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SOL (MSHA) v. B & N CONSTRUCTION
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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. WEST 80-226-M A/O No. 24-01495-05002 R
v.	DOCKET NO. WEST 80-260-M A/O NO. 24-01495-05003 W
B & N CONSTRUCTION, INC., RESPONDENT	MINE: B & N Portable Crusher

DECISION AND ORDER

APPEARANCES:

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for the Respondent

BEFORE: Judge John D. Boltz

STATEMENT OF THE CASE

Pursuant to provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) [here and after referred to as "the Act"], the Petitioner seeks an order assessing civil monetary penalties against the Respondent for violations alleged in two citations involved in the above captioned cases. The cases were consolidated for hearing in Spokane, Washington on November 4, 1980.

Citation No. 343077 (WEST 80-226-M) alleges a violation of section 103(a) of the Act in that on September 6, 1979, the owner of the Respondent corporation allegedly refused to allow two MSHA inspectors onto property where Respondent was operating its portable crusher, for purposes of continuing an inspection.

Citation No. 343078 (WEST 80-260-ii) also issued on September 6, 1980, alleges a violation of section 104(b) of the Act in that Respondent allegedly made no effort to comply with a withdrawal order issued earlier the same day. The withdrawal order referred to in the Citation, Order of Withdrawal No. 34376, stated the Respondent had made no effort to "secure suitable protective footwear" for its employees. The area of withdrawal specified was from "areas or equipment where hazards to the feet exist."

In its answer, Respondent alleges, in effect, that there were no violations of the Act.

FINDINGS OF FACT

1. Respondent has no history of violations prior to August 28, 1979.

2. The parties stipulate, and I find, that the Respondent is a small operator.

3. The proposed penalties will not affect Respondent's ability to continue in business.

4. On August 28, 1979, an MSHA inspector conducted an inspection of Respondent's portable crushing operation set up near Plains, Montana.

5. The crusher was being used to crush and size approximately ten thousand tons of stone for a road project for the State of Montana.

6. The MSHA inspector issued six citations to the Respondent on August 28, 1979, one of which was for an alleged violation of 30 C.F.R. 56.15-3. (FN.1) The citation issued stated that all employees of the Respondent were working without suitable protective footwear and that they were lifting heavy jacks, tools and blocks. By modification of the citation, the alleged violation was to be abated by September 6, 1980.

7. At approximately 2:30 p.m. on September 6, 1980, two MSHA inspectors returned to Respondent's crushing operation and issued Order of Withdrawal No. 343076, in which it was alleged that no apparent effort had been made by the Respondent to secure suitable protective footwear for the employees. The specified area of withdrawal was described as "areas or equipment where hazards to the feet exist."

8. At approximately 5 p.m. on September 6, 1980, one of the MSHA inspectors issued Citation No. 343077, the subject of WEST 80-226-M, alleging that the owner of the Respondent refused to allow the MSHA inspectors to continue their inspection pursuant to section 103(a) of the Act. Earlier that afternoon, at approximately 3 p.m., the owner of the Respondent had ordered the inspectors off the property and not to return without a search warrant.

9. At approximately 7:30 p.m. on September 6, 1980, one of the MSHA inspectors issued Citation No. 343078, the subject of WEST 80-260-M, alleging that no apparent effort was made by the owner of the Respondent to comply with Order of Withdrawal No. 343076, issued at approximately 2:30 p.m. on September 6, 1980.

ISSUES

1. Whether it was necessary for the MSHA inspector to obtain a search warrant in order to inspect Respondent's crusher operation.

2. Whether Respondent failed to comply with the withdrawal order issued at approximately 2:30 p.m. on September 6, 1980.

DISCUSSION

Respondent did not deny the MSHA inspectors access to the property where their portable crusher was located on August 28, 1979. At that time, six citations were issued, including Citation No. 343035 which alleged that Respondent's employees were working without suitable protective footwear. The record shows that the inspector returned to the property on September 4, 1979, and after some discussion with Respondent's foreman extended the abatement time for the citation until September 6, 1979.

At approximately 2:30 p.m. on September 6, 1979, the inspectors returned and began to inspect the property. It was at approximately 3:00 p.m. that the MSHA inspectors were ordered off the property by Respondent's owner and told not to return without a search warrant. The inspectors left the property at that time and then returned at approximately 5:00 p.m. and handed the owner of the Respondent the citation alleging the denial of entry by the Respondent. After the citation was given to Respondent's owner, he allowed the inspectors onto the property to continue the inspection. The inspectors then left the property approximately 30 minutes later. Even though the denial of entry by the Respondent was of short duration, it was a violation of the Act.

