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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
JOSEPH G. DELISIO, JR.,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. PENN 86-83-D
MSHA Case No. CD 85-9

Mathies Mine

v.

MATHIES COAL COMPANY,
RESPONDENT

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Complainant;
Carl H. Hellerstedt, Jr., Esq., Volk, Robertson,
Frankovitch, Anetakis & Hellerstedt, Pittsburgh,
Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a discrimination complaint filed by the Secretary of Labor (MSHA), on behalf of the complainant pursuant to section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1). The complainant alleges that the respondent discriminated against him by issuing him a verbal warning threatening possible disciplinary action because of his desire to serve as the designated miner's walkaround representative during Federal inspections of the mine.

A hearing was held in this matter in Pittsburgh, Pennsylvania, and the parties have filed posthearing briefs in support of their respective positions. All of the arguments made by the parties in their briefs, as well as during

~1773

the hearing, have been considered by me in the course of this decision.

Issues

The critical issue in this case is whether or not the respondent has interfered with the complainant's right to accompany Federal inspectors during mine inspections as the duly recognized union walkaround representative of the miners. Additional issues raised by the parties are identified and disposed of 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. 301 et seq
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).
3. Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 813(f).
4. Commission Rules, 29 C.F.R. 2700.1, et seq.

Complainant's Testimony and Evidence

Joseph Delisio, Jr., testified that he is employed by the respondent as a mine examiner, and has worked for the company for 12 years. He has served as the chairman of the union mine safety committee since May, 1983, and is a member of the miner's Political Action Committee. He is registered with the respondent as the miner's safety representative, and has notified mine management of this fact. He indicated that in the event of a Federal mine inspection, if a member of the mine safety committee, of which there are three, were available, he would be the first choice to accompany the inspector as the walkaround representative (Tr. 19A21).

Mr. Delisio stated that he works 1 week on the daylight shift and 1 week on the afternoon shift. He confirmed that since most MSHA mine inspections (95 percent), take place during the day shift, he would generally be performing his duties as a miner examiner if he were working the afternoon shift. While working the day shift, he is the only available member of the safety committee. He confirmed that he works at the Thomas Portal, and that when inspections occur at that portal during his shift, he acts as the miner representative during these inspections. He confirmed that mine management

~1774

has never threatened him with any disciplinary action, or attempted to discipline him for acting as the miner walkaround representative at the Thomas Portal. He also confirmed that the Thomas Portal does not produce coal, and that coal production takes place at the Linden Portal which is approximately 5 miles away (Tr. 23).

With regard to the exercise of his walkaround rights at the Linden Portal, Mr. Delisio stated that in June, 1985, he attended a communication meeting with Mine Superintendent Edmund Baker and raised the question concerning his ability to act as the walkaround representative at that portal. Mr. Delisio stated that Mr. Baker "recommended" that he not serve as the walkaround, and "that some type of action may be taken against me" (Tr. 24). Mr. Delisio stated that he again raised the question on July 30, 1985, while on his way to work at the Thomas Portal. He stopped by the Linden Portal, which is on the way to the Thomas Portal, and asked Mine Superintendent George Karazsia if he would allow him to accompany the Federal inspector as the union walkaround representative. With him at the time was Ron Stipanovich, president of the local union, and Federal Inspector Phil Freese. Mr. Karazsia informed him that "he had no problem with me travelling with the inspector, but if I did management would take disciplinary action against me, and I could consider that a verbal warning" (Tr. 24).

Mr. Delisio stated that on the evening of July 29, Mr. Baker telephoned his home, spoke with his wife, and informed her that it was his understanding that he (Delisio) would be at the Linden Portal in the morning to accompany an inspector. Mr. Baker advised his wife that he (Baker) recommended that Mr. Delisio not do that, and if he did, "some type of action would be taken against me" (Tr. 25).

Mr. Delisio stated that he did not accompany the inspector as a walkaround at the Linden Portal on July 30, and he confirmed that no miner representative accompanied the inspector that day (Tr. 26). He also confirmed that on that same day he travelled to the MSHA office in Washington, Pennsylvania, and filed his discrimination complaint (exhibit GÄ1, Tr. 26).

Mr. Delisio stated that in February, 1986, he was at the Linden Portal in the company of Federal Inspector Francis Wehr. He again asked Mr. Karazsia if he could accompany the inspector on his regular mine inspection as the union walkaround representative, and that Mr. Karazsia informed him

~1775

that since his discrimination case was on appeal, he recommended that he wait until the case was heard and decided. Mr. Delisio stated that he then inquired of Mr. Karazsia if there would be a problem in Mr. Delisio reporting to the Thomas Portal and then driving his own car back to the Linden Portal to accompany the inspector, and that Mr. Karazsia responded that since the case was on appeal "they would have a problem if I did that." Mr. Delisio stated that he received the same response when he asked Mr. Karazsia if he could report to the Thomas Portal and then travel underground to meet and accompany the inspector at the Linden Portal (Tr. 27).

Mr. Delisio confirmed that his normal work reporting time at the Thomas Portal during the day shift was 8:00 a.m., and that he offered to report at 7:30 a.m., in order to have time to travel back to the Linden Portal before the inspector would start his inspection at 8:00 a.m. (Tr. 28).

Mr. Delisio stated that there have been occasions when he did not report to his assigned portal without informing mine management of his whereabouts. He cited instances when he had "safety business" at the union international district office or "sudden" safety meetings where he could not contact mine management. On some of these days the local union president would turn in an excuse for him, and on other days when no excuses were turned in, mine management never questioned him or inquired as to his whereabouts. He also stated that management has never disciplined him for not reporting to work or for not informing them of his whereabouts. Mine management never threatened him with disciplinary action or gave him any verbal warnings for not reporting to work on those days (Tr. 29).

Mr. Delisio stated that when he reports for work at the Thomas Portal, the foreman can visually observe his presence, and he does not report in to anyone. He simply changes clothes, gets his equipment, and starts work underground. He does not use any check-in or checkout system, and no time clock is used. Even if he reported to the Linden Portal and called the Thomas Portal, mine management would know of his whereabouts, and during an inspection, a representative of management always accompnys the inspector (Tr. 30).

Mr. Delisio cited several examples of miners using their own vehicles to travel from portal to portal. Motormen have driven from one portal to another when their is a shortage of qualified motormen, miners have driven between portals for

~1776

retraining, and safety committeemen have driven between portals when there are problems, accidents, or fires, and this is all on company time (Tr. 32). Forbidding him to drive his own vehicles also precludes his attending mine inspection close-out conferences held at the Linden Portal (Tr 33). In his opinion, the actions taken by mine management in his case have interfered with his ability to act as the miners' walkaround representative (Tr. 34).

On cross-examination, Mr. Delisio confirmed that he is at the Thomas Portal by his own personal choice and that he bid on a job at that location (Tr. 34). If the same job were to become available at the Linden Portal, he would bid on it (Tr. 35). He confirmed that he is the only safety committeeman on the day shift, and that other miners accompany Federal inspectors at the Linden Portal because he is not allowed to accompany them during his shift. The miners that accompany inspectors are designated to do so by the safety committee, but Mr. Delisio believes he is better qualified than those miners (Tr. 36-37). He conceded that the safety committee is satisfied with the qualifications of the miners who accompany the inspectors (Tr. 37). He also conceded that there is another representative who would function in his absence during any close-out conferences (Tr 37), but believes that it is more efficient for the union if he were present if at all possible (Tr. 38).

Mr. Delisio stated that while no other miner walkaround accompanied the MSHA inspector on July 30, 1985, respondent's safety manager Malcom Dunbar did mention that another miner other than Mr. Delisio could accompany the inspector. However, Mr. Delisio asserted that Mr. Dunbar's suggestion was made after the inspector had started his inspection (Tr. 39).

With regard to his absence from the mine on union safety matters, without first notifying mine management, Mr. Delisio could not state how frequently this occurred, and indicated only "several times throughout the year." He indicated that the respondent has an absenteeism policy, but that he has not been subjected to this policy because of his absences (Tr. 41).

With regard to the use of personal vehicles by safety committeemen to travel from portal to portal, Mr. Delisio stated that this occurred when there was a fire, accident, or injury, and that it did not occur too often. The only occasion he would have to travel in a government vehicle with an inspector was when the inspection started at the Thomas Portal and the inspector conducted a surface inspection of the

~1777

dumps or the impoundment. This did not happen frequently because the inspectors usually show up at the Linden Portal (Tr. 42).

Mr. Delisio confirmed that the threatened disciplinary action against him amounted to warnings and that he has suffered no loss of pay (Tr. 43). He confirmed that what he was seeking in this case is the following (Tr. 43):

Q. I will--I just have, really, one more question, and that is am I incorrect in the impression that what you would want to do is to accompany a Federal Inspector anytime that Federal Inspector is inspecting the mine, as long as that inspection is occurring on your regularly scheduled shift?

A. That is correct.

And, at (Tr. 72-75):

JUDGE KOUTRAS: Okay. Now, what's--tell me just in your own words, how you feel that you should be able to do your job there as mine examiner, and also fulfill your obligations as a union walk around? How would you--if you had your druthers, how would you prefer to do it?

THE WITNESS: I would--you mean how would I prefer to travel with the Inspector and do my job?

JUDGE KOUTRAS: No, first of all, you're a paid employee by Mathies as a mine examiner, that's your livelihood.

THE WITNESS: Yes, yes.

JUDGE KOUTRAS: And then your also the Chairman of the Safety Committee designated as the walk around.

THE WITNESS: Yes.

JUDGE KOUTRAS: There seems to be some--

~1778

THE WITNESS: Among--among other duties, I'm paid as--for my job as Chairman of the Safety Committee also.

JUDGE KOUTRAS: You're paid by the union for that?

THE WITNESS: Yes. So that's--that's my job also.

JUDGE KOUTRAS: But, you're a paid employee of Mathies, is that correct?

THE WITNESS: Yes.

JUDGE KOUTRAS: You're not suggesting--you're not under the control of Mathies as an employee?

THE WITNESS: Yes.

JUDGE KOUTRAS: And, they have the right to tell you, you know, you bid on the job at Thomas, they have the right to say to you that your working hours are such and such to such and such, and these are your duties, and this is where you'll report to work. Is that correct?

THE WITNESS: As far as walk around, I don't--

JUDGE KOUTRAS: No, no, no, no, as far as your--you're wearing two hats. Let's put on the employee hat. As a paid employee of Mathies, do you dispute the fact that the Company has the--the management has the--

THE WITNESS: Right to direct a work force.

JUDGE KOUTRAS: Right to direct it's work force. Tell you where to report for work?

THE WITNESS: Yes.

JUDGE KOUTRAS: Okay. Now, you tell me how you would like to accomodate both things. From what I heard from the opening statements

~1779

in this case mine management wants you to report to the Thomas portal and go to work, and then when you're called upon to do the walk around that they more or less according to the Government side of the story here--

THE WITNESS: I would have no problem going to the Thomas portal. I will go to the Thomas portal and check in there, and then travel to wherever the Inspector is at for his inspection.

JUDGE KOUTRAS: Okay, you're willing to do that--

THE WITNESS: I have no problem doing that, no.

JUDGE KOUTRAS: You're willing to do that?

THE WITNESS: I'm willing to do that.

JUDGE KOUTRAS: In your own personal vehicle?

THE WITNESS: Yes.

JUDGE KOUTRAS: And, you say the Company management doesn't want you to do that?

THE WITNESS: That's what management has said.

JUDGE KOUTRAS: And, what reasons are they giving you for refusing you to use your own vehicle?

THE WITNESS: Well, at the time that I requested to do that was the second meeting in February, and, at that time Mr. Karazsia said that he just felt I should wait for this particular case to go to a hearing, and let you decide that.

JUDGE KOUTRAS: What about the first time, now, I couldn't understand, once the case is in litigation--

~1780

THE WITNESS: The first time--the first time was--the question wasn't brought up about me using my own vehicle.

JUDGE KOUTRAS: What was brought up then?

THE WITNESS: About me just traveling with the Inspector--that particular day. And, at that time I was told that action would be taken against me. There was never a question brought up about me reporting to my work portal and then traveling back to the Linden portal. That was brought up at the second meeting.

And, at (Tr. 84Ä85):

* * * * *

THE WITNESS: I believe what you're getting at there is me traveling from Thomas to Linden in my own vehicle, which I stated earlier, I'm willing to do that prior to the shift. I'm willing to do that on my own time, not on company time. I'm willing to take the responsibility to drive my own vehicle, and my liability myself, traveling from the portal to the other portal.

JUDGE KOUTRAS: Once you get there, taking the chance of the Inspector showing up, is that what you're saying? What if he doesn't show up?

THE WITNESS: Well, the Inspector is normally there at 7:30 in the morning. I could easily call--you're talking about ten minutes difference in traveling time, I could easily call that portal, if the Inspector was there then travel--be at that portal before 8:00 a.m., where I would still be on my own time; I wouldn't be on company's time. I could actually leave Thomas portal at a quarter to eight, and be at Linden portal before 8:00 a.m., on my own time where I would not start on company time until 8:00 a.m.

~1781

JUDGE KOUTRAS: And, what if the Inspector weren't there, you'd just turn around and come back?

THE WITNESS: Well, I would call to make sure--if he wasn't there I wouldn't travel to that portal. I mean if I called that portal at twenty to eight, and, no Inspector was there--the majority of the times the Inspector wouldn't be coming that particular day. Just about in all cases they're there by half past.

Mr. Delisio stated that during 1985 there were approximately 70 different occasions when he missed a partial work shift or left the mine early to attend to union business, and that mine management never objected to his absences or complained that his mine examiner duties could not be performed by anyone else (Tr. 44). He confirmed that on each of these occasions, other union members accompanied the inspectors on their inspection rounds. These walkarounds representatives would either be persons designated by him or the regular walkaround representative at the Linden Portal. He also confirmed that there is a regular union walkaround representative available at the Linden Portal during the shifts that he works at the Thomas Portal (Tr. 45-47). He further explained the circumstances concerning his absences from work as follows (Tr. 59-61):

JUDGE KOUTRAS: Mr. Delisio, let me ask you this question. These times when you have business downtown with the National or International Union, you mean to tell me you simply go, and mine management is totally unaware of it?

THE WITNESS: On occasion.

JUDGE KOUTRAS: About how many occasions? Is it usually your practice to let somebody know at the mine that you're not going to be there so somebody else--

THE WITNESS: I make an attempt to but, there's occasions when I can't--

JUDGE KOUTRAS: How many times are you successful in reaching the mine management to

~1782

tell them that you're going to be away on union business?
More than the other way?

THE WITNESS: Yes.

JUDGE KOUTRAS: Simply not showing up?

THE WITNESS: More, yes.

JUDGE KOUTRAS: What is your job as a mine examiner what
precisely do you do as a mine examiner?

THE WITNESS: I examine an area of the mine for
hazardous conditions, for gas--

JUDGE KOUTRAS: Preshift, that sort of thing?

THE WITNESS: Preshift examination, yes.

JUDGE KOUTRAS: That's a pretty important job right?

THE WITNESS: Yes, it is.

JUDGE KOUTRAS: Now, if you simply don't show up, and go
on downtown, where does that put the--

THE WITNESS: I really don't know, cause management has
never questioned me on it.

JUDGE KOUTRAS: But, what I'm--the point I'm making, is
it true or not true that most of the time that you're
away on union business, and mine management is aware of
it, it's not simply a situation of your not showing up,
and them not doing anything.

THE WITNESS: Yeah, I would say the majority of the
time, yes, they would know that. I'm sure the foreman
at the start of the shift looks to see if I'm there on
occasions when I don't call in, and, he's aware of it
then, and that foreman the majority of the time does my
job. That particular foreman.

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JUDGE KOUTRAS: Well, on those occasions when you are not there, does he naturally assume that you're off on union business, or--

THE WITNESS: I don't know. He's never questioned me on it so I really don't know what he assumes.

JUDGE KOUTRAS: When you report back on your next shift do you always have an excuse of some kind, a note or something?

THE WITNESS: No, I don't.

JUDGE KOUTRAS: So, any time you're not there at the mine, mine management just knows automatically that you're off on union business, and they don't say anything to you?

THE WITNESS: I-- I-- I imagine that's what they do, I really don't know how they handle that.

JUDGE KOUTRAS: Okay.

THE WITNESS: I have to say that a lot of those instances, I mentioned 70 cases, a lot of those 70 cases were when I was at the Linden portal on a safety inspection. I do monthly safety inspections where I'm at the Linden portal, and some of those other instances where I would be at the Washington MSHA office, at Manager's conferences. It's not that I'm missing 70 days of work a year, you know, I'm on union business either out there at a conference where managements with me at that time, or I'm at the Linden portal where the prep plant will have you on safety inspections. I don't want you to look at that number and say well, this fellow is missing 70 days of work, or 70 partial days of work a year, you know--

Mr. Delisio believes that he is the "most qualified" first choice of the miners at the Linden Portal to accompany inspectors during their inspections because the chairman of the safety committee has always travelled with the inspectors and none of the walkarounds at the Linden Portal have state safety certifications as he does (Tr. 48). MSHA's

~1784

counsel conceded that there are no particular "certification requirements" for a miner to serve as a walkaround representatives, and whoever the miners select for this task may serve as their walkaround representative (Tr. 49). Counsel further explained her position as follows at (Tr. 50Ä52):

JUDGE KOUTRAS: Well, is he the first choice because he says he's the first choice, or is it because he's on the Safety Committee, or is he the first choice because the miners have said, Mr. Delisio, you as Chairman of the Safety Committee, are the only Safety Representative qualified to accompany a Federal Inspector? How many members are on the Safety Committee? Three?

MS. HENRY: Three.

JUDGE KOUTRAS: How about the other two? What choices would they be, second and third, or--

MS. HENRY: They're all on different shifts.

JUDGE KOUTRAS: They work on different shifts?

MS. HENRY: Yes, Your Honor. So on the particular time--

JUDGE KOUTRAS: On the shift that Mr. Delisio works on--

MS. HENRY: On the shift that Mr. Delisio works, he would be the only Safety Committee member available to accompany the Federal Inspector.

JUDGE KOUTRAS: I understand that, but--

MS. HENRY: And, our point is that--our contention is that this is the miners first choice as the representative. When the miners go in to elect members of the Safety Committee, as there has been testimony, they are aware that the duties of the members of the Safety Committee is that of walk around. If they wanted somebody else to accompany the

~1785

Inspector on a walk around, they would elect that person to the Safety Committee.

JUDGE KOUTRAS: You mean the only reason for someone being on the Safety Committee is that he's available and willing to go as a walk around?

MS. HENRY: Not the only reason, but one of the reasons. And, that management here is attempting, and has been, in numerous cases struck down, attempting to interfere with the miners choice of representative. The plain language of the Statute states that the miners choice must accompany the Inspector, not the most convenient choice for the Company, to accompany the Inspector. And,--

JUDGE KOUTRAS: Do you view that right as being absolute?

MS. HENRY: Yes, Your Honor. Definitely. the legislative history--

JUDGE KOUTRAS: Well, it's not absolute when he's missing though, and designates somebody else.

MS. HENRY: Yes, Your Honor, but, that is the miners choice, not the Company's choice.

Mr. Delisio stated that in 1980 or 1981, mine management allowed union president Ron Stipanovich to travel from portal to portal in his own car on company time to accompany inspectors during inspections. He confirmed that mine management has never indicated to him that he was not the first choice of miners for purposes of serving as the union inspection walkaround representative (Tr. 54-55). He conceded that the union-management collective bargaining agreement does not specify who may function as the walkaround representative (Tr. 55, 58). Although Mr. Delisio claimed that other miners were permitted to travel from portal to portal, he could not identify them (Tr. 58).

Mr. Delisio confirmed that the mine was shut down for 10 months from June 1982 to May 1983, and that prior to this time the mine employed approximately 600 miners who entered at two production portals. Since that time, the mine employs

~1786

approximately 320 miners, and the Linden Portal is the only production portal, while the Thomas Portal only has miners involved in haulage and some construction and maintenance work (Tr. 57, 64).

Mr. Delisio confirmed that when he worked at the Linden Portal, other union members at the Thomas performed the walkaround duties during an inspection at that portal. He also confirmed that at the present time, if he is absent from the Thomas Portal the safety committee may designate other miners as the walkaround representative in his absence (Tr. 65). When asked whether he had ever travelled from the Linden Portal to the Thomas Portal to accompany any inspectors during their inspections, he explained as follows (Tr. 66-69):

THE WITNESS: Did I ever travel from Linden portal to Thomas portal to go with an Inspector?

JUDGE KOUTRAS: Right.

THE WITNESS: No, I didn't.

JUDGE KOUTRAS: My question is, why didn't you?

THE WITNESS: Because--I can't answer why I didn't. Because I felt that the Company policy was that I was not allowed to do that--the only thing I can say. It's always been told to the Safety Committee by management that we are not allowed to travel from portal to portal, and that's what the Safety Committee--this Safety Committee had believed until we got an interpretation of the law, or until we found out that we were being denied our rights.

JUDGE KOUTRAS: Who gave you the interpretation that you had a right to go from portal to portal?

THE WITNESS: Well, I don't know whether I got the interpretation myself from reading the Federal law, or whether it came from someone associated with the Federal Government.

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JUDGE KOUTRAS: Well, who--I mean, did somebody suggest to you that--

THE WITNESS: I believe I got it looking at cases that were decided on walk around rights.

JUDGE KOUTRAS: What cases?

THE WITNESS: I don't know.

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JUDGE KOUTRAS: Why wasn't a case brought then?

THE WITNESS: Because there was never--as I said, I felt that, you know, I was told that I was not allowed to do that, so I just assumed that that was correct.

JUDGE KOUTRAS: Okay. When you went to--initially with Mr.--with the Federal Inspector to the Linden portal on the day of July 30th, how did that all come about? Was this--I'm going to lay it right on the line, was this a test situation? Was this a planned confrontation, or was this--you just happened to appear at the Linden portal knowing that the Inspector was going to be there?

THE WITNESS: It was a situation that came about in June when I mentioned it at a communication meeting that I was going to stop at Linden portal on my daylight shift and accompany the Inspector. And, that was a Monday, that was my daylight shift and that's exactly what I did. Yes, I guess you could say it was a--

JUDGE KOUTRAS: How did you know the Inspector was coming to Linden?

THE WITNESS: Well, I got to the Linden portal roughly around 7:30 and the Inspector was already at the property. If the Inspector was not at the property I would have proceeded to my work portal at Thomas.

~1788

JUDGE KOUTRAS: So, you just took a chance that he would be there?

THE WITNESS: Ninety-nine percent of the time they are there. They do regular inspections at the mine.

JUDGE KOUTRAS: Are you familiar with--well,--. Ninety-nine of the inspections are done at Linden, and also ninety-nine percent of the inspections are also done on the daylight shift, rather than the afternoon shift, right?

THE WITNESS: Right.

JUDGE KOUTRAS: So, at that particular Mathies operation the mine operator has a pretty good idea on when an Inspector is likely to show up, and where he's expected--where he's likely to show up, is that the idea?

THE WITNESS: Yes.

Mr. Delisio confirmed that it was the past and present position of the Union that it did not want miners to be in vehicles operated by company personnel and did not want miners using their own personal vehicles for transportation between locations at the mine, and that this position has been communicated to mine management (Tr. 82). However, he stated that the Union has never taken this position with respect to safety committeemen travelling from portal to portal in their personal vehicles for the purpose of accompanying inspectors, and that mine management has never stated the union's position as a reason for not allowing him to use his vehicle to travel from portal to portal for inspection purposes (Tr. 83).

MSHA Special Investigator John Chambers confirmed that he conducted the investigation of the complaint filed by Mr. Delisio in this case, and that he interviewed and took statements from mine management representatives Edmund Baker, George Karassia, and Malcolm Dunbar. He stated that all three individuals advised him that they were not preventing Mr. Delisio from travelling with the inspector, but wanted him to report to his place of work (Tr. 88).

Mr. Chambers stated that during his investigation, Safety Director Baker confirmed that he had telephoned

~1789

Mr. Delisio's home on July 29. Mr. Chambers identified exhibit GÄ3, as a list of questions asked of Mr. Baker during the investigation, and he read into the record the following question asked of Mr. Baker, and his response (Tr. 89Ä90):

Q. Okay. Could you read where I'm pointing, the last question. Could you read that for us for the record?

A. Yes, ma'am. "If Joe Delisio had first reported to his designated work station, then informed management of his desire to change portals, who would--what would management's position be?" And, do you want the answer?

Q. Yes, please.

A. "Management would not authorize a portal change since the portal is more than--since the portal is more than well represented with union walk arounds. With market conditions, and absenteeism as they are, Matnies cannot properly afford the moving of work force from portal to portal."

Mr. Chambers identified exhibit GÄ2, as a statement taken from Superintendent George Karazsia, and he confirmed that Mr. Karazsia gave Mr. Delisio a verbal warning and indicated that action would be taken if he did not report to his reporting work portal. He also indicated that the statement by Mr. Karazsia reflects that Mr. Delisio was told not to leave the Thomas Portal and go to Linden, or report to Linden before his shift (Tr. 92Ä93). Mr. Chambers confirmed that he spoke with MSHA Inspector Philip Freese, but that he no longer is employed with MSHA (Tr. 92).

On cross-examination, Mr. Chambers stated that he conducted the investigation alone, spoke to several company officials, but has no notes. He confirmed that his investigation reflected no real dispute concerning the facts and no variation among the statements made by either side of the dispute (Tr. 94). He discussed the procedures he followed in reporting the results of his investigations, and did not believe that there were any undue delays in processing the case (Tr. 95Ä96). Mr. Chambers stated that the question concerning the use of private automobiles was not raised during his investigation, and that "the thing that came up during the investigation was that they did say if you don't

~1790

report to your place of duty, there will be action taken" (Tr. 99).

On recall, Mr. Chambers stated that during the course of his investigation he did not contact any of the miners at the Linden Portal other than Union President Ron Stipanovich. Mr. Chambers confirmed that exhibit GÄ5 is a list of the miners working at the Linden Portal, and exhibit GÄ4, is a list of available walkarounds at that portal. Both lists were supplied by mine management during the investigation. Based on these lists, Mr. Chambers confirmed that during the day shift at the Linden Portal there were approximately 12 miners who were familiar with the duties of a walkaround representative, and had served as walkarounds during July and August 1985. He confirmed that he did not interview any of the miners on the lists (Tr. 109Ä113).

Joseph Tortorea, MSHA Mining Engineer and Senior Special Investigator, stated that his duties include the assignment of cases to special investigators and the review of investigative reports to determine whether or not there is enough evidence to forward the case to MSHA's Arlington, Virginia office for action. Mr. Tortorea stated that his initial review of Mr. Delisio's complaint raised a question of interpretation of what mine management meant by Mr. Delisio "not reporting to his portal." He confirmed that he drafted the questions put to Mr. Baker by Mr. Chambers in exhibit GÄ3 (Tr. 103).

Mr. Tortorea confirmed that after reviewing Mr. Chambers' final report, he concluded that mine management intended to discipline Mr. Delisio if he did not report to work at the Thomas Portal, regardless of his desire to report to Linden first or to report to Thomas and then travel to Linden (Tr. 105).

On cross-examination, Mr. Tortorea confirmed that the case was not referred to Arlington within 45 days because of the additional work that had to be done by Mr. Chambers. He believed the case was referred to Arlington within 58 or 59 days, and once this was done he had no part in any MSHA subsequent decisions. He also confirmed that while he was not actively engaged in the investigation of the complaint and conducted no interviews, he monitored the case as it progressed, and does so in all cases which he assigns for investigation (Tr. 106). In his opinion, any threat of disciplinary action against a miner by means of a warning would be considered "interference" and "discriminatory" (Tr. 107).

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Ronald L. Stipanovich testified that he has been employed by the respondent for over 11 years and is the president of the union local and a member of the mine safety committee. He stated that sometime in 1977 or 1978, he participated in a local union meeting where the miners voted that the safety committee would serve as the walkaround representatives to accompany Federal inspectors during their inspections. Since the chairman of the safety committee was the individual who received the most votes in the election, it was decided that the chairman should be "the first to go if there was an inspector on the property," and Mr. Stipanovich could not recall the actual words "first choice" being used (Tr. 130). This decision was made by a vote of the general membership of the local, and since he became president in April, 1983, no members have expressed any dissatisfaction with the designation of the safety committee as the miner's representatives on walkarounds and the matter has never been brought up again for another vote (Tr. 132-133).

Mr. Stipanovich stated that the union furnishes written lists to mine management indicating the names of the union representatives and the members of the safety committees. The chairman of the committee usually furnishes the names of the individuals who serve as walkaround representatives (Tr. 134). He confirmed that he has served as a walkaround representative, and that prior to 1982, before he became president of the local, and prior to the lay off, there were two instances when he travelled from the Thomas Portal, which was his work station, to the Linden Portal or the preparation plant in his automobile to accompany Federal inspectors on their inspection and there "was no problem." He stated that before 1982, this was a "common practice" (Tr. 135).

Mr. Stipanovich stated that exhibit GÄ5 is a list of the crew members used by the foremen to ascertain who is on each particular crew. The names of the foremen are "blacked out," and the list is not a list of authorized miner walkaround representatives. He identified exhibit GÄ4, as a list containing the names of miners who have accompanied Federal inspectors, and he did not regard it as a list supplied by the union to mine management. He alluded to two other lists given to management as "a courtesy" by the union in order to insure that the miners were paid in the event they decided to accompany an inspector during an inspection. He did not regard these lists as definite chosen union walkaround representatives (Tr. 137). He regarded these lists as "substitute lists" of walkarounds to be used when the

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safety committee or chairman were not available. He indicated that it was common knowledge and practice that the chairman and the safety committee are the first options to accompany inspectors, and the other miners listed are substitutes (Tr. 138). The lists were never intended as designated "first choices" of miner walkaround representatives (Tr. 139).

Mr. Stipanovich stated that he knew of no instances when the miners have met to select someone other than a safety committeeman or chairman to be their walkaround representative (Tr. 141). He stated that it is reasonable to assume that the miners listed on exhibit GÄ4, as accompanying inspectors on the dates indicated, did so because the regular safety committeemen were not available on those days (Tr. 144). In order to protect its members, the union makes sure that someone is available to accompany an inspector (Tr. 144).

Mr. Stipanovich stated that at the present time there is usually only one MSHA inspector at the mine, but at least 2 days a week there may be two or three inspectors present. There are times regularly when someone else other than the safety committeemen would need to be available to serve as a walkaround (Tr. 148). He confirmed that he was not always available, and that rotations of individuals serving as walkarounds are necessary as the work shifts rotate (Tr. 148). Mr. Stipanovich stated that it has been his experience that once mine management issues a verbal warning, it usually follows it up with some kind of discipline (Tr. 150).

Mr. Stipanovich stated that on two occasions since February, 1984, he has travelled with company safety escort Kosack from the Linden Portal to the Thomas Portal or the preparation plant in a company car to meet an inspector and management never refused to allow him to do this (Tr. 151). Prior to the layoff there were numerous occasions when he travelled with company safety inspectors from one portal to another in their personal vehicles or his own automobile because company vehicles were not available (Tr. 152-153).

Mr. Stipanovich stated that the question concerning the use of private automobiles on mine property came about primarily as a result of the union's concern with miners transporting 10 to 12 people in the back of their pickups or in their automobiles. The union decided that this was not a safe and good practice, because accidents occurred. He stated that one miner, Jimmy Mills "utilizes his own vehicle a lot" because he begins work at 6:00 or 6:30 a.m. running

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the fans and works at the water treatment plant in Mingo (Tr. 154).

On cross-examination, Mr. Stipanovich responded as follows with respect to Jimmy Mills' use of his own automobile (Tr. 157-159):

Q. Mr. Stipanovich, to pick up something here, this Jim Mills, the individual you named, you left me with the distinct impression that he uses his personal vehicle throughout his work shift to go and check on things like fans and things like that, am I correct in what you're trying to tell me?

A. I say that he doesn't use it everyday, but, he has utilized his own personal vehicle, yes.

Q. Well, isn't it true that he is issued a truck by the Company to make these kinds of stops where he has to go inspect fans or sub-stations?

A. Well, there's a truck there, yes.

Q. Isn't it the fact that what happens is that sometimes on his way to his portal, he'll stop and check one of these locations, and, then when he gets there he uses the Company truck throughout the rest of the day to accomplish his authorized duties?

A. Sometimes that does happen, but, also he has--I know that he has used his own vehicle.

Q. Well, I'm trying to make it clear when he uses his own vehicle, and, I'm asking if isn't it true that what happens with this individual is that apparently wherever he lives he can stop off on his way to his assigned portal, and, check a fan or something, drive to work, park his car, he'll get in the Company truck and he'll continue to do whatever he's doing in checking above ground facilities. And, that's what's happening with Mr. Mills.

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A. Sometimes it does, but, I stated sometimes he uses his own vehicle during the course of his day.

Q. And, how often is that sometimes, do you know?

A. I don't have an average, you know, if you want me to say twice, three times a week, I can't answer that.

Q. You don't know?

A. I know that the fact that he has used his own vehicle.

Q. He has used it, but, you don't know how often?

A. Yes.

Q. Okay. Now, you indicated you were aware that the union and the--perhaps you individually, had raised the concerns with the Company about the miners use of personal vehicles to transport miners between locations?

A. Yes.

Q. Now, you left me with the distinct impression that the only concern the miners had was getting in the back of open pick up trucks, or something like that?

A. That was the complaint that was issued to management.

Q. Well, I'm going to ask you straight out now, is that the only thing, about people getting in the back of pick up trucks, or, did the miners also let the Company know that they were concerned about miners driving their cars inside automobiles between locations?

A. It was both.

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Q. It was both, right. And, when you raise a concern like that to the Company, you expect them to take an interest in it, do you not?

A. Yes, sir, I do.

Mr. Stipanovich stated that prior to 1982, there were many times when two or more MSHA inspectors were on the property and no safety committeeman or chairman was available, he would drive his own car to meet or travel with an inspector. These occurrences varied from one day to 5 days (Tr. 161). He stated that mine management has never directly instituted a policy against the use of private automobiles by miners on mine property, and he has never inquired about any such policy (Tr. 162). He confirmed that since 1984, he has on two occasions been transported by a member of mine management in that individual's private automobile from portal to portal or to the preparation plant for the purpose of accompanying a Federal inspector, and that he has no objection to doing this (Tr. 162).

Mr. Stipanovich identified the members of the safety committee for the period July 9 through August 30, 1985, as Mr. Delisio, chairman, and Ronald Mason and Joe Balluch. He confirmed that he recognizes the names of the 14 miners which appear on exhibit RÄ1, dated August 9, 1983, and that the document is signed by Mr. Delisio. The list contains the names of Mr. Mason and Mr. Balluch. He characterized the list as a "convenience list," and conceded that it does not designate the "choices" for walkaround purposes (Tr. 165). He did not know whether a current list is in existence (Tr. 167). With regard to exhibit GÄ4, containing a list of miners who served as walkarounds from July 9 to September 30, 1985, Mr. Stipanovich stated that he knows of no complaints concerning the names on that list (Tr. 169). MSHA's counsel stated that she had no reason to believe that the individuals listed did not accompany the inspectors on the dates indicated on the list in question (Tr. 170).

Mr. Stipanovich confirmed that he was with Mr. Delisio when he informed Mr. Karazzia that he wanted to walk around at the Linden Portal, and that Mr. Karazzia did not question Mr. Delisio's designation as the authorized representative of the miners (Tr. 176). He also confirmed that in the years he has worked at the mine, mine management has never questioned a safety committeeman's designation as the authorized miner representative for walkaround purposes. Prior to Mr. Delisio's case, management never used as a reason for denying a committeeman his walkaround rights the fact that he

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would have to travel from portal to portal to accompany an inspector. Management never refused a committeeman the right to accompany an inspector at another portal because he had no means of travel (Tr. 176).

Mr. Stipanovich confirmed that mine management has on occasion attempted to have a miner on "light duty" serve as a walkaround, rather than the designated walkaround who may be busier. He has resisted these efforts by informing management that the designated representative must go, and management has never contested his decision in this regard (Tr. 178-179). Prior to Mr. Delisio's case, management never contested the right of anyone to serve as a walkaround representative (Tr. 179).

Mr. Stipanovich stated that prior to July 30, 1985, the safety committee raised the question of Mr. Delisio's desire to accompany Federal inspectors at the Linden Portal at a regular communications meeting held with mine management, and Mr. Baker was present at that meeting (Tr. 183-184).

Mr. Stipanovich stated that in the event an inspector decides to go to the mine supply yard or the preparation plant to begin his inspection, a miner's representative would not likely walkaround with him because there are only two miners assigned to work at those locations and mine management would not likely excuse them from their duties to accompany the inspector (Tr. 185). In this event, because of management's policy prohibiting miners from travelling from portal to portal to accompany inspectors, no miner representative would accompany the inspector, and only the company escort would go with the inspector (Tr. 185-187). He explained further that the two miners at the supply yard and preparation plant begin work at 7:15 or 7:30 a.m., and quit at 2:15 p.m. By the time an inspector arrives, the men are into their work shift, and management is not likely to excuse them to accompany an inspector (Tr. 187).

With regard to the supply yard and preparation plant, MSHA's counsel made the following assertions (Tr. 188-191).

MS. HENRY: The Company has a company wide policy. It won't let people travel from portal to portal. It's not just Mr. Delisio travelling from the Thomas portal to the Linden portal. It won't let Mr. Delisio, if he's on duty at the Thomas portal, go from the Thomas portal to the supply yard. Or, it won't let Mr. Delisio, if he's on duty at the

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Thomas portal during day shift, go from the Thomas portal to the prep plant. There are occasions, because there are two miners that are working there, and,--

JUDGE KOUTRAS: Well, let them go there for what reason, I mean--

MS. HENRY: For inspection. For walk around. As a result, there are some occasions where the Inspector walks around in the prep plant and in the supply yard when there is no union representative, because the Company will not allow travel. And, they will not allow the designated representative of the miners to travel. And, what we are saying here today is, whether it's Mr. Delisio's travelling from the Thomas portal to the Linden portal, or whether it's Mr. Delisio travelling from the Thomas portal to the supply yard, whatever, this travel policy of the Company is unreasonable, and designed to impede and interfere with the miner's right to walk around.

JUDGE KOUTRAS: Well, let me ask you this question. How long has this been going on?

MS. HENRY: I don't know how long it's been going on with the supply yard and the prep plant.

* * * * *

MS. HENRY: And, it is our contention, although I am sure the Company didn't want to qualify that, it is our contention that that is what occurred. That the Company will not allow the designated representative of the miners, if the designated representative is not already at the supply yard or the prep plant to travel from the Linden portal or the Thomas portal to the prep plant or to the supply yard. It's all part of this general--we're not allowing people to travel.

JUDGE KOUTRAS: Did MSHA conduct an investigation about this general--

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MS. HENRY: We did not find out about that particular event until this morning.

JUDGE KOUTRAS: This morning?

MS. HENRY: Yes, Your Honor. We were--when we were--

JUDGE KOUTRAS: And, why is this this morning, I mean, this case obviously has generated a lot of interest. You've got union people here, probably from the International and the National, and, all of a sudden this morning you find out that the mine operator has not permitted walk arounds at the supply and the preparation plant. I'm surprised that the union hasn't--

MS. HENRY: Your Honor--I'm surprised--well, Your Honor we were in all fairness concentrating on Mr. Delisio's specific right in the investigation. We only concentrated on the events of July 30, 1985. Was Mr. Delisio the authorized representative? Was he denied permission to go? MSHA's feeling is that when there is a designated authorized representative, the miner's authorized representative, then he should be permitted to go. And, believing that, and believing that to be true in Mr. Delisio's circumstance, we filed a complaint on Mr. Delisio's behalf against the Company. Why the investigation--the investigation was not more broad than that, it was concentrating on Mr. Delisio's circumstance. And, there was no inquiry as to whether this particular circumstance might have hampered other individuals, but, MSHA's feeling was that the policy in general was wrong, because it does hamper the efforts of the miner's representative to be at the place where the inspection is. And, whether that inspection is at the Linden portal or at the prep plant or at the supply yard, when the miner's designated representative is not allowed, effectively whether it's through circular reasoning--well, it's not your reporting, it's not that we think you're going on the walk around we don't like, it's the fact that you haven't reported--whether it's

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that kind of circular reasoning or whether it's simply straight out someone's not going, that that's an interference with the language is unambiguous, the only one that was investigated at the time. Therefore, it was not discovered until this morning that there were--other than Mr. Delisio's second complaint--second occurrence of trying to attempting to go to the Linden portal.

In response to further questions, Mr. Stipanovich stated that MSHA inspectors have initiated their inspections at the supply yard, but he could not be specific as to the dates when this has occurred (Tr. 207).

John R. Schmitt testified that he has been employed by the respondent since May, 1975, and serves as treasurer of the local union. He previously served as chairman of the safety committee from 1976 to 1982, but lost the position because of a layoff. He confirmed that when he served as chairman he was the authorized miner's walkaround representative for purposes of accompanying Federal mine inspectors. He confirmed that he was on the safety committee and present at the time the union membership voted to designate the chairman and members of the safety committee as the authorized walkaround representatives of the miners. He also confirmed that when he served as committee chairman he was the designated authorized walkaround representative by virtue of his office and the vote of the general membership (Tr. 213-214).

Mr. Schmitt stated that when he served as chairman of the committee he was able to travel from portal to portal to accompany inspectors as the union walkaround representative and did so by using his own automobile, and at no time did the respondent ever deny that he was the authorized walkaround representative (Tr. 214-215). Mr. Schmitt stated that he frequently travelled between portals in his own automobile from his normal work location at the Linden Portal. During this time, he accompanied inspectors everyday while on the steady daylight shift (Tr. 216), and he confirmed that three full portals were in operation at that time (Tr. 215).

Mr. Schmitt stated that the respondent never expressed any displeasure with his absences while accompanying inspectors, and he was never threatened in any way for serving as the walkaround representative. Once he determined that an inspector was present at another portal, he would simply

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inform mine management that he was going to accompany the inspector and would drive to the portal in his car to walk around with the inspector. He would travel from the Linden Portal to the Thomas Portal in his car and management never prevented him from doing so. During the time he was at the Thomas Portal, other miners were available to serve as walkarounds, but he went because he was the chairman of the safety committee and had to be present at inspection close-outs, and had to deal with management and the inspectors on behalf of the union. He stated further that the "vote was taken that the chairman of the safety committee be the head man to go" (Tr. 220). Management never questioned the fact that he was the designated union walkaround representative for the portals, the supply yard, or the preparation plant (Tr. 220-221).

Although he is no longer the chairman of the safety committee, Mr. Schmitt confirmed that he has served as a walkaround at his present portal because there is no safety committeeman there. If a member of the safety committee were there, he would recognize the committeeman as the authorized walkaround, even though he himself is qualified to walk around (Tr. 221). No miners have ever questioned the fact that the safety committeemen are their designated representatives (Tr. 222). There have been no suggestions that miners get together on their work shifts and designate anyone other than a safety committeeman as their representative, and it is common knowledge among the miners that the chairman or members of the safety committee act as their walkaround representatives (Tr. 223-224).

On cross-examination, Mr. Schmitt reiterated that in 1976 and 1977 when he served as safety committee chairman he often left his home Gamble Portal to travel to another portal where the inspector would be beginning his inspection, and he did so in his own car. In the event he encountered an inspector at one portal and the inspector decided to go to another mine location for his inspection, he and the company representative would travel with the inspector in the inspector's car (Tr. 226).

Mr. Schmitt confirmed that within the past month or 6 weeks he raised a concern with mine management about the miners riding in or being transported in private vehicles, and he explained the situation as follows (Tr. 227-228):

A. Yes. In that particular situation we had a--I forget just what it was--the miners were not able to go into the mine at

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this particular time. Okay, there was a problem with the elevator that--I think it was the elevator at Linden portal. They brought everybody upstairs and they had a meeting, and, at this meeting they said that they were going to transport everybody to the Gamble portal and enter the mine from there. And, I for one, was listening to what was going on and I decided to raise my hand because my concern is in all honesty that if a group of individuals as ourselves were transported in different cars, my question was who is responsible for the insurance, you know, if something were to happen to, you know, this large amount of people going over to the mine. The Company was accomodating enough to say that we would take people in Company cars, as many as we could. I asked Malcolm Dunbar at that meeting in front of all of management and the union, what about travelling in our own cars over there or are you going to provide Company cars, and Malcolm's answer to me was, that's a good question. I did not get an answer. He said, that was a good question, we'll have to check on that. And, as--not to create any problems or anything further, we let it go at that, and, I myself rode in the Company car over to Gamble and whatever the other men did I don't know. But, I assume that most of them rode in Company cars.

Mr. Schmitt stated that while safety committeemen are present at the Linden portal, they work different shifts. The one committeeman who works the daylight shift would be the one to accompany an inspector during that shift, but he does not work the same shift as Mr. Delisio. If no committeemen are present, the other miners listed on exhibit GÄ4, including himself, would serve as the walkaround representative, and they have done so (Tr. 232Ä234).

Respondent's Testimony and Evidence

Malcolm Dunbar, respondent's safety manager, identified exhibit RÄ2 as a copy of the Mathies Mine map, and he stated that the Thomas Portal is approximately 5 miles from the Linden Portal, and that the preparation plant is approximately 10 miles from the Linden Portal. Mr. Dunbar stated that on the morning of July 30, 1985, he was at the Thomas

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Portal and received a telephone call concerning a discussion between Mr. Delisio and superintendent George Karazsia which was taking place at the Linden Portal. Mr. Dunbar went to the Linden Portal at 8:00 a.m., and learned that Mr. Delisio was there and wanted to accompany a Federal inspector on his inspection rounds. Mr. Dunbar confirmed that Mr. Delisio was advised by Mr. Karazsia that he could not change portals on his own, and that if he insisted on accompanying the inspector at the Linden Portal he could possibly be disciplined for not reporting to his regular duty station at the Thomas Portal. Mr. Dunbar stated that he suggested that Mr. Delisio designate a miner working at the Linden Portal to accompany the inspector as the walkaround representative, but that Mr. Delisio refused and stated that if he (Delisio) was not permitted to accompany the inspector, no one would. Mr. Dunbar confirmed that the inspector conducted the inspection without a walkaround representative (Tr. 244-248).

Mr. Dunbar stated that since Mr. Delisio is assigned to the Thomas Portal, his foreman would expect him to show up at that portal for work. Allowing Mr. Delisio to first report to the Linden Portal would cause confusion since the foreman would not know his whereabouts or when he may be expected for work. With regard to the use of private vehicles, Mr. Dunbar confirmed that since 1982, and upon the recommendation of the union, the respondent has to the extent possible, limited the use of personal vehicles because of liability problems which may occur while a miner is travelling on mine property. Mr. Dunbar pointed out that there are many narrow roads, and the presence of school children in the morning hours on the roads increases the potential liability (Tr. 249).

Mr. Dunbar confirmed that mine training sessions are usually held at the Linden Portal, and since most of the employees are at that portal, no transportation problems exist. For the miners working at the Thomas Portal, the supply yard, and the preparation plant, they are usually notified in advance of any training at the Linden Portal, and they are permitted to initially drive their vehicles to the Linden Portal, and when the training classes are over, they simply drive home from the Linden Portal (Tr. 250). With regard to replacement miners needed to operate the 50-ton locomotives out of the Thomas Portal, Mr. Dunbar confirmed that the company provides them transportation, and that someone with a company car will pick them up at Linden and transport them to Thomas, and will then return them to Linden. However, if a miner requests permission to use his own automobile, the company will permit them to do so. He indicated

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that "a lot of them" request to drive their own cars to Thomas so that they may shower, and they then drive home from the Thomas Portal (Tr. 251).

Mr. Dunbar confirmed that during the year 1985, 391 Federal inspectors were at one time or another on the mine property. He also confirmed that the mine worked 250 days that year, and that on any given day, an inspector was at the mine (Tr. 251).

Mr. Dunbar stated that the company has suggested that if an inspector originates his inspection at the Thomas Portal, Mr. Delisio could then travel with him and go where-ever he chooses, and management would know where he is (Tr. 252). Mr. Dunbar also confirmed that within the last year, miners have frequently accompanied Federal inspectors in the inspector's government car during travel between different mine locations (Tr. 252). He denied that the company has ever refused a miner the right to walk around with inspectors at the supply yard or the preparation plant. He explained that when inspectors usually show up at these locations, the miners who are working there do not by choice accompany the inspector. However, he indicated that inspectors usually start their inspections at the Linden Portal and have a walkaround with them when they go to the supply yard or preparation plant. The only restriction by the company is to prohibit miners from using their personal vehicles to shuttle between these locations (Tr. 254).

Mr. Dunbar confirmed that in February, 1986, Mr. Delisio again attempted to accompany an inspector on an inspection out of the Linden Portal, and he took the position that he had an MSHA decision which allowed him to do this. Mr. Dunbar stated that he explained to Mr. Delisio that the matter was still in litigation, and that he advised Mr. Delisio that if the inspector would initiate his inspection at the Thomas Portal and pick him up there, he could accompany the inspector (Tr. 255).

Mr. Dunbar stated that allowing Mr. Delisio to travel underground from the Thomas Portal to the Linden Portal would present a problem since there is only one self-propelled jeep that is used by the mine examiner. Due to the complex underground haulage system, the company would have to make special arrangements to transport Mr. Delisio underground, and that the transportation time would be from 20 minutes to an hour underground between portals. Further, due to the fact that underground trips of coal have the right of way, additional problems would be presented in transporting Mr. Delisio back

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and forth underground (Tr. 256-258). Mr. Dunbar confirmed that the verbal warning given to Mr. Delisio on July 30, was because of his failure to be at his proper work station, and not because of his wishing to serve as the miners' representative (Tr. 259).

On cross-examination, Mr. Dunbar conceded that if Mr. Delisio were to call his foreman from the Thomas Portal once an inspection started, mine management would know of his whereabouts. He also conceded that underground jeeps are available at the Thomas Portal for the mine examiner, shift foreman, and occasionally the maintenance foreman, and if all three are running, there may be an extra jeep available for Mr. Delisio (Tr. 260).

In response to further questions, Mr. Dunbar testified as follows (Tr. 261-267):

Q. Okay. And, isn't it true as a result of this statement that you state in that particular piece of information, that even if Joseph Delisio had reported to the Thomas portal, and his foreman knew where he was, and knew that he was at work, he would not be allowed to go to the Linden portal to accompany the inspector from that point, from the Thomas portal? He would not then be allowed to go to the Linden portal?

A. We don't want him to change portals, no.

Q. What you're saying is, once he reports at that portal he cannot go to the Linden portal to accompany the inspector?

A. That's what I said, we don't want him to change portals.

Q. Well, if he reports at his regular portal, is he not in fact there--he has reported once he's reported to the portal?

A. That's correct.

Q. You know where he is?

A. That's correct.

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Q. If he says he's going to the Linden portal do you have any reason--to accompany the inspector on an inspection, would you have any reason to believe that he wasn't going to the Linden portal to accompany the inspector?

A. No.

Q. And, as you've already stated, once the inspection starts, assuming he was there, you would know at all times where Mr. Delisio was during the course of the inspection--as much as you could?

A. Yes. Can I add something to that?

* * * * *

THE WITNESS: You know, what we're talking about here is you're going to set precedence for something that maybe right now you're talking about a good employee, Mr. Delisio, on a one certain day going to another portal. Well, this opens up where if it's fair for this one individual, if next time we have two inspectors or as the testimony has shown, we've had three or four, I could have people traveling from Thomas portal to the Linden portal, and some leaving from the Linden portal going to the preparation plant, and some leaving from the prep plant going somewhere else. And, this is what's causing the majority of management's control problems is--you know, everybody talks about an isolated incidence, but, you're opening up a whole precedent setting policy of losing control of a management situation.

BY MS. HENRY:

Q. Mr. Dunbar, isn't it true that under the present circumstances with only the Linden portal in full production that it's highly unusual that you would have this back and forth--with the three inspectors that you're talking about. At this point in time there's only one inspector generally on the premises.

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A. No. Not with three hundred and ninety one inspectors shifts in 1985, no. That's a lot of inspectors.

Q. Yes, but, would you state that that the majority of those inspection shift occur at the Linden portal?

A. Oh, yeah. The majority does.

Q. And, Mr. Dunbar, when Mr. Schmitt was on the Safety Committee and called in to his mine, reported to his mine, and then reported to a different mine, when the mine was in full production--when all these portals were open; the company did not stop him from using his personal vehicle to go from portal to portal at that point, did they?

A. No. But, again I'd like to add something if I could.

* * * * *

THE WITNESS: Whenever Mr. Schmitt gave his testimony, he was Chairman of the Health and Safety Committee at the mine. But, we had a different concept at the mine. We had a lot more employees in the mine, we had almost double the employees that what we have right now. As far as the logistics problem, as far as a replacement problem for Mr. Schmitt, whenever he left the property, it did not exist as bad as it does right now.

BY MS. HENRY:

Q. But, Mr. Dunbar, didn't you just state that one of your concerns is the control of people should the mine come to full production? I mean, you just stated that one of your concerns about allowing Mr. Delisio to use his car is that should the mine come to full production, and there would be more than one inspector there, you wouldn't know where people were going in their cars? Didn't you just say that?

A. Yeah.

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Q. Okay, well doesn't that conflict with your statement that the reason you let him do it was because there was more people.

A. No, I--

Q. Why didn't that become a problem when Mr. Schmitt was the Chairman of the Safety Committee?

A. I never said, if the mine becomes full production, I'm saying that the mine has a lot of inspectors, then we have a lot of cross shifting, and a lot of changing. I'm not talking about adding more people, I'm talking about three inspectors, or even two inspectors with the same three hundred and some people we have right now.

Q. But, the--assume for the moment, Mr. Dunbar, that there is--it is not possible for Mr. Delisio to travel with the MSHA inspector in the car to get from one portal to another. Would it still be mine management's position at that point that he could not take his own personal vehicle to travel from one portal to another?

A. Yeah. We still don't want him to travel in his own personal vehicle.

Q. Well, if Mr. Delisio was given a warning for not being in his proper work location, and he is not permitted to travel from his work location to the location where the inspector is, aren't you in effect denying him his right to go to the location where the inspector is and accompany the inspector?

A. Not in my opinion because there's other people available that can travel with the inspector.

Q. When you say there are other people available, are you talking about other people who might then go on a walk around should Joseph Delisio be unavailable?

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A. I'm talking about people that--yes, have gone on an inspection a lot of times.

Q. Um-hum. And, during the times that they've gone on these inspections, was Joseph Delisio permitted to travel from his home portal, the Thomas portal to the Linden portal?

A. He never raised that issue prior to July 30, 1985.

Q. Let's talk about post July 30, 1985. That's a lot of what the list and--particularly the list that is in the Government's Exhibit right now mostly concerns that, and, you will agree that he did raise the question in June--sometime in June of 1985, generally.

A. Yeah, I don't have personal knowledge, but I believe that the testimony showed that.

Q. Okay. And, the walk around list that has been given starts in July of 1985, so, it starts sometime after he raised the question, but, before he actually went in and talked to Mr. Karazsia on a specific day about a specific inspection.

A. No response.

Q. Would you state that during that time period Joseph Delisio was not permitted to travel by his own personal vehicle once he reported to Thomas portal, from Thomas portal to Linden portal?

A. Once it's in litigation he never attempted but the one time in early '86.

Q. Um-hum. And, was he permitted at any time to travel from the Thomas portal to say, the preparation plant?

A. Not--not unless the inspection was originated out of there.

Q. And, how about from the Thomas portal to the supply yard, would he have been permitted to travel?

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A. Not unless the inspection was originated out of Thomas.

Mr. Dunbar stated that he has no problem with the designation of the safety committeeman as the representative of the miners. He further stated that he was not previously aware of any "pecking order" or formal vote by the miners as to any order in which miners would serve as the walkaround representative. However, he conceded that if the chairman of the safety committee were present at the same time that the other miners were present, the general practice at the mine since the 1970's is that the chairman would be the designated representative (Tr. 268).

Mr. Dunbar confirmed that there are two members of the safety committee working at the Linden Portal, and they would normally accompany an inspector on his inspection. He also confirmed that the union's request for a limitation on the use of private automobiles was not in connection with travel from portal to portal for the purpose of accompanying an inspector (Tr. 269). He further confirmed that if no one at the supply yard was willing to accompany an inspector there during an inspection, a miner would not be permitted to travel there in his personal vehicle or company vehicle in order to accompany the inspector (Tr. 270).

Mr. Dunbar confirmed that prior to 1982, safety committeeman Schmitt was permitted to travel from portal to portal in his own car to accompany an inspector (Tr. 271). Since there are only 10 miners on Mr. Delisio's shift at the Thomas Portal, and since he is the only mine examiner, a replacement would have to be brought in from the Linden Portal for Mr. Delisio, and the policy was established so that management could control the work force (Tr. 272). Even if Mr. Delisio were employed at the Linden Portal, he would still have to be replaced if he were to serve as the walkaround, and mine management would still desire to exercise management control over its workforce (Tr. 272-273).

In response to further questions, Mr. Dunbar stated as follows (Tr. 274-278):

JUDGE KOUTRAS: Well, the other point is, do you feel that the--you recognize the right of a union walk around to accompany a Federal Inspector, I think that's obvious right?

THE WITNESS: That's correct.

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JUDGE KOUTRAS: But, you seem to feel if that right the exercise of that right, entails changing personnel from portal to portal that somehow the right is ended. Or, at least has to be controlled in some way.

THE WITNESS: No. I see what you're saying, but, my only thing with that is the way that we read 103(f) of the Act is--nowhere in there does it say we have to have special accommodations for people. We're complying with the Act by supplying a representative, but, nowhere does it say we have to go out of our way. Just as MSHA says that they're not bound by the Act to go down and pick him up at that portal; well, in the same respect we're not bound by the Act to do special things to insure that this particular individual goes with them.

JUDGE KOUTRAS: You indicated that your policy on use of private automobiles is limited to the extent possible.

THE WITNESS: That's correct. We try to limit it to--as much as we could. Now, we can't say absolute that you know, nobody can--

JUDGE KOUTRAS: You have no absolute ban against the use of private automobiles?

THE WITNESS: Exactly. Exactly. We do try to limit it.

JUDGE KOUTRAS: What would be the problem with allowing Mr. Delisio to drive to the Linden portal in his own automobile, after he reports to duty at the Thomas portal?

THE WITNESS: Well, the only problem with that is we would have to assume his liability with driving. Assume his liability once he's done at the end of the day driving back to his regular job. And, again, this opens up a precedence that now it's just Mr. Delisio, but I don't know--

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JUDGE KOUTRAS: Why don't you just have an absolute ban on the use of private automobiles on the property?

THE WITNESS: It would be convenient to do that, however, there are times when people for their convenience like to drive down.

JUDGE KOUTRAS: Well, isn't this for his own convenience?

THE WITNESS: It's for that and--yes, I can see what you're saying.

JUDGE KOUTRAS: What if he signs a waiver of liability? I mean, are there ways that you can accomodate Mr. Delisio exercising his right of being a walk around at the Linden portal?

THE WITNESS: Yeah, there's a real easy way you can accomodate him, if MSHA will come down and just--

JUDGE KOUTRAS: And pick him up.

THE WITNESS: Just originate their inspection there.

JUDGE KOUTRAS: Start the inspection at Thomas?

THE WITNESS: Sure.

JUDGE KOUTRAS: Well, what I don't understand--there's not too much to inspect at the Thomas portal is that right? Most of activity is at the Linden portal?

THE WITNESS: Yes it is.

* * * * *

JUDGE KOUTRAS: And, your position here is--seems to be that you didn't--if he was threatened, assuming one can come to the conclusion that Mr. Delisio was threatened or chastised or told that he would be subject to disciplinary action, the Company's position is that that threat or that conversation took

~1812

place in the context of only because you didn't report to duty, not because you want to exercise your walk around rights?

THE WITNESS: That's exactly correct.

JUDGE KOUTRAS: But, if you put up these barriers to having him carry out his rights as a walk around, you're effectively doing the same thing aren't you? You're precluding him from doing it, if you tell him you can't use the car, you can't do this. We want the MSHA Inspector to start there, you're effectively precluding him from exercising his right.

THE WITNESS: I see what you're saying, yeah.

JUDGE KOUTRAS: Aren't you?

THE WITNESS: I see, yeah.

Edmund R. Baker, respondent's general mine manager, testified that during the summer of 1985, he was the underground mine superintendent at the Mathies Mine. He confirmed that the question of Mr. Delisio accompanying Federal inspectors at the Linden Portal as the union walkaround representative was the topic of conversation at a union/management "communications meeting" which he attended sometime in late June, 1985. Mr. Baker stated that Mr. Delisio indicated that he wanted to go to the Linden Portal to accompany Federal inspectors when they appeared there for their inspections, but that in view of the vacation period, Mr. Delisio was advised not to do so. Mr. Baker stated that he informed Mr. Delisio that he would subsequently contact him to convey management's position, and that he later telephoned his home and spoke with his wife.

Mr. Baker confirmed that Mr. Delisio was advised that the company had no objections to his serving as a union walkaround representative, but that it was management's position that he had to report to his regular duty station at the Thomas Portal and could not use his personal automobile to travel to the Linden Portal for the purpose of accompanying Federal inspectors. Mr. Baker stated that mine management has suggested to Mr. Delisio that he assign miners regularly working at the Linden Portal as the walkaround representative, but that management could not transport him from the Thomas Portal in company vehicles. Mr. Baker confirmed that mine management, through Superintendent George Karaszia,

~1813

advised Mr. Delisio on July 30, 1985, that if he insisted on first reporting to the Linden Portal instead of his usual duty station at the Thomas Portal, he could be subject to possible disciplinary action. Mr. Baker confirmed that he is in total agreement with mine management's position in this matter as testified to by safety manager Malcolm Dunbar (Tr. 284-289).

Discussion

Section 103(f) of the Act, 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 serious dispute. Mr. Delisio is employed at the mine as a "fire boss" or mine examiner, and he also serves as the Chairman of the UMWA Mine

~1814

Safety Committee. The mine consists of two portals, a preparation plant, and a supply yard, all of which are inspected by MSHA inspectors. The main coal producing portal is the Linden Portal, and the majority of the work force enters the mine at that location and work there. Virtually all of the mine inspections conducted by MSHA begin at the Linden Portal during the 8:00 a.m. production shift. A small compliment of miners, including Mr. Delisio, work at the second Thomas Portal in construction and transportation functions. The Thomas Portal is approximately 6 miles overland from the Linden Portal, and the preparation plant is approximately 15 miles from the Linden Portal.

Mr. Delisio has in the past accompanied MSHA inspectors at the Thomas Portal in his capacity of safety committeemen and designated miners' representative, and he did so without objection or interference by mine management. Mr. Delisio is the only safety committeeman on the day shift at the Thomas Portal, and two other safety committeemen who work at the Linden Portal, and who are also designated as miners' representatives, do not work the same shifts as he does. The respondent concedes that the safety committeemen are the duly designated representative of miners for walkaround purposes.

The record establishes that in late June, 1985, during a labor/management "communications meeting," Mr. Delisio informed mine management that he wished to accompany MSHA inspectors as the miners' representative when they conducted inspections at the Linden Portal. Subsequently, on July 30, 1985, Mr. Delisio, in the company of the president of his local union and an MSHA inspector, arrived at the Linden Portal shortly before the start of his work shift and requested permission to accompany the inspector on his inspection at that portal. Mine Superintendent George Karaszia purportedly had "no problem" with Mr. Delisio accompanying the inspector, but "verbally warned" Mr. Delisio that if he did not report to his regular work station at the Thomas Portal, he would be disciplined. Mr. Delisio did not accompany the inspector, and he filed his complaint with MSHA that same day.

The record establishes that the question of Mr. Delisio accompanying MSHA inspectors at the Linden Portal arose again in February, 1986, although no additional complaint was filed. At that time, Mr. Delisio appeared at the Linden Portal in the company of an MSHA inspector and requested permission from superintendent Karaszia to accompany the inspector on his inspection at that portal. Mr. Delisio suggested that he either be allowed to first report to the Thomas Portal and

~1815

then drive his car to the Linden Portal to meet and accompany the inspector, or the respondent furnish him with underground transportation from the Thomas Portal to the Linden Portal. Mr. Karaszia informed Mr. Delisio that since his discrimination complaint was still pending, he would have "a problem" with Mr. Delisio's suggestion, and advised him that he should await the results of his complaint. Mr. Delisio did not accompany the inspector on this occasion.

MSHA's Arguments

MSHA argues that when Mr. Delisio requested to accompany the MSHA inspector at the Linden Portal, he was engaged in protected activity. MSHA rejects the respondent's suggestion that Mr. Delisio need not be given the opportunity to walkaround with the inspector at this portal, and that the respondent may require Mr. Delisio to select an alternate walkaround representative. MSHA's views the respondent's position in this case as an attempt to force Mr. Delisio to designate an alternative by denying him access to transportation to the Linden Portal from his usual duty station at the Thomas Portal. MSHA concludes that the miners' choice of walkaround representative must be given great deference, and that Mr. Delisio should be permitted to travel from portal to portal as the miners' representative for purposes of MSHA inspections.

In support of its case, MSHA asserts that the statutory right of a miner representative to accompany an inspector is clearly stated in the Act, and the legislative history reflects the Congressional intent that the scope of a miner's protected activities, including the right to participate in mine inspections, be broadly interpreted. In determining what circumstances may excuse a mine operator from complying with this right, MSHA emphasizes that the importance that the Act places on the miner's participation in mine inspections must be considered. MSHA concludes that the legislative history evinces a clear intent to have the miner's participation as an important element in the inspection enforcement scheme. *Magma Copper Company v. Secretary*, 645 F.2d 694 (9th Cir.1981), cert. denied, 454 U.S. 940 (1981); *Consolidation Coal Company v. Mine Workers*, 2 MSHC 1185 (1981).

