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MSHA V. SO. OHIO COAL
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TTEXT:
January 10, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. WEVA 88-144-R
WEVA 88-212

SOUTHERN OHIO COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act"), and presents two issues: (1) whether a notice to provide safeguards issued pursuant to 30 C.F.R. • 75.1403 is invalid if it addresses conditions that exist in a significant number of mines; and (2) whether the validity of a notice to provide safeguards is materially affected by the fact that it is patterned after 30 C.F.R. • 75.1403-9(a), a published safeguard criterion. Our decision in this matter is one of

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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 judgment of an authorized representative of the Secretary [of Labor], to minimize hazards with respect to transportation of men and materials shall be provided.
30 C.F.R. • 75.1403-1 sets forth general provisions regarding "criteria" by which authorized representatives are guided in requiring safeguards. Section 75.1403-1(a) provides:
Sections 75.1403-2 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.
The procedures by which an authorized representative of the Secretary
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several on this date with respect to the Secretary's issuance of safeguards. 2

In this case, Commission Administrative Law Judge Roy J. Maurer found that the Secretary failed to prove that the safeguard in question was issued because of any conditions "peculiar" to the mine of Southern Ohio Coal Company ("SOCCO"), as opposed to other mines that also have track haulage. 11 FMSHRC 1992, 1997 (October 1989)(ALJ). Consequently, he concluded that the safeguard was invalid because it was not issued on a "mine-by-mine" basis. Accordingly, the judge vacated an order of withdrawal issued to SOCCO alleging a violation of the safeguard. For the reasons that follow, we vacate the judge's decision and remand this case for further proceedings.

I.

Factual Background and Procedural History

On January 28, 1988, Charles Thomas, an inspector of the Department of Labor's Federal Mine Safety and Health Administration ("MSHA"), conducted a regular inspection of the Martinka No. 1 Mine, an underground coal mine operated by SOCCO. Inspector Thomas observed that no shelter holes were provided along a section of the supply track of the E-4 section. 3 He

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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.

Section 75.1403-9 is entitled "Criteria-shelter holes," and section 75.1403-9(a) provides:

Shelter holes should be provided on track haulage roads at intervals of not more than 105 feet unless otherwise approved by the Coal Mine Safety District Manager(s).

2 Our other safeguard decisions issued today are: BethEnergy Mines, Inc., 14 FMSHRC , Nos. PENN 89-277-R, etc.; Mettiki Coal Corp., 14 FMSHRC , Nos. YORK 89-10-R, etc.; and Rochester & Pittsburgh Coal Co., 14 FMSHRC , Nos. PENN 88-309-R, etc.

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3 A shelter hole is an area where a miner can seek protection from haulage equipment, locomotives, mine cars and other vehicles traveling through a passageway.

issued an order pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. 814(d)(2), alleging a violation of a notice to provide safeguard that had

been issued under 30 C.F.R. • 75.1403-9(a) (n. 1 supra).
Order No. 2895348 states:
A shelter hole is not provided along the E4 section supply track for a distance of 170 feet when measured. The area is between No. 1 block and No. 3 block. Overcast walls are in the crosscuts left and right of the track. Notice to provide Safe[g]uard was issued No. 1JF 5/23/75....
Gov. Exh. 3. In issuing the order, Inspector Thomas also entered special findings that SOCCO's alleged violation was of a significant and substantial nature and was caused by its unwarrantable failure to comply. SOCCO contested the order, the Secretary proposed civil penalties, and the matter proceeded to an evidentiary hearing before Judge Maurer.
The notice to provide safeguard issued at the Martinka No. 1 Mine by MSHA Inspector Joe Fraim on May 23, 1975, states:
Shelter holes are not provided at 105 foot intervals on the 1 Left section supply track for a distance of 400 feet. Shelter holes shall be provided on all track haulage roads in this mine....
Tr. 29, 31, 53-54; Gov. Exh. 2. Inspector Thomas testified that he had no knowledge of the reasons, other than the reasons stated on the face of the safeguard itself, for the issuance of the safeguard. Tr. 54.
Inspector Thomas testified that, if coal cars derailed in the cited area and a miner was then unable to escape to a shelter hole, he could be crushed against the wall or suffer broken bones, lacerations, amputations, and possibly death. Tr. 42-43. Thomas believed that the violation was aggravated by the fact that the cited area was wet and presented a slipping hazard to a person running through the area to a shelter hole, and that visibility in the area was impeded by various factors. Tr. 28, 34, 72.
John Metz, the general mine supervisor of the Martinka Mine and Paul Zanussi, the mine's accident prevention officer, agreed with Thomas that a shelter hole was not provided every 105 feet in the cited area, but maintained that certain extenuating circumstances justified the absence of the shelter holes. Tr. 76, 83. Messrs. Metz and Zanussi testified that a small shelter hole (manhole) had been made in the overcast wall in the cited area, which previously had been accepted by MSHA as an alternate type of shelter hole. Tr. 62, 79-80, 84-85. When MSHA changed its policy and no longer accepted such alternate shelter holes, SOCCO determined that it had to "shoot" approximately 30 new shelter holes in solid ribs of coal.
Tr. 86-87. Metz testified that SOCCO had not yet shot a shelter hole in the cited area because it was first shooting holes in priority areas that received the most traffic. He stated that the cited area received only

minimal foot and rail traffic because the area was new at the time of the inspection and there was not yet a need for anyone to be working in that

location. Metz also stated that it had been his experience that tracks such as those in the cited area, which were used for mantrips or for carrying rock dust and other supplies to working sections, were used less frequently than tracks that hauled coal.

Inspector Thomas testified that it was his understanding that the subject safeguard notice requires shelter holes every 105 feet on every track haulage road regardless of the frequency of rail or foot traffic through the area or whether the mine uses a conveyor belt system to remove coal. Tr. 61-62. He further testified that the hazard at the Martinka No. 1 Mine was no greater than the hazard at other track haulage mines that were subject to similar safeguards. Tr. 60. Of the 21 mines using track haulage that Thomas had inspected, each mine had a similar safeguard notice requiring shelter holes every 105 feet along track haulage roads. Tr. 50. A similar safeguard had been issued at SOCCO's Meigs No. 1, Meigs No. 2 and Raccoon No. 3 mines, and at the American Electric Power System's Windsor Coal Mine. Tr. 102, 111. Inspector Thomas testified that he could not recall any underground coal mine using track haulage that did not have a similar safeguard notice. Tr. 49.

Preliminarily, the judge determined that the Secretary bears the burden of proving the validity of the underlying safeguard. The judge then examined the evidence to determine whether the Secretary had successfully met that burden. The judge placed particular emphasis on Inspector Thomas's testimony that each of the 21 track haulage coal mines that Thomas had inspected had a safeguard notice similar to the subject safeguard including the Windsor Coal Mine and SOCCO's Meigs No. 1, Meigs No. 2 and Raccoon No. 3 mines. 11 FMSHRC at 1996. The judge also relied on Inspector Thomas's testimony that he could not recall a single instance in which a safeguard similar to the subject safeguard had not been issued in an underground coal mine utilizing track haulage. Id.

Based upon his review of the evidence, the judge found that the Secretary had failed to establish the validity of the underlying safeguard notice:

> I conclude in this case, the Secretary has failed to demonstrate that Safeguard No. 1JF was issued on a "mine-by-mine" basis and more particularly, has failed to demonstrate that it was issued at the Martinka No. 1 Mine because of any peculiar circumstances or physical configuration of that mine. The safeguard had nothing whatsoever to do with conditions peculiar to that mine as opposed to other mines that also have track haulage.

11 FMSHRC at 1997 (emphasis added).

After finding that the safeguard was invalid, the judge determined that Order No. 2895348 was improperly issued because it was based upon the

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invalid safeguard. Accordingly, he vacated the order without reaching the issues of whether the safeguard had been violated or whether the inspector's special findings were valid. The Commission granted the Secretary's petition for discretionary review. Oral argument in this matter was heard on February 21, 1991, along with argument in the other safeguard cases.

II.

Disposition of Issues

A. The Secretary's authority to issue safeguards addressing conditions that exist in a significant number of mines

1. The Secretary's general safeguard authority

The Secretary's general authority to issue safeguards is derived from section 314(b) of the Mine Act, 30 U.S.C. • 874(b). That provision is contained in a section of the statute that includes interim mandatory safety standards for hoisting and mantrips in underground coal mines. Section 314 is one of several provisions among the interim safety standards of Title III of the Mine Act that were carried over from the Coal Mine Health and Safety Act of 1969, 30 U.S.C. • 801 et seq. (1976)(amended 1977)("1969 Coal Act"). 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.

The legislative history of section 314(b) is scant. When introduced in the House and the Senate, the bills that became the 1969 Coal Act both contained the provision now found at section 314(b). The House Report states simply that this provision "authorizes the inspector to require other safeguards as necessary to reduce the hazards of transporting men and materials." H. Rep. No. 563, 91st Cong., 1st Sess. 55 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 1085 ("Legis. Hist."). The Senate Conference Report provides:

> Subsection (b) authorizes the inspector to require other safeguards for transporting men and materials, such as those in the present advisory code. It is expected, however, that efforts will be made to improve upon these also.

Legis. Hist. at 1619.(Footnote 4)

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4 The reference to the "present advisory code" is to the Federal Mine Safety Code for Bituminous Coal and Lignite Mines (Part I - Underground Mines), published by the Bureau of Mines, U.S. Department of the Interior,

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On March 28, 1970, the Secretary of the Interior promulgated

regulations at 30 C.F.R. • 75.1403 to implement section 314(b).(Footnote 5) As originally promulgated, section 75.1403-1 set forth the Secretary's general interpretation of authority under section 314(b). The regulation stated, in pertinent part:

(a) The sections in the • 75.1403 series ... describe safeguards that are required to minimize commonly recognized hazards with respect to the transportation of men and materials. Authorized representatives of the Secretary shall be guided by these sections in requiring the provision of safeguards under • 75.1403.

(b) An authorized representative of the Secretary shall in writing advise the operator of a specific safeguard to be provided pursuant to 75.1403 and shall fix a time within which the safeguard shall be provided. If the safeguard is not provided within the time fixed, a notice [citation] shall be issued to the operator pursuant to • 104 of the Act.

35 Fed. Reg. 5221, 5250 (March 28, 1970) (emphasis added).

These regulations established specific safeguards designed to minimize "commonly recognized" transportation hazards. The regulations required the Secretary's inspectors to advise an operator in writing if a specific safeguard must be complied with at a particular mine. The regulations also provided that enforcement action would be taken against the operator if the requirements of the safeguard were not met within the time fixed by the inspector.

Later that year, the Secretary amended these regulations to designate the specific regulatory "safeguards" in sections 75.1403-2 through -11 as the "criteria" by which inspectors were to be guided in requiring safeguards; to authorize inspectors to require safeguards for hazardous conditions not covered by a specific criterion; and to make clear that safeguards were to be issued on a "mine-by-mine" basis. 30 C.F.R. 75.1403-1; 35 Fed. Reg. 17923 (November 20, 1970). Section 75.1403-1 als

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October 8, 1953. This code was advisory only and contained extensive provisions directed to improving safety in the transportation of men and materials. See Coal Mine Health and Safety: Hearings on S. 335 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Part 3, 91st Cong. 1st Sess. 1359-1404 (1969) ("Coal Act Hearings").

5 The 1969 Coal Act was enforced by the Secretary of the Interior while the Mine Act is enforced by the Secretary of Labor. We use the term "Secretary" herein to refer to either official, as appropriate.

stated that, in addition to issuing safeguards based on the published criteria, "[o]ther safeguards may be required." Section 314(b) was not changed in the Mine Act and, in all pertinent respects, the implementing regulations at 30 C.F.R. 75.1403 remain the same.

