

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 24, 2008

| | | |
|------------------------|---|---------------------------|
| 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 |

DISMISSAL ORDER

These matters concern 12 citations that were issued as a result of an inspection of the Old County Quarry conducted by Mine Safety and Health Inspector (MSHA) Jeffrey Phillips on December 14, 2005. The Secretary of Labor (“the Secretary”) proposes a \$1,087.00 civil penalty for these citations. The Secretary is represented by counsel. The respondent, SCP Investments, LLC (“SCP”), is appearing *pro se*.

I. Background

The Old County Quarry is a rock crushing facility operated by SCP. Pat Stone is the managing partner of SCP. According to Stone, the mine commenced operations in September 2005. Section 109(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Mine Act”), requires a mine operator to file with the Secretary the name and address of the mine, as well as the name and address of the person who controls the mine. 30 U.S.C. § 819(d). Consistent with the statutory provisions of section 109(d), Part 41 of the Secretary’s regulations requires mine operators to file a Legal Identity Report Form within 30 days of the opening of a new mine. 30 C.F.R. §§ 41.10, 41.11(a).

Section 103(f) of the Mine Act, 30 U.S.C. § 813(f), provides both the miner operator, and a miners’ representative, with the opportunity to accompany a mine inspector during a mine inspection. At the time of Phillips’ December 14, 2005, inspection, SCP had not filed the required Legal Identity Report Form registering the facility as an active mine. Consequently, Phillips ordered Stone to leave the mine property rather than allow Stone to accompany him during the mine inspection.

Before a miner begins working at a mine, section 46.5(b) of the Secretary’s regulations requires not less than 4 hours new miner training, including instruction addressing site-specific hazards. 30 C.F.R. § 46.5(b). However, miners who have not completed new miner training

may work at the mine if an experienced miner can observe the new miner performing his work in a safe manner. 30 C.F.R. § 46.5(a). Phillips reportedly ordered Stone off of mine property because Stone had not received Part 46.5 new miner training. Stone, on behalf of SCP, objects to not being allowed to remain on mine property during the inspection.¹

As a threshold matter, “[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 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 is a general good faith belief that an area to be inspected is too dangerous an adequate justification for denying walkaround rights. *Consol. Coal*, 16 FMSHRC at 718-19.

II. Show Cause Orders

To determine whether Stone’s statutory walkaround right was properly denied, on March 31, 2008, a Show Cause Order was issued requiring the Secretary to identify any regulation that warranted Phillips’ denial of Stone’s right to observe the inspection.² 30 FMSHRC 341. Specifically, the Secretary was requested to identify any regulation that supported the denial of Stone’s walkaround rights. In addition, the Secretary was asked to provide any Interpretive Bulletin or Memorandum addressing her implementation of the walkaround rights in section 103(f) that justified the denial of Stone’s participation. The Secretary was also requested to identify, by specific reference to her regulations, the requisite training that must be completed by a miners’ representative, or a mine operator, before he is allowed to be present during an inspection. Finally, the Secretary was ordered to identify, with specificity, the hazards that Stone would have been exposed to if he had observed Phillips’ December 14, 2005, inspection of this surface mine facility.

¹ As discussed herein, Part 46 new miner training is not material because the issue is not whether Stone was qualified to engage in mining. Rather, the issue is whether Stone was eligible to accompany Phillips on the inspection. Nevertheless, even individuals who have not completed new miner training are allowed to remain at a mine site if accompanied by an experienced miner. 30 C.F.R. § 46.5(a). As an authorized MSHA inspector, Phillips possesses the skills of an experienced miner.

² An Order to Show Cause and a Further Order to Show Cause were issued in this matter. The Secretary’s response to the initial Order is cited as “*Sec’y Resp.*” The Secretary’s response to the further Order is cited as “*Sec’y Resp. II.*”

The Secretary's response to the Order to Show Cause was filed on April 21, 2008. However, the Secretary did not provide the specific information requested. Instead, the Secretary relied on an inspector's broad discretion to preclude walkaround rights when necessary to protect the safety of miners. *Sec'y Resp.* at 7.

Stone's reply to the Secretary's initial response to the Order to Show Cause was filed on May 5, 2008. Stone related that Phillips denied his request to observe the inspection, that Phillips escorted him off of mine property, and that he was denied the opportunity to re-enter the mine site to retrieve keys that were left in several loaders.

Given the lack of specifics in the Secretary's response to the Order to Show Cause, a Further Order to Show Cause was issued on May 8, 2008, requiring the Secretary to specifically respond to the requested information in order to determine if the denial of Stone's right to observe the inspection was an abuse of discretion. 30 FMSHRC ___. A response was filed by the Secretary on May 29, 2008. The Secretary's response to the requested information is summarized below:

- (1) The Secretary should identify the regulations that support Phillips' denial of Stone's right to observe the inspection.

The Secretary responded that she is relying on the training requirements set forth in 30 C.F.R. § 46.5 (new miner training) and 30 C.F.R. § 46.11 (site-specific hazard awareness training).

Sec'y Resp. II at 1.

- (2) The Secretary should provide any Interpretive Bulletin or Memorandum addressing her implementation of the walkaround rights in section 103(f) that justifies the denial of Stone's right to be present during the inspection.

The Secretary responded that she is relying on the Interpretive Bulletin set forth at 43 Fed. Reg. 17546 (April 25, 1978). That bulletin interprets Section 103(f) of the Mine Act, 30 U.S.C. § 813(f), and states, in pertinent part, as follows:

Considerable discretion must be vested in inspectors in dealing with the different situations that can occur during an inspection. While *every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection* by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed, and orderly inspection.

Sec'y Resp. II at 1-2 (emphasis added).

(3) The Secretary should state whether or not a person who is not a miner, that is selected by miners as their authorized representative, is entitled to section 103(f) walkaround rights.

The Secretary noted that her regulations regarding representatives of miners, which implement Section 103(f) of the Act, are set forth in 30 C.F.R. Part 40. Section 40.1(b)(1) defines “representative of miners” as “[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act[.]” The Secretary conceded that section 103(f) of the Mine Act and section 40.1(b)(1) of her regulations traditionally have been interpreted to mean that a non-miner may be a representative of miners and may participate in an inspection. See *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1278-81 (10th Cir. 1995); *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1262-65 (D.C. Cir. 1994); *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447, 449-52 (10th Cir. 1990).

Sec’y Resp. II at 2.

(4) The Secretary should specify, by specific reference to her regulations, the requisite training that must be completed before a miners’ representative, or a mine operator, is allowed to be present during an inspection.

The Secretary responded that Section 46.11 requires site-specific hazard awareness training “for any person who is not a miner as defined by § 46.2 . . . but is present at a mine site[.]” MSHA can and normally does require that a miners’ representative receive hazard training under Section 46.11 before being allowed to participate in an inspection.

Sec’y Resp. II at 2.

(5) The Secretary should identify, *with specificity*, the hazards that Stone would have been exposed to if he had accompanied Phillips during this surface mine inspection.

The Secretary responded that the specific hazards to which Stone would have been exposed to if he had been allowed to participate in the inspection are irrelevant because Phillips was required to act before he began the inspection.

Assuming, for the sake of argument, that the specific hazards to which Stone would have been exposed are relevant, the Secretary relied generally on the hazards posed by the cited violations such as inadequate toilet facilities and a lack of traffic signs and signs prohibiting smoking. The Secretary did not cite any meaningful risk of exposure to hazards.

Sec’y Resp. II at 4-5.

(6) Noting that dismissal is a harsh sanction, the Secretary was requested to suggest what sanction should be imposed, other than vacating the citations and dismissal of this proceeding, if Phillips abused his discretion and Stone's section 103(f) rights were violated.

The Secretary responded that even if Inspector Phillips' action with respect to Stone was an abuse of discretion, dismissal is an impermissible sanction. The Secretary did not suggest any meaningful alternative sanctions.

Sec'y Resp. II at 5.

III. Discussion and Evaluation

a. The Secretary's Regulations and Interpretive Bulletin

Resolution of whether Stone's section 103(f) statutory right was unjustifiably denied is found in the language of the statute. Section 103(f) of the Mine Act provides, in pertinent part, "[s]ubject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany" an MSHA inspector during an inspection.³ 30 U.S.C. § 813(f) (emphasis added). Consistent with this statutory provision, the Commission has recognized that the walkaround right is a qualified right that may only be curtailed by the Secretary's regulations. *Consol. Coal*, 16 FMSHRC at 718.

However, the Secretary has not proffered any regulation that supports the denial of Stone's section 103(f) right of accompaniment. In this regard, the Secretary's reliance on Stone's lack of section 46.5 new miner training, and section 46.11 hazard training, is misplaced. With respect to section 46.5, significantly, the Secretary concedes miner training is not a prerequisite for observing an inspection. The Secretary admits non-miners, who are designated as representatives of miners, are entitled to section 103(f) walkaround rights. Moreover, the issue of miner training is not material as the issue is not Stone's qualifications to perform mining activities. Rather, the issue is Stone's right to observe an inspection.

³ 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.

Similarly, the Secretary cannot find support for Phillips' actions in her hazard training regulation. Section 46.11(f) provides:

Site-specific hazard awareness training is not required for any person who is accompanied at all times by an experienced miner who is familiar with hazards specific to the mine site.

