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MSHA V. HELEN MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 21, 1979

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION

v. Docket No. PITT 79-11-P

THE HELEN MINING COMPANY

DECISION

The question here is whether a mine operator must pay a miners' representative for the time he spends accompanying a mine inspector during a "spot" inspection required by section 103(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. ["the 1977 Act" or "the Act"]. Administrative Law Judge Merlin answered that question in the negative. We affirm.

I.

On April 3, 1978, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) began a lengthy inspection of the entirety of an underground mine operated by Helen Mining. The inspection was completed almost three months later, on June 27, 1978. This type of inspection, which is commonly called a "regular inspection" or "regular entire mine inspection", is required to be made at least four times a year by the third sentence of section 103(a) of the 1977 Act. 1/

On April 6, 1978, the inspector interrupted the regular inspection to conduct a spot inspection required by section 103(i). That section requires the Secretary of Labor to conduct at least one "spot" inspection during every five working days at irregular intervals of every mine that liberates excessive quantities of

methane. This was such a mine. The inspector concentrated his efforts on areas where methane could accumulate, and attempted to determine the amount of ventilation in those areas. He tested for methane concentrations with a methanometer and for air velocity with an anemometer; these are generally the only tests made during a spot gas inspection.

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1/ Section 103(a) of the 1977 Act is reproduced at pages 2-3, infra.

Before the spot inspection began, the inspector notified Helen Mining officials and representatives of the miners of his intention to interrupt the regular inspection to conduct a spot inspection. Helen Mining's safety director told the miners' representative, Mr. McAfoos, that he would not be paid for the time he spent accompanying the inspector on the spot inspection. Mr. McAfoos decided to accompany the inspector anyway because he thought that his union would compensate him. The spot inspection consumed about five hours; Mr. McAfoos, a mechanic, left after three hours to assist in the repair of a continuous mining machine.

Helen Mining did not include payment in Mr. McAfoos' next pay check for the three hours he spent accompanying the inspector. When the inspector learned of this from Mr. McAfoos, he issued a citation under section 104(a) alleging a violation of section 103(f). When Helen Mining again declined to compensate Mr. McAfoos, the inspector issued a withdrawal order under section 104(b) for failure to abate; the withdrawal order did not require the withdrawal of miners from mining operations, however. The Secretary later sought from the Commission the assessment of a penalty against Helen Mining for its alleged violation of section 103(f), and a hearing was held before Administrative Law Judge Merlin. Helen Mining argued to Judge Merlin that because section 103(f) required "walkaround pay" only for inspections made pursuant to section 103(a), and the spot inspection here was made under section 103(i), it was not required to pay Mr. McAfoos. The Judge concurred in this view; he held that no violation had occurred and he therefore did not assess a penalty. The Secretary filed a petition for discretionary review, which the Commission granted on April 11, 1979. On July 31, 1979, we heard oral argument.

The first and third sentences of section 103(f) of the 1977 Act read as follows:

> [1] 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...mine made pursuant to the provisions of subsection (a) [of section 103]. ...
> [3] 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. [Sentence numbers and emphasis added.]

Section 103(a) reads in part as follows:

> [1] Authorized representatives of the Secretary ... shall make frequent inspections and investigations in ... mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of

> accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. [Second sentence omitted.] ... [3] In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground ... mine in its entirety at least four times a year, and of each surface ... mine in its entirety at least two times a year. [4] The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. [5] For the purpose of making any inspection or investigation under this Act, the Secretary, or any authorized representative of the Secretary, ... shall have a right of entry to, upon, or through any...mine. [Sentence numbers added.]

Before Judge Merlin, the Secretary relied upon an MSHA interpretative bulletin, 43 Fed. Reg. 17546 (1978), to argue that the spot inspection here was made pursuant to section 103(a) because it was made for purposes stated in the first sentence of section 103(a)--to determine whether imminent dangers or violations existed. The Judge, however, concluded that if this view were adopted, all inspections would be inspections under section 103(a) and that the phrase "pursuant to the provisions of [section 103(a)]" in the first sentence of section 103(f) would be rendered meaningless. He held that the MSHA interpretative bulletin was not binding upon him, 2/ and he further found that the Secretary's position was contrary to a clear statement on this point in the legislative history of section 103(f).

II.

We examine at the outset the Secretary's objection that Judge Merlin failed to accord "proper deference" to MSHA's interpretative bulletin. The Secretary relies primarily on Certified Color Manufacturers Ass'n v. Mathews, 543 F.2d 284, 294 (D.C. Cir. 1974), where the court stated that "review is guided by the considerable deference traditionally owed the interpretation of a statute by the head of the agency charged with its administration", and NYS Department of Social Services v. Dublino, 413 U.S. 405 (1973), where

the Supreme Court observed that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong...." Id. at 421, quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381.(1969); and Dandridge v. Williams, 397 U.S. 471, 481-482 (1970).

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2/ The Judge cited Bituminous Coal Operators Ass'n v. Marshall, 82 F.R.D. 350, 353 (D.D.C. 1979), appeal docketed, No. 79-1279 (D.C. Cir., March 13, 1979).

The difficulties with the Secretary's argument are that it ignores the language and structure of the 1977 Act, that it fails to recognize the proper roles of the Commission and the Secretary, and that it would, if adopted, frustrate the purposes for which Congress established the Commission as a wholly independent agency. Under the Secretary's view, the Commission could not study a problem afresh and make an independent judgment on matters of law and policy. Its task would be little more than to find the facts, accord considerable deference to the Secretary's position, and determine whether there are compelling indications that his construction of the 1977 Act is wrong. Congress, however, invested the Commission with the authority to decide questions of both law and policy (sections 113(d)(2)(A)(ii) and (d)(2)(B)), and it intended that the Commission do so independently.

