CCASE:
SOL (MSHA) V. BENJAMIN COAL
DDATE:
19870108
TTEXT:

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BARRY MYLAN, LESTER POORMAN, COMPLAINANTS v.	DISCRIMINATION PROCEEDING Docket No. PENN 86-125-D MSHA Case No. PITT CD-8 Benjamin Strip No. 1
BENJAMIN COAL COMPANY, RESPONDENT AND UNITED MINE WORKERS OF AMERICA, (UMWA), INTERVENOR	

SUMMARY DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of discrimination filed by MSHA on behalf of the complainants pursuant to section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1). The complainants state that they are employed by the United Mine Workers of America as Health and Safety Representatives, and they allege that on or about October 31, 1985, when acting as miners' representatives, the respondent denied them the right to travel with an MSHA inspector during a spot inspection of the mine. The complaint seeks the following relief:

> 1. A finding that the complainants were unlawfully discriminated against by the respondent for engaging in actions protected under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815.

2. A cease and desist order and an order directing the respondent to post a notice that it will not violate section 105(c) of the Act.

3. An order assessing a civil penalty against the respondent for its violation of section 105(c) of the Act. Pursuant to 29 C.F.R. 2700.42, MSHA has submitted a statement proposing a civil penalty assessment in the range of $500 to $600 based upon the criteria for penalty assessments set forth in section 110(i) of the Act.

The parties agreed to submit this matter to me for summary decision pursuant to Commission Rule 64, 29 C.F.R. 2700.64, and they have filed a joint stipulation of facts, and briefs in support of their respective positions. The UMWA has been permitted to intervene pursuant to Commission Rule 4(b), 29 C.F.R. 2700.4(b)(1) and (2), and it has filed briefs in support of its position.

Issues

The principal issue presented in this case is whether or not the respondent discriminated against the complainants by its refusal to permit them to accompany an MSHA inspector in their alleged capacity as miner's representatives. 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, Pub.L. 95-164, 30 U.S.C. 801 et seq.

2. Sections 103(f), 105(c), and 110(i) of the Act, 30 U.S.C. 813(f), 815(c), and 820(i)

3. 30 C.F.R. 40.1 and 40.2.

4. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

MSHA and the respondent have stipulated to the following:

1. On November 4, 1985, Barry Mylan and Lester Poorman filed a section 105(c) complaint

with the Mine Safety and Health Administration, Johnson Field Office, against the Benjamin Coal Company.

2. Both Messrs. Mylan and Poorman are employed by the United Mine Workers of America as Health and Safety Representatives. Neither is employed at the Benjamin Coal Company in any capacity.

3. The Benjamin No. 1 Strip Mine, I.D. No. 36-02667, is one of eight surface mining operations which are owned and operated by Benjamin Coal Company and is located in the vicinity of Waukeska, near Westover, Clearfield County, Pennsylvania.

4. The No. 6 Preparation Plant, associated with the Benjamin No. 1 Strip Mine, processes coal from various strip mines operated by Benjamin Coal Company. The plant employs approximately 35 non-union miners on two production shifts and one maintenance shift to process a daily average of 2,200 tons of coal.

5. Employment at the Benjamin Coal Company is currently 335 employees and the No. 1 Strip Mine including the No. 6 Preparation Plant employs approximately 262 miners.

6. The president of the Benjamin Coal Company is David J. Benjamin.

7. On March 14, 1984, a secret ballot election was held at the Benjamin Coal Company by the National Labor Relations Board.

8. The employees (miners) of the Benjamin Coal Company by a vote of 261 to 209 voted against having the United Mine Workers of America become their representatives. (See Exhibit A).

9. On October 21, 1985, four miners who worked at the No. 6 Preparation Plant designated the United Mine Workers of America to act as the miners' representatives at the No. 6 Preparation Plant. (See Exhibit B).

10. The United Mine Workers of America designated Barry Mylan as its representative and Lester Poorman as its alternate representative. (See Exhibit B).

11. On October 21, 1985, the aforementioned designation was placed upon an authorization form in accordance with 30 C.F.R. 40.3 and forwarded to Donald Huntley, District Manager of the Mine Safety and Health Administration's District 2. A copy was also sent to the Benjamin Coal Company. (See Exhibit B).

12. On October 24, 1985, Barry Mylan forwarded to John DeMichiei, Subdistrict Manager-MSHA, a written section 103(g)(1) request for an inspection of the No. 6 Preparation Plant. (See Exhibit C).

13. On October 31, 1985, as a result of the October 24, 1985 request, MSHA Inspector Nicholas J. Kohart visited the No. 6 Preparation Plant for the purpose of conducting a section 103(g)(1) spot inspection.

14. Upon Inspector Kohart's arrival he was met by Messrs. Mylan and Poorman who informed him that they were the authorized mine representatives.

15. Inspector Kohart and Messrs. Mylan and Poorman appeared at the mine office that morning for the purpose of conducting the section 103(g)(1) spot inspection.

16. Said inspection was commenced, however, during the course of the inspection, Messrs. Mylan and Poorman were ordered off of the mine property by David J. Benjamin, President of Benjamin Coal Company.

17. Mr. Benjamin refused to recognize the UMWA as a miners' representative because a majority of the employees of Benjamin Coal Company had voted against the UMWA as their representative in the election of March 14, 1984.

18. Employees, i.e., miners, had in the past been allowed by Benjamin Coal Company to accompany federal inspectors on inspections at the No. 6 Preparation Plant.

19. On April 15, 1986, the Secretary of Labor filed the complaint before the Federal Mine Safety and Health Review Commission, which is the subject of this action.

20. The No. 1 Strip Mine's annual production tonnage is approximately 438,496. The Benjamin Coal Company's annual production tonnage is between 1,100,000 tons and 1,500,000 tons.

21. The history of previous violations during the 24-month period preceding the filing of this complaint was 103 over 68 inspection days. The respondent has no previous history of a section 105(c) violation.

An unopposed motion by the UMWA to amend the stipulations was granted, and paragraph 8 above was amended as follows:

8(a). In a decision issued on July 31, 1985, an administrative law judge of the National Labor Relations Board determined that unfair labor practices committed by Benjamin Coal Company had precluded the conducting of a fair election and he therefore ordered the election of March 14, 1984, set aside (decision attached as Exhibit D). The judge concluded further that said unfair labor practices were so egregious as to preclude the holding of a fair election in the future and that a previous election, conducted on November 17, 1983, in which the UMWA obtained a majority vote, constituted a more reliable indicia of employee desires. The judge therefore concluded, as a matter of law, that the UMWA was, and had been since November 1983, the designated representative of a majority of employees at the Benjamin mine.

8(b). The Administrative Law Judge Decision, attached as Exhibit "D," has been appealed to the National Labor Relations Board, where said appeal is still pending.

Discussion

The facts in this case are not in dispute. The respondent's No. 1 Strip Mine employs approximately 262 miners. The No. 6 Preparation Plant is part of the mine, and approximately 35 miners are employed at the plant.

On October 21, 1985, four miners who worked at the preparation plant designated the UMWA as their representative. This written designation was filed with MSHA's District 2 Manager and a copy was sent to the respondent in accordance with 30 C.F.R. 40.2(a) and 40.3(b). The designation listed Barry Mylan and Lester Poorman as the UMWA officials serving as representatives. Mr. Mylan and Mr. Poorman both are employed by the UMWA as Health and Safety Representatives, and neither is employed by Benjamin Coal Company.

On October 24, 1985, Mr. Mylan filed a request with MSHA for a section 103(g)(1) spot inspection of the preparation plant. In response to that request, MSHA Inspector Nicholas J. Kohart visited the preparation plant on October 31, 1985, for the purpose of conducting the spot inspection. Upon his arrival, Inspector Kohart was met by Mr. Mylan and Mr. Poorman who informed him that they were the authorized representatives of the miners at the plant. Mr. Mylan and Mr. Poorman intended to accompany Inspector Kohart on his inspection as the miners' representative pursuant to section 103(f) of the Act.

Inspector Kohart commenced his inspection, accompanied by Mr. Mylan and Mr. Poorman. Upon learning of the presence of Mr. Mylan and Mr. Poorman, respondent's President, David Benjamin, went to the plant and ordered them off the mine property. Mr. Benjamin's action was prompted by his refusal to recognize the UMWA as the miners' representative because a majority of his employees had voted against the UMWA as the collective bargaining representative of miners in an NLRB directed election held on March 14, 1984. Respondent's miners had in the past been permitted to accompany MSHA inspectors on inspections at the plant.

Thereafter, on November 4, 1985, Mr. Mylan and Mr. Poorman filed a complaint with MSHA alleging that the respondent's refusal to allow them to accompany Inspector Kohart as the miners' representatives pursuant to section 103(f) of the Act violated their rights under section 105(c) of the Act. MSHA conducted an investigation of the complaint, and upon its completion filed the instant complaint on behalf of Mr. Mylan and Mr. Poorman on April 15, 1986.

Respondent's Arguments

The respondent contends that the designation of the UMWA as the representative of the miners by only four (4) miners is not effective to confer representative status on the UMWA over many times that number of miners. Consequently, respondent contends that the allegation that it violated section 105(c) of the Act by its actions cannot be sustained. Respondent asserts that its actions were not motivated because of the exercise of any rights under the Act by Mr. Mylan and Mr. Poorman, and that it is clear that it has always permitted miners' representatives to take part in MSHA inspections. In this instance, however, the respondent maintains that it refused to recognize the UMWA as the representative of its miners because a majority of its miners had declined to have the UMWA act as their representative.

The respondent also contends that the complaint should be dismissed because it was not filed until well after the statutory and regulatory time limits set forth for the filing of a complaint of discrimination, discharge or interference with the Commission.

In support of its principal argument, the respondent points out that the Act contains no definition of a representative of miners. It recognizes that 30 C.F.R. 40.1 defines a representative of miners as "any person or organization which represents two or more miners at a coal or other mine for the purpose of the Act . . .," and states that the Secretary of Labor, in support of this definition has stated that:

> The purposes of the Mine Act are better served by allowing multiple representatives to be designated. This insures that all miners have the opportunity to exercise their right to select the representative of their choice. . . . 43 Fed.Reg. 29508 (July 7, 1978).

Respondent argues that if all miners have the "right to select the representative of their choice" the claimed violation of section 105(c) cannot, in this case, be sustained. If miners have the right to select a representative of their own choice, respondent asserts that the designation of the UMWA as representative for all of its miners or for all miners at the preparation plant by only four miners must be ineffective since neither the 31 other miners employed at the

plant nor the 258 other miners employed at the mine can be forced to accept the UMWA as their representative under the Act by the action of four individuals. Because this is not a proper designation from the persons the UMWA purports to represent, respondent concludes that it cannot be penalized for refusing to recognize the UMWA as the representative of its miners during the inspection of October 31, 1985.

Respondent maintains that MSHA and the UMWA do not claim that the UMWA is the representative of the four miners that designated the UMWA as their representative, but interpret the designation of four miners as being the effective designation of all miners at the mine. In support of this conclusion, the respondent states that MSHA's consideration of the designation by the four miners to be of wide application is evidenced by the fact that the respondent was cited on June 25, 1986, for refusing to allow the UMWA to take part in an inspection on June 19, 1986, at the site of an accident many miles away from the plant and where none of the miners that signed the designation work.

