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

SOUTHERN OHIO COAL COMPANY, CONTESTANT	Contest of Citations
	Docket No. LAKE 82-93-R
v.	Citation No. 1225640 6/3/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. LAKE 82-94-R Citation No. 1225641 6/3/82
	Docket No. LAKE 82-95-R Citation No. 1225867 6/3/82
v.	
UNITED MINE WORKERS OF AMERICA (UMWA), INTERVENOR	Meigs No. 2 Mine Raccoon No. 3 Mine

DECISIONS

Appearances: D. Michael Miller, Daniel A. Brown, Esqs., Columbus, Ohio, for the Contestant Edward Fitch, Attorney, U.S. Department of Labor, Arlington, Virginia, for respondent MSHA David Shreve, Mary Lu Jordan, Esqs., UMWA, Washington, DC, for the Intervenor

Before: Judge Koutras

Statement of the Proceedings

These consolidated cases arise from similar circumstances regarding "meetings or conferences" arranged by MSHA inspectors and held at the mine sites owned and operated by the Respondent Southern Ohio Coal Company (hereinafter SOCCO). In each of the citations herein contested, the inspector issued citations pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, charging SOCCO with violations of section 103(f) of the Act as a result of SOCCO's refusal to compensate the miners' representatives for their time spent at the conferences or meetings. SOCCO concedes that the walkaround representatives were not paid.

Section 103(f), commonly referred to as "the walkaround right", provides as follows:

> 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 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 [emphasis supplied].

Issues

A general issue raised by the UMWA and MSHA is the validity of the Secretary's determination that miners must be paid while attending certain mine site meetings or conferences, held at periodic intervals determined by the inspector, to review citations issued by the inspector. The Secretary has concluded that such meetings are properly categorized as post-inspection conferences under section 103(f) of the Act and that the right of a miner's representative to participate and to receive pay for said participation are co-extensive for any post-inspection conferences held on the mine site.

On the specific facts of the instant cases, and without admitting that a miner representative is entitled to be compensated for attending any post-inspection conference, SOCCO's position is that the meetings held at the mine site were not inspection conferences within the meaning of section 103(f), but were merely assessment conferences held pursuant to the newly promulgated "Part 100" civil penalty assessment regulations. In short, while SOCCO concedes that miner representatives are entitled to compensation under section 103(f) when they accompany inspectors during a physical walkaround inspection of the mine, it does not concede that compensation is mandated by that section for "assessment conferences" held pursuant to Part 100, Title 30, Code of Federal Regulations.

Discussion

In Docket LAKE 82-93-R, the inspector issued Citation No. 1225640, on June 3, 1982, and the condition or practice cited states:

> On May 24, 1982, Frank Goble, representative of the miners, accompanied Myron Beck, MSHA Inspector, during a regular inspection of the mine, which was pertaining to conference and modifications of citations according to new 30 CFR Part 100, civil penalty criteria, and he was not paid for the time he participated in such inspection.

In Docket LAKE 82-94-R, the inspector issued Citation No. 1225641, on June 3, 1982, and the condition or practice cited states:

> On May 24, 1982, Bob Koons, representative of the miners accompanied D. E. McNece, Jr., MSHA Inspector, during a regular inspection of the mine which was pertaining to conference and modification of citations according to new 30 CFR Part 100, civil penalty criteria, and he was not paid for the time he participated in such inspection.

In Docket LAKE 82-95-R, the inspector issued Citation No. 1225867, on June 4, 1982, and the condition or practice cited states:

> On May 24 and 26 Bill Blackburn, representative of the miners traveled with an authorized representative of the Secretary on a regular AAA inspection and was not compensated for his loss of pay for those days.

At the hearing in these cases, testimony and evidence was taken concerning the citations issued in Dockets LAKE 82-93-R and 82-94-R, at SOCCO's Meigs No. 2 Mine. With regard to the citation issued at the Raccoon No. 3 Mine, SOCCO's counsel made a proffer that the testimony regarding the Raccoon Mine No. 3 would be the same as that presented for the Meigs No. 2 Mine, and in its post-hearing brief, at pg. 8, SOOCO's counsel confirms that "the evidence regarding this citation would not be materially different from the evidence concerning the first two" (Tr. 11). MSHA's counsel stated that "no penalty was made for the Raccoon No. 3 Mine citation and it was my understanding that that case was going to be withdrawn" (Tr. 11).

MSHA's responses to certain interrogatories filed in Docket LAKE 82-95-R do confirm that the facts which gave rise to the issuance of the contested citation in that case are similar to those which took place in the other two dockets, and the legal arguments advanced by the parties in all three cases appear to be the same. In order to clarify the matter further, telephone conferences were held by me with counsel for MSHA, SOCCO, and

the UMWA on March 4, 1983, and they confirmed that the facts and legal arguments are similar. However, SOCCO's counsel confirmed that the civil penalty assessed for the citation issued in LAKE 82-95-R, had "been paid by mistake", and SOCCO's position is that it still intends to litigate the issue raised notwithstanding that "mistaken" payment, and that its contest has not been withdrawn. MSHA's counsel could not confirm whether the civil penalty had in fact been paid, and as far as I know, no motions have ever been filed by the parties seeking withdrawal or dismissal of the case. Accordingly, I have included it as part of my decisions in these proceedings.

MSHA's testimony and evidence

MSHA Inspector Dalton E. McNece, testified as to his background, and he confirmed that he went to the Meigs no. 2 mine on May 24, 1982, and met with company safety supervisor Carl Curry and representative of the miners Bob Koons. He advised them that he was there for the purpose of a Part 100 conference, and that instead of a regular mine inspection, he would spend the day "conferencing and modifying citations under the new Part 100 which were citations that had previously been issued and had not been conferenced" (Tr. 47).

Mr. NcNece stated that the conference consisted of a discussion of 14 citations, and that Mr. Koons and Mr. Curry participated in the discussion. Mr. NcNece confirmed that he modified each citation, including the factors of negligence, gravity, and good faith, and his prior "significant and substantial" findings. Mr. Curry advised him that it was possible that Mr. Koons would not be paid for the time spent at the conference (Tr. 49).

Mr. NcNece testified that subsequently, on June 3, 1982, while at the mine for a regular inspection, Mr. Koons advised him that he had not been paid for the time he spent on the May 24, 1982, conference, and that mine management confirmed that he was not going to be paid. Mr. McNece then issued citation no. 1225641 (Tr. 49).

Mr. McNece stated that the May 24, 1982, conference was new to everyone, and that at the present time such conferences are held at the end of each inspection day or week, and any citations issued during the day or week are discussed with mine management and the miner representative. The present conference also includes any findings of negligence, good faith, and gravity, which now appear on the face of the new MSHA citations in lieu of the previously executed inspector's "narrative statement" or "gravity sheet" which is no longer in use (Tr. 51).

Mr. McNece confirmed that in the past, "inspector's findings", which were recorded on the "narrative statement", were not discussed with mine management, but since a new "combined" citation form is now in use, management has an opportunity to discuss the inspector's gravity, negligence, and good faith findings at the time the citation is served (Tr. 52-54).

Mr. McNece explained that prior to the new Part 100 procedures he would hold a preinspection conference at the beginning of each regular inspection period for the purpose of alerting mine management and the miner representative of his presence, and that this usually took 10 to 15 minutes. Thereafter, he would submit his weekly and interim inspection reports to his subdistrict office, and on the last day of the inspection period a "close-out conference" was held, with mine management and the miner representative present, to discuss all of the citations issued during the inspection period (Tr. 63-65).

Mr. McNece stated that under the new Part 100 procedures, he holds weekly conferences at the close of the day on Friday with the mine and union representative present to discuss the citations issued during the week, and that these last half hour or 45 minutes, depending on the number of citations issued. These conferences include a discussion of the conditions cited as violations, and the negligence, gravity, and good faith compliance regarding each citation. At the completion of the inspection cycle, a similar "close-out conference" is held, but it is limited to any citations issued during the last week of the inspection period (Tr. 66).

In response to UMWA cross-examination, Mr. McNece confirmed that of the 14 citations "conferenced" by him on May 24, 1982, two were modified and his "significant and substantial" (S&S) findings were revoked. The remaining 12 citations, which included "S&S" findings, were reaffirmed as originally issued, and he explained why he modified some citations and left the others intact (Tr. 74-78).

In response to SOCCO's cross-examination, Mr. McNece confirmed that while on a physical inspection of the mine, a company representative and a miner's representative are usually with him, and conversations do take place among this "inspection party" with regard to any violations which may arise. After the completion of the inspection walkaround, he reduces his findings to writing and serves any citations on the mine operator (Tr. 83).

Mr. McNece testified that he did not conduct a physical walkaround inspection of the mine on May 24, 1982, but devoted the day to "conferencing and modifications of previously issued citations" (Tr. 83-84). He recalled that the discussions concerning the 14 citations took place from approximately 9:00 a.m. to 12 noon, and that he devoted the rest of the afternoon, until approximately 3:30 p.m., on "paperwork" connected with the citations (Tr. 88-90).

