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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. CENT 80-388-M A/O No. 34-00033-05003
v.	
THE QUAPAW COMPANY, RESPONDENT	Badger Mine

DECISION

ppearances: Ron Howell, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
W. L. Childress, President, The Quapaw Company, Dumright, Oklahoma, for the Respondent.

Before: Judge Stewart

I. Procedural Background

On February 6, 1981, the Secretary of Labor (Petitioner) filed a complaint proposing penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (Act), charging The Quapaw Company (Respondent) with one violation of mandatory standard 30 C.F.R. 56.5-50(a). On March 26, 1981, the Respondent filed an answer to the complaint in response to an order to show cause issued by Chief Administrative Law Judge James A. Broderick on March 16, 1981. Subsequent thereto, a notice of hearing was issued.

The hearing was held in Oklahoma City, Oklahoma, with representatives of both parties present and participating. The Petitioner called one witness, Federal mine inspector Millard Smith. The Respondent was represented by Mr. W. L. Childress, the company president, who took the stand and testified as a witness for the Respondent.

Following the presentation of the evidence, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, neither party filed a posthearing brief or proposed findings of fact and conclusions of law.

II. Opinion

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of mandatory standard 30 C.F.R. 56.5-50(a) occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation. Section 110(i) of the Act.

Federal mine inspector Millard Smith issued Citation No. 167396 during the course of his April 1, 1980, inspection of the Respondent's Badger Mine (Exh. P-2; Tr. 5, 19).(FOOTNOTE.1) The citation charges the Respondent with a violation of mandatory standard 30 C.F.R. 56.5-50(a)(FOOTNOTE.2) in that "[t]he 988 Cat loader, S/N 87A6382, was exposed to noise at the level of 157.9%. The maximum permissible limit at any time is 100%. Hearing protection was not being worn" (Exh. P-2).

As relates to the fact of violation, the record discloses that the inspector arrived at the mine early enough to obtain an 8-hour noise exposure reading for each of the four employees to whom he attached dosimeters. He calibrated the dosimeters prior to attaching them to the four individuals, and obtained an 8-hour noise exposure reading for each of the four (Tr. 6-7). The results of the survey disclosed that the operator of the Model No. 988 Caterpillar loader was overexposed to noise in that the exposure meter on the the dosimeter read between 157 and 158 percent (Tr. 7-9, 11). Of the four employees sampled, only the loader operator was overexposed to noise (Tr. 7). The inspector then performed some calculations which disclosed that the loader operator had been exposed to noise rated at more than 92 dBA but less than 93 dBA during the 8-hour sampling period (Tr. 8-9, 19-21). (FOOTNOTE.3) The inspector also noted that hearing protection was not being worn (Exh. P-2).(FOOTNOTE.4)

Mandatory standard 30 C.F.R. 56.5-50(a) provides, in part, that no employee shall be permitted an exposure to noise in excess of 90 dBA during an 8-hour period. The results of the April 1, 1980, noise survey disclosed that the loader operator was exposed to noise rated at more than 92 dBA but less than 93 dBA during the 8-hour sampling period. Even allowing for the 1 dBA margin of error (see footnote 3, supra), it is clear that the loader operator was exposed to noise in excess of 90 dBA during the 8-hour sampling period. Accordingly, it is found that a violation of mandatory standard 30 C.F.R. 56.5-50(a) has been proved by a preponderance of the evidence.

As relates to the gravity of the violation, the standard is designed primarily to afford protection against a partial or total loss of hearing as a result of exposure to excessive noise over a period of time (see, e.g., Tr. 9-10).(FOOTNOTE.5) Any eventual loss of hearing occasioned by overexposure to noise could reasonably be expected to be permanent (Tr. 9-10).

