FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 28 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2009-570
v.	:	
BLACK BEAUTY COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). At issue is the validity of an original safeguard notice and its modification, issued to Black Beauty Coal Company by the Department of Labor's Mine Safety and Health Administration ("MSHA"), which served as the basis for four citations in this matter.

The Judge found the notice of safeguard and the modification to be valid, and affirmed the four related citations. Order Denying Respondent's Motion to Dismiss (Feb. 2011) (ALJ); 33 FMSHRC 1504 (June 2011) (ALJ).[1] Black Beauty seeks review of those portions of the decision and order in which the Judge found the safeguard notice and modification to be valid. Specifically, Black Beauty claims that the notice and modification do not meet the requirement that a valid safeguard notice must identify a hazard with specificity. Black Beauty accordingly requests that the four citations be vacated because they were issued pursuant to an invalid notice of safeguard. Black Beauty does not challenge the citations on any other grounds.

We conclude that the original safeguard notice is valid, and that when the safeguard notice and modification at issue are read together, the modified safeguard notice is also valid. Accordingly, the four citations are affirmed.

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[1] Docket No. LAKE 2009-570 contains 63 citations and orders; the Judge resolved eleven on the merits, and approved settlement of the remainder. 33 FMSHRC at 1534-36.

I.

Legal Framework

Although an operator is usually cited for violations of mandatory safety and health standards developed through notice and comment rulemaking pursuant to Title I of the Mine Act, 30 U.S.C. § 811(a), Title III of the Mine Act also gives the Secretary the authority to issue safeguards in underground coal mines to reduce hazards associated with the transportation of men and materials. 30 U.S.C. § 874(b) (section 314(b) of the Act).[2] The Secretary implements this provision by authorizing an inspector to issue a safeguard notice on a mine-by-mine basis. A safeguard notice informs the mine operator about conduct that is mandated or prohibited. The inspector issues the safeguard in writing and indicates a time by which the operator must provide and subsequently maintain that safeguard. 30 C.F.R. § 75.1403-1(b). Uniform safeguard criteria guide the mine inspector's issuance of a safeguard as well as its content. *See* 30 C.F.R. § 75.1403-2 – 75.1403-11. If the operator does not comply with the safeguard the inspector issues a citation. 30 C.F.R. § 1403-1(b). Thus, issuances pursuant to section 314(b) are enforceable as mine-specific mandatory standards, as an operator may be issued a citation for failing to provide the required safeguard. *Wolf Run Mining Co.*, 659 F.3d 1197, 1201-02 (D.C. Cir. 2011), *aff'g* 32 FMSHRC 1228 (Oct. 2010). When challenging such a citation, an operator may also challenge the validity of the underlying safeguard notice. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 2-4 (Jan. 1992) (*SOCCO II*).

The Commission has long held that a valid 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," and that "a narrow construction of the terms of the safeguard and its intended reach is required." *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (*SOCCO I*). A narrow interpretive approach serves to balance the Secretary's broad grant of authority to effectively issue mine-specific mandatory standards without resorting to normal rulemaking procedures, with the operator's right to notice of the conduct required of it. *Id.*

The requirement to identify a "hazard" for purposes of section 314(b) is satisfied when the safeguard identifies a hazardous condition; it need not specify a particular harm or risk to miners. *American Coal Co.*, 34 FMSHRC 1963, 1967-71 (Aug. 2012); *Oak Grove Resources*, 35 FMSHRC 2009, 2014 (July 2013). We have "consistently treated safeguards that *specify hazardous conditions and specify a remedy* as valid safeguards." 34 FMSHRC at 1969 (emphasis in original). A valid safeguard notice must identify a hazardous condition and remedy with specificity in order to ensure that the operator has sufficient notice as to the conduct that is prohibited or required. *Id.* at 1967; *see also SOCCO I*, 7 FMSHRC at 512-13.

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[2] Section 314(b) of the Act states that "[o]ther 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 U.S.C. § 874(b).

II.

Factual and Procedural Background

In May 2003, an MSHA inspector issued Safeguard No. 7591942 to Black Beauty at its Air Quality No. 1 Mine. The safeguard notice states:

> Rib coal and rib rock have fallen blocking the travelway along each side of the 2-A conveyor belt (3 West/1 Right) at cross cut #17. The fallen material along the east side of the belt has the travelway blocked for an approximate 15' distance. Fallen material along the west side of the conveyor has the travelway blocked for an approximate 20'-25' distance.
>
> This is a Notice to Provide Safeguard(s) requiring a clear travelway at least 24 inches wide [to] be provided on both sides of all belt conveyors. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway of at least 24 inches is required on the side of such support farthest from the conveyor.

Gov. Ex. 45 (*see* 30 C.F.R. § 75.1403-5(g)). In August 2007, an MSHA inspector issued the following modification:

> This is to modify the safeguard requiring a clear travelway of at least 24 inches along both sides of all conveyor belts. The above-referenced safeguard is hereby modified to require [ ] that the 24 inch travelway shall be clear of mud and water.

Gov. Ex. 46.

In 2009, MSHA issued four citations relevant to this proceeding, alleging violations of the modified safeguard notice. Citation Nos. 8415371, 8415372 and 8415373 allege failures to keep travelways free of mud and water, while Citation No. 8415735 alleges a failure to keep a travelway clear of mud, water, rock and coal.

Black Beauty filed a motion before the Judge to dismiss the four citations, arguing in part that the underlying safeguard notice and modification were invalid because they failed to identify a hazard with specificity. The Judge denied the motion, finding that the safeguard notice and modification did identify hazards affecting transportation of men and materials: namely, coal and rock in the travelway for the original issuance, mud and water accumulations in the travelway for the modification. Order at 2-3. The Judge subsequently issued a decision in which she reiterated the validity of the modified safeguard notice and affirmed the four citations.[3] 33 FMSHRC at 1517, 1530-31.

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[3] Citation Nos. 8415371 and 8415735 were contested on the merits. The only defense Black Beauty raised with regard to Citation Nos. 8415372 and 8415373 was the invalidity of the safeguard. 33 FMSHRC at 1531.

Black Beauty filed a petition for discretionary review of the Judge's conclusion that the safeguard notice and modification identified a hazard with sufficient specificity. Review was granted, but briefing was stayed pending the Commission's decisions in *American Coal Co.*, 34 FMSHRC 1963 (Aug. 2012), and *Oak Grove Resources*, 35 FMSHRC 2009 (July 2013). Following the issuance of those decisions, the stay of briefing was lifted.

III.

Disposition

Because the validity of the safeguard notice and modification is a purely legal issue, we review the judge's decision *de novo*. *American Coal*, 34 FMSHRC at 1972. We conclude that when the original issuance and its modification are read in conjunction, the modified safeguard notice identifies a hazardous condition and modified remedy with sufficient specificity to provide the operator with notice as to the conduct that is prohibited or required. Accordingly, we find that the original safeguard notice and its modification are valid.

As an initial matter, we reaffirm our holding in *American Coal* and *Oak Grove Resources* that a notice of safeguard identifies a hazard for purposes of section 314(b) by identifying a hazardous condition, and need not specify a particular harm or risk to miners. 34 FMSHRC at 1969-70.

Black Beauty argues that, although the original Safeguard No. 7591942 "arguably describes the condition that gave rise to its issuance," it is invalid because it fails to also define the specific danger which the condition creates for miners. BB Br. at 7-8. The operator concedes that its position is "contrary to the Commission's holding in *American Coal*." BB Reply Br. at 6, n.2. Moreover, it fails to offer any new theories that would justify reconsidering the principle adopted therein.[4] The failure to identify a specific risk or harm to miners that might potentially result from the hazardous condition does not render Safeguard No. 7591942 or its modification invalid.

Likewise, we reject Black Beauty's alternative argument that the original safeguard notice is invalid even under *American Coal* because it fails to identify a *hazardous* condition. Black Beauty concedes that the issuance describes "material blocking the travelway, rendering travel along a portion of the conveyor impassible," but claims that it is not a valid notice of safeguard because it "does not identify what hazard that creates, or that the condition was hazardous at all." BB Br. at 9. In essence, Black Beauty again argues that a valid safeguard notice must explicitly describe how a general condition will potentially harm miners, and we again reject that argument as contrary to *American Coal*. Safeguard No. 7591942 describes rock and coal blocking travelways and directs that the operator maintain 24 inches of clear travelway

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[4] Black Beauty relies on earlier Commission caselaw and the use of the term "hazard" in MSHA's Program Policy Manual. Both were considered by the Commission in *American Coal*. The former was found to be consistent with our holding, and the latter was found not to be persuasive. 34 FMSHRC at 1970. The ALJ decisions cited by Black Beauty are not precedential and were decided before the issuance of *American Coal*.

on both sides of all belt conveyors. It specifies a hazardous condition and a remedy. Therefore, it is valid under *American Coal.*

In addition, we are not persuaded by Black Beauty's argument that the modification is invalid because it fails to describe a hazardous condition. If the modification is read in isolation, Black Beauty would be correct.[5] However, modifications do not exist independently; they inherently require an original to be modified. Safeguard notices and their modifications must be read together. *See, e.g., American Coal,* 34 FMSHRC at 1977 (addressing a safeguard notice "as modified"); *see also Mettiki Coal Corp.*, 14 FMSHRC 29 (Jan. 1992). The relevant question is not whether the modification is valid. It is whether the *modified safeguard notice* identifies a hazardous condition and remedy with sufficient specificity as to provide adequate notice as to the conduct prohibited or required. 34 FMSHRC at 1967. We find that it does.

We acknowledge that the modified safeguard does not identify a specific observed condition for every specific remedy; in particular, it does not explicitly state that an inspector observed accumulations of mud and water. However, focusing on the broader concept of *type* of condition, the modified safeguard identifies accumulations of material (such as fallen rib coal and rib rock), and requires that travelways be kept clear of accumulations of material (such as rib coal, rib rock, mud and water). In other words, the modified safeguard identifies specific conditions at the mine which obstructed a travelway, and identifies similar conditions which should be avoided to prevent obstructions.[6] When the original safeguard and modification are

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[5] Chairman Jordan notes that the original safeguard notice (which was prompted by debris) directed the operator to keep a clear travelway of at least 24 inches along both sides of all conveyor belts. She is of the view that such directive also provided adequate notice to the operator that the travelway not be impeded by mud and water.

[6] The dissent states that without the additional context provided by an observed mud and water accumulation, it would be impossible for a reasonable person to understand the requirements of the safeguard. Slip op. at 10-11. We note that safeguards are written by, and for, those with knowledge of the relevant mine. While safeguards do have a specificity requirement, basic industry knowledge can also provide context when interpreting a safeguard. *See, e.g., Oak Grove Resources, LLC,* 35 FMSHRC 2009, 2012 (July 2013) (citing SOCCO I, 7 FMSHRC at 512 n.2) (noting that "safeguards are written by inspectors in the field, not by a team of lawyers," and that "the requirement of specificity is 'not a license for the raising or acceptance of purely semantic arguments'").

Moreover, we note that if the phrase "clear of mud and water" to prevent obstructions were contained in a mandatory standard rather than in a safeguard, there would not be a question of lack of notice. Individual citations would be evaluated under the Commission's familiar "reasonably prudent person" standard stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) and reiterated in numerous other decisions of the Commission. We see no reason why the "reasonably prudent person" test would not be applicable to questions of notice which arise in the context of safeguards.

read in conjunction, the modified safeguard notice identifies a hazardous condition and remedy.[7]

As to whether the conditions are identified with sufficient specificity, we have previously found other safeguard notices that follow the same pattern – identifying mine-specific examples of a problem, and then providing a more general solution – to be valid. For example, a safeguard notice found to be valid in *American Coal* stated:

> The active 13th West Long wall working section, 058 MMU, was not provided with a clear travelway between the long wall face conveyor and the shield bases for the entire length of the long wall face. Coal and gob was observed deposited in the walkway and on the shield bases at various depths. This is a notice to provide safeguard(s) requiring that all long walls at this mine shall maintain the walkways and shield bases, between the face conveyor and the shields, free of all extraneous materials that would affect the safe travel of miners.

34 FMSHRC at 1972. The Commission noted a similarly patterned notice in SOCCO I, which stated:

> A clear travelway at least 24 inches along the No. 1 conveyor belt was not provided at three (3) locations, in that there was fallen rock and cement blocks.
>
> All conveyor belts in this mine shall have at least 24 inches of clearance on both sides of the conveyor belts. This is a notice to provide safeguards.

