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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. WEST 80-69-M
v.	A/C No. 02-01915-05003
SUN LANDSCAPING AND SUPPLY COMPANY, RESPONDENT	MINE: White Marble

DECISION

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
W. T. Elsing Esq.
34 West Monroe, Suite 202
Phoenix, Arizona 85003,
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

The Petitioner filed a petition for assessment of proposed civil penalties against the Respondent for alleged violations on April 4, 1979, of regulations promulgated by authority of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act"). The Respondent denied that the White Marble Mine operation was subject to the jurisdiction of the Act and alleged that the operation was terminated before it ever got into production.

FINDINGS OF FACT

1. Respondent's business is a small operation.

2. The imposition of the proposed penalties would not affect respondent's ability to remain in business.

3. Respondent has no history of prior violations.

4. The two citations at issue were duly served on April 4, 1979, by an MSHA inspector who was an authorized representative of the Secretary of Labor.

5. Respondent's operation consisted of blasting white marble in the pit area and hauling the material to the main highway in order to transport it to the crusher and screening plant. There, the material was processed and laid in stock piles awaiting shipment to Phoenix by truck.

6. On the date of the inspection, April 4, 1979, the MSHA inspector observed crushed white marble material in piles of up to 15 tons each.

7. Sometime after the inspection on April 4, 1979, the Respondent moved its operation to a different location in Arizona.

8. Some of the equipment purchased by the Respondent for use in its business operation was manufactured outside the State of Arizona. Specifically, the Caterpillar loader, drill and compressor were produced or manufactured in Illinois.

JURISDICTION

The act of setting up Respondent's business, including the processing of the marble into stock piles for sale, and the purchase of the equipment as described in the Findings of Fact, affects commerce. It has previously been held in a case involving this same Respondent that the setting up of mining facilities with the intent to mine marble, crush it, and sell it in the future affects commerce and, thus, places the operator under jurisdiction of the Act. Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Sun Landscaping and Supply Company, 2 FMSHRC 975 (1980).

In the instant case, there were no facts presented by the Respondent upon which a different conclusion could be reached. Accordingly, I find that Respondent's mining operation was subject to the jurisdiction of the Act.

CITATION NO. 381381

Petitioner alleges that the operator of the Caterpillar bulldozer was exposed to 206% of the permissible noise level and that feasible engineering or administrative controls were not being used to reduce this level in order to eliminate the need for hearing protection, in violation of 30 C.F.R.55.5-50(b). (FOOTNOTE.1) The bulldozer operator was wearing personal hearing protection.

The evidence is undisputed that, during a sampling time of 360 minutes, the bulldozer operator was exposed to 206% of the permissible noise exposure or 97 dBA. The maximum permissible noise exposure for 360 minutes is 92 dBA, according to the cited regulation. Therefore, feasible administrative or engineering controls must be utilized to reduce the exposure to within permissible levels. If these controls fail to reduce the noise exposure to within permissible levels, personal protection equipment shall then be used.

The Petitioner introduced evidence as to feasible engineering or administrative controls. These controls included installation of a windshield at a cost of between $50.00 and $150.00. The MSHA inspector testified that the windshield alone would have been sufficient to reduce the noise exposure to within acceptable limits.

The burden of going forward with evidence showing that the utilization of feasible controls would not reduce the exposure to within permissible levels then shifted to the Respondent. The President of Respondent corporation testified that it would cost several thousand dollars to construct a frame for the windshield and that the glass alone would cost in excess of $400.00. In addition, the bulldozer would be out of operation two to four days for the installation, and the value of the dozer was $100.00 per hour. He concluded that "by adhering to the regulation [the cost] would have been in the thousands of dollars, not hundreds."

I find the evidence of the Petitioner to be more credible and convincing than that of the Respondent in regard to evidence concerning feasible controls. On rebuttable, the MSHA inspector testified that it had been his experience that the windshield could have been installed for $150.00. Even if the installation were to cost three times that amount, it was a feasible control and a long way from "thousands of dollars."

I therefore conclude that the citation should be affirmed.

CITATION NO. 381382

Again, alleging a violation of 30 C.F.R. 55.5-50(b), the Petitioner states that the drill operator was exposed to 332% of the permissible noise exposure and that feasible engineering or administrative controls were not being utilized to reduce this level in order to eliminate the need for personal hearing protection.

The evidence is undisputed as to the noise exposure recorded by the dosimeter during the 360 minute sampling period. According to the chart received into evidence, this exposure amounted to 100 dBA. 92 dBA is the maximum permissible noise exposure level. Therefore, the issue is whether or not feasible administrative or engineering controls were being utilized to reduce the exposure to within permissible levels. The drill operator was wearing personal hearing protection.

The Petitioner introduced evidence that a muffler system could have been utilized. The manufactured cost would be $550.00 and a "prefab" one would cost $150.00 to $350.00. At the time of the inspection, an MSHA inspector discussed with Respondent's employee both sound proofing with shields and a "homemade" muffler system.

The Respondent failed to go forward with any evidence that feasible controls had been utilized or that such controls would not reduce exposure to within permissible noise levels. The only testimony offered was hearsay evidence that the earplugs and earmuffs were approved by a State mine inspector and were also recommended to the President of Respondent corporation by his "eye, ear, and nose doctor" as being sanitary and helpful. Under these circumstances, the Petitioner has proven his case to a preponderance of the evidence and is entitled to a favorable decision on his petition. Accordingly, the citation should be affirmed.

Considering the factors set forth in section 110(i) of the Act in regard to both citations, I find that the amount of penalty assessed should be the amount prayed for in the petition.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of these proceedings.

2. The Petitioner has proven, by preponderance of the evidence, two violations of 30 C.F.R. 55.5-50(b), as alleged in Citation Nos. 381381 and 381382.

ORDER

Citation Nos. 381381 and 381382 are affirmed and the penalties assessed are $28.00 each. Respondent is ordered to pay total civil penalties in the sum of $56.00 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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~FOOTNOTE_ONE

[Mandatory.] 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 levels of the table.