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MSHA V. SEWELL COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 11, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. HOPE 78-744-P

SEWELL COAL COMPANY

DECISION

This is a civil penalty proceeding arising under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979)(the Mine Act). 1/ The issue is whether the administrative law judge erred in vacating two notices of violation on the ground that compliance was impossible because of a manpower shortage. For the reasons that follow, we reverse.

In February 1978 a federal mine inspector conducted an inspection of Sewell Coal Company s Meadow River No. 1 Mine. The mine contains six sections, and 25 miles of entries and crosscuts. The roof above the coal seam is of a glassy shale type, and is therefore fragile and subject to fracture. The mine is also very wet, accumulating about 500,000 gallons of water per day. The mine floor undulates, which creates places for water to accumulate.

As a result of the inspection, Sewell was cited for a violation of 30 CFR $75.1704. 2/ The notice alleged that Sewell failed to maintain in safe condition a designated intake escapeway to insure the passage of any person at all times, including disabled persons. The notice was issued because water accumulations, of varying depths up to 16 inches, existed for approximately 40 feet in the designated escapeway.

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1/ The inspector issued the notices of violation here on February 13 and 14, 1978, under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976)(the Coal Act). The Secretary filed his petition for assessment of civil penalty after the effective date of the Mine Act.

2/ 30 CFR $75.1704 states in part:

[A]t least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which

are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section ... and shall be maintained in safe condition and properly marked.

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Sewell also was cited for a violation of 30 CFR $75.200. 3/ The inspector testified that "there were slips and cracks in the mine roof and some of the rock had already fallen to the mine floor and other rock was ready to fall."

At the time the notices were issued, employees at the mine represented by the United Mine Workers of America had been on strike for over two months. Sewell normally employs 203 people, both union and supervisory personnel, for underground work at the mine. During the strike however, only 33 supervisory personnel worked in the mine. Sewell's division safety director testified that 50 or 60 men would be needed to prevent any conditions which might constitute violations of the Act during an idle period. He also stated that the strike effectively prevented the hiring of any additional personnel. No coal was mined during the strike and the 33 working supervisory personnel limited their activity to correcting hazardous conditions.4/ However, the natural deterioration of the 25 miles of mine, combined with the scarcity of workers, precluded the correction of all conditions that might constitute violations of the Act. The conditions cited in the two notices were the result of natural deterioration. Sewell conceded the existence of the cited conditions, but contended that they were impossible to prevent because of insufficient maintenance personnel.

The administrative law judge vacated both notices of violation, finding that:

[T]he 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 [1] that the mine was idled by an economic strike, [2] that the mine deteriorates rapidly when idle due to natural forces, [3] that the two violations charged occurred as a result of such natural deterioration, [4] 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), [5] 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.[5/]

3/ 30 CFR $75.200 states in part:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. 4/

Sewell opted not to seal the mine during the strike because natural mine deterioration could have caused massive roof falls as well as flooding.

5/ The judge noted that impossibility of compliance was recognized by the Interior Department's Board of Mine Operations Appeals. Itmann Coal Co., 4 IBMA 61 (1975), and Buffalo Mining Company, 2 IBMA (1973). In both cases the notices were vacated because of the unavailability of required equipment in the marketplace.

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The Secretary does not contest these factual findings and the record as a whole supports them. Rather, the Secretary challenges the judge's conclusion from those facts, that compliance was impossible. The Secretary submits that the operator had discretion; it could assign its 33 management personnel to whatever tasks it deemed important. He argues that although it may have been difficult to do a complete examination of the mine so as to detect all violative conditions, such action was not impossible. To the extent violative conditions are found that cannot be corrected promptly, the operator could, argues the Secretary, danger-off and post such areas so as to prevent miner access and exposure. 6/

We agree with the Secretary that the facts relied on by the judge do not support a finding that compliance with the cited standards was impossible. In fact, the violation was abated by the operator very soon after the citations were issued. When, as here, compliance is difficult but not impossible, the appropriate consideration of such mitigating circumstances is in the assessment of the penalties.

In sum, we hold the judge erred in recognizing an affirmative defense of impossibility of compliance in this case. Accordingly, the notices of violation are reinstated and affirmed and the case is remanded for the assessment of civil penalties.

Richard V. Backley,
Chairman

Frank F. Jestrab,
Commissioner

A. E. Lawson,
Commissioner

Marian Pearlman
Nease, Commissioner

6/ In his brief, the Secretary contends that "the proper place for

consideration of the argument raised by Sewell--that it could not comply with the Coal Act because it had limited manpower--is in assessment of the civil penalty. The fact that most employees were on strike may well mitigate the gravity and negligence associated with the violations."

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Distribution

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

C. Lynch Christian, Esq.
Jackson, Kelly, Holt & O'Farrell
P.0. Box 553
Charleston, West Virginia 25322

Gary W. Callahan, Esq.
Sewell Coal Company
Lebanon, Virginia 24266

Administrative Law Judge Michael Lasher
FMSHRC
5203 Leesburg Pike, lOth Floor
Skyline Center #2
Falls Church, Virginia 22041