

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 5, 2014

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

v.

PORTABLE, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2013-526-M

A.C. No. 24-02016-314135

Mine: Wash Plant

**DECISION**

Appearances: Ronald Gottlieb, Esq., Office of the Solicitor, U.S. Department Labor,  
Denver, Colorado for Petitioner

Donna Pryor, Esq., Breyana Penn, Esq., Jackson Lewis P.C., Denver,  
Colorado for Respondent

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary’s petition alleges that an MSHA Inspector, who was at Portable’s Mine for the purpose of conducting an inspection, was refused entry for a period of time in that the start of MSHA’s inspection was delayed by approximately one-half hour. The delay stemmed from the operator’s claim that a safety escort was needed to accompany the Inspector. As a consequence of the delay, MSHA contends that Portable unreasonably delayed the inspection, in violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a). As an alternative theory of liability, the Secretary asserts that Portable violated section 103(a)’s prohibition against giving mine personnel advance notice of an inspection. A hearing was held in Bozeman, Montana and both parties submitted post-hearing briefs. For the reasons which follow, the Court, finding that neither theory of liability was established by a preponderance of the evidence, vacates the citation and dismisses the matter.

## Findings of Fact and Conclusions of Law

Portable, Inc., a subsidiary of Kenyon Noble Ready Mix, is a small, six employee, sand and gravel operation. Tr. 20, 164. It extracts aggregate from the ground and transfers that material with a loader to a crusher, which then sizes the material, according to the product needed. Tr 165. After being sized, the product is placed onto a conveyor belt where it is sent to the wash plant. From there, as a final step, a loader places the product in its designated pile. *Id.* Portable's products are sold to the public and to Kenyon Noble Ready Mix, for concrete. Tr. 20, 165.

On August 16, 2012, MSHA's Dennis Bellfi<sup>1</sup> arrived at Portable to perform a general inspection. Tr. 19. At that time Bellfi's usual job was as an MSHA conference and litigation representative ("CLR") out of Denver, Colorado, but he was asked by the Montana area MSHA office to temporarily help that office with its required inspections. Tr. 19. Five of Portable's six employees were working at the mine on the day of the inspection. Tr. 164.

According to his testimony, Inspector Bellfi stated that when he arrived at Portable on that date, he proceeded past a small entry gate. He then flagged down a loader operator, who was working at the wash plant, and inquired about where he could find the person in charge. Tr. 20-21. As Bellfi was speaking with the loader operator, laborer Kevin Bright joined them and the Inspector again asked where to find the person in charge. Tr. 21. Mr. Bright told the Inspector that Scott Miller, the general manager, was not on site. Bellfi stated that Bright then proceeded to the front office and returned 5 to 7 minutes later, explaining to him that the Inspector needed to sign in at the front office and that someone would then accompany him on the inspection. Tr. 22. Bellfi, while maintaining that he did not need to sign in, agreed to go to the front office to obtain an escort. Tr. 22.

Bellfi testified that, once at the office, he spoke with Eric Edwards, an employee of Kenyon Noble Ready Mix, who asked him to sign in as a visitor. Tr. 23, 141. Inspector Bellfi refused since, as a matter of practice, he did not consider himself to be a visitor. Tr. 23, 58-59, 68. Mr. Edwards then told him that, for safety reasons, it was company policy to escort any visitor. Tr. 24. Edwards did not provide the Inspector with any estimate of how long it would take to locate an escort. Tr. 24. Inspector Bellfi told Edwards that he knew how to be safe in the mine and that he was ready to begin his inspection. Tr. 24-25. However, the Inspector did not, at that time, tell Edwards that he had the right to inspect the mine without an escort, nor did he advise that a citation could be issued for denying him access to the mine. Tr. 54, 55. Bellfi stated that Edwards then explained to him that Jennifer Rather,<sup>2</sup> the Safety Director, was doing payroll at the corporate office and would get to the mine when she was able. Tr. 25.

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<sup>1</sup> Inspector Bellfi has been an MSHA conference and litigation representative for over 2 years. Prior to that, he was an MSHA mine inspector for about 5 years, performing close to 300 inspections. Tr. 17.

<sup>2</sup> Ms. Rather is employed by several companies, including Portable, Kenyon Ready Mix and other companies, all in the capacity as a human resources and safety director. She has been employed by these companies for 15 years. Tr. 162.

Bellfi stated that he then told Edwards that the longer it took to obtain an escort, the more inclined he was to issue a citation for impeding the inspection. Tr. 25-26. However, Bellfi then told Edwards that he would “go ahead and wait downstairs for [Edwards] to get an escort.” Tr. 26. He then related that 5 to 10 minutes later, Edwards informed him that they were having trouble locating someone to escort him and that they were going to shut down the crusher<sup>3</sup> so that the crusher operator, Tom Hamilton, could accompany him. Tr. 26-27. Bellfi stated that he repeated that the longer he had to wait, the more inclined he was to issue a citation for impeding the inspection. Tr. 27. Approximately 20 minutes later, Edwards came back and it was then that he informed Edwards that he had waited “longer than necessary” and that he was going to issue a section 103(a) citation for impeding his inspection. Tr. 27. Edwards’ response was that Ms. Rather advised that the Inspector could start his inspection by himself. Tr. 27, 43-44, 103.

Based on those events, Citation No. 8587084 was issued on August 16, 2012 by Inspector Bellfi, pursuant to section 104(a) of the Mine Act. The citation alleges a violation of section 103(a) of the Act, which requires the Secretary to make frequent inspections and investigations of mines. In doing so, the Secretary is not required to provide advance notice and has the right of entry to, upon, or through any mine. The violation was described in the citation as follows:

On 08/16/2012[,] the dispatcher and Tom Hamilton, Crusher Operator and person in charge at the mine[,] refused to allow Dennis Bellfi, an authorized representative of the Secretary, entry into the Portable Inc. Wash Plant Mine for the purpose of conducting an inspection of the mine pursuant to Section 103(a) of the Act. Tom Hamilton[,] via the dispatcher[,] stated that the Federal Inspector could not enter the mine without being escorted by a company official. No company official was provided and thus delayed the inspection. After waiting 30 minutes[,] this inspector was advised by Jennifer Rather, Safety Director[,] via the dispatcher that the inspection could commence without [an] escort. This condition has not been designated as “significant and substantial” because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard.

Ex. S-2.

Bellfi determined that there was no likelihood the violation would result in illness or injury, that such injury or illness could reasonably be expected to result in no lost workdays, that no persons were affected, but that the negligence level was deemed to be high. The Secretary proposed a specially assessed penalty of \$1,000.00.

Inspector Bellfi informed that, prior to becoming a CLR, when he used to conduct MSHA mine inspections on a full-time basis, he would generally wait about 5 minutes for an escort. Tr. 19, 53. If an escort was not present within that period of time, Bellfi would begin the inspection

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<sup>3</sup> Shutting down the crusher concerned Bellfi because he preferred to view the mine while it was operational. Tr. 50-51. However, Bellfi did not express this concern to Edwards or any other Portable employee. *Id.*

and tell mine personnel that the escort could meet up with him. Tr. 19, 54. The Inspector advised that he was trained to allow time for an operator to get a mine representative to accompany him during an inspection, as long as doing so did not unduly delay the inspection. Tr. 39. It was Bellfi's view that Portable was in violation of section 103(a) of the Act because it refused to allow him to inspect the mine by telling him that he needed an escort to enter mine property, then failing to provide one for 30 minutes, before then allowing him to begin his inspection without an escort. Tr. 39-41. He considered these actions to be an indirect denial of the inspection. Tr. 81; Ex. R-17. Bellfi believed that other employees, besides Hamilton and Rather, could have escorted him, though he did "suppose" that an operator could designate the escort. Tr. 41, 57. On cross-examination Inspector Bellfi admitted that he never explained to Eric Edwards, or to anyone at Portable, that there are inspection requirements under 103(a). Tr. 55.

Bellfi started his inspection once Edwards told him he could start alone and he was joined by Mr. Hamilton, the crusher operator, approximately 10 to 20 minutes later. Tr. 28, 31. It was the Inspector's testimony that during his inspection he noticed "that there were guards that had had different types of [ ] bolts in the guarding." Tr. 29. There were four or five clean, shiny, new washers and bolts next to rusted bolts and washers on different areas on different screens or guards. Tr. 30. He was unsure how long they had been there, but when pressed, he added that it could have been "[a] couple of days to a week." Tr. 30. Bellfi also observed one berm on the crusher feed ramp that had, what he assumed was new dirt, piled on the edge of it. Tr. 32. He estimated the area of the fresh dirt to be about 10 to 15 feet across and that it had been placed there within the hour based on the fact that it looked wet.<sup>4</sup> Tr. 34. However, Inspector Bellfi did not include the berm or bolt and washer observations in his notes on the day of the inspection, assertedly because he did not think it was an issue at the time. Tr. 77. It was not until after the inspection that Bellfi determined that such safety corrections could have been made during the time that he was waiting for an escort. It was such afterthoughts that prompted MSHA's alternative theory of liability, that Portable gave advance notice of the inspection.

As noted, the Inspector raised two grounds, new bolts and fresh berm dirt, in support of the claim of advance notice.<sup>5</sup> The Inspector acknowledged that he arrived for his inspection of the mine in the afternoon. Tr. 80-81. He claimed that the dirt moved on to the berm could have occurred after his arrival. He admitted that it is not normal practice to change bolts or washers on a crusher while it is running. Further, he did not ask anyone during his inspection when the bolts and washers were last changed, nor did he ask for any maintenance records as a source for indicating when maintenance was last done on the crusher. Similarly, he failed to ask anyone during his inspection when the berms had been created. Tr. 86-87.

The Court noted that these matters were simply suspicions on the Inspector's part, and that the Inspector was unable to state definitively when those actions, regarding the berms and the bolts, were taken. In fact, when that question was then expressly posed to the Inspector, he

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<sup>4</sup> Bellfi made the assumption that the dirt should have been dry and crusted on the top because it was hot on the day of the inspection. Tr. 32.

<sup>5</sup> As the Inspector issued his impeding notice before seeing the berm dirt and new bolts, these contentions have relevance only to the claim of advance notice.

conceded that he could not prove that either of the actions were taken during the interval in which he was delayed. Tr. 90-93. Bellfi then acknowledged that the basis for his advance notice allegation was that Eric Edwards or Jenifer Rather had contacted Tom Hamilton. However, based upon all the evidence of record, the Court does not agree that such an inference is fair. The contact with Mr. Hamilton was simply for the purpose of finding an escort at Portable's very small operation. Tr. 51.

Curt Petty was the MSHA Field Supervisor<sup>6</sup> of the Helena, Montana office at the time that the citation was issued and in that capacity he considered himself Bellfi's boss for the time Bellfi was temporarily assigned to the Helena office. Tr. 119, 125. Inspectors working under Supervisor Petty were instructed to call him *before* issuing a citation for impeding. Tr. 125, 133. Inspector Bellfi admitted that he did not do that but he insisted that inspectors are only supposed to contact their supervisors if they are denied entry *after* issuing a citation. Tr. 84, 85; Ex. R-22 at 39-40. Supervisor Petty testified that once the inspector explains to mine personnel that they have the right to inspect the mine immediately, there is no timeline for issuing such an impedance citation. The Court, wanting additional precision about this, asked if that meant that once an inspector informs that there is a right to inspect, there is to be no delay and the inspector should be permitted to begin his inspection immediately. Mr. Petty agreed with that description. Tr. 120-21.

When asked to describe his experiences with waiting for mine representative escorts, Supervisor Petty testified that he had conducted and been present for hundreds of inspections, and for some of those he waited 30 minutes or longer for an escort and that he did not issue a citation for impeding an inspection in any of those instances. Tr. 124, 132. He also stated that he had inspected Portable twice in the past and had waited about 15 to 20 minutes for Ms. Rather to meet him at the mine the first time. No citation was issued for impeding an inspection then either.

Mr. Edwards, who Inspector Bellfi acknowledged was not an employee of Portable and that he was untrained in MSHA standards, testified that he never asserted to Inspector Bellfi that the property could not be inspected. Tr. 143-44, 147. Edwards stated that he called Mr. Hamilton, who was operating the crusher at the time, to ask him to escort the Inspector and called Ms. Rather to let her know that he was attempting to have Hamilton escort Bellfi. Tr. 147. Edwards followed up with Hamilton 10 minutes later and Hamilton informed him that Richard Van Dyke, the other crusher operator, was not on-site and therefore he had to shut the crusher down. Tr. 148. Mr. Edwards maintained that, when he told the Inspector that Hamilton was shutting the crusher down and would then escort him, Bellfi then wrote the citation. Tr. 148-49. According to Edwards, Bellfi did not discuss his authority under section 103(a), prior to issuing the citation. Tr. 149.