Respondent argues that if the designation by four miners is effective for other miners at the mine, then this is contrary to MSHA's expressed interpretation of the Act's intent "that all miners have the opportunity to exercise their right to select the representative of their choice. . . ." Therefore, the UMWA cannot, as it purported to be, be the representative of all miners at the Company or of all miners at the plant since the miners presumably have the right to remain unrepresented or choose their own representative.

Respondent cites section 103(f) of the Act which states: "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." (Emphasis added.)

Citing the legislative history of this provision, the respondent points out that the Joint House and Senate Conference Committee stated: "The Senate required the Secretary to consult with a reasonable number of miners if there was no authorized representative of miners. The House amendment did not contain this protection for unorganized miners."

Respondent maintains that MSHA is required to consult with a "reasonable number of miners" when there is no authorized representative, and that the designation of a representative by four of several hundred miners cannot relieve it of

this responsibility and deprive other miners of the right to be consulted. Respondent concludes that if a reasonable number of miners must be consulted when there is no authorized representative, the authorized representative of a group of miners must be selected by a reasonable number of miners, and that four miners is hardly a reasonable number in determining the representative for over 250 miners.

Respondent asserts that it is clear that Congress had in mind that the term "authorized representative of the miners" applied to organized mines where MSHA would consult with the representative that had been selected by a majority of the employees, and the reason that MSHA is required to consult with a "reasonable number of miners" where there is no authorized representative, is because in an organized mine by definition, the authorized representative would have been selected by a majority, i.e., reasonable number of miners.

Respondent maintains that if four miners may effectively designate a representative for all other miners, then the remaining miners would also lose valuable rights and protections under section 103(g) of the Act which states:

> (1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative, has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. . . ."

Citing the legislative history of this provision, respondent points out that the Joint House and Senate Conference Committee stated: "The conference substitute conforms to the Senate Bill, except that such inspections can be requested only by a representative of miners, or by a miner where there is no representative of miners at the time."

Respondent argues that if the UMWA is the representative of the miners at the mine and plant by virtue of the designation of four miners, then by statutory mandate all other miners lose their rights under section 103(g) of the Act. The statute and the legislative history make it entirely clear that if there is a representative of miners at a mine, then the miners are to be represented by that representative

for purposes of the Act, and they lose the right to act individually because of the presence of a representative of miners. Similarly, if there is a representative of the miners at the mine, miners apparently lose the right under the Act to be consulted at the time of an inspection pursuant to section 103(f).

Respondent concludes that if miners are going to lose valuable rights under the Act to act individually because they must deal through a representative, then they must be involved in the selection of that representative. Respondent suggests that to allow four miners to designate the representative for all other miners deprives them of their freedom of choice and requires them to be represented by an entity they have in this instance previously rejected, and is contrary to the purpose of the Act as set forth by MSHA which is allegedly best served by allowing all miners "the opportunity to exercise their right to select the representative of their choice." [43 Fed.Reg. 29508 (July 7, 1978)].

Respondent maintains that by refusing to recognize the UMWA as the representative for all of its miners, or as the representative of the miners at the preparation plant, it did not violate section 105(c) of the Act. It concludes that the UMWA cannot, consistent with the regulations nor the spirit of the Act, be the representative for miners that have not authorized it to represent them.

Respondent argues further that allowing four miners to designate a representative for other miners also conflicts with the miners' rights under the National Labor Relations Act (NLRA). In support of this argument, respondent asserts that section 7 of this statute permits employees (miners are included in the definition of employees) to engage in concerted activity for purposes of collective bargaining or other mutual aid or protection. Section 7 also states that employees may refrain from engaging in such concerted activities. Concerted activities for purposes of other mutual aid or protection includes matters of safety and health in the workplace. NLRB v. Washington Aluminum Co., 370 U.S. 9, 8 L.Ed.2d 298 (1962); Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009 (3d Cir.1980); Wray Electric Contracting, Inc., 210 NLRB 757, 86 LRRM 1589 (1974).

Respondent points out that under the NLRA a representative of the employees selected by a majority of the employees becomes the exclusive representative of the employees. [NLRA 9(a), 29 U.S.C. 159(a)]. In 1984 an election was held in which the UMWA sought to become the exclusive representative

of the respondent's employees (miners), and that the employees (miners), by a vote of 261 to 209, voted against having the UMWA as their representative. Since that time, the employees (miners) have not indicated any desire to have the UMWA represent them for any purposes other than the purported designation by four individuals of the UMWA as the representative of miners under the Act.

The respondent suggests that because employees (miners) have the right to refrain from being represented under the NLRA, a determination allowing four individuals to select the representative for many other miners would abrogate their right to refrain from engaging in collective activity, and that any recognition by an employer of a union as a representative of employees that have not selected the union as their representative can be an unfair labor practice under section 8(a)(2) of the NLRA, 29 U.S.C. 158(a)(2). Pick-Mt. Laurel Corp. v. NLRB, 625 F.2d 476 (3d. Cir.1980). Moreover, if the UMWA is their representative, the miners lose their rights to act individually pursuant to sections 103(f) and (g) of the Mine Act.

The respondent points to the fact that MSHA has stated that the purpose of the Mine Act are better served by having all miners "exercise their rights to select the representative of their choice. . . ." If this is the case, respondent further suggests that miners also have the right to refrain from selecting a representative and are free to pursue their rights under the Act individually. Further, if miners are free under the Act to refrain from having the UMWA represent them, respondent concludes that the designation of the UMWA as their representative by others must be invalid. Respondent further concludes that allowing the UMWA to gain representative status over other miners based on the actions of four miners would directly conflict with the comprehensive scheme for the selection of a union established under the NLRA as well as the apparent intent of the Mine Act.

