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SOL (MSHA) V. ROCKLINE
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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
v.

CIVIL PENALTY PROCEEDING

Docket No. WEST 81-339-M
A.C. No. 35-03057-05001 R

Rockline Inc., Pit & Plant

ROCKLINE, INCORPORATED,
RESPONDENT

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor,
U.S. Department of Labor, Seattle, Washington,
for Petitioner;
Mr. Carl Linebarger, President, Rockline, Inc.,
The Dalles, Oregon, Pro Se.

Before: Judge Vail

STATEMENT OF THE CASE

This civil penalty case is brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) ("the Act"). Petitioner seeks an order assessing a civil monetary penalty against the respondent for allegedly refusing to allow an authorized inspector of the Mine Safety and Health Administration ("MSHA") onto the property where respondent was operating its portable crusher. In its answer, respondent alleges, in effect, that there was no violation of the Act.

A hearing in this case was initially set for July 13, 1982, but was continued at the request of respondent's counsel due to his illness. The case was reset for September 20, 1983, in Portland, Oregon, where respondent's President, Carl Linebarger, appeared, without counsel, and stated that he would represent the respondent in this matter as he did not wish to incur the additional expense of legal fees. Both parties waived the right to file briefs.

FINDINGS OF FACT

1. Rockline, Incorporated ("Rockline"), is a corporation for which Carl Linebarger is the president and majority stockholder.

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2. Rockline is a small portable crushing operation employing four employees and Linebarger. On April 22, 1981, the crusher and other equipment used in mining rock was located on land leased from the Port of the Dalles, Oregon. The operation had been located at this site for approximately two years. In addition to the crusher located there, respondent had constructed a large building and moved in a trailer to be used as an office.

3. Respondent has no history of a prior MSHA inspection or violations at the site involved in this case. However, respondent had experienced a prior MSHA inspection and received violations at a different location in 1979.

4. At approximately 9:30 in the morning, on April 22, 1981, MSHA inspector Robert Funk arrived at respondent's mine site for the purpose of conducting a safety and health inspection. He drove through an entrance, past the trailer (office), and a blue building located near the entrance. He continued down to where the rock crusher was located. A truck was being loaded at the crusher when Funk drove up. A conversation was had between Funk and Linebarger at the crusher site and then they drove in their separate vehicles back to an area near the trailer. Linebarger got out of his truck and told Funk he would not allow him to inspect the operation at this location.

5. Funk returned to his office and issued citation No. 587744 to respondent on April 22, 1981, alleging a violation of 103(a) of the Act. (FOOTNOTE 1)

DISCUSSION

At the hearing, MSHA inspector Funk described the events that led up to the issuance of the citation in this case. He testified that after arriving at respondent's mine at about 9:30 a.m. on April 22, 1981, he drove his government vehicle through the entrance past a large blue building on the right and a trailer located on the left of the road. He continued on this

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road approximately 300 yards to where the crusher was located. The vehicle he was driving had United States government license plates and markings on the door. When he arrived at the crusher, the truck was being loaded. Linebarger motioned Funk to park his car near his pickup which he did. Funk got out of his car and walked over to Linebarger and attempted to introduce himself and present his card. Funk testified that Linebarger started yelling at him and asking Funk if he "could read the signs" and that he was "yelling" and "cussing" MSHA and the government in general (Transcript at 19).

Linebarger told Funk to follow him up to the office. After arriving at the trailer, again Linebarger raised his voice and said, "The only reason I don't shoot you right where you stand is, I want to take four or five of you government S.O.B.'s with me." Funk stated he thought there was a rifle in a rack on the back window of Linebarger's pickup (Tr. at 22). Then Linebarger stated that the only way he would allow an inspection would be if he (Funk) was accompanied by a U.S. Marshall (Tr. at 23). Funk got back in his car and left the premises.

Linebarger denies that he made the above statements except as to the need for Funk to bring a U.S. Marshall to inspect (Tr. at 39, 55). Linebarger testified that there was a 4 x 8 foot sign posted near the office which read "Salesmen, Visitors, Please Apply at Office. Do Not Enter Shop or Work Area Without Permission." (Exhibit R-1).

