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MSHA V. PENN ALLEGH COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 29, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. PITT 78-97-P

PENN ALLEGH COAL COMPANY, INC.

DECISION
On September 14, 1975, Penn Allegh Coal Company filed a petition for modification of the application of the cabs and canopies standards, 30 CFR 75.1710-1(a), to the electric face equipment at its Allegheny No. 2 mine. 1/ The petition for modification was filed under section 301(c) of the 1969 Coal Act, 30 U.S.C. $861(c)(1976), which, in relevant part, provided:
Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a mine if the Secretary determines ... that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of such operator or representative or other interested party, to enable

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1/ The standard requires installation of protective cabs or canopies on all self-propelled electric face equipment on a staggered time schedule coordinated with descending mining heights. It states in pertinent part:
(a) [A]11 self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in subparagraphs (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs,

located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls.
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the operator and the representative of miners in such mine or other interested party to present information relating to the modification of such standard. The Secretary shall issue a decision incorporating his findings of fact therein.... Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code. (Emphasis added.) 2/

On January 9, 1976, while the petition for modification was pending before an administrative law judge, a notice of violation of 30 CFR 75.1710-1(a) was issued to Penn Allegh for failure to provide a canopy on a Long-Airdox electric coal drill. On June 15, 1977, the judge issued a lengthy decision in the modification case granting the modification in part and denying it in part. Both Penn Allegh and the Secretary appealed the decision to the Board of Mine Operations Appeals. On March 9, 1978, the pending appeals were transferred to the Assistant Secretary for Mine Safety and Health pursuant to the transfer provisions of the 1977 Mine Act. 30 U.S.C. $961(a). The appeals remain pending before the Assistant Secretary as of this date.

On November, 14, 1977, a petition for assessment of civil penalty for the violation alleged in the January 9, 1976, notice of violation was filed by the Secretary and the civil penalty case was assigned to the administrative law judge who had heard the modification case. 3/

On December 9, 1977, Penn Allegh requested a stay of the penalty proceeding pending the decision of the Board in the appeal of the modification case. The judge denied the stay because the petition for modification had not included the coal drill that was the subject of the notice at issue in the present penalty proceeding. 4/

On January 17, 1978, the judge issued a notice of prehearing conference and pretrial order stating that counsel for the Secretary had "indicated his unwillingness to concede that the use of a canopy on

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2/ Section 101(c) of the 1977 Mine Act, 30 U.S.C. $811(c)(Supp. III 1979), provides for the same modification procedure.

3/ Section 110(a) of the 1977 Mine Act requires that the Secretary assess an operator of a mine at which a violation occurs a civil penalty. Section 105 sets forth the procedures for that assessment and for contesting the assessment before the Commission.

4/ The petition for modification as originally filed did not specify the particular electric face equipment for which modification was

requested. However, at the modification hearing the parties submitted a joint exhibit listing the electric face equipment encompassed by the petition. The judge asked counsel for Penn Allegh if the exhibit was to be deemed as amending the petition so as to apply only to those machines specified therein. Counsel responded affirmatively.
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respondent's coal drill will result in a diminution of the safety of the miners and therefore [that] the canopy requirement is inapplicable." The judge requested that the parties submit proposed stipulations regarding the mining height and the height of the coal drill, and, among other things, that the Secretary furnish a scale drawing "of the canopy design MESA contends can be used safely on the coal drill in question under the mining height present." 5/ In response, the Secretary submitted a drawing of a canopy available from the manufacturer of the drill. Penn Allegh responded by asserting that the design submitted by the Secretary could not be used safely in its mine, that the judge's prior modification decision showed that a canopy could not be used safely, and that requiring a new modification petition would result in a needless multiplicity of proceedings.
On February 27, 1978, the judge issued a notice of hearing and pretrial order which stated:
The issue in this case is whether or not the canopy design proposed by MESA could be used safely in the 4 Right section of the No. 2 mine on January 9, 1976. This issue will be determined on the basis of the scale drawing submitted by MESA and the dimensions as to mining height, machine height and roof support to which the parties have stipulated.
In response to this order the Secretary filed a prehearing statement that included a modified canopy design. This design contained structural modifications not present in the previously submitted design. The Secretary stated that he was "forced" to submit the modified design because the judge was "predisposed" to make findings, based upon the modification case, which would not permit the coal drill to operate safely when equipped with the canopy the Secretary originally proposed. Prehearing statement at 4 (March 8, 1978).
In its response to the pretrial order Penn Allegh asserted that a "canopy utilizing the design [originally] proposed by MESA for the ... drill could not on January 9, 1976 and cannot now be used safely in the 4 Right Section or any other section of Allegheny No. 2 Mine." Supplemental Prehearing Submission, •14, 15, (March 15, 1978). Regarding MESA's drawings of the modified canopy design Penn Allegh stated:
[T]his proposed design is incompetent and irrelevant with respect to the subject violation. Such violation must be adjudicated on the basis of facts and conditions as they

existed at the time the alleged violation occurred. More over, [Penn Allegh] denies that MESA's suggested modifications in the machine and canopy design will overcome the hazards created by equipping the subject machine with a canopy in 47" coal. 6/

