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CONSOLIDATION COAL V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 26, 1981
CONSOLIDATION COAL
COMPANY

v.

Docket No. WEVA 80-333-R

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

and

UNITED MINE WORKERS OF
AMERICA (UMWA)

DECISION

This proceeding was initiated when Consolidation Coal Company (Consol) contested an order of withdrawal issued for failure to abate a violation of section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979)(the 1977 Mine Act).

On April 24, 1980, Mine Safety and Health Administration (MSHA) inspectors arrived at Consol's mine to conduct an inspection. The inspection was requested by the safety committee of the UMWA local. The UMWA is the collective bargaining representative of the miners. Also present, at the request of the local union safety committee, were members of the UMWA International Safety Division, who identified themselves to Consol and the MSHA inspectors as representatives of the miners for walkaround purposes under section 103(f). An MSHA inspector advised Consol that he wanted the UMWA International safety representatives to accompany the MSHA inspection team. Consol's mine safety director refused to permit the International representatives to enter the mine, on the ground that Consol was not required to admit them because their names had not been submitted to MSHA and Consol as "representatives of miners" pursuant to the Secretary's regulations in 30 CFR Part 40. 1/

MSHA issued a citation, and subsequently an order for failure to abate, charging a violation of section 103(f) of the 1977 Mine Act. That section provides in part:

1/ Those regulations require, among other things, that certain information pertaining to representatives of miners be filed with the

MSHA district manager, with copies to operators of the affected mine. Among information required is "the name of the representative" or his "title or official position" and "[a] statement that the person or position named as the representative of miners is the representative for all purposes of the act; or if the representative's authority is limited, a statement of the limitation." 30 CFR §§40.3(a)(1) and (4).

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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). ... 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....

Consol contested the citation and order, arguing that a failure of representatives to comply with the Part 40 filing regulations per se entitles an operator to deny such persons walkaround participation under section 103(f). The administrative law judge disagreed, held that a violation occurred, and dismissed the contest. For the reasons that follow, we affirm the judge.

Part 40 took effect on July 7, 1978. Those regulations replaced 30 CFR Part 81 which contained requirements for filing as representatives of miners under the 1969 Coal Act. It is undisputed that between July 7, 1978, and the day it denied entry to the International representatives, Consol received nothing filed pursuant to Part 40 which identified the International personnel as representatives of the miners. 2/

The walkaround provision of section 103(f) begins with the clause "subject to regulations issued by the Secretary." On review Consol again argues that Part 40 contains such regulations and that the failure of the International safety representatives to be identified as "representatives of miners" in a Part 40 filing is a basis, per se, for refusing to afford them walkaround participation under section 103(f) of the Act. We disagree.

We have previously recognized the important role section 103(f) plays in the overall enforcement scheme of the Act, both in assisting inspectors in their inspection tasks and in improving the safety awareness of miners. *Magma Copper Co.*, 1 FMSHRC 1948 (1979), Petition for review filed, No. 79-7687 (9th, Cir. Dec. 26, 1979). We are not prepared to restrict the rights afforded by that section absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by

Secretarial regulation.

2/ The UMWA International had, however, by letter of March 22, 1978, advised Consol that the UMWA, its officers and members of its safety division would exercise the rights of representatives of miners. This letter was filed while Part 81 was still in effect. Because we hold that failure to file under Part 40 does not deprive a representative of miners of walkaround rights under section 103(f), we need not decide whether the Part 81 filing constituted compliance with Part 40. Cf. 43 Fed. Reg. 29509 (July 7, 1978)(paragraph (6) of preamble to Part 40). On September 20, 1979, the UMWA local union safety committee submitted to Consol a document headed "Employees Who Travel With Inspectors While At Mine 20", that listed several mine employees and also stated that "(t)he Safety Committee shall have the right to amend or add to this list when they wish." This document, which does not list any International personnel, does not mention the Part 40 regulations and was not filed with MSHA.

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Neither the statute nor the legislative history indicates that prior identification of miners' representatives is a prerequisite to engaging in the section 103(f) walkaround right, and Part 40 on its face is silent as to the intended effects of a failure to file. 3/ The preamble to Part 40 does discuss, however, the intended effect of the filing regulations on walkaround participation. It states: [I]t should be noted that miners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as a representative of miners under this part. 43 Fed. Reg. 29508 (July 7, 1978). This statement provides a clear indication of the Secretary's intent in promulgating the filing regulations and is not inconsistent with the language of Part 40. In light of the above, we hold that failure of a person to file as a representative of miners under Part 40 does not per se entitle an operator to deny that person walkaround participation under section 103(f). This is not to say that there may never be circumstances where an operator can legitimately refuse walkaround participation to a person who failed to comply with Part 40's filing requirements. In a particular situation, absent filing, an operator may in good faith lack a reasonable basis for believing that a person is in fact an authorized representative of miners. In this case, however, Consol makes no claim that it lacked a basis for believing that the UMWA International safety division personnel were who they purported to be and were authorized miner representatives. Indeed, Consol was well aware of who these persons were and why they were at its mine. Accordingly, the decision of the judge is affirmed.

Richard V. Backley,
Chairman
Frank F. Jestrab,
Commissioner
A. E. Lawson,
Commissioner
Richard V. Backley,
Commissioner
Marian Pearlman
Nease, Commissioner

3/ The Part 40 filing requirements were not promulgated merely to identify miners' representatives for section 103(f) purposes. As the preamble to Part 40 noted, the Act "requires the Secretary of Labor to exercise many of his duties under the Act in cooperation with miners' representatives." 43 Fed. Reg. 29508 (July 7, 1978). Filing under Part 40 serves, among other things, to identify such representatives to the Secretary, and to assure such representatives that they will be included in the processes contemplated by the Act. See, e.g., sections 101(e), 103(c), 103(g), 105(a), 105(b), 105(d), 107(b), 107(e), 109(b), 305(b).

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Distribution
Samuel P. Skeen, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241
Cynthia Attwood, Esq.
Stephen Kramer, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203
Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005
Chief Administrative Law Judge James A. Broderick
FMSHRC
1730 K Street, N.W.
Washington, D.C. 20006