

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

AUG 7 1986

EMERY MINING CORPORATION, : CONTEST PROCEEDING
Contestant :
 :
v. : Docket No. WEST 86-126-R
 : Citation No. 2834575; 4/15/86
 :
SECRETARY OF LABOR, : Deer Creek Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :
and :
UNITED MINE WORKERS OF AMERICA, :
(UMWA), :
Intervenor :

DECISION

Appearances: John A. Macleod, Esq., and Ellen Moran, Esq.,
Crowell & Moring, Washington, D.C.,
for Contestant;
Edward Fitch, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia,
for Respondent;
Mary Lu Jordan, Esq., United Mine Workers of
America, Washington, D.C.,
for Intervenor.

Before: Judge Morris

This is a contest proceedings initiated by contestant Emery Mining Corporation pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et -seq., (the Act). Emery has contested a citation issued under § 104(a) of the Act by the Mine Safety and Health Administration, (MSHA), on April 15, 1986.

The citation alleged Emery violated § 103(f) of the Act in refusing to permit an international representative of the United Mine Workers of America (Intervenor UMWA) to accompany an MSHA inspector on a regular inspection of Emery's Deer Creek mine.

Emery, in its notice of contest, asserts that it did not violate § 103(f) of the Act because it permitted a representative authorized by his miners to accompany the inspector. Further, Emery permitted the UMWA representative (Mr. Rabbitt) to accompany the inspector subject to his compliance with Emery's policy at the mine. Emery's policy requires that a written notice be given at least 24 hours before the UMWA representative visits the mine. Further, the policy requires that the UMWA representative sign a release and waiver form before entering the mine.

(The form itself is entitled "release and waiver." A hazard training check list also appears on the form. The witnesses in this case at various times referred to the form as a "waiver," a "release" and as a "hazard checklist." For the convenience of the reader all such references are to the document received in evidence as Contestant Exhibits 3 and 6). The portion of the instrument particularly relied on by Emery provides as follows:

Waiver of Liability

The undersigned, in consideration of being allowed to come upon the Deer Creek mine property (insert name of mine), hereby forever releases, discharges and waives as to Emery Mining Corporation ("Emery"), any and all claims rights of causes of action that the undersigned now has or may hereafter acquire against Emery on account of any damages sustained or injuries suffered, presently or hereafter, while present upon or within the mine property. The undersigned further agrees to hold Emery harmless on account of any and all liability which may attach to Emery on account of damages sustained or injuries suffered by the undersigned while upon or within the mine property. All references to Emery shall include its officers, directors, shareholders, employees and agents.

Emery, in its notice of contest, asserts that Mr. Rabbitt failed to comply with Emery's notice and waiver requirements. When MSHA supported Mr. Rabbitt and issued a citation Emery permitted Mr. Rabbitt to enter the mine without signing the required release form.

In its contest seeking to vacate this citation Emery insists that its requirements are reasonable and prudent; further, Emery asserts it did not violate § 103(f), the statutory grant of walk-around rights.

Section 103(f) of the Act, 30 U.S.C. § 813(f), the statutory provision in issue here, 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 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.

The Hearing

A hearing on the merits commenced in Denver, Colorado on May 14, 1986. The evidence was essentially credible and **uncontroverted**.

The Secretary's Evidence

Vern Boston, an MSHA inspector for eight years, was the sole witness called by the Secretary.

Inspector Boston, a person experienced in mining, has been stationed in the Orangeville, Utah MSHA office for the last two years (**Tr. 30, 31**).

On April 15, 1986 the inspector met Mr. Rabbitt at the mine gate. Boston knew Rabbitt by reputation, but he didn't know if Rabbitt had ever previously been in the Deer Creek mine. Rabbitt introduced himself as the International Representative of the UMWA. The inspector knew Rabbitt had been in Utah for sometime. The two men agreed that Rabbitt would travel with the inspector during the inspection (**Tr. 32-35, 52**). Dixon Peacock, a representative of Emery's safety department who frequently accompanied the inspector, concurred.

After changing clothes the inspector entered the company safety department. Mr. White, the Deer Creek mine manager ^{1/}, stated he had a problem with Rabbitt accompanying the inspector. Mr. White recognized Rabbitt as a member of the International Health and Safety Department of the UMWA but he did not believe Rabbitt was a representative of the miners because he was not an employee of the mine. Also the company had its own miner representative on the property. In addition, he had come on the property without giving any advance notice (**Tr. 32-38**).

^{1/} As mine manager he is in charge of all phases of the mining operation (**Tr. 37**).

At this point the inspector issued a **§ 104(a)** citation alleging a violation of **§ 103(f)** of the Act. White was given ten minutes to abate the citation. White agreed Rabbitt could accompany the inspector. The citation was then terminated (**Tr. 33**). White then indicated Rabbitt should sign a waiver form. Inspector Boston checked with his supervisor. He was directed to proceed. White asked for an additional citation but the inspector added the waiver allegation to the prior citation. ^{2/} Rabbitt did not sign the waiver and Emery abated the citation by permitting Rabbitt to accompany the inspector (**Tr. 33-42, 61**). Boston believed it was clear to White that if he did not permit Rabbitt to enter the mine without signing the waiver the inspector would issue a closure order. But it was not clear to the inspector at the time whether White knew that the closure order would be a "no-area affected order" ^{3/} (**Tr. 63**).

This was a AAA inspection. It was not an inspection under section **103(g)** of the Act. Rabbitt was not abrasive and acted in an orderly manner (**Tr. 45, 51**). Boston had been instructed that international representatives are miners' representatives (**Tr. 55**).

^{2/} After the inspection the inspector decided he was not satisfied with the wording of the original citation, so he voided the original and issued a new citation No. 2834575 (**Tr. 34-44, 49, 64-67; Gov't. Ex. 5**).

^{3/} A "no area affected order" arises from the Secretary's interpretative bulletin published in F.R. Vol. 43, No. 80 April 25, 1978 and contained in Government Exhibit 4. It provides in part as follows:

It should be noted that section **104(b)** of the Act provides for issuance of withdrawal orders if an inspector finds that a violation described in a citation has not been abated. Pursuant to the requirements of section **104(b)**, orders under that provision will be issued in cases where there has been a failure to abate violations of section **103(f)**. However, actual withdrawal of miners will not ordinarily occur in cases arising under section **103(f)**, because section **104(b)** also requires the inspector to determine the extent of the area of the mine affected by the violation. In most cases, the area(s) of the mine affected by an operator's refusal to permit participation or to compensate the representative(s) under section **103(f)** would be a matter of conjecture and could not be determined sufficient specificity. However, cases may arise where a particular condition or situation, in the opinion of the inspector, cannot be adequately evaluated in the absence of a representative of miners. In such cases, the area affected by a refusal to permit participation could be determined, and physical withdrawal of miners in the affected area would be directed in the order.

In previous numerous inspections of the Deer Creek mine inspector Boston had frequently been accompanied by representatives of the miners at that mine. This function is usually performed by the same individuals who are employees of Emery (Tr. 53, 54). On this inspection he was accompanied by Mr. Larsen, an employee of Emery (Tr. 67). The inspector had not previously been accompanied by a non-employee asserting that right as a representative of the miners.

