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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 Proceedings Docket No. HOPE 79-6-P A.C. No. 46-03467-03001
v.		Meadow River No. 1 Mine
SEWELL COAL COMPANY,	RESPONDENT	Docket No. HOPE 79-227-P A.C. No. 46-03859-03005
		Sewell No. 1-A Mine

DECISION AND ORDER ASSESSING PENALTIES

This matter came on for hearing on February 5, 1980, in Charleston, West Virginia. Respondent did not appear at the hearing although it was set at the site requested by Respondent (FOOTNOTE 1) and although Respondent received approximately 32 days notice of the hearing.(FOOTNOTE 2)

Respondent was found to have waived its right to present its defense and a summary order was entered assessing MSHA's proposed penalties as final and directing Respondent to pay such penalties.

My oral decision containing findings, conclusions and rationale appears below as it appears in the record aside from minor changes in grammar and punctuation:

> The record will reflect that the Respondent, Sewell Coal Company, is not present. On Thursday, January 31, 1980, I

did receive a call from Respondent's counsel, Mr. Gary Callahan, who advised me he would not be in attendance at the hearing today. He said that he was going to be in Arlington, Virginia, in a hearing before my colleague, Judge William Fauver, in a mine safety matter. I did advise Mr. Callahan at that time that I had previously ruled upon his motion to continue this case, and that I had denied his motion to continue this case.

The sequential facts with respect to my denial of this motion for continuance are as follows:

First, this hearing was noticed by me on January 2, 1980. Mr. Callahan received that Notice of Hearing on or before January 4, 1980, since on that date he sent me a letter and in writing requested that the hearing be continued because of his hearing before Judge Fauver. So the record reflects clearly that the Respondent did have more than thirty days' notice of the hearing in writing.

The pertinent rule with respect to Notice is that contained in 29 CFR 2700.53, which requires that written notice of the hearing shall be given to all parties at least twenty days before the date set for a hearing.

After receiving Mr. Callahan's letter dated January 4, 1980, I issued a written order denying his motion for continuance on January 15, 1980, pointing out that our exceedingly heavy docket makes it impossible to delay or adjust hearing dates based on the availability of one attorney.

In our conversation five days ago when Mr. Callahan called and actually said he would not attend the hearing today, and after I pointed out to him that his client has a great deal of business before this Commission and has insufficient attorneys to represent it, I advised him we could not set our schedule to that of an individual's availability when the client's attorney had more business than he could handle.

Mr. Callahan indicated in this conversation that this was a field of expertise and it was difficult for him to find another attorney. He did not say that he had called other attorneys in an attempt to obtain someone to attend this hearing and represent the Respondent. I advised him I was going to hold the hearing and that I would be in Charleston to hold the hearing on the date scheduled -- that is today, February 5. I asked him to advise the Government attorney. Mr. Callahan indicated he had already spoken to the Government attorney and that the Government attorney said he was going to attend the hearing.

It is my judgment that if the principle were established that hearing schedules were to be established on the basis of the convenience of counsel or on the availability of one counsel, it would soon be impossible to schedule these Mine Safety hearings.

I know of one situation several years ago where a large company had only one attorney, and its whole policy was to delay the processing of these hearings because that attorney was never available.

I note Mr. Callahan has before me in the past sought a delay in hearings I have had with him on this same basis, and I also point out he has done the same with other Administrative Law Judges in our office saying he is the only one who can try these cases for his client. Sewell Coal Company has many, many hearings before this Commission. I question whether any rule which would be established delaying these cases would actually be in the best interest of mine safety.

Where is a proper line to be drawn? If a party says it has two hearings going on simultaneously, can it hide behind an attorney's unavailability and not be required to hire other counsel?

A second question arises: Can an attorney delay the normal processing and hearing of cases because of his unavailability? Can a mine operator charged with violations of the mine safety laws delay these cases by refusing to hire sufficient counsel?

In the very proceedings before us in the two dockets with which we are concerned today, this Respondent, apparently through its counsel, has already engaged in considerable delay. I note that the petition for the assessment of civil penalty was filed by the government on October 3, 1978. Several months went by without an answer being filed by Respondent.

On April 26, 1979, an Order to Show Cause was issued by Chief Administrative Law Judge James A. Broderick requiring the Respondent to show cause why it should not have been deemed to have waived its right to a hearing and to contest the proposed penalty. On May 11, 1979, Judge Broderick granted the Respondent until June 1, 1979, to respond to the Order to Show Cause. On May 17, 1979, the Respondent did file its answer to the petition for assessment. Perhaps an error was made at this point by not finding the Respondent in default at that point. It never did show good cause why

it had delayed filing its answer for several months; however, at that time the commission was in a state of change. We were operating under different procedural rules and new rules were soon to be issued, and they were issued on June 29, 1979.

So the Respondent in this case started the proceeding with a considerable delay. It was very well-accommodated, it was given additional time to answer the Order to Show Cause and was not found in default -- a considerable accommodation which I do question now the propriety of. I am beginning to think that perhaps the default should have been entered at that time. In any event, the default was waived by the Government and Respondent's answer was received and these matters were then starting to be processed.

In its answer to the petition for penalty assessment, the Respondent specifically requested that the hearing in these two cases be held in Charleston, West Virginia. That is where these two cases were noticed for hearing, and the Respondent, through its counsel, was given thirty days' notice.

I find it improper for an attorney to call up a judge five days before a hearing and tell a judge he is not going to appear [in] a case when he has had notice and where the hearing is being set at a site convenient to that particular party, particularly where there is a history by this same counsel of engaging in the same type of delay, and where the apparent belief of counsel is that he, the attorney, is the focal point of Mine Safety and Health proceedings.

Mr. Callahan is a counsel for one party. We have many attorneys in this country. These hearings in Mine Safety matters are held in fifty states. Administrative Law Judges travel to every state in the union to hold these hearings. We are not able to accommodate the scheduling of these hearings based upon the fact that one attorney representing a party cannot himself make it. One of the points that Mr. Callahan made in his conversation with me was that this is an area of expertise, and apparently he's the only one who can try these cases. I reject that out of hand. Any attorney worth his salt can try a Mine Safety and Health proceeding. Attorneys have customarily had no difficulty in trying these cases. It would not have been impossible to begin having a sufficient number of attorneys to try these cases available, and there are such attorneys available, and there is quite a large Mine Safety and Health bar.

I also note for a period of years another large coal company, Eastern Associated, had law students representing it in these cases. Although I did not approve of that practice, the fact remains that that did occur.

So, if Mr. Callahan's argument were accepted that he or another attorney or three more attorneys are the only ones who can represent a client, if that were accepted, then ultimately you would have difficulty bringing many of these cases to hearing.

The question now is what to do in this case. The current rules of procedure differ from the past rules of procedure in such a matter. The only current rule which even winks at this situation is that contained in 29 CFR 2700.63. It has two paragraphs: Subparagraph (a) provides generally, "When a party fails to comply with an order of a judge or these rules, an Order to Show Cause shall be directed to the party before the entry of any Order of Default or Dismissal." Subparagraph (b) provides, "Penalty Proceedings. When the judge finds the Respondent in default in a civil penalty proceeding, the judge shall also enter a summary order assessing the proposed penalties as final and directing that such penalties be paid."

In analyzing this rule, I first note the first paragraph generally applies to all proceedings before the Commission. The second paragraph [refers[specifically to penalty proceedings.

The first paragraph requires an Order to Show Cause shall be directed to a party before the entry of any default; however, it applies only where a party, "--fails to comply with an order of a judge or these rules."

In this case, there is no failure of Respondent to comply with an order or any rule. The Respondent in this case has had a reasonable opportunity for hearing at a site he requested -- or it requested -- and has failed to take advantage of that right.

I therefore conclude that it is not necessary to issue an Order to Show Cause in these proceedings. In so finding, I note there is no specific rule in the current procedural rules covering the situation where a party does not appear at a hearing.

In the interim procedural rules which preceded the current rules, Regulation 2700.26 provided specifically, where the Respondent fails to appear at the hearing, the

judge shall have the authority to conclude that the Respondent has waived its right to a hearing and contest of the proposed penalties and may find the Respondent in default. Where the judge determines to hold Respondent in default, the judge shall enter a summary order imposing the proposed penalties as final, directing that such penalties be paid.

We have no such rule in the current rules. The situation is left uncovered by the current rules. In this situation, I believe the answer is contained in rule -- or let me rephrase that -- that the answer is [found] by reference to two of the current rules, of that contained in 29 CFR 2700.60 and that contained in 2700.63.

2700.60 provides, Any party does have a right to present his case or defense by oral or documentary evidence and to submit rebuttal evidence and the like. That is a right that a party has.

2700.63(b) then provides that if I find a party in default I shall enter a summary order assessing the proposed penalties as final.

I believe in this case that the Respondent has waived its right to a hearing and I so find. The Respondent has unnecessarily delayed this proceeding once before; and while it was not found to be in default, I am not inclined to permit it be continued to delay the processing of such proceedings on the basis that it just has this one attorney or two attorneys who are unable to handle the great amount of business the Respondent has before the Commission.

In conclusion, I am adopting the rule which I gather will go before the Commission and which will either be approved or rejected but in the process of which we hope we should get some clarification as a result of this case. I am going to adopt the rule that where Respondent is given reasonable notice of a hearing and fails to appear or declines to appear at such hearing, it has waived its right -- and I underline the word right -- to present its case at a hearing on the record as provided in 29 CFR 2700.60(b); and that in such circumstances it is proper for the Administrative Law Judge to find the Respondent in default and pursuant to 29 CFR 2700.63(b) to enter a summary order assessing MSHA's proposed penalties as final.

* * * * * * *

Before closing, I am going to indicate one other item that I believe is pertinent in these proceedings to aid the

Commission and perhaps any court subsequently down the line that may be reviewing this matter, and that is the nature of the Commission's hearing process and the problems which are involved in setting these hearings.

In the past two years and since the passage of the 1977 Safety Act, the docket, I believe, of many of the Commission judges -- there are something like fourteen in Arlington and four now in Denver -- the dockets, that is, the number of cases they are carrying has increased dramatically. I am now carrying approximately twice as many cases as I was two years ago. I do not sit, for example, as a United States District Court Judge does, in a single site or two sites. The hearings which I hear are, as I previously indicated, spread out all over the country. I have, for example, a hearing trip set up in March, next month, which requires me on Tuesday to have a hearing in Wheeling for two days and then starting two days later I'll be in Pomeroy, Ohio, beginning on a Thursday morning; the following Monday morning, I'll be in Prestonsburg, Kentucky, and the following Wednesday, I'll be back here in Charleston. If attorneys in any of those cases began calling me up after I had set up such a schedule saying, "Look, I've got to go somewhere else, I've got another hearing elsewhere," it would be impossible to start to process any of these cases.

These are Mine Safety and Health cases and the Congress has given these cases quite a bit of priority. I have had many times in the past lawyers call me up saying, "Look, I've got a traffic court case the same day, I can't make that Mine Safety case." It has been a rare situation where it has been possible to grant these types of continuance with that type of situation existing; that is, a very heavy docket with the hearing sites literally strung out all over the country and with numerous lawyers involved.

I can recognize that an attorney's livelihood and the practice of his profession is important to him. Mr. Callahan has sent a letter around to various of the administrative law judges in the past indicating a long list of fairly large companies he represents in these proceedings, and he has many cases; and it is certainly a credit to him that he undertakes to represent these clients. On the other hand, our moving this large number of cases cannot be dependent on his availability or any one or two or three attorneys in a given case. I hope that this proceeding will result in a good look on the part of the Commission as to the necessity of moving the large number of Mine Safety cases we presently have.

The commission in total has no more judges -- actually, it has less working judges under the 1977 Act then it

had

under the '69 Act, even though the case load has increased by a great amount and the hearings are held now practically everywhere in the United States.

I would note the hearings are by and large much more difficult to process, there are more procedural battles going on, there are more prehearing matters to be disposed of; so some sense of reality has to now be adopted so these cases can be handled and be disposed of.

The commission has previously held that the hearings have to be held in the area where the mines are located. That takes time -- that takes travel time and the like. I hope the rule that I have indicated on the record, which I believe is a reasonable one, will be adopted by the Commission in this case. That simply is that where the Respondent has been given a reasonable notice of hearing and it fails to appear, it has waived its right to present its case on the record as provided in 29 CFR 2700.60. And that in such event, it is proper for the Administrative Law Judge to find the Respondent in default and to enter a summary order assessing MSHA's proposed penalties as final. That procedure had been in the interim procedural regulations, and under the current regulations a gap appears. So if a reasonable rule is not filled in here, I would estimate that every Administrative Law Judge at the commission will soon have stacks of cancelled hearings in their office; and we will just simply create a complete backlog of these hearings, human nature being such as it is and lawyers being the way they are, they will put off, if they can, these cases. If the judges are going to conscientiously try to whack away at the large number of cases, we have to have some sort of reasonable procedures we can work with.

I do find the Respondent in default on the basis that I have previously indicated, and I assess the Respondent in Docket Number HOPE 79-6-P a penalty of six hundred ninety dollars ($690) for the violation of 30 CFR 75.200 described in Order of Withdrawal Number 045973, which issued on March 27, 1978. I also assess a penalty against Respondent in Docket Number HOPE 227-P of five hundred thirty dollars ($530) for the violation of 30 CFR 75.503 contained in Citation Number 044189 dated June 14, 1978; and direct that these penalties be paid to the Secretary of Labor on or before thirty days after the receipt of my written order which will issue in the near future.

Michael A. Lasher, Jr.
Judge

~FOOTNOTE 1

By letter dated January 4, 1980, Respondent's counsel, Gary W. Callahan, requested a continuance of these two proceedings for the reason that he had another mine safety hearing to attend in Arlington, Virginia, on the same day. By Order dated January 15, 1980, Respondent's motion was denied. On January 31, 1980, Mr. Callahan advised me that he was not going to attend the hearing in Charleston, West Virginia. Mr. Callahan was again advised that the hearing would not be cancelled.

~FOOTNOTE 2

A form letter dated November 1, 1979, from Respondent's counsel to administrative law judges in the Commission's Arlington office is attached as Exhibit "A." Among other things, it indicates various mining companies that counsel represents.

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November 1, 1979

The Honorable
Administrative Law Judge
Federal Mine Safety and Health Review Commission
4015 Wilson Boulevard
Arlington, Virginia 22203

Dear Judge

On occasion I receive from your office a notice that trial or hearing has been scheduled for a case of one of the divisions of the Pittston Company, and often I already have a hearing or other matter previously scheduled. Since I handle all MSHA and OSM matters for the companies listed below, my schedule of open dates is somewhat limited. I would appreciate, then, if you would call or otherwise advise me of a prospective date prior to the time a case is set for hearing.

Amigo Smokeless Coal Company
Badger Coal Company
Buffalo Mining Company
Clinchfield Coal Company
Eastern Coal Corporation
Elkay Mining Company
Evergreen Industries, Inc.
Excel Development, Inc.
Jewell Ridge Coal Corporation
Kentland-Elkhorn Coal Corporation
Rail-River Terminal Company
Ranger Fuel Corporation
Sewell Coal Company
The Maple Company, Inc.
The Sycamore Company, Inc.

Sincerely,

Gary W. Callahan
Attorney