In the 15 years that Ms. Rather has worked for Portable she could not remember any MSHA inspector that did not check in at the front office before conducting the inspection. Tr. 170-177. She explained that Portable's policy is to have a representative accompany anyone traveling on the mine site, including MSHA inspectors. Tr. 172-73. According to Ms. Rather,

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<sup>6</sup> Petty has been with MSHA for 16 years, 12 of which were as a field supervisor and 4 of which were as a metal/non-metal inspector. Tr. 121, 123.

the designated representatives allowed to escort MSHA inspectors are the managers, which consist of herself, Scott Miller, and Tom Hamilton, because they are the most knowledgeable and experienced employees. Tr. 173, 176.

Over those 15 years, Ms. Rather has joined the MSHA inspector on every inspection except one, when she was away on travel. Tr. 176. She primarily works at Kenyon Noble's corporate office in Bozeman, Montana which is approximately an 8 to 10 minute drive to Portable. Tr. 172. The practice employed when the MSHA inspector arrives at the mine site is for an employee from the front office to call and so inform her of the inspector's presence. Tr. 177. Ms. Rather asserted that, historically, inspectors have waited anywhere from 10 to 30 minutes for her to then arrive to accompany them. Tr. 178.

On the date of this incident, August 16, Ms. Rather was doing payroll for Kenyon Noble's 280 employees and therefore was not available to accompany the inspector that day, as the company pays its employees on the 16<sup>th</sup> of each month. Tr. 178. Because Miller was out, Hamilton was the only other authorized representative of the mine that could escort the inspector. As mentioned, Mr. Van Dyke, who had the day off, was contacted by Hamilton to see if he could cover for him while the inspection took place. Tr. 180, 183. When Rather was later told that Van Dyke was out of town, she telephoned Hamilton and told him to shut down the crusher. Tr. 183. Hamilton confirmed that he called Van Dyke to cover for him but, because he was too far away, Hamilton had to shut the crusher down, a process that takes approximately 25 minutes. Tr. 211, 217.

Ms. Rather further testified that she was never told by Mr. Edwards that Inspector Bellfi was threatening to issue a citation for impeding an inspection. Tr. 184. She also assured the Court that new procedures have been put in place to prevent a recurrence of the type of delay that occurred on August 16. Tr. 200-01. The Court considers this to be tangential, yet important, as Portable has assured that there will not be a repeat of this misunderstanding.

## **Discussion**

The Secretary states that section 103(a) is violated if a mine operator unreasonably delays the start of an inspection by denying the inspector access to the mine. As a principle, the Court agrees with that contention, but the issue here is whether, in the context of the findings of fact, there was an unreasonable delay in this instance. As mentioned, as an alternative theory of liability, the Secretary contends that Portable violated section 103(a)'s prohibition against giving mine personnel advance notice of an inspection.

The unreasonable delay contention will be discussed first. The Secretary notes that Section 103(a) of the Act prohibits an operator from interfering with an inspection, and that such interference includes that which is caused by unreasonable delay or where an operator's actions have the effect of frustrating the Secretary's legitimate objectives. *Topper Coal Co.*, 17 FMSHRC 945, 948 (June 1995) (ALJ); *Calvin Black Enters.*, 7 FMSHRC 1151, 1156-57 (1985); *Spiro Mining, LLC*, 33 FMSHRC 3255, 3257 (Dec. 2011) (ALJ). Here, the Secretary acknowledges that the 30 minute delay was an *indirect denial* of the right to inspect. Inspector Belfi himself so characterized the delay as an indirect denial. Tr. 81, 84. Nevertheless, the

Secretary contends that the delay was unreasonable in this instance because Portable's safety policy did not apply to MSHA inspectors, because Portable placed its interest in allowing Ms. Rather and Mr. Hamilton to continue their work duties over MSHA's interest in conducting an inspection,<sup>7</sup> and because the delay frustrated MSHA's legitimate objective to observe the mine when it is operating. Sec'y Br. at 7 - 9. As applied to the particular facts here, the Court finds that none of these contentions are meritorious.

