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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER-RESPONDENT	Civil Penalty Proceeding Docket No. LAKE 82-97 A.O. No. 11-00726-03502
v.	Contest of Citation
MONTEREY COAL COMPANY, CONTESTANT-RESPONDENT	Docket No. LAKE 82-82-R Citation No. 1004993 4/28/82
v.	No. 1 Mine
UNITED MINE WORKERS OF AMERICA, INTERVENOR	

DECISIONS

Appearances: Edward H. Fitch, IV, Attorney, U.S. Department of Labor, Arlington, Virginia, for the Petitioner-Respondent MSHA Carla K. Ryhal, Esquire, Houston, Texas, for the Contestant-Respondent Monterey Coal Company Mary Lu Jordan and Joyce A. Hanula, Esquires, Washington, D.C., for the Intervenor UMWA

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a citation issued by an MSHA inspector pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent-contestant Monterey Coal Company with a violation of Section 103(f) of the Act. The citation no. 1004993, was issued on April 28, 1982, by MSHA Inspector Lonnie D. Conner, and the "condition or practice" is described as follows:

> The operator has refused to pay Miner's Representative Frank H. Barrett, Jr., for the period of time that he accompanied Federal Coal Mine Inspector Joe S. Gibson on a roof control technical investigation of the mine. The investigation was conducted on March 23, 1982.

These cases were docketed for hearing in St. Louis, Missouri, commencing on March 17, 1983. However, the hearing was cancelled after the parties agreed to submit the matter to me for summary disposition based on joint stipulations by the parties, with supporting briefs.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Sections 105 and 110(i) of the Act.

3. Commission Rules, 29 CFR 2700.1 et seq.

4. Section 103(a) of the Act provides:

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, ultilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorizied representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine. [Emphasis supplied].

5. Section 103(f) of the Act provides:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. [Emphasis Supplied].

Issues

The parties stipulated that the following issues are presented for decision by me in these proceedings:

1. Is an operator required by Section 103(f) of the Act to compensate a miner's representative for the time spent accompanying a federal inspector on a spot inspection?

> The parties agree that relevant decisions regarding this issue have been rendered by the United States Court of Appeals for the District of Columbia in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982) cert. denied, 74 L.Ed 2d 189

(Oct. 12, 1982) and by the Federal Mine Safety and Health Review Commission Nos. 79-2537 and 79-2518, Secretary of Labor v. Helan Mining Company, Docket No. PITT 79-11-P (Nov. 21, 1979); Nos. 79-2536 and 79-2503; Kentland-Elkhorn Coal Corp. v. Secretary of Labor, Docket No. PIKE 78-399 (Nov. 30, 1979); and No. 80-1021; Secretary of Labor v. Allied Chemical Corp., Docket No. WEVA 79-148-D (Dec. 6, 1979).

2. Is a roof control technical investigation different from a spot inspection for purposes of determining an operator's obligation to compensate a miner's representative for the time spent accompanying a federal inspector pursuant to Section 103(f) of the Federal Mine Safety and Health Act of 1977?

Any additional issues raised by the pleadings and briefs are identified and disposed of in the course of these decisions.

The parties stipulated and agreed to the following:

1. Monterey Coal Company owns and operates the No. 1 Mine (Identification No. 11-00726), which is located in Carlinville, Macoupin County, Illinois, and the mine is subject to the Act.

2. Respondent is subject to the jurisdiction of the Act, the presiding Judge has jurisdiction to hear and decide these cases, and the citation in issue was properly served on the respondent.

3. On March 23, 1982, Federal Coal Mine Inspector Joe S. Gibson, a duly authorized representative of the Secretary and a roof control specialist, conducted what is referred to by MSHA as a "CEA-Roof Control Technical Investigation" (Investigation) of the Monterey No. 1 Mine.

4. A "CEA-Roof Control Technical Investigation" is different from a "regular" inspection. Each activity code, including a "CEA-Roof Control Technical Investigation," is defined as indicated in an attached Exhibit "A", dated June 3, 1979. These activity codes and definitions are included in the MSHA Citation and Order Manual. The activity codes are used by the Department of Labor's Mine Safety and Health Administration both to substantively describe the various enforcement procedures conducted by MSHA and to record the utilization of inspector work hours by means of an automated computerized coding system. The activity codes cover a broad range of activities which are variously applicable to individual inspectors, but collectively are applicable to the entire agency's function.

5. The Secretary and the UMWA consider a CEA-Roof Control Technical Investigation enforcement procedure to be a type of spot inspection covered by Section 103(f) walk-around pay provisions. Monterey does not agree with this determination and maintains that this type of investigation is not a type of spot inspection, nor any type of inspection, and that it is a type of investigation which does not constitute an inspection for

purposes of Section 103(f)'s walk-around pay provisions.

6. The parties agree that the activities involved in the March 23, 1982, enforcement procedure consisted of a one day investigation to determine if the operator was complying with the provisions of 30 C.F.R. 75.200 through 75.205 in particular and all other standards in general. The parties further agree that during said enforcement procedure, Inspector Gibson may and does cite violations of any standard observed. However, his primary responsibility is to observe the roof bolting activities, to measure room, entry, crosscut widths, and roof bolt spacing, to sound the roof and ribs, and to determine if the operator is in compliance with all the provisions of the mine's roof control plan. In fact, during the investigation in question, a citation of alleging a violation of the Monterey No. 1 Mine's roof control plan was issued, as well as a termination thereof. This enforcement procedure is a regular function of MSHA roof control specialists.

7. During said investigation, Frank H. Barrett, Jr., a representative of the United Mine Workers of America, accompanied Mr. Gibson, but Mr. Barrett was not paid by Monterey for the period of his participation in said investigation.

8. On April 28, 1982, Federal Coal Mine Inspector Lonnie D. Conner, a duly authorized representative of the Secretary, issued Citation No. 1004993 (Citation) and served the same upon Dick Mottershaw, Safety Coordinator for Monterey. The Citation stated that it was issued pursuant to Section 104(a) of the Act and alleged a violation of Section 103(f) of the Act. Under the heading "Condition or Practice" the Citation alleges that:

> The operator has refused to pay miner's representative Frank H. Barrett, Jr. for the period of time that he accompanied Federal Coal Mine Inspector Joe S. Gibson on a Roof Control Technical Investigation of the mine. The investigation was conducted on March 23, 1982.

9. On April 30, 1982, Monterey paid Mr. Barrett for the period of his participation in said investigation. Thereafter, on May 3, 1982, Mr. Conner issued Termination No. 1004993-1, which under the heading "Justification for Action Checked Below" stated that:

> The operator has paid Miner's Representative Frank H. Barrett, Jr. for the period of time that he accompanied Federal Coal Mine Inspector Joe S. Gibson on a (sic) investigation of the mine.

10. Monterey is a large operator and the assessment of a civil penalty in this matter, if appropriate, would not adversely affect Monterey's ability to remain in business.

11. The Monterey No. 1 Mine's history of previous violations is indicated in a computer printout of violations issued in the two years preceding April 28, 1982 (see exhibit "G").

Discussion

These proceedings deal with the scope of the right, pursuant to Section 103(f) of the Act, of a representative of miners to be compensated for the time spent accompanying the Secretary's authorized representative during the inspection of a mine ("walkaround pay"). The material facts are not in dispute and have been stipulated to by the parties. Thus, the matter for determination is one involving a question of law, and the parties seek summary decisions pursuant to Commission Rule 29 CFR 2700.64(b).

MSHA and the UMWA contend that Monterey's declination to compensate the miners' representative for the period of his participation of the roof control technical investigation on the occasion in question constitutes a violation of Section 103(f) pursuant to the holding in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert. denied, 74 L.Ed. 2d 189 (Oct. 12, 1982) ("UMWA v. FMSHRC"). Monterey submits, however, that the right to walkaround pay is limited to mandatory inspections of a mine as required by Section 103(a) of the Act, and does not extend to other inspections or investigations required, authorized or permitted by the Act. Monterey asserts that a roof control technical investigation is not such a mandatory inspection required by Section 103(a). Thus, it is Monterey's position that its declination to pay the miners' representative for the period of his participation in the Roof Control Technical Investigation on the occasion in question was not a violation of the Act and, consequently, the citation and proposal for a penalty are invalid and should be vacated and dismissed.

Monterey's Arguments

Monterey concedes that there is a right to walkaround pay under Section 103(f) of the Act in connection with "regular inspections" conducted under Section 103(a). Monterey suggests that the term "regular inspections" has been interpreted by MSHA and the mining industry to connote the mandatory inspections mandated by Section 103(a), and that the term "spot inspection" has come to have the accepted meaning of any inspection other than the mandatory inspections of the entire mine.

Monterey argues that when read together, Sections 103(f) and 103(a) limit the right of the miners' representative to compensation for walkaround activities to only the miners' representative's participation in the "regular inspections" mandated by Section 103(a) of the Act. Further, Monterey argues that if Congress had intended the walkaround pay right to apply to all inspections, then it could easily have used the phrase "any inspection" in Section 103(f) instead of referring to an inspection "made pursuant to the provisions of subsection (a)," the language actually chosen. Monterey points out that Section 103(h) of the 1969 Act did refer to "any inspection," and in other sections of the Act where Congress intended a provision to apply to all inspections, Congress specifically used the term

"any inspection."

Monterey maintains that Section 103(a) provides the substantive authority for virtually all of the inspections and investigations conducted by MSHA under the Act, probably including those specifically authorized by other sections of the Act. However, if walkaround pay is not limited to the statutory minimum number of inspections at each mine, then the phrase "pursuant to subsection (a)" in Section 103(f) is rendered meaningless. Recognizing the fact that the Court of Appeals for the District of Columbia Circuit held to the contrary in UMWA v. FMSHRC, supra, and held that miners' representatives have the right to be compensated for the time spent accompanying MSHA inspectors during spot and regular inspections, Monterey takes the position that the Court's decision was erroneous, and that it is not binding on the Commission or its Judges. Citing a number of Commission decisions which uniformly held that Section 103(f) grants walkaround pay rights to miners' representatives only with respect to regular inspections required by Section 103(a), and not with respect to spot inspections, and citing the legislative history remarks of Representative Carl D. Perkins in support of its argument, Monterey strongly suggests that the Court's decision in UMWA v. FMSHRC should be ignored.

With regard to MSHA's Interpretive Bulletin, 43 Fed. Reg. 17546, April 25, 1980, which lists spot inspections, as well as regular inspections, among the types of activities giving rise to walkaround rights, Monterey argues that I am not bound by the information contained therein.

In further support of its position, Monterey states that even if its obligation to compensate the miners' representative for the time spent accompanying an inspector extends to spot inspections, it does not extend to a roof control technical investigation. In support of this argument, Monterey maintains that investigations and inspections are distinguishable, and the fact that Congress included both inspections and investigations within the coverage of Section 103(a), but used only the term inspection in Section 103(f), clearly indicates that it did not intend investigations to be included within the walkaround provisions of Section 103(f).

Monterey points to the fact that throughout the Act some provisions use only the terms "inspection", and some use only the term "investigation", and some use both terms. However, Monterey suggests that the two terms are never used interchangeably in the Act, and that they are used to mean different things. Since, in all cases, the usage of the terms is logical and consistent with the different meanings of the terms, Monterey concludes that it is inescapable that throughout the Act, and specifically in Section 103(f), Congress made a purposeful and intelligent distinction between the two terms. As an example, Monterey cites the Act's provision in Section 110(e) restricting a person from giving advance notice of an inspection, while there is no restriction in connection with investigations.

Monterey cites the Activity Codes included in MSHA's Citation and Order Manual, as a further indication that the

Secretary also recognizes the distinction between an inspection and an investigation (Exhibit "A", Stipulations). Under Categories A ("Mandatory Inspections and Investigations"),

B ("Policy Inspections and Investigations"), and C ("Auxiliary Inspections, and Investigations"), types of inspections and investigations are distinctly delineated. Further, although other inspections coded and defined in the Manual do not have counterpart investigations, Monterey points to the fact that in Category C several of the inspections and investigations parallel one another, namely: CCA-Roof Control Technical Inspection; CEA-Roof Control Technical Investigation; CCB-Haulage Technical Inspection; CEB-Haulage Technical Investigation; CCC-Ventilation Technical Inspection; and CEC-Ventilation Technical Investigation. This shows that inspections and investigations are different activities, otherwise MSHA would not have coded and defined an inspection and an investigation to address the same concern.

In response to MSHA's assertion that a roof control technical investigation is an enforcement procedure and, as such, is similar to an inspection since the inspector may cite violations of any standards observed during such an investigation, thereby making it subject to the walkaround provisions of the Act, Monterey maintains that while the purposes for conducting inspections and investigations may be the same under Section 103(a) of the Act, there is no indication that the two terms were intended to mean the same thing. The fact that while conducting a roof control technical investigation an inspector may issue citations for violations of standards other than the roof support standards does not render inspections and investigations synonymous, and Section 104(a) requires an inspector conducting either an inspection or investigation to issue a citation whenever he observes a violation of the "Act, or any mandatory health or safety standard ..."

In further support of its position in these proceedings, Monterey maintains that sound policy reasons exist for distinguishing between technical investigations, if not spot inspections, and regular inspections, consistent with the remedial functions of the Act. The first sentence of Section 103(f) expressly states that the purpose of the right to accompany inspectors, and the right to be paid therefor, is to aid in the inspection. Regular inspections and technical investigations are entirely different in scope and purpose. Because regular inspections are detailed and extensive, covering every aspect of health and safety in the mine, it is conceivable that the miners' representative accompanying an inspector on a regular inspection could improve the inspector's effectiveness by contributing personal familiarity with the particular mine and by providing another "pair of eyes," and could enhance miner consciousness as to the complex regulatory scheme created by the Act.

In contrast, argues Monterey, a technical inspection, by its very nature, focuses on one hazard and usually involves narrow, technical procedures. Inspectors who conduct technical investigations are normally specialists who specialize in one type of safety or health standard, such as respirable dust, ventilation control, or electrical standards. They are

especially qualified by training, experience and familiarity with a particular problem. The presence of the miners' representative is not likely

to be terribly helpful to a specialized inspector conducting narrow technical procedures. Nor would the observation by the miners' representative of the inspector conducting these narrow technical procedures enhance the consciousness of miners who perform or observe similar procedures on a regular basis. Monterey points out that a Roof Control Technical Investigation, such as that conducted on the occasion in question, is conducted to determine an operator's compliance with the standards relating to roof support and includes observation of roof bolting activities, measurement of room, entry, crosscut widths, and roof bolt spacing; and sounding of the roof and ribs, and the inspector who conducted the Roof Control Technical Investigation in question was, indeed, a roof control specialist.

Monterey concludes that because the primary purposes for the miners' representatives to accompany an inspector are not applicable in the situation of a technical investigation, its obligation to compensate the representative for doing so should not extend to technical inspections in general, nor to roof control technical investigations in particular.

MSHA's Arguments

In support of its case, MSHA relies on the February 23, 1982, decision by the U.S. Court of Appeals for the District of Columbia Circuit 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 (Oct. 12, 1982), holding that the right to walkaround pay is coextensive with the right to accompany an inspector under Section 103(f) of the Act, and that spot inspections, as well as regular inspections, were included in the coverage of Section 103(f) for walkaround pay purposes.

MSHA asserts that the Court of Appeals interpretation of Section 103(f) should be followed and applied until such time as that interpretation is reversed or modified by the D.C. Circuit, another Federal Court of appeals, or the Supreme Court. MSHA argues that the D.C. Circuit properly interpreted the scope and application of Section 103(f) to require an operator to compensate a miner's representative for the time spent accompanying an inspector on a sport inspection, and that Monterey's suggestion that I should ignore the Court's interpretation should be rejected.

MSHA maintains that the inspection at issue in this proceeding is a type of spot inspection activity which has been described as a roof control technical investigation. It is MSHA's view that the use of the word "investigation" does not negate the reality that the activity involved an inspection of the mine related to its roof control plan, that the enforcement procedure was an inspection activity related to the specifics of the mine's roof control plan and was conducted by an authorized representative of the Secretary with special expertise in roof control, and that the procedure concerns one of the most important aspects of maintaining a safe roof control program.

MSHA points to the fact that the various enforcement procedures it conducts are described and coded as indicated in Exhibit D, which is a part of the stipulations. MSHA states that these codes are used by the agency to keep track of the utilization of inspector work hours, and that the substance of an inspector's activity must serve as the foundation to determine the applicability of Section 103(f), not the code chosen to track the inspector's use of his time.

MSHA concludes that if the Commission and its Judges were to ignore the Court of Appeals precedent, the Secretary would be placed in the burdensome and costly position of repeatedly issuing citations, defending them before the Commission, and then seeking review before the D.C. Circuit. Such a result, suggests MSHA, would be contrary to public policy and practical reality and would make a travesty of the Court's ruling. MSHA concludes further that I should give full force and effect to the Court of Appeals decision and implement the Court's statutory construction of Section 103(f) by affirming the citation, determining an appropriate penalty, and dismissing the notice of contest filed in this matter.

The UMWA's arguments

The UMWA's position in this case is similar to that taken by MSHA. Citing UMWA v. FMSHRC, supra, the UMWA emphasizes the fact that the D.C. Circuit rejected the position taken by Monterey in the instant proceeding and upheld the Secretary's Interpretive Bulletin, requiring walkaround pay for spot inspections. In so doing, the Court reversed the Commission's decision in Secretary of Labor v. Helen Mining Company, 1 FMSHRC 1796 (1979), and the UMWA urges that I reject the notion advanced by Monterey that I should ignore the D.C. Circuit and apply the Helen Mining decision.

In support of its position, the UMWA points out that the Commission remanded the UMWA v. FMSHRC line of cases to the appropriate Judges, with directions for adjudicating the cases consistent with the D.C. Circuit's decision. Further, the UMWA emphasizes that the conditions generally advanced to support the cited NLRB's policy of nonacquiescense with Court precedents are not present in the instant proceedings. The UMWA maintains that the Commission's decision in Secretary of Labor v. Magma Copper Co., 1 FMSHRC 1948, aff'd, 645 F.2d 694 (oth Cir. 1981), cert. denied, 454 U.S. 940 (1981), illustrates the Commission's view that the active participation of miners in the enforcement of the Act will lead to improved health and safety in the mines.

The UMWA maintains that the Commission's decision in Helen Mining restricted walkaround pay, not because the majority felt, on the basis of its expertise, that the purposes of the Act would best be served by compensating miners only during the quarterly inspections of the entire mine. The majority reached that result only because of their determination concerning how much weight should be given to Congressman Perkins' remarks in determining Congressional intent. The D.C. Circuit has determined that the

Commission majority erred by concluding that the Congressman's remarks were "dispositive" of the question of legislative intent. particularly since those remarks conflicted with the statutory language. It is obvious,

argues the UMWA, that the Circuit opinion does not articulate a rule of law which, in the Commission's view, undermines the purposes and policies of the Act. As such, it would not appear to present a situation where the Commission, relying on its expertise, would determine it must adhere to a particular interpretation, in the face of contrary court rulings, until it is overruled by the Supreme Court.

The UMWA argues that regardless of which "activity code" the inspector chose, his activities on March 23, 1982, were clearly enforcement related and were the type of actions contemplated in the Secretary's Interpretive Bulletin as giving rise to Section 103(f) rights. Further, the UMWA maintains that it was entirely appropriate for MSHA to determine that, for purposes of Section 103(f) the enforcement activity conducted at the mine on March 23 was a type of spot inspection, even though, for purposes of MSHA's computer activity code, the action was listed under "CEA", which is designated a "Safety and Health Roof Control Technical Investigation". Regardless of what "activity code" the inspector's actions came under, the UMWA maintains that they clearly fell within the type of activity described in the Interpretive Bulletin as givin rise to Section 103(f) participation rights.

The UMWA concludes that given the fact that Congress considered an important purpose of the walkaround right to be the improvement of the miners' knowledge of health and safety standards, and given the fact that Congress saw a particular need for the improvement of such knowledge in the area of roof control, it would be completely contrary to Congressional intent to interpret Section 103(f) in a manner that precluded miner participation in MSHA's roof control investigations. The UMWA points out that unlike most other mandatory safety standards, the roof control requirements are contained in individual plans, tailored to the specific conditions of each mine, and they are subject to review by MSHA District Managers every 6 months. The District Managers are required to consider any instances of inadequate support and may require improvements in the plan if they deem it necessary (30 C.F.R. 75.200). Allowing miners to actively participate in "roof control technical investigations," such as the one that occurred at the No. 1 Mine, will assist MSHA in carrying out its obligations to review the plans. If miners are traveling with MSHA inspectors when they monitor compliance with the plan, the inspectors will be more likely to be made aware of any occasion when the plan has proved inadequate and will be able to obtain suggestions from the miners as to necessary improvements. The fact that roof control plans are subject to continual revision makes it all the more necessary that miners participate in "roof control technical investigations," so they can be kept abreast of the changes and improvements.

Findings and Conclusions

Section 103(a) of the Act directs the Secretary to make "frequent inspections and investigations" for the purpose of--

> (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines,
>
> (2) gathering information with respect to mandatory health or safety standards,
>
> (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act.

Section 103(f) mandates that a miners' representative be given an opportunity to accompany an inspector during his physical inspection of the mine for the purpose of aiding him in his inspection, and it seems clear to me that the representative is entitled to be compensated during the time spent on the inspection. In the instant case, the question presented is whether or not such compensation is limited to the four annual regular inspections authorized by Section 103(a), and whether or not the roof control technical investigation conducted by Inspector Gibson on March 23, 1982, was in fact a "spot inspection". If one can conclude that the investigation in question was a spot inspection, the question next presented is whether the miners' representative was entitled to be compensated.

The Commission has previously considered the walkaround provisions found in Section 103(f) of the Act in five consolidated cases which resulted from certain MSHA spot inspections for excessive levels of methane gas and electrical hazards; Helen Mining Company, FMSHRC 2193 (1979); Kentland-Elkhorn Coal Corporation, 1 FMSHRC 2230 (1979), and Allied Chemical Corporation, 1 FMSHRC 2232 (1979). In each of those cases, the Commission held that while miners had a right to participate in all mine inspections, mine operators were required to pay them only for their participation in the regular mandatory inspections mandated by Section 103(a) of the Act, and not for "spot" inspections authorized by other sections of the law. On appeal to the United States Court of Appeals for the District of Columbia Circuit, the Court, in a split decision issued on February 23, 1982, reversed the Commission and held that miners were entitled to walkaround pay for "spot" inspections, as well as for regularly scheduled inspections, UMWA v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert. denied, 74 L. Ed. 2d 189, October 12, 1982.

In its supporting brief, Monterey argues that the Court of Appeals decision in UMWA f. FMSHRC, supra, was erroneous and that it is not binding on the Commission or its Judges. In a recent decision issued by Judge Kennedy in MSHA v. Southern Ohio Coal Company, LAKE 80-142, 5 FMSHRC

479, March 14, 1983, he rejected an identical argument, and held that the Commission's direction to him was to dispose of the case in a manner "consistent with the court's order", 4 FMSHRC 856 (1982). * The Commission's remand order to Judge Kennedy specifically makes reference to UMWA v. FMSHRC, and similar orders were issued in a number of cases decided before UMWA v. FMSHRC (See Orders reported at 4 FMSHRC pgs. 854 through 881). In each instance, the Commission's remand orders directed the Judges to adjudicate them in a manner consistent with the decision in UMWA v. FMSHRC. Thus, I am in agreement with the UMWA's arguments in this case that the Commission has not been inclined to deviate from the D.C. Circuit Court of Appeal's ruling in UMWA v. FMSHRC, supra.

Upon review of Judge Kennedy's decision on remand in Southern Ohio Coal Company, I agree with his holding that he is bound by the Court's decision in UMWA v. FMSHRC, that he should not consider de novo the question of law decided in that case, and I incorporate herein by reference his rationale in support of that holding as grounds for my rejection of the respondent's identical argument in this case. I conclude that I am bound by the Court's decision, and that spot inspections are compensable under Section 103(f).

Exhibit "A" to the stipulations is a June 30, 1979, itemized computer "Activity Codes" listing defining each of the various types of inspections and investigations conducted by MSHA. Category "A" is styled Mandatory Inspection and Investigations, and included among the twenty (20) kinds of inspections in this category are the AAA and AAB regular and saturation inspections of the entire mine, eight different types of "spot inspections", a "reopening inspection" covering mines formerly abandoned or inactive, a "toxic substance or harmful physical agent inspection", two "technical inspections" dealing with section 101 petitions, four different kinds of "accident investigations", one "special investigation" dealing with willful violations, and one investigation dealing with discrimination complaints.

Category "B" is styled Policy Inspections and Investigations, and included in this category are eleven (11) different kinds of "technical and special investigations and inspections."

Category "C" is styled Auxiliary Inspections and Investigations, and included in this category are nineteen (19) different kinds of "technical and special investigations and inspections."

Since the avowed purpose of the codes is to track the inspector's time for fiscal and budget purposes, logic dictates that each code is for a particular and specific type of activity, whether it be styled "investigation" or "inspection". Although it is true that the computerized coding system facilities the tracking of inspector work hours, those inspector activities connected with MSHA's actual on-site enforcement

functions are clearly distinguishable from administrative and personnel activities such as inspector leave, training, attendance at meetings, and seminars, which are listed in code categories E, F, and G.

Both MSHA and the UMWA argue that a liberal construction of the provisions of the Act require that miners' representatives be compensated by the mine operator for the time spent on the roof control investigation in question. If one were to accept the arguments advanced by MSHA and the UMWA, then it would logically follow that a miners' representative would be entitled to compensation each time he leaves his regular job in the mine to accompany an MSHA inspector on any of the fifty (50) inspections-investigations covered by MSHA's regulations. While it is not clear that Congress ever intended such a result, MSHA's Interpretive Bulletin distinguishes between pure enforcement inspection activities and those of a purely technical nature unrelated to enforcement. See Interpretive Bulletin, 43 Fed. Reg. 17547, which states as follows:

> Section 103(f) does not necessarily apply to every situation in which a representative of the Secretary is 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.

The Bulletin goes on to explain the types of activities which do not give rise to miners' representative participation and compensation, and included in the explanation of the matters excluded from such participation and compensation is the following, at pg. 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 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.

The parties have stipulated that the type of inspection conducted by Inspector Gibson on March 23, 1982 is known as a "CEA-Roof Control Technical Investigation", which is defined by MSHA as follows in Exhibit "A", pg. A3-6:

> Safety and Health Roof Control Technical Investigation of a mine including engineering and indepth studies of roof problems or potential roof problems, roof control surveys, and pull tests.

The parties also stipulated that Inspector Gibson's activities on March 23, 1982, constituted an enforcement procedure consisting of a one-day investigation to determine whether the respondent was complying with the particular mandatory roof support safety standards found at 30 CFR 75.200 through 75.205, as well as all standards in general. Although the parties agreed that Inspector Gibson's primary responsibility was to observe the roof bolting activities, to measure room, entry, crosscut widths, roof bolt spacing, and to sould the roof and ribs, all for the purpose of determining respondent's compliance with the applicable mine roof control plan, they further agreed that during this enforcement procedure Inspector Gibson may and does cite any observable violations of any mandatory standards. As a matter of fact, during the investigation in question, Inspector Gibson issued a citation for a violation of the roof control plan, and a copy is attached as Exhibit "B" to the stipulations. The citation was issued pursuant to section 104(a) of the Act, and it charges a violation of mandatory standard section 75.200, because one of the mined intersections of a track entry had a diagonal measurement of 43 feet, which was in excess of the 38-foot requirement stated in the roof control plan. Inspector Gibson terminated the citation within an hour of its issuance after abatement was achieved by the installation of additional roof posts to narrow the cited diagonal to the required width.

The crux of Monterey's arguments that the roof control technical investigation conducted by Inspector Gibson in this case was not compensable under Section 103(f), is the assertion that the terms "inspections" and "investigations" have different meanings and are never used interchangeably in the Act. Monterey maintains that the fact that Congress included both terms within the coverage of Section 103(a), but used only the term "inspection" in Section 103(f), indicates that Congress clearly intended that compensation only be paid for inspections and not for investigations.

In my view, the fact that a technical investigation may focus on one hazard, and may only involve an inspector's review of narrow and technical procedures, is really not that important in distinguishing this activity from an inspection. A spot inspection often focuses on one hazard, and often involves narrow technical matters dealing with ventilation, electrical matters, etc., and I fail to see the distinction in the two procedures. I have difficulty understanding any real distinction between a spot inspection and an investigation or inspection to determine whether a mine operator is in compliance with his required roof control plan. Simply because MSHA chooses to place different computer code lables on the two activities does not ipso facto change or alter the inspector's authority or the manner in which he goes about his inspection in any given case. I believe that

an examination of the prevailing facts, on a case-by-case basis, should permit one to distinguish precisely what the inspector is

actually doing at any given time. As a practical matter, once this is done, labeling the activity an "inspection", as opposed to an Investigation", for the purpose of deciding whether it fits the category of "spot" inspection for walkaround compensation purposes in line with the D.C. Circuit's holding should be a relatively simple matter.

On the facts of this case, and after careful consideration of all of the arguments presented by the parties in support of their respective positions, I conclude that the position taken by MSHA and the UMWA is correct, and I reject the arguments advanced by Monterey. I conclude and find that Inspector Gibson's enforcement activities at the mine on March 23, 1982, constituted a spot inspection, and that the walkaround representative was entitled to be compensated for the time spent accompanying the inspector. Under the circumstances, Monterey's initial refusal to pay the representative constitutes a violation of section 103(f) of the Act, and Citation No. 1004993, issued on April 28, 1982, IS AFFIRMED.

Negligence

The parties have advanced no arguments concerning negligence. However, it seems obvious to me that Monterey's refusal to pay the walkaround representative was based on a legal interpretation of the scope and application of section 103(f), and its obvious intent was to test the law. Taken in this context, I do not believe that the facts here presented lend themselves to an appropriate negligence finding.

Size of Business and Effect of Civil Penalty on Monterey's Ability to Remain in Business.

The parties have stipulated that Monterey is a large mine operator and that the proposed civil penalty will not adversely affect its ability to remain in business. I adopt these stipulations as my findings and conclusions.

History of Prior Violations

The parties have stipulated to the history of prior violations for the two years preceding the issuance of the citation in question in this case (computer print-out, Exhibit G). I take note of the fact that Monterey has paid civil penalty assessments for all but two of 362 citations issued during this time period, and for an operation of its size, and on the facts of this case, I cannot conclude that the record warrants an increase in the penalty assessed in this case.

Gravity

The parties have advanced no arguments concerning the gravity of the violation, and I conclude that it was nonserious.

Good Faith Abatement

The parties have stipulated that Monterey paid walkaround representative Frank H. Barrett, Jr., on April 30, 1982, and payment was made within the time fixed for abatement. Accordingly, I conclude that Monterey demonstrated good faith compliance once the citation issued.

Penalty Assessment and Order

MSHA's initial proposed civil penalty assessment of $20 for the violation in question seems reasonable in the circumstances and I accept it. Monterey IS ORDERED to pay the $20 civil penalty assessment within thirty (30) days of the date of this decision.

In view of the disposition of the civil penalty proceeding, Monterey's contest (LAKE 82-82-R) IS DENIED and DISMISSED.

George A. Koutras
Administrative Law Judge

* The Commission denied review of Judge Kennedy's remand decision in April 1983.