CCASE:
PEABODY COAL V. SOL (MSHA)
DDATE:
19820304
TTEXT:

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

PEABODY COAL COMPANY, CONTESTANT	Contest of Order
v.	Docket No. KENT 80-318-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 796237 August 1, 1980
UNITED MINE WORKERS OF AMERICA, (UMWA), RESPONDENT	
AND	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. KENT 81-32 A/O No. 15-02079-03048 R
v.	Ken No. 4 Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION

This matter is comprised of a contest proceeding under section 105(d) and a civil penalty proceeding under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 801 et seq. (hereinafter, the "Act"). Peabody Coal Company (hereinafter, "Peabody") seeks review of a citation issued on August 1, 1980, under section 104(a) of the Act (FOOTNOTE 1) because of Peabody's refusal to permit MSHA to inspect and copy certain records. MSHA seeks assessment of a civil penalty against Peabody for this refusal, an

alleged violation of section 103(d) of the Act (FOOTNOTE 2) and 30 C.F.R. | 50.41. (FOOTNOTE 3) Both parties agree that a hearing is unnecessary and request that a decision be made on the basis of stipulated facts and written briefs. On June 12, 1981, I received the parties' stipulations and written briefs were subsequently received. Based on the stipulations submitted, it is found:

1. The Ken No. 4 Mine is an underground, bituminous coal mine located near Beaver Dam in the County of Ohio, State of Kentucky.

2. Peabody is the operator of the Ken No. 4 Mine.

3. Peabody is subject to the provisions of the Act with respect to the subject mine and citation.

4. Jurisdiction exists over the parties to and the subject matter of these proceedings.

5. On July 29, 1980, a written request for a section 103(g) special investigation was submitted by a UMWA safety inspector to MSHA's office in Madisonville, Kentucky, indicating that there was an injury in a rock fall that had occurred at the Ken No. 4 Mine on May 9, 1977, and enclosing a copy of Peabody's report which states that no injury occurred. The UMWA official requested that a special investigation be made to determine whether an injury had in fact been reported. MSHA can find no record of the injury suggested by the letter of the UMWA official. However, an affidavit was executed by Byron L. Culbertson which, in pertinent part, alleges that while he was employed at cleaning up the rock fall on May 9, 1977, he injured his back and reported the injury to his face boss, and that later, with the aid of the assistant mine foreman, he completed an accident report. Additionally, MSHA has been informed by one C. J. Shipp, M.D., that the latter's medical clinic records show that on May 10, 1977 (the day after the accident), the said doctor examined Byron L. Culbertson.

On August 1, 1980, Federal Inspector Jesse F. Rideout, pursuant to instructions of MSHA's district manager, went to the mine property to inspect the company records relating to the rock fall and purported injury. No request for any other record was made. Inspector Rideout informed Jerry Maggard, Safety Director at the Ken No. 4 Mine, as to the nature of his investigation and gave him a copy of Government Exhibit No. 3. (FOOTNOTE 4) Safety Director Maggard informed Inspector Rideout that Peabody had filed all required reports relating to the rock fall 2 years previously with MSHA and he refused to allow the inspector to see Peabody's accident records. The Safety Director arranged for the inspector to telephone Peabody's legal department whereupon the inspector was informed by Peabody's legal department that they would advise Clyde Miller, the mine superintendent, that MSHA personnel would not be permitted to examine the accident reports without a search warrant.

Inspector Rideout then contacted Dennis Ryan of the Arlington, Virginia Staff of Special Investigations, who after conferring with counsel from the Office of the Solicitor, instructed the inspector as to their next course of action. In accordance with his instructions, the inspector returned to the Ken No. 4 Mine property on August 1, 1980, and demanded to see the records required to be kept relating to the accident and injuries concerning the rock fall on May 9, 1977. Superintendent Miller responded that based on advice of Peabody's counsel, the inspector would not permit the inspector to examine the mine copies of the accident reports. Inspector Rideout then read Superintendent Miller section 103(d) of the Act, but Mr. Miller still refused. Inspector Rideout then issued Citation No. 796236 which is the subject of the instant proceeding.

The issue involved is whether MSHA must obtain a search warrant in order to obtain mine office accident records which are required to be kept under the Act and its implementing regulations.

It is noted initially that there was no actual physical search of Peabody's offices or physical seizure of Peabodys' records.

