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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 80-349-M
A.O. No. 11-02666-05002

v.

Mine: North American Pit

NORTH AMERICAN SAND & GRAVEL
COMPANY, A CORPORATION,
RESPONDENT

DECISION

Appearances: Steven A. Walanka, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for
Petitioner;
Charles W. Barenfanger, Jr., Sandalia, Illinois, for
Respondent.

Before: Judge Melick

A hearing was conducted in this case on February 18, 1981,
in St. Louis, Missouri, following which I issued a bench
decision. That decision, which appears below with only
nonsubstantive changes, is affirmed at this time.

This case is before me upon the proposal for assessment
of civil penalty filed by the Secretary of Labor, Mine
Safety and Health Administration, under the provisions
of section 110(a) of the Federal Mine Safety and Health
Act of 1977, 30 U.S.C. 820(a). The proposal was
directed against the North American Sand & Gravel
Company for allegedly excessive noise levels under the
health standard at 30 C.F.R. 56.5-50. The issue
before me is whether North American violated the cited
regulation and, if so, the appropriate penalty to be
assessed for that violation.

The only citation before me in this case, No. 363033,
charged North American as follows:

The noise level around the operator of the 966-C
Caterpillar front-end loader, Serial

No. 766J1926, was exposed to [sic] 177 per cent of the permissible limit for noise on April 17, 1980, the day shift, for an 80-minute exposure. Feasible engineering or administrative controls were not being used to reduce the front-end loader operator's noise exposure to within those of the table in Section 56.5-50 (a) in order to eliminate the need for hearing protection.

The essential evidence is basically undisputed in this case and I find the testimony of Inspector Aubuchon to be completely credible. On April 17, 1980, in the course of a regular inspection at the North American Sand & Gravel mine, the inspector, following customary procedures in conducting a noise inspection, checked the batteries, calibrated, and cleared the Dupont dosimeter used in this case. I find that the dosimeter in fact calibrated to within accepted norms and, indeed, was registering slightly low so that the readings obtained therefrom were on the conservative side.

The inspector thereafter pinned the dosimeter to the collar of the front-end loader operator and told the operator to follow his normal work procedures. The results of the test are undisputed, that is, that the dosimeter read-out at the end of the 8-hour period was 177 percent of the permissible noise exposure. That is in excess of "unity" in the cited regulation and a prima facie case was therefore established.

The evidence shows that the front-end loader at issue had a history of noise problems and sound-suppressant material had therefore previously been installed. On the date of this test, however, a piece of that material, consisting of rubber matting, was missing from over the transmission. One of the loader operators apparently failed to replace the matting following maintenance. The loader operator here was wearing personal protection equipment in the form of ear muffs or plugs and it was the customary practice of the operator to always wear that equipment. I also note that there is no medical evidence in this case to indicate that any harm would come to an employee as a result of the noise exposure under these circumstances, or for that matter even over a long period of time when considering that the rubber matting was ordinarily in place and when it was in place, the noise exposure was within permissible limits.

I also find a very low level of negligence in this case. It appears that the violation was the direct result of an employee neglecting to replace a piece of noise-suppressing rubber matting after maintenance. Since the mine operator

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does have an obligation to see that excessive noise is suppressed I do consider this violation to have been partly due to its negligence.

The condition was certainly abated within a reasonable time. The rubber matting was installed the same day as the citation. It was of course always available, it was just not installed. I have certainly also considered, in reaching the amount of penalty, that this operator had only a nominal history of violations, that the business size is certainly very small, and that the penalty would certainly not affect the operator's ability to stay in business.

Under the circumstances, I consider this violation to be only a technical one and I would not assess more than a nominal penalty of \$5.

ORDER

The North American Sand & Gravel Company is hereby ORDERED to pay a penalty of \$5 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge