

CCASE:
PEABODY COAL v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

PEABODY COAL COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. KENT 91-340-R
Citation No. 3416696; 4/15/91

Docket No. KENT 91-341-R
Citation No. 3416751; 4/16/91

Docket No. KENT 91-342-R
Citation No. 3416752; 4/17/91

Martwick UG
Mine ID 15-14074

DECISION

Appearances: David R. Joest, Esq., Peabody Coal Company,
Henderson, Kentucky, for the Contestant;
W. F. Taylor, Esq., Office of the Solicitor, U.S.
Department of Labor, Nashville, Tennessee, for the
Respondent.

Before: Judge Melick

These expedited Contest Proceedings were filed by the Peabody Coal Company (Peabody), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to challenge three citations issued by the Secretary of Labor alleging violations of section 103(f) of the Act. (Footnote 1) The citations resulted from Peabody's refusal to pay all

~1303

of the miners' representatives who accompanied separate Mine Safety and Health Administration ("MSHA") inspection teams on regular inspections conducted on March 7, 1991 and March 19, 1991, at its Martwick Underground Mine. There is no dispute that a different miners' representative accompanied each of five separate MSHA inspection teams on March 7, 1991, and a different miners' representative accompanied each of four separate MSHA inspection teams on March 19, 1991, but that Peabody paid walkaround pay to only one such representative on each date. The issue is whether the other miners' representatives are also entitled to walkaround pay.

More particularly the evidence shows that on March 7, 1991, five federal inspectors arrived at Peabody's Martwick Mine to conduct a "regular" inspection mandated by section 103(a) of the Act. This inspection and the one conducted on March 19, 1991, were made during the latter portion of the January through March quarterly inspection period. These areas, Unit Nos. 1 and 4, had not been previously inspected during this inspection period.

The federal inspectors on the March 7 inspection, A. J. Parks (MSHA supervisor), William G. Branson (electrical inspect), Terry Cullen (roof control specialist), Darold Gamblin (Martwick's regular inspector), and Sam Martin, arrived at the mine at approximately 7:10 a.m. At about 7:30 a.m., MSHA supervisor Parks made individual inspection team assignments. The mine records were reviewed by the inspectors and miners' representatives, company representatives, and one state inspector entered the mine. With the exception of Electrical Inspector Branson, who traveled directly to the No. 4 Unit in a separate mantrip with Peabody's electrical supervisor, Robert (Bob) Epley, and miners' representative and electrical repairman, Artemaus Birchwell, the individual inspection teams entered the mine together and traveled to the 4th East panel. Upon arrival at the 4th East panel around 9:00 a.m., the individual inspection teams

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(with the exception noted above) separated to conduct an examination of separate and distinct areas of the No. 4 Unit.

The team members and the inspection responsibilities assigned were as follows: Supervisor Parks, State Inspector James Hawkins and Miners' Representative William D. Johnson, walked and inspected the entire length of the return air course entry of the No. 4 Unit, a distance of approximately 4200 feet. Electrical Inspector Branson, Miners' Representative and Electrical Repairman Birchwell, and Peabody's Electrical Supervisor Epley traveled directly to the No. 4 Unit and conducted an electrical inspection. Inspector Gamblin, Miners' Representative Cecil Phillips and Company Representative Steve Little walked and inspected the full length of the belt entry to the No. 4 Unit, again a distance of approximately 4200 feet. Roof Control Specialist Cullen and Miners' Representative Terry Bowman traveled by mantrip down the track entry to the face area of Unit No. 4 inspecting the roof and faces of the Unit. Inspector Martin and Miners' Representative Sam Sooke walked and inspected the entire 4200 foot intake air course entry.

Upon reaching the No. 4 Unit, the team led by Inspector Martin obtained rock dust samples in seven different locations. Each of the five separate inspection teams started their individual assignments at approximately 9:00 a.m. and reached the No. 4 Unit at about 11:30 a.m. Thereafter, each separate team assisted in completing the inspection of the unit, taking approximately 30 minutes. At noon on March 7, 1991, the separate inspection teams rendezvoused at the end of the track and traveled to the surface together, arriving outside at or near 12:45 p.m., and from this point until 1:30 p.m., the inspectors wrote citations for violations noted while underground. At 1:45 p.m., all members of the separate inspections teams (save Inspector Branson who had already held a close-out conference with Peabody officials and departed the mine at 1:45 p.m.) participated in a close-out conference.

On March 19, 1991, at 7:15 a.m. five federal inspectors arrived at the Martwick Mine to complete the quarterly inspection. Inspection teams were formed and entered the mine at 8:30 a.m. The teams entered the mine together and traveled to the 1st Northwest submain. Upon reaching this submain, at approximately 8:45 a.m., the teams separated and commenced their separate inspection assignments. The team members and the assigned inspection responsibilities were as follows: MSHA Supervisor Parks, Inspector Gamblin, and Miners' Representative Phillips walked and inspected the return air course entry to the No. 1 Unit, a distance of about 3300 feet, arriving on the No. 1 Unit at about 9:30 a.m. Inspector Mike Whitfield and Miners' Representative Bowman walked and inspected the full length of the intake air course entry to the No. 1 Unit, a distance of 3,300 feet. This team arrived on the No. 1 Unit at 9:35 a.m.

