FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE. SUITE 400
DENVER. COLORADO 80204

AUG 17 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. JOHNSON, STEWART & JOHNSON MINING COMPANY, INC., Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-175-M A/C No. 02-00664-05002 MINE: Pit No. 1

Appearances:

Marshall P. Salzman, Esq.
Office of the Solicitor
United States Department of Labor
450 Golden Gate Avenue, Box 36017
San Francisco, California 94102
For the Petitioner

Kay H. Wilkins, Esq.
Corporate Counsel
Johnson-Stewart-Johnson Mining Company, Inc.
1635 N. Alma School Road
Mesa, Arizona 85201
For the Respondent

Before: Judge Jon D. Boltz

DECISION

The Mine Safety and Health Administration, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act"), 30 U.S.C. § 820(a), petitions for assessment of civil penalties against the respondent for alleged violations of regulations, as more fully set forth in three citations.

At the conclusion of all of the evidence, the parties agreed to waive the filing of post hearing briefs and have a decision rendered from the bench after closing arguments.

BENCH DECISION

The parties agree as follows:

1. The Act grants the undersigned jurisdiction over the parties and subject matter of these proceedings.

2. The respondent is a moderately sized company with a moderate history of previous violations.

3. The penalties proposed are appropriate to the size of the business and the imposition thereof will not impair respondent's ability to remain in business.

4. The citations were in fact issued on the date indicated on the citations, July 12, 1978.

CITATION 377977

The petitioner alleges a violation of 30 C.F.R. 56.5-50(b).[1]/ The evidence shows, and I find, that the pit crusher operator was exposed to approximately 200% of the permissible noise exposure based on the tables that were placed in evidence by counsel for the petitioner. The dosimeter utilized measured noise levels above 90 dBA and the sampling of the pit crusher operator took place for a continuous period of 445 minutes. It is undisputed that the noise exposure did exceed permissible limits.

The question, then, is whether or not feasible engineering or administrative controls were being utilized to reduce the exposure. In this case, the only action necessary was to move the pit crusher operator away from the crusher a distance farther than that which he had been standing during the course of his exposure. It is undisputed that this could have been done by the operator and that the noise exposure would then have been within permissible limits. Accordingly, I find that feasible controls were not being utilized. I also find that the respondent demonstrated good faith in achieving rapid compliance after notification of the violation.

The citation is affirmed and the penalty assessed will be $20.00.

CITATION 377978

The petitioner alleges a violation of the same regulation as in the previous citation. In the Bench Decision, I stated that this citation should be vacated. However, on subsequent review of the transcript, I find that the citation should be affirmed.

A pit laborer was sampled for noise exposure for a period of 445 minutes. It is undisputed in the evidence presented that the pit laborer was exposed to 158% of the permissible noise level for this period of time, or 94 dBA. The permissible level is 90 dBA. Personal hearing protection was being worn. Since the employee's exposure exceeded that level listed in the table set forth in the regulations, the question again arises as

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1/ [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.

to what, if any, feasible administrative or engineering controls should have been utilized by the respondent.

The petitioner introduced evidence as to the feasible controls that could have been utilized. One control consisted of an effort to ascertain the sources of greatest noise, so that steps could be taken to remove the need for the employee to be at those sources. The MSHA inspector testified that he suspected that the overexposure of the laborer occurred when he had to work directly under an operating crusher in order to clean up a spill from the conveyor. The spill occurred because the skirting was loose on the collection box under the conveyor. If the skirting had been properly secured there would have been no spill and, thus, there would have been no need for the laborer to be in that location close to the extremely noisy crusher. The inspector also testified that the respondent could have used a noise meter to "go out around the plant and sample".

The respondent had the burden of going forward with evidence to show that feasible controls would have failed to reduce the exposure to within permissible levels and, thus, that personal protect ion equipment was properly provided for the pit laborer in order to reduce the sound levels to within levels prescribed by the table. On review of the transcript, I find that there was no evidence presented by the. respondent to show that any feasible administrative or engineering controls utilized would have failed to reduce the exposure to within permissible levels. Having failed to present evidence on this point, the citation must be affirmed as a matter of law. The penalty assessed is $20.00.

CITATION 377980

Petitioner alleges a violation of 30 C.F.R. 56.5-5.[2]/ A pit laborer, who was sampled for dust exposure during a period of 445 minutes, was exposed to silica bearing dust in the amount of .92 milligrams per cubic meter. According to the threshold limit value adopted by the regulations, .42 milligrams per cubic meter should not have been exceeded. It is also undisputed that it was feasible to reduce these harmful airborne contaminants by use of water incorporated in the plant's spray system.

The respondent's witness testified that the spray system was on the crusher equipment, but because the plant had recently been moved the water system had not yet been connected to the main source of water supply.

2/ Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust vent ilat ion, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of the work involved .... 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 . . . .

The witness also testified that production was started before hooking up the water devices. If the installation had been completed before product ion was commenced, the pit laborer would not have been exposed to harmful airborne contaminants in excess of the threshold limit value prescribed by the regulation. Thus, this citation is affirmed and the penalty assessed is $10.00.

ORDER

The foregoing Bench Decision with regard to Citations 377977 and 377980 is affirmed and Citation 377978 is hereby affirmed. The respondent is ordered to pay a civil penalty of $50.00 within 30 days of the date of this Decision.

Jon D. Boltz
Administrat ive Law Judge

Distribution:

Marshall P. Salzman, Esq.
Office of the Solicitor
United States Department of Labor
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