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February 3, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GMS MINE REPAIR & MAINTENANCE, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2019-0126 A.C. No. 36-07230-493700 Mine: Bailey Mine

DECISION AND ORDER

Appearances: Ryan C. Atkinson, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner

William C. Means, Esq., Andrew J. Ellis, Esq., GMS Mine Repair & Maintenance, Inc., Bruceton Mills, West Virginia, for the Respondent

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("Mine Act" or "Act"), 30 U.S.C. § 815(d). At issue is one citation issued to Respondent GMS Mine Repair & Maintenance, Inc. ("GMS"), under Section 104(a) of the Mine Act.

A hearing was held in Morgantown, West Virginia, on January 14, 2020, at which time testimony was taken and documentary evidence was submitted. I have reviewed all of the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given.

After consideration of the evidence, I dismiss the Section 104(a) citation for the reasons set forth below.

B. Stipulations

1. Consol Energy ("Consol") is the owner/operator of the Bailey Mine. At the time that the citation at issue in this proceeding was served, Respondent GMS was an independent contractor performing services at said mine and was therefore an "operator" at said mine as the term "operator" is defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

2. Bailey Mine is a "mine" as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. Operations of GMS at the mine at which the citation was issued are subject to the jurisdiction of the Mine Act.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission ("FMSHRC") and its designated Administrative Law Judges ("ALJ") pursuant to Sections 105 and 113 of the Mine Act.

5. Payment of the total proposed penalty of $22,113.00 in this matter will not affect GMS's ability to continue in business.

6. The individual whose name appears in Block 22 of the citation in contest was acting in an official capacity and as an authorized representative of the Secretary when the citation was issued, provided however that this stipulation should not be construed as an admission by GMS of culpability regarding the subject matter of said citation.

7. The Citation contained in Docket No. PENN 2019-0126 was issued and served by a representative of the Secretary upon an agent of GMS at the date, time, and place stated in the citation.

8. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 2019-0126 contains an authentic copy of Citation No. 9074949 with all modifications or abatements, if any.

9. Although the parties disagree as to whether the application of 30 C.F.R. § 75.1403 is properly limited to hoists or mantrips, the parties stipulate that no hoist or mantrip (as those terms are used in 30 C.F.R. § 75, Subpart O) was involved in the accident which gave rise to this case.

Jt. Ex. 1.[1]

The parties have also submitted the additional joint stipulations:

[1] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered Ex. P-1 to P-8. In addition, the Secretary submitted the Respondent's assessed violation history report as Ex. P-17. The Respondent did not file any exhibits. The joint stipulations are referred to as Jt. Ex. 1 and Jt. Ex. 2.

1. The service contract between GMS and Consol (the owner-operator of Bailey Mine) contains provisions which contractually obligate GMS to adhere to mandatory safety and health standards.

2. Notices to provide safeguard are not expressly mentioned within the text of the GMS-Consol contract; however, GMS conceded that it is not manifestly unreasonable to construe the aforementioned contractual obligation as including a duty of GMS to Consol to be familiar with directives laid out in those notices to provide safeguard which the Mine Safety and Health Administration ("MSHA") has served on Consol at the mine(s) where GMS performs services for Consol and, to the extent that said notices are applicable to GMS's assigned work, to adhere to those directives.

3. GMS has received from Consol a summary of thirty-five notices to provide safeguard which MSHA served upon Consol at the Bailey Mine from 1993 to present, one of which is Notice to Provide Safeguard No. 7068632 ("Safeguard No. 7068632") at issue in the case at bar.

4. During its site-specific safety training and/or its annual refresher safety training of GMS personnel who perform services at Bailey Mine, GMS does include discussions of notices to provide safeguard.

5. On August 7, 2018, at the Bailey Mine, GMS personnel were attempting to use a one-man-operated piece of equipment known as a "mule" (which is neither a mantrip nor a hoist within the meaning of 30 C.F.R. § 75, Subpart O) to move a longwall shield a short distance away from the mine face.

6. The mule got stuck in place, whereupon GMS personnel attached a cable to an anchor point in the mine roof in an attempt to get the equipment unstuck.

