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SOL (MSHA) V. OZARK-MAHONING
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 88-4-M A.C. No. 11-02780-05506
v.	
OZARKÄMAHONING COMPANY, RESPONDENT	Docket No. LAKE 87-85-M A.C. No. 11-02780-05504 Annabel Lee Mine Docket No. LAKE 88-22-M A.C. No. 11-02667-05505 Denton Mine

DECISIONS

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner; Thomas M. Dowling, Safety and Industrial Relations Manager, and Vic A. Evans, General Manager, OzarkÄMahoning Company, Rosiclare, Illinois, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for eight alleged violations of MSHA's mandatory noise standards found in Part 57, and the injury reporting standards found in Part 50, Title 30, Code of Federal Regulations.

The respondent contested the citations and proposed civil penalty assessments, and pursuant to notice served on the parties, hearings were held in Evansville, Indiana. The parties filed posthearing briefs, and I have considered the

arguments made therein in the course of my adjudication of these cases.

Issues

The issues presented in these proceedings are as follows:

1. Whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalties to be assessed for the violations based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S & S) finding concerning one noise citation violation is supportable.

3. Additional issues raised by the parties in this proceeding are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Exhibit PÄRÄ1):

1. OzarkÄMahoning Company, a Delaware Corporation, is the owner and operator of the Denton and Annabel Lee Mines located in the state of Illinois and the county of Hardin.

2. The mines operated by OzarkÄMahoning Company are subject to the Federal Mine Safety and Health Act of 1977 as it relates to 30 C.F.R. Part 57 for metal and nonmetal mining and milling operations.

3. The Denton Mine is classified under the Act as a small mine having accumulated a

total of 35,136 work hours in the preceding calendar year.

4. The Annabel Lee Mine is classified under the Act as a small mine having accumulated a total of 53,131 work hours in the preceding calendar year.

5. On May 27, 1987 at 2:00 p.m., MSHA Inspector Jerry Spruell issued Citation No. 2865780 to OzarkÄMahoning for an alleged violation of 30 C.F.R. 50.20.

6. On May 27, 1987 at or near 3:00 p.m., MSHA Inspector James Bagley issued Citation Nos. 2865757, 2865758 and 2863759 for alleged violations of 30 C.F.R. 57.5050(b).

7. On May 27, 1987, MSHA Inspector Jerry Spruell issued Citation Nos. 2865785, 3059584 and 3059585 for alleged violations of 30 C.F.R. 57.5050(b). Citation No. 2865785 was issued for an alleged violation of 30 C.F.R. 57.5050.

8. Pursuant to the provisions of section 110(a) of the Federal Mine Safety and Health Act OzarkÄMahoning Company posted Notices of Contest and requested hearings in the matter of alleged violations of 30 C.F.R. 50.20 and 30 C.F.R. 57.5050(b) as issued by Citation Nos. 2865780, 2865757, 2865758, 2863759, 2865785, 3059584 and 3059585.

9. During the preceding year OzarkÄMahoning Company's Mining Division accumulated a total of 238,015 hours worked for all its reportable locations covered under the Mine Safety and Health Act of 1977 as it relates to 30 C.F.R. Part 57 for metal and nonmetal mining and milling operations.

10. Payments as originally proposed for the alleged violations in this matter will not adversely affect the operator's ability to remain in business.

Discussion

The citations in issue in these proceedings are as follows:

Docket No. LAKE 88Ä4ÄM

Section 104(a) non-"S & S" Citation No. 2865757, May 28, 1987, cites a violation of 30 C.F.R. 57.5050(b), and the condition or practice is stated as follows (Exhibit PÄ6):

> The full shift exposure to mixed noise levels of the No. 1 Haulage Truck operator exceeded unity (100%) by 4.25 Times (425%) as measured with a dosimeter. This is equivalent to an 8Ähour exposure to 100.3 dBA. Personal hearing protection was being worn. Feasible engineering controls were not being used to reduce the noise exposure to permissible units.

Section 104(a) non-"S & S" Citation No. 2865758, May 28, 1987, cites a violation of 30 C.F.R. 57.5050(b), and the condition or practice is stated as follows (Exhibit PÄ7):

> The full shift exposure to mixed noise levels of the No. 2 Haulage Truck operator exceeded unity (100%) by 3.65 times (365%) as measured with a dosimeter. This is equivalent to an 8Ähour exposure to 99.3 dBA. Personal hearing protection was being worn. Feasible engineering controls were not being used to reduce the noise exposure to permissible units.

Section 104(a) non-"S & S" Citation No. 2865759, May 28, 1987, cites a violation of 30 C.F.R. 57.5050(b), and the condition or practice is stated as follows (Exhibit PÄ8):

> The full shift exposure to mixed noise levels of the Front-end Loader, operating in the south end of the mine (Miller's Ridge), exceeded unity (100%) by 2.96 (296%) as measured with a dosimeter. This is equivalent to an 8Ähour exposure to 97.7 dBA. Personal hearing protection was being worn. Feasible engineering controls were not being used to reduce the noise exposure to permissible units.

Section 104(a) "S & S" Citation No. 2865785, May 28, 1987, cites a violation of 30 C.F.R. 57.5050, and the condition or practice is stated as follows (Exhibit PÄ5):

> The full shift exposure to mixed noise levels of the jumbo drill operator exceeded unity (100%) by 18.67 times (1867%) as measured with a dosimeter. This is equivalent to an 8Ähour exposure to 111 dBA. Personal hearing protection was being worn. This drill operator was exposed to continuous noise, when both drills were being used, at 118 dBA level, measured at the operator's ear with a sound level meter, on this date. The left drill was not nullified and the right drill exhausted toward the operator.

The respondent asserted that it has previously paid the civil penalty assessment of $20 for section 104(a) non-"S & S" Citation No. 2865784, issued on May 28, 1987, for a violation of 30 C.F.R. 57.5050, and no longer wishes to contest this citation. Petitioner's counsel agreed that this was the case (Tr. 143Ä147).

Docket No. LAKE 88Ä22ÄM

Section 104(a) non-"S & S" Citation No. 3059584, issued on June 17, 1987, cites a violation of 30 C.F.R. 57.5050(b), and the condition or practice states as follows (Exhibit PÄ9):

> The full shift exposure to mixed noise levels of the Wagner 2B loader operator working underground exceeded unity (100%) by 1.583 times (158.3%) as measured with a dosimeter. Personal hearing protection was being worn. This exposure is equivalent to an 8Ähour exposure to 93 dBA.

Section 104(a) non-"S & S" Citation No. 3059585, issued on June 17, 1987, cites a violation of 30 C.F.R. 57.5050(b), and the condition or practice states as follows (Exhibit PÄ10):

> The full shift exposure to mixed noise levels of the operator of the loader (Scoopy #2) working underground exceeded unity (100%) by 3.04 times (304%) as measured with a dosimeter. Personal hearing protection was being worn. This exposure is equivalent to an 8Ähour exposure to 98 dBA.

Section 104(a) non-"S & S" Citation No. 2865780, May 27, 1987, cites a violation of 30 C.F.R. 50.20, and the condition or practice is stated as follows (Exhibit PÄ1):

> A lost time injury accident occurred at this property on 4Ä30Ä87. A 7000Ä1 form, report of accident or injury, had not been submitted to MSHA as required. The employee injured was not worked on 5Ä1Ä87 due to the accident.

MSHA's Testimony and Evidence Concerning the Accident Reporting CitationÄDocket No. LAKE 87Ä85ÄM

MSHA Inspector Jerry L. Spruell testified as to his training and experience, and he confirmed that he conducted an inspection on May 27, 1987, with fellow Inspector James Bagley, and upon requesting to look at any mine records relating to accidents in the mine, management produced records which showed that a lost time injury accident had occurred and that an employee had missed 1 day of work because of that accident. Since an MSHA Form No. 7000Ä1, had not been submitted as required by section 50.20, he issued the citation. The company records he reviewed indicated that the employee was involved in an "injury" and missed 1 day of work and was not able to perform his regular duties because of being overcome by hydrogen sulfide gas. Mr. Spruell confirmed that the records did not show that the employee was involved in an "accident" (Tr. 9Ä16).

Mr. Spruell confirmed that at the time he issued the citation he was not aware that the employee received any medical treatment. After speaking with the employee he told him that he was unable to work on May 1, 1987, "because he was blind and couldn't see to run his drill," and was unable to work because "he couldn't see to do the job safely." The employee also told him that he had visited a doctor and that the doctor told him he did not want him exposed "to the gas at the high level like that at that short period of time without a recovery time" (Tr. 17).

Mr. Spruell believed that the respondent was familiar with MSHA's injury reporting requirements because it has the forms and the instructions which are on the front cover. Mr. Spruell confirmed that he made a gravity finding of "unlikely" because the failure to report the injury would not

cause an injury or illness, and he found "lost days or restricted duty" because the employee had an injury that resulted in a lost day. He also confirmed that he made a negligence finding of "moderate" because the office person who fills out the report advised him that she was not aware of the fact that lost time injuries had to be reported. Mr. Spruell abated the citation that same day after the person filled out a reporting form (Tr. 18).

Inspector Spruell confirmed that he based his citation on certain documents which were given to him by mine management during his inspection. A supervisor's Report of Accident shows that the employee lost 1 day of work on May 1, 1987 (Exhibit PÄ2Äa). A worker's compensation form filed by the respondent reflects that the incident concerning the employee was a "lost work day case" (Exhibit PÄ2Äb); (Tr. 20Ä23).

On cross-examination, Mr. Spruell confirmed that except for the violation in question, the respondent's other records were reasonably kept and the respondent made a reasonable attempt to keep them up to date. He did not believe that any of the respondent's employees were conspiring to "cover up" the injury report in question (Tr. 24).

Mr. Spruell confirmed that he has been trained in the effects of hydrogen sulfide gas, and while it affects individuals differently, the normal result of exposure to the gas results in eye irritation to anyone who has been exposed to high gas levels (Tr. 26). He also confirmed that the supervisor's report reflects the time of the injury as "all day," and this would indicate that the employee worked all day (Tr. 34).

Mr. Spruell stated that he was familiar with MSHA Information Bulletin 86Ä6C, 86Ä3M (Exhibit RÄ1), and he denied that the respondent's accountant, Mrs. Spivey, told him that she used this bulletin in filling out injury and accident forms (Tr. 37). Mr. Spruell made reference to a certain information contained in the bulletin which requires the reporting of a "doubtful" injury (Tr. 40).

In response to further questions, Mr. Spruell stated that it was his understanding that the employee worked his whole shift and went to a doctor after the shift (Tr. 46).

Mr. Spruell stated that the employee in question, Joseph Clanton, did not contact him or his office with regard to his eye injury, and that he did not go to the mine to specifically look for any report incident to Mr. Clanton's eye condition.

Mr. Spruell confirmed that his citation was issued solely on the basis of the records that the respondent showed him, and that he was not aware of Mr. Clanton's injury prior to the inspection (Tr. 72Ä73). Mr. Spruell was made aware of the fact that another MSHA inspector was at the mine on May 1, making gas readings, but this inspector was not looking into the injury reporting situation (Tr. 73).

Mr. Spruell reaffirmed the fact that he issued the citation because of the respondent's injury report and the worker's compensation form which indicated that the employee missed 1 day of work because of gas exposure to his eyes (Tr. 106Ä107). Based on this information, he concluded that the lost day of work was a direct result of the injury, and all lost time injuries must be reported. He agreed that if the employee simply decided to take a day off for a reason other than an injury, then it would not have to be reported (Tr. 108Ä109).

Joseph Clanton, confirmed that he is employed by the respondent as a drillman, and that he worked his shift on April 30, 1987. After coming to the surface at the end of his shift, his eyes were exposed to the light, and he stated that "I was blinded. I was in extreme pain, excruciating pain." He stated that he was angry, and was exposed to the same condition 2Ädays prior to April 30, and that he told the secretary and the mine superintendent "that when they got that place straightened out, fit to work in, I'd be back." He confirmed that he intended to stay off "until they got this condition abated" (Tr. 50Ä51).

Mr. Clanton stated that he attempted to drive home as he had done the previous two evenings, but after driving 5 miles he stopped at a friend's house and asked to be taken to a doctor. Mr. Clanton stated that he blindfolded himself, and after it was dark he was able to see. After arriving at the doctor's office, he was directed to the emergency room where his eyes were flushed out with sterile water. The doctor examined him and put some salve in his eyes and gave him the rest of it to use. The next morning his eyes "scabbed over a little bit, but they cleared up" (Tr. 54Ä55). Mine Superintendent Pilcher called him, and Mr. Clanton advised him that he did not care to come to work that day because he did not want to be exposed to the gas again (Tr. 55).

Mr. Clanton stated that after visiting the doctor on Thursday, April 30, the doctor told him "you better not work tomorrow," referring to Friday, May 1, 1987. The doctor did not order him a prescription other than the tube of ointment

which he gave him, and Mr. Clanton could not identify that medication. The ointment "made it hurt a little worse. But, it cleared up over night" (Tr. 56Ä58). Mr. Clanton was shown copies of the doctor's statements, (Exhibit PÄ3Äa, b, c), and he confirmed that he had not previously seen these reports (Tr. 57). Mr. Clanton confirmed that he did not work on May 1, 1987, and that he was not paid workmen's compensation that day because he was not eligible for it (Tr. 63).

Mr. Clanton could not remember the doctor instructing him to return to the clinic on May 5, 1987, as stated in his report (Exhibit PÄ3Äa), but that he did return the next morning on May 1, 1987, and that on that day his vision was intact and his eyes were clear as stated in the doctor's report. However, his eyes "still hurt a little bit," and he had to wear sun glasses which he had purchased (Tr. 64Ä65).

Mr. Clanton stated that while he was able to return to work on Friday, May 1, he was unwilling to do so, and that he informed Mr. Pilcher that he would not be back "until he got the air cleared up." Mr. Clanton stated that he would not have returned to work that day even if the doctor had told him to (Tr. 65Ä66). He returned to work on Saturday, May 2, and worked in another area of the mine "where the good air was at," and was paid overtime (Tr. 66, Exhibit RÄ2). He confirmed that he has walked off the job on one prior occasion without notifying his supervisor (Tr. 68).

Respondent's Testimony and Evidence

Daniel Pilcher, respondent's mine superintendent, testified as to his experience, background, and education, and he confirmed that the mine air is monitored constantly by the respondent, as well as Federal and State inspectors when they are at the mine for inspections. In addition, mine employees are trained to recognize the hazards associated with hydrogen sulfide gas which is normally liberated by entrapped water. Measures are taken to exhaust the gas and to insure adequate ventilation to remove it (Tr. 77Ä81).

Mr. Pilcher confirmed that he has reviewed the doctor's report which indicated that Mr. Clanton's eyes were clear and his vision intact the day after his injury. He had not seen the report when he spoke with Mr. Clanton that day, and Mr. Clanton led him to believe that the doctor did not think he should work that day (Tr. 82).

Mr. Pilcher stated that Mr. Clanton has walked off the job on two separate occasions without notifying anyone, and he was reprimanded for this (Tr. 85Ä86, Exhibit RÄ3).

On cross-examination, Mr. Pilcher confirmed that he was familiar with MSHA's reporting procedures, and according to the guidelines if there is "a serious question" or doubt concerning an injury, it will be reported. If the respondent is sure of its status, it will not be reported. Mr. Pilcher agreed that the doctor's report, (Exhibit PÄ3Äa) states that Mr. Clanton could return to work on May 2, 1987, but "as far as we are concerned, that is not reportable." With regard to "a first aid case" where an employee loses a day of work, Mr. Pilcher believed it was a matter of judgment as to whether it had to be reported, and that in Mr. Clanton's case it was a first aid case, rather than a medical treatment case. In short, Mr. Pilcher believed that the regulation is not clear as to whether a first aid case is required to be reported (Tr. 91Ä93).

Mr. Pilcher confirmed that the doctor's report was presented well after the issuance of the citation and that the information he had available as to whether Mr. Clanton was able to return to work on Friday, May 1, 1987, was the conversation that he had with him that day during which Mr. Clanton informed him that he did not want to work in the same area and wanted to work elsewhere. Mr. Pilcher stated that he informed Mr. Clanton that this was not an option. Mr. Pilcher stated that he came to the conclusion that Mr. Clanton did not want to return "because he didn't want to return" and not because of any gas exposure. In support of this conclusion, Mr. Pilcher stated that two other individuals working within a few feet of Mr. Clanton did not believe the gas was bad enough to see a doctor (Tr. 100).

