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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 79-118-PM A.O. No. 47-00218-05001
v.	Lannon Quarry and Mill
HALQUIST STONE COMPANY, RESPONDENT	

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, United States Department of Labor, for Petitioner
Paul Binzak, Esq., Kraemer and Binzak, Menomonee Falls, Wisconsin, for Respondent

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This proceeding was commenced by the filing of a petition for the assessment of a civil penalty charging that Respondent violated section 103(a) of the Mine Safety and Health Act of 1977, 30 U.S.C. 813(a), by refusing to permit a duly authorized representative of the Secretary to inspect Respondent's facility.

Pursuant to notice, the case was called for hearing on the merits on April 23, 1979, in Milwaukee, Wisconsin. Walter C. Brey, a Federal mine inspector, testified on behalf of Petitioner. No witnesses were called by Respondent. At the conclusion of the hearing, counsel orally stated their respective positions on the issues presented, and each waived his right 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 anay 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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ISSUES

1. Does the Federal Mine Safety and Health Act of 1977 require or permit nonconsensual inspections of mine facilities without valid search warrants?

2. Did Respondent on June 1, 1978, refuse a Federal mine inspector access to its mine premises?

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 June 1, 1978, Respondent was the operator of a stone quarry located in Waukesha County, Wisconsin, known as the Lannon Quarry and Mill.

2. Respondent's operation includes a large pit area where stone is extracted by blasting and crushed to different sizes. It also includes a stone cutting operation where building stone is jarred loose from the earth by black powder, extracted with a fork lift and cut into different sizes.

3. Respondent employed approximately four men in its quarry operation and approximately seven or eight in its stone cutting operation.

4. Respondent's operation has been visited by Federal inspectors since at least 1974, on an average of three times a year.

5. On May 31, 1978, Federal mine inspector Walter C. Brey began a safety and health inspection of Respondent's Lannon Quarry. Three citations were issued on that date as the safety part of the inspection was completed.

6. On June 1, 1978, Inspector Brey returned to Respondent's quarry to complete the health part of the inspection. He placed dosimeters to measure noise exposure and respirable pumps to measure dust exposure on selected employees.

7. Approximately 2 hours after the inspection began on June 1, 1978, Mr. Bud Halquist, who was in charge of the limestone operations for Respondent, approached the inspector and told him that he was harrassing Respondent and would not be allowed to remain on Respondent's property unless he got a search warrant. The inspector picked up his health equipment and left the property.

8. On June 1, 1978, at about 10:05 a.m., Inspector Brey issued a citation alleging a violation of section 103(a) of the Act for denial of right of entry and served it on Respondent.

9. I find as a fact that Respondent refused to permit the continuation of a health and safety inspection of its mining facility by an authorized representative of the Secretary on June 1, 1978.

CONCLUSIONS OF LAW

DOES THE ACT DIRECT NONCONSENSUAL, WARRANTLESS INSPECTIONS OF MINES?

Section 103(a) of the Act requires ("Authorized representatives %y(3)5C 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 Committee 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 1)

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

Respondent has conceded, and I conclude that its stone quarry is a mine as that term is defined in the Act.

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

In the decision I issued on June 5, 1979, in the case of Secretary v. Waukesha Lime & Stone Company, Inc., Docket No. VINC 79-66-PM, I discussed the constitutional issue raised here, recognizing that an administrative agency does not have the power to rule on a constitutional challenge to the organic statute of the agency.

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).

I concluded in Waukesha, and conclude here, that the mining industry, including stone quarrying operations, is a pervasively regulated industry, that warrantless, nonconsensual inspections are mandated by the Act and do not constitute unreasonable searches under the fourth amendment.

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

In the Waukesha decision, supra, I concluded that refusal to permit an authorized representative of the Secretary to conduct an inspection of a mining facility constitutes a violation of the Act for which a civil penalty may be assessed. I reiterate that conclusion in this case.

PENALTY

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 three citations were issued on May 31, 1978. I do not consider that this history is such that penalties should be increased because of it. The operator's business is small 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 and thus the equivalent of gross negligence. I conclude that the violation was serious. Refusal to admit an inspector could result in a lessening of health and safety

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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 has made no effort 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 $700 should be imposed.

ORDER

Wherefore, Respondent is ORDERED to pay the sum of $700 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

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1 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 615.