

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 4, 2004

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 2003-59-M
Petitioner : A.C. No. 17-00282-05504
v. :
F.R. CARROLL, INCORPORATED, : Limerick Pit & Mill
Respondent :

DECISION

Appearances: Kathryn A. Joyce, Esq., Office of the Solicitor, U.S. Department
of Labor, Boston, Massachusetts, for the Petitioner;
Francis R. Carroll, President, F.R. Carroll, Inc., Limerick, Maine,
for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed
pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act),
30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent,
F.R. Carroll, Incorporated. Francis R. Carroll (Carroll), the corporate president,
appeared on behalf of the respondent. The Secretary proposes a civil penalty of \$250.00
for Citation No. 4569275 for an alleged violation of section 103(a) of the Mine Act,
30 U.S.C. § 813(a). This statutory provision grants Mine Safety and Health Administration
(MSHA) inspectors the right of entry to any mine without advance notice of an inspection.

This matter was heard on October 1, 2003, in Portland, Maine. The Secretary filed
a post-hearing Memorandum of Law. At the hearing, Carroll waived the right to file a
post-hearing brief. (Tr. 145). For the reasons discussed, Citation No. 4569275 shall be affirmed.
With respect to the appropriate civil penalty, Commission judges assess penalties de novo and are
authorized to reduce or increase the penalty proposed by the Secretary as circumstances warrant.
Topper Coal Co., 20 FMSHRC 344, 350 n.8 (April 1998); Sellersburg Stone Co., 5 FMSHRC
287, 291 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). As detailed below, a civil penalty of
\$500.00 shall be assessed for Citation No. 4569275 because of the seriousness of the gravity of
the violation, and because the respondent's conduct was willful, unjustifiable and inexcusable.

I. Findings of Fact

The Limerick Pit and Mill is a sand and gravel facility located in Limerick, Maine. It is operated by Francis Roger Carroll, who, as noted, is the corporate president. Michael P. Carroll, Carroll's son, is the vice-president. (Tr. 8-9). The facility consists of a processing plant where material is crushed and screened, and a quarry and off-site pits that are located approximately five miles from the processing plant. (Tr.81). Operations at the plant include concrete and asphalt production. Carroll's business employs approximately 63 people, 14 of whom work in mining operations. Some employees work both asphalt production and mining tasks. (Tr. 80). Carroll has operated his business since 1952. Carroll testified that MSHA inspectors have inspected his facility once or twice each year since 1970. (Tr. 82).

At the gravel pit equipment is used to remove material from the ground. At the quarry material is extracted by drilling and blasting. In both instances, after the material is removed from the earth, it is loaded and hauled by truck to the processing plant. (Tr. 17, 18, 81). There various products including crushed stone, asphalt, concrete, and sand and gravel are produced. These products are sold to the general public as well as public municipalities for road construction. (Tr. 18).

Donald Fowler has been an MSHA inspector for 27 years. He is assigned to MSHA's Northeastern District Office in Manchester, New Hampshire. To ensure compliance with safety and health standards, section 103(a) of the Mine Act requires MSHA to inspect underground mines at least four times a year, and surface mines at least twice a year. Fowler was scheduled to inspect the Limerick facility for a mandated semi-annual inspection on September 10, 2002. During this quarter, Fowler was responsible for inspecting a total of 80 mines. (Tr. 19).

On September 10, 2002, Fowler arrived at the Limerick pit at approximately 7:35 a.m. Because of his past experience, Fowler went directly to the pit rather than stopping at Carroll's office. Fowler explained that if he went to Carroll's office, he would have to wait for Carroll before he was permitted to start his inspection. In the past, Fowler had to wait for up to 45 minutes before Carroll was available. Fowler opined that delaying an inspection once the arrival of an inspector is known can compromise the effectiveness of an inspection. (Tr. 20-25).

Upon his 7:35 a.m. arrival at the pit, Fowler remained in his vehicle for approximately ten minutes to prepare his inspection paperwork. During this time, Fowler observed an excavator operator loading three trucks with material for removal to the plant. At approximately 7:45 a.m., Fowler approached the excavator operator, identified himself, and asked the operator whether he could communicate with Carroll to notify him of Fowler's presence. The operator replied that he would contact Carroll to inform him Fowler was on site. (Tr. 30).

Shortly before 8:00 a.m., approximately ten minutes after Fowler's conversation with the excavator operator began, Carroll arrived at the pit. (Tr. 31-33). Upon his arrival, Carroll expressed concern that Fowler did not initially stop at Carroll's office before proceeding to the pit. (Tr. 34). Despite MSHA inspections since 1970, Carroll asserted to Fowler that he was not allowed on mine property without a search warrant, and that he was a trespasser. (Tr. 34).

Fowler tried to explain that he was attempting to conduct an inspection as required by statute. Carroll replied that he had a previous appointment, and that he couldn't accompany Fowler on his inspection until 1:00 p.m. that afternoon. (Tr. 34-35). Carroll testified he had a 9:30 a.m. appointment with Ted Jones, a lobbyist for Maine Aggregate. (Tr. 84).

Fowler informed Carroll that he could not wait four hours to begin his inspection. He provided Carroll with a copy of the Mine Act, explaining that he had a right to conduct his inspection without a search warrant. (Tr. 34-36).

Carroll testified that, shortly after arriving at the pit, he radioed his son Michael, instructing him to call the Sheriff's Department to send an officer to the mine site. (Tr. 95). A few minutes after Fowler began his conversation with Carroll, Michael arrived at the pit. Carroll testified that Michael Carroll was too busy to accompany Fowler on his inspection because "he was buried in [paperwork] records" and "we have to get the work out the door." (Tr. 97, 103).

The conversation concerning Fowler's right of entry continued during which time Carroll advised that he had called the York County Sheriff to have Fowler removed from the property. Shortly thereafter, a York County Sheriff arrived at the scene. (Tr.37). It soon became apparent that the Sheriff did not know what to do after Fowler identified himself as a federal official authorized to carry out his duties under federal law. The Sheriff requested back-up assistance. (Tr. 37-38). Carroll testified:

The Sheriff, when he got there, he didn't know what to do with him, and I knew he wouldn't know what to do with him. He said to me, I can't throw him off, I can't.

(Tr. 90). Within minutes, another Sheriff, who appeared to be a senior officer, arrived and took charge of the scene. (Tr. 38).

Carroll and Fowler explained their respective positions to the Sheriffs. (Tr. 39). The lead Sheriff then asked Fowler if he would leave the premises. Fowler replied "no." (Tr. 39-40). Fowler explained to the Sheriffs that he had jurisdiction and that he was not leaving the property at the Sheriff's request. (Tr. 40). Fowler then turned to Carroll and Michael and said, ". . . I'm going to ask you one more time with the county sheriffs as my witnesses . . . to let me continue this inspection . . ." (Tr. 40). Carroll refused. (Tr. 40). Consequently, Fowler verbally issued a citation for denial of entry and left the mine property. The time was 8:35 a.m. (Tr. 70-71).

It is MSHA policy for inspectors to immediately advise superiors of a denial of entry. Thus, after exiting the mine site, Fowler drove into town to telephone Donald Foster of the District Office in Warrendale, Pennsylvania, the office to which the New Hampshire region reported. (Tr. 41). After discussing the morning's events, Foster instructed Fowler to issue a written citation citing section 103(a) of the Mine Act for denial of entry. (Tr. 41-42).

Upon completing the citation, Fowler telephoned Foster to communicate the contents of the citation for Foster's approval. MSHA policy requires that a written citation for a section 103(a) violation must be served on the party denying entry. Fowler contacted the Sheriff's Department to advise that he was returning to the mine site to serve the citation. (Tr.45-46).

Fowler returned to the mine site at approximately 1:00 p.m. and went directly to Carroll's office. Fowler told Carroll that he needed to discuss the citation and he presented Carroll with Citation No. 4569275 citing a violation of section 103(a) of the Mine Act. Carroll invited Fowler into his office whereupon Fowler testified the two had a "real good conversation" about MSHA's role with particular emphasis on the right of entry. (Tr. 46-47). The meeting ended with Carroll inquiring when Fowler could return to perform his inspection. Fowler replied that he could not tell him when the inspection would be. In view of Carroll's representation that he would permit an inspection, Fowler terminated Citation No. 4569275 at 1:33 p.m. and left the mine site. (Gov. Ex. 1; Tr. 48). Fowler subsequently inspected Carroll's facility and did not observe any violations.

Carroll testified that he would like "to be treated like a human being," and that he objected to "Gestapo" tactics. (Tr. 85, 88). He expressed frustration over being over-regulated by numerous state and federal agencies. (Tr. 87-88). Carroll testified, "I can't understand why we are here today" because after five hours, at 1:30 p.m. on September 10, 2002, when Citation No. 4569275 was terminated, he "had agreed to the inspection continuing." (Tr. 92).

II. Pertinent Case Law and Statutory Provisions

As a threshold matter, it is well settled that sand and gravel quarries are governed by the Mine Act because they affect commerce even if they are primarily intrastate in nature. *See, e.g., Jerry Ike Harless Towing, Inc*, 16 FMSHRC 683, 686 (April 1994) *citing Fry v. United States*, 421 U.S. 542, 547 (1975) and *Wickard v. Filburn*, 317 U.S. 111 (1942). Carroll does not assert that his quarry business does not affect interstate commerce, or, that his business activities consisting of the extraction and processing of sand a gravel, are not subject to Mine Act jurisdiction.

The U.S. Supreme Court has recognized that section 103(a) of the Mine Act authorizes warrantless inspections by granting MSHA inspectors the right of entry to, upon, or through any mine, **without advance notice**, to determine if there is compliance with mandatory health and safety standards. *Donovan v. Dewey*, 452 U.S. 594, 596 (1981); *see also Unites States Steel Corp.*, 6 FMSHRC 1423, 1430-31 (June 1984). The Court explained:

[It is] clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

Dewey, 452 U.S. at 600.

Consistent with *Dewey*, the Commission has long held that a mine operator's refusal to permit inspections is a violation of section 103(a). *Waukesha Lime & Stone Co., Inc.*, 3 FMSHRC 1702, 1703-04 (July 1981); *United States Steel*, 6 FMSHRC 1423, 1430-31 (June 1984); *Calvin Black Enterprises*, 7 FMSHRC 1151, 1156 (August 1985). However, MSHA's entry is not absolute. In *Dewey*, the Court acknowledged a mine operator's right to demonstrate, in an adjudicative forum, that a specific inspection is outside federal regulatory authority because of "unusual privacy interests" such as the potential disclosure of trade secrets. 452 U.S. at 604-05.

When mine entry is denied, the Secretary may pursue injunctive relief, or, as in the instant case, bring a civil penalty action before the Commission alleging a violation of section 103(a) of the Mine Act. *Waukesha*, 3 FMSHRC at 1703-04. The party denying entry may defend its action in a neutral adjudicative proceeding. If it is determined that there is no justification for the denial of entry, injunctive relief or civil penalties may be imposed.

III. Further Findings and Conclusions

A mine operator denying entry, particularly an operator like Carroll's business that has been inspected by MSHA for over 30 years, does so at its own "legal peril" absent a showing of "unusual privacy interests." *Secy. of Labor v. Tracey & Partners*, 11 FMSHRC 1457, 1462 n.3 (August 1989). It has neither been contended nor shown that Fowler's attempted inspection on the morning of September 10, 2002, was an unwarranted invasion of Carroll's privacy. Rather, the sole basis for Carroll's denial of entry was that **both** he and his son were too busy to accompany Fowler on his inspection.

The importance of unannounced inspections proceeding without delay is self-evident. Such inspections encourage compliance by preventing mine operators from concealing hazardous violations upon learning that mine inspectors have arrived on the premises. Thus, Carroll's insistence on delaying Fowler's inspection five hours until 1:00 p.m. must be viewed as unreasonable. If Carroll and his son were "too busy" to accompany Fowler, then it was incumbent on Carroll to designate someone else to accompany Fowler. If Carroll could not find someone to fulfill this role, Carroll was obliged to permit Fowler to conduct his inspection unaccompanied.

In considering the conduct of Fowler and Carroll, there was nothing in Fowler's behavior on September 10, 2002, that demonstrates overreaching or an abuse of discretion. Upon arriving at the mine site, Fowler promptly requested the excavator operator to notify Carroll of his presence. Fowler explained the mandatory inspection requirements specified in section 103(a) of the Mine Act. Fowler repeatedly asked Carroll to allow him to proceed with his inspection, explaining why Carroll's request that he return at 1:00 p.m. could not be granted. In apparent recognition that the Mine Act prohibits forcible entry, Fowler voluntarily left mine property to avoid further confrontation. 30 U.S.C. § 818. Finally, Fowler did not charge Carroll with any violations of mandatory safety standards during the inspection that followed Carroll's denial of entry reflects that Fowler harbored no ill will towards Carroll.

In contrast, there are no mitigating circumstances to justify Carroll's conduct. After all, Carroll's mine had been inspected by MSHA since 1970. As the Court noted in *Dewey*, a mine operator "cannot help but be aware that his property will be subject to periodic inspections." 452 U.S. at 600. Carroll's concession that he knew the Sheriff "would not know what to do with [Fowler]" demonstrates that Carroll recognized Fowler was a federal official who was acting within the scope of his authority. (Tr. 90). In the final analysis, Carroll created an awkward confrontation between federal and local officials by his insistence that the Sheriff remove Fowler from mine property although Carroll knew, or should have known, his request was unreasonable. This entire incident occurred because Fowler's inspection apparently was an inconvenience. As discussed above, Congress mandated that section 103(a) periodic inspections are to be unannounced. Mine operators must permit such inspections to occur unimpeded and without delay. Accordingly, Citation No. 4569275 **IS AFFIRMED**.

IV. Civil Penalty

_____As noted, Commission judges assess civil penalties *de novo*, and they are not bound by the Secretary's proposed assessments. *Topper Coal, supra; Sellersburg Stone, supra*. In determining the appropriate civil penalty to be assessed, Commission Rule 30, 29 C.F.R. § 2700.30, requires the judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). In determining the appropriate civil penalty, section 110(i) provides, in pertinent part:

the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

a. Size of Operator and Ability to Remain in Business

The respondent is a small to moderate mine operator. Carroll does not contend that imposition of a reasonable civil penalty in this matter will adversely affect his business' continued viability.

b. Negligence

With respect to negligence, Carroll's conduct was willful, unjustifiable and inexcusable. Given the 30 year history of mine inspections, Carroll's unreasonably created a confrontation between federal and local officials although Carroll knew, or should have known, that Fowler was authorized to conduct an inspection without a search warrant.

c. Gravity

The gravity penalty criterion contained in section 110(i) requires an evaluation of the seriousness of the violation. *Hubb Corporation*, 22 FMSHRC 606, 609 (May 2000) *citing Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996); *Sellersburg*, 5 FMSHRC at 294-95. In evaluating the seriousness of a violation, the Commission focuses on "the affect of a hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Here, refusing to allow an inspection creates the potential that hazardous conditions that expose mine personnel to the risk of serious injury will continue to exist. Consequently, the violation is indicative of extremely serious gravity.

d. History of Previous Violations

Fowler testified that Carroll's mine facility operates in accordance with safety and health standards. Significantly, Fowler did not observe any violations of mandatory safety standards during the inspection that followed Carroll's denial of entry. Fowler further testified that the mine facility has an excellent record with respect to its history of previous violations.

e. Good Faith Efforts at Abatement

As noted, Carroll's conduct cannot be condoned. Carroll's continued refusal to permit Fowler to perform the inspection was unreasonable and in bad faith. Carroll's belated consent to an afternoon inspection is not a mitigating factor.

When considering the penalty criteria in their entirety, the undisputed facts in this case warrant a higher penalty than the \$250.00 civil penalty initially proposed. As the Commission has stated, a mine operator denies entry at its own legal peril. *Tracey & Partners*, 11 FMSHRC at 1462 n.3. With the exception of Carroll's excellent safety record, there are no mitigating circumstances. Carroll's disingenuous insistence that the Sheriff escort Fowler off mine property because "he's trespassing" presents a compelling case for increasing the proposed penalty. (Tr. 90). Consequently, a civil penalty of \$500.00 shall be imposed for Citation No. 4569275.

As a final note, I have exercised restraint. Although the assessed \$500.00 civil penalty is double that initially proposed by the Secretary, it only increases the civil penalty by \$250.00, and, there is no evidence that it will cause financial hardship. Hopefully this relatively small increase in penalty is enough of a deterrent to encourage future cooperation and compliance.

ORDER

Accordingly, **IT IS ORDERED** that Citation No. 4569275 **IS AFFIRMED**.

IT IS FURTHER ORDERED that F. R. Carroll, Incorporated, shall pay a civil penalty of \$500.00 in satisfaction of Citation No. 4569275. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the \$500.00 civil penalty, Docket No. YORK 2003-59-M **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

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