FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 17, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2007-171
Petitioner	:	A.C. No. 11-02752-122978-08
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	:	Docket No. LAKE 2007-172
	:	A.C. No. 11-02752-122978-09
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	:	Docket No. LAKE 2007-202
	:	A.C. No. 11-02752-125002-01
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	:	Docket No. LAKE 2007-205
	:	A.C. No. 11-02752-125002-04
	:	
v.	:	Docket No. LAKE 2008-004
	:	A.C. No. 11-02752-127021-01
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	:	Docket No. LAKE 2008-080
	:	A.C. No. 11-02752-131664-01
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	:	Docket No. LAKE 2008-082
	:	A.C. No. 11-02752-131664-02
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	:	Docket No. LAKE 2008-120
	:	A.C. No. 11-02752-133868-02
	:	
	:	Docket No. LAKE 2008-138
	:	A.C. No. 11-02752-136300-01
	:	
THE AMERICAN COAL COMPANY,	:	Docket No. LAKE 2008-139
Respondent	:	A.C. No. 11-02752-136300-02
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	:	Docket No. LAKE 2008-140
	:	A.C. No. 11-02752-136300-03
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	:	Docket No. LAKE 2008-141
	:	A.C. No. 11-02752-136300-04
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	:	Docket No. LAKE 2008-143
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: Docket No. LAKE 2008-584
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: Docket No. LAKE 2008-585
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: A.C. No. 11-02752-160144-01

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: Docket No. LAKE 2009-445
: A.C. No. 11-02752-182275-02
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: Docket No. LAKE 2009-546
: A.C. No. 11-02752-188266

ORDER DENYING THE AMERICAN COAL COMPANY'S MOTION FOR SUMMARY DECISION

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against The American Coal Company ("American Coal") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). American Coal filed a motion for summary decision pursuant to section 67 of the Commission's Procedural Rules. 29 C.F.R. § 2700.67. The Secretary filed a response in opposition to the motion and American Coal filed a reply brief.

The parties entered into joint stipulations that set forth the 14 safeguard notices at issue in these cases and the 73 citations that were issued alleging violations of these safeguard notices. American Coal contends that, because the safeguard notices at issue are invalid as a matter of law, all 73 citations should be vacated. As described in more detail below, the Secretary argues that the safeguard notices were validly issued and that the citations should be affirmed.

Section 2700.67 sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

I conclude that there is no genuine issue as to any material fact but that American Coal is not entitled to summary decision as a matter of law.

Section 314(b) of the Mine Act authorizes MSHA inspectors to issue a notice to provide safeguard ("safeguard notice") "to minimize hazards with respect to the transportation of men and materials." 30 U.S.C. § 874(b). In order to issue a safeguard notice, an inspector must determine that there exists an actual transportation hazard not covered by a mandatory standard and that a safeguard notice is necessary to correct the hazardous condition. *Cyprus Cumberland Resources Corp.* 19 FMSHRC 1781, 1784-85 (Nov. 1997). The inspector must specify in the safeguard notice the corrective measures that the operator must take to remedy the hazard.

I. ARGUMENTS OF THE PARTIES

A. General Position of American Coal

American Coal argues that, because section 314(b) grants the Secretary "an unusually broad grant of regulatory power" without regard to rulemaking procedures, the Commission rightfully concluded that this exercise of power "must be bounded by a rule of interpretation more restrained than that accorded promulgated standards." *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (April 1985) ("*SOCCO I*"). American Coal states that it is important to recognize that mine operators are denied certain rights when MSHA holds them to a standard set forth in a safeguard notice in lieu of a promulgated safety standard. These rights are set forth in the notice-and-comment provisions of the Mine Act and the Administrative Procedure Act. (*See* 30 U.S.C. § 811(a); 5 U.S.C. 553). American Coal points out that whenever MSHA governs an operator's conduct via a safeguard notice, it does so "without giving the operator (and the public) prior public notice of, and an opportunity to comment on, the resulting standard." (AmCoal Mot. 4). As a consequence, the Commission has held that safeguard notices must be strictly construed. *Cyprus Cumberland*, 19 FMSHRC at 1785. "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." *BethEnergy Mines, Inc.*, 14 FMSHRC 17, 25 (Jan. 1992).

American Coal argues that the safeguard notices at issue here are invalid because "they do not identify specific hazards, and/or they do not identify the conduct required of the operator

to remedy such hazards, and/or they do not address hazards that are not covered by a mandatory standard." (AmCoal Mot. 5). It maintains that, when issuing safeguard notices, MSHA is "governing" a mine "not by rules fashioned through a careful rulemaking process, nor even by the dictates of the agency's leaders in Arlington, but, rather, by the raw, ad hoc regulatory edicts of MSHA inspectors in the field." *Id.* at 6. This "extensive patchwork of ad hoc regulatory edicts - that inspectors have dribbled out over decades of their subjective judgments - is abhorrent to the due process clause and the Mine Act's procedural safeguards." *Id.* The court should not "countenance the wholesale abdication of rulemaking demonstrated in this case." *Id.*

