

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 4, 2011

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|----------------------------|---|-----------------------------|
| SECRETARY OF LABOR,        | : | CIVIL PENALTY PROCEEDINGS   |
| MINE SAFETY AND HEALTH     | : |                             |
| ADMINISTRATION (MSHA),     | : | Docket No. LAKE 2008-41     |
| Petitioner                 | : | A.C. No. 11-02752-129287-05 |
|                            | : |                             |
|                            | : | Docket No. LAKE 2008-42     |
|                            | : | A.C. No. 11-02752-129287-06 |
|                            | : |                             |
|                            | : | Docket No. LAKE 2008-43     |
| v.                         | : | A.C. No. 11-02752-129287-07 |
|                            | : |                             |
|                            | : | Docket No. LAKE 2008-81     |
|                            | : | A.C. No. 11-02752-131664-03 |
|                            | : |                             |
|                            | : | Docket No. LAKE 2008-145    |
|                            | : | A.C. No. 11-02752-136300-08 |
| THE AMERICAN COAL COMPANY, | : |                             |
| Respondent                 | : | Mine: Galatia Mine          |

**ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION**

These cases are before me on petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”). American Coal Company (“American” or the “Respondent”) filed a motion for summary decision (the “motion”) under Commission Procedural Rule 67. 29 C.F.R. § 2700.67. The Secretary of Labor (“Secretary”) filed a response in opposition to the Respondent’s motion. The parties have also submitted the following joint stipulations:

1. American Coal is an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 803(d), at the coal mine at which the citations at issue in this proceeding were issued.
2. Operations of American Coal at the coal mine at which the citations were issued in this proceeding are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated

Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

4. The individuals whose signatures appear in Block 22 of the citations at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor when the citations were issued.
5. A true copy of each of the citations at issue in this proceeding was served on American Coal as required by the Mine Act.
6. The total proposed penalties for the citations in this proceeding will not affect American Coal's ability to continue in business.
7. The citations contained in Exhibit "A" attached to the Secretary's petitions are authentic copies of the citations that are at issue in this proceeding with all appropriate modifications or abatements, if any.
8. Any motion for summary judgment filed in these proceedings - and any decision by this Court in response to any such motion - shall apply to the following citations: in Docket No. LAKE 2008-41, Citation No. 6669738 and 6667302; in Docket No. LAKE 2008-42, Citation No. 6668301; in Docket No. LAKE 2008-43, Citation Nos. 6668322 and 6668325; in Docket No. LAKE 2008-81, Citation No. 6667919; and in Docket No. LAKE 2008-145, Citation No. 6668169.

Jt. Stip. 1-8.

Section 2700.67 sets forth the grounds for granting summary decision:

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.

American argues that the subject safeguards are invalid on their face and, therefore, any citations issued for violations of such safeguards must be vacated. Specifically, American contends that the underlying safeguards fail to identify with necessary specificity any hazard and/or 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. The Secretary contends that the underlying safeguards are valid and summary decision is not appropriate.

The material facts are not in dispute. However, for reasons that follow, I find that American is not entitled to summary decision as a matter of law and, accordingly, **DENY** its motion.

## I. DISCUSSION

Section 314(b) of the Mine Act grants the Secretary authority to issue “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b). A representative of the Secretary, generally an inspector, may issue a notice to provide safeguard only after “determin[ing] that there exists . . . an actual transportation hazard this is not covered by a mandatory standard.” *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992). The Commission has held that, because a notice to provide safeguard is issued by an inspector and is not subject to the notice and comment procedural protections of section 101, the language of a notice to provide safeguard “must be narrowly construed” and is “bounded by a rule of interpretation more restrained than that accorded promulgated standards.” *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). In recognition of such, and in order to provide proper due process, a notice to provide safeguard “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.” *See id.*; *See also Cyrus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997).

Based on the foregoing, a notice to provide safeguard is valid where a transportation hazard, and the conduct required to remedy such, are identified with necessary specificity. The parties’ arguments in this case are essentially the same as those raised by the same parties in an earlier proceeding involving the same issue, i.e., the validity of underlying safeguards.<sup>1</sup> In my order denying a motion for summary decision in the earlier proceeding, I stated the following:

I find that the “hazard,” as contemplated by section 314(b) of the Mine Act, refers to conditions/objects in the mine, as opposed to potential risks/outcomes associated with those conditions or objects. I base my below analysis on whether the subject notices to provide safeguard identify with necessary specificity (1) a condition/object that could affect the safe transportation of men and materials and, (2) the conduct required to remedy such. If the notices to provide safeguard are sufficiently specific, then the safeguards are valid and may be properly enforced. However, in the event they are not sufficiently specific, then the safeguard will be deemed invalid and the Respondent will not be subject to citations or orders issued under the safeguard. At the outset, I note that I will not allow specificity to be argued to the detriment of common sense.

