FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

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SECRETARY OF LABOR,	:	Docket Nos. LAKE 2008-436
MINE SAFETY AND HEALTH	:	LAKE 2009-057
ADMINISTRATION (MSHA)	:	LAKE 2009-058
	:	LAKE 2009-059
v.	:	LAKE 2009-378
	:	
BIG RIDGE, INC.	:	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

These civil penalty proceedings, which arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), involve, in part, a citation issued to Big Ridge, Inc., by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") for an alleged violation of a notice of safeguard. The safeguard notice was previously issued to Big Ridge by MSHA pursuant to section 314(b) of the Mine Act.[1]

On September 8, 2011, an Administrative Law Judge issued a decision vacating the citation at issue here. 33 FMSHRC 2238, 2250 (Sept. 2011) (ALJ). He concluded that the underlying safeguard was invalid because it did not provide the operator with sufficient notice of a hazard with respect to the transportation of men or materials. *Id.* The Secretary subsequently filed a petition for discretionary review, which the Commission granted.

For the reasons that follow, we reverse the Judge, find that the safeguard is valid, and remand the case to the Chief Administrative Law Judge for further proceedings consistent with this decision.[2]

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[1] Section 314(b) provides 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).

[2] The Administrative Law Judge who authored the September 2011 decision has since retired from the Commission.

I.

Factual and Procedural Background

On August 11, 2008, an MSHA inspector visited Big Ridge's Willow Lake Portal, a large coal mine in southeastern Illinois. Tr. 30-33. As a result of his observations at the mine, the inspector issued Citation No. 6674618[3] for an alleged violation of Safeguard No. 7583088. Gov. Exs. 16, 17.[4]

Safeguard No. 7583088, which had been issued by another MSHA inspector on July 12, 2006, states:

> DT 15-160 [a mantrip] was observed coming out of the mine with a ram car bed jack adjacent the driver unsecured in the vehicle. This is a notice to provide safeguards requiring that supplies or tools, except small hand tools or instruments, should not be transported with men at this mine.

Gov. Ex. 17 (restating the criteria at 30 C.F.R. § 75.1403-7(k), which provides that "[s]upplies or tools, except small hand tools or instruments, should not be transported with men").

Big Ridge contested the citation. At the hearing, Big Ridge contended that the underlying safeguard was invalid. 33 FMSHRC at 2250. Specifically, the operator argued that the safeguard failed to meet the Commission's requirement that a safeguard identify with

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[3] The citation states:

> Two mantraps [sic] were observed transporting roof bolting materials in the mantrip with the miner. DT-18 had 12 bundles of 4 foot roof bolts (5 bolts to the bundle) standing up in the seat. DT-04 had 7 bundles of 4 foot roof bolts (5 bolts to the bundle) standing up in the seat, 28 chain hangers in the floor board under the passengers feet, a bucket of chain in the passenger seat behind the driver.

Gov. Ex. 16.

[4] While other mandatory safety and health standards are adopted through notice and comment rulemaking, section 314(b) of the Mine Act provides the Secretary authority to create safeguards, which are in effect, mandatory safety standards issued on a mine-by-mine basis. *Southern Ohio Coal Co.*, 10 FMSHRC 963, 966 (Aug. 1988) (citation omitted). The broad language of the provision "manifests a legislative purpose to guard against all hazards attendant upon haulage and transport in coal mining. *Jim Walter Res., Inc.*, 7 FMSHRC 493, 496 (Apr. 1985). An MSHA inspector issues a written safeguard notice to an operator specifying the safeguard the operator must provide. If compliance does not occur, the inspector issues a citation pursuant to section 104 of the Mine Act. 30 C.F.R. § 75.1403-1(b).

specificity the nature of the hazard at which it is directed. The Secretary maintained that the safeguard was valid because it provided notice of a specific hazard and the remedy required.

The Judge concluded that the safeguard was invalid because it failed to "identify with specificity the nature of the hazard." 33 FMSHRC at 2250 (citing *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) ("*SOCCO I*")). The Judge categorically rejected the Secretary's argument that adequate notice of a hazard is provided when the safeguard specifically describes the hazardous condition observed by the inspector. *Id.* (citing MSHA's Program Policy Manual ("PPM"), Vol. 5 Subpart O). The Judge vacated the citation.

II.

Disposition

We conclude that the Judge erred in his analysis. Section 314(b) of the Mine Act requires that the issuing inspector provide notice of a hazardous condition or practice in the safeguard. *The American Coal Co.*, 34 FMSHRC 1963, 1969 (Aug. 2012); *see also Oak Grove Res., LLC,* 35 FMSHRC 2009, 2014 (Jul. 2013). For the reasons that follow, the safeguard is valid.

In *American Coal,* the Commission stated that it has consistently held that "safeguards that *specify hazardous conditions and specify a remedy* [are] valid safeguards." 34 FMSHRC at 1969, 1972-80 (emphasis in original). *See also SOCCO I*, 7 FMSHRC at 512 ("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"); *Southern Ohio Coal Co.,* 14 FMSHRC 1 (Jan. 1992); *Southern Ohio Coal Co.*, 14 FMSHRC 748 (May 1992); *Green River Coal Co.,* 14 FMSHRC 43 (Jan. 1992).

The Commission, however, has expressly rejected the argument that a safeguard must include a description of the types of risks or harms that may be associated with the cited hazardous condition. *American Coal*, 34 FMSHRC at 1969-1971. A valid safeguard must be drafted with the specificity required to provide an operator adequate notice of the condition covered and the conduct that is required, but it need not foreshadow the events that may occur in its absence. *Id.* at 1967; *see also Oak Grove Res.,* 35 FMSHRC at 2014.

For example, the valid safeguard at issue in *SOCCO I* 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.

7 FMSHRC at 510. Notably, the safeguard specified a hazardous condition, i.e., fallen rocks and cement blocks obstructing a travelway at three locations, and a remedy, i.e., all conveyor belts shall have at least 24 inches of clearance on both sides.

Similarly, the safeguard at issue in the case before us describes a hazardous condition, i.e., a mantrip traveling with an unsecured ram car bed jack adjacent to the driver, and a remedy, i.e., supplies or tools, except for small hand tools or instruments, should not be transported with men.[5] Therefore, we conclude that the safeguard complies with the Commission's test for validity.[6] *See American Coal*, 34 FMSHRC at 1969. The safeguard is valid, and a reasonably prudent person familiar with the mining industry would understand its requirements.

We also conclude that the Judge erred in suggesting that the Secretary's PPM establishes the test for safeguard validity. 33 FMSHRC at 2250. The PPM does not prescribe binding rules of law. *American Coal*, 34 FMSHRC at 1970-71; *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981). While the Secretary's PPM may encourage the issuing inspector to identify the types of injuries that the safeguard is intended to prevent, the Commission has never held that the Secretary is bound by the recommendations in a PPM.

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[5] Tellingly, Big Ridge does not contend that an unsecured ram car bed jack that is located adjacent to a driver in a mantrip is not a hazardous condition.

[6] To the extent the Judge relied on the testimony of the inspector in determining the validity of the safeguard, he erred. At the hearing, the inspector testified that he did not believe that the safeguard described a "hazard." *See* 33 FMSHRC at 2250 (citing Tr. 401, 426-27). However, the legal conclusions of an inspector are neither binding nor dispositive. *See Penn Allegh Coal Co.*, 4 FMSHRC 1224, 1227 n.2 (July 1982).

III.

Conclusion

Accordingly, we reverse the Judge and hold that the safeguard is valid. The civil penalty contest of Citation No. 6674618 is hereby remanded to the Chief Administrative Law Judge for further proceedings consistent with this decision.[7]

Patrick K. Nakamura, Acting Chairman

Robert F. Cohen, Jr., Commissioner

William I. Althen, Commissioner

[7] In his opening brief, the Secretary requests that the Commission affirm a finding of a violation for Citation No. 6674618. However, this issue is not properly before the Commission; it was not raised in the Secretary's petition for review. *See* 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d).

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