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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),	Application for Review of Discrimination
	Docket No. WEVA 79-148-D
ON BEHALF OF:	
	Shannon Branch Coal Mine
ARNOLD J. SPARKS, JR., APPLICANT	
v.	
ALLIED CHEMICAL CORPORATION, RESPONDENT	

DECISION AND ORDER

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Applicant;
Marshall C. Spradling, Esq., Spilman, Thomas, Battle & Klostermeyer, Charleston, West Virginia, for Respondent

Before: Judge Kennedy

This is a discrimination complaint brought pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act, as amended, 30 U.S.C. 815(c)(2), on behalf of Arnold J. Sparks, Jr., a miner employed at Allied Chemical Corporation's Shannon Branch Coal Mine.

On March 28, 1978, MSHA inspector Cloy Blankenship performed a "spot" ventilation inspection of respondent's mine pursuant to section 103(i) of the Act. Before making his inspection, the inspector

informed William P. Lusk, an assistant mine foreman, that Arnold J. Sparks, Jr., was going to accompany him on the inspection as a representative of the miners. Mr. Lusk told Mr. Sparks that he would not be paid by Allied for his participation in the inspection. Mr. Sparks did participate in the inspection, and Allied refused to pay him for that participation. (Footnote 1)

On May 23, 1979, the Secretary of Labor filed this complaint alleging respondent interfered with the exercise of the statutory rights of Mr. Sparks as a representative of the miners in violation of section 105(c)(1) of the Act. Applicant prays that Allied be ordered to cease and desist from refusing to pay representatives of miners for participating in inspections; that Allied be ordered to pay Mr. Sparks for his participation in the inspection on March 28, 1978, with interest at 9 percent; and that Allied be assessed an appropriate civil penalty for its interference with the exercise of rights protected by section 105(c) of the Act. On August 30, 1979, respondent filed a motion for summary decision and brief in support thereof pursuant to 29 CFR 2700.64 on the grounds that the statutory language, legislative history and case law interpreting the relevant sections of the Act demonstrate that as a matter of law Allied is not required to pay Mr. Sparks for his participation in a "spot" inspection made pursuant

to section 103(i) of the Act. On September 10, 1979, the Secretary filed his opposition along with supporting briefs. There being no genuine issue as to the material facts, the matter stands ready for summary decision of the question of statutory construction presented.

At issue in this litigation is the extent of miners' walkaround rights, i.e., the right to accompany an inspector and to receive normal compensation while doing so. This right is recognized in section 103(f), 30 U.S.C. 813(f), of the Act, which provides that a representative of the miners shall be given an opportunity to accompany an inspector for the purpose of aiding in the "inspection of any coal or other mine made pursuant to [section 103(a)]." (Footnote 2) Any such representative of the miners who is also an employee of the operator "shall suffer no loss of pay during the period of his participation in the

inspection." Respondent contends that there are certain types of inspections to which the right to compensation does not attach, in particular, spot inspections for extrahazardous conditions pursuant to the mandate of section 103(i).

The scope of the Secretary's mine inspection authority is delimited by section 103(a), (Footnote 3) which directs "frequent" inspection of all mines for four purposes: (1) to obtain information relating to health and safety conditions and the causes of accidents; (2) to gather information relating to mandatory standards; (3) to determine whether imminent dangers exist; and, (4) to determine compliance with mandatory standards, citations, orders, or decisions. With respect to imminent dangers and compliance, the Secretary is directed to inspect

each mine "in its entirety at least" four times per year for underground mines and two times per year for surface mines. In addition to this minimum requirement for complete inspections, the Secretary is directed to establish guidelines for additional inspections based on his experience under the Mine Act "and other health and safety laws."

Thus, it is apparent that the substantive authority for carrying out inspections for the purposes of obtaining information and insuring compliance is to be found in section 103(a). The regular compliance inspections are to be carried out frequently, but, in no event less than two or four times yearly.

In addition to the minimum requirements for compliance inspections, two other subsections establish special procedures for triggering inspections for compliance and information. Section 103(g)(1) (Footnote 4) provides that at the request of a representative of the miners who has reasonable grounds to believe that a violation or imminent danger exists an immediate special inspection may be had. Section 103(i) (Footnote 5) provides for "spot" inspections for methane accumulations in gassy mines and for "other especially hazardous conditions" on an accelerated schedule.

Respondent takes the position that the compensation right under section 103(f) extends only to the minimum of four mandatory inspections "of the mine in its entirety," and that any other or additional inspections are without the coverage of the section. Maintaining that these "regular" inspections are the "only inspections made pursuant to Section 103(a)" (Brief, p. 5), respondent asserts that only a representative of miners participating in such a "regular" inspection is entitled to be paid. Respondent claims that since the inspection giving rise to the instant complaint was made pursuant to section 103(i), and since "there is no requirement in Section 103(i) that the operator pay a representative of miners for participation in such a spot inspection" (id.), the miner Sparks is not entitled to compensation.

The Secretary, on the other hand, takes the position that the language of the compensation provision of section 103(f) clearly and unambiguously encompasses all inspections carried out for the

purposes enumerated in the four clauses of the first sentence of section 103(a). Relying on the Interpretative Bulletin of April 25, 1978, 43 F.R. 17546, the Secretary maintains that the "inclusion of a statutory minimum number of inspections at each mine is no more than an additional requirement, clearly directed at the Secretary, which does not affect the participation right." 43 F.R. at 17547. Therefore, the Secretary concludes that because they are carried out for the purpose of obtaining information or determining whether imminent dangers, violations or especially hazardous conditions exist, the inspections triggered by sections 103(i) and (g)(1) "are clearly conducted "pursuant to' section 103(a)." Id.

In support of its position, respondent cites two previous decisions by administrative law judges which concluded that operators are not required to pay employees who accompany MSHA inspectors on other than the "regular", i.e., entire mine inspections. Kentland-Elkhorn Coal Corporation v. Secretary of Labor, PIKE 78-339 (March 8, 1979), appeal pending; Secretary of Labor v. Helen Mining Company, PITT 79-11-P (April 11, 1979), appeal pending.

In Kentland-Elkhorn, an MSHA electrical specialist conducted an inspection of the operator's preparation plant. At the time of this inspection, another inspector was in the process of carrying out one of the "regular" inspections of the mine in its entirety. That

inspector was accompanied by a miner who was paid. The electrical specialist was also accompanied by a representative of the miners, and upon the operator's refusal to pay that miner, a citation and subsequently a withdrawal order issued. In a review proceeding, the operator contended that section 103(f) only grants miner representatives the right to participate in an inspection without suffering loss of pay during a "regular" inspection of the entire mine and since the inspection at issue was a spot electrical inspection, it had properly refused to pay the miner. The administrative law judge agreed with these contentions and held that the right to participate without loss of pay is limited to "regular" inspections of the entire mine.

A similar conclusion was reached in Helen Mining Company, supra, with respect to a spot inspection required by section 103(i). Since the mine involved in that case was particularly gassy, it had to be frequently inspected for possible accumulations of methane. The inspector involved had been in the process of making one of the "regular" inspections of the mine in its entirety during the previous 3 days, but he interrupted this inspection so that he could investigate areas where accumulations of methane might exist in order to determine whether those areas were adequately ventilated. The inspector was informed that the representative of the miners who accompanied him on the methane inspection would not be paid, whereupon a citation and subsequently a withdrawal order issued. At the hearing, the operator contended that section 103(f) only requires that the miner representative who participates in an inspection of the entire mine

must be paid. (Footnote 6) Again, the administrative law judge agreed with these contentions and vacated the citation and order.

Both these cases turned on the authority ascribed to certain remarks made by Congressman Perkins, Chairman of the Committee on Education and Labor. These remarks were made after the Conference Committee had made its final report and 21 days after the Senate had passed the bill. (Footnote 7) In attempting to clarify what he considered to be an ambiguity in this aspect of the Conference Report, he stated that:

> Section 103(f) provides that a miner's representative * * * 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 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 in its entirety * * *.

Committee Print, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess (July 1978) at 1357 (hereinafter cited as Leg. Hist.)

This seemingly unequivocal statement concerning the intended scope of section 103(f) was, however, followed by a comparison of the cognate provisions of the 1969 Act which indicates some possible confusion on Congressman Perkins' part. He recognized that section 103(a) of the 1969 Act did not include the provision directing the Secretary to "develop guidelines for additional inspections of mines based on criteria including, but not limited to, * * * his experience under this act and other health and safety laws." (Emphasis added.) He then correctly pointed out that the participation right section of the 1969 Act, section 103(h), provided that a representative of the miners may accompany an inspector on "any" inspection, but that the 1969 Act did not have a compensation provision. He then went on to state:

> 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. [Emphasis added.]

Leg. Hist. at 1358.

Thus, a fair reading of the whole of Congressman Perkins' statement concerning the seeming ambiguity found in section 103(f) indicates that his real concern was that the right to pay for exercise of

the walkaround right not be extended to the "additional inspections" permitted under the new section 103(a), but would be limited to the "frequent inspections" authorized and required by the first sentence of that section. Thus, it appears that when Congress limited the right to pay to inspections "pursuant to subsection (a)," it may have intended to exclude from that right inspections made under guidelines issued by the Secretary calling for "additional inspections," i.e., inspections other than those mandated by the statute. In other words, there are two categories of inspections, statutory section 103(a) inspections and nonstatutory Secretarial inspections. Congress may well have wished to protect the operators from an unlimited expansion of the right to pay based on "additional inspections" authorized only by the Secretary and particularly where they were for the purpose of aiding in the exercise of his responsibilities under "other health and safety laws."

Indeed, the greater weight of the legislative history supports this interpretation. First, it should be noted that the provision at issue was included in the Senate version of the bill and the Joint Explanatory Statement of the Conference Committee clearly indicates that "to encourage miner participation * * * one such representative of miners, who is also an employee of the operator, [shall] be paid by the operator for his participation in the inspection and conferences. The House amendment did not contain these provisions. The conference substitute conforms to the Senate bill." Leg. Hist. at 1323. It is significant to note that nowhere in the Conference

Committee statement is the purported limitation on the compensation right advanced by Congressman Perkins discussed or alluded to.

In the Senate's consideration of the 1977 Act, miner participation in inspections was recognized as an essential ingredient of a workable safety plan. Senator Javits, one of the managers of the bill, explained the critical importance of the walkaround right as part of a comprehensive scheme to improve both safety and productivity in the mines:

> First, greater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated. In addition, there is a general responsibility on the operator of the mine imposed by the bill to provide a safe and healthful workplace, and the presence of miners or a representative of the miners accompanying the inspector is an element of the expense of providing a safe and healthful workplace * * *. But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation, on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.
> In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper * * *. We think safe mines are more productive mines. So the operator who profits from this production should share in its cost as it bears directly upon the productivity as well as the safety of the mine * * *. It seems such a standard business practice that is involved here, and such an element of excellent employee relations, and such an assist to have a worker who really knows the mine property go around with

> an inspector in terms of contributing to the health and safety of the operation, that I should think it would be highly favored. It seems to me almost inconceivable that we could ask the individual to do that, as it were, in his own time rather than as an element in the operation of the whole enterprise.

Leg. Hist. at 1054-1055.

Senator Williams, Chairman of the Committee on Human Resources, also discussed the importance of the walkaround right in the context of improving safety consciousness on the part of both miners and management:

> It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

Leg. Hist. at 616-617.

In light of the broad policy expressed in the Act of protecting miners and making inspections more effective, it is difficult to understand why the isolated remarks of Congressman Perkins have been accorded so much weight. In contrast, similar remarks by other members of the House and Senate are conspicuous by their absence. It would seem that if Congress had intended by section 103(f) to create two separate categories of statutory walkaround rights, one compensable and one non-compensable, there would have been at least some debate on this departure from the general scheme of the Act.

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Otherwise, there exists an arguably invidious discrimination.

In any event, it is questionable whether resort to legislative history has a place in the application of the statutory language in question. T.V.A. v. Hill, 437 U.S. 153, 184 n. 29 (1978). On its face, section 103(f) is clear and unambiguous, and therefore reliance on the explanatory comments of a single Congressman appears unnecessary. Schiaffo v. Helstoski, 492 F.2d 413, 428 (3rd Cir. 1974).

It has been consistently held that as a matter of statutory construction it is error to place undue emphasis on a portion of the legislative history where to do so sacrifices the object of the legislation. "Not even formal reports - much less the language of a member of a committee - can be resorted to for the purposes of construing a statute contrary to its plain terms." Committee for Humane Legislation v. Richardson, 414 F. Supp. 297, 308 (D.D.C. 1976), modified 540 F.2d 1141 (D.C. Cir. 1976); citing Pennsylvania Railroad Company v. International Coal Mine Company, 230 U.S. 184, 199 (1912); F.T.C. v. Manager, Retail Credit Company, 515 F.2d 988, 995 (D.C. Cir. 1975). It must be remembered that the proper function of legislative history is to resolve ambiguity, not to create it. United States v. Missouri Pacific Railroad Company, 278 U.S. 269, 278 (1929); Montgomery Charter Service v. W.M.A.T.A., 325 F.2d 230, 233 (D.C. Cir. 1963); Elm City Broadcasting Corporation v. United States, 235 F.2d 811, 816 (D.C. Cir. 1956).

It should be noted that these sections of the Mine Safety Act serve a broad remedial purpose, and as such should be given a liberal construction, and any asserted exceptions to those provisions should be given a strict, narrow interpretation. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 430 U.S. 938 (1975). Finally, when a statutory interpretation that promotes safety conflicts with one that serves another purpose, the first must be preferred. District 6, UMWA v. IBMA, 562 F.2d 1260, 1265 (D.C. Cir. 1977).

Accordingly, whether based on an analysis of the relevant legislative history or through application of accepted canons of statutory construction, I find that the reference in section 103(f) to inspections "made pursuant to subsection (a)" includes all inspections made for the purposes enumerated in the four clauses of the first sentence of that subsection, and is not limited to the minimum number of inspections of the mine in its entirety mandated by the third sentence of that subsection.

Conclusions of Law

1. Section 105(c)(1), the discrimination provision of the Act, which prohibits any form of interference with the exercise of the statutory rights of a miner or representative of miners is a proper vehicle for review of an operator's refusal to compensate a representative of miners pursuant to section 103(f).

2. The reference in section 103(f) to inspections "made pursuant to subsection (a)" includes all inspections made for the purposes enumerated in the four clauses of the first sentence of section 103(a), irrespective of whether the particular inspection may have been triggered by section 103(i), and is not limited to the minimum number of inspections of the mine in its entirety mandated by the third sentence of section 103(a).

3. Since the inspection at issue in this proceeding was made for the purpose of "obtaining information relating to health and safety conditions" including "especially hazardous" conditions authorized by both sections 103(a) and (i) of the Act, Mr. Sparks' participation was compensable under section 103(f).

4. Taking into consideration the six criteria for the assessment of civil monetary penalties, I find that a penalty for violation of section 103(f) of $100 is consistent with the purposes and policy of the Act.

ORDER

WHEREFORE, IT IS ORDERED that:

1. Respondent CEASE AND DESIST from refusing to pay representatives of miners for participating in inspections made for the purposes of obtaining information relating to extrahazardous conditions under section 103(i) of the Act.

2. On or before Wednesday, October 31, 1979, respondent shall pay the civil penalty assessed in the amount of $100.

3. On or before Wednesday, October 31, 1979, respondent shall pay to Applicant, Arnold J. Sparks, Jr., back pay based on his regular hourly rate for the period of time involved in the inspection of March 28, 1978, with retroactive interest thereon of 9 percent (9%) from March 28, 1978, until the date of payment.

4. Counsel for the parties shall stipulate the dollar amount due under paragraph 3 of this order. If they are unable to stipulate such amounts within 15 days of this order, counsel may file herein proposed amounts due and, if necessary, a hearing shall be held on any issues relating to such proposals.

5. Within 10 days of payment of the amount due under paragraph 3 of this order, counsel for Applicant shall file herein a Satisfaction of Order reciting the amount paid.

6. Respondent shall, within 15 days of the date of this order, post a copy of this decision and order on a bulletin board at the Shannon Branch Coal Mine, where notices to miners are normally placed, and shall keep it posted there, unobstructed and protected from the weather, for a consecutive period of 60 days.

Finally, it is ORDERED that, subject to the satisfaction of the above, this matter be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~Footnote_one

1 These are the material facts as disclosed in applicant's complaint and in respondent's motion for summary disposition. Paragraphs 4 and 5 of the complaint allege that the inspection at issue was a "spot" inspection. The Secretary neither admits nor denies that the inspection was made pursuant to section 103(i).

~Footnote_two

2 Section 103(f), 30 U.S.C. 813(f), of the Act provides:

"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 the subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

~Footnote_three

3 Section 103(a), 30 U.S.C. 813(a), of the Act reads in pertinent part:

"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."

~Footnote_four

4 Section 103(g)(1), 30 U.S.C. 813(g)(1), of the Act reads in pertinent part:

"Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice

to the Secretary or his authorized representative of such violation or danger."

~Footnote_five

5 Section 103(i), 30 U.S.C. 813(i), of the Act reads:

"Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases' shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals."

~Footnote_six

6 The operator's argument proves too much, because if accepted it would lead to the conclusion that the miner initially requested must accompany the inspector during the whole of the entire mine inspection. Recognizing that in many cases such complete inspections take a considerable amount of time, even weeks or months, it is unrealistic to assume that one particular miner would be assigned to accompany the inspector exclusively, especially considering that no one miner possesses the expertise to assist the inspector in investigating all the areas of a large and complex mine.

~Footnote_seven

7 The Conference Committee voted to accept the Conference Report on October 3, 1977 (Leg. Hist. at 1279), the Senate voted to accept the Conference Report on October 6, 1977 (Leg. Hist. at 1347), and a Concurrent Resolution to effect corrections was agreed to on October 17, 1979 (Leg. Hist. at 1351). It was not until October 27, 1977, that Congressman Perkins made his remarks to the House. (Leg. Hist. at 1354). There is no evidence that Congressman Perkins' gloss on section 103(f) was ever brought to the attention of or approved by the Senate.