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Federal 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. CENT 79-297 M A/O No. 03-01425-05001
JET ASPHALT AND ROCK COMPANY, INC., RESPONDENT	DOCKET NO. CENT 79-362-PM A/O No. 03-01425-05002 MINE: Eagle Mills Pit & Plant

DECISION

APPEARANCES:

Bobbie J. Gannaway
Esq.
Office of the Solicitor
United States Department of Labor
55 Griffin Square - Suite 501
Dallas, Texas 75202,
For the Petitioner
Don B. Dodson
Esq.
Nolan, Alderson & Vicery
510 First National Bank Building
Dorado, Arkansas 71730,
For the Respondent

Before: Judge John J. Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent Jet Asphalt and Rock Company (JET), violated a safety regulation promulgated under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

Pursuant to notice, a hearing on the merits was held in Little Rock, Arkansas on January 13, 1981.

The parties waived post trial arguments and briefs.

ISSUES

The threshold issue is whether the Secretary's warrantless search violates respondent's right to be free from unreasonable search and seizure under the Fourth Amendment of the United States Constitution.

Secondary issues are whether the violation occurred, and, if so, what penalty, if any, is appropriate.

CONSTITUTIONAL ISSUE

The respondent raised its objections to the search and seizure conducted by the Secretary. The same arguments were entered in a case involving the same parties, Docket NO. WEST 79-6-M. Respondent reoffered those constitutional arguments in this case.

Before considering the constitutional issue it is necessary to review the following pertinent facts: (1) the alleged violation of the Act involved a mine that has products which enter commerce or has operations or products which affect Commerce; (2) Jet Asphalt's Eagle Pit and Plant is a non-coal operation that has over 10,000 but less than 20,000 annual hours worked; (3) Jet Asphalt, the controlling company, had under 60,000 annual hours at all times relevant to these proceedings (Tr. 4, 5).

Concerning the search warrant, the facts are clear that the inspector did not have a search warrant; however, I find that a search warrant is not necessary under existing law. The type of operation involved here is a gravel operation in combination with an asphalt plant. The weight of authority in the United States holds that a warrantless inspection procedure is authorized by 30 U.S.C. 813. Such a procedure has been upheld in several of the United States Circuit Courts of Appeals.

These cases are Marshall v. Sink, 614 F. 2d 37 (4th Cir. 1980); Marshall v. Texoline Co., 612 F.2d 935 (5th Cir. 1980); Marshall v. Nolichuckey Sand Company, Inc., 606 F. 2d 693 (6th Cir. 1979), cert. denied, ___ U.S. ___, 100 S. Ct. 1835, 64 L.Ed.2d 261 (1980); Marshall v. Stoudt's Ferry Preparation Company, 602 F. 2d 589 (3rd Cir. 1979), cert. denied, 444 U.S. 1815, 100 S. Ct. 665, 62 L.Ed. 2d 644 (1980); also, Marshall v. Cedar Lake Sand and Gravel Company 480 F. Supp. 171 (E.D. Wis. 1979); Marshall v. Donofrio, 465 F. Supp 838 (E.D. Pa. 1978), aff'd without opinion, 605 F 2d 1196 (3rd Cir. 1979), cert. denied, ___ U.S. ___, 100 S. Ct. 1067, 62 L.Ed. 2d 787 (1980); cf., Youghiogheny and Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973). These decisions have generally

examined the 1977 Federal Mine Safety and Health Act under the standards established for judging the constitutionality of warrantless administrative inspections which are set forth in the Supreme Court decision, Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L.Ed. 2d 305 (1978).

A contrary view that would tend to support the Jet claim that a warrant is required is set forth in the case of Marshall v. Wait 628 F. 2d 1255, which was decided by the 9th Circuit Court of Appeals on September 29, 1980. I have carefully read Wait, and it holds that an operation involving the husband and wife, or a very small operation, is not within the terms of a pervasively regulated industry and, therefore, a search warrant was required. Wait is against the weight of authority, and I distinguish it from the case at bar in view of the size of respondent, Jet Asphalt. For the foregoing reasons I overrule respondent's Fourth Amendment arguments.

CENT 79-297-M
CITATION 164055

The above citation alleges a violation of 30 C.F.R. 56.4-1(a) and proposes a civil penalty of $36.00. At the hearing, without objection, the Secretary amended his complaint to allege a violation of 30 C.F.R. 56.4-2 (FN.1) (Tr. 7-8).

FINDINGS OF FACT

1. MSHA inspector Calvin F. Hardway issued a citation because "no smoking" signs had not been posted on a tank used to store fuel in the bed of a Ford pickup (Tr. 9, 10).

2. The 85 gallon diesel fuel tank was located next to oxygen and acetlyene bottles (Tr. 9-10, 16, 19).

3. Oxygen contributes to a fire or explosion hazard (Tr. 11).

4. Some diesel fuel had spilled onto the bed of the truck (Tr. 12).

5. Because fuel had spilled from the tank, a person could set off a fire with a lit cigarette (Tr. 14).

DISCUSSION

The standard, 30 C.F.R. 56.4-2, requires warning signs to be posted ...B where fire or explosion hazards exist. In this case diesel fuel had spilled from the tank onto the bed of the truck. That spillage is sufficient to constitute a fire or explosion hazard.

Jet's twofold contentions are that no fire hazard existed because diesel fuel is not combustible. Jet further argued that a hazard did not exist because the fuel was contained in a steel tank, much like an automobile gas tank.

I find the combustibility of diesel fuel is a matter of expert opinion. The MSHA inspector was of the view that a hazard existed in that a fire or explosion could result if a person threw a lit cigarette into the bed of the truck. I accept his opinion.

Jet's second argument is that the situation here is akin to a person smoking a cigarette while sitting in close proximity to an automobile gasoline tank. Jet's argument is not persuavise. The facts here indicate that some diesel fuel had spilled onto the bed of the truck (Tr. 12). Jet's evidence does not counter the inspector's testimony in this regard. I find that a fire hazard was created by conditions outside of the diesel fuel tank. This hazard could also cause the fuel tank or oxygen and acetlyene bottles to explode. The required signs were not posted in the area. Accordingly, the citation should be affirmed.

The citation, according to inspector Hardway reflects findings for negligence, good faith and gravity (Tr. 12). After reviewing these facts and the stipulation concerning size and prior history of Jet (Tr. 4), I deem the proposed penalty of $36.00 to be appropriate.

CONCLUSION

Based on the foregoing findings of fact I conclude that Citation 164055 and the proposed penalty therefor should be affirmed.

CENT 79-362-M
CITATION 164054

The above citation alleges a violation of 30 C.F.R. 56.11-1, and the Secretary proposes a civil penalty of $56.00.

At the commencement of the hearing respondent stipulated that a violation of the standard occurred (Tr. 67).

In view of the stipulation, I affirm Citation No. 164054. Having considered the necessary criteria, 30 U.S.C. 820(i), I

deem the proposed penalty of $56.00 to be appropriate.

ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following order:

1. In CENT 79-297-M, Citation 164055 and the proposed penalty are affirmed.

2. In CENT 79-362-M, Citation 164054 and the proposed penalty therefor are affirmed.

John J Morris
Administrative Law Judge

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~FOOTNOTE_ONE

1 The standard in contest provides as follows:

56.4-2 Mandatory. Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.