CCASE:
SOL (MSHA) V. SEWELL COAL
DDATE:
19831207
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
DECEMBER 7, 1983

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEVA 79-31

SEWELL COAL COMPANY

DECISION

This case requires us to examine further the relationship between modification and enforcement proceedings under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1976 & Sup. V. 1981). We have previously addressed the propriety of raising the issue of diminution of safety for the first time as a defense in an enforcement proceeding. Penn Allegh Coal Co., 3 FMSHRC 1392 (June 1981). In this case, which is before us a second time, we must examine the effect in an enforcement proceeding of findings concerning diminution of safety made by the Secretary of Labor in a modification proceeding. For the reasons that follow, we hold that under the circumstances of this case the findings in the modification proceeding are binding in the enforcement proceeding.

On January 15, 1976, Sewell Coal Company was issued a notice of violation under the 1969 Coal Act, 30 U.S.C. 801 et seq. (1976) (amended 1977), by a representative of the Secretary of the Interior. The notice of violation charged Sewell with Operating a Galis 300 roof bolter without a canopy in violation of 30 C.F.R. 75.1710-1. Prosecution of the case was continued by the Secretary of Labor after the Mine Act was enacted. The parties agreed that under the terms of the standard a canopy was required. The day before the notice of violation was issued, however, Sewell had filed a petition for a modification of the canopy standard with respect to the roof bolter.1/ Sewell asserted in its petition that installation of a

canopy would diminish the safety of its miners.

_____

1/ Sewell filed its modification petition under section 301(c) of the 1969 Coal Act. 30 U.S.C. 861(c)(1976)(amended 1977). This provision was replaced by section 101(c) of the 1977 Mine Act, 30 U.S.C. 811(c) (Sup. V 1981), which states in part:

> Upon petition by the operator or the representative of miners the Secretary may modify the application of any mandatory

Prior to a decision on the merits in the modification case, the Secretary of Labor instituted this proceeding seeking a civil penalty for the noticed violation. Subsequently, in the modification proceeding, the Administrator for Coal Mine Safety and Health at the Department of Labor's Mine Safety and Health Administration ("MSHA") waived compliance with the standard at minimum mining heights of 48 inches or less in the working section. Sewell Coal Co., No. M76-131 (April 27, 1979). Thereafter, prior to hearing in the enforcement proceeding, the parties agreed to settle the case and the Secretary of Labor moved the Commission's administrative law judge to approve the settlement. The judge denied the settlement motion on the basis that there was no violation because the standard was "null, void and unenforceable," Sewell Coal Co., 1 FMSHRC 1379 (September 1979)(ALJ).

We granted the Secretary's petition for review, reversed the judge's finding that the standard was invalid, and remanded the case. Sewell Coal Co., 3 FMSHRC 1402 (June 1981). We noted that, although a modification decision had been issued, the judge had provided "no clear discussion of the interrelationship between the factual matters at issue in [the] enforcement proceeding and those at issue in the modification case." 3 FMSHRC at 1414-15. Moreover, the judge's decision had not discussed the legal effect, if any, of the granted modification on the pending enforcement proceeding. We therefore remanded the matter to afford the parties an opportunity to present arguments concerning the effect of the modification on the civil penalty case. 3 FMSHRC at 1415.

On remand, the parties again agreed to settle the matter and moved for the judge's approval. The judge issued an extensive order to show cause why the motion should not be denied and the matter dismissed. Sewell Coal Co., 3 FMSHRC 2578 (November 1981) (ALJ). The judge stated that it was more probable than not that when Sewell was issued the notice of violation it could not have installed a canopy on the roof bolter without diminishing safety. The judge expressed his tentative conclusion that an affirmative defense of diminution of safety was therefore available to Sewell, and ordered the parties to "present arguments addressing the issue of the availability of the defense of diminution of safety," 3 FMSHRC at 2590.

---

footnote 1 cont'd.

safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the results of such standard exists which will at all times guarantee no

> less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such a mine. [Emphasis added].

Section 101(c) preserves the same bases for granting a variance that were contained in section 301(c) of the 1969 Coal Act. Under the modification provisions of the Mine Act, the decision to grant or withhold a variance is made by the Secretary of Labor. The MSHA regulations implementing section 101(c) provide for an initial decision by an Administrator of MSHA, with a right of appeal ultimately to the Assistant Secretary of Labor for Mine Safety and Health. 30 C.F.R. 44.13-44.33. Sewell's modification petition was continued before the MSHA Administrator for Coal Mine Safety and Health.

