

CCASE:
OLD BEN COAL V. MSHA
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OLD BEN COAL COMPANY, : CONTEST PROCEEDINGS
 Contestant :
 v. : Docket No. LAKE 91-53-R
 : Citation No. 3537139; 1/9/91
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH : Docket No. LAKE 91-54-R
 ADMINISTRATION (MSHA), : Order No. 3537140; 1/9/91
 Respondent :

: Mine No. 26

: Mine ID 11-00590

SUMMARY DECISIONS

Appearances: Timothy M. Biddle, Esq., Thomas C. Means, Esq.,
 Crowell & Moring, Washington, D.C., for the
 Contestant;
 Edward H. Fitch, Esq., Office of the Solicitor,
 U.S. Department of Labor, Arlington, Virginia, for
 the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern Notices of Contest filed by the
 contestant (Old Ben) pursuant to section 105(d) of the Federal
 Mine Safety and Health Act of 1977, challenging the legality of a
 section 104(a) citation and a section 104(b) order issued on
 January 9, 1991, by MSHA Inspector Robert S. Stamm. The citation
 and order are as follows:

Section 104(a) non-"S&S" Citation No. 3537139, issued at
 8:03 a.m., cites an alleged violation of section 103(a) of the
 Act, and the cited condition or practice is stated as follows:

While attempting to perform the on-going mandated
 quarterly Safety and Health inspection of the entire
 underground Mine 26, MSHA Inspector Robert Stamm was
 refused mantrip or other modes of transportation on the
 8:00 AM to 4:00 PM shift on January 9, 1991, on
 instructions from Robert Roper, Mine Superintendent.
 This precluded Mr. Stamm's ability to properly travel
 and inspect the mantrip and associated areas of the
 mine, and impeded the inspection.

The inspector fixed an abatement time of 8:18 a.m., January 9, 1991, and thereafter at 8:19 a.m. that same day he issued section 104(b) Order No. 3537140, citing an alleged violation of section 103(a) of the Act. The order reflects that "no area" of the mine was withdrawn, and the condition or practice cited is described as follows on the face of the order:

Roger Roper, Mine Superintendent, failed to abate 104(a) citation number 3537139. Roger Roper, Mine Superintendent, denied MSHA Inspector Robert Stamm the right to ride the mantrip transportation, which impeded his efforts to perform mandated inspection activities of the mantrip and associated areas.

The respondent (MSHA) filed timely answers to the contests and asserted that the citation and order were properly issued for violations of section 103(a) of the Act. Old Ben subsequently filed a Motion for Summary Decision pursuant to Commission Rule 64, 29 C.F.R. 2700.64, accompanied by four (4) pre-trial depositions of the inspector, his supervisor, and MSHA's district and sub-district managers. MSHA filed a reply to Old Ben's motion, and Old Ben responded with a reply brief.

After consideration of Old Ben's summary decision motion, and MSHA's reply, I denied the motion after concluding that several issues precluded summary decision, and the matter was scheduled for hearing on the merits in St. Louis, Missouri. Old Ben subsequently filed a motion seeking clarification of the denial, and requested that I identify the material facts which required an evidentiary hearing. I thereupon issued an order clarifying the issues for trial, and the parties subsequently requested a continuance of the hearing in order to file further stipulations which they believed would enable me to proceed with a summary decision of the matter without an evidentiary hearing. The continuance was granted and the parties filed their stipulations.

Issues Presented

The principal issue in these proceedings is whether Old Ben violated section 103(a) of the Act when it refused underground mine transportation to Inspector Stamm during his inspection of January 9, 1991. Stated more specifically, the issues are whether or not Inspector Stamm had a legal right pursuant to section 103(a) to transportation furnished by Old Ben to aid him in his inspection, and whether or not Old Ben's refusal to provide such transportation constituted a denial of Mr. Stamm's right of entry for purposes of conducting his inspection, and precluded or impeded his inspection. Additional issues raised by the parties are identified and disposed of in the course of my decisions.

Stipulations

The parties stipulated to the following:

1. Old Ben's No. 26 Mine is subject to the Mine Act.
2. The Administrative Law Judge has jurisdiction over this proceeding.
3. Citation No. 3537139 ("Citation ") and Order No. 3537140 ("Order") were properly served on Old Ben.
4. The parties have agreed to put this case before the Administrative Law Judge for decision based on stipulated facts and the various briefs previously filed.
5. Beginning on December 13, 1990 and consistently thereafter (until abatement of the Order), Old Ben declined to furnish transportation around the Mine to Inspector Stamm, but no violation of the Act was alleged until the denial of transportation on January 9, 1991.
6. Because elevator transportation between the surface and the underground workings at the bottom of the shaft was necessary for access into and out of the Mine, Old Ben provided it to Stamm. Old Ben did not provide transportation within the underground areas of the Mine because it believed that Stamm could perform his inspection on foot.
7. Beginning on December 13, 1990 and continuing until January 15, 1991, Stamm continued to conduct his regular 4th quarterly inspection of the Mine on foot, accompanied also on foot by representatives of the miners and Old Ben.
8. During this period of time, other MSHA inspectors who came to the Mine were provided with transportation around the Mine by Old Ben.
9. The Mine is large, with several working faces during this time frame; the distances to be travelled from the shaft to the working faces varied from 2,400 feet (0.4 miles) for the closest face and up to 10,000 feet (2.1 miles) for the farthest.
10. Most of the mine (e.g., the bleeder entries) can only be inspected on foot; all of the active workings could be reached within a 30 to 40 minute walk from the bottom of the shaft.
11. During the time Stamm was denied transportation, transportation was otherwise available and could have been provided.

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12. The Order was abated by Old Ben's agreement to transport Stamm to the location where he wished to commence his daily inspection and then to transport him back to the shaft at the end of that inspection, but not from place to place in the Mine during the interval between those times.

13. Stamm was not denied access to the mantrip for the purpose of inspecting it and that is not an issue in this proceeding.

14. It took Stamm three days longer to complete his 4th quarterly inspection (when transportation had been denied for over a month) than his 3rd quarterly inspection (when transportation had been provided). This may largely be explained by the extra time it took Stamm to walk into and out of the Mine in the 4th quarter.

15. Stamm issued more citations and orders during the subject 4th quarter than during the 3rd quarter, and substantially more than during any prior 4th quarter in recent years or in any quarter back through 1986.

16. MSHA believes that the denial of transportation slows down inspectors and means that inspections take longer to complete.

17. MSHA inspections may be conducted by multiple inspectors simultaneously.

18. MSHA inspectors are free to begin their inspections at any time of the day, anywhere in the Mine they choose, without prior notice.

19. MSHA's Program Policy Manual provides that a denial of MSHA's statutory right of entry can occur indirectly, but "[t]here must be a clear indication of intent and proof of indirectly denying entry." Indirect denial of MSHA's right of entry occurs when there is a "[r]efusal to furnish available transportation on mine property when it is difficult or impossible to inspect on foot."

20. Prior to December 13, 1990, Old Ben had complained to Stamm's supervisors that he was improperly conducting himself by issuing an excessive number of citations and orders, including many which they believed were legally defective, and by taking directions from the UMWA. Old Ben asserted that this was disrupting their operations because Stamm went to multiple areas of the Mine during each inspection day. MSHA acknowledges that Old Ben made these complaints but submits that MSHA inspectors are supposed to look into problems that they are told about by miners.

21. Of the approximately 285 citations and orders issued by Stamm during his 1990 3rd and 4th quarterly inspections, some 79 were vacated or modified by MSHA as a result of the 30 C.F.R. Part 100 conference process or after Old Ben had contested them at the Commission.

22. Although Old Ben contested additional citations and orders issued by Stamm, those cases were not set for hearing until many months later, offering no immediate relief from what Old Ben believed were improper and over-zealous enforcement actions. MSHA notes that Old Ben did not file motions to expedite these proceedings and Old Ben notes that it did not believe expedited hearings would have been granted since it had abated the alleged violations.

