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

CONROCK COMPANY,

APPLICANT

CONTEST OF CITATION

v.

DOCKET NOS. WEST 79-373-RM
WEST 79-374-RM
(CONSOLIDATED)

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

CITATION NO. 384009, 8/1/79
384010, 8/1/79

MINE: UPLAND PIT AND MILL

DECISION

APPEARANCES: Scott J. Walcott, Esq., 3200 San Fernando Road,
Los Angeles, California 90065, for the Applicant
Marshall P. Salzman, Esq., Office of Daniel W.
Teehan, Regional Solicitor, United States
Department of Labor, San Francisco, California
94102, for the Respondent

Before: Judge John J. Morris

Applicant, Conrock Company, seeks review of two citations
alleging its workers were exposed to excessive noise
concentrations in violation of 30 CFR 56.5-50.(FOOTNOTE 1)

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The citations were issued pursuant to Section 104(a)2 of the Federal Mine Safety and Health Amendments Act of 1977 (30 U.S.C. 801 et seq.).

ISSUES

The issues are whether the standard is impermissibly vague and whether Conrock violated it.

Conrock contends the excessive noise levels must be measured by the noise actually reaching the employee's ears. Further, Conrock asserts the standard in contest is unenforceably vague. Finally, Conrock argues that MSHA failed to meet its burden of proof in respect to Citation 384010.

The contentions of Conrock and MSHA's counter arguments require a review of the uncontroverted evidence.

FINDINGS OF FACT
CITATION 384009

1. The noise exposure to Conrock's truck driver, who was wearing ear plugs, was 21.6 percent of permissible limit, or about 96 dBA (Tr 9-14, 26).
2. A dosimeter was worn by the driver for 430 minutes; it measured an average exposure of between 95 and 96 dBA (Tr 11-14).
3. Engineering controls to reduce the noise levels include a barrier at the firewall (Tr 21, 60).
4. Holes in the floor could be plugged (Tr 21, 57).
5. Most of the noise was coming from in front of the driver's feet (Tr 42-43).
6. The cost of the controls would not exceed \$200; companies selling insulating material also make engineering recommendations (Tr 62).
7. Controls on the truck, if implemented, would reduce the noise level to within permissible limits.
8. Conrock implemented engineering controls on its Euclide truck at its Capistrano plant; these controls reduced the noise levels to within permissible limits (Tr 73-74, R4, R5).

CITATION 384010

9. A noise sampling was taken by the plant operator who is stationed near one of the sizing screens and the crusher (Tr 22, 23).
10. Most of the time the plant operator, who was wearing earplugs, was outside of his metal 3 X 5 X 6 foot high metal shack; the uninsulated shack was 3 to 4 feet from the shaker screen (Tr 23, 26).
11. The greatest amount of noise came from the shaker screen (Tr 24).
12. Sampling for 485 minutes, an 8 hour shift, indicated a noise level at 165 percent of the permissible limit (Tr 24, 53).

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13. Engineering controls for the plant operator include installing a barrier, insulating the shack, or moving it, (Tr 62-63).

14. MSHA recommendations, if implemented, would reduce the noise levels to within permissible limits at a cost of \$200 to \$300 (Tr 64).

DISCUSSION

For the reasons hereafter stated, I dismiss the contests filed herein.

Conrock's initial contention is that MSHA must measure the alleged violation by the noise actually reaching the worker's ears. The thrust of Conrock's argument seeks to place personal protective equipment, such as ear plugs, before feasible administrative or engineering controls.

The plain wording of Section 56.5-50(b) is directly contrary to Conrock's contention. The section initially requires administrative or engineering controls. If they do not reduce the noise levels, then personal protective equipment is required. The rationale for this approach appears to lie in the fact that workers prefer not to use ear plugs. In addition, the ear plugs are not always fitted properly. Further, ear plugs cannot eliminate all frequencies of noise (Tr 66-67).

Applicant's second contention attacks the vagueness of the standard in regards to its requirement of "feasible administrative or engineering controls."

The test of vagueness is whether the standard is so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, *Allis-Chalmers Corporation v. Occupational Safety and Health Review Commission* 542 F2d 27 (7th Cir., 1976).

Applicant's reliance on *Hilo Coast Processing Company v. Secretary of Labor*, MSHA DENV 79-50-M is misplaced. Commission Judge Charles C. Moore, Jr., did not rule the standard invalid but he indicated MSHA failed to prove that the

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recommended engineering controls were technically and economically feasible. Further considering vagueness compare Brennan v. OSHRC AND Santa Fe Transport Company 505 F2d 869, (10th Cir., 1974).

Applicant cites three Occupational Safety and Health Review Commission (OSHRC) cases in support of its argument that "the vagueness issue has not been put to bed by OSHRC." I disagree, OSHRC has repeatedly ruled that the Occupational Safety and Health Standard(FOOTNOTE 3) relating to noise exposure was not vague, cf Secretary of Labor

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v. Boise Cascade Corporation, Composite, Docket No. 802 (April 1977); Secretary of Labor v. Wheeling Pittsburg Steel Corporation, Docket No. 13286 (November 1977).

In this case MSHA established that engineering controls would reduce the noise levels to within permissible limits. Concerning the Euclide truck see the facts in Paragraphs 3, 4, 5, 6, 7, 8, in this decision. Concerning the plant operator, see facts in Paragraphs 13 and 14.

MSHA's evidence shows that as an administrative control Conrock could rotate its workers after four hours at the site. I reject this proposal since the record presents no foundation to establish the feasibility of this proposal.

Conrock's post trial brief points to the testimony of witness Readon to establish a failure of MSHA's proof on feasibility. I reject this view since witnesses Drussel and Polk directly established economic and technical feasibility. In determining the issues here, the entire record must be considered.

Applicant's final argument is that MSHA failed to prove the economic and technical feasibility of its recommendations for the plant operator's shack. Contrary to Conrock's argument MSHA's engineering recommendations at a cost of \$200 - \$300 are unrebutted (Fact 13, 14).

CONCLUSIONS OF LAW

1. Applicant's Euclide truck operator was exposed to excessive noise and applicant violated 30 CFR 56.5-50; the contest of Citation 384009 should be dismissed (Facts 1 - 8).

2. Applicant's plant operator was exposed to excessive noise and applicant thereby violated 30 CFR 56.5-50; the contest of Citation 384010 should be dismissed (Facts 9 - 14).

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

ORDER

The contests of Citations 384009 and 384010 are dismissed.

John J. Morris
Administrative Law Judge

~FOOTNOTE 1

The cited standard provides in part as follows:

56.5-50 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 S1.4-1971, "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, 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

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

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

~FOOTNOTE 2

30 U.S.C. 814

~FOOTNOTE 3

The Occupational Noise Exposure Standard, 29 CFR 1910.95 reads in part as follows:

(a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows:

TABLE G-16 PERMISSIBLE NOISE EXPOSURES¹

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

(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

(2) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.

(3) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.