

CCASE:

MSHA V. TRACEY & PARTNERS,
RANDY ROTHERMEL, TRACEY PARTNERS

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

August 28, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket Nos. PENN 87-121-R
PENN 87-122-R
PENN 87-124-R
PENN 87-176
PENN 87-235

v.

TRACEY & PARTNERS,
RANDY ROTHERMEL, TRACEY PARTNERS

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Ford, Chairman; Doyle and Nelson, Commissioners

The issue presented in this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), is whether Tracey & Partners, Randy Rothermel, Tracey Partners ("Tracey") violated section 103(a) of the Mine Act because of its refusals to permit an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") to conduct spot inspections pursuant to section 103(i) of the Act. 1/ MSHA issued Tracey two

1/ Section 103(a) of the Act states:

Purposes; advance notice; frequency, guidelines; right of access

Authorized representatives of the Secretary ...

shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining

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whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or

decision issued under this [Act].... In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this [Act], and his experience under this [Act] and other health and safety laws. For the purpose of making any inspection or investigation under this [Act], the Secretary...with respect to fulfilling his responsibilities under this [Act]...shall have a right of entry to, upon, or through any coal or other mine. 30 U.S.C. •813(a).

Section 103(i) of the Act states:

Spot inspections

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot

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citations under section 104(a) of the Act and a failure to abate withdrawal

order under section 104(b) of the Act, 30 U.S.C. § 814(a)-(b), for Tracey's refusals to permit access to its mine. Commission Administrative Law Judge George A. Koutras concluded that MSHA's attempts to conduct the spot inspections under section 103(i) were improper, vacated the contested citations and withdrawal order, and dismissed the Secretary's proposals for assessment of civil penalties. 9 FMSHRC 2127 (December 1987)(ALJ). We granted the Secretary of Labor's petition for discretionary review of the judge's decision. For the reasons that follow, we affirm.

The essential facts were stipulated by the parties. The citations and order were issued at the Tracey Slope Mine, an underground anthracite coal mine located in Schuylkill County, Pennsylvania. The mine employs three to five miners underground and produces approximately 4,000 tons annually. During the 24 months preceding the issuance of the contested citations and orders, the mine was subjected to 142 inspection days and cited for a total of 24 citations. Stipulations 16 and 17, 9 FMSHRC 2131. A methane explosion had occurred at the mine on February 10, 1982, resulting in serious injuries to three miners. As a result, MSHA placed the mine on a five-day spot inspection cycle under section 103(i) of the Mine Act. Section 103(i) mandates, in part, that, whenever the Secretary finds that a methane explosion that results in death or serious injury has occurred in a mine at any time during the previous five years, the Secretary shall provide a minimum of one spot inspection during every five working days, at irregular intervals.

The record reflects that no methane ignitions or explosions that resulted in serious or fatal injury had occurred at this mine since the accident on February 10, 1982, nor had the mine liberated "excessive quantities of methane" as that terminology is defined in section 103(i). The mine did have a methane ignition in 1985 but there were no injuries. On September 15, 1986, six months prior to the fifth anniversary of the February 10, 1982 explosion, Tracey sent MSHA a detailed letter setting forth its reasons as to why the mine should be removed from the section 103(i) spot inspection cycle when the five years elapsed on February 10, 1987. The letter was prompted in part by Tracey's discovery that a neighboring mine had been removed from the section 103(i) cycle seven years after it had experienced a methane explosion similar to the one that occurred at Tracey's mine in 1982. No written response was forthcoming from the agency and one MSHA witness speculated that Tracey's letter had been lost or mislaid. 9 FMSHRC 2141, 2143, 2146.

On the morning of February 12, 1987, two days after the fifth anniversary of the 1982 methane explosion, MSHA Inspector Victor G. Mickatavage arrived at the mine to conduct a section 103(i) spot

inspection by his authorized representative of all or part of such mine every 15 working days at

irregular intervals.

30 U.S.C. •813(i).

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inspection. Randy Rothermel, an owner and the managing partner of the mine, denied Mickatavage entry to the mine to conduct the section 103(i) spot inspection but stated his willingness to permit any other type of inspection. Mickatavage thereupon issued to Tracey a citation alleging a violation of section 103(a) of the Act for denial of entry. After allowing 45 minutes for abatement, Mickatavage requested entry to conduct the section 103(i) spot inspection and again was denied entry. Mickatavage then issued a section 104(b) withdrawal order for failure to abate the citation, again alleging a violation of section 103(a) of the Act. The withdrawal order did not prohibit entry into the mine.

On February 17, 1987, the inspector returned to the mine and issued a modification to the February 12, 1987, citation and withdrawal order that indicated the entire underground area of the mine was affected. Tracey again denied entry to perform a section 103(i) inspection, but the inspector took no new enforcement action. Two days later, however, when Tracey denied Mickatavage entry to the mine to conduct a section 103(i) spot inspection, the inspector issued a second citation alleging Tracey's failure to comply with the section 104(b) withdrawal order as modified and asserting a violation of section 103(a) of the Mine Act. On March 23, 1987, a section 103(i) inspection on the mine was finally permitted.

Tracey filed notices of contest of the citations and order, and the Secretary proposed civil penalties for the alleged violations. These matters were consolidated and proceeded to hearing before Judge Koutras. At the hearing, Tracey contended that the requested section 103(i) spot inspections were unlawful because none of the criteria set forth in section 103(i) with respect to such inspections were satisfied at the time of its denial of entry. Tracey maintained that section 103(i) inspections are strictly limited by the terms of the statute. In response, it was argued for the Secretary that, under section 103(a), she possesses an absolute right of entry to perform inspections authorized by the Mine Act, and that she has discretion based on the particular conditions present in a mine to determine whether that mine should remain subject to the section 103(i) spot inspections that were originally triggered by a methane ignition resulting in death or serious injury. The Secretary contended that MSHA acted within its statutory authority in continuing the section 103(i) spot inspections beyond the five-year anniversary of the triggering methane ignition, based on its continued concern for methane gas in the mine as well as concern about the mine's ventilation and roof control systems, escapeways, and projected development toward impounded water. Judge Koutras concluded that, although section 103(a) of the Act gives MSHA a right of entry into the mine for inspection purposes, its specific authority to conduct spot inspections every five days pursuant

to section 103(i) is subject to the following conditions delineated in that section: (1) liberation of excessive quantities of methane or other explosive gases during its operations, namely, more than one million cubic feet of methane or other explosive gases during a 24-hour period; (2) a methane or other gas ignition or explosion resulting in death or serious injury at any time during the previous five years; and (3) the existence in the mine of especially hazardous conditions. 9 FMSHRC

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at 2145.

Concerning the first and second statutory conditions giving rise to the section 103(i) inspections, the judge noted that MSHA had stipulated "that the mine had not liberated excessive quantities of methane' as that term is defined by section 103(i)" and that MSHA had also stipulated that no methane ignitions or explosions resulting in serious injury had occurred in the mine since the accident of February 10, 1982. 9 FMSHRC at 2148, 2157. Regarding the third condition, the judge considered MSHA's concern about the mine's ventilation, roof conditions, escapeways, and planned development, but found that MSHA had failed to show that this concern warranted inspections every five days under section 103(i). 9 FMSHRC at 2149-55, 2156-57. The judge also found there was no credible evidence that MSHA had ever conducted a detailed methane or ventilation survey at the mine to support its generalized and speculative conclusions that methane liberation is, in fact, a hazard at the mine. 9 FMSHRC at 2149, 2152, 2157. 2/

Based on these determinations, the judge concluded that MSHA had failed to establish good cause for maintaining the mine on a five-day section 103(i) inspection cycle and that, accordingly, Tracey's refusal to allow entry into the mine for the purpose of conducting such section 103(i) inspections was justified and not in violation of section 103(a) of the Mine Act. 9 FMSHRC at 2156-57. The judge vacated the citations and order and dismissed MSHA's proposals for assessment of civil penalties. 9 FMSHRC at 2157.

On review, the Secretary argues that the judge erroneously failed to conclude that MSHA had an unlimited right of entry to the Tracey Slope Mine under section 103(a) of the Mine Act. The Secretary also contends that the judge erred in failing to conclude that MSHA properly exercised its discretion in seeking to conduct section 103(i) spot inspections.

The Secretary submits that under the second statutory condition or trigger, the terminology as to five-years does not set a ceiling on a section 103(i) inspection cycle triggered by a death or serious injury-causing ignition but, in effect, provides only a minimum floor. The Secretary also argues that further five-day spot inspections were justified because of the existence of other hazardous conditions in the mine. We disagree.

There is no question that section 103(a) of the Mine Act confers upon MSHA a broad right of entry to mines for purposes of inspection

and investigation. Section 103(a) expressly grants authorized representatives of the Secretary a right of entry to all mines for the purpose of performing inspections under the Act. E.g., *United States Steel Corp.*, 6 FMSHRC 1423, 1430-31 (June 1984). However, the

2/ The judge noted that Tracey, in its September 15, 1986, letter seeking removal from the section 103(i) inspection cycle, advised MSHA that recent air samples gathered by MSHA inspectors indicated that the maximum amount of methane liberated at the mine during a 24-hour period was 87,000 cubic feet. This is somewhat less than 10 percent of the amount necessary to invoke the first condition of section 103(i).

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Secretary's right of entry is not unlimited or absolute. The Supreme Court has acknowledged a mine owner's right to show, in an appropriate adjudicative forum, that a specific Secretarial "search" is "outside the federal regulatory authority" or to seek accommodation of "any unusual privacy interests." *Donovan v. Dewey*, 452 U.S. 594, 604-05 (1981). 3/ Moreover, we concur with the judge that section 103(i) clearly defines and limits the Secretary's authority to conduct five-day spot inspections pursuant to the authority of that provision. The parties' stipulations establish that the Secretary sought entry for the purpose of carrying out section 103(i) five-day spot inspections. See 9 FMSHRC at 2130-31; Stips. 10, 13, & 14. The Secretary makes no claim that her efforts to conduct these challenged section 103(i) inspections were justified under the first condition set forth in section 103(i) (liberation of "excessive quantities of methane or other explosive gases"). Like the judge, we discern no warrant on this record for the inspections under either the second or third conditions of section 103(i).

We first examine the Secretary's contention that she possessed discretion under section 103(i) to maintain the Tracey mine on the five-day spot inspection cycle. It is a cardinal principle of statutory construction that, in the first instance, we must seek the meaning of this statute in the language in which it is expressed. If the meaning of that language is plain, the statute is to be enforced according to its terms unless it can be established that Congress clearly intended the words to have a different meaning. See, e.g., *Caminetti v. United States* 242 U.S. 470, 485 (1916); *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Matala v. Consolidation Coal Co.*, 647 F.2d 427, 429-30 (4th Cir. 1981). See also *Western Fuels-Utah, Inc.*, 11 FMSHRC 278 (March 1989), appeal docketed, No. 89-1258 (D.C. Cir. April 20, 1989).

In our opinion, section 103(i), as relevant here, displays a plain and unambiguous meaning. Whenever the Secretary finds that a methane or other gas ignition or explosion resulting in death or serious injury has occurred at any time during the previous five years, she must provide a

3/ When entry to a mine is denied, the Secretary may pursue an injunction to gain entry pursuant to section 108 of the Act, 30 U.S.C. •818 (Dewey, 452 U.S. at 604-05), and/or a civil penalty proceeding before the Commission alleging a violation of section 103(a) of the Act. Waukesha Lime & Stone Co., Inc., 3 FMSHRC 1702, 1703-04 (July 1981). In each instance, the party denying entry is permitted to appear before a neutral judicial forum to defend its action. Entry to the Secretary is denied at one's legal peril. If the adjudicatory body determines that there was no justification for the refusal of entry, injunctive relief and/or civil penalties under the Act may be imposed. On the other hand, if inspection is determined to be "outside federal regulatory authority," the denial of access will not be punished under the Act. MSHA indicated at the hearing that a court injunction was not sought because the violations in issue had been abated when Tracey finally permitted access on March 23, 1987.

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minimum of one spot inspection by her authorized representative of all or part of the mine during every five working days, at irregular intervals. After the five-year period has expired without another incident of a gas ignition or explosion resulting in death or serious injury, it is obvious that there is no longer such an event "during the previous five years." By the express language of the statute, therefore, the Secretary is neither required, nor granted "discretion," to continue a minimum of one spot inspection every five working days where she cannot show that such an event has occurred during the previous five years.

The Secretary asserts that her construction of the statute must be accorded deference. While the Secretary must be accorded deference when a statute is silent or ambiguous, effect must be given to the "unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, supra at 843. We believe that Congress, when it drafted section 103(i), was quite specific in setting forth the instances in which it intended the Secretary to deploy her resources in conducting five, ten, and fifteen day inspections under that section. We find no support whatsoever in the statute for the Secretary's interpretation. We conclude that section 103(i) plainly means that, in this instance, the five-day inspection cycle based on the second condition terminates upon the fifth anniversary of the initial ignition, if no further triggering event has occurred during that five-year period.

With respect to the Secretary's various arguments concerning hazardous conditions in the Tracey Slope Mine, it is not entirely clear whether she is suggesting that these conditions support her claim of discretion to continue spot inspections pursuant to the second condition of section 103(i) or whether she is attempting to raise a separate justification for her enforcement actions. We have already demonstrated that, under the circumstances presented here, an exercise of discretion

based on the second condition cannot be reconciled with the plain text of section 103(i). A right of inspection based upon the third condition of section 103(i) was explicitly waived by the Secretary at the hearing when her counsel indicated that while "other hazardous conditions" could be a basis for continued section 103(i) five-day inspections, the foundation for the requested inspections was the second statutory trigger. Tr. 95, 131, 133.35, 138, 139, 155, 182. The Secretary's counsel also indicated that there was a procedure used by MSHA for putting a mine on an inspection cycle based on the third statutory trigger, which course had not been followed. Tr. 133-35. 4/

4/ As noted above, a combination of section 103(i) spot inspections and the regular quarterly inspections mandated by the Act resulted in 142 inspection days expended at the Tracey mine during the 24 months preceding the instant dispute. Given the evidence of record that the mine operated an average of four days per week, that translates to more than one inspection every three days. Yet with such heightened inspection activity only 24 citations were issued during that 24-month period, or .17 citations per inspection day. While we are not bound by the Secretary's civil penalty criteria set forth in 30 C.F.R. Part 100, ~1464

We turn to the Secretary's alternative argument that further spot inspections under section 103(i) were authorized under the general inspection powers conferred upon her by section. 103(a). We agree with the general proposition that all physical inspections of mines under section 103 are conducted pursuant to the basic authority of section 103(a). We further agree that the Secretary has considerable authority to conduct inspections under section 103(a) of the Act. Section 103(a) also grants the Secretary authority to conduct general "spot" inspections, as distinguished from the more specifically described "spot" inspections under section 103(i). See *United Mine Workers v. FMSHRC*, 671 F.2d 615, 623-24 (D.C. Cir. 1982); *Consol. Coal Co. v. FMSHRC*, 740 F.2d 271, 273 (3rd Cir. 1984); *Monterey Coal v. FMSHRC*, 743 F.2d 589, 593 (7th Cir. 1984). (Tracey concedes that "spot" inspections under section 103(a) are authorized. Tr. 151-52.)

All this being stated, however, Tracey has been cited for violating section 103(a) because it did not accede to an MSHA inspector's section 103(i) inspection requests. Although a valid section 103(i) inspection is, to an extent, also an inspection made pursuant to section 103(a) of the Mine Act, we believe that a section 103(i) "spot" inspection must be valid in the first instance under section 103(i) itself. The Secretary is granted the right of entry into a mine only as authorized by the Mine Act. 5/ The Secretary's proffered basis for obtaining entry into Tracey's mine was section 103(i) of the Mine Act and, as discussed, the conditions under which an inspection can be made pursuant to that section were

unavailable to the Secretary at the time she attempted her inspection. We emphasize that denial of access to an MSHA inspector, even in the limited context presented here, is an action not to be taken lightly. As noted in n. 3, the potential consequences of such a unilateral step can be severe. What the record makes abundantly clear, however, is that in this case we have an insistence by the inspector on an inspection of the mine pursuant only to section 103(i). Tracey offered access to the mine under the general authority of the Secretary pursuant to section 103(a). The inspector chose instead to cite Tracey for its refusal to submit to an inspection pursuant to section 103(i), a refusal that was based on its sincere belief that the Secretary's

we note that section 100.3(c) of those criteria provides that penalties are not increased on the basis of past compliance history unless that history indicates more than .3 violations per inspection day. Thus, by the Secretary's own criteria and in light of a rather pervasive inspection presence at Tracey's mine, we find no objective basis for the Secretary's attempt to extend the five-day cycle. 5/ For example, in *Sewell Coal Co.*, 1 FMSHRC 864 (July 1979)(ALJ), cited in *Peabody Coal Company*, 6 FMSHRC 183,

186 n.5 (February 1984), the operator's denial of MSHA access to certain business records not required to be maintained by the Mine Act was upheld. Although that case, unlike this one, involved expectation of privacy issues, the right of entry found in section 103(a) was nevertheless circumscribed to the inspection of records required to be maintained and accessible under the Act.

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authority to conduct a section 103(i) inspection had expired. 6/ It is significant to note that the inspector could have performed the identical tests under the access proffered pursuant to section 103(a) that he had previously performed under section 103(i). The inspector is not precluded from making spot inspections of the mine at least every five days under the auspices of section 103(a). Therefore, we see no overriding safety issue involved in these proceedings.

Thus, because the Secretary's attempts to conduct section 103(i) inspections under the circumstances presented by this case were "outside the federal regulatory authority," Tracey's denial of access did not violate section 103(a) of the Act. See *Donovan v. Dewey*, 452 U.S. at 604-05. Tracey indicated its willingness to permit any other type of inspection. The Secretary could have exercised her discretion to conduct spot inspections authorized under section 103(a) for purposes of "determining whether an imminent danger exists" or "determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under [the Mine Act]."

Accordingly, and for the foregoing reasons, we affirm the judge's decision.

6/ We emphasize that Tracey's limited refusal of access to the inspector under section 103(i) was in large part the result of MSHA's persistent failure to respond officially to the operator's letter requesting that the mine be taken off the section 103(i) cycle and stating its reasons in support thereof. We agree with the judge that MSHA had "the responsibility and obligation to respond in writing to an operator's request of this kind." 9 FMSHRC 2146. Furthermore, after several informal discussions with inspectors regarding the applicability of section 103(i) to Tracey's circumstances, Rothermel testified that the inspectors told him that "if you think that's the law, you have to fight it. So that's what we're doing here today." Id. at 2141.

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Commissioners Backley and Lastowka, dissenting:

In its decision, the majority approves a mine operator's denial of entry to an MSHA inspector at a mine to conduct an inspection to determine whether the operator was complying with mandatory safety and health standards. The inspection sought to be performed by the inspector was one authorized by section 103(a) of the Mine Act and the inspector therefore possessed a clear right of entry into the mine to conduct the inspection. 30 U.S.C. •813(a). Thus, there is no basis in law or fact for the majority's decision upholding the administrative law judge's approval of the operator's denial of access. Accordingly, we dissent.

Section 103(a) of the Mine Act sets forth the Secretary's authority to make frequent inspections and investigations in our Nation's mines. In relevant part, section 103(a) authorizes "frequent inspections" for the purpose of..." (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act." Id. Section 103(a) further provides that "[f]or the purpose of making any inspection or investigation under this Act, the Secretary ... or any authorized representative of the Secretary ... shall have a right of entry to, upon, or through any coal or other mine." Id. (emphasis added).

The Supreme Court has concluded that "the general program of warrantless inspections authorized by •103(a) of the [Mine] Act does not violate the Fourth Amendment." *Donovan v. Dewey*, 452 U.S. 594, 605 (1981). In upholding the Secretary's right of entry, the Court emphasized the "substantial federal interest in improving the health and safety conditions in the Nation's ... mines", and that "the regulation of mines ... is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he 'will be subject to effective inspection'." 452 U.S. at 602, 603 (citation omitted). Consistent with *Dewey*, the

Commission has held that a mine operator's failure to permit inspections authorized by the Mine Act violates section 103(a) of the Act. *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).

Supplementing the broad grant of inspection authority provided in section 103(a), the Mine Act specifies certain types of more specialized mine inspections. For example, section 103(i) requires the Secretary to conduct inspections with increased frequency if she finds that certain hazardous conditions, including the presence of excessive levels of explosive gases, have been found to exist at a mine. 30 U.S.C. •813(i). As relevant here, section 103(i) requires the Secretary to inspect at least once every five working days any mine in which a gas ignition or explosion has occurred during the previous five years that resulted in death or serious injury. *Id.*

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This provision requiring more frequent specialized inspections had its genesis in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. •801, 813(i)(1976)(amended 1977)("Coal Act"). The legislative history of the Coal Act reveals that the bill that passed the Senate required the Secretary to station an inspector at underground coal mines that liberated excessive levels of explosive gases on a daily basis.

Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong. 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1511 (1975). Comparatively, the House bill required 26 spot inspections per year at such mines, and at other especially hazardous mines including mines that had experienced a gas ignition during any five year period. *Id.* The Conference Committee adopted the House bill with certain amendments including a minimum inspection frequency of once every five working days at such especially hazardous mines. *Id.* The House bill, as amended, was adopted because the Senate requirement to inspect excessively gassy mines on a daily basis would have depleted the Secretary's finite resources. *Id.* at 1347-48.

Thus, the legislative history makes clear that subsection (i) of section 103 was adopted to insure that the Secretary would pay particular attention to those mines that Congress determined to be especially hazardous and deserving of increased regulation.

Nevertheless, all inspections of mines conducted by the Secretary for the purpose of determining whether there is compliance with mandatory safety or health standards or whether an imminent danger exists, including those inspections made pursuant to section 103(i), are made pursuant to the basic grant of inspection authority in section 103(a). Section 103(i) does not contain a grant of independent inspection authority; for example, only subsection (a) authorizes the Secretary to make warrantless searches of mines. *Donovan v. Dewey*, *supra*. The United States Courts of Appeals

for the District of Columbia, Third, and Seventh Circuits have each specifically held that under the Mine Act all inspections, including section 103(i) inspections, are conducted pursuant to section 103(a). In *United Mine Workers v. FMSHRC*, 671 F.2d 615 (D.C. Cir.), cert. denied, 459 U.S. 927 (1982), the D.C. Circuit stated that "although a spot gas inspection may be required to be conducted with a certain frequency by subsection (i), it is nevertheless conducted pursuant to the provisions of subsection (a)' because its purpose is to determine whether an imminent danger exists and whether there is compliance with mandatory health and safety standards." 671 F.2d at 624 n.27.

The Seventh Circuit has agreed with the D.C. Circuit's analysis of the relationship between section 103(a) and (i):

The only statutory authority for the Secretary to inspect mines without a warrant or prior notice is section 103(a). That fact suggests that any inspection -such as the spot inspection. in this case-lawfully conducted without prior notice or a warrant is an inspection conducted pursuant to the provisions of subsection (a). Even the types of inspections having more specific authority, e.g., section 103(g)(1) and (i), are conducted without

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warrants and notice and are thus conducted pursuant to the provisions of subsection (a).

Monterey Coal Co. v. FMSHRC, 743 F.2d 589, 593 n.8 (7th Cir. 1984). *Accord Consolidation Coal Co v. FMSHRC*, 740 F.2d 271, 273 (3rd Cir. 1984) We find ourselves in agreement with the District of Columbia Court--that spot inspections of the type challenged. here are authorized by and made 'pursuant to subsection 103(a).'" (citation omitted)).

It is therefore evident that the phrase "103(i) spot inspection" is simply a convenient label to describe inspections made pursuant to section 103(a) at the increased frequency set forth in subsection (i). Such inspections, however, are still inspections authorized by and made pursuant to section 103(a). 1/

We agree with the Secretary that section 103(i) "represents a mandate to, rather than a restriction on, the Secretary in the exercise of her enforcement function." Sec. Br. 10. The language of subsection (i) and its legislative history make clear that the sole purpose of this provision is to require the Secretary to conduct inspections with increased frequency in certain circumstances that Congress determined required increased vigilance. In enacting subsection (i), Congress did not seek to in any manner reduce the Secretary's pervasive inspection authority.

In light of the Supreme Court's upholding in *Donovan v. Dewey*, supra, of an MSHA inspector's right of entry into a mine to conduct an inspection, the majority errs in concluding that a mine operator can deny an MSHA

inspector access based on its belief that its mine no longer meets the criteria of section 103(i). In this case, the owner of the mine stated his willingness to permit any type of inspection other than a section 103(i) inspection and the majority endorses his ability to so control the terms of the inspector's entry. In doing so, the majority fails to recognize that section 103(i) inspections are made pursuant to section 103(a) and that section 103(i) does not limit the Secretary's right to conduct inspections. Contrary to the majority's assertions, the inspection that the inspector attempted to conduct in this case was not "outside the federal regulatory authority." (Slip op. at 9). Rather, the inspection was to be conducted for a basic and eminently lawful purpose, that is, to determine whether the operator was complying with the Secretary's mandatory safety and health regulations.

1/ Analogously, citations issued under section 104(a), which include significant and substantial and unwarrantable failure findings, are frequently referred to as "104(d)(1) citations." Yet, as the Commission has unanimously held, "the commonly used phrase 'section 104(d)(1) citation' is merely a term of convenience and does not indicate a separate basis for issuance of citations independent from section 104(a)." Utah Power and Light, 11 FMSHRC 953, 956 (June 1989).

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Our colleagues elevate form over substance in concluding that because the inspector indicated that section 103(i) was the authority for his presence, entry to the mine could be denied if, in fact, the Secretary was no longer required as a matter of law to inspect the mine every five working days under subsection (i). As discussed above, however, all inspections are conducted pursuant to the basic grant of authority in section 103(a). Furthermore, the inspector did not charge the operator with violations of section 103(i). Rather, the citations and withdrawal orders issued in this case charge that the operator violated section 103(a) by denying the inspector entry into the mine. For example, citation No. 2840770 states in part, that "on 02-12-87, Randy Rothermel, partner and mine foreman, refused to allow Victor G. Mickatavage, an authorized representative of the Secretary, entry into the Tracey Slope mine for the purposes of conducting an inspection of the mine pursuant to section 103(a) of the Act." Joint Exh. 1. (Emphasis added).

Thus, it is clear that the essential basis for the Secretary's assertion of authority to inspect the mine was section 103(a). The majority's endorsement of the operator's right to deny entry to the inspector unless the inspector would state that he was conducting a section 103(a) inspection, rather than a section 103(i) inspection, reduces the Secretary's role from enforcer of the Mine Act to participant in an operator-controlled game of "Simon Says"; the inspector is powerless to enter the mine until he says "May I" in a manner satisfactory to the

operator. Section 103(a)'s broad grant of inspection authority cannot be so constrained.

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In sum, we conclude that the inspection of the Tracey Slope Mine was done for a lawful purpose -- to determine whether the mine operator was complying with the Secretary's safety and health standards. Thus, the inspection was not "outside the federal regulatory authority," but was squarely within it. We would therefore hold that the denial of entry was unlawful. We would reverse the administrative law judge's decision, affirm the citations and order and remand for assessment of civil penalties.

Distribution

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