

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 13 1992

JIM WALTER RESOURCES
INCORPORATED,
Contestant
v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

: CONTEST PROCEEDINGS
:
: Docket No. SE 91-750-R
: Safeguard No. 2805189: **8/8/91**
:
: Docket No. SE 91-751-R
: Citation No. 2805196: **8/12/91**
:
: **No. 4 Mine**
:
: Mine ID 01-01247

DECISIONS

Appearances: R. Stanley Morrow, Esq., Harold D. Rice, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for the Contestant:
George D. Palmer, Associate Regional Solicitor, U.S. Department of Labor, Office of the Solicitor, Birmingham, Alabama, for the Respondent

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern Notices of Contests filed by the contestant (JWR) against the respondent (MSHA) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging safeguard notice No. 2805189, issued on August 8, 1991, pursuant to 30 C.F.R. § 75.1403-1(b). JWR also challenges a section 104(a) "S&S" citation No. 2805196, issued on August 12, 1991, charging JWR with an alleged violation of 30 C.F.R. § 75.1403-1(b), for allegedly failing to comply with the requirements of the August 8, 1991, safeguard notice. A hearing was held in Birmingham, Alabama, and the parties waived the filing of posthearing briefs. However, I have considered their arguments made on the record during the course of the hearing in my adjudication of these matters.

Issues

The issues presented in these proceedings are as follows:

- (1) Whether the initial safeguard notice was properly issued based on a specific mine hazard involving

the transportation of men and materials at
JWR's No. 4 Mine.

- (2) Whether the contested citation which followed the issuance of the safeguard notice was properly issued for a violation of the safeguard notice and 30 C.F.R. § 75.1403-3(b).
- (3) Whether the alleged violation was "significant and substantial". Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Resulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801, et seq.
2. 30 C.F.R. § 75.1403; 75.1403-1, 75.1403-3(b).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stimulations

The parties stipulated to jurisdiction, and that the contestant (JWR) is a large mine operator. They also agreed that the payment of the proposed civil penalty assessment, which has not formally been processed, will not adversely affect the respondent's ability to continue in business (Tr. 5).

Docket No. SE 91-750-R

Safeguard Notice No. 2805189, was issued on August 8, 1991, by MSHA Inspector Claude A. Lutz, pursuant to 30 C.F.R. § 75.1403(b). The notice states as follows:

The man-cage being operated with 65 personnel into the 2,000 foot shaft, and out, with no means of prevent (sic) the employees from be (sic) pushed off the east and west side man cage; except a single chain extended across the east and west side of man cage. The man cage is approximately 10 x 14 feet used to transport 65 employees each man trip three shifts a day. This safeguard is to prevent employees from being pushed or thrown against the shaft walls. The east and west side of the 14 x 10 man cage shall be (sic) provide a gate **or** some other means that will provided (sic) the same safety for the employees.

1. The other means shall provided (sic) protection for the employees so that they cannot be throw (sic) against the shaft walls, if man cage should come to a sudden stop in the shaft.

2. Gate, safety chains that will provided (sic) employees from being throw (sic) out or against the shaft walls.

3. Bars may also be used if they provide the same protection. Any of the above means can be used, the height of the above means should be approximately 5 feet high, and **so** designed so employees cannot be throw (sic) through or under the protection (sic) through or under the protection (sic) chains, bars, or gate.

Docket No. SE 91-751-R

On August 12, 1991, Inspector Lutz issued section 104(a) "S&S" Citation No. 2805196, citing **JWR** with a violation of **30 C.F.R. § 75.1403-3(b)**, and he made reference to the previously issued safeguard notice of August 8, 1991, to support the **citation**. The cited condition or practice is described as follows:

Added safety chains was not provided on the west and east side of the man cage to protect employees from being thrown out of the cage when the hoist cause (sic) man cage to come to a sudden stop in the shaft. The man cage has only one safety chain across the east and west side of cage when transporting 65 employees in and out of the 2000 foot shaft. The safety chain across the east and west end of the man cage only extended, west side 32 **1/2** inches above the cage floor, and 33 **1/2** inches on the east side of man cage. The one (1) chain is not adequate protection.

Inspector Lutz made a finding that the alleged violation was "significant and substantial" and he fixed the abatement time as 8:00 a.m., August 16, 1991. Subsequently, on August 16, 1991, he extended the **abatement time** to 8:00 a.m., August 19, 1991, and the justification for this extension states as follows:

The operator added a safety chain approximately 5 feet on the east and west side of the man cage. However, there was not a safety chain between the safety (sic) 33 **1/2** inches above man cage floor. The safety chain should be added to make sure that employees legs cannot place legs in a danger area outside of the man cage when the 65 employees are being transported into and out of the 2000 feet shaft. The operator requested more time to consider other means, or to **comple** (sic) with the criteria of the safeguard.

Inspector Lutz terminated the citation on August 19, 1991, and the termination notice states as follows:

Added safety chains were provided for the East and West side of the service hoist man cage that transports approximately 300 employees into and out of the 2,000 ft. service shaft (5) days a week when the mine is operating.

MSHA's Testimony and Evidence

James Blankenshin, testified that he has worked at the No. 4 Mine since 1980 and that he is an alternate member of the safety committee and serves as vice-president of his union. He has ridden the cited man cage hundreds of times, and he stated that it operates with four large ropes and guide rails similar to a "track" and can accommodate 65 people. The cage has a mesh floor, and mats are placed down during the winter to keep out the cold air. He confirmed that he has ridden the cage when it has stopped suddenly both up and down, and he stated that "It'll put you on your knees if your not careful. **.you're** dropping at 900 feet a minute, and . . . as far as the safety device that takes it out, it stops instantly. And **I've** seen people on the ground on the floor." (Tr. 10). He confirmed that "grab chains" are provided, but that "people will grab you by the shoulder to keep from **falling**" (Tr. 10).

On cross-examination, Mr. Blankenship confirmed that there are two or three "grab chains" hanging against the cage wall, but not enough for everyone to use when there are 65 people on the cage. He has never been injured while riding the cage (Tr. 11). However, he believed that someone was injured getting off the cage, but he knew of no one else being injured while riding the cage (Tr. 11-12). **JWR's** counsel introduced an accident report which reflects that someone was injured on January 27, 1992, while exiting the man cage and becoming entangled in some excess chain guards (Exhibits CX-1, Tr. 13).

In response to further questions, Mr. Blankenship confirmed that 65 people typically ride the man cage. He stated that he was present when Inspector Lutz returned to abate the citation. At that time, there were two chains installed on the cage, but Mr. Lutz did not believe they were sufficient "to keep people from going over, through, or under the chains", and he extended the citation. Maintenance Superintendent Frankie Lee was concerned that with the addition of a third chain, if it came loose and fell down the shaft it could damage the cage. Mr. Lutz informed him that it was management's responsibility to keep the chains secured (Tr. 16).

Billy Joe Martin, confirmed that he was the individual who was injured on January 27, 1992, while exiting the man cage at

the end of his shift. He explained that the chains were unhooked and thrown down on the floor, and while everyone was exiting at the same time, his foot became entangled in the chains and he started to fall. He caught himself with one foot, but the chain caught his other foot and he was injured. He confirmed that he missed two weeks of work as a result of this injury (Tr. 17-19).

MSHA Inspector Claude Lutz testified that he issued the contested safeguard notice and citation and he identified exhibit R-1 as two photographs of the chain and man cage. He confirmed that one chain was installed at the front and rear of the cage at the time he issued his initial safeguard notice, and that after abatement of the citation three chains were installed at each end (Tr. 20). He stated that the cage travels at 13.3 feet per second, or 900 feet per minute, and that the shaft is 2,000 feet deep. The cage was installed in 1977 or early 1978, and a single chain was installed on each man cage at all of JWR's mines at that time (Tr. 22-23).

Mr. Lutz stated that a complaint was received from the No. 4 Mine on July 31, 1991, because the cage was "kicking off", and he investigated the matter. He stated that in the event the cage tripped off while travelling at 900 feet per second one may not be able to react and hit the stop button and it was impossible to say that serious injuries would not occur. He described the resulting hazards as follows at (Tr. 23-25):

The hazards would be if a man got tripped or thrown or if several men did in the shaft wall, traveling at those speeds and even if it stopped, whenever it stopped it threw him into -- such a sudden stop and if it threw him in there, and his arms or leg or head became entangled when the cage does this, it bounces upward, it could tear off an arm or a leg, even kill him.

* * * * *

We're talking, if this occurred, if those men came out, we're talking torn-off arms and legs, skin -- torn up bodies or perhaps even a head because there is some distance between there. Now I taken measurements. There was seven to thirteen inches difference between the wall and the flange on that cage floor.

Mr. Lutz confirmed that he based his "significant and substantial" finding on "the amount of injury if the accident occurred, the amount of injury that it could do to him. And of course, I expected it to occur by this hoist continuously tripping off. We didn't know whether it was completely fixed or not" (Tr. 26).

Mr. Lutz stated that at the time he issued the safeguard on August 8, **1991**, requiring a chain, he spoke with the mine manager and discussed the alternative use of nylon gates or other means of protecting the men in the event the cage tripped out. Management refused to do anything unless he put it in writing, and the safeguard notice followed (Tr. 28). He explained that he spoke with his supervisor and that **"I didn't have any other choice but to issue a safeguard to get it done before we did have an accident occur"** (Tr. 30).

Mr. Lutz stated that it was possible for an accident to happen even if the emergency stop did not trip. A rail could loosen and anything can occur at the speed the cage travels, and even though the cage is inspected daily, anything can occur because of its daily use (Tr. 30). He also confirmed that in the event of a shift in the weight of the people on the cage, one chain would only provide a workload support of 1,250 pounds, while three chains would provide additional support and would equalize the weight and spread out the impact (Tr. 30-31). He confirmed that he is not aware of any man cage injuries at the No. 4 Mine caused by the hoist **"kicking out"** while it was in operation (Tr. 33).

Mr. Lutz confirmed that the specific condition at the No. 4 Mine which prompted the issuance of the safeguard was the reported **"tripping out"** of the man cage and the men riding the cage while this was occurring (Tr. 39). He believed that someone could stick their foot out of the cage or be pushed out into the shaft wall without any problem with just a single protective chain (Tr. 40-21). He confirmed that the cage was repaired and that it was put back into service, and by the next day, it started **"kicking out"** again, but he was not sure whether this was before or after he issued the safeguard. He insisted that the safeguard was issued **"because there was a hazard there"** (Tr. 43). He confirmed that the safety committee had requested a section 103(g) inspection because of the tripping problem on the same cage and that he issued an imminent danger order and a **"(d) Order"**, which was subsequently modified to a section 104(a) citation (Tr. 44-45).

JWR's Testimony and Evidence

Frankie Lee, maintenance superintendent, testified that he is responsible for the hoist in question and he confirmed that it was installed with a single chain and that it was inspected and approved by MSHA. He stated that the hoist began tripping in June, 1991, and that the safety devices are redundant safety features that are intended to trip when there is a problem. The hoist could trip for different reasons, and the one in question did have a problem that was causing it to trip out, and it would have to be shut down for-repairs. Engineers were called in an

attempt to find the problem, and the union filed a safety grievance. The grievance could not be resolved, and a section 103(g) complaint was filed in June, 1991, because of the continued tripping. Repairs were made in mid-July, and the safeguard was issued after that time (Tr. 62).

Mr. Lee was of the opinion that the use of a single safety chain does not present a safety hazard, but that the use of more than one chain presents a problem with people walking over them and keeping them out of the way, and the combined weight of the chains may present a problem to a small person attempting to lift and hook them up. The single chain has been used since the operation began without any problem (Tr. 62).

On cross-examination, Mr. Lee stated that he could not recall any specific MSHA approval of the hoist with one chain, but he confirmed that it had previously been inspected and travelled by MSHA inspectors, including Mr. Lutz, for years and it was never cited (Tr. 63-64). He agreed that the cage will bounce if it stops immediately, and **he** indicated that the distance from the edge of the cage to the cement shaft wall is three to four inches once the cage is out of the collar level. He confirmed that the problem which caused the tripping in June, 1991, has not re-occurred, but that "nuisance tripping" has occurred since that time when a gate is not properly closed or is accidentally opened or there is a derail or loss of air pressure (Tr. 64-65). He stated that if the cage does not trip there is a problem, and that it could trip **"a couple of times in a twenty-four hour period"** (Tr. 65).

In response to further questions, Mr. Lee stated that the cage does not presently trip out any more than it did in the past and that it has been upgraded frequently over the past nine years and it will be upgraded further (Tr. 67). He confirmed that since the injury occurred, a mesh gate has replaced the three chains and it is attached permanently to one side of the cage and unclipped on the other side to allow the men to exit and to unload material (Tr. 69).

Mr. Lee disagreed with Inspector Lutz's belief that the cage posed a hazard, and he stated that there was never a problem with people being thrown against the wall when the cage had one chain and there were no injuries. He confirmed that the cage bounces up and down for a distance of six inches to one-foot when it stops, but that there is no slowdown when it trips and the brake is activated by air pressure when the safety circuit causes it to trip and stop immediately (Tr. 70). He confirmed that he has ridden the cage when it has tripped, and he agreed that **"it will make you buckle your knees"** and that **"any sudden stop is going to cause you a little bit of an alarm. It would alarm anybody before it would stop"** (Tr. 71).

Mr. Lee stated that JWR objected to adding two more chains and tying them together because it believed that it was abiding by the law, which requires "chains, bars or **gates**". He confirmed that costs were not a problem, but that three chains tied together presented an additional maintenance problem and a tripping hazard which could result in back injuries to someone picking up the chains. He stated that "**it** had been satisfactory for so long with no injuries due to picking it up, no tripping hazard which could result in ever been written and I **didn't** see anything wrong with it and that was my feeling" (Tr. 72-73). He confirmed that the three chains are "**quarter** inch chains", and he believed that the total weight of the chains exceeds 15 pounds (Tr. 73-74).

Mr. Lee confirmed that he has received no safety complaints from the safety committee since the three chains were installed other than the one tripping injury. **As** a result of that incident, a mesh gate was installed to replace the three chains. However, *Mr. Lutz* issued a citation for a tripping hazard when he observed men walking over the mesh while leaving the cage, and the citation reflects that "**the** men were not proceeding in an orderly manner" while exiting the cage (Tr. 77, Exhibit CX-2). Another inspector issued a citation for failure to provide a clear travelway when he observed that the mesh gate was dropped on the cage floor (Tr. 79, Exhibit CX-3).

Mr. Blankenship was recalled by MSHA, and he stated that it was his opinion that the combined weight of the three chains tied together was approximately 20 pounds, and that there was no one on the man cage who could not have picked them up (Tr. 93).

DISCUSSION

The evidence in these proceedings establishes that the cited man cage was installed and placed in operation sometime in **1977** or early 1978, and that a single chain was installed across both ends of the cage at **that** time. The chain was intended to provide protection for persons riding the cage when it was hoisted or lowered into and out of the mine shaft. The cage was subsequently operated with no reported incidents or injuries as a result of the use of the single chain, and there is no evidence that MSHA had ever considered the single chain to be inadequate until Mr. Lutz issued the safeguard notice on August 8, 1991. No citations had previously been issued because of the use of the single chain until Mr. Lutz issued the contested citation on August 12, 1991, because of **JWR's** noncompliance with the safeguard.

In June 1991, problems developed with the cage and it "tripped out" periodically, causing it to be shut down for repairs. Engineers were called in to find the problem and the union filed a safety grievance which could not be resolved. A

section 103(g) complaint was filed because of the continued tripping, and Inspector Lutz investigated the matter and issued an imminent danger order. Repairs were made, but the cage began "tripping out" again and the men continued to ride it while it was in this condition. As a result, Inspector Lutz issued a section 104(d)(2) order, which was modified to a section 104(a) citation, and the safeguard notice followed.

The August 8, 1991, safeguard notice states that the only means of preventing employees from being pushed off the man cage was a single chain extending across each end of the cage. The citation of August 12, 1991, states that the cage still had single chains across each end, that the single chains provided inadequate protection, and that additional chains had not been provided. The inspector fixed the abatement time of August 16, 1991, and when he returned that day he found that a second chain had been installed. However, he determined that two chains still provided inadequate protection, and that a third chain was necessary. He extended the abatement time to February 19, 1991. The citation was terminated on that day after a third chain was installed and tied together with the other two chains as shown in photographic exhibit R-1.

The 3-chain system was subsequently replaced by JWR by the installation of a mesh gate which is permanently attached to one side of the cage and unclipped on the other side to allow the gate to drop down so the men can exit the cage. MSHA has apparently found this to be an acceptable protective device in compliance with the safeguard notice (Tr. 76). However, JWR was served with additional citations for hazards which subsequently developed after the mesh gate was installed. In one instance, Inspector Lutz issued a citation when he observed that the mesh gate had been dropped on the floor as the men were exiting the cage at the end of a shift and they were walking over the gate. He found that the men were not proceeding "in an orderly manner" and he concluded that a tripping hazard existed as they exited the cage and walked over the gate. In a second instance, another inspector issued a citation after observing that the mesh gate had dropped to the floor and six miners had walked over it while exiting the cage. He issued the citation because of his belief that "a clear travelway for exiting the service cage was not provided." (Tr. 77-80).

JWR's Arguments.

JWR asserted that the safeguard notice issued by Inspector Lutz was not based on any specific hazardous condition at the No. 4 Mine, and that the inspector believed that the requirement for chains, bars, or chains should have equally applied to all of JWR's mines (Tr. 96-97). JWR further asserted that the safeguard notice on its face, does not specify the exact conduct required for compliance, and merely refers to "chains." JWR suggested

that since there was one chain installed at one end of the cage, and another chain installed at the other end, "**chains**" were in fact in place and that this amounted to compliance with the safeguard. JWR also expressed concern that "**the** next inspector might come back and say, no, three chains tied together is not good enough, we want four chains with two tied together" (Tr. 99).

JWR further asserted that its principal and basic complaint in this case is that a single chain was installed at both ends of the cage in question for 15 years with no resulting problems or injuries, even with the single chain being dropped to the floor with men walking over it. However, since the safeguard was issued requiring the installation of additional chains, and with the installation of the mesh gate, one miner has been injured, and JWR has received two additional citations, all because of the safeguard and the inspector's insistence that additional protective chains be installed (Tr. 85-88; 99). JWR also suggested that the combined weight of more than one chain exposed an individual who had to lift them to possible back injuries.

MSHA's Arguments.

MSHA argued that the phrase "**chains**" means chains "**that** are safe to accomplish the safety of the people on the man **cage**" and that a chain hung 6 feet high would not be adequate to meet the safeguard **or** the criteria (Tr. 37). MSHA asserted that there was a hazard requiring a safeguard, and that **JWR's** management understood what Inspector Lutz was requiring, but simply disagreed with his conclusion that the use of only one chain presented a hazard (Tr. 49, 51).

MSHA's position is that the inspector established that there was a specific condition at the No. 4 Mine that required a safeguard, that he correctly issued the safeguard, and that it was based solely on the hazard that he perceived would have occurred had the safeguard not been enforced (Tr. 94). With regard to **JWR's** contention that compliance with the safeguard has resulted in an injury and additional citations for tripping and stumbling hazards, **MSHA's** counsel stated that "management can abate any hazard in a sloppy **way**" and that the hanging up of the chain or **insuring** that the mesh gate is against the wall of the cage before people leave it is not onerous (Tr. 85-86).

FINDINGS AND CONCLUSIONS

Section 314(b) of the Act provides as follows:

Other safeguards, adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

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 0 precludes the issuance of a withdrawal order because of imminent danger.

Section 75.1403-3 provides the criteria for cage construction, and subsection (b) of that section states as follow:

(b) Cages used for hoisting persons should be constructed with the sides enclosed to a height of at least six feet and should have gates, safety chains, or bars across the ends of the cage when persons are being hoisted or lowered.

In Southern Ohio Coal Company, (SOCCO), 7 FMSHRC 509 (April 1985), the Commission noted that the safeguard provisions of the Act confer upon the Secretary "unique authority" to promulgate the equivalent of a mandatory safety standard without resort to the otherwise formal rulemaking requirements of the Act. The Commission held that safeguards, unlike ordinary standards, must be strictly construed, and 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." In short, the **operator must** have clear notice of the conduct required of him.

In Jim Walter Resources, Inc., 7 FMSHRC 493,496 (April 1985), the Commission took particular note of the broad language found in section 314(b) of the Act, and it concluded that this section "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining."

In southern Ohio Coal Company, 14 FMSHRC 1 (January 1992), the Commission reaffirmed its SOCCO and Jim Walter Resources, Inc. holdings and stressed that a safeguard must identify with specificity the hazard at which it is directed and the remedial conduct required of the operator. The Commission rejected the operator's contention that a safeguard is invalid if it addresses conditions that exist in a significant number of mines, and it stated in relevant part in this regard as follows at 14 FMSHRC 12:

. . . a safeguard may properly be issued for a commonly **encountered** hazard, so long as such safeguard addresses a specific transportation hazard actually determined by an inspector to be present and in need of correction at the mine in question .. the fact that the safeguard was based on a common hazard encountered in a number of other mines does not, by itself, invalidate the safeguard.

In Beth Energy Mines, Inc., 14 FMSHRC 17 (January 1992), the commission reaffirmed its SOCCO holding that a safeguard must be interpreted narrowly in order to balance the Secretary's **unique** authority to require a safeguard and the operator's right to fair notice of the conduct required of it by the safeguard. The Commission also held that the validity of a safeguard is not affected by the fact that it is based on the published safeguard criteria, 14 FMSHRC at 22-25, and it stated as follows at 14 FMSHRC 25:

. . . A criterion does not provide clear notice until **it is** embodied in a safeguard issued to the operator. The focus of judicial inquiry is on whether the safeguard is based on specific conditions, whether it affords **the operator** fair notice of what is required or prohibited by the safeguard.

. . . the fact that a notice to provide safeguard is **based** upon a promulgated safeguard criterion is not, of itself, determinative of the validity of the **safeguard**. As explained in SOCCO, the validity of a safeguard depends on whether it was based on the inspector's evaluation of specific conditions at the mine in question and a determination that those conditions created a **specific transportation** hazard in need of the remedy prescribed.

Insofar as the validity of the safeguard itself is concerned, the critical issue is whether or not the evidence establishes that the safeguard was based on the judgment of the inspector that a specific condition existed at the mine in question, that the condition concerned an existing transportation hazard, and that the hazardous condition was to be remedied by the action prescribed in the safeguard. Assuming that I find **that** the safeguard was validly issued, the next question presented is whether or not the evidence establishes that the respondent violated the safeguard, and if so, whether the violation was of a significant and substantial nature as claimed by the inspector.

pocket No. SE 91-750-R. Safeauard Notice No. 2805189

It seems clear to me that an adequately written safeguard notice is a mandatory safety requirement that is enforceable at the mine where it is issued. In this case, although the notice issued by Inspector Lutz is not a model of clarity, I conclude and find that it adequately informed JWR of the hazard, and put it on notice as to what was required to achieve compliance. The notice itself states in relevant part that it was issued "to prevent employees from being pushed or thrown against the shaft walls" and to provide protection for the miners riding the cage if it "should **come to** a sudden stop in the shaft". Further, the credible **testimony of** the inspector reflects that the notice was issued to address the hazard presented in the event the man cage came to an abrupt and unannounced stop when it "tripped **out**", and the inspector confirmed that he discussed the safeguard with mine management, including alternative methods of achieving compliance

It is undisputed that the cited man cage in question **was** tripping out and causing problems, and the record reflects that the union filed a safety **grievancd** over the matter. **JWR's** maintenance superintendent Lee confirmed that even after the problem which caused the tripping was taken care of, "nuisance tripping" has continued when the cage gate is improperly closed or accidentally opened, or there is a derail or loss of air pressure. **Mr. Lee** further confirmed that due to the fact the cage is designed to "**trip**" when a problem develops, it could do so "a couple of times" over a **24-hour** period.

Alternate safety committeeman Blankenship, who has ridden the cage hundreds of times, testified credibly that when the safety device trips out, the cage stops instantly and suddenly, and that "**it'll** put you on your knees if your not careful". Although he confirmed that "grab chains" are provided, he stated there are not enough for use when the cage is full. Be also stated that he has observed people on the cage floor when it stopped and that "people will grab you by the shoulders to keep from falling".

Superintendent Lee confirmed that when the cage safety circuit trips, the cage stops automatically and immediately and that it will bounce up and down for a distance of six-inches to one-foot after it stops. He further confirmed that he has been on the cage when it has tripped and that **"it will make you buckle your knees"** and causes some alarm when it comes to a sudden stop.

Inspector Lutz believed that given the speed of the cage up and down the shaft, any sudden stop could possibly propel someone against the shaft wall exposing them to serious arm or leg injuries, or injuries to other bodily parts. Although Mr. Lutz agreed that there have been no reported injuries of this kind caused by the cage in question tripping out, he nonetheless believed that the single protective chain which was installed at each end of the cage was insufficient to restrain people when the cage was filled to capacity, and that it would not prevent anyone from sticking their arm or foot out beyond the cage or being pushed into the shaft wall and contacting it while the cage was moving.

JWR's suggestion that the safeguard notice was improperly issued because Inspector Lutz **believed** that protective chains, bars, or gates should equally apply to all of **JWR's** mines is rejected. There is no evidence that the contested safeguard notice in question applied to mines other than the No. 4 Mine, and even if it did, the Commission recently held that a safeguard covering a specific mine is valid notwithstanding the fact that similar safeguards may have been issued at other mines. Southern Ohio Coal Company, 14 FMSHRC 1, 14 (January 1992).

I agree with the inspector's findings with respect to the existence of a hazard to miners riding the man cage in question when it "tripped out" and came to a sudden and unexpected stop. Based on all of the evidence and testimony adduced in this case, I conclude and find that the safeguard notice issued by Inspector Lutz addressed a specific mine transportation hazard with respect to the cited man cage in question, and that the safeguard was a reasonable and proper way of achieving compliance and correcting the condition which created the hazard. Under the circumstances, the safeguard notice IS AFFIRMED.

Docket No. SE 91-751-R. Citation No. 2805196

The inspector issued the citation after finding that JWR had failed to add any additional chains or other alternative protective devices to protect the miners riding the man cage. He cited a violation of safeguard standard section 75.1403(b), which requires safety chains or bars across the ends of the cage when persons are being hoisted or lowered, and he also included a reference to the prior safeguard notice on the face of the citation which he issued.

JWR's assertion that it complied with the requirements of section 75.1403(b), in that the two single chains which were installed at each end of the cage, when considered together, constituted "chains" within the meaning of that section, and constituted compliance with the safeguard is rejected. The record reflects that when the inspector issued the initial safeguard notice he believed that a single chain at each end of the cage constituted inadequate protection for the miners riding the cage. For this reason, he issued the safeguard notice enumerating the use of protective chains, bars, or a gate to protect the miners from being thrown out of the cage or against the shaft walls in the event the cage came to a sudden stop. It seems clear to me that the inspector required JWR to install more than one chain at either end of the cage, and Mr. Lutz' credible testimony, which is corroborated by Mr. Blankenship, as well as the citation extension which he issued, establishes that Mr. Lutz informed mine management as to what was required to achieve compliance and abate the citation.

JWR's assertion that the cage with single chains had not previously been cited by MSHA is rejected as a defense to the citation. See: Kins Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (June 1980); Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company v. 5 FMSHRC 1359 (July 1983); Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, the Tenth Circuit's Affirmance of the Commission's decision at 5 FMSHRC 1400 (August 1983).

JWR's contention that compliance with the safeguard requirements imposed by the inspector through the use of more than one safety chain at each end of the cage has resulted in safety risks which were non-existent during the approximate 15 years that single chains were used, and that compliance with the safeguard has not only resulted in an injury, but has also exposed JWR to additional citations for tripping or stumbling hazards resulting from the use of multiple chains and a mesh guard, raises the issue of the so-called "greater hazard" or "diminution of safety" defense. This defense had been narrowly construed by the Commission, and it has held that when this defense is raised in an enforcement proceeding it must be closely scrutinized to insure that each of the elements of the three-prong test enunciated in Penn Allegh Coal Co. Inc., 3 FMSHRC 1392 (June 1981), and Sewell Coal Co., 5 FMSHRC 2026 (December 1983), are supported with clear proof. See: Westmoreland Coal Company, 7 FMSHRC 1338 (September 1985). The three-prong test consists of the following elements: (1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Act would not have been appropriate.

I cannot conclude that JWR has established any reasonable **"diminution of safety"** defense in this case. The tripping and stumbling hazards which resulted in the issuance of additional citations are conditions which may be present when the cage comes to a stop and the men are exiting. These are not conditions which prompted the issuance of the safeguard notice. Although I can understand **JWR's** frustration at being cited for stumbling and tripping hazards after it had corrected the conditions which prompted the issuance of the safeguard and abatement of the citation, the fact remains that the burden of continued compliance with the safeguard rests with JWR. Any tripping or stumbling hazards subsequently caused by the installation of the mesh gate or chains are within the control of JWR and it must find a way to insure that these protective devices that are required by the safeguard notice in question are hung and stored in a such a manner as to preclude additional safety hazards. I cannot conclude that **MSHA's** expectation that this is done is unreasonable. **JWR's** defense is rejected. In view of the foregoing, and after careful review and consideration of all of the testimony and evidence adduced in this proceeding, I conclude and find that MSHA has established a violation by a preponderance of the credible evidence and the citation IS AFFIRMED.

Significant and Substantial Violation

A **"significant and substantial"** violation is described in section 104(d)(1) of the Mine Act as a violation **"of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."** 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial **"if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."** Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the commission **explained its** interpretation of the term "significant and **substantial**" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard: (2) a discrete safety hazard--that is, a measure of danger to safety contributed to by the violation: (3) a reasonable likelihood that the hazard contributed to will result in an injury: and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Minins Company, Inc., 7 FMSHRC 1125, 1129, (August 1985), the Commission stated further as follows:

We **have** explained further that the third element of the Mathies formula "**requires** that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Minina Co., 6 FMSHRC 1834, 1836 (August 1984). We **have** emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Minina Comoany, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Minina Comoany, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In Halfway, Incorporated, 8 FMSHRC 8 (January 1986), the commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

[T]he fact that a miner may not **be** directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the **pendency** of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

Inspector Lutz confirmed that he based his significant and substantial (S&S) finding on his expectation that an accident would occur with the cage continuously tripping off. He also considered the lack of knowledge as to whether or not the condition which caused the tripping problem had been repaired, the daily use of the cage, and the extent of injury that one would sustain if an accident occurred. Mr. Lutz believed that in the **event someone** were thrown against the shaft wall after the cage came to a sudden stop while travelling at 900 feet per minute, he would sustain serious injuries. **JWR's** maintenance superintendent Lee confirmed that any sudden stop of the cage will cause it to bounce and that such a bouncing action will cause ones knees to buckle. **Mr. Lee** confirmed that the distance from the edge of the cage to the cement shaft wall once the cage is out of the collar level is three to four inches. Mr. Blankenship confirmed that a sudden stop of the cage traveling 900 feet per minute would likely drop **someone to their knees, and**

he confirmed that he used the cage numerous times and has observed people on the floor of the cage after it came to a sudden and unexpected stop.

Based on the testimony of the inspector with respect to the hazards presented, and the injuries which would likely result in the event of an accident caused by the sudden stopping of the cage travelling at a relatively high rate of speed, and the corroborating testimony of Mr. Lee and Mr. Blankenship concerning the bouncing action of the cage if it were to come to a sudden stop, I cannot conclude that **the** inspector's "**S&S**" finding was unreasonable. I conclude and find that in the normal course of operating the man cage in question, with a full load of miners, and with only one protective chain, the miners were exposed to a hazard in that the bouncing action of the cage could cause them to fall or be pushed against the side of the shaft or outside of the chain. If this occurred, I find that it was reasonably likely that they would sustain injuries of a reasonably serious nature. Under the circumstances, the inspector's "**S&S**" finding IS AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, IT Is ORDERED AS FOLLOWS:

1. Safeguard Notice No. 2805189, August 8 1991, IS AFFIRMED, and **JWR's** contest IS DENIED.
2. Section 104(a) "**S&S**" Citation NO. 2805196, August 12, 1991, IS AFFIRMED, and **JWR's** contest IS DENIED.


George A. Koutras
Administrative Law Judge

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