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TODILTO EXPLORATION & DEVELOPMENT V. SOL (MSHA),  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
WASHINGTON, D.C. 20006  
NOVEMBER 9, 1983

TODILTO EXPLORATION AND  
DEVELOPMENT CORPORATION

v. Docket No. CENT 79-91-RM

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v. Docket No. CENT 79-310-M

TODILTO EXPLORATION AND  
DEVELOPMENT CORPORATION

DECISION

This is a consolidated civil penalty and contest of citation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq (1976 & Supp. V 1981). At issue is an alleged violation of 30 C.F.R. § 57.5-50, the noise standard applicable to metal-nonmetallic underground mines. 1/ The question presented is whether in order to be "feasible" within

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1/ 30 C.F.R. 57.5-50 provides:

- (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 party 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 Nonmetallic Mine  
Safety and Health District or Subdistrict Office of the Mine  
Safety and Health Administration.

(Footnote continued)

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the meaning of section 57.5-50(b) of the noise standard, an engineering control must reduce a miner's exposure to noise to the permissible levels set forth in subsection (a) of the standard. The administrative law judge answered that question in the affirmative. 2/ We disagree. For the reasons that follow, we hold that an engineering control maybe "feasible" even though it fails to reduce a miner's exposure to noise to the permissible levels contained in the standard. Accordingly, we reverse and remand for a determination as to the question of feasibility consistent with our decision in Callanan Industries. Inc., 5 FMSHRC (YORK 79-99-M, decided November 9, 1983).

On January 31, 1979, a Department of Labor Mine Safety and Health Administration ("MSHA") inspector conducted a noise survey at an underground uranium mine operated by Todilto Exploration and Development Corporation. Using a dosimeter to collect the noise sample, the inspector surveyed an operator of a jackleg percussion rock bolt drill for an 8-hour period. At the time of the noise survey, the jackleg drill was not equipped with a muffler. The operator of the drill was, however, wearing both foam earplugs and earmuffs. The results of the noise survey showed that for his 8-hour shift the drill operator was exposed to 114 decibels ("dBA"). The maximum allowable exposure level for an 8-hour period is 90 dBA. 3/ Therefore

Fn. 1/ continued

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

No exposure shall exceed 115 dBA. Impact or impulsive noise 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.

(Emphasis added.)

2/ The judge's decision is reported at 3 FMHSRC 1824 (1981).

3/ Because of the logarithmic nature of noise measurement, 114 dBA is 2,634 percent of 90 dBA. See Callanan Industries, Inc., *supra*, slip op. at 3 n.4.

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in light of the 114 dBA reading and the fact that Todilto had not implemented feasible administrative or engineering controls to reduce the noise level the inspector issued a citation alleging a violation of section 57.5-50(b).

Todilto abated the alleged violation by installing a muffler on the drill. 4/ Subsequent noise readings taken by an MSHA inspector with a sound level meter after the muffler had been installed showed that excessive noise levels still existed. Those readings established that the drill operator's average noise exposure level ranged between 110 dBA and 113 dBA. 5/ Thus, even though Todilto attached a muffler to the drill, the drill operator was still required to wear personal protective equipment.

Thereafter, Todilto filed a notice of contest with the Commission (CENT 79-91-RM) and, in a separate proceeding, the Secretary filed a proposal for assessment of a penalty (CENT 79-310-M). The two proceedings were consolidated and an evidentiary hearing was held. At the conclusion of the hearing, the judge issued a bench decision in which he held that the installation of the muffler was not a feasible engineering control. 6/

On July 21, 1981, the judge's final decision was issued. In that decision, the judge found that the drill operator was exposed to an excessive noise level. 3 FMSHRC at 1826. The judge stated, however, that although the Secretary established that installation of the muffler was an engineering control available to Todilto, "he has also shown that even with such controls the exposure to noise was not within permissible levels as required by the regulation." 3 FMSHRC at 1827. Concluding that the installation of the muffler was, therefore, not a feasible engineering control the judge vacated the citation. Id.

Following the issuance of the judge's decision, the Secretary's petition for discretionary review was granted. Upon consideration of the question presented, we hold that a control may indeed be "feasible" within the meaning of 30 C.F.R. 57.5-50(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

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4/ The MSHC inspector who issued the citation estimated the cost of the muffler to range between \$50 and \$150. In its brief, Todilto set the muffler's cost at \$110.

5/ The 110 dBA to 113 dBA reading reflects the driller's exposure to noise as the drill was being used to drill a hole. Although the

readings taken with the sound level meter were for a substantially shorter period of time than were the readings taken with the dosimeter, we do not have before us the question as to whether the sound level meter readings were insufficient to establish the drill operator's continued overexposure to noise. Therefore, we accept the judge's conclusion that the "sound level meter readings established the fact that the drill operator was overexposed to noise after the muffler was installed. See 3 FMSHRC at 18-6.

6/ The Secretary sought to establish a violation of section 57.5-50(b) by showing that it was feasible to install the muffler. The Secretary did not attempted prove that "the feasible controls existed.

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express wording of the noise standard. Section 57.5-50(b) unambiguously provides that when excessive noise exposure levels exist, "feasible administrative or engineering controls shall be utilized." It continues, "[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 8-hour 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.

Thus, we hold that the judge's apparent conclusion that any control that does not reduce noise exposure to permissible levels is per se infeasible is erroneous. Because his disposition was based on this conclusion it must be reversed. The question remains, however as to whether, based on the specific facts in this case, the Secretary proved a violation of the standard for failure to implement a feasible engineering control. The determination regarding the muffler's "feasibility" requires further findings consistent with our decision in *Callanan Industries, Inc.*, supra. On remand the parties are to be allowed the opportunity to present additional evidence and to submit further arguments in light of the considerations set forth in *Callanan*. 7/

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7/ Because the judge who presided in this case is no longer with the Commission, the case is remanded to the Chief Administrative Law Judge for reassignment.

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Commissioner Lawson concurring and dissenting:

I would concur in the majority's holding that an engineering control may be feasible even though it fails to reduce a miner's exposure to the permissible levels contained in the standard.

For the reasons stated in my dissenting opinion in Callanan Industries, Inc., YORK 79-99-M, however, I would disagree with their conclusion as to the need for further findings on "feasibility", would find this operator in violation of the standard, and remand to the judge below solely for the purpose of assessing a penalty therefor.

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