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CONSOLIDATION COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. PENN 88-252-R
Citation No. 3096663; 6/14/88

Dilworth Mine
Mine ID 36-04281

UNITED MINE WORKERS OF AMERICA
ON BEHALF OF EDWARD BANDISH,
COMPLAINANT

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

DISCRIMINATION PROCEEDING

PENN 89-43-D

PITT CD 88-21

Dilworth Mine

CIVIL PENALTY PROCEEDING

Docket No. PENN 89-76
A. C. No. 36-04281-03652

Dilworth Mine

CONSOLIDATION COAL COMPANY,
RESPONDENT

DECISION

Appearances: Michael J. Healey, Esq., Healey, Davidson & Hornack,
Pittsburgh, Pennsylvania, for Edward Bandish;
David J. Laurent, Esq., Polito and Smock, P.C.,
Pittsburgh, Pennsylvania, for Respondent;
Covette Rooney, Esq., Office of the Solicitor, U. S.
Department of Labor, Philadelphia, Pennsylvania, for
the Secretary.

Before: Judge Weisberger

Statement of the Cases

In these consolidated cases, the Operator (Respondent),
contests a finding by the Secretary (Petitioner), that it
violated section 103(f) of the Federal Mine Safety and Health Act
of 1977,

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and the Petitioner seeks a civil penalty alleging a violation of section 103(f), supra. In addition, the Complainant seeks various declaratory relief, alleging that Respondent discriminated against him in violation of section 105(c) of the Act, by denying him his rights under section 103(f) to accompany an inspector during an inspection of Respondent's mine. Subsequent to discovery, and pursuant to notice, the cases were heard in Pittsburgh, Pennsylvania, on July 11, 1989. James Samuel Conrad, Jr. testified for Petitioner, Paul Edward Bandish and Larry E. Swift testified for Complainant, and Phillip Mark Rebottini, Louis Barletta, Jr., and Mark Schultz testified for Respondent. At the hearing, at the conclusion of the Petitioner's case, Respondent made a Motion for Directed Verdict, and decision was reserved. Post Hearing Briefs were submitted by Complainant and Respondent on September 28, 1989. Petitioner filed Proposed Findings and Facts and a Memorandum on October 1, 1989.

Stipulations

1. The Dilworth Mine is owned and operated by the Respondent, Consolidation Coal Company.

2. The Dilworth Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject Citation and order were properly served by a duly authorized representative of the Secretary of Labor, upon an agent of the Respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements assessed therein.

5. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

6. The appropriateness of a penalty, if any, to the size of the Respondent's business should be based upon the fact that the Respondent's company and mine size are large.

7. The Dilworth Mine was assessed a total of 368 violations over 513 inspection days.

8. The Parties stipulate to the authenticity of their exhibits, but not to their relevance or the truth of the matters asserted therein.

Findings of Fact and Discussion

At approximately 11:30 p.m. on June 2, 1988, MSHA Inspector James Samuel Conrad, Jr. arrived at Respondent's Dilworth Mine to continue a Triple A Inspection during the midnight shift commencing 12:01 a.m., June 3, 1988. Larry E. Swift, a Safety Committee member of the Local Union, was scheduled to work the midnight shift, and was the designated walkaround to accompany Conrad, and Conrad was so informed. Prior to the commencement of the inspection, Conrad ran into Paul Edward Bandish, a miner employed by Respondent on its day shift. Bandish, who was not scheduled to work the midnight shift, was at the mine to give a section 103(g) complaint, concerning certain meetings, to Swift. Bandish, in his capacity as Chairman of the Local Safety Committee, requested of Conrad to accompany him and Swift on the inspection. Neither Bandish nor Conrad indicated that Bandish presented any specific reason in support of his request. Bandish indicated that he did not know that Conrad was going to be conducting an inspection on the midnight shift, and Conrad indicated that prior to Bandish's request, he had not intended to ask for an additional walkaround. In response to Bandish's request, Conrad indicated that he did not have any problem with the request, and so informed Bandish. In addition Conrad suggested that Bandish in turn check with management. Bandish then made his request of the shift foreman, Phillip Mark Rebottini, who in turn conferred with his supervisor Mine Superintendent Louis Barletta, Jr. Barletta in turn called his supervisor Bill Porter, Respondent's Vice President, who checked with legal counsel. Barletta was advised that Respondent had the right to deny Bandish access, and Barletta so informed Rebottini. According to Rebottini, he was informed by Barletta to deny Bandish the right to accompany the inspector, inasmuch, as the inspector already had a paid walkaround, from the night shift, to accompany him and Bandish was a day shift employee. According to Conrad he met with Rebottini, Steven Wolf, Bandish, and Swift, in the maintenance office, and informed Rebottini that "an extra set of eyes has always been beneficial in the conducting of my inspections," (Tr. 43). He also told them that in the past an additional walkaround has brought matters to his attention. In this connection, Conrad indicated that the belt line was one of the items that had not yet been inspected, and there would be a more thorough examination with him on one side of the belt line, and the additional walkaround (Bandish) on the other side, along with the miner's original walkaround and Respondent's representative. In this connection he said that he believed that Bandish was knowledgeable and had experience as a walkaround. Bandish, in essence, corroborated the testimony of Conrad that the latter said something about "his eyes and everybody eyes" (Tr. 109, sic), and informed Wolf, Swift, and Rebottini that, in essence, with more persons present at an inspection, there is a better chance of observing conditions.

Rebottini indicated, on two occasions in his testimony, that Conrad said that he had the authority to take as many walkarounds as were needed. However, Rebottini indicated specifically that Conrad did not use the word "need," and that he did not say that an extra set of eyes would aid the inspection. He indicated that Conrad did not say anything about needing Bandish, or that having Bandish accompany him would aid the inspection. It is significant to note that Swift, who was present when Conrad allegedly made a statement to the effect that an extra set of eyes would be helpful, did not corroborate Conrad's version. According to Swift, Conrad merely indicated that if Bandish was not allowed as an additional walkaround, he would issue a citation, and that if the Company wanted another walkaround, it was acceptable. Also, although Bandish corroborated Conrad's version and stated, in essence, that, when testifying, he remembered all the items he testified to, he indicated that, in January 1989, he suffered a head injury which affects his memory. Further, it is significant to note that in notes contemporaneous to the events at issue, Conrad indicated, in essence, that in response to Bandish's request, he had "no trouble" with Bandish traveling with him (Government Exhibit 2). There is no reference to an "extra set of eyes" as being helpful, nor is there any statement indicating specifically that Bandish would aid in the inspection. In the same fashion, in a statement signed by Conrad on June 27, 1988, less than 4 weeks after the incidents in question occurred, he indicated that "there was no special reason for Bandish to travel with me as far as I know." (Respondent's Exhibit 1). Further, on cross-examination, Conrad indicated that prior to the time Bandish requested to serve as an additional walkaround he (Conrad) had no intention to have an additional walkaround, and had not determined which areas of the mine to inspect. He indicated that there were several areas to inspect, including the belt line. Although Bandish had experience as a walkaround, and in Conrad's opinion was "knowledgeable," and could have observed conditions on the side of the belt line opposite where Conrad would walk, it is clear that the regular walkaround, Swift, could function in the same manner. Further, it should be noted that Bandish did not know that Conrad was to be at the mine on the midnight shift, and did not express any intention of going to the mine on June 2, to bring any matters to the attention of Conrad concerning any underground conditions. (According to Bandish, his only reason for being on the premises was to present to Swift a 103(g) complaint concerning some meetings). Thus, I conclude that there is not sufficient evidence to support a finding that Conrad, on June 2, 1988, made any determination that Bandish would further aid his inspection.

In order for the Complainant to prevail in his 105(c) action, he must first establish a violation of section 103(f), supra. Similarly, Petitioner's petition for assessment of civil penalty is predicated upon a violation of section 103(f), supra. As

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pertinent, section 103(f), supra provides as follows: ". . . To the extent that the Secretary or an authorized representative of the Secretary determines that more than one representative from each Party would further aid the inspection, he can permit each Party to have an equal number of such additional representatives." Thus, based upon a reading of section 103(f), supra, and giving a plain meaning to its terms, it is clear that Respondent has a duty to allow an additional walkaround (and the Complainant has a right to be the additional walkaround), only if the Inspector "determines" that such additional walkaround "would further aid the inspection." In the instant case as analyzed above, the evidence fails to establish that such a determination was made. Accordingly, it is concluded that Complainant has not established that he has been denied the exercise of any rights under section 103(f), supra, and has not been discriminated against under section 105(c)(1) of the Act. Similarly, inasmuch as there has not been a violation of section 103(f), supra, the petition for assessment of civil penalty herein shall be dismissed and the Respondent's Notice of Contest shall be sustained.

ORDER

1. It is hereby ORDERED that Docket No. PENN 89-43-D be DISMISSED.
2. Docket No. PENN 89-76 be DISMISSED.
3. The Notice of Contest, Docket No. PENN 88-252-R, is SUSTAINED.

Avram Weisberger
Administrative Law Judge