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MSHA (ROGER WAYNE) V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 4, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of ROGER LEE
WAYNE, SR.

v. Docket No. WEVA 87-89-D

CONSOLIDATION COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Backley, Doyle, Lastowka and Nelson, Commissioners

This proceeding concerns a discrimination complaint filed by the Secretary of Labor on behalf of Roger Lee Wayne, Sr., pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) (the "Mine Act" or "Act"). The complaint alleges that Consolidation Coal Company ("Consol") violated section 105(c)(1) of the Mine Act, 30 U.S.C. $ 815(c), when it denied Wayne the opportunity to participate in a post-inspection conference without a loss of pay. 1/

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1/ Section 105(c)(1) provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other

mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's

Commission Administrative Law Judge Avram Weisberger found that Consol discriminated against Wayne in violation of section 105(c)(1) and ordered Consol to reimburse Wayne for pay that Wayne lost as a result of Consol's action. The judge also assessed Consol a civil penalty of $300 for the violation. 9 FMSHRC 1958 (November 1987)(ALJ). The Commission granted Consol's petition for discretionary review. For the reasons that follow, we reverse the judge's decision.

The essential facts are not in dispute. Wayne is a first class mechanic employed on the day shift at Consol's Ireland Mine, an underground coal mine located in Moundsville, West Virginia; he is a member of the United Mine Workers of America ("UMWA" or "Union"). At the time of the events herein he was a member of the union safety committee at the Ireland mine.

A mandatory safety standard requires that the Secretary approve and the operator adopt a ventilation system and methane and dust control plan suitable to the conditions and mining system of each underground coal mine. 30 C.F.R. $ 75.316 specifies that such plan "be reviewed by the operator and the Secretary at least every 6 months." In preparation for this mandated review, David Wolfe, an inspector and mine ventilation specialist of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a ventilation inspection at the mine from March 3 through March 6, 1986, in order to determine whether the mine's approved ventilation system and methane and dust control plan was adequate and suitable under existing mining conditions. Following the inspection, Wolfe arranged with Consol's superintendent of mines !or a ventilation plan review meeting to take place at the mine on March 25, 1986.

On March 24, 1986, Hestel Riggle, Consol's safety engineer, told Wayne that the ventilation plan review meeting would be held on the following day. Wayne responded that he would probably go with Riggle to the meeting "because it was my shift." Tr. 84. According to Riggle, the next day and prior to the commencement of the day shift at 8:00 a.m., Wayne informed Riggle that he was to be the representative of the

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agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard

> published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. $ 815(c)(1).

miners at the meeting. Riggle told Wayne that if he was needed as a walkaround, he would be called to the meeting. Tr. 138; 9 FMSHRC at 1960.

On March 25, Inspector Wolfe arrived at the meeting site at 8:40 a.m. Wolfe noted that among those present from Consol in addition to Riggle were Ray Temley, Mine Foreman; Kye Yavlak, Mine Engineer; Steve Perkins, Environmental Control Specialist; Albert Aloio, Assistant Mine Superintendent; and George Carter, Supervisor of Industrial and Employee Relations. Among those present for the miners were: David Shreve, UMWA International Safety Representative, and Bill Wise, Leo Conner, and David Miller, members of the union safety committee.

Riggle asked Inspector Wolfe if a walkaround representative was needed at the meeting. 2/ Wolfe responded that one was not needed as the miners already had sufficient representatives. 9 FMSHRC at 1960.

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2/ The term "walkaround" is used for convenience in reference to the rights granted miners' representatives under section 103(f) of the Mine Act, which 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) of this section, 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 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].

30 U.S.C. $ 813(f).

Miller then requested of Carter that Wayne attend the meeting as the designated representative of the miners. 3/ Wolfe said that a walkaround was not necessary at the meeting because the meeting was not an inspection. Id. Carter then told Miller that Wayne could be brought out of the mine but only on "union business." 4/ Miller then insisted that Wayne be notified to attend the meeting and Wayne was so notified. Before he could arrive at the meeting site, however, both sides had requested and obtained from Wolfe a postponement of the meeting. When Wayne arrived at the meeting site, he was told by Carter that because he had been called out of the mine on union business, he could not return to work.

When Consol refused to pay Wayne for the remainder of his shift, Wayne filed a complaint with the Secretary alleging discrimination under section 105(c)(1) of the Act. Following an investigation by MSHA, the Secretary filed with the Commission the discrimination complaint on Wayne's behalf that is the subject of the present proceeding. The UMWA intervened in support of Wayne and after an evidentiary hearing on the merits, the judge issued his decision finding a violation by Consol of section 105(c).

