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SOL (MSHA) v. EDWARD KRAEMER
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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 Proceedings Docket No. LAKE 80-393-M A/O No. 20-01569-05006-R
v.	
EDWARD KRAEMER & SONS, INC., RESPONDENT	Docket No. LAKE 80-394-M A/O No. 20-01569-05007-R Sibley Quarry & Mill

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Allen H. Bean, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Petitioner
Willis P. Jones, Jr., Esq., and James A. Climer, Esq., Jones, Schell & Schaefer, Toledo, Ohio, for Respondent

Before: Judge Cook

Proposals for penalties were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceedings. Answers were filed and prehearing orders were issued. Subsequent thereto, the parties filed a joint motion requesting approval of a settlement and for dismissal of the proceedings.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The proposed settlement is identified as follows:

A. Docket No. LAKE 80-393-M

Citation No.	Date	Section of Act	Assessment	Settlement
298343	10/16/79	103(a)	$200	$100

B. Docket No. LAKE 80-394-M

Citation No.	Date	Section of Act	Assessment	Settlement
298201	3/26/80	103(a)	$200	$100

The motion states, in part, as follows:

> The parties submit that the penalty reductions shown above are warranted and consistent with the criteria described in Section 110 (i) of the Act because of the arguments presented in the letter dated October 20, 1980 from Willis P. Jones, Jr., attorney for respondent, a copy of which is attached hereto and made a part hereof. The issue of MSHA's right to conduct inspections of respondent's Sibley Quarry under the Act was resolved in Marshall -vs- Edward Kraemer & Sons, Inc., (ED, Mich) Civil Action No. 80-70604, by the entry of a Stipulation and Order, copies of which are attached hereto and made a part hereof. The parties herein state that this Motion does not modify or affect any agreements set forth in the Stipulation and Order entered in Civil Action No. 80-70604, United States District Court, Eastern District of Michigan, Southern Division.

The referenced letter dated October 20, 1980, states, in part, as follows:

> As part of the continuing efforts on behalf of both parties to amicably settle the Proposal for Civil Penalty in the above-captioned cases, I submit to you the following reasons why I believe that the Assessments of $200.00 for each citation should be reduced to $100.00 per citation for a total of $200.00. So that our position is clear, I would point [out] to you that any admissions and/or representations, if any, which are made in this letter are made in connection with settlement negotiations and as such are not to be considered as admissible evidence under the Federal Rules of Evidence.
>
> > 1. On October 16, 1979 when Respondent allegedly denied Petitioner's representative the right of entry to Respondent's Sibley Quarry and Mill for purposes of conducting an inspection under the Act, Respondent's representatives who allegedly denied entry were acting upon the advice of legal counsel. Counsel's advice in this regard was to the effect that attempts by MSHA inspectors to conduct inspections on Respondent's property without a search warrant was a violation of Respondent's rights and protections against warrantless searches embodied

> in the Fourth Amendment to the Federal Constitution. The advice of Respondent's counsel was based upon the case of Marshall -vs-Barlows, INC., 98 S. Ct. 1816 (1978) wherein the Supreme Court found that warrantless inspection [sic] by OSHA violated a business operator's Fourth Amendment rights. Even though the Barlow's case involved OSHA, Respondent submits that because of the similarities in the purposes of OSHA and MSHA, the Barlow's decision throws the Constitutionality of warrantless search provisions of MSHA into considerable doubt. Additionally, as of October 5, 1979, the case of Nolichuckey Sand Company, Inc. -vs- Marshall, was under advisement before the Sixth Circuit Court of Appeals. Nolichuckey involved the question of whether or not the warrantless search provisions of MSHA were unconstitutional under the Fourth Amendment. As of October 10, 1979, Respondent had no way of knowing that Nolichuckey had been decided adversely to the operator on October 5, 1979. Last, District Courts of Wisconsin and New Mexico had held that the warrantless search provisions of MSHA were unconstitutional under the Fourth Amendment.

For these reasons, Counsel felt as of October 10, 1979, that the issue of the Constitutionality of MSHA's warrantless search provisions was open to question. For these reasons, counsel for Respondent submits that Respondent's representatives were making a good-faith assertain [sic] of Respondent's rights when they requested a search warrant of MSHA inspectors on October 10, 1979. Under the Penalty Assessment provisions of 30 CFR Section 100.03 [sic] Respondent submits that it is entitled to a reduction of the proposed penalty due to the Respondent's lack of history of previous violations, Respondent's [sic] lack of negligence, the small likelihood of Respondent's violation resulting in injury to miners and the fact that Respondent's request for a search warrant was in good faith.

