

CCASE:
MSHA & UMWA V. SOUTHERN OHIO COAL

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19860304

TTEXT:
FMSHRC-WDC
March 4, 1986

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

and

Docket Nos. LAKE 82-93-R
LAKE 82-94-R
LAKE 82-95-R

UNITED MINE WORKERS OF
AMERICA (UMWA)

v.

SOUTHERN OHIO COAL COMPANY

BEFORE: Backley, Lastowka and Nelson, Commissioners
DECISION

BY THE COMMISSION:

In this case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et se ., the issue is whether miner representatives who participated in post-inspection conferences held on mine property pursuant to 30 C.F.R. § 100.6(a) are entitled to compensation under section 103(f) of the Mine Act (30 U.S.C. § 813(f)) for the time spent in the conferences. A Commission administrative law judge held that section 103(f) of the Act authorizes payment of compensation to a miner representative for time spent participating in post-inspection conferences conducted at a mine immediately or shortly after the completion of a physical inspection of the mine. 5 FMSHRC 729, 759 (April 1983)(ALJ). However, finding that the particular conferences in issues were not the kind of post-inspection conferences compensable under section 103(f), the judge granted the operator's notices of contest and vacated three citations charging violations of section 103(f). 5 FMSHRC at 759-63. We agree with the judge that in appropriate instances post-inspection conferences at mines are compensable under section 103(f) of the Act. We disagree, however, with his conclusion that the conferences involved in this case do not qualify for section 103(f) compensation. Accordingly, we reverse.

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The essential facts are not in dispute. Three contested citations issued to Southern Ohio Coal Company ("SOCCO"), involving similar facts and the same legal issues, are consolidated in this proceeding. Docket Nos. LAKE 82-93-R and LAKE 82-94-R, arise out of conferences conducted on May 24, 1982, at SOCCO's Meigs No. 2

mine by inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA"). The purpose of the meetings was to review citations for which civil penalties had not been proposed previously. Docket No. LAKE 82-95-R, involves a similar conference held on May 24 and 26, 1982, at SOCCO's Raccoon No. 3 mine.

All of the conferences at issue stemmed from MSHA's adoption on May 1, 1982, of revised civil penalty regulations (47 Fed. Reg. 22,286, 22,294-22,297 (1982)), codified at 30 C.F.R. Part 100. Among these regulations is section 100.6(a), which states:

All parties shall be afforded the opportunity to review with MSHA each citation and order issued during an inspection.

In publishing these regulations, MSHA indicated that all outstanding citations and orders that had not been reviewed for penalty proposal purposes under MSHA's prior rules by May 21, 1982, would be governed by the new procedures. 47 Fed. Reg. 22,286. The three conferences at issue were held pursuant to this policy as section 100.6(a) reviews and, in fact, were among the first conducted under the authority of that provision.

Twenty citations were reviewed at the two conferences held at Socco's Meigs No. 2 mine on May 24, 1982. The citations had been issued during a regular quarterly inspection at the mine between March 3 and May 15, 1982. The first conference, held from approximately 9:00 a.m. to 12:00 noon, covered 14 of the citations. This meeting was conducted by MSHA inspector Dalton McNece and was attended by Carl Curry, a SOCCO safety supervisor, and Robert Koons, a miner representative. In general, the participants discussed the facts surrounding the alleged violations. The discussion included such topics as the seriousness of the violations, the operator's negligence, and the good faith of the efforts to abate the violations. As a result of the conference, the designation of two of the violations as "significant and substantial" violations was deleted. See 30 U.S.C. § 814(d)(1).

The second conference, held from approximately 2:00 to 2:30 .m., was conducted by MSHA inspector Myron Beck. Mr. Curry and miners representative Frank Goble attended this meeting. The remaining six citations were discussed. The content of the afternoon conference was substantially the same as that of the morning meeting. Inspector McNece testified that the time spent in these conferences was unusually long because of the parties' unfamiliarity with the new Part 100 procedures. He estimated that current section 100.6(a) conferences last from five to 45 minutes, depending on the number of citations involved. SOCCO

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subsequently refused to compensate the miner representatives for

the time spent participating in the conferences and MSHA issued two section 104(a) citations (30 U.S.C. § 814(a)) alleging violations of section 103(f) of the Act. 1/ (At the hearing, counsel for SOCCO and the Secretary agreed that testimony regarding the third citation would be the same as that for the other two citations).

The administrative law judge noted that section 103(f) specifically mandates that miner representatives be given an opportunity to accompany an inspector during the physical inspection of a mine, to participate in pre- or post-inspection conferences held at the mine, and to be compensated for the time spent in accompanying the inspector during the mine inspection. 5 FMSHRC at 751. Because section 103(f) does not specifically mandate compensation during the time spent participating in pre- or post-inspection conferences, the judge questioned whether Congress intended that the miner representative be compensated for time spent in conferences or meetings held at the mine after the physical inspection of the mine is completed. After examining the legislative history of section 103(f),

1/ Section 103(f), 30 U.S.C. § 813(f), states:

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 provisions of this Act.

[Emphasis added]

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the judge concluded that Congress intended compensation for the miner representative if he participates in the pre-inspection conferences held at the mine or in the post-inspection conferences held at the mine immediately or shortly after the completion of the inspection. 5 FMSHRC at 759.

The judge then held that the conferences at issue were not "post-inspection" conferences, as that term is used in section 103(f), and hence were not compensable. Noting that "post-inspection conference" is not defined in the Mine Act or in the Secretary's regulations, the judge, looking to the legislative history, described a post-inspection conference as an interchange between an inspector and members of an inspection party, occurring immediately after a physical inspection of a mine, and involving a discussion of the inspector's rationale for issuing a citation or order, his fixing of an abatement time and other safety and health matters related to the inspection. 5 FMSHRC at 757. The judge concluded that Congress desired the miner representative to be able to fully participate in and to be compensated for pre- and post-inspection conferences so that the representative could make a meaningful contribution to the safety and health of miners by being afforded an opportunity to address safety and health concerns resulting from the inspection, when the facts and circumstances of the inspection are fresh and when the parties to the conference can explore ways to correct the conditions and achieve prompt abatement. 5 FMSHRC at 759, 762. The judge found, however, that the subject conferences had no meaningful effect on safety and health because they occurred long after the completion of the inspections and abatement of the violations, and because the miner representatives who participated in the conferences were not present during the inspections. Consequently, the judge concluded that the conference accomplished nothing more than affording the operator an opportunity to take advantage of the Secretary's Part 100 penalty assessment procedures and were not compensable conferences. 5 FMSHRC at 762-63.

We agree that section 103(f) of the Mine Act requires that a miner representative be compensated for participation in pre- or post-inspection conferences. As the judge noted, section 103(f) clearly mandates that a miner representative be afforded the opportunity to accompany an inspector during the physical inspection of the mine, and to participate in pre- or post-inspection conferences held at the mine. Section 103(f) further provides that the miner representative "shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." While section 103(f) does not expressly mention compensation for pre- or post-inspection conferences, the legislative history of the Act

clearly indicates Congress' intent that section 103(f) requires such compensation.

The report of the Senate Committee which largely drafted much of the 1977 Mine Act states the purpose of the provision for miner participation and compensation contained in section 103(f). In addition to discussing the rights of the miner representative to accompany an inspector during an inspection, the report states:

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[T]he opportunity to participate in pre- or post- inspection conferences has also been provided. Presence of a representative of miners at [an] opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at [a] closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation, it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

S. Rep. No. 181, 95th Cong., 1st Sess. at 28-29 (1977), reprinted in Senate Subcommittee 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) ("Legis. Hist.")(emphasis added). The Conference Report likewise states that a miner representative is to be paid by the operator "for his participation in inspections and conferences." Legis. Hist. at 1323. Further, the matter was discussed on the floor of the House during the oral report to the House by the conference committee. During this oral report both Congressman Perkins and Congressman Gaydos stated that the bill authorized miner representative participation and compensation for pre- and post-inspection conferences. Legis. Hist. at 1357, 1361.

With the intent of Congress so clear, we agree with the judge that section 103(f) requires compensation for a miner representative who participates in "pre- or post-inspection conferences" held at the mine. We do not agree, however, with the judge's further conclusion that to be compensable a post-inspection conference must be held immediately or shortly after the completion of the physical inspection of a mine. We need not in this opinion set forth all of the contours for compensable post-inspection

conferences. While we agree that for greater effectiveness and orderly process, a post-inspection conference should ordinarily take place within a reasonably immediate time frame after completion of the physical inspection of a mine, circumstances may exist which lead to legitimate postponement or delay of the conference.

The judge further found that the conferences at issue were noncompensable "assessment conferences", held pursuant to 30 C.F.R. § 100.6(a) and incident to MSHA's civil penalty assessment authority, rather than compensable conferences held incident to the participatory rights of the miner representative as set forth in section 103, and therefore that they were not compensable post-inspection conferences. 5 FMSHRC at 761. We disagree.

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Our review of section 103(f) and of MSHA's Part 100 regulations compels us to reject the attempted distinction between MSHA's physical inspections and attendant post-inspection conferences, and post-inspection assessment conferences conducted pursuant to section 100.6(a) of the Secretary's civil penalty assessment regulations. Section 103(f) requires compensation for "post-inspection conferences held at the mine." As the judge noted, neither the statute nor the Secretary's regulations define a "post-inspection conference." However, as noted above, the purpose of the miner representatives' participation rights under section 103(f) is to "enable miners to understand the safety and health requirements of the Act and ... [to] enhance miner safety and health awareness." Legis. Hist. at 616. As Representative Gaydos stated, "... attendance at the closing conference enables miners to be apprised more fully of the inspection results." Legis. Hist. at 1361. Thus, the pertinent inquiry is whether the substance of the post-inspection conference advanced these goals.

The record establishes that at the post-inspection conferences at issue the inspectors reviewed each citation, explained the reasons for its issuance, and discussed the findings made in conjunction with the citation such as "gravity", "negligence", "good faith abatement" (section 110(i)) and whether the violation was "significant and substantial" (section 104(d)(1)). The representatives of the operator and of the miners had the opportunity to present their views on the asserted violations and the inspectors' findings. The inspectors, in turn, had the opportunity to modify the findings in response to the discussions. In fact, as a result of these discussions, the inspectors deleted two of the "significant and substantial" findings.

We conclude that the subject matter of these post-inspection conferences directly related to the enforcement of the Mine Act through the inspection process, and thus to safety and health issues.

We realize that the discussions had another aspect in that the information exchanged would be considered by MSHA's Assessment Office in determining the amount of penalties proposed for the violations pursuant to the criteria and procedures set forth in 30 C.F.R. §§ 100.3 to 100.5. However, the inspection and assessment functions of the Mine Act are neither wholly discrete nor mutually exclusive. The participation of the miner representative in the post- inspection conferences and the resulting discussion of the violations could assist inspectors in carrying out their enforcement responsibilities and increase miner and operator awareness of the conditions which resulted in the cited violations. Even when the discussions centered on factors which would impact upon the penalty proposed for a violation, they served to enhance safety. A discussion of the "gravity" of a violation or of the "significant and substantial" nature of a violation involves consideration of the hazards to miners created by the violation. A discussion of whether the operator was negligent involves consideration of the standard of care an operator must exercise in seeking to prevent violations and hazardous conditions.

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Thus, we conclude that the post-inspection conferences at issue here were compensable under section 103(f) of the Act. 2/ Accordingly, the conclusion of the judge that the conferences at issue are not compensable under section 103(f) is reversed and the contests of the citations are denied. 3/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

2/ We recognize that the judge particularly was troubled by the delay between the inspections and the post-inspection conferences. 5 FMSHRC at 755, 762. The delay here, however, was of a sui generis nature occasioned by the introduction and implementation of MSHA's new Part 100 procedures. The judge was further troubled by the fact that the four to six miner representatives and the five management representatives who accompanied the inspectors at various times during the inspections were not present at the conferences. 5 FMSHRC at 755, 762. This fact is not sufficient to change the compensable character of the conferences. Many mines are so large that numerous miner representatives accompany an inspector or inspectors during an inspection, and even when post-inspection conferences are held close in time to the inspection, these same miner representatives may be unavailable to participate in the conferences.

3/ 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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