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ROGER STILLION V. QUARTO MINING  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
May 22, 1990

ROGER L. STILLION

v. Docket No. LAKE 88-91-D

QUARTO MINING COMPANY

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

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint filed by Roger L. Stallion, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) (the "Mine Act" or "Act"). The complaint alleges that Quarto Mining Co. ("Quarto") violated section 105(c)(1) of the Mine Act, 30 U.S.C. 815(c)(1), when it denied Stillion the opportunity to participate in an inspection of the mine without a loss of pay.<sup>1/</sup> Following an evidentiary hearing, Commission Administrative

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<sup>1/</sup> 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 within 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

agent, or the representative of 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, 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

Law Judge William Fauver found that Quarto had unlawfully discriminated against Stillion in violation of section 105(c)(1), 11 FMSHRC 523 (April 1989)(ALJ), and ordered Quarto to pay Stillion back pay, interest and attorney's fees. 11 FMSHRC 875 (May 1989)(ALJ). The Commission granted Quarto's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

The events in question took place at Quarto's Powhatan No. 4 Mine, an underground coal mine located near Clarington, Ohio. In approximately September 1987, Quarto contracted with A&C COstruction Co. ("A&C") to extend a gob pile located on the top of a hill at the mine. Pursuant to the contract, A&C was responsible for, among other things, removing and hauling trees, brush, and dirt. In addition, A&C subcontracted some of the work for hauling dirt. The work required A&C and its subcontractor to use haulage trucks and A&C to use other heavy equipment, such as back hoes and bulldozers. It also requires A&C's employees to work in and around the same area as some of Quarto's employees.

Soon after A&C started the project, Quarto's employees complained to Ronald Winkler, a union safety committeeman, and to other union officials, about the manner in which A&C employees were driving their trucks. (The union was the representative of Quarto's employees for Mine Act purposes.) Quarto's employees were also concerned about the lack of backup alarms on the trucks and other of A&C's mobile equipment. The Quarto employees believed that they were endangered by A&C's work practices and equipment. Stillion had himself observed several of the complained of conditions.

Winkle discussed the Quarto employees' safety concerns with some of A&C employees. He also discussed them with John Smith, Quarto's foreman for maintenance. The Quarto employees' complaints about A&C nevertheless continued. As a result, Ted Hunt, chairman of the union safety committee, placed a "Code-A-Phone" call to the Department of Labor's Mine Safety and Health Administration ("MSHA") requesting that MSHA inspect "all equipment of contractors" at the Quarto mine. Ex. Rx-1. 2/

On Friday, October 2, 1987, as a result of the Code-A-Phone

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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].

2/ Code-A-Phone is a toll free "hot line" to the MSHA headquarters in Arlington, Virginia, that is used to request an inspection of a mine, to report safety or health problems, or to report possible violations of the mandatory safety and health standards. MSHA's policy is not to reveal the source of a Code-A-Phone request or report.

request, MSHA Inspector Frank Homko arrived at the mine to inspect the contractor's equipment. 3/ Pursuant to section 103(f) of the Mine Act, 30 U.S.C. 813(f), Hunt served as the walkaround representative for Quarto's employees during the October 2 inspection. 4/ Percy Hawkins,

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3/ The Code-A-Phone inspection of A&C's equipment was conducted pursuant to section 103(g) of the Act, which states in 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 .... [A] special inspection shall be made as soon as possible to determine if such violation or danger exists....

30 U.S.C. 813(g).

4/ 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

Quarto safety inspector, represented Quarto on this inspection.

Inspector Homko, accompanied by Hunt and Hawkins, went to the gob pile to inspect A&C's equipment. During the inspection, Hunt elaborated to Homko the concerns of Quarto employees about A&C's equipment and work practices. The inspection was cut short, however, due to an accident unrelated to the issues in this case, and Hunt was paid by Quarto for the time during which he participated in the inspection. Hunt asked Stillion to act as the miners' walkaround representative when the inspection resumed, and Stillion agreed.

On Monday, October 5, a different MSHA inspector went to the mine to investigate the unrelated accident that had occurred on October 2. (The Code-A-Phone inspection of the contractors' equipment was not scheduled to resume until October 6). The inspector was asked by Hawkins if Quarto was responsible for paying a miners' walkaround representative who participated in an inspection of an independent contractor's work site. The inspector called the MSHA office and subsequently advised Hawkins that Quarto was not obligated to compensate such an employee walkaround representative. (Hawkins later conceded, however, that when posing the question to the inspector, he had not told the inspector of the particular safety complaints that had been lodged by Quarto's employees.)

On October 6, MSHA Inspector Gary Gaines resumed the Code-A-Phone inspection at the mine. Stillion accompanied Gaines during the inspection. Gaines introduced Stillion to A&C employees as a member of the local union and as the walkaround representative. Stillion testified that when Gaines informed A&C employees of their right to participate in the inspection, one of the employees responded, "we [would] just as soon have somebody from the mine went because we don't know the laws anyway." Tr. 131.

On October 7 and 8, Gaines continued and concluded the Code-A-Phone inspection with Stillion accompanying him. Alan Olzer, Quarto's safety supervisor, acknowledged that, as a result of the inspection, a number of safety violations were found.

At the conclusion of the inspection, Quarto refused to compensate Stillion for the time that he had spent accompanying the inspector. 5/

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subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this [Act].

30 U.S.C. 813(f)

5/ Quarto's refusal to pay Stillion reflected a change of company policy.

For about 16 years prior to this inspection, employee representatives of miners who accompanied MSHA's inspectors during inspections of independent contractors' equipment had been paid by Quarto. After the mine was acquired by Consolidation Coal Company, the policy was changed. Although the new policy was in effect when Hunt was paid by Quarto, mine management was not yet aware of the new policy.



(Subsequently, the union reimbursed Stillion for his lost wages.) When Quarto refused to pay Stillion, he filed a complaint with the Secretary of Labor alleging discrimination in violation of section 105(c)(1) of the Mine Act. After an investigation by MSHA, Stillion was informed by the Secretary of her finding that no unlawful discrimination had occurred. Accordingly, Stillion filed a discrimination complaint on his own behalf with the Commission under section 105(c)(3) of the Act. 30 U.S.C. 815(c)(3)

Following an evidentiary hearing, the judge issued his decision finding a violation by Quarto of section 105(c)(1). The judge concluded that Stillion was entitled to be paid by Quarto under section 103(f) of the Act. 11 FMSHRC at 527. The judge reasoned that the Code-A-Phone inspection was the type of inspection subject to the walkaround pay requirements of section 103(f). 11 FMSHRC at 526 (citing *United Mine Workers of America v. FMSHRC*, 617 F.2d 615 (D.C. Cir. 1982), cert denied, 459 U.S. 927 (1982); Interpretative Bulletin, 43 Fed. Reg. 17544-46 (1978)). The judge did not rule, however, on Quarto's contention that an owner-operator should not be required under section 103(f) to pay one of its employees for acting as the miners' walkaround representative during an inspection of an independent contractor's equipment.

On review, Quarto again argues that, as an owner-operator, it was not required to reimburse Stillion for accompanying an MSHA inspector during an inspection of A&C's equipment. Quarto notes that section 103(f) states that "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...." (emphasis added). Quarto notes that the term "operator," as defined in the Mine Act, specifically includes independent contractors. 6/ Quarto recognizes that several entities may meet the statutory definition of "operator" at one mine site. It asserts, however, that the term "operator" is used in the singular in section 103(f), thus indicating that one operator is liable to pay walkaround compensation. Quarto submits that because the inspection was aimed at A&C's equipment, the representative of miners who should suffer no loss of pay should be an A&C employee, not an employee of Quarto. Quarto notes that it was A&C, not Quarto, that was cited by the Secretary for safety violations as a result of the inspection. Therefore, Quarto argues, Stillion was not entitled to be paid for his participation during the inspection of A&C's equipment, and Quarto did not unlawfully discriminate against him by denying him pay.

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6/ Section 3(d) of the Act states:

"operator" means any owner, lessee, or other person

who operates controls, or supervises a coal or other mine or any independent contractor performing services or construction at such time.

30 U.S.C. 802(d).

We do not agree. Given the particular circumstances of this case, we affirm the judge's conclusion that Quarto was required to pay Stillion for his participation in the inspection at issue.

We first note that Stillion's participation in the inspection at issue meets the literal requirements for compensation under section 103(f). Quarto operates, controls, and supervises the Powhatan No. 4 Mine. 30 U.S.C. 802(g). During the time in question, Stillion was a miners' representative within the purview of section 103(f). 30 U.S.C. 813(f). Stillion accompanied Inspection Gaines during an inspection occurring at Quarto's mine which inspection was of the type triggering the right to walkaround compensation under section 103(f).

Furthermore, that Stillion's participation in the inspection furthered the purpose of the walkaround pay provision is clear. "The walkaround pay provision and the participation right are both aimed at the protection of the health and safety of miners - the single overriding purpose of the legislation." *Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694, 698 (9th Cir. 1981). As the Senate Committee that by-and-large drafted the Mine Act stated, paid participation in inspections by the miners' representative "will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." Senate Committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 616-17 (1978). In addition, Congress recognized that paid participation by representatives of miners would, because of the representatives' particular knowledge of the conditions at the mine, make the inspection "much more thorough." *Id.* at 1054. Thus, the right of paid participation by the miners' representative provides MSHA's inspectors needed familiarity with the specific working conditions in a particular mine.

Stillion's participation in the inspection of A&C's equipment met these goals. As the judge found, the inspection of A&C's equipment on October 6, 7 and 8 arose out of the concern of Quarto's employees for their own safety. 11 FMSHRC at 525. Quarto's miners, who complained about the safety hazards associated with the use and maintenance of A&C's equipment, believed that they themselves were endangered by the use of the equipment. Their complaints led to the request for an inspection. Stillion, who had been a safety committeeman for five years, was familiar with the mine and had personally observed the suspect equipment being operated in a manner that he considered unsafe for Quarto's miners. Under these circumstances, Stillion had a right to participate in the inspection and a right to compensation from Quarto.

Quarto's argument that it should not be held liable for compensating its employee who participated in an inspection that resulted in citations being issued to A&C is inapposite in these circumstances. Hence, Quarto's own employees were exposed to the hazards created by A&C's equipment. Although A&C was appropriately cited for the violations, since it was in the best position to abate the hazards complained of, that does not defeat the walkaround rights of Stillion, who served as the sole miners' representative on the inspection and who represented Quarto miners exposed to the hazards created by A&C's

equipment.

Quarto warns that this conclusion is at odds with the purpose of the walkaround provision. It suggests that to uphold a right to compensation here means that an employee of an independent contractor could request an inspection of any part of an owner-operator's mine and be paid for participating in any resulting inspection. Quarto suggests, as an example, that a truck driver employed by A&C could request, participate in and be paid for taking part in an inspection of Quarto's preparation plant. See *Quarto Br.* 12-13. That is not, however, the case we are deciding today. Rather, we are deciding only that, where an owner-operator's employees are endangered by the activities of an independent contractor at the owner-operator's mine, a representative of the owner operator's employees who serves as the sole miners' representative during an inspection of the contractor's operation is entitled to compensation pursuant to Section 103(f). Of course, any interpretation of section 103(f) that is inconsistent with its provisions and does not effectuate its purpose would not be upheld. See *Magma Copper Co., FMSHRC 1948, 1951-52* (December 1979); *aff'd Magma Copper Co. v. Secretary of Labor, 645 F.2d 694* (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981).

For the reasons explained above, we conclude that in the circumstances of the present case Stillion had a right to walkaround pay under section 103(f). 7/

Accordingly, for the reasons stated above, we affirm the judge's decision.

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7/ Quarto appears to suggest that if the Commission concludes that it was required to compensate Stillion, it should nonetheless not be held liable for a violation of section 105(c) because it acted in good faith. Quarto Br. 19. The basis for Quarto's "good faith belief" appears to be the statement by the MSHA inspector that payment was not required. An operator's reliance on an incorrect legal opinion or theory does not defeat effectuation of a miner's statutory rights. Cf. *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir, 1984).