The Secretary<sup>8</sup> asserts that Portable's argument that the delay was prompted by its inability to find an escort to accompany the inspector ignores that, in circumstances when an operator's preferred representative is busy, it is the operator's responsibility to find a substitute. It adds that, if no substitute is available, the operator must permit the inspector to conduct the inspection unaccompanied. Sec'y Br. at 15-16, citing *F.R. Carroll Inc.*, 26 FMSHRC 97, 102 (2004). Last, the Secretary maintains that any of three other employees who were on site on the day of the inspection could have escorted Bellfi and therefore not delayed the start of his inspection.

The Secretary's arguments for upholding the citation are significantly based on the assumption that Portable refused to allow Bellfi to start his inspection and that he was legally entitled to commence the inspection without undue delay. Sec'y Br. at 10. The latter contention is not disputed. Both sides agree that an inspector is entitled to inspect without undue delay. However, as to the former contention, the Court has previously stated that it finds that there was no indirect denial of entry. It is further noted that the Inspector never attempted to explain his authority, nor did he simply start his inspection. On these facts it is clear that the Inspector chose to wait much longer than his normal amount of time for an escort. As he stated, he would usually start the inspection after five (5) minutes, proceeding unaccompanied, if necessary.

There was no testimony or documentary evidence presented by either side that Bellfi was told that he was *not permitted* to inspect the mine at any point during the 30 minute waiting period despite the description in the citation suggesting otherwise.<sup>9</sup> On the contrary, Edwards

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<sup>7</sup> For the sake of completeness only, it is noted that the Secretary observes that Bellfi was not bound by Portable's safety policy. That is true and this decision does not suggest otherwise. Beyond that, it is noted that Mr. Edwards was a marginal figure in this matter. He was an employee of Kenyon Noble, not Portable, and had not been trained in MSHA regulations. On this record, it appears that Edwards simply miscommunicated Portable's company policy to Bellfi.

<sup>8</sup> Both parties addressed Portable's right to have a representative present during the inspection under section 103(f). Resp. Br. at 12; Sec'y Br. at 14. The court does not find this argument relevant to determining whether section 103(a) was violated in this case because Portable sought to have a representative present and Bellfi allowed Portable the opportunity to have a representative present by waiting for 30 minutes before issuing a 103(a) citation and beginning his inspection.

<sup>9</sup> This is distinguishable from the facts in *F.R. Carroll* where the inspector repeatedly asked the operator to allow him to proceed with the inspection, and told mine personnel that a 5 hour delay could not be granted. *F.R. Carroll*, 26 FMSHRC at 102.

had returned to Bellfi to tell him the crusher was being shut down and he could begin the inspection unaccompanied when Bellfi decided to issue the citation. Further, Bellfi never told Edwards he had a right to inspect the mine,<sup>10</sup> nor did he attempt to start his inspection despite testifying that he would normally only wait 5 minutes for an escort before beginning. These actions also diminish the Inspector's claim that Portable's actions constituted an indirect denial. In the Program Policy Manual (PPM), a source of MSHA's interpretation and guidelines on enforcement of the Act, 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." Ex. R-27 at 2. Based on the above actions taken by Portable, the court finds that the record does not evidence such "clear indication of intent and proof of indirectly denying entry," and accordingly it is found that the Respondent did not exhibit the intent to indirectly deny access or otherwise delay the inspection.<sup>11</sup>

In addition, testimony from Supervisor Petty and Ms. Rather regarding past practices were particularly enlightening. Petty had performed or accompanied hundreds of inspections in the past, sometimes waiting 30 or more minutes for an escort before beginning the inspection. No citations for impeding were issued as a result of those prior wait times. Petty also explained that MSHA protocol was for inspectors to tell mine personnel that they had a right to inspect the mine immediately and that, after so informing, there was no timeline for issuing the citation for impeding. There is no indication that Bellfi did this. Ms. Rather had been present for all inspections at Portable, except for one, prior to August 16, 2012, and she never had an issue with an inspector waiting up to 30 minutes for her to arrive and be an escort. While a lack of past enforcement by MSHA cannot be the sole reason for vacating this citation, the Secretary's previous interactions with Portable set the stage for its expectations, and was indicative of the amount of time it considered to be a reasonable period to wait.