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Electrical Inspector Branson, Miners' Representative Birchwell and Peabody Electrical Supervisory Epley traveled separate and apart from the other inspection teams and proceeded directly down the track entry by mantrip to the No. 1 Unit to conduct an electrical inspection in that unit. Inspector Ted Smith, Miners' Representative Sookey, and company Representative Little walked and inspected the belt entry to the No. 1 Unit traveling about 3,300 feet and arriving on the unit at 9:30 a.m.

The teams rendezvoused at the end of the track and thereafter departed the No. 1 Unit at about 12:45 p.m. While on the No. 1 Unit, a ventilation problem was discovered and Miners' Representatives Phillips and Sookey assisted in correcting the problem. Sookey devoted about 30 to 40 minutes in these endeavors.

The teams arrived on the surface at 1:10 p.m. and the federal inspectors wrote citations for the violations noted underground. At 1:30 p.m., a close-out conference was attended by all members of the inspection teams except Inspector Branson, who had conducted a separate close-out conference with Peabody officials and had departed the mine at 1:15 p.m.

It is not disputed that during the course of both of the underground inspections each team operated separate and apart, with no overlapping responsibilities or duplication of inspection efforts. On both dates the teams had distinct inspection assignments unique to that individual team. Physical barriers including stoppings separated the teams during much of the underground portion of the inspection.

All of the miners' representatives who participated in the pre-inspection activities, the inspections on March 7 and 19, and the post-inspection close-out conferences were scheduled to work at the mine at those times. Those unpaid representatives would have received their regular pay except for their participation in the inspection. Because Peabody refused to pay more than one miners' representative on each date Inspector Noffsinger issued the three section 104(a) citations at bar. There is no dispute that those miners listed in these citations were those not paid.

In *Magma Copper Company v. Secretary of Labor*, 645 F.2d 694 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit in affirming a decision of this Commission, held that under section 103(f) of the Act, when an inspection of a mine is conducted by more than one Federal Mine Safety and Health Administration (MSHA) inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners who is an employee of the mine operator may accompany each inspector without loss of pay. The cases at bar fall clearly within the ambit of the Magma decision.

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In reaching this conclusion, I have not disregarded Peabody's argument that the Magma case is inapposite because the inspections in the instant cases occurred within the same mining unit. This distinction is, however, without legal significance. Clearly, the thrust of the Magma decision was that since each inspector was performing a separate and distinct inspection function, it was essential that each be accompanied by a separate representative of miners. It is of no material consequence then, whether the inspectors were performing their unique inspection functions in separate sections of a milling complex, as in the Magma case, or in separate sections of large underground mining units as in these cases, so long as those inspection functions were separate and distinct.

Indeed, while Peabody argues that the inspections on March 7, and 19, 1991, concerned only one "unit" on each respective date, each such "unit" was enormous. Reference to the mine maps makes this quite clear (See Joint Exhibits Nos. 1 and 2). In addition, in these cases the inspection teams were not only functionally separate but, because of stoppings between the entries travelled by the inspection teams, most of the teams were also effectively separated physically.

Under the circumstances, it is clear that Peabody violated the provisions of section 103(f) of the Act in failing to compensate the designated miners' representatives who accompanied an MSHA inspector during the noted inspections.

ORDER

Citation Nos. 3416696, 3416751 and 3416752 are affirmed and the Contests of those citations are dismissed.

Gary Melick
Administrative Law Judge

Footnote starts here-

1. The citations are set forth in the Appendix hereto. Section 103(f) reads as follows:

"Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party

would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

APPENDIX

Citation No. 3416696 charges as follows:

A violation of 103(f) of the 1977 Act has occurred because Sam Sookey has evidence (pay record) that he suffered loss of pay on March 7 and 19 for time spent in the capacity of Miner Representative while traveling with an authorized representative of Secretary of Labor, (MSHA), during inspection.

Citation No. 3416752 charges as follows:

A violation of 103(f) of the 1977 Act has occurred because William D. Johnson (3-7-91) and Artemaus Birchwell (3-7-91 & 3-19-91) has [sic] evidence (pay record) that they suffered loss of pay for time spent in the capacity of Miner Representative while traveling with an authorized representative of Secretary of Labor, (MSHA), during inspection.

Citation No. 3416751 alleges as follows:

A violation of 103(f) of the 1977 Act has occurred because Terry R. Bowman has evidence (pay record) that he suffered loss of pay (3-7-91 & 3-19-91) for time spent in the capacity of Miner Representative while traveling with an authorized representative of Secretary of Labor, (MSHA), during inspection.