FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 21, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-804
	:	A.C. No. 46-04168-142950
v.	:	
	:	
WOLF RUN MINING COMPANY	:	

BEFORE: Jordan, Chairman; Duffy and Young, Commissioners[1]

DECISION

BY: Jordan, Chairman; Young, Commissioner

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), Administrative Law Judge Jerold Feldman determined that a violation of a safeguard notice, issued pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and 30 C.F.R. § 75.1403, may properly be designated as significant and substantial ("S&S").[2] *Wolf Run Mining Co.*, 30 FMSHRC 1198 (Dec. 2008) (ALJ) and 31 FMSHRC 306 (Feb. 2009) (ALJ). The mine operator filed a petition for discretionary review challenging the judge's determination, which the Commission granted. For the reasons that follow, we affirm the judge's determination.

[1] Commissioner Cohen took no part in the consideration of the petition for discretionary review ("PDR") and has recused himself from the case. Commissioner Nakamura assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Nakamura has elected not to participate in this matter.

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

I.

Factual and Procedural Background

On June 27, 2000, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Notice of Safeguard No. 7095089 at the Sentinel Mine located in West Virginia and operated by Wolf Run Mining Company ("Wolf Run"). 31 FMSHRC at 306. Safeguard No. 7095089 cited the criterion in 30 C.F.R. § 75.1403-5(j) that requires suitable crossing facilities where persons cross over or under moving conveyor belts. The safeguard notice was issued pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and 30 C.F.R. § 75.1403.[3] The language of section 314(b) of the Mine Act and the language of 30 C.F.R. § 75.1403 are identical. Both provisions state:

> 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.

Nearly eight years later, MSHA Inspector Jeffrey Maxwell issued Citation No. 6606199[4] to Wolf Run after he determined that someone had crossed under a return belt that was suspended 24 inches above the mine floor. 31 FMSHRC at 308. There was no belt crossover

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[3] 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 section 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.

Moreover, 30 C.F.R. §§ 75.1403-2 through 75.1403-11 set forth specific "criteria" which guide authorized representatives in requiring safeguards. Section 75.1403-5 is entitled: "Criteria–Belt conveyors," and section 75.1403-5(j) states:

> Persons should not cross moving belt conveyors, except where suitable crossing facilities are provided.

[4] Citation No. 6606199 states that "[a] suitable crossing facility is not being provided where miners are required to cross the moving # 5 [belt] coal conveyor belt at # 20 block. The bottom of the return belt is 24 inches from the mine floor, and there is evidence that miners have been crossing under the moving coal conveyor belt at this location." The citation alleged a violation under 30 C.F.R. § 75.1403-5(j).

provided at this location. *Id*. The citation alleged a violation of Safeguard No. 7095089 because a suitable crossing facility was not provided to enable miners to safely cross over a moving conveyor belt. The violation was designated as S&S based on the Secretary's assertion that the cited condition was "reasonably likely" to contribute to an accident that would result in a serious injury. *Id.* at 306-07. To terminate the citation, Wolf Run installed an aluminum crossover at the cited location. *Id*. at 308.

Wolf Run contested the citation and the case was assigned to Judge Feldman. On October 30, 2008, before the case was heard, the Secretary filed a motion to modify the citation seeking to insert Mine Act section 314(b) and to amend existing language from 30 C.F.R. § 75.1403-5(j) to 30 C.F.R § 75.1403. Wolf Run then filed an opposition to the Secretary's modification motion and a motion for partial summary judgment, claiming that the S&S designation should not be applied to a violation of a safeguard notice.

On December 18, 2008, the judge issued an Order Denying the Secretary's Motion to Amend as Moot and Order Denying Respondent's Motion for Partial Summary Decision. 30 FMSHRC 1198. The judge ruled that the Secretary did not need to replace the safeguard criterion set forth in section 75.1403-5(j) with Mine Act section 314(b) and section 75.1403. *Id.* at 1199. He reasoned that the Secretary's authority to issue safeguard notices under section 314(b) of the Mine Act, which is codified in section 75.1403 of the regulations, is inseparable from the safeguard criteria set forth in section 75.1403-2 through 75.1403-11. *Id*.

