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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 86-6-M
A.C. No. 29-01936-05503

v.

Sundt Crusher

M.M. SUNDT CONSTRUCTION
COMPANY,
RESPONDENT

DECISION AFTER REMAND

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
Petitioner; Brian Murphy, Loss Control Manager,
M.M. Sundt Construction Company, Tucson, Arizona,
pro se.

Before: Judge Morris

On September 15, 1986, the Federal Mine Safety and Health
Review Commission remanded the captioned case and directed that
the judge give respondent an opportunity to explain its failure
to comply with a prehearing order that resulted in a default.

Such an opportunity was afforded and respondent filed
various documents supporting its request for a hearing. Inasmuch
as the Commission has indicated that a default is a harsh remedy
the judge granted respondent's request and set the case for a
hearing on the merits.

The hearing took place in Albuquerque, New Mexico on January
21, 1987. The parties waived their right to file post-trial
briefs.

Issues

The issues presented are whether the violations occurred; if
so, what penalties are appropriate.

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Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. M.M. Sundt is the owner and operator of the mine.
2. Respondent is subject to the Act.
3. The Federal Mine Safety and Health Review Commission has jurisdiction.
4. The inspector was a duly authorized representative of the Secretary.
5. A true and correct copy of the citations were served on the operator.
6. The penalties will not affect the operator's ability to continue in business.
7. Respondent abated in good faith.
8. The operator has a good history with only two prior violations.
9. The operator should be considered a large company since it is one of the top 400 contractors in the country.
10. Respondent's employees were wearing ear plugs and respirators on the day of the inspection (Tr. 4).

Citation 2091027

This citation alleges respondent violated 30 C.F.R. 56.5050(b). The regulation provides in part as follows:

56.5050 Exposure limits for noise

(a) 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

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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
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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.

(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.

Summary of the Evidence

Petitioner's Evidence

MSHA Inspector Archie Fuller testified as to both citations. He indicated that a dosimeter records noise levels in excess of 90 dBA. The level appears in a digital display (Tr. 26, Ex PÄ9). He also discussed a typical dosimeter test to calibration (Tr. 27).

Employee Steve Morrison, a crusher laborer, was exposed to excessive noise caused by the cone crusher, the belt transfer, jaw crusher and generator (Tr. 28, 29). Morrison was working in and around this equipment (Tr. 29). Morrison was tested for about eight hours (Tr. 30). Two other employees were not overexposed. The crusher operator was protected by an insulated booth. The oiler was exposed to 97.4 dBA (Tr. 50).

The inspector also uses an instrument that records an instant sound level readout (Tr. 30). The instant readout of the large equipment ranged from 92 to 98 dBA.

The dosimeter on Morrison indicated a readout of 139 percent or approximately 92.5 dBA (Tr. 31). Anything reading over 90 dBA constitutes overexposure.

Excessive noise can cause loss of hearing.

The inspector recommended that the employee clean the area when the crusher was shut down (Tr. 33).

Three workers were monitored for noise but only Steve Morrison was overexposed (Tr. 41).

Cleaning around equipment is a continuous activity. A dosimeter does not get in the worker's ear (Tr. 46).

Respondent's Evidence

Bryan Hoyt Murphy testified he has been the loss control manager for Sundt Corporation for 14 years. The company has a number of plants around the United States (Tr. 53, 54).

Concerning the noise levels, the company had no proof that the inspector's equipment was improperly calibrated. Further, the company had insufficient manpower to rotate its workers. In addition, the employees were protected by personal protective equipment; i.e., foam earplugs. If properly put in the ears, a 10 to 18 dBA attenuation could be expected (Tr. 58).

Except for mufflers already installed, there are no other engineering controls that could reduce the noise level (Tr. 59).

Evaluation of the Evidence

The Secretary's evidence establishes a violation of the noise regulation. Employee Morrison was exposed to a noise level in excess of the permissible limit.

Respondent did not rebut the Secretary's evidence but relies on the fact that the worker was wearing foam earplugs. It is claimed that such earplugs reduce the noise level.

I reject respondent's argument. Even though the earplugs may reduce the noise level, the regulation requires the use of feasible administrative or engineering controls. The fact that only one of two miners in the area was exposed indicates that administrative rotation controls were readily available. Cf. Jet Asphalt and Rock Company, Inc., 3 FMSHRC 940 (1981); Callanan Industries, Inc., 5 FMSHRC 1900 (1983).

The citation should be affirmed.

Civil Penalty

The statutory criteria to assess civil penalties is contained in 30 U.S.C. 820(i). Most of the statutory criteria has been addressed by the stipulation of the parties. Concerning the remaining elements the gravity appears low since only exposure over a long period can effect a worker's hearing. The operator's negligence must also be considered as low because it believed its workers were protected by earplugs.

On balance I believe the \$20 civil penalty, as proposed by the Secretary, is appropriate.

Citation 2091028

This citation alleges respondent violated 30 C.F.R. 56.5001(a) which provides as follows:

56.5001 Exposure limits for Airborne Contaminants.

Except as permitted by 56.5005 - (a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1

through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental Industrial Hygienists by writing to the Secretary-Treasurer, P.O. Box 1937, Cincinnati, Ohio 45201, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

Summary of the Evidence

Archie Fuller, an MSHA mining inspector for nine years, has been trained regarding silica (Tr. 9-14).

Inspector Fuller calibrated the dust pump the day before his inspection (Tr. 15). The witness further explained the methodology used in taking a dust sample (Tr. 16-21, Ex P-7). The result in an 8-hour sampling indicated an employee was exposed to a .88 shift weighted average of silica. The threshold limit value (TLV) is .34 (Tr. 19, 21). Three samples were taken. One was voided, one was not in violation and one analysis caused the issuance of Citation 2091028 (Tr. 20, 48).

MSHA is concerned about silica because of the hazard of silicosis, a lung disease. Silica will reduce the elasticity in a person's lungs (Tr. 22, 23).

Employee Jim Blackwell, who maintains and greases moving parts on the crusher and conveyors, was the employee who was exposed (Tr. 23, 25). The employee would not have been exposed if he had performed the function when the crusher was shut down. In addition, he could have been rotated with another employee (Tr. 25). Further, the sprinklers which were frozen could have been fixed (Tr. 25, Ex R-11).

In cross-examination the inspector indicated he calibrated the dust sampler at the MSHA field office in Grants, New Mexico. The altitude at that location is about 6200 feet as compared with 5300 at the work site (Tr. 34). The inspector felt the difference in altitude would not affect the result "that much." The sampling pump was a Bendix Micronair (Tr. 35, 51). The pump is not calibrated at the factory (Tr. 36).

On the day of the inspection the temperatures in Bloomfield were never higher than 37 degrees, with a low of about 30 (Tr. 36, 37). The inspector considered the water sprays to be engineering controls (Tr. 37).

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Blackwell was sampled outside the respirator and he was exposed to silica-bearing dust, especially if his respirator had a leak in it, was improperly fit, slipped down, or if he took it off (Tr. 39, 40). If the respirator was tight-fitting he wasn't exposed (Tr. 41).

Blackwell's respirator was MSHA, OSHA and NIOSH approved (Tr. 39, 40).

Concerning the dust citation, Brian Murphy, respondent's witness, indicated the engineering controls were shut down the day the citation was issued. In addition, the company did not have a sufficient number of workers on the site to rotate them (Tr. 54).

Mr. Murphy attempted to obtain information as to the extent a 900 foot difference in elevation would affect the test equipment. However, the National Safety Council and NIOSH could not give a definitive calculation (Tr. 55).

The worksite was at 5000 feet and the pump was calibrated at 6000 feet. At the higher altitude the pump would be drawing more air (Tr. 56).

Evaluation of the Evidence

As a threshold matter it is apparent that the pump was calibrated for 6000 feet and the worksite was 900 feet lower. The inspector agreed that this could cause some difference. In short, I agree with respondent's witness that the calibration at 6000 feet would cause the pump to draw more air when used at the lower elevation. This could readily overload the sampling. In addition, one cassette was voided and a third did not establish a violation.

On balance, I conclude that the Secretary did not sustain his burden of proof.

For the foregoing reasons Citation 2091028, and all penalties therefore, should be vacated.

Conclusions of Law

Based on the entire record and the factual finding made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent violated 30 C.F.R. 56.5050(b) and Citation 2091027 should be affirmed.

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3. Respondent did not violate 30 C.F.R. 56.5001(b) and Citation 2091028 should be vacated.

Based on the findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 2091027 and the proposed penalty of \$20 are affirmed.

2. Citation 2091028 and all penalties therefor are vacated.

John J. Morris
Administrative Law Judge