CCASE:
BETHENERGY MINES V. MSHA
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January 10, 1992
BETHENERGY MINES, INC.

v. Docket Nos. PENN 89-277-R
PENN 89-278-R

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act"), presents the following issues: (1) whether the validity of a notice to provide safeguards issued pursuant to 30 C.F.R. • 75.1403 is affected by the fact that it is patterned after 30 C.F.R. • 75.1403-5(g), a published safeguard criterion;(Footnote 1)

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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 may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. □ 75.1403-1(b)
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(2) whether the Secretary of Labor should be collaterally estopped from litigating an issue regarding the issuance of certain relevant citations; (3) whether BethEnergy Mines, Inc. ("BethEnergy") failed to comply with the

subject notice to provide safeguards; (4) whether BethEnergy's alleged violations of the notice to provide safeguards were of a significant and substantial nature; and (5) whether two citations alleging BethEnergy's violations of the notice to provide safeguards were duplicative.

Commission Administrative Law Judge William Fauver determined that although the subject notice to provide safeguards may have addressed hazards commonly encountered at other mines, it was not rendered invalid because it was based on a published safeguard criterion. 12 FMSHRC 761, 768-69 (April 1990)(ALJ). Interpreting the safeguard broadly, the judge found that BethEnergy had violated the safeguard and that the violations were of a significant and substantial nature. 12 FMSHRC at 769-70. The judge also concluded that collateral estoppel should not be applied against the Secretary. 12 FMSHRC at 770. Finally, the judge determined that the two citations issued against BethEnergy for its alleged violations were not duplicative. Id.

For the reasons explained below, we affirm the judge's determination that collateral estoppel should not be applied against the Secretary in this case. We apply herein the general principles concerning the Secretary's power to issue safeguards announced in our companion decision issued this date in Southern Ohio Coal Co., 14 FMSHRC , Nos. WEVA 88-144-R, etc.

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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. • 75.1403-5 is entitled "Criteria-Belt conveyors" and section 75.1403-5(g) provides:

A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

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("SOCCO").2 We vacate the remainder of the judge's decision, and remand this case for further proceedings.

I.

Factual Background and Procedural History

On June 13, 1984, Francis Wier, an inspector of the Department of

Labor's Mine Safety and Health Administration ("MSHA"), issued a notice to provide safeguard to BethEnergy at its Mine No. 60, an underground coal mine located in Pennsylvania. The notice states:

A clear travelway of at least 24 inches wide was not provided on both sides of the belt conveyor in the longwall section MMU 031. Starting at the tipple and extending inby for approximately 400 ft. For the first 200 ft. the clearance changed from the left side back to right and management had the area fenced of[f] and a crossunder had been provided. The second area was approximately 300 ft. inby the tipple was on the left sid[e] and clearance was between 23 inches and 15 inches for approximately 10-15 feet in two different locations.

This is a notice to provide safeguard that requires at least 24 inches of a clear travelway be provided on both sides of all belt conveyors installed after March 30, 1970 at this mine.

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Joint Exh. 3.

More than five years later, on September 7, 1989, MSHA Inspector John Mull conducted a regular inspection at the Livingston portal at the Eighty-Four Complex, an underground coal mine that includes the area formerly known as Mine No. 60. As he walked along the No. 3 and No. 4 belt conveyors, he observed that there was not a continuous 24-inch clearance on both sides of the belts because rib material, concrete blocks, and cribs obstructed the "tight" (i.e., narrow) travelway beside the belts. Tr. 44-45, 58. Based upon his observations, Inspector Mull issued two citations, pursuant to section 104(a) of the Mine Act, 30 U.S.C. • 814(a), each alleging a violation of the safeguard notice issued by Inspector Wier. Tr. 47.

Citation No. 3088080, issued for the alleged violative condition located beside the No. 4 belt, states:

At least 24 inches of a clear travelway was
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2 The present decision is one of four issued this date dealing with safeguard issues. In addition to SOCCO, supra, the other decisions are Mettiki Coal Corp., 14 FMSHRC , Nos. YORK 89-10-R, etc.; and Rochester & Pittsburgh Coal Co., 14 FMSHRC , Nos. PENN 88-309-R, etc.

not provided on both sides of the no. 4 belt ... as the side not normally walked was obstruct[ed] with material from the ribs and other material at numerous locations.

Citation No. 3088162, issued for the alleged violative condition existing beside the No. 3 belt, states:

At least 24 inches of a clear travelway was
not provided on both sides of the entire no. 3 belt,
as the side not normally walked was obstruct[ed]
with rib material, crib, block and other material at
numerous locations.