The respondent maintains that if the UMWA had won the election and had been certified as the exclusive representative of the employees at the company, it would, as contemplated by Congress, be the authorized representative of the miners under the Mine Act. Since the UMWA, a labor organization, did not win the election and has not been certified as the representative of respondent's employees, it cannot now achieve the status of a representative for hundreds of miners based on the actions of four miners, and that as a labor organization, it must follow the procedures of the NLRA to gain the status of representative for hundreds of miners.

Respondent concludes that to interpret the Mine Act to allow a union to gain a status as representative for employees without their consent, would fly in the face of the long established scheme of the NLRA, and that Congress could not have intended a result whereby an employer could refuse to recognize a union that has been rejected by a majority of his employees but the same employer would have to recognize the same union as the representative of the same employees because a few of those employees had designated the union as representative for the employees.

Summarizing its position on the merits, the respondent concludes that the designation of the UMWA as the representative of miners at its mine by four miners is inconsistent with both the Mine Act and the National Labor Relations Act, because there is no authority allowing two or more miners to select a representative for many times that number of miners. This is particularly true if the Acts' purposes are better served by allowing miners to select representatives of their choice.

Respondent concludes that the designation that purported to designate the UMWA as the representative of miners that did not indicate a willingness to waive their individual rights under the Act in favor of having the UMWA act as their representative is clearly defective, and consequently, its refusal to recognize the UMWA under these circumstances is not violative of section 105(c)(1) of the Mine Act. Moreover, the respondent maintains that its actions were clearly not motivated because of the exercise of rights protected under the Act by the UMWA, but instead, were based on the act of its employees that had previously rejected the UMWA as their representative.

In addition to its arguments on the merits of its asserted defense in this case, the respondent asserts that MSHA's complaint should be dismissed as untimely. Citing the time requirements of section 105(c)(3) of the Act, and Commission Rules 40 and 41, 29 C.F.R. 2700.40 and 2700.41, respondent states that MSHA is required to make a written determination of a violation within 90 days of receipt of a complaint and to immediately file its complaint with the Commission if it believes that a violation of section 105(c)(1) has occurred. Respondent points out that 29 C.F.R. 2700.41(a) further delineates that MSHA shall file its complaint with the Commission within 30 days of any determination that a violation has occurred.

Since the complaint by Mr. Mylan and Mr. Poorman was filed with MSHA on November 4, 1985, the respondent maintains that MSHA should have filed its complaint by March 5, 1986. Respondent calculates that 90 days from November 4, 1985 is February 3, 1986; and 30 days from February 3, 1986, falls on March 5, 1986. Instead, respondent points out that MSHA failed to file its complaint with the Commission until April 15, 1986.

The respondent asserts that MSHA had ample opportunity to file a complaint within the mandated time limits. Moreover, respondent asserts that the instant case is not one where an unsophisticated party not knowing their rights under the Act failed out of ignorance to take advantage of his right to file a complaint, and that the alleged discriminatees are representatives of the UMWA, a large, sophisticated labor organization that is fully capable of filing a complaint within the required time limits and has historically been involved in such litigation under the Act.

MSHA's Arguments

In support of its position in this case, MSHA initially points out that under the analytical guidelines established by the Commission in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d. Cir.1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence that (1) he engaged in protected activity, and (2) the adverse action taken against him was motivated in any part by that protected activity. Pasula, 2 FMSHRC at 2799-2800; Robinette, 3 FMSHRC at 817-818. In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity.

MSHA submits that a prima facie case of a violation of section 105(c) of the Act has been proven in this case, and that section 103(f) of the Act provides the statutory right which gives rise to the protected activity at issue. MSHA points out that section 103(f) provides rights to miners and their representatives in connection with their participation in MSHA inspections, and that in fulfilling his statutory rulemaking mandate, the Secretary of Labor issued an Interpretative Bulletin at 43 Fed.Reg. 17546 (April 25, 1978) setting forth the scope of section 103(f). MSHA maintains that this

interpretative bulletin is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act, and that the courts have often held that considerable respect is due the interpretation given a statute by the officers or agency charged with its administration. Whirlpool Corporation v. Marshall, 445 U.S. 1 (1980); Ford Motor Credit Company v. Milhollin, 444 U.S. 555 (1980); Mourning v. Family Publication Service, Inc., 411 U.S. 356 (1973); Skidmore v. Swift & Company, 323 U.S. 134 (1944).

MSHA asserts that as set forth within the preamble of the interpretative bulletin, the Department of Labor is responsible for interpreting and applying the statutes which it administers, and that publication of all interpretative positions by the Department is useful in informing the general public and interested segments of the public of positions on particular provisions of certain statutes. The deference to be afforded interpretative bulletins has been specifically addressed in matters arising under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.). The regulatory provisions of the Fair Labor Standards Act specifically sets forth that "such interpretations of the Act provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 29 C.F.R. 779.9

MSHA cites the introductory statement contained in the interpretative bulletin, at 43 Fed.Reg. 17546, and maintains that the bulletin explicity provides that a representative authorized by the miners shall be given an opportunity to accompany the inspector, and that an operator's refusal to allow participation by a representative of miners is a violation of the Act which subjects the operator to a citation and penalty under sections 104 and 105. MSHA points out that the bulletin also cites the Congressional mandate that the scope of the protected activities be broadly interpreted by the Secretary to include participation in mine inspections, and specifically states that "[a] refusal by an operator to comply with the requirements of section 103(f) is an act which "interferes' with the exercise of statutory rights." Accordingly, MSHA concludes that the provisions of section 105(c) apply to discrimination or interference with the inspection participation right. 43 Fed.Reg. 17547.