B. General Position of the Secretary

The Secretary contends that the safeguard notices at issue here "provide sufficient information to the mine operator regarding the hazardous conditions covered by the safeguard and the manner in which to abate those hazards." (Sec'y Response 4). Section 314(b) of the Mine Act specifically authorizes the Secretary to issue safeguard notices to mine operators "to minimize hazards with respect to transportation of men and materials." This provision is designed to give the Secretary the "authority to use safeguards to create mine-specific safety standards outside the scope of normal notice-and-comment rulemaking procedures." *Id.* at 4-5. As the Commission has stated, "the Act does not require mandatory standards to be promulgated pursuant to notice-and-comment rulemaking." *Wolf Run Mining Co.*, 32 FMSHRC ___, slip op. at 9, No. WEVA 2008-804 (Oct. 21, 2010), *appealed docketed*, No. 10-1396 (D.C. Cir. Nov. 22, 2010). In the present cases, MSHA inspectors determined that a transportation hazard existed that was not covered by a mandatory standard and issued the subject safeguard notices.

The Secretary argues that a safeguard notice is valid if it identifies with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. *SOCCO I* at 512. The Secretary is not required to "anticipate and articulate in detail any and all potential consequences of a hazardous condition." (Sec'y Response 6). The inspector who issues the safeguard notice is also not required to describe in detail the best method for remedying the hazardous condition. The Secretary noted that American Coal has been issued numerous citations for violations of these safeguards. This enforcement activity should have provided the operator with sufficient information regarding how the Secretary interprets these safeguard notices. (Sec'y Response 24).

II. ANALYSIS WITH CONCLUSIONS OF LAW

American Coal's basic position is two-fold. First, it argues that, because safeguard notices are tailor-made by individual inspectors, they are not mandatory standards and should be reviewed using a different analysis than would be applied to standards promulgated through notice-and-comment rulemaking. As a consequence, safeguard notices must be interpreted very strictly and such notices are invalid if they are too vague. American Coal believes that if there is any ambiguity in a safeguard notice, the notice is invalid. (AmCoal Mot. 11). In *Wolf Run*, a majority of the three Commissioners who participated in the decision held that safeguard notices

are mandatory standards. The Commission stated that "[b]ecause section 314(b) [of the Mine Act] is one of the subsections contained within sections 302 through 318 of title III, we conclude that the clear language of the Act dictates that the provisions of section 314(b) constitute a mandatory safety standard." (Slip Op. at 6). The Commission also concluded that a violation of a safeguard notice issued by an MSHA inspector constitutes a violation of section 314(b) and is therefore a violation of a mandatory safety standard. The Commission noted that the Mine Act does not require that mandatory safety standards be promulgated pursuant to notice-and-comment rulemaking. Mandatory standards are only required to fit within the statutory definition set forth in section 3(l) of the Mine Act. (Slip op. at 9). Safeguard notices clearly fall within that definition. Based, in part, on this decision, I reject American Coal's argument that safeguard notices must be so strictly construed that any ambiguity renders them invalid. Such an interpretation would put an impossible burden on MSHA inspectors and would contravene the intention of Congress when it included section 314(b) in the Mine Act.

Second, American Coal contends that each contested safeguard notice is invalid because it (1) did not identify with specificity the nature of the hazard and (2) did not specify the conduct required of the operator to remedy such hazard. It is clear that each MSHA inspector determined that there existed an actual transportation hazard not covered by a promulgated safety standard and that a safeguard notice was necessary to correct the hazardous condition. I conclude that the Commission's decision in *Wolf Run* did not change the general principle that, because section 314(b) of the Mine Act gives MSHA inspectors an "unusually broad grant of regulatory power," safeguard notices must be bound by a rule of interpretation "more restrained than that accorded promulgated standards." *SOCCO I*, at 512. As discussed in more detail below, I find that each contested safeguard notice identified a specific hazard and specified a remedy with sufficient precision to provide American Coal with fair notice of what was required. The Commission reviews the Secretary's issuance of a safeguard notice under an abuse of discretion standard. *Cyprus Cumberland*, 19 FMSHRC at 1785; *Southern Ohio Coal Co*., 14 FMSHRC 1, 9 (Jan. 1992) ("*SOCCO II").* As discussed below, I find that the inspectors did not abuse their authority when they issued the contested safeguard notices. As shown below, American Coal would interpret the Secretary's authority so narrowly that each safeguard notice could only address one particular type of injury that resulted from one very specific type of accident. In addition, under its interpretation, the inspector would be required to provide rather detailed instructions in the safeguard notice as to how the hazard must be eliminated. Neither the Mine Act nor Commission precedent supports such an interpretation. I find that all of the safeguard notices are valid.[1]

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[1] In *American Coal Co*, LAKE 2007-139, etc., an unpublished order dated Sept. 20, 2010, Judge Margaret Miller also determined that some of the same safeguard notices at issue here are valid. Although I reach the same result as Judge Miller, I independently analyzed the issues and did not rely on her decision. I agree with her conclusion that the term "hazard" in section 314(b) of the Mine Act refers to unsafe conditions in a mine rather than to the potential outcomes that could result from these unsafe conditions. (Unpublished Order at 3).

American Coal relies to a great extent on the Commission's decision in *SOCCO I* to support its argument that the subject safeguard notices should be invalidated. In *SOCCO I*, the Commission did not invalidate the subject safeguard notice for failing to identify with specificity the nature of the hazard of concern to the MSHA Inspector. Instead, the Commission vacated the citation issued for a violation of the safeguard notice. The Commission determined that the conditions observed by the inspector who issued the citation for the alleged violation of the safeguard notice were not actually addressed by the original safeguard notice. In *SOCCO I*, the original safeguard notice was issued because fallen rock and cement blocks were in a travelway and obstructing travel. The citation was issued for the presence of water in the travelway. The Commission held that the accumulation of water in the travelway "was neither specifically identified in the safeguard notice, suggested thereby, nor in our opinion even contemplated by the inspector when he issued his safeguard notice." *SOCCO I*, at 513. The Commission stated that, "rather than bootstrapping dissimilar hazards into previously issued safeguard notices," the Secretary is required to issue new safeguard notices specifically addressing these additional hazards. *Id.* The safeguard notice in that case was valid; it just did not address the alleged hazardous condition set forth in the citation. The Commission vacated the citation but the safeguard notice remained in effect. Whether any citations that were issued for alleged violations of the safeguard notices at issue in the present cases should be vacated based on the principles set forth in *SOCCO I* is not before me in this motion for summary decision.

In *Southern Ohio Coal Company*, 14 FMSHRC 748, (May 1992) (*SOCCO III*), the Commission vacated a decision of former Commission Judge James Broderick and remanded the case so that he could evaluate the validity of an underlying safeguard notice in light of recent Commission decisions. 14 FMSHRC at 752. On remand, the judge determined that the safeguard notice at issue was invalid because it "did not specifically identify the hazard at which it was directed." 14 FMSHRC 1404, 1407 (Aug. 1992). The safeguard notice was issued because there was not a total of 36 inches of clearance on the sides of a rubber-tired scoop being operated along a supply track where supplies were being loaded into the scoop bucket. (*See* 30 C.F.R. § 75.1403-10(h)). The safeguard notice simply stated that only 6 inches of side clearance was provided for the scoop and stated that 36 inches must be provided. The judge on remand determined that the inspector's failure to specify in the safeguard notice how miners could be injured by the condition described therein invalidated the notice. He vacated both the safeguard notice and the citation issued for a violation of the notice. 14 FMSHRC at 1407. Decisions of other administrative law judges are not binding on me and, to the extent that Judge Broderick's holding is inconsistent with mine, it is rejected.

A. <u>Safeguard Notice No. 7568565.</u>

Safeguard Notice No. 7568565, issued August 3, 1998, provides:

> Bottom irregularities, debris in the form of rock that had fallen from the roof, and wet and muddy conditions were present on the mine travelways at the following locations: . . . . This notice to

> provide safeguards requires that all mine travelways be kept as free as practicable of bottom irregularities, debris and wet and muddy conditions that could affect the control of mobile equipment traveling these areas.

American Coal contends that this safeguard notice is invalid because, although it describes the conditions the inspector found along the travelways, it does not describe a hazard. (AmCoal Mot. 7). American Coal asks, what was the hazard that the inspector was attempting to prevent? Was it the possibility that a piece of mobile equipment would slide against a rib and strike a miner? Was the hazard the possibility that miners would be thrown from the equipment or thrown around inside the equipment? The safeguard notice does not give the operator fair notice of what hazard it is trying to prevent. American Coal also argues that the safeguard notice does not specify what corrective measures are required of the operator. There is no indication of how to comply because it simply states that American Coal must keep travelways "as free as practicable" of bottom irregularities. The operator is left to guess at a remedy.

American Coal avers that this lack of specificity will only lead to future debates between it and MSHA over what the safeguard notice requires. "That, by definition, does not pass muster as a safeguard." *Id.* at 8. If, on the other hand, the Secretary proposes a new safety standard that is vague, the mining community has the opportunity to address the problem during the notice-and-comment period. There is no opportunity for a mine operator to clarify the meaning of a safeguard notice, "which is why Commission scrutiny must be more demanding." *Id.* A "safeguard should leave no doubt about (1) when it applies and (2) what the operator must do to comply." *Id.* The phrases "free as practicable," "bottom irregularities," "debris," and "could affect the control of mobile equipment," for example, are highly subjective. Thus, different MSHA inspectors would be free to issue a citation based on this safeguard notice that is "outside the context of the immediate set of facts that existed when this safeguard was written." *Id.*

The Secretary argues that "it is both illogical and impractical to insist that the Secretary anticipate every possible consequence of the presence of bottom irregularities in a travelway." (Sec'y Response 14). The Secretary issued this safeguard notice to guard against a specific hazard in specific areas of the mine and the inspector has clearly outlined the problem to be fixed and the manner in which to fix it.

I find that this safeguard notice is valid. It specifies the nature of the hazard, which was the presence of bottom irregularities, debris in the form of rock that had fallen from the roof, and wet and muddy conditions. These conditions created a risk that the operator of mobile equipment driving through the travelways could lose control of the equipment. It is true that there are a number of scenarios in which miners could be injured if the equipment operator were to lose control. The mobile equipment could slam into a rib either injuring miners in the equipment or miners walking along the entry. Miners could also be thrown from the equipment. Injuries could occur in other ways as well. Yet, the nature of the hazard is quite clear. The

impediments in the travelway could affect the ability of mobile equipment operators to maintain control of their equipment.

It is also clear what must be done to correct the hazard. Travelways must be kept as free as practicable of bottom irregularities, debris and wet and muddy conditions. The "as free as practicable" language enures to the benefit of American Coal because it makes clear that the travelway is not required to be completely flat and smooth. By using the term "bottom irregularities," the Secretary will be required to establish that the cited mine bottom was so "irregular" that it presented a hazard to mobile equipment traveling through the roadway. Only those irregularities that affect the ability of equipment operators to maintain control of their equipment would be in violation of the safeguard notice. I find that Safeguard Notice No. 7568565 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.[2]

B. Safeguard Notice No. 3538483.

Safeguard Notice No. 3538483, issued August 17, 1990, provides:

> The established rubber-tired (off-track) haulage roadway located in the No. 1 entry of the 1st east longwall tailgate entries was not maintained to allow safe passage of miners and materials. Numerous pieces of bridging lumber (2 ½" x 10 ½" x 12' - 14') which were used to stabilize the mine floor, were dislodged or protruding from the mine floor along this travel entry. This is a notice to provide safeguards requiring all bridging lumber used on the mine floor be secured or that loose and dislodged pieces of lumber be re-secured or removed from the travelway.

American Coal argues that the safeguard notice does not describe a hazard. Was the hazard that miners walking through the area could trip on the bridging lumber or that a piece of mobile equipment could lose control of steering? (AmCoal Mot. 9). Without receiving notice of the actual hazard of concern to MSHA, a mine operator could fail to address the real issue. The safeguard notice also does not specify the corrective measures to be taken. American Coal asks how large must the piece of lumber be to create a hazard? American Coal states that the

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[2] The Secretary also promulgated a safeguard provision specifically addressing this hazard, which is virtually identical to the safeguard notice at issue. This provision gave notice to the mining community that such a safeguard notice could be issued. Section 75.1403-10(i) provides:

> Off-track haulage roadways should be maintained as free as practicable from bottom irregularities, debris, and wet or muddy conditions that affect the control of the equipment.

safeguard notice is so vague that it would be uncertain how to comply to avoid future citations. "Since the safeguard does *not* 'identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard,' the safeguard is invalid and the citations issued pursuant to the safeguard must be vacated." (AmCoal Mot. 10) (*quoting SOCCO I,* at 512) (emphasis in original).

The Secretary contends that the safeguard notice clearly describes a hazard, which was bridging lumber that has been dislodged or was protruding from the mine floor in travelways. The safeguard notice also states what remedies the mine operator must take to correct the condition. American Coal must secure all bridging lumber used on mine floors or remove all loose and dislodged pieces of lumber from the roadway.

I find that the safeguard notice was valid. The presence of dislodged or protruding pieces of bridging lumber on the mine floor along this travel entry created a number of risks, some of which were identified by American Coal. The fact that there were multiple hazards created by a single condition does not invalidate a safeguard notice. In addition, the safeguard notice clearly provides that all bridging lumber used to stabilize the mine floor must be secured or removed. Thus, the safeguard notice provided fair notice of what is required to comply with the notice. I find that Safeguard Notice No. 3538483 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

C. Safeguard Notice No. 7582643.

Safeguard Notice No. 7582643, issued January 26, 2006, provides:

> The active 13th West Longwall working section . . . was not provided with a clear travelway between the longwall face conveyor and the shield bases for the entire length of the longwall face. Coal and gob was observed deposited in the walkway and on the shield bases at various depths. This is a notice to provide safeguards requiring that all longwalls at this mine shall maintain the walkways and shield bases, between the face conveyor and the shields, free of all extraneous materials that would affect the safe travel of miners.

American Coal maintains that the safeguard notice does not describe a hazard. The condition itself is not a hazard. The notice does not state how much "extraneous material" could create a possible hazard and it does not even delineate what such extraneous material can consist of. As a consequence, the notice does not provide fair notice of what is required to eliminate the hazard. American Coal contends that vague, sloppily-drafted safeguard notices would "pass the buck to the operator to guess as to the inspector's meaning, and leave it to the Commission to sort it out if MSHA and the operator disagree." (AmCoal Mot. 12).

The Secretary maintains that the safeguard notice is clear. Coal and gob material was found on the walkway beside the pan line and on bases for the shield supports on the longwall system. It requires that extraneous material that would affect the safe travel of miners along the longwall be removed. The term "extraneous material" is sufficiently specific.