While, on occasion, the Secretary chooses to include language in the safeguard which addresses the potential risks/outcomes associated with hazards, such inclusion is not necessary under Commission case law. The fact is, far too many potential risks exist with any hazard for an Inspector to be expected to identify each and every one. Further, it would be nonsensical and

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<sup>1</sup> The earlier proceeding involved American Coal Company Docket Nos. LAKE 2007-139, LAKE 2008-79, LAKE 2008-83, LAKE 2008-84, LAKE 2008-122, LAKE 2008-237, LAKE 2008-532, LAKE 2008-536, LAKE 2008-537, LAKE 2008-538, and LAKE-2008-539.

not in the spirit of the Act for a violation of safeguard to be vacated where a hazard exists, causes an injury or accident, but the notice to provide safeguard fails to include the specific scenario involving the hazard that leads to the injury or accident.

*American Coal Co.*, LAKE 2007-139, etc., Unpublished Order at 3 (Sept. 20, 2010). The same analysis is equally applicable here.

*a. Safeguard No. 4056981*

On October 12, 1994, MSHA issued a notice to provide safeguard No. 4056981, which stated as follows:

The MT-11 personnel carrier located on the MMU 004, was not provided with a well maintained audible warning device. It failed to sound an alarm or warning when operated. This is a notice to provide safeguards that all personnel carriers should be equipped with well maintained, functional audible warning devices.

The notice was issued under section 75.1403-6(a)(1) of the Secretary's regulations.

I find that the notice to provide safeguard identifies with necessary specificity the hazard of a non-functioning audible warning device on a personnel carrier. The Respondent points out a number of potential risks that may be created by this hazard. *See* Resp. Mot. 5. Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific, namely, that all personnel carriers be equipped with functioning, well maintained audible warning devices. This condition is easily identified and corrected. I find this safeguard to be sufficiently specific. Moreover, Section 75.1403-6(a)(1) of the Secretary's Regulations "set[s] forth specific 'criteria' which guide authorized representatives in requiring safeguards," *see Wolf Run Mining Co.*, 32 FMSHRC \_\_\_, slip op. at 2 n. 3, No. WEVA 2008-804 (Oct. 21, 2010), and states that "[e]ach self-propelled personnel carrier should . . . [b]e provided with an audible warning device[.]" This criteria provision, which requires essentially the same thing as the notice of safeguard at issue, provided notice to the Respondent that such a safeguard could be issued.

For the above reasons, I find that Safeguard No. 4056981 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.

*b. Safeguard No. 7582396.*

On November 22, 2005, MSHA issued a notice to provide safeguard No. 7582396, which stated as follows:

This is a notice to provide safeguard for all longwall units, the hydraulic manifolds, hoses and CIU shield control boxes shall be mounted in a manner to provide maximum walkway clearance between the pan line cable tray rail and the shield components. In the event that clearances cannot be maintained to provide safe travel in these areas for the miners the conveyor shall be shut off and the electrical isolation switch at the head gate opened before miners travel through the affected area.

The notice was issued under section 75.1403 of the Secretary's regulations.

I find that the notice to provide safeguard identifies with necessary specificity the hazard of hydraulic manifolds, hoses and CIU shield control boxes which could obstruct the walkway between the pan line cable tray rail and the shield components on the longwall. The Respondent points out a number of potential risks that may be created by this hazard. *See* Resp. Mot. 6. Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific, namely, that the above mentioned objects be mounted in such a way that provides maximum walkway clearance between the pan line cable tray rail and the shield components. American argues that it is not clear what amount of clearance will be considered adequate for miners to safely travel through the walkway. By not providing a specific amount of clearance, the Secretary has chosen to impose upon herself a more difficult standard of proof for a violation of the safeguard. In the event the Secretary issues a citation for violation of this safeguard, the Secretary will be required to establish that American failed to mount the object in a position that provides the maximum amount of walkway clearance between the pan line cable tray rail and the shield components. Conversely, American will be able to provide evidence that it has mounted the objects in a location that provides maximum walkway clearance in the subject area. Moreover, the notice of safeguard goes on to provide a contingency plan if the objects "cannot be maintained to provide safe travel." By providing the operator with corrective measures which can be taken to address the hazard, as well as a contingency plan which can be utilized if the preferred method of remedying the hazard cannot be used, the Secretary has provided a sufficiently specific description of the conduct required to remedy the hazard.

For the above reasons, I find that Safeguard No. 7582396 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.

*c. Safeguard No. 4267616*

On January 27, 1995, MSHA issued a notice to provide safeguard No. 4267616, which stated as follows:

The PV55 was not equipped with a sealed-beam headlight, or its equivalent, on each end. The rear lights had a blown fuse. This is a notice to provide safeguards that all personnel carriers shall be

equipped with a functional sealed-beam headlight or its equivalent on each end.

The notice was issued under section 75.1403-6(a)(2) of the Secretary's regulations.

I find that the notice to provide safeguard identifies with necessary specificity the hazard of a non-functioning sealed-beam headlight on a personnel carrier. The Respondent points out a number of potential risks that may be created by this hazard. *See* Resp. Mot. 7. Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific, namely, that all personnel carriers be equipped with a functional sealed-beam headlight or its equivalent. I find this safeguard to be sufficiently specific. Moreover, Section 75.1403-6(a)(2) of the Secretary's Regulations "set[s] forth specific 'criteria' which guide authorized representatives in requiring safeguards," *see Wolf Run Mining Co.*, 32 FMSHRC \_\_\_\_, slip op. at 2 n. 3, No. WEVA 2008-804 (Oct. 21, 2010), and states that "[e]ach self-propelled personnel carrier should . . . [b]e provided with a sealed-beam headlight, or its equivalent, on each end[.]" This criteria provision, which requires essentially the same thing as the notice of safeguard at issue, provided notice to the Respondent that such a safeguard could be issued.

For the above reasons, I find that Safeguard No. 4267616 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.

*d. Safeguard No. 7577893*

On January 21, 2004, MSHA issued a notice to provide safeguard No. 7577893, which stated as follows:

A material trailer was observed parked along the 4th North Headgate at crosscut number 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 number 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.

The notice was issued under section 75.1403 of the Secretary's regulations. On May, 18, 2004, MSHA modified the notice to provide safeguard by adding the following language to the end of the "Condition or Practice" set forth above: "If not possible, then a readily visible warning device will be posted on each side to alert oncoming traffic."

I find that the notice to provide safeguard identifies with necessary specificity the hazard of mine equipment and trailers parked such that they extend outby the rib line. The Respondent points out a number of potential risks that may be created by this hazard. *See* Resp. Mot. 8. Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific,

namely, that all trailers and mine equipment be parked inby the rib line at all times. Moreover, the modification to the notice of safeguard added a contingency plan if parking the trailers and equipment inby the rib line is not possible. By providing the operator with corrective measures which can be taken to address the hazard, as well as a contingency plan which can be utilized if the preferred method of remedying the hazard cannot be used, the Secretary has certainly provided a sufficiently specific description of the conduct required to remedy the hazard.

For the above reasons, I find that Safeguard No. 7577893 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.<sup>2</sup>

*e. Safeguard No. 7581083*

On June 3, 2005, MSHA issued a notice to provide safeguard No. 7581083, which stated as follows:

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 be provided.

The notice was issued under section 75.1403-5(j) of the Secretary's regulations.

I find that the notice to provide safeguard identifies with necessary specificity the hazard of miners routinely crossing under an energized belt conveyor. The Respondent points out a number of potential risks that may be created by this hazard. *See* Resp. Mot. 8-9. Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific, namely, that suitable crossing facilities be provided at places where persons cross moving belt conveyors. American argues that the language of the safeguard is too subjective to provide meaningful notice of what is required to comply with the safeguard. I agree with Judge Manning's statement addressing the validity of the same safeguard that "[c]onveyor 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." *American Coal Co.*, LAKE 2007-171, etc., Unpublished Order at 20 (Dec. 17, 2010). Moreover, Section 75.1403-5(j) of the Secretary's Regulations "set[s] forth specific 'criteria' which guide authorized representatives in requiring safeguards," *see Wolf Run Mining Co.*, 32 FMSHRC \_\_\_\_, slip op. at 2 n. 3, No. WEVA 2008-804 (Oct. 21, 2010), and states that "[p]ersons should not cross moving belt conveyors, except where suitable crossing facilities are provided." This criteria provision, which requires essentially the same thing as the notice of safeguard at issue, provided notice to the Respondent that such a safeguard could be issued.

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<sup>2</sup> Recently, in *American Coal Co.*, LAKE 2007-171, etc., Unpublished Order at 17-18 (Dec. 17, 2010), Judge Manning determined that this same notice of safeguard was valid.

For the above reasons, I find that Safeguard No. 7581083 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.

## II. ORDER

Based on my findings, the Respondent is not entitled to summary decision as a matter of law and, accordingly, I **DENY** its motion for summary decision.

Margaret A. Miller  
Administrative Law Judge

Distribution: (U.S. Certified Mail)

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