In denying Wolf Run's summary judgment motion, the judge determined that safeguard notices are issued as an interim mandatory safety standard under section 314(b) of title III of the Act, and that a "mandatory health or safety standard" under section 3(1) of the Act, 30 U.S.C. § 802(1), includes an interim mandatory standard promulgated in Title III. *Id*. at 1200. Section 3(l) provides that "'mandatory health or safety standard' means the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act." The judge also relied on the language of section 301(a), 30 U.S.C. § 861(a), which states that interim mandatory safety standards in sections 302 to 318 "shall be enforced in the same manner and to the same extent as any mandatory standard." *Id*. at 1200.

In order to facilitate review of the judge's decision on the S&S issue, the Secretary and Wolf Run filed a Joint Motion for Final Decision on February 18, 2009. There the parties stipulated that a violation of section 75.1403 occurred, that the gravity level was "reasonably likely" to result in "lost work days or restricted duty" injury for one miner, that the negligence level was "moderate," and that the proposed "penalty of $1,304 [was] appropriate" and "would not affect the ability of the operator to continue in business." Jt. Mot. at 3. On February 26, 2009, the judge granted the joint motion. 31 FMSHRC 306. He reiterated his previous determination that "it is appropriate to designate safeguard violations as significant and substantial," and found that "it is reasonably likely that the hazard posed by crawling under, or

climbing over, a moving beltline will result in an accident causing serious injury." *Id.* at 309. As a result, the judge found the violation to be S&S and imposed a penalty of $1,304. *Id*.[5]

II.

Disposition

Wolf Run argues that the judge erred by holding that safeguard notices qualify as mandatory standards which can be designated as S&S. PDR at 4. It submits that Wolf Run violated a safeguard, not section 314(b) of the Act or 30 C.F.R. § 75.1403. PDR at 8; WR Br. at 7; WR Reply Br. at 6. Wolf Run argues that section 314(b) is simply a grant of regulatory authority to the Secretary and establishes no standard or obligation with which a mine operator must comply. WR Reply Br. at 5. It asserts that because safeguard notices are not plainly defined as mandatory standards under section 3(1), they cannot serve as the basis for S&S designations. PDR at 9. In addition, Wolf Run claims that safeguard notices do not qualify as mandatory standards because they are issued without notice-and-comment rulemaking. *Id.* at 6-7.

The Secretary responds that a violation of section 314(b) and 30 C.F.R. § 75.1403 can be designated as S&S because they constitute "mandatory safety standards" under the Mine Act. S. Br. at 13. She counters that the standard violated in section 314(b) of the Act and 30 C.F.R. § 75.1403 is the requirement that "operators provide safeguards judged adequate by a representative of the Secretary. . . ." *Id.* at 15 n.9. The Secretary also maintains that the Act does not require mandatory safety standards to be promulgated pursuant to notice-and-comment rulemaking, but only to fall within the statutory definition of "mandatory safety standard" set forth in section 3(l), which the safeguard provisions do. *Id.* at 16-17. Thus, she urges the Commission to affirm the judge's determination that a violation of a safeguard notice may be designated as S&S based on the plain meaning of the Mine Act. *Id*. at 20. Alternatively, the Secretary asserts that, if the Commission concludes that the statute is not plain, the Commission should affirm the Secretary's interpretation as "eminently reasonable." *Id.*

A. Does the Mine Act Directly Address Whether a Safeguard Notice Qualifies as a Mandatory Safety Standard, a Violation of Which May Be Designated as S&S

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co*., 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is

[5] Judge Feldman noted that Judge Zielinski had issued two orders regarding the propriety of designating safeguard violations as S&S that conflicted with his decision. *Big Ridge, Inc.*, 30 FMSHRC 1172 (Nov. 2008) (ALJ); *Cumberland Res. LP*, 30 FMSHRC 1180 (Dec. 2008) (ALJ) (interim orders granting partial summary judgments to operators and denying the Secretary's motions to amend). 31 FMSHRC at 308.

clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *Id.*; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *See Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

Section 104(d)(1) of the Mine Act provides that a violation can be designated as S&S only if it is a violation of a "mandatory health or safety standard."[6] The primary statutory interpretation issue presented by this case is whether Congress directly spoke to the question of whether a violation of section 314(b) of the Act is a violation of a mandatory safety standard and therefore can constitute an S&S violation.

Sections 3(l) and 301(a) of the Act both address the question of what constitutes a mandatory safety standard. Section 3(l) defines the key term "mandatory health or safety standard" as "the interim mandatory health or safety standards, established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act." 30 U.S.C. § 802(l). Moreover, section 301(a) of the Act provides in pertinent part that "[t]he provisions of sections 302 through 318 of . . . [title III] shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act . . . ." 30 U.S.C. § 861(a). Section 301(a) further provides that sections 302 through 318 "shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act." Thus, the statutory language clearly states that the provisions of sections 302 through 318 of title III, unless superseded, are enforced as mandatory standards.

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[6] Section 104(d)(1), 30 U.S. C. § 814(d)(1) states in pertinent part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any *mandatory health or safety standard*, and if he also finds that, . . . such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard . . . , he shall include such finding in any citation . . . [emphasis added].

Because section 314(b) is one of the subsections contained within sections 302 through 318 of title III, we conclude that the clear language of the Act dictates that the provisions of section 314(b) constitute a mandatory safety standard. Moreover, we find no language in the Act that would create any exception for section 314(b) in this regard.

The question then becomes whether a violation of a safeguard notice issued by an MSHA inspector constitutes a violation of section 314(b) and thus is a violation of a mandatory safety standard. A review of the relevant statutory language in combination with the Secretary's regulatory approach in implementing section 314(b) convinces us that a violation of a safeguard notice is a violation of section 314(b) and therefore is a violation of a mandatory safety standard.

The Secretary, in implementing section 314(b), chose to use the mechanism of a safeguard notice to inform the operator in question what she determined constitutes an "adequate" safeguard for the particular situation involved. 30 C.F.R. § 75.1403-1. Accordingly, an operator's failure to comply with a safeguard notice issued by an MSHA inspector is necessarily a failure to comply with section 314(b) and therefore is a violation of a mandatory safety standard. As a result, it is irrelevant whether the citation in a given case alleges the violation of the safeguard notice itself or a violation of section 314(b) and 30 C.F.R. § 75.1403.[7] In either event, the basic allegation is that the operator has failed to comply with its obligation under section 314(b) to provide an adequate safeguard. We conclude that the language of section 314(b) and the relationship between that subsection and safeguard notices issued pursuant to it establish a safeguard notice as a mandatory safety standard for purposes of enforcing section 314(b).

Our holding is consistent with the Commission's treatment of provisions in roof control and ventilation plans that are derived from other interim mandatory standards contained in title III of the Mine Act, i.e., section 302(a) (roof control plans) and section 303(o) (ventilation plans), "as mandatory standards." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *see also UMWA Intern. Union v. Dole*, 870 F.2d 662, 667 n.7 (D.C. Cir. 1989) ("[t]he requirements of these plans are enforceable as if they were mandatory standards") (quoting S. Rep. No. 95-181, at 25 (1977) *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978)). Accordingly, the Commission routinely evaluates whether violations of provisions of mine-specific plans are S&S or a result of unwarrantable failure under Mine Act section 104(d). *See, e.g., IO Coal Co.*, 31 FMSHRC 1346, 1349, 1361 (Dec. 2009) (judge found provision of roof control plan to be S&S and Commission remanded the unwarrantability issue).

Our recognition of extra-regulatory mandatory standards under the direction of title III of the Mine Act is well-settled law. In *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976), the court reasoned that a "'mandatory standard' can reasonably be read to include provisions of plans whose adoption is explicitly required under an existing mandatory standard."

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[7] For this reason, we find it unnecessary to address the Secretary's motion to amend the citation in this case to include an explicit reference to section 314(b).

The court held that provisions of a ventilation system and methane and dust control plans were enforceable "as though they were mandatory standards." 536 F.2d at 402-09. The *Zeigler* holding was explicitly approved by Congress when it enacted the Mine Act. *Dole,* 870 F.2d at 667 n.7. This reasoning applies with equal force to the case at bar, and our holding is consistent with Congressional intent to treat safeguards whose adoption is explicitly compelled by the existing mandatory standards of section 314(b) and 30 C.F.R. § 75.1403, as mandatory standards.