7. A hook clevis on the mule—to which the cable was attached—broke, whereupon the hook traveled 33 feet through the air and struck a miner.

8. Upon investigating the foregoing accident, MSHA issued three citations to GMS.

9. One of the three citations alleged that the condition of the hook clevis had deteriorated and therefore, GMS had operated a piece of equipment which was in unsafe condition. During and/or in conjunction with a citation conference, GMS opined that the deteriorated part of the hook clevis was blocked from view by other parts of the equipment. Nevertheless, GMS accepted responsibility, did not further contest the citation, and paid the assessment for the same. Accordingly, that issue is resolved and closed.

10. Another of the three citations alleged that GMS had violated the roof control plan by attaching a cable to part of the roof control system. During and/or in conjunction with a citation conference, GMS opined that the anchor to which the cable was attached was a supplemental roof bolt in excess of the roof-bolting requirements. Nevertheless, GMS accepted responsibility, did not further contest the citation, and paid the assessment for the same. Accordingly, that issue is resolved and closed.

11. Another of the three citations, i.e., the one citation now at issue, alleges that GMS violated a notice to provide safeguard. The specific notice to provide safeguard is not mentioned in the body of the citation. The specific notice to provide safeguard has since been identified as Safeguard No. 7068632.

12. Within the Mine Act's definition of the term "operator," GMS—as a provider of services at Bailey Mine—is "an operator" at Bailey Mine separate and distinct from owner-operator Consol.

13. It is undisputed that no authorized representative of the Secretary has ever advised GMS in writing of Safeguard No. 7068632, nor did the Secretary ever fix a time within which operator GMS could have addressed the content or validity of that specific safeguard notice before the Secretary's representative served GMS with the one citation which is still at issue in this matter.

Jt. Ex. 2.

II. BACKGROUND

On August 1, 2018, an accident occurred at the Bailey Mine—an underground coal mine in Pennsylvania that is owned and operated by Consol. Tr. 31; Jt. Ex. 1, 2. Subsequently, MSHA conducted an investigation of the circumstances surrounding the accident. Tr. 31. At the time of the accident and investigation, GMS was performing services at the Bailey Mine as an independent contractor. Jt. Ex. 1.

After the accident investigation concluded on August 7, 2018, MSHA inspector Robert Revi[2] issued Citation No. 9074949[3] to GMS on the basis that GMS violated 30 C.F.R.

[2] Revi has been an MSHA employee for eight years and serves as a certified mine inspector. Tr. 23. Prior to his employment with MSHA, Revi was employed by Consol for ten years, was employed by Emerald Mine, and was employed by GMS. Tr. 24. Revi has received training at the National Mine Health and Safety Academy in Beckley, West Virginia—including accident investigation training—and holds various licenses and certifications related to mining. Tr. 24. In total, Revi has approximately 20 years of coal mining experience. Tr. 24-25.

[3] The narrative portion of Citation No. 9074949 states:

> An accident occurred at Bailey Mine in the 6J Longwall tear down between the 2/3 crosscut at spad 1+75, area on August 1st, 2018 injuring one miner. The Pettito Electric mule was being used to recover shield from the longwall face when it got stuck in the number 3 intersection at spad # 1+75. In the process of attempting to free the mule, the hook and hook clevis broke. The hook and hook clevis was propelled a distance of 33 feet striking a miner in the head.

Ex. P-1.

§ 75.1403[4] by failing to adhere to the mandate of Safeguard No. 7068632. Ex. P-1; Jt. Ex. 2. Safeguard No. 7068632, which was issued to Consol on February 13, 2006, states:

> On September 22, 2005, employees were moving a belt drive motor into location for the new 9-H section belt. They were pulling the drive motor into place with a 3/4 inch cable laced through two sheave wheels . . . . The chain which was attached to the sheave at the flat car broke, and a link from the chain flew into the track chute and struck the victim in the face causing severe facial injuries. The victim was approximately 25 to 30 feet away from the chain when it broke.
>
> This is a notice to provide the following safeguard:
>
> When using chains and or cables to move equipment into location all workers are to be located in a position so that they will not be injured should any portion of the chain or cable fail.

Ex. P-4.

III. LEGAL PRINCIPLES

An operator is strictly liable for Mine Act violations. *Nally & Hamilton Enter.*, 38 FMSHRC 1644, 1650 (July 2016) (citing *Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009)). The Secretary bears the burden of proving any alleged violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp*., 153 F.3d 1096 (D.C. Cir. 1998) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

Section 314(b) of the Mine Act provides for safeguards that "inform[] the mine operator about conduct that is mandated or prohibited . . . involving transportation of miners and materials." *Pocahontas Coal Co., LLC*, 38 FMSHRC 157, 157 (Feb. 2016). The Secretary effectuates Section 314(b) "by authorizing inspectors to issue safeguards on a mine-by-mine basis." *Oak Grove Res., LLC*, 37 FMSHRC 2687, 2688 (Dec. 2015); *see also Big Ridge, Inc.*, 37 FMSHRC 213, 214 n.4 (Feb. 2015) (noting that safeguards "are[,] in effect, mandatory safety standards issued on a mine-by-mine basis" (citation omitted)). Inspectors, as representatives of the Secretary, issue the safeguards in writing to the operator, and must also "indicate[] a time by which the operator must provide and subsequently maintain that safeguard." *Oak Grove Res., LLC*, 37 FMSHRC at 2688 (citing 30 C.F.R. § 75.1403-1(b)). An inspector may then issue a citation to that operator for safeguard noncompliance. *Oak Grove Res., LLC*, 37 FMSHRC at 2688 (citing *Wolf Run Mining Co. v. FMSHRC*, 659 F.3d 1197, 1204 (D.C. Cir. 2011)).

[4] Mirroring Section 314(b) of the Mine Act, this regulation states "[o]ther safeguards adequate . . . to minimize hazards with respect to transportation of men and materials shall be provided." 30 C.F.R. § 75.1403; *see also* 30 U.S.C. § 874(b).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

There are three issues that must be addressed in this matter: (1) whether an independent contractor is bound by safeguards issued to the owner / operator of a mine; (2) whether Safeguard No. 7068632 is facially valid; and (3) whether Safeguard No. 7068632 applies to GMS based on the instant facts. For the reasons set forth below, the answer to each question is "no," and, therefore, Citation No. 9074949 must be vacated.

A. Whether an Independent Contractor Is Bound by Safeguards Issued to the Owner / Operator of a Mine

"When 'a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express."' *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995) (quoting *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982)). The language of Section 75.1403-1(b) clearly states that "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." 30 C.F.R. § 75.1403-1(b) (emphasis added). It is undisputed that the Secretary neither "in writing advise[d] [GMS] . . . of a specific safeguard," nor fixed a time for compliance with the safeguard. *Id.*; Jt. Ex. 2.

The Secretary argued that "mine-by-mine basis" means safeguards are perpetually enforceable against all operators present at the mine property, not just against the operator that was served with the safeguard in writing. Tr. 14, 27-28. Further, counsel for the Secretary agreed that, under this interpretation, once a safeguard is issued to an operator, that safeguard could be in effect and enforceable against all operators present at the mine for 20, 30, 40, 50 years, or even forever. Tr. 14-15. However, the Secretary admitted that there is no legal precedent—case law, legislative history, or prior application of this interpretation—to support such a position. Tr. 15-16. Furthermore, the Commission has never been confronted with such an interpretation.

I find that the Secretary's interpretation is incorrect. The Commission has explained that issuing safeguards on a "mine-by-mine" basis means only that the safeguards need to "address[] a specific transportation hazard actually determined by an inspector to be present and in need of correction at the mine in question." *Southern Ohio Coal Co.*, 14 FMSHRC 1, 9 (Jan. 1992) ("*SOCCO II*"). An interpretation that permanently extends the scope of "mine-by-mine" to all operators at a mine site goes against the express language of the regulation and has no demonstrable support. Section 75.1403-1(b) clearly indicates that the Secretary "shall in writing advise *the operator*" of the safeguard, and says nothing about the enforcement of safeguards against other distinct and separate operators that were not advised in writing by the Secretary. 30 C.F.R. § 75.1403-1(b) (emphasis added); *see also BethEnergy Mines, Inc.*, 14 FMSHRC 17, 23-24 (Jan. 1992) ("Section 75.1403-1(b) makes clear that the safeguard criteria *are not binding on any particular operator* unless, and until, that operator is given notice, in a written safeguard from an authorized representative of the Secretary." (emphasis added)); *SOCCO II*, 14 FMSHRC at 7.

In addition, Inspector Revi testified that, in his experience, mine inspectors typically issue safeguards after an operator has received several violations of the same type and the inspector puts the operator on notice. Tr. 26-27. Such activity by an operator would then justify the issuance of a safeguard and, subsequently, validate the issuance of citations for violating that safeguard—should that violative condition or practice continue. Tr. 27. Inspector Revi's testimony underscores the fact that a *specific operator* is to be put on notice and bound by a specific safeguard, not any independent contractor on the mine property at any time after the safeguard is issued.

The Secretary also argued that the contractual agreement between GMS and Consol obligated GMS to adhere to the mandate of Safeguard No. 7068632 because that agreement required GMS to comply with the Mine Act. Tr. 9, 48; Ex. P-2. It is true that GMS was contractually required to "comply with the provisions of the [Mine Act] and the [r]ules and [r]egulations applicable thereto," and it is also true that GMS admitted it was aware of all safeguards at Bailey Mine (including Safeguard No. 7068632). Ex. P-2 at 6; Jt. Ex. 2. However, awareness is not equivalent to the express requirement in Section 75.1403-1(b) that the Secretary provide written, individualized notice to GMS. A private employment contract between a mine owner and an independent contractor does not authorize the Secretary to enforce a safeguard that was issued to the mine owner and is otherwise unenforceable against the contractor.

In contrast to the Secretary's arguments, GMS argued that the Secretary's interpretation runs counter to the principles of due process because GMS lacked notice that the Secretary would enforce Safeguard No. 7068632 without first advising GMS of said safeguard in writing. Tr. 19, 50. Although I decline to address the constitutional argument raised by GMS, some further analysis is warranted. First, it is important to note that Safeguard No. 7068632 is not a regulation that has gone through the rulemaking process; it is an entirely different exercise of authority by the Secretary. *See Pocahontas Coal Co., LLC*, 38 FMSHRC at 165 ("Congress chose not to subject safeguard notices to the notice-and-comment rulemaking required for mandatory standards." (citing *Wolf Run*, 659 F.3d at 1202-03)); *see also Oak Grove Res., LLC*, 35 FMSHRC 2009, 2011-12 (July 2013). Here, GMS is a separate and distinct legal entity from Consol, the operator that received Safeguard No. 7068632 in writing. Jt. Ex. 2. Furthermore, Safeguard No. 7068632 was issued more than 10 years prior to the issuance of Citation No. 9074949, and GMS had no official notice or opportunity to comply with that safeguard before being issued a citation.[5] Ex. P-4.

Neither the Act nor the safeguard regulation by its language includes any other entities *but the operator to which the safeguard was issued* as being bound by that safeguard. The Secretary's interpretation, a new one at that, would lead to absurd results should each safeguard bind any and all independent contractors, subcontractors, and their successors in interest indefinitely. Therefore, the SOL's new interpretation is not to be afforded deference here. The language of Section 75.1403-1(b) is not ambiguous. Even if Section 75.1403-1(b) was

[5] Again, Inspector Revi's testimony that safeguards are typically issued after an operator has committed several violations of the same type—and the operator is put on notice before the safeguard is issued and enforced—supports GMS's argument that it had no fair notice of, or chance to comply with, Safeguard No. 7068632. Tr. 26-27.

ambiguous in its coverage, the Secretary's position would still fail as an unreasonable interpretation of that regulation. I find that the Secretary's position—which the Secretary admitted is unsupported by precedent and has never been advanced before—is not the authoritative or official position of the agency, but instead a convenient litigation position that creates unfair surprise to GMS. "Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme," and "when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar." *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2413 (2019). The Commission and its judges have on numerous occasions stated in unequivocal language that the Secretary should engage in the proper rulemaking procedures to regulate the transportation of miners and materials in underground coal mines. *See, e.g.*, *Wolf Run*, 659 F.3d at 1203 (citing *SOCCO II*, 14 FMSHRC at 16); *cf.* Tr. 46 (describing the threat of a chain or cable breaking as a possibility "at any mine or any industry").