30 C.F.R. § 46.11(f) (emphasis added).

Surely, Inspector Phillips is a qualified, "experienced" mining official who is well aware of mine safety issues. Thus, contrary to the Secretary's assertion, hazard training *is not required* if the walkaround person is accompanied by an experienced miner. In reaching this conclusion, I am not trivializing the importance of training. However, Stone's lack of training under these circumstances did not justify the denial of his right to accompany the inspector.

Finally, the Secretary's relevant publicized interpretive memorandum states that "every reasonable effort" to provide the opportunity for "full participation in an inspection" shall be afforded to section 103(f) walkaround participants. *See* 43 Fed. Reg. 17546. Contrary to the Secretary's policy, the denial of Stone's right to observe the inspection under the circumstances in this case lacked a concerted effort to encourage full participation.

b. Specific Hazards

The Commission has noted that Congress did not curtail walkaround rights in dangerous situations, even during inspections seeking to determine if an imminent danger exists. *Consol. Coal*, 16 FMSHRC at 718. Thus, a general belief that an area to be inspected is too dangerous is not an adequate justification for denying walkaround rights. *Id.* at 718-19. However, in extraordinary circumstances, the Secretary retains the right to preclude participation in inspections "where necessary to protect the safety of miners" because of discrete safety hazards. *Id.* at 719.

The hazards associated with the cited conditions in the subject citations, that are relied on by the Secretary to justify Phillips' action, 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. Rather, it is apparent that the denial of Stone's walkaround right primarily was predicated on SCP's failure to timely file a Legal Identity Report, rather than dictated by a concern for Stone's safety. Accordingly, there are no adequate safety concerns that support the denial of Stone's walkaround right.

c. Abuse of Discretion

The broad discretion accorded inspectors with respect to how they conduct inspections must be balanced with the fundamental right of a mine operator to be present during an inspection. While the decision to allow walkaround rights is committed to the broad discretion of an inspector, his discretion is not unfettered and may not be abused. The Commission has noted that 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.” *Energy West Mining Co.*, 18 FMSHRC 565, 569 (April 1996) (citations omitted).

Phillips’ reported belief that Stone’s lack of section 46.5 new miner training rendered him ineligible to observe the inspection is a misunderstanding of the law. As the Secretary concedes, even non-miners have section 103(f) walkaround rights. Moreover, the Secretary’s reliance on Stone’s lack of site-specific hazard training is undermined by the provisions of section 46.11(f) that allow Stone to participate in the inspection without hazard training if he is accompanied by a qualified and experienced person.

Finally, contrary to the Secretary’s assertion, the fact that a mine inspector may not have knowledge of site-specific hazards prior to an inspection is not a basis for denying walkaround rights to representatives of miners or mine operators. Although Phillips may not have been familiar with the site-specific hazards at the Old County Quarry rock crushing facility before he began his inspection, he is a qualified mine inspector with the expertise to identify and avoid exposure to mine hazards. Any other conclusion would disqualify mine inspectors from conducting inspections when they are unfamiliar with mine specific hazards before entering a mine. Thus, site-specific hazard awareness was not a prerequisite for Stone to accompany Phillips during the inspection.

d. Appropriate Sanction

The cited violative conditions have been corrected and the subject citations have been terminated. Consequently, there are no unresolved continuing safety issues. I believe this is a matter of first impression. I am cognizant that dismissal is a harsh sanction. However, a mine operator’s right to accompany an inspector must not arbitrarily be denied. The mine inspector’s abuse of discretion in this matter requires my exercise of discretion. For to do nothing would be an abuse of my discretion.

Commission Rule 55(h) authorizes the judge to make decisions in the proceedings before him. 29 C.F.R. § 2700.55(h). Under these circumstances, vacating the subject citations and dismissing these proceedings is an appropriate sanction. Dismissal should deter future unwarranted denial of a mine operator’s walkaround right. Consequently, the subject 104(g)(1) order and 104(a) citations will be vacated without prejudice. The Secretary may reissue the citations if the actions taken to abate the citations are rescinded, or, if the cited conditions otherwise remain unabated.

ORDER

In view of the above, **IT IS ORDERED** that 104(g)(1) Order No. 6122908 and 104(a) Citation Nos. 6122909, 6122910, 6122911, 6122912, 6122913, 6122914, 6122916, 6122917, 6122918 and 6122919 in Docket No. SE 2006-148, and, 104(a) Citation No. 6122915 in Docket No. SE 2006-163 **ARE VACATED without prejudice. IT IS FURTHER ORDERED** that the captioned civil penalty proceedings **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street,
Suite 230, Nashville, TN 37219

Pat Stone, SCP Investments, LLC, P.O. Box 82, Crab Orchard, TN 37723

/rps