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SOL (MSHA) V. EDWARD KRAEMER & SONS
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. LAKE 88-118-M A. C. No. 33-00091-05503
v.	White Rock Quarry Mine
EDWARD KRAEMER & SONS, INC., RESPONDENT	

DECISION

Appearances: Kenneth Walton, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, for the Secretary;
Willis P. Jones, Jr., Esq., Jones & Bahret, Toledo, Ohio, forRespondent.

Before: Judge Weisberger

Statement of the Case

In this case the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of 30 C.F.R. 56.20011, and 103(a) of the Federal Mine and Health Act of 1977 (the Act). Pursuant to notice, the case was heard in Detroit, Michigan, on February 1, 1989. Robert G. Casey and David Allen Bright testified for Petitioner, and Edward Steven Kraemer testified for Respondent.

On May 15, 1989, Petitioner filed Proposed Findings of Fact and a Post-Trial Brief. On May 19, 1989, Respondent filed a Proposed Findings of Fact and Conclusions of Law and Post-Trial Brief.

Stipulations

1. The White Rock Quarry is owned and operated by the Respondent, Edward Kraemer & Sons, Inc.

2. The White Rock Quarry is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, and the applicable regulations promulgated thereunder.

3. The presiding Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.

4. Any citations, orders, modifications, and terminations, if any, were properly served by the Petitioner through its duly appointed representative upon an agent of the Respondent.

Citation No. 3060362

Robert G. Casey testified that he is presently a specialist in special investigations employed by the Mine Safety and Health Administration, and that in March 1988, he was a mine inspector for MSHA. Casey testified that, on March 29, 1988, he performed an inspection of Respondent White Rock Quarry. He said that approximately 200 to 300 feet from the East Highwall, which was approximately 100 feet high, and was not being actively worked, he observed various equipment and also observed access to the highwall. He testified that he observed loose unconsolidated material on the highwall and that it was unattended. He indicated, in essence, that the "loose" material he observed was immediately obvious. He further indicated that there were no barricades or warnings. Casey issued a citation which, as pertinent, alleges that the highwall ". . . has ground conditions that will warrant correction prior to exposing persons below it." The Citation further alleges that there were no warning signs or hazards ". . . to display the nature of the aforesaid hazard."

At the conclusion of the Petitioner's case Respondent made a Motion for a Directed Verdict. For the reasons that follow, the Motion was granted.

The above citation alleged a violation of 30 C.F.R. 56.20011 which provides, as pertinent, as follows: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches . . . . " The only evidence of record with regard to the existence of any health or safety hazard consists of Casey's testimony that he observed "loose unconsolidated material" on the highwall. The evidence does not describe in any detail the nature of the material, its location, or its relative size. As such, the evidence is woefully inadequate to establish Petitioner's burden of proving the existence of any health or safety hazard. Furthermore, section 56.20011, supra, provides for posting of warning signs or barricading of areas where health or safety hazard exists "that are not immediately obvious to employees." The only evidence on this point consists of Casey's statement that the loose material was immediately obvious. Thus, Petitioner has not established that there was any health or safety hazard in existence that was not immediately obvious to employees. Accordingly, Petitioner has failed to establish that Respondent violated section 56.20011.

Citation No. 3059354 and Order No. 3059355

Findings of Fact and Discussion

I.

David Allen Bright, an MSHA Inspector, indicated that, in general, surface mines are subject to two inspections each fiscal year. He said that with regard to Respondent's White Rock Quarry, in the fiscal year 88, until February 1988, it had not undergone any inspections. He indicated that on February 23, 1988, he went to inspect the White Rock Quarry, as it was located within the area of his responsibility, and his supervisor told him to do a regular inspection there. He also indicated that there was an outstanding citation on the West Highwall of the quarry, and a computer printout indicated to him that this citation had not been corrected within 90 days of its issuance. According to Bright, he thus went to the quarry on February 23, for the purpose of making a regular inspection "that would encompass looking into the abatement of the outstanding citation" (Tr. 108). (i.e. the conditions on the West Highwall.)

According to Bright, on February 23, 1988, when he arrived at Respondent's quarry, at approximately 9:30 in the morning, he spoke to its foreman and advised him that he was there for a regular inspection. Bright indicated that the foreman told him that the only activity at the quarry consisted of some repair work in the mill and the loading of the materials in some piles. Bright then went to see Respondent's vice president and general manager of the quarry, Edward Steven Kraemer, and requested entry to inspect the mine. In response, according to Bright, Kraemer informed him that he had to talk with his attorney, and upon speaking to his attorney, Kraemer asked Bright if the inspection included the West Highwall. When Bright indicated the inspection would include the West Highwall, Kraemer stated that, based upon his attorney's advice, this would not be allowed. Bright then, in essence, cited the Act, and Kraemer still refused to allow him to enter the premises. Bright left and returned between 10 and 11 a.m., and presented Kraemer with a citation alleging a violation of section 103(a) of the Act. Kraemer returned the citation and indicated that Respondent's attorney advised him not to accept it. Subsequently, Bright returned after 2:00 p.m., on February 23, and again asked Kraemer if he was denying entry. When Kraemer indicated in the affirmative and that he would not accept the Citation, Bright issued a section 104 Order and sent it to him via registered mail.

On cross-examination, it was elicited from Bright that on August 18, 1987, he had issued Respondent a citation requiring a 1500 foot section of the West Highwall to be barricaded pending the scaling of the wall, as it allegedly contained loose areas of ground. By terms of the citation it was to be abated August 18, 1987, but the deadline was extended to November 4, 1987. Bright indicated that "possibly in October" (Tr. 142) it came to his attention that Respondent was contesting this citation. On October 6, 1987, Bright went to Respondent's quarry along with a technical support group, consisting of Don Kirkwood and Calvin K. Wu, in order to get a second opinion with regard to complying with the above citation as to the West Highwall. Kraemer informed Bright that he (Bright) would be allowed to make an inspection, but Kirkwood and Wu were not allowed to go on the premises upon advice from Respondent's attorney. (Bright did not perform any inspection at that time.).

Kraemer explained that Respondent's attorney advised him not to allow Kirkwood and Wu on the premises on October 6, 1987, in order to limit the entry of Petitioner's experts for purposes of preparing for trial. Essentially, according to Kraemer, in the last week of January 1988, an agreement had been reached between Respondent's attorney and Mureen M. Cafferkey, a Trial Attorney with the Office of the Solicitor, wherein a meeting was set for March 24, 1988, with Counsel for Respondent, Trial Attorney for the Solicitor, along with Bright, Kirkwood, Wu, Trig Coombs, Al Hooper, and Kraemer to try and resolve the outstanding citation. Kraemer indicated that there was no agreement for Bright to return to look at the West Highwall.

According to Kraemer, on February 23, 1988, Bright had indicated to him that he was at the quarry for an annual inspection, but since the quarry was not running he wanted to do a compliance inspection. Kraemer indicated that he did not tell Bright that he (Bright) could not do a semiannual inspection, but indicated that he would have to confer with his attorney, who advised him not to permit Bright to inspect for "that purpose," (Tr. 215) as there was an agreement for a future inspection of the West Highwall. Kraemer indicated that subsequent to Respondent's attorney talking with the Office of the Solicitor, Bright was allowed on the quarry for a semiannual inspection.

Section 103(a) of the Act, unequivocally provides for the inspection of mines for the purposes of . . . " determining whether there is compliance with the mandatory health or safety standards or with any citation . . . issued under this title or other requirement of this Act." The above section further provides that in carrying out this requirement, the Secretary shall inspect a surface mine in its entirety at least two times a year.

According to the uncontradicted testimony of Bright, as of February 1988, the subject quarry had not yet been inspected for the fiscal year 1988. I find credible Bright's testimony that his purpose in visiting the mine on February 23, 1988, was to conduct a semiannual inspection which encompassed, in essence, checking the status of the West Highwall, as the time for compliance with a prior citation had already expired. Although the quarry operation was not in production at the time of Bright's visit, and Bright could not perform a health or dust inspection, his testimony stands uncontradicted that a health inspection is not performed at every inspection, and he still could do a full inspection. In this connection, Bright was informed by Respondent's foreman essentially that workers were present repairing and loading.

It appears to be Respondent's argument, that Bright told Kraemer that inasmuch as the quarry was not in production, he then would do a compliance inspection. Respondent appears to maintain that such an inspection should not be permitted, as it's purpose was to check on a violation being contested by Respondent, and subject to negotiations with the Solicitor, and consequently is beyond the purview of a semiannual inspection. Whether Bright's stated purpose to Kraemer was to conduct a semiannual inspection encompassing the West Highwall, or whether it was, as testified to by Bright, to perform a "compliance" inspection, I find that either type of inspection is clearly within the purview of section 103(a) which, in essence, gives the representative of the Secretary the right to perform an inspection to determine whether there is compliance with a mandatory safety hazard or with any citation. In this connection, I note that there is no documentary evidence setting forth the terms of such an agreement. Further, Kraemer, who was Respondent's only witness, did not have personal knowledge of the terms of such an agreement, nor were its terms established through Petitioner's witnesses. I thus find that it has not been established that there was any specific agreement between the Petitioner and Respondent's Counsel to the effect that Bright would not be allowed to inspect the West Highwall either as part of a semiannual inspection, or to see whether Respondent was in compliance with the prior citation of August 1987, concerning the West Highwall.

Based upon all of the above, I conclude that the Respondent violated section 103(a) of the Act, when it denied Bright permission to enter the quarry on February 23, 1988.

II.

As a consequence of not being permitted to inspect the quarry on February 23, 1988, Bright was unable to determine if there were any safety hazards in existence at that time. However, at the time of Bright's original requests to enter the premises, the quarry was not in active production. I thus find the gravity of the violation herein to be only moderate. Although Kraemer should have permitted

Bright to enter on February 23, I find that there is no evidence that he acted in other than good faith in relying upon the advice of Counsel in not permitting Bright entry. Accordingly, I find that Respondent herein acted with only a low degree of negligence. I considered this a most significant factor in assessing a penalty for the violation herein. I have considered the remaining factors set forth in section 110(i) of the Act, and accordingly find that Respondent shall pay a civil penalty of $50 for the violation found herein.

ORDER

It is ORDERED that Citation 3060362 be DISMISSED. It is further ORDERED that Respondent shall, within 30 days of the Decision, pay $50 as civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge