

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**601 New Jersey Avenue, NW, Suite 9500**

**Washington, DC 20001-2021**

Telephone No.: 202-577 6809

Telecopier No.: 202 434 9949

March 28, 2011

|                            |   |                                  |
|----------------------------|---|----------------------------------|
| OAK GROVE RESOURCES, LLC., | : | CONTEST PROCEEDING               |
| Contestant                 | : |                                  |
|                            | : | Docket No. SE 2009-261-R         |
| v.                         | : | Citation No. 7696616; 01/08/2009 |
|                            | : |                                  |
|                            | : |                                  |
| SECRETARY OF LABOR,        | : | Oak Grove Mine                   |
| MINE SAFETY AND HEALTH     | : | Mine ID 01-00851                 |
| Respondent                 | : |                                  |
|                            | : |                                  |
|                            | : |                                  |
| SECRETARY OF LABOR,        | : | CIVIL PENALTY PROCEEDING         |
| MINE SAFETY AND HEALTH     | : |                                  |
| ADMINISTRATION, (MSHA),    | : | Docket No. SE 2009-487-P         |
| Petitioner                 | : | A.C. No. 01-00851-180940-01      |
| v.                         | : |                                  |
|                            | : |                                  |
|                            | : |                                  |
| OAK GROVE RESOURCES, LLC., | : | Oak Grove Mine                   |
| Respondent                 | : |                                  |

**DECISION**

Appearances:

Jennifer D. Booth, Esq., on behalf of the Secretary of Labor

R. Henry Moore, Esq., Jackson Kelly, PLLC, on behalf of Oak Grove Resources, LLC

**Introduction:**

These cases are before the Court on a notice of contest filed by the Respondent, Oak Grove Resources, LLC (“Oak Grove”) and a civil penalty petition filed by the Secretary of Labor (“Secretary”), acting on behalf of the Mine Safety and Health Administration (“MSHA”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as amended. (“the Act”) (30 U.S.C. §§ 815, 820). In the Notice of Contest, the Contestant challenged, among other

aspects, the validity of a safeguard, on several grounds. In the civil penalty proceeding, the Secretary, via a special assessment, seeks a \$55,000.00 penalty on the basis of an alleged violation of 30 C.F.R. § 75.1403-10(b), a safeguard provision. A hearing was held in Birmingham, Alabama on December 7, 2011.

### **Background:**

Miner Lee Graham was killed at Respondent's Oak Grove Mine on May 22, 2008. There is no dispute about the circumstances of his death which may be briefly summarized as follows: On the date of Mr. Graham's death, Oak Grove was in the process of transporting a shearer body to the longwall face via the main haulage road. The shearer body, a machine that operates on the longwall face, weighs 24 tons and at the time of the accident it was being transported on a "shearer carrier," which is a haulage carrier designed for the task of hauling the shearer body. Mr. Graham died when he was pinned between a locomotive he was operating and the shearer body.

Oak Grove was attempting to transport the shearer body using two tandem locomotives: Motors No. 3 and No. 8, to *pull* the shearer carrier and Motors No. 4 and 9 to *push* the shearer carrier. Therefore in terms of their destination to the longwall, Motors No. 3 and 8, since they were pulling, were leading and Motors No. 4 and 9 were following the procession. Each pair of locomotives was connected to one another by a coupling. For the two coupled motors pulling the shearer body, No. 8 was in the lead, and connected to No. 3. The No. 3 itself was connected to the shearer body by a one inch diameter, flexible, wire rope. Thus, unlike the relatively rigid connection between the motors, through a coupling, the connection for the *pulling* locomotives, utilizing a *wire rope* to the shearer carrier was anything but rigid. Miner Graham was operating the No. 3 motor. In contrast to the wire rope arrangement connecting the pulling motors to the shearer carrier, the pushing motors were connected to the shearer carrier by a *solid drawbar*.

To recap, if one were standing alongside the transporting effort at the time, such individual would have observed, beginning at the front, pulling end, the No. 8 motor, which was connected to the No. 3 motor via a coupling and then the No. 3 motor connected to the shearer carrier by the wire rope. Next would be the shearer carrier itself and on the pushing end, a connection from it, by means of a solid drawbar, to the No. 4 motor. Finally, the No. 9 motor was connected to the No. 4 motor via a coupling in the same fashion as the link between the No. 3 and the No. 8. The significance of the wire rope connection will become apparent momentarily.

To understand how the fatality occurred, picture the procession moving towards its destination, as described, and reaching an upgrade. Slack then developed in the wire rope connection and the consequence was a derailment of the shearer carrier. Examining the situation, the victim unwittingly placed himself in a dangerous position, standing in the middle of the track, between his locomotive and the derailed shearer carrier. It was then that the coupled motors, Nos. 3 and 8 either slid or rolled downhill with Mr. Graham becoming fatally pinned between those motors and the shearer carrier.

An MSHA investigation ensued. This investigation was conducted by Inspector David Allen. Upon the conclusion of his investigation, Inspector Allen issued Citation No. 7696616,

pursuant to Section 314(b) of the Mine Act for an alleged violation of Safeguard No. 2604892. In his testimony at the hearing, Mr. Allen spoke to the hazards arising from pushing cars on haulage roads. The hazards, he expressed, are plain. When one pushes a car visibility is affected because the load is in front of the pushing force. This makes it more difficult to see the track and any traffic that may lie ahead. Beyond that concern, when pushing, as opposed to pulling, one does not have positive control. Third, pushing also creates a pinch point, as happened here between the shearer carrier and the No. 3 motor.

### **The law regarding Safeguards:**

The law regarding safeguards is well-established and clear. A few cases, representative of that law, are here noted.

In *McElroy Coal*, 23 FMSHRC 201 (Feb. 2001), Judge David F. Barbour, discussed this issue where the mine challenged the validity of the underlying safeguard.<sup>1</sup> Judge Barbour noted that the Commission has recognized that section 314(b) of the Mine Act “manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining,” citing *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (April 1985), but that, because a safeguard is issued without notice and comment rulemaking, the interpretation of them is more restrained. Further, he observed that “the safeguard must identify with specificity the nature of the hazard involving the transportation of miners or materials at which it is directed,” citing *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (“*Southern Ohio Coal*”). As the Commission expressly stated in *Southern Ohio Coal*, “a safeguard notice *must identify with specificity the nature of the hazard at which it is directed* and the conduct required of the operator to remedy such hazard.” *Id.* at 512. (emphasis added). In that case, the safeguard spoke to fallen rock and cement blocks and required 24 inches of clearance on both sides of the conveyor belt. Given those identified hazards, the Commission held that “conditions such as the water described in the citation” were outside of the hazards identified in the safeguard’s notice.

Judge Barbour also noted that, for all of these requirements, it is the Secretary that bears the burden of proof in establishing the validity of the safeguard “by showing that the inspector evaluated the specific conditions at the mine and determined that the safeguard was warranted in order to address the actual transportation hazard.”<sup>2</sup>

---

<sup>1</sup> The text of that safeguard in that case provided: “Ten miners . . . were observed on the Blakes Reideg elevator . . . also on the elevator was a . . . cart loaded with 6 boxes of water, a belt conveyor scraper, and a pipe connector. If the elevator would stop abruptly, the cart and/or supplies could expose these men to injury from being struck. To eliminate this hazard, the following safeguard notice is hereby issued [:] This is a notice to provide safeguards prohibiting supplies, parts or tools, except small hand tools or instruments, to be transported with persons on the elevator at this mine.” The reader should note that the hazard was described in the safeguard notice.

<sup>2</sup> Judge Barbour also noted that the Secretary’s burden also includes establishing that the “conditions for which the citation was issued c[o]me within the safeguard.”

In *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781 (Nov. 1997), (“*Cyprus*”) the Commission spoke to the subject of safeguards in a context similar to this case. There, signal lights to control traffic were in issue.<sup>3</sup> Although the entire text of the safeguard was not stated in the decision, the quoted portion of it is still informative. There it noted: “. . . track haulage equip[ment]operators to use the block lights installed along supply track haulage at the mine, to clear such lights (turn off after each use) in order to assure approaching haulage equipment a clear road exists and also only 1 piece of haulage equipment shall be operated in the same block light except [motors] . . . .” That safeguard was later modified, deleting the one piece of haulage equipment being operated in a block requirement but adding a requirement that vehicles be separated by at least 300 feet and that the signal light be used properly so that others would know when other equipment was within a block. The Commission took the opportunity in *Cyprus* to review the requirements for a valid safeguard, as set forth in *Southern Ohio Coal Co.*, 14 FMSHRC 1, (January 1992)(“*Socco II*”). It noted that, in addition to the predicate requirement, that is, that there be a transportation hazard not covered by a mandatory standard and that a safeguard is necessary to correct the hazardous condition, the safeguard must state the corrective measures that are to be taken.