The Senate committee that drafted the bill from which the 1977 Act was largely derived, S. 717, 95th Cong., 1st Sess. (1977), considered several alternatives to the establishment of an independent Commission. It considered and rejected the arrangement under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 (1976)(amended 1977) ["the 1969 Act"], in which adjudication as well as prosecution, investigation, and standards-making were all placed in the hands of the Secretary of the Interior. Although the Secretary of the Interior had delegated his adjudication responsibilities under the 1969 Act to the Office of Hearings and Appeals and the Board of Mine Operations Appeals, the Board nevertheless was not independent of the Secretary of the Interior. 3/

The Senate committee followed instead the example that Congress had set under the Occupational Safety and Health Act of 1970, 29 U.S.C. $651 et seq. That statute established the Occupational Safety and Health Review Commission, which has been recognized as an independent

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3/ For example, the Board held that it was not free to apply its own precedent in the face of a Secretarial Order expressing a contrary view. Republic Steel Corp., 5 IBMA 306, 309-311, 1975-76 OSHD %20,233 (1975) ("policy of the Department, as established by the Acting Secretary"), rev'd on other grounds, 581 F.2d 868 (D.C. Cir. 1978), withdrawal order aff'd on remand, 1 FMSHRC 5, 1 BNA MSHC 2002, 1979 OSHD %23,455 (1979), pet. for rev. filed, No. 79-1491 (D.C. Cir., May 11, 1979); Cowin & Co., 6 IBMA 351, 365, 1976-77 OSHD %21,171 (1976), remanded on other grounds, No. 76-1980 (D.C. Cir., May 26, 1978), withdrawal order aff'd, 1 FMSHRC 20, 1 MSHC 2010, 1979 OSHD %23,456 (1979). When the Board decided a group of major cases against

the Mining Enforcement and Safety Administration, the Secretary of the Interior stayed the Board's decisions and proceedings under the "supervisory powers" he reserved to "render the final decision [in any case]." 43 CFR $4.5 (1977); Secretarial Order of January 19, 1977, staying effect of Eastern Associated Coal Corp., 7 IBMA 133, 1976-77 OSHD %21,373 (1976)(on reconsideration en banc), and staying proceedings in nine other cases.

agency with a law- and policy-making role. See, e.g., Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1262, 1266-1267 (4th Cir. 1974). The Senate committee bill thus established this Commission under the 1977 Act as an independent agency with an express policy role. 4/ Senator Williams, the chief architect of the Senate bill, confirmed the important role of the new Commission, when, while introducing the Senate bill, he stated to the Senate that under the bill "[t]he procedure for determining operator responsibility and liability is assigned to a truly independent... Commission.... 1977 Legis. Hist. at 89. 5/

The cases cited by the Secretary are inapposite. They deal with the deference that federal courts often accord to those administrative agency heads who alone have been entrusted by Congress with all administrative and policy functions under a statute. The Commission, however, is not entirely in the position of a court and the Secretary is not in the position of most agency heads. Inasmuch as the 1977 Act divides administrative and policy responsibilities between the Commission and the Secretary, neither has exclusive expertise in the subject matter covered by the 1977 Act. See our decision in Old Ben Coal Company, No. VINC 79-119 (October 29, 1979)(slip op. at 5).

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4/ See S. Rep. 95-181, 95th Cong., 1st Sess., at 47 (1977)[S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 653 (1978)["1977 Legis. Hist."].

5/ We also note Senator Williams' statement during our confirmation hearings as indicative of the Commission's intended role. Senator Williams stated:

* * *

> One of the essential reforms of the mine safety program is the creation of an independent Federal Mine Safety and Health Review Commission charged with the responsibility for assessing civil penalties for violations of safety or health standards, for reviewing the enforcement activities of the Secretary of Labor, and for protecting miners against unlawful discrimination.
>
> It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their

responsibilities under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to protect our Nation's miners and to improve productivity in a safe and healthful working environment.

* * *

Nomination Hearing, Members of Federal Mine Safety and Health Review Commission, Before the Senate Committee on Human Resources, 95th Cong., 2d Sess., l (1978).

Our position is buttressed by the conclusion reached by the Fourth Circuit when it examined the similar relationship between the Occupational Safety and Health Review Commission and the Secretary of Labor. In Gilles & Cotting, supra at 5, the court rejected an attempt by the Secretary to reduce that Commission to "little more than a specialized jury, an agency charged only with fact finding." It found that that Commission "was designed to have a policy role and its discretion therefore includes some questions of law." 504 F.2d at 1262. The Occupational Safety and Health Review Commission has itself adopted a similar view of its role under OSHA. United States Steel Corp., 5 BNA OSHC 1289, 1294-1295, 1977-78 OSHD %21,795 (1977).

Finally, the Secretary relies upon the legislative history of the 1977 Act for support for his position. Although that history states that the Commission is to accord weight to the Secretary's views, it does not support the more far-reaching result that he seeks here. The Senate committee report states only that because the Secretary "is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. at 49; 1977 Legis. Hist. at 637. The most apposite and well reasoned precedent does not require the Commission to accord to the Secretary's view of the statute the degree of deference he claims here, however. Moreover, the Senate committee did hot state that the Secretary's views are entitled to "considerable deference" or are to be controlling unless there are compelling indications that they are wrong. The Senate committee stated only that "weight" is owed. The Secretary's broader reading is inconsistent with the Senate committee's and Congress' intention that the Commission be truly independent of the Secretary and with the policy role that the 1977 Act entrusted to the Commission.

In accordance with this expression of congressional intent, we will accord special weight to the Secretary's view of the 1977 Act and the standards and regulations he adopts under them. His views will not be treated like those of any other party, but will be treated with extra attention and respect. Although this weight may vary with the question before the Commission, especially where the Secretary has gained some special practical knowledge or experience through his inspection, investigation, prosecution, or standards-making activities, it will not rise to the inappropriate level the Secretary has sought here. The issue in this case is one of statutory interpretation. Resolution of such questions is a primary role of the Commission. With this in mind, we now turn to the merits of this

case.

III.

The starting point of our discussion of this matter of first impression is the language of the statute. Southeastern Community College v. Davis, 99 S.Ct. 2361, 60 L.Ed. 2d 980, 987-988 (1979). Both parties claim that the plain language of the statute unambiguously supports their opposing views. 6/ We find that the statute is ambiguous and does not clearly favor either position.