MSHA cites a decision by Judge Melick in support of its argument that miners have the right to designate anyone of their choosing as their primary representative, despite the existence of others who could act as their representative. In *Truex v. Consolidation Coal Company*, 7 FMSHRC 1401 (September 20, 1985), a miner, who also served as a member of the mine safety committee, was designated by the local union

~1816

president to act as the representative of miners at a section 103(f) post-inspection conference arranged by an MSHA inspector with mine management. The miner requested permission from mine management to be allowed to work until the inspector arrived. Management responded that it was company policy to obtain miners' representative from the area an inspector visits. The miner then asked for permission to work in the "Bottom" so that he could be available for the inspector, but was refused. He then announced that he was on "union business" because he believed that he would otherwise have been unable to attend the conference as the representative of miners. Management thereupon informed him that since he was on "union business," he would not be permitted to perform any work that day. The miner performed no "union business" that day other than attending the conference.

Upon the conclusion of the conference, which lasted 1 1/2 hours, the miner asked to go to work for the remainder of the shift, and he was refused. He was paid his regular rate of pay for only the 1 1/2 hour conference. He then filed a discrimination complaint seeking compensation for the remaining 6 1/2 hours of the shift he would have worked but for his assumption of "union business" and the related refusal of management to allow him to return to work. The mine operator defended on the ground that under the National Bituminous Coal Wage Agreement of 1981, once the complaining miner declared himself to be on "union business" he was no longer under the operator's control or direction and that it therefore had no obligation to pay him for his subsequent activities. The operator further argued that it did not have to accept the miner as a representative of miners on the day in question but could have complied with section 103(f) of the Act by giving any one of the approximately 130 miners then working the opportunity to accompany the inspector during the conference. In rejecting this argument, Judge Melick states as follows at 7 FMSHRC 1403Ä1404"

Section 103(f) of the Act provides, as relevant, that "a representative authorized by his miners shall be given an opportunity to accompany the . . . [inspector] . . . during the physical inspection of any coal . . . mine . . . for the purpose aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." [Emphasis added.] Since it is not disputed in this case that the post-inspection conference which Mr. Truex attended was a conference within the meaning of Section 103(f) of the Act it is

~1817

clear from the above language that it is the miners and not the mine operator, who authorize or designate a representative for the purpose of participating in such conference. There is no statutory ambiguity on this point and the plain meaning must prevail. (Emphasis in original).

MSHA further cites a decision by former Commission Judge Steffey in a civil penalty case initiated by MSHA for a violation of section 103(f) of the Act, Leslie Coal Mining Company, 1 FMSHRC 2022, December 9, 1979. In that case, a miner under suspension by the mine operator reported to the mine for the purpose of accompanying an inspector on a regular inspection. The miner was a member of the safety committee, and he was chosen by the committee to serve as the walkaround during the inspection. Mine management refused to permit him to accompany the inspector because he was in suspension status, and instead gathered together five available working miners who selected someone else to accompany the inspector. The MSHA inspector had called his supervisor who apparently took the position that the procedure of selecting the representative in the absence of any other available representative was appropriate. However, when the inspector subsequently returned to his office, his supervisor instructed him to issue a citation for a violation of section 103(f) upon his next return to the mine. Upon his return to the mine, the inspector issued the citation charging the mine operator with a refusal to permit a legally elected representative authorized by the miners to accompany the inspector during his inspection of the mine.

In affirming a violation of section 103(f), Judge Steffey stated as follows at 1 FMSHRC 2026Ä2027:

* * * * *

It appears to me that the fact the company had suspended Mr. Stiltner for this twenty-four hour period does not give the company the right to interfere with the fact that the representative--that the miners had selected Mr. Stiltner as their representative on that specific day.

* * * * *

Consequently, when mine management declined to let Mr. Stiltner go with the

~1818

inspectors on May 26, there was not then available another man to take his place who was still in the same category of a committeeman that was desirable, because these were the three men who were to be selected to accompany the inspectors.

Now, I recognize and I feel that management should have a right to discipline its miners, but in doing so I think that this type of situation could be avoided either by suspending--if they felt Mr. Stiltner was going to accompany the inspector during a period which was still within his suspension period--they could either have anticipated the situation by making it clear to Mr. Stiltner on May 25 that one of the other committeemen should come in on the day shift for the purpose of accompanying the inspectors, or by changing the suspension period in order to permit Mr. Stiltner to make this inspection with the inspectors.

In other words, I believe that the company cannot interfere with the person that the miners choose to accompany the inspectors. As long as he is still an employee and still a member of the safety committee and is still one of the people who is intended to accompany the inspectors, I believe the company must let him do so and must take that into consideration when they are suspending someone. I do not think it is something they can work around.

MSHA argues that Judge Steffey's reasoning is clearly applicable to Mr. Delisio's situation. MSHA asserts that there is no dispute among the miners who testified that Mr. Delisio was the miners' representative on the day in question, and that he was the representative for the entire mine, not simply for a certain section. Further, MSHA maintains that the testimony shows that safety committeemen at the respondent's mine have been designated as the authorized walkaround representatives for the entire mine by a vote of the UMW local. MSHA concludes that while safety committeemen such as Mr. Delisio may designate replacements should they choose not to act as walkarounds, the choice to waive the right to walkaround should not be forced upon them by the respondent, and the respondent cannot "work around" that

~1819

selection by claiming that other potential representatives exist.

MSHA maintains that the respondent bears a heavy affirmative burden of demonstrating what, if any, unusual and exigent circumstances would justify excusing the failure to comply with the Act by forcing a miner representative to choose a replacement to act as the walkaround. MSHA asserts that the respondent's alleged concerns with transportation do not meet this burden, and takes the position that section 103(f) imposes on the respondent an implicit duty to arrange its transportation regulations in a manner that will ensure the opportunity of the authorized miners' representative to accompany the inspector. This right would have little meaning if the respondent could void selection by the miners of their representative by enforcing transportation rules which prevent the representative's participation. MSHA concludes that the plain language of section 103(f) demonstrates that an authorized representative such as Mr. Delisio is under no duty to waive his right and select another representative simply because it would be more convenient for management.

MSHA maintains that the walkaround rights granted miners under the statute are broad and far reaching, and the fact that the respondent would assert the degree of influence it presently asserts in the selection of the miners' representative is inconsistent with the purpose of section 103(f). Although Mr. Delisio may designate another representative for his own reasons, management cannot require Mr. Delisio, through selective enforcement of transportation regulations, to authorize another representative. MSHA therefore concludes that it is clear that Mr. Delisio is the miners' representative, and that in requesting permission to accompany the MSHA inspector, he was asserting a right protected by the Act.

MSHA concludes that the respondent engaged in discriminatory activity when it threatened to discipline Mr. Delisio if he acted on his request to accompany the inspector as the walkaround representative of miners. MSHA suggests that the discrimination that is motivated by such protected activity need not be great, and it cites the legislative history which makes it clear that threats of discipline for engaging in protected activity, as well as actual discipline, are prohibited under section 105(c) of the Act. MSHA also cites a decision by Judge Broderick in *Curcio v. Keystone Coal Mining Corporation*, 3 MSHC 2119, 2120 (1985), where he held that a 14-day suspension was not a de minimis adverse action because

~1820

the policy followed by the mine operator could result in discharge, thereby inhibiting or discouraging miners from bringing safety complaints to the union or to MSHA.

On the facts presented in this case, MSHA asserts that Mr. Delisio was given a verbal warning that he would be disciplined if he chose to act as a walkaround, and it concludes that such a warning is a threat of reprisal which is clearly discriminatory activity prohibited by the Act. In response to the respondent's contention that the warning was not motivated by any protected activity, but was issued because Mr. Delisio would not have reported to his regular work portal, MSHA concludes that this "circular argument" is not supported by the evidence. MSHA asserts that mine management has stated that if Mr. Delisio reported to his portal, he would not have been permitted to travel to the portal of inspection, and that management's safety director admitted that the effect of this policy was to prevent Mr. Delisio from travelling from portal to portal to accompany an inspector. MSHA concludes that the verbal warning to Mr. Delisio had the practical effect of preventing his walkaround activities, and that this is impermissible discrimination under the Act.

In response to the respondent's assertion that its transportation policy is not discriminatory because Mr. Delisio would be able to ride from one portal to another in an MSHA inspector's car, MSHA believes that this is irrelevant because the issue concerns the legality of the respondent's conduct, and such a question cannot be decided by the actions of third parties, such as MSHA inspectors.

MSHA maintains that the respondent acted discriminatorily by giving Mr. Delisio a verbal warning of future discipline if he did not report to his work portal, and by refusing to allow him to travel from his work portal to an inspection portal for the purpose of accompanying an MSHA inspector on his regular inspection. MSHA states that the respondent should be ordered to refrain from such discrimination in the future, to post a notice that it will refrain from such discrimination, and to permit Mr. Delisio access either through company transportation or personal transportation to the mine areas where inspections are to be held. MSHA also seeks an appropriate civil penalty assessment against the respondent.

Respondent's Arguments

The respondent states that since the resumption of such smaller operations in May of 1983, after a long shutdown,

~1821

including a management change from Consolidation Coal Company to National Mines Corporation, the respondent has maintained a policy that miners must report to their assigned portal at the beginning of their shift and are prohibited from using their personal vehicles to travel between portals during their working shifts. The policy regarding personal vehicles was in part prompted by concerns raised by the Union. The concern was that the Union did not want the miner to expose himself or his vehicle to the risk of having an accident, especially involving third parties, when the personal vehicle was used during his shift.

Respondent asserts that the policy regarding reporting to the assigned portal at the beginning of the shift is based on some obvious, common sense reasons. Reporting to where you work obviously is the best way to know a miner is in fact at work and therefore must be accounted for as being underground. In addition, relying on a miner to call from another portal to report his presence there rather than reporting to his assigned portal has some obvious drawbacks. Phone communications between portals at the busy change-of-shift time are subject to be missed or not promptly communicated to others. Also, it is difficult to maintain accurate verification that an employee is where he says he is by his phone report. An employer does not have to assume that all employees are completely honest all the time.

Respondent states that another factor present in this case is the frequency of inspections. Respondent points out that a Federal inspector was present at the mine during 391 shifts in 1985. With approximately 250 work days during the year, this means a Federal inspector appears at the Linden Portal very frequently. Given Mr. Delisio's status as the only designated miner on shifts which he is working (he rotates 8Ä4 and 4Ä12 shifts), Mr. Delisio would be accompanying the inspector most days that he worked the daylight shift, which is the shift when virtually all of the inspections occur. This frequency means that most likely on four (4) out of five (5) work days during his daylight shift, Mr. Delisio would be reporting to the Linden Portal, calling to the Thomas Portal, and using his personal car to drive back to the Thomas Portal at the end of the inspection.

Respondent argues that since Federal inspectors do not give advance warning to the operator as to when they will appear for an inspection, it can only be assumed that Mr. Delisio would either have advance knowledge or simply show up at the Linden Portal on the assumption that a Federal

~1822

inspector would appear before the start of the shift. Respondent assumes that if the Federal inspector did not appear for an inspection, Mr. Delisio would call the Thomas Portal sometime soon after the start of the shift and inform management that he would be reporting late for his job at the Thomas Portal. It also assumes that management would have made arrangements to replace Mr. Delisio's fire boss position at Thomas when he did not report at the beginning of his shift. Respondent asserts that the practical effect of Mr. Delisio's argument would be that virtually every daylight shift his fire boss position at the Thomas Portal would be filled by transferring a miner qualified as a fire boss from the Linden Portal at the start of every daylight shift.

Given the frequency of mine inspections, the respondent states that its concerns underlying its management policies are all the more real and relevant, and it points out that there is no evidence that these concerns underlying the policies in question are a pretext by management. Further, respondent advances what it considers to be a simple solution which would permit Mr. Delisio to accompany the Federal inspector anytime he desired. Respondent's solution would have the Federal inspector appear at the Thomas Portal to initiate the inspection. Mr. Delisio could then declare himself to be the designated miner and accompanying the Federal inspector in his vehicle anywhere the Federal inspector wished to travel, including the Linden Portal or the preparation plant. Respondent recognizes that its suggested solution is beyond its control because it cannot require the inspector to initiate inspections at any particular location. Respondent notes that inspectors have apparently frequently used their vehicles to transport miners while conducting their inspections.

The respondent asserts that the factor which makes this case factually unique is that it appears unusual that in a mine of this size, the miners have apparently decided that only a single miner can act as the designated representative during inspections occurring on the shifts when that miner is working. Compounding the problem is the fact that the single designated miner works at a remote portal.

The respondent recognizes the fact that the Act prohibits any interference with the choice of the designated miner or that miner's ability to accompany an inspector on an inspection. However, the respondent maintains that its policies requiring all miners to report to their assigned portal at the start of their shift and prohibiting the use of private transportation to travel between locations during the shift

~1823

are neither discriminatory nor do they constitute interference prohibited by the Act.

The respondent asserts that the complainant in this case is in reality requesting that the Act be interpreted to require the respondent to accommodate his unusual circumstances in his proclaimed status as the only miner who can act as the designated miner for inspections. The respondent concludes that the Act does not require the accommodation necessary to allow Mr. Delisio to act as the designated miner the way he desires the inspection process to operate. The respondent concludes further that the complainant's accommodation request is unworkable, and that this can be demonstrated by the following analysis of what would take place if his position were sustained.

Every day Mr. Delisio works the daylight shift (every other week), he would drive to the Linden Portal to see if a Federal inspector was going to conduct an inspection. If the inspector was there, Mr. Delisio would call the Thomas Portal at the 8:00 a.m. change of shift and report that he would be going on an inspection. The respondent would then be required to obtain a replacement for Mr. Delisio's position as fire boss at the Thomas Portal. The fire boss performs preshift inspections for the next shift, so it is essential that the position be filled. The replacement would come from the Linden Portal because of the absence of qualified employees at the Thomas Portal. This assumes that all communications work properly, which is obviously not always the case. Because most inspections end about 12:00 or 1:00 p.m., Mr. Delisio would then drive to the Thomas Portal and report to his regular job. Because the respondent would not know exactly when to expect him, the replacement would have to assume that the replacement would perform the afternoon preshift inspection. Mr. Delisio would thus have to catch up to his replacement underground and relieve him. The replacement would then have to be transported back to the Linden Portal to finish his shift.

If the Federal inspector did not happen to be at the Linden Portal, Mr. Delisio would call the Thomas Portal near the start of the shift and report that he was going to report at Thomas at approximately whatever time it takes to drive the six (6) miles between Linden and Thomas Portals. Mr. Delisio would then drive to the Thomas Portal and report late for his shift. One or another of these two scenarios would occur every day that Delisio worked the daylight shift. In addition, Mr. Delisio apparently engages in Union business a great deal of the time. When he engages in Union business,

~1824

he does not always report his whereabouts to the respondent. This means that on any given day, the respondent would not know where Mr. Delisio was or whether he was going to be available for his shift until immediately before or soon after the shift started.

The respondent concludes that the policies it has attempted to apply do not violate the Act and that the accommodation and treatment sought by the complainant in this proceeding is an unreasonable accommodation not required by the Act.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981); and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Secretary on behalf of Jenkins v. Hecla Day Mines Corporation, 6 FMSHRC 1842 (1984). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983); and Donovan v. Stafford Construction Company, No. 83-1566, D.C.Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 463 U.S. 291, 76 L.Ed.2d 667 (1983).

It seems clear to me that Mr. Delisio has a statutory right pursuant to section 103(f) of the Act to serve as the designated walkaround representative of the miners, and the parties do not dispute this fact. The dispute lies in the manner in which Mr. Delisio seeks to exercise this right. Mr. Delisio has advanced several alternatives which he believes would permit him to effectively function as the

~1825

miners' representative, and they are: (1) that he be permitted to first report to the Linden Portal to ascertain whether an inspector is there. If he is, Mr. Delisio wishes to accompany the inspector on his inspection rounds after notifying mine management at the Thomas Portal of his whereabouts; (2) Mr. Delisio would report early to his normal work station at the Thomas Portal, and after confirming the presence of an inspector at the Linden Portal, he would drive his car to that portal to accompany the inspector, and then return to work after the completion of the inspection; (3) instead of using his own car for transportation to and from the Thomas Portal to the Linden Portal, the respondent would provide Mr. Delisio with a self-propelled jeep as a means of travelling underground between the two portals in question.

Although recognizing Mr. Delisio's right to act as the designated miner "first choice" walkaround representative, the respondent's position is that it need not accommodate Mr. Delisio on his terms. In defense of its position, the respondent asserts that Mr. Delisio's suggested "solutions" intrude on management's right to direct its own workforce, and is contrary to its policy prohibiting employees to use their personal vehicles while engaged in mine business on mine property. The respondent's alternative "solutions" include a suggestion that the inspectors pick up Mr. Delisio in their government vehicles at the Thomas Portal, and return him there after the inspection is completed. Another alternative is that Mr. Delisio designate other miners who are readily available at the Linden Portal to serve as the walkaround representative as he has often done in his absence or unavailability.

MSHA's position is that the choice of a walkaround representative lies with the miners. Since Mr. Delisio is the recognized "first choice" of miners by virtue of his safety committeeman's position, MSHA takes the position that absent any unusual or exigent circumstances, mine management may not dictate who the representative shall be. MSHA apparently views the respondent's suggestion that other available miners may serve as the walkaround representative as irrelevant, and concludes that the respondent's insistence on applying its transportation policy has effectively interfered with Mr. Delisio's right to serve and function as the designated miners' representative. MSHA does not address the respondent's concern that permitting Mr. Delisio to initially report to work at the Linden Portal before determining whether he will work at the Thomas Portal or accompany the inspector at the Linden Portal is an unreasonable intrusion on management's right to direct the workforce and to insure the whereabouts of

~1826

its employees. Rather, MSHA's focus is on the respondent's transportation policy, and it concludes that section 103(f) of the Act implicitly requires the respondent to arrange its policy in such a manner that will insure Mr. Delisio's presence at the Linden Portal as the walkaround representative whenever he chooses to exercise that right during an inspection initiated at that portal. In short, MSHA's position is that Mr. Delisio must be accommodated, notwithstanding the avowed policy in question.

In *Beaver v. North American Coal Corporation*, 2 MSHC 1417, June 2, 1981, former Commission Judge Cook dismissed a complaint by a miners' representative alleging that he was discriminated against because of the refusal of the operator to compensate him for the time spent as a walkaround on an idle day when he was not scheduled to work and other scheduled miners were available to accompany the inspector. Judge Cook found no evidence that the miner's idle day status permitted the operator to directly or indirectly participate in any manner in the process of selecting a walkaround representative, and there was no indication that the operator manipulated the miner into an idle day status to discourage his participation in the inspection.

In *Ronnie R. Ross v. Monterey Coal Company*, 3 FMSHRC 1171 (May 1981), the Commission upheld the dismissal of a complaint by a safety committeeman who alleged that he was discriminated against when a mine contractor performing work at a mine placed a letter in his personnel file limiting his inspection activities to the work areas of the contractor rather than non-contractor mine areas. In affirming the Judge's dismissal of the complaint, the Commission found that the record supported a finding that the letter was issued to protect a legitimate managerial interest in controlling the activities of its workforce, and did not establish that the miner's exercise of any statutory rights was in any way restricted.

In *Local Union 1110, UMWA and Robert L. Carney v. Consolidation Coal Co.*, 1 FMSHRC 338 (May 1979), the Commission held that an operator discriminated against a safety committeeman for disciplining him for leaving his assigned work area to contact an inspector concerning a perceived safety hazard, contrary to the operator's policy that permission by management was necessary before he could leave. The Commission stated that "the Company's policy effectively impedes a miner's ability to contact the Secretary when alleged safety violations or dangers arise." 1 FMSHRC 341.

~1827

The Commission found that miner's conduct involved his statutorily protected right to notify the Secretary of any alleged violation or danger.

On appeal of the Truex case, supra, Docket No. WEVA 85Ä151ÄD, the Commission on September 25, 1986, affirmed Judge Melick's decision, and at 8 FMSHRC 1298, stated the following:

The judge found that "it is the miners and not the mine operator, who authorize or designate a representative for the purpose of participating in . . . a [post-inspection] conference. There is no statutory ambiguity on this point and the plain meaning must prevail." 7 FMSHRC at 1404. We agree. The language of section 103(f), providing that "a representative authorized by his miners shall be given an opportunity to accompany the Secretary," unambiguously provides that miners possess the right to choose their representative for section 103(f) inspections and pre- and post-inspection conferences. (Emphasis added). See also Leslie Coal Mining Co. v. Secretary of Labor, 1 FMSHRC 2022, 2027 (December 1979) (ALJ).

* * * * *

The purpose of section 103(f) is to enhance miner understanding and awareness of the health and safety requirements of the Act. The fact that section 103(f) protects the miner representative, who is also an employee of the operator, from a loss in pay in exercising his section 103(f) rights evidences Congressional recognition that an operator would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights. Here, Consol was aware that an MSHA inspector would be arriving for a meeting to review a hearing conservation plan. Consol was also aware that Truex was familiar with the plan and had been designated by the miners to participate as their representative in the review of the plan. Nevertheless, upon being notified that Truex was the representative of miners, Olzer directed Truex to proceed underground with his

~1828

regular crew. Truex indicated his willingness to do so, but asked that he be notified when the inspector arrived. This request was refused. Olzer further refused Truex's request that he be permitted to work, until the inspector arrived, in an area that would have allowed him to be readily available for the meeting. Under these circumstances, Truex's requests rather than Olzer's responses reflected the reasonable work adjustments required under section 103(f) to fully effectuate that section's participation rights. [Emphasis added.]

Protected Activity

On the facts of this case, it seems clear to me that Mr. Delisio has established that in his capacity as Chairman of the Mine Safety Committee, he is the designated first choice of the miners for purposes of serving as their walkaround representative during MSHA inspections. It is also clear to me that the statutory right of a miner representative to accompany an MSHA inspector during his inspection of the mine is clearly stated in section 103(f) of the Act, and the legislative history reflects that this right should be broadly construed. Any undue interferences with this right by a mine operator constitutes discrimination prohibited by section 105(c)(1) of the Act. Although other miners may be available to accompany an MSHA inspector, the respondent may not unduly or unreasonably interfere with Mr. Delisio's right to accompany an inspector as the designated miner representative.

The respondent does not deny that it issued a verbal warning to Mr. Delisio on July 30, 1985, informing him that possible disciplinary action would follow if he did not report to his normal work station. As a matter of fact, the record establishes that the warning was conveyed to Mr. Delisio's wife on the evening of July 29, by telephone call to his home by a member of mine management. Union President Stipanovich testified that such verbal warnings are usually followed up by some kind of discipline, and the respondent has not rebutted this fact.

The respondent's suggestion that the verbal warning issued to Mr. Delisio was solely because he would not have reported to his regular portal if he chose to accompany the inspection as the designated walkaround representative is not well taken. Given the facts and background of this case, the respondent was well aware of the fact that Mr. Delisio was

~1829

seeking some accomodation by the respondent to enable him to effectively function as the walkaround representative. The respondent concedes that it raised the possibility of disciplinary action against Mr. Delisio because of its policies of requiring a miner to report to his assigned portal and its prohibition against miners using their personal automobiles to travel from portal to portal during their work shifts. Further, respondent's Safety Manager Dunbar and Mine Manager Baker candidly conceded that because of its policies, even if Mr. Delisio were to first report to his home portal, he would still be prohibited from changing portals for the purpose of accompanying an inspector during his inspection of the mine. Thus, the practical effect of management's insistence that Mr. Delisio first report to his portal, and its application of its policies, effectively, albeit indirectly, interferred with his right to serve and function as the walkaround representative, an activity which is protected by the Act. Thus, I conclude that the verbal warning, backed up by possible subsequent disciplinary action, constituted a discriminatory threat or interference motivated in part by Mr. Delisio's aborted attempt to serve as the walkaround representative.

The Respondent's Right to Direct its Workforce

The respondent has the inherent and legitimate right to control its own workforce, and is free to implement workplace policies which it believes will permit an efficient and productive mining operation. If the policies are consistently and evenhandedly applied, and are not arbitrary or unreasonable in their application, I would have no basis for concluding that they are discriminatory. In this case, there is nothing to suggest that the respondent's policy requiring an employee to report to his work station is pretextual or is used to circumvent the law. However, in light of the Commission's decision in the Truex case and Judge Steffey's decision in Leslie Coal, a mine operator may have to adjust its work policies on a case-by-case basis in order to avoid any discriminatory result which may occur by the manner in which it applies its policy to any given employee factual situation.

The facts in this case establish that in his capacity as a safety committeeman, and by virtue of his union activities, Mr. Delisio is often away from his job. Mr. Delisio admitted that due to the press of union business, there have been occasions when he did not report to his portal without informing management of his whereabouts, and that this has occurred several times throughout the year (Tr. 29, 41). He also alluded to some 70 different instances when he was away from

~1830

his job on inspections in other mine areas, or on union business attending conferences at MSHA's office (Tr. 61).

Mr. Delisio conceded that mine management has the right to expect him to report to work at his usual work station at the Thomas Portal. While it may be true that mine management has never made an issue of his absences, or applied its absentee policy, the fact remains that management has the right to expect Mr. Delisio to report for work, or to at least notify management if he intends to be absent.

In my view, the facts in this case are different from those presented in Truex. In Truex, mine management was aware of the fact that the designated committeeman had arranged a day in advance to meet with an MSHA inspector for a post-inspection conference at the mine for the purpose of reviewing a hearing conservation plan. The committeeman's requests to be allowed to work until the inspector arrived, or to be allowed to work in a particular mine area so that he would be readily available to meet with the inspector were refused, and the basis for the refusal was management's policy of obtaining miners' representative from the area an inspector visits. Further, once refused the right to be available for the inspector, the committeeman was forced to go on "union business" status because he believed he would otherwise have been unable to attend the post-inspection conference, and management refused to allow him to return to work after the conference was over and refused to compensate him for the remaining 6 1/4 hours of the shift he would have worked but for his assumption of "union business" and the related refusal to allow him to return to work.

Unlike Truex, which appears to have emanated from an isolated instance of refusing to accommodate a designated miners' representative who had a pre-arranged meeting with an inspector which was known to management, the respondent here has no policy restricting miners' representatives to mine areas where an inspection is taking place. More importantly, Mr. Delisio's situation does not involve an isolated instance. Mr. Delisio wants to regularly report to work at a portal which is 6 miles from his usual place of work on a day-to-day basis during his day shift every other week to ascertain whether an inspector is present so that he may accompany him. If an inspector is there, Mr. Delisio wishes to telephone his foreman to advise him that he will not report to work. If an inspector is not present, Mr. Delisio would report late for work. Since Mr. Delisio's job as mine examiner requires him to preshift his portal, mine management would be placed in the untenable position of arranging and rearranging for a

~1831

suitable replacement to be brought in from another portal to do Mr. Delisio's job frequently and unpredictably.

I cannot conclude that the respondent's policy requiring Mr. Delisio to report to his assigned portal at the beginning of his work shift is arbitrary or unreasonable, and the respondent's arguments in this regard are well taken. Given the fact that Mr. Delisio is the only available qualified mine examiner on the day shift at the Thomas Portal, and the frequency of inspections which have occurred at the mine, I find nothing unreasonable or discriminatory in the application of this reporting policy. From a safety standpoint, the respondent has a duty and obligation to account for all of its employees while they are on the job. From a management point of view, and in order to fulfill its obligations in this regard, the respondent should be free to manage its work-force, and the scenarios presented by the respondent with respect to what will no doubt occur in terms of employee disruptions and replacements between portals in the event Mr. Delisio is allowed to decide when and where to initially report for work are legitimate and real concerns, rather than pretexts to preclude Mr. Delisio from functioning as the designated representative of miners.

Respondent's Private Vehicle Policy

During the course of the hearing in response to Mr. Delisio's "suggestion" that he be permitted to drive his personal vehicle between portals for the purpose of serving as the miners' walkaround representative, the respondent took the position that it does not wish to expose itself to liability or risks to Mr. Delisio or other miners while driving private automobiles on company property while in the course of company business. Respondent's counsel asserts that this concern was voiced by the miners themselves several years ago, and reiterated over time. Counsel pointed out that this concern, both by the miners, and mine management, came about as a result of miners being alerted to the potential liability to third parties, with resulting lawsuits, in the event of their involvement in accidents on mine property while using their private automobiles in the course of their employment (Tr. 10).

Respondent maintains that it has offered a reasonable resolution by suggesting that Mr. Delisio be picked up at his regular Thomas Portal duty station by the inspector conducting the inspection, and be taken along with the inspector during his inspection. Respondent maintains that it has been customary for an inspector to transport miners in their

~1832

Government vehicles while conducting inspections, that it has occurred in the past, and the respondent would prefer this procedure to continue (Tr. 11).

Respondent argues that it does not believe that it has discriminated against Mr. Delisio by declining to provide him with company surface or underground transportation from his regular duty portal to another portal where an inspector decides to initiate his inspection, or to permit him to drive his own automobile. With regard to underground travel between the two portals, respondent asserts that while a company jeep is normally available for Mr. Delisio's use while performing his fire boss duties at the Thomas Portal, the availability of underground transportation is determined by production schedules and the necessities of the operation at that portal. Respondent does not believe that it is obligated to provide or schedule "special trips" for Mr. Delisio or any other miner for the purpose of transporting them underground from portal to portal. Making an exception for Mr. Delisio would result in the unavailability of a jeep at the Thomas Portal for safety inspections at that location, and would require the company to replace the jeep with another one while it is gone (Tr. 12).

During the hearing, MSHA agreed that the only accommodation that the respondent seems willing to make in this case is to suggest that the Federal mine inspectors pick up Mr. Delisio in their Government automobile at the Thomas Portal, his regular duty station, and transport him to the Linden Portal, where regular inspections normally begin or end, or transport him to other mine areas where an inspection may take place. MSHA asserts that the Linden Portal is more accessible to everyone in the first instance, and that the respondent's suggestion is totally unacceptable, and would entail a special trip just to pick up Mr. Delisio, would be time consuming in instances where time may be of the essence during an inspection, and would conflict with Government regulations regulating the official use of Government vehicles (Tr. 15-16).

MSHA's position is that if the respondent is unwilling to permit Mr. Delisio to initially report to the Linden Portal to determine whether he will be accompanying an inspector as to the union walkaround, and insists that he must first report to the Thomas Portal, it must accommodate Mr. Delisio by permitting him to use his own automobile to drive to the Linden Portal, or provide him with company transportation. MSHA argues that the respondent cannot have it both ways by taking the position that company policy dictates against the

~1833

use of private automobiles on mine property, and that the use of a company vehicle for Mr. Delisio's transportation would effectively deprive the company of the use of that vehicle at the Thomas Portal where it is needed. MSHA maintains that this position by the respondent is discriminatory because there have been other occasions where other miners were permitted the use of their private vehicles on company property, and that on other occasions miners do not report to their regular portal as planned, and no action has been taken against them.

MSHA concludes that the respondent's position can only be viewed as an action against Mr. Delisio for attempting to exercising his rights as the walkaround representative of the miners. Coupled with the respondent's suggestion that other miners working at the Linden Portal can accompany the Federal inspectors as miner walkarounds, MSHA concludes that this is an attempt by the respondent to choose who the miner representative shall be for purposes of inspection walkarounds, and that this is prohibited by the Act (Tr. 17-18). MSHA further concludes that on the facts of this case, the respondent's failure to accommodate Mr. Delisio by permitting him to use his own vehicle, or to provide him with company transportation, interferes with his rights as the miner walkaround representative (Tr. 6).

I take note of the fact that Mr. Delisio's complaint makes no mention of the respondent's policy with respect to the use of private vehicles by miners. Respondent's safety manager Dunbar testified that prior to July 30, 1985, this was never raised as an issue by Mr. Delisio, and MSHA special investigator Chambers confirmed that the question concerning the use of private vehicles was not raised during his investigation of the complaint. MSHA's counsel conceded that she first learned about the transportation policy on the morning of the commencement of the hearing (Tr. 191). Although Mr. Delisio raised the question of the use of his own car to travel from portal to portal in February, 1986, when he again requested permission to accompany the inspector, this came well after the filing of the complaint, and management at that time communicated no decision to Mr. Delisio because his case was still in litigation. Respondent's safety manager Dunbar did suggest, however, that Mr. Delisio arrange to have the inspector pick him up at the Thomas Portal, and that if this were done, there would be no problem (Tr. 255).

Respondent's safety manager Dunbar conceded that the respondent will not permit Mr. Delisio to use his private automobile as a means of travel between the Thomas and Linden

~1834

Portals for the purpose of exercising his walkaround rights as the miners' designated representative, and he stated two reasons for this position. The first reason is that company policy precludes the use of private automobiles by miners, and the second reason is that respondent believes there are other miners available at the Linden Portal to serve as the walkaround representative, and they have done so in the past. The respondent further concedes that it raised the possibility of disciplinary action against Mr. Delisio because of its reporting and transportation policies which it enforces at the mine (respondent's proposed finding #6). As stated earlier, the thrust of MSHA's arguments in support of its case is the assertion and suggestion that the application of the travel policy in Mr. Delisio's situation has interfered with his right to accompany an inspector as the duly designated miners' representative. Under these circumstances, the issue concerning the travel policy in question must be addressed.

The respondent produced no evidence to establish that its ban on the use of private automobiles by miners is in writing or absolute, nor has it established any definitive ground rules for the application of the policy. On the facts of this case, it seems clear to me that the policy is not consistently applied, and respondent's safety manager Dunbar candidly admitted that there is no absolute ban on the use of private automobiles by miners, and that the use of automobiles by miners is limited to the extent possible. Mr. Dunbar also admitted that there are times when miners like to drive their automobiles for their own convenience.

The credible testimony in this case establishes that safety committeemen have in the past been permitted to drive their own automobiles from portal to portal for the purpose of accompanying inspectors on their inspection rounds. While it may be true that the union has in the past voiced its objections to the use of private vehicles by miners for travelling between portals, some of the objections apparently resulted from the practice of transporting a number of miners in the back of pickup trucks, or transporting too many miners in one vehicle. There is nothing to suggest that the union intended to preclude committeemen from using their automobiles to perform their duly recognized walkaround duties.

The credible testimony also establishes that miners have been permitted to use their private vehicles for their own convenience while attending training sessions held at the mine. One miner (Jim Mills), who reports to work early and is responsible for the mine fans, has been permitted to use

~1835

his private vehicle while checking the fans before he actually reports to his portal. A number of replacement locomotive operators who normally work at the Linden Portal and who may be needed at the Thomas Portal to operate locomotives are permitted to drive their automobiles to the Thomas Portal from the Linden Portal for their own convenience because they shower there and leave directly for home. Consequently, it seems clear to me that the respondent has made exceptions with respect to the use of private vehicles, and it has done so for the convenience of the miners and notwithstanding any liability considerations. Under the circumstances, I conclude that the respondent must also accommodate Mr. Delisio and permit him an opportunity to use his automobile to travel from the Thomas Portal to the Linden Portal for the purpose of accompanying an MSHA inspector as the duly recognized miners' walkaround representative. In the alternative, I further conclude that the respondent must make a reasonable accommodation to Mr. Delisio by providing him with any available underground transportation between the Thomas and Linden Portals for purposes of accompanying inspectors as the walkaround representative of miners. If none is readily available, then Mr. Delisio should be permitted to drive his own automobile between portals.

The credible testimony in this case establishes that by virtue of his position as the chairman of the safety committee, Mr. Delisio is the designated "first choice" walkaround representative, and that other miners who have served as walkarounds in his absence are not the "first choice." Further, respondent concedes that this is the case (respondent's posthearing proposed findings #8 and #9). Since Mr. Delisio is the "first choice," respondent may not obstruct or impede his right to serve through an unreasonable application of an inconsistent and somewhat nebulous private vehicle policy. By precluding Mr. Delisio from using his private automobile as a means of travel between portals for purposes of exercising his right as the duly designated miners' walkaround representative, the respondent has effectively prevented Mr. Delisio from exercising a right protected by the Act, and has forced him to designate someone other than the miners' "first choice" to perform this function. The result of the respondent's private automobile policy, as applied to Mr. Delisio, is an unreasonable and unwarranted interference with his right to serve as the duly designated representative during his shift.

On the facts of this case, and in light of the foregoing findings and conclusions, I conclude and find that the application of respondent's purported policy of prohibiting the use of private automobiles by miners to Mr. Delisio, has

~1836

resulted in discrimination prohibited by section 105(c) of the Act. Given the fact that the respondent has conceded that after first reporting to his regular job at the Thomas Portal, Mr. Delisio would not then be permitted to drive his private automobile to the Linden Portal to accompany an inspector, I further conclude and find that the verbal warning given to Mr. Delisio constituted a discriminatory interference with his right to serve as the walkaround representative. Given these circumstances, I conclude that MSHA has established a violation of section 105(c) by a preponderance of the credible evidence and testimony adduced in this case, and the complaint is therefore AFFIRMED.

Respondent's Request for Dismissal of the Complaint as Untimely

In its answer of March 14, 1986, to the complaint filed by MSHA in this case, the respondent asserted that MSHA's complaint was untimely filed. In its posthearing arguments, respondent reasserts this argument and seeks dismissal of the case. The respondent states that Mr. Delisio filed his complaint with MSHA on July 30, 1985, and that MSHA did not file its complaint with the Commission until February 10, 1986, more than the 90 days required by section 105(c)(3) of the Act.

After due consideration of the respondent's arguments concerning the late-filing of the complaint, they are rejected, and the respondent's request for a dismissal of the complaint on this ground IS DENIED. It has been held that the filing deadlines found in section 105(c) of the Act are not jurisdictional in nature, *Christian v. South Hopkins Coal Company*, 1 FMSHRC 126, 134-136 (1979); *Bennett v. Kaiser Aluminum & Chemical Corporation*, 3 FMSHRC 1539 (1981). Further, as remedial legislation, the Act should be liberally construed so as not to unduly prejudice a miner for MSHA's delay in filing its complaint. In this case, I find no protracted delay on MSHA's part, nor can I conclude that the delay has prejudiced the respondent in its ability to present its defense.

Civil Penalty Assessment

MSHA seeks a civil penalty assessment in the amount of \$1,200 for the respondent's violation of section 105(c) of the Act, and has submitted information concerning the six statutory criteria for penalty assessments found in section 110(i) of the Act.

~1837

On the facts of this case, I do not consider the violation to be egregious. I believe that the respondent's initial verbal warning of possible disciplinary action against Mr. Delisio was made out of a good faith belief by the respondent that it had an inherent right to expect its employees to report to their normal duty station. With regard to the subsequent refusal to permit Mr. Delisio to accompany an inspector, this came after the case was in litigation, and I cannot conclude that given the posture of the case at that point in time, that the respondent acted unreasonably. While it is true that the application of the respondent's transportation policy effectively prevented Mr. Delisio from serving as a walkaround representative, there is no evidence of any pretextual motive on the respondent's part, nor is there any evidence that the respondent has directly or indirectly interfered with Mr. Delisio's activities on behalf of his union. To the contrary, the record here establishes that the respondent has been more than tolerant of Mr. Delisio with respect to his union activities in his capacity as a committeeman, and mine management has not interfered with, or otherwise impeded Mr. Delisio's activities in this regard.

MSHA's proposed civil penalty assessment of \$1,200, IS REJECTED. In the circumstances presented in this case, I conclude that a civil penalty assessment of \$100 is reasonable and appropriate.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. The respondent permit the complainant Joseph Delisio access to the Linden Portal during his work shift for purposes of exercising his walkaround rights to accompany MSHA mine inspectors on their inspection rounds by permitting him to drive his private automobile from his usual reporting place at the Thomas Portal to the Linden Portal for this purpose, or in the alternative, to provide him with underground company transportation between portals for this purpose.

2. The respondent expunge from its personnel or other records any references to the verbal warning given to Mr. Delisio on July 30, 1985, with respect to his request to

~1838

accompany an MSHA inspector on that day as the miners' walkaround representative.

3. The respondent post a copy of this decision on the mine bulletin board or other location readily available or accessible to miners.

4. The respondent remit to MSHA a civil penalty assessment in the amount of \$100 for its violation of section 105(c) of the Act.

Full compliance with this Order is to be made by the respondent within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge