

CCASE:  
SOL (MSHA) V. CONSOLIDATION COAL  
DDATE:  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 92-922  
Petitioner : A.C. No. 46-01453-04008  
v. :  
 : Humphrey No. 7 Mine  
CONSOLIDATION COAL COMPANY, :  
Respondent :

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Petitioner;  
Daniel E. Rogers, Esq., Consol, Inc., Pittsburgh,  
Pennsylvania, for Respondent.

Before: Judge Maurer

Statement of the Case

In this case, the Secretary of Labor (Secretary) seeks a  
civil penalty of \$1,000 for an alleged violation of section  
103(f) of the Federal Mine Safety and Health Act of 1977,  
30 U.S.C. 813(f) (Footnote 1) which authorizes designated  
walkaround

1 Section 103(f) states:

"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

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representatives to accompany inspectors during their inspection of the mine.

Inspector Thomas W. May issued to the respondent section 104(a) Citation No. 3108715 which charges the following:

The operator did not give the representative, authorized by the miners, the opportunity to accompany an authorized representative of the Secretary. On day shift and afternoon shift on 01-13-92, the miner representative was not permitted to accompany me on my physical inspection of the Northwest bleeder system. On day shift John Higgins, General Superintendent, would not permit Sam Woody, the miner representative the opportunity to accompany me into the bleeder system. On afternoon shift Ron Weaver, Superintendent, would not permit Richard Matthews, the miner representative the opportunity to accompany me into the bleeder system. On afternoon shift I was accompanied by Rick Pauley, representative of the operator.

Pursuant to notice, a hearing was held on the alleged violation in Morgantown, West Virginia, on December 17, 1992. Both parties have filed posthearing letter-briefs, which I have duly considered in making the following decision.

#### Stipulations

The parties stipulated to the following, which I accepted (Tr. 7-9):

1. Consolidation Coal Company is the owner and operator of the coal mine at which the citation in this proceeding was issued.
2. Operations of Consolidation Coal are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. This case is under the jurisdiction of the Federal Mine Safety and Health Review Commission and

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1(...continued)

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."

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its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act.

4. The individual whose signature appears in block 22 of the citation at issue in this case was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.

5. True copies of the citation at issue in this case were served on the Respondent or its agent as required by the Mine Act.

6. The total proposed penalty for the citation contested by Consolidation Coal Company in this case will not affect the Respondent's ability to continue in business.

7. For the purposes of assessing any penalty that may be assessed in this case, Consolidation Coal Company is a large coal mine operator with an average history of violations.

8. The citation contained in Exhibit A attached to the Secretary's petition is an authentic copy of the citation at issue in this case with all appropriate modifications for abatements.

#### Discussion

On the morning of January 13, 1992, Inspector May informed Mr. Robert Smith, who works in Consolidation's Safety Department and Mr. Sam Woody, the miner's representative, that he was going to go back into the northwest bleeder system to inspect the Brock Four Bleeder Fan. He also informed them both at this time that they had the right to travel with him or not, as they chose.

This area had not been inspected for 8 months because the company had requested and been given a waiver to examine that area with the proviso that they take their air and gas readings on the surface. Prior to the issuance of this waiver, the area had been the subject of a weekly examination.

Mr. Woody was willing to go, but Mr. Higgins, the general superintendent, told Inspector May that the company representative and the miner's representative, Sam Woody would not be traveling with him to the fan. He told the inspector that he could go anywhere in the mine he wanted to, but that he (Higgins) was not going to permit company employees to go back there. Higgins felt that the area was too dangerous; it had not been inspected in 8 months and he was not going to allow company

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personnel to go into that area. He informed the inspector that his men would stop at the six northwest cut-through.

Inspector May testified that he then told Mr. Higgins that under the Mine Act, the miner's representative had the right to travel with him and assist him in his inspection. Higgins again stated that the miner's representative, in this situation, Sam Woody, was a company employee and his responsibility if he were to get injured. He reiterated that he was not going to permit it.

Subsequently, Inspector May, accompanied by Smith and Woody arrived at the man door at the six northwest cut-through. Inspector May proceeded into the bleeder system alone. Smith and Woody remained on the outby side of the man door at the cut-through. Inspector May remained in the bleeder system for approximately an hour. As a result of his inspection, he issued a section 107(a) order because of methane concentrations. That order is not the subject of this proceeding, but I understand it was later vacated as part of a settlement negotiation.

There was a second inspection of the area that day by Inspector May, to terminate the order. He arrived at the mine about 8:30 p.m. At this time John Webber was the Safety Department representative and Richard Matthews the miner's representative. On this occasion, Mr. Ron Weaver, the superintendent of the Bowers Portal stopped him and informed him that Webber and Matthews would not be going into that area with him, but that a shift foreman, Rick Pauley would travel with him back to the bleeder. Inspector May advised Weaver of the right of the miner's representative under the Act to travel with the inspector and assist in the inspection. Weaver repeated that Matthews would not be going with him, and he didn't. The inspector, accompanied by Foreman Pauley carried out the termination inspection, leaving Webber and Matthews behind at the man door at the six northwest cut-through.

In this case, respondent maintains that it was their corporate duty to protect their employees from potential harm and that they did have a reasonable basis for considering going back into that bleeder system to be too dangerous.

Upon reflection, I am not going to get into the issue of whether or not it was too dangerous or dangerous at all for that matter to inspect the northwest bleeder system as Inspector May insisted on doing on the day in question. The Commission has emphasized repeatedly that the walkaround rights granted miners' representatives by section 103(f) of the Mine Act are a vitally important statutory right granted to miners and their representatives by the Act. And I can find no authority, nor has respondent been able to cite me any, for the proposition that the opportunity to engage in walkaround can be restricted by the

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operator based on potential danger to the employee/miner's representative. Accordingly, I am going to affirm the citation at bar.

#### Civil Penalty Assessment

Taking into consideration all of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment of \$1000 for the violation in question is reasonable, and it will be so ordered.

#### ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation No. 3108715 IS AFFIRMED.

2. Respondent, Consolidation Coal Company shall within 30 days of the date of this decision pay the sum of \$1,000 as a civil penalty for the violation found herein.

Roy J. Maurer  
Administrative Law Judge

#### Distribution:

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