MSHA argues that on the facts of this case, the respondent interferred with Mr. Mylan's and Mr. Poorman's statutory rights to act as representatives of the miners at its No. 6

Preparation Plant, and that this interference constitutes an adverse action against them because of their attempt to participate in protected activity.

MSHA maintains that the respondent's contention that Mr. Mylan and Mr. Poorman engaged in no protected activity because they were UMWA representatives and the UMWA had lost a representation election is without merit. MSHA states that the fact that the UMWA did or did not represent the respondent's miners pursuant to NLRB law does not foreclose representation pursuant to the Mine Act. In support of its argument, MSHA maintains that in 1978 the Secretary promulgated regulations at Part 40 which inter alia defined a representative of miners, and that the language of Part 40.1(b) clearly sets forth that "any person or organization representing two or more miners at a coal mine is a representative of miners for purposes of the Federal Mine Safety and Health Act of 1977." Moreover, MSHA points out that the preamble to Part 40 specifically addresses the term "representative" as it is applicable to NLRB law and the Mine Act, and states that the Secretary, in addressing the comments filed during MSHA's rulemaking, stated that a broad definition would be preferable to a narrow one and that "any attempt to limit the manner in which representatives are selected would be intrusive into labor-management relations at the mine and not in keeping with the spirit if miner participation," 43 Fed.Reg. 29508.

MSHA maintains that the selection of the UMWA as representative of miners in the instant proceeding meets the Secretarial guarantees outlined above, and that the selection of the UMWA as "miner representatives" on October 21, 1984, by four miners who worked at the respondent's No. 6 Preparation Plant was in accordance with the Act and its implementing regulations at Part 40.

MSHA also maintains that the argument that the UMWA representatives were not employees of the respondent, and thus not able to represent the miners at the preparation plant is without merit. In support of this conclusion, MSHA cites Judge Broderick's decision in Consolidation Coal Company v. United Mine Workers of America, 2 FMSHRC 1403 (June 12, 1980), affirmed by the Commission at 3 FMSHRC 617 (March 21, 1981), holding that non-employees may be representatives of miners within the meaning of the Act even though they failed to formally file as representatives pursuant to the Part 40 regulations.

MSHA also relies on Judge Morris' decision in Emery Mining Corporation v. MSHA and the UMWA, Intervenor, 8 FMSHRC 1182 (August 7, 1986), upholding a citation for a violation of section 103(f) of the Act because of Emery's refusal to permit an international representative of the UMWA to accompany an MSHA inspector on an inspection of its mine without first executing a waiver of liability. In that case, Judge Morris specifically held that Congress contemplated that non-employees may be representatives of miners, and that the UMWA representative was within the "person or organization" concept defined at Part 40.1(b). Further, Judge Morris rejected Emery's argument that a distinction existed between employee and non-employee miners' representative, citing footnote 18 of Council of Southern Mountains, Inc. v. Federal Mine Safety and Health Review Commission, 751 F.2d 1418, 1419 (D.C.Cir.1985), where the Court stated that the Mine Act "merely refers to "representatives' and does not articulate any distinction between the rights of employees and non-employee representatives." Judge Morris concluded that both the individual international representative and the UMWA met the definition of "miners' representative."

MSHA concludes that it is without question that the UMWA and its representatives are proper representatives of miners at the respondent's No. 6 Preparation Plant within the meaning of the Mine Act, and that the respondent's failure to recognize this representative status because of an asserted lost NLRB representation election is violative of the UMWA's and its individual representatives' statutory rights under section 103(f) of the Act. MSHA maintains that the Congressional purposes in enacting the Mine Act and the NLRB Act are clearly distinct and separate. It points out that the former is a remedial statute designed to promote the safety and health of the miner, and that Congress promulgated specific individual statutory rights to miners as individual workers not as members of any union, while the latter was designed to minimize industrial strife and improve working conditions by encouraging employees to promote their interests collectively. Accordingly, MSHA further concludes that NLRB law and the results of any NLRB election are not controlling in this proceeding.

MSHA's Proposed Civil Penalty Assessment

In support of its proposal for a civil penalty assessment for the respondent's violation of section 105(c) of the Act, MSHA has submitted information with respect to the civil penalty criteria found in section 110(i) of the Act. MSHA

asserts that the respondent was negligent in refusing to recognize the statutorily guaranteed rights of miner representatives, and that its conduct in this regard displays a lack of due diligence for the rights of miners and presents a "chilling effect" on those rights. MSHA considers the violation to be serious, and concludes that the respondent displayed no good faith in attempting to abate the violation in that it has remained adamant in its refusal to recognize the UMWA as the miners' representative in this case.

MSHA's brief does not address the issue of the timeliness of its complaint, and the respondent's request for a dismissal on the ground that the complaint was not timely filed.

The UMWA's Arguments

The UMWA states that the respondent has admitted that it received the designation of the UMWA pursuant to 30 C.F.R. 40.3, as a representative of miners at the No. 6 Preparation Plant, which listed the complainants Mylan and Poorman as the UMWA officials serving as representatives, and that it also admits that it refused to permit Mr. Mylan and Mr. Poorman to accompany an MSHA inspector on a spot inspection on October 31, 1985. The UMWA rejects the respondent's argument that the UMWA cannot be a representative of miners at the plant because it did not receive a majority of the votes in a March 14, 1984, election conducted under the National Labor Relations Act (NLRA) for selection of an exclusive collective bargaining agent, and because non-employees may not serve as miners' representatives under the Mine Act as totally groundless.

The UMWA asserts that its status as exclusive collective bargaining agent under the NLRA is completely irrelevant to its status as a representative of miners under the Mine Act. In support of its position, the UMWA points out that the Act makes numerous references to miners' representatives for a variety of purposes, and that one of the major functions of a miners' representative is the walkaround right found in section 103(f). Although the Act does not define the term "representative of miners" and the similar terms used throughout the sections of the Act footnoted at page 5 of its initial brief, the UMWA points out that by rulemaking culminating on July 7, 1978, the Secretary of Labor issued regulations which at 30 C.F.R. 40.1(b), defines the term as follows:

> "Representative of miners" means:
>
> (1) Any person or organization which represents two or more miners at a coal or other mine for purposes of the Act, and
>
> (2) "Representatives authorized by the miners," "miners or their representative," "authorized miner representative," and other similar terms as they appear in the Act.

The UMWA maintains that since it has been designated by four miners as their representative at the preparation plant, it is clearly an "organization which represents two or more miners" at the plant and meets the facial definition of "representative of miners" under 30 C.F.R. Part 40, and nothing in that definition indicates that a "representative of miners" must either have been selected by a majority of all miners or have been certified as the exclusive collective bargaining agent under the NLRA. In addition to the clear language of section 40.1(b), the UMWA cites the preamble to Part 40, 43 Fed.Reg. 29508 (July 7, 1978), which states in pertinent part as follows:

> [Some] commenters suggested that the National Labor Relations Board (NLRB) definition of representatives be applied while others suggested that the representatives should be elected by a majority. . . . [T]he NLRB definition is inappropriate because the NLRB definition of "Representative" concerns itself with a representative in the context of collective bargaining. The meaning of the word representative under this Act is completely different. Additionally the rights of nonunion miners would be severely limited by a definition of "Representative of Miners" based on the collective bargaining concept. Furthermore, the "majority rule" concept is a fundamental component of the NLRB definition of representative, which contemplates only one union miner representative at each mine. The purposes of the Mine Act are better served by allowing multiple representatives to be designated. This insures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing the various functions of

> a representative of miners under the Act and within the framework of each provision.

The UMWA argues that nothing in the Mine Act or its legislative history indicates any Congressional intent to limit a representative of miners under the Act to an organization or individual selected by a majority of the miners or to an organization certified as the exclusive bargaining agent under the NLRA. The UMWA points out that the Secretary of Labor, who is charged with enforcing the Mine Act and promulgating regulations thereunder, has determined precisely the opposite through careful rulemaking proceedings, in which the respondent's precise argument was raised, considered fully, and rejected.

Citing United Mine Workers v. FMSHRC, 671 F.2d 615, 626 (D.C.Cir.1982) and Magma Copper Co. v. Secretary of Labor, 645 F.2d 694, 696 (9th Cir.1981), the UMWA further points out that the Courts have held that safety legislation is to be liberally construed to effectuate the congressional purpose and that deference is to be given to the Secretary's reasoned and reasonable statutory construction as enunciated in his promulgated regulations. The UMWA concludes that the Secretary's regulatory definition of "representative of miners" is "a reasoned and supportable interpretation of the Act," and that the UMWA, designated by four miners at the No. 6 Preparation Plant, is not precluded from being a "representative of miners" within the meaning of 30 C.F.R. 40.1(b) and the Mine Act merely because it lacks certification as the exclusive collective bargaining agent under the NLRA.

The UMWA finds no merit in the respondent's contention that the UMWA and its safety and health representative cannot be representatives of miners under the Mine Act because they are not employed by the respondent. In support of its argument, the UMWA maintains that one of the most important functions of a miners' representative under the Act is the inspection walkaround right under section 103(f). Quoting the pertinent provision of that section which provides that "such representative if 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," the UMWA suggests that if all miners' representatives were required to be employees of the operator, the emphasized language would be meaningless surplusage. The UMWA concludes that Congress obviously contemplated and intended that non-employees, as well as employees, could be designated as representatives of miners, and that Commission Judges Broderick and Morris reached precisely this conclusion in

Consolidation Coal Co. v. UMWA, 2 FMSHRC 1403, 1408 (1980), and Emery Mining Corp. v. Secretary of Labor, 8 FMSHRC 1182, 1202 (1986) (review pending).

In addition, the UMWA ponts out that its safety and health representatives receive much the same training as MSHA gives to its inspectors, and that permitting non-employees to serve as miners' representatives furthers the purposes of the Act by allowing participation by representatives specially trained in safety and health matters.

In further response to the respondent's arguments, the UMWA asserts that the purpose of a walkaround representative under section 103(f) is not to represent all of the miners for purposes of collective bargaining, but rather, to assist MSHA and the miners who have selected him in enforcing the statutory and regulatory safety and health standards. The UMWA concludes that nothing in the Act or 30 C.F.R. Part 40 requires that a miners' representative be the exclusive representative for purposes under the Act, or represent all miners, or be selected by a majority of miners. Quite the contrary, as stated by the Secretary in the preamble to Part 40, "the rights of nonunion miners would be severely limited by a definition of "Representative of Miners' based on the collective bargaining concept. Furthermore, . . . [t]he purposes of the Mine Act are better served by allowing multiple representatives to be designated." 43 Fed.Reg. 29508 (July 7, 1978).

The UMWA further concludes that its designation as a representative of miners under the Act does not mean that the other miners employed at the respondent's No. 1 Strip Mine have been forced to accept the UMWA as their representative under the Act by the action of four individuals because no exclusive representative "for the purposes of collective bargaining" under section 9(a) of the NLRA has been selected by the Part 40 designation involved in this case, nor have the rights of any or all other respondent's miners to select one or more other representatives under the Act been interferred with in any manner. Those miners are free to designate any representative(s) they choose, or to continue not to designate other representatives under Part 40.

