

CCASE:
SOL (MSHA) v. ALOE COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

ALOE COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 91-40
A. C. No. 36-00799-03533

Docket No. PENN 91-41
A. C. No. 36-00799-03534

DECISION

Before: Judge Maurer

These consolidated proceedings concern five citations issued by an MSHA Inspector pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent, Aloe Coal Company, with various violations of the mandatory standards found in 30 C.F.R., Part 77.

The parties have agreed to submit the matter to me for summary disposition based on a stipulation of facts and supporting memoranda. I agree that the material facts necessary to decide these cases are not in dispute and have been stipulated by the parties to my satisfaction. Thus, the matter is a proper one for summary decision pursuant to 29 C.F.R. 2700.64.

STIPULATION OF FACTS

Aloe Coal Company (Aloe) and the Secretary of Labor (Secretary) stipulated to the following facts with regard to the above-captioned matter:

1. These cases involve five citations issued against Aloe.
2. Aloe operates a bituminous coal strip mine in Allegheny and Washington Counties, Pennsylvania.
3. On July 10, 1989, Aloe's employees, who were represented by the United Mine Workers of America and its District 5 (UMWA) for purposes of collective bargaining, commenced a strike which is still in progress. Shortly after the strike began, Aloe resumed mining operations with 13 replacement workers and 6 striking employees who had crossed the picket line and returned to work.

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4. On August 17, 1990, two of the UMWA strikers designated the UMWA as their miner's representative.

5. The citations in these cases resulted directly from an inspection conducted on August 21, 23, 24, 27, 31, 1990, and September 4 and 6, 1990, pursuant to Section 103(g) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 113(g).

6. When the inspector first appeared to conduct the Section 103(g) inspection, a dispute arose concerning the UMWA strikers' right to designate a walkaround representative.

7. In Aloe Coal Company v. Secretary of Labor and United Mine Workers of America, 12 FMSHRC 2113 (1990) (ALJ), the Honorable Avram Weisberger ruled that the UMWA strikers at the Aloe Mine were not miners as defined in the Act and had no right to designate a walkaround representative.

8. During the course of the hearing before Judge Weisberger, on September 28, 1990, Aloe learned that UMWA Representative Ken Horcicak was the individual who had requested the Section 103(g) inspection.

9. The conditions identified in the five subject citations in fact existed and the amounts of the proposed penalties set forth in the Secretary's petitions are reasonable.

DISCUSSION

Aloe's Arguments

The inspector who issued the citations at bar did so pursuant to a Section 103(g) complaint filed by an individual who it turns out was not a miner's representative, and therefore, had no right to request an inspection under Section 103(g) of the Act. The line of argument then goes on that if Mr. Horcicak (the UMWA representative who requested the inspection) had no right to request a Section 103(g) inspection, then the inspector had no right under Section 103(g) to conduct it. And since the inspection was not authorized by Section 103(g), it was an unreasonable one in violation of Aloe's Fourth Amendment rights and the evidence obtained during the inspection must be excluded as "fruit of the poisonous tree." Ultimately then the upshot of the whole evolution is that the citations are null and void and cannot form the basis for the assessment of a civil penalty.

FINDINGS

I agree with the Secretary that the Fourth Amendment's exclusionary rule does not extend to these civil proceedings. Along that same line, I also concur that mining is a type of

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business that historically has been subject to extensive government regulation, and therefore, such a business has no reasonable expectation of privacy.

But the rationale for my decision to uphold the citations in these cases is simply the broad power granted by the Act generally to MSHA inspectors to inspect and/or investigate, and to issue citations and orders relating to violative conditions they should find existent at a mine.

Section 103(a) of the Act provides in pertinent part that: "Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in . . . mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards. . . "

Section 104(a) authorizes the Secretary, upon either inspection or investigation, to issue a citation if he believes the operator has violated a mandatory standard.

Section 103(g)(1) appears to me to be but a subset of the broader substantive provision of Section 103(a) that merely provides a procedure for the representative of miners to obtain an "immediate inspection" by giving notice to the Secretary of the occurrence of a violation or imminent danger. This section does not in any way limit the MSHA inspector's broader authority, granted under Section 103(a), to conduct an inspection or issue citations should any violative conditions be found, whether or not the technical requirements of Section 103(g) are met.

In the cases at bar, the operator concedes the violations found at its mine did in fact exist, and I find that the technical defect cited by the operator concerning the Section 103(g) complaint did not hinder Aloe's ability to defend itself in these proceedings.

I therefore conclude that given an MSHA inspector's broad authority to inspect mines and issue citations for violative conditions, when he observes a violation at a mine, regardless of the manner in which he was made aware of the same, the resulting citation he issues is valid.

Accordingly, the five citations at bar will be affirmed and the Secretary's proposed civil penalties assessed by me herein.

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ORDER

Citation Nos. 3092488, 3092401, 3092493, 3099500, and 3092491 are AFFIRMED, and Aloe Coal Company is DIRECTED TO PAY a civil penalty of \$625 within 30 days of the date of this Decision.

Roy J. Maurer
Administrative Law Judge