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SOL (MSHA) V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
: :
v. : Docket No. WEVA 92-922
: :
CONSOLIDATION COAL COMPANY :

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners(Footnote 1)

DECISION

BY THE COMMISSION:

In this civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), the issue is whether a mine operator may prohibit the miners' representative, who is an employee, from accompanying an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") if the operator has a good faith, reasonable belief that the area to be inspected is too dangerous to permit such walkaround.(Footnote 2) Administrative Law Judge Roy J. Maurer held that an operator may not restrict the walkaround right in such circumstances. 15 FMSHRC 768 (April 1993)(ALJ). For the reasons set forth below, we affirm the judge's decision.

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Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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Section 103(f), the Mine Act's "walkaround" provision, provides in relevant part:

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.

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

I.

Factual and Procedural Background

On January 13, 1992, MSHA inspector Thomas May arrived at Consol's Humphrey No. 7 Mine and advised Robert Smith of Consol's safety department and Sam Woody, the miners' representative, that he was going to travel to the mine's northwest longwall panel to inspect the northwest bleeder. Tr. 17-19. The inspector's action was prompted by a disparity between the methane readings he had obtained on the surface and those reflected in Consol's records. Tr. 20, 82.

Until April 1991, the northwest bleeder had been traveled weekly to check methane levels. By letter dated March 28, 1991, Consol had requested that MSHA waive the underground evaluation and allow it to monitor the fan's effectiveness by taking methane readings from the surface. In its letter, C.E. Bane, Consol's Regional Safety Manager, expressed his concern that individuals were traveling old underground areas, because "a potential hazard can exist." Gov. Ex. 4. On April 22, 1991, MSHA agreed to the waiver. No underground examinations of the northwest bleeder had been performed in the eight months preceding Inspector May's January 13 inspection.

Consol's general mine superintendent, John Higgins, was notified of May's intention to inspect the northwest bleeder. By May's account, Higgins told him that he would not permit either the walkaround representative or the company representative to accompany the inspector past the man door at the six northwest cut-through because the area had not been pre-shifted and because of Higgins' belief that the area was dangerous. Tr. 26-27.

During the course of the inspection, Smith and Woody accompanied May only to the man door at the six northwest cut-through and May proceeded alone to the Brock Fan area. He returned about an hour later. Based on the methane concentrations in the area, he issued a section 107(a) imminent danger order, shutting down the longwall. Tr. 35.

That evening, after Consol called to tell him that the methane problems had been corrected, Inspector May returned to the mine. He met with John Webber, also of Consol's safety department, and with miners' representative Richard Matthews. Mine superintendent Ron Weaver told May that no miners' representative could accompany the inspector to the northwest bleeder but that Consol shift foreman Rick Pauley would be going to the bleeder with him. Tr. 38. The inspector and Pauley then went to the northwest bleeder. Finding the methane level there to be less than two percent, the inspector terminated the order. Tr. 41.

Two days later, May issued the section 104(a) citation at issue for Consol's failure to allow the miners' representative to accompany him on his inspection. The citation stated:

The operator did not give the representative, authorized by the miners, the opportunity to accompany an authorized representative of the Secretary. On day shift and afternoon shift on 01-13-92

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the miner representative was not permitted to accompany me on my physical inspection of the northwest bleeder system....

Gov. Ex. 2.

At the hearing, inspector May testified that he did not find the entry unsafe, although he did acknowledge that methane is generated in the gob. Tr. 56-58. He found the area to be well cribbed, with very little pressure on the cribs and with very little rib sloughage. Inspector May further testified that he took safety precautions before going beyond the man door. Tr. 74. The inspector also stated that, if he had encountered an unsafe area, he would have stopped and would also have stopped the miners' representative. Tr. 74.

Consol's witness, general mine foreman Eldon Hagedorn, stated that employees were not permitted to travel into the northwest bleeder. Tr. 90. Foreman Hagedorn explained the dangers that motivated Consol first to prohibit the company and walkaround representatives from accompanying the inspector and later to prohibit the walkaround representative from accompanying him:

Well, that area back in there was approximately 8,000 feet behind the existing longwall face. There's roof conditions in there that constantly change. There could be methane in certain areas that they could wander into. By not being examined you're just not sure what changes are made back there. And we just feel it's unsafe to send anybody into that area.

Tr. 91.

Consol safety supervisor Stanley Brozik also testified as to dangers that could be present:

The area hadn't been examined [by anyone] for the last --- roughly eight and a half, nine months ... [a]nd in an area such as that, over 4,000 feet, there could be numerous things, bad top, gas, shortage of oxygen. A lot of dangers that could be encountered....

Tr. 103.

Consol employee Robert A. Smith testified that he considered inspector May's visit to the Brock Fan area to be unusual because the area was not traveled by Consol employees. Tr. 112. In his view, the dangers in that area were the absence of an intake escapeway, methane liberation, the potential for oxygen deficient air and bad roof. Tr. 113-114.

In affirming the citation, Judge Maurer stated:

The Commission has emphasized repeatedly that the walkaround rights granted miners' representatives by section 103(f) of the Mine Act are a vitally important statutory right granted to miners and their

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representatives by the Act. And I can find no authority, nor has respondent been able to cite me any, for the proposition that the opportunity to engage in walkaround can be restricted by the operator based on potential danger to the employee/miner's representative.

15 FMSHRC at 771-772.(Footnote 3)

The Commission granted Consol's petition for discretionary review and permitted the National Coal Association ("NCA") to participate as amicus curiae.

II. Disposition

On review, Consol, referencing section 2(a) and (e) of the Mine Act, contends that construing section 103(f) to provide the walkaround representative with an absolute right to accompany the inspector conflicts with the mine operator's primary obligation to protect its employees from harm.(Footnote 4) Consol asserts that, in light of this obligation, it should be able to refuse the walkaround representative access to areas it "reasonably considers to be too dangerous to enter." Consol Br. 3.

The Secretary of Labor ("Secretary") asserts that an operator's good faith, reasonable belief that a mine area is hazardous is not sufficient grounds to deny a miners' representative the right to accompany the inspector because such a construction of section 103(f) is contrary to its plain language, its legislative history and its underlying purpose. The Secretary states that, alternatively, if the language is considered ambiguous, deference is due to his interpretation of the provision.

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The judge did not reach the issue of whether the northwest bleeder system was too dangerous to inspect or dangerous at all on the day in question. 15 FMSHRC at 771. Nor do we.

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Section 2 provides, in part:

Congress declares that --

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource -- the miner;

....

(e) the operators of ... mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

30 U.S.C. 801(a), (e).

Amicus NCA, referring to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), argues that the Secretary's views are not entitled to "Chevron-based deference" because the Secretary has failed to issue regulations or policies to fill the gap left by Congress on this issue. NCA Br. 7. NCA notes other restrictions that have been applied to section 103(f): its being subject to regulations and an interpretative bulletin issued by the Secretary; limits on walkaround compensation; filing requirements as to walkaround representatives; and nonemployees' walkaround rights being contingent upon waivers of liability. Thus, NCA asserts that the 103(f) right is subject to reasonable restrictions and, because the walkaround at issue in this case involves an unsafe practice, barring the representative is reasonable. NCA Br. 8.(Footnote 5)

We note preliminarily that the walkaround right provided in section 103(f) existed under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)("Coal Act"). That provision stated:

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.

30 U.S.C. 813(h) (1976)(amended 1977)(emphasis added).

In enacting the Mine Act, Congress continued the Coal Act's broad application of the walkaround right and expanded rights incident to it. The Conference Report on S.717, the Senate's version of the bill, explained:

The conference substitute expands the concept of miners' participation in inspections by authorizing miners' representatives to participate not only in the actual inspection of a mine, but also in any pre- or post-inspection conferences held at that mine.

H.R. Conf. Rep. on S. 717, 95th Cong., 1st Sess. (1977), reprinted in Senate

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Although NCA has referenced MSHA's letter granting Consol a waiver of the underground examination of the bleeder as evidence that the area was extremely dangerous, we note that Consol's letter expressed concern only that a "potential hazard can exist" (Gov. Ex. 4) and that MSHA's approval of the request did not express concurrence in Consol's assessment of potential hazards. MSHA granted the waiver without comment. (Gov. Ex. 3)

NCA further argues that exercise of the walkaround right would have conflicted with other safety standards such as 30 C.F.R. 75.364, which allows only certified persons in the bleeders, and 75.303(a) and 75.314, which require a pre-shift examination before others enter underground areas. We do not reach these issues because they were not raised before the judge. Section 113(d)(2)(A)(iii).

Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1361 (1978). In addition to adding a right of the miners' representative to participate in inspection conferences, the Mine Act added a compensation provision in section 103(f). The Mine Act did not restrict the types of inspections to which the walkaround right applies.

The only qualification to the walkaround right in section 103(f) is that it is subject to regulations issued by the Secretary. The Secretary's regulations have not limited the walkaround right in the manner urged by Consol.(Footnote 6) Moreover, although Congress recognized that a walkaround representative could be exposed to danger, (the inspections enumerated in section 103(a) include inspections to determine whether an imminent danger(Footnote 7) exists as well as inspections of especially hazardous conditions), it did not curtail the walkaround right in dangerous situations.(Footnote 8) Thus, upon "employing traditional tools of statutory construction, including text, structure and legislative history," *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989); *Chevron* at 842-43, we conclude that Congressional intent is clear on this issue. Accordingly, we hold that section 103(f) precludes denying the walkaround right on the basis of an operator's good faith, reasonable belief that the area to be inspected is too dangerous to be

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The Secretary has issued an Interpretative Bulletin which, in essence, excludes from section 103(f) walkaround rights certain inspection activities that are unrelated to enforcement. 43 Fed. Reg. 17546-48 (April 25, 1978).

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An "imminent danger" is defined in section 3(j) of the Act as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j).

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Section 103 provides, in relevant part:

(a) Authorized representatives of the Secretary ... shall make frequent inspections ... in coal or other mines each year for the purpose of ... (3) determining whether an imminent danger exists ...

....

(i) Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, ... or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals.

30 U.S.C. 813(a), (i).

entered. (Footnote 9)

The right of a miners' representative to accompany the inspector on all section 103 inspections has been consistently recognized by the Commission and the courts. It has been uniformly held that the walkaround right includes the right to accompany the inspector during section 103(i) "spot inspections" which, significantly, occur in mines that liberate excessive quantities of explosive gases or that present some other especially hazardous condition. See, e.g., *Helen Mining Co.*, 1 FMSHRC 1796 (November 1979), rev'd on other grounds, sub nom. *United Mine Workers v. FMSHRC*, 671 F.2d 615 (D.C. Cir), cert. denied, 459 U.S. 927 (1982). In that case, the Court of Appeals for the D.C. Circuit concluded that all safety inspections are made pursuant to section 103(a) of the Mine Act, and include inspections carried out to determine whether an imminent danger is present. 671 F.2d at 619, 623-24.

Other circuit courts have also held that the walkaround right applies to spot inspections. See, e.g., *Consolidation Coal Co. v. FMSHRC* 740 F.2d 271 (3d Cir. 1984). In *Monterey Coal v. FMSHRC* 743 F.2d 589 (7th Cir. 1984), the court held that, under the Coal Act, "an authorized representative of miners was entitled to accompany a federal mine inspector on any mine inspection ... [and that] [n]othing in the legislative history [of the 1977 Mine Act] indicates any intent to restrict the pre-existing right under the Coal Act to accompany the inspector on `any inspection.'" Id. at 590, 593.

We note that the Secretary does not assert an absolute requirement that the miners' representative be permitted to accompany the inspector without regard to the circumstances. The Secretary recognizes that mine inspectors are responsible for the safe exercise of the walkaround right and that there may be instances when an inspector, in the course of conducting an inspection, will decide against permitting the walkaround representative to enter a particular area of a mine "where necessary to protect the safety of miners." Sec. Br. 15-16 n.9.

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Because we have decided this case based on Congress' clear intent, we do not address the Chevron deference arguments made by the Secretary and amicus NCA.

III.
Conclusion

For the reasons discussed above, we affirm the judge's determination that an operator may not prohibit a miners' representative from accompanying the inspector during a section 103(a) inspection on the basis of a good faith, reasonable belief that the representative would be exposed to a hazard.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner