CCASE:
MSHA V. SOUTHERN OHIO COAL
DDATE:
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TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 29, 1985
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
v. Docket Nos. WEVA 84-166
WEVA 84-94-R
SOUTHERN OHIO COAL
COMPANY

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This consolidated proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1982), presents issues concerning the applicability to coal-carrying belt conveyors of the safeguard provisions of 30 C.F.R. • 75.1403.1/ A Commission administrative

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1/ 30 C.F.R. • 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. • 874(b), and states:
Other safeguards adequate, in the judgement of an authorized representative of the Secretary [of Labor], to minimize hazards with respect to transportation of men and materials shall be provided.
The procedures by which an authorized representative of the Secretary may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. • 75.1403-1(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 pursuant to section 104 of the Act.
30 C.F.R. • 75.1403-2 through 75.1403-11 set forth specific "criteria" by which authorized representatives are guided in requiring safeguards. Section 75.1403-5 is headed: "Criteria--Belt conveyors" and section 75.1403-5(g) states in part:

A clear travelway at least 24 inches wide should be
provided on both sides of all belt conveyors installed
after March 30, 1970.
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law judge concluded that section 75.1403, in relevant part, applies to coal-carrying belt conveyors, that the citation issued to Southern Ohio Coal Company ("SOCCO") fell within the proscription of an underlying safeguard notice to provide 24 inches of clearance on both sides of belt conveyors, and that SOCCO therefore violated section 75.1403. 6 FMSHRC 2685 (November 1984)(ALJ). Consistent with our decision in Jim Walter Resources, Inc., 7 FMSHRC_____, Docket No. SE 84-23 (decided this same date) ("Jim Walter Resources I), we affirm the judge's conclusion that section 75.1403 extends to the transportation of coal on coal-carrying belt conveyors. However, for the reasons stated below, we reverse the judge's conclusion that a violation of section 75.1403 occurred.

On September 14, 1978, during an inspection of SOCCO's Martinka No. 1 underground coal mine, MSHA inspector Dominick Poster issued notice to provide safeguard No. 018972 pursuant to section 314(b) of the Mine Act and 30 C.F.R. • 75.1403. The notice stated:

A clear travelway at least 24 inches along the No. 1
conveyor belt was not provided at three (3) locations, in
that there was fallen rock and cement blocks.
All conveyor belts in this mine shall have a least
24 inches of clearance on both sides of the conveyor belts.
This is a notice to provide safeguards.

On November 30, 1983, during a regular inspection of the same mine, MSHA inspector Harry Marksley, Jr. issued the citation at issue here alleging a violation of section 75.1403. The citation stated:

A clear travelway of 24 inches was not provided along
the 1-1 east conveyor belt for a distance of 15 feet in
that water was 10 inches in depth from rib to rib at the
No. 7 stopping. A slipping and stumbling hazard.

At the hearing before the Commission judge, witnesses for both parties agreed that the cited 1-1 east belt conveyor was used to transport coal only, and that the distance between the belt and the ribs along both sides of the conveyor was at least 24 inches. The witnesses also agreed that the water described in Inspector Marksley's citation extended from rib to rib for a distance of 15 feet. MSHA's witnesses measured the depth of the water at one point as 10 inches. They also testified that the water, in combination with the fireclay bottom, rock dust and mud in the area, created a serious slipping and stumbling hazard for the examiners, maintenance men, inspectors and workers who regularly traveled the belt line. Inspector Marksley testified that damp bottom conditions were not

unusual at this mine, and that the water present probably resulted from seepage through the bottom. No debris was found beneath the surface of the water. SOCCO's witness estimated the water's depth as seven inches, and testified that the bottom was firm and not slippery.

In his decision, the judge found it unnecessary to resolve whether coal is a "material" within the purview of 30 C.F.R. § 75.1403. Instead, he resolved the issue of the standard' applicability by determining that "the safeguard standard applies ... to minimizing hazards associated with the transportation of men and materials by foot, in this case miners traveling along the walkway adjacent to the moving conveyor belt." 6 FMSHRC at 2687. Analyzing the citation and underlying safeguard notice, the judge found that, even under a strict construction of the safeguard notice, the water presented not only a "slipping" hazard but also a "tripping and stumbling" hazard. 6 FMSHRC at 2687-88. The judge reasoned that although "fallen rock" or "cement blocks," the items specifically referred to in the safeguard notice, and other similar debris were not found in the water, it could "reasonably be inferred from the evidence that such debris could very well come to rest under the water from the adjacent ribs." 6 FMSHRC at 2688. The judge concluded that the safeguard notice, in essence, required a clear travelway of 24 inches on both sides of the beltline, and that the cited travelway was not clear due to the obstruction caused by the water. Id.

On review, SOCCO argues that the references in section 314(b) of the Mine Act and in section 75.1403 to the "transportation of men and materials" refers only to the movement of persons and materials other than coal. SOCCO therefore contends that section 75.1403 and its subsection -5(g) do not apply to the transport of coal on coal-carrying belt conveyors. SOCCO further argues that even if the Commission decides that the relevant safeguard provisions of section 75.1403 apply to coal-carrying belt conveyors, safeguard notices are to be strictly construed. SOCCO asserts that the safeguard provisions of the Act and the Secretary's regulations confer extraordinary authority on the Secretary. SOCCO urges that to avoid abuse of that authority, notices to provide safeguards must be written with such precision and specificity as to leave no doubt as to the conditions or hazards proscribed.

For the reasons set forth in our decision in Jim Walter Resources I, we conclude that section 75.1403, and its subsection -5(g), are applicable to coal-carrying belt conveyors. As explained in Jim Walter Resources I, this provision applies to trackless haulage by all conveyors. Thus, while we agree with the judge in result on this point, we do not rest our conclusion on his rationale that

section 75.1403-5(g) encompasses transportation of materials by foot. ~512

We further hold that the language of notices to provide safeguards must be narrowly construed, and that under a proper construction of the underlying safeguard notice in this case, the instant citation must be vacated.

It is of paramount importance to recognize the crucial difference in the rules of interpretation applicable to mandatory standards promulgated by the Secretary and those applicable to "safeguard notices" issued by his inspector. This Commission previously has recognized that, in light of the underlying purpose of the Mine Act, mandatory standards are to be construed in a manner that effectuates, rather than frustrates, their intended goal. See e.g., Allied Chemical Corp., 6 FMSHRC 1854, 1859 (August 1984); Cleveland Cliffs Iron Co., 3 FMSHRC 291, 294 (February 1981). Mandatory standards, however, 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. Thus, we hold that 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. We further hold that in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required. See e.g., Consolidation Coal Co., 2 FMSHRC 2021, 2035 (July 1980)(ALJ); Jim Walter Resources, 1 FMSHRC 1317, 1327-28 (September 1979)(ALJ). See also Secretary's Brief to the Commission at 11 n. 1. ("Accordingly, while the language of safeguard notices should be narrowly construed, the Secretary's issuance authority must be interpreted broadly").

We believe that this approach towards interpretation of the safeguard provisions strikes an appropriate balance between the Secretary's authority to require additional safeguards and the operator's right to notice of the conduct required of him. We further believe that the safety of miners is best advanced by an interpretive approach that ensures that the hazard of concern to the inspector is fully understood by the operator, thereby enabling the operator to secure prompt and complete abatement.2/

2/ The requirements of specificity and narrow interpretation are not a license for the raising or acceptance of purely semantic arguments.

See e.g., Penn Allegh Coal Co., 4 FMSHRC 1224, 1226 (July 1982). We recognize that safeguards are written by inspectors in the field, not by a team of lawyers.

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Applying these principles to the case before us, we must next decide whether the notice to provide safeguard at issue here, referencing "fallen rock and cement blocks at three locations," and requiring 24 inches of clearance on both sides of the conveyor belt should have put SOCCO on notice that conditions such as the water described in the citation fell within the safeguard's prohibitions. We conclude that it did not.

The underlying safeguard notice was issued by an inspector concerned with the presence of cement blocks and rocks in a travelway. The presence of these solid objects in the walkway would present an obvious stumbling hazard and, depending on the amount of material or debris, could prevent passage altogether. Abatement of the identified condition could readily occur by removal of these objects. Similar physical impediments to safe travel have been the subject of identical safeguards issued at other mines. See e.g., Jim Walter Resources, 6 FMSHRC 1815 (July 1984) (ALJ), rev'd on other grounds, 7 FMSHRC _____, Docket No. SE 84-23, April 29, 1985. Under the rule of interpretation enunciated above, further instances of physical obstructions in travelways, whether rocks, cement blocks, or other objects such as construction materials, mine equipment, or debris would fall within the scope of the safeguard.

The alleged obstruction cited in this case, an accumulation of water, was neither specifically identified in the safeguard notice, suggested thereby, nor in our opinion even contemplated by the inspector when he issued his safeguard notice. The presence of water in an underground coal mine is not an unusual condition; it sometimes results from its introduction into the mining process, but often it is caused by natural ground conditions. The record in this case indicates that natural water seepage was common at this mine, particularly at the location involved. Given the frequency of wet ground conditions in the mine, and the basic dissimilarity between such conditions and solid obstructions such as rocks and debris, we find that SOCCO was not given sufficient notice by the underlying safeguard notice issued in 1978 that either wet conditions in general or the particular conditions cited in 1983 by the inspector in this case would violate the underlying safeguard notice's terms.

We do not hold that a safeguard notice pertaining to hazardous conditions caused by wetness could not be issued. Conditions such as those cited by the inspector here, if hazardous, can just as readily be eliminated by issuance of safeguard notices specifically addressing such conditions. By taking this approach rather than bootstrapping

dissimilar hazards into previously issued safeguard notices, the operator's right to notice of conditions that violate the law and subject it to penalties can be protected with no undue infringement of the Secretary's authority or loss of miner safety.

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For the foregoing reasons, we affirm the judge's finding that section 75.1403 applies in this case, but we reverse his conclusion that SOCCO violated section 75.1403. The civil penalty assessed by the judge for this violation is accordingly vacated.3/

Richard V. Backley, Acting Chairman

L. Clair Nelson, Commissioner

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3/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. • 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.