The Secretary argues in her brief that the only limitation placed on the Secretary in issuing safeguards is that they address hazards relating to the transportation of miners and material. S. Br. at 5. Further limits on the Secretary's powers to issue safeguards, however, are drawn in the statutory language and in the implementing regulations. A safeguard may be issued to minimize transportation hazards only in underground coal mines. An inspector's decision to issue a notice to provide safeguards must be based on his consideration of the specific conditions at the particular mine. The requirement that the inspector identify a specific transportation hazard at a mine before issuing a safeguard flows from the language of section 314(b), authorizing the issuance of a safeguard that is "adequate, in the judgment of an authorized representative of the Secretary," to minimize a transportation hazard. (Emphasis added.) Section 75.1403-1(a) further clarifies that consideration of the specific conditions giving rise to a hazard requires inspectors to issue safeguards on a mine-by-mine basis. Further, safeguards may be enforced at a mine only after the operator is advised in writing that a specific safeguard will be required as of a specified date. Section 75.1403-1(b). MSHA's current Program Policy Manual ("Manual") states that the criteria of sections 75.1403-2 through -11 are not mandatory standards:

> It must be remembered that these 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....

Manual, Volume 5, Part 75, pp. 125-26.(Footnote 6) An inspector's use of the safeguard provision is not limited by the statute, the regulations, or the Manual to hazards that are "unique" or "peculiar" to a mine.

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6 The title page of the Manual states that the "MSHA Program Policy Manual is a compilation of the Agency's policies on the implementation and enforcement of the Federal Mine Safety and Health Act of 1977 and Title 30 Code of Federal Regulations and supporting programs." The United States Court of Appeals for the D.C. Circuit has stated that, while the Manual may not be binding on MSHA, "we consider the MSHA Manual to be an accurate guide to current MSHA policies and practices." Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n.5 (D.C. Cir. 1989). (The Commission has indicated that, as an adjudicative body, it is not necessarily bound by statements in

the Manual, although in appropriate circumstances, it may choose to defer to and apply such pronouncements. See, e.g., King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981).)

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A safeguard, however, must address a transportation hazard that is actually present in the mine in question. An MSHA inspector possesses authority to decide whether a safeguard should be issued at a mine without consulting with representatives of the operator. In order to issue a notice to provide safeguards, an inspector must determine that there exists at a mine an actual transportation hazard that is not covered by a mandatory standard; that a safeguard is necessary to correct the hazardous condition; and the corrective measures that the safeguard should require.

The Commission has held 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." Jim Walter Resources, Inc., 7 FMSHRC 493, 496 (April 1985). The Commission also has observed that, while other mandatory safety and health standards are adopted through the notice-and-comment rulemaking procedures of section 101 of the Act, 30 U.S.C. • 811, 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. Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985)("SOCCO I"). The Commission has recognized that "this unusually broad grant of regulatory authority must be bounded by a rule of interpretation more restrained than that accorded promulgated standards." Id.

2. Validity of safeguards addressing conditions existing at a significant number of mines

Whether a notice to provide safeguards issued under section 75.1403 is invalid if it addresses conditions that exist in a significant number of mines is a question of first impression for the Commission.(Footnote 7) The key question in this case is whether, even if issued on a mine-by-mine basis, a safeguard is invalid if it deals with a hazardous condition that is commonly encountered in coal mines. In other words, if an inspector evaluates the specific conditions at a particular mine, determines that a discrete transportation hazard exists at that mine, and issues a safeguard notice requiring the elimination of the hazard, is that safeguard rendered invalid if similar safeguards have been issued at a significant number of other mines?

a. Statutory considerations

SOCCO contends that Congress's grant of authority to the Secretary in section 314(b), when considered in conjunction with sections 101 and 301(a) of the Mine Act, 30 U.S.C. • 811 and 861(a)(infra), reflects an understanding that safeguards will not be of general applicability. SOCCO maintains that "Congress chose to grant authority to issue safeguards not with the intent that it was creating an exception to the requirements of

section 101 [and 301(a)], but on the basis that such safeguards would be individualistic and peculiar to a given mine." SOCCO Br. 9.

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7 This issue was raised in Southern Ohio Coal Co., 10 FMSHRC 963 (August 1988)("SOCCO II"), but was not then resolved by the Commission.

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Section 101 of the Mine Act sets forth the procedures the Secretary must follow 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). Section 301(a) of the Mine Act states that the interim mandatory safety and health standard of Title III shall be applicable to all underground coal mines "until superseded in whole or in part by improved mandatory safety standards" promulgated by the Secretary under section 101 of the Mine Act. 30 U.S.C. • 861(a). SOCCO reads these two provisions to require the Secretary to promulgate safety standards for commonly occurring transportation hazards. It argues that Congress did not intend to exempt hazards pertaining to the transportation of men and materials from the rulemaking requirements of section 101.

It is important to understand the genesis of the rulemaking provisions referred to by SOCCO. The predecessor to the 1969 Coal Act, the Federal Coal Mine Safety Act Amendments of 1952, 30 U.S.C. • 451 et seq. (repealed), did not authorize the Secretary of the Interior to promulgate improved safety standards. The 1969 Coal Act, like the Mine Act, contained interim safety standards for underground coal mines and empowered the Secretary to promulgate improved safety standards. The rulemaking provisions were included, in large measure, to afford the Secretary flexibility to improve upon the interim standards as experience and technology developed. As stated in the legislative history, the rulemaking provisions of the Coal Act "give the Secretary the flexibility needed to devise improved standards as technology changes, as new safety programs develop, and to provide protection against hazards not covered by [the interim standards]." S. Rep. No. 411, 91st Cong., 1st Sess. 86 reprinted in Legis. Hist. at 212. (Footnote 8) Moreover, section 301(b) of the Mine Act, 30 U.S.C. • 861(b), contains language from the Coal Act that compels the Secretary "to develop and promulgate new and improved standards promptly that will provide increased protection to the miners."

Although Congress empowered and directed the Secretary to provide increased protection for miners through the promulgation of improved safety standards, Congress did not provide any benchmark against which to judge whether improved standards are required. Rather, Congress left that determination to the Secretary. The rulemaking provisions of sections 101 and 301 of the Mine Act do not circumscribe the authority to issue safeguards granted to the Secretary in section 314(b). Thus, we conclude that, in general, it is within the Secretary's sound exercise of discretion

to issue mandatory standards or to issue safeguards for commonly encountered transportation hazards.

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8 The Secretary of the Interior, in a letter to Senator Javits supporting the 1969 Coal Act, stated that he wanted "to emphasize the need for the Congress to enact, not only the very detailed interim health and safety standards in the bill, but also provide ... the necessary flexibility in this Department to change, upgrade and modify these standards as experience and technology develop." Coal Act Hearings, Part 5, at 1585 (letter of Russell Train, Acting Secretary of the Interior, June 16, 1969).

As concluded above, section 314(b) enables an MSHA inspector to issue a safeguard to ensure the safety of miners when the inspector observes a transportation hazard that is not addressed by an existing mandatory standard. We discern nothing in the Mine Act or its legislative history expressly requiring that the hazard be unique to the mine at issue and nothing prohibiting the use of similar safeguards to address similar unsafe conditions that may exist at a number of mines.

SOCCO's argument that the Secretary actually engages in rulemaking when she issues safeguards for commonly encountered hazards fails to acknowledge the unique authority given to the Secretary in section 314(b). In our judgment, SOCCO's argument addresses the legislative wisdom of the broad authority conferred upon the Secretary by Congress in section 314(b). We agree that the Secretary might have issued mandatory standards to cover the hazard involved in this case but, on the basis of the current record, we are not prepared to say that her failure to do so was an abuse of discretion. The Secretary has set forth a reasoned basis for using safeguards to address transportation hazards at underground coal mines. The Secretary cites the flexibility that safeguards provide to maximize transportation safety at mines and the authority conferred by section 314 of the Act to issue safeguards "as necessary" to reduce transportation hazards. In general, we find this rationale well founded in the statute.

Additionally, courts rarely compel an agency to institute rulemaking proceedings, even where an interested person has filed a petition for rulemaking. See, e.g., Arkansas Power & Light Co. v. ICC, 725 F.2d 716, 723 (D.C. Cir. 1984)("[C]ourt will compel an agency to institute rulemaking proceedings only in extremely rare instances"); Bethlehem Steel Corp v. EPA, 782 F.2d 645, 655 (7th Cir. 1986)("When an agency has discretion as to whether or not to undertake rulemaking, the courts cannot tell it how to exercise that discretion.") The United States Court of Appeals for the District of Columbia Circuit has acknowledged the "broad discretionary powers possessed by administrative agencies to promulgate (or not promulgate) rules, and the narrow scope of review to which the exercise of that discretion is subjected...." WWHT, Inc. v. FCC, 656 F.2d 807, 818 (1981).

b. Precedent

SOCCO relies on the D.C. Circuit's decision in Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (1976), and on the Commission's decision in Carbon County Coal Corp., 7 FMSHRC 1367 (September 1985) in challenging the validity of generally applicable safeguards. We believe that these cases, which dealt with ventilation plans, are distinguishable and do not support the operator's position. In Zeigler, the court determined that, because section 303 of the 1969 Coal Act set forth mine ventilation standards, the ventilation plans required by section 303(o) were conceived for a narrow purpose: to provide requirements relating to the particular circumstances of

a given mine. 536 F.2d at 407.(Footnote 9) The Court indicated that if the Secretary were to attempt to compel such plans to include requirements of a general nature that should have been formulated as mandatory standards under section 101, the operator might be able to show that the Secretary had abused the ventilation plan authority conferred by section 303(o). Id. The D.C. Circuit, in UMWA v. Dole, 870 F.2d 662, 672 (D.C. Cir. 1989), repeated its warning, originally made in Zeigler, that "the Secretary should utilize mandatory standards for requirements of universal application." The Dole court, however, also reiterated its earlier pronouncements in Zeigler regarding "the considerable authority of the Secretary to determine what `should more properly have been formulated as a mandatory standard under the provisions of • 101.'" 870 F.2d at 671.

We agree with the Secretary that ventilation plans were conceived for a narrower purpose than safeguards. Comprehensive interim standards were established by Congress for ventilation. Section 314 of the Mine Act does not set forth extensive standards for hoisting and mantrips, but subsection (b) empowers inspectors to issue "other safeguards" as necessary to eliminate hazards associated with transportation. In addition, Congress gave MSHA inspectors comparatively more authority in issuing safeguards for transportation hazards than in imposing ventilation requirements in mine plans. Further, although roof control plans must provide the same level of protection as that provided by the plan criteria, even if a particular criterion is not included in the plan, Dole, 870 F.2d at 670, there is no similar requirement that the level of protection of safeguard criteria be provided at any mine. Section 75.1403-1(b) makes clear that the safeguard criteria are not binding on any operator unless, and until, that operator is given notice, in a written safeguard from an authorized representative of the Secretary, that one or more of the criteria are applicable to its mine. MSHA's Manual reiterates that "these criteria are not mandatory." Manual, Volume 5, at 125-26. Thus, the Court's logic in Zeigler with respect to the mine-particularity of ventilation plans is not transferable to safeguards.

SOCCO maintains that in order to construe sections 101 and 314 harmoniously, we must view section 101 as a limitation on the authority conferred by section 314 of the Mine Act. In Zeigler, however, the Court

held that section 101 of the 1969 Coal Act was violated only if the Secretary exceeded the scope of her authority under section 303(o) of that statute. 536 F.2d at 406-07. In the present case, section 101 of the Mine Act is violated only if a safeguard exceeds the scope of the authority conferred by Congress in section 314(b). As discussed above, we believe that issuing a safeguard for a hazardous condition that is not limited to one mine or a small number of mines is within the scope of the Secretary's

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9 Section 303(o) of the Coal Act was carried over as section 303(o) of the Mine Act, 30 U.S.C. • 863(o), and provides in pertinent part that a "ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form...."

authority, provided the inspector issues the safeguard based on his evaluation of the specific conditions at a particular mine and on his determination that such conditions create a transportation hazard in need of correction.

The Commission's Carbon County decision is consistent with our holding today. In Carbon County, the Commission found that a ventilation plan provision that MSHA sought to incorporate into an operator's plan "was the result of a rote application of [an MSHA] District ... guideline and was not based upon the particular conditions" at the mine. 7 FMSHRC at 1373.(Footnote 10) The Commission held that MSHA could prevail and have the subject provision included in the mine plan if it established that "particular conditions at the mine warrant the inclusion of the [subject] provision in the ventilation plan." 7 FMSHRC at 1375. Thus, it was the rote application of the subject provision of the ventilation plan to the mine in question, pursuant to MSHA District policies, that caused the Commission to invalidate the provision. MSHA had failed to evaluate whether the subject provision or the operator's alternative would best promote safety at the mine in question. Similarly, a safeguard cannot be blindly imposed but must be based on the inspector's determination that a specific hazard exists at a particular mine.

In sum, we conclude that the mine-by-mine requirement with respect to issuance of safeguards does not mean that a safeguard must be based on a hazard "unique" or "peculiar" to any given mine or small number of mines. Rather, a safeguard may properly be issued for a commonly encountered hazard, so long as such safeguard addresses a specific transportation hazard actually determined by an inspector to be present and in need of correction at the mine in question. Therefore, in the present proceeding, the fact that the safeguard was based on a common hazard encountered in a number of other mines does not, by itself, invalidate the safeguard.

B. Safeguards based upon promulgated criteria

The Secretary also argues that, because the safeguard in this case was based upon section 75.1403-9(a), one of the promulgated criteria, the safeguard is valid even though the hazard may be found at a significant number of mines. Thus, the Secretary asserts that, even if the Commission holds that a safeguard may not be issued for a commonly encountered hazard, a safeguard issued for such a hazard is valid if it is based upon one of the promulgated criteria. She bases her argument on the D.C. Circuit's decision in Dole. In another case decided this date, BethEnergy Mines, Inc., 14 FMSHRC , Docket Nos. PENN 89-277-R, etc., we have concluded that the validity of a safeguard is not affected by the fact that it is based on a promulgated criterion in section 75.1403 and that the principles with respect to roof control criteria set forth in Dole are not relevant to cases involving safeguards. Slip op at 7-8. For the reasons given in BethEnergy,

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10 The Dole decision interpreted Carbon County "to make the narrow point that mine operators are entitled to have alternative procedures evaluated by the district manager to determine if they achieve the safety objective set OUT in MSHA regulations and policy." 870 F.2d at 672.

we hold that a safeguard must be based on the specific conditions at a mine, regardless of whether the safeguard is patterned after a promulgated criterion, and that an otherwise invalid safeguard is not made valid simply because it is based on a promulgated criterion.

C. Burden of proof

The judge held that the Secretary bears the burden of establishing the validity of the underlying safeguard. 11 FMSHRC at 1995. The Secretary argues that the judge's allocation of this burden was erroneous. We agree with the judge.

The Mine Act does not specifically state who has the burden of demonstrating the validity of a safeguard. An operator may challenge a safeguard's validity in a contest or civil penalty proceeding arising from the issuance of a citation or order based on that safeguard. The Secretary is required to prove that the safeguard provided the operator with sufficient notice of the "nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." SOCCO I, 7 FMSHRC at 512.

This Commission, as the administrative adjudicatory body under the Mine Act, possesses considerable discretion in allocating the burden of proof, so long as the allocation is rational and consistent with the policies of the Mine Act. See generally Donovan v. Stafford Const. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(approving Commission's burden of proof allocations in discrimination cases arising under the Act). One important factor in allocating the burden of proof is which party possesses knowledge of the conditions giving rise to the safeguard. We believe that the Secretary would be in the best position to produce such evidence. While the

mine operator may have more extensive knowledge of the conditions in its mine, the Secretary would be far more knowledgeable as to why her authorized representative issued the safeguard.

Another important factor to consider is whether a challenge is in the nature of an affirmative defense to the charge of a violation. In general, the Commission, with Court approval, has required the operator to bear the burden of proof as to affirmative defenses. See, e.g., Stafford Const., 732 F.2d at 959, approving in relevant part, Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). However, an allegation by an operator that an inspector did not base a safeguard on the specific conditions actually present in its mine is not an affirmative defense. Rather, proof of specific mine conditions is part of the Secretary's prima facie case as to the validity of the safeguard. We hold that it would be appropriate and consistent with the purposes of the Mine Act to require the Secretary to prove that the inspector issued the safeguard based on an evaluation of the specific conditions at the mine and the determination that such conditions created a transportation hazard in need of correction. Placing this burden on the Secretary is consistent with the Commission's holding in SOCCO I, requiring the Secretary to prove that the safeguard adequately identified the nature

of the hazard and the conduct required of the operator to remedy the hazard. This allocation of the burden of proof does not require the Secretary to prove a negative. For example, she is not required to produce evidence demonstrating that a safeguard was not issued by rote application of an MSHA guideline rather than on a mine-by-mine basis. The Secretary is required to demonstrate only that the inspector evaluated the specific conditions at the particular mine and determined that a safeguard was warranted in order to address a transportation hazard. In rebuttal, the operator would be free to offer evidence that the safeguard was not based on conditions present at its mine or that the safeguard was routinely applied without consideration of the conditions at its mine.

We note that testimony concerning issuance of a safeguard may not be available or necessary in all cases. The safeguard in the present matter was issued in 1975. Nevertheless, in the absence of testimony, the Secretary may still be able to demonstrate that the safeguard was validly issued. The language of the safeguard itself may prove that the safeguard was issued to address specific conditions found at the mine, and that the safeguard comports with the requirements of SOCCO I.

D. Validity of the safeguard in issue

Judge Maurer concluded that the Secretary failed to demonstrate that the underlying safeguard in this case was issued on a "mine-by-mine" basis because he found that the safeguard "had nothing whatsoever to do with conditions peculiar to [the Martinka No. 1 Mine] as opposed to other mines

that also have track haulage." 11 FMSHRC at 1997 (emphasis added). As discussed above, we reject the mine-peculiar view of the nature of the Secretary's safeguard authority. Thus, the safeguard in question is valid if it was based on the specific conditions at SOCCO's mine and on a determination by the inspector that those conditions created a transportation hazard in need of correction, notwithstanding the fact that similar safeguards may have been issued at other mines.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand this proceeding to the judge to evaluate the validity of the safeguard consistently with the principles discussed in this decision.

The judge should first determine whether the safeguard was issued based on specific conditions at the Martinka No. 1 Mine that the inspector found constituted a transportation hazard in need of correction. If the judge concludes that the safeguard was validly issued, he should then determine whether the safeguard was violated and whether the order of withdrawal was properly issued. Taking into consideration the principles set forth in the Commission's decision in SOCCO I, the judge should determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard at which it [was] directed and the conduct required of

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the operator to remedy such hazard." 7 FMSHRC at 512. If the judge determines that there was a violation, he should then consider whether the violation was of a significant and substantial nature and was caused by SOCCO's unwarrantable failure to comply with the safeguard, and assess an appropriate civil penalty.

Notwithstanding the foregoing legal determinations, we find it appropriate to conclude this decision by questioning, from the standpoint of policy, whether the proliferation of safeguards is the most effective method of addressing the more commonly encountered hazards in underground coal mine transportation. Transportation hazards are a major cause of injuries and fatalities in underground coal mines, but have rarely been the subject of

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rulemaking. We note that in the Department of Labor's most recent Semiannual Regulatory Agenda, the Secretary has recognized the need for specific mandatory safety standards to protect miners from the hazards associated with the hoisting and transportation of persons and materials. 56 Fed. Reg. 53584 (October 21, 1991). There, the Secretary states that "[t]ransporting persons and material has been a leading cause of fatal accidents in underground coal mines" and that she "has very few mandatory standards addressing haulage hazards." Id. Because the use of individual safeguards, issued on a mine-by-mine basis, may not adequately protect all affected miners from haulage related hazards, we strongly suggest that the safety of underground coal miners would be better advanced by the

promulgation of mandatory safety standards aimed at eliminating transportation hazards.