Finally, the UMWA concludes that the respondent's refusal to permit the complainants to accompany an MSHA inspector during the inspection on October 31, 1985, interferred with the exercise of their statutory rights under section 103(f) of the Act, and therefore was a violation of section 105(c)(1) of the Act. Under the circumstances, the UMWA asserts that the

respondent was properly cited for a violation and that a civil penalty for that violation must be assessed.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, the complainants bear the burden of production and proof to establish (1) they 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 complainants' 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, --- U.S. ----, 76 L.Ed.2d 667 (1983).

The respondent in this case is charged with a violation of section 105(c)(1) of the Act for allegedly interferring with the asserted statutory right of the complainants to accompany an MSHA inspector during his inspection rounds in their capacity as the designated miners' walkaround representatives pursuant to section 103(f) of the Act. The undisputed facts establish that on October 21, 1985, four miners working at the respondent's No 6 Preparation Plant designated the UMWA as their representative in the exercise of their rights under the Act, and that the UMWA in turn designated complainant Barry Mylan as its representative, and complainant Lester Poorman as its alternate representative. Mr. Mylan and Mr. Poorman are employed by the UMWA as health and safety representatives and are not employed by the respondent. The designation of Mr. Mylan and Mr. Poorman as the representative of the miners was filed with MSHA's District Office pursuant to 30 C.F.R. 40.3, and a copy was served on the respondent.

It is also undisputed that on October 31, 1985, an MSHA inspector visited the mine for the purpose of conducting a section 103(g)(1) spot inspection, and when Mr. Mylan and Mr. Poorman attempted to accompany the inspector on his inspection rounds in their capacity as the miners' designated walkaround representative, the respondent ordered them off the property and would not permit them to accompany the inspector.

Section 105(c)(1) of the Act provides in pertinent part as follows:

> No person shall discharge or in any manner discriminate against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners * * * in any coal or other mine subject to this Act * * * because of the exercise by such miner, representative of miners * * * on behalf of himself or others of any statutory right afforded by this Act. (Emphasis added).

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 representative of miners

> who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. (Emphasis added).

The critical issue in this case is the interpretation to be placed on the term "miner representative" or "authorized representative" of miners. The respondent's principal contention is the assertion that the UMWA could not be the "miner representative" or "authorized representative" of miners at its preparation plant because the UMWA lost a representation election conducted by the NLRB, and that the designation by four miners of the UMWA as their representative is inconsistent with both the Mine Act and the National Labor Relations Act because there is no authority allowing two or more miners to select a representative for many times that number of miners at the mine. Respondent suggests that the purpose of the Mine Act is better served by allowing a majority of the miners to select their own representative, and that to permit four miners to designate the UMWA as their representative impedes the "freedom of choice" available to the other miners, and flies in the face of the statutory scheme of the National Labor Relations Act and the Mine Act.

As correctly stated by the parties, the Mine Act does not specifically define the term "representative of miners," nor does it set out all of the parameters of the statutory right of a miner's representative to serve as a walkaround in a representative capacity. However, in the exercise of his rulemaking authority pursuant to the Act, the Secretary of Labor on April 25, 1978, issued an Interpretative Bulletin at 43 Fed.Reg. 17546, setting forth the scope of the walkaround provisions of section 103(f). The bulletin in pertinent part provides as follows:

> The Federal Mine Safety and Health Act of 1977 (Pub.L. 91-173, as amended by Pub.L. 95-164, November 9, 1977) (hereinafter referred to as the Act) is a Federal statute designed to achieve safer and more healthful conditions in the nation's mines. Effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of miners at every

> level of safety and health activity. Therefore, under the Act, miners and representatives of miners are afforded a wide range of substantive and procedural rights.
>
> Section 103(f) provides an opportunity for the miners, through their representatives, to accompany inspectors during the physical inspection of a mine, for the purpose of aiding such inspection, and to participate in pre- or post-inspection conferences held at the mine. As the Senate Committee on Human Resources stated, "If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.' S.Rep. No. 95-181, 95th Cong., 1st Sess., at 35 (1977).

In recognition of the fact that the Act does not contain a definition of the term "representatives of miners," the Secretary of Labor, on July 7, 1978, acting under his authority found in section 101 of the Act to promulgate and revise mandatory standards, promulgated 30 C.F.R. Part 40, governing the identification of representatives of miners and setting forth the filing requirements for such representatives, 43 Fed.Reg. 29508, July 7, 1978.

30 C.F.R. 40.1--Definitions, in pertinent part provides:

(b) "Representative of miners" means:

> (1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and
>
> (2) "Representatives authorized by the miners," "miners or their representatives," "authorized miner representative," and other similar terms as they appear in the Act.

30 C.F.R. 40.2--Requirements, in pertinent part provides:

> (a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by 40.3 of this part. Concurrently,

> a copy of this information shall be provided to the operator of the mine by the representative of miners.

In my view, the term "representatives of miners" for purposes of the Mine Act was clearly defined by the Secretary when the aforementioned regulations were promulgated. During the rulemaking process, several commenters expressed concern that the regulatory definition found in section 40.1 was overly broad and would cause confusion among miners selecting a representative. Some commenters suggested that the NLRB definition of representative be applied while others suggested that miner representatives should be elected by a majority of the miners. In addressing these comments, the Secretary stated that a broad definition would be preferable to a narrow one and that "any attempt to limit the manner in which representatives are selected would be intrusive into labor-management relations at the mine and not in keeping with the spirit of miner participation," 43 Fed.Reg. 29508, July 7, 1978. Additionally, the Secretary stated that:

> [M]ore specifically, the NLRB definition is inappropriate because the NLRB definition of "Representative" concerns itself with a representation in the context of collective bargaining, the meaning of the word representative under this Act is completely different. Additionally, the rights of nonunion miners would be severly limited by a definition of "Representative of Miners" based on the collective bargaining concept. Furthermore, the "majority rule" concept is a fundamental component of the NLRB definition of representative, which contemplates only one union miner representative at each mine. The purposes of the Mine Act are better served by allowing multiple representatives to be designated. This insures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing the various functions of a representative of miners under the Act and within the framework of each provision. (Emphasis added).

In view of the foregoing, it seems clear to me that in addressing the very concerns raised by the respondent with respect to the application of the collective bargaining provisions of the National Labor Relations Act with respect to the definition of the term "representative," the Secretary, in

promulgating Part 40 clearly distinguished the NLRB law and the Mine Act purposes and rejected any notion that a representative of miners can only be based on any "majority rule." Under the circumstances, I conclude and find that the respondent's arguments with respect to the application of NLRB law in this case are without merit, and they are rejected. I agree with the arguments advanced by MSHA and the UMWA on this issue, and conclude that the fact that the UMWA may not represent the respondent's miners for purposes of NLRB or NLRA collective bargaining purposes does not foreclose its representation of the miners who designated it to act as their representative in the exercise of their rights under the Mine Act.

The regulatory definition of the term "representative of miners" as found in 30 C.F.R. 40.1 includes any person or organization which represents two or more miners. Section 40.2(b) provides that miners or their representatives may appoint or designate different persons to represent them under various sections of the Act relating to representatives of miners. On the facts of this case, there is no question that the four miners working at the preparation plant designated the UMWA as their representatives, and that the UMWA designated Mr. Mylan and Poorman to serve in their representative capacity on behalf of the four miners.

The respondent's suggestion that the designation of the UMWA by the four miners in question is binding on all miners at the mine and has resulted in the loss of individual rights for all remaining miners is not well taken. The issue is not whether the UMWA represents all miners for all purposes under the Mine Act. The issue is whether or not the respondent interferred with Mr. Mylan's and Mr. Poorman's right to accompany the inspector as the walkaround representative of the four miners who designated the UMWA as their representative. As far as the other miners are concerned, under the regulations found in Part 40, they are free to designate any individual or organization to act as their representative for purposes of MSHA inspection walkarounds. If they choose not to select the UMWA, that is their business.

The respondent's contention that Mr. Mylan and Mr. Poorman may not serve as miners' representatives because they are employed by the respondent is rejected. As pointed out by MSHA and the UMWA in their briefs, this issue has previously been raised in Commission cases decided by Judge Morris and Judge Broderick, in Consolidation Coal Company v. United Mine Workers of America, 2 FMSHRC 1403 (1980), and Emery Mining Corp. v. Secretary of Labor, 8 FMSHRC 1182

(1986). I agree with those decisions, and find nothing in the Act or MSHA's Part 40 regulations which makes distinctions between the rights of employees and non-employee miners' representatives.

I conclude and find that the complainants in this case were the duly designated walkaround representatives of the four miners who so designated them, and they had a statutory right pursuant to section 103(f) accompany the inspector during his inspection on October 31, 1985. In a recently decided walkaround discrimination case, Secretary ex rel. Richard Truex v. Consolidation Coal Company, 8 FMSHRC 1293, September 25, 1986, the Commission stated that "[t]he 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 * * *," 8 FMSHRC 1298. Further, the legislative history of section 103(f) clearly shows that Congress recognized the important function served by such a right. The Senate Report stated, "It is the Committee's view that [participation in inspections and pre- and post-inspection conferences] will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." S.Rep. No. 181, 95th Cong., 1st Sess. 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong.2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-17 (1978) ("Legis.Hist."). See also Magma Copper Co., 1 FMSHRC 1948, 1951-52 (December 1979), aff'd, Magma Copper Co. v. FMSHRC, 645 F2d 694 (9th Cir.1981), cert. denied, 454 U.S. 940 (1981).

I further conclude and find that the respondent's refusal to allow Mr. Mylan and Mr. Poorman to accompany the inspector during his inspection on October 31, 1985, violated their protected statutory rights under section 103(f) to serve as the representative of the miners who so designated them, and constituted an unlawful interference with their protected rights under section 105(c)(1) of the Act. Accordingly, the complaint filed in this case IS AFFIRMED.

Respondent's Request for Dismissal of the Complaint as Untimely

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 miners 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

On the facts of this case, I do not consider the violation to be egregious. MSHA's suggestion that the respondent displayed a lack of good faith by adamantly refusing to recognize the UMWA as the miner representative in this case is not well taken. Given the protracted and somewhat nasty legal dispute surrounding the contested NLRB collective bargaining election, I find no basis for unduly penalizing the respondent for its legal position taken in this case. Under the circumstances, and after consideration of the civil penalty criteria found in section 110(i) of the Act, I conclude that a civil penalty assessment of $100 is reasonable and appropriate in this case.

ORDER

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

1. The respondent cease and desist from prohibiting the UMWA or its designated health and safety representatives who have been designated by the four miners at the respondent's No. 6 Preparation Plant as their representatives from accompanying MSHA inspectors as walkaround representatives during their mine inspections.

2. The respondent post a copy of this decision on the mine and preparation plant bulletin boards or at other locations readily available or accessible to miners.

3. The respondent remit to MSHA a civil penalty assessment in the amount of $100 for its violation of section 105(c)(1) 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