

CCASE:
PEABODY COAL V. MSHA
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May 15, 1992
PEABODY COAL COMPANY

v.

Docket No. KENT 91-340-R
KENT 91-341-R
KENT 91-342-R

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

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This contest proceeding is before the Commission by way of a petition for review filed by Peabody Coal Co., and involves alleged violations of section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. □ 813(f), (the Mine Act).(Footnote 1) In a decision issued August 21, 1991 Commission

1 Section 103(f), 30 U.S.C. • 813(f), provides:
Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or postinspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary 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 the subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. 30 U.S.C. • 813(f).

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Administrative Law Judge Gary Melick dismissed Peabody's contest of three citations issued by the Secretary for the operator's refusal to compensate certain miners' representatives for time spent accompanying several MSHA inspectors during a regular quarterly inspection. 13 FMSHRC 1302. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background(Footnote 2)

Peabody owns and operates the Martwick Mine, an underground coal mine in Muhlenburg County, Kentucky. During March 1991, MSHA conducted a quarterly inspection of the mine pursuant to section 103(a) of the Act, 30 U.S.C. • 813(a). Two segments of that regular inspection gave rise to the citations on review when MSHA conducted what are known as "blitz" inspections of the mine. On March 7, MSHA sent several inspectors to the No. 4 Unit and on March 19, MSHA sent several inspectors to the No. 1 Unit of the mine. 13 FMSHRC at 1303; S. Br. 11.

With respect to the March 7, 1991, inspection, A.J. Parks (MSHA supervisor), William Branson (electrical inspector), Terry Cullen (roof control specialist), Darold Gamblin (Martwick's regular inspector), and Sam Martin (inspector) arrived at the mine at 7:10 a.m. Supervisor Parks assigned each MSHA inspector his duties for the day, and they proceeded to examine the mine's records. 13 FMSHRC at 1303; Tr. 14-15.

The inspectors entered the mine at approximately 8:30 a.m., accompanied by: Kentucky state inspector James Hawkins; Peabody representatives Steve Little and Bob Epley; and miners' representatives Cecil Phillips, Sam Sookey, Terry Bowman, William Johnson, and Artemaus Birchwell. Cecil Phillips was the usually designated "walkaround representative" during regular inspections while the other four miners' representatives -- Sookey, Bowman, Johnson and Birchwell -- accompanied the MSHA inspectors at the request of the Local Union. 13 FMSHRC at 1303-1304; Tr. 15, 18.

At approximately 9:00 a.m., the inspection party reached the Four East Panel of the mine and split up into five groups, each of which included a walkaround representative. Once the groups were formed, they proceeded as follows: Group A travelled directly to the face areas of the No. 4 Unit by a mantrip through the track entry. Upon arriving, this group conducted an

2 This case was submitted for decision below on the basis of two joint exhibits and a set of stipulations agreed to by the parties at the hearing and

then read into the record. No testimony was taken, nor were the stipulations reduced to writing. See Hearing Transcript, June 13, 1991, hereafter, "Tr." ~742

electrical inspection of the unit. Group B travelled to the face areas by a separate mantrip through the track entry. They inspected the roof and faces. Group C did a walk-through inspection of the 4,200 foot return entry and arrived at the face areas of the unit at approximately 11:30 a.m. Group D did a walk-through inspection of the 4,200 foot belt entry and arrived at the face areas at about 11:30 a.m. Group E did a walk-through inspection of the 4200 foot intake entry and also arrived at the face areas at approximately 11:30 a.m., where they took rock dust samples in seven different locations.

13 FMSHRC at 1303-1304; Tr. 15-16.

From 11:30 a.m. until 12:00 noon, "the various inspectors all identified above assisted in completing the inspection of the unit." Tr. 16.