In light of the clear language of the Mine Act that defines mandatory safety standards as those "interim mandatory safety standards established by titles II and III," we are not persuaded by Wolf Run's assertion that, because safeguard notices are issued by MSHA inspectors, they do not fall under the definition of a mandatory safety standard. A safeguard notice is derived from, and authorized by, section 314(b), and is established by title III of the Mine Act. Section 314(b) expressly delegates "an authorized representative of the Secretary" with the authority to require that the operator provide certain safeguards. 30 U.S.C. § 874(b). Indeed, the safeguard notice is the Secretary's mechanism for realizing Congress' command that safeguards "shall be provided" by the operator. *Id*.[8]

We similarly reject Wolf Run's argument that section 314(b) is a general grant of authority that places no specific obligations upon an operator, but only on the Secretary. WR Br. at 12; Oral Arg. Tr. at 18-19. Wolf Run's characterization of section 314(b) cannot be squared with the statutory language. All the paragraphs in section 314 impose requirements on an operator using the passive voice. For example, paragraph (e) states that "[e]ach locomotive and haulage car . . . shall be equipped with automatic brakes . . . ." Paragraph (b) is no different from the other paragraphs in this respect. It mandates that "[o]ther safeguards adequate . . . to minimize hazards with respect to transportation of men and materials shall be provided." This language clearly

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[8] Commissioner Young shares Commissioner Duffy's concerns about safeguard notices "issued on a random basis by an individual inspector acting unilaterally without provision for Secretarial or Commission Review" and the potential for hazards to remain unaddressed because a safeguard was not required at a given mine (slip op. at 13-14). However, whether this is a wise policy choice or not, it is in fact, a choice made by Congress and embedded in the statute. *See* 30 U.S.C. § 874(b) (Congress' command that "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." (emphasis added)). Notwithstanding Commissioner Duffy's thoughtful observations about the benefits of uniformity, permanence and thorough consideration of safety concerns that would be better served by formal rulemaking to impose final and detailed standards in this area, the statute itself is a pure delegation from Congress to the Secretary, and the responsibility for providing improved standards is hers alone under section 101 of the Mine Act. *See* 30 U.S.C. § 811(a) ("The Secretary shall . . . develop, promulgate, and revise . . . improved mandatory health or safety standards for the protection of life and prevention of injuries in . . . mines.").

imposes a requirement upon *operators.* Accordingly, we reject the operator's attempt to carve out an exception for section 314(b) as the only subsection in those sections not to qualify as a mandatory safety standard.[9]

Wolf Run seeks to rely on the D.C. Circuit's decision in *Cyprus Emerald Res. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999), which held that "the statute does not authorize [MSHA] to designate as [S&S] a violation of a regulation such as 50.11(b) that is not a mandatory health or safety standard." *Cyprus Emerald,* however, dealt with a 30 C.F.R. Part 50 regulation promulgated under section 508, 30 U.S.C. § 957. Unlike safeguard notices, Part 50 regulations do not fall within the definition of interim mandatory standards as involved here. Hence, there is a clear distinction between the regulation at issue in *Cyprus Emerald* and a safeguard notice that is established by section 314(b), title III of the Act. In fact, the language of the Mine Act itself, just as it did in *Cyprus Emerald*, compels the conclusion here. 195 F.3d at 45. The Mine Act requires that interim mandatory standards established by Title III be treated exactly like mandatory standards, which means they can be subject to S&S designation.

We likewise are not persuaded by Wolf Run's reliance on certain language contained in the underlying Commission decision in *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808-09 n.22 (Aug. 1998), *rev'd,* 195 F.3d 42 (D.C. Cir. 1999), in which the majority stated that "[a] safeguard, because it is not issued pursuant to the procedures set forth in section 101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard." In *Cyprus Emerald,* the Commission concluded that a violation of a Part 50 regulation, which did not meet the statutory definition of a mandatory health and safety standard, could be designated as S&S. 20 FMSHRC at 809. Although Wolf Run relies heavily on the statement, its arguments are unavailing for two reasons. First, the standard at issue *does* "meet the statutory definition of a mandatory health and safety standard" because as noted previously (*supra* at 6), section 314(b) is expressly identified as such by the Act itself. Second, the precise issue of whether a safeguard notice is a mandatory safety standard was not before the Commission, was not fully briefed by the parties, and has never been squarely addressed by the Commission. Accordingly, the majority's statement in *Cyprus Emerald* should be regarded as dicta.[10]

Additionally, we find without merit Wolf Run's argument that safeguard notices do not qualify as mandatory health and safety standards because they are not promulgated through notice-

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[9] The fact that Congress chose to give MSHA inspectors an express role in ensuring that section 314(b) is implemented does not in any way change the overall requirement set forth in section 314(b) that *operators* must provide "adequate" safeguards regarding the "transportation of men and materials."

[10] Moreover, the majority's statement focused on its belief that a safeguard notice is not a mandatory health or safety standard because it is not promulgated under title I of the Act. 20 FMSHRC at 808-09 n.22. The majority did not address the possibility that a safeguard notice could be a mandatory health or safety standard because it is established by title III of the Act.

and-comment rulemaking pursuant to section 101 of the Act, 30 U.S.C. § 811. WR Br. at 9. We agree with the Secretary that the Act does not require mandatory safety standards to be promulgated pursuant to notice-and-comment rulemaking but only to fall within the statutory definition set forth in section 3(l). S. Br. at 16-17.

In summary, we conclude that Congress did directly address the question of whether a violation of section 314(b) constitutes a violation of a mandatory safety standard. The relevant statutory language provides that section 314(b) falls within the section 3(l) definition of a mandatory safety standard because it is an interim mandatory safety standard contained in title III of the Act. As a result, any violation of section 314(b) is a violation of a mandatory safety standard. Because a proven violation of a safeguard notice is necessarily a violation of section 314(b), it follows that the violation of a safeguard notice is a violation of a mandatory safety standard and can constitute an S&S violation.

B. Whether the Mine Act May Be Reasonably Interpreted Such that Safeguard Notices Qualify as Mandatory Safety Standards Subject to S&S Designation

If there were any doubt as to whether the Mine Act expressly provides that a safeguard notice established by section 314(b) qualifies as an interim mandatory standard and should be treated as mandatory safety standard, we conclude that it is certainly reasonable for the Secretary to construe the Mine Act such that safeguard notice violations may be subject to S&S designation. *See Chevron*, 467 U.S. at 843-44; *Sec'y of Labor v. National Cement Co. of California*, 573 F.3d 788, 792-97 (D.C. Cir. 2009); *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.[11]

As discussed *supra* at 5-6, the language and structure of the Mine Act itself support the interpretation that safeguard notices issued pursuant to section 314(b) qualify as interim mandatory safety standards, and are in turn mandatory safety standards subject to an S&S designation. 30 U.S.C. §§ 802(l), 861(a), 874(b). Similarly, the legislative history of the provision also supports a reading of section 314(b) that would most promote safety. *See Jim Walter Res., Inc.*, 7 FMSHRC 493, 496 (Apr. 1985) (citing S. Rep. No. 91- 411, at 81 (1969), *reprinted in* Senate Subcomm on Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 207 (1975)). The Commission emphasized that "the very purpose of [the safeguard provisions] – the elimination of transportation-related hazards – militates against" a narrow interpretation of section 314(b). *Jim*

[11] Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

Walter Res., 7 FMSHRC at 498 (rejecting the assertion that section 314(b) only applies to one type of belt conveyor). Accordingly, even if we were to determine that the statutory language was not clear, we would affirm the judge and the Secretary's reasonable interpretation of the Act that violations of safeguards may be properly designated as S&S.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision and hold that safeguard notices established and issued pursuant to section 314(b), title III of the Mine Act, qualify as interim mandatory safety standards and thereby constitute mandatory safety standards under the definition of section 3(l) of the Act. We conclude that the Secretary may properly designate violations of safeguard notices as S&S violations.

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Mary Lu Jordan, Chairman

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Michael G. Young, Commissioner

Commissioner Duffy, dissenting:

I dissent from my colleagues, and would reverse the judge's decision that the violation of the safeguard noticed previously issued to Wolf Run can be designated as significant and substantial ("S&S").

This case presents an issue that one would have expected to have been resolved decades ago. Indeed, it has been nearly 41 years since Congress authorized individual coal mine inspectors to require certain safety measures, called "safeguards," to address conditions not otherwise covered by the interim safety standards contained in Title III of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"), or improved mandatory safety and health standards adopted by the Secretary through notice-and-comment rulemaking. *See* Pub. L. No. 91-173, 83 Stat. 742, 786. Yet, four decades into the heightened federal enforcement of mine safety and health, including the passage of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act" or "Act") and its reauthorization of Title III of the Coal Act, the Commission, only now, is being asked to specifically address whether a failure to comply with a notice to provide a safeguard can be deemed "significant and substantial" ("S&S"), a designation for certain safety and health violations first employed in the Coal Act and carried over to the Mine Act.

Despite this passage of time and intervening legislation, we have no more insight into the meaning and application of the safeguard system than we did under the Coal Act. The language of the safeguard provision, remains the same, the language of 30 C.F.R. § 75.1403 remains the same, and the definition of "mandatory safety or health standard" remains the same.

The statutory design is relatively simple. Congress, first in section 104 of the Coal Act and then in section 104 of the Mine Act, provided that *only* those violations of a "mandatory health or safety standard" can be designated as S&S. *See* 30 U.S.C. § 814(d)(1). In both statutes it also defined "mandatory health or safety standard" to mean "the interim mandatory health or safety standards established by titles II or III or this Act, and the standards promulgated pursuant to title I of this Act." 30 U.S.C. § 802(l).

In section 104(a) of the Mine Act, however, Congress provided that a citation can be issued for a violation of the Act or of a mandatory health or safety standard, *or* of any rule, order, or regulation promulgated pursuant to the Act. 30 U.S.C. § 814(a).

It is this contrast between the violation of a mine safety and health requirement and the smaller universe of such violations that can designated S&S that provided the crux of the D.C. Circuit's opinion in *Cyprus Emerald Resources, Inc. v. FMSHRC*, 195 F.3d 42 (D.C. Cir. 1999). The court held that if a requirement is not, by definition, a mandatory health or safety standard, it cannot be designated S&S under section 104(d) or (e) of the Mine Act.

Thus, 30 C.F.R. §75.1403-5(j) is not a mandatory health or safety standard because it was neither enacted as an interim mandatory safety standard by Congress in either Act, nor was it promulgated as a mandatory safety standard by the Secretary pursuant to section 101 of the Act. By its very wording, section 75.1403-5(j) is a hortatory criterion, not a mandatory standard, as it is invoked on an informal basis by an individual mine inspector without provision for immediate pre-enforcement review as would be the case with a mandatory health or safety standard adopted through notice-and-comment rulemaking.

Moreover, this Commission has explicitly held that safeguards are not mandatory health or safety standards. In its decision taking an expansive view of which Mine Act violations could be designated S&S that was later overturned by the court in *Cyprus Emerald*, the Commission stated that, "[i]ronically, the regulation that was violated in *Mathies* was not a 'mandatory health or safety standard,' as that term is defined in section 3(l) of the Act. The *Mathies* citation involved a failure to comply with a safeguard notice." *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808 (Aug. 1998). The Commission further concluded that "[a] safeguard, because it is not issued pursuant to the procedures set forth in section 101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard." *Id*. at 808 n.22. The Commission went on to hold that "[a]ccordingly, the *Mathies* decision, involving precisely these criteria, does not restrict the Secretary to applying an S&S designation only to a citation involving a mandatory safety or health standard." *Id*. at 809.

It was this ultimate holding that the D.C. Circuit explicitly reversed in its decision on appeal. *See* 195 F.3d at 45-46. Although the position of the Commission majority in *Cyprus Emerald* was adopted in service to its position that regulations issued pursuant to section 508 of the Mine Act, i.e., accident reporting requirements, could be deemed S&S, I read the court's reversal as applicable to all regulatory requirements that do not fall within the precise statutory definition of "mandatory health or safety standard." That would include notices to provide safeguards.

The Secretary argues, and my colleagues agree, that a violation of a notice to provide a safeguard can be designated S&S because it is derived from section 314(b) of the Act or its verbatim iteration in MSHA's regulations, i.e., 30 C.F.R. § 75.1403. S. Br. at 13-20; slip op. at 5-6. Neither of those provisions can be considered a mandatory health or safety standard that imposes discrete obligations on an underground coal mine operator. They delegate authority to individual mine inspectors to issue notices to provide safeguards, but provide no binding norms nor adequate notice to mine operators as to what conduct is expected of them.

The Secretary would have us amend the citation here to allege a violation of section 314(b) of the Act and 30 C.F.R. § 75.1403. S. Br. at 8-12. In my view, that would make no difference. Allowing section 75.1403-5(j) to fly under the colors of section 314(b) of the Act *does not* transform a notice to adopt a criterion invoked by a single inspector, acting alone, into a

mandatory safety standard as defined by Congress and as understood by the D.C. Circuit in *Cyprus Emerald*.[1]

I also cannot agree that a notice to provide a safeguard is analogous to a provision in a underground mine plan that addresses ventilation or roof control. *See* slip op. at 6-7. It is true that such plan provisions do not appear in Title III of the Act, nor are they promulgated as mandatory health or safety standards under section 101 of the Act, yet the D.C. Circuit in *Ziegler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976), nevertheless concluded that a plan provision could be enforced as a mandatory standard.

However, there are a number of reasons not to read the court's reasoning in *Ziegler Coal* to extend to safeguard notices. First, *Ziegler Coal* was decided in 1976 without the judicial gloss applied by the same court 23 years later in *Cyprus Emerald*.

Second, the issue surrounding the mine plan provision in *Ziegler Coal* was whether it was enforceable *at all*, not whether a violation of the provision *could be designated S&S*. *See* 536 F.2d at 401 (operator challenged applicability of section 104(b)'s notice of violation process, the Coal Act equivalent of a section 104(a) citation under the Mine Act). Here, there is no dispute that safeguards are enforceable under section 104(a); the issue is whether failure to comply with a notice to provide safeguard can be S&S, a much different issue.

Third, the genesis of a mine plan provision is wholly distinguishable from that of a notice to provide safeguard. All underground coal mine operators are required under Title III of the Act to adopt roof and ventilation control plans, the ultimate plan provisions are established through negotiations between the mine operator and the MSHA District Office for the mine, and such plans are systematically reviewed every six months. *See* 30 U.S.C. §§ 862(a), 863(o); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 906-07 (May 1987). If the parties reach an impasse, there is provision for the issuance of a technical citation to allow for Commission review of the dispute. *See, e.g., Twentymile Coal Co.*, 30 FMSHRC 736 (Aug. 2008).

In stark contrast, a safeguard notice is issued on a random basis by an individual inspector acting unilaterally without provision for Secretarial or Commission review. The legitimacy of the notice to provide a safeguard and its application to conditions in the mine cannot be determined

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[1] The dissenting Commissioners in *Cyprus Emerald* sought to distinguish between safeguards and Part 50 regulations by making the same argument the Secretary makes here, i.e., that safeguards issued pursuant to section 314(b) of the Act assume the patina of mandatory health and safety standards because section 314(b) appears in a Title captioned "Interim Mandatory Safety Standards for Underground Coal Mines." *See* 20 FMSHRC at 826, 829 n.3 (Commissioners Riley and Verheggen, dissenting in part). It was that specific argument that led the Commission majority in *Cyprus Emerald* to counter that a safeguard does not meet the statutory definition of "a mandatory health or safety standard." *See id*. at 808-09 n.22.

unless and until the provisions of the notice are violated. *See* 30 C.F.R. § 75.1403-1(b); *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985).

Thus, in my opinion the potential for arbitrariness in the safeguard system precludes it from being considered analogous to the mine plan adoption and approval system specifically mandated in Title III of the Act. Accordingly, on that basis I would reverse the judge and hold that a violation of a notice to provide safeguard, while subject to sanction through the issuance of a citation under section 104(a) of the Act, cannot be deemed S&S for purposes of section 104(d) or (e) of the Act, because the notice to provide a safeguard is not a mandatory health or safety standard as defined in section 3(l) of the Act.