Inspector Mull designated both alleged violations to be of a significant and substantial nature because he believed that the obstructions presented tripping and slipping hazards that could cause a miner to suffer strains, sprains, and bruises. Furthermore, he found that if persons tripped on the obstructions, they could fall against the belt and catch their arms in the roller, which could be permanently disabling or fatal. BethEnergy contested both citations, and the matter proceeded to a hearing before Judge Fauver.

At the hearing, Roger Uhazie, the subdistrict manager for MSHA, testified that there are 47 active mines covered by the MSHA Monroeville Sub-District Office. Tr. 33-34. Mr. Uhazie testified that all of the large mines in the subdistrict have a similar safeguard requiring 24 inches of clearance on both sides of belt conveyors. Tr. 37. Five mines that have not been issued a similar safeguard do not have belt conveyors or are small mines. Tr. 34, 37.

In his decision, the judge focused on the validity of the underlying safeguard. Preliminarily, he acknowledged that he had previously interpreted Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), to stand for the proposition that safeguards addressing commonly encountered hazards in mines were invalid because they were not mine-specific and should have been the subject of a mandatory standard. 12 FMSHRC at 766.

The judge then explained that in United Mine Workers of America v. Dole, 870 F.2d 662 (D.C. Cir. 1989), the United States Court of Appeals for the District of Columbia Circuit clarified its earlier holding in Zeigler. The judge stated:

As so clarified, the Zeigler decision is `a warning
that the Secretary should utilize mandatory
standards [by formal rulemaking] for requirements of
universal application,' but it does not preclude the
Secretary from `requiring that generally-applicable
plan approval criteria or their equivalents be
incorporated into mine plans.' The Court's
reasoning for the latter conclusion has particular
significance here.
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12 FMSHRC at 767, citing Dole, 870 F.2d at 672. The judge interpreted the Court's reasoning to mean that the Secretary would not circumvent formal rulemaking procedures by requiring incorporation of generally applicable roof control provisions in plans if those provisions were based upon criteria that had been promulgated in accordance with notice-and-comment

rulemaking procedures. 12 FMSHRC at 767-68.

The judge then concluded that the roof control plan criteria reviewed in Dole and the safeguard criteria at sections 75.1403-2 through -11 were similar in that both were promulgated in accordance with section 101 of the Act, 30 U.S.C. • 811, and that neither was enforceable until it was incorporated into an actual plan or safeguard. The judge summarized:

> I hold that if an inspector's safeguard notice is based on a published criterion (in 30 C.F.R. □ 75.1403-2 through 75.1403-11), using the same or substantially the same language as the criterion, then (1) the safeguard is valid even if the hazard is of a general rather than a mine-specific nature, and (2) the safeguard is not subject to the strict construction rule announced by the Commission in Southern Ohio Coal Co., [7 FMSHRC 509 (April 1985)], but should be interpreted in the same manner as any other promulgated safety standard.

12 FMSHRC at 769.

Based upon the foregoing, the judge found the safeguard in question to be valid because it was patterned upon section 75.1403-5(g), a published criterion, and he proceeded to interpret the safeguard broadly. 12 FMSHRC at 770. Finding that the language of the safeguard gave reasonable notice that the walkway beside the conveyor belt should be clear, the judge affirmed the citations describing obstructions in the walkway. Id. The judge also concluded that collateral estoppel should not be applied against the Secretary in this matter. Id.

The Commission granted BethEnergy'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. Validity of underlying safeguard

1. The Secretary's general safeguard authority

The central issue in this case is the validity of the underlying safeguard. In its companion decision issued this date in SOCCO, supra, the Commission addressed the extent of the Secretary's power to issue safeguards. We reviewed the text and legislative history of section 314(b)

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of the Mine Act, 30 U.S.C. • 874(b) (see n.1 supra), which confers upon the Secretary the general authority to issue safeguards. We reaffirmed the Commission's view, first expressed in Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985)("SOCCO I"), that section 314(b) is an unusually broad grant of regulatory authority to the Secretary that permits her to issue on a mine-by-mine basis what are, in effect, mandatory standards dealing with transportation hazards.

The Commission rejected the proposition that a notice to provide safeguard is invalid if it addresses a hazard that exists in a significant number of mines. We noted the considerable authority of the Secretary to determine what should properly be formulated as mandatory standards, and we held that the rulemaking provisions of the Mine Act, sections 101 and 301, 30 U.S.C. • 861, do not circumscribe the Secretary's authority to issue safeguards under section 314(b). Rather, we held that a safeguard may properly be issued to deal with commonly encountered transportation hazards, provided it is based on a determination by the inspector of a specific transportation hazard existing at a particular mine. We made clear, however, that a safeguard may not properly be issued by rote application of general MSHA policies, irrespective of the specific conditions at a given mine. We also discussed the Court's opinion in Zeigler Coal Co. v. Kleppe, 536 F.2d 378 (D.C. Cir. 1976), and the Commission's opinion in Carbon County Coal Corp., 7 FMSHRC 1367 (September 1985), both of which dealt with the mine ventilation plan adoption and approval process, and concluded that these cases are distinguishable. Finally, we allocated to the Secretary the burden of proving that a safeguard was issued on the basis of the specific conditions at a particular mine. Notwithstanding the legal conclusions reached in SOCCO, we also questioned, 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, and we strongly suggested that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating such hazards. SOCCO, 14 FMSHRC at , slip op. at 15-16.

2. Validity of safeguard based on published safeguard criterion

The Secretary primarily argues that a safeguard addressing a commonly encountered hazard is nonetheless valid. The Secretary argues alternatively that, if a safeguard cannot validly be issued for a commonly encountered hazard, a safeguard issued for such a hazard is nonetheless valid if it is based upon one of the promulgated safeguard criteria set forth in 30 C.F.R. •• 75.1403-2 through 75.1403-11. The Secretary relies upon Dole, 870 F. 662, to support this position.

In ruling that a safeguard dealing with a commonly encountered hazard may properly be issued if it is based on a published safeguard criterion, the judge also relied heavily on Dole. In Dole, the United Mine Workers of America ("UMWA") brought an action asserting that the level of protection afforded by the Secretary's new roof plan regulations, which include roof control plan criteria, had been reduced. In its determination of whether

the new regulations (30 C.F.R. • 75.204(a) & (b), & 75.213 (1990)) afforded the same level of protection to miners as the predecessor regulations (30 C.F.R. • 75.200-7(a), 75.200-12, 75.204, 75.204-1 and 75.200-14 (1987)),

the Court examined whether the predecessor regulations constituted "mandatory standards," since only such mandatory standards are included within the scope of the "no-less protection rule." 870 F.2d at 667; 55 Fed. Reg. 4592 (February 8, 1990). The "no-less protection rule," embodied in the Act's grant of rulemaking power to the Secretary (30 U.S.C. • 811(a)), authorizes the Secretary to replace existing mandatory standards only if the new standards provide at least the same level of protection as the old standards. See 870 F.2d at 664.

The Court concluded that the predecessor regulations constituted mandatory standards and, therefore, were subject to the "no-less protection rule." 870 F.2d at 672. The Court explained that the predecessor regulations required that a certain level of protection be met by all plans, even if some individual criteria were not adopted in a specific plan. 870 F.2d at 670.

The Court rejected the argument of intervenor American Mining Congress ("AMC") that roof control plans were intended to contain only mine-specific provisions and that generally applicable provisions were invalid and not subject to the "no-less protection rule." 870 F.2d at 669. The Court found that Congress intended roof control plans to afford comprehensive protection against roof falls and, therefore, that they could properly contain provisions that might be appropriate at many mines as well as provisions that might be inappropriate at other mines. 870 F.2d at 670. The Court indicated that the AMC's argument was based upon an apparent misconstruction of Zeigler and Carbon County, supra. The Court interpreted Zeigler and Carbon County to stand only for the proposition that "the Secretary could abuse her discretion by utilizing plans rather than explicit mandatory standards to impose general requirements if by so doing she circumvented procedural requirements for establishing mandatory standards laid down in the Mine Act." 870 F.2d at 671-72.

The Court further explained that the Secretary is not precluded from requiring general plan provisions that would achieve an "overall level of miner protection on all pertinent aspects of roof control," but that the Secretary "should utilize mandatory standards for requirements of universal application." 870 F.2d at 672. The Court acknowledged that the Secretary possesses considerable authority to determine what hazards should be dealt with through the promulgation of mandatory standards under section 101 of the Mine Act, 30 U.S.C. • 811. 870 F.2d at 671.

