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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
v.
SOUTHERN OHIO COAL COMPANY,
RESPONDENT

Civil Penalty Proceeding
Docket No. WEVA 80-45
A.C. No. 46-03805-03055
Martinka No. 1 Mine

SUMMARY DECISION

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA) (hereinafter "the Secretary"), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (hereinafter the Act), (FOOTNOTE 1) to assess civil penalties against Southern Ohio Coal Company (hereinafter SOHIO).

The petition filed by the Secretary on November 29, 1979, included the following citations for which a civil penalty was sought:

Citation or Order No.	Date	Standard	Penalty
00630044	5-29-79	103(f)	\$114
00630045	5-29-79	103(f)	114

Notations by the inspector on the citations issued, in subsequent action in the citations, and on his statements included the following:

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A. Citation No. 0630044

Joe S. Barber, representative of the miners, was not compensated with pay on the 05/08/79, 05/10/79, 05/11/79 and 05/14/79 when accompanying an authorized representative of the Secretary on a physical inspection of the mine.

Inspector's Statement

The condition or practice cited was known by the operator and should have been corrected. It was a technical violation. No dangers were involved.

The condition was corrected within the time specified for abatement. Management took extraordinary steps to gain compliance by paying the man.

Subsequent Action, Citation No. 0630044-1, June 8, 1979

Joe S. Barber, representative of the miners was fully compensated with pay.

B. Citation No. 0630045

Charles F. Yost, representative of the miners was not compensated with pay on the 05/08/79 and 05/09/79 when accompanying an authorized representative of the Secretary on a physical inspection of the mine.

Inspector's Statement

The condition or practice cited was known by the operator and should have been corrected. It was a technical violation. No dangers were involved.

The condition was corrected within the time specified for abatement. Management took extraordinary steps to gain compliance by paying the man.

Subsequent Action, Citation No. 0630045-1, June 8, 1979

Charles F. Yost, representative of the miners was fully compensated with pay.

SOHIO's answer to the petition for assessment of civil penalty filed on December 31, 1979, was as follows:

1. Southern Ohio Coal Company, Respondent, denies that its actions constituted a violation of Section 103(f) of the Federal Mine Safety and Health Act of 1977 as alleged by the authorized representative.

2. Southern Ohio Coal Company, Respondent, states that the authorized representative acted in an arbitrary and

capricious manner contrary to the intent of the law in finding that there had been the alleged violations and in issuing Citation Nos. 630044 and 630045.

WHEREFORE, Southern Ohio Coal Company requests that the Office of Administrative Law Judges deny the Petition for Assessment of Civil Penalty.

Pursuant to Rule 2700.10 of the rules of the Federal Mine Safety and Health Review Commission, 29 C.F.R. Part 2700, SOHIO also filed a motion on December 31, 1979, for an order vacating Citation Nos. 0630044 and 0630045 and for dismissal of the proceeding upon the following grounds:

(1) That Citation Nos. 630044 and 630045, copies of which are attached hereto as Exhibit A, alleged that two representatives of the miners were not compensated with pay when accompanying an authorized representative of the Secretary on a physical inspection of the mine, in violation of Section 103(f) of the Federal Mine Safety and Health Act of 1977 (the "Act").

(2) That the subject citations were issued during a "CCB" type of inspection.

(3) That a "CCB" type of inspection constitutes a haulage inspection which is not a part of a regular inspection, MSHA Citation and Order Manual, I-122, a copy of which is attached hereto as Exhibit B. (FOOTNOTE 2)

(4) That representatives of the miners are not entitled to compensation pursuant to the Act when accompanying authorized representatives of the Secretary during a physical inspection of the mine, unless said inspection is a part of a regular inspection, Secretary of Labor v. The Helen Mining Company, Docket No. PITT 79-11-P, 1 MSHC 2193, 2198, 2199 (Federal Mine Safety and Health Review Commission, November 21, 1979).

On January 22, 1980, the Secretary filed a Motion to Hold in Abeyance requesting an order holding in abeyance Respondent's motion to dismiss. As grounds therefore, the Secretary submitted:

1. The Citations allege violations of 103(f) of the Federal Mine Safety and Health Act of 1977 resulting when

two employees of Respondent suffered a loss of pay when accompanying an authorized representative of the Secretary on other-than-regular inspection of the mine.

2. This issue is now pending an appeal from the Review Commission's decisions in Helen Mining Company, 75-2518, 79-2537 (D.C. Cir.), and Kentland-Elkhorn 79-2503, 79-2536 (D.C. Cir.).

