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MSHA V. WAUKESHA LIME AND STONE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 6, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. VINC 79-66-PM

WAUKESHA LIME AND STONE CO.,
INC.

DECISION

This case involves questions concerning nonconsensual inspections without a search warrant under section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979). The facts are undisputed. On July 10, 1978, Mine Safety and Health Administration (MSHA) Inspector Brey tried to make a routine inspection of the Waukesha Lime and Stone Company, Inc., a limestone quarry. The visit in question followed an April inspection during which Brey had issued citations for 25 alleged safety violations. Before the inspector finished his previous inspection, the operator abated 21 of those violations. Four, however, remained unabated as of the July 10 attempted inspection. On that date, the operator's president, Douglas Dewey, told Brey that he would no longer be allowed to inspect the premises without a search warrant. Brey then issued a citation alleging a violation of section 103(a) for the refusal to permit the inspection. 1/

Thereafter, the Secretary filed a petit!on for assessment of a civil penalty. Waukesha contested the alleged violation of section 103(a), and the matter was set for hearing. 2/ It was undisputed that

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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.

2/ Before the hearing, the Secretary filed a separate action in federal district court pursuant to section 108(a)(1) of the Mine Act,

seeking injunctive relief and requiring Waukesha to permit entry to MSHA inspectors. Section 108(a)(1) provides:

The Secretary may institute a civil action for relief, including a permanent or temporary injunction. restraining order, or any other appropriate order in t!:e district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine his principal office, whenever such operator or his agent

(footnote continued)

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Brey was denied entry. Waukesha contended, however, that its stone 2rey was denied entry. Waukesha contended, however, that its stone quarry is not a "mine", subject to the Act, that section 103(a) does not permit nonconsensual inspections without a search warrant, that if it does, such warrantless inspections violate the Fourth Amendment, and that in any event the refusal to permit federal inspection of a stone quarry does not constitute a violation of the Mine Act for which a civil penalty may be imposed. In his decision, the administrative law judge held against Waukesha on each of its contentions, and assessed a $1,000 penalty. We granted Waukesha's petition for discretionary review. The company makes the same arguments before us.

After oral argument and while the case was pending for decision, the federal district court in the section 108(a)(1) action (see note 2, supra) dismissed the Secretary's complaint for injunctive relief, holding that to the extent the Act permitted nonconsensual warrantless inspections, it violated the Fourth Amendment. Marshall v. Dewey, 493 F. Supp. 963 (D. Wis. 1980). The Secretary then filed a direct appeal with the Supreme Court, which noted probable jurisdiction, sub. nom., Donovan v. Dewey, 49 U.S.L.W. 3531 (U.S. January 26, 1981),_____ U.S._____ (1981). We stayed further action in this case pending the Supreme Court's decision. (Order of March 16, 1981).

On June 17, 1981, the Supreme Court decided the Waukesha case before it. Donovan v. Dewey, 49 U.S.L.W. 4748 (U.S. June 17, 1981) (No. 80-901),_____ U.S._____ (1981). The Court held that the Mine Act provides for nonconsensual warrantless inspections and that such inspections do not violate the Fourth Amendment. Resolution of those issues leaves before us the question of whether the refusal to permit an inspection is a violation of the Act for which a penalty must be imposed. 3/ We hold that it is and thus affirm the judge's decision.

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fn. 2/ cont'd

(A) violates or fails or refuses to comply with any order or decision issued under this Act,

(B) interferes with, hinders, or delays the

Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this Act,
(C) refuses to admit such representatives to the coal or other mine,
(D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine....

3/ We reject Waukesha's contention that its stone quarry is not a "mine" subject to the Act. The definition of "mine" in section 3(h) of the 1977 Mine Act is virtually identical, in pertinent part, with section 2(b) of the Federal Metal and Non Metallic Mine Safety Act of 1966. The legislative history of the 1966 Metal Act clearly indicated that stone quarries were mines. S. Rep. 1296, 89th Cong., 2nd Sess. (1966), reprinted in 1966 U.S. Code and Admin. News at 2851. The legislative history of the 1977 Mine Act establishes that Congress intended a very broad interpretation of "mine."

(footnote continued)

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Section 110(a) of the Act provides:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Waukesha contends, however, that refusal of entry does not constitute a violation of a provision of the Act, because although section 103(a) authorizes certain inspections, it does not require an operator to "perform any act or refrain from performing any act." It also asserts that, in any event, the Secretary's exclusive remedy under the circumstances is an injunction under section 108(a)(1), not a civil penalty under section 110. We are not persuaded by Waukesha's arguments.

First, notwithstanding the absence of express statutory language, it is illogical to assume that Congress intended to mandate inspections and a right of entry for the Secretary's authorized representative pursuant to section 103(a), without also viewing the operator's denial of entry as a dereliction of its duty under the Act. Section 110(a) of the Act, mandates assessment of a civil penalty where an operator violates a mandatory health or safety standard "or ... any other provision of this Act." Therefore, on its face, section 110(a) requires the imposition of a penalty for

the violation here of section 103(a), a "provision of the Act." Any other interpretation would result in our treating denial of entry violations differently than all other violations which subject the operator to penalties under section 110(a). Second, we reject the contention that a section 108(a)(1) injunction is the Secretary's sole remedy if an operator denies entry to his authorized representative. Rather, dual remedies exist: an administrative remedy under sections 104 and 110(a), and a civil injunctive remedy under section 108(a)(1). We believe that if Congress had intended injunctive relief to be the exclusive remedy, it would have stated so unequivocally. We conclude, therefore, that refusal to permit an inspection violates the Act and requires the imposition of a penalty under section 110(a).

fn. 3/ cont

S. Rep. 95-181, 95th Cong., 1st Sess., 14 (1977), reprinted in Subcommittee on Labor, Committee on Human Resources, U.S. Senate, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 (1978) at 602. We do not believe that Congress could possibly have intended to restrict coverage under the 1977 Mine Act to less than that covered by the 1969 Metal Act and 1969 Coal Act. Quite the contrary.

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For the foregoing reasons, the decision of the administrative law judge is affirmed.

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