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THUNDER COAL V. SOL (MSHA)  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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THUNDER BASIN COAL COMPANY, : CONTEST PROCEEDING  
Contestant :  
 : Docket No. WEST 94-238-R  
 : Citation No. 3589040; 2/22/94  
v. :  
 :  
SECRETARY OF LABOR, MINE :  
SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Black Thunder Mine  
Respondent :

DECISION FOLLOWING REMAND

Procedural History

On May 11, 1994, I granted summary decision in favor of the Secretary of Labor in this case, affirming citation 3589040 and order 3589101, despite the fact that the Secretary contended that this matter was not ripe for summary decision for either party, Thunder Basin Coal Company, 16 FMSHRC 1070. The citation and order were issued to Thunder Basin Coal Company alleging a violation of 30 C.F.R. 40.4 for its refusal to post a form designating Dallas Wolf and Robert Butero, employees of the United Mine Workers of America (UMWA), as walkaround representatives for eight employees at Thunder Basin's non-union mine . Both parties filed a petition for review with the Commission.

On June 27, 1994, the Commission remanded the instant matter to the undersigned for appropriate proceedings. The Commission noted the Secretary's assertions that he had been deprived of an opportunity to present his legal position to the judge and that certain material factual findings are not supported by substantial evidence. The Commission order states, "[w]e intimate no view regarding the judge's legal conclusions in this matter." 16 FMSHRC 1239.

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FOOTNOTE 1

Dallas Wolf was at the time of the designation the principal UMWA organizer in the Powder River Basin of Wyoming, and Mr. Butero is a UMWA safety and health representative operating out of Trinidad, Colorado (Contestant's Exhibit 15 at pages 27-28, Secretary's Exhibit 18 at page 269). The principal function of a miners' walkaround representative is to accompany MSHA personnel during their inspections of operators' worksites.

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On July 14, 1994, the parties filed a Joint Procedural Stipulation agreeing that no further evidentiary hearing was necessary. The parties agreed to file briefs based on the existing record created with respect to Contestant's Application for Temporary Relief and its Motion for Summary Decision, and the Secretary's opposition to both.

The Commission's decision in Kerr-McGee controls the disposition of the instant case and requires the affirmation of citation 3589040.

In Kerr-McGee Coal Corporation, 15 FMSHRC 352 (March 1993), appeal pending, D. C. Cir. No. 93-1250, the Commission held that it is the conduct of a miners' representative during an inspection, rather than the motivation of such person in becoming a walkaround representative, that must be examined to determine whether there has been an abuse of the Mine Safety and Health Act's walkaround provisions, 15 FMSHRC at 361.

The Commission also held that the Secretary is not required to integrate National Labor Relations Act concepts into his regulations implementing the walkaround provisions of the Mine Act, 15 FMSHRC at 362. Thus, the fact that the miners' representatives in this case are employees of a union not authorized to represent Contestant's employees under the NLRA, is irrelevant to the disposition of this case.

In Kerr-McGee, the Commission also addressed evidence of the sort that Thunder Basin contends distinguishes this case from Kerr-McGee. After its evidentiary hearing Kerr-McGee moved the trial judge to reopen the record to receive newly discovered evidence. Included in the evidence proffered was "a series of internal UMWA memoranda to and from [Dallas] Wolf, which it asserted, revealed that Wolf had been designated as a walkaround representative in order to facilitate ongoing UMWA organizing activities.", 15 FMSHRC at 355. The judge denied the motion to reopen, finding that the documents merely revealed that union organizing was taking place and that this was established and undisputed at trial.

The Commission's decision in affirming the trial judge's denial of the motion to reopen the record in Kerr-McGee implies that the Commission also did not consider documents indicating that the walkaround designation was motivated by UMWA organizing activities to be material. Therefore, I conclude all the documentation offered to establish the same conclusion in this case is irrelevant to its disposition.

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FOOTNOTE 2

The factual findings at pages 3-5 of my May 11, 1994 Summary Decision are hereby incorporated by reference.



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