Mr. McNece confirmed that he also issued a citation because mine representative Goble had not been compensated for the conference of May 24, 1982, with MSHA inspector Beck (Tr. 93, exhibit R-1). He also confirmed that in the future, similar conferences will be held at the mine, and the amount of time that such meetings will require depends on the number of citations which are issued and discussed (Tr. 94).

Mr. McNece confirmed that the conference of May 24, 1982, included discussions of gravity and negligence. He could not recall whether he had any information concerning the relative "number values" for negligence, gravity, and good faith, but did confirm that respondent's safety representative Curry did. Mr. McNece confirmed that he was only concerned with the factors of negligence, gravity, and good faith and not with "numbers or points" (Tr. 97-98).

The UMWA's testimony and evidence

The UMWA representative who participated in the hearing in these proceedings stated that he had never seen the "Lamonica interpretative bulletin". He did concede that he was aware of the fact that if a miner's representative exercised his right to a conference held off mine property at MSHA's district office, he would not be entitled to compensation, and that this has been the position taken by the UMWA on this question (Tr. 139).

Robert Koons, testified that he is employed at the Meigs No. 2 Mine as a lampman, and that he has served as the chairman of the health and safety committee for approximately 8-1/2 to nine years. He confirmed that he attended the conference in question on May 24, 1982, to discuss certain citations issued at the mine, and he believed that conferences of this kind benefit the miners as well as mine management. In his view, if he were not compensated for the time spent at these conferences, the local union would be unable to afford a representative to be present (Tr. 144-146).

On cross-examination, Mr. Koons confirmed that Mr. Goble was present during part of the conference with Mr. McNece, and he then stayed for his own meeting with Mr. Beck. He also confirmed that he does meet on a regular daily basis with mine management in regard to mutual safety concerns (Tr. 147).

Mr. Koons confirmed that since May 24, 1982, he has met with MSHA District office manager Gaither Knight at Wellston, and with a mine management representative present, at a "second conference," and he was not paid for attending that conference (Tr. 148). He confirmed that he was not paid for the May 24, 1982, conference with Inspector McNece and that he lost five hours of pay. He stated that his presence and participation at that conference was with respect to the matters addressed in the citations under discussion, and he confirmed that he is responsible for reporting the results of the conference to his member ship (Tr. 155).

In response to further questions, Mr. Koons stated that with regard to the citations discussed on May 24, 1982, he may have been on the initial walkaround inspection when some of them were issued, but not on all of them (Tr. 157). He estimated that four to six union walkaround representatives may have been with the inspectors who issued the 14 citations in question (Tr. 158). When asked whether all of these walkaround representatives were entitled to be present at the conference of May 24, and to be

compensated for their attendance, he responded as follows (Tr. 159-160):

> Q. Do you feel personally that those six were also entitled to be present on May 24?
>
> A. Well, it would be impossible because some of them work different shifts and they would have to be summoned into the mine.
>
> Q. Well, let's assume that happened. Let's assume one fellow was on the night shift and he decided to have a conference during the day time and you picked up the phone and called this fellow, got him out of bed or something, said, hey, come on to the mine, we're having a conference on the citation issued last when you were the walk-around. The guy comes out to the mine. Do you feel that he has a right, number one, to participate in that situation and, number two, do you think he ought to be compensated for that, just your personal opinion?
>
> A. That's a pretty tough question. I don't know. I think if I was calling out to the mine I would be certainly entitled to compensation by somebody if I was to come to begin with.

Mr. Koons indicated that the conference of May 24 was "unusual" and the "first of its kind", and that is why he wanted to be present. He confirmed that the usual procedure is for other safety committee members to travel with inspectors and "conference" any citations, and in those instances he simply receives the safety committeemen's reports (Tr. 161). He believed the conference in question was unusual because "it was a new change being introduced. They done away with the assessment officers and they was doing it on the mine site conference and these type violations" (Tr. 161). Mr. Koons confirmed that as a general rule when he is engaged in union business in his capacity as representative of the miners he is normally compensated for his time either by the company or the union (Tr. 174).

Mr. Koons confirmed that prior to the new procedures, he would participate in a preinspection conference with the inspector and mine management, and that this would last approximately 15 minutes to a half hour. The inspection would then take place over a three month period and the inspector would be there everyday. At the conclusion of this three month inspection, he would participate in the "clost-out conference" to discuss all citations which may have been issued during the three month period, and this would last three to five hours (Tr. 175-176).

Mr. Koons confirmed that since May 24, 1982, he still participates in the preinspection conference. However, weekly conferences are now held to discuss all citations issued during the week. In addition, if there is a spot inspection, a daily conference may also be held. Further, at the end of the quarterly inspection cycle, a close-out conference is also held (Tr. 177).

Southern Ohio's testimony

Carl R. Curry, safety supervisor, Meigs No. 2 Mine, testified that the Meigs No. 1 and 2 Mines, as well as the Raccoon Mine, are separate underground mines which are inspected by MSHA four times a year and that each inspection lasts approximately three months (Tr. 225). He confirmed that he was the company representative in attandance at the May 24, 1982, conferences which resulted in the issuance of two of the citations in question (Tr. 227, exhibits R-1 and R-2).

Mr. Curry confirmed that during the past three years he attended assessment conferences in Lexington, Kentucky, and in Columbus and Athens, Ohio, away from the mine, and that the only people in attendance were himself and the MSHA assessment officer (Tr. 228-229). He and the assessment officer discussed grativy, negligence, and good faith compliance "points" as well as the facts and circumstances surrounding the citations under discussion (Tr. 230).

Mr. Curry stated that since May 24, 1982, his conferences are similar to those held at the mine with the inspector on that day, and the only difference is that the inspector conducts the meeting, discusses his citations, and solicits comments from the union and mine management (Tr. 232).

Mr. Curry stated that prior to the May 24 conference, he attended a meeting at MSHA's new Lexington subdistrict office at which time the new part 100 procedures were explained to him, and he was given a handout explaining the number of "points" which would be assessed for the "blocks" checked on the inspector's citation form. He confirmed that he had this handout with him at the May 24 conference (Tr. 232-233). He also stated that at the MSHA meeting he was advised that the "old assessment conferences would be a thing of the past" (Tr. 234).

Mr. Curry produced the notes and comments which he made during the May 24 conference and they were received in evidence (Tr. 238, exhibit C-1). He confirmed that Mr. McNece conducted the conference, and present were Mr. Koons, MSHA inspector Myron Beck, and UMWA worker Frank Goble. Mr. Beck conducted the second meeting that day and Mr. Curry sat in on that one with Mr. Goble, the miner representative. The meetings were held in the mine office conference room, and they were similar to the previous assessment conferences which he had attended. However, dollar amounts were not discussed, but these amounts were "labeled for us for each one of those points" (Tr. 243).

On cross-examination, Mr. Curry confirmed that when he previously participated in assessment conferences he knew what the assessments were and that his input usually resulted in a 25% reduction (Tr. 248). At the present time, he does not talk to the inspector about "points", but generally discusses the boxes he checks on the citation form (Tr. 251). Mr. Curry confirmed that 80 to 90% of the citations issued at the mine are taken to the second stage conference under the new regulations, and that

only after this conference is he formally told what the actual civil penalty is (Tr. 260).

Additional testimony and arguments made at the hearing

Although he first insisted that he conducted a regular inspection of the mine on May 24, 1982, Inspector McNece finally conceded that he conducted no underground or surface physical inspection of the mine and that his sole purpose for going to the mine that day was to discuss 14 previously issued citations which had not been assessed under the new part 100 regulations (Tr. 99-102). At one point during his testimony, he indicated that his mere presence on mine property, even though he spent the time "conferencing" was a "regular mine inspection." When asked whether his position would be the same if he conducted the "conferencing" at a Holiday Inn across the road from the mine, he replied that this would not be a "regular mine inspection" because the Holiday Inn would not be on mine property (Tr. 101).

Mr. McNece stated that MSHA's policies and instructions require him to conduct any Part 100 "initial conferences" on mine property, and that these conferences may not be held elsewhere. However, should a "second conference" be necessary to further discuss any disagreements voiced by mine and union representatives, these are usually held at MSHA's field office, and the representative of miners is not required to be compensated for this second conference (Tr. 103). Compensation is only required for the initial conference (Tr. 103).

On the one hand, Inspector McNece claims he was at the mine on May 24, 1982, to afford the respondent an opportunity to avail itself of the new Part 100 regulations. On the other hand, MSHA's counsel stated on the record that Mr. McNece was there to only consider his "S&S" findings. In this regard, counsel stated as follows at Tr. 108-114:

> JUDGE KOUTRAS: Isn't that precisely what happened in this case, in this docket number, on May 24th he went back there for the specific purpose of conferencing 14 citations that were previously issued where the operator had not had an opportunity for it to go through the assessment office, and under these new regulations it says, effective on -- the effect on prior regulations, the prior Part 100 remained in effect for the prior assessing of all citations and orders where an initial review under 100.5(b) has been issued before May 21, 1982. These 14 citations did not go through the Part 100 assessment stage, and that's what the inspector did when he went back on May 24 was to give the operator an opportunity to have those 14 citations looked at from an assessment point of view on that day; isn't that true?
>
> MR. FITCH: Looked at for implementation of the significant, substantial findings from National Gypsum, which is in reality the only thing that he did during those conferences was apply National Gypsum.

JUDGE KOUTRAS: No. no, no. He made a determination that the gravity on two of them wasn't that severe.

MR. FITCH: As a result of National Gypsum.

JUDGE KOUTRAS: That's the only reason he went out there.

MR. FITCH: Yes.

JUDGE KOUTRAS: So you're telling me now that these conferences today if he were to go out there to that mine next Monday and he would hold a similar type -- would he hold a similar type conference as was held on May 24th?

MR. FITCH: He would be dealing with only the citations issued since the last conference session.

JUDGE KOUTRAS: That's right. And what would he be doing with those, the same type of things he did with these?

MR. FITCH: Yes.

JUDGE KOUTRAS: Looking at them for what, to upgrade them or downgrade them?

MR. FITCH: Upgrading or downgrading but giving the operator an opportunity to provide information.

* * * * * * * * * *

JUDGE KOUTRAS: Does it have to be at the mine?

MR. FITCH: We are interpreting the 103(f) to say that that first one is part of the inspection and that it is going to be at the mine and that it's a compensatory session.

JUDGE KOUTRAS: Why do you say that, because of the physical examination provision of the statute that you can't examine the mine if you're downtown in MSHA's office?

MR. FITCH: Basically because everybody has got their notes with them, and the mine site is the proper place, and 99 percent will be dealt with only at the mine site, and that maybe at our discretion we will grant a request within ten days to give a conference at the local MSHA office where theoretically the company can get in their car and drive down to the MSHA office and walk in and do a hard sell.

* * * * * * * * * *

JUDGE KOUTAS: If that discretionary meeting is given to all parties, downtown at the MSHA district office, is the miners' representative -- assume he's one of the parties, is he entitled to be present?

MR. FITCH: He's entitled to be present.

JUDGE KOUTRAS: Is he entitled to be compensated?

MR. FITCH: The present administration takes the view that he's not.

JUDGE KOUTRAS: Is this office chitchat, this present administration takes the view or is it some place embedded in stone?

MR. FITCH: It's the interpretation of my client that the --

JUDGE KOUTRAS: Where is that?

MR. FITCH: That 103(f) walk-around pay rights extends to conferencing at the mine site and --

JUDGE KOUTRAS: But not downtown under this?

MR. FITCH: That it does not.

JUDGE KOUTRAS: Where -- is that written some place, Mr. Fitch? Is that in this policy guideline some place?

MR. FITCH: It's not written.

JUDGE KOUTRAS: Now, to be consistent why is it not that a miners' representative can't be compensated for a conference downtown which the very regulation gives them that discretion, but they can if they hold it at the mine site? What's the distinction? Why in one and not in the other? Don't you find some inconsistency in that position? Because if a post inspection conference is a post inspection conference that's compensable, what difference does it make where it's held or when it's held?

MR. FITCH: Your Honor, lawyers do not always get to argue their view of the law and --

JUDGE KOUTRAS: Well, I'm giving you an opportunity to do that here. Don't you find some inconsistency in the Secretary saying, look, if under Part 100.6 here under (a) all parties shall be afforded an opportunity to review with MSHA each

> citation and order issued during an inspection, what that means is, judge, that right after the inspection or at least sometime closely after the inspection we sit down, the MSHA inspector sits down with mine management and the union representative to discuss the issues. And this is a lot of give and take, et cetera, et cetera. Okay. But ten days later if the operator has some additional input that would change MSHA's -- I mean the inspector's position or if the mining representative has some direct input, he goes to the district manager and says, wait a minute, I forgot something very important. I want an opportunity to be heard again. And MSHA says, fine, we grant you that right to meet with the district manager downtown at his office, and they all go downtown, but we don't compensate for that. We don't see that as a conference. I don't see the distinction; do you?
>
> MR. FITCH: I would say that a lawyer could conclude that those two conferences are similar in nature and that they indeed should both be covered by compensation. My client's position is that it is a conference which takes place off of the mine. There has never been an interpretation that compensation coupled with participation rights exists off mine property.

SOCCO's counsel argued that it is clear from Mr. McNece's testimony that the May 24, 1982, conference was conducted pursuant to Part 100 of MSHA's regulations, that subsequent conferences have been held on either a daily or weekly basis involving the application of Part 100, and that these are identical to the May 24th conference. However, counsel asserts that MSHA has cited no authority to support its position that these conferences are compensable. Counsel suggested that the only change has been the elimination of the "old assessment conference" at which the miners' representative's participation was not compensable and a new procedure integrated for determining penalty points. Counsel pointed out that he is not arguing that the conferences may not be useful, that the UMWA has not been helpful, or that they should not take place. His argument, simply stated, is that there should be no right to compensation from Southern Ohio for these conferences (Tr. 207-208).

MSHA's position is that the conference which took place on May 24, 1982, was part of the pre- or post-inspection conference concept that has evolved under the authority of section 103(f) of the Act, and that these conferences at the mine site are properly compensable walk-around conferences and that the right to pay is co-extensive with the right to participate in the conference at the mine site (Tr. 208-209). The UMWA concurred in MSHA's position (Tr. 209).

MSHA's counsel took the position that all that is required to invoke the section 103(f) compensation and participation co-extensive rights is that a conference is held at the mine site

related to an inspection related to citations, and the fact that the conference may be held well after the issuance of the citation being conferenced is not controlling (Tr. 215).

Posthearing briefs and arguments

In their posthearing briefs, MSHA and the UMWA make the point that Congress intended the miners to be active participants in the inspection process conducted at the mine site, including attendance at any opening and closing inspection conferences. Citing the legislative history of section 103(f), the UMWA argues that if Congress did not expect miners to be mere passive observers during the inspection, but to actively participate, increase their safety awareness, and be fully apprised of the inspection results, then the conferences held in the cases at hand must be considered within the scope of section 103(f). Citing testimony at the hearing that one focus of discussion during the conferences concerned the inspector's determination of whether the violation was "significant and substantial", under the Commission's ruling in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), this would include a discussion of whether the violation had a "reasonable likelihood of resulting in an injury or illness of a reasonably serious nature". The UMWA suggests that this type of discussion, centering on the possible injury or illness posed by various conditions, is exactly the sort of discussion Congress expected the miners to participate in and benefit from.

Relying on Inspector McNece's testimony, the UMWA asserts that until last summer, the close-out conference operated essentially as a "one-way street" in that MSHA inspectors did little more than inform the operator and miner representative of the enforcement action the inspector intended to take as a result of the inspection, and while miners and operators would know the number of withdrawal orders and citations that were issued, they usually knew little else. Further, the UMWA suggests that the operator was not informed of the reasoning behind the inspector's findings, and that inspectors rarely, if ever, modified their findings or the statutory section under which the citation was issued. If the operator disagreed with the enforcement action taken by the inspector, the operator had to either file a notice of contest with the Commission or appeal the amount of the penalty that was ultimately assessed.

The UMWA maintains that the current close-out conferences may result in the inspector modifying or even vacating various citations he has previously issued. This being the case, the UMWA argues that there is no way a miner walkaround representative could be kept "fully apprised of the results of the inspection" if he does not attend these conferences. Since some modifications, such as downgrading a 104(d) violation to a 104(a) violation, could drastically affect the operator's status under the Act, the UMWA suggests that unless he is present at the close-out conferences, the miners' representative will have no way of rebutting the operator's contentions or of knowing what enforcement action the inspector ultimately took as a result of the conditions observed during the inspection. Further, since the mine employees have a vital stake in seeing that the Act is vigorously enforced as an effective deterrent against violations, the UMWA maintains that they will not be able to protect that

interest if they are precluded from attending the close-out conference, since denying pay for the miners who did attend effectively precludes their participation.

The UMWA fails to see the relevance of SOCCO's contention that it has no obligation to pay the miners in question because the meetings in question were conducted as part of the penalty assessments procedure authorized by section 104 and 110 of the Act. The UMWA asserts that the fact that a particular conference might serve a purpose in the Secretary's procedure for assessing a penalty does not preclude the conference from being a post-inspection conference under section 103(f). The UMWA points out that there is nothing in the Act which states that the two events are mutually exclusive, nor does it define what constitutes a post-inspection conference, but rather, leaves these determinations to the Secretary of Labor's discretion.

Citing the decision in UMWA v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert. denied, 74 L. Ed 2d 189, another case challenging the Secretary's enforcement of the walkaround right wherein the D.C. Circuit Court of Appeals held that the Secretary's construction of section 103(f) "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act," the UMWA maintains that the Secretary's determination that the meetings in question are properly categorized as "post-inspection conferences" under section 103(f) is certainly a reasoned and supportable interpretation of the Act.

