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HILO COAST PROCESSING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

HILO COAST PROCESSING COMPANY, APPLICANT	Applications for Review
	Docket No. DENV 79-50-M
v.	Citation No. 373631 10/6/78
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. DENV 79-51-M Citation No. 373632 10/6/78
	Docket No. DENV 79-52-M Citation No. 373633 10/6/78
	Docket No. DENV 79-213-M Citation No. 373655 12/21/78
	Docket No. DENV 79-296-M Order No. 374481 1/26/79
	Docket No. DENV 79-297-M Order No. 374482 1/26/79
	Docket No. DENV 79-298-M Order No. 374483 1/26/79
	Docket No. DENV 79-299-M Order No. 374460 1/26/79
	HCPC Quarries & Mill

DECISION

Appearances: Hugh Shearer, Esq., Goodsill, Anderson & Quinn, Honolulu, Hawaii, for Applicant
Marshall Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent

Before: Judge Charles C. Moore, Jr.

While there are eight docket numbers listed above, there are actually only four violations alleged. This is because four citations were issued, three involving noise, one involving dust. Thereafter, because the Applicant had made no attempt to abate the

violations because it was challenging jurisdiction, the orders were issued with respect to each of the citations. It was stipulated at the trial in Honolulu, that there was no attempt on the part of management to abate the violations and accordingly it is obvious that if the citations were valid, the orders were equally valid. It was for this reason that I recently denied a motion by the Applicant for temporary relief with respect to the orders.

I will deal with the dust violation first. In the first place, there is no doubt that this particular company is in dire financial straits. It cannot afford to go to any great expense and still hope to remain in business. The evidence clearly establishes that fact.

The evidence also establishes as a fact that a dust problem exists at the Hilo Mine only 20 percent of the time. The rest of the time, 80 percent of the time, there is too much water and mud. The miners use and are forced to use and are penalized if they do not use, respirators during the dusty season. In my opinion, that is sufficient compliance with the dust standard. I therefore rule invalid and vacate the citation that was issued in this case.

The other three citations involved in these cases concern the noise standard. The noise standard under the metal and nonmetal regulations is entirely different from that involved in coal mine regulations. The coal mine regulations, and this includes surface mines as well as the surface areas of underground coal mines, would allow an operator to provide one engaged in moving gravel from one place to another with a front-end loader, to wear ear protection as a primary method of controlling the noise. The metal and nonmetal standards, however, do not allow ear protection (ear muffs) as a primary protection, but only after a certain amount of money is spent in trying to reduce the noise in general. Under the Occupational Safety and Health Administration, a number of rulings have been made regarding the noise standard, which is identical to the metal and nonmetal standard, and a number of court decisions have been involved, but regardless of decisions, the fact remains that it is a question of judgment as to how much money an operator should be required to spend, in his financial condition, to reduce noise before resorting to either ear plugs or ear muffs.

The noise standard applicable to sand and gravel pits, and that is what was involved in the instant cases, appears in 30 CFR 56.5-50 and consists of slightly more than one-half of a page of the Code of Federal Regulations. A crucial subsection is subsection (b) which states:

> 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 courts have ruled that feasibility includes economic feasibility, as well as technical possibility, but there has been no ruling which has been brought to my attention delineating how these feasibility requirements are to be judged.

The published standards refer to "sound level dBA slow response" followed by various numbers from 90 to 115 with time periods for allowable duration associated with each.

While the noise standard enforced by the Occupational Safety and Health Administration was promulgated by the Department of Labor, the noise standards for coal mines and noncoal mines were originally promulgated by the Department of the Interior. I must assume that when the Department of the Interior used the phrase "dBA" in the noncoal regulations, it meant the same as the same term means under the coal mine regulations. 30 CFR 70.500(a) states: ""dBA' means noise level in decibels, as measured with the A-weighted network of a standard sound level meter using slow response."

The inspector stated that our normal voices at the hearing were producing 60 to 70 decibels. If he yelled, it would be 90 decibels. Inspector High stated that a decibel is 2 times 10 to the minus 5 Newtons per meter (Tr. 157). He changed this to a Newton per meter squared, but did not know what was meant by the term "Newton." He therefore did not know how to describe a decibel since it was in terms of Newtons. It is obviously, however, a pressure produced on the eardrum which could be described in terms of pounds or ounces per square inch.

Rather than being a measure of loudness, the decibel is a measure of the pressure on the eardrum created by a sound. The scale of decibels, however, is not a straight line scale, but is based on the logarithm (to the base 10) of the ratio between two different powers or forces. Normal pressure waves, including sound waves, are subject to the inverse square law of physics so that when the distance between the measuring device and the source is doubled, the pressure at the receiver is halved. When the decibel system of measuring is used, however, doubling the distance to a sound source reduces the sound pressure level by 6 decibels. For example, if a sound level meter 40 feet from a noise source is showing 90 decibels, and the meter is removed another 40 feet from the source, the decibel reading should be 84. A straight line nonlogarithmic measuring system would show a reduction of 50 percent when the distance is doubled.(FOOTNOTE 1) This lack of a straight line measuring system leads me to suspect

the validity of the decibel averaging method set out in the regulations. Averaging was not directly involved in any of the instant cases, however.

The three noise violations involved concern the operator of the wagon drill, the operator of the crushing plant, and a bulldozer operator. There was no serious challenge to the allegation that these operators were, if they had not been wearing ear muffs, being exposed to sound levels in excess of that allowed by the health and safety standards. The defense is that the measures suggested by the inspector to reduce the noise levels would cost more than the inspector estimated, that in the company's financial condition it could not afford to make the recommended changes and that the workers were being protected by ear muffs. MSHA's position, on the other hand, is that the company should make feasible changes in the equipment and spend a reasonable amount of money in making those changes to reduce the noise level and then, if the efforts expended did not amount to a sufficient reduction in noise level to comply with the standard, ear muffs could be used for the personnel protection of the operators.

Citation No. 373631 refers to the D8 bulldozer and I do not think it necessary to detail the specific recommendations that the inspector had for reducing the noise level. In general, it involved adding such things as a rubber floorboard under the operator, acoustical rubber tire material over the operator's head, an additional barrier between the operator and the front of the machine, and a muffler. It was his estimate that the changes he recommended would cost about $1,200, but would not bring the sound level reading below 90 decibels. Accordingly, the operator would still have to wear ear muffs for some part of his shift. While it is not altogether clear, and was not stated specifically with respect to each of the three noise violations, the general philosophy that emerges is one of trying to get the operator to reduce the noise level either by muffling or changing machine operators sufficiently often, but if that does not work, then ear muffs will be allowed. That is, they will be allowed in the sense of abating the citation and not issuing a withdrawal order. There was no testimony that if prior to the issuance of a citation, the operator of the mine had attempted to reduce the noise level unsuccessfully that a citation would not have been issued in the first place. If there have been any criteria established for the use of the inspector in determining whether or not to issue a citation when an operator's attempt to reduce the noise level has been unsuccessful, or to determine when to abate the citation and allow the use of personal ear protection, or for his use in deciding when to terminate a withdrawal order, those criteria were not presented during the case and have not been brought to my attention in the briefs. Nor can I find any such criteria in the regulations. It thus appears to be a matter of personal judgment on the part of the inspector.

In cases where it is conceded that the measures taken to muffle the noise of the particular operation involved will not actually

reduce the sound level below 90 decibels, it results in a guessing game on the part of the mine operator if he wishes to avoid a citation. And, it is not even definite that he can avoid a citation if he guesses correctly. First, if there is a machine which is known to be out of compliance and which the operator cannot think of any feasible way to muffle into compliance, he must guess how much money and effort must go into an unsuccessful noise reduction program before an inspector, who will arrive unannounced at some future date, will decide that his efforts were sufficient and that it was reasonable for him to resort to ear muffs. While it is not exactly clear that he would avoid the citation by guessing correctly as to the personal opinion of this yet unknown inspector, it is clear that if he guesses wrong, a citation will be issued and, of course, regardless of whether an order of withdrawal is eventually issued, a penalty assessment will be made.

I am aware of the fact that the Occupational Safety and Health Review Commission has affirmed some citations where the required measures to reduce the noise level would not result in compliance with the standard and that such decisions have been affirmed on review. In RMI Company v. Secretary of Labor Et Al., 594 F.2d 566 (6th Cir. 1979), the court upheld the Review Commission, but stated at page 571:

> Given the fact that the employees will still be equired to wear personal protective equipment for the remaining time they spend in the vicinity of the chipping guns, we probably would not have reached the same result as did the OSHRC were we considering this case as an initial proposition.

