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SOL (MSHA) v. SOUTHERN OHIO COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEVA 90-198<br>A.C. No. 46-03805-03978 |
| v. | |
| SOUTHERN OHIO COAL COMPANY,<br>RESPONDENT | Martinka No. 1 Mine |

DECISION

Appearances: Glenn M. Loos, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Morgantown, West Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed an answer contesting the alleged violations, and pursuant to notice, a hearing was held in Morgantown, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standards as alleged in the proposal for assessment of civil penalty, (2) whether the violations were "significant and substantial," and (3) the appropriate civil penalties that should be assessed based on the civil penalty criteria found in section 110(i) of the Act. 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, 20 C.F.R. 2700.1 et seq.

Discussion

Section 104(a) "S&S" Citation No. 3118460, issued on March 14, 1990, by MSHA Inspector Virgil M. Brown, Jr., cites an alleged violation of mandatory safety standard 30 C.F.R. 75.508, and the cited condition or practice is described as follows:

> The elect (sic) map of the DC trolley system is not accurate in that trolley knife blade switches with handles are used where dead block insulators are shown.

Section 104(a) "S&S" Citation No. 3312067, issued on May 1, 1990, by MSHA Inspector Virgil M. Brown, Jr., cites an alleged violation of mandatory safety standard 30 C.F.R. 75.1403, and the cited condition or practice is described as follows:

> The short circuit protection for the trolley wire outby #30 block was not set properly and was not in compliance with the 75% safeguard. The 18 left rect. (sic) was set on 47/or 2834 amps. Load drop tests revealed that the rect. (sic) outby end should have been set on 37/or 2224 amps.

In issuing the citation, Inspector Brown relied on a previously issued safeguard Notice No. 2258189, dated November 14, 1983, and he included this information in the appropriate places on the face of the May 1, 1990, citation.

Discussion

Citation No. 3118460

After the completion of the testimony of Inspector Brown, the petitioner's counsel was granted a short recess. He then advised the court that the parties had settled the alleged violation and that based on the testimony of the inspector, the petitioner decided to vacate the citation. The respondent raised no objection, and the petitioner's disposition of the alleged violation was approved from the bench (Tr. 146-148).

Citation No. 3312067

Petitioner's Testimony and Evidence

MSHA Inspector Virgil M. Brown, Jr., testified that he is an electrical specialist with prior mine experience as a mine manager, foreman, fire boss, and maintenance person, and that he holds a bachelor's degree in mining engineering and has attended the MSHA Academy at Beckley, West Virginia, which included 2 weeks of electrical training. He has also taken electrical correspondence courses (Tr. 15-16). He confirmed that he conducted an electrical inspection at the mine on May 1, 1990, and that he inspected the short circuit protection for the DC trolley system. He confirmed that he performed a load drop test, and he explained the results of his test (Tr. 159-162). He also identified exhibit P-8 as a copy of his inspection notes, exhibit P-9 as a copy of the citation he issued, and exhibit P-10 as the prior safeguard notice issued by Inspector Wayne Fetty on November 14, 1983.

Mr. Brown stated that the results of his load drop test indicated that the fault protection for the circuit in question was set "nearly at 100 percent setting or just a little bit below 100 percent setting," and he explained that the slight discrepancy in the test results recorded in his notes and those shown on the citation were due to the fact "that 37 is the closest thumb wheel setting to that value, and, you're either going to go 60 below this value or 60 above this value" (Tr. 161).

Mr. Brown stated that the respondent had conducted prior load drop tests on April 10, 1990, as reflected by exhibit P-11, and he confirmed that he based his low negligence finding on the fact that the respondent did not ignore the tests and was trying to maintain the required circuit protection settings on their DC trolley system (Tr. 165). He further confirmed that the respondent was in violation of the previously issued safeguard because the circuit protection setting was at 100 percent, rather than the 75 percent required by the safeguard. If the setting were over 100 percent there would have been a violation of mandatory safety standard section 75.1001, rather than the safeguard (Tr. 165).

Mr. Brown explained what was required under the safeguard issued by Inspector Fetty, and he believed that a trained electrician who has worked around a DC trolley system would be familiar with the requirements of the safeguard notice and the load drop tests. Mr. Brown confirmed his belief that the conditions he cited constituted a violation of the requirements of the safeguard notice (Tr. 168).

Mr. Brown stated that the hazards created by the cited conditions included the probability and likelihood of a bolted short circuit, and a fire caused by arcing which could ignite the

combustible materials used in the roof support system. He explained that wooden header boards or planks are within inches of the trolley wires, and that a prior fire had occurred in the mine when a head board caught fire and he and Inspector Fetty came upon a motorman trying to extinguish the fire over the motor which had caused the fire (Tr. 50-51). He was aware of a trolley wire which fell on another section and did not trip the circuit breaker, indicating that it was not set appropriately. He was also aware of approximately 22 accidents over a 7-year period that resulted in 11 lost time injuries and 12 fatalities, as reported in an MSHA study (Tr. 168-169). He believed that "the situation and the mining methods and the settings that the rectifiers are . . . its likely for a problem to occur that would be S and S" (Tr. 169).

Mr. Brown further explained how a fire could start as a result of inadequate short circuit protection, and he indicated that the 75 percent setting required by the safeguard notice came from an MSHA report and studies which were done showing that arcing faults could occur and not open any circuit interrupting devices. He also explained the difference between an arcing fault and a bolted fault, and he believed it was reasonably likely that a fault would occur because of the metal overcast arches used for roof support. He confirmed that he has observed at least three occurrences, including a recent incident, where the insulation was melted off the trolley wire. He believed that a bolted fault would definitely trip if the circuit protection were set at 100 percent, but that an arcing fault would not trip and would remain open until it was cleared or burned far enough so that the flame path is extinguished or someone saw it and repaired it. He confirmed that he has personally observed six or eight mine fires caused by arcing faults, including one at the subject mine, over the past 20 years (Tr. 171-177).

Mr. Brown stated that the issuance of a "75 percent safeguard notice" such as the one he relied on to support the violation is not based on any MSHA district wide policy at mines with trolley systems. He confirmed that he inspects five mines with trolley systems and that the Martinka and Robinson Run mines are the only ones with safeguard notices (Tr. 177). Mr. Brown confirmed that he was familiar with the requirements of mandatory safety standard section 75.1001 and 75.1001-(b), and he explained his understanding of these regulations. He stated that if he finds any short circuit protection settings over 100 percent, he will cite section 75.1001, but if the setting is between 75 and 100 percent he will cite the safeguard notice (Tr. 179, 183-184). He explained that the 100 percent setting requirement is based on section 75.1001, and it is an industry standard based on the load drop test. The 75 percent safeguards lower the mandatory 100 percent setting based on special mine conditions (Tr. 185-186).

On cross-examination, Mr. Brown stated that he normally selects a mine area which has advanced the furthest to conduct his load drop tests because such an area would be the likely area to be out of compliance or have a problem which the mine electrical department would be aware of. He agreed that loose trolley wire "fish plates" could cause the rectifier settings to be set at less than the 2,224 amps required by the safeguard notice, and that this does occur in a mine, and if it does, it would result in a change in the load drop tests (Tr. 190). He confirmed that the 22 accidents which he previously referred to did not occur at the Martinka Mine, and he stated that "those were just separate safeguards" (Tr. 191). He also confirmed that the melted trolley wire guard fire caused by arcing was not a reportable fire because it was extinguished in less than 30 minutes, and that he was not personally aware of any reportable fires at the mine (Tr. 192).

Referring to section 75.1001-1(b), Mr. Brown explained his understanding of the testing and calibration language found in that regulation (Tr. 192-195). He confirmed that under MSHA's guidelines and policy manuals, it is appropriate for an inspector to issue a safeguard to address specific conditions or problems that have resulted in, or could result in, lost time accidents (Tr. 195-196). He confirmed that any safeguard issued by an inspector must go through the district manager in order to avoid "blanket covering" mines, and that he was so instructed by a supervisor during several meetings (Tr. 197). He confirmed that mine safeguard notices are a matter of record in the uniform mine file that he is required to review, and that such information can be retrieved on a computer at the district or sub-district office. However, he did not know how many safeguards have been issued at the subject mine. He stated as follows with respect to the safeguard he relied on in support of the citation (Tr. 200-201):

> Q. Mr. Brown, do you know the reason that safeguard 2258189 which was issued by Inspector Wayne Fetty to Martinka Mine, do you know why it was issued?
>
> A. It was issued I guess after he did a look at the study that was done on the arcing faults and the --- after a study was done of what was there at that mine, of the conditions there as specific to that mine.
>
> Q. And you're just getting this information by reading the actual safeguard; is that correct?
>
> A. Out of the safeguard and the actual printout and I also talked with the inspector.
>
> Q. Mr. Brown, would you agree with the statement that a duly authorized representative of the Secretary such

as yourself, may issue a safeguard if it addresses hazards related to the transportation of men and materials?

A. Definitely. Yes, ma'am.

Q. All right. And that a safeguard would be issued on a mine by mine basis?

A. Mine by mine.

Q. Due to a peculiar or particular circumstance at that particular mine?

A. That's right.

Mr. Brown stated that he has inspected approximately 45 mines in district three, and that approximately 10 percent of them are trolley powered mines. He indicated that safeguards have been issued at mines with large amp capacities, and these mines are "more apt to have arcing faults and their settings would be higher," and they have combustibles close to the trolley wire and associated switching gear. He also indicated that the Martinka Mine uses trolley haulage on the longwalls with rather large motors that pull the trolleys on the trolley wire and that "they're more apt to have a fault at Martinka" (Tr. 202). Referring to the respondent's pre-trial discovery requests and replies by the petitioner (exhibits R-2-A), Mr. Brown confirmed that 11 of the 17 listed mines in his district have been issued 75 percent safeguard notices (Tr. 203-205).

Mr. Brown confirmed that he did not cite a violation of section 75.1001-1(b), "because it was in compliance with this as far as the 100 percent setting goes" (Tr. 207). In response to a question as to whether MSHA is holding the respondent to a higher standard of care under section 75.1001, by requiring a safeguard setting of 75 percent, Mr. Brown responded "I guess you can see it as that if that's the way you want to look at it. I view it as a violation of a safeguard" (Tr. 208). The parties stipulated that at a 100 percent setting, the mine was within the "plus or minus 15 percent" language found in section 75.1001-1(b) (Tr. 217). Mr. Brown confirmed that the difference between the 75 percent safeguard requirement and section 75.1001-1(b), is the percentages (Tr. 218).

Mr. Brown confirmed that he based his low negligence finding on the fact that the respondent had performed the load drop test, and he did not believe that there was any intent to place the setting beyond 75 percent. He believed that the violation was an oversight resulting from driving and advancing so far and that "it just slipped by them" and "they were trying to do a good job" (Tr. 219).

On re-direct, and after further review of the listing of mines with and without safeguard notices (exhibits R-2-A), Mr. Brown stated that 23 of the mines listed do not have safeguard notices, and that two do (Tr. 225-226).

MSHA Inspector Edwin W. Fetty testified that he is an electrical inspector, has worked for MSHA for 16 years, and has 25 years of mining experience. He has also attended the MSHA mine academy and periodically assists in electrical retraining and conducting mine hoisting classes. He is familiar with the subject mine and was initially assigned there to conduct electrical inspections when he was hired as an inspector. Based on a review of his files, he confirmed that he conducted an electrical spot inspection at the mine on November 14, 1983, and issued a section 104(a) Citation No. 2258188 at 11:00 a.m., after conducting a voltage drop test at the diagonal track haulage switch in the 025 section. He also issued safeguard Notice No. 2258189 at 1:00 p.m. that same day (exhibit P-10) (Tr. 227-231).

Mr. Fetty stated that he issued the citation on November 14, 1983, after finding that a device on a 500 KW rectifier was set at approximately 2,800 amps, which was 100 percent in excess of the 1,700 amps required by section 75.1000-1. Mr. Fetty explained that during a previous electrical spot inspection on September 22, 1983, he found the same condition in another area of the mine and issued a section 104(a) citation. Upon his return to the mine in November, 1983, and after finding the same condition existing again, he decided that he was justified in issuing the safeguard notice. He confirmed that due to problems involving accidents and fatalities associated with trolley circuits and mine fires, district manager Ron Keaton authorized the issuance of safeguard notices, on a mine-by-mine basis, requiring settings of 75 percent in lieu of 100 percent. The specific conditions that warranted the issuance of the safeguard were those stated in Citation No. 2258188, namely, the setting of the breakers "in the neighborhood of 100 percent above the compliance of 75.1000-1" (Tr. 234).

Mr. Fetty stated that at the time he issued the citation and safeguard, he believed that an unplanned roof fall or a piece of mining equipment contacting a trolley wire could cause an arcing fault to occur and this could cause a mine fire, with resulting smoke inhalation, asphyxiation, or burns. In those mine areas where wooden boards are used above the trolley or feeder wires to keep rock and debris from falling down on the track haulage, a fire would be likely (Tr. 234). Mr. Fetty explained the requirements of the safeguard notice which he issued as follows at (Tr. 235-236):

> A. The way the safeguard is written it is required that the automatic circuit interrupting device

installed on a 300 volt DC track haulage system shall be provided with devices to detect short circuits which are at least 75 percent of the minimum voltage short circuit current available as determined by periodic voltage current load drop test.

Q. Okay. In layman's terms, something that I'd understand, what does that require?

A. That requires that you go out and put the amount of current on your DC trolley system and whatever your value is at 100 percent what is available, reduce it to 75 percent of the available fault current.

Q. Okay. Reduce what to 75 percent?

A. The available fault current. Like if it was 1,000, reduce it down 25 percent of 1,000.

Q. And what purpose does that serve?

A. That would be an increase --- a better safety factor and should something happen it would detect and cause the device to trip quicker.

Q. Okay. What device?

A. The interrupting device on the trolley circuit.

Q. Short circuit protection?

A. Right.

Q. Now, would you say the requirements of that safeguard are readily understandable to a person experienced on trolley systems?

A. Someone that has been given proper training at the mine to go out and conduct and perform these required voltage drop tests, yes, but an average run-of-the-mine electrician, I would have to do it to say no.

Mr. Fetty confirmed that he has reviewed the citation issued by Inspector Brown and he agreed that the condition cited violated the requirements of the contested safeguard notice (Tr. 237). He further confirmed that there are approximately 28 to 30 mines in his district that have trolley systems, and he guessed that nine or 10 of these mines were covered by a 75 percent safeguard. He stated that three of the safeguards which he issued were issued at different times, but were based on basically the same condition, and he explained the reasons for the safeguards which were issued at the Consolidation Coal

Company's Loveridge No. 22 Mine, the Robinson Run No. 95 Mine, and an Island Creek Coal Company mine (Tr. 238-240).

Mr. Fetty stated that section 75.1001-1(b) requires the testing of automatic circuit breaker devices at intervals not exceeding 6 months, and also provides that the devices "be in calibration to plus or minus 15 percent with the associated relay to that circuit and if the authorized representative feels that more tests are required" (Tr. 241). He did not believe that this standard has any bearing on the safeguard, and he confirmed that he issued the safeguard because it was justified in light of the problems that he encountered (Tr. 241).

On cross-examination, Mr. Fetty explained the problems he had encountered at the mine with respect to section 75.1001-1 and the trolley short circuit protection. He stated that "after issuing the violations and running through that pattern that I had ran through and reading and making more in-depth studies and seeing what the conditions was, I figured that the 75 percent, which I had permission to issue the safeguard, shouldn't be reduced. It should be maintained at that setting" (Tr. 244). Mr. Fetty stated that there is no "blanket coverage" for issuing safeguards, but if anything is not spelled out under section 75.1403, an inspector must request permission from the district manager to issue a safeguard under the "other safeguards" language found in that section (Tr. 245). Mr. Fetty confirmed that he was not familiar with all of the safeguard notice guidelines set out in the National Gypsum case, but indicated that prior to that decision, he encountered compliance problems at the mine with respect to sections 75.1001, 75.516, and energized trolley wires contacting wooden materials. Although these problems did occur at other mines, they were more frequent at the Martinka Mine (Tr. 248).

Mr. Fetty confirmed that based on his review of MSHA accident and fire reports concerning problems with trolley wires he believed that a way to prevent these occurrences at the subject mine would be to reduce the circuit protection from 100 percent to 75 percent, and even though accidents or fires may not have occurred at the mine, he believed that the safeguard was a preventive measure to preclude those events at the mine (Tr. 251). He believed that he was justified in issuing the safeguard to gain a higher margin of safety by lowering the circuit protection device by 25 percent and establishing a 75 percent requirement (Tr. 253).

Mr. Fetty stated that the 75 percent short circuit protection setting was established from information he obtained through district manager Keaton, and seminar materials and information which he (Fetty) obtained. Mr. Fetty "guessed" that the value setting of 75 percent was established by Mr. Keaton and "whomever made the request to have the permission to issue the

safeguard on a mine by mine basis" (Tr. 256). Mr. Fetty confirmed that those mines which do not have the 75 percent safeguard must comply with sections 75.1001 and make the tests mandated by section 75.1001-1(b) (Tr. 259). He also confirmed that the respondent "learned to live with the 75 percent" safeguard with additional feeder and ground wire, and he has inspected other mines where the available fault current is maintained at 50 percent (Tr. 265). He further explained the establishment of a 75 percent value as follows (Tr. 266):

> A. Because the people in our meetings, my supervisor, other people, prudent engineers, which I'm not, I'm not an engineer, they felt that this safety factor of 25 percent would greatly be in aid and assistance to the health and safety of the miners and to prevent fires in the coal mines and that's why they came up and went with the 75 percent.

Mr. Fetty confirmed that section 75.1001 relates to the circuit device trip setting margin of plus or minus 15 percent, and that mines without the 75 percent safeguard must comply with this section. He still believes that the safeguard which has been in effect for 7 years is still valid because the conditions that prompted him to issue it are still occurring at the mine (Tr. 269, 271-272). He further confirmed that there have been 14 violations of section 75.1001, issued at the mine since 1985, and while he did not know the details, he indicated that they would all pertain to trolley circuit short circuit and overcurrent for various reasons (Tr. 273-274). He stated that these violations could also have been issued under the safeguard notice if the circuit setting was in excess of 100 percent and not in compliance with the 75 percent requirement (Tr. 278).

In response to further questions, Mr. Fetty confirmed that he issued the safeguard notice in question as "a preventative measure," as well as the previously stated mine conditions and problems which he had encountered, and the information and studies pertaining to trolley wire fires (Tr. 276-77, 281).

Respondent's Testimony and Evidence

John R. Cooper testified that he has been employed with the respondent for over 15 years, and has served at the Martinka Mine for over 2 years as the general maintenance superintendent. His duties include the maintenance of all mine equipment and support systems for the mine, ventilation plans, the DC track trolley system, and the safety of all equipment and mine personnel. He is a magna cum laude graduate of the Ohio University, with a Bachelor of Science degree in electrical engineering, and his prior experience includes 3 years as an associate professor of electrical engineering at the Decry Institute of Technology in Columbus (Tr. 286).

Mr. Cooper stated that he reviewed the citation issued by Mr. Brown and discussed it with him briefly after it was issued. He informed Mr. Brown of his belief that the violation was not "S&S" because the actual rectifier setting was below the available short circuit currents, and if a short circuit were to develop any place on the line, the overcurrent devices would recognize the fault condition and trip the circuit breaker offline, and there would be no safety concern whatsoever. Since there was no possibility or probability of any unsafe condition or injury, Mr. Cooper did not believe that the "S&S" finding was justified (Tr. 287).

Mr. Cooper stated that he did not discuss his belief that the condition cited was not a violation under the 75 percent safeguard notice with Mr. Brown, but that he always had a question about it because it was "something new to me . . . that I had inherited here at Martinka since I was transferred over" (Tr. 288). He explained that in his prior 14 years experience at the Meigs Division, no safeguards of the type issued by Mr. Brown ever pertained to the DC track trolley system (Tr. 288). Mr. Cooper did not believe that the safeguard was valid, and he explained his reasons for this conclusion as follows at (Tr. 289-290):

> A. Well, there are many stipulations I understand that should be addressed or be satisfied before a safeguard is issued. I'm not fully familiar with all the legal stipulations of that but a lot of them have to do with being a mine specific type requirement which I was never clear on why that was --- this was a mine specific type situation. I really wasn't clear on where this 75 percent limitation was arbitrarily set and where that came from. I was never familiar with any policy memorandum issued from any of the MSHA districts or headquarters or division offices saying that this is something that should be done or what the guidelines were for issuing it. So I had a lot of questions really that were never answered why we had this safeguard saying that we could only set our protection to 75 percent of the indicated value.
>
> Q. Did you ever try and find out from any of the MSHA people why the safeguard was issued?
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> A. Not to any great length.
>
> Q. I mean, was that just because there wasn't a violation issued in connection with the safeguard or what was the reasoning?
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> A. Well, the violation that was issued at the time, the one that we're discussing here, I believe is the

first time that this was issued under a safeguard condition and not a 75.1001.

> Q. When you were a general maintenance superintendent at Martinka?
>
> A. That's correct. And so when this came up, that's when I started having the questions on where did this come from and why did we have it, what are we accomplishing by looking under the safeguard as opposed to what is set forth with that 75.1001.

Mr. Cooper explained the operation of the DC trolley haulage system and he confirmed that it is operated by "300 volts DC, being conducted down a bare trolley wire conductor," and that the "power is picked off by a sliding carb or shoe arrangement" (Tr. 291). The system is an underground mine railroad with large high force power equipment which moves on rails and smaller personnel carriers with lower horsepower requirements (Tr. 290). He sketched out the system and stated that "the whole trick of the system is keeping it properly protected so that if there's a fault on the line, or short circuit, that the protection devices in the rectifier will recognize that and open up under a fault condition but yet will still allow you to have the proper amount of power to operate these large horsepower pieces of equipment in the mine" (Tr. 292).

Mr. Cooper explained the electrical track system and he stressed the concern with protecting the system or limiting the current under a fault condition, and the importance of knowing the resistance of each feedline on the system and the available short circuit current that will flow so that the trip devices can be set accordingly. He confirmed that circuit breakers are located at every rectifier in the mine, and he explained how they functioned. He explained that a bolted fault could occur if there were a roof fault which took the trolley wire down onto the rail, or a jackknifed piece of equipment into the wire could also be touching the rail and creating a short circuit (Tr. 296).

Mr. Cooper explained how a load drop test is conducted in order to "set the thumb wheels on the rectifier" with the appropriate overcurrent amps setting (Tr. 296-299). Referring to the load drop tests conducted within a month prior to the issuance of the citation by Mr. Brown, Mr. Cooper stated that the load drop measured by the respondent was 3,779 amps, and the rectifier was set at 2,834 amps. Mr. Brown's test showed a short circuit of 2,965 amps, and a 75 percent setting would be 2,224 amps. Since Mr. Brown's test indicated an available fault current of 2,965 amps, and since the respondent's system was set on 2,834 amps, Mr. Cooper concluded that the mine setting was under the available short circuit current, and that any bolted fault would have been recognized and the relay would have tripped

"as soon as we passed the 2,834" (Tr. 300). He confirmed that certain factors could effect a load drop test by changes which occur to the resistance of the system, and the resistance could be affected by atmospheric conditions, the mechanical integrity of the "fish plates" used to join the rails together, and the electrical connections in these devices (Tr. 302).

Mr. Cooper stated that during his years at the Meigs Division, his standard practice and instructions to the electrical department was to set the overcurrent protection at 15 percent below the indicated short circuit current values, and that this was accepted by the local mine inspectors. This instruction was in compliance with section 75.1001, and although the standard allowed a plus or minus of 15 percent of indicated value, his policy was to set the trip protection devices at the lower side to insure a margin of safety in the event of any loosened connections or if the system resistance increased (Tr. 304). He explained the computation for the trip device setting made by the respondent, and he concluded that under the "worse case scenario," at the setting of 2,834, which was in the middle of the allowable setting under section 75.1001-1(b), the circuit device would have tripped before reaching the 2,965 setting established by Mr. Brown's test (Tr. 305).

Mr. Cooper was of the opinion that the safeguard notice in question is not valid because section 75.1001-1(b) establishes the range of acceptable rectifier tripping settings for overcurrent protection, and even without a safeguard, the thumb wheel rectifier settings must comply with this standard. He did not believe that there was any need for any additional 75 percent setting and stated that "I don't know why 75 percent is some magical number or where it came from" (Tr. 306). He confirmed that the mandatory standard section in question provides for load drop tests every 6 months to measure the system resistance, and this is the only way to validly establish this. He confirmed that he conducts such tests on a more frequent basis, and the trip relay is set to trip within plus or minus 15 percent of the indicated load drop value. He believed that the mine was in compliance with section 75.1001-1(b) because the rectifier settings were essentially at the mid-point of the regulatory range, and it would have tripped at the same level. He did not believe that any injury would have occurred because the rectifier trip setting was at 2,834 amps (Tr. 306-309).

Mr. Cooper confirmed that he was unaware of any injury or illness to any miner attributable to the Martinka Mine trolley system, or any reportable mine fire associated with the system short circuit protection (Tr. 309). The cited condition was abated "by setting our thumb wheeling setting to the 75 percent setting of 2,965 amperes, which was the 2,224 . . . it was immediately abated by reducing our trip current setting," which then complied with the 75 percent safeguard. In his opinion, the

mine was already in compliance with section 75.1001-1(b) (Tr. 310).

On cross-examination, Mr. Cooper confirmed that although other safeguards were issued at the Meigs Mines, none of them pertained to the 75 percent short circuit protection setting for the trolley system. He further confirmed that he was not working at the Martinka Mine when the 1983 safeguard notice was issued, and he did not observe the conditions which prompted Mr. Fetty to issue it (Tr. 311). He explained that an "arcing fault" could occur where there is no "dead metal on metal contact" and current is jumping across an air gap, creating a spark or an arc. Such an event could occur on the trolley system by poor connections, or by damaged or open "knifeblades," but he has seen very few actual arcing faults. He confirmed that the trolley wire hangers have faulted and grounded and could cause an arc for a brief period of time. However, it is unlikely that such an arc would occur at the roof because the wires are secured on insulators, but it could occur on the hangers connected to metal arches and to the rail (Tr. 312-313).

Mr. Cooper stated that his "worse case scenario" testimony pertained to voltage faults, and not arcing faults, and that it is difficult to measure or simulate arcing faults. He confirmed that wood is used for timbering and cribbing, but that the mine roof is not generally beamed with wooden posts or timbers (Tr. 314).

In response to further questions, Mr. Cooper stated that the "overcurrent protection" referred to in section 75.1001, in this case is the relay incorporated inside the rectifier and it senses the current that is being pulled from the rectifier at all times. After making a load drop test, an inspector would then take 75 percent of that result to establish the required tripping setting pursuant to the safeguard notice. In the absence of the safeguard, the setting could be plus or minus the results of the load drop test formula (Tr. 315-317).

Mr. Cooper stated that the "testing language" found in section 75.1001-1(b), specifically the phrase "calibration of such devices shall include adjustments of all associated relays to plus or minus 15 percent" is intended to refer to the setting of the rectifier trip device. If this phrase were interpreted to apply only to the calibration of the testing device, there would be no restrictions as to settings of the rectifier, in the absence of a safeguard. Since section 75.1001, makes no reference to any required specific setting, he has always understood section 75.1001-1 to require a setting of plus or minus 15 percent of the indicated value, namely, the load drop results. He agreed that subsection (a) of section 75.1001-1, only requires circuit interrupting devices, and does not mention setting percentages or how the devices are to be tested or set,

and that subsection (b) establishes the calibration frequency and the degree to which the circuit interrupting devices will be set or activated (Tr. 320).

MSHA's Arguments

MSHA asserts that the plain wording of section 314(b) of the Act evidences Congress' intent that MSHA inspectors have broad authority to issue safeguards relative to the transportation of men and materials. MSHA points out that the instant case does not involve a "mine-by-mine" criteria-based safeguard such as those provided for in section 75.1403-2 through 75.1403-11, and that the safeguard issued by Inspector Fetty is based on the "other safeguards may be required" language found in section 75.1403-1(a). MSHA maintains that the only specific limitation placed by Congress on the "other safeguards" language found in section 314(b) is that they address hazards relating to the transportation of men and materials, and that an inspector's use of such safeguards are not restricted to only those transportation hazards which are mine-unique--i.e., hazards which generally do not exists at other mines.

MSHA takes the position that Judge Weisberger's decision in Secretary of Labor v. Rochester & Pittsburgh Coal Co., 11 FMSHRC 2007 (October 1989), invalidating a safeguard notice because it was not mine specific and not promulgated pursuant to the rulemaking provisions found in section 101 of the Act is incorrect. In support of this conclusion, MSHA argues that section 314(b) does not require MSHA to engage in notice and comment rulemaking before issuing a safeguard of general applicability. By choosing not to place safeguards under section 101 rulemaking, and allowing an individual inspector to issue safeguards on a mine-by-mine basis, MSHA concludes that Congress made a deliberate choice in permitting a more informal, and flexible, approach for identifying and remedying mine transportation hazards. MSHA further concludes that to hold that safeguards which address specific hazards at a mine are invalid solely because similar hazards exist at other mines would be to preclude an inspector from issuing safeguards designed to remedy transportation hazards, no matter how obvious or dangerous the hazard, and regardless of the lack of care exercised by the operator, if that hazard exists at other mines. MSHA believes that had Congress intended this result, it would not have written section 314(b) as broadly as it did and it would have placed the "other safeguards" provision where Judge Weisberger did in Rochester & Pittsburgh Coal Co., i.e., in section 101.

Citing the Commission's decision in Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985), MSHA asserts that at most, a safeguard need only identify the nature of the hazard at which it is directed and the conduct required of the operator to remedy the hazard. In the instant case, MSHA believes that the

safeguard notice issued by Inspector Fetty meets these requirements in that it states that the hazard presented concerns arcing faults which will not deenergize the circuit, and that the conduct required of the operator is that all circuit interrupting devices be set at 75% of the bolted short circuit current available. MSHA further points out that both Inspector Fetty and Brown testified that the language found in the safeguard notice would be readily understandable to a trained electrician who is knowledgeable of trolley systems.

MSHA concludes that the conditions cited by Inspector Brown clearly fit within even the narrowest construction of the language of the safeguard issued by Inspector Fetty. MSHA points out that Mr. Brown cited the respondent because the short circuit protection for the trolley system outby the #30 block of the 18 Left Section was not in compliance with the 75% safeguard, and he obviously felt that the safeguard applied to this situation. Further, Mr. Fetty reviewed Mr. Brown's citation and agreed that the conditions cited violated the requirements of the safeguard. Under these circumstances, MSHA concludes that the safeguard was validly issued and in force when Mr. Brown issued his citation, and that they were both valid.

MSHA asserts that Mr. Fetty's safeguard addresses mine hazards specific to the Martinka No. 1 Mine and is valid even under the strict test set forth in Rochester & Pittsburgh Coal Co., supra. In support of this conclusion, MSHA points to the testimony of Mr. Fetty concerning the conditions which he observed at the mine when he issued the safeguard. MSHA asserts that these conditions include combustible head coal and wooden structures above the trolley wires, with little or no clearance between the trolley wire and mine roof (Tr. 234, 280), grounded metal support arches which are in close proximity to both the trolley wire and the combustible materials over the trolley wire, and combustible materials and metal arches contacting the trolley wire at times due to roof falls, sagging roof, and accidents involving the track haulage equipment (Tr. 255, 276). Mr. Fetty also noted "an ongoing problem" regarding the trolley system short circuit protection (Tr. 231-232, 243, 276).

MSHA further asserts that Mr. Fetty testified that the Martinka No. 1 Mine is the only mine in his area that has the strata and roof conditions it has (Tr. 280), including head coal and wooden structures in close proximity above the trolley wire (Tr. 280-281). MSHA also makes reference to Mr. Fetty's testimony concerning "unique repeated and frequent violations and other problems" with the trolley system which he does not have at other mines, the fact that he issued the safeguard in part because of a violation concerning a "burnt up line switch", (Tr. 248, 233, 276), and his statement that he did not find this same combination of conditions in any other mine he had inspected (Tr. 233, 248, 276-277).

MSHA maintains that the disputed safeguard does not "impose general requirements of a variety well-suited to all or nearly all coal mines . . . ", and that the evidence and testimony in this case clearly shows that only a small percentage of coal mines in MSHA District 3 have a safeguard similar to the one issued by Inspector Fetty. MSHA points out that only 11 of the approximately 130-140 mines in the district are under a safeguard notice similar to the one issued by Mr. Fetty, and that the respondent's own witness (Cooper) admitted that there are "many, man mines in this country that do not operate under a safeguard of this type" (Tr. 318-319). MSHA also points out that only 11 of the approximately 28 to 30 mines in the district which utilize trolley wire systems have a safeguard which was issued on a mine-by-mine basis due to specific conditions noted at those mines (Tr. 177-178, 201, 238-240). MSHA points to the fact that these safeguards were issued over a large period of time, beginning in 1983, and ending in 1990, and that the wide disparity in dates tends to indicate that each safeguard was issued due to particular circumstances arising in each mine. Finally, based on these numbers, MSHA concludes that it seems clear that no MSHA district wide policy exists requiring such a safeguard at all mines or even at mines with trolley systems.

MSHA maintains that the contested safeguard is not preempted by mandatory safety standard section 75.1001-1(b), because the safeguard and the standard refer to different concerns. MSHA asserts that the safeguard requires that the short circuit protection on the trolley system be set at 75% of the maximum short circuit current available, while the regulation requires that the "calibration of such devices shall include adjustment of all associated relays to á - 15 percent of the indicated value". In short, MSHA concludes that the safeguard refers to the value at which the thumb wheel on the rectifiers must be set (or the indicated value), and that section 75.1001-1, refers to the calibration of the rectifier or the amount of mechanical error allowed at that setting. Since the calibration refers to the amount of error present in the setting mechanism of the rectifier and has no affect on what setting is required by the safeguard, MSHA concludes that the regulation does not preempt the safeguard.

MSHA concludes that the uncontradicted testimony of Inspector Brown establishes that the respondent violated the requirements of the safeguard when it allowed the short circuit protection in question to be set at 100 percent of the maximum short circuit current available. MSHA further concludes that the violation was significant and substantial within the guidelines established in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In support of this conclusion, MSHA asserts that a discrete safety hazard was contributed to by the violation in that the failure to properly set the short circuit protection presented a fire hazard (Tr. 169), and that the uncontradicted testimony of

Inspectors Brown and Fetty show that a reasonable likelihood existed that a fire would occur at the Martinka No. 1 Mine in the course of normal mining operations if this violation was left uncorrected, and that this fire would result in reasonably serious injuries to at least one miner.

MSHA points out that Inspector Brown testified that an arcing fault was likely to occur along the trolley wire between the wire, the metal roof support arches, and the metal wire hangers in close proximity near the roof of the mine (Tr. 57, 58, 167, 169, 173-174), and that such an arcing fault would not deenergize the circuit with the rectifiers set at 100% (Tr. 172, 175). MSHA further points out that Inspectors Brown and Fetty testified that flame or arc from the fault would likely ignite the combustible materials including wood and head coal on the roof of the Martinka No. 1 Mine, because the combustible materials are in close proximity to, and at times even touching, the trolley wire (Tr. 50-51, 57-58, 167, 169, 175, 202, 234, 280). Both inspectors also testified that the mine fire resulting from this ignition is reasonably likely to result in serious injuries, including burns and smoke inhalation, to at least one miner (Tr. 58, 168-169, 234; Exhibit P-9).

Respondent's Arguments

During the course of the hearing, the respondent argued that existing mandatory safety standard section 75.1001, adequately covers the short circuit hazard situation which prompted Mr. Fetty to issue the disputed 1983 safeguard notice. The respondent took the position that since an existing mandatory standard has already been duly promulgated after rule-making pursuant to the Act, MSHA is without authority to refine or modify the existing standard by issuing a safeguard. Respondent maintained that by requiring it to adhere to the safeguard, MSHA is attempting to hold it to a higher standard than that required by the existing applicable standard. Respondent asserted that in order to hold it to a higher standard of care and compliance than that required by the existing standard, MSHA must do so through rulemaking, rather than simply issuing a safeguard that effectively imposes a greater burden than that required by the existing standard (Tr. 208-212).

The respondent further argued that since it was in compliance with the existing standard as duly promulgated by MSHA's rulemakers, MSHA should be preempted from enforcing the safeguard issued by Mr. Fetty. Respondent argued that it has been adversely affected by the safeguard because it is forced to deal with two different requirements for maintaining short circuit protection on its track trolley system. The respondent pointed out that its rectifier thumb wheel settings were correctly fixed pursuant to section 75.1001, since the settings fell within the plus or minus 15 percent requirement found in

section 75.1001-1(b), and that its track equipment would not "drop out" at this higher short circuit protection level. However, by lowering the level to 75% pursuant to the safeguard, the respondent pointed out that the equipment would "drop out" (Tr. 264-265).

In its post-hearing brief, the respondent argues that the safeguard is invalid because section 75.1403 does not specifically provide for short circuit protection on the cited DC trolley system; that section 75.1000, which is found in Subpart K of MSHA's mandatory regulatory standards, specifically incorporates "Trolley Wires and Trolley Feeder Wires"; that the safeguard is preempted by section 75.1001-1(b), which specifically addresses trolley wire overcurrent protection; and that the safeguard does to meet the guidelines discussed by chief Judge Merlin in his decision of March 29, 1982, in United States Steel Mining Co., Inc. 4 FMSHRC 526, 530 (March 1982).

The respondent asserts that it is undisputed that on the day Mr. Brown issued his citation, the mine's previous load drop test was in compliance with the plus or minus fifteen percent of the indicated value according to section 75.1001-1(b), and that the trip setting was set lower than the fault current, and set safely (Tr. 165, 308). The respondent points out that although Inspector Brown agreed that the respondent was in compliance with section 75.1001, he nonetheless believed that the respondent was not in compliance with the 75 percent safeguard, and issued the citation for this reason (Tr. 165). The respondent asserts that according to Mr. Brown's interpretation, sections 75.1001 and 75.1001-1(b), refer to "the calibration of the interrupting device", but that in the event the short circuit is over 100 percent Mr. Brown would cite a violation of section 75.1001-1(b), rather than the safeguard. Respondent points out that although Mr. Brown is an electrical inspector he does not hold an electrical engineering degree and interprets the standard on the basis of his MSHA training.

The respondent further points out that its electrical engineering expert Cooper is a magna cum laude graduate in electrical engineering, has taught this subject, and has 15 years of experience in electrical engineering. Mr. Cooper was of the opinion that section 75.1001-1(b), specifically addresses the DC trolley system short circuit protection, and he confirmed that during his 15-year tenure with the respondent it has been a standard practice to set the overcurrent protection at minus 15 percent below the indicated short circuit current values in compliance with section 75.1001-1(b). Mr. Cooper also testified that section 75.1001-1(b), establishes the acceptable rectifier tripping ranges for the coal mining industry. Under the circumstances, he believed that the additional restriction imposed by the arbitrary 75 percent safeguard is invalid and preempted by section 75.1001-1(b).

Respondent maintains that MSHA has failed to establish that the alleged violation was significant and substantial in that Inspectors Fetty and Brown, as corroborated by Mr. Cooper, both testified that there were no reportable mine fires at the mine, nor were there any injuries or accidents relating to any such fires.

Respondent further argues that there is no substantive evidence in this case to establish that the Martinka No. 1 Mine has any mine-specific or peculiar hazards relating to the transportation of men and materials, and that the alleged conditions described by Inspector Fetty were not mine-specific to the mine and were present in other mines. The respondent does not dispute the fact that section 314(b) of the Act grants the Secretary a unique authority to create what are in effect mandatory safety standards on a mine-by-mine basis without resorting to otherwise required rulemaking procedures. However, in the instant case, respondent takes the position that the conditions which MSHA claims justified the issuance of the contested safeguard in question are specifically addressed by mandatory safety standard 75.1001 and 75.1001-1(b), and are not mine specific. Respondent further argues that the safeguard is of general application and was not issued to minimize specific mine hazards connected with the transportation of men and material and that the safeguard may not serve to hold it to a higher standard than that required by section 75.1001-1(b).

Findings and Conclusions

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

Section 75.1403-1 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.

The Commission has examined the safeguard provisions found in section 314(b) of the Act and 30 C.F.R. 75.1403, and has noted with approval that the broad language of this provision "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining". Jim Walters Resources, Inc., 7 FMSHRC 493, 496 (April 1985). Although the mandatory safety standards found in Title 30, Code of Federal Regulations, normally are developed and promulgated in accordance with section 101 of the Mine Act and the rule-making provisions contained in the Administrative Procedure Act, 5 U.S.C. 551 et seq., the Commission has observed that section 314(b) of the Act grants the Secretary extraordinary authority to essentially create mandatory safety standards on a mine-by-mine basis without resorting to the normal rule-making procedures, and it has approved the issuance of safeguards without rule-making for a particular mine, Southern Ohio Coal Co., 7 FMSHRC 509 (april 1985). However, the Commission went on to state as follows at 7 FMSHRC 512:

> * * * We believe that in order to effectuate its purpose properly, the exercise of this unusually broad grant of regulatory power must be bounded by a rule of interpretation more restrained than that accorded promulgated standards. Thus, we hold that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. We further hold that in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required. See, e.g., Consolidation Coal Co.., 2 FMSHRC 2021, 2035 (July 1980) (ALJ); Jim Walter Resources, 1 FMSHRC 1317, 1327-28 (September 1979) (ALJ). See also Secretary's Brief to the commission at 11 n. 1. ("Accordingly, while the language of safeguard notices should be narrowly construed, the Secretary's issuance authority must be interpreted broadly").

It seems clear to me from several Commission decisions that adequately written safeguards are mandatory standards or requirements which are enforceable on a mine-by-mine basis. See: Southern Ohio Coal Company, 7 FMSHRC 509 (April 1985); U.S. Steel Mining Company, Inc., 4 FMSHRC 526, 529-530 (March 1982); Jim Walter Resources, Inc., 6 FMSHRC 1815 (July 1984); Mathies Coal Company, 4 FMSHRC 1111 (June 1982); Jim Walter Resources, Inc., 8 FMSHRC 220 (February 1986).

Several Commission Judges have invalidated citations and the supporting safeguard notices on the ground that the safeguards

were of a general, rather than mine-specific, application. See: Rochester & Pittsburgh Coal Co., 11 FMSHRC 2007 (October 1989) (Judge Weisberger); Southern Ohio Coal Company, 10 FMSHRC 1564 (November 1988) (Judge Weisberger); Beth Energy Mines, Inc., 11 FMSHRC 942 (May 1989) (Judge Melick); Southern Ohio Coal Company, 11 FMSHRC 1991 (October 1989) (Judge Maurer); Mettiki Coal Corporation, 12 FMSHRC 92 (January 1990) (Judge Fauver); U.S. Steel Mining company, Inc., 4 FMSHRC 526 (March 1982) (Chief Judge Merlin). The "mine specific" issue in these cases is now pending on appeal before the Commission for decision in the October 1989 Rochester & Pittsburgh Coal Co., and Southern Ohio Coal Company, decisions rendered by Judge Weisberger and Judge Maurer.

In the case at hand, the respondent is charged with a violation of section 75.1403, for failing to adhere to the requirements of a safeguard notice issued by Inspector Fetty on November 14, 1983. The safeguard states as follows:

> The automatic circuit interrupting device installed on the 300 volt DC trolley track haulage system between the track haulage switch and spad station 20 á 00 was not set to deenergize the trolley system during arcing fault. This mine has head coal incorporating combustible material and the construction of steel roof support structure.
>
> All protecting circuit interrupting devices installed on the 300 volt DC trolley haulage system shall be provided with devices to detect short circuits which are at least 75 percent of the minimum bolted short circuit current available as determined by periodic voltage current (load drop) test.

The safeguard in question required that the automatic circuit interrupting devices installed on the mine 300 volt DC trolley track haulage system to be provided with devices to detect and interrupt short circuits which are at least 75 percent of the minimum bolted short circuit current available as determined by periodic voltage/current (load drop) tests. Inspector Brown testified that he conducted a load drop test on the cited trolley system circuit during the course of his electrical inspection on May 1, 1990, and found that the fault protection on one of the rectifier relays was set "nearly at 100 percent setting or just a little bit below 100 percent setting". Since this circuit protection setting exceeded the 75% requirement mandated by Mr. Fetty's previously issued safeguard notice, Mr. Brown issued the citation.

Mr. Fetty testified that as a result of accidents and fatalities associated with mine fires on trolley circuits, district manager Ronald Keaton authorized the issuance of

safeguards, on a mine-by-mine basis, requiring short circuit protection settings at 75% of the settings required by section 75.1001. Mr. Fetty confirmed that when he issued the 1983 safeguard he relied in part on certain information and knowledge which he obtained at safety seminars and conferences concerning trolley wire system accidents and fires which occurred in mines in general. He believed that a way to prevent these incidents at the Martinka Mine was to reduce the short circuit protection requirements found in section 75.1001-1 to 75 percent (Tr. 250, 254). He conceded that the reports of prior accidents and fires which he had reviewed concerned incidents which had taken place "country wide" in mines other than the Martinka Mine, and he was not aware of any reportable mine fires at the Martinka Mine (Tr. 254).

Mr. Fetty confirmed that he also based the safeguard in part on the "numerous problems at that mine" with respect to section 75.1001-1 violations associated with short circuit protection for the trolley service. He stated that during electrical spot inspections which he conducted in September and November, 1983, he found that certain rectifier short circuit devices were set at approximately 100% above the settings required by mandatory safety standard 30 C.F.R. 75.1001-1, and after issuing two section 104(a) citations for these violations, he concluded that he was justified in issuing the safeguard requiring all future rectifier settings to be set at 75 percent. When asked why he issued a safeguard when non-compliance was already addressed by promulgated standard section 75.1001-1, Mr. Fetty responded as follows (Tr. 266):

> A. Because the people in our meetings, my supervisor, other people, prudent engineers, which I'm not, I'm not an engineer, they felt that this safety factor of 25 percent would greatly be in aid and assistance to the health and safety of the miners and to prevent fires in the coal mines and that's why they came up and went with the 75 percent.

Mr. Fetty identified the prior violations of section 75.1001-1, as the specific "mine conditions" which prompted him to issue the safeguard (Tr. 232-234). However, he conceded that any continued non-compliance problems with respect to section 75.1001-1, could have been addressed by issuing section 104(d)(1) and (d)(2) citations and orders (Tr. 252). In my view, simply because an inspector finds repeated violations of a mandatory safety standard does not ipso facto justify or warrant the issuance of a safeguard. If this were the case, an inspector could effectively amend any existing trolley wire standard found in Subpart K of the regulations simply by issuing a safeguard based on one or more prior violations of these standards.

Mr. Fetty also believed that an unplanned roof fall or a piece of mining equipment contacting a trolley wire were additional "hazards" which could have occurred in the area where he issued a citation at the same time the safeguard was issued (Tr. 234). He believed that these conditions could result in a mine fire and that the likely source of the fire would be the head coal or wooden boards located above the trolley wire to keep rock and other debris from falling on the track haulage. However, he indicated that these wooden head boards would only be at "some locations" and not throughout the mine (Tr. 234).

Mr. Fetty also alluded to violations of other standards, such as section 75.516, which prohibits energized trolley wire contacting combustible wooden materials, as examples of other "problems" he found at the mine at the time he issued the safeguard. Although conceding that these "problems" occurred at other mines, he believed that "they repeated and occurred more frequently in those days at Martinka Mine more than they did anywhere else", and he felt justified in issuing the safeguard (Tr. 247-248; 253).

Mr. Fetty agreed that roof falls, dislodged roof arches, and DC trolley accidents have occurred at other mines, and he conceded that he issued the safeguard as a preventive measure to preclude such occurrences at the Martinka Mine (Tr. 249-251; 255). However, I find no credible evidence to establish the existence of any roof falls, dislodged roof arches, or trolley accidents affecting the transportation of men or equipment at the Martinka Mine at the time the safeguard was issued. Indeed, Mr. Fetty confirmed that his prior knowledge of any accidents or other such incidents pertained to mines other than the Martinka Mine (Tr. 251).

Mr. Fetty alluded to one non-reportable fire which he and Inspector Brown found when a motorman caused some combustibles to ignite. Mr. Brown confirmed that the fire occurred two or three years ago, well after the safeguard was issued by Mr. Fetty, and that it was quickly extinguished and was not considered a reportable fire (Tr. 169, 176, 192). Mr. Brown alluded to an additional "hearsay fire" at the mine, but no evidence was forthcoming to confirm or document this event. Further, although Mr. Brown indicated that he has observed 6 or 8 mine fires caused by arcing faults in the past 20 years, only one occurred at the Martinka Mine, and it was the non-reportable one which he and Mr. Fetty found (Tr. 176). Mr. Brown also mentioned an unspecified study which reported 22 accidents over a seven-year period which resulted in 11 or 12 lost time injuries and fatalities, but he confirmed that none of these incidents occurred at the Martinka Mine (Tr. 169, 191).

Mr. Brown stated that MSHA's policy manual guidelines authorize the issuance of a safeguard if an inspector "should

find they have a problem at that mine that specifically addresses the conditions at the mine that have resulted or could result in a lost time accident" (Tr. 195). Mr. Brown confirmed that the safeguard in question came from an MSHA report which concluded that arcing faults could occur and not open any circuit interrupting devices (Tr. 172). However, the report was not further identified or offered in evidence, and Mr. Brown "guessed" that Mr. Fetty issued the safeguard after reviewing "the study that was done on the arcing faults" (Tr. 200).

Respondent's maintenance superintendent Cooper, a magna cum laude graduate electrical engineer, was of the opinion that the safeguard issued by Mr. Fetty is invalid because section 75.1001-1(b), properly and appropriately establishes a range of acceptable rectifier settings for overcurrent protection on the mine trolley system (Tr. 306). Mr. Cooper further testified that during his 15 years of employment with the respondent he was not aware of any reportable mine fires or injuries associated with the short circuit protection on the trolley system (Tr. 309). He confirmed that the trolley wires are supported by insulated belt hangers suspended from metal hangers which are attached to metal pipes anchored into the mine roof (Tr. 313). He also confirmed that as a general practice wooden posts or timbers are not used as beams to support the roof (Tr. 314).

Mr. Cooper further testified that the respondent's Meigs No. 31 and 2 mines, which are also in the same district as the Martinka Mine, and which have underground trolley systems, have never been subject to the kind of safeguard issue by Mr. Fetty and that those mines are subject to the load drop test and short circuit protection requirements found in section 75.1001-1 (Tr. 310-311).

I agree with the aforementioned decisions of the Commission judges who concluded that a safeguard notice must be minespecific and based on hazardous conditions peculiar or unique to the mine where it is issued and enforced. On the facts of this case, and after careful review of Inspector Fetty's testimony, I cannot conclude that MSHA has established that the safeguard issued by Mr. Fetty was based on any mine conditions or hazards peculiar to the Martinka No. 1 Mine, or conditions that could not have been addressed or remedied by reliance on other existing standards. I am convinced that Mr. Fetty issued the safeguard as a general preventive measure to address possible arcing faults which may or may not occur, rather than to address any unique or inherently hazardous mine conditions, and Mr. Fetty tacitly conceded that this was the case.

It seems obvious to me that Mr. Fetty was also influenced by the fact that the Martinka Mine had received citations or violations of sections 75.1001-1, and section 75.516, the standards applicable to trolley wire short circuit protection and

power wires contacting combustible materials, and he admitted that this was the case when he identified these violations as the specific "mine conditions" which prompted him to issue the safeguard. However, as noted earlier, I do not believe that such prior violations can justify the issuance of a safeguard. Those particular standards address the hazardous conditions which resulted in the issuance of the violations, and coupled with the civil penalty assessments which followed, provided an adequate enforcement tool for MSHA. In addition, as Mr. Fetty readily conceded, an inspector may also resort to the use of section 104(d) citations and orders in appropriate cases to deal with a recidivist mine operator.

In addition to the existing requirements found in sections 75.516, and 75.1001.1, I take note of the fact that section 75.1003 requires the insulation and guarding of trolley wires at certain mine locations, and that sections 75.1003-1 and 75.1003-2, require certain precautions and procedures to prevent equipment being moved along haulageways from contacting trolley wires, and to insure that proper short circuit protection exists on the associated automatic circuit interrupting devices. I also take note of the fact that MSHA's Section 75.1003 Policy Manual guidelines require trolley wires to be guarded with wood, plastic, or other nonductive material.

Mandatory safety standard 30 C.F.R. 75.1001 states as follows: "Trolley wires and trolley feeder wires shall be provided with overcurrent protection".

Mandatory safety standard 30 C.F.R. 75.1001-1, states in relevant part as follows:

> (a) Automatic circuit interrupting devices that will deenergize the affected circuit upon occurrence of a short circuit at any point in the system will meet the requirements of 75.1001.
>
> (b) Automatic circuit interrupting devices described in paragraph (a) of this section shall be tested and calibrated at intervals not to exceed six months. Testing of such devices shall include passing the necessary amount of electric current through the device to cause activation. Calibration of such devices shall include adjustment of all associated relays to %9E15 percent of the indicated value. An authorized representative of the Secretary may require additional testing or calibration of these devices.

I find merit in the respondent's contention that existing mandatory section 75.1001-1, adequately covers the short circuit protection requirements for the mine trolley wire system. Based on the testimony of Inspectors Brown and Fetty, and the credible

testimony of respondent's witness Cooper, I conclude and find that MSHA's contention that section 75.1001-1 and the safeguard issued by Mr. Fetty address different concerns is not well taken and it is rejected. Based on the evidence and testimony of the witnesses, I conclude that section 75.1001-1, addresses short circuit protection for trolley wires, and copies of some of the prior citations issued for violations of this section specifically refer to improper "thumbwheel" settings for the cited trolley wire circuit interrupting devices (Exhibit R-2B).

The parties stipulated that at the 100 percent short circuit protection setting found by Inspector Brown, the respondent was in compliance with the plus or minus 15 percent requirement found in section 75.1001-1(b), but that it was not in compliance with the 75 percent safeguard issued by Inspector Fetty (Tr. 217). Mr. Fetty confirmed that those mines which do not have the safeguard are required to comply with sections 75.1001 and 75.1001-1, and he indicated that as long as a mine is in compliance with these standards there is no reason for any safeguard (Tr. 259, 267).

MSHA's section 75.1001-1 Program Policy Manual guidelines, July 1, 1988, at page 88 contain the following statement:

> The setting of an automatic circuit-interrupting device should not exceed 75 percent of the minimum available short-circuit current in the protected circuit to compensate for inaccuracies in the setting and the voltage drop across arcing faults. This safety factor is consistent with accepted engineering practice; however, in determining whether a violation of this Section exists, the safety factor shall not be used.

MSHA's section 75.1001-1, policy guidelines language with respect to the 75 percent setting of an automatic circuit-interrupting device is practically identical to the language found in Mr. Fetty's safeguard notice. Although the statement goes on to state that the 75 percent setting is a safety factor consistent with accepted engineering practice, I find the admonition that such a safety factor should not be used in determining whether a violation exists to be inconsistent, and it remains unexplained.

In view of the foregoing findings and conclusions, I conclude and find that the safeguard notice issued by Mr. Fetty was not based on any mine specific conditions or hazards, and that any transportation hazards associated with the trolley wires which may have existed in the mine were adequately covered by existing mandatory safety standard sections 75.1001 and 75.1001-1. Accordingly, I further conclude and find that the safeguard is not valid and IT IS VACATED. Since I have concluded that the safeguard is invalid, the citation issued by Inspector Brown,

which is based on the safeguard, cannot stand, and it too IS VACATED.

ORDER

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

1. Section 104(a) "S&S Citation No. 3118460, March 14, 1990, citing an alleged violation of 30 C.F.R. 75.508 IS VACATED.

2. Section 75.1403 safeguard Notice No. 2258189, issued on November 14, 1983, IS VACATED.

3. Section 104(a) "S&S" Citation No. 3312067, May 1, 1990, citing an alleged violation of 30 C.F.R. 75.1403, IS VACATED.

4. MSHA's proposed civil penalty assessments for the citations which have been vacated ARE DISMISSED.

George A. Koutras
Administrative Law Judge