A search warrant is not required for an MSHA inspector to conduct an inspection for the purpose set forth in section 103(a) of the Act. The inspectors were on the property in order to determine whether or not there had been compliance with a mandatory health or safety standard, specifically 30 C.F.R. 56.15-3, which allegedly had been violated by the Respondent on August 28, 1979. This type of inspection is specifically authorized by section 103(a)(4) of the Act. Under section 103(a) of the Act, the authorized representative of the Secretary of Labor specifically has a right of entry upon the mine property.

In the case of Marshall v. Wallach Concrete Products, Inc., et al., (U.S. District Court for the District of New Mexico), 1 MSHC 2337 (March 26, 1980), it was held that warrantless inspections of sand and gravel operations under the Federal Mine

Safety and Health Act of 1977 meet the standards of reasonableness and pervasiveness of regulation of a particular industry set forth by the U.S. Supreme Court in Marshall v. Barlow's Inc.,

436 U.S. 307 (1978), and, accordingly, are consistent with the fourth admendment to the United States Constitution.

The Wallach case also held that sand and gravel operations were "mines" within the meaning of the Federal Mine Safety and Health Act of 1977 and are therefore within coverage of the Act. The parties in the Wallach case removed and processed the sand and gravel from the surface. In some instances the rock material was screened and crushed.

I find that there is no substantial difference in the operation of Respondent's business in that it removes rock material from the surface, and crushes and processes it pursuant to a road contract with the State of Montana. Accordingly, I conclude that Citation No. 343077 in WEST 80-226-M should be affirmed.

At approximately 7:30 p.m. on September 6, 1979, the two MSHA inspectors again returned to the property where Respondent's portable crushing operation was working. The inspectors observed that the employees of the Respondent were working without what the inspectors considered to be suitable protective footwear. In the opinion of the inspector who issued the citation on August 28, 1979, safety shoes are protective footwear. They consist of shoes "either being metal on the toes, or covering the entire top of the foot."

One of the inspectors then issued to the Respondent's owner Citation No. 343078 for Respondent's alleged failure to comply with Order of Withdrawal No. 343076. The withdrawal order described the area of withdrawal as "areas or equipment where hazards to the feet exist." The equipment on the job site included a Caterpillar front end loader, a semi-tractor, a portable cone crusher, and several conveyors.

I find that Order of Withdrawal No. 343076 was unforceable for two reasons. First, the area of withdrawal was not sufficiently described so that Respondent could be apprised of its location. Second, the order left it to the decision or discretion of the Respondent itself to determine areas where hazards to the feet existed and where suitable footwear should be worn, yet the Respondent had consistently maintained that the heavy leather boots worn by its employees were "suitable protective footwear."

Section 104(b) of the Act provides in pertinent part that if, upon any follow-up inspection, an inspector finds ". . . (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator . . . to immediately cause all persons . . . to be withdrawn from . . . such area . . . ." The wording "areas or equipment where hazards to the feet exist" is too general and not specific enough to apprise the operator of the extent of the area affected by the violation as required in section 104(b).

As part of the decision in the case of Peabody Coal Company v. Mine Workers, 1 MSHC 2220 (November 14, 1979), the Federal Mine Safety and Health Review Commission found that a withdrawal order which specified the

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area of the mine where an imminent danger existed was valid because on its face the order sufficiently described the area so that the operator was adequately apprised of its location. This was not the case in the withdrawal order issued to the Respondent. Although the Peabody case involved a withdrawal order issued pursuant to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977), the result would be the same under the 1977 Act. The wording of the Act in regard to this type of withdrawal order is substantially the same.

I make no finding as to whether or not the footwear worn by Respondent's employees was suitable and protective, since that is not the issue in this proceeding. On its face, the withdrawal order was defective in failing to set forth the extent of the area from which all persons should have been withdrawn. In addition, the Respondent could not reasonably be expected to decide where areas were located which could be hazardous to the feet, when the Respondent continually asserted that all employees were wearing suitable footwear in the performance of their jobs.

Since the withdrawal order was defective, Citation No. 343078 (WEST 80-260-M), issued to the Respondent for failure to comply, should be vacated.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter in these proceedings.

2. The Respondent violated section 103(a) of the Act as alleged in Citation No. 343077.

3. The Petitioner failed to prove that Respondent violated section 104(b) of the Act as alleged in Citation No. 343078.

ORDER

Citation No. 343078 and the penalty therefor are VACATED. Citation No. 343077 is AFFIRMED and the Respondent is ordered to pay a civil penalty of $100.00 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 Mandatory. All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.