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SOL (MSHA) V. WAUKESHA LIME & STONE
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. VINC 79-66-PM A.O. No. 47-00235-05003
v.	Waukesha Quarry & Mill
WAUKESHA LIME & STONE COMPANY, INC., RESPONDENT	

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
Frederic G. Baldowsky, Esq., Miller & Niebler,
Milwaukee, Wisconsin, for Respondent

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This is a civil penalty proceeding charging Respondent with a violation of section 103(a) of the Federal Coal Mine Safety and Health Act of 1977, 30 U.S.C. 813(a). The violation charged is the refusal of Respondent to allow the Federal mine inspector to enter its premises on July 10, 1978, for the purpose of conducting a mine inspection. Respondent admits that it refused to permit the inspector to enter and inspect its premises. As affirmative defenses, Respondent states that it operates a quarry which is not a mine within the meaning of that term in the Act, and that a nonconsensual inspection of its premises without a valid search warrant would violate rights guaranteed to Respondent under the fourth amendment to the Constitution.

Respondent moved for a continuance of the proceeding during the pendency of a civil action in the United States District Court for the Eastern District of Wisconsin, wherein the Secretary of Labor is seeking to have Respondent enjoined from refusing to admit authorized representatives of the Secretary of Labor to inspect Respondent's facilities. The motion was denied by order issued March 15, 1979.

Pursuant to notice, the matter was called for hearing on the merits on April 23, 1979, in Milwaukee, Wisconsin. Walter C. Brey, a Federal mine inspector, testified for Petitioner. Douglas E. Dewey, president of Respondent, James L. Harris, foreman of Respondent's "dust plant," and George Hart, sales manager of Respondent, testified on behalf of Respondent.

At the conclusion of the testimony, counsel stated their respective positions on the issues raised by this proceeding and waived their rights to file written proposed findings and conclusions. All proposed findings and conclusions not incorporated herein are rejected.

STATUTORY PROVISIONS

Section 103(a) of the Act provides in part:

> Authorized representatives of the Secretary %y(3)5C shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided %y(3)5C.
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> * * * * * * *

Section 3(h)(1) of the Act provides in part:

> "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground %y(3)5C.
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> * * * * * * *

ISSUES

1. Is Respondent's stone quarry a "mine" subject to the provisions of the Act?

2. Does the Act require or permit nonconsensual inspections without valid search warrants?

3. If a violation of the Act has been established, what is the appropriate penalty?

FINDINGS OF FACT

On the basis of the pleadings, stipulations of the parties, the testimony and other evidence introduced at the hearing, I make the following findings of fact.

1. On July 10, 1978, Respondent was the operator of a limestone quarry in Waukesha County, Wisconsin, known as the Waukesha Quarry and Mill.

2. Respondent's operation consists in drilling and blasting solid rock from the quarry, crushing it into different sizes for sale to customers as agricultural lime, as a base for concrete or blacktop and for other uses. The process of making agricultural lime involves pulverizing the limestone and bagging it. The employees involved in this process are exposed to silica dust.

3. Respondent employs between 21 and 28 workers. Its operation extends over approximately 90 acres of land. The quarry has been operating since 1870 and has an expected future life of more than 10 years. It is one of the largest quarrying operations in the State of Wisconsin. However, in comparison with mining operations throughout the country, Respondent is not a large operator.

4. State and Federal safety inspectors have regularly inspected Respondent's facility since prior to 1967.

5. Inspector Walter Brey began inspecting Respondent's facility in 1974; he visited the premises on an average of three times per year prior to July 10, 1978.

6. From April 25 through April 27, Inspector Brey conducted a regular health and safety inspection at Respondent's facility. Twenty five citations were written charging violations of mandatory sasfety standards. Twenty one were terminated by April 27.

7. Inspector Brey returned to the facility in May and again on July 10, 1978, to check on the unabated citations.

8. The purpose of the visit on July 10, 1978, was to do a resurvey of dust exposure of the in the AgLime building.

9. Respondent has had a problem of employee explosure to silica dust in its Aglime plant.

10. On July 10, 1978, Respondent's president, Douglas Dewey, informed the inspector that he would no longer be allowed to inspect the premises without a search warrant. This took place following Respondent's receipt of an assessment order imposing penalties for

the alleged violations found during the April inspection. A search warrant had not been demanded of either Federal or State inspectors prior to this time.

11. On July 10, 1978, Inspector Brey issued a citation charging Respondent with a violation of section 103(a) of the Act for refusal to allow an authorized representative of the Secretary to conduct an inspection of the mine premises.

CONCLUSIONS OF LAW

IS A STONE QUARRY A "MINE" AS THAT TERM IS DEFINED IN THE ACT?

The Act defines a "mine" to include an area of land from which minerals are extracted in nonliquid form. Respondent's facility is an area of land from which it extracts limestone and processes it. "Limestone" has been defined as "a sedimentary rock containing calcium carbonate (calcite), or calcium magnesium carbonate (dolomite), or any combination of these two carbonates at least to the extent of 50 percent of the rock."(FOOTNOTE 1) "Mineral" has been defined as "an inorganic substance occurring in nature, though not necessarily of inorganic origin, which has (1) a definite chemical composition or, more commonly, a characteristic range of chemical composition, and (2) distinctive physical properties or molecular structure" and as including "every inorganic substance that can be extracted from the earth for profit whether it be solid, such as rock, fireclay, the various metals, and coal, or fluid, such as mineral waters, petroleum, and gas."(FOOTNOTE 2) The Senate Labor Committee Report on S.717, which was the basis for the 1977 Act, states that:

> [I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.(FOOTNOTE 3)

The Federal Metal and Nonmetallic Mine Safety Act, P.L. 89-577 (1966), repealed P.L. 95-164 (1977), defined the term "mine" in much the same way except for the exclusion of coal. The Senate Committee Report on the 1966 Act stated that a "mine" is "an area of land from which

minerals (minerals include sand, gravel, crushed stone, quartz, etc.) other than coal or lignite are extracted in nonliquid form."(FOOTNOTE 4)

State(FOOTNOTE 5) and Federal(FOOTNOTE 6) courts have included limestone quarries within the definition of "mine."

The parties have stipulated that Respondent's operations affect interstate commerce.

It is clear, therefore, and I conclude, that Respondent is the operator of a mine and is subject to the provisions of the Mine Safety and Health Act of 1977.

DOES THE ACT DIRECT NONCONSENSUAL WARRANTLESS INSPECTIONS OF MINE?

Section 103(a) of the Act requires ("Authorized representatives * * * shall make") frequent inspections of mines. It prohibits giving "advance notice of an inspection" and thus necessarily prohibits obtaining the operator's consent. It does not specifically address the question whether a search warrant is required, but since the authorized representatives "shall have a right of entry to, upon, or through any coal or other mine," it is clear that a warrant is not required. The Senate Commmittee Report on S.717 states that the above language "is intended to be an absolute right of entry without need to obtain a warrant."(FOOTNOTE 7)

I conclude, therefore, that section 103(a) of the Act directs nonconsensual warrantless inspections of mines.

DOES THE COMMISSION HAVE JURISDICTION TO RULE ON A CONSTITUTIONAL CHALLENGE TO SECTION 103(a) OF THE ACT?

Respondent argues that if section 103(a) is interpreted to require or permit inspections without a search warrant, it would violate the fourth amendment's proscription against unreasonable searches and seizures. As a general proposition, an administrative agency does not have power to rule on constitutional challenges to the organic statute of the agency. Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361 (1974); Public Utility Commission v. United States, 355 U.S. 534 (1958); Spregel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976).

However, it is the responsibility of an administrative agency to determine whether a provision of the statute it administers may

constitutionally be applied to facts found by the agency. Construction of its organic statute is peculiarly the duty of the agency, and a cardinal rule of construction requires that if possible, a statute be construed to avoid conflict with the Constitution. NLRB v. Mansion Home Center Management Corp., 473 F.2d 471 (8th Cir. 1973).

For these reasons, I will address the constitutional issues raised by Respondent. There is a strong presumption in favor of the constitutionality of an act of Congress. Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); FHA v. The Darlington, 358 U.S. 84 (1958). In Marshall v. Barlows, Inc., 436 U.S. 307 (1978), the Supreme Court held that section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), was unconstitutional insofar as it purported to authorize inspections without warrant. However, the Court expressly exempted: "[C]ertain industries (which) have such a history of government oversight that no reasonable expectation of privacy could exist for the proprietor over the stock of such an enterprise. Liquor (Colonade) and firearms (Biswell) are industries of this type." 436 U.S. 313.

Replying to the Secretary's argument that requiring warrants for OSHA inspectors would overturn warrantless inspections in other statutes, the Court said:

> The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulation might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply.

