

CCASE:
MSHA V. SOUTHERN OHIO COAL
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TTEXT:
May 21, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. LAKE 90-53

SOUTHERN OHIO COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This civil penalty proceeding 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 safeguards issued pursuant to 30 C.F.R. • 75.1403 is affected by the fact that it is patterned after 30 C.F.R. • 75.1403-10(h), a promulgated safeguard criterion.(Footnote 1)
Commission

1 30 C.F.R. • 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C.

874(b)

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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Administrative Law Judge James A. Broderick determined that the subject notice to provide safeguards was valid because it was based on a published safeguard criterion. 13 FMSHRC 40, 44 (January 1991)(ALJ). The judge also determined

the scoop tractor's operating compartment and the coal rib was 24 inches and that the distance between the scoop tractor and the supply car was four inches. Based on his observations, Inspector McMahon issued a citation, pursuant to section 104(a) of the Mine Act, 30 U.S.C. • 814(a), alleging a violation of the safeguard notice. The citation states, in pertinent part: Only 28 inches of continuous clearance was provided for the company no. 5050 scoop being operated along the 15L1NW (mmu no. 014-0) supply track. The clearance on the operator's side was 24 inches and between the contactor compartment and the rock dust supply car was 4 inches. A Notice to Provide Safeguards has previously been issued requiring a minimum total clearance (both sides) along mobile equipment roadways of 36 inches.

Gov. Exh 1. Inspector McMahon designated the alleged violation to be of a significant and substantial nature.

SOCCO challenged the safeguard notice and the citation on the basis that the safeguard notice was directed at hazards that are of a general nature rather than hazards that specifically relate to the conditions at the Meigs No. 2 Mine. In his decision, the judge stated that he agreed with the reasoning of Judge Fauver in *BethEnergy Mines, Inc.*, 12 FMSHRC 761 (April 1990)(ALJ). 13 FMSHRC at 43-44. In that decision, Judge Fauver concluded 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 ... the safeguard is valid even if the hazard is of a general rather than a mine-specific nature..." 12 FMSHRC at 769. Judge Fauver relied upon *United Mine Workers of America v.*

Dole, 870 F.2d 662, 672 (D.C. Cir. 1989). In the present case, Judge Broderick concluded that "incorporating published criteria in a safeguard notice, makes it in effect a mandatory safety standard." 13 FMSHRC at 44. He held that the notice to provide safeguards is valid because it "cited and tracked the criterion in 30 C.F.R. • 75.1403-10(h)." *Id.* He also determined that SOCCO violated the safeguard and affirmed the citation. *Id.*

The Commission granted SOCCO's Petition for Discretionary Review.

Briefing was stayed until after the Commission issued its decisions in SOCCO and *BethEnergy*.

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II.

Disposition of Issues

The central issue in this case is the validity of the underlying safeguard. In its recent decision in 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. 14 FMSHRC at 5-8.

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. 14 FMSHRC at 8-10. 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). 14 FMSHRC at 10-12. 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. *Id.* We made it clear that a safeguard may not properly be issued by rote application of general MSHA policies, irrespective of the specific conditions at a given mine. 14 FMSHRC at 12. 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. 14 FMSHRC at 13-14.

In *BethEnergy*, the Commission 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 plan criteria set forth in the D.C. Circuit's decision in *Dole* are not relevant to cases involving safeguards. 14 FMSHRC at 22-24. For the reasons set forth in *BethEnergy*, 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.

In this case, Judge Broderick adopted Judge Fauver's reasoning in *BethEnergy* and held that the safeguard was valid. In *BethEnergy*, the Commission rejected Judge Fauver's view that a safeguard is valid merely because it is based on a published safeguard criterion. Thus, Judge Broderick's decision in the present case is not consistent with the framework set forth in the Commission's *SOCCO* and *BethEnergy* decisions.

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III.

Conclusion

For the reasons set forth above, we vacate the judge's decision that the safeguard is valid and remand this case for further consideration. The judge should set forth his findings and conclusions as to whether the Secretary proved that the safeguard was based on the judgment of the inspector as to the specific conditions at the Meigs No. 2 Mine and on the inspector's determination 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 he finds the safeguard to have been validly issued, he should reevaluate whether SOCCO violated the safeguard. We reiterate here our conclusion in SOCCO: "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." 14 FMSHRC at 16.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner