FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 1 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 84-10 A.C. No. 01-00851-03534
v.	:	Oak Grove Mine
U. S. STEEL MINING CO., INC., Respondent	:	

DECISION

Appearences: George D. Palmer, Esq., Off-ice of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
Louise Q. Symons, Esq.,' U.S. Steel Mining Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a citation issued by an MSHA inspector pursuant to § 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with a violation of § 103(f) of the Act for failing to compensate an authorized representative of miners for the time spent accompanying the inspector during his visit to the mine. The citation no. 2192163, was issued on July 18, 1983, by MSHA Inspector Theron E. Walker, and the "condition or practice" cited is described as follows:

> Steve Marable, an employee of the Oak Grove Mine and an authorized representative of the miners, suffered loss of pay during the period he participated in an accident investigation (an ignition of a mixture of methane gas and air). Steve Marable was accompanying Theron Walker, who was'conducting the investigation and is an authorized representative of the secretary on day shift, June 20, 1983.
>
> The investigation was conducted on Mr. Marable's regularly scheduled workshift and no other authorized representative of the miners received pay for the period they participated in the accident investigation.

Respondent filed a timely answer contesting the citation, and a hearing was held in Birmingham, Alabama. The parties filed posthearing arguments, and they have been considered by me in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

2. Sections 110(i), 103(a), and 103(f) of the Act.

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The question presented is whether or not the union walk-around representative was entitled to pay for the time spent accompanying the MSHA inspector during his visit to the mine on June 20, 1983.

Stipulations

The parties stipulated to the following:

1. The Operator is the owner and operator of the subject mine.

2. The Operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in this case.

4. The MSHA Inspector who issued the subject citation was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject citation was properly served upon the Operator.

6. The copy of the subject citation and determination of violation at issue are authentic and may be admitted into evidence for purpose of establishing its issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

7. Imposition of a penalty in this case will not affect the Operator's ability to do business.

8. The alleged violation was abated in good faith.

9. The Operator's history of prior violations is average.

10. The Operator's size is large.

11. The MSHA Inspectors and the witnesses who will testify in behalf of the Operator are accepted, generally, as experts in mine health and safety.

Discussion

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.

The facts in this case are not in dispute. A methane face ignition occurred at the mine during the day shift on Friday, June 17, 1983. The incident was promptly reported to MSHA by mine management. MSHA Inspector T. J. Ingram issued a verbal § 103(k) withdrawal order for purposes of preserving the scene of the ignition pending an investigation by MSHA. Inspector Ingram subsequently reduced his verbal order to writing (Exhibit P-20).

On Monday, June 20, 1983, MSHA Inspector Theron E. Walker, was instructed by his supervisor to go to the mine to investigate the reported ignition, and Inspector Walker and other MSHA inspectors, along with company and union officials, conducted an investigation, and the results were reported in MSHA's official report of investigation (Exhibit P-2).

Inspector Walker had previously inspected the mine as part of his regular quarterly inspection, which had not been completed at the time of the ignition in question. However, on Monday, June 20, 1983, his principal mission was to conduct an investigation concerning the ignition, and he did not continue his regular inspection of the mine on that day.

Mr. Steve Marable, a miner employed at the mine, was the duly authorized and recognized UMWA walkaround representative, and he had in the past, accompanied Inspector Walker during his regular inspections of the mine. During the special face ignition investigation conducted on June 20, 1983, Mr. Marable participated in the investigation as the duly designated UMWA representative, but he was not compensated and lost a day's pay. Mine management informed him that he would not be paid, and he so informed Inspector Walker. Respondent's counsel conceded that Mr. Marable was not paid, and counsel further conceded that it was mine management's policy to pay UMWA walkaround representatives only for accompanying MSHA inspections on regular enforcement inspections of the mine, and that no payment was authorized for accident investigations of the kind conducted in this case.

Upon completion of the investigation on June 20, 1983, the § 103(k) order was terminated. MSHA's investigation did not result in the issuance of any notices or orders for any violations of any mandatory safety or health standards, and MSHA's findings concluded that the investigation did not reveal any violations.

Inspector Walker testified that he waited until July 18, 1983, to issue his citation because it took that long for Mr. Marable to produce his payroll records to document the fact that he was not paid for June 20, 1983. Mr. Walker confirmed that he terminated the citation on August 11, 1983, after Mr. Marable documented the fact that he was completely compensated. Respondent's counsel confirmed all of these facts.

Petitioner's Arguments

In support of its case, the petitioner states that the Third Circuit has recently joined the District of Columbia

Circuit in holding that compensation of a miner representative is required for spot inspections as well as regular inspections. Consolidation Coal Company v. FMSHRC and Donovan, ___ F.2d ___ (3rd Cir. 1984). In response to the respondent's asserted narrow reading of the law, petitioner cites the following from page 6, slip copy of the Court's decision:

> The narrow reading urged by the company is inconsistent with the declared intent of Congress to promote safety in the mines and encourage miner participation in that effort.

Petitioner also cites my prior decision in Secretary of Labor v. Monterey Coal Company, 5 FMSHRC 1223 (1983), where I held that a miner's representative accompanying an inspector during a roof control "technical investigation" was entitled to be compensated for the time spent with the inspector. */ Petitioner argues that the Monterey decision is consistent with the Interpretative Bulletin published by MSHA on April 25, 1978 (Exhibit P-l), and that when read together, establishes that the respondent has violated § 103(f) of the Act. Petitioner concludes that the "inspection" in question in this case was made for several of the purposes set forth in § 103(a), and that Inspector Walker was obviously present at the mine site to physically observe or monitor safety and health conditions. Under these circumstances, petitioner concludes further that Mr. Walker's physical inspection was part of direct safety and health enforcement activity.

Respondent's Arguments

Respondent argues that walkaround pay is not required in cases where a miner's representative accompanies an MSHA inspector during an investigation. Respondent maintains that such pay is required pursuant to § 103(f), only when the inspector is at the mine to perform an inspection function as a duly authorized representative of the Secretary of Labor. In support of its argument, respondent asserts that inspections made pursuant to § 103(f) of the act seems to be limited to physical inspections of the mine and pre- or post-inspection conferences in connection with the inspection held at the mine. Respondent points out that while § 103(f) refers to § 103(a), it does not seem to incorporate all of § 103(a) for § 103(a) refers to both inspections and investigations. Respondent concludes that Congress must have intended two separate activities by these two words or they would have used only one as they did in § 103(f), and it cites Webster's New International Dictionary, 2d Ed., which.indicates that "inspect" means "to look upon, to view clearly and critically, especially so as to ascertain quality or state, to detect errors, etc.," while "investigate" means "to follow up by patient inquiry or observation; to inquire and examine into with systemic

*/ Affirmed by the 7th Circuit on September 14, 1984, Monterey Coal Co. v. FMSHRC, ___ F.2d ___ (7th Cir.).

attention to detail and relationship." Respondent maintains that this seems purposefully consistent with the theory that Congress intended that miners be paid when they accompany an MSHA inspector who is engaged in an enforcement activity, i.e., a physical inspection of the premises to determine if the operator has met the standards of compliance required by the mandatory health and safety standards. Respondent concludes that one must presume Congress meant what it said when it left the word "investigation" out of § 103(f), i.e., there is no requirement that a miner be paid to accompany an inspector who is examining the underlying causes of an event.

Respondent recognizes that a methane ignition can occur even when the mine is fully in compliance with the federal regulations (Tr. 49). Conceding the fact that the purpose of a methane ignition investigation is to determine what can be done in the future to prevent a reoccurrence (Tr. 17), and that an inspector has to issue a citation everytime, he sees a violation (Tr. 27), respondent maintains that this does not change the purpose for which he entered the mine.

In response to the petitioner's reliance on Monterey Coal Company, supra, respondent maintains that the inspector there was investigating whether the operator was in compliance with his roof control plan. Respondent points out that since a roof control plan becomes a mandatory safety standard at the mine where it is adopted, the purpose of the investigation was to determine compliance with a mandatory standard. Respondent argues that the instant case is easily distinguishable in that the inspector admits that his purpose in coming to the mine was not to inspect the mine to see if it was in compliance with mandatory, safety standards, but to investigate why a methane ignition occurred and to determine what could be done to prevent the occurrence of a second ignition. Respondent concludes that the facts in this case are clear that the visit to the mine on June 20, 1963 was not an enforcement activity (Tr. 17), the inspector did not arrive at any conclusions as to how another ignition could be avoided, and in fact, the mine had another ignition the next shift (Tr. 62).

Findings and Conclusions

The arguments made by the respondent in this case are essentially the same arguments made by Monterey Coal Company. The crux of Monterey's arguments was that a roof control technical investigation conducted by an MSHA inspector was not compensable under § 103(f) 'because the terms "inspections" and "investigations" have different meanings and were never

used interchangeably in the Act. Monterey maintained that the fact that Congress included both terms within the coverage of § 103(a),' but used only the term 'inspection" in § 103(f), indicated that Congress clearly intended that compensation only be paid for inspections and not for investigations.

Inspector Walker confirmed that the § 103(k) order which was issued in this case contained an "AFC" designation code, and that it is not the same as a § 103 spot inspection (Tr. 18, 22). He indicated that in a methane ignition investigation, witnesses are interviewed in an attempt to determine what can be done to prevent further ignitions, whereas in a spot inspection, he is looking for violations of particular standards (Tr. 22-23). MSHA's official Report of Investigation (Exhibit P-2), confirms that Mr. Walker was conducting an ARC, or 'Noninjury Methane Gas Ignition" investigation.

Inspector Walker confirmed that Mr. Marable is the regularly assigned Union walkaround representative who routinely accompanies him during his regular inspection of the mine. Mr. Walker also confirmed that the mine is on an MSHA "103(i) spot inspection cycle" because it is more gassy than some mines (Tr. 12, 14-15), and he testified that during his investigation at the scene of the ignition on June 20, 1983, he checked out the equipment present, the ventilation, roof conditions, equipment permissibility, and made gas tests (Tr. 13). He confirmed that this is essentially what is done during his regular AAA inspections *(Tr.* 13).

Section 103(a) of the Act authorizes the Secretary to conduct inspections or investigations to determine the causes of accidents. Any time there is a mine accident or disaster, MSHA's usual practice is to issue "control orders" to either withdraw miners from the scene, preserve evidence, or both. Once this is done, accident inspection teams consisting of state, federal, union, and company personnel enter the mine for the purpose of conducting an investigation. In this context, I believe that an MSHA inspector is there to investigate and to inspect. One function cannot be separated from the other, and in both instances, an inspector is performing an enforcement function, and it is unrealistic to suggest that he is there for any other purpose.

While it is true that Mr. Walker's initial investigative mission on June 20, 1983, focused on finding the cause of the methane ignition so as to prevent a second such incident, it is clear that had he found any evidence that a violation of a mandatory safety standard was a contributing factor, he

was authorized to issue a citation. It is also clear that during his investigation of the methane ignition, he conducted a physical inspection of the area, including the equipment. Given these circumstances, I cannot distinguish this case from the Monterey case. While it is true that in Monterey, an investigation as to whether or not the mine operator was in compliance with its roof control plan was closer to a "spot inspection," in both instances, I believe that the inspector was performing an enforcement function.

In the case at hand, Inspector Walker confirmed that after terminating the § 103(k) Order at 9:50 a.m., he left the underground portion of the mine and spent the rest of his time on the surface doing "normal paperwork" while waiting for the second shift to come to work. The second shift reported in at approximately 2:00 p.m. and were then available for interview with respect to the methane ignition (Tr. 23-26).

While I believe that a Union representative must be compensated for the productive time spent walking around with an MSHA inspector, I do not believe that an operator is obligated to compensate the representative for "waiting around" with an-inspector while he catches up on unrelated paperwork while awaiting the arrival of mine personnel to interview.

After careful consideration of all of the testimony and evidence adduced in this case, including the arguments made by the parties in support of their positions, I conclude and find that on June 20, 1983, Inspector Walker's visit to the mine in question constituted an inspection and investigation of the mine much akin to a spot inspection, and that the walkaround representative was entitled to be compensated for the time spent accompanying the inspector during the actual performance of duties connected with his investigation and inspection.

In view of the foregoing findings and conclusions, I conclude that the petitioner here has established a violation of § 103(f), and the citation IS AFFIRMED.

Negligence

The parties have advanced no arguments concerning negligence. However, I conclude that the respondent's refusal to pay the walkaround representative was prompted by its interpretation of the scope of § 103(f), and that respondent's intent was to test the law. Given these facts, I cannot conclude that there was any negligence in this case.

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

The parties have stipulated that the respondent 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 that the respondent has an average history of prior violations, and I adopt this as my finding on this issue.

Gravitv

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

Good Faith Abatement

The record reflects that the respondent has paid the walkaround representative, and the parties have stipulated that the violation was abated in good faith, I adopt this as my finding on this issue.

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. Respondent IS ORDERED to pay the $20 civil penalty assessment within thirty *(30)* days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

George D. Palmer, Esq., U.S. Department of Labor, Office of the Solicitor, 1929 9th Ave., South, Birmingham, AL *35256* (Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., 600 Grant St., Rm. 1580, Pittsburgh, PA 15230 (Certified Mail)

/slk