

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, DC 20001

December 18, 2009

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|----------------------------|---|------------------------------|
| SECRETARY OF LABOR,        | : | CIVIL PENALTY PROCEEDING     |
| MINE SAFETY AND HEALTH     | : |                              |
| ADMINISTRATION (MSHA),     | : | Docket No. PENN 2009-273-M   |
| Petitioner                 | : | A. C. No. 36-09655-170239-02 |
|                            | : |                              |
| v.                         | : |                              |
|                            | : | Mine: Buckhorn               |
| LITTS & SON STONE COMPANY, | : |                              |
| Respondent                 | : |                              |

**ORDER GRANTING SECRETARY’S MOTION TO DISMISS COUNTERCLAIM**

This case concerns a proposal for assessment of civil penalty filed pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d), seeking a civil penalty assessment for 13 alleged violations of mandatory safety standards found in Parts 47 and 56, Title 30, Code of Federal Regulations. The Secretary filed the Petition for Assessment of Civil Penalty on February 19, 2009, and the Respondent answered and asserted a counterclaim on March 19, 2009. The Secretary has filed a motion to dismiss the Respondent’s counterclaim.

The respondent alleges that it has been the victim of a series of retaliatory and/or vindictive actions since the spring and summer of 2008 by MSHA inspectors, in violation of the First Amendment to the Constitution. Answer at 6. In the Secretary’s motion, she moves that the counterclaim be dismissed. She asserts the Commission does not have jurisdiction to decide the issue, or, if it does, that the Respondent has failed to state a cognizable cause of action. Motion at 3.

In ruling on the Secretary’s motion, it is important to first identify the relief the Respondent seeks. The Respondent argues that because employees of the agency created by the Act (MSHA) deprived the company of the full exercise of the company’s First Amendment rights, I should enjoin the agency “from taking further vindictive retaliatory actions against [the Respondent]” and direct MSHA to assign “a fair and impartial inspector . . . to [the Respondent’s] facilities.” Answer at 6-7. I cannot fulfill these requests. As counsel for the Secretary rightly points out, my jurisdiction is restricted to that which is granted by the Act. Motion at 2. Administrative agencies such as the Commission have only the jurisdiction that Congress gives. This core principle of administrative law has long been recognized as applicable to the Commission and its judges. *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (September 1988). While the Act establishes specific enforcement proceedings, contest proceedings and other forms of action over which the Commission presides, nowhere does it grant to the Commission and its judges the authority to rule on and to direct MSHA’s internal

personnel policies and practices. Because there is no way under the Act that I can grant what the Respondent asks, the counterclaim must be dismissed. *See Agronics, Inc.*, CENT 98-151-M (Order Denying Motion to Dismiss and Remand) (August 21, 1998) (Chief ALJ Merlin) (*unpublished*). This is not to say the Respondent is without a remedy.<sup>1</sup> It is simply to say that the remedy it seeks is not available before the Commission. Accordingly, the Secretary's Motion to Dismiss Alleged Counterclaim **IS GRANTED**, and the parties are directed to comply with the Order to Confer and Report dated November 5, 2009.

David F. Barbour  
Administrative Law Judge

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<sup>1</sup>A long line of cases recognizes a right of action in the federal courts for damages when agents of the government abridge constitutional rights. *See, e.g. Bivens v. Six Narcotic Agents*, 403 U.S. 388 (1971) (*and cases arising thereunder*).