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SOL (MSHA) V. SUMMITVILLE TILES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket No. VINC 79-213-PM A.O. No. 33-00523-05001
v.		Summitville Pit and Plant
SUMMITVILLE TILES, INC.,	RESPONDENT	

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner James D. Primm, Jr., Esq., Lisbon, Ohio, for Respondent

Before: Administrative Law Judge Melick

Statement of the Case

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq., hereinafter referred to as the "Act"). Petitioner filed a proposal for assessment of civil penalty on March 13, 1979, alleging four violations on June 8, 1978, of mandatory safety standards. An evidentiary hearing was held on December 11, 1979, in Wheeling, West Virginia.

Respondent (Summitville) admits the violations but contends that the citations were vitiated by the MSHA inspector's unlawful entry onto its premises. Summitville argues that it consented to the inspection only because the inspector misled it into believing that it would not be subject to penalties for any violations found on such inspection and claims that it had a right under the Fourth Amendment to the United States Constitution to deny entry to the inspector absent a valid search warrant. MSHA concedes that it had no search warrant but argues that none was required. It contends that whether or not Summitville knowingly consented to the search is immaterial.

The issues in this case are (1) whether the inspection herein was lawfully conducted and, if so, (2) what are the appropriate civil penalties for each of the admitted violations.

I. The Legality of the Inspection

Summitville concedes that its clay pit and processing plant is a "mine" as defined in the Act. Section 103(a) of the Act (FOOTNOTE 1) mandates "frequent inspections" of mines by authorized representatives. It also directs that no advance notice of inspections be provided, and that any authorized representative "shall have a right-of-entry to, upon, or through" any mine. Thus, section 103(a) requires frequent nonconsensual inspections of all mines by authorized representatives. See Secretary of Labor, v. Readymix Sand and Gravel Company, Inc., WEST 79-66-M, December 5, 1979; Secretary of Labor, v. Waukesha Lime and Stone Company, Inc., VINC 79-66-PM, June 5, 1979.

Summitville nevertheless contends that a search warrant is required to make a nonconsensual inspection of its mine under the Act. The established law is to the contrary. In Marshall v. Nolichuckey Sand Company, Inc., 606 F.2d 693, 696 (6th Cir. 1979), a warrantless inspection of a sand and gravel "mine" under the Act was upheld. The court held that the enforcement needs of the mining industry made provisions for warrantless searches reasonable. Similarly, in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589, 593 (3rd Cir. 1979), cert. den., _____ U.S. _____, (January 7, 1980), a warrantless inspection of the company's sand and gravel preparation plant was found to have satisfied the reasonableness standard set forth by the U.S. Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978). Within this framework of law it is clear that not only does the Act mandate warrantless nonconsensual inspection of "mines" such as the one at bar but that such inspections do not constitute unreasonable searches prohibited by the Fourth Amendment to the United States Constitution. Respondent thus has no right to refuse entry to an MSHA inspector attempting to conduct an inspection directed by the 1977 Act. See also Marshall v. Sink, No. 77-2614, U.S. Circuit Court for the 4th Circuit (January 24, 1980); Readymix Sand and Gravel Company, supra; and Waukesha Lime and Stone Company, supra.

Since a warrantless nonconsensual MSHA inspection of Summitville was legally permissible, it was not necessary to obtain the operator's knowing consent prior to such inspection. It is therefore immaterial whether or not

such consent was given before the inspection in this case. The inspection was in any event lawfully conducted. Moreover, I find from the credible testimony of Inspector Beauchchamp, corroborated by the operator's agent, plant superintendent Currie, that Beauchamp did not misrepresent the possible consequences of the inspection, and that the operator in fact gave its consent to be inspected. I find that at most, the Summitville Board Chairman Fred Johnson, misunderstood the accurate representations of the inspector.

II. Appropriate Penalties

Respondent has agreed that the violations occurred as charged. In considering the amount of the penalty, I have determined that the operator is small in size (having only six employees), that it had no history of violations and that the penalties would have no affect on its ability to remain in business. Each of the cited violations was promptly abated.

Citation No. 359057 charges one violation of 30 C.F.R. 55.12-34 (relating to the guarding of lights which present a shock or burn hazard by their location). There were at least two unguarded light bulbs located over the bin area and presenting a hazard to the one employee who would occassionally work there. There was only about a 4-foot clearance at that location so an employee could easily hit the exposed bulbs with his head or arms. The resulting shock could have caused serious injury. I find some negligence as the condition should have been observed. A penalty of $32 is appropriate.

Citation Nos. 359058 and 359059 each charge one violation of 30 C.F.R. 55.9-7 (requiring that unguarded conveyors with walkways be equipped with emergency stop devices along their full length). I find that the likelihood of injury here was probable in that an employee could easily slip or fall against the conveyor and be caught in the rollers. Resulting injuries could be serious, involving potential disability. Negligence existed in that the operator should readily have seen the unguarded conveyor. A penalty of $36 for each violation is appropriate.

Citation No. 359131 charges one violation of 30 C.F.R. 55.11-1 (relating to safe access to working places). Access to the adjustment plow above the extrusion bin was gained by an 18-inch wide platform with no guardrail. The walkway was used only occasionally to readjust the plow. Injury or fatality from falling into the bin would also have been unlikely since the material would have to be of a certain height and consistency to cause the anticipated hazard of suffocation. I find the operator to have been only slightly negligent with regard to this violation because of the improbability and unforeseeability of an accident. A penalty of $20 is appropriate.

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ORDER

WHEREFORE, it is ORDERED that Respondent pay the penalty of $124 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

~FOOTNOTE 1

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

"Authorized representatives of the Secretary * * * 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 * * *."