5/ The Mining Enforcement and Safety Administration (MESA) became the Mine Safety and Health Administration (MSHA) when the 1977 Mine Act took effect.

6/ The parties had agreed that the minimum mining height at which the electric face equipment would have to operate was 47 inches.

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Supplemental Prehearing Submission, at 5-6, (March 15, 1978). In a further response to MESA's modified canopy design Penn Allegh stated:

Obviously this new design was not available on January 9, 1976 because it is strictly conceptual in nature and was prepared for the purpose of this case and hence must be deemed to be irrelevant. Moreover, the [structural modification] merely exacerbates the problems of visibility and the hazards resulting therefrom.

Response to Offer of Proof, at 3, (April 3, 1978).

The matter was heard on April 6, 1978. At the start of the hearing, the judge recited his understanding of the posture of the case:

I understood the sole issue to be determined with respect to the fact of violation was whether the canopy design [initially] proposed by the Secretary ... could have been retrofitted to the ... face drill in use of the 4 Right Section of the No. 2 Mine without diminishing the safety of the miners.

I further understood that the issue with respect to the fact of violation would be determined on the basis of the canopy design configuration found in the manufacturer's drawing ... which the operator agreed was available to it as early as April 1975, and the agreed upon dimensions as to the mining height, machine height and roof support.

Tr. 6-7.

Counsel and the judge then extensively discussed the propriety of admitting as exhibits the Secretary's modified canopy design. Counsel for Penn Allegh stated that "unless there was an actual canopy design available from the manufacturer at [the time of the alleged violation] that could have been retrofitted ... this evidence is worthless and irrelevant." Tr. 18. After further discussion, the judge stated:

[W]hat this offer of proof if accepted amounts to is a direction that the presiding judge impose on the operator

the burden of showing that two untested, unproved design concepts involving a complete overhaul of the equipment and a relocation of the operator's controls would, if accomplished, be acceptable as a safe canopy design concept.
I think this is a thinly disguised attempt to shift from the Secretary the burden of showing that the manufacturer's design configuration could be used safely by requiring the operator to show that [the Secretary's] untested, unproved paper design concepts would, if implemented, diminish the safety of the miner. Even if these design concepts are, as I assume they will be, endorsed by [the Secretary's witness], they would still remain untested, unproved, paper concepts.
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As I have said it is my strong recollection and I have confirmed that [when such testimony was presented before another judge he] said he could assign little weight to such conceptualization testimony. I agree and for this as well as the other reasons adverted to reject this offer of proof.
Tr. 26-27.
After further extended discussion the Secretary stated that the judge's ruling "wipe[s] out our case". Tr. 46. The judge then rendered a bench decision finding that a total mining height of 48.5 inches was necessary to allow safe operation of the drill with the canopy originally proposed by the Secretary. Because the stipulated minimum mining height was 47 inches, the judge concluded that "the canopy design configuration, proposed by the Secretary cannot be used safely in ... Respondent's No. 2 mine and could not have been used safely ... on January 9, 1976." Tr. 55-56. 7/ On April 7, 1978, the judge issued a written decision, reiterating his bench decision, and dismissed the petition for penalty assessment.
On May 5, 1978, the Secretary filed a petition for discretionary review with the Commission. The petition asserted that the judge erred in declaring the standard invalid. It also raised questions concerning the burden of proof, the admission of evidence and the taking of official notice. On January 3, 1979, the Commission granted the Secretary's petition. 8/
Although this matter poses potentially interesting questions regarding the burden of proof in an enforcement proceeding brought for a violation of a performance standard and the nature of the proof that will be

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7/ The judge also found that he had the authority to rule upon the validity of the mandatory safety standard at issue before him. Exercising this authority, he concluded that the Secretary had failed to follow the statutory scheme in promulgating 30 CFR $75.1710-1 and

that the standard was therefore null, void and unenforceable. The judge reached identical conclusions in his decision in Sewell Coal Co., 1 FMSHRC 1381 (WEVA 79-31, 1979). The judge's decision in Sewell was directed for review by the Commission. For the reasons stated in our decision in Sewell, issued this date, we conclude that the judge was correct in finding he had the authority to rule on the standard's validity, but erred in finding 30 CFR $75.1710-1 to be null, void and unenforceable.

8/ At the time that the Secretary's petition for review was filed no Commissioners had yet assumed office. Therefore the 40-day review period expired without review of the judge's decision having been directed. 30 U.S.C. $823(d)(1). On June 16, 1978, the Secretary filed a petition for review of the Commission's "final order" with the U.S. Court of Appeals for the D.C. Circuit. On November 7, 1978, after Commissioners had been nominated and confirmed, the Secretary filed a motion with the Court to remand the case to the Commission to allow the Commission the opportunity to act on the Secretary's petition for review. The Secretary's motion was granted and the case was remanded "so that the Commission may dispose of the Secretary's petition."

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considered to be probative and relevant in such proceedings it presents a yet more fundamental issue which commands our attention--the propriety of allowing an operator to assert as a defense in an enforcement proceeding that application of the allegedly violated safety standard will diminish the safety of miners. Our resolution of this issue makes unnecessary, indeed inappropriate, discussion of the other issues raised in this case.

Penn Allegh's consistent argument throughout this case has been that to require the installation of a canopy on its coal drill will actually diminish, rather than enhance, the safety of miners. This is so, in Penn Allegh's view, because a canopy giving sufficient clearance to the coal drill operator to allow safe and comfortable operation of the drill, necessarily will be too high to allow safe operation in the 47-inch mining height at issue. Therefore, according to Penn Allegh, to apply the standard here is to diminish the safety of miners--a result contrary to the Act's purposes. In view of this, Penn Allegh submits that the notice of violation for failure to comply with 30 CFR $75.1710 should be vacated and the petition for assessment of penalty dismissed.

Section 301(c) of the 1969 Coal Act and section 101(c) of the 1977 Mine Act expressly provide a specific mechanism for handling those situations where the application of a standard diminishes, rather than enhances, miners' safety. In such situations, the operator is required to petition the Secretary for relief from the

application of the standard. Upon receipt of such a petition the Secretary gives notice, conducts an investigation, provides an opportunity for a public hearing, and issues a decision granting or denying the relief sought. The Secretary has adopted detailed regulations governing the processing of such petitions. 30 CFR Part 44. Multi-level review of a modification petition is provided; the initial decision being made by the Administrator of MSHA with the right to be heard by an administrative law judge of the Department of Labor and with an appeal to the Assistant Secretary of Labor. Only a decision of the Assistant Secretary is deemed final agency action for purposes of judicial review. 30 CFR 44.51. 9/

Thus, there is a clear distinction between modification proceedings instituted by an operator and enforcement proceedings instituted by the Secretary. The two serve related but separate ends. In one the Secretary must prove failure to comply with a standard he has adopted for application to the mining industry in general. In the other, the operator must demonstrate why compliance should be waived in view of the special facts at a particular mine.

In the present case, it is undisputed that the coal drill was not equipped with a canopy as required by the standard. It is also undisputed that Penn Allegh did not seek a modification of the cabs and canopies standard for the coal drill at issue. Penn Allegh failed to do so even in view of the fact that it had previously filed a petition for modification of the same standard as it applied to many other pieces of

9/ Under the 1969 Coal Act modification proceedings were processed through the Department of Interior's Office of Hearings and Appeals with a right of appeal to the Board of Mine Operations Appeals. See 43 CFR $4.550 (1972)).

equipment and, therefore, was obviously aware of the procedure to be followed. Instead, with regard to the coal drill at issue here, Penn Allegh waited until it was cited for non-compliance and then raised in the enforcement proceeding the same question that could have been resolved in a modification proceeding, i.e., whether application of the standard would cause a diminution of safety at its mine.

We cannot endorse this short circuiting of the Act's modification procedures. We believe it important that questions of diminution of safety first be pursued and resolved in the context of the special procedure provided for in the Act, i.e., a modification proceeding.

A similar conclusion has been reached in an analogous situation under the Occupational Safety and Health Act of 1970, 29 U.S.C. $651 et seq. In the OSHA statutory scheme, an employer may apply to the Secretary of Labor for a variance from a standard's application. 29 U.S.C. $655(d). As with the Mine Act, the OSHAct's variance

procedure is distinct from the Act's enforcement procedure. In enforcement proceedings the Occupational Safety and Health Review Commission has likewise been confronted with arguments that a violation of the Act should not be found where compliance with a standard would result in a "greater hazard" than non-compliance i.e., a diminution of safety. In establishing a narrow "greater hazard" defense, the OSHRC has set forth three elements: 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protecting employees are unavailable; and 3) a variance application would be inappropriate. (Emphasis added.) See, e.g., Russ Kaller, Inc. t/a Surfa-Shield, 4 BNA OSHC 1758 (1976). The Third and Ninth Circuits have affirmed this formulation of the defense. In General Electric Co. v. Secretary, 576 F.2d 558, 561 (3d Cir. 1978), the Court stated:

> Every employer has the initial obligation to make sure that his working areas comply with all applicable standards. If there is reason to believe that compliance with certain standards may jeopardize his employees, a variance should be sought. If a "greater hazard" defense is allowed at an enforcement proceeding without requiring initial resort to the variance procedures or a showing that such resort would be inappropriate, there would be little incentive for an employer to seek a variance under these circumstances.
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> General Electric contends that an employer who correctly believes that his working conditions are safer than those prescribed in the standards should not be penalized for bypassing the variance procedures and taking his chances that he will not be cited or that he will prevail in an enforcement proceeding. The flaw in this argument is that some employers will believe incorrectly that their working conditions are safer than those prescribed in the standards. By removing this incentive to seek variances, the Commission would be allowing an employer to take chances not only with his money, but with the lives and limbs of his employees. This we cannot do. [Emphasis added.]

The Ninth Circuit endorsed the Third Circuit's reasoning in Noblecraft Industries v. Secretary, 614 F.2d 199 (1980).

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We find this rationale compelling and applicable to the modification procedures of the mine safety statutes. A statutory procedure is and was available to Penn Allegh to obtain a waiver of the application of the cabs and canopies standard to the coal drill at issue. That procedure involves a forum different from this Commission, (i.e., the Department of Labor) and Penn Allegh was aware of the applicable procedures for obtaining the relief sought here. Penn Allegh did not avail itself of this opportunity. Instead, it

chose to operate the drill without a canopy, an admitted violation of the standard, and waited until it was cited before making its argument regarding diminution of safety. Thus, Penn Allegh, rather than the Secretary, has determined that compliance is unnecessary. If Penn Allegh is wrong, employees have been exposed to a hazardous condition in violation of the Secretary's standard. 10/ At the present time, we cannot forecast with any certainty whether Penn Allegh could or could not have equipped its drill with a safe canopy. 11/ The responsibility for making that determination rests in a different forum and should not be determined here.

10/ We recognize that if Penn Allegh is right requiring literal compliance would mean that miners would be exposed to a hazardous condition. We view the regulatory scheme of the Act, however, as being premised upon the proposition that compliance with the safety standards adopted by the Secretary protects the nation's miners, and that the procedures permitting non-compliance, i.e., the modification provisions, must be strictly observed. We also stress, however, that the Secretary's regulations appear to provide a vehicle for insuring that the safety of miners is not compromised during the pendency of a modification petition. 30 CFR $44.16 provides for interim relief from the application of a standard pending final decision on a petition for modification. Also, 30 CFR 44.4(c) provides that "the granting of the modification ... shall be considered as a factor in the resolution of any enforcement action previously initiated for claimed violation of the subsequently modified mandatory safety standard." This case does not present a situation where an enforcement proceeding was brought by the Secretary after the operator had filed a modification petition and before that petition had been finally resolved.

11/ The fact that Penn Allegh had received a partially favorable decision from an administrative law judge in its modification case is of no importance. Although the facts forming the basis of the favorable portions of that decision possibly could be analogized to the facts of the present case, both parties appealed the judge's decision and no final decision on the petition for modification has yet been issued. Therefore, the administrative law judge's decision granted waiver as to other items of equipment does not provide a sound basis for excusing Penn Allegh's failure to file a modification petition here

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Therefore, we hold that the defense of diminution of safety was improperly raised and accepted in this enforcement proceeding. 12/ The judge's decision is reversed and the case is remanded for further proceedings consistent with this decision.

12/ Nor in this case could Penn Allegh assert, as an alternative to its disallowed defense, that it was technologically impossible for it

to comply. Such a defense would be merely an adjunct to its diminution of safety defense because it is "technologically impossible" only because it diminishes safety--not because it is impossible to fit a canopy on the coal drill.

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