CCASE:
MSHA V. ALOE COAL
DDATE:
19930125
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January 25, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 91-40 PENN 91-41
ALOE COAL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The issue presented is whether citations issued by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") to Aloe Coal Company ("Aloe"), pursuant to an inspection requested under section 103(g)(1) of the Mine Act,(Footnote 1) are invalid because the inspection was requested by a

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1 Section 103(g)(1) states:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a

representative of striking employees of Aloe. Commission Administrative Law Judge Roy J. Maurer concluded that the citations were valid and assessed the civil penalties proposed by the Secretary. 13 FMSHRC 1181 (July 1991)(ALJ). We granted Aloe's petition for discretionary review. For the reasons that follow, we affirm.

I.
Factual and Procedural Background

The salient facts of this case were stipulated by the parties. Aloe operates a surface coal mine located in Allegheny and Washington Counties, Pennsylvania. On July 10, 1989, Aloe's miners, represented by the United Mine Workers of America ("UMWA") for collective bargaining purposes, went on strike. Aloe continued mining operations with 13 replacement workers and six union employees who crossed the picket line to return to work. Stip. 3.

Two of the strikers attempted to designate the UMWA as their miners' representative on August 17, 1990, and filed their designation with the local MSHA district manager in accordance with 30 C.F.R. 40.2(a).(Footnote 2) Stip. 4. Following receipt of a request submitted by UMWA representative Ken Horcicak, pursuant to section 103(g)(1) of the Mine Act, an MSHA inspector conducted an inspection of the mine. Stips. 5 & 8. The request for an inspection stated that employees at the mine were not wearing required safety equipment, inadequate berms were present along haulage roads, and electrical equipment was not being properly maintained and inspected. Id. Five citations were issued alleging violations of safety standards, including citations relating to the conditions described in the inspection request. Stip. 1.

Horcicak's identity as the individual who requested the inspection was not known to Aloe at the time of the inspection.(Footnote 3) Aloe discovered at another

> special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

30 U.S.C. 813(g)(1).

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2 Section 40.2(a) provides:

> A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by 40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

3 Under 30 C.F.R. 43.4(c), the name of the person making the inspection request is not to be given to the operator.

Commission hearing on September 28, 1990, that it was Horcicak who had requested the section 103(g) inspection. See Aloe Coal Co., 12 FMSHRC 2113 (October 1990)(ALJ). Stips. 7 & 8.

Aloe contended, in this proceeding before the judge, that Horcicak did not have the authority to request the inspection because he was neither a miner nor a representative of miners under the Mine Act. It argued that the inspection was outside MSHA's authority and that, as a consequence, the citations should be vacated.

Judge Maurer affirmed the citations and assessed the civil penalties proposed by the Secretary. 13 FMSHRC at 1183. The judge determined that the Mine Act grants the Secretary broad authority to inspect and investigate mines under section 103(a) of the Mine Act, 30 U.S.C. 813(a),(Footnote 4) and to issue, pursuant to section 104 of the Act, 30 U.S.C. 814, citations and orders relating to violative conditions existing at a mine. Id. He reasoned that section 103(g)(1) is "a subset of the broader substantive provision of section 103(a) that merely provides a procedure for the representative of miners to

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4 Section 103(a) states:

> Purposes; advance notice; frequency; guidelines; right of access
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> 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 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.

obtain an `immediate inspection' by giving notice to the Secretary of the occurrence of a violation or imminent danger." Id. Judge Maurer concluded that section 103(g)(1) does not limit the MSHA inspector's broader authority granted under section 103(a) to conduct inspections or issue citations where violative conditions are found. Id. Judge Maurer agreed with the Secretary that mine operators historically have been subject to extensive government regulation and therefore have no reasonable expectation of privacy under the Fourth Amendment. 13 FMSHRC at 1182-83.

II.
Disposition of Issues

Aloe argues that, because the inspection was requested under section 103(g)(1) by an individual who was not a miner's representative or a miner, the MSHA inspector had no right under the Mine Act to conduct the inspection or issue the citations. Aloe further characterizes the inspection as an unreasonable search in violation of its Fourth Amendment rights.

Under section 103(g)(1), a representative of miners has "a right to obtain an immediate inspection of a mine" if such individual has reasonable grounds to believe that a violation of the Act or a mandatory health or safety standard exists or an imminent danger exists. Section 103(g)(1) was included in the Mine Act because Congress determined that the safety and health of miners would be improved "to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." S. Rep. No. 181, 95th Cong., 1st Sess. 29-30 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 617-18 (1978).

We first address whether striking employees of a mine operator or a representative of these individuals may request an inspection under section 103(g)(1). In Cyprus Empire Corporation, 15 FMSHRC _____, No. WEST 91-454-R, et al. (January 1993), we concluded that striking employees of a mine operator are not miners entitled to have their previously designated walkaround representative accompany an MSHA inspector, pursuant to section 103(f) of the Mine Act, 30 U.S.C. 813(f), during the inspection of the mine. Slip. op. at 6. We stated that the term "miner" is defined in section 3(g) of the Act, 30 U.S.C. 802(g), as "any individual working in a coal or other mine" and held that individuals on strike are not working in a mine. We emphasized that an individual's status as a miner is determined by whether he works in a mine and not by whether he is employed by a mine operator. Slip op. at 4. We also noted that the Commission has already determined who is a "miner" entitled to the training rights under section 115 of the Act, 30 U.S.C. 825. Id. The Commission has previously held that job applicants and former miners on layoff do not qualify as "miners" under the Act and, hence, are not entitled to training rights. Slip op. at 4-5. (case citations omitted). Finally, we noted that the safety purposes of section 103(f) are not diminished because striking employees are not exposed to the hazards of mining, and thus do not require a walkaround representative. Slip. op. at 6.

Our reasoning set forth in Cyprus Empire applies with equal force with

respect to requests for an inspection under section 103(g)(1). Individuals on strike at a mine are not working in the mine. Accordingly, we hold that striking individuals are not miners for purposes of section 103(g)(1). Indeed, the Secretary does not dispute Aloe's position that a representative of striking individuals is not a representative of miners under section 103(g)(1). See S. Br. at 1, 4. We therefore agree with Aloe that Horcicak was not a representative of miners and consequently did not have a right to obtain an immediate inspection of Aloe's mine under section 103(g)(1).

We do not conclude, however, that the five citations issued during the inspection and the resulting civil penalties are invalid. We agree with the judge that the inspection was proper under section 103(a) of the Act and affirm the judge's finding sustaining the citations and his assessment of civil penalties.

Section 103(a) of the Mine Act expressly grants authorized representatives of the Secretary a right to enter all mines for the purpose of performing inspections under the Act. E.g., United States Steel Corp., 6 FMSHRC 1423, 1430-31 (June 1984). As a general proposition, all inspections of mines under section 103 are conducted pursuant to the basic authority of section 103(a). Tracey & Partners, Randy Rothermal, Tracey Partners, 11 FMSHRC 1457, 1464 (August 1989). Section 103(a) specifically authorizes "frequent inspections and investigations" for the purpose of "determining whether an imminent danger exists and ... whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under [the Act]." The Secretary has the authority under section 103(a) to conduct "spot" inspections of Aloe's surface coal mine as well as the required semi-annual inspections. 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). The Supreme Court has affirmed the Mine Act's broad grant of authority to the Secretary under section 103(a) by upholding the constitutionality of warrantless inspections. Donovan v. Dewey, 452 U.S. 594, 598-608 (1981).

The Secretary possessed the authority to conduct the inspection at issue under section 103(a), even though that inspection ensued from a request from an individual who did not have the right to obtain an immediate inspection. An inspector has broad discretion to gain entry and to inspect a mine. An inspector also may inspect a mine based on information he receives from others that leads him to believe there may be safety or health violations at the mine. The fact that the information that prompted the inspection was provided to MSHA by someone who did not "have a right to obtain an immediate inspection" under section 103(g)(1) does not invalidate the inspection or the citations and orders issued during the inspection.

Section 103(g)(1) is intended to encourage miners to become involved in identifying hazards, and to afford them an active role in correcting those hazards by providing the right to request an inspection whenever miners reasonably believe that a violation or a danger exists. Nowhere in section 103(g)(1) or the legislative history is there any indication that the section was meant to limit the Secretary's broad authority to inspect mines under section 103(a). Although Horcicak did not have a "right to obtain an

immediate inspection" under section 103(g)(1), the MSHA inspector did have the authority to inspect Aloe's mine under section 103(a) of the Act. Because the inspector had the right under section 103(a) of the Act to enter the mine to conduct the inspection, Aloe's argument that the inspection was unreasonable and in violation of Aloe's Fourth Amendment rights is without merit. See Donovan v. Dewey, supra.

Aloe stipulated that the violations existed as alleged and that the penalty assessments proposed by the Secretary were reasonable. We therefore affirm the judge's finding that the citations and civil penalties are valid.

III.

Conclusion

Based on the foregoing conclusions, we affirm the judge's decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner