FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
202-434-9981/tele 202-434-9949/fax

December 4, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2008-318 A.C. No. 36-05018-143487-01
v.	:	
CUMBERLAND COAL RESOURCES, LP, Respondent	:	Mine: Cumberland

ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION

This case is before me on a petition for assessment of civil penalties filed by the Secretary of Labor against Cumberland Coal Resources, LP, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The specific citations at issue, Citation Nos. 7013038, 7025471, 7025962 and 7070887, allege significant and substantial ("S&S") violations of notices to provide safeguards issued pursuant to the Secretary's regulations applicable to underground coal mines. 30 C.F.R. § 75.1403. Cumberland filed a motion for partial summary decision challenging the findings that the violations were S&S, and the Secretary filed a response opposing Respondent's motion. For the reasons set forth below, I find that there exists no genuine issue as to any material fact, and that Cumberland is entitled to summary decision as a matter of law on the issue of whether the violations can be designated S&S.[1] Accordingly, Citation Nos. 7013038, 7025471, 7025962 and 7070887 will be amended to specify that the violations were not significant and substantial.

Facts

On October 4, 2007, a coal mine inspector for MSHA, inspected Cumberland Coal 's Cumberland Mine, which is a large underground mine that extracts bituminous coal in Greene

[1] Commission Procedural Rule 67 provides that a motion for summary decision shall be granted if there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The undersigned Administrative Law Judge recently granted a virtually identical motion filed by mine operator Big Ridge, Incorporated. *Big Ridge Inc.*, Docket Nos. LAKE 2008-68 and LAKE 2008-69, Order Granting Respondent's Motion for Partial Summary Decision and Denying the Secretary's Motion to Amend, November 24, 2008.

County, Pennsylvania. During the inspection, he observed that a clear travelway of at least 24 inches was not being maintained along the 8 Butt coal conveyor belt walk side from the tail piece outby for 25 feet, and issued Citation No. 7025471, alleging a violation of Safeguard No. 7083583, which had been issued on October 17, 2003. Resp. Mot. Ex. 2. On November 5, 2007, an inspector observed that a two foot clear walkway was not being maintained on the tight side of the South Mains Beltline, for which Citation No. 7013038 was issued, also alleging a violation of Safeguard No. 7083583. Resp. Mot. Ex. 1. That same day another inspector issued Citation No. 7025962, for failure to maintain a clear travelway at least 24 inches wide on both sides of the Cumberland West section (MMU 020-0) belt feeder, in violation of Safeguard No. 7025484, issued on October 4, 2007. Resp. Mot. Ex. 3. On December 11, 2007, an inspector observed that Cumberland had failed to maintain a clear travelway of at least 24 inches along the walk side of the feeder on the 029-0 mmu section, and issued Citation No. 7070887, which also alleged a violation of Safeguard No. 7025484. Resp. Mot. Ex. 4. All citations allege that the violations were S&S.

Cumberland timely contested the civil penalties assessed for the violations, and the Secretary filed a petition for assessment of civil penalties. Cumberland filed an answer to the petition, and a motion for partial summary decision on the S&S issue. The Secretary opposed the motion.

Analysis

Cumberland Coal contends that, under section 104(d)(1) of the Act, only violations of mandatory health and safety standards can be designated S&S and, because neither the safeguards allegedly violated, nor section 75.1403, are mandatory standards, the violations cannot be designated S&S.

The Secretary argues that 30 C.F.R. §75.1403 is taken directly from section 314(b) of Title III of the Act, which grants her authority to issue safeguards. Because section 301(a) states that: "The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines," and section 802(l) defines the term "mandatory health or safety standard" as "the interim mandatory health or safety standards established by titles II and III of this Act," she contends that section 75.1403 is a mandatory safety standard. Consequently, she asserts that the violations can properly be designated S&S, and Cumberland Coal's motion for partial summary decision should be denied.

Section 104(d)(1) of the Act states, in pertinent part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary *finds that there has been a violation of any mandatory health or safety standard*, *and if he also finds that,* while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard,* and if he finds such violation to be caused by an

> unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. (emphasis added)

30 U.S.C. §814(d)(1). A "mandatory health or safety standard" is defined as "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 chapter." 30 U.S.C. 802(l).

In *Cyprus Emerald Res. Corp.*, 195 F.3d 42 (D.C. Cir. 1999), the court held that the language of section 104(d)(1) was clear on its face, and permitted a designation of S&S only for violations of mandatory health or safety standards. It reversed a holding by the Commission that a violation of a Part 50 regulation could be designated S&S, even though the regulation was not a mandatory health or safety standard. The question to be decided, therefore, is whether or not the subject citations allege violations of mandatory health or safety standards.

Section 314 of the Act specifies a number of safety requirements for "Hoisting and Mantrips" equipment. For example, section 314(c) provides:

> (c) Hoists shall have rated capacities consistent with the loads handled and the recommended safety factors of the ropes used. An accurate and reliable indicator of the position of the cage, platform, skip, bucket, or cars shall be provided.

30 U.S.C. § 874(c). Those specific requirements are mandatory safety standards pursuant to section 301(a) of the Act.[2] 30 U.S.C. §§ 861 and 961(b).

In addition to the specific safety requirements in sub-sections 314(a) and (c) through (f), section 314(b) grants the Secretary broad discretion to issue safeguards in order to guard against all hazards attendant upon haulage and transportation in coal mining. *Southern Ohio Coal Co.*,

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[2] Section 301(a) of the Act states:

> The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act.

In addition, section 301(b)(1) of the Addendum to the 1977 Mine Act, specified that "standards and regulations under the Federal Coal Mine Health and Safety Act of 1969 [30 U.S.C. § 801 et seq.] which are in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards" under the 1977 Act. 30 U.S.C. § 961(b).

7 FMSHRC 509 (Apr. 1985) ("*SOCCO I*"); *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992) ("*SOCCO II*"); *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (Apr. 1985). Section 314(b) of the Act provides:

> (b) Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 U.S.C. § 874(b). The Secretary promulgated the current regulations addressing safeguards in 1970. 30 C.F.R. §§ 75.1403 – 75.1403-11. The initial provision, section 75.1403, repeats, verbatim, the language of section 314(b) of the Act. Section 75-1403-1 sets forth procedures for the issuance of safeguards and explains that sections 75-1403-2 through 75.1403-11 set out the criteria by which MSHA inspectors are to be guided in requiring safeguards on a mine-by-mine basis.[3]

> § 75.1403-1 General Criteria
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> (a) Sections 75-1404-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.
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> (b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator under section 104 of the Act.

30 C.F.R. § 75.1403-1(a) and (b). Under this regulatory scheme issuance of a notice to provide safeguard requires that an inspector: (1) determine that there exists at the mine an actual transportation hazard not covered by a mandatory standard; (2) determine that a safeguard is necessary to correct the hazardous condition; and (3) specify the corrective measures that the safeguard should require. *SOCCO II*, 14 FMSHRC at 8.

In *SOCCO I*, the Commission discussed the unique nature of safeguards.

> [i]t is of paramount importance to recognize the crucial difference in the rules of interpretation applicable to mandatory standards promulgated by the Secretary

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[3] MSHA's Program Policy Manual recognizes that the guideline criteria set forth in the regulations are not mandatory, and that safeguard notices must address hazards that are not covered by a mandatory safety standard. V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 125 (2003).

> and those applicable to 'safeguard notices' issued by [her] inspector . . . Mandatory standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Mine Act. Section 314(b) of the Mine Act, on the other hand, grants the Secretary a unique authority to create what are, in effect, mandatory safety standards on a mine-by-mine basis without resorting to otherwise required rulemaking procedures. We believe that in order to effectuate its purpose properly, the exercise of this unusually broad grant of regulatory power must be bounded by a rule of interpretation more restrained than that accorded promulgated standards.

SOCCO I, 7 FMSHRC at 512.

A notice of safeguard is an order to comply with a specific safety requirement within a fixed time frame, and to continue to comply with it thereafter. As orders issued pursuant to section 314(b) of the Act, they are enforceable under section 104(a) of the Act. Violations of a safeguard are enforced by issuance section 104(a) citations and, upon an operator's failure to timely abate a violation, by issuance of withdrawal orders pursuant to section 104(b). While not always consistent in use of language, Commission decisions have made clear that it is the violation of the written safeguard that subjects an operator to liability for penalties and sanctions imposed pursuant to sections 104(b) and 110 of the Act. *SOCCO I*, 7 FMSHRC at 513 (operator not given sufficient notice that conditions "would violate the underlying safeguard notice's terms"); *SOCCO II*, 14 FMSHRC at 14 (on remand the judge should "determine whether the safeguard was violated").

The Commission, in its later-reversed *Cyprus Emerald* decision, discussed *Mathies Coal*, the seminal case interpreting the Act's S&S language.[4] It noted that the citation involved in *Mathies* alleged a failure to comply with a safeguard notice, and that: "A safeguard, because it is not issued pursuant to the procedures set forth in section 101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard." *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808-09 n.22. (Aug. 1998). In reversing the Commission, the circuit court made clear that regulations or other provisions that are not mandatory health or safety standards cannot be designated S&S. The safeguards at issue in this case were issued in 2003 and 2007 by MSHA inspectors, and are not mandatory safety standards promulgated pursuant to Title I of the Act. Consequently, the subject citations, which allege violations of those safeguards, do not allege violations of mandatory health or safety standards.

