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SOL (MSHA) V. METTIKI 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 PROCEEDINGS Docket No. YORK 89-5 A. C. No. 18-00621-03649
v.	Docket No. YORK 89-18 A. C. No. 18-00621-03654
METTIKI COAL COMPANY, RESPONDENT	Mettiki Mine

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for the Secretary;
Ann R. Klee, Esq., Crowell and Mooring, Washington, DC, for the Respondent.

Before: Judge Fauver

In these consolidated cases the Secretary of Labor seeks civil penalties for alleged violations of Notice to Provide Safeguard No. 3115882, under 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record1 as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and the further findings in the Discussion below:

FINDINGS OF FACT

Notice to Provide Safeguard No. 3115882

1. On July 27, 1989, MSHA Inspector J. W. Darios observed water and mud in the approaches to the Nos. 9 and 10 Seals at the Mettiki Mine.

2. Based upon his observations, Inspector Darios issued Notice to Provide Safeguard No. 3115882.

3. The Notice stated that "water mixed with and/or mud over boot deep was present at the C-portal Nos. 9 and 10 seals which restricted access and approach to the seals," and provided for a "safeguard that all travel and walkways at this mine shall be maintained with a clear safe travelway free of debris and stumbling hazards." Gov't. Ex. 4.

4. The approaches to the Nos. 9 and 10 Seals were in an remote area of the mine 150-200 feet from the nearest travelway along which miners would normally walk.

5. The only individuals assigned to travel in the approaches to the Nos. 9 and 10 Seals were the fireboss and the pumper, who conducted weekly examinations of the seals as required under 30 C.F.R. 75.305.

6. There were no belt conveyors, track or mechanical equipment in the approaches to the Nos. 9 and 10 Seals.

7. Inspector Darios advised the mine foreman, Mervin Smith, that wooden walkways constructed in the approaches to the seals would suffice to control the hazard presented by water and mud in the approaches.

8. Water and mud are common conditions in underground coal mines.

Citation No. 3109953

9. On September 13, 1988, while conducting a routine quarterly AAA Inspection, Inspector Darios observed water and mud in the approaches to the 12 C Seals.

10. Based upon his observations, he issued Citation No. 3109953 alleging the presence of water and mud in the approaches to the Upper and Lower 12 C Seals in violation of Safeguard No. 3115882.

11. The approaches to the 12 C Seals were 70-80 feet from any entry, walkway or travelway through which miners would ordinarily travel during the course of their duties.

12. The only individuals assigned to travel in the approaches to the 12 C Seals were the fireboss and the pumper who conducted examinations of the seals required under 30 C.F.R. 75.305.

13. There were no belt conveyers, tracks or mechanical equipment in the approaches to the 12 C Seals.

14. The citation was terminated on September 19, 1988, after wooden walkways were constructed in the approaches to the 12 C Seals.

Order No. 3109957

15. On September 14, 1988, Inspector Darios observed water and mud in the approaches to the Nos. 11, 12, 13 and 14 Seals ("C Portal Seals"). He also observed a wooden plank floating in the approach to the No. 13 Seal.

16. Based upon his observations, Inspector Darios issued 104(d)(2) Order No. 3109957 alleging a violation of Safeguard No. 3115882.

17. The approaches to the C Portal Seals were in a remote area of the mine 100-200 feet from any entry, travelway or walkway through which miners would ordinarily travel during the course of their duties.

18. The only individuals assigned to travel in the approaches to the C Portal Seals were the fireboss and the pumper who conducted weekly examinations of the seals required under 30 C.F.R. 75.305.

19. There were no belt conveyors, tracks or mechanical equipment in the approaches to the C Portal Seals.

20. The order was terminated on September 16, 1988, after the water was pumped out of the approaches and the wooden walkway was replaced in the approach to the No. 13 Seal.

DISCUSSION WITH FURTHER FINDINGS

An inspector's authority for issuing safeguard notices, which become mandatory safety standards for the mine, is found in 30 C.F.R. 75.1403, which is a reprint of 314(b) of the Act. It provides:

> 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.
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> (c) Nothing in the section 75.1403 series in this Subpart 0 precludes the issuance of a withdrawal order because of imminent danger.

Respondent contends that Safeguard No. 3115882 is invalid because it is not based upon a mine-specific condition.

In Southern Ohio Coal Co., 10 FMSHRC 963 (1988), the Commission discussed the issue of the general application of safeguards but did not rule on the specific issue of whether a notice to provide safeguard may be issued for a transportation hazard of a general rather than mine-specific nature. It discussed the subject 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.
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> 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) 1367, 1370-72 (September 1985) (Carbon County II).
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> 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.]

Section 101 of the Act establishes rigorous procedures for the promulgation of mandatory safety or health standards. The Secretary must comply with the formal notice and comment rulemaking procedures of the Administrative Procedure Act. As part of the history of administrative law, Congress recognized that substantive standards are likely to be fairer and sounder if they are subject to comment by an interested public, and if the enforcement agency is required to explain its regulatory choices. See generally 1 K. Davis, Administrative Law Treatise 6.12-6.33 (1978). In short, standards established by formal rulemaking are preferred because they are less likely to be arbitrary. See Ziegler Coal Co. v. Kleppe, 536 F.2d 398, 402-03 (D.C. Cir. 1976) ("most important aspect [of agency authority to promulgate mandatory standards] is the requirement of consultation with knowlegeable respresentatives of . . . industry [among others]" which was intended to address concern that "freely exercised power of amendment [of mandatory standards] might result in an unpredictable and capricious administration of the statute").

Congress recognized, however, that conditions vary substantially from mine to mine, and that neither it nor the

agency could anticipate every hazard that might arise in a mine. Accordingly, Congress developed several mechanisms to establish individualized standards on a mine to mine basis without formal rulemaking: (1) It allowed petitions for modification so that application of mandatory standards could be modified to accommodate particular mine conditions. (2) It provided for individual mine plans that incorporate standards tailored to the conditions of each mine. (3) In one limited area (314(b) of the Act reprinted as 30 C.F.R. 75.1403) -- the transportation of men and materials in underground mines -- it authorized individual inspectors to fill regulatory gaps by issuing safeguards to address hazards not covered by promulgated standards.

In Ziegler Coal, supra, the court observed, that a "significant restriction on the Secretary's power to use the ventilation plan as a vehicle for avoiding more stringent requirements [imposed by the rulemaking process] arises from the plan provisions' obvious purpose to deal with unique conditions peculiar to each mine." 536 F.2d at 407. Analyzing the relationship between a ventilation plan under Section 303(o) of the Mine Act, 30 U.S.C. 863(o), and the mandatory standards relating to ventilation, the court further noted that "the plan idea was conceived for a quite narrow purpose. It was not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines . . . . " [Id. emphasis added.]

> [A]n operator might contest an action seeking to compel adoption of a plan, on the ground that it contained terms relating not to the particular circumstances of his mine, but rather imposed requirements of a general nature which should more properly have been formulated as a mandatory standard under the provision of 101 . . . . For insofar 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. [Id. emphasis added.]

Several Commission judges have applied the Ziegler rationale in holding a safeguard to be invalid because the safety condition was not mine-specific.

However, in a later decision (United Mine Workers of America v. Dole; 870 F.2d 662, 672 (D.C. Cir. 1989)), the court clarified its previous Zielger holding by stating that:

> We read this caution in Zeigler to say only that the Secretary could abuse her discretion by utilizing plans rather than explicit mandatory standards to impose general requirements if by so doing she

> circumvented procedural requirements for establishing mandatory standards laid down in the Mine Act. Zeigler did not purport to ignore the considerable authority of the Secretary to determine what "should more properly have been formulated as a mandatory standard under the provisions of 101," id., and to determine what is "subject matter which could have been readily dealt with in mandatory standards of universal application," id.

As so clarified, the Zeigler decision is "a warning that the Secretary should utilize mandatory standards [by formal rulemaking] for requirements of universal application," but it does not preclude the Secretary from "requiring that generally-applicable plan approval criteria or their equivalents be incorporated into mine plans" (870 F.2d at 672).

There is no litmus test for the validity of a notice of safeguard simply by deciding whether the safeguard could as well be applied to "all or nearly all mines" as a mandatory standard. The decision requires a balance between the purpose of a flexible authority (314(b)) to correct unsafe conditions not covered by an existing standard and the purpose of formal rulemaking (101(a)) for safety standards of universal application.

The basic purpose of 314(b) authority to require safeguards is to ensure the safety of miners in transportation of personnel and material by permitting the inspector to correct observed unsafe conditions that are not covered by existing safety standards. Congress did not state that the unsafe condition must be unique to the mine involved, nor did it preclude use of this authority for unsafe conditions experienced in a number of mines.

The record in this case tips the balance on the side of an unwarranted circumvention of the formal rulemaking procedures (101(a) of the Act).

Alan Smith, Safety Director for Mettiki, testified, based upon his personal experience at Mettiki and other mines, that water accumulation and mud are common conditions in underground coal mines, both in approaches to seals and on travel or walkways. Tr. 216-220. In addition, Mr. Smith testified that he had spoken with the safety directors at three other mines, each of whom had stated that they experienced similiar problems with water accumulation in seal areas. Tr. 219-220. Mervin Smith, the mine foreman, also testified that, based on his experience, mud and water are common conditions in underground coal mines. Tr. 211. MSHA's records of safeguards show that MSHA has issued safeguards for water and mud on roads in all but one of the mines in the subdistrict involved in the instant cases. Respondent's Supp. Exs. I-VI. See, e.g., Safeguard No. 222091 (safeguard issued to Laurel Run Mining Company Portal No. 2 requiring that "all off

track haulage roadways . . . be maintained as free as practicable from bottom irregularities, debris, and wet and muddy conditions") (Respondent's Supp. Ex. I); Safeguard No. 630548 (safeguard issued to Island Creek Coal Company Dobbin Mine requiring "all off track haulage roadways . . . [to be] maintained as free as practicable from bottom irregularities, debris, and wet and muddy conditions") (Respondent's Supp. Ex. II); Safeguard No. 626939 (safeguard issued to the Masteller Coal Company requiring "all haulage roads . . . [to be] maintained as free as practicable from bottom irregularities, debris and water or muddy conditions") (Respondent's Supp. Ex. III).

The Secretary's regulatory scheme is fully consistent with treating water and mud hazards in approaches and travelways as a subject for formal rulemaking rather than safeguards. For example, in Part 77 of the regulations -- "Mandatory Safety Standards, Surface Coal Mines and Surface Work Areas of Underground Coal Mines" -- the Secretary must use formal rulemaking, since there is no statutory authority for notices of safeguards in surface mining. Section 77.205 of the mandatory safety standards provides in part:

> 77.205 Travelways at surface installations.
>
> (a) Safe means of access shall be provided and maintained to all working places.
>
> (b) Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards.

These standards address the same kind of safety conditions as those involved in Safeguard No. 3115882. The Secretary has not shown that a bypass of 101(a) rulemaking is reasonably justified for "stumbling and slipping hazards" in underground mines.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Notice of Safeguard No. 3115882 is invalid.

3. Citation No. 3109953 and Order No. 3109957 are invalid because the underlying Notice of Safeguard is invalid.

ORDER

1. Notice of Safeguard No. 3115882, Citation No. 3109953, and Order No. 3109957 are VACATED.

2. These proceedings are DISMISSED.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE

1. The transcript and exhibits are consolidated in Docket Nos. YORK 89-10-R, YORK 89-12-R, YORK 89-5, YORK 89-6, YORK 89-16, YORK 89-17, YORK 89-18, YORK 89-26, and YORK 89-28.