23. The only two mines in MSHA's District 8 which were put on MSHA's Special Emphasis program (based on the number of violations issued) are the two which Stamm had been inspecting. MSHA questions the relevance of this fact in light of other possible explanations.

24. Old Ben's Safety Director Dave Stritzel was an MSHA inspector for 11 years before he was hired by Old Ben in 1982. He served as a regular inspector from 1971-1976 and in 1976 was promoted to supervisory technical specialist (health).

25. As an MSHA inspector, Stritzel believed that there was no legal requirement that mine operators had to furnish transportation all around their mines to MSHA inspectors. Stritzel believed, based upon his experience as an MSHA inspector and his examination of the Mine Act and regulations, that providing in-mine transportation to an MSHA inspector, like offering him coffee in the Mine office, was voluntary on a mine operator's part and that an operator could cease to offer this courtesy to an obnoxious inspector, to an inspector who abused the privilege, or to an inspector who for any reason was deemed no longer deserving of such favors. MSHA notes that none of its current employees who worked with Stritzel in the District can remember him voicing these beliefs while he was an inspector. MSHA further notes that there never has been any official MSHA policy or interpretation of the Mine Act consistent with those beliefs. Old Ben responds that many of Stritzel's colleagues with whom he would have discussed this at MSHA are no longer with the agency.

26. Because of Stritzel's belief as stated in the foregoing paragraph, he believed that Old Ben was under no legal obligation to provide transportation to Stamm around the Mine, other than access into and out of the Mine by elevator, since he could perform his inspections on foot; accordingly, it was pursuant to Stritzel's direction that Old Ben refused to offer mantrip

transportation to Stamm on December 13, 1990 and thereafter, including January 9, 1991.

27. When transportation is provided to an MSHA inspector other than Stamm, the usual procedure is that a company safety representative drives them to a location specified by the inspector; they park the vehicle while the inspector examines conditions in that area; on occasion, the group may then drive the vehicle to other locations specified by the inspector. At the end of the inspection, the inspection party drives the vehicle back to the shaft.

28. Old Ben believes that its motive for not offering transportation to Stamm is not relevant to this proceeding, any more than it is relevant to whether one may rightfully invoke one's 5th amendment right not to testify, that one is doing so because he does not like the police investigator; that is, since Old Ben believes that the Mine Act does not in the first place require a mine operator to transport MSHA inspectors around its mine, Old Ben believes that its decision to voluntarily offer such transportation to others but not to Stamm cannot be a violation. MSHA believes that under these facts transportation is required by the Mine Act and that Old Ben's motives are relevant to this proceeding.

29. Old Ben clarifies that its statement on brief that "only in the limited range of circumstances where the denial of transportation effectively precludes MSHA's ability to exercise its right of entry could there be a section 103(a) violation in declining to chauffeur the inspector" refers to circumstances where operator-provided transportation is necessary to access all or part of a mine to inspect it, as with the elevator to the underground workings of Old Ben's No. 26 Mine.

Deposition Testimony

Old Ben took the depositions of Mr. Stamm and his MSHA superiors and filed them in support of its summary decision motion and supporting arguments. MSHA also relies on these depositions.

MSHA Inspector Robert Stamm, testified that his quarterly inspection of the mine began on October 29, 1990, and that prior to this time he had conducted another inspection beginning on or about July 6, 1990, and ending on approximately October 24, 1990. He was at the mine on a regular basis except for vacation periods, and this was the only mine he was inspecting during these time periods. He confirmed that on December 13, 1990, Mr. Bruce Harris, the mine safety manager, advised him that the company would no longer provide him with transportation while he was conducting his regular inspections. Mr. Harris could not provide him with any reason for the denial of transportation.

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Mr. Stamm informed his supervisor Steve Kattenbraker about the matter on December 13, 1990 (Tr. 6-10).

Mr. Stamm stated that prior to December 13, 1990, he would ride in a diesel pickup truck driven by someone in the safety department to the area that he was inspecting. The truck would normally wait for him while he conducted his inspection, and it would then take him to the next area to continue his inspection. After Mr. Harris informed him that no transportation would be provided Mr. Stamm wrote up his notes and then proceeded to walk to the area to conduct his inspection, and he was accompanied by Mr. Harris and the miner's representative and they all walked (Tr. 10-12). Mr. Stamm confirmed that he subsequently prepared a memorandum on December 20, 1990, at the request of subdistrict manager Sakovich, documenting Mr. Harris' refusal to provide him with transportation (Tr. 16).

Mr. Stamm stated that except for December 19, 1990, when he rode a mantrip into the mine and walked, his inspections during the period December 13, 1990, and January 9, 1991, were all conducted on foot. He confirmed that in the past, when he conducted inspections, he usually rode into the area that he was to inspect, the vehicle would be parked, and he would conduct his inspections on foot. The only difference in this routine after December 13, 1990, was the fact that he had to walk to the locations where he was to conduct his inspections (Tr. 18).

Mr. Stamm confirmed that after December 20, 1990, and before arriving at the mine on January 9, 1991, he spoke with Mr. Sakovich about the transportation problem, and that on January 7, Mr. Sakovich "told me that when I went to the mine to try and ride in on a mantrip, see if they would provide transportation in a mantrip." Mr. Stamm confirmed that he followed these instructions and went to the mine on January 9, and traveled underground on the elevator. He proceeded to the empty mantrip and climbed in and sat down. Mr. Harris then informed him that he was not permitted to ride the mantrip. Mr. Stamm asked if he was being refused transportation, and Mr. Harris responded "yes" (Tr. 24).

Mr. Stamm stated that after getting out of the mantrip he issued a citation to Mr. Harris. He stated that he issued it "due to instructions received from district manager Mike Sakovich" on or about January 8, 1991, after he wrote his January 7, 1991, memorandum to Mr. Sakovich (Tr. 26). Mr. Stamm stated that Mr. Sakovich was acting on instructions, and he assumed "it was the headquarters in Arlington" because Mr. Sakovich gave him typed suggested wording for the citation and order which he issued (Tr. 27-28).

Mr. Stamm stated that after verbally issuing the citation at approximately 8:30 a.m., he went to the surface to write it out

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and advised Mr. Harris that he had 15 minutes to obey the citation and that he would have to issue an order if transportation were not provided. Mr. Stamm then called Mr. Sakovich, issued the citation and order, and returned underground to continue his regular inspection by walking. He stated that he walked the third north belt conveyor entry and that it took him approximately 45 minutes or an hour to walk one way, and he ended up where the belt conveyor starts, and left the underground area between 1:00 p.m. and 1:30 p.m., and left the mine at 2:25 p.m., and returned to his office (Tr. 33, 36).

Mr. Stamm confirmed that the order was terminated on January 15, 1991, after Mr. Harris informed him that transportation would be provided for him and that a diesel truck would take the inspection party where he wanted to go (Tr. 37).

Mr. Stamm explained that the phrase "or other modes of transportation" which appears in the citation refers to the diesel pickup truck which the mine safety department normally drove for inspection purposes (Tr. 38). He confirmed that he did not ask Mr. Harris to provide him with some other mode of transportation other than the mantrip when he was refused a ride in that vehicle (Tr. 39).

Mr. Stamm confirmed that Roger Roper is the mine superintendent, and that Mr. Harris told him that Mr. Roper had issued the instructions that no mode of transportation would be provided for him (Tr. 40). Mr. Stamm explained the cited conditions as follows at (Tr. 40-42):

Q. Okay. Now, you -- say that it precluded your, um, the ability to properly travel and inspect the mantrip. Do you see those words in there?

A. Yes.

Q. All right. What do you mean by that, sir?

A. Well, what we would normally do is if we want to travel the travel road into the unit, ride in the mantrip to see the condition of the traveled road, whether it be too rough or something that would affect the ability to operate that piece of equipment, and also while you were riding this mantrip to inspect it for steering, the brakes and things of this nature.

Q. Did you tell Mr. Harris that you wanted to inspect the mantrip that morning?

A. No.

Q. Um, you say that it -- and I'm quoting here again, "ability to properly travel". Let me stop there. What did you mean by, "properly travel"?

A. To ride that travel way. Like I say, to check for the condition of the travel way itself.

Q. And you said that, um, mention of the word and associated areas of the mine. What do you mean by that?

A. Well, the associated areas would be part of the travel road from the shaft to the working section.

Q. And then you go on and conclude by saying ability, and impeded the inspection -- I'm quoting, "and impeded the inspection". And why did it impede your inspection?

A. Because when you have to walk you can't get to the working section as quickly as you would like to get there to examine the things that we were required to examine.

Q. And with respect to the wording, all of the wording under paragraph eight on the citation under condition or practice, um, you -- I think said earlier that you were sort of given a narrative to put in there, and that's what you put in there; is that right?

A. Right.

Q. So these are not your words, these are someone else's words essentially?

A. Yes.

Q. But you agree with them, do you, sir?

A. Yes.

Mr. Stamm stated that the 15 minute abatement time that he established for compliance with the citation "was suggested" as enough time to allow him to ride the mantrip. He confirmed that the mantrip eventually filled up with people and he observed it leave while he was writing out his notes underground (Tr. 43). Mr. Stamm confirmed that he cited a violation of section 103(a) of the Act because of MSHA's policy interpretation of that section. He stated that the policy states "something to the effect that indirect denial would be if transportation was not provided and the inspection could not be performed, it would be

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impossible to complete the inspection or impeded the progress, something to that effect" (Tr. 46).

On cross-examination, Mr. Stamm confirmed that he is required to conduct mine inspections four times a year, and that the inspections "are always on a time schedule" (Tr. 54). He further explained as follows at (Tr. 56-57):

Q. In terms of conducting a complete inspection, AAA inspection, as you've mentioned was the responsibility when you went underground on January 9, 1991. Were there reasons pertaining to your inspection responsibilities that you needed to get to any section in a relatively short amount of time the transportation that you were refused would have assisted you in doing so?

A. On that date, um, I can't -- I can't answer that. I don't know if that date that would have altered my inspection because had I planned on going to this working section with transportation I would have done that. Since I was not provided, then I would have altered my inspection to go to another area of the coal mine with time when I'm working an eight hour day.

Q. And how would that interfere with your ability to compete an AAA inspection in terms of the area you would want to go to?

A. Well, it would either take a lot longer days than normal than what we normally would perform or possibly by walking every area in a coal mine you possibly wouldn't get the inspection done within the allowed time.

Q. Okay. And, um -- and you were in terms of your transportation when you take this equipment that you normally took, was it part of your responsibilities with AAA to inspect the area as you entered into the area from this bottomless shaft to wherever you might be going?

A. Yes, I'm inspecting throughout wherever I'm going.

Q. Does that matter whether it's one day or the next day or whatever day it is?

A. No, you're just always constantly inspecting and looking.

Mr. Stamm stated that he knew of at least four inspectors who were provided transportation throughout the mine while he was

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conducting his inspection (Tr. 57). He confirmed that prior to December 13, 1990, he was always provided underground transportation to conduct inspections and that transportation has always been provided him unless there was an equipment breakdown (Tr. 58).

On re-direct examination, Mr. Stamm stated that he has to complete his inspections in a "timely manner" so that he can complete four a year. He further confirmed that it is an MSHA practice to perform four regular inspections a year on a calendar quarter basis, and there is nothing to preclude more than one inspector conducting a regular inspection (Tr. 59).

Steven R. Kattenbraker, MSHA supervisory inspector, stated that the "transportation situation" concerning Mr. Stamm first came to his attention on December 13, 1990, after Mr. Stamm had issued an order shutting down the longwall. Mr. Stamm informed him that he was denied transportation and would have to walk back in to abate the order (Tr. 10). Mr. Kattenbraker believed that the refusal to provide transportation was the result of complaints by Old Ben that Mr. Stamm "was writing a lot of violations". He explained that he "conferenced" many of Mr. Stamm's violations and that the working relationship "was not the best" (Tr. 12). Mr. Kattenbraker confirmed that Mr. Stamm had been refused transportation from December 13, through the rest of the year, and he identified copies of Mr. Stamm's memorandum of December 20, 1990, and January 7, 1991, and also referred to additional memorandums by inspectors Michael Pace and Robert Cross, documenting the fact that they conducted section 103(i) spot inspections at the mine during the last half of December, 1990, and had been provided transportation (Tr. 16-18).

Mr. Kattenbraker confirmed that he was present in the MSHA field office at the time the transportation situation involving Mr. Stamm was discussed by telephone by Mr. Sakovich and Mr. Childers with representatives of the MSHA solicitor's office in Arlington, Virginia (Tr. 23). The result of that conversation was that "we decided upon a course of action" and a citation and order were issued on January 9, 1991 (Tr. 24). Mr. Kattenbraker confirmed that Mr. Stamm was given suggested wording to include in the citation and order which he issued (Tr. 24).

Mr. Kattenbraker stated that from January 9, 1991, when the order was issued to January 15, 1991, when it was terminated, he "monitored" the situation. He confirmed that other than the denial of transportation, Mr. Stamm was not denied entry to the mine or barred from going anywhere in the mine, and that he conducted inspections on several days during this time period (Tr. 31). Mr. Kattenbraker confirmed that only one inspector was used on the inspection which began in October, 1990, and that he decides how many inspectors to use during any given inspection (Tr. 32).

Mr. Kattenbraker confirmed that he met with company safety officials Dave Stritzel and Bob McAtee on December 14, 1990, at Mr. Stritzel's request, and that Mr. Stritzel was concerned about Mr. Stamm. Mr. Kattenbraker explained this concern as follows at (Tr. 36):

THE WITNESS: Specifically there were some statements made that Mr. Stamm was issuing violations that were not in their minds violations, that he was perhaps -- I've lost my train of thought here. He was perhaps more, I don't know what the word is, but he was too strong on some of the orders. They just had an order the night before, and they were very upset about the issuance of the order, did not feel it was warrantable, and made some general statements as to whatever takes place now, it can't replace the 12 hours of production, things like, that.

Mr. Kattenbraker stated that during the meeting with Stritzel and McAtee "a statement was made that Mr. Stamm would not be provided transportation as of yesterday" (Tr. 35). Mr. Kattenbraker believed that the denial of transportation to Mr. Stamm was a "type of denial" of his responsibility to conduct an inspection (Tr. 42). Mr. Kattenbraker confirmed that he visited the mine a week after Christmas, 1990, accompanying another inspector on a spot inspection, and they were not denied transportation (Tr. 42-45).

Mike Sakovich, MSHA sub-district manager, stated that he first became aware of a transportation problem on or about December 14, 1990, when Mr. Stamm informed him that he was told that he would not be provided transportation. Mr. Stamm did not further explain why he would be denied transportation, nor did he indicate his understanding as to the reasons why he would be denied transportation.

Mr. Sakovich stated that he "did not do too much of anything" at the time he spoke with Mr. Stamm and simply told Mr. Stamm "to go to the mantrip, and if they refused transportation to just go about his business and do his job" (Tr. 6-7). Since Mr. Stamm had inspection duties which did not require him to have transportation, Mr. Sakovich could not recall his next contact with Mr. Stamm. However, on December 19, 1990, he had a conversation with Mr. McAtee, and he informed Mr. McAtee that "they were impeding Stamm's inspection by not permitting him to ride available transportation" (Tr. 10). Mr. Sakovich explained that the number 26 mine is a large mine and that if an inspector is not permitted to use available transportation, he would double or triple the time it takes to inspect the mine, there would be "a lot of lost motion", and he would be traveling the same area on foot day after day and would "have a hard time

covering the mine". Mr. Sakovich expressed his doubt that Mr. Stamm could inspect the mine once a quarter by walking (Tr. 10-11).

Mr. Sakovich stated that on January 2, 1991 he discussed the transportation situation with MSHA field supervisors Kattenbraker and Wolf in Mr. Stamm's presence, and that on January 3, 1991, he advised district manager Maurice Childers, for the first time, about the situation. In order to resolve the matter, Mr. Sakovich suggested to Mr. Childers that a citation "might or should be issued" (Tr. 12). Mr. Sakovich confirmed that his research reflected that section 103(a) of the Act did not specifically address "indirect denial", but the MSHA manual did, and that Mr. Childers agreed with his assessment of the matter (Tr. 14).

Mr. Sakovich confirmed that he next discussed the matter of "indirect denial" with Mr. Childers on January 8, 1991, and that Mr. Larry Beeman, MSHA's Arlington, Virginia, office was also on the telephone line during the discussion which was initiated by Mr. Childers. Following this conversation, Mr. Sakovich was contacted by an unidentified attorney, and as a result of all of these discussions, he (Sakovich) instructed Mr. Stamm as to the procedure that he was to follow, and this was "played out in what happened the next day with the citation to the letter" (Tr. 17).

Mr. Sakovich confirmed that the narrative description of the cited "condition or practice" included in the citation had previously been faxed to his (Sakovich) office by the MSHA Arlington office where it had been prepared, and that Mr. Stamm simply copied it down on the citation form (Tr. 17). Mr. Sakovich also confirmed that he had instructed Mr. Stamm to go to the mine and to go to the underground mantrip, and get in it. If "he was refused, he was to issue a citation giving them 15 minutes to obey. If they took no action, he would come out on the surface and call me, and then I would instruct him to write the order, and that's exactly the procedure that was followed" (Tr. 18).

Mr. Sakovich identified Roger Roper as the mine superintendent and the "agent of the operator". Mr. Sakovich believed that Mr. Roper gave the instructions that Mr. Stamm would not be permitted to ride any transportation, but he did not personally discuss the matter with Mr. Roper (Tr. 20).

Mr. Sakovich stated that he received a telephone call on January 9, 1991, from Old Ben official David Stritzel, and that Mr. Stritzel was "a little hostile and upset", and wanted to discuss Mr. Stamm (Tr. 19). Mr. Sakovich confirmed that he had previously met with Mr. Stritzel, Mr. McAtee, and Mr. Stamm's supervisor (Kattenbraker) on or about December 14, 1990, and that

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Stritzel and McAtee "were complaining about Stamm's performance" (Tr. 24). He believed that the complaints concerned Mr. Stamm's talking to the United Mine Workers and that "he was writing violations that were not citations for things that were not violations, stuff of that nature" (Tr. 25).

Maurice S. Childers, MSHA District No. 8 Manager, testified that he is the direct supervisor of Michael Sakovich and Steve Kattenbraker and indirectly supervises Inspector Stamm. He confirmed that he first became aware of a transportation problem concerning Mr. Stamm on January 3, 1991, when Mr. Sakovich advised him that Mr. Stamm was not permitted to ride a mantrip. Mr. Childers instructed Mr. Sakovich to tell Mr. Stamm "not to force himself on it, that he would proceed with his inspections" (Tr. 6). Mr. Childers also confirmed that Mr. Stamm was not being denied entry to the mine and that it was only "a local transportation issue" (Tr. 6).

Mr. Childers stated that Mr. Stamm followed his instructions of January 3, 1991, and that his conversation with Mr. Sakovich was brief on that day. Mr. Childers subsequently spoke with MSHA's attorneys, and he confirmed that the wording for the citation issued by Mr. Stamm on January 9, 1991, was prepared by the Solicitor's office in Arlington, Virginia, and communicated to him. Mr. Childers agreed with the wording, and he believed that there was a violation of section 103(a) of the Act because "the company was impeding the regular inspection of the mines by refusing Mr. Stamm transportation, you know, underground to his wherever...whatever area he was going to" (Tr. 10). He confirmed that the "impeding the inspection" language appears in MSHA's program policy manual as part of the explanation of section 103(a).

Mr. Childers confirmed that he instructed Mr. Sakovich to have the citation issued by Mr. Stamm, and that Mr. Stamm was to issue an order five minutes later if the operator did not comply (Tr. 11). He also confirmed that he sent a letter to Mr. Roper on January 9, 1991, and he confirmed that it was drafted by MSHA's Arlington office and faxed to him (Tr. 13). Mr. Childers stated that he subsequently received a telephone call from Mr. Markel Chamness, Old Ben's vice-president for underground operations, and Mr. Chamness advised him that he would provide transportation for Mr. Stamm (Tr. 14).

Mr. Childers confirmed that MSHA's regulations do not state that transportation shall be provided for inspectors. However, he indicated that it has been an industry practice throughout Illinois to provide transportation for inspectors and that "it's never been a problem before". He also stated that there are times when an inspector must ride the mantrip, and when he is not, it has also been a practice to provide transportation for the inspector, the company official, and the walkaround (Tr. 15).

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Mr. Childers agreed that if no transportation is available, the company need not purchase a special vehicle for the inspector, and if a piece of equipment is not available because it is broken down or operating elsewhere, the company is not required to make a special effort to supply transportation. He confirmed that an inspector is not authorized to displace regular workers who may need transportation, and that if an inspector finds that a mantrip has left or was filled with workers, the inspector would be expected to start walking to conduct his inspection and that "they do not sit and wait" (Tr. 17).

Mr. Childers stated that the "local transportation" provided by the contestant is in a sense "a courtesy to the inspectors and helpful to the operator, too" (Tr. 18). He confirmed that an operator is not obliged to provide an inspector with lunch, safety equipment, or clothing (Tr. 18).

On cross-examination, Mr. Childers stated that there are times when it is necessary for an inspector to get to a mine area in the least amount of time as possible, and as an example, he cited a situation where an inspector intends to go to an area two miles away with an inspection party, and that it would be beneficial for the inspector to complete his inspection as quickly as possible. He also indicated that an inspector must inspect an actual ongoing complete mining cycle to determine whether the equipment is being properly operated, whether there is adequate ventilation, and "things of that nature, that's part of his routine inspection" (Tr. 20). He believed that expedient transportation would assist the inspector in doing this.

Mr. Childers stated that he was not aware that Mr. Stamm was denied transportation because of the unavailability of a mantrip, and as far as he knew transportation was available for inspectors to conduct their inspections. He confirmed that inspectors are required to conduct four underground inspections a year, and that mobile transportation would assist them in achieving that result. He believed that denying an inspector transportation would interfere with his accomplishing the required inspection because of the distances that he would be walking, and the inspection would take several weeks longer. Although he did not know the distances or all of the areas which would be travelled by the inspector, he stated that "in this mine it would hinder completing the required number of inspections" (Tr. 21-22). He also confirmed that an inspector is responsible for observing any imminent dangers or other safety concerns, and to insure that any cited violative conditions are corrected. The use of mobile transportation would help expedite his inspection in these situations (Tr. 23).

On re-direct, Mr. Childers agreed that there are situations when an inspection may be expedited by using more inspectors, and that his testimony that an inspection would be delayed for

several weeks assumed that only one inspector was involved (Tr. 25). He confirmed that Mr. Roper's name is included in the citation and order because he is the mine superintendent and because "he is the top guy", and it was his understanding that Mr. Roper issued the instructions to refuse transportation for Mr. Stamm. Mr. Childers confirmed that if Mr. Roper had refused transportation to all inspectors, his views in this matter would still be the same (Tr. 26).

