 C.F.R. 75.1403. The citation was based on the inspector's finding that one of four sanding devices provided for a self-propelled personnel carrier was inoperative. The inspector described the "inoperative" sander as follows: "The sander was empty due to valve that was stuck open." The underlying safeguard notice relied on by the inspector required that "all mantrips be provided with properly maintained sanding devices sufficient to sand all wheels in both directions of travel." Although an appeal was taken on Judge Lasher's "significant and substantial" finding, his ruling on the fact of violation was not appealed. The Commission subsequently affirmed Judge Lasher's decision, 6 FMSHRC 1 (1984).

The criteria language found in section 75.1403Ä6(b)(3), requires that personnel carriers be equipped with properly installed and well-maintained sanding devices. Although the term "well maintained" is rather general, Webster's New Collegiate Dictionary defines the word "maintain" in pertinent part as "to keep in an existing state (as of repair, efficiency); preserve from failure or decline (machinery); to sustain against * * * danger; * * *." In the instant case, the respondent does not dispute the fact that the sanding device in question was not in an operative condition at the time it was cited by the inspector. It seems obvious to me that the failure of the sanding device reservoir to retain its supply of sand while the bus was parked rendered it less than operative, and I find that the failure to insure that the sand did not escape from the reservoir supports a conclusion that the sanding device was not well maintained. Had the bus been placed in operation with no sand in its sanding device reservoir, it seems logical to me that the sanding device would be useless.

While it is true that the inspector who issued the disputed citation in this case failed to refer to section 75.1403Ä6(b)(3), on the face of the citation, he did cite

section 75.1403, and he specifically cited the prior safeguard notice issued on October 19, 1976. In addition, by specifically describing the condition which rendered the sanding device less than operative, the respondent was put on notice as to what was required to correct the condition. The safeguard notice, as well as the intervening citations, should have alerted the respondent of the requirement for maintaining operative sanding devices on its personnel carriers.

I conclude that the safeguard notice, coupled with the subsequently issued violations which were not contested, adequately informed the respondent as to the requirements for maintaining the sanding devices on its personnel carriers in an operative condition. Although the prior inspectors should have detailed the particular conditions which rendered the previously cited sanding devices inoperative, as did the inspector who issued the citation in this case, the fact that they did not do so does not render the citation or the safeguard notice less than adequate to inform the respondent as to what it was required to do. The prior violative conditions were abated, and I conclude that the "inoperative sanding device" condition cited in this case was substantially the same as the condition cited in the original safeguard notice, and
in both instances the sanding devices were repaired so as to render them operative. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Fact of Violation-Docket No. SE 85Ä59-Citation No. 2310757

In this case, the respondent is charged with a failure to provide adequate clearance on a track section over which men and materials were transported. The inspector found two timbers lying along the track, and he found a material car parked in the track "kick-back" which was loaded with timbers which hung over a man bus that was operating on the track. The inspector relied on a previously issued safeguard notice, and cited a violation of the track haulage road safeguard criteria found in section 75.1403Ä8(d), which provides as follows: "(d) The clearance space on all track haulage roads should be kept free of loose rock, supplies, and other loose materials."

The criteria found in subsection (b) of section 75.1403Ä8, provides as follows:

> (b) Track haulage roads should have a continuous clearance on one side of at least

24 inches from the farthest projection of normal traffic. Where it is necessary to change the side on which clearance is provided, 24 inches of clearance should be provided on both sides for a distance of not less than 100 feet and warning signs should be posted at such locations.

The previously issued safeguard notice, 1 T.J.I., issued by Inspector Ingram on July 27, 1976, states as follows:

> Several locations along the track haulage-ways that were used for travel had clearance less than 24 inches. Refuse, loose rock and supplys (sic) obstructed the available clearance in the provided walkway. Signs were not provided in places where the clearance side could be changed.
>
> The track haulage roads should have a continuous clearance on one side of at least 24 inches from the farthest projection of normal traffic. Where it is necessary to change the side on which clearance is provided, 24 inches of clearance should be provided on both sides for a distance of not less than 100 feet and warning signs should be posted at such locations.
>
> Track haulage roads developed after March 30, 1970, should have from the farthest projection of the normal traffic. A minimum clearance of 6 inches should be maintained on the "tight" side of all track haulage roads developed prior to March 30, 1970.
>
> The clearance space on all track haulage roads should be kept free of loose rock, supplies and other loose materials.

The parties advance the same arguments with respect to the adequacy of the safeguard notice as those stated in the previous case. MSHA produced copies of 13 citations and one order issued at the No. 3 Mine at various times during 1977, 1979, 1981, 1982, 1983, and 1984, for obstructions on the respondent's track haulage system. In each instance the issuing inspectors cited a violation of section 75.1403Ä8(b) or (d), and with one exception, the inspectors relied on the

previously issued safeguard notice issued by Inspector Ingram. The variety of blocks, loose rock, chain link fencing materials, concrete blocks, pipe, rails, trash, and in 10 cases loose timbers were included among the materials cited for the obstruction of the track or the failure to maintain the required clearances noted in the safeguard notice. In each instance, the violations were abated by the cleanup and removal of the materials.

Although the safeguard notice issued by Inspector Ingram makes reference to an obstructed walkway along the mine track haulageways, and makes no specific reference to section 75.1403Ä8(d), it specifically required that adequate clearances be maintained along the track haulage, and that the track haulage roads be kept free of loose rock, supplies and other loose materials. Mr. Ingram testified that he issued the safeguard after finding the main track haulageway cluttered and the clearance side of the track obstructed, and he confirmed that he discussed the matter with the respondent's safety inspector (Tr 39Ä40). Mr. Ingram also confirmed that the safeguard notice is still in effect at the mine, and that he would continue to rely on it in issuing citations for conditions similar to those stated in the safeguard (Tr. 44).

I conclude and find that the timbers which obstructed the cited track area in question in this case fall within the category of supplies or other loose materials noted in section 75.1403Ä8(d), and that they were conditions similar to the conditions cited in the safeguard. Respondent does not dispute the existence of the timbers, nor does it dispute the fact that the protruding timbers obstructed the track. Inspector McAnally's testimony, which I find credible, establishes that the timbers not only obstructed the track, but that the man bus "bumped" the timbers, and Mr. McAnally had to contort his body to avoid being struck by the protruding timbers. Respondent offered no testimony or evidence to rebut Mr. McAnally's testimony.

MSHA's counsel argues that it is clear from the record that the track area in question was obstructed, and that since Mr. McAnally found that there was no track clearance, or less than 24 inches of clearance because of the protruding timbers, his reliance on the previously issued safeguard notice was proper (Tr. 35Ä36).

I conclude that the safeguard notice issued by Inspector Ingram, as well as the citation issued by Mr. McAnally relying on that safeguard, adequately informed the respondent as

to what was required to maintain compliance with the cited regulatory standard. I take particular note of the fact that the citations issued subsequent to the safeguard notice included specific references to timbers which obstructed the track haulageways in the No. 3 Mine, and in each instances respondent corrected the conditions by removing the materials. I find nothing in this record to suggest that the respondent was confused as to the requirements of the safeguard relied on by Mr. McAnally, nor do I find any basis for concluding that the safeguard was other than adequate. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Significant and Substantial Violations

Citation No. 2483944

In arriving at his decision that the inoperative sanding device violation in the Mathies Coal Company case, supra, was "significant and substantial," Judge Lasher discussed in some detail the conditions which prevailed at the time the citation was issued. Judge Lasher made credibility findings and resolved disputed testimony concerning the track curves, grades, whether the tracks were wet, the braking capacity of the mantrip, the mechanics of the sanding device, etc., and the Commission affirmed his findings in this regard.

In the instant case, the inspector who issued the sanding device citation was unavailable for trial because he was out of state on other MSHA business. Under the circumstances, there is no testimony or evidence as to the actual underground conditions which prevailed at the time the citation was issued. Although the parties stipulated to the fact that the sanding device was inoperative, and that the inspector was correct when he marked the gravity portion of the citation "reasonably likely," and "lost workdays or restricted duty," there is no factual or evidentiary basis to support the inspector's "significant and substantial" finding. Under the circumstances, I conclude that the petitioner has failed to establish that the violation was "significant and substantial," and the inspector's finding in this regard IS VACATED.

Citation No. 2310757

The testimony and evidence in this case establishes that the parked protruding timbers obstructed the track and posed a hazard to the miners who were riding in the man bus. The inspector's unrebutted testimony established that the bus "bumped" the timbers and that the inspector had to move to

avoid being struck by the timbers. Under the circumstances, I conclude and find that the violation exposed the miners riding in the man bus to a reasonable likelihood of being struck by the timbers and being seriously injured while riding along the track. Accordingly, the inspector's "significant and substantial" finding IS AFFIRMED.

History of Prior Violations

The petitioner filed no information concerning the respondent's history of prior violations. Although the parties stipulated that the respondent has an "average" history of prior violations, I have no idea what this means. Accordingly, for purposes of any civil penalty assessments for the citations, I cannot conclude that the respondent's compliance history warrants any additional increases or decreases. In the future, the petitioner will be expected to make some meaningful input with respect to this statutory standard.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a medium-size operator and that the imposition of civil penalties will not affect itsability to continue in business. I adopt these stipulations as my findings andconclusions on these issues.

Good Faith Abatement

The parties stipulated that the cited conditions were abated in good faith by the respondent. I agree and conclude that the respondent exercized good faith in abating the violations.

Negligence

I conclude and find that the respondent knew or should have known of the requirements for maintaining an obstruction-free track and insuring that its personnel carrier sanding device was in operative condition. The safeguard notices, as well as the subsequently issued citations, provided ample notice to the respondent as to what was expected to maintain compliance with the cited standards. I conclude and find that the respondent was negligent, and that the violations resulted from the failure by the respondent to exercise reasonable care. In view of the number and frequency of violations because of timbers and other clutter on its track system, it

would appear to me that the respondent needs to give closer attention to its preventive measures in this regard.

Gravity

I conclude and find that the sanding device citation was serious. The lack of an operative sanding device would obviously affect the safe operation of the man bus. The obstructed track posed a serious hazard to the men riding the track in a man bus, and I consider this violation to be extremely serious.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the following civil penalty assessments are appropriate and reasonable for the citations which have been affirmed:

Docket No. SE 85Ä60

Citation No. 2483944, January 22, 1985, 30 C.F.R. 75.1403-$150.

Docket No. SE 85Ä59

Citation No. 2310757, June 15, 1984, 30 C.F.R. 75.1403Ä8(d)-$600.

ORDER

The respondent IS ORDERED to pay the assessed civil penalties within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge