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

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

Civil Penalty Proceeding

Docket No. PITT 79-11-P
A/O No. 36-00926-03001

v.

Homer City Mine

HELEN MINING COMPANY,
RESPONDENT

DECISION

Appearances: Leo McGinn, Esq., Office of the Solicitor, Department
of Labor, Arlington, Virginia, for Petitioner, MSHA;
Todd D. Peterson, Jones, Day, Reavis and Pogue,
Washington, D.C., for Respondent, Helen Mining Company.

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of a civil
penalty under section 110(a) of the Federal Mine Safety and
Health Act of 1977.

MSHA alleges a violation of section 103(f), the "walkaround"
provision of the Act. A hearing was held on March 20, 1979. Both
parties presented oral evidence (Tr. 9-36). At the conclusion of
the taking of evidence, counsel waived the filing of written
briefs, presented oral argument, and agreed to have a decision
rendered from the bench (Tr. 36-80). Upon the conclusion of oral
argument, a decision was rendered from the bench (Tr. 80-89).

Bench Decision

The bench decision is as follows:

The issue presented in this case is whether a miner
representative who accompanies an MSHA inspector during
a section 103(i) "spot inspection" is entitled to be
paid pursuant to the provisions of section 103(f) of
the Federal Mine Safety and Health Act of 1977.

The facts are undisputed. On April 6, 1978 an inspector of the Mine Safety and Health Administration made a spot inspection pursuant to section 103(i) of the Act. Section 103(i) directs, inter alia, that where a mine liberates excessive quantities of methane, it shall be inspected during every five working days.

On April 6, 1978 the inspector made a 103(i) inspection and during that inspection was accompanied by a miner representative for three hours. The operator refused to pay the miner representative for the three hours, resulting in the issuance of the subject citation and order, and also resulting in the assessment of a civil penalty and filing of the instant petition.

The evidence also shows that three days earlier, on April 3, 1978, this inspector had begun a "regular" inspection of the mine. Section 103(a) requires that each underground coal mine be inspected in its entirety at least four times a year. Each total inspection is of course done over a period of time, and the individual inspections which comprise the total inspection are referred to as "regular" inspections.

On April 6, 1978 the inspector performed a 103(i) spot inspection for methane instead of continuing on the regular inspection which he was performing during that period. The inspector testified, however, that a regular 103(a) inspection and a 103(i) could be going on at the same time with two different inspectors, and that if this were so, MSHA would require that if miner representatives accompanied both inspectors, both miner representatives be paid. Accordingly, it makes no difference that in this case only the spot inspection was being performed because it is MSHA's position that all walkarounds on 103(i) spot inspections must be compensated pursuant to section 103(f). Section 103(f) provides that a miner representative shall be given the opportunity to accompany the MSHA inspector during the physical inspection of any coal or other mine made under section 103(a), and that the miner representative shall suffer no loss of pay while he so participates in the inspection.

It is the operator's position that under 103(f) it is required to pay only the miner representative who accompanies an MSHA inspector on a regular inspection, and that, therefore, it was not required to pay the miner representative in this case who accompanied the inspector on a section 103(i) spot inspection.

MSHA's position is that the operator is required to pay the miner representative who participated for three hours in the 103(i) spot inspection. As the Solicitor's oral argument makes clear, MSHA's position is predicated essentially upon the Interpretive Bulletin published by the Secretary of Labor at 43 Federal Register 17546, April 25, 1978. The Bulletin recognizes that the participation and payment provisions of section 103(f) refer to inspections made pursuant to section 103(a). However, the Bulletin refers to all the purposes enumerated in 103(a) for which inspections are made, including determinations for imminent danger and violations. Since 103(i) spot inspections are made for the purposes of finding imminent dangers or violations, the Bulletin takes the position that a spot inspection constitutes an inspection under 103(a) for purposes of the participation and payment provisions of 103(f). According to the Bulletin, the requirement of four inspections per year for each mine in its entirety as set forth in section 103(a) is only a statutory minimum and has nothing to do with the right of participation or the right to compensation. It is on this basis that MSHA contends in this case the operator must pay the miner representative who accompanied the inspector under 103(i) spot inspections.

I have carefully considered MSHA's position as explained here today at length by the Solicitor and as set forth in the Interpretive Bulletin. I am unable to accept MSHA's position. I recognize the Interpretive Bulletin represents the Secretary's position, and that it should be reviewed in light of the Secretary's responsibilities under the Act. However, the Interpretive Bulletin is not binding upon me. This was expressly decided by the United States District Court for the District of Columbia in Bituminous Coal Operators Association, Inc. versus Marshall and the United Mine Workers, Civil Action No. 78-0731, (January 11, 1979).

I must review and judge the Interpretive Bulletin in light of the language of the statute and the legislative history. The Interpretive Bulletin and the interpretation advanced by the Solicitor here today in effect, read section 103(i) back into 103(a). In addition, the Bulletin recognizes that there are other inspections such as those under 103(g) which are performed at the request of a miner. The Bulletin also reads these inspections back into subsection (a) by relying upon the purposes for which such inspections

are carried out, i.e., discovering violations or imminent dangers.

The insuperable difficulty I have with this approach is that if section 103(f) covered all inspections, it could have provided for walkarounds and payments for all inspections without making any reference whatsoever to subsection (a). Reference to subsection (a) must be regarded as a limitation because it leaves out the other subsections pursuant to which inspections also are undertaken. Any other interpretation renders the reference to subsection (a) as it appears in subsection (f) meaningless. Accordingly, reading the other subsections, such as (i) and (g) back into subsection (a) in the manner of the Interpretive Bulletin in effect violates the language of the statute and the way it is written and organized. In this connection also I note that subsection (f) precedes (i) and (g). I conclude, therefore, that the reference in 103(f) to inspections under 103(a) means the regular inspections described in that section.

On this basis, I conclude the operator was not required to pay for the walkaround in this case, and that, therefore, there was no violation.

During oral argument great attention was given, both by the Solicitor and operator's counsel, to the remarks of Congressman Perkins who was the manager of the Conference Committee for the House of Representatives. When introducing the conference bill and report to which the House and Senate conferees had agreed, Congressman Perkins explained on the floor of the House the meaning of section 103(f) with respect to compensation. First, the congressman set forth all the purposes for which inspections are performed under 103(a) and that each mine must be inspected in its entirety at least four times a year. He then pointed out that in addition to the regular inspections performed under subsection (a), inspections also were performed under subsections (i) and (g). Turning then to section 103(f), Congressman Perkins gave the following explanation with respect to compensation: "Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section (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."

Congressman Perkins then compared section 103(f) of the present Act with section 103(h) of the 1969 Act, which gave the miner representatives the right to participate in "any" inspection, but which had no provision at all for compensation. The congressman then stated as follows: "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."

Finally, the congressman stated: "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."

The congressman's statements appear at Volume 123, No. 174, Congressional Record, H-11663, Daily Edition, October 27, 1977; and in Legislative History, Committee Print (July 1978) at pages 1356 to 1358.

Immediately after Congressman Perkins' statements, the House of Representatives voted to pass the bill. I believe the congressman's remarks regarding the operator's obligation to pay for walkarounds are too clear to be ignored and do not point to any interpretation other than that the operator only has to pay for the walkarounds on the four regular inspections. As the Solicitor has persuasively stated, it may be desirable to compensate miner representatives who accompany MSHA inspectors on all inspections. This, however, is not what the Act presently says. Moreover, the congressman, who perhaps had more to do with the enactment of this legislation than any other, specifically stated the opposite. I cannot legislate and neither can the Secretary. Change must come from Congress.

One final matter: I recognize that limiting the right to compensation to regular inspections performed

under subsection (a) may raise a question of whether there is a walkaround right for inspections other than regular inspections. Congressman Perkins' statement quoted above indicates that the miner representative can accompany the inspector during any inspection other than a regular inspection, exclusive of the operator's responsibility to pay. The statutory basis of the congressman's assertion of the general walkaround right for all inspections is not apparent. Be that as it may, however, the congressman's explanations limiting the operator's obligation to compensate walkarounds is so clear and the statutory language regarding the limited obligation to pay under these circumstances is so clear to me that they simply cannot be ignored. Here, again, if the walkaround right without compensation has inadvertently been limited, then the remedy lies with Congress. However, I must point out that for present purposes, this issue is not presented in this case, and I do not have to decide it. I only make the general observation that if the problem exists, it is one to be set right by legislation and not by administrative fiat. Of course, based upon the representations made to me during oral argument, it appears that as a practical matter, the problem does not exist because the walk-around right is available during all inspections, generally, pursuant to the union contract.

In light of the foregoing, therefore, I find there was no violation.(FOOTNOTE 1) MSHA's petition for the assessment of a civil penalty is hereby dismissed. I express my appreciation to both counsel for the very fine oral arguments that were made.

ORDER

It is hereby ORDERED that the foregoing bench decision be affirmed, that no penalty be assessed for the reason that no

