

CCASE:
ROCHESTER & PITTSBURGH COAL V. MSHA
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ROCHESTER & PITTSBURGH COAL : CONTEST PROCEEDINGS
 Contestant :
 : Docket No. PENN 88-309-R
 v. : Citation No. 2889075; 8/24/88
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 SECRETARY OF LABOR, : Docket No. PENN 88-310-R
 MINE SAFETY AND HEALTH : Citation No. 2889067; 8/24/88
 ADMINISTRATION (MSHA), :
 Respondent : Greenwich Collieries No. 2
 : Mine
 :
 : Mine ID 36-02404

DECISION ON REMAND

Before: Judge Weisberger

The Commission remanded this case to me for further Proceedings consistent with its decision, Rochester and Pittsburgh Coal Company, 14 FMSHRC 37 (1992)). On February 5, 1992, in a telephone conference call with counsel for both parties, counsel indicated, that in the event the issues raised by the Commission's Decision cannot be settled, briefs will be filed by April 6, 1992. On March 9, 1992, in a follow-up telephone conference call with counsel with both parties, counsel indicated their intention to rely on their previously filed post hearing briefs and that supplemental briefs, if any, will be filed by March 20, 1992. The Operator filed a brief on March 19, 1992.

The factual background of these cases is set forth in the Commission's decision, Rochester and Pittsburgh, supra, at 38-40, and need not be repeated here. In its Decision, the Commission, Rochester and Pittsburgh, supra, at 41, directed as follows:

The judge should set forth findings and conclusions as to whether the Secretary proved that the disputed safeguard was based on the judgment of the inspector as to the specific conditions at Mine No. 2 and on a determination by the inspector that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. Taking into consideration the principles announced in SOCCO I, the judge should determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard

at which it [was] directed and the conduct required of the operator to remedy such hazard." 7 FMSHRC at 512. If the judge finds the safeguard to have been validly issued, he should resolve the question of whether R&P violated the safeguard. If the judge determines there were violations, he should then consider whether the violations were of a significant and substantial nature and should assess appropriate civil penalties.

I.

Whether the safeguard was based on the judgment of the inspector as to the specific conditions at Mine No. 2.

The evidence is not controverted that the safeguard in issue was issued by Neven Davis, an MSHA inspector, on May 18, 1988, as a result of having observed 2 miners unloading from an elevator, 4 or 5 metal pipes about 2 inches in diameter, and between 2 to 4 feet in length. He also had observed two cylindrical objects about an half foot high on the floor of the elevator. Hence, I conclude that the issued safeguard, which refers to these objects, and requires that no person shall be transported on cages or elevators with equipment, supplies, or other materials, was therefore based on the judgment of the inspector as to the specific conditions at Mine No. 2.

II.

Whether the safeguard at issue was based on a determination by the inspector that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard.

Davis testified, with regard to the hazard that necessitated the issuance of the safeguard, as follows: "we have metal objects there and these elevators have been known to speed up or slow down at times, thereby creating more or less the hazard of these pipes moving or flying and then striking anybody riding the elevator with this equipment on at this time." [sic] (Tr. 23) Based on this testimony that has not been either rebutted, impeached, or contradicted, I conclude that the safeguard was issued based on the determination by Davis that a transportation hazard existed that was to be remedied by the action prescribed by the safeguard i.e. prohibiting persons from being transported on an elevator with equipment supplies or other materials, aside from the carrying of small hand tools, surveying instruments, or technical devices.

III.

Whether the safeguard notice identified with specificity the nature of the hazard at which it was directed and the conduct required of the operator to remedy such hazard, and whether the

~515

operator violated the safeguard.

In Southern Ohio Coal Company ("SOCCO I"), 7 FMSHRC 509 (April 1985), a case involving the issue of whether a notice to provide a safeguard was violated, the Commission, at 512, held as follows: "... 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." The Commission, in SOCCO I, supra, did not analyze the wording of the safeguard at issue, but rather focused on whether the specific conditions referred to in the safeguard should have put the operator on notice that the specific conditions cited in citation at issue fell within the safeguard's prohibitions. In this connection, the Commission concluded that the citation subsequently issued for an accumulation of water in a travelway, did not fall within the safeguard's prohibition which referred to fallen rocks and cement blocks, and required 24 inches of clearance on both sides of a conveyor belt.

In Green River Coal Co Inc., 14 FMSHRC 43 (January 1992) a safeguard had been issued by an MSHA inspector requiring 24 inches clearance on each side of the belt, as a result of having observed roof support timbers that had been installed too close to the belt. Subsequently, on the basis of this safeguard, the inspector issued a citation alleging that 24 inches of clearance had not been provided due to an obstruction caused by a roof fall.

The Commission, in Green River, supra in referred to its decision in SOCCO I, supra, where the safeguard had been issued to address an obstruction caused by cement blocks and rocks, and took cognizance of its statement in SOCCO I, supra, "...that further instances of physical obstructions, whether rocks, cement blocks, construction materials, mine equipment, or debris, would fall within the scope of the safeguard" (7 FMSHRC at 513). In this connection, the Commission explicitly stated that its disagreement with the following argument of the Secretary: "...because the safeguard notice and citation in this case cover 'physical obstructions', roof support timbers and fallen rock, the citation was validly issued... ." (Green River, supra at 46). Instead, the Commission reiterated its explanation in SOCCO I, supra, that "...strict construction of safeguards is premised upon the unique process by which safeguards are issued." (Green River, supra, at 46).

In the same fashion, the Commission, in Green River, supra, at 47, took cognizance of the inspector's belief "...that whenever a clear travelway was not provided for whatever reason, he should issue a citation, even though an obstruction caused by fallen rock was not specifically addressed in the safeguard

notice." However, the Commission concluded, as it did in SOCCO I, supra, that a safeguard "...must identify with specificity the nature of the hazard against which it is directed and the conduct required of the operator to remedy the hazard." (Green River, supra, at 47).

In addressing the directives of the Commission on remand, and following the analysis of the Commission in SOCCO I, supra, and Green River, supra, I conclude that the Safeguard herein did not identify with specificity the nature of the hazard against which it was directed. The safeguard does not explicitly set forth any hazard.(Footnote 1) Further, even if it be assumed that the hazards described are the pipes and cylindrical objects themselves, the safeguard, rather than prohibiting these specific hazards, instead proscribes a broad category of equipment, supplies, or other materials. I agree with the position of the Contestant, that if the Secretary believes that men should not be transported with equipment supplies and other materials, the proper procedure is to promulgate a mandatory standard under section 101 of the Federal Mine Safety and Health Act of 1977. I also do not find that the exclusion of the carrying of small hand tools, surveying instruments, or technical devices from the provisions of the safeguard, renders the prohibition of equipment, supplies, or other materials sufficiently specific to validate the safeguard. In addition, given the strict construction to be accorded the safeguard, I also conclude that a dolly approximately two feet high, tapered toward its rectangular base that was approximately one foot by two feet, is not within the scope of the prohibition of the safeguard which referred to metal pipes and "large" cylindrical objects.

1The objects mentioned in the safeguard i.e. metal pipes and cylindrical objects, are not hazards per se, as Davis, in describing the hazard involved in transporting this equipment in elevator with persons, described the creation of a hazard of the pipes moving and hitting the person in the elevator as a consequence of the elevator speeding up or slowing down. He did not describe any hazard of the pipes or cylindrical objects per se. Also, I note that in SOCCO I, supra the Commission did not indicate that the objects referred to in the safeguard i.e. the presence of cement blocks and rocks, constituted a hazard per se. To the contrary, the Commission recognized that the objects themselves did not constitute the hazard, but the hazard was that of stumbling. In this connection the Commission stated as follows: "The presence of these solid objects in the walkway would present an obvious stumbling hazard and depending on the amount of material or debris, could prevent passage altogether." SOCCO I, supra at 513.

~517

For all the above reasons I conclude that although the safeguard was validly issued, Contestant herein did not violate the safeguard. Accordingly I find that the notices of contest herein shall be sustained, and that Citation Nos. 2899095, and 2889167 be DISMISSED.

Avram Weisberger
Administrative Law Judge

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