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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CLIMAX MOLYBDENUM COMPANY, A DIVISION OF AMAX, INC., CONTESTANT	Contest of Citation and Order Docket No. WEST 79-92-RM
v.	Citation No. 334415 April 18, 1979
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 33417 April 18, 1979
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Climax Mine Civil Penalty Proceeding Docket No. WEST 80-108-M
v.	A.O. No. 05-00354-05032R
CLIMAX MOLYBDENUM COMPANY, A DIVISION OF AMAX, INC., RESPONDENT	Climax Mine

DECISIONS

Appearances: W. Michael Hackett, Esquire, Golden, Colorado, and Todd D. Peterson, Esquire, Crowell & Moring, Washington, D.C., for contestant-respondent Climax Molybdenum Company Robert A. Cohen, Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for petitioner-respondent MSHA

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a section 104(a) citation and subsequent 104(b) order issued by MSHA pursuant to the Federal Mine Safety and Health Act of 1977, charging Climax Molybdenum Company with a violation of section 103(a) of the Act for its refusal to permit MSHA inspectors to bring cameras on its mine property in the course of their inspections for the purpose of documenting violations of the Act and safety and health

standards promulgated thereunder. The parties waived an evidentiary hearing, and submitted the case for decision on the record, which includes the pleadings and legal arguments presented in the proposed findings, conclusions, and supporting briefs filed by the parties.

There does not appear to be any dispute as to the facts which precipitated the controversy at issue in these proceedings. On April 18, 1979, MSHA inspectors commenced a regular safety and health inspection of the Climax Mine. The inspectors carried with them instamatic cameras with flash attachments for the purpose of recording potential violations of the Federal Mine Safety and Health Act of 1977. Climax spokesman David Helmer refused to permit the MSHA inspectors to bring the photographic equipment along on the inspection. Climax's refusal of permission was based upon a uniform company policy that prohibits non-employees from using photographic equipment on Climax property and upon Climax's belief that MSHA was not statutorily permitted to use the equipment for the purpose of documenting violations.

As a result of the refusal, inspector Richard H. White issued a section 104(a) citation, No. 334415, which alleged a violation of section 103(a) of the Act. Subsequently, Inspector White issued a section 104(b) order, No. 334417, for failure to abate the citation. Climax subsequently filed a contest under section 105 of the Act in order to challenge the citation and order, and based on a stipulation of the facts, and at the request of the parties, I cancelled the scheduled hearing and ordered the parties to file briefs.

Petitioner's pleadings filed in the civil penalty proposal (Docket No. WEST 80-108-M) states that Citation No. 334415 was issued pursuant to section 104(a) of the Act, and that the specific standard cited was "30 CFR 103(A)." A copy of the citation attached to the pleadings and proposal reflects that it was issued on April 18, 1979, at 10:03 a.m., by MSHA inspector Richard H. White, and the condition or practice alleged to be a violation is described as follows on the face of the citation: "A spokesman for the company in the pre-inspection conference would not let MSHA inspector carry cameras underground for the purpose of taking pictures of violations which were to be a citation or order."

The inspector fixed the abatement time as 10:33 a.m., April 18, 1979, and at 10:45 a.m. that same day he issued a section 104(b) order of withdrawal citing a violation of section 103(a) of the Act, and the condition or practice is again described as follows: "The spokesman for the company still will not allow MSHA inspectors to take cameras underground for the purpose of taking pictures of violations." The area required to be closed by the withdrawal order is described as "none."

In its answer filed in response to the proposal for assessment of a civil penalty for the alleged violation, Climax states that there was no violation of section 103(a) because

there is no authority under the Act or its regulations for MSHA to utilize photographic equipment during the course of regular health and safety inspections. In contesting both the citation and order, Climax asserts that:

1. The provisions of 103(a) of the Mine Act, cited by the inspector as the basis for the issuance of the citation/order, do not authorize the use of photographic equipment in underground mines during the course of regular health and safety inspections conducted by the MSHA inspectors.

2. MSHA has no specific regulatory authority which justifies the use of photographic equipment during regular health and safety inspections of underground mines.

3. The use of photographic equipment underground by MSHA inspectors may actually expose miners to unsafe conditions.

4. The use of photographic equipment on Climax company property by non-employees is in violation of Climax policy.

5. The use of photographic equipment by MSHA inspectors is in violation of the interim rules of the Commission concerning the proper manner for taking discovery in administrative litigation cases.

6. Utilization of photographic equipment by MSHA inspectors creates the potential for disclosure of information which is proprietary in nature, and thus would divest Climax of the right to have this information remain outside the domain of public knowledge.

7. The improvement of safety is not advanced by the utilization of photographic equipment during the course of MSHA regular health and safety inspections.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

2. Section 103(a) of the Act provides, in pertinent part:

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering of information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with

any citation, order or decision issued under this title or other requirements of this Act * * *. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare shall have a right of entry to, upon, or through any coal or other mine. [Emphasis added.]

Section 103(b) states in pertinent part:

> For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths.

Section 103(e) provides:

> Any information obtained by the Secretary or by the Secretary of Health, Education, and Welfare under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this Act. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible.

Section 104(a) provides:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

Issues Presented

1. Does section 103(a) of the Act grant MSHA inspectors the authority to take cameras into or onto mine property for the purpose of taking

photographs of alleged conditions or practices which they believe constitute violations of mandatory safety or health standards?

2. Can MSHA inspectors use photographic equipment during a regular health and safety inspection irrespective of formal Secretarial rulemaking authorizing the use of cameras by MSHA personnel?

3. Can a mine operator be cited under section 103(a) of the Act for refusal to permit MSHA inspectors to take photographic equipment with them underground?

Additional issues raised by the parties are discussed in the course of these decisions.

DISCUSSION

Contestant's Arguments

In support of its position, Climax asserts that since the Climax Mine is private property, and since freedom from unreasonable Government intrusion is one of the fundamental guarantees of the Constitution, in the absence of any statutory authority to the contrary, Climax may regulate the Government's entry and activity in the mine. Thus, if the Government seeks to transgress upon the established privacy rights of Climax, it must at the very least, possess some explicit statutory authority to do so. Assuming, arguendo, that there exists such statutory authority, Climax asserts that it is found in section 103(a) of the Act, and that from its point of view, the issue here is whether that section of the Act unequivocally authorizes MSHA to intrude upon Climax's privacy and property rights by taking photographs solely for use as evidence at trial in a contested proceeding.

In further support of its arguments, Climax asserts that the strictness or liberality with which the words of section 103(a) are construed must be determined by reference to the nature of that particular section as it applies to the issue in this case, and that it is well settled that a remedial statute may be broadly construed for most purposes, yet strictly construed where it is punitive or treads close to constitutionally-protected areas. 3 C. Sands, Sutherland Statutory Construction, 58.03, 60.04 (1973). Even though the substantive provisions of the Act, as remedial legislation, may be construed liberally, Climax argues that the proper focus in the context of the present case is not upon the nature of the Act as a whole, but rather on the specific statutory provision at issue, as it impacts upon the parties in this case. Thus, the effect of section 103(a) alone must determine the nature of the construction given that provision. Foremost among the factors justifying a strict construction of section 103(a), argues Climax, is the danger that MSHA's use of photographic equipment, particularly in the context of a warrantless inspection, would further encroach upon Climax's constitutionally-protected right of privacy. The fourth amendment guarantees of freedom from unreasonable searches

applies to

Climax as it does to any homeowner, and the Supreme Court has consistently refused to uphold otherwise unreasonable searches simply because commercial establishments were the subject of the search. Go-Bart Importing Company v. United States, 282 U.S. 344 (1931); Amos v. United States, 255 U.S. 313 (1921); Silverthrone Lumber Company v. United States, 251 U.S. 385 (1920). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." See v. City of Seattle, 387 U.S. 541, 543 (1967), accord, Marshall v. Barlow's, Inc., 436 U.S. 307, 311-12 (1978).

Climax argues that the Supreme Court has specifically emphasized that fourth amendment rights must be protected by limitations on the right of the Government to invade premises during an administrative search. Camara v. Municipal Court, 387 U.S. 5223 (1967); See v. City of Seattle, supra; Marshall v. Barlow's, Inc., supra. Since MSHA inspections may result in criminal as well as civil liability (see, e.g., section 110(d) of the Act), Climax asserts that the full range of constitutionally-based self-protection, as well as privacy guarantees, shield the Climax Mine from unreasonable Government intrusion, Camara v. Municipal Court, supra, 387 U.S. at 520, and that "[i]f the government intrudes upon a person's property, the privacy interest suffers whether the government's motiviation [sic] is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," Marshall v. Barlow's, Inc., supra, 436 U.S. at 312-13.

