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BETH ENERGY MINES V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
FALLS CHURCH, VA
April 19, 1990

BETH ENERGY MINES, INC., Contestant	CONTEST PROCEEDINGS
v.	Docket No. PENN 89-277-R Citation No. 3088080; 9/7/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	Docket No. PENN 89-278-R Citation No. 3088162; 9/7/89
	Livingston Portal Eighty Four Complex

DEClSION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, PA for the Contestant; Anita D. Eve, Esq., Office of the Solicitor, Philadelphia, PA, for the Respondent.

Before: Judge Fauver

Beth Energy seeks to vacate two citations and the Secretary seeks to affirm them, with civil penalties, 1/ under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

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

FINDINGS OF FACT

1. On June 13, 1984, MSHA Inspector Francis E. Weir observed the following condition at Beth Energy Mine lnc.'s No. 84 Complex underground coal mine:

1/ At the hearing the parties stipulated that this record may be used to assess civil penalties if violations are found, without the necessity of filing a separate petition for assessment of civil penalties.

> A clear travelway of at least 24 inches wide was not provided on both sides of the belt conveyor in the longwall section MMU 031. Starting at the tipple and extending inby for approxinately 400 ft. For the first 200 ft. the clearance changed from the left side back to right and management had the area fenced off and a crossunder had been provided. The second area was approximately 300 ft. inby the tipple was on the left side and the clearance was between 23 inches and 15 inches for approximately 10-15 feet in two different locations.

Pursuant to 30 C.F.R. 75.1403 and 75.1403-5(g), the inspector issued Notice to Provide Safeguard No. 2395866, which stated:

> This is a notice to provide safeguard that requires at least 24 inches of clear travelway be provided on both sides of all belt conveyors installed after March 30, 1970 at this mine.

2. On September 7, 1989, at the same mine, MSHA Inspector John Mull issued 104(a) Citation Nos. 3088080 and 3088162, alleging violations of the safeguard notice issued by Inspector Weir. Citation No. 3088080 stated:

> At least 24 inches of a clear travelway was not provided on both sides of the Number 4 belt, as the side not normally walked was obstructed with rib material, crib block and other material at numerous locations.

Citation No. 3088162 stated:

> At least 24 inches of a clear travelway was not provided on both sides of the entire Number 3 belt, as the side not normally walked was obstructed with rib material, crib block and other material at numerous locations.

3. Belts 3 and 4 are main belts that travel uphill for about 3000 feet each. The belts are suspended from the mine roof. From the top of the belt to the mine roof there is a three to four foot clearance. The bottom belt is about 18 to 24 inches from the mine floor. The belts are 60 inches wide.

4. The obstructions noted in Citation No. 3088162 were 3 inches high in one location and 1 1/2 to 2 feet high in others. The obstructions noted in Citation No. 3088080 were as high as 3 feet.

5. The obstructions created hazards of tripping, slipping and falling, including falling against a moving belt.

6. Miners worked on the "tight" side of the belts to clean up spillage, to maintain the roof support system, to change belt rollers, and, in the event of an interruption of the ventilation system, to make repairs on the stopping line. Inspector Mull found evidence that someone had traveled the tight side of the belt in that there were legs for I-beams used for a roof support system in some of the material left along one of the cited belts.

7. Beth Energy has a policy that prohibits employees from working on the tight side of the belt when the belt is running unless another employee is stationed at the pull cord, on the wide side. When activated, the pull cord stops the movement of the belt conveyor, but not immediately. Depending on the weight of the load on the belt, the belt would travel another 5 to 15 feet. An employee would most likely work on the tight side of a moving belt to clean up spillage. In the event that an employee tripped or fell while the belt was running and became entangled in the belt, serious injuries, even death, could occur.

8. Citations Nos. 3088080 and 3088162 were abated over the course of 10 shifts, with two to four employees .oerforming clean-up activities on each shift. The belts were running when this work was done; one employee stood on the wide side at the pull cord and another cleared loose coal, sloughage and other materials from the tight side.

9. Safeguard Notice No. 2395866 was one of many similar safeguard notices issued to mines in the Monroeville subdistrict in Region II of MSHA pursuant to 30 C.F.R. 75.1403-5(g). These all tracked the language of that published criterion.

DISCUSSION WITH FURTHER FINDINGS

The principal issue is whether a notice to provide a safeguard issued under 30 C.F.R. 75.1403 and 75.1403-5(g) is valid where (1) it tracks a criterion promulgated in the regulation, and (2) it addresses a safety hazard of a general rather than a mine-specific nature.

An inspector's authority to issue safeguard notices, which become mandatory safety standards for the mine, is found in 30 C.F.R. 75.1403, which repeats 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.
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> (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 the original safeguard is invalid because it addresses a general rather than a mine-specific hazard.

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 whether a notice to provide safeguard may be issued for a hazard of a general rather than a 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 than 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 Zeiqler 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) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 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 rulemaking 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 Zieqler 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 knowledgeable representatives 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 in the Act to establish standards on a mine to mine basis without formal rulemaking: (1) Petitions to the Secretary for modification of the application of a mandatory standard; (2) mine plans (approved by the Secretary) tailored to the conditions of each mine; and (3) safeguard notices issued by inspectors under 314(b) of the Act (repeated as 30 C.F.R. 75.1403), limited to the transportation of men and materials in underground mines.

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 [the rulemaking process] arises from ths 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 will not to be used to imoose general requirements of a variety well-suited to all or nearly all coal mines ... ." [Id. emphasis added.] The Court further stated:

> [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 requirenents 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 (including this judge) applied the Ziegler rationale in holding safeguards to be invalid because they were not mine-specific but addressed hazards of a general nature.

However, after those decisions, in 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. Zeiqler 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 for'nal rule-making] 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). The Court's reasoning for the latter conclusion has particular significance here.

In the UMWA case, the union challenged new regulations on ground that they provided less protection than existing safety standards. Under the Act, the Secretary is authorized to replace existing mandatory health and safety standards only if the new standards provide at least the same level of protection to miners as the old ones. A key issue was whether the Secretary's published roof control criteria for approving roof plans were "mandatory health or safety standards" as that term is used in Section 101(a)(9) of the Act, since only mandatory standards are included within the "no-less protection" directive of the Act.

The Court first noted that the specific contents of a roof control plan are determined through consultation between the mine operator and the district nanager of MSHA, and that, to guide this process, MSHA had promulgated criteria to be met in all plans. District managers of MSHA were explicitly prohibited from approving plans that did not provide the same level of protection as the promulgated criteria. 870 F.2d at 667-668. The Court held that the general criteria promulgated by the Secretary for roof control plans met the notice and co'nment requirements of rulemaking and were in fact mandatory standards under 101(a)(9), so as to invoke the no-less protection rule. Thus, roof control plans could be approved by MSHA only if they either confor'ned to the criteria or "provide[d] no less than the same measure of protection to the miners" as the criteria. 870 F.2d at 670. The Court concluded that the general criteria already existing with respect to roof control constituted a mandatory standard laying down a required level of protection for miners, that had to be met by all plans. In so holding, the Court

concluded that the decisions in Zeigler and Carbon County Coal Co. did not stand for the proposition that the Secretary was prohibited from setting general criteria as mandatory standards for approval of mine operators' plans.

As clarified by the UMWA decision, Ziegler's warning applies only to plan requirements that are not based upon promulgated plan criteria. 2/ To the extent, therefore, that the Ziegler analysis is applicable to safeguard cases, its application is limited to safeguards that are not based upon criteria promulgated under Section 101.

In 30 C.F.R. 75.1403-2 through 75.1403-11, the Secretary has promulgated criteria as guidelines to MSHA inspectors in issuing safeguards pursuant to Section 314(b) of the Act and 30 C.F.R. 75.1403. The criteria were the subject of notice and comnent rulemaking under Section 101 of the Act. See 35 Fed. Reg. 12, 911, et seq. (August 14, 1970) (Notice of Proposed Rulemaking); 35 Fed. Reg. 17, 890, et seq. (November 20, 1970) (Final Rule). Like the roof control plan criteria discussed by the court in UMWA, operators had the opportunity to participate in that rulemaking and since promulgation of the criteria they have been on notice of the conduct expected of them. Unlike other mandatory standards, the roof control criteria in UMWA did not become enforceable until they were included in a roof control plan. Similarly, the safeguard criteria are not enforceable until an operator has been issued a safeguard notice that includes a particular criterion. Use of a promulgated safeguard criterion in safeguard notices is therefore not a circumvention of Section 101 rulemaking procedures.

Section 75.140-3-5(g) is one of those criteria and it states that a clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. The inspector cited and tracked this criterion in issuing Notice to Provide Safeguard No. 2395866.

The Secretary relies on the UMWA case in contending that a safeguard that is based on one of the criteria in 30 C.F.R. 75.1403-2 through 75.1403-11 is valid even though it addresses a general rather than a min@-specific hazard. Before the Court decided the UMWA case, its earlier Zeigler decision and references to Zeigler it by the Commission and a number of Commission judges (including this judge) would not have indicated support for this position. However, the UMWA decision illuminates this area of the law and supports the Secretary's position. As mentioned, the Court found that the Secretary's

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2/ Both Ziegler and Carbon County involved ventilation plan provisions of general applicability which were not based upon published criteria and, therefore, did not meet rulemaking requirements. See 870 F.2d at 671-72.

"roof plan approval criteria were promulgated according to notice and comment procedures" and that "the criteria regulations ... themselves constituted a mandatory standard laying down a required level of protection for miners that had to be met by all plans" (870 F.2d at 670 and 671). By analogy, I find that the Secretary's published criteria for safeguard notices were promulgated according to the notice and comment procedures of 101(a) and therefore may be used as safeguards even though they are applied at many mines and are not mine-specific. Similarly, the Commission's distinction between promulgated safety standards (by rulemaking) and safeguards issued by an inspector, holding that safeguards are subject to a strict construction rule,3/ is not applicable to safeguards that are based upon a published criterion, in light of the UMWA decision.

In summary, I hold that if an inspector's safeguard notice is based on a published criterion (in 30 C.F.R. 75.1403-2 through 75.1403-11), using the same or substantially the same language as the criterion, then (1) the safeguard is valid even if the hazard is of a general rather than a mine-specific nature, and (2) the safeguard is not subject to the strict construction rule announced by the Commission in Southern Ohio Coal Co., supra, but should be interpreted in the same manner as any other promulgated safety standard.

Applying these holdings to the instant cases, I find that the original safeguard notice is valid because it cited and tracked a published criterion, i.e. 30 C.F.R. 75.1403-5(g). Therefore, it is subject to a "reasonable notice" rule of interpretation, the same as applied to any published safety standard, and not the strict rule of construction announced in Southern Ohio Coal Co. Under the applicable rule, the question is whether the language of the safeguard (safety standard) gives

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3/ In Southern Ohio Coal Co., 7 FMSHRC 503 (1985), the Commission held that, "in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required." Id. at 512. It based this holding on "the crucial difference in the rules of interpretation applicable to mandatory standards promulgated by the Secretary and those applicable to 'safeguard notices' issued by [her] inspector." Id. Applying this principle of narrow construction, it held that a safeguard notice that referred to "fallen rock and cement blocks at three locations," and required 24 inches of clear travelway on both sides of a belt conveyor, was not sufficient notice to support a later citation based on water accumulations for a depth of 10 inches from rib to rib, causing slipping and stumbling hazards in the travelway. However, that decision was before the Court's UMWA decision, supra, and would not logically apply to published criteria that met the rulemaking requir@ments.

reasonable notice to the operator of the conduct required. This inquiry is limited to the language of the safeguard, and does not depend on the context of the original safeguard notice. I find that the language of the safeguard at issue, to provide a "clear walkway," gives reasonable notice to the operator to maintain a walkway that is clear, i.e. open and free of obstructions, for the minimum width specified on both sides of a conveyor belt installed after March 30, 1970. The evidence of substantial obstructions in the tight walkway of each belt amply sustains the two citations.

Beth Energy argues that the Secretary is estopped from relitigating the issue whether safeguards may be issued without regard to mine-specific conditions. It states that this issue was litigated between the parties in Beth Energy Mines, Inc., 11 FMSHRC 942 (Judge Mellick, 1989). However, that case did not involve 75.1403-5(g). Also, it appears to have been decided without the benefit of the UMWA decision, and does not consider the Court's clarification of its Zeigler decision. I therefore reject the estoppel argument.

The operator contends that the cited violations should not be found to be "significant and substantial," citing Commission decisions such as Mathies Coal Co., 6 FMSHRC 1 (1981), which hold that an S & S violation is one that presents a reasonable likelihood that the hazard will result in a reasonably serious injury. In light of the extent and height of the obstructions in the tight walkway of each belt, I find that the violations presented a reasonable likelihood of causing a serious injury. The risks included shipping, tripping, and falling and, in some cases, falling against a moving belt. The practice of stationing a miner on the wide side of the belt, near the belt pull cord, did not reduce the violation below an S & S degree, because in an emergency a serious injury or even death could result despite having the cord pulled. First, the miner on the wide side would have to observe the accident and then pull the emergency cord. The time spent in these reflexes could easily be too late to prevent serious injury or a fatality. Secondly, even if the miner pulled the cord immediately, the belt would travel some distance and its added motion (5 to 15 feet) could cause serious injury or even death if the victim were entangled in a roller.

Finally, the operator contends that the two citations are duplicative. It argues that, since the two belts had originally been one belt and the violative conditions are essentially the same, only one violation should have been cited.

Each belt was 3,000 feet long and the belts were separately designated by the operator. I find the conditions were sufficiently separate in distance and in identity of the equipment to justify two citations. Considering all the critaria for a civil penalty in 110(i) of the Act, I find that a penalty of $150 for each violation is appropriate.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Notice of Safeguard No. 2395866 is valid.

3. The operator violated 30 C.F.R. 75.1403 and 75.1403-5(g) as alleged in Citation No. 3088080.

4. The operator violated 30 C.F.R. 75.1403 and 75.1403-5(g) as alleged in Citation No. 3088162.

ORDER

WHEREFORE IT IS ORDERED that:

1. Notice of Safeguard No. 2395866, Citation No. 3088080 and Citation No. 3088162 are AFFIRMED.

2. The above contest proceedings are DISMISSEO.

3. Beth Energy Mines, Inc., shall pay the above civil penalties of $300 within 30 days of this Decision.

William Fauver
Administrative Law Judge

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