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SOL (MSHA) V. GREEN RIVER COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. KENT 88-152 A.C. No. 15-13469-03658
v.	Green River Coal No. 9 Mine
GREEN RIVER COAL COMPANY, RESPONDENT	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
B. R. Paxton, Esq., Paxton & Kusch, Central City, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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 four alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely notice of contest and a hearing was conducted in Owensboro, Kentucky. The parties were afforded an opportunity to file posthearing arguments, but did not do so. However, I have considered their oral arguments made during the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether the violations were "significant and substantial." Additional issues raised

by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 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.

The parties stipulated to the following (Exhibit P-1):

1. The presiding judge has jurisdiction to hear and decide this case.

2. The respondent employs approximately 200 workers, and produces over one million tons of coal per year.

3. The civil penalty assessments in question will not affect the respondent's ability to continue in business.

4. The respondent acted in good faith and timely abated the alleged violations.

5. The respondent's history of previous violations for the 2-year period preceding March 21, 1988, is as indicated in MSHA's computer print-out (Exhibit P-2).

Discussion

During a prehearing conference prior to the taking of testimony, the parties informed me that they proposed to settle Citation Nos. 3227255 and 3227256, and that the respondent agreed to pay the full amount of the proposed civil penalty assessments, and to withdraw its notice of contests with respect to these citations. The proposed settlement was approved from the bench, and my decision in this regard is affirmed. The citations are affirmed as issued.

With regard to Citation No. 3227257, respondent's counsel confirmed that although the respondent does not dispute the fact of violation, or the inspector's "S&S" finding, it does dispute the appropriateness of the proposed civil penalty assessment. Counsel also confirmed that the parties have discussed a settlement of the case but that the petitioner's

counsel would not agree to any reduction in the proposed civil penalty assessment. Under the circumstances, evidence was taken on this citation, and the parties were afforded an opportunity to present arguments with regard to the appropriate civil penalty assessment.

With regard to Citation No. 3227259, respondent's counsel confirmed that the respondent still desired to continue its contest on this alleged violation, and testimony and evidence was taken in this regard.

All of the section 104(a) "S&S" Citations in this case were issued by MSHA Inspector Jerrold Pyles on March 21, 1988. Mr. Pyles issued an initial section 107(a) imminent danger order and cited four alleged violations which are as follows:

Citation No. 3226255, cites a violation of 30 C.F.R. 75.200, and the cited condition or practice is described as follows:

> The inby and outby brows located at crosscut 6, on the 5 D-belt, had not had additional support set where a roof fall had occurred, according to the rock loading plan on page 9 of roof-control plan dated Dec. 3, 1987. Also refer to page 6, art. 22 B and D.

Citation No. 3227256, cites a violation of 30 C.F.R. 75.200, and the cited condition or practice is described as follows:

> The timber plan, located in roof-control plan dated Dec. 3, 1987, on page 13 in sketch was not followed at crosscut 6 on the 5 D-belt. A roof fall had occurred in this area and there were no timbers from the beginning of fall (3 ft. outby crosscut) to end of fall, at end of intersection. Two bolts in cavity on either side of belt were not touching roof. Water was coming through top in this area.

Citation No. 3227257, cites a violation of 30 C.F.R. 75.400, and the cited condition or practice is described as follows:

> At cross cut No. 6 on the 5 D-belt where roof fall had occurred, grey shale had slid against belt and belt was running against it. Also a piece was lodged between bottom and top

> belt. Belt was also rubbing against a wooden holy board used to prop belt rope up; there were four frozen or stuck rollers in this area (approximately 24 ft.) and belt line from tail-piece to this area (approx. 540 ft.) had float dust under and in crosscuts along the belt, areas were light brown to black.

Citation No. 3227259, cites a violation of 30 C.F.R. 75.1403(5)(g), and the condition or practice is described as follows:

> A clear travelway of at least 24 inches was not provided on the 5 D-belt crosscut No. 6, in that rock had fallen down against belt due to a roof fall and had the travelway partially blocked to where a man or person would have to walked (sic) over the top of it. Area was wet and slippery on top of the grey shale.

MSHA Inspector Jerrold Pyles testified as to his experience and training, and he confirmed that he issued Citation No. 3227259 (exhibit P-8). He confirmed that a rock fall had previously occurred at the No. 6 crosscut where the number 5 D-belt was located, and that the rock had slipped down on each side of the belt partially blocking the travelway on each side of the belt. Mr. Pyles identified exhibit P-5 as a copy of his notes which include a sketch of the fall area.

Mr. Pyles described the extent of the fall, and confirmed that the rock covered both sides of the belt. He stated that the rock was approximately 2 feet high and extended for a distance of 10 to 12 feet along both sides of the belt. He confirmed that the area was wet, and although the rock was slippery in spots, there was no standing water in the area. He also confirmed that most of the rock fall had been loaded out, and that coal was being loaded out on the belt.

Mr. Pyles stated that he made a gravity finding of "reasonably likely" because he believed that a belt examiner walking the belt line for the purpose of examining the belt pursuant to standard section 75.303, would have to walk over the rock to examine the belt, and since the rock was slippery, the examiner could fall into the belt if it were moving. If it were not moving, the examiner could slip on the rock and suffer injuries if he were to strike the belt. Mr. Pyles confirmed that the shift started at 8:00 a.m., and that he issued the citation at 10:00 a.m.

Mr. Pyles stated that only the belt examiner would be exposed to the hazard, and although he observed a man in the area, he did not know what he was doing there. Mr. Pyles confirmed that in the event of a slip off the rock, the examiner would likely suffer serious injuries or bruises depending on whether the belt was running or not, and that lost time would likely result from such injuries.

Mr. Pyles confirmed that he made a negligence finding of "moderate" because the respondent had loaded out most of the rock fall and was loading out coal on the belt. He believed that the operator was aware of the condition, but conceded that the rock in question could have slipped after the initial rock fall occurred and was loaded out. Mr. Pyles confirmed that he based his "S&S" finding on his belief that it was reasonably likely that an accident would occur and that serious injuries would follow.

Mr. Pyles identified exhibit P-9, as a copy of a previous safeguard notice he issued on January 21, 1987, citing mandatory standard section 75.1403(5)(g), and he confirmed that he based his citation on that safeguard notice. Mr. Pyles could not recall the details concerning the conditions which prevailed at the time of the safeguard notice, and he confirmed that no rock fall was involved. He stated that once a safeguard notice is issued, it becomes law for the mine, and in the event of a subsequent repeat violation, a citation would be issued. He also confirmed that the cited condition was corrected and the citation was terminated at 4:30 p.m., the same date that it was issued.

On cross-examination, Mr. Pyles stated that although the belt examiner could walk around the rock on either side of the belt, and had enough room to shine his light on the belt, his passage would be restricted and he would still be required to walk over the slippery rock in order to adequately inspect the belt. He conceded that the belt examiner had enough room to walk around the belt to shine his light, and that he could get within 10 feet of the belt to observe it, and that by doing this, he would be in a safe position.

Mr. Pyles confirmed that the belt examiner would be looking for fallen rocks, spillage, and stuck belt rollers, and that he would also be required to shut the belt down in the event of a hazardous condition. In order to adequately do his job in this regard, the belt examiner would necessarily have to walk over the slippery fallen rock.

Mr. Pyles did not know when the rock slipped, and he agreed that the cited condition could have occurred between the time the belt examiner last walked and examined the belt and the time he arrived on the scene. Mr. Pyles confirmed that pursuant to section 75.303, belt conveyors are required to be examined at any time during the shift and after coal production has started. Mr. Pyles confirmed that he did not speak to the belt examiner or examine the preshift books.

Mr. Pyles confirmed that after the initial rock fall, enough rock was removed to facilitate the reinstallation of the belt, and he confirmed that he observed evidence of work being done to correct the rock fall conditions. He also confirmed that the prior roof and rock fall cavity had been re-bolted and the roof re-supported. In the final analysis, it was his judgment that the rock which had slipped restricted passage on either side of the belt and it did not afford the belt examiner enough room to pass through the area to adequately view and inspect the belt.

Grover Fischbeck, respondent's former safety manager, confirmed that he was with Inspector Pyles during the course of his inspection, and that the citation was served on him. He confirmed that an initial roof fall had occurred in the cited area earlier in the week of March 21, 1988, and that the rock was removed from the center of the crosscut down to the mine floor level, and that rock was scaled down to clear out any remaining loose rock. He also confirmed that the roof was fully supported, and that he did not know when the rock which was present when he and Mr. Pyles observed it during the inspection fell, and that the last time the belt was "made" was during the last shift on the day before the inspection.

Mr. Fischbeck believed that the belt area in question could have been visually inspected by the belt examiner safely by walking up to edge of the belt where the rock had fallen and then walking around the adjacent entry and viewing the belt from the other side. If this were done, the belt examiner would not have been exposed to any hazard.

Mr. Fischbeck stated that while he and Mr. Pyles were in the cited area, he observed belt examiner Hubert Hunt walk up to the edge of the belt where the rock was located and observe the belt, but that he did not speak to him at that time. Mr. Fischbeck stated that he was surprised to find the rock when he and Mr. Pyles arrived at the scene.

Mr. Fischbeck confirmed that he was familiar with the prior safeguard notice issued by Mr. Pyles and confirmed that

it did not involve a rock or roof fall. He explained that the installation of timbers in an area adjacent to a belt which had been installed off-center restricted the adjacent walkway in such a manner as to reduce the clearance to less than 24 inches, and that additional rock had to be scaled down to further widen the walkway to permit access for the belt examiner.

On cross-examination, Mr. Fischbeck stated that the belts are not usually examined unless they are in operation, and that this is necessary in order to inspect the belts for hazards under actual operational conditions. He confirmed that the rock had slipped down from the side of the entry and was resting against the belt, but that it was not uniformally 2 feet high along the 10 feet distance in which it was resting against the belt. He estimated that the height of the rock ranged from 1-1/2 to 2 feet, and that the belt was 18 to 24 inches high off the mine floor. He agreed that the rock caused some blockage of the walkway and that it presented a stumbling hazard.

Inspector Pyles confirmed that he issued Citation No. 3227257 (exhibit P-7), after observing loose coal and coal dust ranging from zero to 8 inches on either side of the 5 D-belt. He also observed that a piece of the shale rock which had slipped against the belt was rubbing the belt top and bottom, and that the belt was also rubbing against a roof support "header" or "holy" wooden board which was being used to support a cable. The rock had knocked the belt out of line against the board causing it to touch and rub against the belt. He described the dimensions of the board as 10 x 16 inches. Mr. Pyle also confirmed that he observed four stuck belt rollers which were not turning within a belt area of 24 feet, and float coal dust under the belt and in the crosscuts for a distance of approximately 540 feet from the belt tail piece to the area where the rock fall had occurred.

Mr. Pyles stated that the belt was running, and he believed that any friction caused by the belt rubbing against the rock and board, and the stuck rollers which were not turning, were potential ignition sources and could have ignited the float coal dust. Although the area was wet, some of the float coal was on top of the wet areas, but when he picked up a handful of the float coal dust and squeezed it, it was dry and not damp. He also confirmed that he did not otherwise "test" float coal dust accumulations and simply observed it visually. He described the float coal dust as "light brown to black" in color.

Mr. Pyles confirmed that he made a gravity finding of "reasonably likely," and he believed that in the event of a fire it was reasonably likely that 12 miners working on the section would be exposed to fire, smoke inhalation, and entrapment hazards. He also confirmed that he based his "S&S" finding on the fact that if mining were allowed to continue it was reasonably likely that a fire would have occurred and exposed miners to the aforementioned hazards.

On cross-examination, Mr. Pyles stated that his principal concern was the potential fire which could result from the presence of the accumulations of loose coal and coal dust, and the potential ignition sources which were present. He confirmed that he observed no fire sensors on the belt, but conceded they could have been present because each belt is normally provided with a fire sensor system.

Mr. Fischbeck testified that the board referred to by Mr. Pyles was saturated with water and that no float coal dust or other combustibles were present in the area where the board was located. With regard to the belt rubbing against the rock, Mr. Fischbeck believed that given the fact that it was a rock and not coal, there was a low potential for any fire.