Thomas M. Dowling, respondent's Safety and Industrial Relations Inspector, confirmed that the filing of accident forms with MSHA is his responsibility and that the forms are kept in his office. He also confirmed that he is familiar with MSHA's accident reporting bulletin and that he uses it as a guide for the preparation of the reports. He stated that no report was filed in Mr. Clanton's case because it did not appear to be a lost time accident which met MSHA's criteria guidelines. He believed that a first aid situation establishes a "doubtful case" under the guidelines, and that there was no attempt to hide anything from MSHA, nor was it an oversight. He stated that based on MSHA's available criteria, "we did what we thought was right" (Tr. 115Ä117).

On cross-examination, Mr. Dowling confirmed that worker's compensation reports are filed in any accident or injury situation that requires medical treatment or first aid, even in cases of no lost work days. This is done so that payment of the medical services may be obtained (Tr. 119Ä120). When asked why the forms which were filed in Mr. Clanton's case reflect "one lost day," Mr. Dowling responded "I don't rightly know at this time" (Tr. 121).

Mr. Dowling conceded that taking the position that Mr. Clanton lost a day of work for worker's compensation purposes, but not for MSHA's reporting requirements, was contradictory (Tr. 122). The discussions with Mrs. Spivey as to whether the incident had to be reported to MSHA took place the week following the incident, but Mr. Dowling could not recall whether he discussed with Mrs. Spivey whether or not a report should be filed. The decision was probably made after the doctor's report was received, and Mr. Dowling concluded that it was a first aid case since no charges were received from the doctor for any prescription medication, and he probably instructed Mrs. Spivey not to file any report (Tr. 124Ä129).

Mr. Dowling stated that he did not speak to the doctor concerning Mr. Clanton's case, and that the letter received from the doctor on June 19, 1987, was obtained to enforce his belief that there was some reasonable doubt, and to support the respondent's defense to the contested citation (Tr. 130).

Mr. Dowling confirmed that Mr. Clanton worked in a different mine area when he returned to work on Saturday, May 2, because there was no activity in the area where he had previously worked on April 30, and all employees are given the option to do other work when they work on Saturdays (Tr. 131).

Inspector Spruell was called by the respondent, and he confirmed that he had a conversation with Mr. Evans during which he advised Mr. Evans that Mr. Clanton could not be moved from a work area where he was experiencing a problem with gas in order to avoid lost time because this would be considered "restricted duty" which would have to be reported (Tr. 132Ä134).

MSHA's Testimony and Evidence concerning the Noise CitationsÄDockets LAKE 88Ä4ÄM and LAKE 88Ä22ÄM

MSHA Inspector Jerry L. Spruell confirmed that all of the noise citations in these proceedings were issued after inspections at the mines, which included noise surveys taken in connection with the cited equipment operator occupations, and

mine management was informed of the inspections and surveys. Mr. Spruell confirmed that he issued Citation No. 2865785, after finding a muffler missing from one of the drill mechanisms mounted on the front of a two-boom jumbo drill. The drill operator was prepared for the noise survey at the start of his work shift, and a sound level meter test indicated that he was constantly exposed to noise levels above 115 dBA, and that is why he cited a violation of section 57.5050. Although the drill operator was wearing hearing protection, he was not wearing it at all times, and Mr. Spruell stated that he observed him on the drill without his hearing protective muff in place.

Mr. Spruell stated that one of the drills was equipped with a muffler, and the other was not. He considered the muffler to be a feasible engineering control which reduced the level of noise exposure to the operator. He explained that the exposure level of 111 decibels as stated in the citation was the average noise exposure for the drill operator over his full work shift, and that the 118 decibels indicated a continuous noise exposure level as measured with a sound level meter. He confirmed that the equipment operators were "hooked up" for the noise survey before they went underground, and that the testing devices were removed when they came to the surface after their work shift. He also confirmed that the maximum allowable noise exposure pursuant to section 57.5050 is 90 decibels over an 8Ähour work shift, and 115 decibels for any particular time (Tr. 149Ä155). Mr. Spruell explained the noise testing procedures which he follows in conducting noise surveys, and he confirmed that the dosimeter and noise level meters were properly calibrated and used to support the citations which he issued (Tr. 155Ä159).

Mr. Spruell stated that the jumbo drill is either factory-equipped with a muffler, or is manufactured in such a way as to facilitate the installation of a muffler. He stated that the respondent used "rubber type" mufflers, but that in this instance did not equip one of the drills with a muffler because "they didn't feel it had done that much good, and they didn't see any reason they would have to have it there" (Tr. 159).

Mr. Spruell stated that the drill violation presented a loss of hearing and permanently disabling type injury, and that he made a gravity finding of "highly likely" because the operator was not wearing hearing protection at all times, and he had to consider it highly likely that he would suffer some type of hearing loss from being exposed to noise of the level

tested. Mr. Spruell confirmed that he made a "moderate" negligence finding because the operator was wearing hearing protection "at times," and one of the drills had a muffler (Tr. 161Ä162).

On cross-examination, Mr. Spruell confirmed that the drill was running at the time he observed the operator without his hearing muffs, and while conceding that he stated on the citation that "personal hearing protection was being worn," he explained that he made that statement to give the respondent the benefit of the doubt, and because the operator was wearing ear muffs "the biggest part of the time" (Tr. 164, 165). Mr. Spruell conceded that in the 9 years he has inspected the respondent's mines, he has not previously cited any noise violations (Tr. 167), and the reason for this is that no prior noise surveys were made at the mines (Tr. 208).

Mr. Spruell confirmed that in the course of issuing his noise citations, he monitored the employees, but did not stay with them for the entire 8 hours. He confirmed that the employees were exposed to other mixed noise sources in the course of their work, and although they were wearing muffs, they were still exposed to measured noise levels above those required by the cited standards. With regard to the jumbo drill, his noise level meter recorded the sound level from that particular piece of equipment only, and his 118 decibel reading with the sound level meter was from that drill (Tr. 170). Noise levels measured with a dosimeter indicate the work environment noise exposure, while sound level meter readings measure an instantaneous noise exposure level (Tr. 173).

Mr. Spruell explained that a dosimeter records all noise exposure levels that are 90 decibels or above over a full working shift, and while it is true that it records noise levels from different sources and does not differentiate the amount of noise coming from any one particular source, a sound level meter reading can (Tr. 177). In the case of the jumbo double drill citation, a noise level meter reading alone was sufficient to support the citation (Tr. 178).

Mr. Spruell confirmed that among his suggestions to the respondent for achieving compliance with the noise standards was a suggestion that mufflers be installed or put back on the equipment in question. He agreed that the installation of mufflers would not achieve total compliance and that the equipment operators would still be required to wear personal hearing protection. Mr. Spruell also agreed that there were no other feasible engineering controls that would bring the

respondent into compliance with the noise standards, but that in one instance a cab did bring the drill operator in his compartment into compliance, but would probably not bring others who are exposed to the drill noise into compliance (Tr. 180Ä181).

Mr. Spruell contended that with the installation of equipment mufflers, which are feasible engineering controls, and the wearing of personal hearing protection, the respondent will come into compliance, but without the personal hearing protection, it would not be in compliance (Tr. 184). Respondent's representative agreed that this is the issue that is basically involved in all of the noise citations which were issued in these proceedings, and that it has done everything required by MSHA to abate the citations and attempt to stay in compliance (Tr. 184Ä185).

Diane Brayden, Industrial Hygienist, MSHA's Duluth, Minnesota District Office, testified as to her experience, education, and training in noise matters. She confirmed that she holds a B.S. degree in biology, and a master's degree in industrial hygiene, and that she has been in her present position with MSHA for 10 years (Tr. 249Ä251). She has participated in approximately 50 MSHA inspections involving noise, has visited mine sites where violations have occurred, and has testified for MSHA as an expert witness (Tr. 253).

Ms. Brayden confirmed that she has reviewed the citations in this case, and that the mufflers involved are the exhaust type used to decrease the amount of energy being exhausted from compressed air, and to dissipate exhaust noise, which is a major contributor to the total noise emitted by the machines. She stated that the use of mufflers is feasible, and that the small noise decibel decreases resulting from the use of such mufflers translates into a significant change in the amount of energy that is doing the noise damage. In her opinion, the use of personal hearing protection to achieve a degree of compliance that has not been achieved by other means is unreliable because the hearing protectors such as muffs and ear plugs are tested under laboratory conditions which are not reflective of actual mine conditions and the use of other equipment, and she referred to several articles dealing with the testing and reliability of such personal hearing devices (Tr. 253Ä263).

With regard to Citation No. 2865785 for the jumbo drill, and after hearing the testimony regarding that citation, Ms. Brayden's was of the opinion that while the noise exposure was significantly reduced by the installation of a muffler to

abate the citation, the dosimeter reading of 1,867 percent of allowable noise exposure would indicate that the drill operator was losing his hearing to a significant degree even if he were to wear his ear muffs all day. With regard to this piece of equipment, the driller would be required to wear both ear plugs and muffs as well as having a muffler on the drill (Tr. 265Ä266).

Ms. Brayden considered the installation of mufflers on the equipment to be extremely important, and that the installation of such a muffler would take about 2 or 3 hours. She conceded that mufflers used on equipment under freezing conditions do aggravate existing freezing conditions, but that the use of air dyers to alleviate this problem is common in the industry. She believed that the use of mufflers as an engineering noise control device will permit the personal hearing protection to work more effectively in that the individual is exposed to less noise exposure (Tr. 269).

On cross-examination, Ms. Brayden stated that as a general rule, exhaust noise is a major contributor to the total amount of noise exposure from other sources, but she could not state the percentage of noise that would be attributable to the exhaust without testing the particular piece of equipment (Tr. 270). She agreed that a muffler would not bring a drill into total compliance below 90 decibels, and that this would probably be true also for ear muffs. She stated that while MSHA would like to achieve total noise protection, in most cases total protection is not possible, and that to the degree that protection is available, the employee should have it (Tr. 272).

Ms. Brayden also conceded that the wearing of ear protection throughout the day will not guarantee an employee's hearing, but that MSHA's position is that engineering controls are to be implemented to the degree that compliance can feasibly be met in that manner and that hearing protection will be accepted after that to achieve the remainder of the compliance. She believed that mufflers are a feasible engineering control in that they reduce noise to a significant degree, but that they are not capable of bringing the operator's exposure down to a 90 decibel level. However, mufflers are still considered by MSHA to be a feasible control in that their use reduces the noise exposure significantly, and without the muffler the employee would be exposed to a greater degree of noise than he would be with the muffler, regardless of whether he is in full compliance with the standard (Tr. 276Ä277).

Findings and Conclusions

Docket Nos. LAKE 88Ä4ÄM and LAKE 88Ä22ÄM

In these cases, the respondent is charged with violations of the mandatory noise exposure requirements found in 30 C.F.R. 57.5050. Citation Nos. 2865757, 2865758, 2865759, 3059584, and 3059585 were issued because of the failure by the respondent to utilize feasible engineering controls to reduce noise levels of over 90 decibels for an 8Ähour period in violation of section 57.5050(b), and Citation No. 2865785 was issued for the failure by the respondent to utilize feasible engineering controls to reduce noise exposure in excess of 115 decibels in violation of section 57.5050. The cited noise standards provide as follows:

> 57.5050 Mandatory. (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 S1.4Ä1971. "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 Health and Safety 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

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

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

If the sum

(C1/T1) + (C2/T2) + . . . (Cn/Tn)

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure Cn 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 - 68 0.0602 SL

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

(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.

The respondent agreed that all of the contested citations concern common issues, and involve the absence of mufflers on the particular pieces of equipment being operated by the miners who were out of compliance with the noise exposure requirements found in the cited standard (Tr. 211). All of the affected miners were wearing personal hearing protection at the time the citations were issued, and although abatement was achieved by the installation of mufflers on the cited equipment, the respondent was still out of full compliance with the cited standards. The respondent denied that it seeks to discontinue the use of personal hearing protection devices, or that it had any problems in installing mufflers on the cited equipment in question (Tr. 231Ä233). Respondent contended that section 57.5050(b) does not include a requirement

that noise levels be reduced to any specific level and permits the continued use of personal hearing protection notwithstanding the fact that feasible engineering noise control devices such as mufflers still do not reduce the noise levels to within permissible levels (Tr. 215). Respondent took the position that requiring it to install mufflers on its equipment is an exercise in futility because it would still be out of compliance and the equipment operators would still be required to wear personal hearing protection. In this regard, respondent's representative stated that MSHA "wants us to spend money for remedies that don't work."

The respondent conceded that MSHA has not required it to do anything other than install mufflers and to insure that its employees wear personal hearing protection. However, it is concerned that future inspections will require it to do more and that "it's an ongoing thing" (Tr. 199Ä201). Inspector Spruell stated that had the mufflers been installed on the equipment, and all employees were wearing personal hearing protection, he would not have issued the citations (Tr. 203). He confirmed that he issued the citations because of the absence of mufflers which are considered feasible engineering controls to reduce noise levels (Tr. 203). Although Mr. Spruell mentioned the use of cabs as feasible noise controls, he conceded that they are not feasible at the respondent's mines, but that mufflers definitely are. Further, Mr. Spruell could cite no other feasible noise controls available at this time for the respondent other than mufflers (Tr. 207).

During the course of the hearing, the respondent conceded that all of the cited equipment was out of compliance with the noise level requirements found in the cited standards, and it did not deny the existence of the conditions cited and described by the inspectors on the face of the citations. Further, the respondent did not question the noise exposure levels cited by the inspectors as a result of their noise survey tests, nor did it question the test procedures followed by the inspectors with respect to the use of dosimeters and noise level meters in support of the citations (Tr. 212Ä215; 220, 236, 239Ä241). The respondent further agreed that a dosimeter which is attached to a miner during a noise survey records the sound levels in his normal working environment, and that once it is attached to an employee, there is no requirement that an inspector stay with the employee and monitor his movements during the entire 8Ähour working shift (Tr. 170). Respondent also agreed that a dosimeter measures the noise exposure level for an employee's working environment

over a full 8Ähour shift, and that a noise level meter gives an instantaneous reading of the noise level exposure.

In its posthearing brief, the respondent asserts that as a result of the mobility of its employees, they are exposed to numerous noise sources such as loaders, trucks, drills, fans, and rock breakers during the normal course of a days work, and it rejects MSHA's argument that the installation of a muffler on a single piece of equipment being operated by an employee resulted in a reduction of the noise exposure level, and that coupled with the use of personal hearing protection, the respondent is in compliance with the standard. Respondent states that it rejects this argument because MSHA did not address the issue of total 8Ähour exposure and the feasibility of muffling of all noise exposure sources that an employee would encounter during the duration of his work shift. In support of this argument, the respondent cites my prior decision in ASARCO, Inc., v. Secretary of Labor, 3 FMSHRC 1300 (May 1981), in which I vacated a noise citation after finding that MSHA's suggested use of certain noise controls were not technologically feasible because of the required mobility of the cited equipment operators.

The respondent further argues that MSHA has failed to prove that any feasible engineering controls are available for multi-noise sources resulting from equipment operator mobility, and that in the abatement of the citations MSHA made no effort to inspect for 8Ähour noise exposure to the employee, but simply relied on an instant sound meter reading on single items of equipment. The respondent suggests that this type of testing fails to prove that the type of muffler suggested by the inspectors for installation on the cited equipment did in fact lower the 8Ähour noise exposure levels in question. The respondent points out that while Inspector Spruell agreed that it was in compliance after the mufflers were installed, he could not speak for other inspectors, and the respondent expressed concern that other inspectors may in the future continue to cite it for being out of compliance in the same circumstances.

Citing a decision by former Commission Judge Charles Moore in Hilo Coast Processing Company v. Secretary of Labor, 1 FMSHRC 895 (July 1979), respondent argues that the lack of any identifiable and definitive MSHA criteria for economically feasible noise controls when they do not bring noise exposure within permissible limits leaves the matter to the judgment of individual inspectors, and requires an operator to guess at what must be spent on noise controls that will meet the estimate of some unknown inspector at some future time. In the

Hilo case, Judge Moore vacated several noise citations after finding that MSHA had failed to prove that certain engineering controls recommended by the inspector were technically and economically feasible. Judge Moore found that for the most part, MSHA's proof was based on the unsupported personal judgments of the inspector who issued the citations, and that the operator was left in the untenable position of "guessing" as to what was required by the inspector for compliance.

