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SOL (MSHA) V. ASARCO
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF RAY GANN
AND DENNIS GANN,
COMPLAINANTS

Complaint of Discharge
Discrimination or Interference

Docket No: SE 81-34-DM

Young Mine

v.

ASARCO, INCORPORATED,
RESPONDENT

DECISION ON CROSS MOTIONS FOR SUMMARY JUDGEMENT

All of the pertinent facts in this discrimination case have been stipulated and the matter has been presented to me on cross motions for summary judgement. At the time in question the two complainants were classified as production machine men earning \$5.43 per hour. When production machine men do the work of drilling and blasting they are paid an incentive bonus which is based upon the time they were engaged in drilling and blasting and upon the total tonnage broken by all employees in a particular week.

On July 29, 30 and 31, 1980, federal mine inspector Frank Mouser inspected respondent's mine. On the first two days he was accompanied by Mr. Ray Gann for two 8-hour workshifts and on July 31, 1980, Mr. Dennis Gann accompanied the inspector for an entire 8-hour workshift. The two complainants were paid "walkaround pay" at the rate of a production machine man, and the alleged act of discrimination is they did not get the incentive bonus that they otherwise would have earned. Stipulation VII states:

"On the days in question all other employees in the machine man classification did drilling and blasting work for their entire shifts and received incentive pay in direct proportion to the number of hours actually worked in the classification."

It is therefore clear that it cost each of the complainants a certain amount of money when they accompanied the inspector during the inspection.

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Section 103(f) of the Act authorizes a representative of the miners to accompany an inspector on his rounds and states:

"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."

It is not necessary to resort to legislative history to determine that each of these two miners did suffer a "loss of pay during the period of his participation in the inspection" There was a violation of the Act and a citation would have been appropriate. If a citation was issued, and I do not know whether one was, then the appropriate civil penalty should be considered during the normal assessment procedures connected with a citation. Unless and until the Commission rules that it is appropriate to bypass the established assessment procedures, I am not going to assess civil penalties in discrimination cases. If I were to assess a civil penalty in this case, however, it would be nominal because the hazard and negligence are of such a low degree.

It is hereby ORDERED that respondent, Asarco, Inc. pay to Dennis Gann the sum of \$7.94 */ and pay to Ray Gann the sum of \$15.88 and that each be paid interest at the rate of 10% beginning on the day when they normally would have received the incentive pay involved herein and continuing until payment is made.

Charles C. Moore, Jr.
Administrative Law Judge

*/ The amounts of pay where stipulated