Thereafter, all the participants rendezvoused at the end of the track entry and left the mine together, arriving at the surface at about 12:45 p.m. From 12:45 p.m. until 1:45 p.m., the inspectors wrote those citations that had not been issued underground and delivered them to the Peabody representatives. Inspector Branson discussed his own findings with Peabody and left the mine at 1:45 p.m. At that point the remaining inspectors held a close-out conference with Peabody representatives and all five miners' representatives. The conference adjourned at 2:00 p.m., and Cullen and Martin left the mine. Parks and Gamblin left at 2:30 p.m. 13 FMSHRC at 1305; Tr. 16-17.

On March 19, 1991, a similar scenario took place when MSHA representatives Parks, Gamblin, and Branson were joined by Ted Smith and Mike Whitfield, also of MSHA. The group arrived at the mine at 7:15 a.m. to inspect the No. 1 Unit. Once again, in addition to the regular walkaround representative, Phillips, the Local Union requested that miners' representatives Sookey, Bowman and Birchwell be added to the inspection party. Peabody's representatives were again Little and Epley. 13 FMSHRC at 1304; Tr. 18-19. The inspection party entered the mine together at 8:30 a.m., arrived at the First Northwest Main at 8:45 a.m., and split up into four groups, each of which included a walkaround representative.

Group A travelled directly to the face areas of the No. 1 Unit through the track entry where they commenced an electrical inspection at about 9:00 a.m. Group B did a walk-through inspection of the 3,300 foot return entry arriving at the face areas of the unit at approximately 9:30 a.m. Group C walked the 3,300 foot belt entry also arriving at approximately 9:30 a.m. Group D walked the 3,300 foot intake entry and arrived at the face areas at approximately 9:35 a.m. 3 FMSHRC at 1304-1305. According to the stipulations, "various inspectors identified above conducted an inspection of the unit which lasted until approximately 12:45 p.m." Tr. 20. During that period a ventilation problem arose, and miners' representatives Phillips and Sookey were assigned to correct it. Sookey devoted 30 to 40 minutes to that task. 13 FMSHRC at 1305.

The entire group again rendezvoused at the end of the track entry, travelled out of the mine, and arrived on the surface at 1:10 p.m. As he had done on the previous occasion, Inspector Branson immediately discussed his findings with the Peabody representatives and left the mine at 1:15 p.m. After writing their citations, the remaining MSHA inspectors held a close-out conference from 1:30 p.m. until 1:45 p.m., with Peabody representatives and ~743

the four miners' representatives in attendance. Smith and Whitfield left the mine at 1:45 p.m., and Parks and Gamblin, at 3:00 p.m. 13 FMSHRC at 1305, Tr. 21.

Following the March 7, 1991, inspection, Peabody paid miners' representative Phillips for the time spent accompanying the MSHA inspectors but did not pay miners' representatives Johnson, Birchwell, Bowman or Soockey. Following the March 19, 1991, inspection, Peabody again paid Phillips for the time spent accompanying the MSHA inspectors but did not pay Birchwell, Bowman

or Soockey. 13 FMSHRC 1303, 1307; Tr. 21-22. On April 15, 1991, MSHA issued a

citation alleging a violation of section 103(f) for Peabody's failure to compensate miners' representative Soockey "for time spent in the capacity of Miner Representative while traveling with an authorized representative of [the] Secretary" on March 7, 1991, and March 19, 1991. 13 FMSHRC at 1307. Similar citations were issued on April 16, 1991, with regard to Peabody's failure to compensate miners' representatives Johnson and Birchwell, and on April 17, 1991, for failure to compensate miners' representative Bowman. *Id.* After summarizing the facts, the judge concluded: "It is not disputed that during the course of both the underground inspections, each team operated separate and apart, with no overlapping responsibilities or duplication of inspection efforts." 13 FMSHRC at 1305. The judge then cited *Magma Copper Company v. Secretary and FMSHRC*, 645 F.2d 694 (9th Cir. 1981), for the proposition that, whenever an inspection is conducted by more than one MSHA inspector and each acts separately and inspects a different part of the mine, a representative of the miners, who is also an employee of the operator, is entitled to accompany each inspector without loss of pay. *Id.*

Applying *Magma* to the instant case the judge found that although each inspection at the Martwick mine took place within a single mine unit, "each inspector was performing a separate and distinct inspection function." He further found that, "because of stoppings between the entries travelled by the inspection teams, most of the teams were also separated physically."

13 FMSHRC at 1306. Accordingly, the judge held that the circumstances in the Martwick mine fell "within the ambit of the *Magma* decision," and that Peabody had violated section 103(f) by not compensating all of the miners' representatives who accompanied the MSHA inspectors during the two inspections. 13 FMSHRC at 1305-1306.

II.

Disposition of Issues

Peabody argues on review that this case presents a matter of first impression: the scope and construction of the Magma decision, *supra*, in the context of "blitz" inspections conducted at underground coal mines. The operator asserts that the circumstances in the Martwick mine are distinguishable from those in Magma. In the Magma case, Peabody argues, two inspectors were indeed inspecting separate areas of a mine. Their inspections of a huge milling complex took them as many as six or seven miles apart and they did not see each other until they returned to the mine office to complete their paperwork. Under those circumstances, Peabody agrees the Secretary was justified in requiring a paid walkaround representative for each inspector.

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Peabody asserts, in contrast, that Unit 1 and Unit 4 are each a single area or a single part of the mine. Therefore, under Magma, the MSHA contingents deployed on March 7, 1991, and March 19, 1991, were each a single inspection party entitled to only one paid walkaround representative during the course of the inspection. The operator argues that under the judge's interpretation of Magma, "a mine operator would be required to pay walkaround pay on virtually any occasion on which multiple inspectors inspect an underground coal mine." Pet. 5.

The Secretary rejoins that the judge correctly applied Magma here, given that the MSHA inspectors at the Martwick Mine on March 7, 1991, and March 19, 1991, were inspecting "different parts of the mine and perform[ing] separate and distinct inspection functions." Br. 9. She further contends that utilizing multiple inspectors and multiple miners' representatives reduces the amount of time needed to complete inspections at larger mines. Therefore, the Secretary contends, the total outlay of walkaround wages is approximately the same as it would be if only one inspector and one miners' representative were assigned to the same areas.

The Secretary argues that Peabody's attempt to distinguish the facts presented in Magma from the facts presented here, "exalts form over substance." Br. 11. The Secretary first points out that Peabody stipulated that the separate inspection groups performed separate functions (Tr. 27) and refers to joint exhibits showing the separate routes travelled by the respective groups through Units 1 and 4 of the mine. The Secretary contends that, given the "unique character of each entry, the individual areas of expertise of the different inspectors, and the division of the general inspection party along different paths to perform separate and distinct inspection functions in the mine," including a paid walkaround representative in each group was justified under the circumstances. Br. 14. The Secretary concedes that the areas covered in the Martwick Mine "may not have been as physically separate as those in Magma," but asserts nevertheless that "the same basic principles established in Magma are applicable here." Br. 14-15. In Magma, the principal case dealing with compensation for multiple walkaround representatives, two MSHA inspectors arrived at the mine to inspect

separate areas of the operator's extensive milling complex. Magma agreed to the inspector's requests that each be accompanied by a walkaround representative, but insisted that it would compensate only one of the representatives for time spent accompanying the inspector. Only one walkaround representative participated in the inspection, but Magma was cited for refusing to pay a miners' representative to accompany the second inspector. In deciding the matter on review, the Commission first reviewed the legislative purpose of section 103(f) in light of MSHA's customary inspection practices:

The language of section 103(f) conveys the impression that Congress expected that one inspection party will visit all parts of the mine and one paid miners' representative will therefore fully participate in the inspection. The walkaround pay limitation appears designed to minimize the operator's economic burden by

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requiring him to pay only one miner who is in that one inspection party. However, several inspectors are often sent into large mines to expedite inspection of the entire mine. Providing walkaround pay only to one miners' representative when several inspection parties are inspecting the entire mine would make the right to walkaround pay dependent on the number of inspectors sent to the mine.

1 FMSHRC at 1951. Accordingly, the Commission held that "when the inspection is divided into two or more parties to simultaneously inspect different parts of a mine ... one miners' representative in each inspection party must be paid for time spent accompanying [the] inspector ..." 1 FMSHRC 1948.

The United States Court of Appeals for the Ninth Circuit affirmed the Commission's decision, holding that "where an inspection of a mine is conducted by more than one inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners may accompany each inspector without loss of pay if he is an employee of the mine operator." 645 F.2d at 695. The Court also cited an Interpretive Bulletin for section 103(f), which states that when multiple inspectors inspect different areas of a mine, each is entitled to a walkaround representative and each representative is entitled to participate without loss of pay. 43 FR 17546, 17549 (April 25, 1978).

The citations in this case address the compensability of time spent by miners' representatives in the March 7 and March 19, 1991, inspections from the time the inspection teams were assembled up to the time when the teams completed their inspections of the face areas of the two units.(Footnote 3)

The citation issued with respect to Peabody's failure to compensate miners' representative Sooke, which mirrors the citations issued with respect to the other uncompensated representatives, states:

A violation of 103(f) of the 1977 Act has occurred because Sam Sookey has evidence (pay record) that he suffered loss of pay on March 7 and 19 for time spent in the capacity of Miner Representative while traveling with an authorized representative of Secretary of Labor, (MSHA), during inspection. 13 FMSHRC at 1307.

Peabody challenges the citations on the basis that Units 1 and 4 of the Martwick Mine are each an indivisible "area of the mine" analogous to each area of the milling complex for which a paid walkaround was required in the

3 On review, the parties also limit their discussion to the inspections themselves. We therefore leave to another case the extent to which a mine operator may be liable for compensation to miners' representatives who participate in post-inspection conferences following multiple-party inspections.

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Magma decision. Accordingly, the operator argues, it was liable for compensation to only one walkaround representative for all of Unit 4 on March 7, and to only one such representative for all of Unit 1 on March 19, 1991. We disagree.

Insofar as the inspections of the respective entries in the two units were concerned, the inspectors and their miner escorts were as physically separated from each other as were the inspection teams at Magma's milling complex. Therefore, that portion of the inspections falls within the ambit of Magma.

As to the inspection activity at the face areas of the two units following the walk-through inspections of the entries, the record evidence is spare, essentially limited to the following stipulations: "the various inspectors ... assisted in completing the inspection of the [No. 4] unit" (Tr. 16), and "various inspectors ... conducted an inspection of the [No. 1] unit..." (Tr. 20). Furthermore, on the basis of an admission by Peabody that "each inspector performed a different and specific function during the course of these inspections," (Tr. 20), the judge concluded that "[i]t is not disputed that during the course of both of the underground inspections each team operated separate and apart with no overlapping responsibilities or duplication of inspection efforts." 13 FMSHRC at 1305. Moreover, Peabody did not challenge the judge's conclusion on this issue in its petition for review. We therefore conclude, on the basis of the record in this case, that the activity of the various inspectors at the face areas was separate and nonduplicative, and we deem the face inspection activity also to fall within the parameters of Magma.

In summary, we conclude from the record before us that the walkaround activity specified in the citations, i.e., "travelling with an authorized representative of [the] Secretary of Labor during inspection," 13 FMSHRC at

1307, was compensable time spent by each of the miners representatives who participated from the point at which the inspection teams were assembled until they completed their inspections of the face areas in Units No. 1 and No. 4.

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Accordingly, as explained above, we affirm the judge's decision that Peabody violated section 103(f) of the Mine Act.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner