FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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JAN 12 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-6-M A.C. No. 47-02575-05502
v.	:	Pit #6
NELSON TRUCKING, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Mr. Kenneth M. Nelson, Nelson Trucking Company, Green Bay, Wisconsin, pro se.

Before: Judge Lasher

The Petitioner initiated this proceeding on October 30, 1985, by the filing of a Proposal for Penalty requesting that a penalty be assessed for Respondent's alleged violation of 30 C.F.R. § 56.5-50 which 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 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, N.Y. 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92

4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

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

X X X X X X X X

(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.

Pursuant to notice, this matter came on for hearing in Green Bay, Wisconsin, on August 13, 1986, at which MSHA Inspector Arnie Mattson testified for Petitioner and Kenneth Nelson, a co-owner, testified for Respondent.

In the citation involved, No. 2374054, Inspector Mattson described the violative condition as follows:

> "The eight hour exposure to mixed noise levels of the 120 Hough International front-end loader operator in the pit exceeded unity (100%), by 2.68 times (268%) as measured with a dosimeter. This is equivalent to an 8-hour exposure to 97 dBA. Personel [sic] hearing protection was being worn."

Based on stipulations, documents, and testimony, I find or infer from the preponderant reliable and probative evidence as follows:

The Respondent is a very small (four employees) sand and gravel operator doing business in the vicinity of Green Bay, Wisconsin; it has no history of violations prior to that involved in the subject citation which Respondent, in good faith, promptly abated after it received notification thereof. Payment of a penalty in this matter will not adversely affect Respondent's ability to continue in business.

While on a regular inspection of Respondents No. 6 Pit on July 10, 1985, Inspector Mattson observed the crusher and determined that a noise survey should be conducted. On July 11, 1985, Inspector Mattson performed such survey (Ex. S-3) for a period of eight hours, during which time a dosimeter was attached to the short collar of CHRIS NICKLAS, the operator of the 120 Hough International front-end loader.

As a result of the sound level examination and testing of the environment of the crusher operator, it was determined that the operator of the front-end loader was exposed to (a) 97 dBA for a period of eight hours (480 minutes), and to (b) noise 2.68 times the permissible level (T. 16-20). 1/ The loader operator had been wearing ear protection and the Respondent's management erroneously believed that this alone constituted compliance with the requirements of the standard, according to the Inspector (T. 28, 29).

To abate the violation, the Respondent was required to install engineering controls, i.e., a muffler, on the loader which reduced the sound level to approximately 93-94 dBA for the relevant period. Since the mine operator had only four employees, administrative controls, in this case, reducing the number of hours the operator of the loader actually operated the machine each day, were not feasible (T. 25). Since the installation of the muffler did not bring the sound level down to permissible sound limits, the loader operator was also required to also wear personal ear protection to insure compliance with the standard. The Citation was terminated on August 29, 1985, upon Respondent's compliance with the above requirements. The Inspector indicated that the occurrence of the hazard posed by the infraction, injury to the loader operator's hearing, was "not likely" (Ex. S-1), but that had such occurred, such an injury would be "permanently disabling".

Issues

1. Whether the evidence established that Respondent failed to employ feasible engineering controls where its employee's exposure to noise exceeded permissible limits.

2. If so, the amount of an appropriate penalty for the violation.

Ultimate Findings, Conclusions and Discussion

The Respondent made no substantial or persuasive challenge to the existence of the conditions which constitute the violation and raised no legal defense thereto. 2/ By stipulation at the

1/ Exposure of the loader operator to a sound level in excess of 90 dBA for an 8-hour workday constitutes an infraction of the standard.

2/ Respondent's concerns about not being advised about this infraction during a prior MSHA courtesy assistance visit were, inasmuch as such might be construed as an equitable estoppel defense, addressed in my decision in a related matter, Docket No. LAKE 85-102-M, issued September 11, 1986. My decision on this question is incorporated herein by reference.

commencement of the hearing, Respondent conceded that the Commission and this administrative law judge has jurisdiction over it and the subject matter of this proceeding.

In July 11, 1985, Respondent's loader operator was exposed to noise 2.68 times the permissible level; the exposure was equivalent to 97 dBA for eight hours per day.

There were feasible engineering controls available to reduce the exposure, i.e., the installation of a muffler on the subject front-end loader. Respondent thus was in violation of 30 C.F.R. § 56.5-50 because of its failure to utilize such engineering controls (administrative controls not being feasible) to reduce the exposure of its loader operator to excessive noise (T. 28).

Because MSHA had examined the Respondent's operation previously during a courtesy inspection and had not required engineering controls to reduce the noise levels, Respondent's negligence is found to be minimal. Based on the Inspector's characterization of the probability of the hazard ever being realized as "not likely", the violation is not found to be serious. There is no contention-or evidence-that the imposition of a penalty will adversely affect this very small Respondent's ability to continue in business. Considering the above mandatory penalty assessment factors, and the fact that Respondent proceeded in good faith, upon notification of the violation, to promptly abate such, the penalty urged by the Secretary, $20.00 is found appropriate. In view of the very modest amount ($20.00) of the penalty sought by the Secretary to begin with, I find no reason for a reduction thereof based on MSHA's failure to advise the Respondent about it during the prior "courtesy" visit. See Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

ORDER

(1) Citation No. 2374054 is affirmed.

(2) Respondent shall pay the Secretary of Labor within 30 days from the date hereof the sum of $20.00 as and for a civil penalty.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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