CCASE:
SOL (MSHA) V. SWELL COAL
DDATE:
19810930
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEVA 79-31 A.O. No. 46-01478-03014
v.	
SEWELL COAL COMPANY, RESPONDENT	Sewell U.G. No. 1 Mine

ORDER TO SHOW CAUSE

Upon remand from the Commission, 3 FMSHRC 1402 (1981), of my decision of September 20, 1979, 1 FMSHRC 1379 (1979), the parties once again move for approval of a settlement based upon the assessment of a token penalty of $50.00 for the two violations of the canopy standard alleged. I share the parties obvious desire to see an end to this administrative whirlwind. Nevertheless, because the Commission saw fit to remand the matter and because of the importance of finding a proper balance between an enforcement and a modification proceeding, I undertake with the greatest reluctance to once again set forth the reasons for my disagreement with the Secretary's and the Commission's assertion that because compliance is claimed to be technologically possible diminution of the safety of the miners is irrelevant to enforcement of the canopy requirement or, if it is not, the affirmative defense of diminution of safety was not, in fact, made out.

My earlier decision found that with respect to (1) the two pieces of face equipment in question, a Galis 300 roof bolter and a Joy 16 SC shuttle car, and (2) the coalbed or mining heights involved (50 inches and 43 inches respectively), compliance with the canopy requirement set forth in the "improved" mandatory safety standard, 30 C.F.R. 75.1710-1(a), was "impossible without diminishing the safety of the miners". 1 FMSHRC 1380. In addition, I held that the Secretary's failure to comply with the mandatory safety standard set forth in section 318(i) of the Mine Safety Law, 30 U.S.C. | 878(i), (FOOTNOTE 1) rendered the improved standard

"null, void and unenforceable". My decision further held the improved standard was unenforceable as applied to the specific undisputed facts of this case because it violated section 101(a)(9)'s, formerly section 101(b)'s, (30 U.S.C. | 811(a)(9)) prohibition against issuance or enforcement of any improved standard that "reduces the protection" afforded the miners by a Congressionally enacted standard, namely section 318(i). It is part of the conventional wisdom that the best test of whether a mining practice or device is safe is to observe the conditions under which it must operate. By that test the requirement for canopies in mining heights in medium and low coal (less than 60 inches) has been shown to be technologically infeasible which, whether the Commission believes it or not, translates into the creation of serious new hazards and the aggravation of old hazards. (FOOTNOTE 2)

In regard to the technological infeasibility of canopies, I take official notice of the following from a Report to the Congress of the United States by the Comptroller General entitled "Low Productivity In American Coal Mining: Causes and Cures", Rpt. No. EMD 81-17, issued March 3, 1981:

Technically infeasible requirements

> Coal operators complain that some MSHA regulations require technology which is exotic or unavailable. Since MSHA enforces these regulations, the resulting inspections, violations, withdrawal orders, machine modifications, and paperwork reduce productivity. The two regulations that mine managers cite most frequently are requirements for cabs and canopies and mine illumination.
>
> Cabs and canopies are steel roof and sides which protect mining machine operators from collapse of roof, face, or rib. On January 1, 1973, protective cabs and canopies became mandatory on all mobile face equipment used in mines 72 inches and above in height. By 1978, coal mines of all seam heights had to comply with this regulation. Mines with 60 inch or higher seams have generally not had problems in fitting cabs and canopies to their machines. However, 45 percent of production and 41 percent of mines have seams under 60 inches. Low coal and narrow

> work spaces leave little room to attach these devices. One coal mine official told us that in the last 4 years, his mine experimented with 88 different canopy designs. He also said that the work required to install and test these canopies had substantially reduced productivity.
>
> Other problems with using cabs and canopies in low coal are that they impair the machine operator's vision, restrict movement, and cramp and tire the operator. Thus, some mine managers have had to deal with worker resistance to the cabs and canopies, further hindering productivity.
>
> Recognizing problems with installing cabs and canopies in low coal, MSHA suspended requirements for coal mines with 42-inch seams or less. Further, coal operators have received substantial Federal assistance in complying with cab and canopy regulation. MSHA has provided some technical assistance to mines to help them retrofit machines. For example, during 1973, the first year cabs and canopies were required, the Roof Control Group of MSHA's Pittsburgh Technical Support Center analyzed about 60 cab or canopy designs and 120 redesigns for coal mine operators and equipment manufacturers. The Bureau of Mines has also assisted operators and manufacturers to comply with cab and canopy regulations. The Bureau estimates that 20 percent of the total canopy designs now being used have come from this research.
>
> While requiring cabs and canopies in low coal may have disrupted mining operations, it may also have reduced fatalities and disabilities due to roof collapse. However, an examination of available data suggests that the injury prevention benefits of cabs and canopies require further study. Id. at 61.

This report, from what appears to be a reliably objective source to the Congress of the United States, casts serious doubt on the Commission's finding that "sufficient practical technology" exists to support the conclusion that operators encounter no difficulty in retrofitting face equipment "in mining heights above 30 inches". 3 FMSHRC 1410. The record clearly shows that the requirement has been suspended at least in regard to mining heights below 42 inches for lack of practical technology. See also, the Secretary's Annual Report to Congress for FY 1978, at 11-12.

Serious conflict also exists within MSHA over the existence of practical technology for medium and low coal mines. A January 1981 Report of the United States Regulatory Council states that "while local MSHA officials have agreed that canopied equipment in coal seams under 50 inches is "impractical' MSHA officials in Washington require continued experimentation" in seam heights below 50 inches. Cooperation and Conflict: Regulating Coal Production, Report of the U.S. Regulatory Council, January 1981,

at 47.

There is also available for consideration a carefully crafted decision by Judge Steffey in which he found, after a full evidentiary hearing, that (1) canopies are not required where the coal height is less than 42 inches and (2) that the undisputed facts of record in his proceeding showed that as recently as March 10, 1980 practical technology did not exist to permit the installation of canopies in mining heights of 43 to 50 inches. Wright Coal Company, Inc., 3 FMSHRC 496 (1981). Because Judge Steffey's finding of technological impossibility was never challenged by either MSHA or the Commission it became by operation of law a final decision of the Commission.

A careful reading of the Comptroller General's report, supra, also leads me to conclude that up to 80 percent of the research, development and experimentation with canopy designs has been accomplished without any input on the part of the Secretary. The report further supports the view that this shifting of the burden has been counterproductive not only in terms of productivity but also of safety. As the report notes, "injury prevention benefits of cabs and canopies require further study." Attempts on the part of this judge to obtain such data has been very frustrating. In response to a subpoena for such data, counsel for the Secretary advised on April 7, 1981, that "there are no formal reports or studies reflecting the number of lives saved or injuries avoided by the use of cabs or canopies." Ltr. to Trial Judge from Stephen P. Kramer, Esq., Attorney for the Secretary. This admission leads me to regard MSHA's claims as to the efficacy of the canopy requirement with great skepticism.

The Commission in reversing my decision concluded inter alia, that in the absence of an evidentiary hearing or stipulation of facts the trial judge's finding that application of the canopy requirement would compromise the safety of the miners was impermissible. This is incorrect. What the Commission seems to have overlooked was that my decision was based solely on (1) the undisputed facts set forth in a final decision by the Secretary on a petition for modification or waiver of the canopy requirement with respect to the mine and equipment in question, Sewell Coal Co., No. M. 76-131 (April 27, 1971); 44 F.R. 44838 (August 17, 1979), and (2) the facts agreed upon, stipulated to and submitted by the parties in support of their joint motion for settlement. (FOOTNOTE 3)

The Commission found that the parties' stipulation was that (1) the use of a canopy on the roof bolter "had caused injuries to miners" and (2) "that technology to abate the violation (in the 50 inch coalbed or mining height) was in an experimental stage" at the time the citation was written on January 15, 1976. 3 FMSHRC 1413-14. The Commission found this fell short of an express judicial admission that compliance would diminish the safety of the miners and that an implied admission was negated by a finding by the Secretary (never cited or relied upon by the parties in their motion to approve settlement) that on and after October 1972 "sufficient practical technology" existed to warrant imposition of a general duty on coal operators to utilize such "practical technology" to design, fabricate and retrofit canopies on all face equipment used in coalbed or mining heights in excess of 30 inches. 3 FMSHRC 1410-13; Compare, Eastover Mining Co., 3 FMSHRC 1155 (1981), rev. granted, June 1981.