The court went on, however, to give the type of deference usually accorded to an administrative agency and affirmed that part of the Commission's decision. I question whether agencies such as the Occupational Review Commission and our own Mine Review Commission should be given the type of deference which courts accord to enforcement agencies, such as the Federal Trade Commission and their enforcement policies. The two review commissions are not enforcement agencies nor are they regulatory agencies. They perform the same function as courts do and their interpretation of regulations should be given no more deference by a reviewing court than that reviewing court would give to a lower court's interpretation of regulations. But since the deference was given in the RMI case, the result is that the court's decision is not a decision interpreting the regulations. It is merely a decision refusing to disturb, because of the deference, the review commission's interpretation of the regulations. Certainly, our Mine Review Commission is not bound to accept the Occupational Review Commission's interpretation even though the rules being interpreted may be similar or identical.

Furthermore, there are fundamental differences in the enforcement provisions between mine health and safety and occupational

health and safety. For one thing, a civil penalty is mandatory if a citation against a mine operator is valid. And I cannot affirm a citation which will result in a civil penalty against a company in dire financial straits because the company failed to guess properly what the inspector would require before agreeing that the use of ear muffs would be appropriate. The citation involved here is VACACTED.

Citation No. 373632 involves the pneumatic wagon drill and it is admitted that there is no feasible way to bring this machine into compliance except by the use of ear muffs. The ruling here is the same as in the previous violation. It might be reasonable to require the company to spend $1,200 or even more to reduce the noise level, but it is completely unreasonable to issue a citation which will result in a civil penalty because the operator was unable to correctly guess the extent of noise reduction efforts that the inspector would require. The citation is VACATED.

Citation No. 373633 involves the operator of the jaw crusher which crushes the basalt into smaller pieces. It was the opinion of the inspector that a booth could be constructed from plywood at a cost of about $1,000 or maybe under that, which would bring the sound level below the 90-decibel limit so that an operator could stay at the controls for 8 hours without being required to wear ear muffs. He later testified (Tr. 53) that even if it cost $2,400 it would nevertheless be feasible to spend that amount of money to bring the crusher into the noise compliance regulation. It was the Applicant's position that an experimental modification would cost $2,000 and that it would not bring the machine into total compliance (see Applicant's Exh. No. 1). When Applicant's witness, Mr. Bryce Robinson, testified, however, he stated that he did believe that a compartment would bring the jaw crusher noise level down below 90 decibels. His estimation, as stated in the transcript at page 82, is $20,000, but he referred to Applicant's Exhibit No. 1 and seemed to be testifying in support thereof. My own handwritten notes, however, do show that he said $20,000, rather than $2,000.

As to the dividing line between economic feasibility and nonfeasibility, the inspector testified at Tr. 55-56 as follows:

> Q. Okay. Is there a point -- same controls, same results, same company -- that it becomes, in your mind, economically infeasible?
>
> A. Yes, it certainly is.
>
> Q. Okay. Can you estimate at what point?
>
> A. I believe that after I'd inspected -- I'd worked there with the people, we'd tried a few things where we were actually trying to accomplish something -- I believe

that as far as reducing noise percentages -- and when it dropped below a certain point, that's all they could have done, that's all that we technologically know about in 1979, then I would abate the citations.

Q. Same controls, same results -- what if these, instead of costing $1,200.00 cost $20,000.00?

A. I would not consider it feasible.

Q. What if they cost $10,000.00?

A. Well, I don't know where the point to stop would be.

Q. Then, is the substance of your testimony -- it would be on a case by case basis, discussing it with the company, where that line of economic feasibility is?

A. Working with the company.

Q. Okay. There is a line of demarcation, but you can't state, at this point, exactly what it is?

A. No, I can't state. After we both tried, then I would say we would abate.

Q. And would that be true -- just as true -- for the drill and the crusher?

A. Either one of the 3 machines.

The entire emphasis is on how to abate a violation, rather than how to avoid one and that is where I think the big problem is with regard to MSHA's enforcement of the noise standard. If a machine is out of compliance with the noise standard and ear muffs are not worn, I think a citation would be justified. Where ear muffs are worn, however, and no harm is coming to a miner's ears, MSHA has to work out some system of advising the mine operator of its desires prior to the issuance of a citation. That is true because even though with respect to the jaw crusher, it may have been possible to reduce the noise below 90 decibels, it was still a guessing game as to what extent and how much money should be spent toward that goal by this particular mine operator. The jaw crusher citation is accordingly, VACATED.

ORDER

It is therefore ORDERED that all four citations involved in these cases be VACATED and that all four withdrawal orders that were based on the vacated citations be likewise VACATED.

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    It is FURTHER ORDERED that these cases are DISMISSED.

Charles C. Moore, Jr.
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
     1 In the decibel system, 0 is barely audible, 10 is 10 times 0, 20 is 100 times 0, 30 is 1,000 times 0, etc.