Climax suggests that the danger of unreasonable Government interference is even greater in the case of a warrantless search, and even assuming that the warrantless search of its mine did not run afoul of the fourth amendment, the warrantless nature of the search created greater dangers for invasion of Climax's constitutionally-protected privacy, and in such a setting, the Supreme Court has always strictly limited the scope of permissible warrantless searches, citing Michigan v. Tyler, 436 U.S. 499 (1978), a case in which fire officials had made repeated warrantless entries of a building in order to search for evidence of arson. The Court held that fire officials needed no warrant to enter a burning building because entry to extinguish a fire was "reasonable." The Court further held that once in the building, the fire fighters could remain for a reasonable time to take only evidence in plain view and to investigate the cause of the fire. After the initial exigency, however, any further reentry to investigate required either a warrant or the consent of the property owner. Thus, Climax asserts that the scope of a permissible warrantless search is restricted by the fourth amendment privacy rights of the property owner, and even where a warrantless search is permitted, the scope of the authorized search is exceedingly narrow; citing Chimel v. California, 395 U.S. 752 (1969) (searches incident to arrest); Terry v. Ohio, 392 U.S. 1 (1968) (pat-downs for weapons); and even where the courts have upheld the right of MSHA to conduct warrantless searches, they have recognized that the searches must be limited in scope, Marshall v. Nolichuckey Sand Corporation, 606 F.2d 693 (6th Cir.

1979).

Climax asserts that to grant the inspector wide latitude to engage in activities not expressly authorized would result in an unwarranted and unreasonable intrusion upon Climax's constitutionally-shielded right of privacy, and that the problem is exacerbated in the case of photographs for a number of reasons. Photographs have the great potential of revealing trade secrets or other proprietary information, and MSHA could unwittingly reveal sensitive information about Climax's production or mining practices. The creation of a permanent pictorial record of Climax's private mining facilities thus compounds the invasion of privacy severalfold; it opens up Climax property not only to the inspector, but effectively to all who might see the photographs. This multiplier effect therefore enhances Climax's need for protection and justifies a close reading of MSHA's statutory powers on this specific issue.

Climax argues further that the impact on its privacy and proprietary operations is further increased by the fact that the use of photographic equipment and its accompanying flash attachments could distract miners whose attention must be focused entirely on the safe operation of massive machinery in confined underground spaces. The mere presence of Government inspectors is distracting enough to Climax's miners; taking pictures with a flash has much greater potential for disrupting normal operations and diminishing safety during the mining process. This factor simply reinforces Climax's protected privacy interest in avoiding added MSHA intrusion into its property.

Finally, Climax asserts that strict construction is even more appropriate where there is no explicit regulation or formal MSHA action authorizing the use of photographic equipment, and points to the fact that by contrast, OSHA inspectors are specifically authorized by regulation to take photographs during the course of an inspection, 29 CFR 1903.7(b), and which may be used in a subsequent enforcement hearing. MSHA, however, has no comparable regulation; in fact, there appears to be no official MSHA authorization at all for the attempted use of photographic equipment by Inspector White. In the absence of a formal authorizing regulation, MSHA inspection practices ought to be strictly limited. Since MSHA has not officially sanctioned the use of photographic equipment, the informal practices of individual inspectors or district managers are not entitled to great deference. Particularly in an area where privacy rights are implicated, the scope of an inspector's informal power, unauthorized by specific regulation, ought to be carefully circumscribed.

In addition to its fourth amendment arguments, Climax asserts that section 103(a) of the Act contains no explicit authorization to take photographs, and that any such authority must be inferred from the general inspection power. The photographs, and the use to which they are put, must achieve in some direct and concrete manner one of the four statutorily-prescribed purposes for MSHA inspections. If the photographs are not reasonably calculated to achieve one of the four-stated purposes, then their use is not authorized by the

statute.

Climax asserts that the purpose for which MSHA intends to use photographs taken in the course of an inspection was made clear in a recent case involving the same parties, Climax Molybdenum v. MSHA, DENV 78-581-M (Judge Cook; hearing date, January 31, 1979), where MSHA inspector James Enderby testified as follows:

> Well, since our first meeting here in November, the District Manager has issued cameras as inspection equipment to every inspector in the district. We are instructed as a policy from now on, from that point forward, if we think we are going to have a citation that we write or whatever, that could come into litigation, to take a picture of that particular violation.
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> * * * * * * *
>
> Now, anytime we write a violation that we think will be, or has a possible chance of being litigated, to take a picture of it in all the surrounding circumstances.

Climax argues that this testimony makes it clear that MSHA inspectors in this district are attempting to use photographic equipment in preparation for potential litigation, and that the sole conceivable justification is to develop evidence for use at trial. In these circumstances, Climax believes that the inspector ceases to be an enforcement officer of MSHA and instead becomes an agent of the Solicitor to aid the lawyer in preparing his case, and in this context his inspection is not for violations, but a form of extrajudicial pretrial discovery. In support of its arguments, Climax asserts that the taking of photographs to be used as evidence in a later hearing does not further any of the statutorily-enumerated purposes of section 103(a) and therefore is not authorized by the Act. The first two purposes clearly do not apply to the present situation. The use of photographs as evidence in a hearing does not involve "obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines." This section is aimed at the generation of publicity and public information relating to mine safety and health, not to the development of evidence for use in a hearing. Thus, while it might authorize the taking of photographs for the purpose of studying some specific condition or disseminating information to the public, it does not justify the use of photographic equipment for the purpose of corroborating an inspector's testimony at a hearing.

The second statutory purpose, "gathering information with respect to mandatory health or safety standards," grants power to conduct research in order to develop effective regulations for the protection of safety and health. It does not contemplate use in an enforcement proceeding of the information gathered pursuant to its provisions. Thus, it cannot authorize the taking of photographs for use as evidence in an enforcement hearing.

The third and fourth purposes authorize inspections only for "determining whether an imminent danger exists" and "determining whether there is compliance with the mandatory health and safety standards * * *." Simply stated, this section authorizes an inspector to travel the mine to assure himself that no imminent dangers exist and that the operator is complying with the mandatory standards. It does not authorize an inspector to do whatever is helpful to the Solicitor's Office for the purpose of persuading an administrative law judge that a violation existed when the inspector visited the mine.

Photographs for use in a hearing are not taken to help the inspector to determine whether a violation or imminent danger exists; rather, the photographs are used later to support the Solicitor's case that a violation did exist. Thus, the taking of photographs is distinguishable from the taking of air samples, measurements, or other physical evidence where the evidence is used by the inspector to determine whether a standard has been violated rather than as corroboration of the inspector's judgment that a violation existed. The section does not authorize unlimited sleuthing solely for the purpose of preparation for trial. The development of trial evidence is more properly within the scope of prehearing discovery and is therefore outside the ambit of the explicit authority granted by section 103(a).

Climax asserts that when Congress intended MSHA to have evidence-gathering capabilities similar to pretrial discovery, it explicitly granted such authority in very limited instances. Pursuant to section 103(b) of the Act, MSHA is empowered to take testimony and compel production of documents in the course of an investigation, but no such powers are authorized for use during an inspection. Thus, although the Solicitor could take depositions and compel production of documents in preparation for a hearing on a challenged citation, MSHA inspectors are not authorized to gather such evidence during the course of an inspection. This provision confirms the division between those activities that are required in order to enable an inspector to determine the existence of a violation and those activities that are solely for the purpose of gathering evidence for trial. Citing the legislative history of both the 1969 and 1977 Acts, Climax asserts that nowhere is there any indication that Congress authorized inspectors to gather, in the course of a warrantless inspection, evidence to be used at a later trial, and the only authority granted is the power to determine whether the inspector believes there is a violation of the Act.

Finally, Climax argues that any statutory authority granted by section 103(a), must be strictly construed in light of the important privacy rights at stake, and it does not include the power to take photographs solely for the use as evidence at trial. Such evidence is not necessary to make a determination that a violation exists, rather, it is more appropriately considered a part of pretrial discovery that is best carried out under some form of judicial supervision, as for example, Commission Procedural Rule 57, 29 CFR 2700.57, which specifically provides that good cause must be shown to obtain an order to

permit, inter alia, "photographing of designated documents or objects, or to permit a party or his agent to enter upon designated land to inspect and gather information."

SHA's Arguments

MSHA argues that section 103(a) of the Act authorizes frequent mine inspections for the purpose of obtaining information concerning compliance with mandatory health or safety standards, and that section 103(e) mandates that this be done in such a manner as to not impose unreasonable burdens upon mine operators. MSHA points out that the basic method utilized by an inspector to determine compliance is by visual observations of mine conditions and practices. However, since there are many occasions when an inspector is required to use certain types of equipment or testing devices to determine if an operator is in compliance, the equipment could include methane detectors, respirable dust-sampling equipment, and smoke tubes. Here, the MSHA inspector sought to bring a camera with him as part of his regular equipment in order to better establish the existence of certain conditions, and any photograph taken would have been a part of the regular inspection process. Since there is little doubt that an inspector has the right to take and remove from a mine air and dust samples, MSHA asserts that the use of a camera to take photographs to support his belief that a violation has occurred is also appropriate, and in fact, necessary to adequately perform his duties.

In support of its position, MSHA argues that inherent in the inspector's duty to gather information under the Act is the right to preserve that information in a form in which it can be used at a later time if the inspector's enforcement actions are contested. Since the Act sets forth a procedure for contesting MSHA's enforcement actions, an inspector should be allowed to support his findings by any means which are consistent with section 103(a). While inspectors' notes and drawings of conditions observed are helpful, photographs taken at the time violations are cited can be especially useful in documenting findings that have previously been made, and the use of cameras by MSHA personnel to support enforcement actions will be helpful in resolving credibility questions which arise when citations are contested by mine operators.

MSHA asserts further that the Act requires all underground mines to be inspected at least four times a year, and because of the limited number of inspectors available to carry out the mandate of the Act, an inspector may be in an area of a mine where he is required to take some enforcement action for only a short period of time. If a particular enforcement action is contested by an operator, an inspector may not have the opportunity to revisit the mine prior to a hearing before an administrative law judge. Any hearing of a contested violation may take place many months after the initial enforcement action was taken by the MSHA inspector. All of these factors may result in the testimony of MSHA inspectors being found too vague when it comes to describing the conditions they actually observed prior to issuing a citation or withdrawal order. Operators who are seeking to contest MSHA enforcement actions may have similar problems when presenting evidence to support their position. Mine management personnel who appear at hearings frequently base

their testimony concerning contested conditions on hearsay statements of other employees who are not available

for cross-examination. This type of testimony can result in difficult credibility problems which must be resolved by an administrative law judge before he can determine if a violation of the Act has occurred.

MSHA takes the position that the use of photographs would serve to reduce the amount of time spent by its inspectors, as well as mine operators, in exploring the circumstances under which a violation has occurred. MSHA states that many times a judge is not fully apprised of the severity of a violation because of the inability of an inspector to accurately describe all of the conditions which lead to the issuance of his enforcement action. However, since courts have generally upheld the use and admission of photographs to give the trier of facts a better understanding of conditions at the scene of an accident, Louisville & N.R. Company v. Brown, 127 Ky. 732, 746, 196 S.W. 795, 798 (Ky. 1908), MSHA asserts that the same rationale which makes the use of photographs admissible in accident cases in supporting the testimony of witnesses is directly applicable to their use by MSHA inspectors to support their judgments that a violation of the Act has occurred. Under certain circumstances, the use of photographs will be able to convey to an inspector's supervisor, an assessment officer, or to an administrative law judge, a better impression as to whether or not a violation of the Act has occurred than could the inspector's verbal description of the conditions he observed. Of course, said photographs must usually be taken at the time the violation is observed. Recognizing the fact that before a photograph can be introduced at a hearing, it has to be authenticated that the photograph is substantially accurate and purports to represent accurately the condition or practice that it is seeking to portray, MSHA emphasizes that a photograph will not itself establish a violation of the Act, but will merely be used to support an inspector's testimony in those situations where conflicts in testimony arise. Any photograph which is not material to the condition or practice sought to be established by the inspector will be subject to objection for reasons of relevancy and materiality.

With regard to Climax's contention that the Secretary has not formally conducted any rulemaking with respect to the use of cameras as part of MSHA's enforcement scheme, similar to the OSHA regulation cited by Climax, MSHA asserts that Climax ignores the fact that administrative agencies are not required to resort to formal rulemaking in order to develop all policies and procedures necessary to aid in the enforcement process, and cites Human Resources Management, Inc. v. Weaver, 442 F. Supp. 241, 251 (1978), and the Supreme Court's holding that: "Absent constitutional constraints or extremely compelling circumstances administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Vermont Yankee Nuclear Power Corp. v. NRDC, 55 L.Ed 2nd 460, 479 (1978)."

In further support of its position, MSHA states that it is clear that the Act authorizes a mine entry by its inspectors to

observe conditions in the mine, and that the use of a camera to preserve those conditions underground is a natural extension of the right of entry since a photograph is

a mere picture of those conditions already observed, and the act of taking a photograph cannot support a claim for invasion of privacy. MSHA further believes that when an inspector uses a camera to support his judgments made with respect to the enforcement provisions of the Act, he is engaging in an efficient recognized method of inquiry. No individual rights of mine operators are affected, nor is the authorizing of the use of cameras by MSHA inspectors as part of their equipment, a substantive rule or policy that relates to the public and therefore must be published in the Federal Register. Therefore, no new rulemaking is necessary.

MSHA has submitted a copy of an April 30, 1979, policy memorandum from its Metal and Nonmetal Mine Safety and Health Administrator addressed to its Metal and Nonmetal Mine Safety and Health District Managers, regarding the use of cameras by inspectors during mine inspections. That memorandum states as follows:

> Pursuant to section 103(a) of the Mine Act, inspectors make frequent inspections of mines for purposes of (1) obtaining information relating to health and safety conditions, and the causes of accidents, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or other requirements of the Mine Act. Inasmuch as the Mine Act establishes the purposes of inspections, it follows that an inspector may take into the mine the equipment necessary to accomplish his mission.
>
> This equipment could include, in appropriate circumstances, methane detectors, torque wrenches, additional lights, and a camera. Hence, if an inspector, in his judgment, needs a particular piece of equipment to accomplish his statutory mission, the Mine Act implicitly authorizes him to use such equipment.
>
> Frequently, inspectors feel that taking photographs of the scene of an alleged violation, imminent danger or accident would be of great assistance in verifying and correcting the conditions or practices resulting in the violation, danger, or accident. The use of cameras may also be of great assistance in subsequently resolving differences of opinion between the mine operator and the inspectors as to the conditions present at the time of citation. Such photographs could also be of benefit to both parties by expediting assessment and review proceedings by providing a pictorial illustration of the scene of a violation. Accordingly, when the use of a camera would be necessary or helpful in an inspection, the District Manager or Subdistrict Manager may authorize such use during inspections of metal and nonmetallic mines subject to the following special restrictions:

1. All non-gassy metal and nonmetallic mines - none.

2. All gassy metal and nonmetallic mines - tests for methane will be performed prior to any use of a camera. If methane is present at levels in excess of 1%, or if the inspector has reason to believe methane is present, only photographic equiment approved for use in gassy mines by Approval and Certification Center shall be used.

3. All gilsonite mines - prohibited.

Because questions have arisen in the past regarding the use of cameras, I am initially requiring District Manager's or Subdistrict Manager's approval of the use of cameras in each instance. I want you and the Subdistrict Managers to exercise discretion in the approval of the use of cameras.

You should also be sure the inspectors are instructed in the use of cameras. The inspectors should make a record of the physical conditions under which the photographs are taken and the date and time and place.

A refusal to permit the inspector to carry a camera into the mine will be considered a violation of section 103(a) of the Act and could also be considered an interference or hindrance of the inspector in carrying out the provisions of the Act. If there is a refusal of permission to take a camera into the mine, the inspection should nevertheless be completed and a record made of any special reasons for taking the camera into the mine.

The Solicitor's Office has reviewed this memorandum and concurs with the position taken.

In view of the policy memorandum regarding the use of cameras, MSHA maintains that since it restricts the use of cameras in certain gassy mines and in all gilsonite mines, the safety problems resulting from their use in underground mines have been minimized and that unless Climax can demonstrate that there are important overriding circumstances why MSHA's use of cameras in specific situations should not be permitted underground, inspectors should be free to perform their duties using the best investigative tools available.

With respect to the alleged violation of section 103(a) for Climax's refusal to permit the use of cameras on its mine property, MSHA argues that section 104(a) authorizes the issuance of a citation or withdrawal order for violations of the Act as well as any mandatory safety or health standards. MSHA believes that the refusal of Climax to allow an inspector to carry a camera underground during an inspection amounts to hindering and impairment by an operator of MSHA's ability to carry out its duties specified under

section 103 of the Act, and Climax should not be allowed to dictate to an inspector the type of equipment which he may use underground. The gathering of information to determine compliance with the requirements of the Act must proceed in an atmosphere free from attempts to intimidate or limit the activities of the inspector during the course of his duties, and given the remedial nature of the Act, an inspector must be allowed broad latitude and discretion in carrying out his duties, St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378, 381 (3d. Cir. 1959); Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 744 (7th Cir. 1974). Should Climax claim that the use of an individual photograph by MSHA violates a company trade secret or some other rights, it would be free to challenge the use of that particular photograph. However, that potential challenge by Climax should not be persuasive in supporting a general refusal to permit the use of cameras in underground mines. Thus, anytime an operator prevents an inspector from carrying out his investigatory functions, he violates the provisions of section 103 and can be cited accordingly.

