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

KENTLAND-ELKHORN COAL CORPORATION,  
APPLICANT

Application for Review  
Docket No. PIKE 78-399  
Feds Creek No. 1 Mine

v.

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

AND

UNITED WORKERS OF AMERICA,  
RESPONDENTS

DECISION

Appearances: C. Lynch Christian III, Esq., Jackson, Kelly, Holt and O'Farrell, Charleston, West Virginia, for Applicant;  
Leo J. McGinn, Esq., Office of the Solicitor, S Department of Labor, for Respondent.

Before: Administrative Law Judge Lasher

I. Statement of the Case

Applicant seeks review of Order No. 063798, dated June 23, 1978, which was issued by MSHA inspector Vernon E. Hardin. 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 by Inspector Hardin on June 20, 1978, cited Applicant for refusing to pay employee Douglas Blackburn, the representative of the miners, for his participation in an electrical inspection at Applicant's preparation plant on May 23 and May 24, 1978.(FOOTNOTE 2)

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The Application for Review which initiated this proceeding was timely filed on June 28, 1978. Applicant contends that both the citation and order, each of which charge violations of section 103(f) of the Act, are invalid and seeks to have them vacated.(FOOTNOTE 3)

A hearing was held in Princeton, West Virginia, on December 7, 1978, at which both parties were represented by counsel.(FOOTNOTE 4) Inspector Hardin testified for MSHA and Roger Bartley, Applicant's safety director, testified for the Applicant.

## II Discussion and Findings of Fact

Applicant contends that it was not in violation of section 103(f) of the Act, since, on May 23 and 24, 1978, it did pay one of two miners' representatives present for participation in an inspection. The facts are not in substantial dispute. According to Inspector Hardin, two separate inspections were being conducted on the dates

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in question: the one he was conducting was a specialized electrical inspection which was not part of a regular inspection of the mine which was being conducted independently by a second MSHA inspector, Aaron Hall. The record amply reveals that these inspectors did not travel together, did not coordinate their inspections, and were functioning separately on the dates in question. According to Inspector Hardin, his electrical inspection was one which is required to be conducted once annually by the MSHA manual, whereas the inspection conducted by Inspector Hall was one of at least four regular inspections required to be conducted annually by the Secretary of every mine in its entirety by section 103(a) of the Act. The report of his inspection filed by Inspector Hardin (Court Exh. 1) indicates that it was a coal mine safety and health electrical CBA inspection (Tr. 42). The electrical inspection was not part of the regular inspection of the entire mine conducted by Inspector Hall. The evidence clearly indicates, and I conclude, that these were two separate inspections (Tr. 16-18, 35-42, 48-53).

Inspector Hall was accompanied by Kenneth Smith, a slate picker, who was paid for his participation in Inspector Hall's regular "entire mine" inspection, which would have taken approximately 1 month to complete. Respondent admits that it refused to pay another employee, Douglas Blackburn, for his participation in the 2-day electrical inspection conducted by Inspector Hardin both at the time the citation was issued and again when the order of withdrawal was issued.(FOOTNOTE 5)

Applicant's argument at the hearing that replacing Blackburn and Smith with less experienced miners might have an adverse affect on safety has been considered. However, it has no direct relevance in determining the primary legal issue involved in this proceeding and that is whether Applicant was required to pay Blackburn for the time he expended in participating in the inspection conducted by Inspector Hardin so that Blackburn would "suffer no loss of pay during the period of such participation" as required by the Act. Since Inspector Hardin's inspection was a separate inspection from Inspector Hall's, it would ordinarily be concluded at this point that both the citation and order were properly issued and that the relief sought by the application should be denied.(FOOTNOTE 6)

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Applicant, however, in its brief raised for the first time a purely legal issue which I find dispositive of this case. Applicant contends that the provisions of section 103(f) of the Act granting miner representatives the right to participate in an inspection with pay is limited to the regular "entire mine" inspections conducted pursuant to section 103(a) of the Act. (FOOTNOTE 7) There is no question but that the first sentence of section 103(f) is a general section against which the remaining sentences must be read and it does expressly limit the types of inspections in which the operator's and miners' representatives have a participation right to those "made pursuant to the provisions of subsection (a)." On the face of it, this is a restriction--why else include the quoted language at all? Moreover, Congress' intent to limit walkaround rights under 103(f) is further demonstrated by its elimination of such rights for "any inspection" as previously provided in section 103(h) of the 1969 Act.

What is the extent of this limitation? Applicant places great emphasis, and I believe properly so, on the remarks of Congressman Perkins, Manager of the Committee of Conference for the House of Representatives, in his report to the House. They follow.

Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference report that seems to be somewhat ambiguous.

Section 103(a) of the conference report provides that authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations 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 title or other requirements of this act. 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.

In carrying out the requirements of clauses (3) and (4) - concerning imminent dangers or compliance with standards - 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.

In addition to the regular inspections of each mine in its entirety as specified in section 103(a), section 103(g)(1) provides that whenever a representative of a miner, or a miner at a mine where there is no such representative, has reasonable grounds to believe that a violation or imminent danger exists, such representative or miner shall have a right to obtain an immediate inspection. Further, section 103(i) provides for additional inspections for any mine which liberates excessive quantities of methane or other explosive gases, or where a methane or gas ignition has resulted in death or serious injury, or there exists some other especially hazardous condition.

Section 103(f) provides that a miner's representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector, including pre- and post-conferences, at no loss of pay only during the four regular inspections of each

underground mine and two regular inspections of each surface mine in its entirety, including pre- and post-inspection conferences.

The original section 103(a) of the Federal Coal Mine Health and Safety Act of 1969 provided that--

In carrying out the requirements of clauses (3) and (4) of this subsection in each underground mine, such representatives shall make inspections of the entire mine at least four times a year.

Section 103(a) of the 1969 Act did not include the new provisions--

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 the act, and his experience under this act and other health and safety laws.

Section 103(h) of the 1969 act provided generally that--

At the commencement of any inspection \* \* \* the authorized representative of the miners at the mine \* \* \* shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection

Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 act, but, rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act. Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator." Vol. 123, No. 174, Cong. Rec. H 11,663 (daily ed. October 27, 1977); Legislative History, Committee Print (July, 1978), 1347, 1356-1358. [Emphasis supplied.]

It could, of course, be argued that the Act is not ambiguous and that Congressman Perkins' remarks should be ignored since reference to the legislative history is not warranted. Pursuing this approach, the points of argument would seem to be that:

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1. Section 103(a)(FOOTNOTE 8) does not say "four entire mine inspections will be conducted annually."

2. It does say--expressly in its first sentence--that the Secretary shall make frequent inspections (entire mine or otherwise) for various purposes and--expressly in the third sentence--that at least four entire mine inspections annually will be made for the purpose of determining if imminent danger or violations exist.

3. The 103(f) limitation to inspections made pursuant to "the provisions (plural) of subsection (a)" cannot simply ignore the first sentence of 103(a) and confine itself to the third sentence.

I am unable to adopt the above rationale for the reason that Congress, by tacking on to its grant of accompaniment rights the phrase "\* \* \* during the physical inspection \* \* \* made pursuant to \* \* \* subsection (a)" must have had something in mind other than blanket coverage of all inspections. This phrase becomes a meaningless appendage if--via confinement to the general opening sentence

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of section 103(a)--it is construed to cover all inspections. The only specific kind of inspection mentioned in 103(a) is the regular inspection mandated in the third sentence thereof. As categories of inspection go, the regular is the most important kind--of an entire mine, conducted at least quarterly, for the purpose of finding violations and seeking out imminent dangers.

The widely-quoted admonition of Justice Murphy in *Harrison v. Northern Trust Co.*, 317 U.S. 476, 87 L.Ed. 407, 65 S. Ct. 361 (1943), is particularly applicable here. After first noting that the court below had refused to examine the legislative history of section 807 of the Revenue Act of 1932 on the ground that it was unambiguous, Justice Murphy made this observation:

But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination. \* \* \* So, accepting the Circuit Court's interpretation of Illinois law as to the incidence of the tax, we think it should have considered the legislative history of 807 to determine in just what sense Congress used the words "payable out of".

Similarly, the purpose to be achieved here is to secure that construction of the Act which gives effect to the Congressional purpose. For this reason, considerable weight must be given the statement of Congressman Perkins. At the outset of his remarks, he noted that indeed there was an "ambiguity." His statement--made on behalf of the Committee, not just himself--reveals that the ambiguity referred to is precisely that with which we are dealing. In explaining the ambiguity, he pointed his remarks directly to the legal question under discussion, the meaning of the phrase "physical inspection \* \* \* made pursuant to the provisions of subsection (a)." This is not the situation which occurs so frequently when reference to the legislative history is sought--where we are asked to draw inferences from some indiscriminately dropped word or phrase uttered by a speaker focused on an issue extraneous to the one under discussion. It is a relevant, unequivocal statement by the Conference Committee of Congressional intent made at the most significant stage of the legislative process. It cannot be ignored. (FOOTNOTE 9)

I conclude that the clearly expressed intent of Congress is to require accompaniment with no loss of pay only for the so-called regular entire mine inspections mandated by subsection 103(a). Relying thereon, I also find that the section 103(f) phrase "physical inspection \* \* \* made pursuant to the provisions of subsection (a) \* \* \*" "refers to the inspections expressly referred to in the third sentence of section 103(a) of the Act, that is, the regular inspections which the Secretary, in carrying out his responsibility to determine either if an imminent danger exists or if there is compliance, must conduct of a mine in its entirety at least four times a year.

In the instant case, a miner representative/employee was permitted accompaniment on the regular inspection of the entire mine conducted by Inspector Hall on May 23 and 24, 1978, without loss of pay. I conclude that accompaniment by a miner representative/employee without loss of pay on Inspector Hardin's electrical inspection on the same 2 days was not required by section 103(f) of the Act. There is merit in the application.

ORDER

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



at 8:50 a.m. on June 23, 1978.

~FOOTNOTE\_SIX

6. This is a case of first impression. I have held in another matter, MSHA v. Magma Copper Company, Docket No. DENV 78-533-M, issued simultaneously herewith, that the right of a miner representative/employee to participate in an inspection without loss of pay granted by section 103(f) of the Act is expressly limited to one representative per inspection--not per inspector.

~FOOTNOTE\_SEVEN

7. More specifically, in its posthearing brief at page 15, Applicant makes the following contention:

"B. Order No. 063798 was improperly issued because section 103(f) of the Act provides miner representatives the right to participate in inspections at no loss of pay only where the inspection is conducted pursuant to section 103(a) of the Act. Inspector Hardin's electrical inspection was not conducted pursuant to section 103(a).

The plain language and legislative history of section 103(f) of the Act establish that the right to participate in inspections at no loss of pay exists only for a limited type of inspection. Specifically, section 103(f) limits walkaround rights with no loss of pay to "physical inspection[s] of any coal or other mine made pursuant to the provisions of subsection (a)" of section 103 of the Act. Section 103(a) provides for at least four annual "inspections of each underground coal or other mine in its entirety." These four annual inspections of an entire mine are identified in the MSHA Citation and Order Manual (A-1) by the code letters AAA, and are distinguished therein from all other types of inspections."

~FOOTNOTE\_EIGHT

8. Section 103(a) provides:

"Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare 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 title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. 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, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine."

~FOOTNOTE\_NINE

9. See also *Cass v. U.S.*, 417 U.S. 72, 40 L.Ed.2d 668, 94 S. Ct. 2167 (1974), where the Court again declined to "ignore the clearly relevant" legislative history of a problem Act. I am aware that the Respondent's Interpretative Bulletin, 43 F.R. 17546, April 25, 1978, at page 17547, directly contradicts the Conference Committee's indication of the types of inspections covered. The Bulletin covers all inspections mentioned in both the first and third sentences of section 103(a), while the Committee intended that only the regular inspections mandated by the third be covered. While an agency interpretation is usually entitled to great weight, in this instance the Respondent appears to have leapt the chasm between what the law is and what it ought to be. In my decision in *MSHA v. Magma Copper Company*, supra, I noted that the Bulletin is to be distinguished from regulations promulgated in compliance with the Administrative Procedure Act. In divining the Congressional intent underlying section 103(f) in the specific respect involved here, I believe the only objective approach is to accept the clearly relevant interpretative aid of the legislative history rather than the construction urged by the enforcement agency. Congress has anticipated the question posed in this proceeding and answered it.