In sum, only the operator that was advised of the safeguard in writing may be held responsible for implementing the remedial measures prescribed by that safeguard or penalized for failing to do so. Therefore, Safeguard No. 7068632 is not applicable to GMS.

B. Whether Safeguard No. 7068632 Is Facially Valid

In addition to Safeguard No. 7068632 not applying to GMS because GMS was never advised in writing of that safeguard, Safeguard No. 7068632 is also facially invalid.

To be valid, a safeguard must identify a hazardous condition and specify a remedy. *See Oak Grove Res., LLC*, 38 FMSHRC 1273, 1278 (June 2016); *see also Am. Coal Co.*, 34 FMSHRC 1963, 1969 (Aug. 2012). The safeguard must articulate the hazard and "conduct required of the operator to remedy such hazard" with specificity. *Oak Grove Res., LLC*, 35 FMSHRC at 2012 (citing *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) ("*SOCCO I*")). Because the Secretary issues safeguards "without resort to the normally required rulemaking process," it is essential that "a narrow construction of the terms of the safeguard and its intended reach" is employed.[6] *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808 (Aug. 1998) (quoting *SOCCO I*, 7 FMSHRC at 512 (internal quotation marks omitted)). This is necessary to balance the Secretary's "unique authority to require a safeguard" and the operator's right to fair notice of the conduct required under the safeguard. *BethEnergy Mines, Inc.*, 14 FMSHRC at 25. Safeguard No. 7068632 purports to specify the hazard of miners being injured "should any portion of a chain or cable fail," and the specific remedy that miners "be located in a position so that they will not be injured." Ex. P-4. However, I find that Safeguard No. 7068632 is facially invalid for three separate reasons.

First, Safeguard No. 7068632 is invalid because the hazard it purports to address—the danger of a chain or cable breaking—is not based on the "consideration of the specific conditions

[6] The Commission has reaffirmed this principle from *SOCCO I* multiple times. *See Black Beauty Coal Co.*, 38 FMSHRC 1, 2 (Jan. 2016); *see also Oak Grove Res., LLC*, 37 FMSHRC at 2690; *Cyprus Cumberland Res. Corp.*, 19 FMSHRC 1781, 1785 (Nov. 1997); *United States Steel Mining Co., Inc.*, 15 FMSHRC 2445, 2447 (Dec. 1993); *Green River Coal Co., Inc.*, 14 FMSHRC 43, 48 (Jan. 1992).

at the particular mine." *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1607 (Aug. 1994) (citing *SOCCO II*, 14 FMSHRC at 9) (internal quotation marks omitted). "The hazard posed by the use of unsafe equipment," such as a broken chain or cable, "does not arise from conditions specific to particular mines and thus is not properly addressed by issuance of a safeguard." *Id.* *But see Oak Grove Res., LLC*, 35 FMSHRC at 2013 (citing *SOCCO II*, 14 FMSHRC at 8) (reiterating that a safeguard is not per se invalid "if it addresses conditions that exist in a significant number of mines" (internal quotation marks omitted)). However, this condition—hoisting men or materials—applies to every mine in the entire country, which is entirely too broad to be the subject of a safeguard. The following exchange between GMS counsel and Inspector Revi at the hearing demonstrates why the hazard that Safeguard No. 7068632 attempts to address is too broad to be covered by a safeguard:

GMS Counsel:	Okay. The condition that is described in the safeguard about using chains or cables to move equipment, does that present a hazard wherever it may be found?
Inspector Revi:	If there's stored energy in that cable or chain, yes. Absolutely. Anything that has tension on it, if it breaks, it's going to fly somewhere, but nobody knows where.
GMS Counsel:	And that's true at Bailey [Mine]. Right?
Inspector Revi:	That's true at any mine or any industry.
GMS Counsel:	At any mine anywhere, that's true?
Inspector Revi:	What, that this could happen?
GMS Counsel:	Yes.
Inspector Revi:	Absolutely.

Tr. 45-46.

Second, Safeguard No. 7068632 is invalid because it contains a nonspecific remedy that does not adequately address how the operator must adhere to its mandate. *Cf. Am. Coal Co.*, 34 FMSHRC at 1979 n.5 (finding that a safeguard requiring equipment be mounted "in a manner that provides 'maximum' clearance" was insufficiently specific and facially invalid). Inspector Revi's testimony makes clear that Safeguard No. 7068632 does not provide a specific remedy, as required by law. Although no exact distance was specified in Safeguard No. 7068632, the remedial "safe" distance that miners were to be located should have been greater than the 25 to 30 feet that the injured miner was standing during the 2006 incident. Tr. 45; Ex. P-4. In the instant matter however, the miner that was struck was standing 33 feet away. Tr. 44-45; Ex. P-1. Again, even Inspector Revi testified that he was unsure what distance would have been

appropriate under the direction of the safeguard and in fact stated: "I guess with hindsight . . . would 40 feet be far enough? I don't know." Tr. 45.

Third, Safeguard No. 7068632 is facially invalid because it never fixed a time for compliance. *Cyprus Emerald Res. Corp.*, 20 FMSHRC at 808 (quoting *SOCCO II*, 14 FMSHRC at 7) (stating that "a safeguard 'may be enforced at a mine only after the operator is advised in writing that a specific safeguard will be required *as of a specified date*'" (emphasis added)); Jt. Ex. 2.

Consequently, Safeguard No. 7068632 is facially invalid because it is neither sufficiently specific as to the hazard identified, nor the specific remedy to be undertaken.

C. Whether Safeguard No. 7068632 Is Applicable to GMS on the Instant Facts

Finally, in addition to the conclusions set forth above, the specific hazard envisioned by Safeguard No. 7068632—and mandatory remedial directive—is not applicable to GMS under the factual circumstances described in Citation No. 9074949.

A citation that alleges a violation of a safeguard "should be vacated if the conditions 'differ fundamentally in nature, cause and remedy' from those in the underlying safeguard, such that the operator lacked notice that the cited conduct was prohibited." *Oak Grove Res., LLC*, 38 FMSHRC at 1278 (quoting *BethEnergy Mines, Inc.*, 15 FMSHRC 981, 986 (June 1993)); *see also SOCCO I*, 7 FMSHRC at 512-13. Further, safeguards "must be strictly construed in determining whether a violation has occurred." *Cyprus Cumberland Res. Corp.*, 19 FMSHRC at 1785 (citing *SOCCO I*, 7 FMSHRC at 512).

Here, the conditions cited in Citation No. 9074949 differ fundamentally from those in Safeguard No. 7068632. The equipment that failed here, a hook and hook clevis, was part of the 20-ton Pettito Mule, not a portion of a separate "chain or cable" that was expressly envisioned by Safeguard No. 7068632. Tr. 8, 34, 42, 44, 53; Exs. P-1, P-4; Jt. Ex. 2. Inspector Revi expressly testified that no chain or cable was used during the August 2018 accident at Bailey Mine. Tr. 44. Further, Inspector Revi testified that the root cause of the hook failure was the deterioration of the mine road where the Pettito Mule was stuck. Tr. 8, 34, 37, 39-40. Nothing in Safeguard No. 7068632 applies in any way to the maintenance of the mine road or to poor road conditions. Finally, the parties stipulated that neither a mantrip nor a hoist was involved in this accident. Jt. Ex. 2. Therefore, even if Safeguard No. 7068632 was otherwise valid and applicable to GMS, the facts do not support a finding that GMS violated Safeguard No. 7068632—if the safeguard is strictly construed.

V. CONCLUSION

In sum, because Safeguard No. 7068632 (1) is facially invalid, (2) differs fundamentally from the instant circumstances, and (3) is unenforceable against GMS, Citation No. 9074949 must be vacated.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation No. 9074949 is **VACATED**. Accordingly, these proceedings are **DISMISSED**.

Priscilla M. Rae
Administrative Law Judge

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