The Secretary argues that when Congress passed the Act of 1977 it directed that the standards and regulations under the Federal Coal Mine Health and Safety Act of 1969 shall remain in effect as mandatory health or safety standards under the Act of 1977 until the Secretary of Labor promulgates new or revised mandatory standards. As such, because no new or revised standards were issued, section 75.1403 remains in effect as a mandatory safety

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[4] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

standard. Sec'y Resp. at 4. The Secretary further argues that because section 314(b) of the Act, pursuant to which the safeguards were issued, is included in Title III, which establishes mandatory safety standards, that it is a mandatory safety standard.

Neither section 75.1403, nor section 314(b) of the Act, establish mandatory standards that could be violated by a mine operator. Section 314(b), as previously noted, is a grant of regulatory authority to the Secretary. To hold that a specific written safeguard is a mandatory safety standard, because the grant of regulatory authority to issue it is contained in Title III of the Act, would impermissibly elevate form over substance.[5] As the Commission observed in its *Cyprus Emerald* decision, safeguards are not mandatory health or safety standards. Regardless of the regulatory or statutory provision referenced in the citation, the actual violation alleged is that the operator failed to comply with a notice of safeguard issued by an MSHA inspector.

The Secretary argues that holding that safeguard violations cannot be S&S would deprive the Secretary of an important enforcement tool, and would be at odds with Congress' intent to create a flexible mine-specific enforcement system responsive to the unique hazards related to mine transportation.[6] The same argument was made, and rejected, in *Cyprus Emerald*, where the court observed that section 107(a) imminent danger withdrawal orders, section 104(a) citations and section 110 penalties provide "adequate" means of enforcement.[7] 195 F.3d at 46. Withdrawal orders, issued pursuant to section 104(b), also provide a powerful tool to ensure that any violation of a safeguard is promptly remedied.

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[5] In *SOCCO II* the Commission noted that section 314(b) "is contained in a section of the statute that includes interim mandatory safety standards for hoisting and mantrips in underground coal mines. Unlike other provisions of Title III of the Mine act, section 314 contains few specific mandatory standards. The specific mandatory standards in section 314 concern hoists, brakes on rail equipment and automatic couplers." 14 FMSHRC at 5. The Commission went on to note that the Secretary had recognized in a 1991 regulatory agenda, the need for specific mandatory standards to protect miners from hazards associated with the hoisting and transportation of persons and materials, and "strongly suggest[ed] that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating transportation hazards. *Id*. at 16. Such standards have yet to be promulgated.

[6] Only mandatory health and safety standards can be enforced through the issuance of withdrawal orders pursuant to section 104(d) of the Act. In addition, operators who engage in a pattern of committing S&S violations may be subject to enhanced enforcement provisions of section 104(e) of the Act. 30 U.S.C. § 814(d) and (e).

[7] Imminent danger withdrawal orders, issued pursuant to section 107(a) of the Act, can be issued to address immediately dangerous conditions, regardless of whether the danger violates the Mine Act or the Secretary's regulations. *Utah Power & Light, Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991).

The Secretary also argues that any ambiguity in the statute must be resolved by according deference to her interpretation. However, as in *Cyprus Emerald*, the argument is rejected, because the statutory language is not ambiguous. That section 314(b) is contained in Title III of the Act does not alter its fundamental nature, and transform the grant of regulatory authority into a mandatory safety standard. To the extent that ambiguity could be found, the Secretary's attempted transformation of section 314(b) into a mandatory safety standard would be unreasonable.

As noted above, the actual violations alleged in the citations are that Cumberland Coal failed to comply with specific notices of safeguard issued by MSHA inspectors, not that it failed to comply with a regulatory provision. Therefore, they do not allege violations of mandatory safety standards, and they cannot be designated S&S.[8]

ORDER

Based upon the foregoing, the Respondent's Motion for Partial Summary Decision is **GRANTED**, and the gravity designations of Citation Nos. 7013038, 7025471, 7025962 and 7070887 are **AMENDED** to "non-significant and substantial."

Michael E. Zielinski
Administrative Law Judge

Distribution:

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

Gayle M. Green, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

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[8] The Secretary has cited several Commission decisions upholding S&S designations of safeguard violations. *See, e.g., Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998). However, the cases were all decided prior to the court's decision in *Cyprus Emerald*.