In line with these requirements, the Commission added that such safeguards must be strictly construed, because they are issued without the usual practice of notice and comment rulemaking. *Socco II*, 14 FMSHRC 1, 8.

### **Oak Grove’s challenge to the validity of Safeguard No. 2604892.**

Oak Grove has raised a number of challenges to MSHA’s enforcement action which will now be discussed.

Respondent contends that although the safeguard refers to a locomotive pushing two loaded supply cars down grades, nowhere does it identify the nature of the hazard to which it was directed. R’s Br. at 2. Looking to Commission precedent, Oak Grove asserts that the safeguard was not validly issued. It notes that not only do Commission decisions in cases such as *Socco II* make this a plain requirement for safeguards, but also that MSHA’s own Program Policy Manual (“PPM”) directs that the “safeguard notice should also identify the nature of the hazard to which it is directed.” Emphasizing this point, the PPM continues with an example of a potential subject for a safeguard, adding that the “safeguard should also include a statement of the hazards that . . . [it] is intended to prevent.” R’s Br. at 8-9, quoting 2003 PPM at p. 129. In fact, the safeguard notice in issue in this litigation fails to expressly address any hazard. Thus, the Respondent urges that because the safeguard in this case lacked the required specificity identifying the nature of the hazard, it must fail. R’s Br. at 7-10. Accordingly, it is Respondent’s position that the Citation in issue in

---

<sup>3</sup> In *Cyprus* the transportation hazard was leaving a block light “on” after an equipment operator had departed that block and the Commission upheld the validity of the safeguard. The light system provided a means of communication so that miners would be informed of the presence of another piece of equipment within a block. Disregarding the light procedure could result in an accident between cars operating in a block.

this proceeding should be vacated because the underlying safeguard “fails to identify with specificity the nature of the hazard at which it is directed.”<sup>4</sup>

The government’s sole witness was David Allen, who is with the MSHA District Office in Birmingham, Alabama. Presently he is the supervisor, Mine Safety and Health Specialist for the ventilation plans group. Tr. 16. Allen was assigned to investigate the accident associated with this litigation. Tr. 19. Ex 4 is Allen’s accident investigation report. Tr. 20. According to Allen, as noted earlier, miners were in the process of moving the shearer carrier and, as they were traveling upgrade, slack developed in the wire rope between the No. 3 motor and the shearer carrier. With that slack, the carrier derailed. Allen agreed that once the shearer carrier derailed, the miners evaluated the problem. This took anywhere between two to five minutes and during that time the motors on either side of the shearer carrier did not move. At some point after that time elapsed Mr. Graham, the victim, stepped in between the shearer body and the No. 3 motor and it was then that the motor moved, resulting in Mr. Graham becoming fatally pinned between that motor and the shearer body. Tr. 56-57. Allen agreed that “one of the causal factors” was someone forgot to set a brake on the motors that moved. Tr. 58. Thus, apart from the safeguard’s failure to identify any hazard, and even if the Secretary’s claim as to the hazards supposedly addressed by the safeguard were accepted, this accident occurred not because of any claimed failure to comply with that safeguard. In short the accident did not occur from pushing the shearer.

Allen, who had prior mining experience moving mining equipment, stated that, when in his past work at mines, he had performed such tasks, the equipment was pulled through the mine. The pulling was accomplished by using a solid bar, that is a tongue or a drawbar between the locomotive and the car itself. Yet, he conceded, even when moving by pulling, derailments would occur. Tr. 28-29.

The safeguard, which was originally issued in March 1986, is set forth in GX 2. Tr. 40. Allen offered *his particular interpretation* of the hazard the safeguard is intended to address. To that end, he described what the safeguard *requires*, that is, that cars on main haulage roads are not to be pushed. Tr. 42. Distinct from that requirement, which is undeniably in the safeguard, is the matter of the hazard. To deal with that, however, Allen moved from reading the text of the safeguard to “the hazard that [*he*] identified in association with the safeguard.” That answer required, not reading on Allen’s part, but *reading into* the hazard he *assumed* was intended by that safeguard. Tr. 42. Allen then proceeded to identify “several hazards associated with [the safeguard].” These included visibility hazards, the lack of “good positive control of the loads” by pushing instead of pulling, and creating a “pinch point.” Tr. 42-44. To get right to the point, the Court notes that not one of these hazards, or any other expressly stated hazard for that matter, is

---

<sup>4</sup>Alternatively, even if it is determined that the safeguard is valid, Respondent contends that the action must also fail because the conditions cited must be within the reasonable scope of its terms. Respondent raised several other arguments such as that the safeguard does not pertain to the act of moving heavy equipment. Given the outcome here, these contentions need not be resolved.

within the four corners of the safeguard, and as such the safeguard is fatally flawed.<sup>5</sup> Nor is the hazard so plainly obvious that it need not be stated.

It was brought out that during his investigation of the accident, Allen also issued two safeguard notices. Tr. 63. In contrast to the safeguard at issue here, Allen's safeguards, one of which was based on 30 C.F.R. § 75.1403-10(b), described both the condition *and the hazard* he identified. Tr. 64. The other safeguard he issued did the same thing; it identified the hazard. Tr. 65. Further, Allen admitted that the safeguard in issue in this case *does not* describe the hazard. Tr. 65. Accordingly, when Allen was asked if the safeguard made any reference to "pinch points or visibility or the ability to control the load," he responded: "No. I mean, it's not in there." Tr. 66. Allen admitted that when *he* writes a safeguard he always puts the hazard in it. Tr. 67.

For its part, the Secretary notes that the Act specifically provides for safeguards, per Section 314(b) of the Mine Act and that the provision allows the Secretary to issue "other safeguards adequate, in the judgment of an authorized representative . . . to minimize hazards with respect to transportation of men and materials." Of course, no one disputes those observations. The Secretary acknowledges that the inspector must determine the presence of an actual transportation hazard, which hazard is not already addressed by another mandatory standard and that the safeguard is necessary to correct that hazard.

To the Respondent's contention that the safeguard fails to specifically identify the hazard, the Secretary contends that the safeguard does sufficiently notify the mine of the hazardous conditions. Sec. Br. at 5. However, the Secretary's admission that the hazard must be identified is not unqualified, as she argues that the safeguard does not require enumerating the specific hazards in it, such as the risk of one being crushed or struck. In its Reply Brief, the Secretary reiterates that point, asserting that the Commission has never invalidated a safeguard for failure to identify the specific hazards involved. Sec. Reply at 1. The test, it maintains, is that the safeguard adequately apprise the mine operator of the hazardous practice proscribed by it. Here, the Secretary believes, the safeguard could not be plainer: cars on main haulage roads are not to be pushed, period. The Secretary adds that is exactly what occurred with this fatality. The shearer carrier was being pushed, contrary to the safeguard's prohibition of that practice. Thus, from the Secretary's perspective, upholding the safeguard is a simple matter. The safeguard proscribes pushing cars and the Respondent's Assistant General Mine Foreman/DayShift Foreman, Chad Johnson, admitted that the shearer carrier was being pushed as the shearer was being transported to the face. Sec. Br. at 7, citing Tr. 99. Therefore, it contends the Citation, No. 7696616, was established. As explained earlier, the Court has noted that Commission law requires more for a safeguard to be sustained.

---

<sup>5</sup>While the failure to state a hazard is fatal, even beyond that the safeguard would fail. Allen stated that if the operator had been pulling the shearer no pinch point would have existed between the No. 3 motor and the shearer carrier. Of course, the shearer was being pulled and pushed at the same time. The pulling aspect was by means of the wire rope but even as to that Allen maintained a rigid connection, not a wire rope, would have to be used. Just as one will not find any listed "hazard" in the safeguard, one will search in vain to find any requirement for a rigid connection.

## CONCLUSION

In applying the law regarding safeguards to a specific enforcement action, here a section 104(a) citation, the determination of the applicability and validity of the safeguard must begin, and be bounded by, the four corners of the notice to provide safeguard. In this instance, the safeguard in question, which was issued on March 3, 1986 provided in full:

The No. 902 battery powered locomotive was being used to push two loaded supply cars consisting of a car of timber and a car of roof bolts down the graded haulage supply mine track entry of the main south area of the mine, near the intersection of the No. 7 and No. 14 section switch and the No. 10 and the No. 5 section switch. Such area is approximately 2100 feet from the main bottom area of the mine and approximately 3600 feet from the No. 7 section and the No 10 sections. Respectively, this notice to provide safeguard requires that cars on main haulage roads not be pushed except where necessary to push cars from side tracks located near the the working section to the producing entries and rooms.

