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SOL (MSHA) V. PATCO INC.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

Civil Penalty Proceeding
Docket No. KENT 80-34
A.C. No. 15-11526-03002-R

v. No. 1 Preparation Plant

PATCO, INCORPORATED,
RESPONDENT

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner James Patrick, President, Patco, Incorporated, Hindman, Kentucky, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." The general issue in this case is whether Patco, Incorporated (Patco), denied entry to an MSHA inspector in violation of section 103(a) of the Act, and, if so, the appropriate civil penalty to be assessed for the violation. Patco does not deny that a former employee, Grover Patrick, swung at MSHA inspector Eugene Lewis while Lewis was on Patco property but claims that it was the result of a personal dispute having nothing to do with Patco. It contends in the alternative that in any event Grover Patrick had no authority to act for Patco; that he was not then even an employee of Patco, having been laid off the month before, that he was at the Patco plant on strictly personal business and indeed that he acted contrary to the consistent policies and practices of Patco not to interfere with MSHA inspectors.

Section 103(a) provides in essence that any authorized representative of the Secretary has the right of entry to, upon, or through any coal mine in order to conduct an inspection prescribed by the Act. MSHA claims that the authorized representative of the Secretary, in this case MSHA inspector Lewis, was denied entry to inspect Patco's No. 1 Preparation Plant on March 30, 1979, and has accordingly petitioned for a penalty of \$1,500.

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The essential facts are as follows. On the morning of March 30, 1979, Inspector Lewis heard that Patco might have been loading coal at its previously closed preparation plant. Lewis therefore decided to inspect Patco. He first watched the plant from a distance to determine whether it was actually operating. He thought it was. He saw two men inside the scalehouse and a coal truck parked on the scales. He recognized one of the men as Grover Patrick who appeared to be doing "paperwork" inside the scalehouse. He had known Grover to have been at one time an employee of Patco but from his past inspections knew that Grover had never officially represented the company. He did not know that Grover was no longer employed by Patco and did not inquire to find out. Grover had in fact been laid off the month before and was at the plant only for the purpose of using its tools to repair his own truck.

The coal truck and its driver left when Lewis approached Grover. Lewis asked to see James Patrick, Patco's owner and officially designated representative for health and safety. See 30 C.F.R. Part 41. Grover stated that James had gone to town about 5 miles away. Lewis apparently then asked Grover if he had received his papers as a certified mine foreman. (FOOTNOTE 1) Advised that he had, Lewis thereupon told Grover that he would conduct an inspection. According to Lewis, he then told Grover that the truck that just departed had no backup alarm and Grover allegedly responded that that was the truck driver's problem. According to Lewis, Grover then said "You Goddamn son-of-a-bitch," took four or five steps towards him and swung at him through the window of his jeep. Lewis immediately left the premises and prepared the citation at bar charging that he was unlawfully denied entry by Patco. Lewis conceded that he had inspected Patco on four or five prior occasions, and once subsequently, without difficulty or opposition.

Grover Patrick testified that he had formerly operated a front-end loader for Patco but never served in a management capacity and had never represented to anyone that he had ever served in such a capacity. He had not worked for Patco for more than a month and on the day in question went to the plant to use its tools to repair his own truck. When Lewis arrived, he was reading the truck maintenance manual. The coal truck parked near the scalehouse had not been loaded at Patco. The driver had only stopped to inquire whether Patco intended to reopen. Grover admitted that he swung at Lewis but claims that this was precipitated by his continuing false accusations that he had torn up some construction equipment where Lewis had a parttime job. Lewis had ostensibly harassed him about these allegations on several prior occasions. Lewis denies that he harassed Grover but admits that he did on one occasion ask Grover about the damaged equipment.

James Patrick, president of Patco, testified that his brother Grover was not employed at the time, and was at the yard for the sole purpose of working

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on his own truck. He had seen him there earlier that morning. The plant was not then operating and had not been operating for some time. He had never authorized Grover to act on behalf of the company and was shocked when he learned on the following day what Grover had done. At the first opportunity he went to the MSHA district office to explain things. He had never authorized Grover to act on behalf of the company and certainly never authorized him to bar an inspection of Patco property. It had always been company policy to allow such inspections and to treat inspectors courteously and with respect. James Patrick himself had once been an MSHA inspector. He thought that there had been some personal conflict between Grover and Inspector Lewis that might have precipitated the incident.

The issue before me is whether Inspector Lewis was in fact denied entry by Patco thereby preventing an inspection. The resolution of this issue depends on whether Grover Patrick had the express or apparent authority to act as an agent on behalf of Patco at that time or whether on the facts of this case Patco should be estopped from denying that Grover had such authority. If Grover Patrick did not have such authority then Patco was not in violation of the law but if he did have such authority or if his acts were subsequently ratified then Patco is bound by those acts and is guilty as charged.

Although the term "agency" in its usual legal sense imports commercial dealings, analogies can nevertheless be drawn to the law of agency in resolving the question at bar. Under the law of agency the authority of an agent arises from an express or implied agreement. 3 Am Jur. 2d Agency 18. An express agency is an actual agency created as a result of the oral or written agreement of the parties. An implied agency is also an actual agency, but its existence is proved by deductions or inferences from other facts and circumstances of the particular case, including the words and conduct of the parties. The existence of an implied agency, for example, may be inferred from prior habits or from a course of dealings of a similar nature between the parties, especially where the agent has repeatedly been permitted to perform similar acts in the past. 3 Am Jur. 2d, supra.

While the creation of an agency, as between the principal and agent, is a matter of their mutual consent, an agency by estoppel may also be created insofar as third persons are concerned--that is, it may arise from acts and appearances which lead third persons to believe that it has been created. Agency by estoppel may be apparent only and exist because of the estoppel of the principal or agent to deny the same after the third party has relied on such appearance, so that such third party would be prejudiced if the fact were shown to be otherwise. 3 Am Jur. 2d, supra 19.

In the instant case there is no evidence that Grover Patrick had ever been expressly authorized to act on behalf of Patco in any official capacity. Moreover, there is no evidence from acts, appearances or a previous course of dealing that he had by implication been authorized to act in such a capacity. Thus,

there can be no inference that any agency, including an implied agency or any agency by estoppel, existed in this case.

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He had never been more than an ordinary employee and was not even an employee on the date at issue. His mere presence on Patco property and the fact that he happened to be the owner's brother is not sufficient evidence standing alone from which to conclude that he was an agent authorized to act for Patco. It is clear, moreover, that Patco, as represented by its president James Patrick, did not ratify the unauthorized acts of Grover Patrick. To the contrary, James Patrick went to the MSHA district office as soon as he could to reaffirm his longstanding position that MSHA inspectors were welcome on his premises at any time and to assure those officials that Grover's acts were not those of Patco. Inspector Lewis himself conceded that neither he nor any other inspector had ever before or since been denied entry by Patco. I find that under these circumstances Grover Patrick was not authorized to act on behalf of Patco and that therefore his acts cannot be attributed to Patco. Thus, Patco is not guilty of the violation charged.

Citation No. 737413 is accordingly VACATED and this case is DISMISSED.

Gary Melick
Administrative Law Judge

~FOOTNOTE_ONE

1 As explained at hearing, these papers are issued by the State of West Virginia Department of Mines and have nothing to do with whether or not a person is employed, the capacity in which that person may be employed or by whom he may be employed.