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SOL (MSHA) V. LANDWEHR MATERIALS
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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. LAKE 85-81-M
A.C. No. 47-0095-05502

v.

Mackville Quarry

LANDWEHR MATERIALS, INC.,
RESPONDENT

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for
Petitioner; Thomas J. Landwehr, General Manager,
Landwehr Materials, Inc., Appleton, Wisconsin,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. 56.550(b). Pursuant to notice, the case was heard in Green Bay, Wisconsin on December 10, 1985. Arnie Mattson, a Federal mine inspector, testified on behalf of Petitioner. No witnesses were called by Respondent. The parties waived their right to file written post-hearing briefs, but both made arguments on the record at the close of the hearing. I have considered the entire record, and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of a limestone quarry in Outagamie County, Wisconsin, known as the Mackville Quarry and Mill.

2. The subject mine is open about 9 months of the year, and works about 38,000 to 40,000 production hours annually. About 20 employees work at the mine.

3. Inspections of the subject Quarry's noise levels were conducted by MSHA in May, 1979 and March, 1984. In May, 1979 citations were issued because two miners were exposed to excessive noise and were not wearing approved hearing protection. The citations were terminated when Respondent required the miners to wear hearing protection. In March, 1984, a noise sampling survey was conducted. It showed that certain employees were exposed to noise in excess of the prescribed limits. Citations were not issued, because the employees were wearing approved hearing protection.

4. Between October 17, 1982 and October 16, 1984, Respondent had a history of one paid violation of a mandatory health or safety standard.

5. Respondent has always cooperated with the MSHA inspectors in their inspections of its facilities.

6. On October 16 and 17, 1984, Federal Mine Inspector Arnie Mattson conducted a health and safety inspection of Respondent's mine. The inspection included a sound level examination of the environment of a shovel operator. The inspector determined that the shovel operator was exposed to 96 dBA for an 8 hour day. The operator was wearing personal hearing protection. A citation was issued because the Inspector determined that feasible engineering controls were not being utilized.

7. Following a discussion between Respondent and the Inspector, the MSHA Technical Support Unit in Denver, Colorado performed a noise control examination in April and May, 1985. The citation termination date was extended because of this examination.

8. A vinyl barrier curtain was installed between the shovel operator and the engine compartment of the shovel. Tests performed by MSHA's Industrial Hygienist showed that the noise level was reduced in the shovel operator's environment by almost 4 dBA (from an average of 101 dBA to an average of 98 dBA). This was a reduction in terms of the percentage of the permissible noise levels of approximately 33 percent (101 dBA is 459 percent of the allowable level; 98 dBA is 303 percent). The reduction, though significant, did not reduce the noise to permissible levels (90 dBA), so personal protection equipment was still deemed necessary.

9. The report from the Denver technical center indicated that the ear muffs worn by the shovel operator did not afford adequate protection because of a loose fit. This report was issued after the citation was terminated.

10. The citation was terminated on May 1, 1985 after the installation of a leaded vinyl curtain between the shovel operator and the engine. The shovel operator was still required to wear hearing protection.

REGULATORY PROVISIONS

30 C.F.R. 56.550 provides in part as follows:

56.550 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA, slow response
8.....	90
6.....	92
4.....	95
3.....	97
2.....	100
1- 1/2.....	102
1.....	105
1/2.....	110
1/4 or less.....	115

* * *

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce

exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

ISSUES

1. Whether the evidence showed that Respondent failed to utilize feasible engineering controls where an employee's exposure to noise exceeded permissible limits?
2. If so, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act) in the operation of the subject mine. I have jurisdiction over the parties and the subject matter of this proceeding.

2. Section 110(a) of the Act provides that if a violation occurs of a mandatory health or safety standard, a civil penalty shall be assessed for the violation.

3. On October 17, 1984, a shovel operator at the subject mine was exposed to noise 2.28 times the permissible level; the exposure was equivalent to 96 dBA for 8 hours per day.

4. There were feasible engineering controls available to reduce the exposure, namely the installation of a vinyl curtain between the shovel operator and the shovel motor.

5. Respondent was in violation of 30 C.F.R. 56.50(b) on October 17, 1984 because of its failure to utilize engineering controls to reduce the exposure of its shovel operator to excessive noise.

6. Respondent is a relatively small operator and operates only 9 months of the year.

7. The violation was moderately serious: the exposure was 2.28 times the permissible level; the shovel operator was wearing inadequate personal protection. Therefore, a hearing loss was likely to result from continued exposure to the excessive noise.

8. Because MSHA had examined the noise level in the facility previously, and had never required engineering

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controls to reduce the noise levels, Respondent's negligence must be deemed minimal.

9. There is no evidence that the imposition of a penalty will have any effect on Respondent's ability to continue in business.

10. Respondent abated the violation promptly and made a good faith effort to comply with MSHA's requirements.

11. Considering the moderately serious nature of the violation, an appropriate penalty would be \$90. Giving Respondent credit for the minimal negligence, its cooperative attitude, and prompt abatement, I conclude that an appropriate penalty for the violation is \$70.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation 2373982 issued October 17, 1984 is AFFIRMED.

2. Respondent shall within 30 days of the date of this decision pay the sum of \$70 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge