FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 24, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2008-68 A.C. No. 11-03054-130199-01
v.	:	Docket No. LAKE 2008-69 A.C. No. 11-03054-130199-02
BIG RIDGE, INCORPORATED, Respondent	:	Mine: Willow Lake Portal

ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION AND DENYING THE SECRETARY'S MOTION TO AMEND

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against Big Ridge, Inc., pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The specific citations at issue, Citation Nos. 6667365 and 6667393, allege significant and substantial ("S&S") violations of notices to provide safeguards issued pursuant to the Secretary's regulations applicable to underground coal mines. 30 C.F.R. §§ 75.1403, 75.1403-5(g) and 75.1403-10(i). Big Ridge filed a motion for partial summary decision challenging the findings that the violations were S&S. The Secretary countered by moving to amend the citations to allege violations of 30 C.F.R. §75.1403. Big Ridge opposed the motion to amend, contending that, even if allowed, the amendment would not defeat its motion. For the reasons set forth below, I find that there exists no genuine issue as to any material fact, and that Big Ridge is entitled to summary decision as a matter of law on the issue of whether the violations can be designated S&S.[1] The Secretary's motions to amend the citations will be denied. Accordingly, Citation Nos. 6667365 and 6667393 will be amended to specify that the violations were not significant and substantial.

Facts

On September 20, 2007, a coal mine inspector for MSHA, inspected Big Ridge's Willow Lake Portal Mine in Saline County, Illinois. Willow Lake is a large underground mine that extracts bituminous coal. During the inspection, he observed that the travelway along either side

[1] Commission Procedural Rule 67 provides that a motion for summary decision shall be granted if there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

of the 2-A belt conveyor was obstructed, and issued Citation No. 6667365, alleging a violation of safeguard no. 7581365, which had been issued on May 5, 2005, based upon criteria set forth in 30 C.F.R. § 75.1403-5(g). Resp. Mot., Ex. 1. The mine was inspected again on October 5, 2007. Muddy conditions and bottom irregularities on the 5-C travel road were observed, for which Citation No. 6667393 was issued, alleging a violation of safeguard no. 7581412, which had been issued on August 2, 2005, based upon criteria set forth in 30 C.F.R. §75.1403-10(i). Resp. Mot., Ex. 2. Both citations allege that the violations were S&S.

Big Ridge timely contested the civil penalties assessed for the violations, and the Secretary filed petitions for assessment of civil penalties. Big Ridge filed answers to the petitions, and a motion for partial summary decision on the S&S issue. The Secretary opposed the motion and moved to amend the citations. Big Ridge opposed the Secretary's motion, and both parties filed supplemental memoranda of law on the issues.

Analysis

Big Ridge contends that, under section 104(d)(1) of the Act, only violations of mandatory safety standards can be designated S&S and, because neither the safeguards allegedly violated, nor sections 75.1403-5(g) and 75.1403-10(i), are mandatory standards, the violations cannot be designated S&S. Big Ridge further argues that amending the citations to allege violations of section 75.1403 would have no effect on the primary issue, because it was cited for violating the underlying safeguard notices, not for violating section 75.1403.

The Secretary argues that the violations alleged in the citations are, in effect, violations of 30 C.F.R. §75.1403, which is taken directly from section 314(b) of Title III of the Act, and which grants her authority to issue safeguards. Because section 301(a) states that: "The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines," and section 802(l) defines the term "mandatory health or safety standard" as "the interim mandatory health or safety standards established by titles II and III of this Act," she contends that section 75.1403 is a mandatory safety standard. Consequently, she asserts that the violations can properly be designated S&S, and Big Ridge's motion for partial summary decision should be denied.

Section 104(d)(1) of the Act 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,* while the conditions created by such violation do not cause imminent danger, *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,* and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator

under this chapter. (emphasis added)

30 U.S.C. §814(d)(1). A "mandatory health or safety standard" is defined 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 chapter." 30 U.S.C. 802(l).

In *Cyprus Emerald Res. Corp.*, 195 F.3d 42 (D.C. Cir. 1999), the court held that the language of section 104(d)(1) was clear on its face, and permitted a designation of S&S only for violations of mandatory health or safety standards. It reversed a holding by the Commission that a violation of a Part 50 regulation could be designated S&S, even though the regulation was not a mandatory health or safety standard. The question to be decided, therefore, is whether or not the subject citations allege violations of mandatory health or safety standards.

Section 314 of the Act specifies a number of safety requirements for "Hoisting and Mantrips" equipment. For example, section 314(c) provides:

> (c) Hoists shall have rated capacities consistent with the loads handled and the recommended safety factors of the ropes used. An accurate and reliable indicator of the position of the cage, platform, skip, bucket, or cars shall be provided.

30 U.S.C. § 874(c). Those specific requirements are mandatory safety standards pursuant to section 301(a) of the Act.[2] 30 U.S.C. §§ 861 and 961(b).

In addition to the specific safety requirements in sub-sections 314(a) and (c) through (f), section 314(b) grants the Secretary broad discretion to issue safeguards in order to guard against all hazards attendant upon haulage and transportation in coal mining. *Southern Ohio Coal Co.*, 7 FMSHRC 509 (Apr. 1985) ("*SOCCO I*"); *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992) ("*SOCCO II*"); *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (Apr. 1985).

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[2] Section 301(a) of the Act states:

> The provisions of sections 302 through 318 of this title 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, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act.

In addition, section 301(b)(1) of the Addendum to the 1977 Mine Act, specified that "standards and regulations under the Federal Coal Mine Health and Safety Act of 1969 [30 U.S.C. § 801 et seq.] which are in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards" under the 1977 Act. 30 U.S.C. § 961(b).

Section 314(b) of the Act provides:

> (b) Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 U.S.C. § 874(b). The Secretary promulgated the current regulations addressing safeguards in 1970. 30 C.F.R. §§ 75.1403 – 75.1403-11. The initial provision, section 75.1403, repeats, verbatim, the language of section 314(b) of the Act. Section 75-1403-1 sets forth procedures for the issuance of safeguards and explains that sections 75-1403-2 through 75.1403-11 set out the criteria by which MSHA inspectors are to be guided in requiring safeguards on a mine-by-mine basis.[3]

> § 75.1403-1 General Criteria
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> (a) Sections 75-1404-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.
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> (b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 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 under section 104 of the Act.

30 C.F.R. § 75.1403-1(a) and (b).

Under this regulatory scheme issuance of a notice to provide safeguard requires that an inspector: (1) determine that there exists at the mine an actual transportation hazard not covered by a mandatory standard; (2) determine that a safeguard is necessary to correct the hazardous condition; and (3) specify the corrective measures that the safeguard should require. *SOCCO II*, 14 FMSHRC at 8.

In *SOCCO I*, the Commission discussed the unique nature of safeguards.

> [i]t is of paramount importance to recognize the crucial difference in the rules of interpretation applicable to mandatory standards promulgated by the Secretary and

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[3] MSHA's Program Policy Manual recognizes that the guideline criteria set forth in the regulations are not mandatory, and that safeguard notices must address hazards that are not covered by a mandatory safety standard. V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 125 (2003).

> those applicable to 'safeguard notices' issued by [her] inspector . . . Mandatory standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Mine Act. Section 314(b) of the Mine Act, on the other hand, grants the Secretary a unique authority to create what are, in effect, mandatory safety standards on a mine-by-mine basis without resorting to otherwise required rulemaking procedures. We believe that in order to effectuate its purpose properly, the exercise of this unusually broad grant of regulatory power must be bounded by a rule of interpretation more restrained than that accorded promulgated standards.

SOCCO I, 7 FMSHRC at 512.

A notice of safeguard is an order to comply with a specific safety requirement within a fixed time frame, and to continue to comply with it thereafter. As orders issued pursuant to section 314(b) of the Act, they are enforceable under section 104(a) of the Act. Violations of a safeguard are enforced by issuance section 104(a) citations and, upon an operator's failure to timely abate a violation, by issuance of withdrawal orders pursuant to section 104(b). While not always consistent in use of language, Commission decisions have made clear that it is the violation of the written safeguard that subjects an operator to liability for penalties and sanctions imposed pursuant to sections 104(b) and 110 of the Act. *SOCCO I*, 7 FMSHRC at 513 (operator not given sufficient notice that conditions "would violate the underlying safeguard notice's terms"); *SOCCO II*, 14 FMSHRC at 14 (on remand the judge should "determine whether the safeguard was violated"). As the Secretary recognized in her papers, "the actual issue to be litigated . . . is whether the operator complied with the underlying safeguard." Sec'y Mem. of Law at 4.

The Commission, in its later-reversed *Cyprus Emerald* decision, discussed *Mathies Coal*, the seminal case interpreting the S&S language.[4] It noted that the citation involved in *Mathies* alleged a failure to comply with a safeguard notice, and 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." *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808-09 n.22. (Aug. 1998). In reversing the Commission, the circuit court made clear that regulations or other provisions that are not mandatory health or safety standards cannot be designated S&S. The safeguards at issue in these cases were issued in 2005 by MSHA inspectors, and are not mandatory safety standards promulgated pursuant to Title I of the Act. Consequently, the subject citations, which allege violations of those safeguards, do not allege violations of mandatory health or safety standards.

The Secretary argues that because section 314(b) of the Act, pursuant to which the safeguards were issued, is included in Title III, which establishes mandatory safety standards, that it is a mandatory safety standard. She has also moved to amend the citations to specify that

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[4] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

they allege violations of section 75.1403, the regulatory counterpart to section 314(b) of the Act. However, neither section 75.1403, nor section 314(b) of the Act, establish mandatory standards that could be violated by a mine operator. Section 314(b), as previously noted, is a grant of regulatory authority to the Secretary. To hold that a specific written safeguard is a mandatory safety standard, because the grant of regulatory authority to issue it is contained in Title III of the Act, would impremissably elevate form over substance.[5] As the Commission observed in its *Cyprus Emerald* decision, safeguards are not mandatory health or safety standards. Regardless of the regulatory or statutory provision referenced in the citation, the actual violation alleged is that the operator failed to comply with a notice of safeguard issued by an MSHA inspector.

The Secretary has argued in a related case that holding that safeguard violations cannot be S&S would deprive the Secretary of an important enforcement tool, and would be at odds with Congress' intent to create a flexible mine-specific enforcement system responsive to the unique hazards related to mine transportation.[6] The same argument was made, and rejected, in *Cyprus Emerald*, where the court observed that section 107(a) imminent danger withdrawal orders, section 104(a) citations and section 110 penalties provide "adequate" means of enforcement.[7] 195 F.3d at 46. Withdrawal orders, issued pursuant to section 104(b), also provide a powerful tool to ensure that any violation of a safeguard is promptly remedied.

The Secretary also argues that any ambiguity in the statute must be resolved by according deference to her interpretation. However, as in *Cyprus Emerald*, the argument is rejected, because the statutory language is not ambiguous. That section 314(b) is contained in Title III of the Act does not alter its fundamental nature, and transform the grant of regulatory authority into a mandatory safety standard. To the extent that ambiguity could be found, the Secretary's attempted transformation of section 314(b) into a mandatory safety standard would be unreasonable.

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[5] In *SOCCO II* the Commission noted that section 314(b) "is contained in a section of the statute that includes interim mandatory safety standards for hoisting and mantrips in underground coal mines. Unlike other provisions of Title III of the Mine act, section 314 contains few specific mandatory standards. The specific mandatory standards in section 314 concern hoists, brakes on rail equipment and automatic couplers." Id. at 5.

[6] Only mandatory health and safety standards can be enforced through the issuance of withdrawal orders pursuant to section 104(d) of the Act. In addition, operators who engage in a pattern of committing S&S violations may be subject to enhanced enforcement provisions of section 104(e) of the Act. 30 U.S.C. § 814(d) and (e).

[7] Imminent danger withdrawal orders, issued pursuant to section 107(a) of the Act, can be issued to address immediately dangerous conditions, regardless of whether the danger violates the Mine Act or the Secretary's regulations. *Utah Power & Light, Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991).

The subject citations allege violations of safeguards issued by MSHA inspectors. They do not allege violations of mandatory safety standards, and they cannot be designated S&S.[8]

The Secretary's Motion to Amend the Citations

The Secretary has moved to amend Citation Nos. 6667365 and 6667393 to allege violations of section 75.1403. She asserts that the amendments would more accurately reflect the actual violations cited than references to the guideline criteria. The citations were issued on the Secretary's standard "Mine Citation/Order" form, "MSHA Form 7000-3, Mar 85 (revised)." That form contains a block numbered 9, entitled "Violation," section "C" of which reads: "Part/Section of Title 30 CFR." In the space allowed, the inspectors inserted "75.1403-5(g)" and "75.1403-10(i)," respectively, the regulatory criteria that were, no doubt, used as guidance in issuance of the safeguards. References to the actual safeguards alleged to have been violated are made in block 14 of the forms, entitled: "Initial Action," where the specific safeguards are identified by number and date of issuance.

The MSHA form is not well-suited to citing violations of safeguard provisions. While a reference in block 9 to the Secretary's regulatory authority to issue safeguards might be somewhat more appropriate than a reference to the guideline criteria, neither would be an accurate description of the violation actually alleged. As noted above, the actual violations alleged in the citations are that Big Ridge failed to comply with a specific notice of safeguard, not that it failed to comply with a regulatory provision.

The Secretary's motions to amend the citations to allege violations of 30 C.F.R. § 75.1403, are denied. The proposed amendments would not accurately state the actual violations alleged in the citations.

ORDER

Based upon the foregoing, The Secretary's Motions to Amend Citations are **DENIED**, the Respondent's Motion for Partial Summary Decision is **GRANTED**, and the gravity designations of Citation Nos. 6667365 and 6667393 are **AMENDED** to "non-significant and substantial."

Michael E. Zielinski
Administrative Law Judge

[8] The Secretary has cited several Commission decisions upholding S&S designations of safeguard violations. *See, e.g., Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998). However, the cases were all decided prior to the court's decision in *Cyprus Emerald*.

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