The Secretary responded that the judge had improperly raised the defense of diminution of safety sua sponte and, alternatively, that the defense could not be established with respect to the roof bolter. The Secretary asserted that in the modification proceeding the Administrator had not waived compliance with the safety standard at the mining height specifically at issue in the enforcement proceeding. That height, the Secretary asserted (and the parties subsequently agreed), was 50 inches. The Secretary argued that the judge could not, in effect, overrule the Administrator's decision. Sewell responded that for the reasons stated by the judge, the settlement should be denied and the matter dismissed.

The judge again rejected the settlement. He held that he had properly raised the issue of diminution of safety, and concluded that the defense had been established. In response to the Secretary's assertion that he was attempting to overrule the Administrator's finding as to whether compliance diminished safety, the judge asserted: "[E]vidence in this record which was not before the Administrator 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." 3 FMSHRC at 2579 (footnote omitted). Accordingly, the judge dismissed the case. 3 FMSHRC at 2580. We then granted the Secretary's petition for discretionary review.

We first consider whether an operator may raise a diminution of safety defense in an enforcement proceeding where it has already received a modification decision with respect to the same condition at issue in the enforcement case. The phrase "diminution of safety" in section 101(c) of the Mine Act (n. 1, supra) serves as one of the following two bases for a determination by the Secretary that an operator may depart from otherwise mandated compliance with a standard: (1) if an alternative method of achieving the results of the standard exists with no loss in the measure of protection afforded to the miners by the standard; or (2) if application of the standard to the mine will diminish the safety of the miners.

The reasons for providing for such departures in thee circumstances are obvious. As to the first, modification provides a degree of operating flexibility while accomplishing the same level of miner protection. As to the second, Congress found "an urgent need to provide more effective means and measures for improving the working conditions and practices in the nation's ... mines in order to prevent death and serious physical harm." 30 U.S.C. 801(c). The key means for accomplishing this legislative goal was establishing a

basic level of safety through statutory interim mandatory safety standards and requiring the Secretary to raise that level through the promulgation of improved standards. 30 U.S.C. 801(g)(1). There, due to a mine's particular circumstances, compliance with a mandatory standard would have an effect opposite to that intended -- that is, where adherence to a standard would reduce miner safety -- logic dictates and Congress provided the modification procedures.

As noted above, the decision as to whether compliance with a standard diminishes safety rests statutorily with the Secretary and his designee, in this case, the Administrator. Penn Allegh, 3 FMSHRC at 1397-98. We adhere to our previous holding that an operator is foreclosed from bypassing this statutory modification procedure and unilaterally determining to forego compliance with a mandatory standard. Id Cf General Electric Co. v. Secretary of Labor, 576 F.2d 558, 561 (3d Cir. 1978). 2/ The present case, however, concerns an operator that filed a modification petition prior to being cited and received a final modification decision from the Secretary prior to the administrative law judge's hearing in the enforcement proceeding. Cf. Florence Mining Co., 5 FMSHRC 189 (February 1983), pet. for review filed, No. 83-3134, 3d Cir., March 15, 1983. We conclude that where, as here, an operator has applied for and received a modification on the grounds of diminution of safety, recognition of a narrow diminution of safety defense in a subsequently filed enforcement action is necessary to effectuate the purposes of the Mine Act and, properly applied, is compatible with its statutory scheme.

Consequently, we hold that an operator may argue diminution of safety as a defense to the Secretary's allegation of a violation and request for imposition of a penalty under the following circumstances: (1) the operator petitioned for the modification of a standard and was subsequently cited for violating the standard; (2) the Secretary granted the modification but nonetheless continued the enforcement proceedings; and (3) the material circumstances encompassing the modification and the enforcement proceedings are identical. Therefore, where the operator's petition for modification has been granted by the Secretary, introduction of the modification decision and an unrebutted showing that the underlying conditions at issue in the enforcement proceeding are identical with those upon which the modification decision is based will establish a complete defense. If the defense is established, we will not find a violation or assess a penalty. For us to do so would be at odds with the Act's goal of assuring an improved level of safety because, under these circumstances, we would be penalizing the operator for having avoided a hazard to miners.

2/ We realize that emergency situations may arise where the gravity of circumstances and presence of danger may require an immediate response by the operator or its employees, necessitating a departure from the terms of a mandatory standard without first resorting to the Act's modification procedures. In such conditions, an exception to the Act's modification and liability provisions may be necessary in

order to further the Act's primary goal, the protection of miners. Penn Allegh did not present such a situation, nor does this case. Rather, these cases involve only the operator's ability to conduct safely routine mining operations on a continuing and regular basis. Therefore, we reserve for a case appropriately raising such an issue detailed consideration of any emergency exception to the general rules on modification and liability.

The Act's modification procedures must be accorded respect (Penn Allegh 3 FMSHRC at 1397-98) and the diminution of safety defense is therefore a narrow one. Accordingly, we hold that the findings of the Administrator in the modification proceeding are conclusive with respect to the question of diminution of safety in the enforcement proceeding. If the modification was denied, the operator should exhaust its administrative and judicial remedies concerning the denial. Also, if the modification was denied but the circumstances have changed and the operator believes compliance will diminish safety, it should again seek a modification from the Secretary rather than ask the Commission in an enforcement proceeding to vacate a citation. Similarly, if the Secretary granted a modification and subsequently cited the operator, he may refute a proffered diminution of safety by showing that the cited conditions are different from those encompassed by the modification decision.

In this case; we will consider Sewell's diminution of safety defense because Sewell instituted a proceeding to modify the standard prior to being cited for the violation and received a final decision in that proceeding granting the petition for heights at or less than 48 inches. 3/ Thus, we turn to the question of whether Sewell's defense should be upheld.

We first reject the Secretary's assertion that the issue of diminution of safety was waived because it was not pleaded initially by Sewell. We remanded this matter for the express purpose of consideration of "the legal effect of the grant of a modification petition [upon] a pending enforcement proceeding." Sewell's modification petition to which we referred was based upon an assertion of diminution of safety. Sewell Coal Co., 3 SHRC at 1415. The question of whether a failure to plead an affirmative defense constitutes a waiver must be decided on a case-by-case basis. A crucial consideration is ether the opposing party has been deprived of notice of the issue and thus has been hindered in its ability to prepare for and to participate in trial. We detect no lack of fair notice here. Not only did we put the Secretary on notice, but the judge also, in his order to show cause, set forth fully his views on the subject and gave the Secretary sixteen days to "present arguments addressing ... the availability of the defense of diminution of safety in this case." Sewell Coal Co., 3 FMSHRC at 2586-90.

We also reject the Secretary's assertion that the judge improperly raised the issue of diminution of safety sua sponte. In previous cases we have found that our judges, when reviewing a settlement, may examine the fundamental question of whether there

is in fact a violation. Co-opining Co , 2 FMSHRC 3475, 3475-76 (December 1980); Olga Coal Co., 2 FMSHRC 2669, 2770 (October 1980). The Mine Act requires us to oversee penalty settlements as a means of encouraging compliance. 30 U.S.C. 820(k). Paying a penalty where there has been no violation does not promote that goal. Co-op Mining Co 2 FMSHRC at 3476. Here the judge properly raised the question to determine whether the violation could stand. The thrust of our inquiry therefore is whether he correctly found it could not.

_____

3/ This case does not present the situation where an enforcement proceeding has been heard before the petition for modification has been finally resolved, and we leave for another day the question of the recognition of a diminution of safety defense under such circumstances.

In his modification decision, the MSHA Administrator found that in the 2 West section of Sewell's mine there would be inadequate clearance to permit safe use of a canopy on the Galis 300 roof bolter except where the mining height exceeded 48 inches. Thus, the Administrator waived compliance with the standard at or under mining heights of 48 inches. Despite the fact that the violation was cited at a mining height of 50 inches and the modification of the standard would appear to be inapplicable, the judge found that compliance at even 50 inches would diminish safety.

The judge, as we have noted referred to "evidence in [the] record which was not before the Administrator." Sewell Coal Co., 3 FMSHRC at 2579. This evidence appears to be the Secretary's representation in his first motion to approve settlement that "in some instances the use of canopies on the Galis drills had caused injuries to employees" and that when the violation was cited technology to abate it was in the experimental stage. 3 FMSHRC at 2579 n.1. 4/ The judge also relied on the fact that the original notice of violation, which referred to a mining height of 55 inches, was subsequently amended to show a minimum mining height on the section of 50 inches. Id. Finally, the judge noted his own "accumulated expertise." 3 FMSHRC at 2587-88.

We find no evidence in this record that leads us to conclude that the Administrator's finding with respect to diminution of safety should not apply. The Administrator's decision and the contested citation concern the same mine, the same section in that mine, and the same equipment. The Secretary and Sewell agree that the mining height was 50 inches. 5/ The facts upon which the Administrator based his findings are set forth in his decision the mined height of the section, the condition of the roof and floor, and the clearance between the frame of the roof bolting machine and the bottom of the roof supports. Sewell Coal Co., No. M76-131 (April 27, 1979), at 5. As we have indicated, if Sewell believes that these conditions have changed so that compliance at heights above 48 inches diminishes safety, Sewell should petition the Secretary for modification.

Finally, to the extent the judge relied on the statement in the first settlement motion that when the notice was issued "technology was in the experimental stage," we note that the Secretary's second motion on behalf of the parties expands upon this assertion and maintains that canopies were

---

4/ In the second settlement motion, the Secretary stated that

"canopies were available from the manufacturer of the Galis 300 roof bolter at the time [the violation was cited], but many operators were dissatisfied with this design and were seeking other alternatives or modifications to the design to improve its capabilities." Request for Settlement Approval, August 20, 1981, p. 1.

5/ The original citation stated the height on the section averaged 5 inches. The citation was subsequently modified by the inspector to state that the minimum mining height on the section was 50 inches. Sewell does not contest the accuracy of this modification. In its brief, Sewell states that the inspector modified the original citation to "show that the actual mining height was actually 50 inches."

in fact available from the manufacturer at the time of the violation. Sewell raised the feasibility issue in the modification proceeding, and the Administrator disposed of it by waiving compliance at mining heights at or below 48 inches.

In light of the foregoing, we cannot affirm the judge's conclusion that the defense of diminution of safety bars this proceeding. We therefore reverse the judge's dismissal of this matter and his denial of the motion to approve settlement. 6/

Ordinarily, we would remand to the judge for further consideration of the settlement motion. However, because the contested notice of violation was issued over seven years ago, and in view of the fact that the case has been before the judge twice and is now before us for a second time we deem it time to end the controversy. Cf. Eastover Mining Co., 4 FMSHRC 1207, 1214 (July 1982). A penalty has been proposed for the violation. We have reviewed the record in light of the statutory penalty criteria (30 U.S.C. 820(i)), and find the proposed penalty appropriate in light of all the circumstances. Accordingly, the parties' second motion for approval of the settlement, agreeing to the proposed $25.00 penalty, is granted.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

_____

6/ This result corresponds with that reached| y the judge concerning this case. The Secretary other violation that was originally at issue i also sought a penalty for a violation of 30 C.F.R. 75.1710-1(a) with respect to a shuttle car, which was operating without a canopy at a mining height of 43 inches. As in the case of the roof bolter, the operator had petitioned for a

modification with respect to the shuttle car prior to being cited for the violation. In the modification decision, the Administrator concluded that installation of a canopy on the shuttle car in mining heights of 48 inches or below would diminish safety. Sewell Coal Co., M76-131 (April 27, 1979), at 14. The judge held that, based upon these facts and the Administrator's conclusion, the defense of diminution of safety was established. 3 FMSHRC at 2579. The Secretary.v did not seek review of this portion of the decision.

~2033
Commissioner Lawson concurring:

Although I am in most respects in agreement with my colleagues, certainly as to the result reached, and substantially as to the reasoning underlying that result, I do not subscribe to their suggestion that undefined "emergency" situations may arise in which an operator is to be permitted to ignore mandatory standards. (Slip op., p. 4 n.2). Although--perhaps--dicta, the danger inherent in encouraging claims of emergency "exception(s)" to the clear mandate of the statute, including section 101(c) thereof, neither assures an "improved level of safety" (slip op., p. 4) nor, without strict adherence to the requirements necessary to establish the narrow defense of diminution of safety, "... guarantee[s no less than the same measure of protection afforded the miners ... by such standard ..." 30 U.S.C. 811(c).

~2034
Distribution

Timothy W. Gresham, Esq.
Fletcher A. Cooke, Esq.
Sewell Coal Company
P.0. Box 4000
Lebanon, Virginia 24266

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

Administrative Law Judge Joseph Kennedy
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041