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SOL (MSHA) V. JOHN CULLEN ROCK
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 22, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 93-172-M
Petitioner : A.C. No. 05-04420-05502
 :
v. : Grant Pit
 :
JOHN CULLEN ROCK CRUSHING & :
GRAVEL, :
Respondent :

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
John Cullen, Pro Se, Pueblo, Colorado,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), charges John Cullen Rock Crushing and Gravel, the operator of the Grant Pit, with refusing to allow one of Petitioner's mine inspectors to inspect Respondent's Grant Pit, a gravel pit located near Pueblo, Colorado.

After due notice to the parties a hearing was held on the merits in Pueblo, Colorado. Oral and documentary evidence was introduced by the parties and the matter was submitted. The parties declined the filing of briefs or proposed findings of fact and conclusions of law.

I

The 104(a) citation in question was issued to Respondent by federal Mine Inspector Lyle Marti. The citation issued by Inspector Marti charges Respondent with the violation of section 103(a) of the Act which provides in pertinent part:

"Authorized representatives of the Secretary
... shall make frequent inspections and in-
vestigations in coal or other mines.... In

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carrying out the requirements of this subsection, no advance notice of an inspection shall be provided. ...[and the authorized representatives] shall have a right of entry to, upon, or through any ... mine."

The citation issued by Inspector Marti states in pertinent part:

During the inspection of Grant Pit, John Cullen, owner-operator, denied me the right to continue my inspection of the mine property in accordance with the requirements of Section 103 of the Act.

At approximately 8:00 a.m. on July 22, 1992, John Cullen ordered me off the mine property.

It is undisputed that Lyle Marti is an authorized representative of the Secretary of Labor.

II

The Secretary entered into the record in this matter the "Injunctive Order" of Judge Richard P. Matsch of the United States District Court, District of Colorado issued June 24, 1993, in the case of Reich v. John Cullen, individually, and doing business as John Cullen Rock Crushing and Gravel, Civil Action No. 92-M-2186. After a full evidentiary hearing on April 29, 1993, in Pueblo Colorado, the Federal District Court found:

[T]he defendant's own statements constitute a basis for finding that he has interfered with, hindered and delayed the authorized representatives of the Secretary of Labor in carrying out the provisions of the Act; has refused to admit them to his gravel pit and refused to permit the inspection of his business. The Department of Labor is, therefore, entitled to an order of this court in the nature of an injunction.

Thus, the Federal District court has enjoined Respondent from denying entry upon his mining operations, from refusing to permit inspections and from interfering with MSHA inspectors carrying out their official duties. The Injunctive Order is attached to this decision as Exhibit A.

III

It is the Secretary's position that the only issue before me is the appropriate penalty for the established violation of

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section 103(a) of the Act. While the Secretary's position appears sound, we have in the instant proceeding statements and admissions volunteered by John Cullen while under oath which constitutes a solid basis for finding a violation of 103(a) of the Act. John Cullen under oath openly and frankly volunteered the following:

Well, there's no denying I told these people they should leave, and I damn well meant it. But I wasn't doing it to violate any law. I truly believed that my Constitutional rights were violated and that these people should not have that kind of power.

And I still believe that, but I don't think that trying to stand up for your rights that a person should be penalized for trying to do the very best that he can do.

Q When you say you told these people to leave, you're referring to the inspector who was making a regular inspection of the gravel pit?

A Well, I guess. He told -- to tell you the whole thing here, he left on his own power. I did not tell him to leave. He told me, "Hey, I'm leaving. I'm out of here."

Q Why did he say that?

A Because I was mad, and I ought to have the right to be mad. I run the place.

* * * * *

And I believe that these people -- maybe they don't know it, but they are going to ruin the small business of this country. ---

And I just can't understand why these people (MSHA Inspectors) have more power than the FBI or the police or anyone. They need no reasonable cause. They can make any amount of regulations that they want, whenever they want, to enforce those regulations.

And, you know, I'm in business for myself because I want to be private and I want to be independent. And I don't necessarily want the government telling me what to do. And I

believe in that free country. That's more important to me than life, than this business, than anything, is to be a free person and be -- have a country where my kids could start a business and do as they want to do.

With respect to the Respondent's financial condition and the effect of the proposed penalty on its ability to continue in business Mr. Cullen testified:

Q This gravel business that you are in, is this an intermittent thing or --

A I've made my living off of it for the last 15 years. Sometimes I made a living. Usually -- I'll tell you, I've been told more than once to file bankruptcy and get the hell out, and I just -- we've struggled and we've struggled and we've struggled.

And maybe now -- I think I own enough machinery now, but maybe I could recuperate some of the money that I've lost, maybe pay off the second mortgage on my home, and things like that. But I -- I can't deal with this -- with this -- I don't know --

Q One of the factors in this is your ability to pay without going out of business or hindering your business, so if --

A You know, it's hard for me to say. Today I probably could write a check for \$2,000. Maybe. I'd have to check with my wife, but I have no retirement. My house is in hock to the hilt. My machinery needs repairing, and I have to make a payroll this Friday.

And how should -- should I be allowed to accumulate anything? Should I be able -- do you want to take all I have, or shall I -- can I just keep a little bit? I don't know how to address that.

Q -- the purpose of this (assessing penalties) is to get the operator to comply with the law.

A Okay. I'm going to comply with the law, because I'll be out of business. I don't want to be out of business.

IV

The operator appears to be sincere in questioning the authority of federal mine inspectors to enter his mine property without his permission and make inspections for regulatory safety violations. He apparently believes that his constitutional rights are violated and one should not be punished for "trying to stand up for your constitutional rights." His beliefs may well be sincere but as discussed in greater detail below, they are badly mistaken and misguided.

V

The terms of the Mine Act as well as the Act's legislative history reflect a congressional determination that all mining related accidents and diseases unduly burden and impede interstate commerce. See section 2(f) of the Mine Act, 30 U.S.C. 801(f)

In addition, the Mine Act defines the Act's scope as including "the Nation's coal or other mines," with no express limitation or exception. 30 U.S.C. 801(c), (d), and (g). The legislative history of the Federal Coal Mine Health and Safety Act of 1969, the statute from which the Mine Act derived, also indicates that Congress intended to regulate mining "to the maximum extent feasible through legislation." S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966). Thus, in enacting the Mine Act, Congress chose to regulate mines as a class. See *Marshall v. Kraynack*, 604 F.2d 231, 232 (3rd Cir. 1979), cert. denied, 444 U.S. 1014 (1980) (applying Coal Act to family-owned mining operation); *Marshall v. Bosack*, 463 F.Supp. 800 (E.D. Pa. 1978), aff'd, 3rd Cir. No. 78-1803 (Jan. 15, 1979) (applying Coal Act to coal preparation plant).

Congressional intent to counter the adverse effect of mining accidents and injuries by regulating the mining industry as a whole has been recognized by the Supreme Court. In *Donovan v. Dewey*, 452 U.S. 594, 602 (1982), a case involving a surface limestone quarry, the Supreme Court stated that "--- Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce." Congress' finding was "based on extensive evidence showing that the mining industry was among the most hazardous of the nation's industries. (See S. Rep. No. 95-181 (1977); H.R. Rep. NO. 95-312 (1977))." *Id.* at 602 n. 7.

It is well established that when Congress regulates a class of activity under the Commerce Clause, all members of the class are covered, including a particular member whose activities are entirely intrastate. *Perez v. United States*, 402 U.S. 146, 150 (1971); *Fry v. United States*, 421 U.S. 542, 547 (1975).

Thus, when Congress has determined that an activity affects interstate commerce, "the courts need inquire only whether the finding is rational." *Hodel v. Virginia Surface Mining and Recl. Assn.*, 452 U.S. 264, 277 (1981). As stated above, in *Donovan v. Dewey*, supra, 452 U.S. at 602 n. 7, the Supreme Court properly deferred to the express findings of Congress, set out in the Mine Act itself and based on extensive evidence, about the effects of mining-related injuries and diseases on interstate commerce.

It is well established that a congressional finding that an activity affects interstate commerce is presumed to be valid, and a reviewing court will invalidate such legislation "only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Hodel v. Indiana*, 452 U.S. 314, 323-324 (1981). Mr. Cullen does not and cannot show a lack of any rational basis for Congress' finding that mining-related accidents and diseases at all mines burden and impede interstate commerce. Thus, the legislative history of the Mine Act indicates that Cullen's gravel pit is properly the subject of congressional regulation.

The nature of Cullen's mining activities fall within the broad scope of jurisdiction contemplated by the Mine Act. Section 4 of the Act, 30 U.S.C. 803, states that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator --- and every miner in such mine shall be subject to the provisions of [the] Act." Applicable case law also indicates that Cullen's facility and sales "affects commerce" within the meaning of section 4 of the Mine Act. Courts have consistently held that Congress is empowered under the Commerce Clause to regulate even intrastate sales. *Wichard v. Filburn*, 317 U.S. 111 (1942). See also *Marshall v. Meredith Mining Co.*, 483 F.Supp. 737 (W.D. Pa. 1980) (Mine Act); more recently, in *Andrus v. P-Burg Coal Co., Inc.*, 644 F.2d 1231, 1232 (1981), the Seventh Circuit reiterated that Congress is empowered to regulate a mining operation that produces a product solely for intrastate sale. In that case, the court adopted the district court's jurisdictional determination that intrastate producers compete with interstate producers, and that intrastate sales have a cumulative effect on commerce.

VI

The record in the instant case clearly dictates that the operator's conduct was tantamount to a denial of entry. MSHA inspectors are not required to force entry or subject themselves to possible confrontation or physical harm in order to inspect. *Secretary v. Calvin Black Enterprises*, 7 FMSHRC 1151 (Aug. 20, 1985) at 1157. See also *U.S. Steel Corp. v. Secretary of Labor*, 6 FMSHRC 1423 (June 26, 1984).

VII
PENALTY

There are numerous cases upholding the authority to issue civil money penalties under section 110(a) of the Mine Act for denial of entry to a mine. Secretary v. Calvin Black Enterprises, 7 FMSHRC 1151 (August 20, 1985). In Waukesha Lime and Stone Company, Inc. 3 FMSHRC 1702 (July 1981) the Commission held that an operator's refusal to permit an inspection requires the imposition of a penalty notwithstanding the fact that the Secretary has obtained an injunction.

In determining the appropriate civil penalty, I have, pursuant to statutory mandate, considered the statutory criteria set forth in section 110(i) of the Mine Act. As to the size of the business, Mr. Cullen testified that he usually has two or three employees at the gravel pit. The parties stipulated that Respondent is a small operator. It is undisputed that the operator showed good faith in his abatement of the violation. The violation was abated on July 27, 1992, when John Cullen, the owner, signed an agreement stipulating that he would not interfere with or hinder or delay the Secretary of Labor or his authorized representatives from conducting official inspection duties under the provisions of the Mine Act. This signing of the written agreement was pursuant to an earlier oral agreement to the same effect between the Solicitor on behalf of the Secretary and Mr. Cullen.

The violation was a serious one that threatens to undermine mine safety enforcement. Considering the statutory criteria however, and Mr. Cullen's sincere but badly mistaken belief that he was merely standing up for his constitutional rights, I find the MSHA proposed penalty of \$2,000.00 for this violation by this small operator is excessive. The violation was a very serious one but considering the statutory criteria including the good faith abatement and the small size of the operator I find the more appropriate penalty for this serious violation is \$500.00. I believe a \$500.00 penalty in this case will effectuate the deterrent purpose of the Act. See Robert G. Lawson Coal Company, 1 IBMA 115, 117-118 (1972).

ORDER

Citation No. 4121093 is AFFIRMED. The Respondent John Cullen Rock Crushing and Gravel is ORDERED TO PAY to the Secretary of Labor a civil penalty of \$500.00 for this violation of

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section 103(a) of the Mine Act within 30 days of the date of this decision. On receipt of payment the case is dismissed.

August F. Cetti
Administrative Law Judge

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NB: Pages 917 - 119 Exhibit A are omitted from text.