Thus, it is fair to state that Portable's past experience with MSHA inspections led it to believe that it was acting in a manner consistent with those experiences, and therefore that it was not thwarting any inspection. What was remarkably different here is that Portable was dealing

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<sup>10</sup> Bellfi did testify at hearing that he told Edwards the longer he had to wait, the more inclined he would be to issue a citation for impeding. Respondent pointed out that the Inspector did not mention this in his depositions, nor does this claim appear in his notes. Tr. 101-02; Ex. R-22. When questioned, Bellfi stated that he remembered this while reviewing the case prior to hearing. *Id.* These observations undercut the Inspector's assertion.

<sup>11</sup> With regard to the above facts and the Secretary's position about the delay frustrating his legitimate objective to view the mine while in operation, it appears to the Court that he is trying to argue both sides. On one hand he states that Hamilton should have been instructed to shut down the crusher immediately so that Bellfi could begin his inspection. Sec'y Br. at 16. In depositions on February 2, 2014, Bellfi stated that it would not have mattered whether the crusher was operating if he was able begin his inspection promptly. Ex. R-22 at 21-22. On the other hand, the Secretary states he has a legitimate interest in seeing the mine in operation – an attempt made by Hamilton when he called Van Dyke to take over for him so that he could escort Bellfi. It seems that the Secretary would not have been satisfied with either scenario.



with a new inspector, one who was temporarily assisting the Helena, Montana office with its inspection responsibilities, and who lacked the institutional knowledge of the interactions between that local MSHA office and Portable's operation. It is fair to state that no claim of indirect denial, nor the advance notice claim, would have arisen but for the temporary inspector's lack of appreciation of the protocol that MSHA had been observing with Portable.

As noted, in the alternative, the Secretary has argued that Portable violated section 103(a)'s prohibition against giving mine personnel advance notice of an inspection. Sec'y Br. at 8. He states that because Edwards and Rather told Hamilton that MSHA had arrived to conduct an inspection 30 minutes before Bellfi was permitted to start the inspection, Portable violated section 103(a). *Id.* This contention has largely been discussed. However a few additional remarks follow.

Bellfi testified that the depositions of Rather, Edwards and Hamilton revealed that Rather made phone calls to Hamilton, telling him that Bellfi was at the mine to conduct an inspection and needed an escort. Tr. 51, 93. Edwards also told Hamilton that Bellfi was at the mine to conduct an inspection and needed an escort. Tr. 73-74, 93. Bellfi asserted that these actions constituted advance notice. However, he did not believe that talking to Bright or the loader operator was the equivalent of advance notice because he was ready to conduct his inspection at that moment. Tr. 71. Bellfi maintained that Edwards and Rather should not have told Hamilton to escort him specifically for an inspection and that it should not have been disclosed that he was there for an "inspection." Tr. 95. Bellfi did not give this instruction or recommendation to Bright, the loader operator, Edwards, or Rather. Tr. 71-72, 96. It should also be remembered that this is a very small, six employee, operation.

Section 103(a) of the Act states that "no advance notice of an inspection shall be provided to any person." It is acknowledged that this is important to the health and safety of miners because it helps to ensure that operators do not conceal or address hazardous conditions before the inspector observes them. However, the court finds the Secretary's argument lacks merit in this case. The Secretary did not believe that Rather was given advance notice when she was contacted by Edwards. Even if Rather was not doing payroll and could leave for the mine promptly, she still would have taken at least 8 to 10 minutes to get to the mine. Bellfi's argument appears to hinge on the use of the word "inspection," but both Rather and Edwards were told that Bellfi was there for an inspection. Bright and the loader operator were informed by Bellfi himself when he arrived that he was there to conduct an inspection. While Bellfi was ready to conduct his inspection at that moment, he did not start performing the inspection until 30 minutes later, yet Bellfi did not consider this to be advance notice. The court fails to see how informing Hamilton was distinguishable from informing Rather or Edwards. Most of Portable's employees were aware that an inspection was imminent by the time Hamilton was contacted. Again, Portable never told Bellfi that he could not begin his inspection and Bellfi never attempted to do so.

In addition, Hamilton was clearly contacted about Bellfi's presence so that he could be an escort. In this respect, the situation at bar is distinguishable from other advance notice cases. See *Topper Coal Co.*, 20 FMSHRC 344 (Apr. 1998) (Commission upheld citation for a 103(a) violation where an operator warned miners that MSHA inspectors were entering the mine and to

“watch out and be careful” despite being instructed by the inspectors not to tell anyone about their presence.); *Cougar Coal Co.*, 17 FMSHRC 628 (Apr. 1995) (ALJ upheld citation for a 103(a) violation where surface personnel alerted underground miners of the inspectors’ presence despite being told not to do so.)

Based on the above, the court finds that notifying Hamilton of Bellfi’s presence is clearly distinguishable from other cases where a violation of section 103(a) was found for providing advance notice. As a result, the court finds that Rather’s and Edwards’ communications to Hamilton did not constitute advance notice in violation of section 103(a).

As noted, the Secretary further alleges that Portable corrected hazardous conditions, or had the opportunity to do so, while Bellfi was waiting for an escort. Sec’y Br. at 11. However, for this alternative liability theory of advance warning, the record simply does not support the conclusion that such activity occurred. This conclusion is consistent with the facts associated with the unreasonable delay claim and, beyond that, the indicia that the visiting inspector pointed to support this afterthought theory of liability, that is the fresh bolts and berms, were not established under the preponderance of evidence burden as having occurred during the 30 minute window of time that forms the foundation for either theory.

Inspector Bellfi arrived in the *afternoon* of August 16, but stated in his memo to the district manager, supporting the citation, that the dirt on the berm had been moved the *morning* of August 16. Tr. 79-80; Ex. R-17. In addition, Bellfi did not ask anyone at the mine when the bolts and washers were last changed, and conceded that it was not normal practice to change them while the crusher was running, as it was on the day of the inspection. Tr. 86-87. He also did not request maintenance records to see when these tasks were performed because he did not think it was relevant, and no other evidence supporting this surmise was introduced at hearing. Tr. 87. Thus, Bellfi was not certain that the berm, washers, and bolts were fixed while he was waiting for an escort. Tr. 92-93.

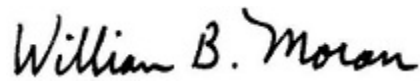
As a result, the court finds that the Secretary did not meet its burden in proving by a preponderance of the evidence that Portable took corrective actions while Bellfi was waiting for an escort in violation of section 103(a).

Upon review of the entire record and the Court’s assessment of the credible testimony, it concludes that there was miscommunication and some confusion on Portable’s part in reacting to Inspector Bellfi when he appeared at the mine to conduct his inspection, but there was no intent to delay the inspection. Nor, *under the particular circumstances of this case*, was the 30 minute delay unreasonable, given the unfamiliarity of those at the mine with how to deal with a mine inspection and the lack of precision on the Inspector’s part in communicating the immediacy associated with his right to inspect. The Mine’s reaction was also tempered by the history of its significant experience when MSHA inspectors had arrived in the past.

Based on the above determinations and facts, the Court finds that Portable did not unreasonably delay Bellfi’s inspection or indirectly deny access to its mine on August 16, and therefore, did not violate section 103(a). It is further determined that Portable did not engage in any advance notice violation. It is important to recognize, however, the Secretary’s valid

concern that “excusing” a 30 minute delay “would severely impair MSHA’s ability to protect miners.” Sec’y Br. at 19. Under a different set of facts, intentionally and unreasonably delaying an MSHA inspector for 30 minutes, or possibly, in some circumstances, a delay of less time, could indeed weaken MSHA’s ability to protect miners. Accordingly, the Court’s decision here is not meant to be broadly interpreted but instead is limited to the specific circumstances of this is case.

Wherefore, Citation No. 8587084 is **VACATED** and this case is hereby **DISMISSED**.

A handwritten signature in black ink that reads "William B. Moran". The signature is written in a cursive, slightly slanted style.

William B. Moran  
Administrative Law Judge

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was served via email and certified mail on December 5, 2014:

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