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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

TODILTO EXPLORATION AND DEVELOPMENT CORPORATION, CONTESTANT	NOTICE OF CONTEST
v.	DOCKET NO. CENT 79-91-RM
	Citation No. 151433 1/31/79
SECRETARY OF LABOR, MINE SAFETY HEALTH ADMINISTRATION (MSHA), RESPONDENT	MINE: Haystack Underground
SECRETARY OF LABOR, MINE SAFETY HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING
	DOCKET NO. CENT 79-310-M
v.	ASSESSMENT CONTROL NO. 29-01650-05003
TODILTO EXPLORATION AND DEVELOPMENT CORPORATION, RESPONDENT	MINE: Haystack Underground

DECISION

Appearances: U. Sidney Cornelius Esq.
Office of the Solicitor
United States Department of Labor
555 Griffin Square, Suite 501
Dallas, Texas 75202,
For the Petitioner

Mr. G. Warnock President
Todilto Exploration & Development Corporation
3810 Academy Parkway South N.E.
Albuquerque, New Mexico 87109
Pro Se

Before: Judge Jon D. Boltz

Contestant filed case No. CENT 79-91-RM in order to obtain review of the issuance of Citation No. 151433, which alleged a violation of 30 C.F.R. 57.5-50(b).(FOOTNOTE.1) Subsequently, in case No. CENT 79-310-M, the Secretary of

Labor filed a petition proposing an assessment of several penalties for violations alleged in Citation No. 151433 and Citation No. 151105, the latter citation alleging a violation of 57.9-69.(FOOTNOTE.2) The cases were consolidated for hearing in Albuquerque and the respondent Todilto Exploration and Development Corporation was represented pro se by its President, Mr. G. Warnock.

These cases were filed pursuant to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

At the conclusion of all the evidence the parties agreed to waive the filing of briefs and agreed to have a Decision rendered from the bench.

The bench Decision is as follows:

BENCH DECISION

I make the following findings:

1. I have jurisdiction over the parties and subject matter of these proceedings.

2. The inspectors who duly issued the citations and extensions thereof were authorized representatives of the Secretary.

3. The history of previous violations on the part of the respondent is not substantial or significant.

4. Proposed civil monetary penalties are appropriate to the size of the business of the operator.

5. The assessment of proposed penalties would not affect the operators ability to continue in business.

6. The operator demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violations.

Citation No. 151105

This citation issued May 9, 1979, alleges that there was no means to prevent wheel locking rims from creating a hazard to the person inflating tires with locking rims, in violation of 30 C.F.R. 57.9-69. During the course of the hearing, the respondent agreed to withdraw his objection to the citation since he agreed with the facts as alleged by the Secretary.

The Secretary proposed a reduction of penalty from $66.00 to $49.00 as being a proper settlement.

I find that the criteria set forth in section 110(i) of the Act are met, and I approve the settlement.

Citation No. 151433

The petitioner alleges a violation 30 C.F.R. 57.5-50(b), in that the drill operator in the 440 South drift was exposed to 2,634 percent of a permissible limit for an eight hour exposure to noise. Hearing protection was being worn. Petitioner also alleges that all feasible engineering or administrative controls were not being utilized to reduce this level in order to eliminate the need for hearing protection.

I find that the tests made by the inspector were properly conducted and the results were accurate. It is undisputed that miners who were operating the jackleg drills were using ear plugs with ear muffs over the ear plugs at the time that the citation was issued. The miners exposure to noise did exceed the sound levels permissible during an eight hour period of exposure. A dBA level exceeding 90 dBA is not permissible and the dBA level during the eight hour period of the inspection measured approximately 114 dBA based on the table utilized by the MSHA inspector. That being the case, feasible administrative or engineering controls are to be utilized as required by the regulation, and if such controls fail to reduce the exposure to within the permissible levels, personal protection equipment must be provided.

The feasible controls that could be utilized as testified to by both parties was that of a muffler installation on the jackleg drill. With the utilization of this device, the dBA level would be reduced to approximately 110 dBA to 113 dBA. The respondent stated that the dBA level would be approximately 114 dBA to 115 dBA with the muffler installation. In any event, regardless of the use of this device, which was the only type of administrative or engineering control introduced as part of the evidence, it would fail to reduce the exposure to within permissible levels, that being 90 dBA for an eight hour period. Thus, personal protection was required since there would be no other way that the dBA level could be reduced to the permissible level.

On closing argument, counsel for the Secretary stated that the utilization of feasible controls is a necessary step as far as the regulation is concerned. In order to establish a prima

facie case, the Secretary has shown in his case in chief that feasible controls were

available in that a muffler device could have been utilized on the jackleg drills. However, he has also shown that even with such controls the exposure to noise was not within permissible levels as required by the regulation. The reduction of noise exposure to a level of 110 dBA to 113 dBA by use of the muffler is a long way from the 90 dBA within an eight hour period required by the regulation.

Counsel for the Secretary also argues that there was no evidence that ear plugs and ear muffs reduced the noise to permissible levels. However, I note that on abatement the inspector was satisfied with this personal protection, even though the muffler used reduced the sound level from only one to four dBA.

Therefore, I conclude that the miner involved at the time of the inspection was exposed to unacceptable or impermissible noise; that no feasible controls were available to reduce the exposure to within permissible levels as set forth in 30 C.F.R. 57.5-50(b); and that the respondent in providing personal protection equipment, in this case, ear plugs and ear muffs which were not shown to be inadequate, was in compliance with the regulation.

Citation No. 151433 is vacated.

ORDER

The foregoing bench Decision is affirmed and respondent is ordered to pay a civil penalty of $49.00 within 30 days from the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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~FOOTNOTE_ONE
[Mandatory.] (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
57.9-69 Mandatory. Tires shall be deflated before repairs on them are started and adequate means shall be provided to prevent wheel locking rims from creating a hazard during tire inflation.