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

SUNSHINE MINING COMPANY,
CONTESTANT
v.

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

CONTEST OF CITATION PROCEEDING

DOCKET NO. WEST 81-197-RM

MINE: Sunshine

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

SUNSHINE MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 81-322-M

MINE: Sunshine

Appearances:
Daniel L. Poole Esq.
Elam, Burke, Evans, Boyd & Koontz
Boise, Idaho,
For Sunshine Mining Company

Frederick W. Moncrief, Esq., Office of the Solicitor
United States Department of Labor, Arlington, Virginia,
For the Secretary of Labor

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Sunshine Mining Company, (Sunshine), with violating Section 103(a) of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq (Supp III 1979).

Section 103(a) of the Act, now codified at 30 U.S.C. 813(a), provides as follows:

> Sec. 103 (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose

> of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

After notice to the parties a hearing on the merits was held in Coeur d'Alene, Idaho on September 22, 1981.

The parties filed post trial briefs.

ISSUE

The issue is whether, during a PAR (FOOTNOTE 1) investigation, the Secretary may conduct private interviews of Sunshine's workers on the company's property and the company's time.

SUMMARY OF THE EVIDENCE

The evidence is uncontroverted.

The acronym PAR designates a program sponsored and conducted by the Secretary of Labor. The PAR program seeks to reduce accidents in the mining industry. For an operator to be eligible for a PAR evaluation an audit must show that the operator's rate for injuries to its miners exceeds the national norm (Tr. 14, 15, 60, P1).

If the MSHA criteria dictates the selection of a mine operator then the company is contacted and advised of the program. When the Secretary undertakes his investigation special inspectors conduct an onsite study and interview management, supervisors, and workers (Tr. 104). The principle focus of PAR's attention is on the cause of accidents, rather than a physical inspection of the worksite (Tr. 21, 32). The PAR investigators do not seek out violations. But they would issue an imminent danger citation if the situation warranted (Tr. 48). After the completion of the study the company management receives the PAR team's recommendations (Tr. 14-15).

The sole point of contention here centers on MSHA's insistence that the PAR investigators interview the company's personnel on a one to one basis on the company time and on the company property (Tr. 20, 75, 92, 93, 138). MSHA's policy and guidelines require such a procedure (Tr. 20, 75).

Sunshine objects to the private interviews. The company recognizes its prior safety record was inadequate, and it blames a lack of communication between labor and management for the situation (Tr. 141, 142). To reverse its poor safety record Sunshine has recently encouraged direct and open communication between workers and management in safety matters (Tr. 162). As a result Sunshine finds its safety record improving and its absenteeism declining (Tr. 143-144). Sunshine feels that its plan of mutually responsive reaction and open communication cannot coexist with MSHA's private interview technique. Sunshine sees MSHA's approach as antagonistic and counterproductive (Tr. 162, 172).

When Sunshine refused to allow such private interviews of its workers MSHA issued a citation for the violation of Section 103(a) of the Act (Tr. 92-93, P5). A subsequent noncompliance order was issued (Tr. 95, P6).

DISCUSSION

At the outset it should be observed that if the Secretary has authority to conduct the private interviews as he seeks here then Sunshine's objections, no matter how well intended, must yield to the statutory mandate. The efficaciousness of the PAR program, a conclusion well documented here, is not an issue in this case (P9a, P9b).

Section 103(a) of the Act authorizes the Secretary to conduct frequent inspections and investigations in coal and other mines. Further, the Secretary has the right of entry upon any such coal or other mine.

The courts have on numerous occasions ruled that the scope of authority of an administrative agency is determimed by the applicable enabling legislation, and not by the agency's own interpretation of its powers. Civil Aeronautics Board v. Delta Airlines, Inc., 367 U.S. 316, 81 S. Ct. 1611, 6 L.Ed. 2d 869, (1961). Pentheny, Ltd. Government of the Virgin Islands, 360 F. 2d 786, 790 (3rd Cir. 1966).

MSHA considers the private interview to be the cornerstone of PAR. But the statute is devoid of any mention of terms which would connote that Congress was conferring authority for MSHA to conduct such interviews. Terms such as "question privately", "one on one questioning", "private interview" or any phrase of similar import do not appear in the Act.

By comparson Congress, in enacting the Occupational Safety and Health Act, 29 U.S.C. 651, et seq. seven years before the Mine Safety Act, specifically authorized private interviews. Section 8(a) of the OSH Act, [29 U.S.C. 657(a)] provides as follows:

> Sec. 8(a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized -
>
> > (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
> >
> > (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee. (Emphasis added).

Where Congress intends to confer certain authority it says so. Alaska Airlines v. Civil Aeronautics Board, 257 F. 2d 229 (D.C. Cir.), Cert. denied 79 S. Ct, 120, [230-231], (1958). Trans-Pacific Frgt Conf of Japan v. Federal Maritime Board, 302 F. 2d 875, (D.C. Cir., 1962).

The omission of the power to conduct private interviews is further heightened by the obvious parallel construction of the OSH Act and the Mine Safety Act.

These citations should be vacated because no statutory authority exists authorizing the interviews the Secretary seeks. Accordingly, it is not necessary to consider Sunshine's additional contentions that such private interviews violate the Fourth Amendment to the United States Constitution, that MSHA cannot rescind Sunshine's safety policy when such action is not authorized by statute. And finally, that a PAR interview is within the purview of Section 103(f) [30 U.S.C. 813(f)].

SECRETARY'S CONTENTIONS

The Secretary contends the Act authorizes the private interviews. And that Congress has approved PAR as a separate budget item. In addition, the Secretary asserts that Andrus v. Magma Copper Company, Civ 77-765, a United States District Court case in Arizona, clearly supports his view.

The Secretary initially contends that the authority to conduct investigations is grounded in the mandate of Section 103(a):

> frequent inspections and investigations in coal or other mines each hear for the frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information, relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines. . . . . (emphasis added).

And the Secretary declares that in discharging these responsibilities, he is granted a right of access to mines subject to the Act which is superior to the operators' privacy interests. Donovan v. Dewey ÄÄÄ US ÄÄÄ, 69 L. Ed. 2d 262, 101 S. Ct. ÄÄÄ, 1981.

The thrust of the Secretary's argument is misdirected. No one questions his right to conduct investigations and to gain access to mines. In fact, the authority to investigate appears in prior mining legislation. The Federal Metal and Nonmetalic Mine Safety Act (Metal Act), 30 U.S.C. 721, et seq., as well as the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq (Coal Act) contain authority for the Secretary's "investigation". But the legislative histories of the statutory predecessors and of this Act are silent as to the precise meaning of the term. No legislative history supports the Secretary's argument that he may conduct private interviews on the company's time and premises. It is no doubt more convenient for the Secretary to conduct interviews in this fashion but mere convenience is not the test of a statutory grant of authority. No one questions the Secretary's power to interview workers off of the company's premises.

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In the absence of statutory support and in the absence of any favorable legislative history I am unwilling to grant the Secretary the unfettered authority he seeks under the guise that he is conducting an "investigation."

The Secretary's second contention is that PAR bears the Congressional budget's stamp of approval. Specifically, the Secretary states that PAR is a separate line item in the budget. The Secretary declares that the budget description contains a narrative discription of PAR -- its purpose, effect, and resource commitment.

The Secretary's argument is not persuasive. There is no claim that the Congressional budget narrative recites that a portion of the funds are expended for private interviews of the nature requested here. The absence of that fact causes me to conclude that Congress did not approve, tacidly or otherwise, the expenditure of funds for that purpose. Then it not necessary to consider the effect of a Congressional budget resolution.

In support of his position the Secretary cites Andrus v. Magma Copper Company, Civ 77-765 Phx, an unpublished United States District Court case from the District of Arizona. (Complainant's post trial brief).

The history of the cited case: Cecil D. Andrus, the then Secretary of the Interior sued Magma Copper Company under the Federal Metal and Nonmetallic Mine Safety Act (1966 Act), 30 U.S.C. 721-740. The original order of the Court and the subsequent contempt order were appended to the Secretary's post trial brief.

On January 16, 1978 the original order was issued by the trial court. That order contains no reference to the right of PAR investigators to conduct private interviews on company time and the company premises.

On August 2, 1978 the Court issued a two page order holding Magma Copper in contempt of Court for violating the prior injunction order. For the first time, in its order on the contempt proceedings, the Court refers to private interviews. The Court states:

> Defendant will permit its employees to be interviewed by agents conducting the PAR program outside the hearing and presence of other employees, agents or representatives of defendant.

No rationale pertaining to private interviews appears in either order. Under these circumstances this Judge does not consider Andrus v. Magma Copper Company as persuasive or controlling authority.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

Citations 350724 and 350726 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE
1 Program of Accident Reduction.