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MSHA V. CONSOLIDATION COAL
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FMSHRC-WDC
September 25, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of RICHARD TRUEX

v. Docket No. WEVA 85-151-D

CONSOLIDATION COAL COMPANY

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

DECISION

BY THE COMMISSION:

This case involves a discrimination complaint brought by the Secretary of Labor on behalf of Richard Truex, 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") discriminated against Mr. Truex in violation of section 105(c)(1) of the Mine Act. 1/ The Secretary asserts that Consol violated section 105(c)(1)

1/ Section 105(c)(1) of the Mine Act 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 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).

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by denying Truex the opportunity to participate in a post-inspection conference pursuant to section 103(f) of the Act without a loss of pay. 2/ The case was submitted to Commission Administrative Law Judge Gary Melick on stipulated facts. Judge Melick found that Consol discriminated against Truex in violation of section 105(c)(1), and ordered Consol to pay Truex back wages with interest for the six and one-half hour period that Truex was found to have been unlawfully denied the opportunity to work. The judge also assessed Consol a civil penalty of \$600 for the violation. 7 FMSHRC 1401, 1404 (September 1985)(ALJ). The Commission granted Consol's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

The facts are not in dispute. Truex is a longwall mechanic at Consol's McElroy Mine located in Marshall County, 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 mine. On August 27, 1984, Department of Labor, Mine Safety and Health Administration ("MSHA") Inspector, James Mackey, telephoned Consol's mine safety director, Tom Olzer, and informed Olzer that he would be at the mine at approximately 9:30 a.m. the next morning

2/ Section 103(f) of the Act 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 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 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).

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to review a hearing conservation plan. Olzer notified Truex, who was familiar with the plan, of Inspector Mackey's intentions. Truex then told Richard Lipinski, president of the Union local, of Mackey's plans, and Lipinski designated Truex as the representative of miners for the meeting with Mackey.

The next day, August 28, 1984, Truex was scheduled to work the 8:00 a.m. to 4:00 p.m. shift. At 7:50 a.m., Truex informed Olzer that he was the representative of miners for the meeting with Inspector Mackey who had not yet arrived at the mine. Olzer told Truex he would have to go to work underground with his regular crew. Truex indicated his willingness to work with his regular crew but asked that he be notified when the MSHA inspector arrived so that he could attend the meeting. Olzer replied that a representative of miners would be notified and given an opportunity to attend the meeting with the inspector. It is undisputed that had Truex proceeded underground to work with his crew, it is unlikely that he would have been notified of the inspector's arrival or been available to attend the meeting. Truex then requested that he be given alternate work in an area that would allow him to be readily available for the meeting. Olzer denied this request and instructed Truex to go underground to work with his regular crew.

At this point, Truex declared himself to be on "Union business" because he believed that otherwise he would not be able to attend the conference as the designated representative of miners. 3/ Truex waited at the mine for the inspector who arrived sometime between 9 a.m. and 9:45 a.m. Stipulation 20. Truex attended the one and one-half hour meeting on the hearing conservation plan with the inspector and Olzer. At the close of the meeting, Truex asked Olzer if any work was available for him. Olzer told Truex that, because he had declared himself to be on "union business," no work was available for him for the remainder of the shift. Truex then left the mine property.

On October 5, 1984, Consol received a citation from an MSHA inspector, alleging a violation of section 103(f) for refusing to pay Truex for the time during which he participated in the meeting concerning the hearing conservation plan. Consol abated this citation by paying Truex for the one and one-half hour period spent at the meeting.

Consol refused to pay Truex for the remaining six and one-half hours he was scheduled to work on August 28, 1984. Truex filed a complaint with MSHA alleging discrimination under section 105(c)(1) of

the Mine Act. Following an investigation by MSHA, the Secretary filed with the Commission a discrimination complaint on behalf of Truex that is the subject of the present proceeding. The parties then filed briefs, submitted stipulated facts, and the judge subsequently issued his decision. 7 FMSHRC 1401. "Union business" is an excused unpaid leave of absence to participate ^{3/} in union activities provided for in Article XVII of the National Bituminous Coal Wage Agreement of 1981 ("Contract"). See Stipulations of Fact, Exhibit A (July 22, 1985).

In concluding that Consol discriminated against Truex by denying him the six and one-half hours pay, the judge cited section 103(f)'s provision that "a representative authorized by his miners shall be given an opportunity to accompany the ... [inspector] during the physical inspection of any coal ... mine ... for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." Noting that the parties did not dispute "that the post-inspection conference which ... Truex attended was a conference within the meaning of section 103(f) of the Act ...", the judge concluded that in light of the language of the statutes miners, not mine operators, were given the right to authorize or designate miner representatives for the purpose of participating in the section 103(f) conferences. 7 FMSHRC at 1403-04. Accordingly, the judge held that Consol's action "in denying [Truex] the statutory right to act as the 'authorized' representative of miners under section 103(f) without in effect compelling him to first declare himself to be on union business" was discriminatory. 7 FMSHRC at 1404. Further, the judge concluded that the effect of Consol's discriminatory action was to require Truex to lose s.. and one-half hours' pay for serving as the authorized representative of miners. 7 FMSHRC at 1404.

On review, Consol contends that the judge erred in finding that it violated section 103(f) and discriminated against Truex in violation of section 105(c)(1) of the Act. Consol raises a number of arguments in support of this contention. Consol argues that under the circumstances presented the Union could not insist on designating Truex as the miner representative and that Consol could comply with section 103(f) by offering to permit one of the other 130 hourly employees to participate in the conference as a representative of miners. Consol emphasizes that at the time Truex notified management that he was the representative, the MSHA inspector had not arrived and was not expected for about one and one-half hours. 4/ Consol asserts that its duty under section 103(f) does not arise until such time as the MSHA inspection activity begins and that Truex's request constituted an impermissible infringement on management's work assignment prerogatives. Consol also asserts that the Union failed to comply with the requirements of 30 C.F.R. Part 40 with respect to filing information identifying the representative of miners and that this failure entitled Consol to follow past practice and provide any one of the miners the opportunity to participate as the miner representative. Finally, Consol contends that once Truex elected to go on "union business" he was no longer under the direction and control of Consol, and therefore Consol had no obligation to assign work to him or to pay him for the remainder of the shift.

4/ Consol asserts that MSHA Inspector Mackey violated the provisions of section 110(e), 30 U.S.C. § 820(e), prohibiting advance notice of inspections, when he telephoned Olzer and informed Olzer that he would be at the mine the next morning to review the hearing conservation plan. Although Consol contends the judge erred in failing to consider this

(footnote continued)

In response, the Secretary argues that pursuant to section 103(f) it is the right of the miners to designate a representative to participate in inspections and conferences, with no loss of pay for an employee-representative. The Secretary notes that Olzer was informed that Truex was the representative of miners for the conference at issue. Therefore, the Secretary contends that Consol's assertion that any of the 130 miners could have served as the authorized representative of miners is erroneous. According to the Secretary, once Consol was notified that Truex was the miners' designated representative, Consol was required by the statute to afford him an opportunity to participate in the meeting without a loss in pay.

For the reasons that follow, we conclude that the judge correctly found that, in the circumstances of this case, Consol discriminated against Truex in violation of section 105(c)(1) of 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, Truex must first show that his attempt to attend the conference with Inspector Mackey was protected under the Act. Therefore, we first consider the rights conferred upon miners by section 103(f). We emphasize at the outset, however, that the parties have stipulated that the meeting with Inspector Mackey was "the type of activity giving rise to [miner] participation rights under section 103(f) of the Act." Stipulation 31. We are constrained in this case by the parties' stipulations and our decision is restricted solely to the facts presented.

Footnote 4 end.

argument, the issue was not raised before the judge. Consol advances it for the first time on review. Absent a showing of good cause, section 113(d)(2)(A)(iii) of the Mine Act precludes our review of questions of law and fact not presented to the judge. 30 U.S.C. § 823(d)(2)(A)(iii). Jones & Laughlin Steel Corp., 5 FMSHRC 1209, 1212 (July 1983). Such good cause has not been demonstrated.

Consequently, the "advance notice" issue is not before us and will not be addressed.

Section 103(f) affords to both representatives of operators and to representatives of miners the right to accompany the MSHA inspector during his "physical inspection of [the]... mine" and to aid in Pre- or post-inspection conferences. Further, participation by the representative of miners is compensable. Congress recognized the important function served by such rights. The Senate Report stated, "It is the Committee's view that [participation in inspections and pre- and post-inspection conferences] will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." S. Rep. No. 181, 95th Cong., 1st Sess. 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-17 (1978) (Legis. Hist.). 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).

The judge found that "it is the miners and not the mine operator, who authorize or designate a representative for the purpose of participating in ... a [post-inspection] conference. There is no statutory ambiguity on this point and the plain meaning must prevail." 7 FMSHRC at 1404. We agree. The language of section 103(f), Providing that "a representative authorized by his miners shall be given an opportunity to accompany the Secretary", unambiguously provides that miners possess the right to choose their representative for section 103(f) inspections and pre- and post- inspection conferences. (Emphasis added). See also *Leslie Coal Mining Co v. Secretary of Labor* 1 FMSHRC 2022, 2027 (December 1979)(ALJ).

The undisputed record evidence establishes that Truex was selected by the miners to serve as their representative for the meeting at issue. The president of the Union local, Lipinski, assigned Truex to serve as the miners' representative at the meeting with Inspector Mackey. On the morning of the meeting, Truex informed Olzer that he had been designated as the miners' representative for the meeting with the inspector. Consol does not dispute that, for the purpose of the meeting, Truex was designated by the miners as their authorized representative. See Stipulation 34. The parties agree that had Truex proceeded to work with his regular crew, It is likely that he would not have been "notified of the inspector's arrival nor have been available to attend the conference. Stipulation 17. Further, Consol does not dispute that Truex understood this to be the case and went on "union business" only to be able to act as the representative of miners at the meeting. Stipulation 33.

Consequently, it is clear that Consol's refusal to either agree to notify Truex at his underground work station of the inspector's arrival and allow him to leave to attend the meeting or to reassign him work in an area from which he could have easily attended the meeting effectively denied miners their choice of representative at the conference. Furthermore, as explained below, the miners' choice of Truex as their representative rested on reasonable grounds and would have caused no unacceptable disruption in the work place.

Consol's argument that the miners' section 103(f) rights, if any, arose when the inspector arrived on mine property is not well taken on this record. The purpose of section 103(f) is to enhance miner understanding and awareness of the health and safety requirements of the Act. The fact that section 103(f) protects the miner representative, who is also an employee of the operator, from a loss in pay in exercising his section 103(f) rights evidences Congressional recognition that an operator would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights. Here, Consol was aware that an MSHA inspector would be arriving for a meeting to review a hearing conservation plan. Consol was also aware that Truex was familiar with the plan and had been designated by the miners to participate as their representative in the review of the plan. Nevertheless, upon being notified that Truex was the representative of miners, Olzer directed Truex to proceed underground with his regular crew. Truex indicated his willingness to do so, but asked that he be notified when the inspector arrived. This request was refused. Olzer further refused Truex's request that he be permitted to work, until the inspector arrived, in an area that would have allowed him to be readily available for the meeting. Under these circumstances, Truex's requests rather than Olzer's responses reflected the reasonable work adjustments required under section 103(f) to fully effectuate that section's participation rights.

Olzer's violative refusal caused Truex, if he was to fulfill his statutory role as a representative of the miners, to declare himself on "union business". Accordingly, at the time that Truex invoked the Wage Contract right, Consol already had acted in violation of section 105(c)(1) interfering with Truex's section 103(f) rights. Thus, Consol's attempt to use the Contract as a defense is irrelevant and Consol is liable for payment of the six and one-half hours of wages Truex would have earned absent its violation.

Finally, we are not persuaded that the Union's failure to file information required by 30 C.F.R. sections 40.2(a) and 40.3 regarding the identification of representatives of miners defeats Truex's claim here. In *Consolidation Coal Co. v. Secretary of Labor and United Mine Workers of America*, 3 FMSHRC 617 (March 1981), the Commission held that the failure to file as a representative of miners under Part 40 did not per se entitle an operator to deny an individual walkaround participation rights. 3 FMSHRC at 619. The Commission recognized that "In a particular situation, absent filing, an operator may in good faith lack a reasonable basis for believing that a person is in fact an authorized representative of miners." *Id.* Here, however, as

the judge noted and as the stipulations establish, Consol did not question that Truex was, in fact, the designated representative of miners for the conference at issue. Whatever implications might result in some other context from a failure to file under Part 40 need not be resolved in this case.

Consequently, we conclude that by preventing Truex from acting as a representative of miners without first declaring himself to be on "Union business" and thus incurring a loss of pay, Consol denied Truex the opportunity to exercise his 103(f) rights and thereby discriminated against Truex in violation of section 105(c)(1).

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Accordingly, we affirm the decision of the judge.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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Distribution

Karl T. Skrypak, Esq.
Consolidation Coal Company
1800 Washington Road
Consol Plaza
Pittsburgh, Pennsylvania 15241

Mary Griffin, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

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