FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 18, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2008-804
Petitioner	:	A.C. No. 46-04168-142950
	:	
v.	:	
	:	
	:	Sentinel Mine
WOLF RUN MINING,	:	
Respondent	:	

ORDER DENYING THE SECRETARY'S MOTION TO AMEND AS MOOT AND ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION

This matter presents the question of whether safeguard violations citing safeguard criteria in sections 75.1403-2 through 75.1403-11, 30 C.F.R. §§ 75.1403-2-75.1403-11, issued by the Secretary, pursuant to the authority delegated by Congress in section 314(b) of the Federal Mine Safety and Health Act of 1977, as amended ("the Act"), 30 U.S.C. § 874(b), can be properly designated as significant and substantial ("S&S").[1] Section 314 is one of several provisions among the interim safety standards in Title III of the Act that were contained in the initial Coal Mine Health and Safety Act of 1969. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 5 (Jan. 1992) *(SOCCO II)*; 30 U.S.C. § 801 et seq. (1976) (amended 1977).

The statutory provisions of section 314(b) are repeated verbatim in section 75.1403 of Part 75 of the Secretary's regulations. 30 C.F.R. § 75.1403. Specifically, Congress, in section 314(b), authorized the Secretary to issue and enforce safeguards to minimize hazards associated with the transportation of people and materials. Section 104(d)(1) of the Act limits S&S designations to only violations of "mandatory health or safety standards." 30 U.S.C. 814(d)(1).

[1] Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

Statement of the Case

On June 27, 2000, the Secretary issued Safeguard No. 7095089 at the Wolf Run Mining Company ("Wolf Run") Sentinel Mine. Section 75-1403-1 of the Secretary's regulations 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 and issuing safeguard violations on a mine-by-mine basis. 30 C.F.R. §§ 75-1403-2 through 75.1403-11. Safeguard No. 7095089 cited the criteria in section 75.1403-5(j) that requires suitable crossing facilities where persons cross over or under moving conveyor belts.

Citation No. 6606199 was issued at Wolf Run's Sentinel facility on January 23, 2008. The citation alleged a violation of Safeguard No. 7095089 because a suitable crossing facility was not provided where miners were required to cross over moving conveyor belts. Wolf Run asserts that safeguard violations citing the safeguard criteria provisions cannot be designated as S&S because the safeguard criteria are not mandatory safety standards. Consequently, Wolf Run has filed a Motion for Partial Summary Decision concerning the S&S designation in Citation No. 6606199 based on its contention that neither the safeguard allegedly violated, nor section 75.1403-5(j), are mandatory standards as contemplated by section 104(d)(1) of the Act.[2] The Secretary opposes Wolf Run's motion.

To counteract Wolf Run's motion, the Secretary has filed a Motion to Amend Citation No. 6606199 to reflect that the safeguard violation was issued under section 75.1403, rather than the criteria in section 75.1403-5(j). Wolf Run opposes the Secretary's motion. It argues that "whether the citation lists Section 75.1403-5(j) or Section 75.1403 is immaterial" because Wolf Run is alleged to have violated a safeguard rather than a mandatory standard. (Wolf Run o*pp*. at 3).

With respect to the Secretary's Motion to Amend, although Wolf Run contests the propriety of an S&S designation of a safeguard violation, it does not challenge the authority of the Secretary in section 314(b) of the Act, codified in section 75.1403 of the regulations, to issue safeguard violations. The Secretary's exercise of her safeguard authority is inseparable from the safeguard criteria that describe the necessary requirements to maximize transportation safety, the absence of which give rise to the issuance of a citation. In other words, the authority to issue safeguard citations in section 75.1403, and the criteria for issuing safeguard citations in sections 75.1403-2 through 75.1403-11, are not mutually exclusive. Accordingly, the Secretary's motion to amend Citation 6606199 to replace section 75.1403-5(j) with section 75.1403 shall be dismissed as moot.

[2] Commission Rule 67 provides that a motion for summary decision may be decided if there is "no genuine issue as to any material fact." 29 C.F.R. § 2700.67(b). Wolf Run's request for partial summary decision concerns a question of law rather than questions of fact. Consequently, it is proper to address the issue before me in this summary decision matter.

Turning to Wolf Run's Motion for Partial Summary Decision, section 3(l) of the Act states that a mandatory safety standard promulgated in a Title I rulemaking also means an interim mandatory safety standard promulgated by Congress in Title III. 30 U.S.C. § 802(l). Although safeguards are not mandatory safety standards created as a result of a formal rulemaking under Title I of the Act, they are issued as an interim mandatory safety standard under section 314(b) of Title III of the Act. As such, consistent with the statutory definition in section 3(l), section 301(a) of the Act provides that interim mandatory safety standards are enforceable "... in the same manner and to the same extent as a mandatory safety standard" until superseded in a formal rulemaking. 30 U.S.C. § 861(a). Wolf Run does not contend that the Secretary's failure to supersede the interim standard in section 314(b) of the Act in a formal rulemaking proceeding precludes the enforcement of safeguards as an interim safety standard. Accordingly, as discussed below, Wolf Run's motion shall be denied.

Statutory Framework and Analysis

This matter presents the question of the proper construction of the term "mandatory safety standard" in section 104(d)(1) that is a condition precedent for the assignment of an S&S designation. The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue. *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.,* 18 FMSHRC 582, 584 (April 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-843. *Accord Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 460 (D.C. Cir. 1994). An interpretation of a statute may not be adopted that "alter[s] the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988) (citations omitted). Significantly, the Court of Appeals decision in *Cyprus Emerald Resources Corp.*, 195 F.3d 42, 44 (D.C. Cir 1999), *rev'g Cyprus Emerald Resources Corp.*, 20 FMSHRC 790 (Aug. 1998), primarily relied on in this matter by Wolf Run, concluded the controlling statutory language concerning mandatory safety standards was unambiguous.

As a general proposition, contrary to Wolf Run's assertion, there is nothing unusual about enforcing standards that are unique to a specific mine, such as safeguards, as mandatory safety standards even though the standards are not explicitly set forth in the Secretary's regulations.
See UMWA v. Dole, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) (the law governing the enforcement of mandatory standards is applicable to ventilation and roof control plan provisions). Moreover, the Commission has noted "clear Congressional intent" that "mine by mine compliance plans required by statute or regulation . . . are enforceable as if they were mandatory standards . . . ." *Jim Walter Res., Inc.*, 28 FMSHRC 579, 588 (Aug. 2006) (quoting S. Rep. No. 95-181 at 25 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978).

Turning to the specific dispositive statutory language, section 104(d)(1) of the Act provides that only violations of mandatory health and safety standards can be designated as S&S. Specifically, 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 . . . .

(emphasis added) 30 U.S.C. § 814(d)(1).

The statutory scheme in the Act contains two categories of mandatory safety standards, namely a "mandatory health or safety standard" promulgated by the Secretary pursuant to Title I and "interim mandatory health and safety standards" promulgated by Congress pursuant to Titles II and III. By statutory definition, a mandatory health or safety standard includes safety standards promulgated by either the Secretary or Congress. Specifically, section 3(l) of the Act defines "mandatory health or safety standard" as:

> . . . the interim mandatory health or safety standards established by titles II and III of this Act, and standards promulgated pursuant to title I of this Act.

30 U.S.C. § 802(l). Thus, the term "mandatory safety standard" clearly includes an interim mandatory safety standard.

Title I of the Act authorizes the Secretary, through a notice and comment rulemaking, to "... develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. § 811(a).

In Title II of the Act, Congress promulgated "Interim Mandatory Health Standards" to be enforced by the Secretary "... until superseded in whole or in part by improved mandatory health standards promulgated by the Secretary under the provisions of section 101 of the Act." 30 U.S.C. § 842(a). The interim mandatory health standards are enforceable by the Secretary "... in the same manner and to the same extent as any mandatory health standard promulgated ..." by the Secretary's rulemaking. *Id.*

In Title III of the Act Congress promulgated "Interim Mandatory Safety Standards for Underground Coal Mines," applicable to all underground coal mines, that are also not superseded, in whole or in part, until the Secretary, under the provisions of section 101 of the Act, promulgates superseded mandatory safety standards through rulemaking. 30 U.S.C. § 861(a).

Section 301(a) of the Act, consistent with the statutory definition of a mandatory safety standard in section 3(l), exemplifies the equivalency of safety standards promulgated by the Secretary through rulemaking, and by Congress through the interim safety standards. Section 301(a) of the Act provides:

> 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*. Any orders issued in the enforcement of the interim standards set forth in this title shall be subject to review as provided in title I of this Act.

(emphasis added) 30 U.S.C. § 861(a).

The language of section 301(a) is unambiguous, and inclusive. Interim mandatory safety standards in sections 302 to 318 "shall be enforced in the same manner and to the same extent as any mandatory safety standard." *Id*. Interim mandatory standards are included within the definition of mandatory safety standards. 30 U.S.C. § 802(l).

Section 314(b), promulgated under Title III, is an interim mandatory safety standard that authorizes mine inspectors to issue, and subsequently enforce, safeguards to minimize transportation hazards that are specific to a particular mine. Wolf Run has provided no meaningful basis to support the conclusion that the safeguard provisions in section 314(b) do not constitute an interim mandatory safety standard.

Moreover, the Commission has noted that ". . . the language of section 314(b) of the Act is broad and 'manifests a legislative purpose to guard against all hazards attendant upon haulage and transport[ation] in coal mining.'" *SOCCO II*, 14 FMSHRC at 8 (quoting *Jim Walter Resources, Inc.*, 7 FMSHRC at 496). Thus, I decline to view section 314(b) as a diamond in Wolf Run's rough, by narrowly construing, and differentiating, section 314(b) from other interim mandatory safety standards contained in sections 302 to 318 of the Act. 30 U.S.C. §§ 862 - 878.

Case Law Analysis

Although there is no statutory authority for granting the relief that Wolf Run seeks, Wolf Run's reliance on case law for the proposition that safeguards are not mandatory standards as contemplated by section 104(d)(1) of the Act is misplaced. As a threshold matter, the Commission long ago determined that a safeguard violation could be designated S&S. *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). The Commission has also noted that "while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures of section 101 of the Act, section 314(b) extends authority to the Secretary to create on a mine-by-mine basis what are, in effect, mandatory standards, without the formalities of rulemaking." *SOCCO II,* 14 FMSHRC at 8 *citing Southern Ohio Coal Co.,* 7 FMSHRC at 512 *(SOCCO I)*. Thus, the Commission has recognized that safeguards may be enforced as mandatory safety standards even in the absence of formal rulemaking. 20 FMSHRC at 809.

Wolf Run's reliance on the Court's decision in *Cyprus Emerald* for the contrary proposition is misplaced. 195 F.3d 42. *Cyprus Emerald* dealt with whether section 50.11(b) of the Secretary's regulations, governing the investigation and reporting of accidents, was a "mandatory safety standard" that could be designated as S&S. The Court held that: "[s]ection 104(d) *unambiguously* authorizes a 'significant and substantial' violation finding for a violation only of a mandatory health or safety standard." (Emphasis added) *Id.* at 44. Thus, the Court concluded section 50.11(b) was not a mandatory safety standard because it was promulgated by Congress under the "Administration" provisions in Title V, section 508 of the Act, rather than by a section 101 rulemaking.[3] 30 U.S.C. § 957. Nothing in *Cyprus Emerald* warrants the conclusion that the Court abrogated the statutory definition in section 3(l) of the Act that explicitly provides that a "mandatory health or safety standard" includes "interim mandatory health or safety standards" promulgated under Title II or III of the Act. 30 U.S.C. § 802(l).

Wolf Run's reliance on the Commission's dicta in its underlying *Cyprus Emerald* decision is likewise unconvincing. 20 FMSHRC 790. Although *Cyprus Emerald* primarily concerned accident reporting requirements in section 50.11(b) of the regulations, the Commission did acknowledge, as Wolf Run suggests, that there was a "crucial difference" in interpreting mandatory standards promulgated in a Title I rulemaking and safeguard notices issued by an inspector. *Id*. at 808. The Commission explained:

> In *SOCCO* I, we held that while mandatory standards "should be construed in a manner that effectuates, rather than frustrates their intended goal[,]" safeguards

[3] Section 508 provides, "[t]he Secretary, The Secretary of Health, Education, and Welfare and the Panel are authorized to issue such regulations as each deems appropriate to carry out any provision of this Act." 30 U.S.C. § 957.

> are issued without resort to the normally required rulemaking process, and therefore "a narrow construction of the terms of the safeguard and its intended reach is required."

20 FMSHRC at 808 *(*quoting *SOCCO* I, 7 FMSHRC at 512) (footnote omitted).

Thus, it is the scope of an inspector's unilateral discretion in issuing safeguards, without the benefit of a notice and comment rulemaking to vet a mandatory standard adopted under Title I, that concerns the Commission. It is in this context that the Commission noted that the safeguard criteria in sections 75.1403-2 through 75.1403-11 are not mandatory safety standards. *Id*. at 808-09. However, the Commission ***did not*** conclude that they could not be enforced as Title III interim mandatory safeguard safety standards. On the contrary, the Commission concluded, citing *Mathies*, that safeguards can be cited as S&S. *Id.* at 809.

In the final analysis, Congressional failure to include safeguard criteria in its Title III interim standards is of little import. Obviously, Congress could not identify and enumerate the diverse hazards associated with the movement of underground mine personnel and equipment. However, the Secretary's identification of safeguard criteria in subsections 75.1403-2 through 75.1403-11 of section 75.1403 satisfies a major Commission concern - - that broadly written safety standards must provide mine operators with notice of what conditions are proscribed. *See Kerr-McGee Corp.,* 3 FMSHRC 2496, 2497 (Nov. 1981)*; Alabama By Products Corp.,* 4 FMSHRC 2128, 2130 (Dec. 1992); s*ee also U.S. Steel Corp.,* 5 FMSHRC 3, 4 (Jan. 1983). Consequently, safeguard violations are enforceable as mandatory safety standards even when cited as violations of the safeguard criteria in 75.1403.

MSHA Program Policy Manual

Finally, Wolf Run, in its Memorandum of Law in support of its request for partial summary decision, citing MSHA's Program Policy Manual, avers that the Secretary "recognizes" that the safeguard criteria in section 75.1403 are not mandatory health or safety standards.
(Mem. of Law, at 6; *see also* Mem. of Law, Ex. 3). While policy statements in MSHA's Program Policy Manual are not binding on the Secretary or the Commission, MSHA's policy statement is not inconsistent with the enforcement of safeguard violations as S&S infractions. See *D.H. Blattner & Sons, Inc*., 18 FMSHRC 1580, 1586 (Sept. 1996), (quoting *King Knob Coal Co.,* 3 FMSHRC 1417, 1420 (June 1981)). The thrust of the policy statement is that safeguard criteria, unlike safety regulations born of rulemaking, are not enforceable until a notice of safeguard is issued. The relevant MSHA policy provisions relied on by Wolf Run do not support the proposition that a 104(a) citation for violation of safeguard criteria may not be designated as S&S after issuance of the safeguard notice. The relevant provisions state:

> It must be remembered that these [safeguard] criteria are not mandatory. If an authorized representative of the Secretary determines that a transportation hazard exists and the hazard is not

> covered by a mandatory regulation, the authorized representative must issue a safeguard notice, allowing time to comply before a 104(a) citation can be issued . . . .

MSHA Program Policy Manual, Vol. V, Subpart O, at 125 (October 2003); *see also* SOCCO II, 14 FMSHRC at 7-8 (safeguards can be enforced like mandatory standards only after mine operators are advised in writing that specific safeguards will be required as of a specified date) . Thus, it is inappropriate to suggest that MSHA recognizes that safeguard criteria cannot be enforced as mandatory safety standards ***after*** a notice of safeguard is issued. Consequently, the Secretary may designate the safeguard violation in 104(a) Citation No. 6606199, alleging a violation of Notice of Safeguard No. 7095089, as S&S in nature.

ORDER

In sum, the citation in issue cites a violation of an interim mandatory standard in section 314(b) of Title III of the Act. 30 U.S.C. § 874(b). Interim mandatory health and safety standards are defined as mandatory health and safety standards under section 3(l) of the Act. 30 U.S.C. § 802(l). Section 104(d)(1) limits S&S designations only to violations of mandatory health and safety standards. 30 U.S.C. § 814(d)(1). As a safeguard violation is a violation of a mandatory safety standard as defined by the Act, it may be properly designated as an S&S violation. Accordingly, **IT IS ORDERED** that Wolf Run's Motion for Partial Summary Decision **IS DENIED**.[4]

IT IS FURTHER ORDERED, consistent with the above, that the Secretary's Motion to Amend Citation No. Citation No. 6606199 to substitute the safeguard criterion in section 75.1403-5(j) with section 75.1403, that repeats verbatim the statutory language in section 314(b) of the Act, **IS Denied** as moot because the sections are indivisible rather than mutually exclusive.

Jerold Feldman
Administrative Law Judge

[4] In reaching this conclusion I am cognizant that a colleague, Judge Zielinski, reached the opposite decision in cases involving similar facts. *See Big Ridge, Inc.*, Docket Nos. LAKE 2008-68, 69, 30 FMSHRC ___ (ALJ, Nov. 24, 2008); *Cumberland Resources LP*, Docket No. PENN 2008-318, 30 FMSHRC __ (ALJ, Dec. 4, 2008).

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