Applying the 1 dBA margin of error (see footnote 3, supra), the record discloses that the loader operator was exposed to greater than 1 dBA but less than 2 dBA in excess of the allowable exposure during the 8-hour sampling period. Although the inspector testified that he felt the violation was "serious enough" (Tr. 24), he also gave testimony which indicated that the overexposure was not great (Tr. 24). In view of all of the circumstances, it is found that the violation was nonserious and that the gravity was of a moderate nature.(FOOTNOTE.6)

In order to establish that the Respondent demonstrated negligence in connection with the violation, the Petitioner must prove by a preponderance of the evidence that the Respondent either knew or should have known of the violative condition. When asked whether he believed that the mine operator either knew or should have known of the violative condition, the inspector testified that it was "pretty hard to say" that the mine operator knew because he did not believe that a noise inspection had ever been performed on the

cited loader by the Mine Safety and Health Administration. He also testified that it is rather difficult to detect the difference between 90 and 92 dBA by listening to the equipment because (1) the noise survey measurements are made over an 8-hour period; (2) the difference between 90 dBA and 92 dBA is not very great; and (3) the type of sound involved is a variable which must be taken into account (Tr. 24).

Mr. Childress testified that the Respondent had "no way to know about the noise level" (Tr. 27). He also testified that the Respondent purchased the equipment new in the late 1960's or early 1970's, that the loader was exactly the way it was when it came from the factory, and that it had a good muffler, a cab, doors, and glass (Tr. 27, 29). It should be noted, however, that the windows and doors were open at the time of the inspection (Tr. 23).

In view of the foregoing circumstances, it is found that the Petitioner has failed to prove operator negligence by a preponderance of the evidence.(FOOTNOTE.7)

The inspector testified that the Respondent was cooperative (Tr. 14) and that the Respondent demonstrated good faith in abating the violation (Tr. 23). Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement of the violation.

The evidence presented shows that the size of the Badger Mine was rated at approximately 69,938 man-hours in 1977, 69,089 man-hours in 1978, 57,902 man-hours in 1979, and 15,509 man-hours as of the first 3 months of 1980 (Exh. P-1; Tr. 18). The inspector testified that the facility-was a medium size mine for the state of Oklahoma, but indicated that the mine would be classified as small when compared to mine operations throughout the country (Tr. 19). Mr. Childress testified that, as of the date of the hearing, the mine was no longer operational because it had been shut down and the equipment sold (Tr. 29). He also testified that another mine was opened but that it too had been shut down and all of its equipment sold (Tr. 30). The Respondent operated two mines as of the date of the hearing, one a quarry and the other a sand pit. The Respondent operates the sand pit only approximately 1 day per month and the sand extracted is for the Respondent's own use (Tr. 30-31). In view of the foregoing, it is found that the Respondent is a small operator.

The evidence presented as to the Respondent's history of previous violations shows that the Respondent has no history of violations prior to November 1978. The Respondent was cited for a total of 19 violations from November 1978 through December 1980, and paid assessments for 18 of those cited violations. The 19th violation cited, i.e., the one for which no assessment has been paid, is the violation which is the subject matter of this proceeding. Of the 18 violations for which assessments have been paid, 12 occurred prior to April 1, 1980.

It is well settled that paid assessments are the only assessments properly included in a mine operator's history of previous violations. See Peggs Run Coal Company, Inc., 6 IBMA 212, 83 I.D. 245, 1976-1977 CCH OSHD par. 20,839 (1976); Peggs Run Coal Company, Inc., 5 IBMA 144, 148-150, 82 I.D. 445, 1 BNA MSHC 1343, 1975-1976 CCH OSHD par. 20,001 (1975); Old Ben Coal Company, 4 IBMA 198, 217-218, 82 I.D. 264, 1 BNA MSHC 1279, 1974-1975 CCH OSHD par. 19,723 (1975); Corporation of the Presiding Bishop, Church of Jesus Christ of Latter Day Saints, 2 IBMA 285, 80 I.D. 633, 1973-1974 CCH OSHD par. 16,913 (1973); Valley Camp Coal Company, 1 IBMA 196, 203-204, 79 I.D. 625, 1 BNA MSHC 1043, 1971-1973 CCH OSHD par. 15,385 (1972). Additionally, only those paid assessments for violations charged prior to the one in issue may be properly considered in determining a mine operator's history of previous violations. See Peggs Run Coal Company, Inc., 5 IBMA 144, 82 I.D. 445, 1 BNA MSHC 1343, 1975-1976 CCH OSHD par. 20,001 (1975). Accordingly, I conclude that the Respondent has a history of 12 previous violations which are cognizable in this proceeding. I further conclude that the Respondent's history of previous violations is good.

The Respondent did not introduce in evidence any business or tax records to establish that the assessment of a civil penalty will impair its ability to remain in business. Hall Coal Company, 1 IBMA 175, 180, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972); see also Davis Coal Company, 2 FMSHRC 619, 1 BNA MSHC 2305, 1980 CCH OSHD par. 24,291 (1980). It should be noted that the Respondent was specifically accorded the opportunity to present evidence on this point, but that the Respondent declined to do so (Tr. 29-30). Mr. Childress did testify that the Respondent has assets (Tr. 30).

In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972), the Federal Mine Safety and Health Review Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Therefore, I find that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to remain in business.

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that

the assessment of a $25

~2843
civil penalty is warranted for the April 1, 1980, violation of mandatory standard 30 C.F.R. 56.5-50(a) set forth in Citation No. 167396.

ORDER

Accordingly, IT IS ORDERED that the Respondent pay a civil penalty in the amount of $25 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

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~FOOTNOTE_ONE

The Badger Mine was an open-pit limestone mine and related milling operation (Tr. 6).

~FOOTNOTE_TWO

Mandatory standard 30 C.F.R. 56.5-50(a) provides as follows:

"No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters,' approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc. 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

"NOTE: When the daily noise exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

If the sum

(C1/T1)á(C2/T2)á... (Cn/Tn)

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure. Gn indicates the total time of exposure at a specified noise level, and Tn indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

"Log T=6.322-0.0602 SL

Where T is the time in hours and SL is the sound level in dBA."

~FOOTNOTE_THREE
It appears that the calculations must reveal that the individual has been exposed to more than 91 dBA during an 8-hour sampling period before a citation will be issued on the basis of noise exposure exceeding 90 dBA for an 8-hour period. The inspector testified that both the manufacturer of the dosimeter and the U.S. Department of Labor allow 1 dBA as an error factor for the equipment (Tr. 7, 20, 22).

~FOOTNOTE_FOUR
The use or absence of personal hearing protection on the facts of this case is immaterial to the determination as to whether a violation occurred. Mandatory standard 30 C.F.R. 56.5-50(b) provides that:

"When employees' exposure exceeds that listed in the [table set forth in 30 C.F.R. 56.5-50(a)], 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."

Thus, the law authorizes the use of personal protection equipment as a means of achieving compliance with 30 C.F.R. 56.5-50(a) only if feasible administrative or engineering controls fail to reduce noise exposure to within permissible levels. The evidence presented in this case clearly shows that feasible administrative or engineering controls existed which could have been utilized by the Respondent to reduce noise exposure to within permissible levels.

Inspector Smith testified that such controls existed in the form of lining the cab with insulation and/or relocating the muffler and exhaust system (Tr. 11-12). In fact, the Respondent abated the citation by relocating the muffler and by running the exhaust pipe approximately 4 to 5 feet farther from the equipment operator's cab. The actions taken to abate the citation achieved compliance with the standard (Tr. 12).

~FOOTNOTE_FIVE
In this regard, it should be noted that the standard prohibits exposure to greater than 115 dBA.

~FOOTNOTE_SIX

Although it is not determinative of the gravity issue, it should be noted that earplugs had been issued to the loader operator. Mr. Childress gave testimony which seemed to indicate either that the loader operator simply was not wearing the earplugs or that he had lost the earplugs and had not sought replacements from the Respondent. The Respondent has issued earplugs to its employees several times and always keeps replacements available (Tr. 28).

~FOOTNOTE_SEVEN

The inspector recorded on his inspector's statement that the loader operator led him "to believe that he had complained to management about excess noise on this particular machine" (Exh. P-2). However, the inspector never gave testimony on this point so as to explain the foundation for this belief, and the Petitioner did not prove that the loader operator had in fact complained to the Respondent concerning excessive noise. The statement appearing on the inspector's statement is not considered reliable evidence that such a complaint had been lodged with the Respondent, and cannot form the basis for a finding that the Respondent knew or should have known of the violative condition.