

CCASE:

ISLAND CREEK & VIRGINIA POCAHONTAS V. SOL (MSHA) & (UMWA)

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TTEXT:

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

ISLAND CREEK COAL COMPANY, CONTESTANT	Contests of Citations and Orders Docket NO. VA 79-62-R
VIRGINIA POCAHONTAS COMPANY, CONTESTANT	Citation No. 0694332 Order No. 069433 May 16, 1979
v.	Virginia Pocahontas No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. VA 79-63-R Citation No. 0694936 Order No. 0694937 May 9, 1979
UNITED MINE WORKERS OF AMERICA (UMWA), RESPONDENT	Virginia Pocahontas No. 4 Mine Docket No. VA 79-61-R Citation No. 0695807 May 18, 1979 Virginia Pocahontas No. 2 Mine

DECISIONS

Statement of the Proceedings

These cases concern contests filed by the contestants pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, on June 8, 1980, challenging the legality of the captioned citations and orders issued by respondent MSHA for contestants' refusal to pay certain employee representatives for the time spent accompanying MSHA inspectors on their spot inspection rounds.

Contestants' defense to the citations and orders is based on the Commission's decisions in Magma Copper, 1 FMSHRC 1948, Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833, and Helen Mining Company, 1 FMSHRC 1796 (1979), holding that employee representatives are not entitled to compensation for the time spent accompanying MSHA inspectors during spot inspections of a mine.

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In view of the aforementioned Commission decisions, which I find are controlling on the issue presented in these proceedings, I issued an order on May 5, 1980, directing the parties to show cause why the contestants are not entitled to summary judgment as a matter of law. At the same time, I dissolved a previous stay issued by Chief Judge Broderick on June 26, 1979, taking note of the fact that the stay was erroneously based on the decision in *MSHA v. Monterey Coal Company*, Docket Nos. HOPE 78-469 et seq.

Respondents MSHA and UMWA responded to my order of May 5, 1980, and they take the position that since the Commission's decisions in *Helen Mining Company* and *Kentland-Elkhorn* are currently on appeal in the Court of Appeals for the District of Columbia Circuit (appeals filed December 30, 1979), and since *Magma Copper* is on appeal in the Ninth Circuit, those decisions are not fully and finally dispositive on the issue of walkaround compensation, and that contestants are not entitled to summary decisions until such time as the court decides the appeals. Under these circumstances, respondents request that I deny the contestants further relief and reinstate the stays in these proceedings.

Contestants responded to my order of May 5, 1980, and they take note of the fact that Judge Broderick's previous stay of June 26, 1979, was actually based on the fact that *Helen Mining*, *Kentland-Elkhorn*, and *Magma Copper* had not as yet been decided by the Commission. Since the Commission has now finally decided the walkaround issue and rendered its decisions in these cases, contestants take the position that the instant proceedings are ripe for summary decision. Further, since there appears to be no factual dispute, contestants believe that the cases may be summarily decided without the necessity for any evidentiary hearings. Contestants move that the citations and orders issued be vacated ab initio.

#### Discussion

Based upon a review of the pleadings filed in these cases, the facts leading to the issuance of the contested citations and orders do not appear to be in dispute, and briefly stated, they are as follows:

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On April 18, 1979, MSHA inspector James R. Baker conducted a section 103(i) spot inspection at the mine and was accompanied by employee representative Elmer Ball. Contestant refused to pay Mr. Ball for the time spent on this walkaround, and it did so on the basis of its belief that compensation for spot inspection walkarounds were not required in light of Judge Lasher's prior decisions in *Magma Copper Company*, DENV 78-533-M, and *Kentland-Elkhorn Coal Corporation*, PIKE 78-399. Thereafter, on May 16, 1979, at 9:07 a.m., MSHA inspectors Carl E. Boone II and James R. Baker issued a section 104(a) citation to the contestant charging a violation of section 103(f) of the Act for failing to pay Mr. Ball. The citation required payment to Mr. Ball no later

than 12 p.m. on May 16, 1980, and when contestant again refused to pay

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Mr. Ball, the inspectors issued a section 104(b) withdrawal order. Contestant then paid Mr. Ball under protest in order to terminate the citation and order, and the order was subsequently terminated.

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On March 9, 1979, MSHA inspector James Franklin conducted a section 103(i) spot inspection at the mine and was accompanied by employee representative Larry Allen. As a result of contestant's refusal to pay Mr. Allen for the time spent on the walkaround, MSHA inspector Clarence W. Boone issued a section 104(a) citation to the contestant at 10:15 a.m. on May 9, 1979, citing a violation of section 103(f), and requiring payment to Mr. Allen by 12:30 p.m. that same day. Upon refusal by the contestant to pay Mr. Allen, Inspector Boone issued a section 104(b) withdrawal order and contestant then paid Mr. Allen under protest asserting the same defense as noted above. The order was subsequently terminated.

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On April 10, 1979, MSHA inspector Jerry Wiley conducted a section 103(i) spot inspection of the mine and was accompanied by employee representative Lilah L. Agent. Upon refusal to pay her for the time spent on this walkaround, contestant was served with a section 104(a) citation by MSHA inspector Ronald L. Pennington at 8:30 a.m., on May 18, 1979, and the abatement time requiring payment to Ms. Agent was fixed as 12:30 p.m. the same day. Contestant paid Ms. Agent under protest, and the citation was terminated.

I take note of the fact that on March 21, 1980, the Commission denied a request by the United Mine Workers of America that the effect of its decisions in Helen Mining Company and Kentland-Elkhorn be stayed pending judicial review, 2 FMSHRC 778. As aptly noted by Commissioner Backley in his concurring opinion at page 779: "To stay the precedential effect of our decisions would not merely result in the issuance of final Commission decisions contrary to what the Commission has found to be the intent of Congress, but it would be inconsistent with the role assigned to the Commission under the Act."

#### Conclusion

After careful consideration of the pleadings and arguments presented by the parties in these proceedings, including a review of the facts, which I find are not in dispute, I conclude that contestants' position is correct and that they are entitled to summary decision as a matter of law. It seems clear to me that the Commission has finally decided the issues presented in these proceedings and has ruled that miners' representatives are not entitled to be compensated for the time spent on walkarounds during the course of a spot inspection. That precedent is controlling in these proceedings, and the fact that MSHA and the UMWA have seen fit to appeal the Commission's final rulings is no

basis for staying these proceedings any further. Accordingly, respondents' motions for a continued stay of these proceedings are DENIED.

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Since the facts are not in dispute, I accept and adopt the facts as set forth in the contests filed by the contestants as set forth above as my findings of fact. Further, I accept the legal arguments advanced by the contestants in these proceedings as my conclusions of law and find that contestants are entitled to summary judgment on the pleadings. The contrary arguments advanced by the respondents are rejected. I conclude and find that the Commission's precedent decisions as discussed herein with respect to the rights of a miner to be compensated during a spot walkaround inspection are dispositive of the issues presented in these proceedings, and that contestants are entitled to summary decisions as a matter of law.

ORDER

IT IS ORDERED that the captioned citations and orders which are the subject of these contests be VACATED.

George A. Koutras  
Administrative Law Judge