As Judge Merlin observed, adoption of the Secretary's view would render meaningless the phrase "pursuant to the provisions of subsection (a)" in the opening sentence of section 103(f). The Secretary has also offered no satisfactory explanation of why Congress used the phrase "any inspection" in sections 103(a), 104(g)(1) and 107(a) of the 1977 Act, why it did not carry over that phrase from the walkaround provision of the 1969 Act, 7/ and why it instead used "pursuant to the provisions of subsection (a) in the 1977 Act.

Even if we were to overlook this infirmity in the Secretary's argument, the text and structure of the 1977 Act would still not clearly support his view. Several different types of inspections are described in sections of the 1977 Act other than section 103(a). See sections 103(g)(1), 103(i), 202(g), and 303(x). 8/ The only inspection that section 103(a) describes specifically, however, is the regular inspection, which is not described elsewhere in the Act. Thus, even if the Secretary were correct in arguing that the third and fourth clauses of the first sentence of section 103(a) encompass all types of inspections, one could still reasonably believe that the phrase "pursuant to the provisions of subsection (a)" in section 103(f) was intended to accord the right to walkaround pay to the only inspection specifically and exclusively described in section 103(a)--the regular inspection.

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6/ Inasmuch as both parties also claim that the legislative background or history favors their positions, we need not in any event consider only the plain language of the Act no matter how clear it may appear on superficial examination. Train v. Colorado Public Interest Research Group, 426 U.S. 1, 9-10 (1976).

7/ Section 103(h) of the 1969 Act read as follows:

> At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

8/ Section 103(g)(1) requires the Secretary to conduct a "special"

inspection if a miner or miners' representative has reasonable grounds to believe that a violation or imminent danger exists, and gives written notice to the Secretary. Section 103(i) requires the Secretary to make "spot" inspections at stated intervals of mines liberating excessive quantities of explosive gases, of mines in which a gas ignition or explosion has occurred in the past five years that caused death or serious injury, and of mines with some other especially hazardous condition. Section 202(g) requires the Secretary to make frequent "spot" inspections to obtain compliance with the health standards in Title II of the Act. Section 303(x) requires the Secretary to inspect a formerly inactive or abandoned mine before mining operations commence.

The construction offered by the operators is also problematic, however. Helen Mining conceded during oral argument that if its construction of the statutory language is followed, miners would have no right to accompany inspectors even without pay in other than regular inspections. Under this construction, miners would have fewer walk-around rights under the 1977 Act than coal miners had under the 1969 Act. We share the Secretary's grave doubts that this was what Congress intended.

The legislative history of the walkaround provisions of the 1977 Act clarifies the matter, however. Although a walkaround pay right had been written into the Senate bill, the House bill merely continued the right in the 1969 Act to accompany the inspector and did not expressly provide for walkaround pay. 9/ The conflicting bills were referred to a conference committee which reported its bill to the House and Senate. The conferees' written report stated only that" [t]he conference substitute conforms to the Senate bill." 10/ The conference committee did, however, change the opening sentence of what is now section 103(f) by striking the phrase "physical inspection of any mine under subsection (a)" and substituting "physical inspection of any coal or other mine made pursuant to the provisions of subsection (a)". 11/

Although there are no definite indications of how the Senate construed the conference or Senate bills on this point, there is clear evidence of how the Senate and House conferees construed the conference bill. Representative Perkins, the chief House conferee and the chairman of the House committee that drafted the House bill, made the customary oral report to the House describing the agreement reached by the conference committee. His statement on this point was as follows:

* * *

> Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference [bill] that seems to be somewhat ambiguous.
>
> Section 103(a) of the conference [bill] provides [in part] that....

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9/ S. 717, $104(e)(as passed by Senate), Legis. Hist. at 1115; H.R. 4287, 95th Cong., 1st Sess., at 78-81 (1977)(as reported), reprinted in 1977 Legis. Hist. at 266, 343-346; same, as substituted for Senate bill, 1977 Legis. Hist. at 1260, 1263-1265.

10/ S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. (1977) ["Conf.

Rep."], reprinted in 1977 Legis. Hist. at 1279, 132.3.
11/ Conf. Rep. at 10; 1977 Legis. Hist. at 1288.

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[i]n carrying out the requirements of clauses (3) and (4)--concerning imminent dangers or compliance with

standards--the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year and of each surface coal or other mine in its entirety at least two times a year.

In addition to the regular inspections of each mine in its entirety as specified in section 103(a), section 103(g)(1) provides that whenever a representative of a miner, or a miner at a mine where there is no such representative, has reasonable grounds to believe that a violation or imminent danger exists, such representative or miner shall have a right to obtain an immediate inspection. Further, section 103(i) provides for additional inspections for any mine which liberates excessive quantities of methane or other explosive gases, or where a methane or gas ignition has resulted in death or serious injury, or there exists some other especially hazardous condition.

Section 103(f) provides that a miner's representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post- inspection conferences pursuant to the provisions of subsection (a). Since the conference [bill] reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector, including pre- and post-[inspection] conferences, at no loss of pay only during the four regular inspections of each underground mine and two regular inspections of each surface mine in its entirety including pre- and post-inspection conferences.

* * *

Section 103(h) of the 1969 act provided generally that--

At the commencement of any inspection ... the authorized representative of the miners at the mine ... shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

Since the conference [bill] does not refer to any inspection, as did section 103(h) of the 1969 act, but, rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act. Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator.

* * *

1977 Legis. Hist. at 1356-1358 (emphasis added). The thrust of Mr. Perkins' statement is that it was the intention of the Senate and House conferees to preserve the right under the 1969 Act to accompany the inspector on all inspections, but to accord a walkaround pay right for only regular inspections.

The Secretary argues that Mr. Perkins' statement cannot be resorted to for the purpose of construing a statute contrary to its plain terms or its purpose. He also argues that Mr. Perkins' statement should be disregarded because it is only "an isolated remark by a single Congressman".

We are unable to share this reasoning. First, the literal language of section 103(f) does not clearly favor the Secretary's interpretation. Second, the modern rule is that legislative history can be resorted to even if statutory language is thought to be clear. See note 6, supra. Third, Representative Perkins was not merely setting forth his personal opinion of how section 103(f) should be interpreted. He was stating the intention of the conference committee, and was therefore speaking as more than a "single Congressman". Moreover, as the Secretary and other familiar with mine safety and health legislation are well aware, Representative Perkins has always been more than a "single Congressman" in this field. As a principal sponsor of both the 1969 and 1977 Acts, chairman of the House Committee on Education and Labor during their consideration and passage, and chief conferee for the House when both statutes were given final form in conference committees, Mr. Perkins was instrumental in the passage of the 1969 Act and highly influential in the passage of the 1977 Act. Mr. Perkins' statement was clear, detailed, and prepared with obvious care. It was carefully delivered solely to inform the House of the conferees' agreement. We also note that the Secretary has not pointed to, nor have we found, a subsequent statement by any conferee or other member of Congress that the walk-around pay right extends beyond regular inspections, or disavowing Mr. Perkins' statement of the conferees' intention. Compare Train v. Colorado Public Interest Research Group, 426 U.S. 1, 23 (1976), with American Smelting & Refining Co. v. F.S.H.R.C., 501 F.2d 504, 510 (8th Cir. 1974).

We conclude that :!r. Perkins' statement of the conference committee's intention is dispositive here. Not only is Mr. Perkins' statement the only passage in the legislative history that speaks specifically to this question and clarifies an ambiguity in the statute,

but, more importantly, it reflects the conferees' understanding of the walkaround pay right and is therefore the basis upon which the conferees agreed to it. 12/ Inasmuch as our purpose is to ascertain and effectuate the legislative intent (Philbrook v. Glodgett, 421 U.S. 707, 713 (1975)), and Mr. Perkins' clear and unequivocal statement of the conference committee's understanding is the best guide to that intent, we follow it here.

Accordingly, the judge's decision is affirmed.

Jerome R. Waldie,

Chairman

Richard V. Backley,

Commissioner

Marian Pearlman

Nease, Commissioner

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12/ When the two Houses of the 95th Congress were considering mine safety and health legislation, there were not, as there sometimes is, identical or closely similar bills reported out of committee in each House. The House and Senate bills were in many respects quite different. On the matter of walkaround pay, they were very different, for the bill passed by the House had no walkaround pay provision. When these very different bills were referred to a conference committee, the conferees were faced with reconciling many important differences between the two bills. The complexity of the task is indicated by the length and detail of the 31-page report. It is therefore quite understandable that not all conferees' agreements or understandings were discussed in the conference report, especially on a point that did not go to the heart of the proposed legislation. The conference report itself stated that the "principal differences between the Senate bill, the House [bill] and the [conference bill] are noted below." Conf. Rep. at 37; 1977 Legis. Hist. at 1315 (emphasis added). And inasmuch as the House conferees largely receded and agreed to the Senate bill over the House bill, it is quite understandable that when Mr. Perkins introduced the conference bill to the House he felt it necessary to make to the House a more detailed presentation of the conferees' actions.

Jestrab, Commissioner, dissenting:

In the Petition for Discretionary Review granted by Order dated October 29, 1979 in Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Arnold J. Sparks, Jr., Applicant v. Allied Chemical Corporation, Respondent, Docket No. WEVA 79-148-D (September 27, 1979), now pending before the Commission, the Petitioner, Allied Chemical Corporation argued that that case and Kentland-Elkhorn Coal Corporation v. Secretary of Labor, PIKE 78-339 (March 8, 1979), likewise pending before the Commission,and this case contain a common question of law. I think this is correct. Allied argued extensively in its petition that based upon a reading of the statute and its legislative history, the decision of Judge Merlin here was correct, and that the decision of Judge Kennedy in Allied was wrong. I disagree. I dissent here for reasons set out in the Decision and Order of Administrative Law Judge Kennedy in Allied Chemical Corporation above. For convenience of counsel in this case, the Commission's administrative law judges, and the Bar the portion of Judge Kennedy's opinion which I think relevant, follows:

> At issue in this litigation is the extent of miner's walkaround rights, i.e., the right to accompany an inspector and to receive normal compensation while doing so. This right is recognized in section 103(f), 30 U.S.C. $813(f), of the Act, which provides that a representative of the miners shall be given an opportunity to accompany an inspector for the purpose of aiding in the "inspection of any coal or other mine made pursuant to [section 103(a)]." 2/ Any such representative of the miners who is also an employee of the operator "shall suffer no loss of pay during the period of his participation in the inspection." Respondent contends that there are certain types of inspections to which the right to compensation does not attach, in particular, spot inspections for extrahazardous conditions pursuant to the mandate of section 103(i).

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2/ Section 103(f), 30 U.S.C. $813(f), of the Act 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 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

> The scope of the Secretary's mine inspection authority is delimited by section 103(a), 3/ which directs "frequent" inspection of all mines for four purposes: (1) to obtain information relating to health and safety conditions and the causes of accidents; (2) to gather information relating to mandatory standards; (3) to determine whether imminent dangers exist; and, (4) to determine compliance with mandatory standards, citations, orders, or decisions. With respect to imminent dangers and compliance, the Secretary is directed to inspect each mine "in its entirety at least" four times per year for underground mines and two times per year for surface mines. In addition to this minimum requirement for complete inspections, the Secretary is directed to establish guidelines for additional inspections based on his experience under the Mine Act "and other health and safety laws."

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fn. 2 (continued)

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."

3/ Section 103(a), 30 U.S.C $813(a), of the Act reads in pertinent part:

> "Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order,

or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this

Thus, it is apparent that the substantive authority for carrying out inspections for the purpose of obtaining information and insuring compliance is to be found in section 103(a). The regular compliance inspections are to be carried out frequently, but, in no event less than two or four times yearly.

In addition to the minimum requirements for compliance inspections, two other subsections establish special procedures for triggering inspections for compliance and information. Section 103(g)(1) 4/ provides that at the request of a representative of the miners who has reasonable grounds to believe that a violation or imminent danger exists an immediate special inspection may be had. Section 103(i) 5/ provides for "spot" inspections for methane accumulations in gassy mines and for "other especially hazardous conditions" on an accelerated schedule.

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fn. 3 (continued)

subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws."

4/ Section 103(g)(1), 30 U.S.C. $813(g)(1), of the Act reads in pertinent part:

"Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

5/ Section 103(i), 30 U.S.C. $813(i), of the Act reads:

"Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years,

or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his

Respondent takes the position that the compensation right under section 103(f) extends only to the minimum of four mandatory inspections "of the mine in its entirety," and that any other or additional inspections are without the coverage of the section. Maintaining that these "regular" inspections are the "only inspections made pursuant to Section 103(a)" (Brief, p. 5), respondent asserts that only a representative of miners participating in such a "regular" inspection is entitled to be paid. Respondent claims that since the inspection giving rise to the instant complaint was made pursuant to section 103(i), and since "there is no requirement in Section 103(i) that the operator pay a representative of miners for participation in such a spot inspection" (id., the miner Sparks is not entitled to compensation.

The Secretary, on the other hand, takes the position that the language of the compensation provision of section 103(f) clearly and unambiguously encompasses all inspections carried out for the purposes enumerated in the four clauses of the first sentence of section 103(a). Relying on the Interpretative Bulletin of April 25, 1978, 43 F.R. 17546, the Secretary maintains that the "inclusion of a statutory minimum number of inspections at

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fn. 5 (continued)

authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, 'liberation of excessive quantities of methane or other explosive gases' shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals.. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals."

each mine is no more than an additional requirement, clearly directed at the Secretary, which does not affect the participation right." 43 F.R. at 17547. Therefore, the Secretary concludes that because they are carried out for the purpose of obtaining information or determining whether imminent dangers, violations or especially hazardous conditions exist, the inspections triggered by sections 103(i) and (g)(1) "are clearly conducted 'pursuant to' section 103(a)." Id.

In support of its position, respondent cites two previous decisions by administrative law judges which concluded that operators are not required to pay employees who accompany MSHA inspectors on other than the "regular", i.e., entire mine inspections. Kentland-Elkhorn Coal Corporation v. Secretary of Labor, PIKE 78-339 (March 8, 1979), appeal pending; Secretary of Labor v. Helen Mining Company, PITT 79-11-P (April 11, 1979), appeal pending.

In Kentland-Elkhorn, an MSHA electrical specialist conducted an inspection of the operator's preparation plant. At the time of this inspection, another inspector was in the process of carrying out one of the "regular" inspections of the mine in its entirety. That inspector was accompanied by a miner who was paid. The electrical specialist was also accompanied by a representative of the miners, and upon the operator's refusal to pay that miner, a citation and subsequently a withdrawal order issued. In a review proceeding, the operator contended that section 103(f) only grants miner representatives the right to participate in an inspection without suffering loss of pay during a "regular" inspection of the entire mine and since the inspection at issue was a spot electrical inspection, it had properly refused to pay the miner. The administrative law judge agreed with these contentions and held that the right to participate without loss of pay is limited to "regular" inspections of the entire mine.

A similar conclusion was reached in Helen Mining Company, supra, with respect to a spot inspection required by section 103(i). Since the mine involved in that case was particularly gassy, it had to be frequently inspected for possible accumulations of methane. The inspector involved had been in the process of making one of the "regular" inspections of the mine in its entirety during the previous 3 days, but he interrupted this inspection so that he could investigate areas where accumulations of methane might exist in order to determine whether those areas were adequately ventilated. The inspector was informed that the representative of the miners who accompanied him on the methane inspection would not be paid, whereupon a citation and subsequently a withdrawal order issued. At the hearing, the operator contended that section 103(f) only requires that the miner representative who participates in an inspection of the entire mine must be paid. 6/ Again, the administrative law judge agreed with these contentions and vacated the citation and order.

Both these cases turned on the authority ascribed to certain remarks made by Congressman Perkins, Chairman of the Committee on Education and Labor. These remarks were made after the Conference Committee had made its

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6/ The operator's argument proves too much, because if accepted it would lead to the conclusion that the miner initially requested must accompany the inspector during the whole of the entire mine inspection. Recognizing that in many cases such complete inspections take a considerable amount of time, even weeks or months, it is unrealistic to assume that one particular miner would be assigned to accompany the inspector exclusively, especially considering that no one miner possesses the expertise to assist the inspector in investigating all the areas of a large and complex mine.

final report and 21 days after the Senate had passed the bill. 7/ In attempting to clarify what he considered to be an ambiguity in this aspect of the Conference Report, he stated that:

> Section 103(f) provides that a miner's representative * * * shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the federal inspector, including pre- and post-conferences, at no loss of pay only during the four regular inspections of each underground mine in its entirety * * *.
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> Committee Print, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess (July 1978) at 1357 (hereinafter cited as Leg. Hist.)

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7/ The Conference Committee voted to accept the Conference Report on October 3 1977 (Leg. Hist. at 1279), the Senate vote to accept the Conference Report on October 6, 1977 (Leg. Hist. at 1347), and a Concurrent Resolution to effect corrections was agreed to on October 17, 1979 [sic] (Leg. Hist. at 1351). It was not until October 27, 1977, that Congressman Perkins made his remarks to the House. (Leg. Hist. at 1354). There is no evidence that Congressman Perkins' gloss on section 103(f) was ever brought to the attention of or approved by the Senate.

This seemingly unequivocal statement concerning the intended scope of section 103(f) was, however, followed by a comparison of the cognate provisions of the 1969 Act which indicates some possible confusion on Congressman Perkins' part. He recognized that section 103(a) of the 1969 Act did not include the provision directing the Secretary to "develop guidelines for additional inspections of mines based on criteria including, but not limited to, * * * his experience under this act and other health and safety laws." (Emphasis added.) He then correctly pointed out that the participation right section of the 1969 Act, section 103(h), provided that a representative of the miners may accompany an inspector on "any" inspection, but that the 1969 Act did not have a compensation provision. He then went on to state:

> Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 fact, but rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the Act. [Emphasis added.]

Leg. Hist. at 1358.

Thus, a fair reading of the whole of Congressman Perkins' statement concerning the seeming ambiguity found in section 103(f) indicates that his real concern was that the right to pay for exercise of the walkaround right not be extended to the "additional inspections" permitted under the new section 103(a), but would be limited to the "frequent inspections" authorized and required by the first sentence of that section. Thus, it appears that when Congress limited the right to pay to inspections "pursuant to subsection (a)," it may have intended to exclude from that right inspections made under

guidelines issued by the Secretary calling for "additional inspections," i.e., inspections other than those mandated by the statute. In other words, there are two categories of inspections, statutory section 103(a) inspections and nonstatutory Secretarial inspections. Congress may well have wished to protect the operators from an unlimited expansion of the right to pay based on "additional inspections" authorized only by the Secretary and particularly where they were for the purpose of aiding in the exercise of his responsibilities under "other health and safety laws."

Indeed, the greater weight of the legislative history supports this interpretation. First, it should be noted that the provision at issue was included in the Senate version of the bill and the Joint Explanatory Statement of the Conference Committee clearly indicates that "to encourage miner participation * * * one such representative of miners, who is also an employee of the operator, [shall] be paid by the operator for his participation in the inspection and conferences. The House amendment did not contain these provisions. The conference substitute conforms to the Senate bill." Leg. Hist. at 1323. It is significant to note that nowhere in the Conference committee statement is the purported limitation on the compensation right advanced by Congressman Perkins discussed or alluded to.

In the Senate's consideration of the 1977 Act, miner participation in inspections was recognized as an essential ingredient of a workable safety plan. Senator Javits, one of the managers of the bill, explained the critical importance of the walkaround right as part of a comprehensive scheme to improve both safety and productivity in the mines:

> First, greater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated.

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In addition, there is a general responsibility on the operator of the mine imposed by the bill to provide a safe and healthful workplace, and the presence of miners or a representative of the miners accompanying the inspector is an element of the expense of providing a safe and healthful workplace * * *. But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.

In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper * * *. We think safe mines are more productive mines. So the operator who profits from this production should share in its cost as it bears directly upon the productivity as well as the safety of the mine * * *. It seems such a standard business practice that is involved here, and such an element of excellent employee relations, and such an assist to have a worker who really knows the mine property to go around with an inspector in terms of contributing to the health and safety of the operation, that I should think it would be highly favored. It seems to me almost inconceivable that we could ask the individual to do that, as it were, in his own time rather than as an element in the operation of the whole enterprise.

Leg. Hist. at 1054-1055.

Senator Williams, Chairman of the Committee on Human Resources, also discussed the importance of the walkaround right in the context of improving safety consciousness on the part of both miners and management:

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> It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

Leg. Hist. at 616-617.

In light of the broad policy expressed in the Act of protecting miners and making inspections more effective, it is difficult to understand why the isolated remarks of Congressman Perkins have been accorded so much weight. In contrast, similar remarks by other members of the House and Senate are conspicuous by their absence. It would seem that if Congress had intended by section 103(f) to create two separate categories of statutory walkaround rights, one compensable and one non-compensable, there would have been at least some debate on this departure from the general scheme of the Act. Otherwise, there exists an arguably invidious discrimination.

In any event, it is questionable whether resort to legislative history has a place in the application of the statutory language in question. T.V.A. v. Hill 437 U.S. 153, 184 n. 29 (1978). On its face, section 103(f) is clear and unambiguous, and therefore reliance on the explanatory comments of a single Congressman appears unnecessary. Schiaffo v. Helstoski, 492 F.2d 413, 428 (3rd Cir. 1974).

It has been consistently held that as a matter of statutory construction it is error to place undue emphasis on a portion of the legislative history where to do so sacrifices the object of the legislation. "Not even formal reports - much less the language of a member of a committee - can be resorted to for the purposes of construing a

a statute contrary to its plain terms." Committee for Humane Legislation v. Richardson, 414 F. Supp. 297, 308 (D.D.C. 1976), modified 540 F.2d 1141 (D.C. Cir. 1976); citing Pennsylvania Railroad Company v. International Coal Mine Company, 230 U.S. 184, 199 (1912); F.T.C. v. Manager, Retail Credit Company, 515 F.2d 988, 995 (D.C. Cir. 1975). It must be remembered that the proper function of legislative history is to resolve ambiguity, not to create it. United States v. Missouri Pacific Railroad Company, 278 U.S. 269, 278 (1929); Montgomery Charter Service v. W.M.A.T.A., 325 F.2d 230, 233 (D.C. Cir. 1963); Elm City Broadcasting Corporation v. United States, 235 F.2d 811, 816 (D.C. Cir. 1956).

It should be noted that these sections of the Mine Safety Act serve a broad remedial purpose, and as such should be given a liberal construction, and any asserted exceptions to those provisions should be given a strict, narrow interpretation. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 430 U.S. 938 (1975). Finally, when a statutory interpretation that promotes safety conflicts with one that serves another purpose, the first must be preferred. District 6 UMWA v. IBMA, 562 F.2d 1260, 1265 (D.C. Cir. 1977).

Accordingly, whether based on an analysis of the relevant legislative history or through application of accepted canons of statutory construction, I find that the reference in section 103(f) to inspections "made pursuant to subsection (a)" includes all inspections made for the purposes enumerated in the four clauses of the first sentence of that subsection, and is not limited to the minimum number of inspections of the mine in its entirety mandated by the third sentence of.that subsection.

I would reverse the decision of the Administrative Law Judge and remand this case for further proceedings.

Commissioner Lawson, dissenting:

Although I am not in disagreement with my colleague, Commissioner Jestrab, my analysis of the case before us is somewhat different from that set forth by Judge Kennedy in Secretary of Labor et al v. Allied Chemical Corporation, Docket No. WEVA 79-148-D. I am therefore setting forth my individual reasons for joining in the dissent from the views of the majority herein.

My colleagues in the majority conclude that the right to walkaround pay does not extend to all inspections made to discover violations or imminent dangers. Their holding is inconsistent with both the language and the purpose of the 1977 Act, and rests upon a single statement in the legislative history that, in the circumstances here, cannot be considered authoritative. I would hold that the right to walkaround pay applies to all inspections made to discover violations or imminent dangers and would accordingly reverse and remand this case for further proceedings.

The language of section 103(f) is straightforward. It gives miners' representatives the right to accompany the inspector "during the physical inspection of any ... mine made pursuant to the provisions of subsection (a)" of section 103, and guarantees that the representative of miners "shall suffer no loss of pay during the period of his participation...." Section 103(f) thus accords a right to compensation coextensive with the right to accompany. 1/ The majority's bifurcation of these rights is flatly inconsistent with this statutory language.

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1/ The only exception to this principle is of no consequence here. Section 103(f) contains an express limitation on the number of miners' representatives entitled to walkaround pay when more than one miners' representative accompanies an inspection party.

The question is, then, how broad is the right to accompany the inspectors. Helen Mining maintained during oral argument that the right to accompany does not extend to all inspections. None of my colleagues accept this reading of the statute, nor do I. Like them, I do not believe that Congress intended to narrow the broad right to accompany granted by the 1969 Act. The 1969 Act's walkaround provision granted a right to accompany the inspector on all inspections. The purpose of the 1977 Act was to promote rather than weaken mine safety and health, and to encourage rather than discourage miner participation in inspections. The Senate committee that drafted the walkaround provisions of the 1977 Act stated not only that the right to accompany in the 1977 Act is "based on that in the [1969] Coal Act" (S. Rep. at 28; 1977 Legis. Hist. 616)(reproduced at 28, infra), but that the purpose of the 1977 Act was to establish "a strengthened mine safety and health program." S. Rep. at 13; 1977 Legis. Hist. at 601 (emphasis added). 2/ The phrase "pursuant to the provisions of subsection (a)" should be read in light of this indisputable congressional purpose. Inasmuch as there can be no dispute that this was not intended to limit the miner's right to accompany the inspector, it cannot be read to limit the right to walkaround pay.

Other considerations buttress this reading of the Act. Even if I were to consider the language of the 1977 Act without reference to the 1969 Act, or to the expressed congressional intention to strengthen the mine safety laws, I would not construe the phrase "pursuant to the provisions of subsection (a)" as has Helen Mining. First, the phrase appears to be a simple cross-reference to the provision that describes all inspections--section 103(a)--rather than a limitation. Second, even if considered as a limitation, the inspection here is not excluded by that phrase. The Secretary argues that simply because a type of inspection is specifically treated in another provision of the Act does not mean that it is outside section 103(a). I agree. Although the spot gas inspection in this case was required to be conducted with a certain frequency by section 103(i), it was conducted "pursuant to the provisions of subsection (a)" since its purpose was to determine "whether an imminent danger exists" and "whether there is compliance with the mandatory health or safety standards."

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2/ The legislative history relied on by my colleagues confirms that no diminution of the right to accompany was intended. See 1977 Legis.

This point is best illustrated by supposing that section 103(i) did not exist at all. In that case, if the Secretary were to adopt a schedule of spot gas inspections identical to that mandated by section 103(i), there would be no question that the inspection fell within the provisions of section 103(a). Yet, because Congress decided instead to enhance miner health and safety by statutorily mandating the frequency of such inspections, the right to walkaround pay is limited. This is senseless. Not only does this result bear no relationship to the purpose for the inclusion of section 103(i), it contravenes that purpose. Section 103(i) covers not only gassy mines, which present great dangers of fires and explosions and in which ventilation and methane control are critical, but also mines in which there are "some other especially hazardous conditions". The majority has thus discouraged miner participation in inspections of those mines that are among the most dangerous to miner health and safety. Under the majority's holding, a miner who requests a special inspection pursuant to section 103(g)(1), would not be paid for participating in the inspection to, for example, personally show the inspector the condition that he or she requested be inspected, or explain why the miner believed the condition is dangerous.

My colleagues maintain that section 103 is ambiguous and does not "clearly" support the Secretary's position. I find it plain and unambiguous on its face and would therefore deem it unnecessary to look at legislative history as a guide to its meaning. 3/ I do so here only because the majority relies almost entirely on a statement by Congressman Perkins (supra) to support its position. That some sections of the 1977 Act use the phrase "any inspection" merely reflects the different sources of the statutory language,4/ rather than ambiguity. That the language of the 1969 Act was not copied precisely, and that section 103(a) refers specifically and exclusively to only regular inspections, are ambiguities only if one believes--which the majority apparently does not--that Congress intended to accord miners fewer walkaround rights under the 1977 Act than under the 1969 Act. When section 103 is read in historical context and in consonance with the entire statute, these alleged ambiguities disappear.

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3/ TVA v. Hill, 437 U.S. 153, 184 n.29 (1978).

4/ Much of section 103(f), including the phrase "under subsection (a)" in the Senate bill, was derived from 29 U.S.C. $657(e), section 8(e) of the Occupational Safety and Health Act of 1979, 29 U.S.C. $651 et seq. The last sentence of section 103(a) and the first sentence of section 107(a) were derived from sections 103(b)(1) and 104(a) of the 1969 Act.

The authoritative portions of the legislative history of section 103(f) also support the Secretary's interpretation of the walkaround pay right. The Senate committee that drafted the walkaround pay provisions of the 1977 Act stated in its report the reasons for according the right to walkaround pay:

> The right of miners and miners' representatives to accompany inspectors.
>
> Section 104(e) contains a provision based on that in the [1969] Coal Act, requiring that representatives of the operator and miners be permitted to accompany inspectors in order to assist in conducting a full inspection. It is not intended, however, that the absence of such participation vitiate any citations and penalties issued as a result of an inspection. The opportunity to participate in pre- or post-inspection conferences has also been provided. Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for the other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties. The Committee also recognizes that in some circumstances, the miners, the operator or the inspector may benefit from the participation of more than one representative of miners in such inspection or conferences, and this section authorizes the inspector to permit additional representatives to participate.

S. Rep. at 28-29; 1977 Legis. Hist. at 616-617. The Senate report does not limit either the rights to accompany or to walkaround pay. Indeed, it states that the right to accompany is "based on that in the [1969] Coal Act", which, as noted above, extended to all inspections. It states a legislative purpose applicable to all inspections and nowhere evidences so much as a suggestion that the right to walkaround pay is not coextensive with the right to accompany.

The conference committee's report summarized the Senate bill's provisions, and declared that its purpose was "to encourage miner participation". The committee made only a technical, non-substantive change in the first sentence of section 103(f), and stated that "[t]he conference [bill] conforms to the Senate bill." Conf. Rep. at 45; 1977 Legis. Hist. at 1323. 5/

These Senate and conference reports therefore provide no support for the majority position. In short, the Act makes inseparable the right of miners to accompany inspectors on walkaround and to receive pay.

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5/ The conference report states:

> Both the Senate bill and the House amendment contained provisions permitting miners' representatives to accompany inspectors on mine inspections. The House amendment did so by adopting Section 103(h) of the Coal Act. The Senate bill permitted miners' representatives to participate not only in the actual inspection of the mine itself, but also in the pre- or post-inspection conferences held at the mine. Under the House amendment this right was limited to the actual inspection of the mine. The Senate bill required the Secretary to consult with a reasonable number of miners if there was no authorized representative of miners. The House amendment did not contain this protection for unorganized miners. The Senate bill permitted the Secretary's representative to permit more than one miner representative to participate in such inspection and conferences, and further, to encourage miner participation, provided that one such representative of miners, who is also an employee of the operator, be paid by the operator for his participation in the inspection and conferences. The House amendment did not contain these provisions.
>
> The conference substitute conforms to the Senate bill.

The majority, however, reaches beyond the Act and even the Senate and conference reports. It seizes upon a statement made by Representative Perkins on the floor of the House and construes the Act in a manner inconsistent with both its language and purpose.

Assuming arguendo that Mr. Perkins' statement reflected the intent of the conference committee, it does not follow that those views are determinative here. If the views of the conference committee are presented to or are available to both Houses before they vote to accept a conference bill, such views would no doubt be of more significance than is here the case. The joint explanatory statement in the conference report! or the oral presentation by the chief conferee of each House, ordinarily provides each House with an explanation of the conferees' agreement. 6/ The members of each House can therefore be informed of the reasons why the final bill has been shaped in a certain way or resembles a bill of one House. It is primarily for this reason that in the ordinary case the intention of the conferees can be safely said to be a convincing guide to the intention of the entire Congress.

This is not the ordinary case, however. The conference report did not mention the agreement later attested to by Representative Perkins; to the contrary, it conveyed the distinct impression that the broad walkaround pay right granted by the Senate bill was unchanged, for it stated that the conference bill "conforms to the Senate bill." Senator Williams, the primary architect of the Senate bill and the chief conferee for the Senate, did not mention the point during his presentation of the conference bill to the Senate. The conference bill itself could not plausibly be said to have put the Senate on notice of the conferees' agreement because the language of the conference bill unmistakably grants a right to walkaround pay which is coextensive with the right to accompany the inspector; the same is true of the Senate report and the Senate bill.

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6/See 2 U.S.C. $109c(a)(Senate rule), and House Rule XXVII(1)(c), requiring that conference bills be accompanied by a joint explanatory statement that is "sufficiently detailed and explicit to inform the [House and Senate] as to the effect which the amendments or proposition contained in such report will have upon the measure to which those amendments or propositions relate." See also, Jefferson's Manual $542 at 276 (1977).

Finally, and fatal to the majority's contention, Representative Perkins' statement of the conference committee's contrary understanding was made 21 days after the Senate voted. 7/ Therefore, when the Senate voted to accept the conference bill, there was no indication before the Senate, nor would the Senate have had reason to suspect, that the conference bill, the conference report and the Senate report were not reliable guides to the conference committee's agreement. The Senate could have only believed that the conference bill meant what it said. Although arguably the vote of the House may have reflected the view of the conference committee, the same cannot be said of the vote of the Senate.

It is a basic principle that the content of the law must depend upon the intent of both Houses, not of just one. Department of the Air Force v. Rose, 425 U.S. 352, 366-368 (1976), quoting Vaughn v. Rosen, 523 F.2d 1136, 1142-1143 (D.C. Cir. 1975). Cf. K. Davis, Administrative Law Treatise $3A.31 at 175 (1970 Supp. to 1st ed.). In this case, to follow the conferees' interpretation would violate this principle, for the Senate cannot be said to have been aware of or suspect, let alone assent to, the conferees' interpretation. What is equally paradoxical, however, is that not to follow the conference committee's view may perhaps fail to give effect to the House's intention.

Congressional intent can best be determined, however, by looking to the stated purpose of the walkaround pay right as expressed in bills and documents that were available to both Houses before they voted, and most importantly, the language of the statute that the entire Congress passed. Cf. Department of the Air Force v. Rose, 425 U.S. at 365-367; Jordan v. Department of Justice, 591 F.2d 753, 768 (D.C. Cir. 1978)(en banc); Vaughn v. Rosen, 523 F.2d at 1142-1143; Hawkes v. IRS, 467 F.2d 787, 794, 796-797 (6th Cir. 1972); Getman v. NLRB 450 F.2d 670, 673 n.8 (D.C. Cir. 1971). See also March v. United States, 506 F.2d 1306, 1314 & n.33 (D.C. Cir. 1974).

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7/ These remarks were made on October 27, 1977; the Senate had voted to accept the Conference Report on October 6, 1977. 1977 Legis. Hist. at 1347, 1354.

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The right to walkaround pay is clearly expressed in the Senate report and the conference report. Congress insisted upon miners' participation in inspections, in order that safety and health hazards be exposed, brought to the attention of the Secretary and eliminated promptly. This would also aid the inspector and result in a valuable reciprocal benefit to the miners, who would thereby learn more about health, safety and mine hazards. Assuring that miners' representatives are paid during all inspections serves these purposes. In so observing, I give weight to the Secretary's opinion that his inspectors will be aided by the miners' participation in these inspections.

Most importantly, section 103(f) is simply not susceptible to the construction urged by the operators. As noted, the language of the statute clearly makes the right to walkaround pay coextensive with the right to accompany the inspector, and it is impossible to hold that Congress intended to deny miners the right to accompany the inspector. I therefore dissent.