During the course of the hearing, MSHA took the position that although the installation of mufflers on the cited equipment in question were feasible engineering controls which could readily be used to reduce the noise level, personal hearing protection would still be required in conjunction with the use of the mufflers. MSHA pointed out that the respondent's complaint is that it was still required to use personal hearing protection even though the use of mufflers did not reduce the noise exposure to within the levels required by the table found in section 57.5050 (Tr. 186). MSHA's view is that the installation of the mufflers resulted in a significant reduction of the noise levels to which the employees operating the equipment were exposed, and that this is precisely what section 57.5050 mandates (Tr. 230).

In its posthearing brief, MSHA asserts that the mufflers used to reduce the noise levels in question are feasible engineering controls because (1) the operators of the equipment were exposed to excessive noise; (2) the mufflers were capable of reducing noise exposure and were technologically feasible; (3) a significant noise reduction was obtained by the use of the mufflers; and (4) the cost estimates for the mufflers were sufficiently precise and were not wholly out of proportion to the expected benefits.

In MSHA v. Callanan Industries, Inc., 5 FMSHRC 1900 (November 1980), the Commission construed the term "feasible" as "capable of being done," and it concluded that the determination of whether the use of an engineering control to reduce a miner's exposure to excessive noise is capable of being done involves consideration of both technological and economic achievability. In allocating the burden of proof required to make this determination, the Commission offered the following guidelines at 5 FMSHRC 1909:

> [I]n order to establish his case the Secretary must provide: (1) sufficient credible evidence of a miner's exposure to noise levels in excess

> of the limits specified in the standard; (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source; (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control; (4) sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of elements 1 through 4 above, the costs of the control are not wholly out of proportion to the expected benefits. After the Secretary has established each of the above elements, the operator in rebuttal may refute any of the components of the Secretary's case.

In Todilto Exploration and Development Corporation v. MSHA, 5 FMSHRC 1894 (November 1983), an inspector cited a violation of 30 C.F.R. 57.5Ä50(b), after conducting an 8Ähour noise survey with a dosimeter on a jackleg percussion rock bolt drill in an underground uranium mine and finding that the drill operator was exposed to 114 dBA. The drill operator was wearing ear plugs and muffs, and the drill was not equipped with a muffler. The violation was abated by the installation of a muffler on the drill. However, subsequent noise readings with a sound level meter showed that excessive noise levels still existed, and the readings established that the drill operator's average noise exposure levels ranged between 110 dBA and 113 dBA. Even though Todilto attached a muffler to the drill, the drill operator was still required to wear personal protective equipment.

The judge found that the drill operator was exposed to an excessive noise level, and although he also found that MSHA established that the installation of the muffler was an engineering control available to Todilto, since the exposure to noise was still not within permissible levels as required by the regulation, even with the muffler attached, the judge concluded that the installation of the muffler was not a feasible engineering control, and he vacated the citation. On appeal, the Commission reversed and stated as follows at 5 FMSHRC 1896Ä1897:

> [W]e hold that a control may indeed be "feasible" within the meaning of 30 C.F.R. 57.5Ä50(b) even though it does not reduce the miner's exposure to noise to permissible levels

> set forth in subsection (a) of the standard. Our holding is based upon the express wording of the noise standard. Section 57.5Ä50(b) unambiguously provides that when excessive noise exposure levels exist, "feasible administrative or engineering controls shall be utilized." It continued, "[i]f such [feasible] controls fail to reduce exposure to within permissible levels, personal protection equipment is to be provided and used . . . ." (Emphasis added). Thus, the noise standard clearly contemplates that in a given case a control might not reduce the noise exposure level to within permissible levels, but nevertheless be a "feasible" control required to be implemented. To allow a mine operator to proceed directly to the use of personal protective equipment and thereby avoid implementing otherwise feasible administrative or engineering controls, solely because use of the controls themselves does not achieve permissible exposure levels, would be to allow circumvention of the standard's clear requirement that excessive noise levels first be addressed at their source. We note that under the judge's approach a control that reduces the level of noise from 114 dBA to 91 dBA (on the basis of an 8Ähour exposure period) would not be feasible simply because it fails to reduce the noise level to 90 dBA. We find no support for this result in the standard.

The Todilto case was remanded for the judge's determination as to whether or not MSHA proved a violation of section 57.5Ä50(b) for failure by the operator to implement a feasible engineering control within the parameters of the Commission's guidelines as enunciated in Callanan, supra. On April 17, 1984, the judge issued his decision and found that MSHA had established that the drill operator was exposed to an excessive noise level, that the muffler was a technologically achievable engineering control capable of reducing the drill operator's noise exposure, and that the cost was not unreasonable for the benefits achieved. The judge found that Todilto was in violation of section 57.5Ä50(b), and stated in pertinent part as follows at 6 FMSHRC 934 (April 1984):

> Therefore, based upon the credible evidence in this case, and the Commission's decision in Callanan, I find that the Secretary has proven the respondent violated mandatory

standard 57.5Ä50(b) by failing to implement the feasible engineering control (muffler) which was available to it. The fact that the muffler did not reduce the noise level to that required by the standard is not a proper reason for an operator to avoid the control and go directly to personal protection equipment. The standard contemplates the use of such personal equipment only after all other "feasible" engineering controls are installed to achieve the best results possible.

In MSHA v. Landwehr Materials Inc., 8 FMSHRC 54 (January 1986), Judge Broderick affirmed a citation for a violation of section 56.5Ä50(b), after finding that a shovel operator at a limestone quarry who was wearing personal hearing protection was exposed to a 96 dBA noise level for an 8Ähour shift. After the termination date for the citation was extended, MSHA's Denver Technical Support Group performed a noise control survey which showed that the noise level in the shovel operator's environment was reduced by approximately 33 percent, from an average of 101 to 98 dBA, when a vinyl curtain was installed between the shovel operator and the engine compartment of the shovel. While significant, this reduction did not bring the noise level down to the permissible 90 dBA specified in the cited standard, and personal protection equipment was still deemed necessary. Judge Broderick found that the installation of the vinyl curtain was a feasible engineering control available to reduce the operator's noise exposure, and that Landwehr's failure to utilize this feasible noise control constituted a violation of section 56.5Ä50(b).

In MSHA v. Texas Architectural Aggregates, Incorporated, 9 FMSHRC 1136 (June 1987), I affirmed a violation of section 57.5050(b), after finding that the development and installation of a noise barrier on a drill were not wholly out of proportion to the resulting noise reduction benefits which were achieved, and that the fact that the 5 dBA noise reduction with the use of the barrier did not bring the mine operator into total compliance with the permissible level stated in the standard is no reason to excuse the use of the barrier or from continuing to use personal hearing protection in conjunction with the barrier.

After careful consideration of all of the arguments presented in these proceedings, I conclude and find that MSHA has the better part of the argument, and on the facts here presented, its position is correct. The respondent's reliance on the ASARCO and Hilo Coast decisions, supra, are not well taken.

The facts in those cases are clearly distinguishable from those presented in the instant proceedings. In those cases, the citations were vacated because of a lack of any credible evidence that feasible or economically achievable administrative or engineering noise controls were available for use by the operators to reduce noise exposure. The credible evidence presented in the instant cases establishes that the use of mufflers were economically feasible for use on the equipment, and that once installed, the noise levels were reduced.

The evidence establishes that after the installation of the mufflers, the mixed noise exposure to the No. 1 haulage truck operator was reduced from 100.3 dBA to 99.5 dBA; the noise level exposure to the No. 2 truck haulage operator was reduced from 99.3 dBA to 95.5 dBA; the noise exposure to the front-end loader operator was reduced from 97.7 dBA to 95.9 dBA; the noise exposure to the jumbo drill operator was reduced from 111 dBA to 105.9 dBA; the noise exposure to the Wagner 2B loader operator was reduced from 93 dBA to 92.3 dBA; and the noise exposure to the Scoopy No. 2 loader operator was reduced from 98 dBA to 94.6 dBA.