The Secretary has expressed concern that if safeguard notices are not deemed to be mandatory heath or safety standards, the full panoply of Mine Act enforcement sanctions, i.e., unwarrantable failure closure orders or pattern of violation closure orders, would not be available to her. *See Cumberland Coal Res., LP*, 30 FMSHRC 1180, 1185 (Dec. 2008) (ALJ). An identical argument was presented in the *Cyprus Emerald* case and the D.C. Circuit responded that "[i]f the Secretary of Labor finds a particular practice or condition so dangerous as to require the sanctions provided in section 104(d) and (e), she may promulgate an appropriate mandatory standard under section 101 [of the Mine Act], 30 U.S.C. § 811, the violation of which may properly be found 'significant and substantial.'" 195 F.3d at 46.

Moreover, as far back as 1992 the Commission noted that MSHA had acknowledged the need for specific mandatory safety standards for the transportation of miners and materials in underground coal mines. *See Southern Ohio Coal Co.*, 14 FMSHRC 1, 16 (Jan. 1992) ("*SOCCO II*") (citing the then most recent MSHA Semiannual Regulatory Agenda). The Commission went on to "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." *Id*. In the 18 years since, nothing has been done.

The Commission's concern in *SOCCO II* was not an idle one. Transportation of persons and materials is an integral part of the mineral extraction process. Haulage accidents consistently rank at or near the top of causes for mine fatalities and serious injuries. *See* MSHA Fatality Statistics (http://www.msha.gov/stats/charts/chartshome.htm) (accessed Oct. 19, 2010). Consequently, surface coal miners and both surface and underground hardrock miners are protected from death and serious injury by comprehensive mandatory transportation and materials handling standards in Parts 77, 56, and 57, respectively, of Title 30 of the Code of Federal Regulations.

The lesser protection provided to underground coal miners is illustrated by the content of Subpart O of 30 C.F.R. Part 75, entitled "Hoisting and Mantrips," which sets forth the regulatory scheme for addressing the transportation of miners and materials in underground coal mines. There are mandatory standards applicable to hoists, locomotives, and wire ropes. All other

aspects of transportation and haulage are addressed by section 75.1403, which authorizes safeguards and contains 11 sets of criteria, *not mandatory standards*.

Many of the criteria are common sense, best practices that read suspiciously like actual mandatory safety standards set forth in 30 C.F.R. Parts 77, 56, and 57, applicable to coal and hardrock mines. For example, section 75.1403-10(l) states: "All self-propelled rubber-tired haulage equipment should be equipped with well-maintained brakes, lights, and a warning device." 30 C.F.R. § 75.1403-10(l).

While that requirement has universal application even beyond the mining environment, it is not a mandatory standard applicable to all underground coal mines. It is only applicable in those mines where an inspector has ordered it through a notice to provide a safeguard. Numerous other criteria set forth under section 75.1403 fall within the same category— common sense rules of the road that have never been promulgated as mandatory standards since they were first published in 1970.[2]

Why these criteria have not been made mandatory during 40 years of mine safety enforcement and eight Presidential administrations appears to be lost in the mists of regulatory lassitude, but the implications are troubling. Under the current safeguard regime, it is possible for miners to be killed or seriously injured without any enforcement consequences. The underground coal mine operator, post-accident, is not cited but, rather, is given a notice which requires it to take such measures prospectively that operators at surface coal mines and all hardrock mines are already required to do through mandatory safety standards.

Given this hole in the enforcement net and the threat it poses to miner safety, I find it difficult to credit the Secretary's complaint that not designating notices to provide safeguards as mandatory safety health and safety standards constrains her ability to ensure miner safety. The Commission in *SOCCO II* and the D.C. Circuit in *Cyprus Emerald* told the Secretary what she can do to avoid this problem. She and her predecessors have had 40 years to take action, and have not done so. I simply do not believe it is in the best interest of underground coal miners' safety for the Commission to serve as an enabler and permit the Secretary to continue a slapdash approach to regulating transportation and haulage in underground coal mines.

[2] There may be one exception: 30 C.F.R. § 75.1403-10(a) provides that reflectors or headlights need not be required on loads pulled by animals. I trust that exemption is no longer necessary.

Thus, in addition to reversing the judge on legal grounds, there are sound safety policy reasons for not finding that notices to provide safeguards are mandatory safety standards as defined in section 3(l) of the Act and as addressed in section 104(d) and (e) of the Act.

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