WHEREFORE, the Secretary requests that Respondent's aforesaid Motion be held in abeyance until a decision is rendered in the above-mentioned cases.

Following the January 22, 1980, Motion to Hold in Abeyance, no further action was taken until December 1, 1980, when pursuant to Rule 2700.64 of the Federal Mine Safety and Health Review Commission's Rules of Procedure, SOHIO filed a motion for summary decision in the above-captioned case to dispose of the entire subject proceeding. In support of this motion, SOHIO enumerated the following statement of facts, statement of reasons presented, and discussion:

STATEMENT OF FACTS:

On May 29, 1979, Charles J. Thomas, authorized representative of Petitioner, served upon Respondent Citation Number 630044. Said Citation alleged that "Joe S. Barber, representative of the miners, was not compensated with pay on 05/08/79, 05/10/79, 05/11/79 and 05/14/79 when accompanying an authorized representative of the Secretary on a physical inspection of the mine." On that same date and during that same inspection, which was a "CCB" (haulage) inspection and not a part of a regular inspection, Inspector Thomas issued Citation Number 630045, which Citation alleged that "Charles F. Yost, representative of the miners, was not compensated with pay on 05/08/79 and 05/09/79 when accompanying an authorized representative of the Secretary on a physical inspection of the mine." Both of the subject citations were later terminated following Respondent's compensating Messrs. Barber and Yost.

On December 27, 1979 Respondent filed a Motion to Dismiss the subject action. Said Motion stated in part that the citations were not issued during a regular inspection and that the representatives of the miners were not entitled to compensation pursuant to the Federal Mine Safety and Health Act of 1977, according to Secretary of Labor v. The Helen Mining Company, 1 MSHC 2193, 2198, 2199 (Federal Mine Safety and Health Review Commission, November 21, 1979).

Subsequently, on January 15, 1980, Petitioner filed a Motion to Hold in Abeyance in which Petitioner admitted that the two subject employees were engaged in an "other-than-regular inspection of the mine" at the subject times and locations. Petitioner further stated that the issue in the subject action was pending appeal from the Review Commission's decisions in Helen Mining Company, supra, and Kentland - Elkhorn, 1 MSHC 2230 (Federal Mine Safety and Health Review Commission, November 30, 1979). Thus far, no formal ruling has been made concerning the above motions.

ISSUES PRESENTED:

(1) Whether Section 103(f) of the Federal Mine Safety and Health Act of 1977 provides for compensation to representatives of the miners who accompany a federal inspector during a non-regular inspection.

(2) Whether the precedential effect of Federal Mine Safety and Health Review Commission decisions in The Helen Mining Company, supra, Kentland - Elkhorn Coal Corporation supra, should be stayed in the instant action pending judicial review.

DISCUSSION:

(1) It is undisputed that both Citation Numbers 630044 and 630045 concern Respondent's refusal to compensate representatives of the miners during a non-regular inspection, see Section 1 of Petitioner's Motion to Hold in Abeyance. It is further undisputed that the issue of whether representatives of the miners are entitled to compensation when accompanying an authorized representative of Petitioner on a non-regular inspection is now pending an appeal from the Review Commission's decisions in Helen Mining Company, supra, and Kentland - Elkhorn, supra, see Section 2 of Petitioner's Motion to Hold in Abeyance. Both of the above cases stand for the proposition that walkaround pay is limited to regular inspections, Helen Mining Company, supra, at 2198; Kentland - Elkhorn, supra, at 2231.

(2) Since the filing of Respondent's Motion to Hold in Abeyance, numerous cases have been decided regarding the validity of citations such as those in the instant action. In Helen Mining Company, the United Mine Workers of America moved for an order staying the effect of the Review Commission decisions in the Helen Mining Company and the Kentland - Elkhorn cases, among others, pending judicial review. The Commissioner's denied this motion. Commissioner Backley in his concurring opinion stated that the UMWA was seeking "a

stay of the precedential value of the Commission's opinions." Commissioner Backley further stated that "[t]o stay the precedential effect of [the Commission's] 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," Helen Mining Company, 1 MSHC 2331 (Federal Mine Safety and Health Review Commission, March 21, 1980). Commissioner Backley further stated that "[t]o temporarily overrule our precedent pending judicial review of our final orders . . . would be in derogation of our function."

Subsequently numerous other cases have come before Federal Mine Safety and Health Review Commission judges in which the operators have moved for summary decision and such motions have invariably been granted. In Princess Susan Coal Company, an inspector conducted a "free silica technical investigation" and the representative of the miners who accompanied the inspector was not compensated for the time he spent accompanying the inspector. Because the "free silica technical investigation" was not a regular inspection, the motion for summary decision was granted and the citation vacated, Princess Susan Coal Company, 1 MSHC 2367 (March 7, 1980). In Alabama By-Products Corp., miners were not compensated for accompanying inspectors during a "blitz" inspection. Citing Helen Mining Company, the Administrative Law Judge granted the Motion for Summary Decision and vacated the citation, Alabama By-Products Corporation, 1 MSHC 2395 (February 14, 1980). Similarly, in Island Creek Coal Company, the Administrative Law Judge vacated citations issued because compensation was denied to representatives of the miners who accompanied inspectors during spot inspections, Island Creek Coal Co., 1 MSHC 2521 (July 30, 1980).

WHEREFORE, RESPONDENT, SOUTHERN OHIO COAL COMPANY
HEREBY REQUESTS:

- (1) That its motion for Summary Decision be granted;
- (2) That Citation Numbers 630044 and 630045 be vacated;
- (3) That the civil penalty proceeding captioned Docket No. WEVA 80-45 be dismissed; and
- (4) That the court grant such other and further relief as the court may deem proper.

On December 29, 1980, the Secretary filed a Memorandum in Opposition to Motion for Summary Decision to respond to SOHIO's motion for summary decision, stating:

The issue before this Tribunal is whether or not the instant action should be stayed pending the decisions of federal courts in *Helen Mining Company*, BNA 1 MSHC 2193 (FMSHRC, November 21, 1979), and *Kentland-Elkhorn*, BNA 1 MSHC 2230 (FMSHRC, November 30, 1979).

Respondent has urged that the instant case should not be stayed, and that a summary decision in its favor should be entered. As its only grounds for this position, Respondent notes that Commissioner Backley stated in his concurring opinion in *Helen Mining Company*, 1 MSHC 2331 (FMSHRC, March 21, 1980) that to stay the effect of that decision would result in the issuance of final Commission decisions contrary to Commission precedent and that staying the *Helen* decision would be inconsistent with the role assigned to the Commission under the Act. *Helen Mining Company*, supra.

Petitioner respectfully submits that Commissioner Backley's dicta in the *Helen* decision has no application to the instant case. If the Commission had stayed the *Helen* decision, the effect of its action would have been to subvert its own final order in that very case. In contrast, in the case at bar a stay is appropriate to preserve Petitioner's position so that in the event the courts rule in the Secretary's favor in *Helen* and *Kentland-Elkhorn*, the presiding administrative law judge may quickly reach a decision on the merits of the instant case. Otherwise, if Respondent's Motion is granted and the courts do rule in the Secretary's favor, Petitioner would have to begin his entire case again from scratch by issuing new Citations. Clearly the most economical course would be to stay the instant proceedings pending the courts' decisions.

The presiding administrative law judge may, in his discretion, exercise his authority to stay proceedings where issues raised in the proceedings will be substantially affected by other pending litigation.

[T]he power to stay proceedings is incidental the to power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. *Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936) (Cardozo, J.). In the exercise of its sound discretion, a court may hold one law suit in abeyance to

abide the outcome of another which may substantially affect it or be dispositive of the issues. Cf. American Life Ins. Co. v. Steward, 300 U.S. 203, 215, 57 S. Ct. 377, 81 L. Ed. 605 (1937).

Bechtel Corp. v. Local 215, Laborers' International Union, 544 F.2d 1207, 1215 (3d Cir. 1976).

WHEREFORE to serve the interests of judicial economy, Petitioner respectfully opposes Respondent's Motion and requests that the presiding Administrative Law Judge continue to stay these proceedings in accordance with Petitioner's Motion to Hold in Abeyance, filed January 15, 1980.

IN THE ALTERNATIVE, Petitioner requests that if Respondent's Motion is granted, that the Secretary's case be dismissed without prejudice.

Citation Nos. 0630044 and 0630045

This case involves two 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) * * *. [O]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 Corporation, 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 Company, 1 FMSHRC 1796 (November 21, 1979), appeal pending No. 79-2537 (D.C. Cir. December 21, 1979). In Helen Mining Company, the Commission held that a miner was not entitled under section 103(f) to walkaround 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.

