

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

November 24, 1997

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH:
ADMINISTRATION (MSHA):

:
v.: Docket No. PENN 95-75

:
CYPRUS CUMBERLAND RESOURCES :
CORPORATION:

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977 (AMine Act@ or AAct@), 30 U.S.C. ' 801 et seq. (1994). At issue is the validity of a safeguard issued by the Mine Safety and Health Administration (AMSHA@) at the Cumberland Mine, owned and operated by Cyprus Cumberland Resources Corporation (ACyprus Cumberland@), and whether Cyprus Cumberland violated the safeguard. Commission Administrative Law Judge Jerold Feldman concluded that the safeguard was valid and that Cyprus Cumberland violated it, and assessed a \$100 penalty. 18 FMSHRC 718, 725-26, 730-31 (May 1996) (ALJ). The Commission granted Cyprus Cumberland's petition for discretionary review challenging the judge's determinations regarding the validity and violation of the safeguard. For the reasons that follow, we affirm the judge's conclusion that the safeguard is valid, and reverse his determination that Cyprus Cumberland violated it.

I.

Factual and Procedural Background

Cyprus Cumberland operates the Cumberland Mine, an underground coal mine in Greene County, Pennsylvania. The mine uses a track haulage system to transport miners and equipment. 18 FMSHRC at 719; Tr. 63. Four types of vehicles are used on the track system: mantrips that carry personnel (Tr. 95, 269-70); modified mantrips called Aduckbills@ that have a modified open compartment at one end for carrying supplies (Tr. 95, 97, 177, 270); small locomotive-type

vehicles called *motors* that are used to haul equipment such as rockdust cars through the mine (Tr. 96, 244); and small, slow-moving personnel carriers called *crickets* (Tr. 95, 270).

In 1980, Cyprus Cumberland installed a system of signal lights to control traffic on the track system at the Cumberland Mine. 18 FMSHRC at 719. Red lights at each end of track sections designated as *blocks* can be turned on or off at either end of the blocks. *Id.* Operators of track vehicles are supposed to turn a block's lights on upon entering a block, then turn the lights off upon exiting the block. *Id.* An activated block light signals track vehicle operators that another vehicle is in a block they are approaching. Under company policy, more than one vehicle can occupy a block at the same time. *Id.* at 721. An operator approaching a block with its signal light on must *wait* for a reasonable length of time, then proceed with caution. *Id.* at 719. Cyprus Cumberland warns its equipment operators to

[s]top before pulling onto the main line from any switch. Make sure nothing is coming before pulling out. Remember there may be more than one piece of equipment in a block light.

Id.

On October 25, 1993, MSHA Inspector Robert Santee encountered a block light that apparently had been left on by a track vehicle operator after exiting a block. *Id.* at 720. In response, Santee issued a safeguard requiring, in relevant part,

. . . track haulage equip[ment] operators to use the block lights installed along supply track haulage at the mine, to clear such lights (turn off after each use) in order to assure approaching haulage equipment a clear road exists and also only 1 piece of haulage equipment shall be operated in the same block light except [motors]. . . .

18 FMSHRC at 720 (quoting Safeguard No. 3655478). This safeguard was modified on November 1, 1993 to delete the requirement that only one piece of equipment at a time be operated in a block, and to further require that vehicles operating in the same block maintain a minimum distance of 300 feet and communicate *by* some means, to be assured the signal block light will be turned off after the last haulage equipment exits the light block. Subsequent Action No. 3655478-01 (modifying Safeguard No. 3655478).

On July 14, 1994, as Inspector Santee was conducting an inspection of the mine, the mine's maintenance foreman, Doug Conklin, entered the mine in a duckbill operated by

¹ The judge misquoted the modification as stating, in relevant part: *H*aulage equipment operating in the same block light shall communicate, by some means, to be assured the signal block light will be turned off after the last haulage equipment exits the *last* block. 18 FMSHRC at 721 (emphasis added to misquoted word).

mechanic Mark Zuspan and traveled down the 57 Mains track to where it intersected the 1A block of the 55 North track. *Id.* at 722. After curving off to the left of the 57 Mains, the 55 North track runs in a straight line for 1,200 feet. *Id.* As Conklin and Zuspan approached the intersection, they saw a motor hauling two rock dust cars and a trailing motor stopped just in by the intersection. Tr. 177. Conklin testified that the motors and rock dust cars (the haulage train²) were waiting for the duckbill to switch out of their way, so they could continue out of the mine. *Id.*

As the haulage train moved past the duckbill, the operator of the first motor signaled to Conklin and Zuspan that he would leave the 1A block light on for them. 18 FMSHRC at 722. The operator of the second motor, however, apparently turned off the light, unbeknownst to Conklin or Zuspan. *Id.* Before Conklin and Zuspan passed the light, a cricket entered the far end of the block and its operator turned on the block light that had just been turned off by the operator of the second motor. *Id.* In the cricket was Inspector Santee, accompanied by representatives of the company and the miners. *Id.* Conklin and Zuspan then passed the block light under the mistaken belief that it had been left on for them by the operator of the first motor. *Id.* At first, Conklin and Zuspan could not see down the full length of the 1A block due to the short curve at the intersection of the two tracks. *Id.* at 723. As soon as they entered the 55 North straightaway, however, they saw the cricket approaching them; Santee also saw the duckbill pulling into the block. *Id.* Although the two vehicles were approaching each other, Zuspan had plenty of time and pulled into the 55 North switch [to wait] for the cricket to pass. *Id.*; see also Ex. J-1. Thereafter, Santee issued Order No. 3672055, charging an unwarrantable and significant and substantial (S&S²) violation of Safeguard No. 3655478. 18 FMSHRC at 723. The Secretary subsequently proposed a \$2800 penalty, which Cyprus Cumberland contested.

The judge found that the safeguard on which the contested order was based was valid. *Id.* at 724-25. He reasoned that, although Cyprus Cumberland had no obligation to install a block light system, once it did so, the company became responsible for maintaining the system and ensuring that its personnel comply with its block light safety procedures. *Id.* at 724. The judge found that because the light that had been left on manifested a failure to adhere to Cumberland's block light procedures, Inspector Santee acted within his discretion when he concluded that this failure posed a transportation hazard and that a safeguard was needed to ensure compliance with the mine's block light procedures. *Id.* Finally, the judge concluded that the safeguard, as amended, adequately set forth the corrective measures required. *Id.* at 724-25.

The judge also found that a violation occurred as alleged in Order No. 3672055. *Id.* at

² The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), which establishes more severe sanctions for any violation that is caused by an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards. 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.

725-26. The judge determined that the safeguard set forth four requirements: (1) that equipment operators use the block signal lights; (2) that they turn the lights off after exiting a block; (3) that equipment operating in the same block maintain a safe distance to allow them to stop within the limits of visibility, but never closer than 300 feet; and (4) that operators in the same block communicate by some means to assure that the lights will be turned off after the last equipment exits the block. *Id.* at 725. He found that Conklin and Zuspan complied with all but the last of these requirements. *Id.* at 725-26. The judge concluded that because there was a failure of communication between them and the dustcar motormen to assure that there was no misunderstanding concerning the status of the [1A] block lights, the Secretary had proven a violation of the safeguard. *Id.* at 726. Concluding that the violation was not S&S or the result of the operator's unwarrantable failure, the judge assessed a \$100 penalty. *Id.* at 727-31.

II.

Disposition

On review, Cyprus Cumberland argues that the judge erred in affirming Safeguard No. 3655478 because it was not validly issued. C.C. Br. at 10-22. The company contends that the judge failed to scrutinize Inspector Santee's assessment of whether a hazard existed under an objective standard, as the company argues he should have. *Id.* at 12-16. Purporting to apply such a standard, Cyprus Cumberland argues that leaving a block signal light on did not create a hazard. *Id.* at 16-18. The company also argues that Santee failed to justify either his issuance of the safeguard or the terms of the safeguard itself. *Id.* at 18-22. As to the violation, Cyprus Cumberland argues that the judge impermissibly broadened the scope of the safeguard to apply to vehicles outside a particular block, and that because the safeguard did not apply to the duckbill operated by Conklin and Zuspan, the judge erred in finding a violation. *Id.* at 23-26.

In response, the Secretary argues that Santee was justified in issuing the safeguard because of his concern that the miners were routinely leaving block lights illuminated regardless of whether the block was cleared of equipment, [and that] a miner would eventually take it for granted that a block that had its light illuminated was cleared of equipment and enter it when it was in fact not cleared of equipment. S. Br. at 11. As to whether Cyprus Cumberland violated the safeguard, the Secretary contends that [t]he failure to communicate in this case . . . occurred *within* the 1A block, and therefore the judge was correct in finding a violation. *Id.* at 16 (emphasis in original).

A. Validity of the Underlying Safeguard

Under section 314(b) of the Mine Act, the Secretary may issue [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. 30 U.S.C. § 874(b). In order to issue such a safeguard, an inspector must determine that there exists an actual transportation hazard not covered by a mandatory standard and that a safeguard is necessary to correct the hazardous condition. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (January 1992) (*ASOCCO II*). He must also specify the corrective measures an operator must take. *Id.* The Commission reviews the

Secretary's issuance of a safeguard under an abuse of discretion standard. *Id.* at 9.

Inspector Santee considered that a transportation hazard was created when a block light was left on after an equipment operator had departed that block. 18 FMSHRC at 724; Tr. 57-58. The judge's conclusion that Santee's determination was within the inspector's discretion is both legally sound and supported by substantial evidence. Santee's concern that if the lights were not used, equipment operators could have been lulled into habitually disregarding them (Tr. 57), appears well grounded and not overly speculative. Regardless of Cyprus Cumberland's policies, Santee did not abuse his broad discretion to issue the safeguard based on his concern. *See SOCCO II*, 14 FMSHRC at 8 (An MSHA inspector possesses authority to decide whether a safeguard should be issued at a mine without consulting with representatives of the operator). Accordingly, we affirm the judge's conclusion that Safeguard No. 3655478 was validly issued.

B. Violation of the Safeguard

We have held that, because safeguards are issued by MSHA inspectors without the procedural protections of notice and comment rulemaking, they must be strictly construed in determining whether a violation has occurred. *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (April 1985) (*ASOCCO I*). Here, the judge interpreted the safeguard as requiring, among other things, track haulage equipment operators to communicate, by some means, with haulage equipment operating in the same block to be assured the signal block light will be turned off after the last haulage equipment exits the light block. 18 FMSHRC at 725. The judge concluded that Cyprus Cumberland violated this requirement because there was a failure of communication between [Conklin and Zuspan] and the dustcar motormen to assure that there was no misunderstanding concerning the status of the block lights as [the] duckbill entered the 1A block. *Id.* at 726.

Strictly construed, the safeguard refers to equipment operating in the same block light and the signal lights for that block. Subsequent Action No. 3655478-01 (modifying Safeguard No. 3655478). The safeguard addresses communications that must occur between operators of track haulage equipment operating in the same block regarding the signal lights for the block within which they are operating. Counsel for the Secretary conceded at oral argument before the Commission that, to make out a violation, the Secretary had the burden of establishing that both the haulage train and duckbill were in the same block at the time of the failure to communicate, and that they failed to communicate about the lights for the block they shared. Oral Arg. Tr. at 21-22. Whether a violation has occurred thus depends on the exact locations of the duckbill and haulage train when the alleged failure to communicate occurred.

³ When reviewing a judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The parties disagree on this dispositive factual issue. The Secretary argues that A[t]he failure to communicate in this case . . . occurred *within* the 1A block.@ S. Br. at 16 (emphasis in original). Cyprus Cumberland responds that A[w]hen the front motorman waved at Mr. Zuspan as he pulled past, they were both outside the 1A block.@ C.C. Reply Br. at 5. The judge made no explicit finding on this issue, but impliedly found that the pieces of equipment were outside the 1A block when the failure to communicate occurred. *See* 18 FMSHRC at 722.

Substantial evidence supports the judge's conclusion. When they entered the mine, Conklin and Zuspan traveled down the 57 Mains to its intersection with the 1A block of the 55 North haulage track, where they met the haulage train. *Id.* The leading motor of the train was stopped on the 55 North haulage track just inby the intersection. Tr. 177. The trailing motor, behind two rock dust cars, was inby the block light for the 1A block, which was illuminated. *Id.* at 180. Conklin and Zuspan maneuvered their duckbill further up the 57 Mains inby the intersection to allow the haulage train to pass. 18 FMSHRC at 722. In fact, since the haulage train was traveling outby, the only place the duckbill could have been moved was further along the 57 Mains inby its intersection with 55 North. Ex. J-1. In testimony not rebutted by the Secretary, Conklin explained:

I got out of the motor, I threw the switch. Mark [Zuspan] proceeded inby the switch up the straight [of 57 Mains]. I threw the switch back for the turn. The rock dust crew pulled out of the switch, proceeded outby on the 57 [Mains] Haulage, I threw the switch back for the straight. Mark brought the duckbill back up the straight, passed the switch, I threw it for the turn, went to the duckbill and we proceeded around the turn.

Tr. 180-81; *see also* Ex. J-1. By the time Conklin and Zuspan entered the 1A block, believing that the block light had been left on for them by the operator of the first motor, the cricket carrying Inspector Santee had turned on the light. 18 FMSHRC at 722. Thus, contrary to the Secretary's assertion that when the alleged violation occurred, both the duckbill and motors were within the 1A block, it would have been physically impossible for the duckbill to have been in the 1A block as the haulage train was exiting that block. The only block in which the two vehicles could have been operating simultaneously was the 57 Mains.

Although the judge found this to be the case, he nevertheless found a violation. Under

⁴ The judge found that as the duckbill approached the intersection of the 57 Mains and 55 North, the haulage train was Aabout to enter the 57 Mains.@ 18 FMSHRC at 722. The judge found that AConklin [then] exited the duckbill to throw the track switch so Zuspan could pull the duckbill past the 55 North haulage.@ *Id.* Thus, the judge found that, before the duckbill entered 55 North, it moved to a location beyond the intersection. The only such location to which the duckbill could have moved was the 57 Mains just inby the intersection since the haulage train was blocking access to the 55 North haulage.

the terms of the safeguard, however, and as the Secretary has conceded (Oral Arg. Tr. at 21-22), the duckbill operators and the motormen were not obligated to communicate regarding the status of the 1A block lights because they were not operating in that block simultaneously. Accordingly, we reverse the judge's finding of a violation of the safeguard.

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Safeguard No. 3655478 was validly issued, and we reverse his conclusion that Cyprus Cumberland violated the safeguard.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

For the reasons expressed in the majority opinion, I concur in the conclusion that Safeguard No. 3655478 was validly issued and join in affirming the judge's decision on that ground.

However, I part company with my colleagues because I would also affirm the judge's decision that the Safeguard was violated by the facts of this case. As the majority acknowledges, when the failure to communicate over the block light occurred, the two vehicles were operating simultaneously in the same block of the 57 Mains. Slip op. at 6; 18 FMSHRC at 722. The Safeguard requires that haulage equipment operating in the same block light shall communicate . . . to be assured the signal block light will be turned off after the last haulage equipment exits the light block. 18 FMSHRC at 721; Subsequent Action No. 3655478-01 (modifying Safeguard No. 3655478). The Safeguard directly applies here; both vehicles were operating in the same block and there was a miscommunication that resulted in having the adjacent block light 1A turned off when a vehicle was entering that block rather than when exiting the block. Therefore, the judge's finding of a violation of the Safeguard is supported by substantial evidence in the record and is a sensible interpretation of the Safeguard.

Under the auspices of strict construction, the majority would only apply the Safeguard's protection when equipment and lights are located in the same block. Slip op. at 6. Such a narrow reading defies common sense because it overlooks that vehicles traveling in the same block will often need to communicate about lights on adjacent and intersecting blocks so as to prevent potentially fatal crashes. Strict construction should not be slavishly adhered to at the expense of safety. In fact, the majority has taken a stricter view than even the language of the Safeguard warrants. The Safeguard does not specify that the *same* signal block light be extinguished after the last vehicle exits the block light. Subsequent Action 3655478-01. The more reasonable view is that of the judge **C** that the Safeguard is violated when two haulage equipment operators operating in the same block fail to communicate such that a light in an adjoining block, which one of the vehicles has just exited and one is about to enter, gives the wrong signal, thus permitting a third vehicle to enter and potentially cause a serious collision. See 18 FMSHRC at 726. The Safeguard does not expressly preclude the judge's reading and I believe it is the only reasonable construction of the Safeguard that would further the safety and remedial goals of the Mine Act.

Accordingly, I dissent and would affirm the ruling of the judge.

Marc Lincoln Marks, Commissioner

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