We believe that conclusions with regard to criteria that are drawn from the roof control plan process are not applicable to cases involving safeguards. A roof control plan must provide the same level of protection as that afforded by the plan criteria, even if a certain roof plan criterion is not included in a particular plan. 30 C.F.R. • 75.200-6 (1987); Dole, 870 F.2d at 670. There is no similar requirement with respect to the safeguard criteria. Section 75.1403-1(b) makes clear that the safeguard criteria are not binding on any particular 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. 30 C.F.R. • 75.1403-1(b). MSHA's Program Policy Manual (the "Manual") reiterates "that these criteria are not mandatory." Manual, Volume V, Part 75, p. 125.(Footnote 3)

As we concluded in SOCCO, a safeguard is valid only if it is based on a determination by the inspector that a transportation hazard exists at a particular mine. The fact that a safeguard is based on a published criterion does not, by itself, establish its validity. In this regard, the judge erred when he concluded that the safeguard criteria "may be used as safeguards even though they are applied at many mines and are not minespecific" because they were promulgated in accordance with section 101 of the Act. 12 FMSHRC at 769. The judge reached this conclusion by interpreting Dole to mean that the published roof control criteria constituted mandatory standards because they were promulgated in accordance with notice-and-comment rulemaking procedures. Id. quoting, 870 F.2d at 670 & 671. We disagree with the judge's interpretation of Dole. The Court reached the conclusion that the published criteria constituted mandatory standards not because individual criteria were promulgated but, instead, because overall they mandated a particular level of protection. The Court stated that roof control plans can be approved by MSHA "only if they either conformed to the criteria or `provide[d] no less than the same measure of protection to the miners' as the criteria.... MSHA was not only empowered but required to withhold approval of the plan until the mine operator incorporated the criterion. Thus the criteria ... themselves constituted a mandatory standard laying down a required level of protection for miners that had to be met by all plans." 870 F.2d at 670 (emphasis in original) (citations omitted). The roof control plan criteria in Dole cannot appropriately be compared to safeguard criteria because, as noted above, there is no similar requirement that all mines provide the level of protection that would result from imposition of the safeguard criteria. Hence, we reject the view that a safeguard is valid merely because it is based on a published safeguard criterion and, as explained above, we do not read Dole to compel by analogy the contrary result.

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3 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 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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3. Judicial construction of safeguard based on a published criterion
We also reject the judge's determination that a safeguard notice based on a promulgated safeguard criterion need not be strictly construed by the Commission, but may be interpreted more broadly in a manner similar to the proper construction of any other mandatory standard. As we discussed in SOCCO I (7 FMSHRC at 512), and reaffirm today, a safeguard must be interpreted narrowly in order to balance the Secretary's unique authority to require a safeguard and the operator's right to fair notice of the conduct required of it by the safeguard. The fact that a safeguard is based on a published criterion does not alter this fundamental consideration. A criterion does not provide clear notice until it is embodied in a safeguard issued to the operator. The focus of judicial inquiry is on whether the safeguard is based on specific conditions at a mine and, as to those specific conditions, whether it affords the operator fair notice of what is required or prohibited by the safeguard.
In sum, we hold that the fact that a notice to provide safeguard is based upon a promulgated safeguard criterion is not, in itself, determinative of the validity of the safeguard. As explained in SOCCO, the validity of a safeguard depends on whether it was based on the inspector's evaluation of specific conditions at the mine in question and a determination that those conditions created a specific transportation hazard in need of the remedy prescribed. Because the judge in this case failed to consider the manner in which the safeguard was issued, we vacate the judge's determination that the safeguard was valid. We remand for further consideration in light of the present decision, our companion decision issued today in SOCCO, and the principles of construction announced in SOCCO I, 7 FMSHRC at 512.
Since we vacate the judge's determination that the underlying safeguard was valid, we need not reach at this juncture the issue of whether BethEnergy violated the safeguard, whether the alleged violations were properly designated significant and substantial, and whether the citations issued were duplicative. The judge may reach those issues again on remand, as appropriate.
The single issue remaining is whether the judge erred in concluding that collateral estoppel should not be applied against the Secretary in this proceeding.
B. Collateral Estoppel
BethEnergy contends that the Secretary should be collaterally estopped from relitigating the issue of whether she possesses the authority to issue and enforce a safeguard on an MSHA District-wide basis, without consideration of the specific conditions at a given mine, because she

previously litigated and lost the same issue against BethEnergy in BethEnergy Mines, Inc., 11 FMSHRC 942 (May 1989)(ALJ) (BethEnergy I"). The judge determined that the Secretary should not be collaterally estopped in this proceeding because the safeguard in question in BethEnergy I was based ~26 upon a different criterion than the criterion invoked here and, further, that BethEnergy I was decided "without the benefit of the [Dole] decision." 12 FMSHRC 761, 770 (April 1990).

The Secretary counters that the judge correctly rejected BethEnergy's collateral estoppel argument because there are significant differences in the safeguard issues in BethEnergy I and the present case. The Secretary considers the most significant difference to be that this case involves the validity of a safeguard based upon a published criterion, while in BethEnergy I the safeguard was greatly modified from the language of a published criterion. Finally, the Secretary argues that BethEnergy I involved a different mine and that the safeguard addressed a different hazard.

Under the doctrine of collateral estoppel, a judgment on the merits in a prior suit may preclude the relitigation in a subsequent suit of any issues actually litigated and determined in the prior suit. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); Bradley v. Belva Coal Co., 4 FMSHRC 982, 990 (June 1982). Collateral estoppel does not apply in instances in which there has been a change in controlling facts or applicable legal principles between the two cases. See, e.g., Montana v. United States, 440 U.S. 147, 158-59 (1979); United States v. Stauffer Chemical Co., 464 U.S. 165, 169 (1984). A change in controlling facts may, in effect, create a new issue in the second suit that was not litigated or adjudicated in the prior suit. 1B J. Moore, Moore's Federal Practice •0.448 (2d ed. 1984). Identity of issue is a fundamental element that must be satisfied before collateral estoppel may be applied. Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590, 594 (7th Cir. 1979).

As discussed above, the fact that a safeguard is based upon a published criterion does not necessarily affect its validity or the manner in which it is to be judicially construed. Accordingly, we reject the Secretary's contention that the issues in the two proceedings differ significantly merely because the safeguard in the present proceeding is founded on a published criterion. Likewise, we reject the judge's apparent determination that there was a change in legal principles between BethEnergy I and the present case because BethEnergy I was decided without the benefit of Dole. Dole was in fact decided before BethEnergy I.

Nonetheless, we agree with the Secretary that the judge correctly rejected BethEnergy's collateral estoppel argument. We conclude that collateral estoppel should not be applied against the Secretary in this case, in part, because BethEnergy did not prove identity of issue in view of

the different controlling facts in BethEnergy I and the present case. In BethEnergy I, the judge found that the evidence was undisputed that the same safeguard had been issued at all mines with track haulage in MSHA District 3, that these safeguards were uniformly based on a sample furnished by MSHA's District 3 Office, and that the standardized modification language was applied to all track haulage mines in District 3, regardless of the conditions in any particular mine. See 11 FMSHRC at 943. Here, the evidence was presented that the same safeguard requiring 24 inches of
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clearance on both sides of conveyor belts had not been issued to all mines in the relevant MSHA subdistrict with belt conveyors. Small mines in the subdistrict did not receive the safeguards. Tr. 37. BethEnergy has not shown that there was no change in controlling facts between BethEnergy I and this case, and therefore, has not proven identity of issue.

More importantly, however, we reject BethEnergy's collateral estoppel argument because we find it to be irrelevant to the disposition of the issues before the Commission in this case. As noted, BethEnergy seeks to apply collateral estoppel to prevent the Secretary from litigating the issue of "whether the Secretary has the authority to issue and enforce a safeguard pursuant to 30 C.F.R. • 75.1403 on a District-wide basis without consideration of the specific conditions at the mine." BE Br. at 24. The Secretary is not attempting to litigate that issue. In fact, it appears that the Secretary agrees that a safeguard may be issued only after a representative of the Secretary considers the specific conditions at a mine. See, e.g., Oral Arg. Tr. at 26. Thus, because the Secretary does not dispute the issue that BethEnergy seeks to estop her from litigating, collateral estoppel would have no effect on the resolution of the issues before the Commission.

III.

Conclusion

For the reasons set forth above, we affirm, in result, the judge's decision that collateral estoppel should not be applied against the Secretary in this case, vacate the remainder of the judge's decision, and remand this case for further consideration.

With respect to the issue of whether the underlying safeguard is valid, the judge should set forth findings and conclusions as to whether the Secretary proved that the disputed safeguard was based on the judgment of the inspector as to the specific conditions at BethEnergy's Mine No. 60 and on a determination by the inspector that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. Taking into consideration the principles announced in SOCCO I, the judge should
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determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." 7 FMSHRC at 512. If the judge finds

the safeguard to have been validly issued, he should resolve the question of whether BethEnergy violated the safeguard. The remaining issues are to be reconsidered as appropriate to the judge's other determinations.