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MSHA V. GREEN RIVER COAL
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January 10, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. KENT 88-152

GREEN RIVER COAL COMPANY, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
The issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "Mine Act"), is whether Green River Coal Company, Inc. ("Green River") failed to comply with a notice to provide safeguard issued pursuant to 30 C.F.R. • 75.1430 and based upon the criterion set forth in 30 C.F.R.• 75.1403-5(g).(Footnote 1) The Secretary alleges that conditions found by her inspector

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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 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

subsequent to the issuance of a safeguard notice and described in a citation alleging a violation of section 75.1403-5(g) were prohibited by the safeguard notice. Commission Administrative Law Judge George A. Koutras found that the conditions for which the citation was issued were not encompassed by the safeguard notice, and he vacated the citation. 11 FMSHRC 685 (April 1989)(ALJ). For the reasons set forth below, we affirm.

On January 21, 1987, Jerrold Pyles, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a notice to provide safeguard to Green River Coal Company, Inc. ("Green River") at Green River's No. 9 Mine, an underground coal mine located near Madisonville, Kentucky. The notice states:

> A clear travelway at least 24" wide was not provided on both sides of the "7B" belt between xcuts No's 88 & 89. There was less than 24" on one side of belt between roof support (timbers) and rib nor between belt and roof support. This is a notice to provide safeguard.

Exh. P-9. In order to remedy the condition, Green River created a clear 24-inch travelway between the roof support timbers and the rib by shearing off part of the rib with a pick and an electric jack hammer.

On March 21, 1988, Inspector Pyles, accompanied by the safety manager for Green River, Grover Fischbeck, conducted an inspection of the mine, during which they observed that damage from a roof fall existed in the area of the 5-D belt, cross-cut number 6. The area had been partially cleaned by removing fallen rock from the conveyor belt. However, some fallen rock remained, approximately 2 feet in height and extending for a length of 10 to 12 feet on either side of the conveyor belt. The rock was slippery in places as a result of water leaking from the roof.

Pyles testified that to conduct a thorough inspection of the 5-D conveyor belt, a belt examiner would have to walk on the slippery rock, which would expose the examiner to hazards associated with falling. Fischbeck confirmed that Pyles issued the citation because of the obstructions in the travelway caused by the fallen rock, which would prevent the belt examiner from walking along the entire length of the belt.

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which authorized representatives are guided in requiring safeguards. Section 75.1403-5 is entitled "Criteria -- Belt Conveyors" and section 75.1403-5(g) states:

> 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.

Pyles issued a citation alleging a violation of section 75.1403-5(g) based upon the safeguard notice he had issued on January 21, 1987. The citation states:

A clear travelway of at least 24 inches was not provided on the 5 D belt xcut No. 6, in that rock had fallen down against belt, due to a roof fall, and had the travelway partially blocked to where a man or person would have to walked [sic] over the top of it. Area was wet and slippery on top of the gray shale....

Exh. P-8. The Secretary proposed a civil penalty of $800 for the violation, which Green River contested.

Following an evidentiary hearing, the judge vacated the citation.

Citing the Commission's decision in Southern Ohio Coal Co., 7 FMSHRC 509 (April 1985)("SOCCO I") and the decision of Commission Administrative Law Judge John A. Carlson in Mid-Continent Resources, Inc., 7 FMSHRC 1457 (September 1985)(ALJ), he concluded that the safeguard notice issued by Pyles on January 21, 1987, did not encompass the cited conditions. 11 FMSHRC at 702-03.(Footnote 2) The judge agreed with Judge Carlson's reasoning in Mid-Continent and compared the conditions leading to the issuance of the citation with those leading to the issuance of the safeguard notice. He found that the conditions giving rise to the safeguard, which had come about as a result of installing roof support timbers too close to a conveyor belt and which required that the rib be sheared to provide the necessary

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2 In SOCCO I, a case involving an alleged violation of a notice to provide safeguard, the Commission held that, in determining whether an operator has violated a safeguard notice, the notice must be strictly construed and must give the operator clear notice of the hazard and of the conduct required to remain in compliance. 7 FMSHRC at 5l2.

In Mid-Continent, an inspector issued a safeguard notice pursuant to section 75.1403-5(g) because coal sloughage obstructed part of a 24-inch travelway along a conveyor belt. Subsequently, the inspector found another travelway obstructed by coal sloughage, a shallow trench, and roof support timbers. Judge Carlson found that the citation was valid with respect to the coal sloughage, but invalid with respect to the trench and timbers. He held that specification of coal sloughage in the safeguard notice "was broad enough to embrace the casual presence or accumulation of coal or similar solid objects in the travelway." 7 FMSHRC at 1461. He further held, however, that the safeguard notice was not broad enough to include the dissimilar obstructions of the trench, which differed in nature from the sloughage, or the standing roof support timbers, which were installed as part of the roof control system and which required abatement action far

different from the removal of coal sloughage. The judge therefore concluded that the trench and the roof support timbers "differed enough from the class of objects akin to coal sloughage to remain outside the reasonable scope of [the] ... notice of safeguard." 7 FMSHRC at 1462.
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clearance, were different from the rock fall condition on which Pyles based the citation.
On review, the Secretary contends that the judge misapplied the Commission's holding in SOCCO I. She argues that the citation must be upheld if both the safeguard notice and the citation cover physical obstructions to a 24-inch travelway. The Secretary refers to the Commission's statement in SOCCO I, where the safeguard notice had been issued to address an obstruction caused by cement blocks and rocks, that further instances of physical obstructions, whether rocks, cement blocks, construction materials, mine equipment, or debris, would fall within the scope of the safeguard. 7 FMSHRC at 513. She argues that, because the safeguard notice and citation in this case cover "physical obstructions," roof support timbers and fallen rock, the citation was validly issued and should have been upheld, and a civil penalty assessed against Green River.
We disagree. In SOCCO I, the Commission explained that strict construction of safeguards is premised upon the unique process by which safeguards are issued. Inspectors are authorized by section 75.1403 to write what are, in effect, mandatory safety standards on a mine-by-mine basis in order to reduce hazards posed by the transportation of men and materials in a particular mine. If the operator fails to comply with a safeguard as issued, he is susceptible to the issuance of a citation and the subsequent assessment of a civil penalty. 30 C.F.R. • 75.1403-1(b).
The Commission concluded that the special nature of the safeguard provision, that is, its unusually broad grant of regulatory authority, requires a rule of interpretation more restrained than that accorded standards promulgated for nationwide application to all mines. The Commission held 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." SOCCO I, 7 FMSHRC at 512. The Commission further stated that its approach toward interpretation of the safeguard provisions "strikes an appropriate balance between the Secretary's authority to require ... safeguards and the operator's right to notice of the conduct required of him" and that "the safety of miners is best advanced by an interpretative 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." Id.
In SOCCO I, the safeguard notice was issued because fallen rock and cement blocks obstructed the travelway, and the citation that alleged a violation of the safeguard was issued because an accumulation of water, which presented a slipping and stumbling hazard, was present in the

travelway. The Commission found that the accumulation of water was neither specifically identified in the safeguard notice nor contemplated by the inspector when he issued the safeguard notice. SOCCO I, 7 FMSHRC at 513. In concluding that the conditions for which the citation was issued did not violate the notice to provide safeguard, the Commission considered the physical characteristics of the impediments to travel, as well as factors such as the type of hazards posed by the conditions, the manner by which the conditions were created, and the manner in which the conditions could be
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remedied. Id.(Footnote 3)

Following the analytical guidelines adopted by the Commission in SOCCO I, Judge Koutras correctly concluded that the safeguard notice in this case did not cover the cited obstruction. In so doing, the judge properly rejected the inspector's opinion that, regardless of the conditions that caused a belt travelway to be restricted, a violation of the safeguard occurred whenever a clear travelway of at least 24 inches was not provided in accordance with the safeguard notice. 11 FMSHRC at 700-03. The judge focused upon the characteristics of the obstacles causing the obstruction, the type of hazard posed by the obstacles, the manner in which the obstacles were created, and the manner in which the resulting conditions could be remedied. The judge found that, while no evidence was presented with respect to the hazards associated with a travelway restricted by the installation of roof support timbers close to a conveyor belt, the evidence, nonetheless, established a slipping and falling hazard with respect to the fallen rock. 11 FMSHRC at 702. The judge noted that the obstructions described in the safeguard notice and citation arose in dissimilar manners. The safeguard specifically addressed a lack of clearance caused by the installation of roof timbers too close to a conveyor belt, while the cited obstruction was caused by rock that had fallen against the belt. 11 FMSHRC at 702-03. The judge also noted that the safeguard obstruction was abated in a manner requiring the use of a jack hammer to shear off a rib to provide greater clearance. 11 FMSHRC at 703. The cited obstruction was abated by removing the fallen rock. Tr. 12, 17. Given these differences between the impediment caused by the intentional placement of roof support timbers and the impediment caused when rock had accidentally fallen against the conveyor belt, he held that the safeguard notice did not encompass the conditions in the citation. 11 FMSHRC at 703.

The inspector believed that whenever a clear travelway was not provided for whatever reason, he should issue a citation, even though an obstruction caused by fallen rock was not specifically addressed in the safeguard notice. Tr. 63-64. A safeguard, however, must identify with specificity the nature of the hazard against which it is directed and the conduct required of the operator to remedy the hazard. Obstructions in travelways caused by the deliberate placement of roof supports differ fundamentally in nature, cause, and remedy from those that occur due to roof

falls. We find, therefore, that the prohibition against obstructions in travelways caused by the placement of roof support timbers did not provide sufficient notice to Green River that obstructions caused by roof falls likewise were prohibited.

We reject the Secretary's argument that the concerns expressed by the Commission in SOCCO I regarding the necessity for narrow construction of a

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3 This same wide range of distinguishing factors was considered by the judge in Mid-Continent when he concluded that the safeguard notice issued because coal sloughage obstructed an escapeway did not encompass obstructions caused by a trench and roof support timbers. 7 FMSHRC at 1461. See n.2, supra.

~48

notice to provide safeguard are valid only when the safeguard is not based on a specific published criterion of sections 75.1403-2 through 75.1403-11. See Sec. Br. at 10. The Secretary argues that a safeguard notice that is based on a published criterion should be construed like a mandatory standard and should apply to all factual circumstances reasonably encompassed by the language of the criterion. The Secretary cites UMWA v. Dole, 870 F.2d 662 (D.C. Cir. 1989) as supporting her argument.

We have addressed a number of issues concerning the authority of the Secretary of Labor to issue safeguards in decisions issued this date in the following cases: Southern Ohio Coal Co., 14 FMSHRC, , Nos. WEVA 88-144-R, etc.; BethEnergy Mines, Inc., 14 FMSHRC , Nos. PENN 89-277-R, etc.; Mettiki Coal Corp., 14 FMSHRC , Nos. YORK 89-10-R, etc.; and Rochester and Pittsburgh Coal Co., 14 FMSHRC , Nos. PENN 88-309-R, etc. In BethEnergy, supra, we held that the fact that a safeguard is founded on a published criterion does not affect either its validity or the manner in which it is to be construed. The validity of a safeguard depends on whether the safeguard is based on the inspector's evaluation of specific conditions at the mine in question and on the inspector's determination that those conditions created a specific transportation hazard in need of the remedy prescribed. We determined that the principles with respect to roof control plan criteria set forth in Dole are not relevant to cases involving safeguards. We reaffirmed our holding in SOCCO I that a safeguard must afford the operator fair notice of what is required or prohibited by the safeguard. The fact that a safeguard is based on a published criterion does not alter the fundamental consideration that a safeguard must be interpreted more narrowly than a promulgated standard in order to balance the Secretary's authority to require a safeguard and the operator's right to fair notice of the conduct required by the safeguard. Slip op. at 8-9.

~49

We conclude, therefore, that the judge properly construed the safeguard notice and correctly found that it is not broad enough to encompass the conditions described in the citation. Accordingly, we affirm

the vacation of the citation.