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CONSOLIDATION COAL V. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY  
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEVA 88-184-R  
Citation No. 2949890; 3/1/88

Ireland Mine  
Mine ID 46-01438

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

v.

CONSOLIDATION COAL COMPANY,  
RESPONDENT

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF DAVID P. CLARKE,  
COMPLAINANT

v.

CONSOLIDATION COAL COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-209  
A. C. No. 46-01438-03730

Ireland Mine

DISCRIMINATION PROCEEDING

Docket No. WEVA 88-282-D  
MORG CD 88-7

Ireland Mine

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U. S.  
Department of Labor, Philadelphia, Pennsylvania,  
for the Secretary;  
Michael Peelish, Esq., Consolidation Coal Company,  
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Weisberger

Statement of the Cases

In these consolidated cases the Secretary (Petitioner) seeks  
a civil penalty for an alleged violation by the Operator  
(Respondent) of section 103(f) of the Federal Mine Safety and  
Health Act of 1977, and the Respondent has contested the

violation and alleges that the underlying citation be vacated. In addition, the Secretary on behalf of David P. Clarke seeks, in a Complaint filed on June 27, 1988, and in an Amended Complaint filed on July 20, 1988, seeks a civil penalty and various declaratory relief alleging that Respondent unlawfully discriminated against Clarke in violation of section 105(c)(1) of the Act. Respondent filed its Answer to the Complaint on July 11, 1988. Subsequent to notice, the cases were heard in Wheeling, West Virginia, on December 14, 1988. David P. Clarke, David Miller, and Lyle Tipton testified for Petitioner, and John Hiram Snyder and Hestle B. Riggle, Jr., testified for Respondent.

The Parties were allowed 3 weeks after receipt of the Transcript to file Proposed Findings of Fact and Memorandum of Law. Respondent filed its Brief on March 21, 1989. Petitioner did not file any Brief or Proposed Findings of Fact.

#### Stipulations

At the hearing the Parties submitted the following stipulations:

1. Consolidation Coal Company is the owner and operator of the Ireland Mine located in Marshall County, West Virginia.

2. Consolidation Coal Company and the Ireland Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over this case pursuant to section 105 of the Act.

4. Section 104(a) Citation No. 2949890 was issued by Lyle R. Tipton, a duly authorized representative of the Secretary of Labor.

5. The appropriateness of the penalties, if any, to the size of the coal operator's business, should be based on the fact that in the previous calendar year, 1987, the Ireland Mine produced an annual tonnage of 2.3 million and the contracting company, Consolidation Coal Company, had an annual tonnage of 48.5 million.

6. The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 652, and the total number of inspection days for that period is 687.

7. Assessment of a civil penalty in these proceedings will not affect the operator's ability to continue in business.

Essentially the ultimate issue to be decided in each of the above captioned cases, which have been consolidated, is whether Respondent discriminated against David P. Clarke in violation of section 105(c)(1) of the Act. In this connection, Respondent argues that Clarke was not engaged in any protected activities. However, Respondent concedes that if it be found that Clarke did in fact engage in protected activities, then it is not disputed that Respondent took adverse action against Clarke based solely upon his protected activity. As such, the critical issue to be determined herein is whether or not Clarke engaged in any protected activities.

#### Findings of Fact and Discussion

David P. Clarke, a miner employed by Respondent at the Moundsville Portal of its Ireland Mine, is an elected Safety Committeeman of the union representing the miners at the Ireland Mine. In this capacity it is his responsibility, along with the three other members of the safety committee, to accompany MSHA inspectors on inspections of the Ireland Mine. On December 21, 1987, Hestle B. Riggle, Jr., Respondent's safety supervisor, in response to Clarke's inquiry, advised him at the beginning of the day shift, that an MSHA inspector was at the River Portal that morning to perform an inspection. Clarke informed Riggle that he was the elected official on the Union's Safety Committee, and requested of the latter permission to go to the River Portal to accompany the inspector on the inspection. Riggle denied his request and indicated that, in essence, the designated Union members at the River Portal, which was approximately 12 miles from the Moundsville Portal, would go with the Inspector. Clarke then made the same request of George Carter and received the same response. Subsequently on January 12 and January 16, 1988, Clarke made similar requests to accompany the MSHA inspector at the River Portal, and the requests were denied for the same reasons. At each instance there were no Union Safety Committeemen at the River Portal. Further, on March 1, 1988, Clarke made a similar request to accompany an MSHA inspector at the River Portal, and John Hiram Snyder, Respondent's operations superintendent at the Ireland Mine, informed him that he (Snyder), would not allow Clarke to travel to the River Portal unless the inspector would write a violation. Lyle Tipton, a MSHA Journeyman inspector, on March 1, 1988, issued a Citation No. 2949890 alleging that Respondent violated section 103(f) of the Act in refusing Clarke permission to accompany him at the inspection at the River Portal.

The local Union representing the miners at Respondent's Ireland Mine had prepared separate walk-around lists for the Moundsville Portal, River Portal, and Preparation Plant. According to the uncontradicted testimony of Snyder, the walk-around list for the Moundsville Portal was posted on the Portal's bulletin board. The Complainant's name was not on the posted list. The walk-around list for the River Portal and the one for the Preparation Plant were posted in those areas respectively. According to Snyder, prior to Clarke's request on December 21, 1987, it was the practice that an inspector commencing an inspection at the Moundsville Portal would get a walk-around from among the workers in that area. In 1987 and 1988 respectively, David Miller gave management an updated walk-around list containing only the four names of the safety committeemen as designated representatives. According to Miller, these lists stated that if one of the safety committeemen was not present, then the miners were free to choose their representative as per the Act. He further testified that the more extensive walk-around list was to be used at a specific location if the miners' Union representative was not present at that shift in 1985. Tipton indicated that in performing inspections, in the event that none of the walk-around specified on the walk-around list were present on the shift, he then offered an opportunity to the miners to select a representative to participate in the inspection.

It appears to be the position of Respondent that, in essence, inasmuch as the miners' representatives to accompany the inspector could be selected from a broad list supplied by the Union, Clarke was not engaged in any protected activities when he asked to travel from the Moundsville Portal to the River Portal to accompany the Inspector. I find however, that in resolving the issue of whether Clarke engaged in protected activities an analysis must be made of Clarke's rights, as opposed to an analysis of management's duties and responsibilities. In this connection, testimony from Miller and Clarke, which has not been contradicted, establishes that Clarke was elected by the Union representing the miners at the Ireland Mine, to serve as a safety committeeman. Further, as their testimony has not been contradicted, it established that in this capacity Clarke had a right to represent the miners in accompanying the MSHA inspector on an inspection. In this connection, Clarke explained that to disallow him to travel with an Inspector on an inspection would, in essence, decrease the effectiveness of his being an authorized representative of the miners as a member of the safety committee, inasmuch as in that capacity he receives complaints from miners with regard to various hazards at the mine. Hence, he explained that if he would be unable to accompany an inspector at the River Portal, he would not be able to bring to the attention of the inspector the safety complaints of the miners he

represents. I thus conclude that Clarke, in requesting of management on the various dates in issue, the opportunity to travel from the Moundsville Portal to the River Portal to accompany an inspector on an inspection, was engaging in a protected activity. (See, Secretary on behalf of Richard Truex v. Consolidation Coal Company, 8 FMSHRC 1293 (1986)). Hence, inasmuch as Clarke was a representative of the miners, and authorized by them, he thus had a right to accompany the inspector as requested pursuant to section 105 of the Act (See, Truex, supra). Thus, inasmuch as Clarke had engaged in a protected activity on each occasion that he requested to accompany an inspector on an inspection, and it is essentially not contested that adverse action was taken against him in denying him this right, it is concluded that Complainant herein has established a prima facie case of discrimination. (See, Secretary of behalf of Pasula v. Consolidation Coal Company 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. non. Consolidation Coal Company v. Marshall, 663 F 2nd 1211 (3rd Cir. 1981)). This prima facie case has not been rebutted, nor has Respondent herein established an affirmative defense. Thus, I conclude that there has been a violation of section 105(c) herein, and also of section 103(f).

In assessing a penalty for the violation found herein, I have taken into account and adopted the stipulations of the Parties with regard to the size of Respondent's operation, the history of its violations in the preceding 27 months, and the stipulation that an assessment of a penalty will not affect its ability to continue in business. With regard to Respondent's negligence, I have taken into account the testimony of Respondent's witnesses that the denial of Clarke's request to accompany the inspectors at the River Portal was based upon prior policy that miners working at that area be the ones to accompany the inspector. In this connection, Snyder explained the policy by indicating that a miners' representative traveling from the Moundsville Portal to the River Portal to accompany an inspector would lose production time during the travel between the two Portals, in contrast to having a representative from the miners already working at the River Portal accompany the inspector at that site. As such, Respondent's policy in this regard appears to be based upon a business reason. I also have taken into account Snyder's testimony that he conferred with legal counsel who advised him not to change the Respondent's policy in this regard. I also note that on each of these occasions when Clarke was deprived of his right to accompany the inspector, another miners' representative did indeed go with the inspector. However, with regard to the gravity of the violations, I note, as discussed above, that the deprivation of Clarke's right to accompany the inspectors at the River Portal would tend have the

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effect of diminishing the effectiveness of safety complaints made by miners to him in his capacity as member of the safety committee. Taking into account all of the above factors, I conclude that a penalty herein of \$200 is appropriate for the violations found herein.

ORDER

It is ORDERED that, within 30 days of this Decision, Respondent shall post a notice stating that it will not violate section 105(c) of the Act. It is further ORDERED that Respondent shall cease and desist attempts to interfere with the right of David P. Clarke to accompany inspectors on inspections as the designated representative of the miners.

It is further ORDERED that Respondent shall, within 30 days of this Decision, pay \$200 for the violations found herein.

Avram Weisberger  
Administrative Law Judge