> 2. On or about March 26, 1980, Petitioner alleged in [Citation No. 298201], that Respondent violated the [Act] by refusing to allow Respondent's employees to wear noise and dust monitoring devices. As of March 26, 1980, Respondent was once again acting on advice of counsel. Counsel's advice to Respondent was based upon the case of Plum Creek Lumber Company -vs- Hutton, 608 F2d 1283 (Ninth Circuit 1979.) This

> case involved the right of OSHA inspectors to hang and/or attach noise and dust monitoring devices to employees of a business being inspected. The Court found that OSHA provided no authority for the hanging of such noise and dust monitors. Again, Counsel for Respondent submits that even though OSHA and MSHA are different [Acts], their similarities of purpose and the fact that MSHA has no provisions explicitly requiring operators to allow the hanging of monitoring devices on their employees makes it questionable whether or not MSHA inspectors have the right to hang such monitoring devices. On this basis, Counsel for Respondent submits that Respondent was once again making a good-faith ascertain [sic] of its rights under the Constitution when it denied MSHA inspectors the right to hang dust and noise monitoring devices on its employees on March 26, 1980.
>
> Further, Respondent submits that the attachment of the noise and dust monitoring devices constitutes an unnecessary safety hazard to its employees. It is a universally accepted rule of industrial safety that persons working around or near machinery with exposed moving parts should not wear jewelry, chains, loose keys or other loose apparel. This principle is set forth by the National Safety Council in Accident Prevention Manual for Industrial Operations, Seventh Addition [sic] (1974) at pgs. 699, 828, 830, and 1004. Respondent submits that accurate noise and dust measurements can be taken by means other than attaching noise and dust monitoring equipment to employees working around moving machinery. See: Accident Prevention Manual for Industrial Operations, Supra, at 1247-1248.
>
> Because of Respondent's good-faith ascertain [sic] of its rights and its lack of intent to hinder MSHA in sections [sic], Respondent's Counsel once again submits that under the guidelines of 30 CFR Section 100.03 [sic], Respondent is entitled to few or no penalty points for history of previous violations, negligence, gravity of violation and good-faith.

For the foregoing reasons Edward Kraemer & Sons, Inc. feels that it is entitled to a reduction of at least $100.00 for each citation involved in these proceedings.

The referenced proceeding in the United States District Court for the Eastern District of Michigan, Southern Division, was disposed of by an order of dismissal issued by United States District Judge John Feikens on September 10, 1980. The proceeding was dismissed pursuant to the following stipulation:

> It is hereby stipulated and agreed by the parties as follows:
>
> 1. The defendant will not deny authorized representatives of the Secretary of Labor entry to, upon and/or through the Sibley Quarry in Trenton, Michigan, for the purpose of carrying out inspection or investigation under the provisions of the Federal Mine Safety and Health Act of 1977, nor interfere with, hinder or delay said authorized representatives in the conduct of such investigation, all subject to the qualifications stated in paragraph [sic] 2 and 3 hereof.
>
> 2(a) During the course of any such inspection or investigation, if the defendant claims it believes that the wearing of audio dosimeters, personal dust sampling devices or similar devices by any of its employees would represent a risk of injury to said employee, the plaintiff will not require that said monitoring device(s) be worn by the employee.
>
> 2(b) Instead, the monitoring device will be placed at a location mutually agreed upon in accordance with the following criteria:
>
> > (1) the device will be placed so that it is located as closely as possible to simulate the location of the orfice(s) [sic] of the employee's head during the monitoring period which represents the most significant access point for the contaminant or other hazard being tested for.
> >
> > (2) The device will not be place anywhere where it would constitute a potential safety hazard or would impede the normal movement of workers and/or equipment in and about the area.
> >
> > (3) The Defendant will not challenge the results of monitoring obtained in accordance with the criteria stated in paragraph 2(b) hereof on the ground that the results do not demonstrate the employee's actual exposure because of the location of the monitoring device(s)

providing agreement as to location as described in 2(b) hereinabove.

2(c) If the parties cannot agree on a mutually agreeable location for the placement of the monitoring device(s) the Plaintiff may pursue either of the following options:

(1) The Plaintiff shall have the right to place the monitoring device(s) at a location that plaintiff believes satisifies the criteria of paragraphs 2(b)(1) and (2) and the parties agree that the issue of the compliance of the placement of the sampling device(s) with the criteria of paragraphs 2(b)(1) and (2) shall be the subject for review by the Mine Safety and Health Review Commission (or its Judge.

(2) The plaintiff shall have the right to place the monitoring device(s) on a Mine Safety and Health inspector(s) who shall reasonably emulate the movements of the employee(s) to be monitored. Defendant will not challenge the results of the monitoring so obtained on the grounds stated in paragraph 2(b) above as long as the inspector(s) wearing the monitoring device(s) reasonably emulate the movements of the employee(s) to be monitored.

3. Defendant reserves the right to refuse to consent to a warrantless inspection of the subject mine in the event a final decision (a decision is not final until action by any court having power of review has been precluded or concluded) of the Sixth Circuit Court of Appeals or the U.S. Supreme Court upholds the right of the operator of an open quarry to insist that inspections provided for under the provisions of the Federal Mine Safety and Health Act of 1977 be made only pursuant to a duly authorized search warrant.

4(a) The execution of this stipulation is without prejudice to the right of either party hereto to litigate the issues raised in the Second, Third and Fourth Defenses in Defendant's Answer in any other current or any subsequent litigation, including litigations between the parties hereto. However, it is not the intent of this paragraph to grant the parties any additional procedural or substantive rights in any such action.

4(b) The execution of this stipulation is without prejudice to the right of either party to litigate in any

current or subsequent litigation, including litigation between the parties, the issue of whether the plaintiff can require that audio dosimeters or personal dust sampling devices be worn by an employee during the course of an inspection under the Act. The execution of this stipulation is not to be construed as an admission on this issue in any such litigation by either party hereto.

5. Pursuant to the provisions of Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, this action is hereby dismissed, with each party to bear its own court costs.

The reasons given above by counsel for the parties for the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of $200 assessed in these proceedings.

John F. Cook
Administrative Law Judge