

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

30 JUL 1980

ISLAND CREEK COAL COMPANY,	:	Contest of Citations
Contestant	:	
V.	:	Docket No. KENT 79-216-R
	:	Citation No. 712200; 6-15-79
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Big Creek No. 2 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEVA 79-183-R
	:	Citation No. 635499; S-7-79
	:	
	:	Docket No. WEVA '79-184-R
	:	Citation No. 635500; 5-7-79
	:	
	:	Birch No. 2-A Mine
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 80-72
Petitioner	:	A.C. No. 46-01459-03053
v.	:	
	:	Birch No. 2-A Mine
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

SUMMARY DECISION

These consolidated cases involve three citations charging violations of section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Act). Section 103(f) reads in part:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection [103](a) * * * **[0]ne** such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.

In Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833 (November 30, 1979), appeal pending No. 79-2536 (D.C. Cir., December 21, 1979), the Federal Mine Safety and Health Review Commission interpreted the section 103(f) so-called walkaround pay provision to apply to section 103(a) "regular" inspections only. In reaching this decision, the Commission relied on its reasoning in Helen Mining Co., 1 FMSHRC 1796 (November 21, 1979), appeal pending No. 79-2537 (D.C. Cir., December 21, 1979). In Helen Mining Co., the Commission held that a miner was not entitled under section 103(f) to walk-around pay for spot inspections pursuant to section 103(i) of the Act and noted that compensation was due only for a miner's accompaniment of a Federal inspector during a section 103(a) "regular" inspection. The Commission concluded therein that "regular" inspections were those described in the third sentence of section 103(a) of the Act, i.e., the four required annual inspections of underground mines and the two required annual inspections of surface mines.

The parties in these cases have reached factual stipulations that the inspections giving rise to the citations at bar were all spot inspections, the type of inspections classified by the Commission as "nonregular" inspections in the Kentland-Elkhorn and Helen Mining decisions. There is therefore no issue as to any material fact. Under the circumstances, I find as a matter of law that Island Creek did not violate section 103(f) of the Act as charged in the citations at bar. 29 C.F.R. § 2700.64(b).

Accordingly, the motions for summary decision filed in these cases are GRANTED, and Citation Nos. 635499, 635500 and 712200 are VACATED. The civil penalty proceeding, Docket No. WEVA 80-72, is DISMISSED. 1/

In connection with these cases Island Creek also seeks damages against MSHA in amounts equal to the wages it paid its employees as a result of the citations issued in these cases. Island Creek claims that it paid these wages to the miners representatives against its will, under protest and as a direct result of MSHA's erroneous interpretation of the Act. Island Creek requests that the damages be awarded as a **setoff** and credit against any future civil penalties that might properly be assessed by MSHA against it In other administrative proceedings before the Commission. It cites no authority in support of its proposition. It is clearly beyond the scope of my authority to grant any such remedy; Island Creek's remedy, if any, lies in an independent action against the employees who may have been erroneously overpaid. Under the circumstances Island Creek's claims for damages are DENIED.



Gary Melick
Administrative Law Judge

1/ Island Creek's motions to dissolve previous stays in these proceedings are of course granted. See Secretary v. The Helen Mining Company, 2 FMSHRC 778 (March 21, 1980).

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