CCASE:
MSHA V. ROCHESTER & PITTSBURGH COAL
DDATE:
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TTEXT:
January 10, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. PENN 88-309-R
PENN 88-310-R

ROCHESTER AND PITTSBURGH
COAL COMPANY

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 issue of whether a notice to provide safeguard issued pursuant to 30 C.F.R. • 75.1403 is invalid if it addresses conditions that exist in a significant number of mines. (Footnote 1) Our decision in this matter is one of several issued on this date

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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 judgment 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 [citation] shall be issued to the operator pursuant to section 104 of the Act.
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concerning the authority of the Secretary of Labor to issue safeguards. 2

Commission Administrative Law Judge Avram Weisberger concluded that the Secretary failed to prove that the safeguard was "mine specific" to the Greenwich Collieries No. 2 Mine of Rochester and Pittsburgh Coal Company ("R&P"). 11 FMSHRC 2007, 2010 (October 1989)(ALJ). Consequently, he found the safeguard to be invalid because it was not promulgated pursuant to the rulemaking procedures of the Act. Accordingly, the judge vacated the citations issued to R&P alleging violations of the safeguard. For the reasons that follow, we vacate the judge's decision and remand this case to the judge for further proceedings.

I.

Factual Background and Procedural History

On August 24, 1988, Nevin Davis, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a spot inspection at the Greenwich Collieries No. 2 Mine and observed a miner exiting an elevator at the top of the South Portal with a portable dolly made of metal pipe. The dolly was approximately 2 feet high and tapered towards its rectangular base, which was approximately 1 foot by 2 feet. The dolly had two wheels and was designed to be pushed by hand. Davis issued a citation to R&P alleging a violation of an underlying Notice to Provide Safeguard (No. 2885431). The citation states:

> An employee of this Company was observed by this writer exiting the South Portal elevator at the surface area with a metal type portable dolly carrying device. A notice to provide Safeguard No. 2885431 was issued at this mine on 05/18/88 under District Memorandum No. 207 - dated May 8, 1978 under Part/Section 75.1403 and prohibits person or persons being transported in elevators with equipment, supplies, or other materials except small hand tools, surveying instruments, or technical devices.

The inspector designated the alleged violation as being of a significant and substantial nature.

On September 6, 1988, Davis was again at the No. 2 mine and observed a miner exiting the top of the same South Portal elevator with a dolly, which he thought was the same one that he had observed on August 24, 1988. He issued another citation, again alleging a violation of Notice to Provide Safeguard No. 2885431. The citation states:

> An employee of this Company (Lamp No. 109) was observed and later questioned by this writer exiting

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2 Our other safeguard decisions issued today are: Southern Ohio Coal Company, 14 FMSHRC , Nos. WEVA 88-144-R, etc.; BethEnergy Mines, Inc., 14 FMSHRC , Nos. PENN 89-277-R, etc.; and Mettiki Coal Corp., 14 FMSHRC , Nos. YORK 89-10-R, etc.

the South Portal elevator at the surface area with a metal type portable dolly carrying device. A notice to provide Safeguard No. 2885431 was issued at this mine on 05/18/88 under District Memorandum No. 207 - dated May 8, 1978 under
Part/Section 75.1403 and prohibits person or persons being transported in elevators with equipment, supplies, or other materials, except small hand tools, surveying instruments, or technical devices.
The inspector also designated this violation as significant and substantial.
Notice to Provide Safeguard No. 2885431 had been issued by Inspector Davis on May 18, 1988, as a result of his observations at the No. 2 Mine on May 16, 1988. On that date, Davis saw two miners unloading four or five metal pipes about 2 inches in diameter and between 2 to 4 feet in length from an elevator. There were also two unidentified "cylindrical" objects about 1/2 foot high on the floor of the elevator. Based on these observations and relying on "District Memorandum No. 207," Davis issued the Notice to Provide Safeguard, which states:
Two (2) employees of this Company w[ere] observed by this writer on 05/16/88 at approximately 1500 hours exiting this mine[']s underground workings by way of the South Portal[']s elevator. These same two employees then proceeded to unload metal pipe arrangements and large cylindrical type objects (2) from this elevator. This notice to provide safeguard is issued for this mine per District Memorandum No. 207 dated May 8, 1978 and requires that no persons shall be transported on any cages or elevators with equipment, supplies, or other materials. This does not prohibit the carrying of small hand tools, surveying instruments, or technical devices.
District Memorandum No. 207, from Donald W. Huntley, MSHA District Manager for Coal Mine Safety and Health, states:
In accordance with the procedure for expansion of provisions under section 75.1403, 30 C.F.R. 75, ... the following list of provisions should be enforced:
No person shall ride on a cage or elevator with equipment, supplies, or other materials.
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This does not prohibit the carrying of small hand tools,surveying instruments, or technical devices. 3
In his decision, the judge stated that a safeguard must be issued on a "mine-specific" basis, dealing with hazards "unique" or "peculiar" to a given mine, and that a safeguard purporting to address "generally applicable"

conditions must instead be promulgated pursuant to the rulemaking provisions of the Act. 11 FMSHRC at 2010-11. The judge found that the Secretary had failed to establish that the safeguard in issue was "mine-specific" to the No. 2 mine. 11 FMSHRC at 2011. The judge concluded that the safeguard was invalid "as it was not promulgated pursuant to the rule-making procedures" of the Mine Act and dismissed the citations as being predicated upon an invalidly issued safeguard. Id. 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

The sole issue in this case is the validity of the underlying safeguard. In its companion decision issued this date, Southern Ohio Coal Co., 14 FMSHRC , Nos. WEVA 88-144-R, etc. ("SOCCO"), the Commission addressed the extent of the Secretary's authority to issue safeguards under section 314(b) of the Mine Act, 30 U.S.C. • 874(b) (see n.1 supra). We reviewed the text and legislative history of that section and 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 to the Secretary of regulatory authority permitting 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 safeguards 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, 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

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3 The Secretary does not contend that the safeguard at issue in this proceeding was based on any published safeguard criterion set forth at 30 C.F.R. • 75.1403-2 through -11. We note, however, that 30 C.F.R. • 75.1403-7(k), dealing with mantrips, provides that "[s]upplies or tools, except small hand tools or instruments, should not be transported with men."

specific conditions at a given mine. We 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.
Against the backdrop of these general principles, we now review the judge's determinations in the present case. 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.
The judge concluded that the Secretary failed to establish that the safeguard was "mine-specific to the subject mine." 11 FMSHRC at 2011. The judge determined that Inspector Davis issued the safeguard as a result of District Memorandum No. 207 and that both the terms of this memorandum as well
as the safeguard itself "relate to conditions that are applicable to all elevators and are not unique to the elevators at Mine No. 2." 11 FMSHRC at 2010-11. The judge concluded that there is no evidence that the condition described in the safeguard "is unique to Mine No. 2, or is occasioned by equipment peculiar to Mine No. 2." 11 FMSHRC at 2011.
In SOCCO, we rejected the "mine-peculiar" view of the Secretary's safeguard authority. Consistent with that holding, the safeguard in question in this case is valid, notwithstanding the fact that similar safeguards were issued at a number of other mines, if it was actually based on the specific conditions at the Greenwich Collieries No. 2 Mine and on a determination by the inspector that those conditions created a transportation hazard in need of correction. The judge also relied heavily on Zeigler and Carbon County, supra. For the reasons explained in SOCCO, those decisions do not compel the "mine-peculiar" approach in the safeguard context. In light of these conclusions, we vacate the judge's decision and remand this proceeding to him for reevaluation of the validity of the safeguard according to the framework discussed in SOCCO and in this decision.
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 Mine No. 2 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 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 R&P violated the

safeguard. If the judge determines there were violations, he should then consider whether the violations were of a significant and substantial nature and should assess appropriate civil penalties.

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III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand for further proceedings consistent with this decision.