The Commission's reliance on the Secretary's finding that "an appropriate level of practical cab and canopy technology existed" on the date of the violation was, I respectfully submit, irrelevant to the question of whether a violation, in fact, occurred with respect to the specific roof bolter at issue. As the Commission concedes, the "improved" standard imposes only a duty to apply "existing practical technology". This obviously does not embrace "experimental" technology for, as the Commission held, "There is %y(3)4B no affirmative duty for research and development placed upon an operator in the cab and canopy standard." (FOOTNOTE 4) Id. at 1412. For these reasons, I believed the admission that the use of "experimental" technology had "caused injuries to miners" warranted the finding that compliance on the date of the alleged violation was technologically impossible under the existing state of the art of canopy design without diminishing the safety of the miners. This conclusion was furthered by the fact that, because the Secretary recognized the "difficulties" occasioned by the "experimental stage" of the canopy design art, the time for compliance was repeatedly extended to permit a decision on the operator's petition for modification or waiver which was filed before the citation issued.

Despite my reservations pertaining to the broad issues decided by the Commission, the case is now before me to decide another separate issue of major significance, the effect of a successful petition for modification on a pending enforcement proceeding. Because the Commission could find no "clear discussion of the interrelationship between the

factual issues in the enforcement proceeding (this proceeding) and those at issue in the modification case", Sewell Coal Company, No. M. 76-131, decided April 27, 1979, supra, it remanded the matter to afford the parties, and presumably the trial judge, an opportunity to address the issue of this interrelationship "in the context of the facts of this case", 3 FMSHRC 1413-15, and "for further proceedings consistent with this opinion", and with the Commission's recent decision in a companion canopy case, Penn Allegh Coal Co., 3 FMSHRC 1392 (1981).

In Penn Allegh, the Commission found that "the defense of diminution of safety" could not regardless of its merit, be raised in an enforcement proceeding unless the operator could show that the "enforcement proceeding was brought by the Secretary after the operator had filed a modification petition and before that petition had been finally resolved." 3 FMSHRC 1399, footnote 10. (FOOTNOTE 5)

A comparison of the factual matters in the enforcement and modification proceedings establishes a firm basis for application of the principles of res judicata and collateral estoppel against the Secretary in the instant enforcement proceeding. Thus, the record that is before me and that was before the Commission shows:

I

> Effective January 1, 1975, canopies were required whenever the coalbed height, height of the coal seam or mining height exceeded 48 inches. 30 C.F.R. 75.17101(a)(4). The first notice or citation issued under the Coal Act on January 15, 1976. It charged that the failure to install a canopy on a Galis 300 roof bolter in the 012 section, which at the time had a minimum mining height of 50 inches, constituted a violation of the improved standard. One day prior to issuance of the notice, i.e., on January 14, 1976, the operator filed a petition seeking modification or waiver of the requirement. Sewell Coal Co., supra, at 1. Thereafter, MSHA conducted an investigation of the operator's petition in April and October 1976 and in December 1978 filed and served a report of its findings and recommendations. Id.

> When the parties failed to respond to the investigatory report, the Administrator for Coal Mine Health and Safety, MSHA, issued a proposed decision and order on April 27, 1979. Thirty days thereafter, no appeal having been noted, the proposed decision became final. 30 C.F.R. 44.16.
>
> With respect to the 012 Section, the Administrator's decision found that "the mined height was 38 to 48 inches", the "roof was laminated shale supported by roof bolts", the "floor was uneven, steep, sideling and wet", and that the Galis roof bolting machine, with a frame height of 34 inches, was equipped with a canopy. Id. at 5. The Administrator further found that "for the Galis 300 roof bolting machine, there would be inadequate clearance to require the installation of a canopy except where the minimum mining height exceeds 48 inches." Id. at 9.
>
> Based on these findings, which were undisputed, the Administrator concluded that the installation of a canopy on the Galis roof bolter would diminish the safety of the miners wherever the minimum mining height did not exceed 48 inches.
> The Administrator's decision was published in the Federal Register on August 17, 1979. 30 C.F.R. 44.5.
> The parties' motion to approve settlement was filed on August 24, 1979.

Taking official notice of the Administrator's decision and more particularly his findings with respect to the undulations in seam height on the section in question, coupling this with the parties' representation as to the experimental nature of the technology, the hazards actually experienced, and MSHA's vascillation over whether the seam height was 55 inches, 50 inches, or 30 to 48 inches, and applying the accumulated expertise gained in hearing and deciding the difficult questions that

attend the application of the science of anthropometrics to safe canopy design, I concluded that it was more probable than not that on January 15, 1976 it was technologically impossible to install a canopy that would not diminish the safety of the miners whether or not it was physically possible to fit a canopy on the roof bolter.

This, as I have indicated, was wholly without regard to whether the improved standard was valid or invalid. In fact, it was premised on the assumption that the improved standard was valid but that the diminution in safety made out on the record of the modification proceeding and in the parties' stipulations established a defense of "greater hazard". It is my tentative conclusion, therefore, that the defense of diminution of safety or greater hazard is available to the operator with respect to this enforcement proceeding and this violation.

II

The second citation involved in this enforcement case issued on April 26, 1978 under the Mine Act. It charged that the failure to install a canopy on a Joy 16SC shuttle car on the 014 section of the Sewell No. 1 Mine in a mining height of 43 inches constituted a violation of the improved standard. Effective January 1, 1977, canopies were required wherever the coalbed height, coal seam height or mining height exceeded 36 inches. 30 C.F.R. 75.1710-1(a)(5)(i). As noted, this section of the mine and piece of equipment was covered by the petition for modification or waiver filed some two and one-half years earlier, i.e., on January 14, 1976. Sewell Coal Co., supra, at 6. Thereafter, MSHA conducted an investigation and in April and October 1976 and in December 1978 filed and served a report of its findings and recommendations. Id.

When the parties failed to respond to the investigatory report, the Administrator for Coal Mine Health and Safety, MSHA, issued a proposed decision and order on April 27, 1979, thirty days thereafter, no appeal having been noted, the proposed decision became final. 30 C.F.R. 44.16.

With respect to the 014 Section, the Administrator's decision found that "the roof was shale supported with roof bolts and posts", the "floor was uneven, wet and steep with sideling places", the "mined height was 53 to 108 inches". The frame height of the shuttle car was 32 inches. It was not equipped with a canopy. The Administrator further found that "there is a minimum vertical clearance, between the frame of the equipment and the bottom of the roof supports, in excess of 18 inches for each piece of equipment on the section. I find this to be sufficient clearance for properly installed canopies without causing a diminution of safety to the operators of this equipment or to other

miners." Id. at 10.

> Based on these findings, which were undisputed, the Administrator concluded that the installation of a canopy on the shuttle car would not diminish the safety of the miners except where the minimum mining height does not exceed 48 inches. Id. at 13-14, Conclusions 3, 5. Accordingly, the Administrator ordered that the petition be denied, except where the mining height did not exceed 48 inches. Id. at 14, Order, Para. 3.
>
> The Administrator's decision was published in the Federal Register on August 17, 1979. 30 C.F.R. 44.5. The parties motion to approve settlement was filed August 24, 1979.
>
> The motion to approve settlement did not advise that the Administrator had granted a petition for modification on the piece of equipment involved but did stipulate that "no cab or canopy was commercially available for Respondent's use on a shuttle car working in 43-inch high coal".

Based on the Administrator's uncontested findings and the stipulation of the parties, I concluded it was more probable than not that installation of a canopy on the shuttle car in question would have diminished the safety of the miners whether or not it was physically impossible to fit a canopy on the equipment.

This, as I have indicated, was wholly without regard to whether the improved standard was valid or invalid. In fact, it was premised on the assumption that the improved standard was valid but that the diminution in safety made out on the record of the modification proceeding and in the parties' stipulations established a defense of "greater hazard". It is my tentative conclusion, therefore, that the defense of diminution of safety or greater hazard is available to the operator with respect to this enforcement proceeding and this violation. (FOOTNOTE 6)

~2590

The parties are entitled under the order of remand to an opportunity prior to any further order of dismissal "to present arguments addressing" the issue of the availability of the defense of diminution of safety in this case.

Accordingly, it is ORDERED that on or before Friday, October 16, 1981, the parties show cause why their pending motion to approve settlement should not be denied and the captioned matter dismissed.

Joseph B. Kennedy
Administrative Law Judge

ÄÄ

~FOOTNOTE_ONE

1 This provision requires that the mechanical and electrical components of face equipment be. "designed and constructed in accordance with the specifications" of the Secretary. The Commission held this requirement is met by a performance specification that relates only to the tensile strength of the canopy and not to its suitability for safe use under widely varying mining conditions. Despite the plain language of the Congressional directive, the Commission held the Secretary could short circuit his responsibility for designing and constructing safe canopies by delegating it to the coal operators and enforcing a requirement for canopies without regard for whether or not "technological compliance" diminishes the safety of the miners.

~FOOTNOTE_TWO

2 I held the Secretary's failure to comply with section 318(i) in promulgating the improved standard violated section 101(a)(9) because it compels mine operators to experiment with the lives and safety of miners required to operate oversized face equipment under canopies in coalbed heights that create an imminent danger of death or disabling injury from roof falls for all miners and of decapitation and dismemberment of equipment operators. The Commission held the bitter experience developed in the records of the modification cases was no basis for concluding that application of the improved standard "at all times and under all circumstances" diminishes the safety of the miners and therefore it must be conclusively presumed that the improved standard both as applied and generally is valid and does not "reduce the protection" of the miners.

~FOOTNOTE_THREE

3 In Co-op Mining, 2 FMSHRC 3475 (1980), the Commission held that where stipulated facts establish that no violation occurred, a motion for settlement should be denied. And in Olga Coal Co., 2 FMSHRC 2769 (1980), the Commission held that the trial judge has "the inherent authority to question whether, as a matter of law, a case before him presents a cause of action."

~FOOTNOTE_FOUR

4 This, I understand, means an operator cannot be required to experiment with his own designs. Experimental technology is

speculative, emerging or unproved technology. Practical technology is that which the empirical evidence shows to be proven safe for use in the mine environment.

~FOOTNOTE_FIVE

5 This exclusionary rule was first fashioned by OSHRC in October 1976 almost a year after the violations in question in this case allegedly occurred. A review of the record shows the Commission raised the issue sua sponte and that it was never raised or briefed by the parties. While two courts of appeals have endorsed the rule, three courts of appeals have appended qualifications to its application. Thus, in General Electric Co. v. Secretary, 576 F.2d 558 (3d. Cir. 1978), which the Commission cites, the Court held that the rule does not empower the Secretary to promulgate a standard that "increases the danger to employees", and that upon a showing in an enforcement proceeding that compliance will in all likelihood diminish rather than enhance the safety of workers enforcement must be stayed pending a determination of a petition for modification or waiver. 576 F.2d 561-562; Holtze Construction v. Marshall, 627 F.2d 149, 152 (8th Cir. 1980). In Holtze the court refused to pass on the propriety of the exclusionary rule because it was "not entrenched at the time" the matter was before the trial judge. To hold otherwise the court noted would require that the operator be afforded an opportunity to show that "the rules were changed to its prejudice in mid-course." 627 F.2d at 152, n. 2; Irwin Steel Erectors, Inc. v. OSHRC, 574 F.2d 222, 223-224 (5th Cir. 1978). In light of section 101(a)(9) of the Mine Safety Law the application of the exclusionary rule, developed under OSHA, to the Mine Act is questionable. However, if the exclusionary rule is to be applied to the defense of greater hazard under the Mine Act, the Secretary should also recognize that the granting of the modification mooted the charges and requires vacation of the citations. OSHRC did this in a case where the petition was filed after issuance of the citation. See, Star Textile and Research, Inc., 1974-75 OSHD, CCH %57 19,442.

~FOOTNOTE_SIX

6 In a statement of enforcement policy dated June 29, 1981 (copy attached), MSHA has said that if a citation issues after a petition is filed the operator may petition for a stay under 30 C.F.R. 44.16. This permits an operator to file for a stay at any time prior to issuance of a final departmental decision on the petition. Where the citation issues before a petition is filed, the period of time for abatement may be extended until a decision has been rendered (1) where it is alleged in good faith that application of such standard will result in a diminution of safety to the miners, and (2) where, due to a particular circumstance, to force compliance with the standard would be unreasonable or impose an undue hardship upon the operator and adequate temporary measures have been taken to eliminate any hazards to miners.

~2591
MSHA Policy Memorandum No. 81-22 C

Enforcement Policy When Coal Mine Operators Petition for Modification Under Section 101(c) of the Act

Questions have been raised recently by district managers and enforcement personnel concerning MSHA's enforcement policy regarding mandatory safety standards when coal mine operators are in the process of petitioning for modification of a safety standard under Section 101(c) of the Act.

Operators will be required to comply with all mandatory safety standards even though the operator filed a request for modification under 30 CFR 44.10. Accordingly, a citation should be issued to the mine operator when not in compliance with any safety standard even though a decision on the petition is pending before the Administrator.

There are, however, two circumstances under which the period of time for abatement may be extended until a decision has been rendered. Those conditions are: (1) where it is alleged in good faith that application of such standard will result in a diminution of safety to the miners. For example, the safety standard for which modification is sought was filed under 30 CFR 75.305 alleging that certain return air courses in the mine are unsafe for travel due to adverse roof conditions; and, (2) where, due to a particular circumstance, to force compliance with the standard would be unreasonable or impose an undue hardship on the operator, and adequate temporary measures have been taken to eliminate any hazards to miners. For example, where an operator cannot comply with the provisions of 30 CFR 75.1105 since no return air course(s) is located within the immediate area of permanent pumps, and the operator proposes as an alternative method to install such pumps in a fireproof structure with additional safeguards. In those instances where a citation has been issued and the abatement time extended, the citation should be terminated if a favorable decision is rendered by the Administrator.

It should be noted that nothing precludes an operator from seeking interim relief from enforcement of any mandatory safety standard according to 30 CFR 44.16, prior to being issued a citation.

Joseph A. Lamonica
Acting Administrator
for Coal Mine Safety and Health

Inquiries: Joseph A. Woods, (703) 235-9745

State of Virginia, County of Fairfax, to wit:

I,Judith K. O'Rear, being first duly sworn, depose and say as follows:

Based on my independent memory and the contemporaneous notes I keep on all telephone conversations these are the true facts surrounding the Motion to Approve Settlement in the Sewell Co. case, WEVA 79-31.

On August 12, 1981, I received a phone call from Mr. Fletcher Cooke, counsel for Sewell Coal Co. I had previously left a message for him to call me. I asked him whether the Sewell Coal case remanded by the Commission was going to be appealed by the company. He replied in the negative and informed me that he and the counsel for the Government were engaging in settlement discussions. He promised to inform me of the results of these discussions by August 14. On August 14, Mr. Cooke and Mr. Gresham told me that they had not yet spoken to company officials regarding a possible settlement, but that a tentative settlement had been reached with the Government, and they would advise the company to consider it. They were to advise me Monday, August 17 of the Company's position. On August 17, Mr. Gresham called to inform me that the parties were attempting to settle the case at $25.00 per violation. He told me that Mr. Kramer was handling the case for the Government and that Mr. Kramer was preparing a motion to approve settlement.

On August 17, 1981, after talking to Mr. Gresham, I called Mr. Kramer for the first time. I asked Mr. Kramer if there were any developments in the Sewell case. He replied that he was going to resubmit a motion to approve settlement. He also mentioned an amount which agreed with that which counsel for the operator had previously supplied. I asked him when the motion would be submitted and he replied that the motion would be "out in the next couple of days." I specifically deny that I asked Mr. Kramer to file a motion superceding and replacing Mr. Street's motion, or suggested that he negotiate and prepare a motion for settlement of any kind. Insofar as Mr. Kramer's statement in paragraph 4 of the Government's response to the Order to Show Cause implies that I made such statements, he is either mistaken or misrepresenting the facts.

Judith K. O'Rear

Subscribed and sworn before me this date 30, Ocotber, 1981

State of Virginia
Fairfax County

IleneB. McGeachy Notary
Commission Expires 2, 6, 1981