FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 19, 2010

OAK GROVE RESOURCES, LLC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2009-261-R
	:	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
Petitioner	:	A.C. No. 01-00851-180940-01
v.	:	
	:	
OAK GROVE RESOURCES, LLC.,	:	Oak Grove Mine
Respondent	:	

ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT and its ALTERNATIVE MOTION FOR PARTIAL SUMMARY DECISION AS TO SIGNIFICANT & SUBSTANTIAL FINDINGS

This case arose in connection with a fatality at the Respondent's Oak Grove Mine on May 22, 2008. It is alleged that on that date a motorman died when he was crushed between "a derailed haulage car and the locomotive he had been operating." Citation No. 7696616, issued January 8, 2009. The Citation averred that the haulage car was being pushed on the main haulage road and that the miner would not have been exposed to the hazard if the haulage car was pulled, instead of being pushed. MSHA contended that the practice of pushing the haulage car contravened a safeguard notice, number 2604892, issued more than more than twenty years earlier, on March 3, 1986.

The pertinent text from the March 3, 1986 issuance of the safeguard provided:

> 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 working section to the

producing entries and rooms.[1]

Oak Grove Exhibit 2.

Presently before the undersigned Administrative Law Judge ("Court") is Respondent's Motion for Summary Decision, or in the Alternative, Motion for Partial Summary Decision with Respect to Significant and Substantial Findings. ("Motions"). The Secretary filed a Response to the Respondent's Motions ("Response"). Regarding its Motion for Summary Decision, Contestant/ Respondent Oak Grove Resources, LLC ("Oak Grove") acknowledges that the Safeguard was issued in 1986 but that it then received a waiver from that Safeguard on August 31, 1987. Oak Grove then recounts that, on December 21, 2001, MSHA issued a notice that the waiver was void and that "all '[f]uture MSHA inspections of the transportation of men and materials shall be directed by the provisions of 30 CFR Part 75.1403." Motion at 3. The history of the events surrounding this Safeguard is not in dispute. Rather, Oak Grove's critical assertion is that, although MSHA had voided its waiver, it then needed to reinstate the Safeguard, Number 2604892, but that it never did so. Thus, the question posed is what procedural steps are required by MSHA in circumstances when it issues a valid Safeguard notice, then issues a "waiver" for that Safeguard, and then, thinking better of that decision to issue a waiver, wishes to reinstate the original Safeguard. If Oak Grove is correct that MSHA needed to formally reinstate the Safeguard, then it would be entitled to summary decision, as the safeguard did not exist at the time of the fatality and consequently any citation relying on it would be null.

Oak Grove's motion in the alternative argues that, even if the safeguard did not need to be reinstated, the "significant and substantial" designation can not be included within the Citation because only "mandatory health and safety standards" may have such a finding and a "Notice to Provide Safeguard" is not such a "mandatory standard" under the Mine Act. *Id.* at 4.

Discussion

I. Oak Grove's Motion for Summary Decision

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[1]The condition or practice identified in the safeguard, which prompted the notice to provide safeguard on that date, provided; "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 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." Oak Grove Exhibit 2, copy of the Safeguard issued March 3, 1986. Oak Grove agrees that, apart from the particular condition or practice identified, the Safeguard "requires that cars on main haulage roads not be pushed except where necessary to push cars from side tracks near the working section to the producing entries and rooms." Oak Grove Memorandum in Support of its Motion (Memorandum in Support) at 2.

In its Memorandum in Support of its Motions, Oak Grove describes MSHA's 1987 action as waiving the safeguard which had been issued the year before. Thereafter, in 2001, it acknowledges that it was informed by letter that the 1987 waiver was void. However, it contends that not only did the letter *not* indicate that the 1986 safeguard was now reinstated, but to the contrary, it believed that the letter suggested that, with the act of voiding the waiver, safeguards then would be issued in the future. Oak Grove, looking to the wording of the safeguard provisions, points out that while such safeguards may be "provided" to minimize hazards with respect to the transportation of men and machines, this is implemented by the authorized representative's issuance, in writing, of the "specific safeguard which is required" and which is to include a time for the operator to provide and maintain such safeguard. Memorandum in Support at 4. It is Oak Grove's position that the December 3, 2001 voiding letter is not a substitute for those safeguard issuance requirements found at 30 C.F.R. § 75.1403. The MSHA letter, it contends, is merely a "blanket statement of sorts" which voided all waivers issued before 1986. Oak Grove complains that the letter left it with "no required notification of what [would now be] specifically required of [it]" and this left Oak Grove unable to discern whether it would be receiving a new safeguard or simply that the prior safeguard would be reinstated. *Id.*