The Supreme Court of the United States in Donovan v. Dewey, %y(3)6D U.S. %y(3)6D, 69 L.Ed.2d 262 (1981), hereinafter Dewey, held that search warrants were not required for a section 103(a) inspection to be conducted under the Act. The crux of the Dewey holding, which I find to be generally dispositive, is that the inspection process is not such an unreasonable intrusion upon the interests of the mine operator as to offend Fourth Amendment

requisites. In its discussion, the Court specified three instances where inspections of commercial property may be found unreasonable:

(1) If they are not authorized by law,

(2) If they are unnecessary for the furtherance of Federal interests, and

(3) If the inspections are so random, infrequent, or unpredictable that the owner for all practical purposes has no real expectation that his property will from time to time be inspected by Government officials.

Since none of these were found applicable to section 103(a) inspections, the process was held to be reasonable. By virtue of Dewey, the mining industry apparently has joined the liquor and firearms industries as an exceptional enterprise subject to the warrantless inspection of its commercial premises. See Colonade Catering Corporation v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972), respectively.

Reconsideration of the three tests for reasonableness set forth in Dewey in connection with section 103(d) inspections is in order.

Is the Inspection Authorized by Law

At the time of the rock fall on May 9, 1977, the Federal Coal Mine Health and Safety Act of 1969 (hereafter, 1969 Act) was in effect. The Federal Mine Safety and Health Act of 1977 (hereafter, 1977 Act) did not become effective until March 9, 1978. Accordingly, examination of both the 1969 and 1977 Acts is desideratum.

Section 111 of the 1969 Act provides:

> Maintenance of records; investigation of accidents; accessibility; periodic reports to Secretary; publishing of reports; limitations
>
> (a) All accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents, roof falls, and investigations shall be kept and and the information shall be made available to the Secretary or his authorized representative and the appropriate State agency. Such records shall be open for inspection by interested persons. Such records shall include man-hours worked and shall be reported for periods determined by the Secretary, but at least annually.

> (b) In addition to such records as are specifically required by this chapter, every operator of a coal mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary may reasonably require from time to time to enable him to perform his functions under this chapter. The Secretary is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this chapter, all records, information, reports, findings, notices, orders, or decisions required or issued pursuant to or under this chapter may be published from time to time, may be released to any interested person, and shall be made available for public inspection. ÕEmphasis added.Ê

30 U.S.C. | 821 (1971).

Thus, under section 111, the operator clearly was required to keep records at the time of the rock fall and to make the same available to the Secretary. Additionally, the following three regulations were pertinent at the time of the rock fall.

(1) 30 C.F.R. | 80.22, which delineates what accident investigation report records shall contain:

> (a) The written record of each investigation of any accident shall contain:
>
> (1) An identification of, and correlation with, the record or records of the accident, injury, or occupational illness reported and required to be maintained by Section 80.31.
>
> (2) The date and hour upon which the accident occurred.
>
> (3) The date and hour the investigation was started.
>
> (4) The name of the person or persons who made the investigation.
>
> (5) The specific location of the accident and a description of the location.
>
> (6) Names, occupation at the time of the accident, and pertinent occupational experience for all persons who received disabling injuries and other injuries.
>
> (7) A narrative description of the accident, including all pertinent related events prior to the accident, measurements of any dimension or clearance; type of equipment or

machinery, noise level, visibility, lighting (in general terms); any identifiable human behavioral factors contributing to the accident; or any other element contributing to or related to the accident.

(8) A description of the steps taken, or to be taken in the future to avoid a recurrence, including, where appropriate, suggestions for modification or improvement in operating rules and regulations, working rules and regulations, safety standards, modification of equipment, training of personnel, or any other changes needed to prevent recurrence of the accident.

(b) Additional records shall be kept as follows of all unintentional roof falls of a size that would restrict ventilation or the passage of men:

(1) a plot of the roof fall on a mine map.

(2) A rough sketch or sketches of suitable scale showing the dimensions of the fall, the type and location of the roof support used, the type and thickness of the strata above the coalbed, and a statement of the depth of overburden in the affected area. Abnormalities in the immediate roof structure also shall be located and described.

(2) 30 C.F.R. | 80.23, which states these records shall be maintained at the mine for a period of 5 years and available to MESA upon request of the district manager:

The written records of investigation of accidents required by this Subpart C shall be maintained at the mine for a period of 5 years from the date of the accident and shall be open for inspection by interested persons. A copy of the written record of each investigation of an accident made under section 80.22 shall be furnished to the Mining Enforcement and Safety Administration upon request by a Coal Mine Health and Safety District Manager.

(3) 30 C.F.R. | 80.31(a), which delineates record-keeping requirements for accidents:

The operator of a coal mine shall maintain at the mine office a Coal Accident, Injury, and Illness Report (Form 6-347) on which there shall be entered and recorded specified information with respect to each accident, and reach resultant injury by date of occurrence, and each occupational illness by date of diagnosis or occurrence. The Coal Accident, Injury, and Illness Report is organized to facilitate the recording

> and compilation of information for each occurrence. The operator's copy (white) shall be maintained at the mine for a period of 5 years from the date of occurrence or diagnosis, whichever is applicable, and shall be open for inspection by interested persons.

The statutes and regulations in effect on the date of the accident required the mine operator to keep records of the type Inspector Rideout requested. Nothing in the 1977 Act suggests that the record-keeping requirements under the 1969 Act were to be disregarded. In fact, section 103(d) of the 1977 Act is substantially congruent to the 1969 Act's mandates. Consequently, since the accident occurred on May 9, 1977, and records were required to be kept for a period of 5 years from that date, I find that Inspector Rideout's August 1, 1980, request for records was in accordance with applicable law, that Respondent was required to keep such records by express provisions of both the 1969 and 1977 Acts, and that Respondent was likewise required to allow the Secretary to inspect such records.

Is the Inspection Necessary for the Furtherance of Federal Interests

Congressional concern over mine safety has been apparent since Federal intervention in the mining industry began in 1910 when the Bureau of Mines Act was enacted (Pub. L. No. 61-179, Ch. 240, 36 Stat. 369 (1910)). Of utmost concern has been the health and safety of the mining industry's most precious resource--the miner (see Preamble, 1977 Act, 30 U.S.C. | 801(a)) (Pocket Part 1981). Congress has taken pervasive measures to ensure the health and safety of the miner. It is manifest that record-keeping requirements are needed to monitor safety performances and to document accidents and their causes. MSHA uses this information to improve the overall quality of a mine's safety program.

In requesting records, MSHA sometimes touches upon another legitimate concern, that of the general expectation that a mine operator has of privacy in his offices. Judicial pronouncements involving these competing interests suggest that whenever an inspector seeks information that is required to be kept by law, the privacy expectations of the mine operator must yield to the Federal interest protecting the health and safety of the miner. (FOOTNOTE 5) For example, in Youghiogheny and Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio, 1973), the court noted:

> The governmental interest in promoting mine safety, it might be concluded, far outweighs any interest the mine operators may have in privacy. 364 F. Supp. 45, 51.

and footnoted:

> The mine operator though, does have a general expectation of privacy in his offices on the mining property. There is, however, no expectation of privacy in the maps, books, and records which are maintained for and in compliance with the Mine Safety Act. These must, of course, be produced upon demand to the federal inspector when he makes his unannounced entry. 364 F. Supp. 45, 51. n. 5.

See also United States v. Consolidation Coal Company, 560 F.2d 214 (6th Cir. 1976), which, at page 218, underscores a significant industry interest in maintaining this inherent part of the statutory scheme of self-regulation:

> It follows that business records and other paraphernalia, which are maintained pursuant to the Act, are appropriate targets for periodic federal scrutiny. %y(3)5C In the instant case, these materials constitute the veritable life blood of a statutory scheme which contemplates responsible, self-monitoring of working conditions by mine operators.

As noted above, the firearm's industry like the mining industry has been found to be pervasively regulated. In United States v. Biswell, supra, the Supreme Court of the United States upheld a statute authorizing warrantless searches of firearm's records required to be kept by law provided the inspection was during normal business hours. (FOOTNOTE 6)

Section 103(e) of the 1977 Act requires that any information required to be kept should be obtained so "as not to impose an unreasonable burden with the underlying purposes of the Act." (FOOTNOTE 7) Accordingly, since the investigation occurred during regular business hours and Inspector Rideout's sole request was for information of an accident report of a rock fall on May 9, 1977, and since this information was required to be kept by law, I conclude (1) that the request was reasonable under section 103(e), (2) not burdensome, and (3) in furtherance of federal interests.

Is the Inspection of a Type So Random, Infrequent, or Unpredictable That the Owner, for All Practical Purposes Has No Real Expectation That His Property Will from Time to Time Be Inspected By Government Officials

Peabody argues that since the request for the accident record was "special" (i.e., one not of certainty or regularity), it "cannot be expected to foresee an investigation that was created for the sole purpose of securing accident information." This contention is both specious and pernicious to the mututal interest of industry and the public in that it attacks the underpinnings of the concept of self-regulation, which ultimately must operate in a spirit of cooperation and good faith.

As the parties stipulated, Inspector Rideout "demanded to see the records required to be kept relating to the accident and injuries concerning the rock fall on May 9, 1977" (Stipulation, No. 6). These records are required to be kept by the mine operator by both the Act and the regulations and made available to the Secretary. Official notice is taken that, in the abstract, a rock fall is a most dangerous circumstance. Investigations of such are clearly a legitimate regulatory concern. Since the request was made during regular business hours for records specifically required to be kept and turned over, Peabody's claim that the request was uncertain and unforeseeable is not found meritorious. In this connection, I find that the request was "routine" in the sense that it was specifically authorized by the Act, even though it was not in furtherance of a common enforcement practice. Consolidation Coal Company, supra, p. 218, fn. 8.

Conclusion and Assessment of Penalty

Since it is concluded that Inspector Rideout's warrantless request for information relating to the records required to be kept should have been complied with, I find Peabody, a large mine operator, to be in violation of the Act. MSHA admits that the violation was not serious since no physical harm was posed to any miner by reason of the failure to produce the report. The culpability of this intentional violation is mitigated by its being in furtherance of advice from counsel. (FOOTNOTE 8) Peabody has but a moderate history of previous violations. Accordingly, a penalty of $500 is assessed which Peabody is directed to pay to the Secretary of Labor within 30 days from the issuance date of this decision.

Michael A. Lasher, Jr.
Judge

ÄÄ

~FOOTNOTE_ONE

1 The citation, originally issued under section 104(b) of the Act on August 1, 1980, was subsequently modified on August 4, 1980, to a section 104(a) action.

~FOOTNOTE_TWO

2 This provision provides:

"All accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents and investigations shall be kept and the information shall be made available to the Secretary or his authorized representative and the appropriate State agency. Such records shall be open for inspection by interested persons. Such records shall include man-hours worked and shall be reported at a frequency determined by the Secretary, but at least annually." 30 U.S.C. | 813(d) (Pocket Part 1981).

~FOOTNOTE_THREE

3 30 C.F.R. | 50.41, Verification of Reports, provides:

"Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illness which MSHA considers relevant and necessary to verify a report of investigation required by | 50.11 of this Part or relevant and necessary to a determination of compliance with the reporting requirements of this Part."

~FOOTNOTE_FOUR

4 This exhibit is a copy of a letter dated July 28, 1980, addressed by a safety inspector employed by the United Mine Workers of America addressed to the MSHA office at Madisonville, Kentucky, requesting a section 103(g) special investigation to determine whether there was a 30 C.F.R. | 50.20 violation (which is similar to 30 C.F.R. | 80.31, 37 F.R., Page 5753 (March 21, 1972), which was the standard in effect at the time of the rock fall on May 9, 1977.

~FOOTNOTE_FIVE

5 The factual configuration underlying the decision of Judge Broderick in Sewell Coal Company v. MSHA, 1 FMSHRC 864 (July 6, 1979), is distinguishable from the instant matter in that a wholesale search of files and records (some records were required and others were not required to be kept under the Act) was involved.

~FOOTNOTE_SIX

6 Also see United States v. Petrucci, 486 F.2d 329 (9th Cir. 1973), to the same effect.

~FOOTNOTE_SEVEN

7 Section 103(e) reads:

"Any information obtained by the Secretary or by the Secretary of Health, Education, and Welfare under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators especially those operating small businesses, consistent with the underlying purposes of this Act.

Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible." 30 U.S.C. | 811(c) (Pocket Part 1981).

~FOOTNOTE_EIGHT

8 A fact which was stipulated to by the parties (see Stipulation received June 17, 1981, p. 4).