With respect to coal mines, it has been held that warrantless searches authorized by the Federal Coal Mine Health and Safety Act did not contravene the fourth amendment. Youghiogheny & Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio, 1973); accord, United States v. Consolidation Coal Company, 560 F.2d 214 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, 98 S. Ct. 2481 (1978), reinstated, 579 F.2d 1011 (1978). Congress has determined that the mining industry historically and inherently has posed grave threats to the health and safety of those employed in it. It is a closely-regulated industry, and both coal and metal/nonmetallic mines have been subjected to Federal warrantless inspections for many years. In the Senate Report on the 1966 Federal Metal and Nonmetallic Safety Act, 30 U.S.C. 721, it is stated that "the number and severity of the injuries experienced each year by persons employed in the extractive industries should be alarming to an America that prides itself on its * * * concern for the welfare of its citizens."(FOOTNOTE 8)

I conclude that the mining industry, including stone quarrying, is a pervasively regulated industry and that warrantless nonconsenual inspections are mandated by the Act and do not constitute unreasonable searches prohibited by the fourth amendment to the Constitution.

DOES REFUSAL TO ADMIT AN INSPECTOR CONSTITUTE A VIOLATION OF THE ACT FOR WHICH A PENALTY MAY BE IMPOSED?

Section 103(a) authorizes inspections of mines. "Authorized representatives of the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations * * * (and) shall have (a) right of entry to, upon, or through any coal or other mine."

Section 104(a) allows an inspector to issue a citation to an operator who has violated the Act:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order or regulation promulgated pursuant to this Act, he shall, with reasonable promptness issue a citation to the operator * * * .

Likewise, section 110(a) states that an "operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary * * * ."

Therefore, I conclude that refusal to admit an inspector constitutes a violation for which civil penalties may be assessed.

PENALTY

Section 110(i) of the Act directs that in assessing a penalty, I consider six criteria: the operator's history of previous violations, the size of the business of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. There is no evidence concerning the operator's history of previous violations except the testimony that 25 citations were issued from April 25 through April 27, 1978. I do not consider that this history is such that penalties should be increased because of it. The operator's business is moderate in size. There is no evidence that penalties will have any effect on the operator's ability to continue in business and therefore, I conclude that they will not.

The violation was intentional. Respondent argues that it relied in good faith on what it conceived to be the protection of the fourth

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amendment and that this fact should mitigate the amount of the penalty. However, the evidence shows that warrantless inspections authorized by the Metal and Monmetallic Safety Act have been conducted on Respondent's premises since at least 1967. The reliance on the fourth amendment was precipitated, not by a desire for privacy, but because penalties were assessed for alleged safety violations. I reject the argument for mitigation, and conclude that insofar as the negligence criterion is concerned, the penalty should be increased because the violation was intentional and thus the equivalent of gross negligence.

I conclude that the violation was serious. The inspector was in the course of a dust survey of Respondent's operation. There was an admitted problem of silica dust in its Aglime plant. Exposure to excessive concentrations of silica dust could result in silicosis, a serious debilitating disease. Twenty five citations were issued during the course of a 2-day inspection in April. Refusal to admit an inspector could result in a lessening of health and safety consciousness and indirectly could cause illness or injury to Respondent's employees. Respondent has not demonstrated good faith in attempting to achieve rapid compliance, since it is not making any attempt to comply.

Based on the testimony and other evidence introduced at the hearing and on the contentions of the parties, and considering the criteria in section 110(i) of the Act, I conclude that a penalty of $1,000 should be imposed for the violation found.

ORDER

Therefore, Respondent is ORDERED to pay the sum of $1,000 within 30 days of the date of this decision as a civil penalty for a violation of section 103(a) of the Act.

James A. Broderick
Chief Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE
1. A Dictionary of Mining, Mineral and Related Terms (Paul W. Thrush, comp.) (1968), p. 643.

~FOOTNOTE_TWO
2. Id., p. 710.

~FOOTNOTE_THREE
3. S. Rep. No. 95-181, 95th Cong., 1st Sess., 14 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 602.

~FOOTNOTE_FOUR
4. S. Rep. No. 1296, 89th Cong., 2d Sess., (1966), 1966 U.S. Code Cong. and Adm. News, p. 2846.

~FOOTNOTE_FIVE
5. Lambert v. Pritchett, 284 S.W.2d 90 (Ky. 1955).

~FOOTNOTE_SIX

6. Marshall v. Texoline Co., Civ. Action CA 4-78-49 (N.D. Texas 1979).

~FOOTNOTE_SEVEN

7. S. Rep. No. 95-181, supra, note 3 at 615.

~FOOTNOTE_EIGHT

8. Quoted in S. Rep. No. 95-181, 95th Cong., 1st Sess., 3 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 591.