In the Secretary's Response, it characterizes MSHA's August 31, 1987 letter as "a waiver of 30 C.F.R. 75.1403-10(b) contingent upon six conditions."[2] It then asserts that MSHA's December 3, 2001 letter "provided the Respondent with clear notice that the August 31, 1987 letter was void." The effect of that voiding, it contends, was to "re-establish[] the original conditions of [the 1986] Safeguard." Response at 2. MSHA asserts that the December 2001 letter "specifically voided the pushing of heavy equipment on track haulage roads." The contention is accurate, as the letter states that the Respondent is "hereby notified that the waiver dated August 31, 1987, permitting the pushing of heavy equipment on track haulage roads and any other waivers granted prior to January 1, 1996, is void." Significantly, as observed by the Secretary, the next line in the letter voiding the August 1987 waiver advises that "[f]uture MSHA inspections of the transportation of men and materials shall be directed by the provisions of 30 C.F.R. Part 75.1403."

The Court agrees with the Secretary that the December 3, 2001 letter from MSHA to the Respondent negated the August 1987 waiver and thereby restored the effective status of the March 3, 1986 notice to provide safeguard. Although Oak Grove cites to *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Rev. Comm. April 1985) ("*SOCCO I*") for the proposition that a safeguard notice must identify with specificity the nature of the hazard being addressed and the conduct to remedy it, this requirement is applicable at the time the safeguard is first issued. Oak Grove would prefer to treat this case as if no prior safeguard had been issued, but that is not the case. In short, the December 3, 2001 letter from MSHA was not issued as if there was a blank slate on the issue, as that

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[2]The Secretary asserts that the August 31, 1987 letter "never specifically stated that Safeguard No. 2604892 was waived." Response at 2. This is not a credible contention as the single page letter is titled "W A I V E R", advises in it that "[a] Waiver is issued to the operator," and then provides that the conditions upon which the "waiver" is contingent, identifying six procedural steps to be followed.

is not the historical reality.[3]

Oak Grove's position that MSHA did not provide "proper notice that the safeguard would *again* be considered enforceable" is rejected. *Id*. at 6 (emphasis added). Although it contends that the December 2001 letter from MSHA indicated only "a *future* intention to enforce Section 75.1403, with no mention of the past Safeguard" and, applying that perspective, it asserts that the Safeguard in issue had not been "properly reinstated," that is not a fair reading of the December 3, 2001 letter from MSHA. *Id.* (emphasis in original). Oak Grove cites no principle of law to support its claim that, because it issued a waiver, MSHA must begin the safeguard notice process *ab initio*. Even the waiver itself listed six contingencies for it to apply and there was no indication in that letter that MSHA could not entirely void the contingent-laden waiver. It is noted that the context in which the waiver was issued was not contractual and therefore MSHA did not take on any obligations which would restrict its ability to reactivate the 1986 Safeguard notice.[4] Nor does the affidavit of Mr. Thompson, offered by Oak Grove to support the idea that the Notice of Safeguard was not in effect after it received the December 3, 2001 letter from MSHA, provide a recognizable defense, as the determination made here involves the *legal determination* of the terms of the waiver and the December 2001 notification to Oak Grove that the waiver was now void. For that reason, Mr. Thompson's *personal interpretation* of the MSHA December 2001 letter does not establish the letter's legal effect.

Accordingly, the Court finds that the December 3, 2001 letter revived the March 3, 1986 Safeguard and there was no obligation for MSHA to take the strictly procedural steps anew in order to return the notice of safeguard to its full effect.

II. Oak Grove's Alternative Motion for Partial Summary Decision with Respect to Significant and Substantial Findings.

As noted, Oak Grove's alternative contention is that, even if the Court finds that the safeguard is in effect, the Citation in issue in this case cannot include a "significant and substantial" finding because that designation is only available for violations of mandatory health and safety standards and a safeguard is not such a standard. To support this argument,
Oak Grove looks to Section 104(d) of the Mine Act, which provides that if a violation of a mandatory health or safety standard is found, other findings may accompany that determination. One of those possible findings is that the nature of the violation is such that it "could significantly and

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[3]Oak Grove makes similar arguments on that theme, such as contending that an inspector must first determine that a hazard exists before a notice to provide safeguard may be issued. These fail for the same reason; Oak Grove's contentions cannot be grounded on amnesia.

[4]Most frequently, as distinct from the situation involving Oak Grove, the subject of voiding a waiver arises in plea bargain contexts where there is, in effect, a contract between the parties.

substantially contribute to the cause and effect of a . . . mine safety and health hazard," which is known by the shorthand expression as a "significant and substantial" finding or, even briefer, a "S & S" finding.

As only "mandatory health and safety standard[s]" can potentially include the "significant and substantial" finding, Oak Grove looks to the Mine Act's definitions section for the meaning of such standards. There, at Section 3(l)[5], the Mine Act provides that this means "the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act[.]" In short, an "S & S" finding can only be included if the standard is established by titles II or III of the Mine Act or promulgated pursuant to Title I of the Mine Act.

Oak Grove notes that cases, such as *Cyprus Emerald Resources Corp. v. FMSHRC*, 195 F.3d 42 (D.C. Cir. 1999) ("*Cyprus Emerald*") support this view. The Court of Appeals held there that a "significant and substantial" finding was not available for two cited regulations because they were not mandatory standards promulgated under section 101 of the Mine Act.[6] Instead the regulations in issue there were promulgated under section 508 of the Mine Act. Mandatory safety and health standards are to be promulgated under section 101 of the Act. The Court concluded that no *Chevron* analysis[7] was needed, as the plain wording of the Act allows the "significant and substantial" finding only for violations of mandatory health or safety standards. *Cyprus* at *45.

For its part, the Secretary too cites to *Cyprus Emerald*, agreeing that only a mandatory health or safety standard may have the additional designation of "S & S." Thus, the Secretary turns to Section 3(l) of the Mine Act as well. The Secretary then observes that the interim *mandatory safety standards* under Title III of the Mine Act provide, without any qualifier, that the provisions of sections 302 through 318 of Title III *shall be* interim mandatory safety standards applicable to all underground coal mines and shall be enforced *in the same manner and to the same extent as any mandatory safety standard.* The Secretary submits that this language is inescapable and consequently that Section 314(b) is to be enforced as the mandatory standard that it is. Response at 4.

The essential problem with *Cyprus Emerald* is that its reach is limited to standards that are

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[5] To avoid confusion, it is noted that the designation after 3 is a lower case "L."

[6]The regulations promulgated under section 508 involved 30 C.F.R. § 50.10, a requirement to notify MSHA of a refuse pile collapse and 30 C.F.R. § 50.11(b), for failing to investigate that collapse.

[7]"*Chevron*" refers to the Supreme Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which is the seminal decision on the subject of deference to agencies' interpretations of the statutes and regulations they administer.

not mandatory health or safety standards.[8] If the matter involves a mandatory health or safety standard, as it does in this *Oak Grove* case, then *Cyprus Emerald* counts for naught. 30 C.F.R. § 50.11(b), dealing as it does with accident investigations, is not a mandatory *health or safety* standard. Rather, it is a standard dealing with a mine operator's duties in the wake of an accident. While the Commission concluded that non-mandatory health or safety standards could include a 'significant and substantial" designation on the theory that the Mine Act was ambiguous on that point, the D.C. Circuit in no way suggested that such a designation was improper where a mandatory health or safety standard *is* involved.[9]

The Secretary also notes that the 11th Circuit, in addressing the language found in Section 201(a) of the Mine Act, which language is nearly identical to that in Section 301(a), concluded that Section 202(f) is a mandatory health standard. *National Mining Ass'n v. Sec'y of Labor*, 153 F.3d 1264 (11th Cir. 1998). Although the focus of that case was the next step envisioned by Congress, that such mandatory standards could be superseded, but only by *improved* mandatory standards, it necessarily agreed that, until *such improvements* came about, the existing *interim* standards were *mandatory*.[10] This meant that, applying the plain language of Title II, which has the heading "Interim Mandatory Health Standards," the 11th Circuit had to have recognized the word "Coverage" for such mandatory health standards and read exactly what Congress directed: "[t]he provisions of sections 202 through 206 of [Title II] and the applicable provisions of section 318 of title III shall be interim *mandatory health standards* applicable to all underground coal mines until superceded

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[8]As an aside, the Court notes that sometimes there is much made of whether an enforcement tool is denominated as a 'regulation' or a 'standard.' However, it is noteworthy that the Court of Appeals in *Cyprus Emerald* used those descriptions interchangeably. As one example, among others in that decision, the D.C. Circuit spoke of "conditions that did not violate the regulation under which the mine operator was cited. Because that regulation *was* a mandatory standard." *44 at n. 3. At least here though it does not matter as this case deals strictly with mandatory standards.

[9]The Court is aware of the holding in *Big Ridge*, 30 FMSHRC 1172, (ALJ, Nov. 24, 2008) in which another ALJ reached a different conclusion than this Court does today. The reasons for this Court's conclusions have been set forth in this Order. While the judge in *Big Ridge* expressed that allowing a S & S finding for a safeguard would elevate "form over substance," the form and the substance was created and expressed by Congress when it enacted Section 301(a).

[10]The fact that the 11th Circuit determined that MSHA came up short in its attempt to supplant the existing mandatory standards with improved standards meant simply that the existing interim standards remained what they were: mandatory. In fact, the court specifically stated that "[m]andatory health and safety standard is defined, in §802 (*l*) as the 'interim mandatory health or safety standards.'" *1267. And, to make it clear, that court added that the such interim standards remain what they are, mandatory, and they continue as such until they are superceded effectively. *1268.

[by improved mandatory health standards]." Title III employs the same approach, the only difference being that the subject addressed by Congress there is "interim *mandatory safety standards* for underground coal mines. Thus, in the "Coverage" under Title III, Congress mirrored its commands for Title II, by providing that "[t]he provisions of sections 302 through 318 of [Title III] shall be interim mandatory safety standards applicable to all underground coal mines until superceded [by improved mandatory safety standards]."

As applied here, there is no genuine dispute but that the measure for deciding whether a "significant and substantial" finding may attach to safeguard violations is dependent on whether the standard was established by titles II or III of the Mine Act or as a standard promulgated pursuant to title I of that Act.

Oak Grove sums up its position that the authority for the Secretary of Labor to issue safeguards is derived from Section 314(b) of the Mine Act and that the Secretary implemented that statutory provision by promulgating the regulations found at 30 C.F.R. § 75.1403. *Id.* at 9. It asserts that the "requirements set out in the safeguard, not the Order or the criteria or Section 314(b) or Section 75.1403, establish the conduct required of the operator." *Id.* at 10. On those bases it contends that, as a safeguard is neither an "interim standard" established by Titles II or III of the Mine Act nor is it promulgated under Title I pursuant to notice and comment rulemaking, it does not fit within the definition of a mandatory standard. *Id.* at 11.[11]

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[11]Oak Grove implies that, as safeguards are issued on a mine-by-mine basis, and as the "typical[]" method for promulgating mandatory health standards is through "notice and comment rulemaking," this distinction somehow bears upon the authority to include "significant and substantial" findings. But this observation overlooks that a purpose of making such a finding is to record whether the nature of the violation is such that it "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." Lest the legal analysis completely obscure the facts, it should be remembered that there was a fatality here and, according to the allegations, it was exactly the conduct proscribed in the safeguard notice that caused the motorman to be crushed between the haulage car and the locomotive. Further, had the safeguard's proscription been heeded, namely had the haulage car been pulled, instead of pushed, the fatality would not have occurred. While the Court does not suggest that this controls the outcome, it is noted that the safeguard is very different from the circumstances the Court of Appeals dealt with in *Cyprus Emerald* because the regulations there dealt with notifying MSHA after an accident and failing to investigate such accident. Violation of those duties could not conceivably significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Another distinction asserted by *Oak Grove* is that there must be a violation before one can challenge a safeguard and that this is different from the ability to challenge mandatory safety and health standards promulgated under Section 101 of the Mine Act. The short answer to this is that *Congress* created the authority to deal with this specific topic in order to minimize hazards it recognized as inherent with the transportation of men and materials. Therefore, the challenge, if one were to be made, should have been when the statutory provision was enacted.

Oak Grove further maintains that, contrary to the determination of Judge Feldman in *Wolf Run Mining Co.,* 30 FMSHRC 1198, 2008 WL 5479246, (December 18, 2008), safeguards are not interim mandatory standards established under Title III of the Mine Act. To support this view, Oak Grove points to the fact that safeguard notices are issued on a mine-by-mine basis by the issuing inspector and it contends that the "substantive benchmark for the safeguard is the individual safeguard notice itself." *Id.* at 14. It rejects the position that one can rely on section 314(b) of the Mine Act as the source of the safeguard because that statutory provision does not itself spell out the requirements that can be violated.[12]

In the Court's view, the arguments made by Oak Grove in this regard note, from its perspective, alleged problems with safeguard notices but their argument does not show that safeguards were not established as interim mandatory standards under Title III of the Mine Act. Thus, to remark that safeguards lack a particular code section to examine, and to note that the safeguard notice itself provides the substantive benchmark, is really a disagreement over the method *Congress employed* to address enforcement for the safe transportation of men and materials, but not a challenge to whether safeguards are interim mandatory standards under Title III. Despite the subject's obvious concern to Congress, as expressed through Section 314, Oak Grove's interpretation would deny MSHA from expressing that a given violation is "significant and substantial" even when, as here, the facts, at least as alleged here, fairly shout that it was.[13]

Oak Grove does attempt in a fashion to address the language that is troublesome to its argument, namely that Section 301(a) of the Mine Act provides that "the provisions of Sections 302 through 318 shall be interim mandatory safety standards applicable to all underground coal mines . . . and shall be enforced in the same manner and to the same extent as any mandatory standard promulgated under section 101 of this Act." *Id.* at 15. (ellipsis in quoted language). To avoid this plain expression, Oak Grove simply puts that language aside and contends that safeguards only allege a violation of the underlying language in that safeguard and therefore never allege a violation of Section 301 itself.

While Oak Grove acknowledges that Judge Feldman correctly observed that since Section 314(b) is included within Title III and therefore that safeguards issued pursuant to that Section *must* be classified as interim mandatory standards, it describes this observation as "an unnecessary detour" which can be avoided if one examines only the underlying safeguard itself. *Id.* at 16.

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[12]In this Court's view at least, in its next breath, Oak Grove's own memorandum provides the answer to this issue, because as it notes, Congress gave the agency "a general grant of authority" to issue safeguards to minimize hazards pertaining to the transportation of men and materials. Oak Grove Memorandum at 14.

[13]While Oak Grove points to the fact that 30 C.F.R. § 75.1403 is "a verbatim replication of Section 314(b)" of the Mine Act and sees that as evidence of the problem with safeguards, the Court sees it as evidence that, in fact, safeguards *literally* allege violations of Section 314(b).

The Court does not view Judge Feldman's route as a "detour" but rather as the main thoroughfare to answering the issue.[14]

Accordingly, for the reasons stated, Oak Grove's Motion for Summary Decision or Partial Summary Decision is **DENIED**. The case should now proceed for scheduling of the hearing. The parties are directed to contact the Court for that purpose.

William B. Moran
Administrative Law Judge

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[14]Nor, for reasons already articulated, does the Court accept Oak Grove's reliance on the D.C. Circuit's analysis in *Cyprus Emerald* to support its argument, as the Part 50 violations there did not involve either interim mandatory standards established by Titles II and III nor standards promulgated under Title I. Accordingly, the Court does not agree with Oak Grove's view that the D.C. Circuit's expression in *Cyprus Emerald* "rings just as true for safeguards as it does for Part 50 regulations." Oak Grove Memorandum at 19. The reach of *Cyprus Emerald* is simply not as broad as Oak Grove would wish.