FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 24, 2000

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 2000-110-R
	:	Citation No. 7143392; 8/28/2000
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Loveridge No. 22
	:	Mine ID 46-01433
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA) Intervenor	:	

DECISION

Appearances: Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant;
Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, the Respondent;
Claudia Davidson, Esq., Healey Davidson & Hornack, P.C., Pittsburgh, Pennsylvania; Judith Rivlin, Esq., United Mine Workers of America, Fairfax, Virginia, (on the brief), for the Intervenor.

Before: Judge Feldman

This proceeding concerns a Notice of Contest filed by Consolidation Coal Company (Consol) that challenges 104(a) Citation No. 7143392 issued on August 28, 2000, at Consol's Loveridge No. 22 Mine. The Loveridge Mine had been sealed following a fire and explosion that occurred in June 1999. Consol began its efforts to re-enter the mine in July 2000 in accordance with a Mine Safety and Health Administration (MSHA) re-entry plan approved by the Secretary under section 103(k) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 813(k).[1]

[1] Section 103(k) requires an operator to obtain the Secretary's approval of any recovery plan concerning re-entry into a mine following an accident such as a fire or explosion. It also authorizes the Secretary to issue any orders she deems necessary to insure the safety of those re-entering the mine.

Citation No. 7143392 alleges a violation of the paid walkaround rights conferred on miners' representatives by section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 813(f).[2] The central issue in this matter is the circumstances under which Consol has a statutory duty, pursuant to the provisions of section 103(f) of the Mine Act, to pay a union representative to accompany an MSHA inspector who is monitoring the underground recovery activities of MSHA personnel from a communications center located on the surface of mine property. As a general proposition, as discussed below, section 103(f) walkaround rights apply when MSHA is engaged in investigative or inspection activities conducted pursuant to section 103(a) of the Mine Act. 30 U.S.C. § 813(a). The United Mine Workers of America (UMWA) has intervened in this proceeding.

The expedited hearing in this contest matter was conducted on September 19, 2000, in Fairmont, West Virginia. At the hearing, the Secretary and Consol proffered a written Motion for the Approval of Settlement that is opposed by the UMWA. A ruling on the settlement motion was held in abeyance pending briefs in support of the settlement motion by the Secretary and Consol, and the UMWA's written opposition. The parties filed their post-hearing briefs and opposition on October 18, 2000.

Background

As noted above, the Loveridge Mine was sealed in June 1999 following an underground fire and explosion. The mine remained sealed until July 2000 to allow the fire to burn out at which time Consol personnel re-entered the mine to determine if it was safe to resume operations. Entry into the mine was undertaken by mine rescue teams to determine if re-entry was safe. The mine rescue teams consisted of MSHA and Consol personnel who carried self-contained breathing apparatus (SCBA). Because the mine had been sealed for more than one year, rehabilitation work such as pumping water, and installation of electrical cables and ventilation controls was required before the site of the fire and explosion located deep inside the mine could be reached. Initial entry into the mine in July 2000 began approximately eight miles away from the site of the fire and explosion.

A communications center was established on the surface of the mine at the Sugar Run Portal. The communications center is located in one room containing desks, a storage cabinet and a table. The room contains one outside telephone line. In addition, there are three mine phones that are connected to a cable used to communicate within mine property on the surface and underground. These three phones cannot be used to communicate with off-site locations. The room contains a mine ventilation map and a mine re-entry map. There are no sampling, analysis or barometric devices in the room. The communications center was established as a central location for Consol, MSHA, West Virginia Department of Mines, and Union officials, to monitor

[2] The terms miners' representative, Union official, and Union representative refer to Consol employees who act as walkaround representatives. These terms are used interchangeably in this decision.

and record underground activities. Generally speaking, Union officials do not accompany mine rescue teams underground during their initial advancement through the accident site because conditions are unknown and potentially hazardous. Union officials had been present in the communications center when underground activities were monitored, however, they were not receiving walkaround pay from Consol.

On August 7, 2000, after re-entry efforts had begun, MSHA District Manager Timothy Thompson responded to the July 28, 2000, inquiry of Joseph Main, the UMWA's Occupational Health and Safety Administrator, concerning MSHA's interpretation of the applicability of the no loss of pay (walkaround pay) provisions of section 103(f) to the re-entry activity at the Loveridge Mine. (Gov. Ex. 3). Thompson noted recovery of the mine included initial re-entry as well as "subsequent phases of accident investigation, inspection, and rehabilitation work." *Id.*

Thompson characterized the re-entry activities at the mine as "initial exploration . . . to re-establish proper ventilation and to ensure that the mine is safe for further recovery work." *Id.* Since the re-entry activities were taking place pursuant to the re-entry plan submitted by Consol under section 103(k) of the Mine Act, Thompson opined that MSHA's activities during the re-entry phase "are not related to inspection activity under section 103(a)." *Id.* Although Thompson noted enforcement action during this phase is possible, he explained that such enforcement action was "highly unlikely." *Id.* Rather, Thompson opined that MSHA was serving as a "first-person" observer who was present to lend technical support during rehabilitation activities such as installation of electrical cables to re-establish power, track installation, water pumping and installation of ventilation controls. *Id.*

Thompson further explained that once the mine was rehabilitated, MSHA would conduct inspections and an investigation of the accident pursuant to section 103(a). *Id.* Finally, Thompson stated that, consistent with prior MSHA applications of section 103(f) to mine recovery efforts, post-rehabilitation inspections and investigations would give rise to the no loss of pay walkaround provisions of section 103(f). *Id.*

The rescue teams initially arrived at the site of the fire and explosion on August 25, 2000. Shortly thereafter, on August 28, 2000, MSHA supervisor Paul Mitchell arrived at the Loveridge Mine to monitor activities from the communications center. Mitchell notified Consol that he was there as part of an accident investigation and that a miners' representative was entitled to accompany him during his inspection. Consol disagreed that Mitchell was conducting a "physical inspection" of the mine as contemplated by section 103(f), and it refused to provide a paid miners' representative to accompany him. As a result of Consol's refusal to provide a paid Union official to accompany Mitchell in the communications center, MSHA issued the subject Citation No. 7143392 alleging a violation of section 103(f) of the Mine Act. The violation, which

was characterized as non-significant and substantial (non-S&S),[3] was attributed to Consol's moderate degree of negligence.

The Settlement Agreement

At the hearing, after extensive off-the-record negotiations between the parties, the Secretary and Consol reached an agreement concerning the applicability of section 103(f) to the recovery activities at the Loveridge Mine. Consequently, the Secretary and Consol proffered a formal Motion to Approve Settlement at the hearing. Under the proposed settlement, Consol proposes to withdraw its contest of Citation No. 7143392, and, it has agreed to pay a civil penalty of $55.00. In return, the Secretary moves to modify Citation No. 7143392 to reflect that Consol's negligence was "low" because it had a good faith belief that section 103(f) did not require it to pay a Union representative who was accompanying an MSHA inspector who was monitoring underground activities from the surface. The settlement terms also note Consol's immediate and good faith abatement of the citation.

The settlement agreement also sets forth a statement of understanding concerning MSHA's application of section 103(f) during the recovery activities at the Loveridge Mine. Pursuant to the their motion, Consol stipulates that when MSHA is engaged in activities related to the investigation of the fire and explosion, and, a paid Union representative is not accompanying MSHA personnel underground, Consol will pay a Union representative to accompany MSHA personnel who are monitoring activities from the surface. The motion further sets forth that, when paid Union officials are with MSHA personnel underground at all locations where MSHA is conducting accident investigation activities, Consol is not required to provide a paid walkaround on the surface in the communications center.

At the hearing, the UMWA objected to the proposed settlement asserting that the settlement agreement is overly broad because it does not distinguish section 103(a) inspection and accident investigation activities from section 103(k) technical support activities related to MSHA's general re-entry oversight authority. In addition, the UMWA asserts that section 103(f) requires Consol to pay a Union representative who is present in the communications center during MSHA monitoring regardless of whether underground MSHA personnel are accompanied by paid walkarounds.

[3] A violation is properly characterized as non-S&S if it is not reasonably likely that the hazard contributed to by the violation will result in an event that causes illness or injury of a reasonably serious nature. *U.S. Steel Mining, Inc.*, 7 FMSHRC 1125, 1129 (August 1995).

Discussion and Evaluation

The UMWA has intervened in this proceeding as a matter of right pursuant to Commission Rule 4(b). 29 C.F.R. § 2700.4(b). Having intervened, Commission Rule 4(a) confers party status on the UMWA. 29 C.F.R. § 2700.4(a). This case presents the unusual threshold question concerning whether an Administrative Law Judge has the authority under Commission Rule 31 to approve a settlement motion over the objections of an intervening party. 29 C.F.R. § 2700.31.

In this contest proceeding brought by Consol against the Secretary, Consol and the Secretary are indispensable parties.[4] The UMWA is an interested party with standing.[5] While a settlement agreement between an indispensable party and an interested party cannot be approved over the objection of the other indispensable party, it is clear that a settlement agreement between indispensable parties can be approved over the objection of an interested party. Thus, the UMWA's opposition does not preclude the grant of the settlement motion under Commission Rule 31.

Resolution of whether the settlement proposal should be approved must be based on whether the terms of the agreement result in a reasonable interpretation and application of the no loss of pay provisions of section 103(f) of the Mine Act. In making this determination, it is helpful to examine the legislative history of section 103(f), as well as its language.

The walkaround rights provisions of section 103(h) of the Federal Coal Mine Health and Safety Act of 1969 (the 1969 Mine Act) established the right of a miners' representative to accompany an MSHA inspector during "any inspection" without requiring the mine operator to pay the miners' representative for the time spent accompanying the MSHA inspector. 30 U.S.C. § 813(h) (1976). Thus, while the 1969 Mine Act provided a broad right for miners' representatives to accompany MSHA inspectors, there was no corresponding responsibility of the mine operator to pay the walkaround representative.

[4] An indispensable party is defined as, "[a] party who, having interests that would inevitably be affected by the court's judgment, must be included in the case. If such a party is not included, the case must be dismissed. Fed. R. Civ. P. 19(b). Cf. *necessary party*." *Black's Law Dictionary* 1144 (7th ed. 1999).

[5] An interested party is defined as, "[a] party who has a recognizable stake (and therefore standing) in a matter. *Black's Law Dictionary* 1144 (7th ed. 1999).

Section 103(f) of the 1977 Mine Act changed significantly the language of section 103(h) of the 1969 Mine Act by adding the right to no loss in pay, with express limitations, to the right to accompany. Specifically, section 103(f) provides:

> 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 provision 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. (Emphasis added).

While, unlike the 1969 Act, the 1977 Act provides for both the right to accompany and the right to pay, the broad "any inspection" language in the 1969 Act was changed to "physical inspection . . . made pursuant to the provisions of subsection (a)." Thus, the right to pay under Section 103(f) is contingent upon MSHA's activities being conducted "pursuant to the provisions of subsection (a)." Subsection (a) of section 103 authorizes the Secretary to conduct "inspections" and "investigations" for the following purposes:

> (1) Obtaining information concerning health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments;
>
> (2) Gathering information with respect to mandatory health or safety standards;

(3) Determining whether an imminent danger exists; and

(4) Determining whether there has been compliance with mandatory health and safety standards or with citations, orders, or decisions issued under the 1977 Mine Act.

The D.C. Circuit Court of Appeals has determined that the phrase "physical inspection . . . made pursuant to the provisions of subsection (a)" should be broadly construed to include all inspections pursuant to Section 103(a), not just regular quarterly inspections. *United Mine Workers of America v. FMSHRC*, 671 F.2d 615, 623-27 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 927 (1982). However, the extent to which miners' representatives have a right to receive pay under section 103(f) is not unlimited. For example, section 103(f) limits the right to receive pay to only one miners' representative per inspection party, and only for 103(a) activities.

Here, the settlement terms reflect that the no loss of pay provisions of section 103(f) will not apply to rehabilitation activities in areas unrelated to the accident site that are being observed by MSHA pursuant to its oversight authority under section 103(k). Such activities include pumping water, installing electrical cables, track repair and re-establishing ventilation controls.

Consistent with their agreement, Consol has assured the Secretary that, during the re-entry efforts at the Loveridge Mine, it will either pay miners' representatives who accompany fire and rescue teams at the underground accident site, or, it will pay a miners' representative to be present in the communications center, but not both. Thus, when Union representatives elect not to "physically" accompany rescue teams at a location in proximity to the accident site because it is too dangerous, Consol has agreed to pay a Union representative to accompany MSHA personnel in the communications center. In view of Consol's limited agreement to pay Union officials on the surface during monitoring by MSHA, the question of whether MSHA's monitoring from the mine's surface constitutes a "physical inspection" as contemplated by section 103(f) need not be addressed.

The UMWA objects to the settlement agreement on the grounds that it is overly broad. In this regard, the UMWA asserts miners "remain uncertain about when they would have a right to a 103(f) representative under the terms of the proposed agreement." (*Brief in Opp.*, p.6). Obviously, the parties settlement agreement cannot anticipate or address the myriad of circumstances that may occur in the future that may raise walkaround issues. However, while the provisions of section 103(f) should be broadly construed, the UMWA does not have an unlimited right to paid walkarounds.

As noted above, disposition of the settlement motion must be based on whether the settlement terms constitute a reasonable interpretation and application of the provisions of section 103(f). The settlement terms recognize that section 103(a) inspection and investigation activities give rise to paid walkaround rights. Moreover, ensuring no loss of pay either to Union

walkarounds underground, or to a Union representative monitoring on the surface when paid walkarounds are not underground, is consistent with the language of section 103(f) that "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 [section 103(f)]."[6]

Thus, as a general matter, it is apparent that the subject agreement is consistent with the plain meaning of the statutory language that limits paid walkarounds to section 103(a) related MSHA activities. More specifically, with respect to any ambiguity that may exist concerning the Secretary's position that MSHA's section 103(k) actions do not constitute section 103(a) activities giving rise to section 103(f) walkaround rights, the Secretary's interpretation that no enforcement or investigative activities are occurring under the color of section 103(k) is reasonable, and is entitled to deference. *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). Consequently, the UMWA, as an intervenor in this matter under Commission Rule 4, has failed to provide a basis for denial of the joint settlement motion.

In the future, if the Union believes its rights under section 103(f) are being denied, it can exercise its rights under section 103(g).[7] However, in the final analysis, MSHA must determine whether the facts warrant citing Consol for a section 103(f) violation. The Secretary has expressed her hope that the need for future 103(g) complaints will be eliminated as a result of the settlement reached in this matter. (*Sec.'s Mem.*, p.7). While Union representatives should be encouraged to confer with MSHA if legitimate questions arise, I am confident that the provisions of section 103(g) will not be abused.

As a final note, I am sensitive to the UMWA's desire, as expressed at the hearing and in its opposition, to achieve the broadest possible participation of miners in health and safety matters. (*See, e.g., Brief in Opposition*, p.14). However, the Union's goal of maximizing miner participation does not alter the fact that the Mine Act does not always require a mine operator to pay a walkaround who wishes to accompany MSHA personnel. At the hearing Consol conceded that a Union representative may accompany MSHA inspectors who are in the communications center on an unpaid basis at any time. Unfortunately, miners may be discouraged from participating in walkaround activities not covered by the pay provisions of section 103(f).

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[6] It should be noted that section 103(f) has been interpreted to mean that the mine operator is obligated to pay more than one miners' representative when there are multiple MSHA inspections occurring simultaneously at different underground locations. However, only one representative per inspection party is covered by the provisions of section 103(f). *Magma Copper Company*, 1 FMSHRC 1948, 1951-52 (December 1979), *aff'd Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 475 (1981).

[7] Section 103(g) of the Mine Act authorizes a miners' representative to request an immediate MSHA inspection whenever such representative has "reasonable grounds to believe that a violation of [the] Act . . ." has occurred. 30 U.S.C. § 813(g).

Under such circumstances, perhaps the Union should consider alternative sources of funding.

ORDER

In view of the above the joint motion to approve the settlement in this matter between the Secretary of Labor and Consolidation Coal Company **IS GRANTED**. Consistent with the parties agreement, **IT IS ORDERED** that 104(a) Citation No. 7143392 **IS AFFIRMED** as modified to reflect the degree of negligence associated with the cited violation is low. **IT IS FURTHER ORDERED** that Consolidation Coal Company shall pay a civil penalty of $55.00 in satisfaction of Citation No. 7143392. **ACCORDINGLY**, the contest proceeding in Docket No. WEVA 2000-110-R **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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