

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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FALLS CHURCH, VIRGINIA 22041

**MAY 27 1992**

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

DECISION ON REMAND

The Commission remanded these cases (Bethenersv Mines, Inc., 14 FMSHRC 17 (1992)) with the following directives:

With respect to the issue of whether the underlying safeguard is valid, 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 **BethEnergy's** Mine No. 60 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, 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 **BethEnergy** violated the safeguard. The remaining issues are to be reconsidered as appropriate to the judge's other determinations. [14 FMSHRC at 27-28.]

The parties have submitted proposed findings and conclusions, with supporting briefs.

Having considered the hearing evidence and the record as whole, I find that a preponderance of the substantial, reliable,

and probative evidence establishes the following Findings of Fact and further findings in the Discussion that follows:

FINDINGS OF FACT

1. On June 13, 1984, MSHA Inspector Francis E. Weir issued Notice to Provide Safeguard 2395866 at the subject mine which provided:

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

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

2. On September 7, 1989, MSHA Inspector John Mull issued § 104(a) Citations 3088080 and 3088162, alleging violations of the safeguard notice issued by Inspector Weir. Citation 3088080 alleges:

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

Citation 3088162 alleges:

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

3. Belts 3 and 4 are main belts that travel uphill about 3000 feet each. The belts are suspended from the mine roof. From the top of the belt to the mine roof there is a three to

four foot clearance. The bottom belt is about 18 to 24 inches from the mine floor. The belts are 60 inches wide.

4. The obstructions alleged in Citation 3088162 were 3 inches high in one location and 1 1/2 to 2 feet high in others. The obstructions **alleged in** Citation 3088080 were as high as 3 feet.

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

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

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

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

9. Safeguard Notice 2395866 was one of many similar safeguard notices issued to mines in the Monroeville subdistrict pursuant to a published criterion, 30 C.F.R. § 75.1403-5(g).

#### DISCUSSION WITH FURTHER FINDINGS

#### Is the Underlying Safesuard Valid?

The Commission stated that 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 **BethEnergy's** Mine No. 60 and on a determination by the inspector that a transportation hazard

existed that was to be remedied by the action prescribed in the safeguard." 14 FMSHRC at 27.

The conditions causing Inspector Weir to issue Notice of safeguard 2395866 were obstruction of the travelway (putting a fence across the travelway) and failing to keep a width of at least 24 inches (he found distances of 15 to 23 inches). He referred to the obstructing fence and the narrow travelway in the safeguard notice and then applied the safety guideline in 30 C.F.R. § 75.1403-5(g), requiring a safeguard that "at least 24 inches of clear travelway be provided on both sides of all belt conveyors installed after March 30, 1970 at this mine." I conclude that the safeguard notice was based on the judgment of the inspector as to specific conditions at this mine, which he observed and stated in the notice.

Inspector Mull, who issued the two citations based on the safeguard, interpreted the language of the safeguard notice as requiring a clear travelway free of obstructions and extending at least 24 inches. The day before the hearing, -he spoke to Inspector Weir about the conditions Inspector Weir had intended the safeguard notice to apply to, and Inspector Weir told him the safeguard notice was intended to require a clear travelway of at least 24 inches, free of "Anything that could be obstructing the clearance." Tr. 143.

I conclude that the safeguard was based on a determination by the inspector that transportation hazards existed that were to be remedied by the action prescribed in the safeguard. The transportation hazards implicit in Inspector Weir's safeguard are those that one would conclude from an ordinary and reasonable understanding of its language. A requirement to have "at least 24 inches of clear travelway" means, in ordinary language, that the travelway be clear - - that is, open and unobstructed - - for a width of at least 24 inches. Protection against certain hazards is implicit in this requirement: (1) With inadequate clearance (fewer than 24 inches) a miner may walk too close to the belt or the rib, and fall against either; (2) if the travelway is obstructed by objects or material, the obstructions may cause a miner to trip and fall against the belt, rib or floor; (3) becoming entangled with a moving belt could result in death or serious injury; (4) falling against a rib, the mine floor, or a belt conveyor could result in serious injury. The Commission's rule of narrow interpretation of safeguard notices (see Discussion at pp. 6-7, below) requires eliminating the hazards in item (2), above, from the reach of the safeguard.

Citations 3088080 and 3088162

Inspector Mull found that 24 inches of clear travelway was not provided because of material from the ribs and other material obstructing the travelway along the Number 4 belt, as alleged in

Citation 3088080, **and because of rib material, crib block and** other material obstructing the travelway along the Number 3 belt, as alleged in Citation 3088162. He found the conditions to be violative of the safeguard notice, based on his interpretation that it required a clear travelway, free of obstructions, for at least 24 inches.

The obstructing material reduced the safe, usable width of each travelway but the Secretary did not prove that it was reduced to **below** 24 inches. Inadequate clearance could present a danger of accidental contact with the moving belt, with likely serious injuries or death. There are many trips and falls in mines, **so that** walking too close to a moving belt, without adequate clearance, is itself a dangerous practice. Also, inadequate clearance could present a danger of walking too close to the rib, with the risk of falling against it. However, **since** the inspector did not measure the safe, usable widths of the obstructed travelways, I find the evidence is not sufficient to prove dangers from inadequate clearance.

The obstructions in each travelway created hazards of tripping, slipping or falling against the belt, rib, or mine floor. If someone attempted to break a trip or fall by reaching out, he or she could come into contact with the moving belt and become entangled in a roller, with a high risk of serious injury or death. The likelihood of injury was created by the fact that employees travel and work on the **"tight"** or **"narrow"** side of the belt when the belt is running to maintain the roof support system, to change belt rollers, clean spillage, and, in the event of an interruption of the ventilation system, to make repairs on the stopping line. Inspector Mull also found evidence that someone had traveled the tight side of the belt in connection with the installation or placement of legs for I-beams used for roof support.

**BethEnergy** has a policy that prohibits employees from working on the tight side of the belt when the belt is running unless another employee is stationed at the pull cord, which can stop the belt conveyor in about 5 to 15 feet. If a miner tripped or fell and became entangled in the belt, the pull cord would be activated by the other employee. However, serious injury or death could occur despite **BethEnergy's** policy. First, the miner on the wide side of the belt would have to observe the accident and then pull the emergency cord. The time spent in these reflexes could easily be too late to prevent serious injury or a fatality. Secondly, after the cord was pulled, the belt would still travel another 5 to 15 feet and this added motion could cause serious injury or death if the victim were entangled in a roller.

Citations 3088080 and 3088162 were abated over the course of 10 shifts, with two to four employees performing clean-up

activities on each shift. The belt was running when the ~~work~~ was done; one employee stood on the wide side of the belt at the pull cord and another cleared loose coal, sloughage and other materials from the tight side.

Is the **Safeguard** Enforceable as to the  
Hazards Alleued in the Citations?

In Southern Ohio Coal Company ("SOCCO I"), 7 FMSHRC 509 (1985), the Commission held 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." It then held that a citation for slipping and falling hazards caused by a 10 inch accumulation of water in a travelway did not fall within a safeguard requiring 24 inches of clear travelway. The Commission reasoned that the hazards causing the notice of safeguard were tripping and falling because of fallen rocks and cement blocks, not slipping and falling because of an accumulation of water, and that this distinction was sufficient to invalidate the citation. The Commission did not address the issue whether reducing the safe, usable width to below 24 inches would violate the safeguard.

In applying a rule of strict construction,<sup>1</sup> the Commission expressed its concern for possible abuses of the safeguard authority, which does not give the operator an opportunity to participate in the formulation of the safety standard, as in rulemaking procedures. At the same time, the Commission recognized the inspector's authority and responsibility to require a **safeguard** to prevent a specific transportation hazard not covered by a published safety standard.

The line between the appropriate use or misuse of the inspector's safeguard authority may be a fine one. The Commission appears to have made the line bolder by narrowing the scope of safeguards under a rule of strict construction.

Applying the Commission's strict construction rule, I conclude that the safeguard at issue, requiring "at least 24 inches of clear **travelway**," while validly issued, is not enforceable except as to the specific conditions that gave rise to the safeguard and were noted in the notice of safeguard. That is, a violation of this safeguard exists only if (1) a travelway

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<sup>1</sup> The Commission has applied the rule of strict construction to safeguards in a number of cases, e.g., Green River Coal Co., Inc., 14 FMSHRC 43 (1992) and the remand decisions in Rochester & Pittsburgh Coal, 14 FMSHRC 37(1992) and in the instant cases.

between the **rib** and the conveyor belt has a width below 24 inches <sup>2</sup> or (2) a fence <sup>3</sup> obstructs the travelway.

The first of these conditions may be met by proof that obstructions reduced the safe, usable width of a travelway to below 24 inches. Such a holding is consistent with a strict construction rule, for as a practical matter of safety, a travelway cannot be said to "**clear** for at least 24 inches" if a miner must move around obstructions that reduce his corridor of safe, usable space to below 24 inches. The hazards of inadequate clearance (fewer than 24 inches) include the risk of walking too close to a moving belt and falling against it, or falling against the rib. Thus, quite apart from tripping hazards left in a travelway, there are many trips and falls in coal mines, which commonly have uneven walking surfaces. With inadequate clearance, if someone attempted to break a trip or fall by reaching out, he or she could come into contact with a moving belt and become entangled in a roller, with a high risk of serious injury or death.

However, Inspector Mull testified that by observation (not measurements) he believed the travelways were over 24 inches wide, and he did not measure the width in any place where he found obstructing material. The Secretary thus failed to prove that obstructions reduced the safe, usable width of the travelways to below 24 inches. In the area where rib sloughage was about three feet high, and Inspector Mull believed it was necessary to cross over the belt to get around the obstruction, the evidence might have sustained a finding that the safe, usable width of the travelway was reduced to below 24 inches. However, since the inspector did not measure the width of the area, I find that the Secretary failed to prove a violation of the safeguard.

To summarize, the Secretary contends that a safeguard issued for a narrow travelway and an obstructing fence also addresses obstructing materials in the travelway, such as crib blocks and rib sloughage. I hold that the Commission's rule of strict construction precludes this position, except where obstructing materials reduce the safe, usable width of a travelway to below 24 inches. The inspector's failure to measure the width of the travelways at the places where obstructions were found precludes a finding that the obstructing material reduced the safe, usable width of the travelway to below 24 inches. Accordingly, I conclude that the **Secretary** failed to prove a violation of the safeguard.

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<sup>2</sup> The safeguard notice notes a finding of clearances of 15 to 23 inches.

<sup>3</sup> The safeguard notice notes a finding of a fence blocking a travelway.

As a final point, it appears to this judge that the commission's narrow construction of safeguards should suggest to the Secretary that her guidelines for safeguards (30 C.F.R. §§ 75.1403-1 through 75.1403-11) may have little practical effect unless they are promulgated as mandatory safety standards by public rulemaking. In that case, they would be interpreted by a "reasonable **notice**" rule, not strict construction.

The Commission stated its view on this matter at the end of socco II:

. . .[W]e strongly suggest that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed, at eliminating transportation hazards. [14 FMSHRC 15.]

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Notice of Safeguard 2395866 is AFFIRMED.
3. The Secretary failed to prove a violation of Notice of Safeguard 2395866 as alleged in Citations 3088080 and 3088162.
4. Citations 3088080 and 3088162 are VACATED.

  
William Fauver  
Administrative Law Judge

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