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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. DENV 79-371-PM
v.	A/C No. 10-00634-05003
WASHINGTON CONSTRUCTION COMPANY, RESPONDENT	MINE: Monsanto Quartzite Quarry

BENCH DECISION AND ORDER

Appearances: Robert A. Friel Esq.
Office of the Solicitor
United States Department of Labor
8003 Federal Office Building
Seattle, Washington 98174,
For the Petitioner

James A. Brouellette
EEO/Safety Officer
Washington Corporations
500 Taylor
P.O. Box 8989
Missoula, Montana 59807,
For the Respondent

Before: Judge Jon D. Boltz

This proceeding is brought by the Petitioner, Secretary of Labor, Mine Safety and Health Administration (MSHA), on a petition for assessment of civil penalties against the Respondent for alleged violations of a regulation promulgated by authority of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act").

At the conclusion of the hearing, the parties agreed to waive the filing of post hearing briefs and agreed that a Bench Decision could be issued.

I make the following findings of fact:

1. The Respondent has no significant history of previous violations.

2. The Respondent is a moderate sized operator.

3. The payment of the proposed penalties will not affect the Respondent's ability to continue in business.

4. The Respondent demonstrated good faith in achieving rapid compliance after notification of the violations.

5. The MSHA inspector who issued and served the citations involved was a duly authorized representative of the Secretary.

6. The Respondent's products enter commerce and the mine involved is subject to the jurisdiction of the Act.

The citations at issue, Nos. 345023, 345024, and 345025, were dated July 12, 1978, and were subsequently served on the Respondent. Each citation alleges a violation of 30 C.F.R. 56.5-5.(FOOTNOTE.1) The Respondent contends that the citations should be dismissed because of the long time between their issuance and this hearing on August 6, 1981. The records in the file disclose that the Secretary filed a petition within the time prescribed by the regulations and, although it did take possibly an unusual length of time before a hearing could be scheduled, there is no showing that the Respondent's case was prejudiced. Mr. Brouelette stated during the course of the hearing that he had testified as to all of the facts that individuals who are no longer with the Respondent company would have testified to had they been present. Mr. Brouelette also stated that the Secretary had lost pleadings filed in response to the petition filed by the Petitioner. In this regard, I should point out that a procedural rule of the Commission requires that responsive pleadings be filed with the Commission and not with the Secretary. Accordingly, I find that there is no merit in Respondent's contention.

The evidence is undisputed that the results of the sampling of three miners in regard to airborne contaminants revealed that they were subjected to harmful exposure based upon threshold limit values duly adopted in accordance with the regulation. The employee referred to in Citation No. 345023 received approximately ten times the allowable amount. In Citation No. 345024, the employee received approximately six times the allowable amount. In Citation No. 345025, the employee received approximately three times the allowable amount. Thus, there was a violation of the regulation cited unless it is shown that the regulation would allow the use of respirators. It is undisputed that the miners involved were using respirators or that respondent issued respirators for their use.

The Petitioner presented evidence that it would have been feasible to lower the amount of silica in the air by use of water-spraying nozzles installed on hoses. The Respondent claimed that it did not have sufficient water pressure for that purpose. However, after completion of its mining season, Respondent did in the Spring of 1979 dig its well 65 feet deeper and install a submersible pump and other equipment which ultimately reduced the airborne contaminants to an acceptable level. The evidence shows that accepted engineering control measures could have been applied in order to control the amount of airborne contaminants, thus, allowing the Respondent to be in compliance with the regulation without the use of respirators.

Respondent also contends that it was not convenient to shut down the operation to make the needed engineering changes until the completion of the mining season in October 1978. However, as long as there are accepted engineering control measures available which when utilized will alleviate the problem as shown in this case, a violation of the regulation is necessarily proven, and the Petitioner has established a prima facie case.

I find that the Petitioner has proven by a preponderance of the evidence that the three citations should be affirmed. The penalties are assessed in amounts of $30.00, $30.00 and $24.00 for Citation Nos. 345023, 345024 and 345025, respectively, as prayed for in the petition.

ORDER

The foregoing Bench Decision is affirmed and the Respondent is ordered to pay a total civil penalty of $84.00 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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~FOOTNOTE_ONE

Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where excepted engineering control measures have not been developed %... employees may work for reasonable periods of time in concentration of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment%....