I agree with the Secretary. The safeguard notice clearly and concisely requires American Coal to keep the walkway along the longwall free of extraneous material that would pose a hazard to miners walking through the area. Such material would present a slipping and tripping hazard to miners. The safeguard notice covers materials such as loose coal and materials from the gob. The MSHA inspector did not require that the area be kept in pristine condition, so the safeguard notice would only apply to conditions which posed a tripping and slipping hazard to miners. By necessity, there must be some level of subjectivity involved and there is no question that disputes could arise in the future. But the risk of future disputes is not sufficient to render the safeguard notice invalid. I find that Safeguard Notice No. 7582643 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

D. Safeguard Notice No. 4268263.

Safeguard Notice No. 4268263, issued April 18, 1995, provides:

> A clear travelway at least 24 inches wide was not provided on the No 4 Galatia belt for approximately 100 feet due to water and slurry conditions in an excess of 16 inches. This is a notice to provide a safeguard for a clear travelway at least 24 inches wide shall be provided on both sides of all belt conveyors and kept free from water and/or slurry conditions that would affect safe travel of miners.

American Coal contends that the safeguard notice describes the conditions found by the inspector but that it does not state a specific hazard. The condition itself was not a hazard. "Was the hazard the possibility of miners stumbling and falling due to the depth of the water?" (AmCoal Mot. 13). In the alternative, "was the hazard an interference with travel by persons because of difficulty in viewing the mine floor?" *Id.* Was the hazard "the possibility of water and slurry causing alignment problems with the belt?" The operator is left to guess what hazard was created and what it must do to comply with the notice.

The Secretary argues that the hazard is clearly set forth in the safeguard notice and it more than meets the "nature of the hazard" standard outlined in *SOCCO I.* The safeguard notice clearly states that the presence of water and slurry affects the safe travel of miners and it requires that the area be kept free of such material.

I find that this safeguard notice is quite clear. The hazard is obvious. Trying to walk through 16 inches of water and slurry exposes miners to falling, tripping, stumbling hazards. The

water and muck make the area slippery and it would be difficult to see obstructions on the mine floor. Again, the fact that the condition that creates a hazard presents multiple scenarios for injury does not invalidate a safeguard notice. I find that Safeguard Notice No. 4268263 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.[3]

E. Safeguard Notice No. 4054826.

Safeguard Notice No. 4054826, issued September 8, 1993, provides:

> Accumulations of rib rash, rock, crib ties, belt rollers, and other extraneous material [were] observed along both sides of the 1st section main east belt conveyor, ... These accumulations were at various locations and were not continuous. This is a notice to provide safeguard requiring a clear 24 inch travelway be maintained free of debris and extraneous material, along both sides of all belt conveyors.

As before, American Coal contends that this safeguard notice does not identify a hazard and is therefore invalid. The presence of "debris and extraneous material" does not constitute a hazard. (AmCoal Mot. 14). Was the hazard that this material could be "picked up and thrown by an explosion?" Was the hazard that miners could stumble and fall? Or, was the hazard "the possibility of the extraneous material being caught in the moving belt and creating a friction point?" *Id.* American Coal contends that an operator "*must be aware of* what is deemed to be the hazard in order to prevent future occurrences." *Id.* (emphasis in original).

The Secretary maintains that the safeguard notice provided fair notice of its requirements. "It is an obvious and reasonable interpretation" of the safeguard notice that the presence of rib rash, rock, crib ties, belt rollers, and other extraneous material "in a 24-inch travelway constitutes a significant tripping hazard." (Sec'y Response 8). American Coal's suggestion that a "valid safeguard must also identify and describe any and all conceivable safety hazards presented by the accumulation of these materials completely misreads the Commission's 'nature of the hazard' standard and places an impossible burden on the Secretary." *Id.*

I find that the safeguard notice is straightforward and clear. One must use common sense when reading a safeguard notice. Section 314(b) of the Mine Act authorizes MSHA inspectors to

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[3] The Secretary also promulgated a safeguard provision addressing this hazard, which is similar to the safeguard notice at issue. This provision gave notice to the mining community that such a safeguard notice could be issued. Section 75.1403-5(g) provides:

> A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970.

issue safeguard notices "to minimize hazards with respect to transportation of men and materials." Thus, only hazards that relate to the transportation of men and materials can be addressed by a safeguard notice. The Commission's decisions in *SOCCO I* and other safeguard cases make clear that safeguard notices must be interpreted in a restrained manner with the result that any citations based on a safeguard notice must address hazards that were identified in the safeguard notice or contemplated therein. As stated above, an inspector is not required to include all the possible ways in which a miner could be injured by the conditions he observed. I find that Safeguard Notice No. 4054826 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

F. <u>Safeguard Notice No. 4272082.</u>

Safeguard Notice No. 4272082, issued July 23, 2002, provides:

> Construction tractor (CT10) was not provided with a proper coupling device. The construction tractor was en route to the 8th west headgate unit pulling a material trailer loaded with crib ties coupled only by a belt chain. This is a notice to provide safeguard requiring that a proper coupling device be used on CT10 and all other mobile equipment used at this mine to transport materials and equipment.

American Coal argues that the safeguard notice does not identify a specific hazard. Was the hazard that the chain was too small and, if it broke, the trailer could break away and run into the mine or was the hazard that the trailer was not securely attached and might run into the tractor? In addition, the safeguard notice does not specify the corrective measures required. What is a proper coupling device?

The Secretary maintains that the hazard was the "improper coupling of mobile equipment used in the mine to transport material and equipment." (Sec'y Response 17). The remedy is to use a coupling device on tractors and other mobile equipment rather than belt chains. American Coal is in the best position to know what a proper coupling is for its mobile equipment.

I agree with the Secretary. Using a belt chain to couple a trailer carrying crib ties to the tractor pulling the trailer presented a transportation hazard. The safeguard notice covers events that naturally flow from that hazard, including the risk that the chain would break or that the trailer would slam into the back of the tractor. I incorporate the analysis I used with respect to the other safeguard notices, discussed above, to validate this safeguard notice. I find that Safeguard Notice No. 4272082 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

G. Safeguard Notice No. 7576399.

Safeguard Notice No. 7576399, issued November 12, 2002, provides:

> As a result of an investigation of the recent hoisting accident that occurred September 28, 2001, it was determined that 4 persons were being transported in the slope brake car while a shearer trailer loaded with a shearer was being pulled up the slope. The single 1½ inch steel wire sling was looped around a pin of the shearer trailer without the use of a thimble and both ends were attached to the brake car. The trailer hung and the rope broke at the middle where it looped the pin. This is a notice to provide safeguards at this mine requiring all cars or conveyances be coupled with proper couplings, attachments, and additional safety devices (chains or ropes) rated for the purpose and maintained in good shape shall be used.

American Coal states that the language of the safeguard notice describes the occurrence of an accident, but it does not "identify with specificity a future hazard." (AmCoal Mot. 16). Was the hazard the possibility that the slope brake car could become uncoupled and injure miners on the slope brake car, or was the hazard the possibility of the shearer trailer running over miners if the coupling device failed? In addition, the safeguard notice does not specify the corrective measures required and it "does not set forth a definite method of compliance." *Id.* The safeguard notice does not give the operator any guidelines that set forth the "type or size of the required couplers, attachments, and additional safety devices." *Id.* As a consequence, this safeguard notice does not identify with specificity the nature of the hazard and the conduct required of the operator.

The Secretary states that the safeguard notice clearly sets forth the nature of the hazard. A single 1½ inch of steel wire was looped around a pin on the shearer trailer without the use of a thimble. As a result of this condition, the rope broke when the trailer hung up. The safeguard notice also identifies the remedies that the operator must take. American Coal is in the best position to know what type of coupling should be used on its own equipment and what other safety devices would work the best to provide safe operation.

I find that the safeguard notice is valid. The future hazard is that a 1½ inch steel wire sling is not sufficient when pulling a loaded shearer trailer up the slope while four miners are in the slope brake car. Without proper couplings, there is a significant risk that a wire rope will break, thereby creating a hazard to miners. The MSHA inspector was not required to list all of the potential accident scenarios in the safeguard notice. I agree with the Secretary that American Coal is in the best position to know what coupling devices work best on its mobile equipment and what additional chains or ropes should be attached to ensure the safe transportation of miners and equipment. MSHA cannot be dictating the type and size of couplings to be used on the

equipment of mine operators. The fact that disputes could possibly arise does not invalidate an otherwise valid safeguard notice. I find that Safeguard Notice No. 7576399 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

H. Safeguard Notice No. 7490527.

Safeguard Notice No. 7490527, issued June 14, 2007, provides:

> A serious accident occurred on May 24, 2007, at this mine during recovery of the 3rd East Longwall. A miner was pinned between two longwall shields in the Main South Storage Area at Station 5+90 in the No. 5 entry. One shield had been placed in the storage area and another shield had been transported there and was being unloaded. The shield had been moved there by a battery-powered "duckbill" shield mover. The shield had been secured to the duckbill shield mover by a hook fastened to a winch. During the process of unloading the shield the miner stepped between the two shields. The shield being unloaded slid toward the previously placed shield.
>
> This is a notice to provide safeguards. Shields being transported shall be secured in all directions to prevent movement during transport. Straps, hooks, chains, etc. shall be used in addition to the winch provided on the shield mover. In addition, safe work procedures shall be established and incorporated into the mine's training plan which will address safe methods of shield loading and unloading, and safe work locations for miners performing these duties.

American Coal contends that the injury referenced in this safeguard notice was the result of an unsafe act by a miner who placed his body in a pinch point area while unhooking a shield from the scoop mover. The safeguard notice should have addressed unloading procedures which would include body positioning and other similar safe work practices. Instead, the safeguard notice addresses securing the shields while being moved, but "does not identify with specificity the proper method to unload a shield." (AmCoal Mot. 17). The safeguard notice states that shields are to be loaded and unloaded safely but it does not give "specific parameters or describe what conduct is required for compliance." *Id.* The command that "safe work procedures shall be established" leaves it to another MSHA inspector to determine whether American Coal had done everything that the inspector who issued the safeguard notice required. "There is no escaping the probability that a different inspector will construe the safeguard differently." *Id.* at 18.

The Secretary argues that the language of the safeguard notice provides sufficient guidance to the mine operator to remedy the identified hazard. The safeguard notice states that

the operator should use "straps, hooks, chains, etc." to secure shields to prevent movement during transport." (Sec'y Response 20). Such language is certainly specific enough to comply with Commission precedent and to provide fair notice.

I agree with the Secretary that this safeguard notice adequately describes what is required when transporting shields on the shield mover. The notice requires that shields being transported be secured in all directions to prevent movement during transport. The provision regarding the establishment of safe work procedures when loading and unloading shields is, by necessity, less specific. A safeguard notice cannot possibly establish a detailed training program for the operator. American Coal is better able to develop such a program and, indeed, its current training program may only need to be modified a little to put more emphasis on safe methods of shield loading and unloading and safe work positions for miners performing these duties. I find that Safeguard Notice No. 7490527 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

I. <u>Safeguard Notice No. 7576054.</u>

Safeguard Notice No. 7576054, issued May 9, 2002, provides:

> The Galatia North Portal automatic elevator has been experiencing trouble with the doors at each landing. Several times over the past month, the doors were opened by miners while the elevator was not at a landing. This is a notice to provide safeguard requiring that the Galatia North elevator doors cannot be opened unless the elevator is at the landing where the doors are opened.

American Coal again maintain that the safeguard notice does not identify a specific hazard. It raises several potential hazards, such as a miner falling down the shaft or materials falling down the shaft and striking a miner. Because the safeguard notice does not identify with specificity the nature of the hazard, the safeguard notice is invalid. It also argues that the condition addressed by the safeguard notice is covered by section 75.1725(a), a mandatory standard that was promulgated by the Secretary. Consequently, this safeguard notice is unnecessary and should be invalidated. *Cyprus Cumberland*, at 1784-85.

The Secretary contends this safeguard notice provides very specific information as to the hazard and remedy necessary to eliminate the hazard. She states that if such language does not provide the mine operator with notice of the nature of the hazard, then "no language will ever suffice." (Sec'y Response 10). The safety standard at 75.1725(a) is a general "safe operating condition" standard. This standard has never been applied to elevators in mines and there is no legal basis from which to conclude that the condition described in the safeguard notice is covered by section 75.1725(a).

I find that this safeguard notice provides very specific information as to the nature of the hazard. The fact that miners could be injured in several different ways by the hazard presented does not invalidate the safeguard notice. I also reject the argument that this hazard is covered by an existing mandatory safety standard. Section 75.1725(a) simply states that mobile and stationary equipment and machinery shall be maintained in safe operating condition. Under American Coal's logic, any safeguard notice that alleges that mobile machinery or equipment is unsafe would be invalid. That safety standard is very general and the safeguard notice is very specific in that it addresses doors on elevators. Indeed, the Secretary promulgated a safeguard provision as a guideline that specifically addresses the hazard presented here.[4] I find that, although section 75.1725(a) can be construed to extend to elevator doors that operate in an unsafe manner, the hazard here was not specifically covered by a mandatory standard and is therefore valid. Moreover, Safeguard Notice No. 7576054 was sufficiently specific to provide fair notice of what is required.

J. Safeguard Notice No. 7577893.

Safeguard Notice No. 7577893, issued January 21, 2004, provides:

> A material trailer was observed parked along the 4th North Headgate at crosscut No. 24. The cable roof bolts on the trailer extended outby the rib line approximately four feet into the travelway. A continuous mining machine was also parked along the Main West Travelway at crosscut No. 36 with the tail extending outby the rib line approximately three feet. This is a notice to provide safeguards requiring all trailers and mine equipment be parked inby the rib line at all times.

American Coal contends that the safeguard notice does not describe a hazard. It says that it cannot determine what hazard was of concern to the inspector who wrote the safeguard notice. Was the hazard that other mobile equipment would run into the parked equipment and injure miners riding in the mobile equipment or was there some other hazard that was of concern to the inspector? Because the safeguard notice does not specify the nature of the hazard, it is invalid.

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[4] This provision gave notice to the mining community that a safeguard notice could be issued for this condition. Section 75.1403-4(a) provides, in part:

> The doors of automatic elevators should be equipped with interlocking switches . . . arranged so that such door or doors cannot be inadvertently opened when the elevator car is not at a landing.

The Secretary maintains that the hazard is the extension of mine equipment outby the rib line and that the safeguard notice clearly outlines this hazard. I agree and I find that this safeguard notice is valid for all the reasons set forth with respect to the other safeguard notices.

K. Safeguard Notice No. 7576398.

Safeguard Notice No. 7576398, issued November 12, 2002, provides:

> As a result of an investigation of the recent hoisting accident that occurred on September 28, 2002, it is determined that 4 persons were being transported in the slope brake car while a shearer trailer loaded with a shearer was being pulled up the slope. This is a notice to provide safeguards at this mine requiring that no persons are allowed to ride or be transported in the brake car or other conveyances while any material is transported, other than with normal hand tools.

American Coal raises the same argument that the safeguard notice does not describe the hazard that was of concern to the inspector. The hazard could range from a concern that miners might fall off the brake car and get run over or that the material being hoisted could break loose and run over miners. The inspector could also have been concerned that the weight of the loaded trailer and the miners on the brake car could put too much strain on the hoist rope. This lack of specificity should invalidate the safeguard notice.

The Secretary contends that the safeguard notice should not be invalidated simply because it does not articulate all conceivable risks associated with the condition described. I agree with the Secretary and, for the reasons discussed above with respect to other safeguard notices, find that this safeguard notice to be valid.[5]

L. Safeguard Notice No. 7576913.

Safeguard Notice No. 7576913, issued May 28, 2003, provides:

> One of the balance ropes on the Millenium Portal man and material hoist was observed running in water and mud at the bottom of the man and material shaft. The balance ropes on this cage have been

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[5] The Secretary also promulgated a safeguard provision addressing similar types of hazards. This provision gave notice to the mining community that a safeguard notice could be issued in similar circumstances. Section 75.1403-7(k) provides, in part:

> Supplies or tools, except small hand tools or instruments, should not be transported with men.

> damaged as a result of running in water. This is a notice to provide safeguards requiring the area at the bottom of the shafts be kept clear of mud and water in depths that allow contact with the balance ropes.

American Coal notes that this safeguard notice states that the balance rope was damaged as a result of running in water but it does not describe what type of damage occurred or what type of hazard existed. "Was the hazard that the hoist could become wedged inside the shaft and expose miners on the hoist to a high volume of cold air coming down the shaft, with the possibility of hypothermia?" (AmCoal Mot. 21).

The Secretary believes that the safeguard notice clearly describes the nature of the hazard. I agree. Having the balance ropes running in water will subject them to damage that could affect the ability of the hoist to operate safety, although I doubt that hypothermia was on the inspector's mind. As the Commission stated in *SOCCO I*, the safeguard notice must be construed rather narrowly so that hazards not identified in the notice are not bootstrapped into it during future MSHA inspections. I find that Safeguard Notice No. 7576913 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.

M. <u>Safeguard Notice No. 7581083.</u>

Safeguard Notice No. 7581083, issued June 3, 2005, provides:

> A suitable crossing facility was not provided for the energized 6th North Conveyor Belt in the belt drive area where miners are routinely crossing under the energized belt conveyor. A bridge has been built under the belt in this area for miners to cross under the moving belt. This is a notice to provide safeguards requiring where persons cross moving belt conveyors that a suitable crossing facility shall be provided.

American Coal states that this safeguard notice does not describe a hazard or what must be done to remedy the presumed hazard. "The language is too subjective to give the operator any meaningful notice of how it is to comply with this safeguard." (AmCoal Mot. 22). Is guarding required at the crossover, how strong should the guarding be, and what materials would be acceptable to MSHA? "The conduct described in this safeguard is too vague to notify the operator of a definite method of compliance." *Id.*

The Secretary states that the safeguard notice describes the hazard associated with miners routinely crossing beneath an operating belt conveyor. The mine operator is in the best position to determine what constitutes a "suitable" crossing facility, given the unique and specific characteristics of the mine.

I find that this safeguard notice is valid. It does describe the hazards associated with miners passing under an operating conveyor. It mandates that a suitable crossing facility be established. It is true that it does not describe how this should be done and what materials should be used. Conveyor crossing facilities are frequently built in underground mines so American Coal will not have to start from scratch or take a wild guess as to what MSHA will find acceptable. A safeguard notice does not have to spell out in detail how every hazard must be addressed by the operator. I find that Safeguard Notice No. 7581083 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.[6]

N. Safeguard Notice No. 7572630.

Safeguard Notice No. 7572630, issued December 7, 2000, provides:

> The north gate at the collar of the Main North man and material shaft was open and the cage was at the bottom of the shaft. This notice to provide safeguards requiring that the landing gates be kept closed except when the cage is at the landing.

American Coal argues that this safeguard notice does not provide any description of hazard. The Secretary maintains that American Coal "attempts to conflate the 'nature of the hazard' standard with a requirement that the Secretary anticipate and articulate any and all risks associated with an identified condition." (Sec'y Response 13).

I find the safeguard notice to be valid for the same reasons set forth above. This safeguard notice is similar to Safeguard Notice No. 7576054, discussed above. The risks are obvious and the remedy is obvious. I find that Safeguard Notice No. 7572630 was sufficiently specific to provide fair notice of what is required and that it is a valid safeguard notice.[7]

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[6] The Secretary also promulgated a safeguard provision addressing this hazard, which is similar to the safeguard notice at issue. This provision gave notice to the mining community that such a safeguard notice could be issued. Section 75.1403-5(j) provides:

> Persons should not cross moving belt conveyors, except where suitable crossing facilities are provided.

[7] The Secretary also promulgated a safeguard provision addressing this hazard, which is similar to the safeguard notice at issue. This provision gave notice to the mining community that such a safeguard notice could be issued. Section 75.1403-11 provides, in part:

> All open entrances to shafts should be equipped with safety gates at the top and at each landing. Such gates should be self closing and should be kept closed except when the cage is at such landing.

III. ORDER

I find that the subject safeguard notices are **VALID**. For this reason, American Coal Company's motion for summary decision is **DENIED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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