In the inspector's opinion Rabbitt did not have any special skills, talent or knowledge of the mine that would cause the inspection to be any different from what it would have been without him (Tr. 55). Further, management representatives did not aid the inspector. But generally speaking, miners representatives and company representatives assist the inspector in performing broader, more comprehensive and more complete inspections (Tr. 68).

Boston agrees that when § 103(f) refers to "his miners" the reference is to miners employed at Deer Creek (Tr. 57). But in Boston's view the context of that section of the Act refers to representatives of miners on the international level. Boston had no knowledge whether Rabbitt's presence had been requested by the Deer Creek miners. Further, he did not take steps to ascertain if Rabbitt had been designated in any Part 40 filing by the Deer Creek miners (Tr. 57, 58).

UMWA's Evidence

Thomas J. Rabbitt and Joseph Main testified for the UMWA.

Thomas J. Rabbitt has been employed by the UMWA for seven and one half years as an International Health and Safety Representative (Tr. 71).

He reports to Joseph Main, administrator of the UMWA Health and Safety department (Tr. 117). Rabbitt has held various positions involving matters of safety. He also investigates accidents, disasters, fires and explosions (Tr. 72). Investigations have included the Homer City mine disaster, Greenwich Collieries as well as numerous accidents and fatalities. He has held virtually every job in a coal mine. In addition, he served as a safety committeeman for three years (Tr. 72, 73). His training includes seminars sponsored by MSHA. These are the same courses given the MSHA inspectors (Tr. 74).

On June 12, 1985 his supervisor assigned him to assist in the recovery of bodies and to monitor the investigation of the Wilberg mine disaster of December 19, 1984 (Tr. 74, 87, 118, 119).

Rabbitt now resides in the vicinity of the Wilberg mine. Usually on a daily basis he goes underground and consults with the safety committees. He has accompanied federal inspectors on **103(i), 103(g), 103(a)** inspections. ^{4/} Rabbitt was not **re-****stricted** at the Emery mine until three or four months ago (**Tr. 75, 118**). He normally would enter the mine at 8 o'clock, contact the safety director and then go underground (**Tr. 75**). His underground work included investigations and search for the Wilberg victims (**Tr. 75**). Three or four months after he arrived in Utah the Cottonwood mine was opened. (The Cottonwood is a part of the now sealed Wilberg mine). In the Cottonwood he has gone on inspections in coal producing sections that were unrelated to the recovery operations ^{5/} (**Tr. 76**).

In January 1986 Rabbitt had written Emery's mining management concerning conditions within the sealed area of the Wilberg mine (**Tr. 79**). A copy of the letter went to various federal and state officials as well as the UMWA office (**Tr. 80; UMWA Ex. 2**). The letter, directed to Emery mine manager John **Boylen**, was sent after a meeting with Emery's mine superintendent. The letter complained about the seals at #37 crosscut. Approximately three weeks later the seals were isolated and regulated (**Tr. 81**).

After the January 20th letter Emery began to restrict Rabbitt's access to the mine. He was stopped at the gate and manager **Boylen** had to be notified before he could enter. He would then have to go to **Boylen** or Neldon Sitterud's office (**Tr. 79, 107, 108**). In the sample room a sign stating "Authorized Persons **Only**" appeared. Rabbitt accepted **Boylen's** explanation of the situation and he had no problem with it (**Tr. 107, 108**).

On March 3, 1986 Rabbitt again wrote to Emery's mine manager at the Wilberg and Cottonwood mines. This letter probably caused the most concern to management. It addressed certain technical matters and its purpose was to verify a conversation so there would be no later misunderstanding (**Tr. 85, 109; UMWA Ex. 3**). The process and procedure of entering the mine had worked smoothly for a period of time but it became less smooth after March 3.

The totality of the letters in early March dealt with full notice and compliance with **MSHA's** regulations which had not been fully complied with in the past (**Tr. 109**).

^{4/} These inspections are described in the transcript at page 146: a **103(i)** is a special five day spot inspection required at the Wilberg mine; a **103(g)** is a special request inspection by the representatives of the miners or a miner; a **103(a)** is a regular quarterly MSHA inspection of the entire mine.

^{5/} Related cases filed simultaneously with this decision involve Emery's Wilberg mine.

On March 4 Rabbitt learned of a request by Emery to maintain less than a specific width, length and height in an escapeway ^{6/} (Tr. 110, 111). No one initially objected to Rabbitt accompanying the team to the area involving the request. A discussion occurred whether this was a right under the UMWA contract or § 103(f). This was the first time § 103(f) was expressly discussed (Tr. 112, 121, 148).

About 45 minutes later manager **Boylen** refused to let Rabbitt go with the group (Tr. 112, 148). At that point he renewed his 24-hour prior notice requirement. Before March 5 Rabbitt had total access to the mine and no 24-hour prior notice had been required (Tr. 113, 130, 149). Rabbitt was concerned that Emery's policies might adversely affect his ability to represent the UMWA in investigating this disaster in Utah as well as any other disasters in the future (Tr. 114). But he didn't know if the policy was directed at his activities (Tr. 122, 123).

Rabbitt also wrote to manager John **Boylen** on April 12, 1986 concerning sealed areas of the Wilberg mine (Tr. 105; UMWA Ex. 6). The letter followed a conversation with Emery officials (Tr. 106). About a week before April 15, 1986 Rabbitt learned from Frank Fitzek (chairman of the Deer Creek local union safety committee) that MSHA inspectors were writing numerous citations and orders alleging unwarrantable failures. ^{7/} The local union wanted Rabbitt's assistance in looking into these matters. The local union felt the matters were serious. It was not a point-blank request. But Rabbitt indicated he'd be there in the next week or two (Tr. 88, 125, 126).

The day before the MSHA inspection of April 15 Rabbitt called Fitzek and advised him he would respond to the request the next day. Prior to the MSHA inspector's arrival at the gate Fitzek appeared and told Rabbitt that he had notified various management personnel including White and Peacock. White was reported to have been disturbed at the arrangement (Tr. 89).

^{6/} 30 C.F.R. § 75.1704-1 authorizes the MSHA district manager to **approve** an escapeway not in compliance with the specified criteria (Tr. 110).

^{7/} The Federal Mine Safety and Health Review Commission has **defined** the term "unwarrantable failure", as contained in § 104(d)(1) of the Act, to mean that the operator failed to abate the condition or practices constituting a violation and knew or should have known the condition existed or that it failed to abate because of a lack of due diligence or indifference or lack of reasonable care, United States Steel Corporation, 6 FMSHRC 1423, 1436 (1984); Westermoreland Coal Company, 7 FMSHRC 1338, 1342 (1985) citing Zeigler Coal Co., 7 IBMA 280 (1977).

At that point Fitzek joined the day shift and inspector Boston arrived. Rabbitt introduced himself and he proceeded onto the property to obtain clearance. About five minutes later Boston returned with Mark Larsen, a safety committeeman at the mine (Tr. 90). In discussing the matter White, the Deer Creek mine manager, questioned Rabbitt's authority to enter under the contract.^{8/} Rabbitt indicated his authority was under § 103(f) of the Act (Tr. 90). After the men discussed the matter Boston issued a citation and he gave White 10 minutes to abate (Tr. 91).

White then relented but told Rabbitt he would have to sign a waiver of liability form. Discussion continued. Boston then called his supervisor. White requested another citation. Boston complied and issued a citation (Tr. 91, 92).

Mark Larsen (representative of the miners from the safety committee), Terry Jordan and Dixon Peacock (for Emery) and Rabbitt accompanied the inspector underground (Tr. 93). While underground one citation was written concerning the company's roof control plan. The inspection team went to a specific area because Emery had requested that MSHA abate certain prior citations and orders in that area (Tr. 93). During this inspection Boston asked for and received opinions from those present (Tr. 94). Rabbitt also pointed out one roof control violation to Boston (Tr. 94).

Rabbitt accompanied Boston until 5 p.m. that day (Tr. 95). At about 2:15 p.m. White handed Rabbitt a letter. The original had been forwarded to the safety committee of the Union. Rabbitt's copy stated that under the wage agreement Emery required 24-hour notice in writing before any international health and safety representative could enter the mine. White also mentioned the waiver requirement (Tr. 96, 97; UMWA Ex. 4).

Rabbitt had never previously knowingly^{9/} signed a waiver at the Deer Creek mine or elsewhere. The first-time he heard of the waiver was on March 11 or 12. However, he signs a check in/check out form which is common at all mines (Tr. 98, 99, 123, 142; UMWA Ex. 5). Rabbitt next saw the waiver release form on April 15. He declined to sign it because he thought his supervisors should approve such action (Tr. 133, 134; Contestant Ex. 3).

^{8/} The contract referred to by White was received in evidence and the scope of its terms are not an issue in the case. The agreement is entitled "Bituminous Coal Wage Agreement of 1984 between Emery Mining Corp and the International Union United Mine Workers of America". Article III, section (d) of the contract provides the conditions under which the UMWA may have access to the mine (UMWA Ex. 7).

^{9/} In fact, on January 10, 1986, March 7, 1986 and April 15, 1986 Rabbitt had signed a "Visitor Release" form that was kept in a clipboard at the Deer Creek mine (Tr. 100, 101, 137, 138, 139, 142; Contestant Ex. 4; UMWA Ex. 5).

Before April 15, specifically in January and February (or early March) 1986, Rabbitt visited the Deer Creek mine (Tr. 102). The company had requested, under § 101(c), 10/ a modification to use a two-entry longwall mining system. Rabbitt was directed by his superior in Washington, D.C. to investigate the matter and report back to him (Tr. 102, 103, 124). On the first occasion he was underground for five hours. He met with Earl White and persons in the safety department. He also met with the superintendent and persons in the engineering department (Tr. 103, 124). On the second occasion he was underground nine hours. He entered various areas of the Deer Creek mine-as a result of this investigation (Tr. 103, 124). The Union opposed the petitions for modification that Emery had filed at the Cottonwood as well as the Deer Creek mines (Tr. 103). In October 1985 Rabbitt had done a similar investigation at the Deer Creek mine. On those occasions, before April 15, there was no discussion about Rabbitt's ability to conduct such investigations or to enter the property (Tr. 104).

Rabbitt believes his right of entry under § 103(f) can be conditioned on reasonable restrictions such as eye protection requirements (Tr. 135, 136). He didn't feel the hazard training checklist on Emery's release form was necessary (Tr. 136; Contestant Ex. 3).

Joseph Main testified that he is the administrator of the Department of Occupational Safety and Health for UMWA (Tr. 152). Thirty-five members of his staff of 40 are trained, experienced and educated international health and safety representatives who basically represent the UMWA members on health and safety matters. Their duties include conducting inspections at the mines, assisting plan approvals, processing petitions for modifications filed by the operator, providing assistance to local unions and guidance to the local safety committees (Tr. 154, 155). They also investigate mine disasters, injuries and accidents that occur (Tr. 154). The local union safety committee is comprised of miners employed full time at the mine site. The local members serve in an extra capacity as a representative (Tr. 155). The background educational level of the local mine committee is less than the health and safety representatives on the UMWA staff (Tr. 155).

Main estimates that the UMWA staff is in the field on a daily basis in some type of § 103(f) activity. There are numerous events which trigger a participation with an MSHA inspection. These include investigations of an accident, injury or an explosion, a regular inspection, or an inspection made for some special problem. In addition, participation may occur where the mine operator wishes to modify the law. Many mining plans

10/ Section 101(c) of the Act authorizes the Secretary to modify the application of any mandatory safety standard upon petition of the operator or the representative of miners subject to certain conditions.

such as ventilation, blasting, roof control, and training require continual review (Tr. 154-156). If it is believed that a violation exists it is normal procedure for the local union committee or the international representatives to have the conditions checked out. From time to time the UMWA representatives travel with the MSHA inspectors to determine the existence or seriousness of the condition (Tr. 156-157).

The historical application of § 103(f) is to provide an ability for the representatives of miners to assist MSHA to carry out its function to protect miners' lives. (Tr. 157). Those representatives of miners who are also employees of the operator, are subject to a certain amount of control by the operator (Tr. 157). Such controls may inhibit the miners from expressing whatever views they may have. However, confidentiality is provided for a complaining witness. In addition, there are extensive provisions 11/ to protect miners against discrimination. But some miners are reluctant to rely on this protection (Tr. 168, 169).

In addition, the local miners are not trained for analyzing problems (Tr. 158). The members of UMWA's staff are trained experts participating in various functions on a national scale. If the staff was strictly restricted to the provisions of the contract to gain access it would interfere with UMWA's ability to protect the miners. (Tr 159).

At times access to the mine is gained through the labor contract and at times under § 103(f) (Tr. 159). The witness described some circumstances of entries under § 103(f) (Tr. 160, 161). In some instances committeemen have been afraid to call in the international so the UMWA has bypassed the contractual provisions and entered under a § 103(f) inspection (Tr. 161). The international uses different types of approaches, such as checking abatement dates, etc., to find out when the MSHA inspector will arrive at a mine site (Tr. 161). Witness Main was not aware that any mine operators required the international representatives to sign waivers to gain access to the mine (Tr. 162). The only occasion known to the witness where an operator questioned a Part 40 filing was evolved in the Consolidation Coal Company case (cited, infra).

Main assigned Rabbitt and several other representatives to the Wilberg mine (Tr. 163). The representatives are charged with coordinating the investigation.

Among other duties the international representatives also inspect Emery's mines based on complaints they receive. In addition, they have helped recover the victims of the Wilberg disaster (Tr. 163).

11/ Section 105(c), the discrimination section of the Mine Safety Act.

The designation of who constitutes the representatives of the miners is basically a decision making process on the part of the miners at the mine in conjunction with the organization representation rights (Tr. 166).

The miners that are employed at the mine have a right to designate their representatives. The UMWA has the inherent right, based on its organizational structure and the fact that they are the bargaining representative of **those employees**, to have access to the mine under § 103(f). In sum, once the miners at the mine designate the UMWA International they designate it for all provisions of the Act (Tr. 168).

The persons designated in the Part 40 regulations are filed with MSHA and the operator. The filings under Part 40 provide a mechanism for the miners at the mine to designate their representatives (Tr. 170).

Emery's Evidence

Earl R. White, James T. Jensen, Dave Lauriski, William Ponceroff and John Barton testified for Emery.

Earl R. White, the mine manager and top management official at the Deer Creek mine, is presently employed by Utah Power and Light. On April 15, 1986 he served in the same capacity for Emery Mining Company (Tr. 171, 172, 196). White is responsible for the mine, its production, its surface facilities and the transportation of the coal (Tr. 173).

On April 15 at 7:45 a.m. Frank Fitzek ('chairman of the local safety committee) and Joe Crespini, (a member of the pit committee 12/), entered his office at the mine and stated that Tom Rabbitt **would** be visiting the mine that day. This time of the day involved a shift change and White was very busy. White called Terry Jordan, safety engineer at Deer Creek, to inquire as to what was "going on"; in addition, he asked if they had been notified. At that particular time there was a closure order on the third south belt, one of the main belt arteries in the mine (Tr. 174, 175). On inquiry Fitzek denied inviting Rabbitt. White asked what provision of the contract was involved. The miner replied it was under paragraph 1 of Article III, section (d) of the labor contract (Tr. 175, 176). White asked if they had invited Rabbitt underground to look at something in particular. His reply was negative. They wanted Rabbitt to talk to White. White complained about the short notice. The 24-hour notice requirement had been relayed to White, Fitzek and others

12/ Pit committee is a group of individuals elected by miners. The committee handles contract issues (Tr. 175, 195).

about two weeks before 13/ (Tr. 176). White agreed to meet with Rabbitt. Fitzek left (Tr. 176, 177, 196).

White then contacted Dixon Peacock, the company's safety engineer. Peacock stated Rabbitt was going to accompany Vern Boston, the MSHA inspector (Tr. 177). White directed Peacock to see if Boston had invited Rabbitt to make the inspection with him (Tr. 177). Peacock reported back that Rabbitt had approached the MSHA inspector (Tr. 178). White objected because Rabbitt was supposed to be talking to him, not going on an inspection with the federal inspector (Tr. 178). Since becoming the mine manager on April 29, 1985 White had not known of any non-employee being admitted as a representative of miners under **§ 103(f)** (Tr. 215, 217).

White, Rabbitt and Larsen met. Rabbitt inquired if there was a problem if he traveled with the inspector. White said he had not been notified and he also asked under what provisions of the contract was the inspection being made. Rabbitt replied he was entering under **§ 103(f)** (Tr. 178-180). White then read the Act while conferring with Jordan, Peacock, Boston, Rabbitt and Larsen. White refused to let Rabbitt accompany the inspector. White stated that it was clear that the walkaround man is the employee authorized by the miners at the mine (Tr. 181, 182). Boston said he would write a citation and he gave White 10 minutes to reconsider. If the company continued its refusal he would then write an order (Tr. 182).

White then called his superior, Dave Lauriska, and discussed the details with him (Tr. 182, 183). Lauriska agreed with White's position. White said they were going to get an order on it. Lauriska said they didn't need another order and he instructed White to abate the citation if Rabbitt signed the waiver (Tr. 183).

The guard in the shack said Rabbitt hadn't signed the waiver form. On rechecking Lauriska said Rabbitt could not go underground without signing the form (Tr. 184). A waiver was brought in and discussed. Boston called his supervisor (**Ponceroff**). Boston said he would include the waiver matter on the previous citation (Tr. 186; Contestant Ex. 1). White relied on the citation in permitting Rabbitt to go underground. Upon White's demand, Rabbitt returned the unsigned waiver (Tr. 187).

At this point Inspector Boston and the walkaround party went underground (Tr. 187).

At about **2:30** p.m., when the group came out of the mine, there was a further discussion about the walkaround citation as it related to the waiver agreement. White understood another citation would be written (Tr. 188-190).

13/ White had been told by his superior that the 24 hour notice requirement was directed to the international safety representatives. He interpreted that his instruction related to notice under the collective bargaining agreement (Tr. 196).

Witness White identified Emery's notice to Frank Fitzek. It indicated that management (in accordance with Article **III(d)** of union contract) would require 24-hour notice to the company before the UMWA could enter the mine property (**Tr. 190, 191; UMWA Ex. 4**). White gave a copy of the notice to Rabbitt the afternoon of April 15 (**Tr. 191**).

Emery maintained two clearly marked sign-in, sign-out books. One says "Company Visitor Release", the other says "Non-Company Visitor Release" (**Tr. 192, 193**). No portion of the text was obscured by the punch holes or the bar (**Tr. 193**). An hour before he testified White had verified the condition of the books with his secretary (**Tr. 194**).

Prior to April 15, White had never discussed **§ 103(f)** with management or members of the local union (**Tr. 197**). White construed **§ 103(f)** to relate exclusively to employees of the mine (**Tr. 198**).

About mid-March White first became aware of the waiver policy. He was advised of it by Dave Lauriski and Stan Rajski (Emery's director of security) (**Tr. 199, 213**).

Under Emery's policy a visitor is any non-employee or federal or state inspector at the mine (**Tr. 199**).

On April 15 Rabbitt signed under the old release policy. That form shows a check number. The visitor retains the brass tag with a number stenciled into it (**Tr. 201; Contestant Ex. 4**). Its purpose is to identify the persons in the mine (**Tr. 202**). The check-in, check-out procedure is mandated by federal law (**Tr. 2021**).

White did not know on April 15 but he agreed that the definitions in 30 C.F.R. Part 40 [**40.1(b)(1)**] defines a representative of miners as any other person or organization which represents two or more miners at a coal or other mine (**Tr. 206, 207**).

White outlined, in detail, his previous mining experience (**Tr. 208-210**).

The contract provision authorizing access for the international safety and health representatives does not contain any reference to a 24-hour notice (**Tr. 211**). The only notice provision in the contract provides as follows: "The committee shall give sufficient advance notice of the intended inspection to allow a representative of the employer to accompany the committee" (**Tr. 211**). The safety and health committee makes regular monthly inspections under the contract (**Tr. 212**).

The contract further provides: the provisions of this section are in no way intended to impair or to waive any

statutory rights under federal or state laws or regulations which union officials and representatives may have to enter upon mine property or enter the mines (Tr. 212; UMWA Ex. 7).

Prior to April 15, 1986 James T. Jensen, an attorney practicing in Utah, served as general counsel for Savage Industries, the parent of Emery Mining Corporation (Tr. 219).

Witness Jensen prepared and implemented Emery's release and waiver form (Tr. 219). At the time of the Wilberg accident in 1984 Emery carried general liability insurance aggregating \$50,500,000. When these policies expired in June 1985 only \$30,500,000 in insurance coverage could be procured (Tr. 219-220). The base policy was \$500,000, then a first level of excess coverage at \$10 million, then \$5.1 million and then another \$15 million.

In October or November the first \$10 million excess was cancelled. Hence, there was a gap in the coverage (Tr. 221). The company was able to find a \$1 million partial replacement policy (Tr. 221). In December 1985 the \$15.1 was cancelled. Emery's efforts at replacement were unsuccessful (Tr. 221).

The additional insurance coverage was not available at any cost and the \$1.5 million coverage was, in Emery's opinion, inadequate (Tr. 222).

After consultation it was determined that Emery would continue in business and also attempt to limit its exposure (Tr. 222-223).

Emery's employees were covered by workman's compensation and the areas of potential exposure involved claims by non-employees (Tr. 223). It was decided to use a release and waiver approach for those entering the company property. Existing and new forms were reviewed (Tr. 223-225; Contestant Ex. 3, 4). There were no discussions concerning the status of mine rescue terms from other companies, federal inspectors or UMWA representatives in connection with the release and waiver forms (Tr. 224; 225, 230).

The Wilberg disaster generated claims and caused the company to focus on non-employee visitors. But lawsuits against Emery by non-employees were not an extensive part of the litigation and the total of such claims would be within Emery's \$1,500,000 coverage (Tr. 226-228).

The final release form was finally approved in the latter part of February 1986 (Tr. 231). In part, the policy came about after a vendor was killed in a Kaiser mine (Tr. 231).

Dave Lauriski, Emery's director of health and safety, testified that he has 16 years experience in the mining industry (Tr. 237, 238). His responsibilities include overall safety at the company's mines and the coordination of staff activities.

Between late December 1985 and February 1986 Lauriski helped develop the waiver of liability form. The waiver was created due to the inability of Emery to maintain an adequate amount of insurance (Tr. 259). Utah Power and Light (UP&L) subsequently advised the press that it was taking over the operation of the mines because of the insurance question (Tr. 259, 260). The waiver policy has been continued by UP&L but the basic reason for the policy was negated by UP&L's insurance capability (Tr. 260). Lauriski indicated the older form was "very loose" (Tr. 240; Contestant Ex. 4). After receiving forms from various companies Lauriski began to develop Emery's new form based on the company's experience (Tr. 241). At that point he added on the form the hazard recognition or training checklist for all non-employee personnel. The draft form was approved by various individuals who reviewed it (Tr. 242). In early March 1986 a final form emerged (Tr. 243; Contestant Ex. 3, 5). An interoffice memorandum, dated March 21, 1986, identified those who would have to sign the waiver and those exempt from signing it (Tr. 245; Contestant Ex. 5). One of the criteria used to determine whether a person should be required to sign the waiver was the risk involved after the person entered the mine property (Tr. 246).

The first exemption involved state and federal agencies on mine property for reasons relating to coal production and/or inspections or enforcement actions. Even if any of these individuals were injured on mine property Emery believed it would not be held liable for such injuries (Tr. 246, 270, 282). An additional exemption focused on the employees of common carriers such as United Parcel and Uintah Freight. These individuals are exempt because of existing contracts holding Emery harmless in the event of injury to them. Further, Emery **didn't** think the risk was great enough for them to sign a waiver for each entry to the mine property (Tr. 247, 270, 283). In addition, the common carrier personnel do not go underground (Tr. 247, 283). A further exemption involved Lowdermilk Construction Company. This company does underground and surface work at the mine 100 percent of the time (Tr. 247). In addition, the Lowdermilk contract indemnifies and insures Emery (Tr. 248).

An additional exempted class consists of employees of Utah Power and Light. UP&L owns these particular coal mines and Emery serves as the operator (Tr. 248).

With the exception of the four described classes of persons, the waiver of liability policy applies to all other non-employees visitors to **Emery's mines** (Tr. 248).

The Emery people who developed the exemptions (Lauriski, Jensen, Cowan and **Rajski**) did not discuss the status of mine rescue teams entering the property. But such teams are exempt because a Utah state law holds coal operators harmless for miner rescue teams on their property (Tr. 250)

When the waiver policy was issued (**Rajski's** memorandum, Contestant's Ex. 5) there was no discussion of the status of the international representatives of the UMWA (**Tr. 265**). But in any event such a person would be required to sign under category 4, that is, as "all other visitors" (**Tr. 266**; Contestant **Ex. 5**).

The hazard training checklist incorporated with the release form used at Deer Creek mine is identical to the form used at the other Emery mines (**Tr. 268**). Lauriski directed the mine managers to implement the program (**Tr. 250, 251**).

Emery's mines consist of three separate complexes geographically very close but with three different entrances. The mines are independent. They are known as the Deer Creek mine, the Des-Bee-Dove complex and the Cottonwood Wilberg complex. Deer Creek mine overlies the Wilberg mine (**Tr. 252, 293**). Each of the three mines has its own security system (**Tr. 252**). A security guard records the times when visitors enter the property. Further, they are responsible for a visitor signing the waiver (**Tr. 253**).

Tom Rabbitt was the only person known to Lauriski who refused to sign the waiver although for the preceding six or seven months it had been the practice for Rabbitt to come on Emery's property day or night without its knowledge (**Tr. 253, 288-289**).

Witness Lauriski identified an exhibit which consisted of a large number of waiver and release forms. The forms received in evidence were generated at the Deer Creek mine between March 21, 1986 and April 27, 1986 (**Tr. 254, 290**; Contestant Ex. 6). All of the forms had been signed by non-employee visitors to the mine.

Up until the events of April 15, 1986 Lauriski was not aware of any person asserting the right to enter an Emery mine under **§ 103(f)** of the Mine Act (**Tr. 255, 273, 287**).

In cross examination Lauriski agreed that during a **§ 103(g)** inspection in January 1985 four UMWA health and safety representatives accompanied the federal inspectors during an electrical inspection (**Tr. 285**).

When a representative of the UMWA, who is also a non-employee, enters the mine under a contract right Emery requires that waiver be signed (**Tr. 268**).

On April 15, 1986 Lauriski instructed White to abate the citation rather than take a closure order. He did not understand at that time whether the closure order would be a "no-area affected order" (**Tr. 256, 257**). In three subsequent similar events Emery accepted the closure order (**Tr. 257**). The refusal to abate came about because Lauriski was advised by his counsel that the closure order would not affect any area of the mine (**Tr. 257, 279**).

As director of health and safety for Emery, Lauriski had a fairly broad knowledge of the presence of MSHA and the UMWA on mine property (Tr. 261). Lauriski has known Tom Rabbitt for eight or nine months (Tr. 261). Lauriski understood Rabbitt was there to work on the Wilberg investigation (Tr. 261, 286). Significant delays have occurred during the lengthy investigation into the Wilberg fire (Tr. 261).

On two occasions during the delays of the Wilberg disaster investigation, Rabbitt went underground in the Deer Creek mine to look at a two entry mining system (Tr. 262). He also entered the Cottonwood mine in late 1985 for the same purpose (Tr. 262). He has also been underground in the Wilberg mine and participated in the recovery operations (Tr. 262). Further, the witness does not dispute the claim that Rabbitt accompanied the inspectors on more routine inspections (Tr. 286).

Witness Lauriski was aware of Rabbitt's letter in January dealing with the seals (Tr. 263). The company thought Rabbitt was reiterating positions already decided on by the company (Tr. 264). The company was irritated over the second letter (Tr. 264).

William Ponceroff, called as an adverse witness, indicated that he is the supervisor at the MSHA field office in Orangeville (Utah) (Tr. 300).

Witness Ponceroff, a person experienced in mining, holds a degree in safety (Tr. 301-303). The field office, with six inspectors, has ten mines under its jurisdiction (Tr. 303).

At the time of this incident MSHA inspector Boston called Ponceroff and advised him that mine management refused to permit a UMWA representative to travel with him unless he signed a waiver (Tr. 305, 306). Ponceroff was not familiar with the waiver form nor did he attempt to learn about it. Abatement time was not discussed.

In a similar incident about March 5, 1986 MSHA inspector Baker had not taken any action (Tr. 306, 307). At a staff meeting a few days later the issue was discussed. It was decided that if any union representative on an international level wanted to accompany the inspector the company was to have equal representation. If the operator refused then a citation was to be issued. If the operator failed to comply then a (b) order would be issued but it would be a no-closure type of order (Tr. 309, 310). The foregoing policy resulted in the instructions given to Boston on April 15, 1986 (Tr. 310).

When Boston called him, Ponceroff was not aware Rabbitt had previously signed any release forms. In any event, that fact would not have affected his judgment (Tr. 310).

Boston later advised his supervisor that he had rewritten the citation. In Ponceroff's opinion, if Emery denied access to a representative of the International **UMWA** claiming the right to enter under **§ 103(f)**, then such a denial constituted a violation of the Act (**Tr. 312**). A violation would also occur if the company refused access conditioned upon the signing of a release and waiver (**Tr. 313, 325**). However, if a representative of miners does not act in an orderly fashion or hinders the inspection in any manner, he would be asked to leave and someone else would be selected (**Tr. 326**).

After April 15 no person employed by Emery indicated that Rabbitt should not be considered as a representative of the miners at the mines (**Tr. 326**). On the Part 40 filing form the **UMWA** is one of the organizations named as a representative of the miners (**Tr. 326, 327; Contestant Ex. 7**).

Witness Ponceroff testified concerning situations where disputes might arise over different individuals claiming to be representative of the miners (**Tr. 327, 328**).

Ponceroff's duties include enforcement of **MSHA's** regulations under 30 C.F.R. Part 40. The Part 40 regulations require representatives of miners to make certain designations and file certain documents with the **MSHA** District Manager (**Tr. 314**).

On July 30, 1984 a Part 40 document was filed with **MSHA's** Orangeville office (**Tr. 315, 316; Contestant Ex. 7**). The document received in evidence was the most recent on file and it identifies for **MSHA** the representatives at the various mines (**Tr. 316, 317**). Boston's call of April 15 did not inquire as to the name of the individual who was listed as a representative of the miners at the Deer Creek mine (**Tr. 318**). The form designates who will represent the miners under various sections of the Act (**Tr. 322, 323**).

The parties stipulated that **UMWA** international representative Rabbitt was not listed as a named delegate on any filing under Part 40 associated with any of the Emery mines (**Tr. 323**).

Ponceroff did not recognize the name of any **UMWA** international representative on the Part 40 form (**Tr. 324**). Nor did he look at the filing made by the Deer Creek miners (**Tr. 324**).

John W. Barton, called as an adverse witness, testified as to his education and experience in mining. He further identified himself as the district manager of District 9 for Coal Mine Health and Safety (**Tr. 330, 344, 345**). He is responsible for the total administration of the Act. He has 110 employees and four primary divisions including administrative, education and training (a consultant service to industry), an engineering service to industry, and an enforcement division (**Tr. 342-343**).

Barton's jurisdictional area consists of all states west of the Mississippi except for Minnesota, Iowa and half of Missouri (Tr. 343). His duties include enforcing the Part 40 regulations (Tr. 331). Barton's office has written letters to various mines concerning steps that need be taken to comply with Part 40 (Tr. 331, 332).

When changes are made in Part 40 filings by individual mines MSHA accepts such changes as a matter of course and enters them as part of the official MSHA file (Tr. 332). On occasion mines have been directed to use MSHA forms (Tr. 333). Barton identified the form prepared in his office. It was prepared as a convenience for miners' representatives (Tr. 333, 334).

Barton considers Part 40 to be a procedure available to mine workers. However, in accordance with the Secretary's directions, MSHA is told to take a very broad view of miners participation rights (Tr. 343, 344, 356). Portions of the Part 40 regulations use the term "shall", (Tr. 356) but the witness believed the wording in the preamble instruct him how to interpret the regulation (Tr. 357). In Barton's opinion Inspector Boston acted correctly (Tr. 358).

Section 103(f) is a general provision of the Act that allows a non-employee miners' representative to travel with the representative of the Secretary (Tr. 335, 350). Such an individual is not an employee of the agency but is present to assist the MSHA inspector (Tr. 350). The regulations state that participation by a miners' representative cannot interfere with the active completion of the inspection. The inspector has authority under the law to prevent a representative from further traveling with him (Tr. 351). MSHA encourages the representatives to have some input into the inspections (Tr. 351). Barton only knew of one instance where an intentional representative of the UMWA was denied access to a mine (Tr. 349).

In Barton's understanding, the Act and its regulations seek to encourage miners to participate and to bring forth people who would best serve the purpose on any particular inspection (Tr. 349). This evolves from the fact that miners at an individual mine do not have a great amount of experience and therefore outside representation and wider experience can be of great benefit to the rank and file members (Tr. 349, 350). The miners representatives are chosen at the discretion of the employees at the mine (Tr. 335, 336). Such discretion can be exercised by submitting the form or by submitting a miners' representative when the inspector arrives at the mine (Tr. 336). The preamble in Government Exhibit 3 (the Secretary's bulletin of July 7, 1978) states, in part, that "it should be noted that miners and their representatives do not lose their statutory rights under **§ 103(f)** by their failure to file as a representative of the miners under this part" (Tr. 336).

The Part 40 filing form itself was discussed by the witness (Tr. 337, 338).

The policy that any UMWA international representative has an automatic entry right under § 103(f) emanated from Barton's office when Part 40 was promulgated (Tr. 338, 339). The Part 40 filings are occasionally consulted by MSHA since the regulations govern the identification of representatives of miners for all mines under the Act (Tr. 340). Further, the regulations define the term "representatives of miners" (Tr. 341).

Barton analyzed a procedure to be followed if conflicting claims arise between different persons claiming to be representatives of miners (Tr. 354, 355).

In rebuttal Forrest Adison and Mark Larsen testified for the UMWA.

Forest Adison has been employed at the Wilberg mine for eight years.. His local union offices include safety committeeman and mine committeeman (Tr. 360). Adison was present at a meeting with mine management representatives Neldon Sitterud, Jorgenson (shift foreman), John Boylen, and Baker (MSHA) at the Wilberg mine on March 5. At that time Adison requested that international representative Tom Rabbitt accompany him on a regular quarterly safety inspection conducted by Bob Baker. There was a question of a variance involving an escapeways in the Wilberg mine (Tr. 361, 366). Sitterud told Rabbitt he had no right to enter the mine. He and Boylen were not aware of the Act. Baker took no enforcement action when the company refused to allow Rabbitt to walkaround. Adison considered Rabbitt to be his representative protecting him and keeping the membership aware of activities (Tr. 362-367). Since the mine disaster he has asked the international union representatives about matters within their expertise (Tr. 364).

Mark S. Larsen, a safety committeeman for the two years, has been employed at the Deer Creek mine for seven years (Tr. 368, 369, 373).

On April 15, 1986 Larsen was present to accompany the MSHA inspector whom he met at the gate. The two men picked up Rabbitt. Later, in his office, White questioned Rabbitt's authority to enter the mine under the contract. Rabbitt stated his entry was not under the contract but under § 103(f) of the Act (Tr. 369, 370). When he read the Act, White said Rabbitt was not an employee. Rabbitt agreed but stated that he would suffer no lost wages by accompanying the inspector (Tr. 370). Larsen indicated Rabbitt was being paid in part by the local union dues of \$40 per month (Tr. 370, 371).

As the argument continued Larsen told White that he felt Rabbitt was his representative (Tr. 371). The MSHA citation, as previously described, was issued (Tr. 371). At this meeting Rabbitt did not state he could get into the mine at any time (Tr. 372).

Larsen trusts the advice he receives from the international representatives. He further thought such advice was important to his safety (Tr.372,373). Larsen felt they need the UMWA's expertise. This is why the local miners pay their dues. Futher, the international helps them (Tr.373,374).

Witness Rabbitt, recalled by the UMWA, described the sign-in and sign-out books at the mine (Tr. 375, 376).

Discussion

This case turns on the interpretation of **§ 103(f)** of the Federal Mine Safety and Health Act of 1977. 14/

The walkaround participation right was first enacted in the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 750, Public Law 91-173. Section **103(h)** thereof provided as follows:

(h) At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

The 1977 amendment, enacted in **§ 103(f)**, considerably broadened the walkaround participation right and addressed the issue of pay when a representative of miners accompanied the inspection team.

Specifically, such representative of miners "who is also an employee of the operator shall suffer no loss of pay . . ." Clearly, then, Congress contemplated that **non-employees** may be representatives of miners, Commission Judge James A. Broderick ruled to this effect in Consolidation Coal Company v. Secretary of Labor et al, 2 FMSHRC 1403 (1980).

In fulfilling his statutory rulemaking mandate contained in the 1977 Act the Secretary issued his interpretative bulletin, 43 Fed. Reg. 17546, (April 25, 1978) setting for his general interpretation of the scope of **§ 103(f)**. The bulletin provides, in part, as follows:

14/ This section has been before the Courts of Appeals in UMWA v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (DC Cir. 1982), cert. denied 74 L. Ed.2d 189 (1982); Magma Copper Company v. Secretary of Labor, 645 F.2d 694 (9th Cir. 1981) cert. denied 50 U.S..L.W. 3296 (1981); Consolidation Coal co. v. Federal Mine Safety and Health Review Commission, 740 F.2d 271 (3rd Cir. 1984); Monterey Coal Co. v. Federal Mine Safety and Health Review Commission, 743 F.2d 589 (7th Cir. 1984).

The Federal Mine Safety and Health Act of 1977 (Pub. L. 95-173, as amended by Pub. L. 95-164, November 9, 1977) (hereinafter referred to as the Act) is a Federal statute designed to achieve safer and more healthful conditions in the nation's mines. Effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of miners at every level of safety and health activity. Therefore, under the Act, miners and representatives of miners are afforded a wide range of substantive and procedural rights. Section 103(f) provides an opportunity for the miners, through their representatives, to accompany inspectors during the physical inspection of a mine, for the purpose of aiding such inspection, and to participate in pre- or post-inspection conferences held at the mine. As the Senate Committee on Human Resources stated, "If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." S.Rep. No. 95-181, 95th Cong., 1st Sess., at 35 (1977).

Further, in 1978 the Secretary promulgated 30 C.F.R. Part 40 wherein he defined a representative of miners to mean: "(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act" and (2) "Representatives authorized by miners", "Miners or their representatives", "authorized miner representative" and other similar terms as they appear in the Act. (§ 40.1).

I agree with Emery that it seems beyond contradiction that there are two principal reasons for the § 103(f) walkaround right. They are to increase the safety awareness of miners and to produce more thorough inspections through the participation of those familiar with the conditions being inspected. However, I do not concur with Emery's view that a colloquy ^{15/} between Senators Helms and Javits is determinative of the final scope of this section.

Contrary to Emery's views Senate Report No. 95-181 contained in the legislative history is much more persuasive. On the point the report states as follows:

The right of miners and miners' representatives to accompany inspectors

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 assist in conducting a full inspection. It is not intended, however, that the absence of such participation vitiate any citations and penalties issued as a result of an inspection.

^{15/} The senators, in discussing § 103(f), referred to "employees" and "miners."

The opportunity to participate in pre- or post-inspection conferences has also been provided. Presence of a representative of miners at opening conference helps miners to know-what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the 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 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. The Committee also recognizes that in some circumstances, the miners, the operator or the inspector may benefit from the participation of more than one representative of miners in such inspection or conferences, and this section authorizes the inspector to permit additional representatives to participate.

(Emphasis added)

Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session 616, 617 (July 1978).

In short, the Senate in its formal report had no difficulty deciding **that the** inspector might include additional miners' representatives to participate with him in the inspections.

In support of its position, **Emery** cites Emery Mining Corporation, 783 **F.2d** 155, 158 (10th Cir. **1986**), Council of Southern Mountains, Inc., v. Federal Mine Safety and Health Review Commission, 751 **F.2d** 1418 (DC Cir. 1985), and Stouffer Chemical Company v. E.P.A., 647 **F.2d** 1075 (10th Cir. **1981**), among other cases.

The cited Emery case is not controlling. In Emery the court reviewed the scope of a different section of Act, namely § 115. Further, the-Court emphasized that none of the Secretary's "otherwise extensive regulations" addressed the issue of the operator's liability to pay newly hired miners for their costs in receiving 32 hours of miner training, 383 **F.2d** at 159. The instant case involves the Secretary's interpretative bulletin but more particularly he has defined a representative of miners to be a person or organization which represents two or more miners. Mr. Rabbitt is such a person and the UMWA, intervenor, is such an organization.

In Council of Southern Mountains the Council, a non-employee miner representative, sought access to mine property to monitor certain training classes. Specifically, the Court noted that **"(i)t** was not, in these circumstances, asserting its right under

§ 103(f), 30 U.S.C. § 813(f), to accompany a federal mine inspector investigating mines for compliance with safety training requirements" (fn 21, 751 F.2d at 1421).

In fact, in footnote 18 the Court takes a contrary position to Emery's view that a distinction exists between employee and non-employee representatives. The Court stated that "(t)he Council is a non-employee miners' representative. The Mine Act, however, merely refers to 'representatives' and does not articulate any distinction between the rights of employee and non-employee representatives", 751 F.2d at 1421.

Further, in footnote 31 the Court noted: "Our holding is limited to situations where miners' representatives assert an independent right to enter mine property for monitoring purposes. It has no application to instances where representatives assert a statutory right under Section 103(f) to accompany federal mine inspectors investigating mines for compliance with statutory or regulatory safety training requirements", 751 F.2d at 1418.

In Stauffer Chemical Company the question before the Court involved the right of access by EPA's contractor under the Clean Air Act. Stauffer provides no support for Emery's position that the miner's representatives must be employees of the operator in order to be allowed access to mine property. Under § 103(f) Mr. Rabbitt was not an employee of the Secretary. He was an employee of the miners at the Deer Creek mine.

Emery's search warrant cases, commencing with Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967) and its progeny illustrate a principle of law. But the Supreme Court has already ruled that a search warrant is not required under the Mine Act, Donovan v. Dewey, 101 S. Ct. 2534 (1981). The right of the international representative under § 103(f) is to inspect mine property at the same time and in the presence of the MSHA inspector.

On this record it is uncontroverted that the UMWA International was bound by its collective bargaining agreement to Emery and its miners. Further, Emery knew Rabbitt was a UMWA international representative. Rabbitt and UMWA both meet the Secretary's definitions of a miners' representative. Further, miners Fitzek, Addison and Larsen wanted Rabbitt's expertise and assistance. A portion of the local union dues go to Rabbitt's wages.

The foregoing facts cause me to conclude that Rabbitt may participate in a walkaround inspection with the MSHA inspector as a matter of statutory right.

The second issue focuses on whether Emery may condition the entry of the UMWA international representative upon his signing a release and waiver agreement.

A credibility issue arises here as to whether the release agreement was intended to restrict the activities of Rabbitt at the Emery mines. Rabbitt expressed such an opinion but no collateral evidence supports such a conclusion. Accordingly, I reject such a construction of the evidence. Emery's reasons for requiring various parties to sign the release and waiver are credible and detailed in the summary of the evidence. However, the record indicates that the potential exposure for possible claims from this class of persons was within Emery's initial coverage of \$1,500,000. In addition, the insurance problem was resolved when Utah Power and Light took over the operation of its mines.

In any event, § 103(f) does not condition the international representative's access upon a waiver of that person's right to seek redress for injuries that might be sustained as a result of the operator's negligence. The right to apply to the courts for relief from the perpetration of a wrong is a substantial right. Bracken v. Dahle et al, 68 Utah 486, 251 P. 16 (1926).

In addition, the State of Utah's Constitution in Article I, Section 11 provides as follows:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay: and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself. or counsel, any civil cause to which he is a party.

The State of Utah has included the above right within the protection of its constitution. It would appear that if Emery's position were sustained, serious 10th Amendment implications could arise.

Emery may well have the right, in dealing with the members of the public, to condition access to its mine. There are certain benefits accruing to sales representatives and similar persons in entering a mine. The signing a waiver in those cases is an appropriate quid pro quo for the expanded business opportunity. But the person seeking access here is acting under a statutory provision. The Commission has noted that access under this provision plays an important role in the overall enforcement scheme of the Act. It is therefore inappropriate for Emery to equate the UMWA international representative's access with that of a sales representative in determining the appropriateness and validity of the operator's release and waiver requirement. Providing access to the former was determined by Congress to be an important means of achieving the goal of improved health and safety in our nation's mines. Providing access to sales representatives and the like does not relate to the achievement of goals that are in the public interest and that matter is left to the **operator's** discretion.

It is also noted that non-employee Union representatives have been held to have a right of access to an employer's property, in order for the union to properly carry out its duties as collective bargaining representative under the National Labor Relations Act. NLRB v. Holyoke Water Power Co., 778 F.2d 49 (1st Cir. 1985).

For the foregoing reasons, I conclude that Emery may not insist that the UMWA international representative sign a waiver prior to exercising § 103(f) rights.

Emery's policy also requires 24 hour advance notice before entry into a mine will be permitted. However, it is not necessary to explore this aspect of the case because the notice requirement clearly relates to entry under the terms of the wage agreement (UMWA Ex. 4). And the parties agree the terms of the wage contract are not an issue in the case.

The final issue centers on whether Emery may refuse entry to UMWA international representative Rabbitt merely because he was not designated by name in the filings made under 30 C.F.R. Part 40.

This issue was squarely addressed by the Commission in Consolidation Coal Company, 3 FMSHRC 617 (1981).

In the Consol case the inspection was requested by the safety committee of the UMWA local. The UMWA was the collective bargaining representative of the miners. The operator refused entry on the grounds that their names had not been submitted pursuant to 30 C.F.R. Part 40.

In considering the issue the Commission stated as follows:

We have previously recognized the important role section 103(f) plays in the overall enforcement scheme of the Act, both in assisting inspectors in their inspection tasks and in improving the safety awareness of miners. (Case cited) We are not prepared to restrict the rights afforded by that section absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation.

Neither the statute nor the legislative history indicates that prior identification of miners' representatives is a prerequisite to engaging in the section 103(f) walkaround right, and Part 40 on its face is **silent** as to the intended effects of a failure to file. The preamble to Part 40 does discuss, however, the intended effect of the filing regulations on walkaround participation. It states:

[I]t should be noted that miners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as a representative of miners under this part.

43 Fed. Reg. 29508 (July 7, 1978). This statement provides a clearly indication of the Secretary's intent in promulgating the filing regulations and is not inconsistent with the language of Part 40.

In footnote 3 of the decision the Commission further observed:

The Part 40 filing requirements were not promulgated merely to identify miners' representatives for section 103(f) purposes. As the preamble to Part 40 noted, the Act "requires the Secretary of Labor to exercise many of his duties under the Act in cooperation with miners' representatives." 43 Fed. Reg. 29508 (July 7, 1978). Filing under Part 40 serves, among other things, to identify such representatives that they will be included in the processes contemplated by the Act. See, e.g., sections 101(e), 103(c), 103(g), 105(a), 105(b), 105(d), 107(b), 107(e), 109(b), 305(b).
3 FMSHRC at 618, 619

In the **Consol** case the operator was well aware of who the UMWA safety representatives were and why they were at the mine. Likewise, in the instant case, international representative Rabbitt was well known to Emery's management.

For the foregoing reasons, I conclude that the mere failure of representative Rabbitt to file under 30 C.F.R. Part 40 does not authorize the operator to deny access under § 103(f).

Briefs

The parties have filed pre-trial and post-trial briefs which have been most helpful in analyzing the record and defining the issues. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Contestant failed to meet its burden of proof to establish that Citation 2834575 should be vacated.
3. The contest of Citation 2834575 should be dismissed.

ORDER

Based on foregoing findings of fact and conclusions of law,
I enter the following order:

The contest filed herein is dismissed.


John J. Morris
Administrative Law Judge

Distribution:

John A. Macleod, Esq., Ellen Moran, Esq., Crowell & Moring, 1100
Connecticut Avenue, NW, Washington, D.C. 20036 (Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department
of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified
Mail)

Mary Lu Jordan, Esq., United Mine Workers of America, 900
Fifteenth Street, NW, Washington, D.C. 20005 (Certified Mail)

/blc