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SOL (MSHA) V. JOHN CULLEN
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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 82-33-M
v.	MSHA CASE NO. 05-03488-05002
JOHN CULLEN, D/B/A JOHN CULLEN ROCK CRUSHING, RESPONDENT	MINE: Marrow Pit

Appearances:

Mr. John Cullen, John Cullen Rock Crushing
4356 Blueflax Drive
Pueblo, Colorado 81001
Pro Se

Katherine Vigil, Esq., Office of the Solicitor
United States Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294,
For the Petitioner

Before: John A. Carlson, Judge

DECISION

This is a civil penalty proceeding arising out of respondent's alleged refusal to allow one of petitioner's mine inspectors to inspect respondent's rock quarrying and crushing operation near Pueblo, Colorado. The matter is before me under the provisions of the Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act").

A hearing on the merits was held on September 23, 1982. The parties declined to submit briefs or proposed findings of fact and conclusions of law. The Secretary charges respondent with violation of section 103(a) of the Act which provides:

> "Sec. 103. (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare 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 to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary of the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine. The undisputed evidence shows that James P. Ploughman is an authorized representative of the Secretary of Labor. Ploughman's duties under the Act included the inspection of mines. He attempted to conduct an inspection of respondent's operation on April 15, 1981 but was turned away by Mr. Cullen who insisted inspectors had no right to come upon the property without a search warrant.

The evidence also shows that respondent sells the rock extracted and crushed in his operation to various construction companies, and that in in conducting his business he uses equipment manufactured outside of Colorado. He employed three workers at the time of inspection.

Mr. Cullen's defense, as articulated at the hearing, appeared to be based upon a belief that the inspection provisions of the Act purport to allow warrantless inspections of business properites in violation of the Fourth Amendment's bar against unreasonable searches and seizures. He also questioned whether his operation is subject to the Act, suggesting in his testimony that he had heard that the Act was to be amended to exclude coverage of rock crushing operations. Beyond this, he maintained that at the time of the questioned inspection he was attempting to contest five

earlier citations upon essentially the same grounds. (FOOTNOTE-1) These earlier citations arose from a single inspection. He believed that a further inspection was unfair until these earlier charges were heard and decided. Finally, he suggested that he was being harassed, and that the inspection provisions of the Act are "communistic."

I first observe that there is no legitimate issue of coverage under the Act. The Act extends to sand and gravel pits and to rock quarries under the broad definition of a mine in Section 3(h).(FOOTNOTE-2) Attempts to amend the Act to exclude these activities have been made, but no such change has been enacted. For a time, certain temporary appropriations measures forbade the Mine Safety and Health Administration to expend funds for enforcement of the Act against sand, gravel or quarry operators, but no such provisions were in effect at the time of the inspection or hearing in this case. Moreover, whether an appropriations measure not the affecting substance of the Act is enforceable before this Commission (which has no express authority to adjudicate disputes arising under appropriation acts) is highly questionable. Finally, the evidence shows that the Cullen operation "affects commerce" as that term is used in the Act. This is so irrespective of whether respondent sells his product intrastate or interstate.(FOOTNOTE-3)

Respondent's constitutional objection to the inspection also lacks merit. The "warrantless inspection" issue has been settled by the United States Supreme Court in Donovan v. Dewey, ÄÄÄ U.S. ÄÄÄ, 101 S. Ct. 2534 (1981). There the Court held that the nonconsensual, warrantless inspections authorized under the Act do not offend the Fourth Amendment guarantees against unreasonable searches and seizures.

Since the uncontroverted evidence shows that Mr. Cullen turned away the inspector because he lacked a search warrant, a violation of section 103(a) of the Act occurred.

Nor is it a defense that respondent believed it somehow improper for the inspector to visit the mine while previous citations were pending. Neither the Act, nor any holding of the courts, nor any holding of this Commission supports such a notion.(FOOTNOTE-4) The Act requires that surface operations be inspected at least twice a year, but imposes no limits on the frequency of inspections.

We now turn to the matter of appropriate penalty. Waukesha Lime, cited previously, stands for the proposition that a refusal of inspection justifies imposition of a civil penalty under the Act. In the present case the Secretary proposes a penalty of $200. For the reasons which follow, I conclude that $200 is excessive.

Section 110(i) of the Act sets forth the criteria a judge must weigh in assessing a reasonable penalty. These are the degree of the operator's negligence, the size of his mine, his good faith in abating the violation, the gravity of the violation, and whether exaction of a particular penalty will affect the operator's ability to continue in business. Here the respondent's refusal of entrance to the inspector was more than negligent, it was deliberate. This factor weighs against respondent. Neither does he deserve extensive credit for good faith. He did ultimately abate by allowing an inspection, but the inspection at issue here was not his first. During the initial inspection respondent was apprised of the existence of the Act. From that time he was under a duty to make reasonable inquiry as to his obligations under the statutes. Nevertheless, one can have some sympathy for this pro se respondent whose financial means are limited and for whom federal safety regulation is a fairly new experience. I give credence to his testimony that he was confused by a second inspection while he was attempting to obtain review on the earlier inspection, which he believed to have been unlawful. The uncertainty surrounding his apparent attempts to contest the results of the earlier inspection tends to blunt the effect of that inspection as an unfavorable "prior history."

Since this case does not involve a violation of a substantive safety and health standard, the customary measurements of gravity cannot be applied. There is no evidence of what hazards, if any, actually existed at the site.

The size of respondent's crushing operation is quite small. While the evidence did not establish that imposition of the proposed penalty of $200 would affect his ability to remain in business, it did show that in the year preceding the year of inspection he suffered a loss of approximately $30,000 and in 1981 he only broke even. These facts weigh in his favor.

On balance, I conclude that a civil penalty of $75 is appropriate.

CONCLUSIONS OF LAW

Upon the entire record in this case, including the determinations of fact made in the narrative portion of this decision, the following conclusions of law are entered.

(1) The Commission has jurisdiction to hear and decide this matter.

(2) Respondent, John Cullen, violated section 103(a) of the Act.

(3) The appropriate civil penalty is $75.

ORDER

Accordingly, the citation is affirmed and respondent is ORDERED to pay a civil penalty of $75 to the Secretary within 30 days of the issuance of this order.

John A. Carlson
Administrative Law Judge

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~FOOTNOTE_NOE

1 The existence of these earlier citations was stipulated. Respondent asserted that he wanted a hearing on their validity, but that his letters had apparently been lost by MSHA, and that he was still trying to ascertain why he had not been granted a hearing. Counsel for petitioner knew nothing of the fate of the citations except that they were issued, and that civil penalties were now somewhere in the collection process.

~FOOTNOTE_TWO

2 Waukesha Lime and Stone Company, Inc., 3 FMSHRC 1703, n. 3 (1981).

~FOOTNOTE_THREE

3 Wickard v. Filburn, 317 U.S. 111 (1942).

~FOOTNOTE_FOUR

4 This case presents no proper issue as to whether or not the inspection attempt was made in bad faith -- that is, for reasons other than those authorized by the Act. Respondent's allegation of "harassment" was based upon the mere fact of inspection. It was supported by no specific evidence from which a wrongful purpose or active misconduct may be inferred.