CCASE:
BETHENERGY MINES V. SOL (MSHA)
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June 29, 1993

BETHENERGY MINES, INC.	:	
	:	
v.	:	Docket Nos. PENN 89-277-R
	:	PENN 89-278-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

This contest 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 raises the question of whether BethEnergy Mines, Inc. ("BethEnergy") violated a notice to provide safeguards applicable to its belt conveyors. The safeguard notice was issued by an authorized representative of the Secretary of Labor pursuant to 30 C.F.R. 75.1403 and was based upon the safeguard criterion set forth at 30 C.F.R. 75.1403-5(g).(Footnote 1) In an earlier decision, BethEnergy Mines, Inc., 14 FMSHRC 17 (January 1992)("BethEnergy I"), the Commission vacated Administrative Law Judge William Fauver's determination that the safeguard was valid as well as his affirmance of the two citations alleging violations of the safeguard, and remanded to the judge for reconsideration pursuant to the principles discussed by the Commission in its opinion and in Southern Ohio Coal Co., 14 FMSHRC 1 (January 1992)("SOCCO II"), one of four

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1 30 C.F.R. 75.1403 has language identical to 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, to minimize hazards with respect to transportation of men and materials shall be provided.

30 C.F.R. 75.1403-5 is entitled "Criteria-Belt conveyors," and section 75.1403-5(g) states, in pertinent part, that a "clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors...."

other safeguard decisions issued the same date.(Footnote 2)

On remand, Judge Fauver again determined that the safeguard was valid, but found that the Secretary had not established the alleged violations of the safeguard. 14 FMSHRC 894 (May 1992)(ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's vacation of the citations. We affirm the judge's conclusion but on grounds different from those relied upon by the judge.

I.

Factual Background and Procedural History

A. Factual Background

On June 13, 1984, Francis Weir, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a notice to provide safeguards to BethEnergy at its Mine No. 60, an underground coal mine 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 MMUU 031. Starting at the tipple and extending inby for approximately 400 ft. For the first 200 ft. the clearance changed from the left sid[e] 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 ft. in two different locations.
>
> This is a notice to provide safeguard that requires at least 24 inches of clear travelway be provided on both sides of all belt conveyor[s] installed after March 30, 1970 at this mine.

Jt. Exh. 3.

On September 7, 1989, some five years later, MSHA Inspector John Mull inspected the Livingston portal in BethEnergy's Eighty-Four Complex, a mine that includes former Mine No. 60. Inspector Mull observed that 24 inches of clearance had not been provided along both sides of the No. 3 and 4 conveyor belts, and issued two citations, alleging violations of Inspector Weir's safeguard notice.

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2 The other decisions are: Mettiki Coal Corp., 14 FMSHRC 29 (January 1992); Rochester & Pittsburgh Coal Co., 14 FMSHRC 37 (January 1992); and Green River Coal Co., 14 FMSHRC 43 (January 1992).

The citation alleging a violative condition along 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.

Jt. Exh. 1. The citation alleging a violative condition beside the No. 4 belt states:

> At least 24 inches of a clear travelway was 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.

Jt. Exh. 2.

The two citations were terminated after miners removed the obstructions along the belt lines over the course of ten shifts. 14 FMSHRC at 896. BethEnergy contested both citations, and the matter was heard by Judge Fauver.

B. Procedural History

In his original decision, Judge Fauver determined that, because the safeguard was based on a published safeguard criterion, it was valid even if it addressed a general rather than a mine-specific hazard and should be interpreted in the same manner as a promulgated mandatory standard. 12 FMSHRC 761, 769 (April 1990)(ALJ). Construing the safeguard broadly, the judge found that the safeguard provided reasonable notice that the walkways beside the conveyor belts should be clear, and he affirmed both citations. 12 FMSHRC at 769-70.

On review, the Commission noted its holding in SOCCO II that the Secretary may properly issue a safeguard that addresses a commonly encountered hazard so long as it is based on a determination by the inspector that the specific hazard exists in the mine. BethEnergy I, 14 FMSHRC at 21-22, citing, SOCCO II, 14 FMSHRC at 15-16. The Commission held that the fact that a safeguard is based on a published safeguard criterion neither affects its validity nor the narrow manner in which it is to be construed. 14 FMSHRC at 22-25. Accordingly, the Commission vacated the judge's determination that the safeguard was valid, and remanded for consideration of whether the safeguard was based on Inspector Weir's determination that the conditions at BethEnergy's Mine No. 60 created a transportation hazard requiring the corrective action prescribed in the safeguard. 14 FMSHRC at 27. If the judge concluded that the safeguard had been validly issued, he was to determine, pursuant to the principles announced in Southern Ohio Coal Co., 7 FMSHRC 509 (April 1985)("SOCCO I"), whether BethEnergy had violated it. 14 FMSHRC at 25, 27-28.

On remand, the judge determined that the safeguard was valid but that the Secretary had not proven that BethEnergy had violated it. 14 FMSHRC at 897, 899-900. Applying a narrow construction of the safeguard as discussed in SOCCO I, 7 FMSHRC at 512, the judge reasoned that a violation of the safeguard exists "only if (1) a travelway between the rib and the conveyor belt has a width below 24 inches or (2) a fence obstructs the travelway." 14 FMSHRC at 899-900 (footnote omitted). He determined that the first condition could be met "by proof that obstructions reduced the safe, usable width of a travelway to below 24 inches." 14 FMSHRC at 900. He concluded that, because Inspector Mull had not measured but had only estimated the clearance along the travelways, the Secretary had failed to prove that obstructions reduced the width of the travelways to less than 24 inches. Id. Accordingly, he vacated the citations. 14 FMSHRC at 901.

II.

Disposition of Issues

The Secretary sought review of "[w]hether the ... judge erred in concluding that the Secretary failed to establish violations of a safeguard notice ... because the inspector failed to measure the distance between the belts and the obstructions...." PDR at 1. We conclude that the judge erred in relying upon the inspector's failure to take measurements as the basis for finding no violation of the safeguard but, nevertheless, affirm in result his vacation of the citations.

In determining whether the Secretary had established a violation of the safeguard notice, the judge imposed upon the Secretary, in effect, a stricter burden of proof than preponderance of evidence, which is the appropriate standard of proof in proceedings before Commission administrative law judges. See, e.g., Kenny Richardson, 3 FMSHRC 8, 12 n.7 (January 1981). Inspector Mull testified that he issued the citations because material was obstructing the travelways beside the conveyor belts and, as a result, 24 inches of clearance had not been provided. Tr. 45, 47. He stated that he had to cross over the No. 4 belt because the rib sloughage beside the belt was too high for him to walk over. Tr. 49-50. Inspector Mull also testified that "the reason [he] didn't measure it [the width of the walkway] was because there were obstructions from the belt structure ... in most cases clear to the rib." Tr. 66. BethEnergy offered no evidence in contradiction of Inspector Mull's testimony that 24 inches of clearance had not been provided. The judge did not question Inspector Mull's general credibility and, in fact, accepted his observed estimates as to the size of the obstructions and the distance between the belt and the floor and the roof. 14 FMSHRC at 895-96; Tr. 49-50, 75-76. Thus, a preponderance of the evidence presented to the judge established the cited lack of clearance.

We conclude, therefore, that substantial evidence does not support the judge's rejection of the Secretary's case on the basis of the inspector's

failure to take measurements.(Footnote 3) SOCCO I does not require the application of a burden of proof stricter than a preponderance of the evidence in determining whether a safeguard was violated. Rather, SOCCO I requires the Commission and its judges to construe narrowly the terms and intended reach of a safeguard. Accordingly, we reverse the judge's determination that the Secretary failed to prove the cited lack of clearance.

BethEnergy argues that, even assuming the cited lack of clearance, the citations were properly vacated because the obstructions alleged in the citations were not encompassed by the safeguard's prohibitions.(Footnote 4) We agree.

In SOCCO I, the Commission concluded that a safeguard notice must identify with specificity the nature of the hazard against which it is directed and the conduct required to abate the hazard, and held that "a narrow construction of the terms of the safeguard and its intended reach is required." 7 FMSHRC at 512. The Commission explained that strict construction was necessary in order to balance the unusually broad grant to the Secretary of authority to issue safeguards with the operator's right to notice of the conduct required of him. Id. The Commission concluded that the safeguard, which referred to physical obstructions in a travelway, fallen rock and cement blocks, did not provide the operator with adequate notice that wet

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3 The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

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4 Although the Secretary narrowly tailored the issue presented for review, we conclude that BethEnergy is not precluded from interjecting this argument in its response brief, rather than in a cross-petition for review. In Secretary on behalf of Price & Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521 (August 1990), the Commission determined that:

> the "appellee" may urge in support of the judgment below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or issue resolution, so long as the appellee does not seek to attack the judgment itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review.

12 FMSHRC at 1529 (emphasis in original; citations omitted). The Commission reaffirmed this determination on subsequent review of the judge's decision on remand. Secretary on behalf of Price & Vacha v. Jim Walter Resources, Inc., 14 FMSHRC 1549, 1552 n.2 (September 1992). Here, the appellee does not seek to attack the judge's conclusion that the citations should be vacated or to enlarge its rights under that judgment. Thus, we consider the argument.

ground conditions resulting in an accumulation of water fell within the safeguard's prohibitions. 7 FMSHRC at 513.

In Green River Coal Co., 14 FMSHRC 43, 47 (January 1992), the Commission affirmed the judge's determination that a safeguard, which addressed a hazardous narrowing of a travelway caused by the erection of roof supports near a conveyor belt, did not give the operator adequate notice that it also prohibited the loose rock obstructing a travelway. The Commission explained that "[o]bstructions 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." Id.

Here, the impediments to travel described in the safeguard differ substantially in nature from the cited obstructions. The lack of clearance described in the safeguard was caused by the operator's erection of a fence across the travelway and by placement of the belt too close to the rib. In contrast, the cited coal sloughage, concrete blocks and cribbing material resulted from unintended accumulations in the travelways. The fence, although erected as a safety measure, impeded travel, and the proximity of the belt to the rib narrowed the passageway. The cited obstructions presented primarily slipping, tripping, and falling hazards. See Tr. 45-46. Unlike abatement for lack of clearance caused by the belt being too close to the rib, abatement of these citations required removal of the coal sloughage, concrete blocks, and crib material. Thus, for the reasons discussed in SOCCO I and Green River, we conclude that the lack of clearance described in Inspector Weir's safeguard did not provide BethEnergy with adequate notice that the safeguard prohibited the cited conditions. Accordingly, we affirm, in result, the judge's vacation of the citations.

III.

Conclusion

For the reasons discussed above, we affirm the judge's vacation of the citations.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner