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SOL (MSHA) V. ATLANTIC CEMENT
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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. YORK 80-34-M A.C. No. 30-00006-05007
v.		Ravena Quarry and Plant
ATLANTIC CEMENT COMPANY, INC.,	RESPONDENT	

DECISION

Appearances: Jithender Rao, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner Howard G. Estock, Esq., New York, New York, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging two violations of health regulations. The general issue is whether the Atlantic Cement Company, Inc., (Atlantic) has violated the provisions of the Act and its implementing regulations charged herein and, if so, the appropriate civil penalties to be paid.

At hearing held in Albany, New York, on June 17 and 18, 1980, the parties moved to settle Citation No. 205221. Atlantic was charged therein with one violation of 30 C.F.R. 56.5-60, for exceeding permissible noise exposures in the cab of a scraper. A reduction of penalty from $78 to $50 was proposed because of Atlantic's extraordinary efforts in abating the violative condition. It spent $5,000 installing noise-suppressing engineering controls in the cited scraper cab. I approved the proposal at hearing as being consistent with the criteria under section 110(i) of the Act and affirm that decision at this time.

The citation remaining at issue (No. 205351) charges one violation of the standard at 30 C.F.R. 56.5-1(a). That standard requires, in essence, that employee exposure to airborne contaminants not exceed certain limits. The citation here charges that crane operator Michael Fatica was exposed to silica-bearing dust in an amount exceeding those limits. Atlantic does not appear to deny that Fatica was in fact exposed as charged (See Atlantic's brief) but cites the provisions of 30 C.F.R. 56.5-5 by way of defense.

That section provides, in essence, that where accepted engineering control measures have not been developed or when necessary by the nature of the work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment under certain conditions. MSHA admits that the provisions of section 56.5-5 would have furnished a valid defense to the citation had the subject employee been wearing such protective equipment at the time in question (see Petitioner's Brief at p. 3 and Tr. 128).

The credible evidence in this case leads to the inescapable conclusion that the subject employee was not in fact "protected" by appropriate respiratory equipment even though such protective equipment was clearly available to him. MSHA inspector Kettlecamp saw the employee on four occasions for approximately 3 to 4 minutes each and the employee was not wearing a respirator on any of these occasions. According to Kettlecamp, the employee did not even have a respirator on or about his person. The subject employee, Michael Fatica, admitted that he could not remember whether he wore a respirator that day. In light of this admission made shortly after the violation, I can give but little credence to his self-serving testimony at hearing that he thought he had worn the respirator "once in a while" that day. It is reasonable to infer therefore that Fatica was not in fact "protected" by appropriate respiratory protective equipment during the time of the cited exposure. Under the circumstances, Atlantic clearly has not met its burden of proving the affirmative defense provided by section 56.5-5. Accordingly, I find that the violation has been proven as charged.

Although a violation of the cited standard would in most cases be considered serious, under the unusual circumstances of this case, I find only minimal gravity. The exposed employee ordinarily worked within an air-conditioned and pressurized cab where exposure to airborne contaminants had been shown by prior testing to have been within permissible limits. On the date of this citation, the equipment had broken down and the employee was therefore working outside of the protected cab in an environment to which he was not ordinarily exposed.

I also find that the failure to have utilized respiratory protective equipment in this case was due solely to the negligent or intentional failure of the individual employee and not to any negligence on the part of Atlantic. MSHA inspector Thomas Reszniak conceded at hearing that Atlantic had in effect at the time the citation was issued "a very good respirator policy and program" and that part of that program was "to ensure" that the men wore respirators when they were in dusty areas. The company then had on hand an ample supply of approved respirators and indeed a box of respirators was kept in the crane cab where the subject "employee" usually worked. The employees had been instructed on how to fit and wear those respirators.

Disciplinary action had also been taken in the past against employees who violated company rules regarding the use of respirators. This evidence is not disputed. Under the circumstances, I consider that a nominal penalty of $10 is appropriate for the violation.

ORDER

Upon consideration of the entire record in this case and in light of the criteria set forth in section 110(i) of the Act, I hereby ORDER that Respondent pay the following penalties within 30 days of the date of this decision:

Citation No. 205221 -- $50
Citation No. 205351 -- $10

Gary Melick
Administrative Law Judge