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SOL (MSHA) V. SEWELL COAL
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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. HOPE 78-744-P A.C. No. 46-03467-02070
v.		Meadow River No. 1 Mine
SEWELL COAL COMPANY,	RESPONDENT	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, Department of Labor, for Petitioner
C. Lynch Christian III, Esq., Jackson, Kelly, Holt and O'Farrell, Charleston, West Virginia, and Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent

Before: Judge Lasher

This proceeding arises under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970), hereinafter the Act.(FOOTNOTE 1) Under section 301(c)(3) of the Federal Mine Safety and Health Act of 1977,(FOOTNOTE 2) proceedings such as this which were pending at the time the 1977 Act took effect are to be continued before the Federal Mine Safety and Health Review Commission.

STIPULATIONS

The parties entered the following stipulations:

1. Notices of Violation 2 HSG (8-0004) issued February 12, 1978, and 1 HSG (8-0005) issued February 14, 1978, are the subjects of this proceeding (Tr. 5).(FOOTNOTE 3)

2. The presiding judge has jurisdiction in this matter.

3. Sewell Coal Company, a subsidiary of the Pittston Company, is the operator of the Meadow River No. 1 Mine located at Lookout, Fayette County, West Virginia (Tr. 5). The Meadow River No. 1 Mine was, at the time of the issuance of the two notices, subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969, and the regulations promulgated thereunder (Tr. 5-6). The Meadow River No. 1 Mine is subject to the provisions of the Act and the regulations promulgated thereunder (Tr. 6).

4. Respondent is a large operator (Tr. 6).(FOOTNOTE 4)

5. At the time the notices of violation were issued, Respondent's union employees, members of the United Mine Workers of America, were on strike. This strike began on December 6, 1977, and continued until March 17, 1978 (Tr. 6).

6. The UMWA employees had been on strike for over 2 months prior to the issuance of the notices of violation (Tr. 6).

7. Homer S. Grose was a duly authorized representative of the Secretary at all times relevant to the issuance of Notices of Violation Nos. 2 HSG and 1 HSG. True and correct copies of the notices of violation were served on Respondent (Tr. 6).

8. At approximately 9:50 a.m. on February 13, 1978, Inspector Grose issued Notice of Violation No. 2 HSG to Sewell for an alleged violation of 30 CFR 75.1704. The condition or practice alleged was Respondent's failure to maintain a designated intake escapeway to insure passage at all times of any person, including disabled persons. The alleged impediment to

travel was a water accumulation from 0 to 16 inches in depth for about 40 feet in the designated escapeway (Tr. 6-7).

9. At approximately 9:30 a.m., on February 14, 1978, Inspector Grose issued Notice of Violation No. 1 HSG to Respondent for an alleged violation of 30 CFR 75.200. The condition alleged was fractured and loose roof in the No. 1 section above the No. 1 entry roadway just inby the last open crosscut and extending in toward the face approximately 30 feet. The roof was a shale material with loose rocks between the resin roof bolts, some of which had allegedly fallen in this area (Tr. 7).

10. The conditions cited in Notices of Violation Nos. 1 HSG and 2 HSG did exist (Tr. 7).

11. Respondent demonstrated good faith in abating Notices of Violation Nos. 1 HSG and 2 HSG and both notices were subsequently terminated (Tr. 7).

12. For the purposes of this proceeding, the Meadow River No. 1 Mine has a moderate history of previous violations (Tr. 7).

Although not by stipulation, Respondent concedes that payment of penalties for the two alleged violations would not interfere with its ability to continue in business (Tr. 48).

FINDINGS OF FACT

Sewell's Meadow River No. 1 Mine is a six-section coal mine entered by two shafts and one slope (Tr. 26). Mining is performed in the Sewell seam of coal and the Sewell Meadow River No. 1 Mine has approximately 25 miles of entries in such seam (Tr. 83). The entries are approximately 20 feet wide and 4-1/2 feet high (Tr. 24, 83), and are connected to adjacent entries by crosscuts (Tr. 82-83; R-1) which provide ventilation for the entries (Tr. 82). The roof above the coal seam is of a glassy shale type which is subject to fracture (Tr. 53, 84). The floor of the mine is undulating (dips up and down) and the mine itself is very "wet" in that it accumulates 500,000 gallons per day (Tr. 24, 84, 85).

Inspector Grose and his fellow inspectors were instructed to conduct inspections of all the coal mines within the jurisdiction of their field office for the purpose of finding violations and hazardous conditions so that the operators would give "priority in eliminating these from the mines as soon as the miners return to work" after the strike (Tr. 21, 22).(FOOTNOTE 5)

An accumulation of water on the floor of an escapeway "forty feet long" and "zero to 16 inches" deep led Inspector Grose to issue Notice No. 2 HSG (8-0004) Tr. 24, 31). Inspector Grose admitted that this was not a "particularly serious" condition (Tr. 30) and that "* * * the mine deteriorates a little more rapidly during work stoppages" (Tr. 34).

Slips and cracks in the mine roof, fallen rock, and rock which was ready to fall led the inspector to issue Notice No. 1 HSG (8-0005) (Tr. 37). This was a serious condition which could have caused a fatality or serious injury (Tr. 37).

During the strike period (see Stipulation #5, supra), MSHA (MESA) inspectors were instructed to be more liberal with respect to granting abatement time and to help the mine operator find hazardous conditions during the strike since the operator has "fewer personnel and only management personnel" employed (Tr. 21-23, 52-54, 56, 57). The inspectors were also instructed not "to insist on management complying with" abating violations since this would be an interference with labor and management and would force management to perform manual labor (Tr. 21, 22, 57). Inspector Grose thought the strike would be over by the time he set for abatement (Tr. 58).

During a strike, a mine deteriorates rapidly because it does not get attention to minor problems since there are insufficient personnel to perform the repairs (Tr. 90, 92). The conditions cited in the two notices of violation were the result of natural deterioration in the mine (Tr. 91-93, 119) and there were an insufficient number of personnel at the mine to accomplish the elimination of such conditions during the strike (Tr. 91, 111-113, 120).

The mine was not sealed by Respondent during the strike because flooding and massive roof falls would probably occur, equipment would deteriorate, and a permit for reopening the mine might have taken a year because of changing legal requirements (Tr. 525, 526).

During the strike no coal production was undertaken (Tr. 90). The supervisory personnel who worked were occupied in "fixing up hazard conditions," such as rock dusting and pumping, and also timbering and ventilation work (Tr. 90-91). There were not sufficient supervisory personnel available during the strike to eliminate all the conditions which occurred in the mine

as a result of natural deterioration which might constitute violations (Tr. 85, 96, 90, 91, 93, 102).(FOOTNOTE 6)

The supervisors conducted preshift examinations only of the areas where they were assigned to work on a given day during the strike (Tr. 87, 106). Mine management followed the practice of correcting the most serious conditions first (Tr. 110, 127).

DISCUSSION, ULTIMATE FINDINGS AND CONCLUSIONS

Petitioner, MSHA, maintains that its policy was not to force management into performing manual labor during the strike.(FOOTNOTE 7) Yet, it did issue notices of violation during the strike and in this proceeding seeks a penalty.(FOOTNOTE 8) Respondent concedes the existence of the violative conditions (see Stipulation No. 10, supra), but contends it was impossible to prevent such violations during the strike because of insufficient personnel.

Impossibility of compliance became established in mine safety law as an affirmative defense to charges of mine safety violations by the Interior Department's Board of Mine Operations Appeals in its decision in Itmann Coal Company, 4 IBMA 61 (1975). In that matter, the mine operator, as the Respondent here, in effect conceded the existence of the violative conditions (a lack of various items of safety equipment) but argued that no violation should have been found because the equipment required by the regulations was not available. In Itmann, the Board affirmed its prior holding in Buffalo Mining Company, 2 IBMA 226m, 80 I.D. 630 (1973), that "* * * Congress did not intend that a section 104(b) notice be issued or a civil penalty assessed where compliance with a mandatory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians."

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The burden of establishing that compliance with the safety standards is impossible rests of course on the mine operator charged. Here, as the proponent of the rule, Respondent clearly carried its burden and established a prima facie case by its evidence that the mine was idled by an economic strike, that the mine deteriorates rapidly when idle due to natural forces, that the two violations charged occurred as a result of such natural deterioration, that the small complement of men (33 management personnel) available was insufficient to correct conditions in such a large mine (25 miles of entries and crosscuts), and that the realities of labor--management relations made it impossible to hire additional personnel to keep the mine violation--free during the prolonged period of its idleness.

Petitioner failed to rebut Respondent's evidence in those respects. In contrast to the persuasive evidentiary presentation by Respondent, Petitioner failed to establish, even in a general way, how it would have been possible for Respondent to either prevent or correct the various physical problems occurring during the work stoppage. Petitioner's stated policy of not forcing management personnel to perform manual labor during a strike seems to be in contradiction to its prosecution of this proceeding.

I conclude that Respondent's position is meritorious and that the two notices of violation involved should be vacated.

ORDER

1. All proposed findings of fact and conclusions of law proposed by the parties which are inconsistent with the foregoing are rejected.

2. Notices of Violation 2 HSD (8-0004) issued February 12, 1978, and 1 HSG (8-0005) issued February 14, 1978, are VACATED.

Michael A. Lasher, Jr.
Judge

~FOOTNOTE 1

Section 109(a)(I1) states, in part, as follows:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of Title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense * * *."

~FOOTNOTE 2

83 Stat. 742, 30 U.S.C. 801 et seq.

~FOOTNOTE 3

Notice No. 2 HSG (8-0004) alleges that Respondent violated

30 CFR 75.1704 by failing to maintain a designated intake escapeway to insure the passage of any person at all times, because of water ranging from 0 to 16 inches in depth. Notice No. 1 HSG (8-0005), alleges that Sewell violated 30 CFR 75.200 because of the occurrence of fractured and loose roof in the No. 1 section above the No. 1 entry roadway just inby the last open crosscut and extending inby approximately 30 feet.

~FOOTNOTE 4

At the time pertinent herein, Sewell's payroll was 203 underground employees (which figure includes supervisory personnel). During the strike only 33 supervisory personnel worked (Tr. 85-86). Approximately 15 worked on the day shift, 10 on the second shift, and 8 on the third shift. Other personnel could not be hired because of the economic strike (Tr. 111-113, 124) which was in progress at the time.

~FOOTNOTE 5

Inspector Grose testified:

"During the strike period, the abatement process is more liberal. We do not try to force management personnel to do manual labor and labor related activities in the mines. We give them an extended period of time. In some instances, if the original time as set expires before the work force returns, there are extensions given extending the time 'til the workforce does return." Respondent was given 14 days to abate the two notices involved. Abatement of both, however, was accomplished within 2 days. The two notices were issued during MESA's first inspection of the mine during the strike-after the strike had been in progress approximately 2 months (Tr. 36).

~FOOTNOTE 6

I have found the following testimony of Respondent's Division Safety Director to be persuasive:

"Q. In your opinion, Mr. Given, based on your experience with Sewell for the thirteen years you've been employed there and your knowledge of the Meadow River No. 1 Mine, do you believe the number of employees at the Meadow River No. 1 Mine during the strike were capable of eliminating all the conditions which occurred in the mine as a result of natural deterioration which might constitute violations of the Act?

A. No, we did not have enough for that, I don't believe.

Q. Can you generally summarize for the Court why?

A. Well, the fact you have twenty-five miles of entry and crosscuts to look after. You know. We didn't have a work force there, and the people we were using weren't very experienced in doing these things. And it's just physically impossible for a fellow to cover all these areas and take care of every conceivable condition." (Tr. 91).

~FOOTNOTE 7

To avoid interfering with labor-management relations, and presumably, to avoid pressuring one of the parties involved in an economic strike to the benefit of the other.

~FOOTNOTE 8

The subject of safeguard notices--for which penalties are not sought--was raised at the hearing but not subsequently pursued by either party (Tr. 58).