Reply Brief Arguments

Contestant

In its reply brief, Climax views the issue in this case to be the narrow question of whether MSHA is statutorily authorized to take photographs during a warrantless inspection solely for use as evidence in an enforcement hearing. Climax does not view the issue to include whether MSHA may ever use photographic equipment; nor does it believe that the case calls for a determination as to whether photographs may be used as evidence in an enforcement hearing. Climax's position is that the taking of photographs for use in a hearing is explicitly contemplated by the Commission's Rules of Procedure, 29 CFR 2700.57, but the photographs must be taken as part of the judicially-supervised pretrial discovery process. Climax makes no objection to the gathering of evidence in this specifically-authorized and well-regulated manner. Climax does, however, object to the gathering of photographic evidence under the pretense of an inspector's determination whether to issue a citation. This form of extra-judicial discovery infringes upon Climax's privacy rights and is unauthorized by the Act. Regarding MSHA's reliance on section 103(a), Climax asserts that this section is not relevant because the conference report demonstrates that it deals only with recordkeeping requirements, S. Rep. No. 461, 95th Cong., 1st Sess. 45 (1977).

Climax reiterates its strict construction arguments, and conceding the fact that substantive provisions of the act should be liberally construed in order to effectuate the remedial purposes of the Act, it maintains that the warrantless inspection provision should be strictly construed to avoid conflict with Climax's constitutionally-protected right of privacy, and it distinguishes the cases of St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378 (3d.

Cir. 1959), and Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741

(7th Cir. 1974), relied on by MSHA for its liberal construction arguments. Climax points out that these cases dealt with substantive provisions directly related to safety precautions that are readily distinguishable from the provisions of the Act in issue in the instant proceedings. Since the inspection provisions of section 103(a) authorize warrantless entry and impinge directly on Climax's constitutionally-protected right of privacy, Climax asserts that the effect of this particular provision, not the Act as a whole, is the key to the type of construction that should be applied in this case. The extent to which MSHA may invade Climax's protected privacy rights must be construed strictly in order to avoid any unnecessary infringement of Climax's privacy rights. Climax points out that MSHA's policy memorandum was issued after the citations in these proceedings were issued, and that contrary to MSHA's arguments, there is no suggestion in these proceedings that MSHA inspectors were intimidated in any way. Climax officials simply requested that they not use photographic equipment in what Climax believed to be an unauthorized manner. Further, Climax asserts that MSHA assumes that the burden is on Climax to demonstrate "over-riding circumstances" in order to prevent the use of photographic equipment, and that implicit throughout MAHA's arguments is the assumption that an inspector can enter a mine and do whatever he pleases, regardless of whether there is specific statutory authorization for his actions.

Climax believes that the MSHA approach is best illustrated in its analysis of the statutory foundation of an inspector's right to take photographs. Commenting on MSHA's argument that the use of a camera during an inspection "is a natural extension of the right of entry," Climax agrees that the use of cameras to develop evidence for trial extends the right of entry, but it is an extension that is unjustified by the specific language of section 103(a). In fact, states Climax, MSHA makes no effort to cite specific statutory language in support of its position; its arguments are all based on general assertions as to what is helpful or convenient for MSHA, and the essence of its argument is that inspectors may develop photographic evidence for trial during the course of a regular inspection in that it would be helpful to MSHA to have pictures to introduce at a hearing, and the regular inspection is the most convenient time to take the photographs. Even if the above were true, maintains Climax, it would not mean that MSHA is statutorily authorized to obtain photographic evidence at the time of an inspection. First, the fact that photographs may, in general, be useful does not mean that photographs are statutorily authorized. The whole point of the fourth amendment is to prevent the Government from taking actions that would be useful in the Government's enforcement efforts, but would infringe upon a citizen's protected right of privacy.

In this case, the general usefulness of photographs at trial does not indicate that they may be taken as part of an inspection, and in fact, Climax believes the Act authorizes an inspector only to do that which is necessary in order to determine whether to issue a citation. Photographs are not

required in order to make that determination, and their use may be distinguished from methane detectors, smoke tubes, and dust sampling devices. Moreover, even assuming that photographs would be helpful at a hearing, the

Act does not authorize the extra-judicial gathering of such evidence in the course of a warrantless inspection. The inspector's statutorily-prescribed role is to determine whether a violation exists; photographs do not further that goal. If the Solicitor desires to obtain photographic evidence for a hearing, he should follow the explicit Commission procedures that have been established for that type of pretrial discovery. See 29 CFR 2700.57.

MSHA

Addressing contestant's warrantless search arguments, MSHA cites two recent U.S. Circuit Court decisions concluding that MSHA's warrantless inspections and enforcement procedures are reasonable with respect to gaining access to the nation's mines, Marshall v. Nolichuckey Sand Company, Inc., 606 F.2d 693 (6th Cir. 1979), and Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, No. 79-614 (January 7, 1980). MSHA takes the position that once it has been determined that a Federal inspector has a lawful right to gain access to a mine without a warrant, the warrantless search and right of privacy issues become moot. MSHA asserts that the real issue in this case concerns the investigatory methods an inspector may use to preserve evidence and document his findings, after he has gained access to the premises. Since mining has been a heavily-regulated industry for a number of years, MSHA argues that Congress intended that MSHA's right to make warrantless searches be interpreted broadly, and cites the following excerpt from the legislative history:

> Safety conditions in the mining industry have been pervasively regulated by Federal and state law. The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under the Act without first obtaining a warrant. S. R. No. 95-181, 95th Cong., 1st Session, p. 27

In further support of its arguments, MSHA asserts that its broad right-of-entry not only applies to the actual entry itself, but also to what an MSHA inspector may do during the course of his inspection. The fact that he gains access to a mine without a warrant does not in any way limit or restrict his investigatory duties under the Act, and the use of a camera to preserve evidence and to document his findings are clearly reasonable and important parts of his investigatory functions. The actual taking of a photograph does not enlarge MSHA's original right-of-entry, since an inspector already has the right to visually observe all conditions in a mine which a photograph could depict.

In response to Climax's privacy arguments, MSHA points out that inspectors are at the Climax Mine on almost a daily basis, and citing United States v. Biswell, 406 U.S. 311 (1972), argues that the court there held that owners of highly-regulated industries have little expectation of privacy since Federal

regulation of these industries serves an important Governmental interest. Since a photograph merely preserves a visual picture of what an inspector has already observed, MSHA suggests that no privacy rights of Climax are affected.

Regarding Climax's characterization of an inspector as an "agent" of the Solicitor's Office, MSHA states that this is absurd since the same argument could be made about an inspector who takes good notes or makes detailed drawings of conditions he observes in a mine. Moreover, the Solicitor's Office only becomes involved in a small percentage of the total enforcement actions taken by MSHA. It is clear that photographs can serve many important functions in assisting MSHA in carrying out the Congressional mandate, aside from litigation preparation; and photographs are frequently used in resolving credibility problems and therefore may actually serve to eliminate the need for litigation in a particular situation. MSHA concludes that Climax's reliance on a narrow interpretation of MSHA's right-of-access to its mine should be rejected.

Findings and Conclusions

Warrantless Searches

The authority of Government officials to conduct inspections for law enforcement purposes is limited by the fourth amendment to the Constitution which proscribes unreasonable searches and seizures. As a general rule, to conduct a search, a law enforcement official must first obtain a warrant based on probable cause, See v. City of Seattle, 387 U.S. 541 (1967). Where authorized by Congress, however, warrantless searches without probable cause may be conducted for legitimate regulatory purposes, United States v. Biswell, 406 U.S. 311 (1972). Although the courts in the past have deferred to the discretion of the legislature in granting administrative investigative powers, recent decisions indicate that the courts may not be hesitant to prevent the abuse of these powers or to discharge their role as protectors of individual rights.

Two cases decided by the Supreme Court in 1967 dealt with the administrative searches by non-federal Government officials, and both found administrative searches sufficiently significant intrusions to require prior judicial authorization. In Camara v. Municipal Court, 387 U.S. 523 (1967), a case cited by Climax, a public health inspector sought to make a routine annual inspection of appellant's premises for possible violations of a local housing code. Without requiring that a search warrant be obtained, a local municipal ordinance provided that inspectors should have the right to enter at reasonable times to permit such inspections, and refusal to permit entry was subject to a fine and jail sentence. Upon refusal by the appellant to permit a warrantless inspection of his premises, he was arrested and charged with a violation of the local ordinance. Noting that even a law-abiding citizen has a strong interest in preserving the sanctity of his home from official intrusion, the Court rejected the notion that the fourth amendment interests at stake in inspection cases are merely "peripheral" and held that the constitutional guarantee applies with full force to such searches, and further found administrative searches sufficiently significant to require prior judicial authorization.

In See v. Seattle, supra, a municipal ordinance authorized compulsory warrantless inspections of certain buildings, except the interior of dwellings, as often as necessary to discover violations of the city's fire code. The Court ruled that there is no justification for relaxing fourth amendment safeguards simply because the inspection is of commercial premises, since a businessman's constitutional right to be free from unrestricted official entries is of no less significance than that of a private resident. The Court applied the warrant procedure outlined in Camara to commercial inspections, and while noting that each demand for entry should be measured against a flexible standard for reasonableness, noted that "the decision to enter and inspect should not be the product of unreviewed discretion of the enforcement officer in the field." 387 U.S. at 544-45.

Although Camara and See involved local municipal administrative searches and may arguably be distinguishable from Federal administrative agencies on the basis of the subject matter regulated, it would seem that for the most part, the interests generally advanced for Federal agency searches are no more compelling than those at issue in the cases concerning local, state, and municipal agencies. As a matter of fact, as pointed out by Climax in the cases footnoted at page 7 of its initial brief, the issue of warrantless searches, insofar as it may affect Climax's constitutionally-protected right of privacy, is not free of doubt, particularly in the context of the metal and nonmetal mining industry.

The issue of warrantless searches pursuant to section 103(a) of the Act was previously raised in two Commission proceedings decided by Judge Broderick in MSHA v. Waukesha Lime and Stone Company, Inc., VINC 79-66-PM, June 5, 1979, and MSHA v. Halquist Stone Company, VINC 79-118-PM, June 8, 1979. Addressing the general proposition that an administrative agency does not have the power to rule on constitutional challenges to an organic statute of an agency, Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361 (1974); Public Utility Commission v. United States, 355 U.S. 543 (1958); Spregel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976), Judge Broderick nonetheless ruled that it is the responsibility of an administrative agency to determine whether a provision of the statute it administers may constitutionally be applied to the facts found by the agency, that construction of its organic statute is peculiarly the duty of the agency, and that a cardinal rule of construction requires that if possible, a statute be construed to avoid conflict with the Constitution, NLRB v. Home Center Management Corporation, 473 F.2d 471 (8th Cir. 1973). Judge Broderick concluded that the mining industry is a pervasively-regulated industry, and that as such, warrantless nonconsensual inspections are mandated by the Act and do not constitute unreasonable searches prohibited by the fourth amendment to the Constitution. I agree with his conclusions.

In disposing of the constitutional challenges on the warrantless search issues raised in Waukesha Lime and Halquist SStone, Judge Broderick relied on the requirements of section

103(a) that MSHA inspectors make frequent inspections of mines, and the Senate Committee Report stating that the language

"shall have a right of entry to, upon, or through any coal or other mine" was intended by the Committee "to be an absolute right of entry without need to obtain a warrant." S. Rep. No. 95-181, 95th Cong., 1st Sess., 14 (1977), note 3 at 615. Further, Judge Broderick relied on recent court decisions holding that warrantless searches of coal mines authorized by the Act do not contravene the fourth amendment. Youghiogheny & Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio, 1973); accord United States v. Consolidation Coal Company, 560 F.2d 214 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, 98 S. Ct. 2481 (1978), reinstated, 579 F.2d 1011 (1978).

I believe it is clear from the legislative history of section 103(a) that Congress intended to confer on the Secretary broad inspection authority over the mining industry under his jurisdiction for the purpose of insuring compliance with mandatory health and safety standards. This authority granted by Congress includes the right-of-entry to a mine without advance notice and without the necessity of obtaining a warrant. The authority granted the Secretary under section 103(a) permits mine entry and access by MSHA to places from which it would normally be otherwise excluded by persons having fourth amendment rights in such places. Further, it seems clear to me that in order to carry out an effective enforcement program, Congress deemed it necessary to confer on the Secretary the right-of-entry for the purpose of ascertaining and insuring compliance with the Act and the promulgated mandatory health and safety regulations. As the Supreme Court noted in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978):

> [C]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist. Thus, there is a well-established exception to the search warrant requirements of the Constitution, Fourth Amendment, * * * for "pervasively regulated businesses' * * * and for "closely regulated' industries "long subject to close supervision and inspection' * * * Idem, quoting from United States v. Biswell, 406 U.S. 311, 316 (1972), and Colonnade Catering Corp. v. United States, 397 U.S. 72, 74 (1970).

In Marshall v. Nolichuckey, supra, the district court observed that since Congress determined that the mining industry is such a closely-regulated industry, regulation of that industry falls within the Biswell-Colonnade exception to the fourth amendment's warrant requirements, and the court cited the legislative history of the 1977 Act which noted that "[s]afety conditions in the mining industry have been pervasively regulated by Federal and State law." 3 U.S. Code Cong. & Admin. News (1977), p. 3427. The court also took note of the fact that:

> [A]s to the coal mining industry, it has been determined in this circuit that such industry has a history of close federal regulation under the aegis of the commerce clause, United States v. Consolidation

Coal Co., 560 F.2d 214, 220 (6th Cir. 1977), vacated and remanded (1979) _____ U.S. _____, 56 L.ed 783, Judgment and opinion reinstated on remand,

579 F.2d 1011 (1978), Youghiogheny and Ohio Coal Company v. Morton, 364 F. Supp. 45, 49 (D.C Ohio 1973).

On appeal and affirmance, the Sixth Circuit in Nolichuckey, observed as follows at 606 F.2d 693, slip op., page 7:

> We conclude that the enforcement needs in the mining industry make a provision for warrantless inspections reasonable. The Act also contains privacy guarantees which are sufficient. As construed by this court, Section 201(a) and (b) of the Act permits warrantless inspections only of the "active workings" of coal mines. A warrant is required for the inspection of offices and other areas where the operator has a general expectation of privacy. See United States v. Consolidation Coal Co., 560 F.2d 214, 217 (6th Cir. 1977), vacated and remanded, 436 U.S. 942 (1978), judgment reinstated, 579 F.2d 1011 (1978). The same limitation would apply to sand and gravel "mines." Further, the statute provides for participation in all inspections by a representative of the operator. Finally, refusal of an operator to permit an inspection does not lead to summary imposition of sanctions. The Act provides for institution of a civil action by the Secretary of Labor seeking an injunction or other appropriate order.

In Marshall v. Stoudt's Ferry Preparation Company, supra, the Fourth Circuit stated as follows at 602 F.2d 593-94:

> Mindful of the Supreme Court's reluctance to foreclose the incremental protection afforded a proprietor's privacy by a warrant, we are persuaded that the Mine Safety Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonableness standard reasserted in Barlow's. Although the Mine Safety Act's coverage of enterprises has been broadened from that of the predecessor Coal Mine Safety Act to include other than coal mining, the statute is still much more limited than OSHA and is aimed at an industry with an acknowledged history of serious accidents. Moreover, unlike OSHA, the Mine Safety Act mandates periodic inspections and is specific in that no advance warning is to be given when the inspection is to determine whether an imminent danger exists or whether there is compliance with mandatory health and safety standards or with any citations, orders, or decisions outstanding, 30 U.S.C.A. 813(a).

In another recent Fourth Circuit decision, Marshall v. Charles T. Sink, d/b/a Sink Coal Company, No. 77-2614, January 24, 1980, the court affirmed the district court's decision upholding the warrantless routine inspection of a mine, and relied on Barlow's, the Colonnade-Biswell exception, Stoudt's

Ferry, Nolichuckey, and Youghiogheny. See also, Marshall v. Texoline Company, Civil No. CA 4-78-49, Northern District of Texas, March 23, 1979, where the court upheld the Secretary's warrantless search of a limestone mine on the basis of Barlow's, Colonnade-Biswell, and Youghiogheny. I take note of the court's observation in Sink that the Secretary must seek an injunction when he is refused entry to a mine and that this procedure permits operators to present their objections to a district court before an inspection takes place to any sanctions that are imposed. This statement by the court is not altogether accurate since the injunction provision of 30 U.S.C. 818 is permissive and not mandatory, and refusal of entry may result in a citation or closure order pursuant to section 104(a).

It seems clear to me from the aforementioned decisions, that the courts have accepted the strong presumption of the constitutionality of the warrantless inspection provisions of section 103(a), as well as the proposition that the Barlow's situation regulating business in general is readily distinguishable from the enforcement scheme fashioned by Congress under the 1977 Mine Safety and Health Act which relates to a single mining industry which has had a history of close Federal regulation and supervision, a fact specifically recognized by the Supreme Court in Barlow's.

May An MSHA Inspector Use a Camera To Document Conditions Or practices Which He Believes Constitutes Violations Of Mandatory Health Or Safety Standards?

In my view, the taking of a photograph by an inspector at the time the condition or practice which he believes constitutes a violation of a mandatory standard is observed is no different than an inspector taking notes, making diagrams of the scene, making measurements with a rule or tape, or otherwise documenting the conditions observed by him with the naked eye. If a citation results from such an inspection, the inspector's concern should be to fully document the conditions and to describe them in such a manner so as to put the mine operator on full and fair notice as to what is required to achieve abatement so as to timely correct the hazard. If this is done, the inspector not only achieves compliance with the least amount of friction, but is also in a position to back up his citation with credible evidence in the event the citation is challenged. During the initial inspection, if a citation should issue, the inspector does not at that point in time know that it will be formally challenged through the hearing process, and in this setting, Climax's suggestion that he is acting as an agent of the Solicitor's Office is somewhat farfetched. The taking of a photograph merely documents the inspector's visual observations, and I conclude that it is an extension of his inspection and the camera is merely a tool to aid him in that inspection. In my view, a pocket instamatic or similar camera carried by the inspector during his inspection rounds, so long as it is confined to that use while making observations of conditions or practices which he believes constitute a violation, is no different than a pad of paper and pencil on which the inspector records notes and other

observations.

I believe that the use of cameras by an inspector may, under the circumstances discussed above, serve as a useful tool to resolve credibility questions surrounding routine violations which may involve judgment calls on the part of the inspector which are at odds with those of mine management officials who may view the same conditions and come to different conclusions. The use of a camera is particularly useful and critical in situations involving imminent dangers, accidents resulting from violations, and situations where the conditions are likely to change after the occurrence of the event which prompted the citation or order. Further, the use of a camera cuts both ways; for just as an inspector may use a photograph to support a violation, a mine operator is free to use a camera to establish the lack of a violation. As an example, I cite the following three OSHA cases, recognizing the fact that OSHA has a specific regulation authorizing the use of cameras by its compliance officers.

In Beall Construction Company, 1971-1973 CCH OSHD 15,223, the judge observed that conflicting testimony as to the condition of a ladder on a construction site could have been easily resolved by a photograph. The Secretary's failure to submit a photograph resulted in his failure to prove a violation.

Marino Development Corporation, 1971-1973 CCH OSHD 15,478, concerned an unshored trench cave-in fatality, and one of the witnesses called by the Secretary was a police sergeant who was called to the scene and who took pictures within minutes after the occurrence of the event. The judge found the pictures to be of great value in determining the weight and credibility to be given to the testimony of the witnesses with respect to the critical issue of the depth and width of the trench as well as other prevailing conditions.

W. J. Lazynski, Inc., 1971-1973 CCH OSHD 15,184, concerned a case in which the judge concluded that the Secretary had failed to establish by his evidence that two nonserious violations had occurred as a result of the alleged presence of debris in a working area in violation of a mandatory standard. Photographs taken by the respondent, coupled with the testimony of the company president, convinced the judge that the materials cited were not "debris," but in fact materials stored and stacked for reuse. The judge found no violation.

The use of photographs in proceedings before the Department of the Interior and the Commission pursuant to the 1969 and 1977 statutes has been an ongoing practice by both MSHA and mine operators, and as far as I know, no prior objections or questions have been raised as to the right of an inspector or a mine operator to use a camera to support their respective positions with respect to the fact of a violation. Of course, the use of photographs has been limited to questions of their admissibility at the hearing pursuant to the established rules of evidence; see, e.g., Mountaineer Coal Company, 6 IBMA 308 (1976), where the judge attributed no weight to an operator's photographs of a mine area submitted to establish that float coal dust did not exist as alleged in the notice of violation on the

ground that the photographs distorted the true prevailing conditions. See also, my decision of July 3, 1979, in MSHA v. Lone Star Industries, VINC 79-21-PM, July 3, 1979, where photographs taken and submitted by the mine operator were extremely useful in resolving credibility problems concerning certain alleged unguarded pinch points on a conveyor belt system. In Lone Star, a number of photographs were taken by the operator to support its conclusions that the locations cited were adequately guarded, and at the hearing MSHA utilized some of the photographs (with the consent of the mine operator's counsel) to establish some of the citations, while others were used as the basis for vacating several citations.

In Climax Molybdenum Company v. MSHA, DENV 78-581-M, an imminent danger review proceeding decided by Judge Cook on December 28, 1979, MSHA sought to introduce as evidence at the hearing, photographs of a piece of equipment taken by an MSHA inspector after the case was in litigation. The withdrawal order was issued on August 31, 1978, Climax filed its application for review on September 28, 1978, and the hearings were conducted between November 28, 1978, and February 1, 1979, The pictures were taken by the inspector on December 13, 1978, while at the mine lawfully during the course of his normal inspection duties.

Climax strenuously objected to the admission of the photographs into evidence in the proceeding and noted that the issue presented was not whether the photographs were accurate representations of what the inspector observed at the time they were taken, but rather, Climax framed the issue as "whether photographs or other evidence obtained after litigation on a citation or order is begun can properly be admitted when those photographs are not obtained in compliance with the Discovery Rules" (Cook decision, p. 8). Quoting from Climax's brief, its argument as posed to Judge Cook, was as follows:

> Climax has no right of access to either interview inspectors or obtain copies of inspector's notes outside of the context of the Discovery Rule. MSHA must be required to follow those rules also and the only suitable means for requiring that is to exclude from evidence all documents, photographs, or similar materials which are obtained outside the bounds of the Commission's Discovery rules. This is not to say that MSHA inspectors should be prohibited from returning from the scene of alleged violations after a citation has been issued is [sic] a part of determining whether abatement has been accomplished. It is to say however that if that matter is in litigation that any photographs or statements taken by an inspector after the application for review has been filed or any documents which are obtained by inspector requests after litigation has been initiated should not be admitted into evidence unless those documents are obtained through the Discovery processes provided for in the Rules. To rule otherwise would establish an unfair and arbitrary scheme which cannot be sustained,

> particularly in view of the presence of the Discovery Rules. Climax is obligated to comply with the Commission's Rules and MSHA must comply with them as well. It would clearly be inappropriate to give MSHA this unfair advantage in administrative litigation.
>
> No effort was made to comply with the Discovery Rules in taking the photographs. Because litigation was pending and those rules were not complied with, and further because in addition Climax was given no opportunity to have either a knowledgeable electrician or its attorneys involved in the taking of the photographs, Exhibits M-14 [sic] through M-17 inclusive should not be admitted into evidence.

MSHA's arguments concerning the admissibility of the photographs were that (1) there was no showing that Climax was in any way prejudiced by the introduction of the photographs, which were offered solely as an aid to the court in perceiving the work area of the mine involved; (2) the taking of photographs did not involve an attempt to question Climax's agents without the presence of counsel; and (3) at the time the photographs were taken, MSHA personnel were present in the mine lawfully during the course of their normal inspection duties.

In overruling Climax's objections and admitting the photographs, Judge Cook cited McCormick, Handbook of the Law of Evidence, section 214 at 530-31 (2nd ed., E. Cleary, 1972), which discussed the use of photographic evidence in judicial proceedings as follows:

> The principle upon which photographs are most commonly admitted into evidence is the same as that underlying the admission of illustrative drawings, maps, and diagrams. Under this theory, a photograph is viewed merely as a graphic portrayal of oral testimony, and becomes admissible only when a witness has testified that it is a correct and accurate representation of relevant facts personally observed by the witness. Accordingly, under this theory, the witness who lays the foundation need not be the photographer nor need he know anything of the time, conditions, or mechanisms of the taking. Instead he need only know about the facts represented or the scene or objects photographed, and once this knowledge is shown he can say whether the photograph correctly and accurately portrays these facts. Once the photograph is thus verified it is admissible as a graphic portrayal of the verifying witness' testimony into which it is incorporated by reference. [Footnotes omitted.]

Relying on the aforesaid passage from McCormick, Judge Cook concluded that a photograph serves merely as a graphic portrayal of a witness' oral testimony, into which the photograph is incorporated by reference, and that unlike evidence submitted under an exception to the hearsay rule, a photograph is not

introduced ordinarily as independent proof of the truth of

the matters asserted therein. Noting that the photographs were offered as graphic aids in interpreting what the MSHA inspectors observed at the time the order issued, Judge Cook reasoned that to the extent that they set forth an accurate graphic portrayal of the conditions observed by the witnesses at the time of the event in question, they were relevant to the subject matter of the hearing within the meaning of Commission Interim Rule 29 CFR 2700.50, which was then in effect and which provided that "[a]ny relevant evidence may be received at the discretion of the Judge. The Judge may exclude evidence which he finds to be unreliable or unduly repetitious." Judge Cook also took note of the fact that the record did not support the conclusion that the inspector who took the photographs attempted to interrogate Climax's agents, and that since the photographs merely related back to conditions already observed at the time the order issued, he concluded further that the taking of the photographs did not amount to an interrogation of Climax's agents.

Commenting on MSHA's failure to comply with Commission Rule 29 CFR 2700.46, which provided in part, "For good cause shown, the Judge may order a party to produce and permit inspection, copying or photographing of designated documents or objects relevant to the proceeding," Judge Cook nonetheless observed that:

> [W]e are now faced with an accomplished fact and a consideration of whether evidence which would be helpful to the ultimate determination of the case should now be received in evidence. It could be argued that MSHA's request for admission of the pictures in evidence is in effect a motion for ratification of the act of obtaining discovery by photographing of objects.

He concluded that Climax had not been prejudiced by the admission of the photographs and that they were helpful in understanding the issues presented in the case (Cook Decision, pp. 10-11).

Climax requests that I take official notice of the record adduced in the case before Judge Cook (Initial Brief, p. 11), and it seems obvious that it wishes me to take official notice of the fact that the photographs in that case were taken in the midst of litigation while the hearings were in recess. I have noted this fact, and I conclude that there is a distinction in a situation where an inspector takes pictures after the fact and while the case is in litigation without notice to the operator, and the facts presented in the instant proceedings where Climax apparently seeks to deny MSHA the right to take pictures at any time. In Judge Cook's situation, I may have sustained Climax's objections to the introduction of photographs taken after the citation was issued and while the case was in a litigation and hearing posture without notice to Climax's attorneys. In other words, although Climax may arguably be correct in its conclusion that photographs taken after litigation is begun is in the nature of discovery and may only be introduced in compliance with the Commission's discovery rules, the question of whether photographs in general are permissible at all is, in my

view, a question of first impression to be decided by me on the basis of the record presented in the instant proceedings.

In a series of OSHA cases involving alleged violations of fourth amendment rights for failure by OSHA's compliance officers to properly identify themselves by displaying their credentials or affording the respondent the opportunity to accompany the inspector on his inspection rounds, both of which were statutory requirements, both the Commission and the courts, on the facts presented, viewed these requirements as procedural defects which did not prejudice the respondents or otherwise violate their fourth amendment rights. See Accu-Namics, Inc. v. OSHRC, 515 F.2d 828 (5th Cir. 1975); Hoffman Construction Company v. OSHRC, 546 F.3d 281 (9th Cir. 1976).

In United States v. Minton, 488 F.2d 37 (4th Cir. 1973), the court affirmed the conviction of a defendant for violation of certain liquor laws which was based on evidence seized as a result of observations of illegal activities through binoculars and the subsequent seizure of evidence without the benefit of a search warrant resulting from those observations. The court there ruled that the illegal activity was in "plain view," and that in these circumstances there was no reason for expectation or privacy and no requirement for a search warrant.

In Environmental Utilities Corporation, 1977-1978 OSHD 21,709, April 4, 1977, an OSHA inspector entered the premises for the purposes of an inspection, and after observing certain conditions which he believed were violations of safety regulations, returned to his car to get a camera. Upon his return, he photographed the alleged violative conditions and testified that photographs were required because there was an immediate possibility that working conditions would change. The photographs were taken at a time when a company representative was not present, and the Commission rejected the company's fourth amendment arguments that the inspector had not identified himself as an inspector and did not afford the company an opportunity to be present when the photographs were taken. The Commission noted that the nature of the work practices in effect at the time the violation was cited supported the inspector's belief that immediate action was necessary to preserve evidence.

Minotte Contracting & Erection Corporation, 1978 OSHD 22,551, February 7, 1978, concerned a case where an OSHA inspector took photographs of certain conditions which he believed were violations from a public roadway prior to presenting his credentials to the company upon his arrival on the premises. The citations based on these photographs were affirmed by the Commission, and it rejected the company's fourth amendment arguments seeking to exclude the photographs and it did so on the ground that the conditions were in "plain view," that the company was not prejudiced, and that in the circumstances, the company could not claim a reasonable expectation of privacy protected by the fourth amendment particularly where the worksite was open to public view.

In Laclede Gas Company, 1979 OSHD 24,007, October 31, 1979, the Commissioni rejected a company's assertion that photographs taken by an OSHA compliance officer by means of a telephoto lens camera from a highway prior to his arrival on the premises and displaying his credentials should be excluded as evidence of any violations, and it did so on the basis of the "plain view" doctrine, and its prior decisions in Environmental Utilities Corporation and Minotte Contracting, supra.

Although I recognize the fact that in these OSHA cases the Commission's application of the "plain view" doctrine involved situations where the worksite and the resulting violations were in effect in the public domain, I see little distinction in a situation where an MSHA inspector has a statutory right of access to mine property without the necessity of a warrant and while there in the course of his authorized inspection duties observes conditions which he believes violate the law. Although an underground mine area is not necessarily in the public domain, the fact is that the conditions observed by an inspector are in his plain view, and in these circumstances, I conclude that an operator may not at that point in time reasonably claim any right of privacy insofar as the documentation of those conditions are concerned. Just as the inspector is free to take notes, measurements, and make sketches and diagrams of the scene, I believe he is also free to record the conditions observed by means of a camera. Any subsequent use to be made of those photographs is a matter which I believe should be left to the adjudicatory discretion of the judge on a case-by-case basis. Since Congress and the courts have recognized the fact that the mining industry is a pervasively-regulated industry, I am not convinced that the use of cameras to assist the Secretary in his regulation of that industry is a practice which should generally be proscribed by the fourth amendment or the Act.

There is one area of contention in these proceedings which I believe the Secretary should take serious note of and take some corrective action. This concerns Climax's argument that the Secretary has engaged in no formal rulemaking to fix the circumstances and guidelines under which cameras are to be used. As pointed out by Climax, OSHA has a specific regulation authorizing the use of cameras and has also published detailed instructions to its compliance officers with respect to the circumstances under which they are to be used. Climax's arguments that the lack of specific guidelines gives rise to possible abuses and unwarranted intrusions into its mining business and operations are well taken. While I do not believe that its arguments may serve as a basis for interdicting the general use of cameras during an inspection, I believe that reasonable ground rules should be established by the Secretary and communicated to the industry in order to preclude potential abuses and to ensure even-handed enforcement. The practice of some MSHA districts using cameras, while others do not, and the practice of using them to regulate one class of mining operations as opposed to another, may in certain circumstances result in arbitrary and confused enforcement practices which I believe should not be permitted. For example, MSHA's reliance on its

April 30, 1979, memorandum to support its contention that cameras are authorized and used throughout its inspector force is somewhat suspect because that memorandum is addressed only to metal and nonmetal

district managers, and not to coal districts, and its effective date is after the refusal incident which prompted the instant proceedings. If distinctions are to be made, MSHA should address this question head on and communicate this to the industry as a whole. Care should also be taken that in this process, MSHA does not put itself in the position of having its inspectors act as trial lawyers. Further, it should be readily apparent to MSHA that reasonable precautions should be taken to insure that hazardous conditions will not be created by flash or spark-producing camera equipment. Inspectors should be adequately trained in the use of camera equipment, and they should insure that the taking of pictures are not done in such a manner as to distract the workforce while they are engaged in their mining duties. Such distractions may expose a miner to hazards and potential injuries which he otherwise would not have been exposed to but for the presence of an inspector armed with camera equipment.

After careful consideration of all of the arguments presented, I conclude that Climax's suggestions that the taking of photographs is per se prohibited must be rejected. Of course, if an operator can establish that the inspector abused his authority by taking photographs unrelated to a citation, that the taking of a photograph posed a mine safety or health hazard in a given situation, or that the taking of photographs unduly interferes with or disrupts the mining process, he can raise this with the judge on a case-by-case basis, and seek remedial action for such enforcement practices. In the instant proceedings, Climax does not assert that this is the case. Rather, it seeks a general exclusion of the use of cameras by MSHA's inspectors during the course of their mine inspection.

I recognize the fact that Climax has a legitimate right to protect the confidentiality of its mining processes as well as any unwarranted disclosure of any trade secrets which may result from an entry by an inspector to its mine property and the subsequent taking of pictures which may end up as part of a public record in any subsequent adversary litigation. However, the possibility of this happening may not, in my view, serve as a general prohibition of the use of cameras or the taking of pictures by an inspector during the course of an authorized inspection of the mine for the purpose of insuring compliance with mandatory health and safety standards.

In my view, the use of cameras should be limited to the specific condition or practice which the inspector believes is a violation. If the taking of the photograph exposes the operator to a possible disclosure of trade secrets and mine procedures which he believes should be protected from public disclosure, he is free to seek an appropriate protective order or to request an "in-camera" limitation on the use of such photographs. This was precisely the method used in several OSHA-reported cases which held that the appropriate method for protecting such secrets was the use of protective orders. See: American Can Company, November 30, 1979, 7 Occupational Safety and Health Reporter, 1947, noted in 48 L.W. 2431, January 1, 1980; Owens-Illinois,

Inc., 1978 OSHD 23,218.

May An MSHA Inspector Use A Camera And Take Photographs After Litigation Is Begun Solely For The Purpose Of Use At A hearing Without Prior Discovery Notice Given To the Operator?

In its reply brief, Climax seemingly concedes that MSHA is not forever precluded from using photographic equipment or from introducing photographs as evidence in a hearing. Climax views the "sole issue" to be whether MSHA is statutorily authorized to take photographs during a warrantless inspection solely for use as evidence in an enforcement hearing, and in support of this argument takes the position that the taking and use of photographs for hearing purposes must be governed by the Commission's discovery rules, 29 CFR 2700.57, and must be authorized and regulated by the presiding judge. Climax's argument seems to be that photographs taken by an inspector during his initial inspection, and which are limited to documenting the conditions he observes is permissible, but if the photographs are to be taken after litigation begins, their taking and use must be specifically authorized and regulated by the judge pursuant to the normal discovery rules.

As indicated earlier, I have concluded that the use of cameras and photographs taken at the time the inspector initially observes conditions and practices which he believes constitute violations of the Act or any mandatory safety standards is within the authority granted an inspector under the right-of-entry provisons of section 103(a) of the Act, and it matters not that the photographs will at some future time be used by the Solicitor to establish a contested violation at the hearing. However, on the facts presented in these proceedings before me, there is no indication that the inspectors attempted to take photographs after the start of litigation and solely for use at the hearing as was the situation in the prior Climax case before Judge Cook. As a matter of fact, the stipulation entered into and filed by the parties in the instant proceedings on October 17, 1979, is limited to the question of whether MSHA inspectors may use cameras and take photographs during the course of regular mine inspections, and the stipulated facts reflect that MSHA inspectors were refused the right to bring their instamatic cameras with them onto mine property when they appeared for regular inspections. The citation and order at issue in these proceedings resulted from Climax's refusal to permit the inspector to use a camera in the mine to document any violations which may result from his routine inspection.

Climax's counsel has attempted to expand the factual situation in these proceedings to those which were presented in the case before Judge Cook by expanding his legal arguments in the brief and reply brief to the question of whether photographs taken solely for the purpose of use at an adversary hearing are permissible. The problem with this approach is that there are no facts present in these proceedings which lead me to conclude that the inspectors attempted to use cameras solely for litigation purposes when they appeared at the mine on April 18, 1979, for the purpose of conducting a regular mine inspection. The fact that I have taken note of the prior litigation before Judge Cook

cannot serve as the basis for my deciding an issue which was before him and not before me. It seems to me that Climax should have preserved its appeal rights by filing an appeal of Judge Cook's

decision addressing the very issue which Climax is attempting to address here by means of legal arguments based on proposed stipulated facts which are not before me. Under the circumstances, my findings and conclusions in these proceedings are limited to the question of whether MSHA inspectors may generally use cameras and take photographs of conditions and practices alleged to be violations at the time of their initial inspections. I have answered this question in the affirmative, but I make no findings or conclusions as to whether the use of cameras or the taking of photographs after litigation is begun solely for the purpose of use at a hearing without notice or without resort to the appropriate discovery rules of the Commission is permissible under the Act, and I have declined to do so because those facts are not before me.

May A Mine Operator Be Cited Under Section 103(a) Of The Act For Refusal To Permit MSHA Inspectors To Take Photographs Of Mine Conditions Which They Believe Constitute Violations?

In view of my finding and conclusion that the use of cameras by MSHA inspectors is not an invasion of privacy prohibited by the fourth amendment but merely an extension of the inspection specifically authorized by section 103(a), without the need for a warrant, I conclude that Climax's refusal to permit the use of cameras, while not directly a refusal of the right-of-entry, does constitute a violation of that section for which a civil penalty may be assessed. The amount of such a penalty must, however, be determined on the facts of each case, and my findings and conclusions on this issue follow.

As indicated earlier in this decision, the civil penalty proceeding has been consolidated with the contest filed by Climax. MSHA takes the position that the refusal of Climax to permit the use of cameras constitutes a violation of section 103(a), and that pursuant to section 104(a), which mandates a civil penalty for violations of the Act, Climax may be assessed a civil penalty for a violation of section 103(a). In support of its argument, MSHA asserts that the refusal by Climax to permit the use of cameras amounts to hindering and impairing MSHA's ability to carry out its inspection duties under section 103(a). MSHA equates this refusal by Climax to allow the taking of photographs to intimidation of the inspector. Climax takes the position that there is no evidence of intimidation or harrassment of the inspector, and the record is devoid of any facts to suggest that this occurred in this case. I agree. There is no evidence of record to support the conclusion that that inspector was refused entry or was otherwise prohibited from conducting his normal inspection. The inspector was simply advised that he could not use a camera, and there is nothing to suggest that he was otherwise limited in the manner in which he conducted his inspection on the day in question.

MSHA's initial proposed civil penalty was for $500. The Assessment Office "worksheet" which is part of MSHA's pleadings, simply reflects a proposed penalty of $500, and no assessment "points" were assigned for any of the six statutory criteria set

forth in section 110(i) of the Act. Since

it is well settled that any civil penalty assessment levied by me is de novo, without regard to any assessment formula utilized by MSHA in its initial evaluation of the penalty, I will assess a penalty based on the facts of record.

The parties filed supplemental briefs addressing the question of an appropriate civil penalty for Climax's refusal to permit the use of cameras. MSHA takes the position that Climax's refusal to permit the use of cameras hindered its ability to carry out its duties under the Act and that the violation was serious. MSHA also believes that since the violation resulted from Climax's intentional conduct to test the extent of MSHA's inspection authority, Climax was negligent, and since an order resulted from Climax's refusal to abate the citation, MSHA concludes that no finding of good faith is warranted. MSHA also cites Climax's moderate history of prior violations and now seeks a civil penalty assessment of $150.

Climax concedes that it is a large mine operator and that MSHA's proposed penalty will have no effect on its ability to continue in business. However, Climax argues that its refusal to permit the use of cameras was based solely on its desire to administratively challenge MSHA's use of photographic equipment, and that it in no way harrassed, intimidated or otherwise disturbed the inspectors. In fact, Climax asserts that it cooperated with the inspectors with respect to the remainder of the inspection and made known to the inspectors the purpose of its objection to the use of photographic equipment. In these circumstances, Climax argues that it should not be penalized for exercising its right administratively to challenge the validity of an MSHA procedure by the imposition of a severe civil penalty. Further, since the application of the six statutory criteria of section 110(i) are specifically designed for the purpose of deterrence, and since operators should not be deterred from bringing genuine test cases, Climax asserts that the statutory criteria should be disregarded in favor of the imposition of a nominal or token penalty of no greater than $10.

After careful review of the arguments presented, including the record here presented, I conclude that Climax has the better part of the argument and I agree with its position with respect to the assessment of a civil penalty on the basis of the facts presented in these proceedings. I cannot conclude that Climax intimidated or otherwise harrassed the inspectors in this case. To the contrary, I conclude that Climax's refusal to permit the use of cameras on its mine property was based on what it honestly believed to be a constitutionally-protected right of privacy and its desire to challenge MSHA's assertions to the contrary. As correctly pointed out by Climax in its arguments, it must first exhaust its administrative remedies before seeking court review of its asserted right to be left alone, and the initial step in this administrative review process is to provoke the issuance of a citation. Absent any credible evidence that Climax harassed the inspector or otherwise impeded him in the conduct of his inspection, I cannot conclude that the refusal to permit him to use a camera constituted a refusal of entry per se warranting a

substantial civil penalty assessment. Since

this case is a case of first impression, and considering the prior proceeding before Judge Cook, I am convinced that Climax's refusal to permit the use of a camera was based on its desire to provoke a "test case," rather than to deliberately obstruct the right of the inspector to go about his normal inspection duties. This is not the first enforcement proceeding involving Climax Molybdenum Company, and to my knowledge, it has never refused an MSHA inspector the right-of-entry on its mine property for the purpose of conducting an inspection.

MSHA's argument regarding the severity of the violation, including its arguments and conclusions that the refusal to permit the use of cameras is per se harassment and intimidation of its inspectors, are rejected. While the refusal by an operator to permit an inspector to take with him equipment directly related to safety may be considered serious, on the facts in this case, I cannot categorically characterize a camera as a safety-oriented piece of equipment. For example, while a methanometer, anemometer, and noise-measuring devices directly measure compliance or noncompliance with a specific mandatory safety standard, the use of a camera during the inspectioin is in the final analysis an additional tool to aid the inspector in pictorially preserving conditions he observes. Those conditions may or may not amount to a violation, and in this context, the value of a camera is in the credibility it lends to any testimony by the inspector in a contested case.

Climax concedes that the citation resulted from its intentional conduct to test MSHA's authority to use cameras during an inspection. While this may amount to negligence in the ordinary sense, given the factual setting which provoked the citation in the first place, I cannot conclude that an increase in any civil penalty is warranted because of the negligence factor.

I take note of the fact that in this case, once the citation was issued and an abatement time fixed, the inspector issued a withdrawal order based on Climax's continued objections to the use of a camera and he specifically noted on the face of the order that no area of the mine should be closed. Under the circumstances, I fail to understand the rationale in issuing an order. The order did nothing to achieve compliance. It simply documented Climax's continued refusal to permit the use of cameras after being put on notiuce that the inspector believed he had a right to use a camera. In my view, the use of an order in these circumstances was inappropriate. However, since it did not close down mining operations, I can find no prejudice to Climax and I consider the order as simply a further documentation and indication of Climax's continued refusal to permit the use of cameras and do not believe that its mere issuance should serve as a basis for increasing any civil penalty assessment resulting from the violation. On the basis of the entire record here presented, I find that a civil penalty of $10 is appropriate.

Conclusion and Order

In view of the foregoing findings and conclusions, the citation and order issued in these proceedings are AFFIRMED, and Climax is assessed a

civil penalty in the amount of $10 for its refusal to permit the use of a camera in its underground mine by an MSHA inspector during the course of an inspection, and Climax is ordered to pay that amount within thirty (30) days of the date of these decisions.

George A. Koutras
Administrative Law Judge