FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

August 6, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. SE 2006-148-M
	:	SE 2006-163-M
v.	:	
SCP INVESTMENTS, LLC	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), Judge Jerold Feldman vacated all 11 citations and the one order at issue. 30 FMSHRC 544 (June 2008) (ALJ). The judge did so as a sanction for the Department of Labor's Mine Safety and Health Administration ("MSHA") inspector's refusal to permit a representative of the operator to accompany him on the inspection that occurred in connection with the issuance of the citations and order, an exclusion which the judge determined to be contrary to section 103(f) of the Mine Act, 30 U.S.C. § 813(f).[1]

[1] Section 103(f) of the Mine Act states in pertinent part:

> Subject 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 the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. . . . Compliance with this subsection shall not be a

The Commission subsequently granted the Secretary of Labor's petition for discretionary review. This case poses the question of whether the judge erred in dismissing the order and citations because the operator was not permitted to accompany the MSHA inspector on his first inspection of this mine.

Commissioners Young and Cohen, with Chairman Duffy concurring, affirm the judge's finding that the mine operator's walkaround rights were violated in this instance. Commissioner Jordan does not reach the issue. However, because of the jurisdictional language of the last sentence of section 103(f), all Commissioners agree that the judge erred as a matter of law when he vacated the Secretary's citations and dismissed these proceedings. Accordingly, the judge's decision is vacated.

On remand, the judge is permitted to consider the effect of the improper denial of the operator's walkaround rights on the operator's ability to present its case. Commissioners Young and Cohen would apply an exclusionary rule. Under their formulation, the judge should determine what prejudice, if any, resulted from the denial of the operator's walkaround rights. The judge could then exclude evidence resulting from the inspection, where the operator demonstrated the existence of prejudice as a result of not being present during the inspection. Chairman Duffy would have the judge exercise his discretion to decide whether the Secretary established a violation and (if so) the appropriate penalty, taking into account that the failure to permit the walkaround may have prevented the operator from offering probative evidence to support its case. Commissioner Jordan believes that the inspector's exclusion of the owner-operator from the inspection has no effect on the trial of this case.

The separate opinions of the Commissioners follow.

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jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 813(f).

Opinion of Commissioners Young and Cohen:

This case involves the relationship of MSHA with a new and very small operator. And, as Judge Feldman recognized, fundamentally this case involves how our government relates to its citizens.

I.

Factual and Procedural Background

Although the opinions in this case focus on legal issues, it is very important to understand the facts out of which the case arises.[1] SCP Investments took over and began operating the Old County Limestone Quarry in Crab Orchard, Tennessee, in September 2005. Show Cause Order, 30 FMSHRC at 341. It had three employees, including the owner-operator, Pat Stone. SCP Show Cause Reply at 1. According to information provided by Mr. Stone, in September 2005 SCP purchased county property in Cumberland County, Tennessee, that included an existing limestone quarry that had been used for 50 years in connection with county road work. *Id*. at 1. There is no record evidence of when the county ceased operating the quarry or regarding MSHA regulation of the quarry's operations, if any. SCP eventually commenced rock crushing operations at the site, which it called the Old County Quarry. *Id*.; 30 FMSHRC at 544.

Mr. Stone has stated in the record that he has a construction background but no mining experience. He was not at all familiar with MSHA, nor with legal requirements of the Mine Act. On December 13 or 14, 2005, an MSHA inspector, Jeff Phillips, arrived to inspect the Old County Quarry, which at that point had been operating for about three months. Upon learning that the quarry did not have an MSHA identification number, Mr. Phillips had Mr. Stone fill out an application, and Mr. Phillips obtained the identification number. Then Mr. Phillips asked Mr. Stone about the employees' mining experience and their training under MSHA's training

[1] Because of the procedural history, the record in the case is sparse. Our description of the facts is based on the judge's Order to Show Cause, 30 FMSHRC 341 (Mar. 2008) (ALJ), and the submissions of the parties, both to the judge and on review. The operator has not been represented by counsel at any point, and its submissions have been in the form of letters from its owner, Pat Stone. There are factual assertions in the letters to the judge from Mr. Stone which are neither confirmed nor denied by the Secretary. The most detailed letter by Mr. Stone is dated April 30, 2008. In the letter (hereinafter referred to as "SCP Show Cause Reply"), he replied to the Secretary's response to the judge's show cause order (which required the Secretary to explain why the citations should not be vacated because of the inspector's refusal to permit Mr. Stone to accompany him during the inspection). Since Judge Feldman issued a Further Order to Show Cause on May 8, 2008, 30 FMSHRC 563 (May 2008) (ALJ), which acknowledged Mr. Stone's letter, and since the Secretary responded to Judge Feldman's Further Order to Show Cause on May 29 and did not dispute the factual representations in Mr. Stone's April 30 letter, we are relying on some of Mr. Stone's factual representations, as well as the Secretary's, when they are not inconsistent.

regulations (set forth in Part 46 of Title 30 of the Code of Federal Regulations). Mr. Stone explained that one of his employees had worked for him for eight years, the other had worked for him for six years, and that they were both excellent employees. However, Mr. Stone was not aware of the training requirements of Part 46.

At this point, Mr. Phillips issued a section 104(g)(1) withdrawal order and escorted Mr. Stone off the premises.[2] S. Br. at 2; SCP Show Cause Reply at 1. The violation was designated significant and substantial ("S&S").[3] He had Mr. Stone contact his employees on the radio and direct them to leave the premises also. Mr. Phillips then told Mr. Stone that he was going to inspect the pit and the equipment. Mr. Stone asked Mr. Phillips if he could accompany the inspector.[4] Mr. Phillips refused to allow Mr. Stone to accompany him. The reason for Mr. Phillips' refusal apparently was that Mr. Stone did not have 24 hours of new miner training pursuant to 30 C.F.R. § 46.5(a). This is the basis set forth in the section 104(g)(1) order issued by Mr. Phillips. Mr. Phillips refused to allow Mr. Stone to re-enter the mine site to retrieve keys which were left in several loaders.

Following the inspection, Mr. Phillips issued 11 more citations. He informed Mr. Stone that he and his employees could not return to the mine until they were trained. Mr. Phillips indicated that the training must include 16 hours of classroom training and 8 hours of training on the job. SCP Show Cause Reply at 1-2.

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[2] Section 104(g)(1) provides:

> If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

30 U.S.C. § 814(g)(1).

[3] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[4] We assume that Mr. Stone was not specifically familiar with his "walkaround rights" under section 103(f) of the Mine Act, 30 U.S.C. § 813(f), but was simply requesting the opportunity to accompany a government official who was inspecting his property.

Mr. Stone contacted the Tennessee Department of Labor, and made arrangements for classroom training for himself and his employees at a mine safety school on December 19 and 20. To obtain the on-the-job training, Mr. Stone contacted several mines in the area which agreed to provide the training. However, Mr. Phillips would not accept this training, apparently because it would have been at a different kind of quarry. The only other possible quarry was Mr. Stone's direct competitor, Franklin Limestone, and the competitor refused to provide the training to Mr. Stone and his employees. Mr. Stone then asked Mr. Phillips to provide the training. At this point, it appears that Mr. Phillips agreed to let Mr. Stone provide the training for his employees. *Id*. In any event, Mr. Phillips terminated the section 104(g)(1) order on December 21, 2005. The other violations were terminated the next day, presumably after Mr. Stone and his employees had returned to the quarry and fixed the problems.

A couple of points emerge from the factual pattern in this case. As shown by his letters, Mr. Stone was very angry. But significantly, he obeyed all of Mr. Phillips' orders, obtained the required training for himself and his employees, and promptly abated the violations identified by Mr. Phillips. The record before us indicates that Mr. Stone was in no way a rogue operator. Prior to Mr. Phillips' inspection, Mr. Stone was not aware of his legal responsibilities. Upon finding out what he was required to do, he complied with the law.

MSHA issued a penalty assessment in February 2006 and another the next month, proposing penalties totaling $1,087. SCP subsequently contested all 12 of the proposed penalties.

After reviewing the case, Judge Feldman issued an Order to Show Cause on March 31, 2008. 30 FMSHRC at 341. He was concerned that the MSHA inspector had not permitted Mr. Stone to accompany him on the inspection. *Id*. at 342. The judge recognized that under section 103(f) and our case law, the right of the operator to accompany the inspector during an inspection is an important right which may only be curtailed by the Secretary's regulations.[5] Thus, Judge Feldman issued an order requiring the Secretary to show cause why the citations should not be vacated because the MSHA inspector violated section 103(f). The judge specifically directed the Secretary to respond to particular questions relating to the possible denial of Mr. Stone's rights under section 103(f). *Id*.

The Secretary responded to the Order on April 16, 2008. S. Resp. to Show Cause Order. Basically, the Secretary argued that the purpose of the section 103(f) walkaround rights is to assist the inspector in his inspection, that the inspector has discretion to limit who may accompany him on an inspection, that section 115 of the Mine Act, 30 U.S.C. § 825, requires training of new miners, and that even if there was a violation of section 103(f), it should not

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[5] Section 103(f) of the Mine Act grants both operators and representatives of miners what are known as "walkaround" rights. *See* 30 U.S.C. § 813(f). These rights include the qualified rights to accompany MSHA personnel during their inspection of a mine and to participate in conferences at the mine both before and after the inspection. *Id*.

affect any citations and penalties issued as a result of the inspection. *Id*. at 2-9. The Secretary did not respond to Judge Feldman's specific questions.

Judge Feldman issued a Further Order to Show Cause on May 8, 2008, noting the generalities of the Secretary's response to his first Order. 30 FMSHRC at 563. He stated, correctly in our view, that the discretion of MSHA inspectors in conducting inspections must be "balanced with the fundamental right of a mine operator to be present during an inspection." *Id*. at 564. He set forth five specific questions for the Secretary to respond to, including the identification of specific regulations, Interpretive Bulletins, and Memoranda which supported the denial of Mr. Stone's right to accompany the inspector; the specific training that must be completed before a mine operator or miners' representative is permitted to accompany an inspector; and the hazards to which Mr. Stone would have been exposed if he had accompanied Mr. Phillips. *Id.* at 565. Additionally, Judge Feldman recognized that dismissal of the citations and order is a harsh sanction. Therefore, he asked the Secretary to identify, assuming that the operator's section 103(f) rights were violated, lesser sanctions which could be imposed. *Id.*

The Secretary responded to this Order on May 29, 2008. S. Resp. to Further Order to Show Cause. In response to the judge's final question, the Secretary argued that dismissal is an impermissible sanction. *Id.* at 5-6. The less drastic remedy offered by the Secretary was to have the judge adjudicate the case on the merits, but take into consideration that Mr. Stone was unable to observe the conditions at the time that the inspector observed them. *Id.* at 6-7. Thus, the "less drastic remedy" suggested by the Secretary would, in effect, hobble the operator in making his defense at trial after being denied his right to accompany the inspector.

Following receipt of the Secretary's response, Judge Feldman issued his Dismissal Order on June 24, 2008. 30 FMSHRC at 544. He found that MSHA had abused its discretion in refusing Mr. Stone's request to accompany the inspector. *Id*. at 550. He further noted that the cited violative conditions had been terminated, and thus there were no continuing unresolved safety issues. In order to deter future unwarranted denials of a mine operator's walkaround rights, Judge Feldman dismissed the order and citations. *Id*.

II.

Disposition

The Secretary argues that the plain meaning of section 103(f) prohibits a judge from vacating citations and orders as a sanction for the issuing inspector's failure to accord walkaround rights. S. Br. at 8-10. The Secretary states that even if the judge were authorized to so sanction the Secretary and MSHA, it was not appropriate in this case, because the failure to permit the exercise of walkaround rights did not prejudice the operator, and the lesser sanction of taking the failure into account in his decision on the merits of citations and order was available to the judge. *Id*. at 11-15. The Secretary also takes issue with the judge's conclusion that Mr. Phillips could have permitted Mr. Stone to accompany him on the inspection under section

46.11(f) of MSHA's hazard training regulations. *Id*. at 18-21. The operator, which has acted pro se throughout this case, did not file a response brief.

A. Mr. Stone's Walkaround Rights Under Section 103(f)

The first question to consider is whether Judge Feldman correctly determined that Mr. Stone's rights under section 103(f) were violated. At the outset, we must recognize that the statutory language is mandatory: "Subject to regulations issued by the Secretary,[6] a representative of the operator . . . *shall* be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) . . . ." 30 U.S.C. § 813(f) (emphasis added). In *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994), the Commission noted that "[t]he right of a miner's representative to accompany the inspector on all section 103 inspections has been consistently recognized by the Commission and the courts." Moreover, the Commission has recognized the critical role that section 103(f) plays in the overall enforcement scheme of the Act, and has cautioned that "[w]e are not prepared to restrict the rights afforded by that section absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation." *Consolidation Coal Co.*, 3 FMSHRC 617, 618 (Mar. 1981). We agree with the judge that Mr. Stone's walkaround rights were violated, although we differ somewhat in our reasoning.

The Secretary's position to the contrary is not convincing. She relies on a 1978 Interpretive Bulletin which states that the inspector has discretion in conducting the inspection, and that the purpose of the section 103(f) walkaround rights is to aid the inspection. S. Br. at 15-16. It is certainly true that the walkaround rights under section 103(f) are "for the purpose of aiding such inspection." 30 U.S.C. § 813(f). Section 103(f) of the Mine Act is essentially identical to section 8(e) of the Occupational Safety and Health Act ("OSH Act"), which similarly contains language that the OSH Act "walkaround right" is "for the purpose of aiding such inspection." 29 U.S.C. § 657(e).[7] In *Chicago Bridge & Iron Co. v. OSHRC,* 535 F.2d 371, 376

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[6] The "regulations" referred to in section 103(f) include any of the Secretary's regulations which may be implicated by the exercise of walkaround rights.

[7] Section 8(e) of the OSH Act, 29 U.S.C.§ 657(e), contains wording similar to the Mine Act's walkaround provision:

> Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized

n.12 (7th Cir. 1976), the court interpreted this language to mean that when representatives of the operator and employees accompany the inspector, factual disputes can often be resolved on the site, thus avoiding the expense of trying such issues. The Secretary's limited view of the walkaround rights in this case diminishes the role of the operator and employee representatives in "aiding" the inspection. S. Br. at 16.

In discussing the inspector's discretion in limiting walkaround rights, the Secretary cites our decision in *Secretary of Labor on behalf of Wayne v. Consolidation Coal Co.,* 11 FMSHRC 483, 489 (Apr. 1989), in which we found that an inspector did not abuse his discretion in excluding a miners' representative from a post-inspection meeting when there were already three members of the union safety committee and one representative of the union international in attendance. S. Br. at 16-17. Certainly there is a huge difference in refusing to permit a fifth representative of miners to be present compared with excluding a single owner-operator.

The Secretary next argues that the inspector did not actually exclude Mr. Stone based on his lack of section 46.5 new miner training, 30 C.F.R. § 46.5.[8] S. Br. at 17. This is a strange argument given that the Secretary, in her Response to Further Order to Show Cause, specifically relied on section 46.5, as well as section 46.11 of her training regulations, 30 C.F.R. § 46.11,[9] in

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> representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

[8] Section 46.5(a) requires that operators

> provide each new miner with no less than 24 hours of training as prescribed by paragraphs (b), (c), and (d). Miners who have not yet received the full 24 hours of new miner training must work where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner.

30 C.F.R. § 46.5(a). Section 46.5(b) addresses seven aspects of training that must be provided before a miner can begin work, section 46.5(c) requires two other areas of training that must be provided within 60 calendar days after a new miner begins working, and the balance of the 24 hours of training must be provided within 90 calendar days, according to section 46.5(d). 30 C.F.R. § 46.5(b)-(d).

[9] Section 46.11 provides:

> (a) You must provide site-specific hazard awareness training before any person specified under this section is exposed to mine hazards.
>
> (b) You must provide site-specific hazard awareness

justifying Mr. Phillips' refusal to permit Mr. Stone to accompany him on the inspection. S. Resp. to Further Order to Show Cause at 1-3. Additionally, Mr. Phillips relied on section 46.5 in the 104(g)(1) order. Order No. 6122908. The Secretary states that the judge confused the section 104(g) order with the decision to exclude Mr. Stone from the inspection. S. Br. at 17. It is hard to understand how the Secretary can suggest that the judge was confused when the Secretary had previously told him that section 46.5 was indeed part of the basis for excluding Mr. Stone.

More troubling, however, is the Secretary's further argument: "The decision to exclude Mr. Stone from the inspection, however, was not documented by an order or citation – and was not required to be." S. Br. at 17. While it is true, strictly speaking, that the inspector did not have to issue an order or citation documenting the basis for excluding Mr. Stone, common decency compels the conclusion that Mr. Stone be given something in writing providing him the legal basis for his exclusion from the inspection, particularly when the one written record actually issued by Mr. Phillips made reference solely to section 46.5. When the government excludes a citizen from exercising a statutory right, the government ought to document its reasons in writing at some point prior to being ordered to do so in a judge's Order to Show Cause.

> training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at a mine site, including: . . . .
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> . . . .
>
> (d) Site-specific hazard awareness training is information or instructions on the hazards a person could be exposed to while at the mine, as well as applicable emergency procedures. The training must address site-specific health and safety risks . . . .
>
> (e) You may provide site-specific hazard awareness training through the use of written hazard warnings, oral instruction, signs and posted warnings, walkaround training, or other appropriate means that alert persons to site-specific hazards at the mine.
>
> (f) 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.

In any event, as the Secretary now apparently concedes, section 46.5 is not a proper basis for excluding Mr. Stone. Section 46.5 specifically refers to training which a new miner must have before he or she can "work" at a mine. As noted by Judge Feldman, 30 FMSHRC at 548, by its terms section 46.5 does not relate to inspections of the mine. This conclusion is supported by our case law, in which we have held that a non-miner may be a representative of miners and participate in an inspection under section 103(f). *See, e.g.*, *Emery Mining Corp.*, 10 FMSHRC 276 (Mar. 1988), *aff'd in pertinent part and rev'd on other grounds sub. nom*. *Utah Power & Light Co. v. Sec'y of Labor,* 897 F.2d 447 (10th Cir. 1990).

This leaves section 46.11 as the sole basis for excluding Mr. Stone from the inspection. Section 46.11 requires the mine operator to provide site-specific hazard training to any person who is not a miner but is present at the mine site. It further provides, in subsection (f), that site-specific hazard training is not required for a 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). Judge Feldman addressed this issue by finding that Mr. Phillips, as an experienced mine safety official well aware of mine safety issues, was an "experienced miner" within the meaning of section 46.11(f). 30 FMSHRC at 549. In her brief, the Secretary argues that an MSHA inspector can never constitute an "experienced miner" under section 46.11(f) because the inspector is not a "miner" within the meaning of section 46.2(g)(1), i.e., the inspector is not working "in mining operations." S. Br. at 18. This begs the point. Mr. Phillips, as a former miner and an experienced inspector, has at least as much knowledge of safety hazards generally as an experienced miner.

The Secretary's next argument relative to section 46.11 is that the judge's finding that Mr. Stone could accompany Mr. Phillips as an "experienced miner" defeats the purpose of section 103(f) in that the walkaround rights are for the purpose of aiding the inspection. S. Br. at 19. This overlooks the fact that Mr. Stone had been working at the quarry for three months and supervising the work of the other miners, while it was the first visit for Mr. Phillips. He was far more familiar with the mine site than Mr. Phillips and, in that respect, certainly could have aided him.

The Secretary's final argument is that the ALJ's interpretation of section 46.11 would have made Mr. Phillips the "guardian of Mr. Stone's safety during the inspection." *Id*. at 19. This is probably the Secretary's best argument, and, in the abstract, has some attraction. However, it overlooks a critical fact in this case. Based on Mr. Stone's letter of April 30, 2008, which has not been contradicted by the Secretary, it appears that after Mr. Stone obtained the classroom training for himself and his employees, Mr. Phillips permitted Mr. Stone to provide the on-the-job safety training to his employees. SCP Show Cause Reply at 2. If Mr. Stone had the ability to provide on-site safety training, he certainly would have been able to accompany Mr. Phillips on his inspection without Mr. Phillips having to become his "guardian."

Section 103(f) provides that a representative of the operator "shall" be given the opportunity to accompany an MSHA inspector, subject to regulations issued by the Secretary. It

is clear that the reasons advanced by the Secretary to justify the exclusion of Mr. Stone from the inspection are not valid, viewed within the context of the Secretary's regulations.

B. The Judge's Vacature of the Citations and Order

While the inspector's denial of Mr. Stone's walkaround rights was improper in this instance, we conclude that vacature of the citations and order was not a remedy that was available to the judge.[10] In section 103(f), Congress spoke directly to the issue of whether an inspector's failure to adhere to section 103(f) can impact MSHA's ability to use that inspection to enforce the terms of the Mine Act. Section 103(f) concludes by stating that "[c]ompliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." 30 U.S.C. § 813(f). That provision must be read as a statement that MSHA's failure, either intentionally or unintentionally, to permit any of the specified walkaround rights under section 103(f), even if contrary to the terms of section 103(f), does not prevent MSHA from taking an enforcement action.

The language covers the issuance of citations and orders for violations of the Mine Act, as occurred in this instance. Section 103(a) of the Mine Act, referenced in section 103(f), authorizes mine inspections for, among other purposes, "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." 30 U.S.C. § 813(a). Consequently, the language of section 103(f) plainly means that any citation or order issued in connection with an inspection in which walkaround rights were not granted is valid, regardless of whether the failure to grant the walkaround rights was proper or not.

The legislative history of section 103(f) confirms this interpretation. In considering the legislation that eventually became the Mine Act, the Senate Committee responsible for drafting it stated that, with regard to walkaround rights, the legislation

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

S. Rep. No. 95-181, at 28 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616 (1978)

[10] All Commissioners agree that the judge's vacature of the order and citations was not permissible under the Mine Act and must be reversed.

(emphasis added).[11] "[A]bsence . . . of participation," of course, can occur not only when walkaround rights are voluntarily not exercised, but also when the inspector refuses or otherwise fails to permit their exercise.

In his order dismissing the proceeding, the judge did not address the legislative history explaining section 103(f), and only indirectly addressed the pertinent last sentence of that provision. He cited the provision's qualified requirement that representatives of the operator and of the miners are to be given the opportunity to accompany an MSHA inspector on his inspection, and stated that:

> 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. 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, jurisdiction to enforce does not provide a license to abuse.

30 FMSHRC at 548 n.3 (citing *Emery*, 10 FMSHRC at 289).

The judge thus read section 103(f) to accord to an operator the qualified right to accompany the inspector on an inspection, and the last sentence of section 103(f) to mean only that when an operator does not exercise that right, the inspector could still inspect the mine and issue citations and orders for what he found during his unaccompanied inspection. The judge apparently found that the purpose of the last sentence was to make it clear that an operator's failure to exercise its walkaround rights could not be used to defeat an inspector's right to take enforcement actions as a result of the inspection in which the operator did not participate to the extent to which section 103(f) permitted it to participate.

Such a reading misstates the purpose of the final sentence of section 103(f). There is nothing in either section 103(f) or the remainder of the Mine Act that indicates that an operator would have the extraordinary power to essentially nullify an inspection by refusing to participate in it. Rather, the meaning of the final sentence of section 103(f) is found by reading it in the context of the entire subsection.

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[11] Section 103(h) of the Coal Act provided only for the right of a representative of miners to accompany an inspector during his inspection, and was otherwise silent on the other subjects addressed by section 103(f) of the Mine Act. *See* 30 U.S.C. § 813(h) (1976).

Section 103(f) states that "*[c]ompliance with this subsection* shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." 30 U.S.C. § 813(f) (emphasis added). In the absence of a statutory definition or a technical usage of a term, the Commission applies the ordinary meaning of a word in the Mine Act. *See Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, No. 96-1205, 1997 WL 159436 (D.C. Cir. Mar. 3, 1997); *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). The term "[c]ompliance" is invariably defined to mean required adherence or obligation, particularly with respect to a statute or other legal provision.[12]

In order to understand how the term "compliance" is used in section 103(f), it is necessary to look at the remainder of the provision. *See Twentymile*, 30 FMSHRC at 750-51 & n.7 (stating that in order to discern a statutory or regulatory standard's plain meaning, it is necessary to read it in context). "Compliance with this subsection" can only be read in reference to the obligations that section 103(f) imposes.

With regard to a mine operator's representative accompanying an MSHA inspector or participating in a pre- or post-inspection conference, nothing in section 103(f) can be read to indicate that the operator's representative is required or obligated to do so. Rather, what section 103(f) clearly does with regard to operators vis-a-vis MSHA and its inspectors is grant a qualified right: "Subject to regulations issued by the Secretary, a representative of the operator . . . shall *be given an opportunity* to . . . ." 30 U.S.C. § 813(f) (emphasis added). A "right" is not something that is "[c]ompli[ed]" with; rather, a right is something that is exercised.

Thus, there is no question that the final sentence can only mean "compliance" by MSHA and its representatives. In an instance such as this, the only party that could prevent an operator's representative from exercising walkaround rights, and thus the only party that could potentially fail to "compl[y]" with that portion of section 103(f), is the inspector. Moreover, it is MSHA, acting through the inspector, that enforces the Mine Act. Therefore, in the case of an operator's representative being improperly denied walkaround rights, the last sentence can only mean that the denial does not prevent enforcement actions from being taken by the inspector, the only party that can fail to comply with section 103(f) in such an instance.[13]

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[12] *See Webster's Third New Int'l Dictionary Unabridged* 465 (1993) ("conformity in fulfilling formal or official requirements . . . cooperation promoted by official or legal authority or conforming to official or legal norms"); *The Random House Dictionary of the English Language Unabridged* 419 (2d ed. 1987) ("the act of conforming, acquiescing, or yielding . . . conformity, accordance . . . cooperation or obedience"); *American Heritage Dictionary of the English Language* 272 (New College ed. 1976) ("[a] yielding to a wish, request, or demand; acquiescence").

[13] To be sure, section 103(f) also imposes obligations upon operators to permit miners' representatives to participate in the MSHA inspection process, so there also can be a question of an operator's "compliance" with section 103(f). Operators can be cited for improperly

Accordingly, we conclude that the judge erred as a matter of law in using the failure to allow walkaround rights as the basis to vacate the citations and order in this case. The final sentence of section 103(f) plainly provides that enforcement actions otherwise properly taken by MSHA cannot be vacated due to the failure of an inspector to comply with any of section 103(f)'s requirements.[14]

C. The Impact of the Denial of Mr. Stone's Rights on the Evidence Obtained by the Secretary

This leaves the question of whether a remedy exists for the infringement of Mr. Stone's walkaround rights. We are extremely troubled by the fact that the operator's statutory right to accompany the inspector on the inspection of Mr. Stone's own mine was violated, and MSHA essentially suggests that he has no legal remedy. Our government, represented by MSHA in the one instance and by this Commission in the other, should not take the position that a citizen's rights can be violated, leaving the citizen without any legal remedy. This idea is contrary to our fundamental belief in ordered liberty, and to the development of Anglo-American law since the Magna Carta nearly 800 years ago.

There is a remedy in this case, consistent with the jurisdictional language of section 103(f). In other contexts, we are familiar with the use of an exclusionary rule. If the government violates a citizen's legal rights by, for example, conducting an illegal search, then the fruits of the illegal search or other violation may be excluded from evidence at trial. This is not a new concept. The Supreme Court applied an exclusionary rule to illegally-obtained evidence 95 years ago in *Weeks v. United States*, 232 U.S. 383 (1914).

An exclusionary rule is properly rooted in at least two important policy considerations. First there is "the imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222 (1960). The Court in *Elkins*, quoting Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928), explained that

> "[i]n a government of laws, . . . existence of the government will be imperiled if it fails to observe the law scrupulously. . . . For good or for ill, [the government] teaches the whole people by its example. . . If the government becomes a lawbreaker, it breeds

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interfering with a miner representative's walkaround rights. *See* 43 Fed. Reg. 17,546, 17,547 (Apr. 25, 1978). That, however, is an entirely different situation than the one presented here.

[14] The only possible basis to overcome the statutory language would have to be constitutional in nature, such as a violation of the Due Process Clause. This complex issue has not been presented to us.

> contempt for law; it invites every man to become a law unto himself; it invites anarchy."[15]

364 U.S. at 223.

The second policy consideration is deterrence of official misconduct. While this principle did not appear in the early Supreme Court cases such as *Weeks*, it emerged in cases such as *Elkins* and *Mapp v. Ohio*, 367 U.S. 643 (1961), and has become the dominant rationale for the exclusionary rule. *See, e.g., United States v. Leon*, 468 U.S. 897, 916 (1984*); Terry v. Ohio*, 392 U.S. 1, 12 (1968) (stating that the "major thrust [of the exclusionary rule] is a deterrent one"); *see also* Trant, 1981 Duke L.J. at 683-87.

The use of an exclusionary rule to suppress evidence obtained in violation of a statutory mandate is not a novel concept. The Occupational Safety and Health Review Commission ("OSHRC") and courts of appeals reviewing that Commission's decisions have, for at least the past 30 years, acknowledged that evidence may be excluded when the walkaround provision of the OSH Act[16] is violated, when the employer can demonstrate prejudice. *See, e.g., Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.3d 840, 846 (D.C. Cir. 2004); *Pullman Power Prods., Inc. v. Marshall*, 655 F.2d 41, 44 (4th Cir. 1981); *Marshall v. Western Waterproofing Co.*, 560 F.2d 947, 951-52 (8th Cir. 1977); *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976); *Chicago Bridge*, 535 F.2d at 376; *Accu-Namics, Inc. v. OSHRC,* 515 F.2d 828, 833-34 (5th Cir. 1975).

OSHRC, after originally finding that section 8(e) of the OSH Act confers a substantive walkaround right, the violation of which by OSHA entitled an employer to relief, now holds, in response to the decisions of the courts in *Accu-Namics* and *Western Waterproofing*, that evidence obtained in violation of an employer's walkaround rights may be excluded when the employer can demonstrate prejudice in the preparation or presentation of its defense. *See Titanium Metals Corp. of America*, 7 O.S.H. Cas. (BNA) 2172 (Jan. 1980); *Laclede Gas Co*., 7 O.S.H. Cas. (BNA) 1874 (Oct. 1979); *Able Contractors, Inc.*, 5 O.S.H. Cas. (BNA) 1975 (Oct. 1977).

Use of an exclusionary rule by our Commission when statutory walkaround rights are abridged would result in several differences from the approach taken by Judge Feldman. First, the remedy is not dismissal of the citation, but exclusion of evidence obtained by virtue of the illegal action. Thus, this remedy does not raise an issue relating to the last sentence of section

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[15] As noted in Charles E. Trant, "*OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer Has Blundered?*, 1981 Duke L.J. 667, 680-85 (1981), judicial integrity has fallen out of favor as a basis for enforcing an exclusionary rule. We agree with Trant that this development is unfortunate for our society.

[16] *See* note 7, *supra*.

103(f). An exclusionary rule does not implicate Congress' admonition that compliance with the walkaround rights subsection shall not be a jurisdictional prerequisite to the enforcement of the Act. Under an exclusionary rule, the Secretary could issue citations, require abatement of unsafe conditions (which, as Judge Feldman noted, is central to the safety of miners), and propose penalties. The Secretary could only lose the ability to use evidence at trial resulting from the illegal action. This remedy does not affect the "jurisdictional prerequisite" language of the statute. Indeed, it gives full effect to all of the provisions of section 103(f), which is a goal of statutory construction. Norman J. Singer, 2A Sutherland Statutory Construction, § 46.6 (7th ed. 2007).

Second, this remedy would in no way affect citations which did not arise in connection with the denial of the walkaround rights. Thus, in the present case, the section 104(g)(1) order would be completely unaffected because inspector Phillips learned of the absence of training separate from his inspection of the mine site. There could be other citations in this case which would also be unaffected by exclusion of evidence from the inspection itself. This would have to be determined by the judge.

Exclusionary rules are rules of evidence and are historically judge made. This Commission has the authority to promulgate rules of evidence which apply in hearings before our administrative law judges. We can do this either in rulemaking or in our decisions. Hence, there is no legal principle which would prevent us from promulgating an exclusionary rule in this case.

Chairman Duffy does not specifically endorse application of the exclusionary rule for violations of walkaround rights under the Mine Act. He suggests that a judge can "take into account" an improper denial of walkaround rights in considering whether a violation occurred or when setting a penalty for a violation. Slip op. at 19. However, our colleague proposes no standards for an administrative law judge to apply. This approach is not sufficient, and provides inadequate guidance. With an exclusionary rule, a Commission judge would apply a two-step process in a situation where an operator contends that its representative was not permitted to participate in an MSHA inspection under section 103(f). Based on evidence adduced in a suppression hearing or otherwise, the judge first would determine whether the operator's walkaround rights were indeed violated.[17] If so, the judge would then determine what prejudice,

[17] Contrary to Chairman Duffy's suggestion, we would not mandate a separate suppression hearing. Slip op. at 19. The determination of whether an operator's walkaround rights were violated could be made in a number of ways. If the relevant facts alleged in a motion to exclude evidence were essentially uncontested, a ruling could be made based on the pleadings. A suppression hearing would only be necessary if material facts relating to exercise of the walkaround rights are disputed. The point where we differ from our colleague, in addition to urging that the Commission provide its judges with standards to apply in these situations, is that we believe that the issue should be addressed prior to hearing.

if any, resulted from the violation.[18] Depending on the outcome of these determinations, the judge could exclude none, some, or all of the evidence resulting from the inspection.

Commissioner Jordan states that the failure of an MSHA inspector to permit a representative of the operator to accompany him on an inspection "does not curtail the inspector's right to enter and inspect the mine." Slip op. at 22. We fully agree. As stated *supra*, with an exclusionary rule, the inspector is in no way prevented from entering a mine and ordering the operator to take such action as is necessary to ensure the safety of miners. Commissioner Jordan also states that "[a]dopting a policy designed to deter official misconduct implies that the officials in question have an incentive to skirt the law's requirements." *Id*. at 23. We are not implying in any way that MSHA inspectors have an incentive to skirt the law's requirements, or that such is anything but a very unusual occurrence.

In summary, on remand we would instruct the judge to determine what, if any, evidence proposed for admission by the Secretary should be excluded because of prejudice to the operator. Thereafter, the judge should proceed to trial.

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

[18] In all of the OSH Act cases cited herein, the courts found that employers either did not allege, or did not establish, prejudice. However, these cases generally involved situations where the courts also found that the OSHA inspectors "substantially complied" with the walkaround requirements of section 8(e) of the OSH Act and/or found that the employers did not assert walkaround rights at the time of the inspection. For example, after the inspection in *Western Waterproofing*, the OSHA compliance officers asked the employer's representatives if they wanted to accompany the compliance officers back to the site of the inspection, and the employer's representatives declined the invitation. 560 F.2d at 951. In the present case, Mr. Stone was totally excluded from the Old County Quarry for about a week after the MSHA inspection, and could not have viewed the site as Mr. Phillips had viewed it at the time of the inspection.

Opinion of Chairman Duffy:

I agree with my colleagues, Commissioners Young and Cohen, that MSHA's training regulations did not provide a basis by which Phillips could exclude Stone from the inspection. Even though Stone at the time lacked the required training to work at the mine, there is no disputing that walkaround rights under section 103(f) may be exercised by non-miners.

Further, my colleagues correctly dismiss the Secretary's contentions that Phillips could have also forbade Stone from accompanying Phillips on his inspection because Stone lacked the site-specific hazard training generally required of non-miners by 30 C.F.R. § 46.11. Nothing in the record indicates that Phillips even considered that Stone may have had a right, as SCP's representative, to be included on the inspection as a non-miner; rather, Phillips appears to have viewed the section 104(g) withdrawal order as entirely dispositive of Stone's right to be at the mine in any capacity. Moreover, what little evidence there is shows that not only had Stone been supervising operations at the mine for some time, but when MSHA needed someone to train the other miners at the mine the next week, it looked to Stone to provide that training. For the Secretary to now claim that Phillips could have properly refused Stone's walkaround request because Stone lacked the training required of non-miners makes little sense.[1]

I also agree with my colleagues that the plain meaning of the final sentence of section 103(f) prevents a judge from vacating citations and orders issued as the result of an inspection in which the operator was not permitted to participate in contravention of section 103(f). Where I part company with my colleagues is in the proposed "remedy" for an inspector's impermissible failure to grant walkaround rights.

To be sure, an operator's right to observe an inspection, while not inviolable, may be key to its ability to effectively contest an allegation contained in a citation or order. That is particularly the case where the only evidence supporting the allegation is based on an inspection conducted by MSHA from which an operator's representative was absent. In a case in which an operator's representative was improperly denied walkaround rights, it would be unfair to the operator to necessarily accord the inspector's observations the same evidentiary weight they would be accorded if the inspector had been accompanied on his inspection by an operator's representative. In the latter instance, the operator would be able at hearing to contest, or corroborate, any or all of the inspector's account.

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[1] I note that my colleagues do not address the judge's determination that section 46.11 training was not required in this instance because of the subsection 46.11(f) exception. *See* 30 FMSHRC at 549. I believe the judge in so doing misinterpreted section 46.11. By employing the term "you" in multiple instances, the regulation clearly directs *operator* action with regard to site-specific hazard training. It thus would be inconsistent to interpret its final subsection, subsection (f), as contemplating that *an MSHA inspector* could serve as the "experienced miner" that would accompany around mine property any person that had not received the otherwise required training.

While the Secretary in her brief touches upon this subject and comes to the conclusion that the operator was not prejudiced by the denial of walkaround rights in this case (*see* S. Br. at 13-14), the extent to which the citations and orders depend on what the inspector found during his unaccompanied inspection can only be determined after a factual record in this case is developed. It appears that the withdrawal order and some of the citations were issued on the basis of what Phillips learned from speaking with Stone. Thus, any failure by Phillips to permit Stone to accompany him on his inspection should be irrelevant to determining whether the violations alleged in that order and those citations actually occurred, and the appropriate penalties if they did occur.

Other citations, however, contain allegations of violations derived from the inspection of the mine property itself. In those instances, the judge may find during the hearing that the inspector's improper denial of walkaround rights is preventing the operator from presenting probative evidence in support of its contest. If he so finds, I believe the judge, in deciding whether the Secretary established the violation and, if so, the appropriate penalty for that violation, has the discretion to take into account the fact that the operator was so handicapped in its defense.

I believe this approach is much simpler than that of my colleagues, who would have a judge in an instance such as this hold a separate suppression hearing on any evidence obtained as the result of an inspection from which an operator has been excluded in violation of section 103(f). Slip op. at 14-17. Given that this issue so rarely arises, I do not see the need for Commission judges to conduct separate suppression hearings.

Moreover, as my colleagues admit, evidence would only be excluded if the operator could establish prejudice to its defense from the inspector's refusal to grant a walkaround rights request. *Id*. at 16-17. I believe the existence and extent of such prejudice is best determined during the hearing on the merits of the violation, not in a separate pre-hearing proceeding.[2]

Further, I believe that, in the end, Commission judges are in the best position to accord weight to evidence, including that which was obtained during an inspection in which walkaround rights were improperly denied. I would thus not prevent them from considering such evidence, but rather entrust them with taking the circumstances of the inspection into account in reaching their decisions on violations and penalties.

Finally, I cannot help but think that the acrimony that appears to have developed in this case between MSHA and the operator could have been avoided if MSHA and Inspector Phillips had handled the matter differently. Although it is up to MSHA to determine its inspection

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[2] While my colleagues suggest that a separate proceeding on suppression may not be necessary, and that the issue can simply be addressed through pleadings (slip op. at 16 n.17), I am inclined to doubt that a judge would want to rule on the essentially factual question of prejudice without a hearing.

techniques, the goals of the Mine Act clearly would have been better served if Phillips' first visit to the Old County Quarry had been carried out as less of a Mine Act enforcement effort and more as an opportunity to educate a new operator regarding its obligations under the Mine Act. In my opinion, MSHA and Phillips could have done so while keeping well within both the letter and the spirit of the Mine Act.

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Michael F. Duffy, Chairman

Opinion of Commissioner Jordan:

I agree that the judge erred as a matter of law when he vacated the citations and order issued by the Mine Safety and Health Administration ("MSHA") inspector who, the judge concluded, had erroneously deprived the operator of its right, under section 103(f) of the Mine Act, to accompany the inspector.[1] I therefore join my colleagues in vacating the judge's dismissal order and remanding these penalty cases for further proceedings. I write separately, however, because I disagree with the views expressed by my colleagues regarding the ability of the Secretary to present her case on remand.

My colleagues hold the view that SCP was wrongly deprived of its right to accompany Inspector Phillips,[2] and that the deprivation of this statutory right should impact the Secretary's ability to present evidence in support of the citations and order that were issued by the inspector. Specifically, Commissioners Cohen and Young believe the Commission should apply an exclusionary rule to the evidence the inspector obtained during his inspection. Slip op. at 14-17.

In promulgating the walkaround rights in section 103(f), Congress pointedly stated that "compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." My colleagues agree that this language bars the outright dismissal of the inspector's citations and order, but they maintain that excluding evidence obtained during the inspection "does not raise an issue relating to the last sentence of section 103(f)." Slip op. at 15. The evidence is appropriately excluded because, in their view, it was obtained "by virtue of the illegal action." *Id*. I disagree. Unlike in Fourth Amendment cases, to which my colleagues cite, the health and safety violations observed by Inspector Phillips do not constitute evidence obtained by virtue of an illegal action.

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[1] In section 103(f), Congress provided in relevant part that:

> Subject 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 the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant the provisions of subsection (a) for the purpose of aiding such inspection and to participate in pre-or post-inspection conferences held at the mine.

30 U.S.C. § 813(f).

[2] My colleagues engage in an extensive discussion of why the inspector was not justified in denying SCP the opportunity to accompany him. Slip op. at 11-14, 18. Because it is not relevant to my analysis, I do not address those arguments.

The Secretary's evidence regarding the health and safety hazards at issue here was obtained during the course of a valid inspection. The inspector's right to enter and inspect the mine flows from section 103(a), which provides in pertinent part:

> Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (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. . . . 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 mine.

30 U.S.C. § 813(a).

Despite the mandatory language of the walkaround provision ("shall be given an opportunity"), an inspector's failure to provide an opportunity to accompany him does not curtail the inspector's right to enter and inspect the mine. There is no language in section 103(a) that makes the inspector's right to enter the mine, or to conduct an inspection and cite conditions that violate mandatory standards, contingent upon the inspector's compliance with the walkaround provision under section 103(f). Indeed Congress made that fact clear when it stated: "Compliance with this subsection [103(f)] shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." 30 U.S.C. § 813(f).

In contrast, evidence obtained in violation of the Fourth Amendment's protection from unreasonable searches is information obtained by virtue of an illegal action. The failure to comply with the Fourth Amendment's probable cause or warrant requirement necessarily makes the ensuing search illegal and unreasonable. When a United States Marshal invades a house without a warrant, he acts without the sanction of law. *Weeks v. United States*, 232 U.S. 383 (1914). If the Marshal obtains evidence of a crime, that evidence has been obtained at the expense of the suspect's Fourth Amendment rights. Had that Marshal complied with the Constitution's requirements, the Marshal would not have been able to enter the house and would not have obtained the evidence.

This is not the case with MSHA inspections, even ones that fail to comply with the walkaround right. Despite his refusal to let the mine owner accompany him, Inspector Phillips was acting within the sanction of the law when he conducted his inspection. Section 103(a) authorized his entry upon and his inspection of the mine. Moreover, unlike the U.S. Marshal who fails to comply with the Constitution's requirements, Inspector Phillip's compliance with section 103(f) would not have restricted his ability to enter the mine, nor would it have limited his inspection in any way. His compliance with section 103(f), in other words, would have resulted in the same inspection and would have allowed him to view the same conditions that led to the citations and order at issue here. Thus, contrary to my colleagues' claim, the evidence

relied on by the Secretary is not properly characterized as evidence obtained by virtue of an "illegal action," or "in violation of a statutory mandate." Slip op. at 15. Because the evidence here was obtained as a result of the inspector conducting a valid, legal inspection authorized by section 103(a), we do not face the issue confronting the courts in Fourth Amendment cases: whereby to admit the evidence would be to sanction the use of illegally obtained information against the individual whose rights have been violated. *United States v. Leon*, 468 U.S. 897, 928 (1984) (Brennan, J., dissenting). Some Supreme Court Justices have described such action as jeopardizing the integrity of the courts themselves. *Id.* at 933; 468 U.S. at 976-78 (Stevens, J., concurring and dissenting).

However, even if the Commission need not be concerned that admitting the evidence obtained as a result of Inspector Phillip's inspection would make it complicit in an illegal act, my colleagues point out that policy considerations favor an exclusionary rule as a deterrence of official misconduct. I question whether the deterrence rationale is even relevant here. Inspector Phillips' refusal to allow Mr. Stone to accompany him does not appear to be an example of official misconduct. Rather, it appears that the inspector was acting according to what he believed the law required. Before inspecting the mine's physical plant, Inspector Phillips asked Mr. Stone about the training of the miners working there. When Phillips learned that neither Mr. Stone nor SCP's other two miners had received the 24 hours of training MSHA requires of new miners under 30 C.F.R. §46.5(a), Phillips issued a withdrawal order, pursuant to section 104(g) of the Mine Act, 30 U.S.C. § 814(g)(1). The Mine Act requires that such order be issued when the inspector determines that a miner has not received the requisite training. The miner is considered to be a hazard to himself and to others and the statute requires the immediate withdrawal of the miner. Once withdrawn, the miner is "prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act." *Id.* As the Supreme Court has noted, the deterrence factor is not appropriately applied in situations where the government official had a good faith reasonable belief that he or she was acting in accordance with the law. *Leon*, 468 U.S. at 919. Given the prohibitory language of section 104(g), it appears quite likely that Inspector Phillips considered he had no choice but to refuse Mr. Stone's request that he be allowed to remain at the mine and accompany the inspector.

Adopting a policy designed to deter official misconduct implies that the officials in question have an incentive to skirt the law's requirements. In Fourth Amendment cases, that incentive is obvious. Skirting the Constitution's requirements allows the police to get evidence they would not otherwise have obtained. As discussed above, that is not the situation under the Mine Act. Avoiding the walkaround requirement of section 103(f) does not provide the MSHA inspector with any greater access to information regarding health and safety violations. In fact, it would be more appropriate to say that the inspector is deprived of information: the information that would have been supplied to him by the representative of the owner or the representative of the miner who should have been allowed to accompany him.

Under the procedure proposed by my colleagues Cohen and Young, prior to excluding any evidence, the judge should determine what prejudice, if any, resulted from the inspector's

violation of section 103(f). As my colleagues note, slip op. at 15, the Occupational Safety and Health Review Commission ("OSHRC") follows a policy whereby evidence obtained in violation of an employer's walkaround right may be excluded when the employer can demonstrate prejudice in the preparation or presentation of its defense. It is worth noting that the Occupational Safety and Health Act's walkaround right, 29 U.S.C. § 657(e), does not include the admonition contained in the last sentence of section 103(f), to wit: that "[c]ompliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." It is also worth noting that OSHRC has adopted the good faith exception to the exclusionary rule. *See Sanders Lead Co.*, 15 O.S.H. Cas. 1640 (May 1992) (explicitly adopting the good faith exception to the exclusionary rule).

SCP has not alleged any prejudice that resulted from Inspector Phillip's refusal to allow its owner, Mr. Stone, the opportunity to accompany him.[3] Indeed in his letter to Judge Feldman, Mr. Stone rebuts the allegations contained in the citations, accuses the inspector of "lying on and about the tickets" and assures the judge he "look[s] forward to proving this in court." SCP Show Cause Reply at 3.

Chairman Duffy has not advocated for an exclusionary rule but would allow the judge to "take into account an improper denial of walkaround rights" when that denial "may have prevented the operator from presenting probative evidence in support of its contest." Slip op. at 19. For the same reason that I believe an exclusionary rule is inappropriate, I believe it would be improper for the judge to take the walkaround denial into account in deciding whether the Secretary established a violation. Moreover, with regard to determining the appropriate penalty, the statute is explicit as to what factors the Commission should consider.[4] The inspector's failure to afford the operator the opportunity to accompany him or her on the inspection is not one of them.

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[3] Indeed, as Commissioners Cohen and Young acknowledge (slip op. at 17 n.18), none of the OSHA cases cited by him involve an employer who could establish prejudice.

[4] In assessing civil monetary penalties, 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 achieving rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

For the foregoing reasons, I would vacate the judge's dismissal order and remand the case to him for further proceedings.

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Mary Lu Jordan, Commissioner

Distribution:

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

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021