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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

MAGMA COPPER COMPANY,
APPLICANT

Application for Review

Docket No. DENV 78-533-M

v.

San Manuel Mill

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

AND

UNITED STEELWORKERS OF AMERICA,
RESPONDENTS

DECISION

Appearances: N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills,
Phoenix, Arizona, for Applicant;
Michael V. Durkin, Esq., Office of the Solicitor, U.S.
Department of Labor, for Respondent MSHA.

Before: Administrative Law Judge Lasher

I. Statement of the Case

Applicant seeks review of Order No. 376821 dated July 26, 1978, which was issued by MSHA inspector Chester A. Pasco. The order was issued pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977(FOOTNOTE 1) citing Applicant with failing to abate a previously issued citation within the time required. The citation, which was issued earlier on July 26, 1978, by Inspector Pasco, cited Applicant for refusing to pay a representative of the miners for his participation in an inspection conducted on July 26, 1978.(FOOTNOTE 2)

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The application for review which initiated this proceeding was timely filed and perfected on August 14, 1978. Applicant challenges both the order and the citation which latter document indicates that there were two MSHA inspectors present at the mine whose intent was to form two parties to expedite the inspection and that Applicant refused to allow a second representative of miners to accompany the second MSHA inspector without suffering a loss in pay.

A hearing was held in Phoenix, Arizona, on November 13, 1978, at which both parties were represented by counsel.(FOOTNOTE 3)

II. Findings of Fact

The essential happenings involved in this matter are not in substantial dispute.

Magma Copper Company operates a large copper mine and mill in the vicinity of San Manuel, Arizona. MSHA, successor to MESA, inspects these operations periodically. The mill, which includes the crushing facility, even though it is located near the mine site (Tr. 56), has a mine identification number separate from that of the mine. The mill consists of a mine crusher, a mill crusher, a concentrator, a molybdenum plant, and a filter plant. The mill I.D. number covers several buildings, some of which are one-quarter mile long and three stories tall.(FOOTNOTE 4)

On July 26, 1978, inspectors Chester A. Pascoe and Thomas Aldrette, authorized representatives of the Secretary, arrived together at the San Manuel Mill to continue an ongoing regular "entire mine" inspection (Tr. 34-35, 55) of the mill which had begun the previous week. The inspectors drove to the site in the same car and coordinated their planned inspection on the way to the site. They had been orally assigned to conduct this inspection by their supervisor (Tr. 55). When they arrived at the mill, a conversation with company officials ensued in which the inspectors discussed the fact that they were going to continue the inspection and indicated that they "would like a miners' representative to accompany each inspector." They were advised that Applicant would furnish two miners' representatives, but that only one would suffer no loss of pay (Tr. 37). Miners' representatives did not accompany the inspectors the previous week because the unions had not furnished Applicant with a list of such representatives (Tr. 37-39, 52).

Inspectors Pascoe and Aldrette selected Ernest Badia to accompany them on their inspection (Tr. 51, Ct. Exh. 1). The inspectors knew that a second representative would have been selected had they requested one (Tr. 47-48), but they were also aware that Applicant's position was that so long as one representative was being paid, no other representative would be paid for the same period of participation (Tr. 95).

After the inspectors asked that they be provided two representatives of miners and that both representatives be paid for the time spent assisting in the inspections (Tr. 37), Horace Carter, Assistant Director of Safety and Industrial Hygiene, read them a portion of section 103(f) of the Act, which stated: "However, only one such representative of miners who is an employee of the Operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection" (Tr. 95). Inspector Pascoe then issued the citation and, subsequently, the order based on the Applicant's refusal to pay the second representative of miners. They provide as follows:

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Citation #376720: "A representative of miners was not given the opportunity to accompany an authorized representative of the Secretary of Labor on a Safety and Health inspection. The Company allowed a representative of miners to accompany one MSHA inspector on the inspection, but refused to allow a representative of miners the opportunity to accompany second [sic] MSHA inspector on the same property (same I.D. No.) without suffering loss of pay. The intent was to form two (2) parties to expedite the inspection.'

Order #376821: "Mr. Horace A. Carter, Assistant Director of Safety and Hygiene, stated that the Company's interpretation of the Act was that they would provide one representative of miners for each inspection; therefore, they would not provide a second representative of miners on the same property (I.D. No.) without loss of pay.'

The citation was issued at 11:05 a.m. and it required that abatement be completed by 12:30 p.m. The inspectors then went to lunch. After they returned, Mr. Carter indicated that his position had not changed. Consequently, Inspector Pascoe issued the order of withdrawal.

Ernest Badia, the representative of the miners who was provided with pay, accompanied Pascoe. However, a representative of the miners with pay was not provided to Inspector Aldretti. Pascoe and Aldretti examined separate parts of the mine (mill) as planned and their inspections took them a distance of 7 miles apart. The inspections took approximately 2 hours. The inspectors saw each other again when they subsequently returned to the safety engineer's office to do their paper work. There was no connection between the activities of the two inspectors during the full period of their respective inspecting (Tr. 37, 40-45, 47).

Inspector Pascoe did not request that a second representative be asked whether he desired to walk around without pay in order to justify the order of withdrawal because the second representative would have to stand the loss of a day's wages (Tr. 61).

The regular inspection in question took approximately 6 days (Tr. 62) off and on during the period July 19 - August 1, 1978 (Tr. 57, 58).

III. Discussion

The Applicant maintains that while the Act grants representatives of miners the right to volunteer for walk-around activities, it limits the number of representatives who shall be paid for such activities to one. Applicant contends that it was not in violation of section 103(f) of the Act, since it did pay one of the two miners' representatives for participation in the inspection conducted on July 26, 1978.

MSHA contends that one representative should be paid for accompanying each inspector conducting an inspection, and, that there is no limitation on the number of inspectors (Tr. 99). MSHA's position in this connection is more fully set forth in Interpretative Bulletin No. 1, issued April 1, 1978, 43 FR 17546 at 17549:(FOOTNOTE 5)

[T]here are also occasions when there is more than one inspector at a mine, such as when the mine is so large that it is necessary to send several inspectors in order to most effectively or efficiently conduct inspection activity. Inspectors may also arrive to conduct special "spot inspections" at a mine where a "regular inspection" of the mine is already in progress. There are also situations when several inspectors are dispatched to a mine at which there are special safety and health problems needing concentrated attention. Where more than one inspector is on the mine property at the same time, the inspectors frequently go to different areas of the mine, and for all practical purposes, they could be inspecting different mines. Under such circumstances, if representatives of miners are accompanying each inspector, one such representative accompanying each inspector is protected against loss of pay. If, regardless of the number of inspectors engaged in inspection activity at a mine, one and only one representative of miners were protected against loss of pay, an anomaly would result in that the decision to send several inspectors, rather than a single inspector, to a mine would adversely impact the protection against loss of pay, thereby eroding the participation right itself. The manner in which inspectors were assigned would thus determine the scope of a statutory right.

Insofar as the precise issue in this case is concerned, section 103(f) of the Act is not vague or ambiguous. It consists of five sentences which are examined separately below.

1. "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 the pre- or post-inspection conferences held at the mine."

This sentence is preliminary and of general application. It requires that an authorized miner representative (singular) be given the opportunity (a) to accompany the "Secretary or his authorized representative"--not every given inspector--during the physical inspection of a mine, and (b) to participate in any conferences held before or after the inspection.

The phrases "the physical inspection" and "such inspection" refer to one inspection. The purpose of allowing accompaniment by operator and miner representatives is clearly specified as "aiding the inspection," not aiding the inspector. Furthermore, the inspection referred to must be one "made pursuant to the provisions of subsection (a)." In my decision in another case of first impression, *Kentland-Elkhorn Coal Corporation v. Secretary of Labor*, Docket No. PIKE 78-399, issued simultaneously herewith, I have concluded that the quoted clause was intended to be restrictive, and that during the legislative history of the Act, Congress clearly expressed its intent to limit accompaniment with no loss of pay to the regular "entire mine" inspections described in the third sentence of section 103(a).

2. "Where there is no authorized miner representative, the Secretary or his authorized miner representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine."

This second sentence applies only where there is no authorized miner representative (union) at the mine. In such a special situation, consultation by the Secretary, acting through an inspector, with a reasonable number of miners is required.

3. "Such representative of miners(FOOTNOTE 6) who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection(FOOTNOTE 7) made under this subsection."

This third sentence requires that the miner representative, whether appointed by a union, or otherwise selected where there is no union, if he is an employee, (FOOTNOTE 8) shall be paid at his regular rate of pay for the period of time he participates in the inspection. (FOOTNOTE 9)

4. "To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives."

This gives the Secretary, acting through an inspector, discretion to allow each party more than one representative to accompany him on the inspection (singular) provided the number is equal.

5. "However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss in pay during the period of such participation under the provisions of this subsection."

This expressly limits the pay provision to one miner representative/employee per inspection regardless of the number of inspectors conducting the inspection, and regardless of the number of operator's and miners' representatives accompanying them. The language is plain and admits of no more than one meaning. The word "However," clearly links this provision with the preceding sentence and both should be read together. Thus, if the Secretary permits accompaniment by more than one representative, only one is entitled to suffer no loss of pay.

Congress could not have expressed the limitation of the "pay" provision of 103(f) more clearly. This is not some inadvertent ambiguity which has found its way into the statute. It is a strongly-worded clear-cut restriction constituting an integral part of this new statutory provision first introduced into the mine safety scheme by the 1977 Act. While Congress sought to encourage miner participation in regular inspections, it also drew a distinct line as to how many mine representative/employees would be paid for their time of participation in the inspection. Its plain meaning is that it provides inspection participation rights without loss of pay to one miner representative/employee per regular inspection--not per inspector. Contrary to MSHA's contention, I do not find this reading to result in an absurdity, nor am I inclined to follow MSHA's Interpretative Bulletin where it directly contradicts the Act. I have found

the legislative history to be of little value in deciding this issue. In the parts thereof pointed to by the parties as support for their positions, the Congressional source being quoted was not directly addressing the question with which we are concerned. To draw inferences favorable to one party or the other from some word or phrase idly dropped in the context of remarks directed to some other issue or subject matter is not warranted. This, indeed, is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute. *March v. United States*, 506 F.2d 1306, 1314 (D.C. Cir., 1974).

It is clear from the record that on July 26, 1978, the two inspectors were conducting but one regular inspection of the mine (mill). Applicant, by agreeing to pay one miners' representative for his participation therein was in compliance with section 103(f) of the Act. I find merit in the application.

IV. Conclusions of Law

Where a single regular "entire mine" inspection is being conducted pursuant to section 103(a) of the Act by two or more inspectors, only one representative of miners is entitled to participate in the inspection without loss of pay even though the group conducting the inspection is divided into two or more parties to simultaneously inspect different areas of the mine.

ORDER

All proposed findings of fact and conclusions of law submitted by the parties not expressly incorporated in this decision are rejected.

The citation and order which are the subject of this proceeding are vacated.

Michael A. Lasher Jr.,
Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. 83 Stat. 742, 30 U.S.C. | 801 et seq., herein the Act.

~FOOTNOTE_TWO

2. Both the citation and order charge a violation of section 103(f) of the Act which provides:

"(f) 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. Where there is no authorized miner representative, the Secretary or his authorized representative

shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

~FOOTNOTE_THREE

3. The United Steelworkers of America, having failed to timely respond to the prehearing order issued October 17, 1978, was dropped as a party at the hearing (Tr. 3-9).

~FOOTNOTE_FOUR

4. Prior to March 9, 1978, the responsibility for regulating health and safety standards in the metal and nonmetal mining industry belonged to the Mining Enforcement and Safety Administration (MESA). Mine operators were issued mine identification numbers to identify the function which was being regulated (Tr. 46, 91). In large operations, MESA assigned separate numbers to parts of the operation which had an integrated function or operated in a functionally related manner (Tr. 47). I conclude that the mill and its related facilities covered by the same I.D. number are a mine as defined in section 102(b)(3) of the Act.

~FOOTNOTE_FIVE

5. This Interpretative Bulletin, which I find to be inconsistent with the governing legislation, insofar as it seeks to construe and implement the Act involved, is to be distinguished from legislative-type regulations duly promulgated in compliance with the rulemaking provisions of the Administrative Procedure Act. *Morton v. Ruiz*, 415 U.S. 199, 39 L.Ed.2d 270, 94 S. Ct. 1055 (1974).

~FOOTNOTE_SIX

6. Singular.

~FOOTNOTE_SEVEN

7. Singular.

~FOOTNOTE_EIGHT

8. By inference, a miners' representative can be selected who is not an employee.

~FOOTNOTE_NINE

9. Since the word "inspection" used here is not qualified by the word "physical" as in the first sentence, I conclude that it includes both the physical inspection and the pre- and

post-inspection conferences.