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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. YORK 79-92-M A.C. No. 30-00059-05010
v.	Hudson Cement and Stone Quarry and Mill
INDEPENDENT CEMENT CORPORATION, RESPONDENT	

DECISION

Appearances: William M. Gonzalez, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner Robert H. Iseman, Esq., and Thomas S. West, Esq., DeGraff, Foy, Conway, Holt Harris and Mealey, Albany, New York, for Respondent

Before: Administrative Law Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., hereinafter referred to as the "Act." At hearings commencing April 9, 1980, in Albany, New York, and continuing on May 28, 1980, in Kingston, New York, the Independent Cement Corporation (Independent) moved to dismiss the citations on the grounds that they did not provide adequate notice of the violations charged. Although the motion was initially granted that determination was amended and the motion was then held in abeyance while Independent was granted additional time to file for discovery. The issues before me at this time are: (1) whether the citations at bar provided adequate notice of the violations charged, and, if so, (2) whether Independent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties filed herein, and, if so, (3) the appropriate civil penalties to be assessed for the alleged violations.

I. The Motion to Dismiss

In an oral motion to dismiss filed at hearing, Independent claimed that the wording of the citations was incomprehensible and therefore did not provide sufficient notice of the violations charged. In particular, Independent complained that the use of undefined technical language and abbreviations in the citations that do not appear in the cited standard made it impossible to prepare an adequate defense.

Although the legal basis for its motion was not articulated at hearing it is clear that notices of violations charged under the Act and its implementing regulations must comport with constitutional, statutory and regulatory requirements. Ultimately, the notice must meet the fundamental requirements of due process of law under the Fifth Amendment to the United States Constitution. Constitutional due process does not, however, require any specific form or content for pleadings as long as the parties are given adequate notice. S. S. Kresge Company v. NLRB, 416 F.2d 1225 (6th Cir. 1969); NLRB v. United Aircraft Corp., 490 F.2d 1105 (2nd Cir. 1973). Section 104(a) of the Act requires that "each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." Additional general requirements for notice are set forth in the Federal Mine Safety and Health Review Commission Rules of Procedure, 29 C.F.R. 2700.53, which are virtually identical to provisions of the Administrative Procedure Act. 5 U.S.C. 554(b).(FOOTNOTE 1)

I observe that in meeting the statutory requirements for notice it is not necessary to describe the nature of the violation in the precise language of the statute or regulation cited so long as it is described with "particularity". The description must however afford notice sufficient to enable the operator to be properly advised so that corrections may be made to insure safety and to allow adequate preparations for any potential hearing on the matter. MSHA v. Jim Walter Resources, Inc., et al., 1 FMSHRC 1827 (1979).

The cited standard reads as follows:

PHYSICAL AGENTS

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, 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 by examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

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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.

Note: When the daily noise exposure is composed of two or more periods of noise exposure at different 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 - 0.0602 SL

Where T is the time in hours and SL is the sould 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.

* * * * * *

Citation No. 204148 states as follows:

Mandatory standard 56.5-50 was not being complied with in that mill helper received a noise exposure of 274 percent

> whereas the TLV was 100 percent. Engineering controls were not utilized to prevent the need for personal hearing protection. Administrative controls were utilized, due to the person worked 4 hours a day in the area and 4 out. The mill helper was not wearing approved personal hearing protection.

Citation No. 204149 was couched in essentially the same language and the discussion that follows applies equally to that citation.

Independent contends that the notice provided in the citation was deficient because it was not comprehensible. It is readily apparent that the violations were not set forth in the precise terms of the cited standard. In particular, although it is conceded in this case that the noise exposure at issue herein was composed of two or more periods of exposure at different levels, there is no specific allegation in the citation that the sum of the appropriate equation appearing in the standard exceeded "unity." Rather, the violation was cited as a percentage. An MSHA expert in electronics engineering, John Seiler, testified at hearing that in his field the term "unity" is commonly expressed as "100 percent" and that percentages in excess of 100 percent are accordingly in excess of unity. Thus, while precisely the same language of the standard was not used in the citation, the language used was the functional equivalent. While it would certainly have been preferable for MSHA to have charged the violation in the language of the cited standard, I find that its use of such equivalent alternative terminology having the same technical meaning and well enough known in the industry to enable those within the field to understand and apply that terminology, provided the requisite notice to the operator. See United States v. Quong, 303 F.2d 499 (6th Cir. 1962), cert. denied, 371 U.S. 863, 83 S. Ct. 119, 9 L.Ed.2d 100 (1962); Jim Walter Resources, supra.

Independent also claims that notice was deficient because of the use of the undefined abbreviation "TLV" in the citation. While it is true that the abbreviation "TLV" is not defined and does not appear in the cited standard, Mr. Seiler explained that this abbreviation for "threshold limit value" is commonly used in the field of industrial hygiene to mean the maximum limit. Accordingly, a "TLV" of 100 percent is the equivalent of "unity" as used in the cited standard. While the use of such undefined abbreviations in citations and orders should be discouraged, where the abbreviation is one that is commonly understood and utilized in the industry, there is no ground for dismissal. U.S. v. Quong, supra; Hewitt v. United States, 110 F.2d 1 (8th Cir. 1940), cert. denied, 60 S. Ct. 1089, 310 U.S. 641, 84 L.Ed. 1409 (1940). This is consistent with the general principle that administrative pleadings be given liberal construction. National Realty and Construction Company, Inc. v. OSHA, 489 F.2d 1257 (D.C. Cir. 1973).

In meeting the requirements for "particularity" set forth in section 104(a) of the Act it will obviously be necessary in charging violations of highly technical regulations, such as the one at bar, to use commensurately technical language. The

operator in these circumstances cannot escape by claiming ignorance. If it does not understand such technical language it is

incumbent upon the operator to utilize prehearing discovery or obtain expert assistance to gain the necessary understanding. I observe that the operator here failed to take advantage of discovery in this regard though it had ample opportunity to do so both prehearing and, after hearing commenced, when I granted an extension of time to file for discovery.

Under all the circumstances, I do not find that the notice provided in the citations at issue was insufficient to enable the operator to defend at hearing. Moreover, in light of the evidence that the conditions were timely abated it is apparent that the operator did in fact have sufficient notice to make the necessary safety corrections. Jim Walter Resources, supra. The notice provided therefore comports with constitutional, statutory and regulatory requirements. Accordingly, the motion to dismiss is denied.

II. The Alleged Violations and Appropriate Penalties

Independent claims by way of defense that MSHA did not prove that the dosimeters used in obtaining the noise-level readings forming the basis of the citations were sufficiently accurate and, in particular, that MSHA did not show that they were properly certified by a chain of certification to the standards maintained by the National Bureau of Standards. In defense to Citation No. 204148, it further claims that the noise level readings for the mill helper were deficient inasmuch as the readings on two separate dates under "identical conditions" produced different results.

Contrary to Independent's allegations, there is no requirement in the cited standard that the dosimeters be certified to the standards maintained by the National Bureau of Standards. In any event I observe that according to John Seiler, head of the Physical Agents Branch of MSHA's Technical Support Center, such a calibration is in fact periodically made. The dosimeter placed on the mill helper resulting in the excessive noise level readings charged in Citation No. 204148 was calibrated, according to the uncontradicted testimony of MSHA inspector Ralph Hopkins, by using a calibrator which had been certified accurate within the previous 6 months by the Federal laboratory. I find that the procedures followed by the inspector were sufficient to demonstrate the accuracy of the dosimeter used to produce the results found in Citation No. 204148. I also observe that Independent has failed to produced any affirmative evidence that the dosimeter was not accurate.

Inspector Hopkins also testified, without contradiction, that he used a calibrator to verify the accuracy of the instruments used in the survey leading to Citation No. 204149. Although he testified at this point that the calibrator was calibrated by the technical support staff in Pittsburgh on a yearly basis rather than every 6 months as he had previously testified it is apparent from the testimony that the calibrator used had been properly certified by the technical support laboratory.

Seiler testified that one of the functions of his laboratory was to calibrate the acoustical calibrators used by inspectors in the field. A label certifying to the accuracy of these field calibrators is placed on the instruments after they are calibrated at the Pittsburgh laboratory. Inspector Hopkins observed such labels on the instruments he utilized. Seiler opined that the field calibrators were "very reliable" instruments and that he would not hesitate to accept the data from the dosimeters used in this case as long as they had been calibrated before the full shift measurement. I conclude based on this evidence that MSHA has sufficiently demonstrated the accuracy of the instruments used in this case. The procedures followed herein clearly provided reasonable guarantees of accuracy.

Independent also argues that the noise level charged in Citation No. 204148 was deficient because subsequent readings under "identical conditions" produced different results. Independent has failed to prove however that the conditions were in fact "identical". Without that essential proof its argument must fail. Under the circumstances the violations are proven as charged.

In determining the amount of civil penalty to be assessed, section 110(i) of the Act requires that six factors be considered: (1) whether the operator was negligent; (2) the gravity of the violation; (3) the history of previous violations; (4) the appropriateness of the penalty to the size of the operator's business; (5) the operator's good faith in attempting rapid abatement of the violation; and (6) the effect of the penalty on the operator's ability to continue in business.

Negligence: MSHA maintains that the operator was not negligent in this case contending that the specific locations cited for excessive noise had never previously been tested. Although there is evidence to suggest that previous noise violations had been cited regarding the mill helper at this plant the violations were directed to a previous operator. There is insufficient evidence to show that the current operator (Independent) knew of those violations. MSHA also observes that the mill helper had been directed to work outside of the high noise level area for a portion of his work day. The operator here did not have its own monitoring equipment. Under the circumstances I accept MSHA's position as to negligence.

Gravity: MSHA produced no probative medical evidence to indicate what, if any, physical or mental damage could occur to the employees exposed to the noise levels cited. I reject the testimony of the inspector in this regard. He clearly did not have the expertise to render such an opinion.

History: The printout submitted by MSHA reveals a moderate history of violations by this operator with no previous violations of the standard cited herein.

Business Size: Based on the evidence submitted, I find the

operator to be medium in size.

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Good Faith Rapid Abatement: The evidence reveals that with respect to both citations the operator exercised good faith in attempting rapid abatement of the violations. With respect to Citation No. 204148, additional administrative controls were implemented so that the mill helper was exposed to within permissible levels. With respect to Citation No. 204149, engineering controls were implemented by the construction of a sound insulated cab on the subject crane.

Ability to Stay in Business: There is no evidence that the penalties assessed herein would affect the operator's ability to stay in business.

Considering all of these factors, I conclude that with respect to each citation a penalty of $200 is appropriate. The operator is therefore ordered to pay penalties totaling $400 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

~FOOTNOTE_ONE

1 Commission Rule 29 C.F.R. 2700.53 reads as follows:

"Except in expedited proceedings, written notice of the time, place, nature of the hearing, the legal authority under which the hearing is to be held, and the matters of fact and law asserted shall be given to all parties at least 20 days before the date set for hearing."