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SOL (MSHA) V. ROCKITE GRAVEL
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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 80-130-M A.O. No. 21-00596-05001
v.	Mine: Rockite Gravel Company
ROCKITE GRAVEL COMPANY, RESPONDENT	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Roger L. Gilmer, Esq., Hutchinson, Minnesota, for Respondent

Before: Judge Edwin S. Bernstein

On September 16, 1980, a hearing was held in Minneapolis, Minnesota, to determine if Respondent violated the mandatory health standard at 30 C.F.R. 56.5-501 as alleged in Citation No. 289904 and, if so, what penalty should be assessed in accordance with the criteria in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act).

Findings of Fact

The citation in question was issued to Respondent on June 12, 1979, and read:

> The noise level around the Caterpillar #908B front end loader operator was 220% of the permissible limit for noise on June 12, 1979, day shift, from 7:05 a.m. to 3:10 p.m.

Feasible engineering or administrative controls were not being used to reduce the loader operator's noise exposure to within the levels of the table in part and section 56.5-50(a) in order to eliminate the need for hearing protection.

The parties stipulated, and I find:

1. Respondent, Rockite Gravel Company, is a partnership located in South Haven, Minnesota.

2. Respondent is a small operator.

3. There is no history of previous violations by Respondent.

4. If a penalty is imposed, it will not affect Respondent's ability to continue in business.

5. The violation was abated within a reasonable time.

6. Arnie Mattson, the MSHA inspector who issued the citation, is a duly authorized representative of the Secretary of Labor.

7. The citation in question was issued by Mr. Mattson on June 12, 1979, and was duly delivered to a representative of Respondent on or about that date.

8. Hutchinson, Minnesota, is approximately 90 miles north of the Minnesota-Iowa border, and approximately 90 miles east of the Minnesota-South Dakota border. These distances represent the closest distances between Hutchinson and the next adjacent states.

At the hearing, Arnie Mattson testified for Petitioner and Robert Peterson testified for Respondent.

Inspector Mattson testified that he is a mining inspector stationed at MSHA's field office in Mankato, Minnesota. On June 12, 1979, he conducted a health inspection at Respondent's facility. During a previous visit, Mr. Mattson noticed that the front end loader was fairly loud and he felt there might be a noise problem with it. In order to verify this, he decided to take a dosimeter (FOOTNOTE 2) reading during the June 12 inspection. He asked the

operator of the loader to place the dosimeter in his shirt pocket with the microphone under his collar near his ear. The operator refused to wear the device and told the inspector to "hang it someplace else." Mr. Mattson then hung the device in the cab of the loader "close to [the operator's] hearing, trying to get the microphone so it [didn't] bang against glass or metal, [or] anything * * * that would pick up extra noise."

During the first half of the eight-hour shift, after he had hung the dosimeter, Mr. Mattson took four readings in the cab with a sound level meter.(FOOTNOTE 3) He testified that when the loader was operating normally, he got readings of 90 to 95 decibels, but when the loader was "revved up," the readings were 98 to 100 decibels. The readings dropped below 90 decibels when the loader was idling.

After taking the sound level meter readings, Mr. Mattson checked the loader for any engineering controls (FOOTNOTE 4) which may have limited the operator's exposure to noise. There was no rubber matting on the floor of the cab, but Mr. Mattson noted some insulation on the cab ceiling. He testified that rubber matting on the floor would have helped to cushion the sound from the engine, which was located in back of the cab. He also stated that the loader did not have a muffler, but only "a straight pipe for an exhaust."

Asked if he was aware of any administrative controls (FOOTNOTE 5) which may have been used to control the operator's exposure to excessive noise, Mr. Mattson

replied in the negative. He also determined that no personal protection equipment, such as ear plugs or ear muffs, was being used by the men, but he did not check with the owner to see if such equipment was provided.

During his testimony, Mr. Mattson repeated the statement made in the citation that the noise level in the relevant area was 220 percent of the permissible limit. Neither Mr. Mattson nor Petitioner's counsel, Mr. Carmona, was able to enunciate at the hearing exactly what this figure represented.6 Mr. Mattson stated that he obtained this number from the readout machine when he placed the dosimeter memory cell into it at the end of the shift. At one point in his testimony, he stated that this number represented a percentage of the "threshold limit value," which is the maximum noise that an employee can be exposed to over an eight-hour period. This explanation is consistent with the following statement printed on the back of the readout machine: "Readout value is displayed in percent of allowable OSHA exposure. 100% equals one allowable dose." (FOOTNOTE 7)

Mr. Mattson testified that the violation was abated by installing a muffler on the loader. After this was done, the inspector took several sound level meter readings which convinced him that the condition had been abated and that another dosimeter test was not necessary.

Respondent's witness was Robert Peterson. Mr. Peterson and his wife are the sole owners of Rockite Gravel Company. Mr. Peterson is also the sole proprietor of Rockite Silo Company, which is located in Hutchinson, Minnesota, approximately 30 miles south of Rockite Gravel. Rockite Gravel has five employees, one of whom serves as manager, or foreman. Mr. Peterson testified that between 10 and 20 percent of the company's production is sold locally to private consumers in the area, or to the local county government. The remaining production is trucked by an independent contractor to Rockite Silo. Rockite Silo produces several products from this material, including concrete blocks (about 15 percent of its production), silo materials (about 25 percent), farm drain tiles (10 to 15 percent), and ready-mix concrete (about 50 percent). Due to the prevailing freight charges, most of Rockite Silo's production is sold within a 50-mile radius of the company's facility in Hutchinson. On very rare occasions, products may be shipped as much as 100 miles away. Mr. Peterson testified that Rockite Silo buys from suppliers other than

Rockite Gravel, but that he was unaware of any sales by Rockite Silo to out-of-state customers.

The Interstate Commerce Issue

Respondent contended that its operation "does not meet the definition of [interstate] "commerce' as provided by law." It asserted in its brief that it is not subject to the Act since "its activities are conducted solely within the State of Minnesota, and because its activities do not in any way affect commerce." [Emphasis in original.] In order to decide on this question, it is necessary to examine the constitutional underpinnings of federal jurisdiction over the mining industry.

Article I, Section 8, Clause 3 of the Constitution gave Congress the power to "regulate Commerce * * *" among the several States * * *". The U.S. Supreme Court has a long history of upholding federal regulation of ostensibly local activity on the theory that such activity may have some effect on interstate commerce.

In Wickard v. Filburn, 317 U.S. 111 (1942), the Court upheld a federal law regulating the production of wheat which was "not intended in any part for commerce but wholly for consumption on the farm." Id. at 118. The Court stated that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct' or "indirect."' Id. at 125.

In 1975, the Court elaborated on this idea, stating that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." Fry v. United States, 421 U.S. 542, 547 (1975). More recently, the Seventh Circuit Court of Appeals relied upon Wickard when it said that the commerce clause "has come to mean that Congress may regulate activities which affect interstate commerce." United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) [Emphasis in original.]

These principles have often been relied on by the lower courts in ruling on the coverage of the present Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969. (FOOTNOTE 8) One leading case is Marshall

v. Kraynak, 457 F. Supp. 907 (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). There, the Court upheld the applicability of the 1969 Act to a small mine which was owned and operated entirely by four brothers. No other personnel had worked there for at least seven years, and the brothers had no intention of hiring other employees in the future. The brothers contended that all of the coal which they mined was sold and consumed within the State of Pennsylvania and did not involve interstate commerce. Id. at 908. The defendants admitted, however, that more than 80 percent of their production was sold to a paper processing corporation which was "actively engaged in interstate commerce." Id. at 909. The Court held that "the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of * * *" the Act." Id. at 911.

A similar case was Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976), involving a mine which was operated entirely by two brothers, Edward and Frederick Shingara. In the words of the Court, "Edward [went] underground, while Frederick [did] the hoisting." Id. at 694. The Court found that the fruits of their labor were sold as follows:

> The Shingara coal is sold primarily to Calvin V. Lenig of Shamokin, Pennsylvania who resells it, along with other coal which he has gathered, to Keystone Filler and Manufacturing Co., Inc. of Muncy, Pennsylvania and Mike E. Wallace of Sunbury, Pennsylvania. Keystone Filler combines the Shingara-Lenig coal with others in order to achieve a particular ash content, dries the mixture, and grinds it into a powder which is shipped to customers outside of Pennsylvania.

Id. The Court stated that "[a]lthough the activity in question here may seem on first examination to be local, it is within the reach of Congress because of its economic effect on interstate commerce." Id. The Court compared the facts of the case to the facts in Wickard and concluded that "the Shingara coal mining activity, which has an even more direct impact on the coal market, also "affects commerce' sufficiently to subject the mine from which it emanates to federal control." Id. at 695.

In both Kraynak and Shingara, the coal in question was being sold to parties who were engaged in interstate commerce. In other mining cases, such facts were not shown, but the courts nevertheless utilized the seminal Wickard decision to find that the activities in question "affected commerce." Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), involved a specific agreement between the owner of a coal mine and his buyer that the latter would sell the coal only within the state and not place any of it into interstate commerce. In holding that interstate commerce was still affected, the Court went back to the following passage from Wickard:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.

478 F. Supp. at 7, citing 317 U.S. at 128. Using this rationale, the Kilgore Court found it "inescapable that the product of the defendant's mine would have an affect [sic] on commerce. The fact that the defendant's coal is sold only intrastate does not insulate it from affecting commerce, since its mere presence in the intrastate market would effect [sic] the supply and price of coal in the interstate market." 478 F. Supp. at 7. See also Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978) ("The Act does not require that the effect on interstate commerce be substantial; any effect at all will subject [the operator] to the Act's coverage.")

I am aware of only one case where a Court held that a mine did not affect commerce within the meaning of the Act. Morton v. Bloom, 373 F. Supp. 797 (W.D. Pa. 1973), involved a one-man mine which had no employees. The coal which the defendant produced was sold "exclusively within Pennsylvania." Id. at 798. The Court held that this operation was not the type which the Congress intended to cover when it enacted the statute. Id. More significantly, the Court found itself unable to conclude "that defendant's one-man mine operation will substantially interfere with the regulation of interstate commerce." Id. at 799. Even under the Wickard standard, the Court stated that the mine was "one of local character in which the implementation of safety features required by the Act will not exert a substantial economic effect on interstate commerce." Id.

I have carefully reviewed the Court's reasoning in Bloom, and I conclude that it should not be followed in the instant matter. First, I do not believe the Court properly considered all of the possible means by which the Bloom operation could have affected interstate commerce. At one point in the opinion, the

Court noted that the "defendant does use some equipment in his mine which was manufactured outside of Pennsylvania * * *" 373 F. Supp.

at 798. The Court found that this did not bring the defendant's mine within the ambit of the commerce clause since the purchase of this equipment was "so limited that its use would be de minimis." Id. This reasoning, in my view, runs directly contrary to the Supreme Court's statement in Mabee v. White Plains Publishing Company, 327 U.S. 178, 181 (1946), that the de minimis maxim should not be applied to commerce clause cases in the absence of a Congressional intent to make a distinction on the basis of volume of business. And, as the Court noted in Bosack, the Mine Safety Act does not require that the effect on interstate commerce be substantial. See 463 F. Supp. at 801.

Secondly, and perhaps more importantly, the Court in Bloom did not consider the effects which many one-man coal mining operations, taken together, might have on interstate commerce. Going back once again to the Wickard case, the Supreme Court held that even if the wheat in question was never marketed, "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." 317 U.S. at 128. Similarly, in the instant case, the gravel which Respondent supplies to Rockite Silo supplies the needs of that company, which would otherwise be reflected by purchases in the open market. While the parties indicated that Rockite Silo would have bought from local merchants even if Rockite Gravel went out of business, I believe that such practices in the open market would have enough of an effect, direct or indirect, on commerce to bring Respondent within the purview of the commerce clause, and thus the Act.

Concluding Findings and Conclusions of Law

I find that Respondent violated the mandatory standard at 30 C.F.R. 56.5-50 as alleged. The dosimeter readout indicated that the operator of the loader was exposed to a noise level equal to 220 percent of the permissible level over the course of the shift. In my view, there was insufficient evidence that the dosimeter or other noise measuring equipment was operating improperly to negate this reading. (FOOTNOTE 9) Further, the inspector

testified that Respondent did not utilize any engineering or administrative controls sufficient to bring the operator's exposure within permissible limits. This testimony was uncontroverted by Respondent. The inspector also determined, and the Respondent was unable to refute, that no personal protection equipment was being used by the operator of the loader. Finally, as discussed in the preceding section, I find Respondent's argument that it does not affect commerce within the meaning of the Act to be without merit.

Turning to the criteria in Section 110(i) of the Act, I find Respondent's negligence in this matter was high, since the inspector testified that the loudness of the noise emanating from the loader was noticeable even without taking a noise level reading. The gravity was also high, since the noise which the loader operator was exposed to was more than twice the permissible exposure. However, Respondent is a small operator with no previous violations of the Act, and this violation was rapidly abated. I assess a penalty of $75 for this violation.

ORDER

Respondent is ORDERED to pay $75 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

~FOOTNOTE_ONE

1 The standard in question provides in part:

"56.5-50 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 Health and Safety 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

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level. NOTE: When the daily noise exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

If the sum

$$(C1/T1)+(C2/T2)+...(Cn/Tn)$$

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure. Cn indicates the total time of exposure at a specified noise level, and Tn indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\text{Log } T=6.322-0.0602 \text{ SL}$$

Where T is the time in hours and SL is the sound level in dBA.

(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.

~FOOTNOTE_TWO

2 The dosimeter which was introduced into evidence as Petitioner's Exhibit 6 contains a memory cell which is sensitive to all sound with a loudness between 90 and 115 decibels. The cell stores information relating to cumulative noise exposure during an entire eight-hour shift. At the end of the shift, the memory cell is placed into a read-out machine (Petitioner's Exhibit 8) which allows the inspector to determine the percentage of allowable noise to which the worker was exposed during the shift.

It should be noted that if there is any exposure to noise louder than 115 decibels, a special indicator inside of the dosimeter is triggered. Since the standard states that "[no] exposure shall exceed 115 [decibels]," there would presumably be an automatic violation in any such situation, regardless of what readout was obtained from the memory cell.

~FOOTNOTE_THREE

3 A sound level meter (Petitioner's Exhibit 7) is a small, hand-held device which gives an instant reading as to the number of decibels of noise in a given area. Mr. Mattson testified that he used the sound level meter to give him "a little idea what the dosimeter should produce at quitting time."

He also stated that he checked his equipment before and after the inspection to make sure it was operating properly. Two devices which are used to calibrate the equipment were admitted as Petitioner's Exhibits 9 and 10.

~FOOTNOTE_FOUR
4 Mr. Mattson explained that an engineering control was a device or mechanism which reduced the level of noise in the working area. He stated that a muffler, additional insulation, or some other barricade between the source of the noise and the working area would be examples of engineering controls.

~FOOTNOTE_FIVE
5 Administrative controls involve methods of organizing work assignments at the site so that a worker who is exposed to high noise levels for part of his shift is later moved to another job involving much less noise exposure. The net effect of such a system is to reduce the worker's overall noise exposure during the course of the full shift.

~FOOTNOTE_SIX
6 On September 22, 1980, after the record in this case was closed, Petitioner moved to admit into evidence the operating manual for the dosimeter which was used to take the noise readings. Respondent opposed the motion on the grounds that the operating manual "was not introduced, nor received, at the hearing" and that its introduction would deprive Respondent of "the opportunity of cross-examination."

I agree with Respondent. The May 9, 1980, Prehearing Order directed the parties, inter alia, to list proposed exhibits. Petitioner's Prehearing Report, filed May 28, 1980, did not refer either to the dosimeter or the operating manual. Nevertheless, at hearing, Petitioner utilized the dosimeter in connection with the presentation of its case. At my request, to make the record more complete, the dosimeter was introduced into evidence as an exhibit. At that time, no reference was made by Petitioner to any operating manual. In failing to offer the manual during the hearing, Petitioner deprived Respondent of the opportunity to challenge statements made in the manual, and in failing to refer to the manual and the dosimeter before the hearing, Petitioner deprived Respondent of the opportunity to prepare cross-examination and present witnesses to challenge the device as well as statements made in the manual. It is further noted that no argument was based on the manual at the hearing, in Petitioner's Motion to Supplement the Record, or in the briefs submitted by the parties. Therefore, Petitioner's motion is DENIED.

~FOOTNOTE_SEVEN
7 The "Permissible Noise Exposure" table in 30 C.F.R. 56.5-50, reproduced in footnote 1, supra, is identical to the table which appears in the Occupational Safety and Health Administration's noise standard. See 29 C.F.R. 1910.95(b)(1), Table G-16. Therefore, the manufacturer's statement that the readout machine measures sound in terms of percent of allowable OSHA exposure also applies to the allowable MSHA exposure.

In its brief, Petitioner explained that the "Note" to 30 C.F.R. 56.5-50 contains a formula for determining whether a violation of the standard has occurred when "daily noise exposure is composed of two or more periods of noise exposure at different

levels * * *"." The following example and explanation is helpful to understanding what the dosimeter is designed to measure (Petitioner's Brief at 11-12):

"This formula can be better understood by substituting numbers for the letters in an equation in which D is the individual daily noise recorded.

Example:
D= (C1/T1) + (C2/T2) = (Cn/Tn)
D= 6/8 + 1/2 + 1/1 = 2.25 of allowable exposure
C1 = exposure for 6 hours at 90 decibels
T1 = 8 hours noise exposure permitted by Table in 30 C.F.R. 56.5-50(a) at 90 decibels
C2 = exposure for 1 hour at 100 decibels
T2 = 2 hours noise exposure permitted by Table at 100 decibels
Cn = exposure for 1 hour at 105 decibels
Tn = 1 hour noise exposure permitted by Table at 105 decibels.

"The result in this example is 2.25 or 225% which exceeds a unity and that would be considered a violation of 30 C.F.R. 56.5-50(a) because it exceeded the permissible exposure according to the provision in the note part of this standard. Even though in this example the individual noise levels are permissible (6 hours at 90 decibels, 1 hour at 100 decibels, and 1 hour at 105 decibels) their combined effect would result in a violation of the standard. Since the sound level meter records individual periods of noise level, a dosimeter is always used for practical purposes in situations where the daily noise exposure is composed of two or more periods of noise exposure at different levels as is shown in this example, and as is the situation in the instant case." [Emphasis in original.]

~FOOTNOTE_EIGHT
8 Section 4 of the 1969 Act, which was substantially unchanged by the 1977 Amendments Act, provided: "Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine shall be subject to the provisions of this Act." Section 3(b) of the 1969 Act, which was not amended by the 1977 Amendments Act, defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof." It is clear that in enacting mine safety legislation, Congress intended "to exercise its authority to regulate interstate commerce to "the maximum extent feasible through legislation'." Secretary of the Interior v. Shingara, 418 F. Supp. 693, 694 (M.D. Pa. 1976), quoting S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966), reprinted in (1966) U.S. Code Cong. & Ad. News 2072.

~FOOTNOTE_NINE
9 It should be noted that Mr. Mattson did testify that the

efficiency of the noise-measuring equipment could be affected by prolonged exposure to high temperatures. He stated that it was his practice to leave the equipment in the back seat of his car, but that he kept the windows rolled down when the weather was hot, and he took the equipment into his motel room with him at night when he was on the road if it was hot outside. He produced some notes which he received during a noise training course concerning the possible effect of heat on the instruments. Part of this material stated: "If the instrument is used for an extended period of time or is stored in ambient temperature above 100 degrees Fahrenheit, the battery should be removed to avoid corrosion effects of battery leakage." However, there was no firm testimony that the instruments which were used to establish this violation were exposed to excessive heat which may have affected their operation. Additionally, the training notes indicated that the primary danger from such heat was that the batteries in the instruments might leak. Apparently, this did not occur in the instant situation, since Mr. Mattson testified that he checked the batteries both before and after making the measurements which resulted in the issuance of the instant citation. Therefore, I do not find that the instruments were rendered inoperative by excessive heat prior to their use at Respondent's facility on June 12, 1980.