FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, DC 20001

January 5, 2010

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

DECISION ON REMAND

Before: Judge Feldman

These consolidated civil penalty matters have been remanded by the Commission for further consideration. 31 FMSHRC 821 (Aug. 2009). These matters concern two statutory provisions of section 103(f) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 813(f) ("Mine Act" or "Act"), concerning walkaround rights and jurisdiction. More specifically, these cases concern the impact, if any, on the viability of citations issued as a consequence of an inspection that was conducted after the impermissible denial of the statutory section 103(f) right of Pat Stone, as a representative and owner-operator of the Old County Quarry, to accompany the inspector during his inspection.

At issue are eleven citations alleging several violations of the Secretary's mandatory safety standards, and a 104(g)(1) order issued because of a failure to provide personnel with new miner training. The Secretary seeks to assess a total civil penalty of $1,087.00 for the alleged violations. The cited violative conditions have been corrected and the subject citations and order have been terminated. Consequently, there are no unresolved continuing safety issues.

The initial decision vacated the eleven citations and the one order in issue. The citations and order issued during the inspection were vacated based on an abuse of the mine inspector's discretion in denying walkaround rights. 30 FMSHRC 544 (June 2008) (ALJ). The initial decision stated:

> Section 103(f) does not mandate that an inspector must be accompanied by a mine operator during an inspection. Thus, I am cognizant that the failure of a mine operator to accompany an inspector is not a jurisdictional bar to the issuance of citations for violations of the Secretary's mandatory safety standards observed during the inspection. *See Emery Mining*, 10 FMSHRC at 289. However,

> section 103(f) provides the "opportunity" for the mine operator to exercise its right to be present during an inspection. This right cannot arbitrarily be denied. In other words, the jurisdiction to enforce does not provide a license to abuse.

30 FMSHRC at 548, fn. 3.

Although the Commission reinstated the citations and order vacated in the initial decision and remanded these matters for further action, it did so on jurisdictional grounds. 31 FMSHRC 821. It 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 to determine what prejudice, if any, resulted from the denial of walkaround rights. 31 FMSHRC at 822. One Commissioner suggested that I exercise my discretion to determine the appropriate civil penalty given 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.*

Although the Commission's remand lacked a majority consensus, a majority of the Commissioners agreed with respect to two issues that now are the law of the case. The Commissioners unanimously concluded there was jurisdiction to conduct the inspection. A majority of the Commissioners also concluded that Stone's statutory 103(f) walkaround rights were violated. *See, eg.*, 31 FMSHRC at 827, 838.

I. Statutory Framework

These matters concern two statutory provisions of section 103(f) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 813(f) ("Mine Act" or "Act"). The first provision of section 103(f) provides that: "[s]ubject to regulations issued by the Secretary, a representative of the operator . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to subsection (a), for the purpose of aiding such inspection . . . ." 30 U.S.C. § 813(f). The second provision of section 103(f) specifies that compliance with this subsection is not "a jurisdictional prerequisite" to enforcement. *Id*.

With respect to the first provision, the right of a mine operator, or, a miner's representative, to accompany an inspector is a fundamental right that is recognized in Commission case law as well as the legislative history. In this regard, it has been noted that "[t]he right to accompany an inspector on all 103 inspections has been consistently recognized by the Commission and the courts." *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994).

The failure to comply with MSHA filing requirements, that occurred by virtue of Stone's failure to register as a mine operator, is not a basis for denying section 103(f) "walkaround rights." *Emery Mining Corporation*, 10 FMSHRC 276, 277 (Mar. 1988) (failure of a non-employee miners' representative to file identifying information required by 30 C.F.R. Part 40 does not permit an operator to refuse the representative entry to its mine for purposes of exercising section 103(f) walkaround rights). Nor does an assertion that an area to be inspected is too dangerous provide an adequate justification for denying walkaround rights. *Consol. Coal*, 16 FMSHRC at 718-19.

As noted by the Commission, the legislative history of the 1977 Mine Act mandates that MSHA *is required to permit* representatives of miners and operators to accompany inspectors. The legislative history states that the Mine Act:

> contains a provision based on that in the [Federal Coal Mine Health and Safety] Act [of 1969 ("Coal Act')] *requiring that representatives of the operator and miners be permitted to accompany inspectors* in order to assist in conducting a full inspection. It is not intended, however, that *the absence of such participation* vitiate any citations and penalties issued as a result of an inspection.

31 FMSHRC at 831-32 (citing S. Rep. No. 95-181, at 28 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616 (1978)) (emphasis added).

There is a crucial substantive difference between the legislative history's reference to "*the absence of such [walkaround] participation*" that "is not intended [to vitiate] any citations and penalties," and, *the unauthorized denial of such walkaround rights* that a majority of the Commission has determined occurred in this case. 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. 31 FMSHRC at 827, 829, 830-31, 838. In fact, two Commissioners concluded Stone's treatment lacked "common decency."[1] 31 FMSHRC at 829.

[1] Specifically, two Commissioners concluded "common decency compels the conclusion that Mr. Stone be given something in writing providing him the legal basis for his exclusion from the inspection . . . ." 31 FMSHRC at 829.

The important substantive distinction between "absence" and "denial" brings us to the second operative provision of section 103(f) that " [c]ompliance 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. The only reasonable meaning of this provision is that a mine operator cannot successfully attack citations on jurisdictional grounds simply because it was not available during an inspection or refused to participate.[2] Surely, it does not give the Secretary the authority to arbitrarily deny a fundamental statutory walkaround right that the legislative authors noted the Secretary was 'required' to respect.

The disposition of this matter is not affected because the subject citations were issued pursuant to the authority to conduct mine inspections delegated to the Secretary in section 103(f). The Commission was created by Congress as an "independent adjudicative body authorized to hear disputes arising under the Mine Act." *Emery West Mining Corp. v. FMSHRC*, 40 F3d 457, 459 (D.C. Cir. 1994) citing 30 U.S.C. §§ 815(d), 823. The Commission is authorized by Congress to review, upon a mine operator's contest, enforcement actions of the Secretary to determine if citations should be affirmed, modified, or vacated. 30 U.S.C. §§ 813(a), 814(a), 815(d). The rights of miners' representatives and representatives of mine operators to accompany inspectors are equally important, and, their participation in inspections enhances safety. In exercising its responsibilities, the Commission routinely considers whether citations should be set aside based on abuse of discretion, prejudice, or due process considerations.
The Secretary's view that these fundamental fairness issues are immaterial in this case must be rejected.

II. <u>September 1, 2009, Show Cause Order</u>

In view of the determination by a Commission majority that the Stone's section 103(f) walkaround right was impermissibly violated, on September 1, 2009, the Secretary was ordered to show cause why the citations issued as a consequence of the December 2005 inspection should not be vacated on abuse of discretion, prejudice, and/or due process grounds. 31 FMSHRC 1273. The Order to Show Cause noted that the denial of Stone's walkaround right does not effect the propriety of the Part 46 training violations in 104(g)(1) Order No. 6122908 and Citation No. 6122916 as these violations were not cited as a consequence of the physical inspection of the mine. *Id.* at 1275. An analysis of the Secretary's responses to questions posed in the Order to Show Cause follows.

[2] I previously have denied a mine operator's attempt to prevent an inspection because it refused to provide a representative to accompany the inspector. *F.R. Carroll, Inc.*, 26 FMSHRC 97 (Feb. 2004) (ALJ).

a. Abuse of Discretion

The show cause order requested the Secretary to state whether she believed the inspector's denial of Stone's walkaround right constituted an abuse of discretion in light of the Commission's determination that Stone's 103(f) right was violated, Commission case law, and the Secretary's history of prosecution of cases involving a denial of a miners representative's 103(f) walkaround rights. 31 FMSHRC at 827, 829, 830-31, 838. Specifically, the Secretary was requested to address *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991), *quoting Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985) (an "abuse of discretion" has occurred when "there is no evidence to support the decision or *if the decision is based on an improper understanding of the law*."). 31 FMSHRC at 1275. (Emphasis added).

The Secretary responded that the inspector does not have the discretion to violate the statute assuming, for the sake of argument, that Stone's right was impermissibly violated. *Sec'y Resp.*, at 1-2.

The Secretary's reticence to concede the occurrence of the abuse of discretion in this case is disconcerting. Section 103(f), as well as its legislative history, *requires* the Secretary to afford representatives of the operator and miners an opportunity to accompany an inspector subject to the Secretary's regulations. Initially, the Secretary alleged Stone was disqualified from observing the inspection due to a lack of Part 46 new miner training. 30 C.F.R. Part 46. The Secretary now admits, albeit hesitantly, that Part 46 new miner training is not required to accompany an inspector.[3] The Secretary has not proffered any regulation that justifies the denial of Stone's right to participate in the inspection. The Secretary's stance in this proceeding with regard to her own denial of Stone's section 103(f) rights is ironic in view of her history of prosecution of alleged 103(f) violations against mine operators. *See, eg*., *Consol. Coal*, 16 FMSHRC at 714 (issuance of 104(a) citation for failure of an operator to allow an authorized representative of miners to accompany an authorized representative of the Secretary). In the final analysis,
the Commission has concluded that the denial of Stone's walkaround right was an impermissible violation of section 103(f). Since the inspector's action was contrary to the applicable statutory provisions, the denial of Stone's rights was based on an "improper understanding of the law" that constitutes an abuse of discretion. *Utah Power & Light*, 13 FMSHRC at 1623 n.6.

Assuming the inspector abused his discretion, the Secretary was requested to address whether longstanding case law supports the proposition that a citation can be vacated based on a mine inspector's relevant and material abuse of discretion. Specifically, the Secretary was asked to address the decisions in *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

[3] As noted by the Commission, although initially asserting the contrary, the Secretary now concedes that the denial of Stone's walkaround right cannot be based on his lack of 30 C.F.R. § 46.5 new miner training. 31 FMSHRC 828-29.

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). 31 FMSHRC at 1275.

The Secretary's response seeks to distinguish the abuse of discretion in this case from abuses of discretion in *Energy West* and *Rochester & Pittsburgh Coal* concerning the reasonableness of 104(b) orders and imminent danger orders, respectively. In this case, the Secretary asserts that the abuse of discretion was the decision to exclude the operator from the inspection rather than an error in judgement related to the merits of the subject citations. *Sec'y Resp.*, at 3.

The Secretary misses the point. The abuse of discretion with respect to 104(b) orders, imminent danger orders, and the subject citations, that were issued without the operator's presence and participation, all involve issues of fundamental fairness. A 104(b) order can be vacated if the MSHA inspector requires an unreasonably short abatement period. A 107(a) imminent danger order can be set aside if an inspector unreasonably concluded that the hazard created by the violation could cause death or serious injury before the condition can be abated. In each instance, subjecting the mine operator to withdrawal orders was unjustified by the circumstances.

Here too, Stone's withdrawal from his mine property was unjustified. Significantly, the subject citations posed no significant danger to Stone. For example, the health and safety hazards created by no on-site toilet facilities, inadequate guarding, an absence of traffic signs, a lack of "no smoking" signs, and fire extinguishers that were not periodically tested, clearly did not present any walkaround dangers. In the absence of any extraordinarily hazardous conditions, the Secretary has not presented a rational basis for the denial of Stone's walkaround right.

Moreover, the Secretary's contention that a denial of walkaround rights is warranted because an inspector cannot predict what hazardous conditions exist before entering a mine is unavailing. As a threshold matter, such an approach would justify the denial of all walkaround rights. Moreover, a representative of a mine operator can alert an inspector to potential dangers based his familiarity with the mine. Consequently, as in the cases vacating 104(b) and 107(a) withdrawal orders, imposing liability on the mine operator, given the unwarranted forced withdrawal of Stone from the mine site, is not justified by the circumstances. Accordingly, the inspector's abuse of discretion provides an adequate basis for vacating the subject citations.

b. Due Process

In its remand, two of the Commissioners suggested "[t]he only possible basis to overcome the [jurisdictional] statutory language would have to be constitutional in nature, such as the Due Process Clause." 31 FMSHRC at 834, fn. 14. Although the inspector's jurisdiction to conduct the December 2005 inspection in issue is beyond dispute, Commission case law reflects that violations of due process are grounds for vacating citations otherwise

jurisdictionally and substantively valid. *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 otherwise properly issued). Consequently, the Order to Show Cause, requested the Secretary to address whether the MSHA inspector's unreasonable denial of the mine operator's statutory section 103(f) walkaround right constitutes a due process violation. 31 FMSHRC at 1275.

The Secretary responded that:

> Assuming that the inspector's determination was contrary to § 103(f), there is no evidence that the determination was based on anything other than the inspector's misunderstanding of the law. Even assuming the inspector's misunderstanding of the law constituted negligence, negligence does not support a substantive due process claim.

Sec'y Resp., at 7, citing County of Sacramento v. Lewis, 523 U.S. 833, 845-50 (1998); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986); Daniels v. Williams, 474 U.S.327, 330-32 (1986).

The Secretary's reliance on the aforementioned cases involving negligence is misplaced. They involve the death or injury of victims of alleged negligence by government officials as a consequence of a vehicular police chase and unsafe prison conditions. In each of these cases, the court concluded that the negligence of government officials does not give rise to Fifth Amendment "right to life" claims. These cases do not concern the arbitrary denial of a statutory right.

Moreover, the Secretary's assertion that a negligent misunderstanding of the law is not a material consideration when due process issues arise is surprising. The inadmissable confession obtained in violation of the right to counsel, the illegally obtained evidence acquired without a search warrant, and the instant arbitrary denial of a fundamental statutory right, cannot be overlooked based on a claim of carelessness. It is clear that the denial of Stone's right to accompany the inspector deprived the mine operator of its statutory right to provide exculpatory information during the course of the inspection. Nor are, as the Secretary suggests, subsequent post-inspection close-out conferences with MSHA officials to discuss the merits of citations substitutes for 103(f) statutory rights. *Sec'y Resp*., at 5-6.

In addition to relying on "excusable negligence", the Secretary, citing *Valot v. Southeast Local Sch. Dist. Bd. Of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997), notes that there are two categories of substantive due process claims. Within the first category are deprivations of a particular constitutional guarantee. *Id*. The second category consists of actions that "shock the conscience." *Id.* The Secretary asserts that neither category is applicable to the facts in this case. *Sec'y Resp*., at 4-5.

The Fifth Amendment provides, in pertinent part, that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Stone was removed from his property against his will as a result of an abuse of governmental authority. Even though it was of short duration, Stone's removal must not be viewed as a trivial matter. Consequently, the inspector's action could reasonably be viewed as a violation of Stone's Fifth Amendment Constitutional property right.

However, even if the section 103(f) walkaround right violation does not constitute a due process deprivation of a right to property under the Fifth Amendment, it nevertheless constitutes a denial of due process because of the erroneous denial of Stone's right to participate in the inspection. The Supreme Court has identified the elements of government conduct that can result in violations of due process. The Court has stated:

> . . . the truism [is] that "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). *"(D)ue process is flexible and calls for such procedural protections as the particular situation demands."* Morrissey v. Brewer, 408 U.S. 471, 581, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, supra, 416 U.S., at 167-168, 94 S.Ct., at 1650-1651 (Powell, J., concurring in part): Goldberg v. Kelly, supra, 397 U.S. at 263-266, 90 S.Ct., at 1018-1020; Cafeteria Workers v. McElroy, supra, 367 U.S., at 895, 81 S.Ct., at 1748-1749. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if, any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. See, e.g., Goldberg v. Kelly , supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (emphasis added).

Thus, the Court has identified three factors for determining whether a violation of due process has occurred. With respect to the first "private interest" factor, a major objective of the Mine Act is to encourage the efforts of mine operators and miners " . . . to prevent the existence of . . . [hazardous] conditions and practices in . . . mines." 30 U.S.C. § 801(e). That is why section 103(f) of the Act confers the right of representatives of mine operators and miners to accompany inspectors during inspections "for the purpose of aiding such inspection." 30 U.S.C. § 813(f). In fact, the Commission recently noted that it examines decisions of administrative law judges for abuses of discretion to ". . . ensure that [each decision] effectuates

the purposes of the Mine Act." *Sec'y of Labor o/b/o Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1053-54 (Oct. 2009) citing *Sec'y of Labor o/b/o Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 (July 1997). An MSHA inspector must not be held to a lesser standard. Consequently, the deprivation of Stone's private interest to accompany the inspector for the purpose of providing material information and "for the purpose of aiding [in the] inspection" is readily apparent. 30 U.S.C. § 813(f).

Second, the Commission has already concluded that the inspector erroneously deprived Stone of his right to participate in the inspection. 31 FMSHRC at 827, 838. The Secretary's assertion, in essence, that a close-out conference is an acceptable substitute for walkaround rights that provides a procedural safeguard to protect Stone's rights is unavailing. The legislative history makes clear that Congress did not intend to empower the Secretary to arbitrarily deny
Section 103(f) walkaround rights in favor of a substitute procedure.

Finally, and most importantly, there is no Government interest that justifies the denial of Stone's right. In this regard, notwithstanding that new miner training is not a prerequisite to mine inspection participation, the Secretary has, in effect, conceded that Stone was a qualified miner. Significantly, MSHA allowed Stone to provide Part 46 new miner and hazard training to his personnel despite the fact that Stone had never received formal Part 46 training. 30 C.F.R. §§ 46.5, 46.11; *see also* 31 FMSHRC at 830. In fact, Stone's participation furthers, rather than burdens, the Government's interest in encouraging a safer mining environment. As previously noted, a mine operator is familiar with the particular conditions that are unique to each mine. Consequently, the mine operator is an asset to a successful mine inspection that seeks to identify hazardous conditions and to address the necessary remedial actions required to alleviate the dangers. *Id.* Allowing walkaround rights does not result in any administrative burden. Finally, vacating the subject citations as a consequence of this due process violation does not adversely affect safety as these citations have been terminated because the necessary abatement actions have been taken to correct the alleged violative conditions.

Consequently, even if the inspector's action did not specifically violate the Fifth Amendment, Stone was the victim of an abuse of government authority that constitutes a due process violation. Longstanding Commission case law dictates that violations of due process are grounds for vacating citations otherwise substantively valid. *American Coal Company,* 29 FMSHRC at 952-53 (lack of due process notice of MSHA's interpretation of a regulation). Accordingly, the subject violations can be vacated on due process grounds.

(1) Exclusion of Evidence

The Commission did not reach a majority consensus on how to proceed in light of the potential due process violation in this case. Two Commissioners suggested an exclusionary hearing to determine what information, if any, Stone would have provided during the inspection in defense of each citation. 31 FMSHRC at 836-37. Having been deprived of the opportunity, we will never know what information Stone would have provided during the December 2005

inspection. Any testimony he now may give concerning what he might have said is entitled to little weight because it is remote in time and self-serving. In other words, the Secretary's denial of Stone's due process has undermined the value of Stone's testimony. Certainly, the Government should not benefit from its own misconduct. Rather, two Commissioners suggested that I determine, in view of the denial of Stone's 103(f) walkaround right, whether "none, some, or all of the evidence resulting from the inspection" should be excluded. 31 FMSHRC at 836-37.

Once due process issues arise, all direct and indirect evidence obtained as a result of a government official's abuse is excluded. *See, eg., Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338, 341 (1939) (suppression of "fruit of poison tree"); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The material facts are not in dispute and the mine operator is appearing *pro se*. Consequently, the exclusionary hearing suggested by the Commissioners to determine whether a due process violation has occurred has been accomplished, in effect, as a result of the Secretary's opportunity to provide answers to the September 1, 2009, Order to Show Cause. 31 FMSHRC 1273. Having given the Secretary the opportunity to address the due process issue, and, having determined that Stone's right to due process was violated, all evidence obtained as a result of the inspector's observations of the mine conditions during the inspection must be excluded. *Weeks*, *supra*.

c. Prejudice

The Order to Show Cause requested the Secretary to 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. 31 FMSHRC at 1276. The Secretary responded that the arbitrary denial of walkaround rights is not prejudice *per se* in view of the Commission's remand. Although one Commissioner concluded the mine operator was prejudiced, the remaining Commissioners did not specifically address this issue. With respect to whether prejudice provides a basis for vacating the subject citations, the Secretary responded that the operator has not been prejudiced because it has not shown an inability to defend itself in these proceedings.

The exercise of a section 103(f) right is not contingent on an operator's showing of a need to accompany the inspector for the purposes of litigation. Although walkaround rights are qualified rather than absolute, they can only be denied pursuant to the Secretary's regulations, or in instances where there is a legitimate government need to preclude the mine operator's participation. Government officials must not be permitted to arbitrarily decide when statutory rights will be granted. Consequently, the unreasonable denial of a section 103(f) walkaround right is prejudicial *per se* regardless of whether it interferes with an operator's ability to defend itself. Moreover, the operator's ability to defend itself has been adversely affected by the absence of its opportunity to provide material contemporaneous information at the time of the inspection.

Finally, the Commission may deny MSHA's issuance of a modified citation if it results in legally recognizable prejudice to the operator. The Secretary may be precluded from modifying a citation to allege a different standard upon a showing of prejudice even if the facts support a violation of the modified standard. *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). In other words, prejudice provides a basis for precluding enforcement regardless of whether a cited safety standard was in fact violated.

Thus, the Secretary's section 103(f) violation is both prejudicial *per se*, and, prejudicial based on its adverse impact on the operator's ability to defend. Consequently, consistent with Commission case law, the resultant prejudice provides an additional basis for vacating the subject citations.

III. Part 46 Training Violations

As stated above, the September 1, 2009, Order to Show Cause noted that the denial of Stone's walkaround right does not effect the propriety of the Part 46 training violations in 104(g)(1) Order No. 6122908 and Citation No. 6122916 as these violations were not cited as a consequence of the physical inspection of the mine. 31 FMSHRC at 1275. Consequently, during an October 23, 2009, telephone conference with Stone and the Secretary's counsel, I explained that there is no basis for disturbing the operator's liability for these two violations if it is not contended that Part 46 training had occurred. As a result, Stone reluctantly agreed to withdraw the operator's contest of 104(g)(1) Order No. 6122908 and Citation No. 6122916, and to pay
the total $281.00 civil penalty for these two training violations. Letter from Pat Stone to Judge Feldman (Oct. 24, 2009).

IV. Ultimate Findings and Conclusions

In the final analysis, the Commission is a quasi-judicial independent agency created by Congress to adjudicate Mine Act disputes. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994). Although an executive branch agency, Commission decisions are reviewable by the Court of Appeals. *Id.* at 208 citing 30 U.S.C. § 816(a)(1). Due process, abuse of discretion and prejudice are related concepts that are applied by the judiciary to remedy abuses of governmental authority. As recognized throughout these proceedings, while the decision to allow walkaround rights is committed to the broad discretion of the inspector, the right to accompany an inspector is an important right that must not arbitrarily be denied. 30 FMSHRC at 550.

As noted in the Commission's remand in this matter:

> . . . the Commission has recognized the critical role that section 103(f) plays in the overall enforcement scheme of the Act, and has cautioned that "[w]e are not prepared to restrict the rights afforded by that section absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation.

31 FMSHRC at 827 citing *Consolidation Coal Co.*, 3 FMSHRC 617, 618 (Mar. 1981). The Secretary has failed to provide any rational justification for the denial of Stone's right to accompany the inspector. Accordingly, the subject citations shall be vacated as a consequence of the denial of Stone's section 103(f) right to be present during the inspection. The alternative is to ignore the denial of this important statutory right.

As a final note, due process violations and abuses of discretion generally occur as a result of errors in judgement or misunderstandings of the law rather than because of intentional wrongdoing, bad faith or misconduct. *United States v. Nolen*, 472 F.3d 362, 376 (5th Cir. 2006) (citations omitted). I am certain the inspector had a good faith belief that Stone was not entitled to exercise his walkaround right because the mine operator had not filed a mine identity report, and/or, because Stone had not received Part 46 new miner training. The inspector was wrong.

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 6122909, 6122910 and 6122911 (alleged guarding violations), 6122912 (alleged warning sign violation), 6122913 (alleged traffic control violation), 6122914 (alleged lack of a work place examination program), 6122915 (alleged failure of periodic fire extinguisher examinations), 6122917 (alleged failure to implement a hazardous chemical identification and training program), 6122918 (alleged lack of first aid materials), and 6122919 (alleged lack of toilet facilities) **ARE VACATED** on due process, abuse of discretion and/or prejudice grounds.

IT IS FURTHER ORDERED that the contests of SCP Investments, LLC, of the Part 46 training violations in 104(g)(1) Order No. 6122908 (lack of new miner training) and Citation No. 6122916 (lack of approved training plan) **ARE DISMISSED**.

IT IS FURTHER ORDERED that SCP Investments, LLC, shall pay, within 45 days of the date of this decision, a total civil penalty of $281.00 in satisfaction of 104(g)(1) Order No. 6122908 and Citation No. 6122916.

IT IS FURTHER ORDERED that upon timely payment of the $281.00 civil penalty, the civil penalty proceedings in Docket Nos. SE 2006-148-M and SE 2006-163-M **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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