CCASE:
MSHA V. MIDWEST MINERALS
DDATE:
19900727
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 27, 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
Docket No. CENT 89-67-M
v.

MIDWEST MINERALS, INC.

Before: Ford, Chairman, Backley, Doyle, lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

At issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), is whether there is support for certain findings of the trial judge. This case arose in the wake of four citations issued to Midwest Minerals Inc. (Midwest) on August 11, 1988, pursuant to section 104(a) of the Mine Act. 30 U.S.C. 814(a). Each citation charges a violation of 30 C.F.R. 56.9002 which stated that: "Equipment defects affecting safety shall be corrected before the equipment is used." 1/ The equipment defect cited was an inoperative grade retarder on each of four haul trucks.

A hearing in this matter was held on September 28, 1989, before Administrative Law Judge Gary Melick. Midwest appeared pro se through its safety director, who was also Midwest's sole witness. The Secretary also presented only one witness, Robert Earl, the MSHA inspector who issued the subject citations.

In his decision, Judge !@lick upheld the violations and found that they were significant and substantial, that Midwest had consciously

avoided abating the violations and that Midwest was highly negligent. The judge assessed a $300.00 penalty for each of the four violations. (The Secretary had proposed a $20.00 penalty for each violation). Midwest's petition for discretionary review of the judge's decision was filed pro se through the company's

_____

1/ Shortly after these citations were issued, 30 C.F.R. 56.9002 was replaced by a new standard, 30 C.F.R. 56.14100(b), which provides: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

president, Richard Atkinson. After the Commission granted Midwest's petition for review Midwest retained legal counsel who filed a brief in support of the petition for discretionary review and a motion to have the matter remanded to the administrative law judge and reopened for the taking of additional evidence.

In seeking a remand and a reopening of the record, Midwest relies on Fed. R. Civ. P. 60(b)(1) and (6)("Rule 60(b)"). 2/ The essence of Midwest's claim for relief is that its pro se representative at the hearing before the judge failed to introduce material evidence relevant to Midwest's defense against the Secretary's allegation of violation, failed to interpose objections during the presentation of the Secretary's case, and failed to cross-examine the Secretary's witness or file a post-hearing brief.

Thus, Midwest asserts that its representative failed to properly present its position at the hearing. Further, Midwest links this failure to emotional and medical problems allegedly suffered by its representative, and purportedly manifesting themselves and coming to Midwest's attention subsequent to the hearing.

The Secretary opposes Midwest's motion to remand and reopen. The Secretary essentially argues that Midwest consciously chose a non-lawyer as its representative at the hearing and cannot now belatedly invoke Rule 60(b) to avoid the consequences of the adverse decision Midwest received from the administrative law judge. The Secretary asserts that to grant Midwest's request to reopen this proceeding for the taking of additional evidence would be tantamount to giving Midwest a "second turn at bat." Sec. Br. at 5.

We agree with the Secretary that, under the circumstances presented, a re-opening of the record pursuant to Fed. R. Civ. P 60(b) is not warranted. Under the Mine Act, proceedings before this independent adjudicatory agency are adversarial proceedings conducted in conformity with the procedural dictates of the Act, applicable provisions of the Administrative Procedure Act, and the Commission's Rules of Procedure, 29 C.F.R. Part 2700. Although these proceedings are legal in nature, the Commission's rules permit parties appearing before the Commission to be represented by non-attorney representatives. 29 C.F.R. 2700.3. In fact, it is not uncommon for parties to choose to appear before the Commission without the assistance of an attorney, to diligently present their evidence and arguments, and to prevail on the merits.

_____

2/ Rule 60(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; *****

(6) any other reason justifying relief from the operation of the judgment.

On the other hand, it is also not uncommon for a party choosing to appear without legal counsel to fail to present its case in a manner which best preserves all available legal rights that could contribute to the successful advancement of the party's cause. This consequence, which should not be entirely unexpected, directly flows from the party's choice of its representative.

Because the adequacy of a party's representation at a hearing is linked to the party's choice of its representative, we must look askance at any request that Rule 60(b) relief be granted because the party's chosen representative is claimed to have performed ineffectually at the hearing before the judge resulting in an adverse decision. Routinely granting such relief would, as the Secretary has suggested, unfairly provide a losing party "a second turn at bat". Here Midwest is pursuing a claim that a medical condition manifesting itself subsequent to a representative's appearance at a hearing should excuse his "poor" performance at the hearing. Such a claim would necessitate a collateral inquiry into such person's medical fitness at the time of the hearing, a diversion we find unnecessary in this case.

Instead, we find more pertinent a review of the proceedings as conducted before the administrative law judge. Our review of the transcript in this proceeding does indeed reveal, from a trained legal point of view, a rather passive participation by Midwest's lay representative. We cannot say, however, that his representation was totally ineffectual or markedly different from the caliber of pro se representation frequently demonstrated in proceedings before the Commission. More importantly, we find nothing suggestive of the type of mistake or excusable neglect that is contemplated by Rule 60(b) as grounds for obtaining relief from a judgment. It is also important to note that even after the judge's adverse decision was rendered, Midwest nevertheless chose to file its appeal of the judge's decision through a different lay representative, whose pro se petition might also be viewed as failing to preserve all legal arguments that otherwise may have been available to Midwest in this appeal

For these reasons, in the exercise of our discretion, we conclude that a reopening of this proceeding on the theory advanced here is unwarranted and would set an unwise precedent for proceedings conducted before this Commission. Accordingly, Midwest's motion to reopen and remand this proceeding for the taking of additional evidence is denied. 3/

In its petition for discretionary review Midwest makes several challenges which can be addressed summarily. Midwest challenges the judge's finding that,

_____

3/ The Secretary's motion to strike an attachment to Midwest's petition for discretionary review, and attachments to its brief and portions of the brief itself, has been considered, as has Midwest's opposition thereto. Upon consideration we grant the motion to strike the attachment to the petition for discretionary review. We deny the motion to strike the attachments to the brief insofar as they were submitted in connection with Midwest's motion to reopen. We grant the motion to strike those portions of the brief addressing the merits of the case which refer to the attachments and other evidence not entered into the record before the judge.

during a compliance assistance visit (C.A.V.), it did not dispute MSHA's position that inoperative grade retarders affect safety. Midwest also asserts that: the inspector who issued the citations did so out of animus towards it; the cited trucks were all purchased as used vehicles; the trucks came with disconnected grade retarders; Midwest employees misuse the retarders; grade retarders can be a hazard in themselves; and that it is common mining practice to have the devices disconnected.

There is no evidentiary support in the record for any of these contentions. 4/ Furthermore, all of these matters were raised for the first time in Midwest's petition for review and therefore cannot be considered by the Commission. Ozark-Mahoning Co., 12 FMSHRC 376, 379 (March 1990); Union Oil Co 11 FMSHRC 289, 301 (March 1989).

Midwest also challenges the judge's finding that the cited trucks were moved out of the MSHA district in which they were cited in order to avoid repairing the retarders. In his decision the judge states: "Moreover apparently to avoid making the repairs the cited trucks were moved out of the MSHA district in which they had been cited." 11 FMSHRC at 2172. Midwest asserts that the judge's finding that the operator moved its trucks in order to avoid abatement is not supported by substantial evidence. We agree. The record contains no evidence that Midwest's movement of its equipment subsequent to the issuance of the citations at issue was an attempt to avoid compliance with the Mine Act. At the hearing the Secretary did not assert that Midwest was engaging in intentional avoidance of abatement. Rather, Inspector Earl testified that the period between the C.A.V. and the date the citations were issued was insufficient time for Midwest to repair the retarders. Tr. 27-28. Also, Earl extended the time for abatement of the citations because Midwest informed him that they intended to contest the citations. Tr. 28. Further, Earl explained that while the trucks had been moved to another MSHA District, they were moved because Midwest's operation was a portable one that moved among various locations. Tr. 30. In short, the record establishes that Midwest's movement of its equipment was not an attempt to avoid compliance, but was consistent with the very nature of the operation. 5/

In her brief on review, the Secretary asserts that the judge's finding that Midwest was attempting to avoid repair of the retarders was a permissible inference. Although inferences may be relied on where appropriate, "any such inference ... must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact inferred." Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2153 (November 1989). Measured

---

4/ Midwest's safety director did testify that it had been Midwest's

practice over a fifteen year period to disconnect the devices and that in so doing the operator had not been previously cited. Such testimony, however, cannot be extrapolated to indicate a widespread industry practice.

5/ Midwest's assertion at the hearing that a different MSHA district did not subsequently cite the trucks for the disconnected retarders was intended to show inconsistent MSHA enforcement, not that the trucks had been moved for the purpose of obtaining a different enforcement result.

against this standard, we find that the facts of record regarding the reasons for nonabatement militate against utilization of the inference sought by the Secretary.

On review Midwest vigorously argues that the judge's erroneous conclusion as to intentional avoidance of compliance had a serious impact upon the judge's evaluation of the negligence criterion relevant to assessment of the civil penalty. 30 U.S.C. $ 820(i). We agree.

In arriving at his conclusion with respect to negligence the judge states, "In any event the failure of Midwest to have repaired the defective grade retarders before the inspection at bar and the continued use of the trucks without grade retarders therefore constitutes high negligence." 11 FMSHRC at 2172. That conclusion ignores, however, the testimony by Inspector Earl (noted earlier) that there was insufficient time between the C.A.V. and the enforcement inspection for Midwest to have completed the repairs, Tr. 28, and that he had granted a 30-day extension of the time for abatement because Midwest intended to request a conference with the agency to discuss the matter of the grade retarders and the citations. Id.

Also, Midwest's safety director testified that Midwest had not been cited previously for a lack of grade retarders and that, in the week before the hearing, he was informed by MSHA Inspector Ramirez that the trucks had not been cited by MSHA for lack of grade retarders during their operation in Kansas. Tr. 34. Inspector Earl stated that he considered Midwest's negligence "moderate" since, while in the Kansas area, the trucks "apparently have been allowed to go ahead with the retarders unhooked." Tr. 27. 6/ As we have recently observed in a similar context, "[t]he fact that seemingly conflicting MSHA policies left [the operator] in doubt as to what was required for compliance with [a standard] is a factor which militates against finding that [the operator's] conduct" was of an aggravated nature. Utah Power & Light Co., 12 FMSHRC 972, (May 1990).

In the circumstances presented, we conclude that substantial evidence does not support the judge's finding of high negligence and that the inspector's finding of moderate negligence was appropriate.

_____

6/ The judge also recognized the inconsistency in enforcement, as reflected by his statement that "[m]aybe MSHA ought to get together and decide what they ought to do." Tr. 36.

Therefore we vacate the judge's finding .of high negligence. We find the penalty amount proposed by the Secretary to be appropriate and we accordingly assess a penalty of $20.00 for each violation. See Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Jerald Feingold. Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

David J. Hardy, Esq.
Henry Chajet, Esq.
Jackson and Kelly
1701 Pennsylvania Ave., N.W.
Suite 650
Washington, D.C. 20006

Administrative Law Judge Gary Melick
Federal Mine Safety and Health
Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041