Inspector Spruell confirmed that his noise level test with a noise level meter recorded only the noise from the jumbo drill because that was the only piece of equipment operating at the time, and he did not test any of the jack legs located in another heading because they were equipped with mufflers and would be in compliance, and they were not in operation when he tested the drill (Tr. 168Ä170). He also confirmed that the noise level measurements taken by means of the dosimeters measured the mixed noise exposure of each of the other equipment operators in their respective work environments during the course of their work shifts. MSHA's noise expert Brayden confirmed that exhaust noises emitted by the machines in question are major contributors to the total noise emitted by that equipment as well as to the total noise exposure from other sources, and that the use of the mufflers were feasible engineering controls that reduced the total noise exposure to a significant degree. In her unrebutted opinion, the small noise decibel decreases which resulted from the installation of the mufflers on the equipment translated into a significant change in the amount of exhaust energy causing noise damage, and that the use of mufflers reduces the noise exposure significantly. Without the use of the mufflers on the equipment, the employees would be exposed to a greater degree of noise.

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has established violations

for each of the noise citations in question by a preponderance of the credible evidence adduced in these proceedings, and they are all AFFIRMED.

Docket No. LAKE 87Ä85ÄM

Fact of Violation

In this case, the respondent is charged with a violation of mandatory reporting standard 30 C.F.R. 50.20, for failing to report an eye injury to miner Joseph Clanton. The record reflects that Mr. Clanton was exposed to hydrogen sulfide gas while working underground on Thursday, April 30, 1987, and that after coming to the surface at the end of his work shift and exiting the mine, he experienced severe pain to his eyes and went to see a doctor for treatment. Mr. Clanton did not work the following day, Friday, May 1, but did work on Saturday, May 2. The respondent maintains that Mr. Clanton's failure to report for work on May 1, was not due to his injury, and the petitioner claims that it was.

Section 50.20(a), 30 C.F.R. 50.20(a), of the regulations provides:

> (a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000Ä1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. * * * The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.
>
> * * * * * * * * * *
>
> Section 50.2(e) 30 C.F.R. 50.2(e) states:
>
> (e) "Occupational injury" means any injury to a miner which occurs at the mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

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Section 50.2(g), 30 C.F.R. 50.2(g) states:

> (g) "First aid" means one-time treatment, and any follow-up visit for observational purposes, of a minor injury.

The criteria for differentiating between medical treatment and first aid is found in section 50.20Ä3. Medical treatment includes, but is not limited to, the treatments and procedures described in subsection (a). First aid is described as follows:

> First aid includes any one-time treatment, and follow-up visit for the purpose of observation, of minor injuries such as cuts, scratches, first degree burns and splinters. Ointments, salves, antiseptics, and dressings to minor injuries are considered to be first aid.

The criteria for treatment of eye injuries is found in section 50.20Ä3(a)(5), which provides as follows:

> (5) Eye Injuries. (i) First aid treatment is limited to irrigation, removal of foreign material not imbedded in eye, and application of nonprescription medications. A precautionary visit (special examination) to a physician is considered as first aid if treatment is limited to above items, and follow-up visits if they are limited to observation only.
>
> (ii) Medical treatment cases involve removal of imbedded foreign objects, use of prescription medications, or other professional treatment.

MSHA's policy guidelines with respect to the reporting requirements of Part 50, Title 30, Code of Federal Regulations, are found in MSHA Program Information Bulletin No. 86Ä6C and 86Ä3M, December 11, 1986, (Exhibit RÄ1). These guidelines provide in pertinent part as follows:

> In some cases, an injured or ill employee may miss one or more scheduled days or shifts and it will be uncertain if the employee was truly unable to work on the days missed. Situations may arise when a physician concludes that the employee is able to work but the employee feels that he or she is not able. In such

instances, the employer should make the final judgment based on all available evidence. Similarly, if a doctor tells the employee to take time off and the company requests a second opinion, and the second doctor says the employee can return to work, it would be the employer's decision as to when the employee was able to return to work. (Page 8).

* * * * * * * * * *

Medically treated injuries are reportable. First-aid injuries are not reportable provided there are no lost workdays, restricted work activity or transfer because of the injury.

Medical treatment does not include first-aid treatment (one-time treatment and subsequent observation of minor scratches, cuts, burns, splinters, and so forth, which do not ordinarily require medical care) even if it was provided by a physician or a registered professional person.

* * * It is not possible to list all types of medical procedures and treatments and on that basis alone determine whether first aid or medical treatment was involved. The important point to be stressed is that the decision as to whether a case involves medical treatment should be made on the basis of whether the case normally would require medical treatment. The decision cannot be made on the basis of who treats the case. First aid can be administered by a physician or another medical person and medical treatment can be administered by someone other than a physician. (Page 9).

* * * * * * * * * *

Prescription medication--Any use of prescription medication normally constitutes medical treatment. However, it should be considered first aid when a single dose or application of a prescription medication is given on the first visit merely for the relief of pain or as preventive treatment for a minor injury. This situation may occur at facilities having dispensaries stocked with prescription

medications frequently used for preventive treatment and relief of pain and attended by a physician or a nurse operating under the standing orders of a physician. The administration of nonprescription medication in similar circumstances would be considered first aid. (Page 10).

* * * * * * * * * *

Eye injuries. First-aid treatment is limited to irrigation, removal of foreign material not imbedded in the eye, and application of nonprescription medications. A precautionary diagnostic visit (special examination) to a physician is considered as first aid if the treatment is limited to the above items. Follow-up visits are limited to observation only. Medical treatment cases involve removal of imbedded foreign objects, use of prescription medications, or other physician-type treatment. (Page 11).

* * * * * * * * * *

23. Q. What are "days away from work" and how are they calculated.

A. "Days away from work" are days which the employee would have worked but could not because of an occupational injury or an occupational illness. * * * (Page 26).

* * * * * * * * * *

47. Q. What is an occupational injury?

A. An occupational injury is any injury to an employee which occurs at a mine. To be reportable, the injury must (1) require medical treatment, or (2) result in death or loss of consciousness, or (3) result in the inability of the injured person to perform all of the job duties required by the job on any day after the injury, or (4) require the injured person to be temporarily assigned to

> other duties, or (5) require the injured person to be transferred to another job, or (6) require the injured person to be terminated. (Page 32).
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> * * * * * * * * * *
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> 58. Q. Should an operator report questionable injuries?
>
> A. Operators have an obligation to investigate all injuries happening or alleged to have happened on mine property. After an investigation has been completed, the operator must make the determination as to whether the incident is reportable to MSHA. If he has any doubt, he should report. If the operator's conclusion is that no incident occurred, then there is nothing to report. (Page 34).

Respondent's Arguments

The respondent maintains that the facts surrounding Mr. Clanton's eye injury constitutes a "doubtful reporting case," and in deciding whether or not to report such an injury, it relied on the guideline information contained on page 8 which allows a mine operator to make the final judgment in situations of uncertainty. Based on all of the available evidence at the time of the injury, respondent concludes that the injury was not reportable.

In support of its position that the injury was not reportable, the respondent points out that on the day of the injury Mr. Clanton worked all day at his regular job as a drillman, that his exposure to the gas did not hinder his ability to perform his work that day, and that other employees working in the same work environment did not file any reports of injury and were present for work the following morning. Referring to the Surgeon's Report dated May 5, 1987, (exhibit PÄ2B), the respondent further points out that it states that Mr. Clanton's eyes were congested, but that his vision was intact and his lungs were clear, and that the treatment administered consisted of irrigating his eyes with sterile water and an application of an ointment. Given this treatment, and the fact that the report states that further treatment was not needed, the respondent concludes that on the day of his visit

to the doctor, Mr. Clanton had no vision damage, could see normally, his lungs were unimpaired, and no medical reason is stated in the report as to why Mr. Clanton could not work.

Referring to a doctor's statement dated June 19, 1987, (exhibit PÄ3), the respondent further points out that the statement indicates that rather than reporting back to the doctor on May 5, 1987, as instructed, Mr. Clanton returned the day after his injury, May 1, 1987, without an appointment, and his vision was intact and his eyes were clear. No symptoms or conditions were cited that would have prevented Mr. Clanton from reporting to work, and the doctor reported that Mr. Clanton could work on Saturday, May 2, 1987. The respondent finds this unusual in that Saturday was not normally a scheduled work day, but Mr. Clanton was aware that the mine had been scheduled for work that day and by being released that day he could and did in fact work at time and one-half his normal rate. The respondent states that in most cases, the doctor would have scheduled a reporting time as Monday unless requested to do otherwise. Under these circumstances, the respondent concludes that a prudent man would have to assume that if all of the symptoms which gave rise to the problem in the first place are gone, Mr. Clanton was fit, well and able to return to work on May 1, 1987.

Finally, the respondent asserts that according to Mr. Clanton's own testimony during the hearing, he admitted that he was not unable to work on Friday, May 1, 1987, but was unwilling to do so and that he would not have returned to work that day even if the doctor had told him to do so (Tr. 65Ä66). The respondent points out that Mr. Clanton had previously been disciplined by verbal and written reprimand for walking off the job on two occasions in March and August, 1987, {exhibit RÄ3), and that his demeanor and statements made during the hearing reflects a hostile dislike for his job assignment, the company, and authority in general. The respondent concludes that Mr. Clanton's failure to report for work on May 1, 1987, the day after his injury, was not the result of his injury, but rather, a decision of his own which had no connection with his injury. The respondent further concludes that Mr. Clanton's injury was a "doubtful case" consisting of first aid, and that the respondent exercised its discretion and judgment in such cases in concluding that the injury did not have to be reported (Tr. 139Ä140).

Petitioner's Arguments

During the course of the hearing, petitioner's counsel asserted that Mr. Clanton lost a day of work on May 1, 1987,

because of his eye injury. Counsel asserted that when Mr. Clanton went to the doctor on April 30, he was treated and told to come back the following Tuesday, May 5, and that the doctor "was expecting that he wasn't going to work the following day." Although Mr. Clanton was feeling better and went back to see the doctor on Friday, May 1, and the doctor found that his eyes and vision were clear, the doctor did not tell him to go to work that day and "considered that he shouldn't go to work that Friday and go back to work on Saturday." Since Mr. Clanton was unable to work on Friday, counsel concluded that his injury was reportable (Tr. 140Ä141).

In his posthearing brief, petitioner's counsel argues that Mr. Clanton's eye injury was a reportable occupational injury because it required medical treatment and he was unable to perform all of his job duties the day after his injury. Counsel cites the definition of "occupational injury" found in section 50.2(e), which states that such an injury is one which requires medical treatment or which results in the miner's inability to perform all job duties on any day after an injury. Counsel also cites the criteria for treating eye injuries found in section 50.2Ä3(a)(5), which states that medical treatment cases involve the use of prescription medications.

Citing page 1315 of the Physicians Desk Reference, 42 Edition, 1988, published by Edward R. Barnhart, regarding the decadron family or prescriptions for eye treatment, petitioner's counsel asserts that Mr. Clanton received prescription medication, that Neosporin Opt Ointment was prescribed three times daily, and that in first aid treatment the doctor does not prescribe medications with instructions for its continued use. Counsel also cites the unrebutted testimony of Mr. Clanton that the doctor told him not to work the day following his injury (Tr. 56).

Finally, counsel states that the record establishes that the respondent was familiar with MSHA's requirements for reporting injuries, and in response to the respondent's "doubtful" case defense, points out that MSHA's policy guidelines state that doubtful cases should be reported.

Findings and Conclusions

Inspector Spruell confirmed that he issued the citation after reviewing the respondent's accident and injury records. His review included an examination of a report prepared by Mr. Clanton's supervisor K.E. Clanton, who is not related to Mr. Clanton, and it was prepared on May 6, 1987 (exhibit PÄ2). That report indicates that Mr. Clanton "lost 1 day 5Ä1Ä87."

At the time the citation was issued, Mr. Spruell was unaware of the fact that Mr. Clanton had received any medical treatment, but after speaking with him at a later time, he learned from Mr. Clanton that he had been "blinded" by his exposure to gas and had visited a doctor. Mr. Spruell also confirmed that he reviewed a report filed by the respondent's accountant, Mrs. E.L. Spivey on May 6, 1987, with the state workers' compensation office which indicated that Mr. Clanton's case was a "lost workday case" (exhibit PÄ2Ä2D). In view of the fact that the inspector could find no record that the respondent had reported the injury to MSHA, he issued the citation. The violation and citation were abated that same day after Mrs. Spivey filled out the required MSHA Form 7000Ä1 (exhibit PÄ2Ä2C).

Inspector Spruell confirmed that the respondent had never been previously cited for failure to report accidents or injuries, and with the exception of the citation which he issued in this case, the respondent always maintained its records current. He confirmed that Mrs. Spivey told him that she had not filed the injury report in question because she was not aware of the fact that all lost time injuries had to be reported.

Mrs. Spivey was not called to testify in this case. Although Mine Superintendent Pilcher acknowledged that MSHA's guidelines require the reporting of "serious question" injury cases, he took the position that Mr. Clanton's case was a "first aid" type of injury case, rather than a medical treatment case, and that in his judgment, the injury did not have to be reported. He also believed that the guidelines were not clear as to whether a "first aid" case needed to be reported, and that Mr. Clanton's failure to work on the day after his injury was unrelated to his injury, and that Mr. Clanton simply did not wish to return to work.

Safety and Industrial Relations Inspector Dowling confirmed that no MSHA injury report was filed because it did not appear that Mr. Clanton's case was a lost time accident case pursuant to MSHA's guidelines. He believed that a first aid situation establishes a "doubtful case" under MSHA's guidelines, and that in the exercise of its judgment not to report the injury, the respondent acted properly and did not attempt to hide anything from MSHA. Mr. Dowling could offer no explanation as to why the forms executed by the respondent which were reviewed by the inspector reflected "one lost day," nor could he recall whether he specifically discussed with Mrs. Spivey the need to file a report with MSHA. Mr. Dowling concluded that since no charges were received from the doctor

for any prescription medicine, Mr. Clanton's injury was a first aid case, and that he "probably" instructed Mrs. Spivey not to file an MSHA report. Mr. Dowling confirmed that he did not speak to the doctor, and that the doctor's statement of June 19, 1987, was obtained to confirm Mr. Dowling's belief that Mr. Clanton's case involved some reasonable doubt as to whether his injury needed to be reported.

The evidence adduced in this case, including Mr. Clanton's admissions, suggest that his eye condition had cleared up on May 1, 1987, when he voluntarily returned to see the doctor, and that he was able to return to work that day but chose not to do so. There is no evidence other than Mr. Clanton's self-serving statement, that the doctor ordered him not to return to work that day. Given the fact that the doctor found that Mr. Clanton's vision was intact and his eyes were clear on May 1, and Mr. Clanton's admission that he was unwilling to return to work regardless of his eye condition, and that he would not have done so even if the doctor had specifically cleared him for work that day, I cannot conclude that Mr. Clanton was unable to perform his job duties that day, or that his lost day of work was the direct result of his eye injury.

Having viewed Mr. Clanton's demeanor and attitude toward the respondent during his testimony, which indicates a dislike for his general employment situation at the mine, I believe Mr. Clanton's reluctance to return to work was based not only on his fear of being further exposed to gas, but on his anger toward the respondent. This anger prompted Mr. Clanton to tell Mr. Pilcher and the office secretary that he would only be back to work "when they got that place straightened out, fit to work," and that he would not be back "until he got the air cleared up, so it wouldn't hurt my eyes again" (Tr. 50, 65). As a matter of fact, Mr. Clanton admitted that he was still angry about the incident, and that he intended to stay off "until they got this condition abated" (Tr. 50Ä51). I take note of the fact that although Mr. Clanton claimed that he had been exposed to the same gas condition 2Ädays prior to April 30, "when it got so I couldn't stand it," he did not report any injuries on those days, and that "what I done, was more or less to bring this to the attention to the Federal agencies that working conditions were intolerable" (Tr. 50). I also take note of the fact that Mr. Clanton returned to work on Saturday, May 2, 1987, and received premium pay for that day.

Although I have concluded that Mr. Clanton's lost day of work on May 1, 1987, was not a direct result of his injury,

this is not the sole determining factor as to whether or not his eye injury which occurred the day before was required to be reported to MSHA. The crucial question is whether or not Mr. Clanton suffered a reportable occupational injury within the meaning of MSHA's mandatory reporting regulations. An "occupational injury" is defined as any injury which occurs at the mine for which medical treatment is administered. The term "injury" has been construed by the Commission as "an act that damages, harms, or hurts," Freeman Mining Company, 6 FMSHRC 1577, 1578Ä1579 (July 1984).

In the instant case, Mr. Clanton's unrebutted testimony, which I find credible, indicates that he suffered severe eye pain and discomfort as a result of his exposure to hydrogen sulfide gas while working at the mine, and promptly sought treatment by going to the doctor. Under these circumstances, I conclude and find that Mr. Clanton's eye condition was an injury. The next question presented is whether or not the treatment received by Mr. Clanton constituted medical treatment or first-aid. A medically treated injury is considered to be a reportable occupational injury, regardless of any lost work days, but a first-aid injury is reportable, provided there are no lost workdays, restricted work activity or transfer because of the injury.

With regard to the treatment of eye injuries, one factor in determining whether such treatment is medical treatment or first-aid treatment, is the use of prescription medication as part of the treatment. The use of a prescription medication is among the criteria for determining medical treatment, and the application of nonprescription medication is included among the criteria for determining first-aid treatment.

The evidence adduced in this case reflects that the treatment received by Mr. Clanton on April 30, 1987, for his eye inflammation, or conjunctivitis, included the application of Neodecadron Ophthalmic Ointment. (See: Doctor's Report, May 5, 1987, exhibit PÄ2Ä2ÄB). The doctor's report of June 19, 1987, also reflects that Mr. Clanton was treated with Neosporin Opthalmic Ointment, three times daily, and contrary to Mr. Dowling's assertion that no doctor's charges were received for any prescription medication for Mr. Clanton, the hospital bill apparently submitted to the respondent's insurance carrier, includes an emergency room charge in the amount of $14.25 for deodecadron. (See: exhibits PÄ3Ä3A and PÄ3Ä3C).

The Physicians Desk Reference, 42d Edition, 1988, published by Edward R. Barnhart, cited by the petitioner in its posthearing brief, is a standard reference source listing

all prescription medications, and it is available at any public library. I take official notice of the information contained in this reference source with respect to the medication administered to Mr. Clanton. Neosporin Ophthalmic Ointment is listed at page 814 as a prescription medication, and the prescribed application is every 3 or 4 hours within a 7Äday period. Neodecadron Ophthalmic Ointment is listed at page 1376 as a prescription medication, and the prescribed application is "a thin coating 3 or 4 times daily."

Although Mr. Clanton could not recall receiving a written prescription from the doctor for the medication in question, it seems clear to me that prescription medication was in fact used as part of his treatment, and the doctor's report of June 19, 1987, reflects that the Neosporin ointment was to be used three times daily. Mr. Clanton confirmed that after his eyes were flushed out at the emergency room, the doctor put some "salve" in his eyes and gave him the rest to use. Mr. Clanton stated that "I smeared it in there one more time" (Tr. 55).

MSHA's bulletin guidelines at page 10 state that the use of prescription medication normally constitutes medical treatment, but that a single doze or application of a prescription medication given on a first visit merely for the relief of pain or as a preventive treatment for a minor injury should be considered first aid. The available evidence in this case reflects that Mr. Clanton received more than a single dose of the prescribed medication used for the treatment of his eye injuries. Further, I find nothing in MSHA's regulatory definitions of "first-aid" or the criteria for the treatment of eye injuries that even mentions or suggests single or multiple doses of prescription medication.

In view of the foregoing, and after careful consideration of all of the available evidence in this matter, I conclude and find that Mr. Clanton's eye injuries constituted a reportable occupational injury, and that the treatment he received for his condition constituted medical treatment rather than first-aid treatment. I also conclude and find that the respondent's failure to report the injury in question constituted a violation of cited section 50.20, and the citation is therefore AFFIRMED.

With regard to the respondent's "doubtful case" defense, although one may agree that MSHA's guidelines concerning a mine operator's judgment and discretion in determining whether an employee's lost work day is attributable to an injury, the introduction of the term "single dose" in the discussion of

prescription medication, and the reference to ointments and salves as part of any first-aid treatment, without any specific reference to whether they are prescription or nonprescription, are somewhat ambiguous, the guideline instruction found on page 34 is not. It specifically states that a doubtful injury case should be reported. Under the circumstances, I reject the respondent's "doubtful case" theory as an absolute defense to the citation, but have considered it in mitigation of the respondent's negligence.

Significant and Substantial Violation

Noise Citation No. 2865785

In this instance, Inspector Spruell made a finding that the citation was significant and substantial. As a result of his dosimeter noise test, he found that the jumbo drill operator was exposed to noise levels which exceeded the allowable limit by 1,867 percent, which was equivalent to an 8Ähour exposure of 111 dBA's. The jumbo drill was equipped with a left and right drill, one of which had a muffler installed, while the other one did not. The sound level which the inspector measured with a sound level meter while both drills were in operation indicated that the drill operator was exposed to continuous noise levels at 118 dBA's. The noise exposure in both instances was well over the allowable limit of 90 decibels.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and

substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Spruell's significant and substantial finding was based on his belief that the noise levels to which the drill operator was being exposed was such as to make it reasonably likely that he would suffer some hearing loss. The inspector made a gravity finding of "highly likely" and that a "permanently disabling" injury of illness could reasonably be expected because of the noise level exposure to the drill operator. Although Mr. Spruell stated on the face of the citation that "personal hearing protection was being worn," he explained that he made that statement to give the respondent the benefit of the doubt since the drill operator was wearing protective ear muffs most of the time. However, when he observed the

drill operator with the drill in operation, he was not wearing his personal ear protection.

MSHA's noise expert Brayden testified that although the installation of the muffler on the drill reduced the operator's noise exposure, the dosimeter reading of 1,867 percent of the allowable noise exposure would indicate that the operator was losing his hearing to a significant degree even if he were to wear his ear muffs all day. In her opinion, the drill operator would need to wear ear plugs as well as ear muffs to protect his hearing.

In view of the unrebutted testimony of Inspector Spruell and Ms. Brayden, which I find credible and probative, I conclude and find that the noise exposure levels to which the drill operator was being exposed presented a hazard to his hearing capability, and that such noise level exposures would reasonably likely contribute to a serious loss of hearing. Accordingly, the inspector's significant and substantial finding IS AFFIRMED.

History of Prior Violations

MSHA's civil penalty assessment computer print-out for the respondent's Annabel Lee Mine for the period May 28, 1985 to May 27, 1987, reflects that the respondent paid penalty assessments in the amount of $94 for three section 104(a) citations (exhibit PÄ4). The computer print-out for the Denton Mine for the period June 17, 1985 to June 16, 1987, reflects civil penalty assessment payments in the amount of $74 for two section 104(a) citations. I conclude and find that the respondent has a good compliance record, and I have taken this into consideration in the civil penalties assessed for the violations which have been affirmed in these proceedings.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent's Denton and Annabel Lee Mines are small mining operations, and I adopt these stipulations as my findings on this issue. The parties also stipulated that the proposed civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business. I find and conclude that the payment of the civil penalty assessments for the violations which have been affirmed in these proceedings will not adversely affect the respondent's ability to continue in business.

Good Faith Compliance

The record establishes that all of the violations were timely abated in good faith by the respondent. I have taken this into consideration in the assessments made for the violations in question.

Negligence

I conclude and find that all of the violations which have been affirmed in these proceedings resulted from the respondent's failure to exercise reasonable care. Accordingly, I adopt the inspector's moderate negligence findings with respect to all of the citations as my negligence findings and conclusions on this issue.

Gravity

With the exception of "S & S" noise Citation No. 2865785, the inspector found that all of the remaining noise citations were non-"S & S", and that any injury or illness would be unlikely. They were all assessed as "single penalty" citations. He made the same findings for reporting Citation No. 2865780. I concur in these findings, and find that with the exception of "S & S" noise Citation No. 2865785, which I find was serious, the remaining violations were non-serious and not likely to result in any serious injuries.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed in these proceedings:

Docket No. LAKE 88Ä4ÄM

Citation No.	Date	30 C.F.R. Section	Assessment
2865757	05/28/87	57.5050(b)	$ 20
2865758	05/28/87	57.5050(b)	$ 20
2865759	05/28/87	57.5050(b)	$ 20
2865785	05/28/87	57.5050	$ 85

Docket No. LAKE 88Ä22ÄM

Citation No.	Date	30 C.F.R. Section	Assessment
3058584	06/17/87	57.5050(b)	$ 20
3059585	06/17/87	57.5050(b)	$ 20

Docket No. LAKE 87Ä85ÄM

Citation No.	Date	30 C.F.R. Section	Assessment
2865780	05/27/87	50.20	$ 20

ORDER

The respondent IS ORDERED to pay the civil penalties assessed in these proceedings within thirty (30) days of these decisions and orders. Upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge