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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. WEVA 79-31 A.O. No. 46-01478-03014
v.	
SEWELL COAL COMPANY, RESPONDENT	Sewell U.G. No. 1 Mine

DECISION AND ORDER

Pursuant to the order of remand, the trial judge issued an order to show cause which afforded the parties an opportunity to be heard on the issue of the availability of the defense of "diminution of safety" or "greater hazard" in an enforcement proceeding. As the Commission's decision pointed out, in this case, unlike Penn Allegh Coal Company, 3 FMSHRC 1392 (1981), the operator (1) filed a petition for waiver of the canopy requirement prior to issuance of the notice of violation, (2) the petition was granted before the enforcement proceeding was adjudicated, and (3) at the time the first motion to approve settlement was submitted notice of the finality of the waiver of the canopy requirement for the equipment in question had been published in the Federal Register. It had, therefore, the force and effect of law.

Despite this, counsel for the Secretary contends that because the operator has waived its rights by twice agreeing to pay a token penalty, the trial judge and the Commission must ignore the importance of the issue raised by the remand. Counsel also asks that the Commission ignore the fact that the operator, in response to the show cause order, has withdrawn its settlement proposal and now prays the matter be dismissed.

The citation to P & P Coal Co., 6 IBMA 86 (1976), is inapposite. This is not, as counsel suggests, a default proceeding in which the trial judge has, on his own motion, raised an affirmative defense never established in the record. It is rather a case for application of the Commission's rule that the trial judge has "inherent authority to question whether, as a matter of law, a case before him presents a cause of action." Olga Coal Co., 2 FMSHRC 2769 (1980). This, in turn, depends on whether, as a matter of law, the defense of "diminution of safety" is available to the operator in this case. Indeed, the case was remanded for the express purpose of permitting the trial judge to make this determination.

My conclusion is that the defense is available and has been established. Therefore, MSHA's motion to approve settlement must be denied and the matter dismissed.

MSHA's arguments against such a disposition are without merit. Contrary to the Secretary's contention, I have not attempted to overrule the Administrator's decision with respect to the Galis 300 roof bolter. I have merely concluded that evidence in this record, which was not before the Administrator,(FOOTNOTE.1) established that, independent of the Administrator's decision, sufficient practical technology did not exist on the date of the alleged violation to warrant imposition of an obligation to install canopies in either a 48 inch or 50 inch mining height.

In regard to the Joy 16SC shuttle car, the claim by MSHA that the Administrator's decision was not predicated on a finding that use of canopies on the shuttle cars diminished the safety of the miners is clearly erroneous. As the operator's response points out, at no time did the operator propose an alternate method of compliance. Instead what was sought was a total waiver of the requirement on the ground that compliance was technologically impossible without diminishing the safety of the miners. 30 U.S.C. 861(c) (1970); 811(c) (1977). MSHA's afterthought argument is a thinly disguised effort to evade the estoppel imposed by the Administrator's decision on maintenance of the enforcement proceeding.

Nor does the fact that the operator installed a canopy in a 43 inch clearance establish that its use did not diminish the safety of the miners. One of the great failings of the canopy program is MSHA's callous indifference to whether or not the requirement for installation of canopies is compatible with the safety of the miners who must use them. The canopy standard has been repeatedly criticized by both miners and operators for creating in medium and low coal more hazardous conditions than it cures. It is this type of irresponsible enforcement that leads both miners and coal operators to contend that MSHA's canopy standard is an arbitrary and dangerous exercise of regulatory power.

Finally, I find counsel's attempt to redact or to expunge unilaterally and ex parte the record of the representations made by the parties in support of their original motion as feckless and irresponsible at best and reprehensible at worst. Those representations and stipulations were highly material to the initial disposition made of this matter. Furthermore, they were relied upon and quoted from at length by the Commission. As the attached affidavit by my clerk shows, at no time did she tell Mr. Kramer to file a new motion for settlement that would "supersede and replace Mr. Street's previously filed motion."

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Consequently, for the reasons set forth in this decision and in my show cause order of September 30, 1981, as appended hereto and incorporated herein, I conclude the defense of diminution of safety or greater hazard is a bar to this enforcement proceeding. Accordingly, it is ORDERED that the pending motion to approve settlement be, and hereby is DENIED and the captioned matter DISMISSED with prejudice.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

Such as, the parties' representation as to the experimental nature of canopy technology in January 1976; the injuries to miners performing tramming operations with canopies; and the fact that the notice was modified a month after its issuance to show the minimum mining height on the section at the time of the alleged violation was 5 inches less than stated.