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

BETH ENERGY MINES, INC., CONTESTANT	CONTEST PROCEEDING
	Docket No. WEVA 88-268-R
v.	Citation No. 2897509; 5/23/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Mine No. 108
	Mine I.D. 46-03887
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING
	Docket No. WEVA 88-345
	A.C. No. 46-03887-03570
v.	Mine No. 108
BETH ENERGY MINES, INC., RESPONDENT	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania for Beth Energy Mines, Inc.;
Nanci A. Hoover, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to challenge one citation issued by the Secretary of Labor against Beth Energy Mines, Inc., (Beth Energy) and for review of civil penalties proposed by the Secretary for the violation alleged therein.

The evidence shows that on August 12, 1976, MSHA Inspector Frank J. Cervo issued Notice to Provide Safeguards 1FJC at Mine No. 108, then operated by the Bethlehem Mines Corp., Beth Energy's predecessor. That safeguard notice quoted the criteria set forth in 30 C.F.R. 75.1403-10(e) providing that "positive-acting stopblocks or derails shall be provided near the end of all supply tracks."

It is undisputed that the same safeguard had been issued at all mines with haulage track in District 3, the MSHA district which includes Mine No. 108. It is also undisputed that Mine No. 108 utilizes track haulage only to move miners and supplies through the mine and that such a mine differs significantly from mines where the track is used to haul coal in regard to the volume of traffic, the size of trips and the size of the locomotives and cars.

Sometime before February 1988, all of these safeguards regarding the use of positive acting stopblocks or derails in District 3 were uniformly modified to include language prohibiting the use of certain types of stopblocks. Such a modification was issued at Mine 108 on February 17, 1988, by Inspector Scott Springer and read as follows:

Safeguard Notice 1FJC issued 8-12-76 is hereby modified to include the following statement:

> Positive acting stopblocks, derail or chain type car holds shall be used to secure or prevent runaways of track mounted haulage equipment. Other devices not specifically designed to secure track mounted haulage equipment to prevent runaways are not acceptable.

It is undisputed that this standardized modification was prepared from a sample form furnished by MSHA's District 3 office. It is further undisputed that this standardized language was applied to all track haulage mines in District 3, regardless of the conditions in any particular mine. It was intended to prohibit reliance on skids or chained timber stopblocks and to require chain type car holds. Beth Energy installed such car holds but continued to also use a timber arrangement.

On April 28, 1988, Inspector Roy Bennett issued an additional modification to Safeguard Notice 1FJC. The modification reads in relevant part as follows:

> Positive acting stopblocks, derails or chain type car holds shall be used to secure or prevent runaways of track mounted haulage equipment. Other devices not specifically designed for such purpose are not acceptable such as skid retarders, post or crib block crossed over rails of any design in

> front or rear of haulage equipment, wooden chocks under wheels or jill pokes of any design.

It is undisputed that this modification was also issued on a district-wide basis in MSHA District 3, without regard to conditions in the particular mines and was also based upon a sample format prepared by the district office.

On May 23, 1988, Inspector Bennett traveled to the J-8 section of Mine 108 with Phil Burnside, a company Mine Inspector, and Mason Payne, a UMWA miners' representative. Upon arriving at the J-8 section they parked their vehicle outby several other vehicles including two supply cars near the end of the track. Beth Energy maintains that it had a timber stopblock in place at this location to provide protection from runaway haulage equipment. It concedes however that the chain-type car hold required by the latest modification was not attached to the supply cars and was in fact located approximately 30 feet outby the cars.

Inspector Bennett accordingly issued the citation at bar for failure to have the chain-type car hold attached to the supply cars. More specifically the citation alleges a "significant and substantial" violation of 30 C.F.R. 75.1403 and Safeguard 1FJC and reads as follows:

> Two supply cars were on the J8 section supply track and were not chained to prevent runaway. The tie down chain was located 30 feet outby the cars.

Beth Energy raises two related arguments that may be dispositive of these cases: (1) whether the modification to Safeguard 1FJC upon which the citation at bar is based, was properly issued in that it was issued on a district-wide basis without consideration of the specific conditions at Mine 108; and (2) whether the issuance of the original underlying safeguard in 1976 was proper in that it was issued on a district-wide basis without consideration of the specific conditions at Mine 108. Inasmuch as I agree that neither the original safeguard nor the subsequent modifications were properly issued, the citation at bar, based upon such safeguard and modifications, must be vacated.

> Section 314(b) of the Act 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.

The regulatory standard at 30 C.F.R. 75.1403 contains the same provisions. The regulatory standards also set forth criteria, similar to those for the approval of individual mine plans for ventilation and roof control, to be applied when determining whether a safeguard is necessary. The operation of these criteria are described in 30 C.F.R. 75.1403-1(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 75.1403. Other safeguards may be required. (Emphasis added.)

As with the criteria for the approval of individual mine plans, these safeguard criteria are not in themselves mandatory safety standards but become enforceable only when an operator is given notice through the issuance of a safeguard notice. See Secretary v. Southern Ohio Coal Co., 10 FMSHRC 963 (1988).

In Southern Ohio Coal Co., supra, the Commission discussed the issue of the general application of safeguards but did not rule on the specific issue of whether a generally applicable safeguard would be invalid. It discussed the issue as follows:

> The Commission has observed that while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Act, section 314(b) extends to the Secretary an unusually broad grant of regulatory power--authority to issue standards on a mine-by-mine basis without regard to the normal statutory rulemaking procedures. Southern Ohio Coal Co., supra, 7 FMSHRC at 512. The Commission also has recognized that the exercise of this unique authority must be bounded by a rule of interpretation more restrained that that accorded promulgated standards. Therefore, the Commission has held that a narrow construction of the terms of a safeguard and its intended reach is required and that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the remedial conduct required by the operator to remedy such hazard.

> These underlying interpretive principles strike an appropriate balance between the Secretary's authority to require safeguards and the operator's right to notice of the conduct required of him. They do not, however, resolve the important issue raised here for the first time--whether a notice to provide safeguard can properly be issued to address a transportation hazard of a general rather than mine-specific nature. The United States Court of Appeals for the District of Columbia Circuit, in the context of the Mine Act's provision for mine-specific ventilation plans, has recognized that proof that ventilation requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans. In Zeigler Coal Co., supra, the court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application." 536 F.2d at 407; See also Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984%9B (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370-72 (September 1985) (Carbon County II).
>
> Whether, as the judge believed, a similar type of challenge may be made to a safeguard notice is a question of significant import under the Mine Act. Given the manner in which this important question was raised and addressed in the present case, and the nature of the evidence in this record, it is a question that we do not resolve at this time. 10 FMSHRC at 966-7.

I find that indeed with respect to the proper interpretation of safeguard notices an analogy can properly be made to the law that has developed concerning the adoption of mine plans. In Carbon County Coal Corp., 7 FMSHRC 1367 (1985), the Commission addressed a similar issue. There an MSHA district office sought to require Carbon County to

include a provision in its ventilation plan concerning auxiliary fans. The provision was not one set forth in the criteria for ventilation plans in 30 C.F.R. 75.316-2 but was a "guideline" issued by the district. The Commission did not address the merits of the inclusion of the disputed provision in the plan but rather held that the attempt to include a generally applicable provision was improper, stating as follows:

> Because we conclude that the uncontroverted material facts establish that MSHA's decision to impose the free discharge capacity provision was not based upon particular circumstances at the Carbon No. 1 Mine, but rather was imposed as a general rule applicable to all mines, we hold, for the reasons stated in Zeigler and enunciated here, that MSHA's insistence upon the free discharge capacity provision, MSHA's revocation of Carbon County's ventilation plan, and MSHA's revocation of Carbon County's ventilation plan, and MSHA's subsequent citation of Carbon County for a violation of section 75.316, were not in accord with applicable Mine Act procedure. Also, if MSHA believes the free discharge capacity provision to be of universal application, the Secretary may proceed to rulemaking under section 101 of the Mine Act and promulgate the free discharge capacity provision as a nationally applicable mandatory safety standard. 7 FMSHRC at 1375.

The Commission further discussed the issue of the application of general guidelines, quoting Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976):

> The approval-adoption process protects operators and miners by assuring that particular conditions at a mine are addressed by individualized safety requirements. The court in Zeigler, in a discussion we have found "persuasive and compelling" Carbon County Coal Co., 6 FMSHRC at 1127, described the limits the statute places upon the Secretary regarding the restricted subject matter of a ventilation and methane and dust control plan:
>
> > Section 303(o) specifically states that the plan is to be "suitable to the conditions and the mining system of the coal mine. . . " The context of the plan requirement, amidst the other provisions

> of 303, which set forth fairly specific standards pertaining to mine ventilation, further suggests that the plan idea was conceived for a quite narrow and specific purpose. It is not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine.
>
> [I]nsofar as those plans are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application. 7 FMSHRC at 1371-2.

This legal analysis is analogous to the application of district-wide criteria for safeguards. Under the applicable regulations MSHA may impose requirements on an operator on a mine-by-mine basis subject to the specific conditions and requirements necessitated by the peculiar circumstances at a particular mine. Conversely and by similar analogy it is clear that safeguards issued under 30 C.F.R. 75.1403 cannot be used to impose general requirements on all mines throughout a district without regard to the circumstances of the specific mines. Since it is undisputed that the original safeguard in this case, as well as the subsequent modifications, were issued on a district-wide basis without regard to the specific conditions at Mine 108 they were not properly issued. Citation No. 2897509, conditioned upon the validity of that safeguard and its modifications, must therefore be vacated. See U.S. Steel Mining Co., 4 FMSHRC 526 (Chief Judge Merlin 1982), Southern Ohio Coal Co., 9 FMSHRC 273 (Judge Maurer 1987), rev'd on other grounds, 10 FMSHRC 963 (1988), and Southern Ohio Coal Co., 10 FMSHRC 1564, (Judge Weisberger, 1988).

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ORDER

Citation No. 2897509 is vacated.

Gary Melick
Administrative Law Judge
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