Mr. Fischbeck identified exhibit P-12 as a copy of the most recent fire boss examination records which he supplied, and he stated that the examination record for March 21, makes no reference to any hazardous conditions in the areas cited Mr. Pyles. Although the records indicated that some areas needed to be cleaned up and rock dusted on March 18 and 19, since these conditions were not noted on the record for March 21, he assumed they had been corrected and were not present on March 21.

Mr. Fischbeck confirmed that Mr. Pyles took no samples of the loose coal or coal dust, and that clean-up and rock dusting is performed periodically on the section. He agreed that 12 miners were working on the section on the day of the inspection, but that an alternative fire escape route was available to these individuals through the intake air course.

Mr. Fischbeck stated that his notes reflect that the area cited by Mr. Pyles was damp and rock dusted. He stated that dry coal dust is not uncommon, and agreed that the tail piece needed to be shovelled because of some coal spillage, and that shovelling is done periodically at that location.

Mr. Fischbeck stated that fire detection sensors were in place on the belt line, and that 2 inch fire hoses and water

lines were available along the belt for use in the event of a belt fire. The detection devices were located down the center of the belt, and they were suspended from the roof.

Findings and Conclusions

Fact of Violations

Section 104(a) "S&S" Citation Nos. 3227255 and 3227256, 30 C.F.R. 75.200

As previously noted, the parties agreed to settle these violations, and the respondent conceded the fact of violations, including the inspector's significant and substantial (S&S) findings, and agreed to pay the proposed civil penalty assessments in full. The proposed settlements have been approved, and the citations and violations ARE AFFIRMED AS ISSUED.

Section 104(a) "S&S" Citation No. 3227257, 30 C.F.R. 75.400

The respondent does not dispute the fact of violation or the inspector's "S&S" finding, and only contests the reason-ableness of the proposed civil penalty assessment of $1,000, for the violation (Tr. 71). Under the circumstances, the citation and violation ARE AFFIRMED, and my findings and conclusions concerning the mitigation of the proposed civil penalty assessment follow below.

I take note of the respondent's answer to the citation and its assertion that at the time of the inspection which led to the issuance of the violation, the respondent was doing everything humanly possible to expeditiously address the conditions caused by the initial rock fall and that it was addressing the most serious condition first. During oral argument at the hearing, respondent's counsel confirmed that this was the case, and he pointed out that all of the citations issued in this case arose out of the same circumstances, and that the respondent has agreed to pay the full amounts of the civil penalty assessments made for the two violations which have been settled. Petitioner's counsel asserted that in seeking a civil penalty assessment in the full amount of $1,000 for the violation, he does not rely on the narrative findings and conclusions of MSHA's "special assessment officer," but does rely on the testimony of the inspector who issued the citation (Tr. 73).

It is clear that I am not bound by MSHA's proposed penalty assessment, nor am I bound by the narrative findings of its

Office of Assessments. I am free to make my own judgment as to the reasonableness and appropriateness of any civil penalty assessment based on the credible evidence and testimony adduced by the parties, including any mitigating factors which I may conclude warrant any adjustments in the proposed civil penalty amount.

As noted earlier, the respondent does not dispute the fact of violation, or the existence of the conditions which prompted the inspector to issue the violation. It has, however, presented credible and probative evidence which in my view mitigates its culpability, and the seriousness of the possible fire hazard presented by the cited conditions.

Respondent's former safety manager Grover Fischbeck confirmed that the belt conveyor in question was equipped with workable fire detection devices which would have alerted anyone of any fire on the belt. He also confirmed that the belt was provided with a 2-inch water line with fire hose outlets spaced periodically throughout the belt line, and that fire hoses were located at the working section, as well as the unit header, and that all of the fire hoses and detection systems were operational (Tr. 96-98). Inspector Pyles confirmed that the belt was protected by fire suppression devices consisting of a "fire line" equipped with fire sensor heads (Tr. 81). Although the inspector noted that he did not particularly notice any of these devices, he confirmed that they are normally provided on every belt in the mine, and he agreed that the existence of these devices would be relevant in any gravity determination. He conceded that he did not issue any violation for the failure by the respondent to provide any such fire fighting devices, and he agreed that they could have been in place and operational (Tr. 81-82). With regard to his initial imminent danger order which was issued in conjunction with the issuance of the section 104(a) citation in question, the inspector conceded that his gravity finding of "reasonably likely" in connection with the citation would indicate a degree of hazard less than a hazard that is characterized as "imminent," and that the cited conditions presented a possibility of a fire (Tr. 83-84).

Although Mr. Fischbeck conceded that the board which was rubbing against the belt was combustible, he also indicated that it was saturated with water which was leaking from the roof, and he considered the rock which was rubbing the belt as a low potential fire source. According to Mr. Fischbeck's inspection notes, the belt tailpiece was extremely wet, and the belt line was damp in different areas, including the area where the fall had occurred (Tr. 89). Mr. Fischbeck also

pointed out that in the absence of any tests, or samples, it is difficult to determine how much rock dust may be mixed in with the coal dust, and that on the day of the inspection no rock dust samples were taken (Tr. 89). Mr. Fischbeck also believed that in the event of a fire, the miners could have escaped by an alternate route (Tr. 91).

Inspector Pyles confirmed that no rock dust samples were taken, and although he indicated that he picked up a handfull of float coal dust and squeezed it in his hand and no moisture came out, he conceded that he only did this in one area (Tr. 102). He also agreed with Mr. Fischbeck's testimony that the area was damp, but indicated that the float dust he observed was lying on top of the damp and wet areas (Tr. 100). Mr. Pyles also confirmed that the four stuck belt rollers were not turning in any coal accumulations, and that he did not issue any separate violation for the stuck roller condition because there were not enough stuck rollers to warrant another citation (Tr. 103).

Having viewed the witnesses during the course of the hearing, I consider Mr. Fischbeck to be a credible witness. His testimony concerning the presence and availability of fire detection and suppression devices on the belt line in question, and his observations concerning the damp and wet conditions in some of the areas in question mitigate the seriousness or gravity connected with a potential fire hazard on the belt line in question.

I take note of the fact that Inspector Pyles made a negligence finding of "moderate," and he confirmed that at the time of the inspection most of the rock fall had been loaded out. He conceded that the rock which slipped against the belt could have slipped after the initial rock fall occurred and had been loaded out, and that the sliding rock caused the movement of the belt and could have caused some of the coal spillage (Tr. 101). Mr. Pyles also confirmed that he saw evidence of work being done to correct the rock fall conditions. This lends credence to the respondent's assertion that it was attempting to correct the conditions resulting from the initial fall of rock.

Mr. Fischbeck testified that on the day of the inspection, he was surprised to find that the rock had slipped against the belt, and that when he spoke with the belt examiner that same day after the inspection, the examiner advised him that the rock was not there the day before (Tr. 57). The inspector confirmed that he based his moderate negligence finding on the fact that his examination of the belt examiner's reports

reflected that some of the cited conditions had been noted in the reports, and he concluded that the examiner should have been aware of them. The examiner's reports (exhibit P-12), for March 18 to March 21, 1988, contains notations that certain areas of the 5-D belt were "dirty" and were in need of rock dusting. However, I find nothing to reflect the existence of any stuck rollers or the belt rubbing against any rock or board.

The belt examiner did not testify in this case, and Inspector Pyles confirmed that he did not speak with him during the course of his inspection. Mr. Fischbeck assumed that the conditions noted in the belt examiner's reports had been corrected because the subsequent reports made by the last person to walk the belt did not note the existence of those conditions (Tr. 92). I find no evidence to support any conclusion that the conditions associated with the stuck rollers or the belt rubbing against the rock were present for any extended period of time prior to the inspection. Under all of these circumstances, I conclude and find that the respondent's negligence is to some degree mitigated.

Citation No. 3227259, 30 C.F.R. 75.1403-5(g)

The inspector issued the citation after finding that a clear travelway of at least 24 inches was not provided on the cited belt conveyor (exhibit P-8). The cited mandatory criteria for belt conveyors found in 30 C.F.R. 75.1403-5(g), provide as follows:

> A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

In addition to the conditions observed by the inspector which led him to conclude that a clear travelway was not maintained in compliance with the cited standard, the inspector cited and relied on a previously issued Safeguard Notice No. 2215634, which he served on the respondent at the same mine on January 21, 1987 (Exhibit P-9). That notice was issued pursuant to section 75.1403-5(g), and it states as follows:

> A clear travelway at least 24" wide was not provided on both sides of the 7B belt

> between xcuts Nos. 88 & 89. There was less than 24" on one side of belt between roof support (timbers) and rib nor between belt and roof support. This is a notice to provide safeguard.

MSHA's regulatory authority for issuing safeguard notices which subsequently become mandatory for the mine is found in 30 C.F.R. 75.1403, which is the statutory language found in section 314(b), of the Act. It 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 75.1403-1 provides:
>
> (a) Sections 75.1403-2 through 75.1403-11 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 a safeguard notice, unlike other ordinary safety standards, must be strictly construed, and that the safeguard must give the mine operator

clear notice of the nature of the hazard and the conduct required of the operator to stay in compliance.

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 those cited by the inspector here, if hazardous, can 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 the instant case, the contested citation was issued by inspector Pyles after he found that the travelways on either side of the number 5D conveyor belt for a distance of some 10 feet at the location where the rock had slipped and fallen against the belt did not provide clear access for the passage of a belt examiner who was required to walk and examine the belt for hazards. The inspector found that the travelways were partially obstructed by the rock, and although he believed that the belt examiner could still travel through both sides of the travelway adjacent to the belt, he would have to walk over the top of the fallen rock which he considered to be hazardous because of its wet and slippery condition (Tr. 62). The inspector also believed that the obstructed travelways would not allow the belt examiner an opportunity to make an adequate close examination of the belt because the examiner could not position himself at a point which would have enabled him to see over the rock into the belt location where the stuck rollers were found (Tr. 36-37, 65-66). The inspector believed that any attempt by a belt examiner to walk over the slippery rock which obstructed the belt travelways would have exposed him to a possible fall with serious injuries, and the possibility of his falling into the moving belt (Tr. 16).

Mr. Fischbeck believed that the belt examiner could have safely inspected the belt, but he conceded that given the 10 feet area where the rock had slipped against the belt, the examiner would not be able to walk the belt in its entirety (Tr. 46). Mr. Fischbeck believed that the belt examiner could have safely examined the belt by walking up to the area where the travelways were obstructed by the rock, viewed the belt, and then walked around the crosscut to the other side of the belt, and viewed it from that position (Tr. 46, 50). Although Mr. Fischbeck believed that the examiner could have visually inspected the belt from these positions, he conceded that in one area of the belt the rock, which he estimated was 18 inches to 2 feet thick, was resting across the top of the belt (Tr. 53). He confirmed that rock was on both sides of the belt, and that more of it was located on the front or supply road side of the belt, than on the back side (Tr. 56).

Mr. Fischbeck agreed that the inspector issued the citation because "there was some stumbling hazards" and that "there was some obstructions in it" (Tr. 56-57). Mr. Fischbeck confirmed that during the inspection he observed the belt examiner approach the belt area where the rock had slipped, squat down, and then proceed out the supply road to the other side of the

belt (Tr. 54, 57). Although Mr. Fischbeck believed that the procedure used by the belt examiner to examine the belt would have provided him with a safe means of doing so, he conceded that by doing it in this manner, the belt examiner "would not be exposed to walking over the rock that had slid down to the belt" (Tr. 46).

After careful examination of all the testimony and evidence presented with respect to this citation, I conclude and find that the travelways along both sides of the belt conveyor for a distance of approximately 10 feet where the rock had slipped and fallen against the belt were obstructed and were not maintained with a clearance of at least 24 inches wide. I also conclude and find that the obstructed travelways would not allow the belt examiner to make a complete and thorough inspection of the belt, and that the wet and slippery rock conditions presented a hazard to any belt examiner attempting to climb or walk over it, particularly while the belt was running.

Inspector Pyles believed that his previously issued safeguard notice presented the same situation as that which was present when he issued the citation in question, namely, the obstruction of travelways along a belt conveyor (Tr. 20). Mr. Pyles was of the opinion that regardless of the conditions which may cause a belt travelway to be restricted, if a clear travelway of at least 24-inches is not provided in accordance with the safeguard notice, a violation is established (Tr. 63-64).

The respondent's credible testimony by Mr. Fischbeck reflects that the obstructed travelways which prompted the issuance of the initial safeguard notice were the result of the timbering of an area where the belt was out of line, and did not involve any fallen or slipped rocks. The location of the belt near the rib, coupled with the installation of roof timbers, resulted in the restriction of the travelways which did not provide for a clearance of at least 24 inches, and a jackhammer had to be used to scale the rib to provide more clearance (Tr. 48-49). Inspector Pyles confirmed that this was in fact the case (Tr. 64).

During oral argument on the record, respondent's counsel took the position that the citation should be dismissed because the previously issued safeguard notice was based on timbering conditions which did involve any rock falls or slips (Tr. 23, 43). Counsel asserted that the prior safeguard concerned travelway conditions which were "man made," and that the rock slip in connection with the contested citation was not such a

condition (Tr. 50). In support of his argument, counsel cites the decision of the late Judge Carlson in Mid-Continent Resources, inc., 7 FMSHRC 1457 (September 1985). In that case an inspector issued a safeguard notice pursuant to section 75.1403-5(g), because coal sloughage obstructed a part of a 24-inch travelway on one side of a belt. Upon a subsequent inspection, the inspector found another 24-inch travelway on another belt obstructed by coal sloughage, timber, and a 1-foot wide trench. Responding to the same argument as that made by the respondent in this case, and relying on the Commission's decision in Southern Ohio Coal Company, supra, Judge Carlson concluded that the citation was valid with respect to the coal sloughage, but invalid with respect to the trench and timbers, and his reasoning for these conclusions are stated as follows at 7 FMSHRC 1461:

> Under the Commission's reasoning in Southern Ohio, I am not convinced that either the shallow trench or the timbers in the 24-inch travelway were encompassed within the limits of the underlying notice to provide safeguards. The specification of "coal sloughage" in the original notice was broad enough to embrace the casual presence or accumulation of coal or similar solid objects in the travelway. It was not, however, broad enough to include a wholly dissimilar impediment to travel such as a shallow trench. The trench differed from such solid objects in much the same way as accumulated water in Southern Ohio differed from the rocks and construction debris which were covered by the previous safeguard.
>
> The status of the timbers which allegedly impinged on the walkway space is not so clear. Had the timbers been left on the floor to join the coal sloughage as tripping-and-falling hazards, they should logically be treated as a "similar" hazard covered by the underlying safeguard. The inspector's testimony, however, indicated that the timbers were not merely a loose impediment lying on the floor. Rather, they were upright timbers installed as a part of the roof control system (Tr. 29). The timbers therefore constituted what may be referred to as an essential part of the underground mine structure. In that sense they represented an abatement problem far different from the mere

> removal of random obstacles left on the travel-way floor. They differed enough from the class of objects akin to coal sloughage to remain outside the reasonable scope of the inspector's notice of safeguard.

With regard to the assertion that the conveyor referred to in the safeguard notices was at a location different from that referred to in the citation, Judge Carlson found this difference to be of no legal significance because the safeguard notice was directed to all conveyors in the mine, and the evidence established that both conveyors were of the sort covered by 30 C.F.R. 75.1403-5(g), 7 FMSHRC 1462.

In the instant case, the safeguard notice issued by Inspector Pyles on January 21, 1987, citing section 75.1403-5(g), specifically addressed the lack of 24 inches of clearance on both sides of a conveyor belt travelway which was restricted by roof support timbers. The notice stated that thee was less than 24 inches on one side of the belt between the roof support and the rib, and less than 24 inches on the other side between the belt and the roof support. The second sentence of section 75.1403-5(g), provides as follows: "Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor."

Inspector Pyles could not recall the circumstances under which he issued the safeguard notice. However, he agreed with Mr. Fischbeck's explanation that the notice was issued because the installation of roof support timbers adjacent to the belt travelways restricted the clearance on either side of the belt to less than 24 inches. Inspector Pyles also agreed that the safeguard notice did not involve any rock falls or slips. Although he provided credible testimony with respect to the slip and fall hazards associated with any attempt by a belt examiner to climb over the wet and slippery rock which obstructed the belt travelways on March 21, 1988, no testimony or evidence was presented with respect to the hazards associated with a restricted travelway caused by the installation of roof support timbers close to a belt conveyor belt, or whether or not a belt examiner would have been prevented from conducting his required examination of the belt because of such a condition.

Given the Commission's decision in Southern Ohio Coal Company, supra, and the reasoning by Judge Carlson in Mid-Continent Resources, Inc., supra, with which I agree, I conclude and find that the conditions relied on by Inspector

Pyles in issuing the initial safeguard notice, conditions which came about by the installation of roof timbers too close to a belt conveyor which was out of line, and which required the use of a jack hammer to shear off a rib to provide more clearance, were different from the rock fall and slippage which restricted the travelways cited by Mr. Pyles in his citation of March 21, 1988. In short, I conclude and find that the travelway impediment caused by the installation of roof support timbers was dissimilar from any impediment caused by the rock which had slipped and fallen against the belt and that the safeguard notice relied on by Inspector Pyles was not broad enough to encompass the conditions cited in the citation. Under the circumstances, I further conclude and find that Mr. Pyles' reliance on the safeguard notice to support the citation was invalid, and that the citation was improperly issued. Accordingly, the citation IS VACATED.

Based on the stipulations by the parties, I conclude and find that the respondent is a medium-to-large size mine operator, and that the civil penalty assessments for the violations which have been affirmed will not adversely affect its ability to continue in business. I also conclude and find that the respondent acted in good faith in timely abating the violations in question, and I affirm the inspector's moderate negligence findings. I also conclude and find that the violations were serious.

Civil Penalty Assessments

I have approved settlements for two of the contested citations, and the respondent has agreed to pay the full amount of the proposed civil penalty assessments for the violations in question, as follows:

Citation No.	Date	30 C.F.R. Section	Assessment
3227255	03/21/88	75.200	$800
3227256	03/21/88	75.200	$800

With regard to Citation No. 3227257, concerning a violation of 30 C.F.R. 75.400, because of the accumulations of float coal dust along the cited belt conveyor line, the respondent admitted to the fact of violation and did not dispute the inspector's significant and substantial (S&S) finding with respect to the cited conditions. Given the extent of the accumulations, which have not been rebutted by the respondent, and the potential fire hazard which existed on the belt line, and notwithstanding the existence of fire detection and suppression devices which were on the belt line, I nonetheless

agree with the inspector's S&S finding which has been conceded by the respondent.

Petitioner's Exhibit P-2 is a computer print-out detailing the respondent's prior compliance record for the period March 21, 1986, through March 20, 1988, and the parties have stipulated that this print-out reflects the respondent's history of prior violations for the 2-year period prior to the issuance of the citations in question in this case. The print-out reflects that the respondent was issued 1,012 violations, 746 of which are S&S violations. It also reflects that the respondent has paid $128,007, in civil penalty assessments for 973 of the listed violations.

The aforementioned print-out also reflects that for the 2-year period in question, the respondent paid civil penalty assessments for 167 prior violations of mandatory safety standard 30 C.F.R. 75.400. Although I have taken into consideration the mitigating circumstances previously discussed with respect to the citation, I conclude and find that for an operation of its size, the respondent does not have a very good compliance record, particularly with respect to section 75.400, which deals with accumulations of coal dust and float coal dust. Accordingly, I have also taken this into consideration in the following civil penalty assessment which I have made for the citation in question.

Citation No.	Date	30 C.F.R. Section	Assessment
3227257	03/21/88	75.400	$800

ORDER

On the basis of the foregoing findings and conclusions IT IS ORDERED THAT:

1. Section 104(a) S&S Citation Nos. 3227255, 3227256, and 3227257 ARE AFFIRMED, and the respondent shall pay the aforementioned civil penalty assessments to the petitioner within thirty (30) days of the date of this decision and order.

2. Section 104(a) "S&S" Citation No. 3227259, March 21, 1988, 30 C.F.R. 75.1403-5(g), IS VACATED.

George A. Koutras
Administrative Law Judge