In further support of its position in these cases, the UMWA points out that Section 103(f) refers to conferences "held at the mine", and it asserts that the conferences which are at issue in these proceedings were in fact held at the mine and that they played an integral part in the inspectors' enforcement efforts. The UMWA states further that Inspector McNece conceded that certain enforcement actions he had taken during his inspection were modified as a result of his meeting at the mine, and that the discussions which took place about the gravity and the cause of the cited violations contributed to the miners' safety and health awareness and their understanding of the Act's requirements, purposes which the UMWA contends Congress expected Section 103(f) to serve.

In response to SOCCO's contention that the meetings in question cannot be considered post-inspection conferences because no part of the mine was actually inspected on the days the meetings occurred, the UMWA argues that the meetings related to inspection activity that had occurred within the few weeks or months prior to the meetings in question, and since Section 103(f) does not state how long after an inspection a post-inspection conference is to occur, the fact that the meetings in question took place when they did does not render the Secretary's interpretation unreasonable.

The UMWA concedes that the meetings that gave rise to the instant proceedings are "unique" in that they were the first ones held after MSHA decided to expand the nature of the post-inspection conference to provide operators with the opportunity to explore the inspector's findings and offer rebuttal evidence. As a result, the UMWA admits that the

conference in question here took longer than usual, and the discussions related to all the citations that had been issued but not yet assessed under the new procedures of Part 100.

In response to SOCCO's alternative contention that Section 103(f) mandates pay only for the actual inspection and not for the pre- and post-inspection conferences, the UMWA asserts that the legislative history of the 1977 Act reveals that the concept of inspection was broadened to include the pre- and post-inspection conferences and that Congress did not intend to eliminate the pay requirements during the period of the miner's participation in such conferences. Citing its earlier assertion that the current walkaround provision was adopted from the Senate version of the 1977 Act, the UMWA quotes from the Senate Report which refers to the pay requirement as follows:

> Section 104(e) contains a provision based on that in the Coal Act requiring that representatives of the operator and miners be permitted to accompany inspectors in order to asist [sic] in conducting a full inspection ... 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. (Emphasis added.) Senate Report, supra at 28-29.

Finally, the UMWA argues that SOCCO's narrow construction of Section 103(f) not only conflicts with the legislative history, but is inconsistent with the approach taken by the D.C. Circuit in UMWA v. FMSHRC, supra. In that case, the UMWA points out that like the instant proceeding, the Court was confronted with an interpretation of Section 103(f) that attempted to distinguish between the miners' participation right and the right to pay. The operators argued successfully before the Review Commission that miners were entitled to participate in all inspections, but that section 103(f) required operators to pay miners only during their participation in the quarterly inspections of the entire mine. However, the UMWA points out further that after thoroughtly examining the language, the legislative history, and the purposes of Section 103(f), the Court concluded that:

> the right to walkaround pay is clearly coextensive with the right to accompany the inspector under subsection (f) [of sec. 103] and there is simply no basis for reading it as supporting the bifurcation of participation and compensation rights espoused in the Commission's decisions." UMWA v. FMSHRC at 626.

The UMWA suggests that if, as the Court held, the right to compensation is coextensive with the right to participate under Section 103(f), then miners cannot be denied pay for their participation in post-inspection conferences. The UMWA concludes that the miners' participation right under Section 103(f) is tied to the inspector's enforcement responsibilities at the mine, that Congress expected miners' representatives to assist the inspector in carrying out his duties, and the fact that the Secretary changes the method by which inspectors carry out their enforcement obligations should not deprive miners of their participation right under Section 103(f). If the inspector's enforcement duties have been expanded to include a periodic review of the citations and orders issued at the mine, then the UMWA suggests that Section 103(f) requires that the miners' participation right also be expanded to coincide with such changes.

In its brief, SOCCO argues that the facts here show that prior to May 24, 1982, MSHA's established procedure involved meetings held approximately once each month by an MSHA assessment officer, off mine property, usually in Lexington, Kentucky, and that its safety representative Carl Curry attended, but representatives of the miners did not, even though they had a right to attend. SOCCO asserts that at such meetings various factors ("gravity points")--such as the degree of negligence, the degree of good faith, and the number of persons potentially affected--were discussed as they might apply to each Citation that had been issued [Tr. 229, 230]. SOCCO maintains that except for the further fact that (a) the inspector now checks boxes on the bottom of the Citation form instead of having filled out a "gravity sheet", and (b) the discussion now centers upon "points"--which have dollar values--instead of directly upon dollars, the newly promulgated Part 100 meetings are essentially the same as the old assessment officer meetings [Tr. 50, 51, 66, 243, 248-250, 254, 268]. Carl Curry testified that at the new Part 100 meetings, such as those of May 24, 1982, he presents the same types of arguments, based upon the same considerations, as he once did at meetings before an MSHA assessment officer [Tr. 280, 281].

In further support of its factual arguments, SOCCO points out that when Inspector McNece performs his actual physical inspection duties at the mine, he typically discusses at that time any potential violations that he might discover with the management and miner representatives (the "walkarounds") and anyone else who might be in the vicinity of the discovery [Tr. 81, 82]. In addition, at the end of the inspection day, he frequently confers with the walkarounds about anything noteworthy from the inspection [Tr. 82, 83]. However, on the facts of this case, SOCCO points out further that Mr. McNece and Mr. Koons clarified the fact that the meetings of May 24, 1982--as well as all other subsequent meetings that have been held pursuant to Part 100--were different from the informal conferences that occur during and immediately after a physical walkaround inspection (Tr. 84-91, 144, 145, 179, 180). From the testimony of all three witnesses at the hearing, SOCCO concludes that it is evident

that this difference entails a focus upon the assessment of "gravity points" as required in such meetings by Part 100 (Tr. 86, 87, 97, 98, 179, 180). SOCCO cites the following testimony by Mr. Curry and Mr. Koons in support of its argument (Tr. 243; 161):

> The meetings were conducted very similar to the assessments conference we [previously had] attended in Lexington ... [Tr. 243]. - Curry.
>
> * * *
>
> They [MSHA] done away with the assessment officers and they was doing it on the mine site conference ... [Tr. 161]. - Koons.

SOCCO cites the testimony of Mr. Curry indicating that in approximately early May 1982, MSHA had held a meeting in New Lexington, Ohio, where it was explained that, under new Part 100, MSHA was doing away with the conferences before assessment officers and replacing them with conferences held by MSHA inspectors at the mine site [Tr. 233, 234]. The meetings held on May 24, 1982, which are the subject of two of the Citations contested here, were the first two such meetings Curry had attended [Tr. 227, 231]. At the prior MSHA meeting in New Lexington, Curry was provided with a hand-out which, similar to Part 100, equated "gravity points" with dollar values which he could, and did, use during the meetings of May 24 [Tr. 234, 239, 240, 249, 250, 268]. Recognizing the fact that the safety of miners is the foremost concern of a SOCCO Safety Supervisor, SOCCO nonetheless argues that at the assessment stage of any proceeding that supervisor must be vigilant about savings dollars and cents (Tr. 261-262), and maintains that as of May 24, 1982, MSHA had shifted the forum for this function from assessment conference to Part 100 conferences (Tr. 228-234).

SOCCO has submitted that the evidence regarding the third Citation (Raccoon No. 3 mine, Citation No. 1225867, LAKE 82-95-R) would not be materially different from the evidence concerning the first two, as summarized above [Tr. 11]. SOCCO also concedes that miner representatives Bob Koons and Frank Goble were not paid for their attendance at the new Part 100 meetings held on May 24, 1982.

With regard to its legal arguments in this case, SOCCO points out that each of the citations in these proceedings allege violations of Section 103(f) of the Act, and that this section of the Act, according to its own terms, concerns only "inspections, investigations, and recordkeeping." Section 104 addresses "citations and orders," and Section 105 provides a "procedure for enforcement" of such citations and orders. Section 110 speaks to the "penalties" that might be assessed based upon action taken under Section 104, Section 105 or Section 107.

SOCCO argues that the evidence shows that the May 24, 1982, meetings that resulted in the contested Citations were held

pursuant to new Part 100 of Title 30, Code of Federal Regulations. In turn, Part 100 states

that its purpose is to set forth "criteria and procedures for the proposed assessment of civil penalties under sections 105 and 110 ..." SOCCO notes that MSHA did not utilize Section 103 of the Act, which concerns inspections, in its promulgation of Part 100. For that matter, Section 104, concerning citations, was not employed either. Rather, Part 100 was proposed, revised and finalized by MSHA as an extension of its enforcement and penalty ("assessment") functions. Part 100 involves the further steps that logically occur well after the issuance of a citation during an inspection: that is, the assessment of a penalty as an enforcement matter.

SOCCO states that it does not contend that miner participation in important safety proceedings is, or should be, curtailed. Rather, its focus is on the Congressional intent that coal mine operators should bear the direct financial burden of supporting such participation only insofar as is set forth in Section 103(f) of the Act. Leaving aside the existing controversies as to the exact scope of the miners' right to be compensated by operators under Section 103(f), whatever the scope of this section might be, SOCCO maintains that it is clear that this right pertains only to inspections, and is unaware of the advancement of any allegation in any forum that this 103(f) right applies to any function other than inspection.

In response to MSHA's arguments at the hearing that Part 100 meetings constituted extensions of its Section 103 inspection functions, and thus were still "inspections", SOCCO finds no logic in such a position and maintains that the legislative fact is that such extensions represent, in actuality, a separate function: assessment. SOCCO maintains that Congress treated this function separately from inspection (Sections 105 and 110 as opposed to Section 103) and that MSHA has honored and preserved the distinction in its promulgation of Part 100 as setting forth "the criteria and procedures for the proposed assessment of civil penalties... See subsection 100.1 of Part 100." To now contend that Part 100 is part of inspection, MSHA must ignore the structure of the Act as well as its own characterization of its purpose and authority for promulgation of these regulations.

SOCCO submits that it is precisely because the miners' Section 103(f) right to compensation is tied directly to the inspection function which explains why MSHA has strained so mightily in these matters to attach an "inspection" label to the meetings of May 24, 1982. At the outset, MSHA Inspector McNece characterized each meeting as "a regular inspection of the mine which was pertaining to conference and modification of citations" in the language he employed in each contested Citation. SOCCO strongly suggests that the very choice of an employee who is labeled by MSHA as an "inspector" to hold the meetings required under Part 100 might reflect an additional MSHA attempt to fit the square "assessment" peg into the round "inspection" slot, and that MSHA's insistence that Part 100 meetings be held at mine sites -- despite the fact that the subject matter

of such meetings does not give rise to any logical reason why they might better be held there -- serves only to advance MSHA's effort to push an unwarranted cost upon the operators. Finally, SOCCO suggests that the constant use of the terms "conference" and "conferencing" during the hearing (and in much of the written material, too) to refer to meetings to review citations, as now required by Part 100, might well be designed to ram Part 100 through Section 103(f) of the Act -- which speaks of "pre- or post-inspection conferences" -- and into the inspection functions delineated by the Act.

SOCCO submits that (1) MSHA's efforts to place an "inspection" label on Part 100 meetings, (2) its use at such meetings of an employee it has labeled as an "inspector," (3) its insistence that such meetings occur at mine sites, and (4) the imposition of the Section 103(f) term "conferences" are all intended to achieve a result neither intended by, nor found in, the Act and the regulations promulgated pursuant thereto. SOCCO concludes that the new Part 100 regulations, including the requirement for review which prompted the May 24, 1982, meetings at issue in these proceedings, fulfills assessment functions -- and clearly says so -- and not inspection functions. Thus, SOCCO concludes that there is no legal requirement that it pay any Union walkaround representatives for the time such a representative may spend on the types of conferences that took place in these proceedings. SOCCO concludes further that the meetings held in these cases were not "conferences" within the meaning of Section 103(f), because they were meetings held in accordance MSHA's Part 100 assessment duties to provide a forum for review of previously issued citations and orders, and nowhere in section 100.6 do the terms "representative of the operator" or "a representative authorized by his miners" appear. Thus, SOCCO maintains that the structure and language of Part 100, for an "opportunity" to review by interested "parties" cannot be equated with a "conference" for "representatives" of operators and miners which may be part of the inspection process. SOCCO submits that I should reject MSHA's "strained attempt" to label the opportunities provided to review citations--as mandated by regulatory section 100.6(a)--as a "conference" falling within the ambit of Section 103(a) of the Act.

SOCCO argues that the only types of conferences mentioned in Sections 103(a) and (f) of the Act are pre- and post-inspection conferences, and in support of this conclusion, it cites the remarks of Representative Joseph M. Gaydos prior to House acceptance of the Joint Conference Report regarding the Act, as follows:

> The conference substitute expands the concept of miners' participation in inspections by authorizing miners' representatives to participate not only in the actual inspection of a mine, but also in any pre- or post-inspection conference held at that mine. The presence of such representative at an opening conference aids miners in understanding the concerns of the inspector, and attendance at the closing conference

enables miners to be apprised more fully of the inspection results.

> Legislative History of the Federal Mine Safety and Health Act of 1977 (Comm. Print 1978), 1361 (emphasis supplied).

SOCCO maintains that under the evidence presented in the cases at hand, it is clear that pre-inspection and close-out conferences, as referred to by Congressman Gaydos, have occurred and still do occur -- unaffected by the "Citation Conferences" mandated by Part 100. Pre-inspection conferences are to impart information as to what the inspection is intended to entail. The post-inspection, or close-out, conferences are used to go over the important elements of the inspection and to discuss specific ways to make the mine environment safer. Fulfilling separate purposes, Part 100 "Citation Conferences" are opportunities for interested parties to review previously issued citations, with special reference to "gravity" factors. Such a meeting is far afield from pre- and post-inspection conferences -- as set forth in the Act, as intended by Congress, and as established through experience. It is apparent, therefore, that a "Citation Conference" is not a Section 103(f) conference, and cannot be used as a basis to require operator payment to miner representatives.

In conclusion, SOCCO maintains that the language of Section 103(f) is clear and unambiguous, and only provides compensation of a representative of the miners for his participation only in inspections, and not in "conferences" or any other type of meetings. Citing a number of court cases at page 19 of its brief, SOCCO submits that the plain terms of Section 103(f) admit to no ambiguity as to this issue, and that the language authorizing what is commonly known as a "walkaround" to accompany an MSHA inspector "during a physical inspection of any coal ... mine" is certainly clear. In the next phrase of the same sentence the language "such inspection" is used: an unambiguous reference back to the prior language "a physical inspection of any coal ... mine". Within the very phrase wherein the "such inspection" language is employed, something further is added: "... and to participate in pre- or post-inspection conferences [emphasis supplied]." The fact that the connector "and" is used, and the fact that the "conferences" mentioned are those that occur before ("pre") or after ("post") an "inspection," leads inescapably to the conclusion that a "conference" is not a part of an "inspection" under Section 103(f).

Skipping over the next sentence of Section 103(f), SOCCO argues that the following sentence provides the miner compensation factor that MSHA insists has been triggered in these cases: "... shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." Nothing more than this is stated in the Act about the obligation of an operator to compensate a miner representative. Nothing has been added to this direct statement that might lead to any reasonable inference as to what the language means. An inspection is not a conference, or any other type of meeting. The language of subsection (a), referenced in (f), does not say anything about conferences, or any other types of meetings, that

might logically be viewed as having any effect whatsoever upon the distinction drawn in subsection (f) between an

inspection and a conference. Moreover, the ordinary definitions and usages of these two nouns show that they refer to separate and distinct types of occasions. Section 103(f) requires compensation for a certain category of "inspection," but does not mandate compensation for a "conference".

SOCCO's proposed conclusions of law include the following:

1. The procedures set forth in 30 C.F.R., Part 100 (47 Fed. Reg. 22294, May 21, 1982), are for the purpose of proposing the assessment of civil penalties under Sections 105 and 110 of the Act.

2. Section 103, including subsection 103(f), of the Act concerns inspection functions, and does not involve the assessment of civil penalties.

3. The right of a miner representative to be compensated by the operator in conjunction with that representative's participation in an inspection (as defined and limited by Section 103) has no application to a proceeding under Part 100.

4. SOCCO has no duty under subsection 103(f) to compensate a miner representative for his participation in the meetings of May 24, 1982, or any other meetings held pursuant to Part 100.

5. In the alternative, and as wholly independent bases for reaching the same conclusion as is set forth in the immediately preceding paragraphs, SOCCO suggests that:

   (a) an "opportunity to review" as described in 30 C.F.R. 100.6(a) is not a "conference" as that term is used in Section 103(f) of the Act; and

   (b) Section 103(f) does not mandate payments by operators to miner representatives for their participation in any "conference".

Findings and Conclusions

The Secretary of Labor has the authority to promulgate mandatory safety and health standards and to enforce those standards through mine inspections. Upon inspection of the mine, if violations are found to exist, the inspector may issue citations and withdrawal orders. Section 105(a) of the Act provides that if the Secretary of Labor

issues a citation or order, "he shall ... notify the operator ... of the civil penalty proposed to be assessed ... for the violation cited and that the operator has 30 days within which to contest the ... proposed assessment of penalty." 30 U.S.C. 6 815(a) (emphasis added). If an operator does not contest the Secretary's proposed penalty assessment, by operation of law the proposed assessment becomes a final order not subject to review by any court or agency.

When an inspector finds a condition or practice in a mine that he believes violates any mandatory safety or health standard, he will inform the mine operator of that fact so that corrective action may be taken. The usual practice for citations which do not present imminent danger conditions, or conditions giving rise to other withdrawal orders, is for an inspector to make some notations as to the conditions he observes and to note the specific regulation cited. Absent any withdrawal orders, the inspector continues on his inspection rounds, and at the conclusion of the inspection, and usually while on the surface, he will reduce his findings to writing on a citation form and will serve it on the operator. At that point in time, the inspector has already concluded that a violation exists, and both the miners' and mine operator's representatives are apprised of the conditions or practices observed and cited.

In addition to the arguments made at hearing, and its references to the legislative history and the court decisions in UMWA v. FMSHRC, supra, and Magma Copper Company v. Secretary of Labor and the FMSHRC, 645 F.2d 694 (9th Cir. 1982), MSHA argues that liberal construction of the Act dictates that great deference should be given to its position in this case in order to help achieve the Act's overall objectives of improving health and asfety conditions in the nation's mines.

The issue in UMWA v. FMSHRC was whether miners' representatives were entitled to compensation under section 103(f) for the time spend accompanying MSHA inspectors on "spot inspections", or, as held by the Commission in that case, whether compensation is limited to the four "regular inspections" required by section 103(a) of the Act. Magma Copper involved the issue of whether section 103(f) requires that, when an inspection of a mine is conducted by more than one inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners may accompany each inspector without loss of pay.

In UMWA v. FMSHRC, supra, at page 619, the Court observed that the scope of a miner representative's right to participate in mine inspections, and his right to do so without loss of pay, are governed exclusively by sections 103(a) and (f) of the Act. The lead-in language to subsection (b) adds the caveat subject to regulations issued by the Secretary. Therefore, a critical question in this case is whether the regulations promulgated by the Secretary, as interpreted and applied by MSHA on the facts of this case, are in accord with the requirements of the Act. If they are not, a second question is whether the statute itself

mandates that miners representatives be compensated for the time spent at the types of "meetings" or "conferences" which took place in these cases.

Section 103(f) clearly and unambigously mandates that miner representatives be given an opportunity to (1) accompany an inspector during the physical inspection of any mine for the purpose of aiding such inspection; and (2) to participate in pre- or post-inspection conferences held at the mine. It also seems clear to me that the clear and unambiguous language of Section 103(f) mandates that miner representatives be compensated during the time spent on the mine inspection. What is unclear is whether Congress intended that miners be compensated for time spent on conferences or meetings held at the mine after the actual physical inspection of the mine is completed.

On April 25, 1978, the Secretary issued his Interpretative Bulletin of Section 103(f), 43 Fed. Reg. 17546-17549 (exhibit R-3), and the stated purpose of the bulletin is reflected as follows:

> The purpose of this Bulletin is to make public certain interpretations of section 103(f) of the Act, which will guide the Secretary of Labor in the performance of his duties thereunder unless and until otherwise directed by authoritative decisions of the Federal Mine Safety and Health Review Commission (Commission), or of the courts, or until the Secretary concludes, upon reexamination of an interpretation, that modification is appropriate.

I have closely scrutinized the bulletin in question and can find no clear or concise language indicating the specific right of miners' representatives to be compensated for conferences held at the mine. The bulletin includes examples of the types of section 103(f) activities which give rise to participation and compensation rights by miners' representatives, and the types which do not. In each instance where a miner is entitled to participate and to be compensated for that participation, MSHA's condition precedent and emphasis is on a physical inspection of the mine.

The types of activities giving rise to section 103(f) rights are summarized as follows at 43 Fed. Reg. 17548:

> (1) "Regular inspections,"
> (2) The various kinds of "spot inspections,"
> (3) Inspections conducted at the request or miners of miners' representatives,
> (4) Inspections at especially hazardous mines, including mines liberating excessive amounts of explosive gases,
> (5) Inspections made in conjunction with accident investigations.

The explanatory language which immediately follows states as follows:

> It must be emphasized that MSHA carries out a wide range of activities at minesites. The

> administrative classification of a particular activity as an "inspection" does not necessarily control the applicability of section 103(f). While the list summarized above is generally inclusive of activities giving rise to section 103(f) rights, unusual factual situations may arise which require resolutions on a case-by-case basis. The general rule will be that the participation right under section 103(f) arise when: (1) an inspection is made for the purposes set forth in section 103(a), and (2) the inspector is present at the mine to physically observe or monitor safety and health conditions as part of direct safety and health enforcement activity. (Emphasis added)

And, at 43 Fed. Reg. 17547:

> Section 103(f) does not necessarily apply to every situation in which a representative of the Secretary is present at a mine. Rather, section 103(f) contemplates activities where the inspector is present for purposes of physically observing or monitoring safety and health conditions as part of a direct enforcement activity. This is indicated by the text of section 103(f) itself, which refers to "physical inspection" where the presence of miners' representatives will "aid" the inspection. (Emphasis added)

The types of activities which do not give rise to miners' representative participation and compensation are noted at page 17548 of the bulletin, and they include the following:

> 1. Technical consultations.
> 2. Demonstration of prototype equipment.
> 3. Safety and health research.
> 4. Investigations and other activities pursuant to petitions for variances.
> 5. Field certification of permissible equipment.

Included in the explanation of the matters excluded from miner representative participation and compensation, is the following, at page 17548:

> In these types of activities, while there may sometimes be a need to physically observe or monitor certain conditions or practices, this aspect of the overall primary activity is incidental to other purposes. Although

> enforcement action could result from certain of these activities, the relationship of the activities to enforcement of safety and health requirements is indirect, or the activity is being carried out in accordance with other duties under the Act. The continuing presence of a representative of miners in all phases of these activities would not necessarily aid the activity. (Emphasis added).

Exhibit R-4 is a copy of MSHA's Policy Memorandum No. 83-19-C, dated June 16, 1983, and exhibit R-5 is a copy of Policy Memorandum No. 82-21-C, dated June 24, 1983, and they are both signed by the Administrator for Coal Mine Safety and Health, Joseph B. Lamonica.

The June 16, 1983, memorandum generally explains the rights of parties for review of citations and orders under the newly promulgated Part 100 regulations, 30 CFR 100.6. The memorandum explains that the review process pursuant to section 100.6(a) includes an opportunity for all parties to review with MSHA each citation and order issued during an inspection, and that this would generally occur at the inspection close-out conference. For issues not resolved at this level of review, the memorandum goes on to explain that pursuant to section 100.6(b), an additional opportunity is available to the parties by means of a discretionary conference with MSHA's District Manager or his designee.

The June 24, 1982, memorandum in its entirety, states as follows:

> The inspection close-out conference should be held, in most instances, immediately after the completion of an inspection. This procedure will normally allow for the timely discussion of inspection findings and will not cause undue delays in the processing of cited violations. When an inspection is on-going or takes longer than one week to complete, a different procedure is necessary so that findings may be conferenced and processed with reasonable promptness. In order to ensure the timely discussion of the issues, an inspection close-out conference on cited violations should be held at lease weekly during all inspections that are greater than one week in duration.
>
> At many complex multi-shift operations, short close-out conferences have been held at the end of each shift or at the end of each inspection day. This procedure may continue to be used if agreeable to the parties involved; however, the last close-out conference of the week should be used to afford all involved parties the opportunity to discuss the weekly findings and to

> extablish the control date for the health and safety conference ten-day request period. The weekly close-out conference may be postponed and rescheduled if a different Stime is more convenient to the parties involved.

At page 10 of its brief, MSHA implies that the conferences in question in these proceedings were incorporated into its inspection procedure by the May 21, 1982, new Part 100 regulations. Recognizing the fact that its Interpretative Bulletin does not directly address itself to the question presented here, MSHA nonetheless argues that the Secretary's determination, based on the principles included in the Bulletin, that the conferences in question are covered by the statutory language of section 103(f), is entitled to deference because it is consistent with a construction of the Act which best effectuates the legislative purpose.

MSHA asserts that while the conference may have a penalty result or effect, the true purpose of the conference is to determine whether the inspector has properly analyzed the facts associated with each citation and to allow the parties an opportunity to correct misunderstandings or improper findings and conclusions. Any penalty effect would not come until after a determination has been made of the accuracy of the findings that the inspector is required to make as part of the citation issuing process. Since the inspector must make a determination on whether a violation is significant and substantial, as well as general findings on negligence, gravity, and good faith abatement, such findings are not susceptable to bargaining, but may be changed based on facts which the inspector may not have been aware of at the time the violation was issued. Thus, the ability to have this conference at the mine site, in the presence of all parties, implements the pre- and post-inspection conference concept included in section 103(f) more fully than the prior assessment procedure which have been replaced by MSHA's new procedures.

MSHA rejects out of hand the assertion by SOCCO that the mine conferences authorized by 30 CFR Part 100.6 are merely a replacement of the old assessment conferences previously held in MSHA's district offices. MSHA maintains that it is not, and has never been, its intent that the new health and safety conference would serve as a retitled assessment conference. MSHA maintains that the new procedures are directed at safety, and while civil penalties may be the ultimate result of all citations, the precise penalty is determined on the inspector's findings, but not by the inspector. The mine site conferences are simply an amplification and expansation of the prior existing close-out conferences conducted after all mine inspections.

Both MSHA and the UMWA emphasize the fact that miners have to play an active part in the enforcement of the Act and that achievement of this goal is dependent in great measure upon the active but orderly participation of miners at every level of safety and health activity.

While I do not dispute this, the fact is that miners are not given the right to compensatory participation at "every level of safety and health activity". One example of this are the exclusions itemized at 43 Fed. Reg. 17548, whereby miners may not participate and be compensated under section 103(f) in some rather basic areas of mine safety and health. Another example is section 100.6(b) of MSHA's regulations. Under this section, a mine operator has an opportunity for a "manager's conference" with MSHA's district office officials, and at that conference the operator has a second opportunity to seek further modifications and revisions in any citations or orders which may have been discussed at the first conference held at the mine. Both MSHA and the UMWA concede that while miners' representatives may be present at this conference, they are not eneitled to compensation under section 103(f) because the conference is held away from the mine. Without compensation, a miners' representative is effectively excluded from any participation.

A third, and most important example of what I believe to be a contradictory position taken by the UMWA and MSHA is the fact that in any given case, the miner representative who participates in the so-called weekly or monthly close-out conferences may not be the same miner representative who walked around with the inspector who issued the citations or orders which are subsequently "conferenced" well after the date of their issuance. Other than reviewing a piece of paper, I fail to comprehend how that mine representative, who is not present during the physical inspection of the area of the mine cited, and who has no personal knowledge of the conditions observed by the inspector who issued the citation, can make any intelligent or rational contribution to any discussion concerning the violative conditions, particularly where the discussions take place well after the fact, after the mine conditions have changes, and in many cases, after abatement has taken place.

It is clear from the record in these cases that the miners' representatives who were not compensated for their particiaption in the conferences which took place on May 24 and 26, 1982, were not present as the walkaround representatives during the actual physical inspections which gave rise to the issuance of all of the citations which were issued during those inspections, and which subsequently became the subject of the conferences in issue. Mr. Koons confirmed that there could have been four to six different walkaround representatives on the inspections (Tr. 157-158). Further, the record here shows that the citations which were the subject of the May 24, 1982, conferences conducted by Inspectors McNece and Beck, were issued during mine inspections conducted on March 3, 5, 9, 16, 19, April 21, 26, 28, and May 5, 7, 10, and 13, 1982 (exhibit C-1), and notations on this exhibit reflect that they were served on five different company management representatives who accompanied the inspector, and Mr. Curry was not one of them.

Given the above circumstances, I again fail to comprehend how any meaningful safety discussions could have taken place on May 24 and 26, 1982,

apart from mine management's efforts to reduce the inspector's "S&S" findings to "non-S&S". Addressing the "uniqueness" of these cases, MSHA's counsel conceded that it is not the usual practice to hold inspection close-out conferences two months after citations are issued, and he conceded further that a conference held on May 24th to address conditions which were cited the previous March 3d, would not allow for any meaningful discussion of the conditions or problems cited in the citation (Tr. 210).

At page five of its brief, the UMWA states that under MSHA's current procedures, "the close-out conference could result in the inspector changing his opinion about whether the violation was significant or substantial, or whether it was caused by the negligence of the operator". Should this occur, the UMWA goes on to state that "the operator is free to commit these violations over and over without fear of a withdrawal order under section 104(e)." If this is the case, then the UMWA should be arguing for repeal of the regulation which affords a mine operator an opportunity for such a conference.

My observation is that it is not unusual for an inspector to change his mind. Such changes in an inspector's "S&S" findings are sometimes made by an inspector during trial testimony, they are sometimes modified by an inspector after consultation with MSHA's trial counsel in advance of a trial, and they are sometimes the subject of "settlement negotiations" between trial counsel. Of more significance is the fact that under MSHA's regulatory section 100.6(b) and (d), a mine operator has an opportunity at the "Manager's Conference", at which a miner representative may not be present because he is not entitled to compensation, to seek further modification or changes in the inspector's findings, and examples of such changes are the following:

-- downgrading an "S&S" citation to "non-S&S".

-- vacating an imminent danger order issued under section 107(a).

-- modifying a section 104(d)(1) order to a section 104(a) citation.

-- convincing the inspector to change his gravity or negligence findings by checking a different box on the citation form.

During the hearing, Inspector McNece was of the opinion that Part 100 does not provide for compensation for miners' representatives who attend the discretionary "management conference" pursuant to section 100.6(c), but that compensation is required for the "initial conference" (Tr. 103). In response to my inquiry to pinpoint the regulatory language to support the inspector's opinion, MSHA's counsel stated that compensation for conferences at the mine site comes directly from Section 103(f) of the Act,

and that it is a statutory right and not a regulatory right (Tr. 105). In further explanation of the compensatory nature of the two conferences authorized by section 100.6, MSHA's counsel stated that "we are interpreting the 103(f) to say that that first one is part of the inspection and that it is going to be at the mine and that it's a compensatory session" (Tr. 110). When asked why the initial conference must be held at the mine, counsel replied "so that everybody is around who is involved" and "everybody has got their notes with them" (Tr. 105, 111).

Neither the Act, the Secretary's regulations, his interpretative bulletin, or the policy memorandums cited previously in this decision, define the terms "pre-inspection conference" or "post-inspection conference". Further, while the legislative history citation to the Senate Report (Pg. 15 of this decision), uses the terms "opening" and "closing" conferences, the other citations to the legislative history contain no such terminology, and section 103(f) of the Act contains no such language. I conclude that the terms "pre" and "post"have the same meaning as the terms "opening" and "closing" insofar as the application of section 103(f) to the facts of these cases are concerned.

In practice, I believe that one can reasonably conclude that a "pre-inspection conference" takes place after an inspector arrives at the mine, identifies himself to the mine operator, and states his business. At that point in time the "inspection party" is assembled, and its members include a representative of the mine operator and the employee "walkaround" representative. The inspection party collectively chart out the metes and bounds of the inspection and they proceed, as a group, to physically inspect the mine. The preliminary discussions which take place prior to any actual inspection can be loosely characterized as a "pre-inspection conference".

If the inspector finds any conditions or practices which he believes warrant the issuance of citations or orders, his usual practice is reduce his findings to writing from notes or other observations made during his inspection, and he does this by use of the citation form which he serves on the mine operator or his representative. During this process, the other members of the inspection party may or may not be present. If they are, they have an opportunity for some input or comment as to the inspector's rationale for issuing a citation or order, his fixing of an abatement time, etc., etc., and these discussions and exchanges may loosely be characterized as a "post-inspection conference".

My observations concerning the meaning of "pre-inspection" and "post-inspection" conferences are not too far afield from those expressed by the UMWA's former counsel, J. Davitt McAteer of the Center for Law and Social Policy, in his informative Miner's Manual, at pg. 296, as follows:

> Usually when the inspector arrives at the mine, he goes to the mine office and meets with the company officer

to explain what he was come to inspect and ask questions about problems. That is the pre-inspection conference. (Your representative has the right to attend this meeting and to be paid (COAL: Act 103(f)).

> Your representative must let MSHA know that he wants to be called when the inspector arrives. At the meetings, your representative should explain the miners' concerns and point out problems.
>
> After the inspection, the inspector again meets with the company. This is the post-inspection conference, and your representative has the right to go and be paid. The inspector will discuss the problems and violations he found and will talk about fixing them in a certain amount of time. He may issue citations (notice or orders) for violations.

In the aforementioned circumstances, one may reasonably conclude that the time spent by the miner "walkaround" representative during the pre- and post-inspection "conferences" incident to the physical inspection of the mine which took place that same day is time spent as part of the inspection and therefore compensable under section 103(f). As a matter of fact the legislative history found in the Senate Report cited by the UMWA at page 15 of my decision here, as well as the remarks by Congressman Gaydos, cited by SOCCO at pages 19-20 herein supports such a conclusion. I take note of the fact that SOCCO failed to include in its brief the second paragraph of Mr. Gaydos' remarks, which are as follows:

> The conference substitute additionally authorizes the Secretary's representative to permit more than one miner representative to participate in an inspection and in inspection-related conferences. However, it provides that just one such representative of miners who is also an employee of the operator, is to be paid by the operator for his participation in the inspection and conferences. (Emphasis added).

I also take note of the fact that the UMWA failed to include the following statements from its citation to the Senate Report

> * * * 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 purposes of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties. * * * (Emphasis added).

I take further note of the fact that none of the parties in this case saw fit to cite the remarks of Congressman Carl Perkins which appear at pages 1356-58, Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Act, (1978), I suspect that the reason for this is that in prior litigation in connection

with the right of a miner representative to be compensated for the time accompanying an inspector on a "spot inspection", the majority of the Court in UMWA v. FMSHRC, supra, was of the opinion that Mr. Perkins' floor statement in the House of Representatives following the adoption of the Act by the House-Senate conferees was not entitled to decive weight in the interpretation of section 103(f). Mr. Perkins' comments, in pertinent part are as follows:

> * * * 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-inspection 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. (Emphasis added).

While it is true that Mr. Perkins' comments, as well as some of the other legislative history and court citations discussed above, deal with the kinds of inspections for which a union walkaround representative is entitled to be compensated, they are relevant in that they specifically refer to physical inspections of the mine. The express purpose of such an inspection is to insure that a mine operator is complying with the law, and if he is not, to insure that compliance is achieved through prompt corrective action by the inspector conducting the inspection. It is in this setting that I believe Congress intended for full participation rights by a miner representative so that he can make some meaningful contribution to protect the safety and health of his fellow miners.

I conclude that the language of section 103(f) authorizing a representative of miners to participate in a post-inspection conference clearly contemplates his participation as part of the physical inspection of the mine made by the inspector with whom he travels during the inspection on any given day. Further, while the compensation language found in section 103(f) -- shall suffer no loss of pay during the period of his participation in the inspection -- does not specifically include the phrases "pre- and post-inspection conferences", I believe it is reasonable to conclude that Congress intended for compensation for the miner representative if he chooses to participate in the "conference" held at the mine by the inspector immediately or shortly after the completion of his physical inspection of the mine.

The express purpose of the civil penalty regulations found in Part 100 is to provide a regulatory framework for the application of the penalty criteria found in section 110(i) of the Act. The regulatory procedures establishing a "point system" for the initial assessment of penalties are in reality in a system whereby the mine conditions found to be out of compliance by an inspector are reduced to "points", and then translated into a fixed dollar figure for each violation. In my view, I believe

that during the legislative process which resulted in the 1977 Amendments to the Coal Act, Congress never contemplated the scope and effect of the elaborate regulatory civil penalty procedures found in Part 100. Insofar as the rights of miner "walkaround" representatives are concerned, Congress granted them subject to regulations issued by the Secretary. As indicated earlier in this decision, contraty to MSHA's assertion at page 5 of its brief that its policy memorandum (exhibit R-5) mandates that the type of conferences be held at the mine site, I can find no such specific requirement in that memorandum. While there may be an inference that MSHA contemplated the mine site to be the locale of such a conference, neither Part 100, the Interpretative Bulletin, or the policy memorandum dated June 16, 1982, (exhibit R-4), contain any specific requirement that such assessment conferences be held at the mine site.

At page 7 of its brief, MSHA asserts that "the mine site conference is an amplification of the prior close-out conference conducted after all inspections" and that they "expand on the close-out conference concept". While this is certainly true, in my view such "amplifications" and "expansions" must have some reasonable regulatory base, rather than on a somewhat arbitrary method of achieving "efficiencies" for the administrative convenience of MSHA.

On the facts of the instant cases, it is clear that no physical inspection of the mine took place at the time the inspectors went to the mine site to sit down with management and union representatives to discuss the citations which had not been previously assessed, and which were the subject of the new Part 100 regulations. It seems clear to me that had those citations been assessed under the old Part 100 regulations by MSHA's district office, there would have been no need for any of the inspectors to go to the mine site in question, and any participation or input by the UMWA with regard to MSHA's assessments, would have been at its own expense and would not have been compensable, and MSHA and the UMWA concede that this is true. The thrust of MSHA's argument in these cases is that no "assessment process" took place at the mine on the days in question.

The facts in this case establish that MSHA's new Part 100 civil penalty assessment regulations became effective on Friday, May 21, 1982. The following Monday, May 24, 1982, Inspector McNece went to the mine for the express purpose of giving the respondent an opportunity to avail itself of the new regulations. The 14 citations which were "conferenced" that day had not previously gone through MSHA's normal and routine assessment procedure, and under the newly promulgated Part 100 procedures, mine operator's were given the opportunity to avail themselves of the new procedures. MSHA's counsel conceded that this was in fact the case (Tr. 61).

Although MSHA's counsel conceded that Inspector McNece went to the mine on May 24, 1982, for the specific purpose of giving the respondent an opportunity to take advantage of the newly

promulgated Part 100

assessment procedures, he maintained that the "conference" which took place that day was not an "assessment conference" (Tr. 62). At the hearing, counsel argued that what Mr. McNece did was "something we didn't need to do, but that we did for their benefit and that it was perfectly consistent with the new process" (Tr. 63). Counsel argued that the "conference" conducted by Mr. McNece "would be a part of the inspection that had not been formalized as part of the inspection before" (Tr. 63).

I conclude and find that MSHA's newly promulgated Part 100 Civil Penalty Assessment regulations are for the express purpose of facilitating an initial administrative determination for proposed assessment of civil penalties under Sections 105 and 110 of the Act. I further find and conclude that the regulatory language found in Section 100.6(a), affording "all parties the opportunity to review with MSHA each citation and order issued during an inspection" is part and parcel of MSHA's assessment procedures, and while MSHA has seen fit to administratively characterize it as a "conference" or "close out conference" in its policy memorandums for purposes of Part 100, on the facts of these proceedings, I conclude and find the so-called "conferences" held by the inspector's in these cases were in fact assessment conferences incident to MSHA's civil penalty assessment authority under sections 105 and 110 of the Act.

With regard to MSHA's policy memorandums, aside from the fact that they are not binding regulations promulgated through statutory rule-making, they are simply attempts to administratively clarify the rights of the parties with respect to the review of citations and orders for purposes of civil penalty assessment determinations under Part 100, as distinguished from any statutory rights afforded miners participation in the actual physical inspection of a mine under section 103(f). Further, I can find nothing in those policy memorandums to support MSHA's attempts to expand or amplify anything other than the rights of the parties under section 100.6 to review citations and orders for purposes of civil penalty assessments. The memorandums are totally devoid of any information concerning the compensation rights of miners for their review participation, either on or off mine property.

With regard to the Secretary's Interpretative Bulletin, it simply establishes and refines the statutory right given miners pursuant to section 103(f) to accompany an inspector during his physical inspection of the mine at no loss of pay for the time spent on the inspection, and it is totally devoid of any references to the type of participation incident to the review of citations and orders found in section 100.6. While it is true that the Bulletin states that it is not intended to address every conceivable issue or factual situation that could arise in connection with section 103(f), it is absolutely silent on any of the issues raised in these proceedings. As a matter of fact, the only mention of "pre- or post-inspection conference" participation rights by a representative of miners is in the introductory statement, and it is limited to a citation to the

language found in section 103(f). I REJECT MSHA's assertion that the principles included in this Bulletin support its position in this case that the "conferences" which took place in the cases at hand are covered by the statutory language of section 103(f).

After careful consideration of the arguments presented by the parties in these proceedings, I conclude that SOCCO's arguments with regard to the statutory differentiation between the Secretary's authority to conduct mine inspections and to assess civil penalties for violations which flow from those inspections are valid, and I reject the assertions advanced by MSHA and the UMWA to the contrary. I conclude further that the authority for the Secretary's promulgation of the Part 100 assessment regulations comes from his enforcement and assessment authority found in sections 105 and 110 of the Act, and not from section 103. Although the statutory and regulatory scheme for enforcement of the Act gives a representative of miners a right to participate in the Secretary's enforcement efforts, those rights must be based on some valid statutory or regulatory authority. In my view, the right of a representative of miners to participate in the kinds of mine inspections contemplated by section 103 of the Act by accompanying the inspector during his on-site mine inspection comes directly from section 103. Conversely, the right of a representative of miners to participate in the review of citations and orders for assessment purposes flows from Part 100, the regulatory implementation of the authority of the Secretary to assess civil penalties under sections 105 and 110, well after the mine inspection, and the fact that MSHA has administratively decided that these reviews are to be held at the mine site for administrative convenience does not cure the statutory distinctions addressed by SOCCO.

The post-inspection conference held by an inspector immediately after his inspection rounds afford all parties an opportunity to address safety and health concerns resulting from that inspection, and they are important in that with all parties present when the facts and circumstances are fresh at hand, they can explore ways to correct the conditions and to achieve immediate, or reasonably immediate, abatement and compliance. On the other hand, the types of reviews which took place in these cases, well after the fact of violation and abatement, and with different personalities participating, accomplished nothing more than affording the operator an opportunity to avail himself of the new Part 100 assessment procedures, and in particular, it afforded the mine operator an opportunity to review MSHA's newly promulgated assessment guidelines for differentiating between a "significant and substantial" violation, as opposed to one which is not.

On the facts presented in these proceedings, I conclude and find that the participation by the miner representatives at the meetings or "conferences" which gave rise to the citations which were issued in these cases was participation incident to the civil penalty assessment process being conducted at that time by MSHA under section 100.6(a). This citation-review-participation by the miner representatives in question was clearly limited to, and an integral part of, the regulatory civil penalty assessment process encompassed by Part 100 of the Secretary's regulations. In these circumstances, I find no regulatory authority requiring the mine operator to pay or otherwise to compensate the miner representatives who participated

in this review process. Therefore, I conclude that the mine operator was under no obligation to pay those representatives for the time spent during this review.

In view of my prior findings and conclusions concerning the distinctions to be made in the section 103(f) "post-inspection conferences" incident to mine inspections conducted pursuant to section 103(a), and the types of "conferences" which took place in these proceedings pursuant to Part 100. I further find and conclude that any statutory compensation rights afforded a representative of miners by section 103(f) for his participation in mine inspections as defined and limited by section 103(a) do not apply to the Part 100 review "conferences" in question, and that those so-called "conferences" were not the type of compensable "post-inspection conferences" contemplated by section 103(f). Accordingly, I cannot conclude that the mine operator in these proceedings had any duty under section 103(f) to compensate them for their participation.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude that the contestant has not violated the provisions of section 103(f), and Citation No. 1225640, 1225641, and 1225867 ARE VACATED, and the contests ARE GRANTED.

George A. Koutras
Administrative Law Judge