Manifestly, the notice to provide safeguard fails to satisfy the requirements established by the Commission because nowhere does it identify the hazard it purports to address. True, the *requirement* is stated clearly that, with some exceptions, cars may not be pushed, but *the hazard* from that activity is not stated. As such, applying the clear rules established by the Commission for evaluating the validity of a safeguard, the safeguard issued here must fail.<sup>6</sup>

---

<sup>6</sup>This safeguard has some history associated with it. After it was issued, a waiver of its requirements followed. Then, that waiver was voided and the safeguard reinstated. Those issues were addressed in the Court's earlier Order on the Respondent's Motion for Summary Judgment. 2010 WL 3616463 (August 2010). The "waiver" of the safeguard provides some insight into the hazard the safeguard attempted to address because the contingencies for the waiver speak of ensuring that the track is clear of all traffic, that a sign or light be placed to prevent equipment from entering the haulage route during the move, and that sufficient motors be employed to control the load. However, there are two problems with referencing the waiver to understand the hazard addressed by the safeguard. First, the *safeguard* must identify the hazard in the first instance. Subsequent documents, such as a waiver, cannot act as a substitute for what the safeguard must provide in the first instance. Only a new safeguard notice or an amendment to the original safeguard notice can fill the void created by the absence of a hazard being identified. Second, even if it were assumed for the sake of argument that one could look to a subsequent document that is not a safeguard itself or an amendment to one, in this case the waiver only implicitly identifies the hazard being addressed.

The history of the safeguard in this case fails to comport with these requirements.<sup>7</sup>

## ORDER<sup>8</sup>

---

<sup>7</sup> The Secretary has also noted that two other administrative law judges have recently addressed this issue. For example, Judge Miller in *American Coal Company* held that it is not required for a safeguard to specify each specific scenario that may develop. Instead the requirement is for the safeguard to identify the hazard. Order Denying Respondent's Motion for Summary Decision, LAKE 2007-139 etc. (September 20, 2010) Administrative Law Judge Manning reached the same conclusion in a separate case involving *American Coal Company*, LAKE 2007-171 etc. (December 17, 2010). Some comment about the impact of these two administrative law judge decisions is in order. The first, and most obvious observation, is that decisions issued by fellow administrative law judges have no precedential effect. The second observation, the corollary of the first, is that the Court must pay attention to the Commission's decisions. That said, a closer examination of the administrative law judges's decisions cited by the Secretary is still useful. In Judge Miller's decision in *American Coal Company*, she stated that a safeguard "hazard" refers to "conditions/objects in the mine, as opposed to potential risks/outcomes associated with those conditions or objects." Order Denying Respondent's Motion for Summary Decision, LAKE 2007-139 etc. (September 20, 2010). For Judge Miller the safeguard must 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." This Court interprets the phrase "a condition/object" that could affect the safe transportation as synonymous with the hazard. But beyond the semantic choices employed, a closer examination of the safeguards themselves reveals that they are quite different from the safeguard issued in this case. In one, a miner was being hoisted in a cage with the gate in open position. The safeguard required that the gate be closed. In another, a mine floor had loose and dislodged flooring and the safeguard required such problems to be corrected either by re-securing or removing the problems, while another was issued for insufficient travelway width due to water and slurry, a problem to be corrected by removal of the water and slurry. In the Court's view, the hazards were identified in many instances. A safeguard addressing a miner traveling in a car with the gate open needs no further statement, as it is plain that the hazard, an open door on a moving elevator, creates a hazard. Similarly, in Judge Manning's decision, *American Coal Company*, LAKE 2007-171 etc. (December 17, 2010), in many instances the hazards were inherently or expressly described within the safeguards.

<sup>8</sup> The parties raised a number of other issues but, because of the Court's ruling that the safeguard was irreparably flawed by failing to identify the hazard for which certain activity was to be proscribed, these matters became ancillary. These included Oak Grove's claim that after the MSHA waiver was voided, the agency allowed Oak Grove to develop its own procedure for pushing heavy equipment; that the safeguard here only applied to mine supply cars, not moving heavy equipment; that it was safer to push the shearer carrier; that at least one MSHA inspector had observed the mine move heavy equipment and made no objection to the process and that a former MSHA District Manager testified that he ordered all deficient safeguard notices to be vacated and if a hazard was again determined to exist, to re-issue the safeguard with the hazard clearly stated in it.



For the foregoing reasons, Oak Grove's contest to Citation No. 7696616 is sustained and accordingly that Citation is hereby VACATED. Further, the Petition for the Assessment of Civil Penalty in Docket No. SE 2009-487-P is hereby DISMISSED.

William B. Moran  
Administrative Law Judge

Distribution:

Jennifer Booth, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, 401 Liberty Avenue, Suite 1340, Pittsburgh, PA 15222

---

For various reasons, none of these claims were considered impressive by the Court but it is unnecessary to elaborate upon them, given the determination that the safeguard itself failed to identify the hazard involved.