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ISLAND CREEK COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ISLAND CREEK COAL COMPANY,
CONTESTANT

Contest of Citation

Docket No. VA 79-74-R

v.

Citation No. 694946

June 4, 1979

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

Virginia Pocahontas No. 4 Mine

AND

UNITED MINE WORKERS OF AMERICA,
RESPONDENT

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

Civil Penalty Proceeding

Docket No. VA 80-9

Assessment Control

No. 44-02134-03011

v.

Virginia Pocahontas No. 4 Mine

ISLAND CREEK COAL COMPANY,
RESPONDENT

DECISION GRANTING MOTION TO DISMISS

The issues involved in the above-entitled cases were consolidated and scheduled for hearing in an order issued on February 29, 1980. The issue raised by the Notice of Contest in Docket No. VA 79-74-R and by the Petition for Assessment of Civil Penalty in Docket No. VA 80-9 is whether Island Creek Coal Company violated section 103(f) of the Federal Mine Safety and Health Act of 1977 by refusing to pay a miners' representative for accompanying an inspector who was conducting other than a regular inspection pursuant to section 103(a) of the Act.

The Commission held in *The Helen Mining Co.*, 1 FMSHRC 1796 (1979), and in *Kentland-Elkhorn Coal Corp.*, 1 FMSHRC 1833 (1979), that an operator does not have to pay a miner who accompanies an inspector who is making a "spot" inspection. Those decisions have been appealed by the Secretary and UMWA to the United States Court of Appeals for the District of Columbia Circuit. In subsequent orders issued March 11, 1980, and April 1, 1980, I granted motions for stay filed by counsel for the Secretary. After I became aware that the

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Commission in *The Helen Mining Co.*, 2 FMSHRC 778 (1980), had denied a motion for stay based on the same argument which had been used by the Secretary's counsel in the motions for stay granted by my orders issued in this proceeding, I issued a further order on July 8, 1980, dissolving the stay and requiring the parties to state whether these cases could be disposed of on the basis of stipulations in lieu of holding hearings.

In response to my order of July 8, 1980, counsel for the Secretary filed on August 12, 1980, the following stipulation:

Island Creek Coal Company, Virginia Pocahontas No. 4 Mine, VA 80-9 (A/O No. 44-02134-03011) and Island Creek Coal Company, same mine, VA 79-74-R. Both of these proceedings concern 104(a) Citation No. 0694946, issued on June 4, 1979, when the Mine Operator failed to compensate a representative of the miners who accompanied an inspector on May 14, 1979, during a 103(i) five day spot inspection. [Emphasis part of quoted material.]

Counsel for Island Creek filed on August 18, 1980, a letter in which he concurred in the description of the facts set forth above and moved that I dismiss the proceedings in Docket Nos. VA 79-74-R and VA 80-9 on the grounds that both proceedings pertained to a spot inspection for which Island Creek does not have to compensate the representative of miners who accompanied the inspector who was making a "spot" inspection.

Counsel for the Secretary filed a letter on August 19, 1980, in which he recognized that the Commission's decisions in the *Helen Mining* and *Kentland-Elkhorn* cases, *supra*, would require the granting of the motion filed by counsel for Island Creek, but stated that he opposes the grant of the motions in order to preserve the Secretary's position in the court proceedings challenging the Commission's decisions in the aforesaid cases.

I find that the Commission's decisions in the *Helen Mining* and *Kentland-Elkhorn* cases, *supra*, are dispositive of the issue raised by the Notice of Contest and Petition for Assessment of Civil Penalty filed in this consolidated proceeding. The sole issue is whether Island Creek violated section 103(f) when it refused to compensate the miners' representative who accompanied the inspector during a "spot" inspection. Although Island Creek did subsequently pay the miner under protest so as to keep the inspector from issuing a withdrawal order, it is clear under Commission precedent that Island Creek did not violate section 103(f) by initially refusing to pay the miners' representative on May 14, 1979. Therefore, I find that Citation No. 694946 dated June 4, 1979, should be vacated and the Notice of Contest should be granted. Likewise, I find that the Petition for Assessment of Civil Penalty, seeking to have a penalty assessed for Island Creek's violation of section 103(f) alleged in Citation No. 694946, should be dismissed because no violation of section 103(f) occurred.

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WHEREFORE, it is ordered:

(A) The Notice of Contest filed in Docket No. VA 79-74-R is granted and Citation No. 694946 dated June 4, 1979, is vacated.

(B) The Petition for Assessment of Civil Penalty filed in Docket No. VA 80-9 is dismissed because no violation of section 103(f) exists for which a penalty may be assessed.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)