The administrative law judge concluded that the ventilation plan review meeting was a "post-inspection conference" within the purview of section 103(f) of the Act. 9 FMSHRC at 1962. The judge further concluded that Wayne was the "authorized representative" of the miners for participation in the March 25 conference and that his participation in the conference was protected under section 105(c) of the Mine Act. The judge noted the parties' stipulation that the safety committeeman who was on the shift at the time of the post-inspection conference would be the first choice as the authorized representative of the miners on that shift; that Wayne, a safety committeeman, was working on the shift during which the meeting occurred; and that Miller had requested that Wayne be present at the meeting as the designated representative of the miners. The judge concluded that although three other safety committeeman were already at the meeting, Wayne was the "authorized" representative of miners within the purview of section 103(f) of the Act. 9 FMSHRC at 1962.

The judge also found that Wayne's loss of pay constituted an adverse action and that Carter's refusal to allow Wayne to return to work after the meeting had been postponed was an attempt to punish Wayne for attempting to exercise his protected right to attend the meeting. Therefore, the judge held that Consol unlawfully discriminated against Wayne in violation of section 105(c)(1) of the Act when it refused to

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3/ At the hearing, the parties stipulated that a safety committeeman working on the shift during which an inspection or conference occurred would be the miners' first choice as the authorized representative of the miners on that shift. See 9 FMSHRC at 1959. Wise, Conner and Miller worked on shifts other than the day shift.

4/ The term "union business" refers to a contractual right to an excused, unpaid leave of absence to participate in union activities.

allow Wayne to return to work or to pay him. 9 FMSHRC at 1962-63.

On review, Consol raises a number of arguments in support of its contention that the judge erred in finding that it unlawfully discriminated against Wayne. Consol argues that the March 25 meeting was not a "post-inspection conference" within the meaning of section 103(f) and, therefore, Wayne's participation in the meeting was not protected activity. Consol also asserts that section 103(f) confers upon the Secretary and her authorized representative wide authority and discretion in interpreting and implementing walkaround rights, and that Inspector Wolfe, acting within that authority, excluded Wayne from walkaround status when he determined that the miners were already adequately represented at the meeting. In this regard, Consol contends that its stipulation that an on-shift safety committeeman is the miners first choice as the walkaround representative on that shift does not guarantee walkaround status to the on-shift safety committeeman. Because Wayne's presence was determined by the inspector to be superfluous to the other miner representatives who were also present to aid and participate in the six-month ventilation meeting, Wayne was not entitled to be paid by Consol for the remainder of the shift after he exited the mine on union business. Finally, Consol argues that Wayne's right to go on union business and Consol's right to refuse to allow him to return to work or to pay him for the remainder of the shift are controlled by the 1984 Wage Agreement (the "contract").

In response, the Secretary and the UMWA contend that the ventilation review meeting was a "post-inspection conference" under section 103(f), Wayne was the miners: choice as their authorized representative for participating in the conference, the presence at the conference of other members of the union safety committee did not negate Wayne's right to participate in the March 25 meeting without a loss in pay, and that none of Inspector Wolfe's actions can properly deprive Wayne or the miners of their rights.

We conclude the judge erred in finding, under the facts of this case, that Consol discriminated against Wayne in violation of section 105(c)(1). In reaching this conclusion, we need not resolve whether the meeting at issue is a compensable post-inspection conference. Rather, assuming the applicability of section 103(f) to a ventilation review meeting, we find that, given Inspector Wolfe's exercise of his authority under section 103(f), Consol cannot be found to have violated the Act.

Under the Mine Act, a complaining miner establishes a prima

facie case of discrimination by proving he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. Thus, to prevail on his complaint, Wayne must first show that he had a protected right to attend the

March 25 meeting.

Section 103(f) affords both representatives of operators and representatives of miners the right to accompany an MSHA inspector during a "physical inspection of [the] ... mine" and to "participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. $ 813(f). We have previously emphasized the important function served by these rights in enhancing miners' understanding and awareness of the health and safety requirements of the Act. Emery Mining Corp., 10 FMSHRC 276, 289 (March 1988), petition for review filed Nos. 88-1655 and 1659 (lOth Cir. April 27, 1988); Secretary on behalf of Truex v. Consolidation Coal Co., 8 FMSHRC 1293 (September 1986); see also Magma Copper Co., 1 FMSHRC 1948, 1951-52 (December 1979), aff'd, Magma Copper Co. v. FMSHRC, 645 F.2d 694 (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981). We have further recognized that section 103(f) provides miners, rather than mine operators, the right to designate a representative for section 103(f) inspections and conferences. Truex, 8 FMSHRC at 1298. Unlike Truex, however, the controlling question here is not whether the operator has a role to play in the selection of a miners' representative but the extent of the role played by the Secretary's Inspector.

The right of a miners' representative to accompany an inspector is not an unqualified right. Emery, 10 FMSHRC at 289. Section 103(f) itself expressly provides that the exercise of the right is "[s]ubject to regulations issued by the Secretary," requires that a representative "be given an opportunity to accompany" the inspector, and grants the inspector discretion to permit additional representatives where he determines that more than one walkaround representative would aid his inspection. 30 U.S.C. $ 813(f). See Emery, 10 FMSHRC at 289.

In exercising the authority granted by section 103(f), the Secretary has recognized that the exercise of the walkaround right by miners' representatives must be the subject of appropriate qualification and she has expressly invested MSHA inspectors with the authority to limit the number of miners' representatives participating in an inspection, consistent with the primary obligation to carry out inspections in a thorough, detailed, and orderly manner. Interpretative Bulletin, 43 Fed. Reg. 17546 (1978). Emery at 289 n. 13. 5/

5/ The Secretary's Interpretative Bulletin setting forth guidelines for the inspector's interpretation and application of section 113(f), provides:

Considerable discretion must be vested in inspectors in dealing with the different situations that can occur during an inspection. While every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed, and orderly inspection. The inspector cannot allow inordinate

Here, it is clear that Inspector Wolfe believed that Wayne's presence as a walkaround was not required at the meeting because the miners already were adequately represented by the three union safety committeemen then present. It is undisputed that Wolfe informed the representatives of the miners already in attendance, as well as Consol's representative, of his position. Consol's safety engineer Riggle testified that had Wolfe stated that he required a walkaround for the meeting, Consol would have made certain that a walkaround was available to the inspector, and the parties do not dispute that Consol's practice is to defer to the MSHA inspector's determination regarding walkaround. Tr. 144, 154.

In view of the central role that inspectors play under the statute and the Secretary's own guidelines with respect to walkaround representation, we hold that the judge erred when he found "no relevance" in Wolfe's "comments" that "a 'walkaround' was not required ... and that the miners were already represented by the three safety committeemen who were present." 9 FMSHRC at 1962. In stating to the representatives of the miners and of Consol already present at the meeting that Wayne's additional presence was not required, Wolfe exercised the discretionary authority accorded him by the Act to determine the composition of the group participating in an inspection. Since three other members of the union safety committee and one representative of the International UMWA were present at the meeting, we cannot say that the inspector acted arbitrarily or capriciously in excluding Wayne.

We have considered the parties: stipulation that the safety committeeman working the shift during which an inspection takes place would be the "first choice" as miners: representative for an inspection occurring during that shift. The statute, however, does not limit walkaround participation to only "on-shift" miners. Instead, this statute requires only that, if an "on-shift" representative participates

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> delays in commencing or conducting an inspection because of the unavailability of or confusion surrounding the identification or selection of a representative of miners. Where necessary in order to assure a proper inspection, the inspector may limit the number of representatives of the operator and miners participating in an inspection. The inspector can also require individuals asserting conflicting claims regarding their status as representatives

> of miners to reconcile their differences among themselves and to select a representative. If there is inordinate delay, or if the parties cannot resolve conflicting claims, the inspector is not required to resolve the conflict for the miners and may proceed with the inspection without the presence of a representative.

43 Fed. Reg. at 17546 (emphasis added).

as the authorized representative, such representative is to be compensated by the operator. Here, several representatives of miners were present to participate at the meeting and the inspector, acting within his authority, determined that an additional miners' representative was not needed. In the circumstances of this case, the inspector's decision controls.

Accordingly, we find that the inspector acted within the discretion granted him under section 103(f) and the Secretarial guidelines in determining that Wayne's presence was not required at the meeting. We further find that in relying upon the inspector's determination Consol did not violate section 105(c). Therefore, the judge's decision is reversed, the discrimination complaint is dismissed, and the penalty assessed by the judge is vacated.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Chairman Ford concurring in result:

I agree with my colleagues in the majority that the decision of the judge should be reversed, but I would base the reversal on a more fundamental ground: Mr. Wayne's participation in the ventilation plan review meeting of March 25, 1986 was not a statutorily protected activity, the denial of which would constitute a violation of section 105(c) of the Mine Act. 30 U.S.C. 815(c). To the extent that my colleagues decline to reach the issue of whether a miner or miner representative's participation in such a review meeting lies within the "walkaround" right set forth in section 103(f) of the Mine Act, 30 U.S.C. 813(f), I am obliged to file this separate opinion.

It is appropriate to begin an analysis of how this dispute arose by recalling what Inspector Wolfe was doing at the Ireland Mine in March of 1986. He was there to carry out the Secretary's responsibilities under 30 C.F.R. 75.316, which requires that coal mine ventilation plans "be reviewed by the operator and the Secretary at least every six months" (emphasis added). The regulation is drawn verbatim from the Mine Act itself. 30 U.S.C. 863(0). There is simply no regulatory or statutory authority for participation by miners or their representatives in the development, review and approval of mine ventilation plans, however appropriate such participation might be. 1/

The question then becomes whether, despite this lack of authority for miner participation in the plan review and approval process, there exists an overriding right of participation derived from section 103(f) of the Mine Act. That section provides the miners' representative "an opportunity to accompany" the inspector during the physical inspection of the mine and "to participate in pre- or post- inspection conferences held at the mine." The Secretary argues that Inspector Wolfe's ventilation survey conducted on March 3-6, 1986 and the follow-up review meeting held on March 25, 1986 both invoke the "walkaround" right of section 103(f). The Secretary's position on review, however, conflicts with the delineation of section 103(f) rights set forth in the Department of Labor's Interpretative Bulletin (Bulletin) issued April 25, 1978, which is the only official Secretarial pronouncement on the scope of walkaround participation. 43 Fed. Reg. 17546. 2/

1/ The standard also provides that plans be initially "adopted" by the operator and "approved" by the Secretary. Numerous ventilation standards within Part 75, however, do require that records and reports of ventilation examinations conducted to evaluate the effectiveness of the ventilation plan must be made available to "interested persons"

which would of course include miners. See, e.g., 30 C.F.R. 75.300-4, 75.303, 75.305 and 75.306. Additionally, 30 C.F.R. 75.1203 requires that a mine map setting forth the ventilation system be kept current and made available to miners and their representatives.

2/ The Bulletin does not address a miners' representative's participation in pre-and post-inspection conferences; rather, it deals with various mine site "activities" giving rise to miners' participation rights. For purposes of analysis here, however, I am assuming that if a right to participate in a particular activity exists, that right extends to any subsequent conference held on mine property to discuss specifically the consequences of that activity.

Stating that "the types of activities which give rise to the [miner's] participation right under section 103(f) are numerous, but pot unlimited," the Bulletin proceeds to distinguish those situations where walkaround participation is warranted from those where it is not. Those activities giving rise to the right of participation are: (1) "regular inspections", i.e., the four underground and two surface mine inspections required annually by the Mine Act; (2) "spot inspections", described as inspections made for purposes of determining if an imminent danger or a violation exists; (3) inspections in response to requests from miners or their representatives, i.e., section 103(g) inspections; (4) inspections at mines liberating excessive quantities of methane or other explosive gases, i.e., section 103(i) inspections; and (5) inspections in conjunction with accident investigations. 43 Fed. Reg. 17547-48.

Conversely, activities that do not invoke the right to participation include: (1) technical consultations; (2) demonstration of prototype equipment; (3) education and training services; (4) safety and health research; (5) general information gathering; (6) criminal investigations; (7) investigations of discrimination complaints; (8) investigations into petitions for variances under section 101(c); and (9) field certification of permissible equipment. 43 Fed. Reg. 17548.

Viewed against the backdrop provided by these distinctions, I conclude that the activity engaged in by Inspector Wolfe during his visits to the mine on March 3-6, 1986 was more in the nature of consultation and information gathering in conjunction with the plan review and approval process than in the nature of "direct enforcement activity" described by the Bulletin as "carried out for the purpose of determining if an imminent danger or a violation exists." 43 Fed. Reg., 17547-48. 3/

This is not to say that "direct enforcement activity" could not arise in the course of an activity that would not otherwise invoke a miner representative's right to participate. In fact, Inspector Wolfe issued two

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3/ Indeed, the inspector's activities throughout March of 1986 are most analogous to those carried out during investigations into petitions for variance under section 101(c) (number 8 among the list of activities, supra, that do not give rise to miner participation rights). In both cases, the operator's past compliance record is reviewed, whether that review covers compliance with the current plan or compliance with the standard from which a variance is sought.

Likewise, in both cases the review covers proposed changes in the operator's compliance responsibilities, whether through revisions to the plan or through the variance being sought. If, as the Secretary argues and the judge found, the discussion of past compliance and changes in future compliance responsibilities are the criteria for determining whether an activity, i.e., the ventilation review meeting, comes within the "purview of section 103(f)", 9 FMSHRC 1962, I fail to see why section 101(c) investigations would not also require walkaround participation.

citations during the March 3-6 survey though neither one related to the ventilation standards or the ventilation plan (nor were the two citations reviewed at the March 25 meeting). The Bulletin, however, anticipates such circumstances by stating that while "enforcement action could result from some of those [non-participation] activities ... [t]he continuing presence of a representative of the miners in all phases of the activities would not necessarily aid the activity." 43 Fed. Reg. 17548.

Granting appropriate deference to the Secretary as an interpreter of the enabling statute, I find no basis in her Interpretive Bulletin for considering the mine plan review and approval process as an activity giving rise to section 103(f) participation rights for miners or their representatives. Indeed, the Bulletin taken as a whole supports an opposite view. Nor am I persuaded by the case law advanced by the Secretary in support of her position. In Southern Ohio Coal Co., 8 FMSHRC 295 (March 1986) miner participation at a post-inspection conference was specifically authorized by 30 C.F.R. 100.6 which granted "all parties" the opportunity to review each citation and order issued during a regular quarterly inspection. Id. 296. In Secretary on behalf of Truex v. Consolidation Coal Co., 8 FMSHRC 1293 (March 1988) the operator stipulated that a miner representative's attendance at a conference called to discuss a hearing conservation program was subject to the walkaround requirements of section 103(f). Here, there is neither regulatory authority nor an admission by the operator establishing that the ventilation plan review meeting of March 25, 1986 was subject to the walkaround rights of section 103(f).

In the final analysis the dispute in this case appears to have arisen from the inevitable blurring of miner's rights set forth separately in the Mine Act and in the National Bituminous Coal Agreement of 1984 and in their respective predecessors. Custom and practice at the Ireland Mine have obviously led to some confusion as to where statutory rights terminate and wage agreement rights commence. 4/ As this Commission has often stated, however, "the Mine Act is not an employment statute." United Mine Workers of America on behalf of James Rowe et al. v. Peabody Coal Co., 7 FMSHRC 1357, 1364 (1985) aff'd 822 F.2d 1134 (D.C. Cir. 1987). Great care must therefore be taken by the Secretary and the Commission to keep statutory and contractual rights separate and distinct. Here, regardless of what rights of participation may or may not lie in contract, it is clear to me that neither the Mine Act nor, in particular, standard 30 C.F.R. 75.316 grants miners or their representatives rights to participate in the review and approval

of mine ventilation plans. If the Secretary believes that

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4/ See, for instance, Article III, section (d)(7) of the wage agreement guaranteeing pay for certain safety committee activities and Article III, section (h) setting forth miners' rights to receive in advance and to comment upon various plans required to be developed and approved under the Mine Act. In fact, the latter provision was invoked by safety committeeman Miller when he requested a 10 day postponement of the March 25, 1986 meeting to allow the union to consider an MSH, proposed change in the ventilation plan. Tr. 107, 109. Although the plan was ultimately approved, the rescheduled meeting was never held. Tr. 55.

such participation is both vital and appropriate (and sound arguments can be marshalled to support that belief) her recourse is to the rulemaking provisions of section 101 of the Act, not to the discrimination provisions of section 105(c). 5/

For the reasons set forth above I would reverse the decision of the judge and dismiss the complaint.

Ford B. Chairman

5/ In fact, it should be noted that the scope of miner participation in the development, approval and periodic review of mine plans is a specific consideration in the Secretary's ongoing rulemaking activities. The Secretary's relatively recent revision of her roof control standards does not provide for the participation of miners or their representatives in the development of roof control plans nor in the approval and review process. Plans are to be "developed" by the operators, "approved" by the MSHA District Managers, and "reviewed" every six months by the Secretary's authorized representatives. 30 C.F.R. 75.220, 75.222 and 75.223. See 53 F.R. 2375, 2378-80 (January 27, 1988). Miner involvement is limited to access to approved plans and instruction in their provisions prior to implementation. Id. In her preamble to the standards, however, the Secretary deferred the issue of miner participation in the plan approval process to her pending rulemaking proceedings on ventilation standards. 53 F.R. 2370. In turn, the Secretary's proposed rule on ventilation provides the miners' representative an opportunity to provide written comments on the mine operator.s proposed plan and to meet with the District Manager to discuss the plan. The proposal is silent, however, with respect to walkaround rights. 53 F.R. 2354, 2404, 2421 (January 27, 1988).

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Distribution

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Thomas M. Myers, Esq.
United Mine Workers of America
56000 Dilles Bottom
Shadyside, Ohio 43947

Michael Peelish, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041