# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. LAKE 90-53<br>A. C. No. 33-01173-03825 |
| v. | : | Meigs No. 2 Mine |
| SOUTHERN OHIO COAL COMPANY, Respondent | : | |

## DECISION ON REMAND

Before: Judge Broderick

This is a civil penalty proceeding in which the Secretary seeks a penalty for an alleged violation of a safeguard notice issued under section 314(b) of the Mine Act. In a decision issued January 9, 1991, I upheld the safeguard notice and the related citation and assessed a penalty of $150 for the violation.

On May 21, 1992, the Commission remanded this case for findings and conclusions as to whether the Secretary proved that the safeguard notice was based on the judgment of the inspector as to the specific conditions in the Meigs No. 2 Mine, and on the inspector's determination that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. I was directed to determine whether the safeguard notice identified the hazard at which it was directed and the conduct required to remedy the hazard. If I find the safeguard valid, I am further directed to reevaluate whether SOCCO violated it. 14 FMSHRC 748 (1992).

Pursuant to a notice which I issued June 6, 1992, both 'parties have filed briefs directed to the issues identified in the Commission's remand. Both parties stated that further evidence was not needed. I am issuing this decision based on the record made at the hearing in Columbus, Ohio, September 26, 1990. I have considered the entire record and the contentions of the parties in making this decision.

## FINDINGS OF FACT

1. On March 31, 1989, Federal Mine Inspector Patrick McMahon discovered a rubber-tired scoop being operated along a supply track with only 6 inches of side clearance. The scoop picked up supplies from supply cars on the track and carried them to the face area.

2. The inspector observed that the scoop was **bumping [the] supply cars" as it proceeded up the entry. (Tr. 31).

3. Similar "incidents" in the past in the subject mine resulted in inspector discussions at the MSHA office and the conclusion that "something needed to be done to prevent this from happening." (Tr. 32). In one of these incidents, a scoop had knocked a supply car loose and caused it to run off the track. McMahon's knowledge of that incident was based on a statement of another inspector who heard it from someone else.

4. The inspector was first of all concerned about the safety of the scoop operator: with limited clearance, pieces of rib coal could be knocked loose and come through the screened canopy of the operator's cab and cause serious injury.

5. He was further concerned because the track entry is a walkway, and pedestrians could be imperiled by the scoop, travelling with insufficient side clearance.

6. The scoop operated at a very slow speed and only for a short time on each shift. Much of the time it was parked in the track entry next to the supply cars. The distance from the supply cars to the end of the track was from 300 to 500 feet.

7. The track entry is 20 feet wide. The scoops vary in width from 8 feet 10 inches to more than 10 feet. The supply cars also vary in width. Some are much wider than others.

8. On March 31, 1989, Inspector McMahon issued a notice to provide safeguards because there were only 6 inches of side clearance for the scoop operating along the supply track. The notice described the condition or practice as follows:

> Only 6 inches of side clearance was provided for the company No. 5062 rubber-tired scoop car being operated along the 3L2SW (014-O mmu) supply track where supplies were being loaded into the scoop bucket. This is a Notice to Provide Safeguards requiring that a total of at least 36 inches of unobstructed side clearance (both sides combined) be provided for all rubber-tired haulage equipment where such equipment is used.

**9.** On January 5, 1990, while conducting a regular inspection at the subject mine,Inspector McMahon observed a scoop parked in a track entry between the coal rib and the supply cars. The scoop operator was loading supplies. The inspector measured the distance between the scoop operator's compartment and the coal rib which he found to be 24 inches. He measured the distance from the other side of the scoop to the supply car which he found to be 4 inches.

**10.** The rib line was uneven, and the bottom was muddy and rutted from vehicles operating in the area. There was a downhill slope toward the face area.

**11.** Inspector McMahon issued a 104(a) citation alleging a violation of the safeguard notice because only 28 inches of continuous clearance was providedfor the scoop being operated along the supply track.

## ISSUES

1. Whether the safeguard notice was based on the inspector's judgment as to specific conditions at the subject mine?

2. Whether the safeguard notice was based on the **inspector's** determination that a transportation hazard existed that was to be remedied by the safeguard?

**3.** Did the safeguard notice identify the hazard at which it was directed and the conduct required to remedy it?

4. If the safeguard was validly issued, did SOCCO violate it as charged in the citation?

## CONCLUSIONS *OF* LAW

1. Findings of Fact No. 2 and 3 clearly establish that the safeguard notice was based on the inspector's judgment as to specific conditions at the subject mine. **SOCCO's** position is that there were no conditions at the mine justifying the safeguard. But in fact the inspector and his fellow **MSHA** inspectors were concerned about prior incidents of contacts between scoops and supply cars. The inspector observed the scoop bumping the supply cars as it travelled up the track entry.

2. The safeguard notice was based on the inspector's determination that a hazard existed: Findings of Fact 3 and 4 describe the hazards he believed resulted from inadequate clearance and were to be remedied by the safeguard mandating increased clearance. SOCCO argues that the safeguard restricted the use of scoops in carrying heavy supplies to the face, and that if scoops could not be used, the supplies would have to be

carried by hand. This, SOCCO argues, would create additional and more serious injuries to miners. This argument was considered in my original decision. I concluded that the safeguard addresses and attempts to minimize hazards to the scoop operators and to miners using the track entry as a walkway to the face. The fact that alternative means of transporting materials might pose other hazards does not preclude the inspector from issuing a safeguard notice addressed to actual hazards which be observed.

3. The safeguard notice did not specifically identify the hazard at which it was directed. It did identify the conduct required to remedy what the inspector determined was a hazard, namely the requirement of a **total** of 36 inches of side clearance. The Commission remand decision and its decisions in SOCCO I, 7 FMSHRC 493 (1985); Southern Ohio Coal Company, 14 FMSHRC 1 (1992) and Beth Energy Mines, Inc., 14 FMSHRC 17 (1992) require that a safeguard notice "identify with specificity the nature of the hazard at which it [was] directed. ..." The safeguard notice was issued, according to Inspector McMahon's testimony to minimize hazards to scoop operators and pedestrians resulting from insufficient side clearance. The hazards to the scoop operator were potential injuries from striking the rib or the supply cars or in being struck by rib coal coming through the canopy. Hazards to pedestrians include being struck by a scoop or by a dislodged supply car. However, none of these hazards was specifically identified in the safeguard notice. For this reason, the safeguard notice is invalid.

4. Although the citation for which a penalty is sought herein accurately charges that SOCCO was in violation of the requirement of the safeguard notice, because the safeguard notice is invalid, the citation which is based on the safeguard is also invalid.

**ORDER**

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Safeguard Notice 3124669 issued March 31, 1989, is VACATED.

2. Citation 3323861 issued January 5, 1990, is VACATED.

3. The penalty proposal and this proceeding ARE DISMISSED.

James A Broderick
James A. Broderick
Administrative Law Judge