

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

September 1, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-148-M
Petitioner	:	A.C. No. 40-03268-80642
	:	
v.	:	Docket No. SE 2006-163-M
	:	A.C. No. 40-03268-82949
SCP INVESTMENTS, LLC,	:	
Respondent	:	Old County Quarry

ORDER TO SHOW CAUSE

_____ These civil penalty matters were remanded on August 6, 2009, for further consideration. These cases concern a mine inspector's refusal to permit a representative of the mine operator to accompany the inspector during an inspection. The initial decision vacated the eleven citations and the one order in issue. 30 FMSHRC 544 (June 2008) (ALJ). The initial decision to vacate the cited violations was based on a determination that the mine inspector abused his discretion by unjustifiably denying the mine operator's statutory right to accompany him during the mine inspection.

The Commission's remand set aside the initial decision on jurisdictional grounds.¹ The Commission noted that a mine inspector is authorized to enter a mine to conduct an inspection, with or without the presence of a mine operator, pursuant to the authority delegated to the Secretary in section 103 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"). (*Slip op.* P.11). The Commission also noted that an operator cannot nullify an inspection by refusing to participate.² (*Slip op.* p.12).

¹ The Commission relied on the language in section 103(f) that ". . . Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this act." 30 U.S.C. § 813(f). Obviously, the only party that can object to jurisdiction under section 103(f) is the mine operator. This provision means that a mine operator cannot successfully attack citations on jurisdictional grounds simply because it was not present during an inspection. As recognized by the Commission, this provision does not vitiate the walkaround rights that are also granted in section 103(f).

² I too previously ruled that a mine operator cannot prevent or delay an inspection because of his unavailability or his decision not to participate. *F.R. Carroll, Inc.*, 26 FMSHRC 97 (Feb. 2004) (ALJ).

However, the analysis in this case does not stop simply because the mine inspector was authorized to act as a consequence of his inspection. The Commission is “an independent adjudicative body authorized [by Congress] to hear disputes arising under the Mine Act.” *Energy West Mining Corp. v. FMSHRC*, 40 F.3d 457, 459 (D.C. Cir. 1994) citing 30 U.S.C. §§ 815(d), 823. Fundamental to the Commission’s mandate is the responsibility of determining whether contested citations, issued under section 104(a) of the Mine Act as a result of an authorized section 103(a) mine inspection, should be affirmed, modified, or vacated. 30 U.S.C. § 814(a). Obviously, the authority to inspect a mine and issue citations has no bearing on whether those citations must be sustained by the Commission. Surely the statutory walkaround rights in section 103(f), granted to miners’ representatives as well as mine operators, *are not* illusory.

Although the Commission reinstated and remanded these matters for further action on jurisdictional grounds, the Commission also recognized the substantive distinction between an operator’s unavailability, or its decision not to participate in an inspection, and MSHA’s refusal to allow its participation. While an operator’s absence generally is benign, the Commission concluded that the arbitrary and unreasonable refusal in this case constituted an “impermissible” violation of the mine operator’s section 103(f) statutory walkaround right. (*Slip op.* pps. 7, 9, 10-11, 18).

However, the Commission did not reach a majority consensus concerning the action I now should take. *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff’d on other grounds*, 969 F.2d 1501 (3rd Cir. 1992) (“*Penelec*”) (disposition by the Commission requires a majority vote). Two Commissioners suggested that I conduct an exclusionary hearing, apparently predicated on due process concerns, to determine what prejudice, if any, resulted from the denial of walkaround rights. (*Slip op.* p.2). One Commissioner suggested I should exercise my discretion by evaluating the prejudice caused by the mine operator’s lack of an opportunity to present probative evidence during the inspection. *Id.* The remaining Commissioner concluded the refusal of walkaround rights has no effect in this case. *Id.* However, as noted above, a majority of the Commission agreed with the initial decision that the mine operator’s statutory walkaround right was impermissibly violated.

In the performance of its adjudication functions, longstanding case law reflects the Commission’s frequent examination of whether, abuses of discretion, however well intentioned, due process considerations, or prejudice caused to an operator by the Secretary, provide a basis for vacating or denying modifications of citations that are otherwise validly issued. An “abuse of discretion” occurs when “there is no evidence to support the decision or *if the decision is based on an improper understanding of the law.*” *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (October 1991), *quoting Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985) (emphasis added). While the Commission’s remand decision did not specifically characterize the mine inspector’s action as such, it is clear that an impermissible violation of a statutory right that, according to two Commissioners, lacked “common decency,” surpasses the threshold of actions properly deemed as an abuse of discretion. (*Slip op.* p.9).

In view of the Commission's determination that the mine operator's section 103(f) walkaround right was violated, the Secretary **IS ORDERED to SHOW CAUSE** why the citations issued as a consequence of the December 2005 inspection should not be vacated.³ The Secretary's response must address the following issues that are material in the disposition of these matters.

1. Section 104(a) provides that a mine operator is liable for a violation of any provision of the Mine Act. Since a mine operator is clearly liable, under section 104(a), for an unjustifiable denial of an authorized miners' representative section 103(f) walkaround right, the Secretary should address whether, in view of *Utah Power & Light* and the Commission's remand, she disputes that MSHA's impermissible denial of the section 103(f) walkaround right in this case constitutes an abuse of discretion. In other words, is the Secretary's violation of a statutory right that she is obliged to enforce an abuse of discretion?
2. Longstanding case law supports the proposition that a citation, otherwise properly issued by a mine inspector pursuant to the authority delegated to the Secretary by the Mine Act, can be vacated based on that mine inspector's relevant and material abuse of discretion. *Energy West Mining Company*, 18 FMSHRC 565, 569 (Apr. 1996) and its progeny (abuse of discretion as a basis for vacating a 104(b) order otherwise validly issued); and *Rochester & Pittsburgh Coal Company*, 11 FMSHRC 2159, 2163-64 (Nov. 1989) quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d at 31 (7th Cir. 1975) and its progeny (findings and decisions of an inspector are supportable unless there is evidence that he abused his discretion or authority). The Secretary should thoroughly discuss whether or not this case law provides a basis for vacating the citations in issue.
3. In view of the Commission's remand, does the MSHA inspector's unreasonable denial of the mine operator's statutory section 103(f) walkaround right in this case constitute a due process violation? The Secretary should provide a thorough analysis of this question supported by relevant case law.
4. A citation, otherwise properly issued by a mine inspector pursuant to the authority delegated to the Secretary by the Mine Act, can be vacated based on a relevant and material violation of the mine operator's right to due process. *American Coal Company*, 29 FMSHRC 941, 952-53 (Dec. 2007) citing *Gates & Fox Co. V. OSHRC*, 790 F.2d 1189, 1193 (9th Cir. 1982). (considerations of due process prevents imposition of a civil penalty and validation of a citation

³ The MSHA inspector's action does not effect the propriety of the Part 46 training violations in 104(g)(1) Order No. 6122908 and Citation No. 6122916 because they were not cited as a consequence of the physical inspection of the mine.

otherwise properly issued). Assuming the impermissible denial of section 103(f) walkaround rights in this case is a due process violation, the Secretary should thoroughly discuss whether or not this case law provides a basis for vacating the citations in issue.

5. Finally, the Commission may deny MSHA's issuance of a citation if it results in legally recognizable prejudice to the operator. *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990) (modification of a citation to allege a violation of a different standard may be precluded upon a showing of prejudice). The Secretary should address whether an unreasonable denial of a mine operator's walkaround right is prejudicial *per se*, and whether prejudice provides a basis for vacating the citations in issue.

ORDER

IT IS FURTHER ORDERED that above information should be provided by the Secretary within 30 days of the date of this Order. The Secretary should specifically address the impact of the cases cited above in her analysis of whether there is an adequate basis for vacating the citations. The Secretary may submit any additional arguments or authorities to support her position. Failure by the Secretary to provide a timely response that directly addresses these relevant issues may result in dismissal of these civil penalty proceedings. SCP Investments, LLC (SCP) shall have 14 days to reply to the Secretary's submission, although a response by SCP is not required.

Jerold Feldman
Administrative Law Judge

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