Linebarger testified that when Funk arrived at the crusher, he parked his vehicle in front of the crusher blocking the access of trucks to be loaded and requiring the crusher to be shut down (Tr. at 54, 55). Linebarger told Funk to move his car and to follow him up to the office. He stated that he explained to Funk that Linebarger had rules and regulations to go by for the health and safety of his employees and the public and if Funk wouldn't follow them, he (Linebarger) would refuse to allow Funk to conduct an inspection unless he was accompanied by a U.S. Marshall (Tr. 38, 39).

Respondent submitted evidence of prior inspections at different plants in 1974 by Mining Enforcement and Safety Administration ("MESA"). He had received several citations in which reference was made that, "The cooperation of all persons contacted during the inspection was greatly appreciated" (Exh. R-8). It is Linebarger's position that he had been inspected in the past and always cooperated with the enforcement agency.

The evidence further revealed that the respondent had been inspected by MSHA in 1979 at a different location and received six citations which were all abated (Exh. P-2).

Although there is conflicting testimony in this case as to what was said by the parties on the date of the attempted inspection, I find there is no dispute that the inspector was refused the opportunity to inspect respondent's operation. This is an obvious violation of section 103(a) of the Act which specifically provides that frequent inspections shall be made without a requirement of advance notice and that the inspectors have a right to entry to, upon, or through any mine. On June 17, 1981, the United States Supreme Court held that the Mine Act provides for nonconsensual warrantless inspections and that such inspections do not violate the Fourth Amendment. *Donovan v. Dewey*, 49 U.S.L.W. 4748 (U.S. June 17, 1981), No. 80-9011, --- U.S. ---- (1981). In *Secretary v. Waukesha Lime and Stone Company, Inc.*, 3 FMSHRC 1702 (July 6, 1981), the Commission decided that a refusal to permit an inspection is a violation of the Act for which a penalty must be imposed.

In light of the foregoing, I find a penalty is warranted in this case. The respondent does not deny that he refused the inspector access to conduct an inspection on his premises but instead argues that the inspector should have read the posted signs and stopped at the office prior to driving down to the crusher. I am not persuaded that the respondent's position is supported by the facts in this case. The inspector denies seeing the sign alleged to have been erected at the entrance and as evidenced by photos submitted at the hearing (Exhs. R-1, R-2, R-3 and R-4). It is difficult to believe these signs were not noticed by the inspector, if they were actually at their alleged location near the entrance to the property. However, I have carefully considered the conflicting testimony of inspector Funk and Linebarger regarding the signs and conversations on April 22, 1981. Based upon my observation of the witnesses at the hearing and the evidence submitted, I find that the testimony of the inspector to be more credible than that of Linebarger. Even assuming, however, that the signs were located as alleged by respondent, entry onto the premises by the inspector is not to be predicated upon acquiring prior approval. This is a very small operation and the crusher was located near the entrance. It is reasonable for the inspector to drive to that location to observe the operation. It does not appear reasonable and rational for the respondent to refuse an MSHA inspection, if the only basis is that the inspector may have parked in the wrong area, as alleged by Linebarger, or driven by signs directed to "Visitors and Salesmen".

PENALTY

The petitioner seeks a penalty against respondent of \$1,000.00 based upon a special assessment. For some unexplained reason, the petitioner's records indicated that the respondent

had no history of prior inspections or citations. However, at the hearing, evidence was submitted that there were six prior citations issued and abated as a result of an inspection by MSHA of the respondent at a different location (Exh. P-2). This fact does not indicate a pattern of past behavior on respondent's part to prevent MSHA inspections. Also, there is evidence of respondent's cooperation with MESA, the prior mine safety and health enforcement agency. These facts would persuade me that the circumstances in this case, although unjustified, are not evidence of a pattern of behavior or attitude suggesting the imposition of a penalty in the amount suggested by the petitioner. I find that a penalty of \$500.00 is reasonable in this case.

CONCLUSIONS OF LAW

1. The respondent is subject to the jurisdiction of the Act. The undersigned Judge has jurisdiction over the parties and subject matter of these proceedings.

2. Respondent violated section 103(a) of the Act as alleged in Citation No. 587744.

4. A reasonable penalty in this case is \$500.00.

Citation No. 587744 is AFFIRMED and respondent is ordered to pay a civil penalty of \$500.00 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 103(a) provides in pertinent part:

Authorized representatives of the Secretary * * * shall make frequent inspections and investigations in coal or other mines * * * In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided * * * [and the authorized representative] shall have a right of entry to, upon, or through any * * * mine.