34 FMSHRC at 1967, *citing* 7 FMSHRC at 510, 514. A safeguard can be sufficiently specific to put an operator on notice as to the conduct required, even where the remedy is broader than the specific conditions noted by the inspector. In the instant case, the provisions of the modified

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[7] The Judge appears to have upheld the validity of the modification by inferring that a generic mine hazard existed from the modification's mandate (that travelways be clear of mud and water), rather than by looking to the original safeguard issuance for the hazard. Order at 3. The Secretary looks outside the text to support the modification, claiming that the operator was aware of the relevant hazardous condition because mine personnel were present when the modification was issued. Oral Arg. Tr. 14-15. Both methods are improper. Hazardous conditions must be in the text of the safeguard notice, rather than inferred or established through the record. *See, e.g.*, *American Coal*, 34 FMSHRC at 1978-79 (finding a safeguard notice invalid where, although one could infer that the inspector observed the conditions addressed in the remedy, those conditions were not explicitly described). However, the Judge's inference is harmless error. As discussed above, the modification is properly read in conjunction with the text of the original issuance; the Judge reached the correct conclusion regarding the validity of the modified safeguard notice.

safeguard are sufficiently specific to notify the operator that accumulations of material such as rock, coal, mud and water in sufficient quantity to block travel are prohibited in travelways along conveyor belts.[8]

Perhaps it would have been preferable, in pursuit of extra clarity, if a description of the water and mud accumulations observed by the issuing inspector had been included in the text of the modification. However, the original condition and modified remedy are similar enough that they can logically be read together, and when read narrowly, they are sufficiently specific to provide notice as to the type of accumulations prohibited by the modified safeguard, i.e., those that prevent a clear travelway.[9] The notice of safeguard, as modified, is valid.

[8] Whether subsequent cited accumulations are indeed sufficient to prevent a clear travelway is a factual determination that is properly decided by the Judge. In this case, the Judge made those determinations. 33 FMSHRC at 1517-18, 1530-31. On appeal, Black Beauty has only challenged the facial validity of the safeguard, not its applicability to the relevant citations. Accordingly, the fact that then operator failed to comply with the safeguard is not in dispute. However, we would note that a cited condition need not exactly mirror the conditions described in the safeguard notice in order to constitute a violation. Notices of safeguard are intended to address *types* of conditions and/or conduct; limiting their application to an exact replica of the situation which led to their issuance would defeat their purpose, as a practical matter.

[9] This matter is distinguishable from *SOCCO I*, which noted a "dissimilarity" between water accumulations described in a citation, and solid debris described in the underlying safeguard notice. 7 FMSHRC at 513. In *SOCCO I*, the dissimilarity was between a citation and the underlying safeguard; we concluded that the safeguard *did not provide notice* that the cited accumulations were prohibited, and vacated the citation. Here, only the safeguard notice is at issue, and it was modified specifically to provide notice that water and mud accumulations are prohibited.

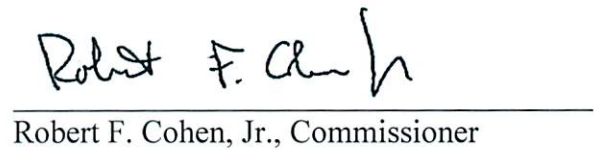
In support of its contention that a hazard of a travelway blocked by fallen materials is not relevant to a safeguard remedy to clear the travelway of water and mud, the dissent relies on the Commission's finding in *American Coal* that two safeguards which addressed fallen material and "water and slurry conditions" respectively were not duplicative safeguards. Slip op. at 15 n.5, citing 34 FMSHRC at 1975. However, the Commission's reason for rejecting the operator's duplication claim was that there was a need to provide notice that accumulated water was prohibited. 34 FMSHRC at 1975. In other words, the holding in *American Coal* does not prevent a single safeguard from addressing both types of accumulations, it simply confirms that the safeguard must put the operator on notice that both types of accumulations are prohibited. That is what the modification at issue accomplished.

IV.

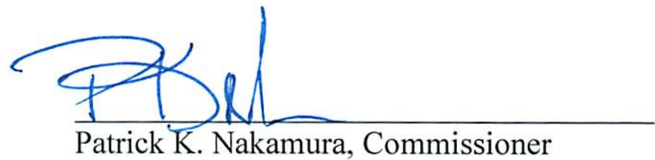
Conclusion

For the reasons discussed above, we conclude that Safeguard No. 7591942, as originally issued and as modified, is valid. Accordingly, Citation Nos. 8415371, 8415372, 8415373 and 8415735 are affirmed.

Mary Lu Jordan, Chairman



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Commissioners Young and Althen, dissenting:

The Mine Act confers upon the Secretary's inspectors the right to issue, instantly, safeguards to protect miners from mine-specific hazards associated with the movement of miners or materials. However, the Commission has long recognized the need for safeguards to articulate clearly the hazard and the means for avoiding the articulated hazards. The amended safeguard at issue in this case falls far short of our standards in that regard. Accordingly, we dissent from the majority's approval.

I.

Safeguards Have the Force of Law and Must Clearly Impose Safety Obligations Based on Mine Specific Conditions.

In *Southern Ohio Coal Co.*, 7 FMSHRC 509 (Apr. 1985) ("*SOCCO I*"), the Commission recognized that a safeguard is a unique form of government action. A lone inspector on his or her own initiative unilaterally imposes a binding obligation upon a mine operator to take specified actions. There is no consultation between the inspector and operator; the inspector makes a wholly discretionary decision to issue the notice in response to his or her personal perception of a mine-specific hazard. Further, because a safeguard enforces an interim mandatory safety standard, an inspector may cite a subsequent violation of a safeguard as a significant and substantial violation.

Because there is no formal rulemaking, as there is with traditional mandatory safety standards, the Commission established basic requirements for valid safeguards: (1) they must identify with specificity the nature of the hazard; (2) they must specify the conduct required of the operator to counteract that specified hazard; and (3) they must be narrowly construed. *Id.* at 512; *BethEnergy Mines, Inc.*, 14 FMSHRC 17, 25 (Jan. 1992) ("[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.").

Safeguards also must meet the legal requirements for valid safety standards: they cannot be arbitrary and capricious and must provide fair notice of the prohibited or required conduct. *Green River Coal Co.*, 14 FMSHRC 43 (Jan. 1992) (finding a prohibition against placement of timbers that obstructed travelways insufficient to address obstructions caused by roof falls); *American Coal Co.*, 34 FMSHRC 1963, 1967 (Aug. 2012) (citing *SOCCO I*, 7 FMSHRC at 512) (a notice must be clear on the conduct required and the conditions covered by the safeguard). As a result, there must be a sufficient nexus between hazard and remedy so the operator receives fair notice of the specific conditions covered (hazard) and the conduct required (remedy).

The threshold issue before us is whether the safeguard itself, outside of the context of a specific citation, conforms to the standards we have imposed to ensure clarity in the law and fair notice. We would hold that it does not.

II.

The Amended Safeguard at Issue Does Not Clearly Identify The Hazard Arising from Mine-Specific Conditions and is Unclear on the Standard of Conduct Required by the Operator.

A safeguard that fails to provide adequate, reasonably-understood notice of the conditions to which it applies may not be saved by a *post-hoc* rationalization that it may apply to a specific hazard that was not contemplated or expressed in the written notice. Yet, that is the course the Secretary urges upon us here.

Safeguard No. 7591942 originally identified one specific hazard – namely, a blocked travelway resulting from fallen rib coal and rock material:

> Rib coal and rib rock have fallen blocking the travelways along each side of the 2-A conveyor belt (3 West/1 Right) at cross cut #17. The fallen material along the east side of the belt has the travelway blocked for an approximate 15' distance. Fallen material along the west side of the conveyor has the travelway blocked for an approximate 20'-25' distance.

In turn, the safeguard specified remedial conduct tailored to the blocking hazard caused by fallen rib coal and rib rock:

> This is a Notice to Provide Safeguard(s) requiring a clear travelway at least 24 inches wide[1] be provided on both sides of all belt conveyors. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway of at least 24 inches is required on the side of such support farthest from the conveyor.

A little more than three years later, an inspector determined that completing the tasks required by the safeguard could expose miners to dangers of adverse roof conditions. The inspector therefore modified the remedy specified in the original safeguard to provide an alternative means to deal with the fallen material:

> It has been determined that action to clean up a clear travelway of 24 inches would be hazardous to the miners due to adverse roof conditions. The above referenced safe guard [sic] is hereby modified to allow the material to remain in its present condition provided that [the] operator installs supplementary roof support on both sides of the fall area and installs start and stop switches

[1] Safeguard notices commonly require that travelways be maintained with 24 inches of clearance, specifically identifying conditions observed in the mine impairing travel. As we have repeatedly urged in the past, the cause of miner safety would be much better served by the promulgation of rules proscribing travel hazards in all mines, rather than relying on mine-by-mine safeguards.

and cross overs or unders on both sides of the fall in the blocked travelway. Red reflectors shall be placed at each start/stop switch.

Order Denying Respondent's Motion to Dismiss, slip op. at 1 n.2 (Feb. 2011) (ALJ).

Nearly a year later, on August 9, 2007, another inspector again modified the safeguard. Once again, the specified hazard – fallen rib coal and rock blocking the travelway – was not modified. Rather, the second modification added a separate and new remedy to the existing safeguard, obligating the operator to ensure that "the 24 inch travelway shall be clear of mud and water." Gov. Ex. 46.

Consequently, the modified safeguard continues to describe the specific hazard as fallen rib coal and rock material blocking a travelway. However, the newly-prescribed remedy relates not to a blocking of the travelway by fallen rib coal and rock but instead to water and mud. The modified safeguard did not identify any hazard, specific or general, from mud and water. The remedy is broad, undefined, and, taken literally, may be impossible to achieve. These are fatal defects under the law.

A. The Modified Safeguard is Incoherent on the Hazard and the Conduct Required by the Operator.

The concise, literal expression of "clear of mud and water" is "dry." Read without reference to a specific hazard attributable to water or mud, the new "remedy" in the safeguard thus appears to demand something that is geologically impossible in a typical underground coal mine. We do not conceive that MSHA meant to go that far, but that is the problem. The safeguard does not give the operator sufficient notice of how far it actually *does* go. The remedy specified in the modification is non-specific and does not relate to fallen material blocking the travelway. It, therefore, fails to provide sufficient notice to the operator of its requirements.

Government mandates enforced by civil penalties must provide clear notice of the conduct that will result in their imposition. *See Kropp Forge Co. v. Sec'y of Labor*, 657 F.2d 119, 122 (7th Cir. 1981) (refusing to impose sanctions where the standard the regulated party allegedly violated "d[id] not provide 'fair warning' of what is required or prohibited"); *see also Dravo Corp. v. Occupational Safety and Health Review Comm'n*, 613 F.2d 1227, 1232-33 (3d Cir. 1980); *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997); *Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976). Unsurprisingly, we have thus held that a safeguard must clearly specify the operator's duty under the law. *SOCCO I*, 7 FMSHRC at 512; *Green River Coal Co.*, 14 FMSHRC at 45 n.2.

In this regard, identification of the specific hazard addressed by a safeguard informs the operator of the requirements of the specified remedy in the context of the particular mine and location in the mine. Without identification of a specific hazard, it is impossible for a reasonable person to understand the requirements of the specified remedy, and fair notice has not been provided.[2]

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[2] A variety of factors are relevant to notice "including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's

This case perfectly illustrates the problems arising from impermissibly vague expressions masquerading as legal "standards." Without the contextual support required by the law, a broad command to "keep a travelway clear of mud and water" is virtually meaningless, because it fails to make clear the hazard posed *by water or mud at this mine* and *the precise remedy for that specific hazard.*[3] Must the operator prevent "any" mud or water from being present on the travelway, to prevent slippery conditions that might arise thereby? The Secretary seems to believe so, and also seems to have persuaded the Judge that this would be sufficient. In denying the operator's motion to dismiss on grounds that the safeguard was invalid, the Judge stated that the requirement to keep the travelway "free of mud and water" was valid because "[a] miner should be able to travel along the belt without fear of slipping and falling." 33 FMSHRC 1504, 1517 (June 2011). Without doubt, "slipping" is a different hazard from the travelway blocked by fallen material set forth in the safeguard.

Thus, the citation in this case was grounded on water that "hindered the ability to travel," *id.* at 1516, an unsatisfactorily broad description of a yet-unspecified degree of water.[4] Indeed, the Judge in this case found that the water was a hazard, despite crediting operator witnesses who testified that the water was neither as deep nor as murky as the Secretary charged. *Id.* at 1518. While the Judge found that the water constituted a "hazard," she declined to affirm the S&S finding because the Secretary did not show that the particular violation would be reasonably likely to lead to an injury-causing event. *Id.*

By itself, this finding should be sufficient to invalidate the safeguard because it places the conditions observed in the mine during the inspection in sharp contrast against the conditions which prompted the original safeguard issuance and defined the hazard. The occlusion which prompted the initial issuance of the safeguard "blocked" the travelway for a length of 40 feet. Gov. Ex 45; slip op. at 3. While the majority asserts that the safeguard here is "sufficiently

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enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question." *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3088 (Dec. 2014), *quoting Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002). Here, of course, the text of the safeguard is patently ambiguous, as it baldly requires the travelway be "clear of mud and water." There is no regulatory scheme or regulatory history from which to glean meaning and no record of consistency in MSHA's treatment of mud and water on underground travelways. Finally, without doubt, the operator did not have "ascertainable certainty" of the agency's intended meaning of the required conduct.

[3] As the majority correctly notes, it is improper to either infer a generic, unspecified hazard as the Judge did in this case or to look outside the text of the safeguard itself to provide contextual support that is left unexpressed. Slip op. at 6 n.7. However, both the Secretary and the Judge were compelled to grasp for meaning outside of the modified safeguard because it is amorphous and cannot be clearly understood as written.

[4] We do not suggest that water or mud may not present a hazard to the safe travel of miners. We merely remind the majority that the safeguard at issue in this case, arising from conditions at this mine, did not state such hazard with reasonable particularity, as we have always required.

specific to notify the operator that accumulations of material such as rock, coal, mud and water in sufficient quantity to block travel" are prohibited, slip op. at 7, the record makes clear that the travelway was not "blocked," and that the Judge found that travel was not impeded to a degree that put miners at significant risk of serious injury.

This is more than a mere question of degree; it is a difference in kind. The material is different, the nature and type of impediment are not congruent and the type of hazard is not at all the same. Tolerating this degree of lassitude by inspectors charged with the inception of mandatory standards is inconsistent with the law as we have always interpreted it.

While the majority acknowledges, as it must, that "safeguards have a specificity requirement," slip op. at 5 n.6, it is unable to express specifically how the requirement to keep a travelway free and clear of mud and water relates to the original hazard of solid material blocking a travelway. The majority must feel a keen sense of irony in citing *Ideal Cement Co.*, 12 FMSHRC 2409 (Nov. 1990), for the proposition that a "reasonably prudent person" will know what the phrase means. Without itself being able to articulate its meaning, in a case where a Commission ALJ has affirmed a finding of violation based on conditions entirely unlike those which prompted the original safeguard, the majority nonetheless permits issuance of citations and imposition of penalties because some other hypothetical "reasonably prudent person" might understand the patently ambiguous requirement to keep an inevitably wet travelway "clear of mud and water." In sum, the majority recognizes the fatal deficiency in the safeguard and wholly fails in its attempted resuscitation.

B. The Secretary has Failed to Articulate a Nexus Between the Purported Hazard and the Suggested Remedy.

As one might expect, when a safeguard is only vaguely suggestive of the nature of the hazard, the operator will have difficulty discerning the relationship between the hazard and the conduct required to ameliorate it. That is certainly the case here, where the citing inspector and the Judge were similarly unclear about the conditions that prompted the original safeguard, and the supposed relationship between those conditions and the ones observed when the second modification was issued on the day the violation was cited.

Indeed, the second modification is silent on the conditions which led to its issuance. This left an open invitation to cite any degree of water based solely on the subsequent inspector's subjective definition of "clear of mud and water." We decline to join the majority in this misadventure.

In addition to the lack of clarity about the "hazard" and the interpretive stumbling and lack of notice it has occasioned, we further note that the safeguard is not valid because it does not establish any linkage between the supposed hazard and the remedy. Safeguards, as we have noted, are unique, and the Commission has thus rigorously insisted upon a clear connection between the identified hazard and the conditions cited in the enforcement action, a requirement that is not satisfied by the mere fact that the remedy specified in the safeguard would abate the hazard described in the citation. *See Green River Coal Co.*, 14 FMSHRC at 47 (Commission refused to enforce a safeguard that addressed a hazard of roof supports impeding travel when an

inspector applied the safeguard to accumulations of loose rock obscuring the travelway). In asserting the importance of this relationship, we held that a safeguard:

> 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.

Id. (emphasis added). As in that case, there is a fundamental difference here between a travelway that is "blocked" by fallen material, to the point where a permitted remedy is a diversion around the impassable area, and a travelway that is "impeded" to an unspecified degree by water or mud in an undefined quantity.

Nor may the Secretary avoid the burden of demonstrating the nexus through use of a broad, all-encompassing prohibition. *See BethEnergy Mines Inc.*, 14 FMSHRC at 25 (rejecting the Judge's reliance on a published safeguard criterion as sufficient to establish the validity of a safeguard mandating 24 inches of clear travelway on both sides, and remanding the issues of notice and nexus).

In both *Green River* and *BethEnergy*, where the hazard identified in a citation differed from the hazard specified in the safeguard, we rejected it as the basis for an enforcement action. While the majority correctly points out that this case does not deal with a citation but with a facial challenge, the principles established in the cited cases support that the modified safeguard in this case is invalid due to the same failure to identify a relationship between the original and only identified hazard in the safeguard, and the remedy required in the modification.

Here, there is no nexus between the hazard specified in the safeguard (fallen rib material) and the remedy prescribed in the modification to keep the travelway free and clear of mud and water. Inevitably, any citation for mud or water will be founded on the type of "slipping, tripping, and falling hazards" identified in *BethEnergy*, *supra*, rather than the hazard specified in this case in the original safeguard, i.e. fallen rib coal and rock "blocking" a travelway. Even if one were to accept that a narrowly-interpreted safeguard might apply to mud and water "blocking" a travelway, those were not the conditions found by the Judge in this case, and the safeguard must fail because it was not drafted with a sufficiently close focus on the distinct hazards created by mud and water, or with a satisfactory description of the amount of mud and water found and the type of hazard(s) arising therefrom.

We held in *American Coal* that the Secretary's agents need not state the obvious when identifying hazards arising from observed conditions. In this case, however, the original safeguard is wholly unrelated to the cited conditions. The "remedy" of clearing water and mud has nothing whatsoever to do with the specified hazard of a travelway "blocked" by fallen material. Effectively, the modified safeguard is a remedy without an identified hazard, and

without a properly defined hazard, the scope of the remedy cannot be properly limited in a way that facilitates compliance.[5]

III.

Conclusion

Safeguards are site specific and are aimed at specific hazards identified by individual inspectors. Thus, they do not admit of broadly worded rules amounting, in effect, to a mandatory safety standard for which rulemaking must be required. The majority decision is a deviation from this sound, well-established principle. We therefore dissent.

Michael G. Young, Commissioner

William I. Althen, Commissioner

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[5] In *American Coal*, *supra*, the Commission relied upon the need for a nexus between the specific hazard and specific remedy to find separate safeguards not duplicative. Safeguard No. 4054826 specified a hazard of fallen or misplaced material such as rib rash, rock, etc. along the sides of the beltline. The specified remedy was very broad. Safeguard No. 4268263 specified a hazard arising from the lack of a clear travelway due to "water and slurry conditions in an excess of 16 inches." Essentially embracing the theory of the majority in this case, the operator argued that the two safeguards actually constituted one safeguard and were duplicative. The Commission disagreed. Distinguishing a safeguard identifying a hazard of fallen material from a safeguard dealing with a hazard of a wet travelway, the Commission found the safeguards were not duplicative because the hazard in the one safeguard (fallen material) was different from the hazard (wet conditions) in the other safeguard. 34 FMSHRC at 1975. Here, the Commission takes a directly contradictory position, finding that the original safeguard's identification of a hazard from fallen material is sufficient to identify a hazard from wet conditions. The problem with the safeguard under review is not that it sets forth two remedies but instead that the second remedy (keep travelways clear of mud and water) is not linked to any described hazard. In *American Coal*, the safeguards were not duplicative because the remedy required by each safeguard was linked to a different hazard in each safeguard that provided context and notice for the specific remedy. Here, the second prescribed remedy is not linked to any described hazard and, as a result, the need for and the scope of the remedy remains undefined.

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