Old Ben's Arguments

Old Ben argues that the citation and order are invalid because section 103(a) of the Act does not require mine operators to furnish transportation to MSHA inspectors in order to facilitate their inspections. Old Ben asserts that not only does the statute itself not impose such a duty on mine operators, but the legislative history also does not indicate any congressional intent that mine operators would be required to afford transportation to MSHA inspectors. Old Ben further states that there is no case law supporting MSHA's claim to a right of transportation, and even MSHA's own interpretive guidelines do not go that far.

Old Ben maintains that nothing in section 103(a) of the Act in any way requires that transportation must be furnished to the Secretary or her authorized representative, and that a mine operator's duty is a passive one and limited to an obligation not to block or otherwise interfere with the Secretary's "right of entry". Old Ben argues that this same scheme is echoed and reinforced in section 108(a)(1) of the Act where the Secretary has been provided with a remedy when an operator has denied the Secretary her rights under 103. Again, the operator's obligation (the breach of which entitles the Secretary to injunctive relief) is passive: it is to guide the inspection, not to help the Secretary conduct it, not to speed it, ease it, or otherwise make it a more comfortable and relaxing experience. Section 108(a)(1) provides for judicial relief if, in pertinent part, the operator "interferes with, hinders or delays" the Secretary, "refuses to admit [her] to the . . . mine," "refuses to permit the inspection," or "refuses to permit access to and copying of . . . record . . ." Just as the operator is not required to copy the records for the Secretary, just to "permit access and copying" of them, Old Ben concludes that it is not required to transport the Secretary around the mine, just to permit her to inspect it without a warrant.

Old Ben concludes that although Congress gave the Secretary a unique power to enter and inspect a mine without operator consent, and without a search warrant, it did not go as far as the Secretary now would like. Old Ben points out that while Congress gave the Secretary a right of entry, it did not also give her the novel and unheard of right to be transported, nor

did it give her the power of requiring the mine owner to convey her representatives as passengers in mine vehicles so that they "could be whisked around the mine to speed their inspection of it". Old Ben further points out, however, that Congress did not entirely ignore the issue of transportation in the mine when it required that mine operators provide transportation for injured persons in emergencies. Old Ben concludes that this shows that Congress knew how to grant a right of transportation when it intended to, by expressly providing one for injured persons.

Old Ben maintains that if section 103(a) were construed not only to provide the Secretary with a right of access, but also to require mine operators to transport her inspectors all around the mine, the statute would have to be ruled unenforceably vague since it is silent as to creating any such operator duty and "a statute violates due process if it is so vague that a person of common intelligence cannot discern what conduct is prohibited, required, or tolerated", citing *Mini Spas, Inc. v. South Salt Lake City Corp.*, 810 F.2d 939, 9439 (10th Cir. 1987), citing *Connally v. General Contr. Co.*, 269 U.S. 385, 391 (1926). *Accord, Phelps Dodge corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982).

Old Ben asserts that its search of the legislative history of the Mine Act, the 1969 Coal Act, and the law in which MSHA's right to inspect mines originated in 1941, establish that a federal mine inspector's right of access has been an entitlement "to admission" to a mine to inspect it, and the mine operator has, since the inception of that right in 1941, been subject to punishment only if he "refuses to admit" the inspector, not if he refuses to transport him. Citing the legislative committee reports, Old Ben concludes that MSHA must be limited to a right of entry, and that there is no right to operator-furnished transportation.

Old Ben further asserts that its review of the case law reveals no decisional authority to support the Secretary's claim that section 103(a) of the Act confers authority for inspectors to require that they be ferried about by mine operators ("Nor was there found any such authority for OSHA inspectors as they roam the rest of America's workplaces"). Old Ben cites *United States Steel Corp.*, 6 FMSHRC 1423 (June 1984), in which the mine operator was cited under section 103(a) for denying an inspector access to the scene of an accident. In that case, the inspector, who was at the mine at the time of the accident, sought to accompany mine personnel on their way to examine the scene in a company vehicle but was not permitted to do so. The operator's personnel testified that they refused to allow the inspector to "accompany [them] to the accident because the inspector had no right to investigate an accident until [the operator's] personnel had first investigated . . . to determine whether a reportable

"accident" within the meaning of [Part 50] had occurred."
4 FMSHRC at 620.

As a result of U.S. Steel's action, Old Ben points out that the inspector was unable to visit the accident scene, and that the judge "held that U.S. Steel violated section 103(a) of the Mine Act when [it] prevented [the MSHA inspector] from going to the scene of the [accident]." 6 FMSHRC at 1429. The Commission affirmed, noting not that the operator had denied the inspector transportation and that therefore 103(a) was per se violated, but that under the circumstances the operator "violated section 103(a) of the Act by preventing [the inspector] from inspecting the scene of the [accident]." Id. at 1431. Old Ben maintains that the denial of transportation was not itself deemed a violation of 103(a), but merely one fact bearing on whether the operator had prevented the inspector from inspecting the accident scene, which it clearly had under the circumstances, and which was a violation of 103(a).

Old Ben argues that the facts in the instant case are different from those in U.S. Steel, and unlike that situation, there was no intent whatsoever (and no claim by MSHA of any intent) to prevent the inspector from inspecting anything, and no claim that the inspector did not have the right to inspect any incident or any location in the mine. Citing the text of the citation, which was drafted by MSHA attorneys in Arlington, and which alleges that the inspector was precluded from inspecting "the mantrip and associated areas of the mine", Old Ben concludes that this "is a pure red herring" in that it was neither the inspector's intent to inspect the mantrip or associated areas, nor did he request to do so (Citing the Inspector's deposition, Tr. 33, 41).

Old Ben states that there is nothing in the record that indicates that inspector Stamm was ever, or would be ever, denied the opportunity to inspect the mantrip or other vehicles if that were his expressed intent, and it points out that the section 104(b) order was terminated when Mr. Stamm was given a ride in a diesel truck, not the mantrip. Moreover, when asked by his supervisor to recount the facts concerning the denial of transportation to the inspector from December 13, 1990, and thereafter, Mr. Stamm's only mention of any effect on his inspection was to complain that not having transportation required him to be "repeatedly walking the same areas to reach (his) destination" (Stamm deposition, exhibit 2), and no mention was made of the mantrip.

Old Ben asserts that when denied transportation on December 13, 1990, and thereafter, Mr. Stamm continued with his inspections on foot, free to examine any portion of the mine, accompanied by the company safety representative and the miners' representative as usual. Indeed, he continued his daily

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inspections without needing to be driven around the mine, without any claim by the inspector or his supervisor that Old Ben was violating section 103(a) of the Act, at least not until the District Manager called Arlington.

Old Ben concedes that had its refusal to chauffeur Mr. Stamm around the mine actually precluded him from inspecting, then section 103(a) would arguably have been violated. It also agrees that where a denial of transportation is effectively a denial of the inspector's right of entry, then section 103(a) would arguably be violated. However, Old Ben maintains that merely because Mr. Stamm would have to walk and therefore might not be able to finish the inspection as quickly as he would have if Old Ben had conveyed him around the mine cannot be held to be a violation of MSHA's right under section 103(a).

Old Ben emphasizes the fact that although MSHA's published policy manual interprets section 103(a) not only to prohibit direct denials of the right of entry, but also "indirect denials", the policy makes no claim that there is an absolute right to transportation or that a refusal to provide transportation is itself an indirect denial in violation of section 103(a). Instead, the policy specifically identifies as a possible "indirect denial" an operator's "refusal to furnish available transportation on mine property when it is difficult or impossible to inspect on foot". Old Ben asserts that this was clearly not the case since Mr. Stamm continued his inspection on foot after the citation and order were issued.

Old Ben asserts that the "walkaround" right of a miners' representative to accompany the MSHA inspector on his rounds is aptly named to reflect the longstanding, traditional approach to mine inspections. Old Ben recognizes that MSHA inspectors may prefer to "be chauffeured around", and that being driven around the mine may save MSHA time and thus inspection resources. It also recognizes the fact that denying transportation to an MSHA inspector may not be a very wise management practice and will likely not be widely replicated in the future.

In conclusion, Old Ben maintains that although MSHA has a right of entry pursuant to the Act, it does not have a right of transportation under section 103(a). Old Ben believes that at most, only in a limited range of circumstances where the denial of transportation effectively precludes MSHA's ability to exercise its right of entry, could there be a section 103(a) violation in declining to chauffeur an inspector as he conducts his warrantless search of the mine. Old Ben further believes that this was not the case in the instant proceedings and that the citation and order should be vacated.

MSHA's Arguments

MSHA asserts that the obvious and primary purpose for right of entry authority under section 103(a) of the Mine Act is to provide an unannounced opportunity for an inspector to enter upon or through a mine in order to adequately inspect it for health and safety hazards and/or violations. MSHA takes the position that if an inspector is merely permitted to walk into a large complex modern mine, such as Old Ben's Mine No. 26, while at the same time being denied readily available transportation to the working areas, the inspector is, in effect, denied entry to the mine area most crucial to a proper inspection. MSHA believes that if Inspector Stamm is not permitted to observe the actual mining cycle, related ventilation, roof control, and general safety practices when and where there is peak mining activity, then he is, in effect, denied entry to these areas at the most crucial time, and is unable to adequately inspect these important areas. MSHA concludes that this practice has the same effect as not permitting the inspector to enter upon or through the mine at all.

MSHA maintains that in order to achieve the purpose of a mine inspection (the protection of miner safety and health), the authority of an inspector to enter "through" a mine must apply to those mine areas where and when mining extraction activity is occurring. By not permitting the inspector to use available mobile transportation to inspect the active mining extraction cycle areas of the mine when such activity is at its peak, is tantamount to denying him entry "through" the mine in a manner in which health and safety hazards, conditions, and violations may be readily and timely observed.

MSHA asserts that mobile transportation is readily available at the No. 26 Mine, and that a specific vehicle is routinely and customarily made available to take inspectors wherever they direct. MSHA points out that prior to December 13, 1990, Inspector Stamm was permitted to be transported to any mine area he requested. Further, during the time period he was refused transportation while conducting a quarterly inspection of the mine, transportation was made available to other mine inspectors and these inspectors were transported from place to place as they requested in a company vehicle. Although Old Ben concedes its obligation to provide elevator transportation to the bottom of the shaft, MSHA maintains that it ignores the plain meaning of the word "through" when it denies readily available transportation from the elevator to the working areas.

MSHA asserts that contrary to Old Ben's narrow interpretation, timeliness is an important aspect for adequate inspection under section 103(a) of the Mine Act, since it also bars advance notice of inspections for violations and imminent danger conditions or practices. MSHA concludes that by requiring

Inspector Stamm to walk in a large, complex mine where a substantial distance exists to the actual mining extraction areas, Old Ben has created an advance notice problem because by the time the inspector arrives at the mining cycle face areas, mining personnel could easily have been informed of the ensuing inspection. Regardless, denial of available mobile transportation hinders, delays and impedes the inspector's opportunity to inspect crucial areas of the mine, and in effect, denies entry into these areas.

Citing the Commission's decision in United States Steel Corporation, 6 FMSHRC 1423 (June 1984), MSHA asserts that the Commission affirmed MSHA's position that denial of transportation to an inspector, under appropriate circumstances, is a violation of section 103(a) of the Mine Act. MSHA points out that in the United States Steel case, an inspector was not permitted access to an accident scene when a company official refused to permit the inspector to accompany him to the scene in a company vehicle even though the company had customarily provided MSHA personnel with a company vehicle driven by a company representative. MSHA further points out that the Commission clearly affirmed that an inspector, when performing regular inspections required under the Act, had the authority to inspect the mine in its entirety and that section 103(a) does not limit the areas he may inspect or the sequence he may employ to complete his inspection.

MSHA asserts that by denying Inspector Stamm vehicle transportation routinely provided for other inspectors, Old Ben singled him out and denied him access "through" the mine. MSHA maintains that this denial of access must be viewed in the context of the availability of transportation and Old Ben's practice of providing such transportation to other inspectors and on other occasions. MSHA concludes that a denial of entry occurred when Inspector Stamm was denied transportation customarily available, thereby preventing him from inspecting important mining activities in the mine at the time sequence of his choosing and preventing him from fulfilling the inspection requirements under section 103(a) of the Mine Act.

Findings and Conclusions

Section 103(a) of the Act, 30 U.S.C. 813(a), provides in relevant part as follows:

. . . . For the purpose of making any inspection or investigation under this Act, the Secretary . . . or any authorized representative of the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

The judicial enforcement remedies available to the Secretary pursuant to section 108(a)(1) of the Act, 30 U.S.C. 818(a)(1), provide in relevant part as follows:

The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States . . . whenever such operator or his agent - -

* * * * *

(B) interferes with, hinders, or delays the Secretary or his authorized representative . . . in carrying out the provisions of this Act,

(C) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine,

* * * * *

(F) refuses to permit access to, and copying of, such records as the Secretary . . . determines necessary in carrying out the provisions of this Act.

MSHA's Program Policy Manual, Volume I, Section 103, July 1, 1988, which discusses "Denials of Entry" policy, provides in relevant part as follows:

* * * * *

Denials of entry can be either: (a) direct denials involving confrontation; or (b) indirect denials involving interference, delay and/or harassment.

Upon being denied right of entry, the inspector should first attempt to determine the reason for the denial. Was it direct or indirect? Specific actions must be taken for the different types of denials:

* * * * *

2. Indirect: Indirect denials are those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to prevent inspection of the mine by interference, delays, or harassment. There must be a clear indication

of intent and proof of indirectly denying entry. For example, access to the mine is blocked by a locked gate or other means of blockage. However, a locked gate or other means of blockage, in and of itself, does not necessarily constitute a denial of entry. Mine management may have only closed the mine for the day and blocked the mine access road to prevent vandalism. However, when a locked gate is accompanied by continued production and deliberate avoidance of communication with the inspector, the mine operator is denying MSHA right of entry to the mine property. Other examples are listed below. The list is not meant to be all-inclusive, and reference is made only to some of the situations which may constitute an indirect denial.

- a. Refusal to furnish available transportation on mine property when it is difficult or impossible to inspect on foot; (emphasis added).

* * * * *

In this case the citation and order charge Old Ben with a violation of section 103(a) of the Act on January 9, 1991, for refusing the inspector transportation on the mantrip, or other modes of transportation, thereby allegedly impeding and precluding his ability to travel and inspect the mantrip and associated mine areas. The parties have stipulated that the inspector was not denied access to the mantrip for the purposes of inspecting it and that this is no longer an issue. Accordingly, that portion of the citation and order which allege that the denial of transportation precluded or impeded the inspector's efforts to inspect the mantrip IS VACATED.

The parties have stipulated that elevator transportation between the surface and the underground workings at the bottom of the shaft was provided to Inspector Stamm out of recognition of the fact that such transportation was necessary for his access into and out of the mine. They also stipulated that the usual inspection procedure for an MSHA inspector and his party (union walkaround and company safety representative) other than Mr. Stamm calls for an Old Ben representative to drive the party to any location specified by the inspector and to park the vehicle while the inspector examines the conditions at that location. On occasion, the group may then drive the vehicle to other locations specified by the inspector, and at the end of the inspection, the inspection party drives the vehicle back to the shaft.

Old Ben takes the position that since the Act does not in the first place require it to transport MSHA inspectors around its mine, its motive for not offering transportation to Mr. Stamm is not relevant, and that its decision to voluntarily offer transportation to all other MSHA inspectors except Mr. Stamm cannot be viewed as a violation. In short, Old Ben believes that it may discriminate against any inspector for whatever reason, and in this case it seems obvious that Old Ben is not too enchanted with the manner in which Mr. Stamm conducts his inspections. Old Ben has complained to Mr. Stamm's superiors that he was improperly conducting himself by issuing an excessive number of citations and orders, that he was taking directions from the UMWA, that his inspections of multiple areas of the mine each inspection day was disrupting its operations, and that the only two mines in MSHA District 8 which were put on MSHA's "Special Emphasis Program" are the two inspected by Mr. Stamm.

Old Ben has characterized Mr. Stamm's enforcement actions as "improper and over-zealous", and it believes that many of the citations and orders which he issued prior to December 13, 1990, the day the denial of transportation initially began, were legally defective. MSHA acknowledges that Old Ben has complained to Mr. Stamm's superiors, and the parties have stipulated that some 79 of the 285 citations and orders issued by Mr. Stamm during the last half of 1990 were either vacated or modified by MSHA during the Part 100 conference process. Thus, while it would appear that Old Ben has availed itself of an opportunity to redress some of its complaints about Mr. Stamm, it obviously reacted rather strongly and directly when on December 13, 1990, it summarily discontinued its customary practice of providing transportation to Mr. Stamm and his inspection party, while continuing to provide it to other inspectors.

I have reviewed the Commission's decision in the U.S. Steel, case, supra, and I agree with Old Ben's position that the principal issue in that case was whether or not the cited mine operator prevented the inspector from going to the scene of an accident, and not whether or not section 103(a) of the Act directly required the operator to furnish transportation to the inspector to go to the accident scene.

In Climax Molybdenum Company, 2 FMSHRC 542 (February 1980), I affirmed a citation issued to a mine operator for a violation of section 103(a) of the Act because of the operator's refusal to allow an inspector to use a camera in the course of his inspection. MSHA argued that the use of a camera to preserve conditions observed by an inspector in the course of his inspection was a natural extension of his right of entry, and that an operator's refusal to allow an inspector to bring or use a camera in the mine hindered and impaired MSHA's ability to conduct the inspections authorized by section 103(a).

I concluded that the use of a camera as an inspection tool was an extension of the Secretary's right of entry and inspection authorized by section 103(a). 2 FMSHRC 571. However, I rejected MSHA's argument that the refusal to permit the use of cameras constituted harassment and intimidation of the inspector per se, and I ruled that absent any credible evidence of harassment, or the impeding of the inspection, the operator's refusal to allow the use of cameras did not warrant a substantial civil penalty assessment. 2 FMSHRC 572-573.

I believe that it is clear from the legislative history of section 103(a) of the Act, and the case law, that Congress intended to confer on the Secretary broad inspection authority, including the right of mine entry by inspectors without advance notice and without the necessity of obtaining a warrant. Although I find no inherent right to operator furnished transportation pursuant to section 103(a) of the Act, given the fact that the mining industry is a pervasively regulated industry that requires a broad and liberal construction and application of the inspection and enforcement provisions of the Act, I conclude and find that an inspector has a qualified right, as a natural and reasonable extension of his right of entry through a mine pursuant to section 103(a), to use readily available operator furnished transportation to facilitate his mine inspection. I further conclude and find that in a given set of circumstances, and on a case-by-case basis, denying an inspector routinely and customarily available transportation which does not unreasonably burden or disrupt mining operations, and which unduly delays or obstructs an inspection is contrary to the spirit and intent of section 103(a) of the Act and may constitute a violation of that section.

I recognize the fact that section 108(a) of the Act prohibits a mine operator from interfering, hindering, or delaying the Secretary or her authorized representatives in carrying out the provisions of the Act, and provides for U.S. District Court injunctive remedial relief in such instances. However, given the great numbers of daily mine inspections, I find it unrealistic and unreasonable to expect the Secretary to inundate the courts with injunction actions each time mine management decides to withhold a transportation "privilege or favor" from a mine inspector because of his perceived "overzealous" inspection and enforcement actions.

Contrary to Old Ben's position in these proceedings, I conclude and find that safety director Stritzel's motives in denying Mr. Stamm available transportation, while at the same time making it routinely and customarily available to other MSHA inspectors, is relevant. Mr. Stritzel, who served as an MSHA inspector for 11 years prior to 1982, believes that Old Ben is under no legal requirement to furnish "voluntary and courtesy" transportation all around its mines to MSHA inspectors and that

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such transportation may be denied for any reason, particularly in the case of "an obnoxious inspector . . . an inspector who abused the privilege, or to an inspector who for any reason was deemed no longer deserving of such favors". On the facts of this case, and although not stated directly, it seems rather obvious to me that Mr. Stritzel's view of Mr. Stamm is that he is an "obnoxious" inspector who has "abused the privilege" of company furnished transportation and is therefore no longer deserving of such a company bestowed favor. It appears to me that Mr. Stamm has fallen out of favor with Old Ben's safety director because his inspections have resulted in an increased number of citations and orders, and have apparently resulted in at least two of Old Ben's mines being subjected to MSHA's Special Emphasis program.

I am somewhat surprised by Old Ben's admissions and suggestions that its safety director may curry favor with MSHA inspectors by making available coffee and transportation as "favors" which may be withheld or granted by management on the basis of whether an inspector is "no longer deserving" of such "privileges of favors". In my view, such a policy could subject inspectors to undue pressures, and influences, and possible harassment or intimidation, which may adversely impact on the effectiveness or integrity of their inspections. Further, in some instances, a practice of bestowing "favors" on inspectors may be illegal or contrary to government regulations.

On the facts of this case, I find that the denial of transportation to Mr. Stamm, who had fallen out of favor with Old Ben's safety director, while at the same time making such transportation routinely and customarily available to other MSHA inspectors, was a petty and unprofessional way of dealing with an inspector who had become persona non grata because of his purported "overzealous" enforcement of the Act and MSHA's regulatory safety and health standards. In these circumstances, and if it can be established by a preponderance of the credible evidence that the denial of transportation to Mr. Stamm obstructed or unduly delayed his inspection on January 9, 1991, as charged by MSHA in the contested citation and order, I would find a violation of section 103(a) of the Act.

As correctly argued by Old Ben in its briefs, MSHA's policy manual interpretation of section 103(a) of the Act makes no claim that there is an absolute right to transportation or that a refusal to provide transportation is itself an indirect denial in violation of section 103(a). MSHA's policy statement specifically states that refusal to furnish available transportation when it is difficult or impossible to inspect on foot may constitute an indirect denial of entry to the mine for inspection purposes. Thus, in order to establish a violation of section 103(a) pursuant to MSHA's policy interpretation, it must be shown that transportation was available, but denied to the inspector,

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and that it was difficult or impossible for the inspector to conduct his inspection on foot.

The record in this case establishes that the narrative allegations in the citation and order that the denial of transportation to Mr. Stamm "precluded his ability to properly travel and inspect associated areas of the mine and impeded his inspection" were drafted by the Arlington Solicitor's office and faxed to the MSHA District office so that Mr. Stamm could incorporate that language in the citation and order which he was directed to issue on January 9, 1991, after he was refused transportation. Mr. Stamm conceded that these were not his words, but he agreed with the statements. However, I find nothing in the citation or order, as written, which alleges or suggests that it was difficult or impossible for Mr. Stamm to conduct or complete his inspection on January 9, 1991.

The record reflects that Mr. Stamm was initially denied transportation on December 13, 1990, and that with the exception of December 19, 1990, when he rode a mantrip into the mine and walked, all of Mr. Stamm's inspections from December 19, 1990, to January 9, 1991, were conducted on foot. Mr. Stamm testified that the only difference in his inspection routine after December 13, 1990, was the fact that he had to walk to the locations where he was to conduct his inspections, whereas prior to December 13, he was transported to these locations. Aside from Mr. Stamm's conclusion that requiring him to walk "impeded" his inspection because he could not get to the working section as quickly as he would like, I find no evidence that it was difficult or impossible for him to conduct his inspections on foot during this time frame. Indeed, when specifically asked why it was necessary for him to timely reach the section on January 9, 1991, and whether or not the transportation which was refused would have assisted him in timely reaching the section, Mr. Stamm responded "I can't answer that. I don't know if that date that would have altered my inspection . . .", and he explained that he would have gone to another area of the mine to continue his inspection within his eight hour day. Although Mr. Stamm alluded to the "possibility" of not being able to complete a AAA inspection within the allowed time, he confirmed that once he entered the underground workings from the bottom of the shaft, he is "constantly inspecting and looking" wherever he travels, and that it does not matter whether this is done on any one particular day (Tr. 56-57).

Supervisory Inspector Kattenbraker testified that Mr. Stamm was not denied entry to the mine, nor was he barred from going anywhere in the mine to conduct his inspections. He confirmed that Mr. Stamm conducted inspections on several days during the period December 13, 1990, to January 9, 1991. Sub-district manager Sakovich testified that when Mr. Stamm was denied transportation from December 13, 1990, to December 19, 1990, he

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instructed Mr. Stamm "to go about his business and do his job". Mr. Sakovich confirmed that during this time period, Mr. Stamm had inspection duties which did not require him to have transportation.

District manager Childers characterized the denial of transportation to Mr. Stamm as a "local transportation problem" and he did not believe that Mr. Stamm was denied entry to the mine. Mr. Childers testified that when he first learned of the problem on January 3, 1991, he instructed Mr. Sakovich to tell Mr. Stamm "not force himself on it and to proceed with his inspections". Mr. Childers confirmed that providing transportation to inspectors was a "courtesy" and an industry practice in Illinois and that there were no prior problems in this regard in his district. He also indicated that if transportation is unavailable because it is operating at another location, is down for maintenance, or is filled with company personnel, an inspector would be expected to walk to his place of inspection and should not "sit or wait".

Mr. Sakovich and Mr. Childers were of the opinion that due to the size of the mine, the denial of transportation to Mr. Stamm "impeded" his inspections. Mr. Sakovich believed that the denial of transportation would "double or triple" Mr. Stamm's inspection time and he doubted that Mr. Stamm could inspect the mine once a quarter by walking. Mr. Childers was of the opinion that Mr. Stamm's inspections would take "several weeks longer" due to the denial of transportation. Mr. Childers believed that the language "impeding the inspection" is found in MSHA's section 103(a) policy statements, and both he and Mr. Sakovich relied on the policy in support of their conclusions that Old Ben violated section 103(a) of the Act by denying transportation to Mr. Stamm.

I have carefully reviewed MSHA's section 103(a) policy statements, and I find no "impeding the inspection" language. Although the language found at page 10, of the July 1, 1988, policy manual explains that "interference, delays, or harassment" to prevent an inspection may be considered an indirect denial of entry, the policy goes on to state that there must be a clear indication of intent and proof of indirectly denying entry. The only policy reference to a refusal to provide transportation is the qualified policy statement found in paragraph 1(a) at page 10, which indicates that refusal to furnish available transportation when it is difficult or impossible to inspect on foot may constitute an indirect denial of entry.

I find no credible evidence to support any conclusion that it was difficult or impossible for Mr. Stamm to conduct his inspection on January 9, 1991, after he was denied transportation. I also find no evidentiary support for any conclusion that it was difficult or impossible for Mr. Stamm to conduct his inspections during the period December 13, 1990, to

January 9, 1991, or thereafter. Indeed, the parties stipulated that most of the mine can only be inspected on foot, and that all of the active workings can be reached within a 30 to 40 minute walk from the shaft bottom. The parties further stipulated that Mr. Stamm continued to conduct his regular 4th quarterly inspection of the mine on foot from December 13, 1990, and continuing until January 15, 1991, (when the order was abated), and that it took him only three days longer to complete his 4th quarterly inspection when transportation had been denied for over a month than his 3rd quarterly inspection when transportation had been provided.

Although the parties stipulated that the three day delay was largely attributable to the extra time it took Mr. Stamm to walk into and out of the mine in the 4th quarter, I take note of the fact that Mr. Stamm issued more citations and orders during the 4th quarter than during the 3rd quarter, and substantially more than during any prior 4th quarter in recent years or in any quarter back through 1986 (stipulation #15). Under these circumstances, I would venture a guess that Mr. Stamm spent more "inspection" time in the fourth quarter on the necessary "paperwork" incident to issuing citations and orders and documenting the cited conditions than he did during the 3rd quarter.

I take further note of the fact that Inspector Stamm began his fourth quarterly inspection on October 29, 1990, one month after the start of the fourth calendar quarter and during the time when he was provided with transportation. I also note that on January 9, 1991, after issuing the citation and order, Mr. Stamm continued his inspection by walking, left the underground area sometime between 1:00 p.m. and 1:30 p.m., and left the mine at 2:25 p.m. to return to his office. Assuming that Mr. Stamm's normal work day ended at 5:00 p.m., and absent any explanation to the contrary, it would appear to me that Mr. Stamm either completed his inspection that day and left the mine, or left it early for other reasons. As for Mr. Stamm's beginning his fourth quarterly inspection well into the last quarter, I find no evidence that the delay was the result of any transportation difficulties, and absent any further explanation, I believe one may reasonably conclude that a fourth quarterly inspection which begins a month late will end late.

I find no evidentiary support for Mr. Sakovich's belief that the denial of transportation doubled or tripled Mr. Stamm's inspection time, or Mr. Childer's belief that the inspection would take several weeks longer. I further find no evidentiary support for any conclusion that the denial of transportation to Mr. Stamm from December 13, 1990, to January 9, 1991, and thereafter to January 15, 1991, when the order was abated, violated MSHA's policy or unduly delayed or obstructed Mr. Stamm's inspections in violation of section 103(a) of the Act.

In short, I conclude and find that MSHA has failed to prove any violations by a preponderance of the evidence of record, and that the contested citation and order should be vacated.

Old Ben has conceded the necessity for providing Mr. Stamm with elevator transportation from the mine surface to the underground workings, and while it abated the order by agreeing to transport him to the location where he wished to commence his daily inspection and back to the shaft at the end of that inspection, it did not agree to transport him from place to place in the mine during the interval between those times, and did not provide him with transportation within the underground mine because it believed that he could perform his inspection on foot. It is not clear whether Old Ben's agreement to provide Mr. Stamm with transportation from the elevator shaft bottom to the initial point of his inspection and then back to the shaft when he has finished his inspection was limited to the abatement of the order, or whether Old Ben will in the future continue to accommodate the inspector in this manner.

I find it rather unfortunate that Old Ben's safety director, a former MSHA inspector himself, and the incumbent MSHA mine inspector have become adversaries in what should ordinarily be a mutually cooperative effort to insure safe and healthy working conditions in the mine. I take note of Old Ben's candid recognition of the fact that "antagonizing MSHA inspectors, with their broad discretion and substantial enforcement powers, including the power to issue ex parte closure orders, is likely ill-advised" (fn. 8, Old Ben's Motion for Summary Decision). It is hoped that both parties to this dispute can reach some accommodation and mutual understanding so as preclude any further escalation of the obvious breakdown in the working relationship between the inspector and Old Ben's safety director.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Section 104(a) Citation No. 3537139, January 9, 1991, IS VACATED, and Old Ben's contest IS GRANTED.
2. Section 104(b) Order No. 3537140, January 9, 1991, IS VACATED, and Old Ben's contest IS GRANTED.

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