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SOL (MSHA) v. CALLANAN INDUSTRIES
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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
v.
CALLANAN INDUSTRIES, INC.,
RESPONDENT

Civil Penalty Proceeding
Docket No. YORK 79-99-M
A.C. No. 30-00013-05003
South Bethlehem Quarry and Mill

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
Harry R. Hayes, Esq., Albany, New York, for
Respondent

Before: 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., the "Act"), alleging four violations of mandatory standards. The general issues are whether Callanan Industries, Inc. (Callanan), has violated the regulations as alleged in the petition filed herein, and, if so, the appropriate civil penalty to be assessed for the violations.

I. Contested Citations

Citation No. 204924 charges a violation of the mandatory safety standard at 30 C.F.R. 56.5-50, specifically alleging that the employee operating the Ingersoll type CM-2 air track drill, was exposed to 660 percent of the permissible level of noise. According to the charges, personal hearing protection (ear muffs) was being worn but feasible engineering or administrative controls were not implemented to eliminate the need for such protection. The citation was issued on September 18, 1978, and the operator was given until October 13, 1978, to abate the condition cited. On June 8, 1979, a section 104(b) withdrawal order (FN.*) was issued requiring that the cited drill be withdrawn from service because "no apparent effort was made by the operator to implement feasible engineering or administrative controls to protect the employee" while operating the drill. The drill was thereafter withdrawn from

service. The validity of this withdrawal order is not in itself at issue in this civil penalty proceeding. Insofar as the order concerned a failure to abate the cited violation, however, it may be relevant evidence under section 110(i) of the Act in determining the amount of any penalty.

There is no dispute that the cited drill emanated noise levels above those permitted by the cited regulation, and indeed, that the drill emanated noise at 660 percent of the exposure permitted by that regulation. Callanan's principle defense rests upon subsection (b) of the cited regulation which provides in part as follows: "When employees' exposure exceeds that listed * * *, 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." MSHA contends that feasible engineering and administrative controls existed which the operator failed to implement. Callanan maintains on the other hand that the proposed engineering controls are not feasible, emphasizing that such controls are not economically viable under the circumstances.

In determining the feasibility of the proposed engineering controls, MSHA concedes that both technological and economic considerations are relevant. The term "feasible" as used in a similar noise standard promulgated in regulations under the Occupational Safety and Health Act (29 C.F.R. 1910.95(b)(1)) has been judicially construed to include economic feasibility. *RMI Company v. Secretary of Labor, et al.*, 594 F.2d 566 (6th Cir. 1979); *Turner Company v. Secretary of Labor*, 561 F.2d 82 (7th Cir. 1977). In determining such feasibility, the court in *RMI* approved of the cost-benefit analysis employed by the Occupational Safety and Health Review Commission (OSHRC) in the case of *Continental Can Company, 1976-1977 CCH OSHD ¶57 21,009, 4 BNA OSHC 1541 (1976)*. The OSHRC stated therein:

[T]hat the standard should be interpreted to require those engineering and administrative controls which are economically as well as technically feasible. Controls may be economically feasible even though they are expensive and increase production costs. But they will not be required without regard to the costs which must be incurred and the benefits they will achieve. In determining whether controls are economically feasible, all the relevant cost and benefit factors must be weighed. [Citations omitted.]

In setting forth a general test to be followed in determining economic feasibility, the court in *RMI* stated as follows:

The benefits to employees should weigh heavier on the scale than the cost to employers. Controls will not necessarily be economically infeasible merely because they are expensive. But neither will controls necessarily be economically feasible merely because the

employer can easily (or otherwise) afford them. In order to justify the expenditure,

there must be a reasonable assurance that there will be an appreciable and corresponding improvement in working conditions. The determination of how the cost benefit balance tips in any given case must necessarily be made on an ad hoc basis. We do not today prescribe any rigid formula for conducting such analysis. We only insist that the Secretary, and the OSHRC on review, weigh the costs of compliance against the benefits expected to be achieved thereby in order to determine whether the proposed remedy is economically feasible.

RMI, supra at pages 572-573. I find this test to be relevant and reasonable and in the absence of precedent from the Mine Safety and Health Review Commission I find it appropriate to adopt to the facts of this case.

The court in RMI, again citing OSHRC decisions on point, further concluded that the Secretary has the burden of proving both the technologic and economic feasibility of the proposed controls in showing that a violation of the noise standard has occurred. RMI, supra at p. 574. See also Administrative Procedure Act, section 7(d), 5 U.S.C. 566(d), and Diebold, Inc. v. Marshall, 585 F.2d 1327, 1333 (6th Cir. 1978). I find similarly that MSHA has that burden here. MSHA in this case did indeed go forward with its evidence in this regard in its case-in-chief.

The precise question before me then is whether MSHA has met its burden of proving the feasibility of the controls proposed in this case. I find that it has not. I am not satisfied, first of all, with MSHA's cost estimate for the proposed engineering controls. While superficially the estimate of \$2,672.78 does not appear to be unreasonable or unacceptable, upon closer examination I find that that estimate is too imprecise to allow a proper economic analysis. The estimate did not include the cost of a muffler, certain labor costs and the cost of transporting the subject drill between upstate New York and Joplin, Missouri, where the proposed retrofitting was to be done. Without more accurate figures, a true cost-benefit analysis cannot be made.

In any event, regardless of the accuracy of MSHA's cost estimates, I do not find on the facts of this case any reasonable assurance that there would be an appreciable and corresponding improvement in working conditions as a result of the proposed controls. RMI, supra, pages 572-573. While the manufacturer of the subject drill, the Ingersoll-Rand Equipment Corporation, indeed concluded that it could not be muffled at all, even MSHA's expert conceded that he did not know what specific degree of noise reduction could be achieved from his proposed controls and could only speculate that a 5-decibel improvement might be expected based on MSHA's experience with muffling other types of drills. He further conceded that Callanan's drill would not, even after the proposed alterations, meet permissible noise levels but that Callanan would still be required to implement additional administrative controls the feasibility of which I also find suspect. The expert based his conclusions on

~171

the assumption that the drill operator would not even occasionally be required to work near the drill--an assumption that is not supported by the credible evidence. Thus, even after the suggested engineering controls would have been implemented at substantial cost, Callanan's employees would nevertheless still have no doubt been required to wear personal hearing protection while operating the drill. Thus the benefits of the proposed controls, if indeed there be any, remain highly speculative. There is clearly no reasonable assurance that the thousands of dollars MSHA would have Callanan spend for the proposed controls would realistically produce any corresponding improvement in working conditions. Under the circumstances, I find that MSHA has failed in its burden of proving the feasibility of the proposed controls.

Inasmuch as personal protection equipment (earmuffs) was admittedly being utilized by the exposed employee in this case and since the uncontradicted evidence from the tests performed by Doctor Iandoli, an audiologist from the Albany Medical Center, demonstrates that the sound levels within the employee's muffs would under ordinary operating conditions be within that set forth in the relevant tables, I conclude that there has been no violation of the standard. Citation No. 204924 is therefore vacated.

Citation No. 205343 charges one violation of the standard at 30 C.F.R. 56.9-2. That standard requires that equipment defects affecting safety be corrected before the equipment is used. Here it was charged that the automatic reverse signal alarm on the company's No. 2 haul truck was not operating. Callanan concedes that the backup alarm was not functioning as alleged but claims that the truck driver found the backup alarm to have been working properly before the truck was used that morning and, therefore, argues that there was no violation. Under this construction of the standard, if defects affecting safety are discovered after the equipment is being used then there is no violation. I reject such a strained and restrictive construction of the standard. It is clearly contemplated by that standard that defects affecting safety which occur during the course of equipment operation must also be corrected before the equipment is used any further.

I find that Callanan was only slightly negligent, however, in failing to detect the faulty alarm here. Truck drivers had been instructed to check the functioning of the alarm at the beginning of each shift and at lunchtime and were paid a bonus to do so. The alarm cited in this case had been functioning at the beginning of the shift that morning. No one seems to know when it ceased to function and it could have stopped only moments before detection by the inspector. Callanan immediately took the truck out of service and paid an employee overtime to correct the condition. I find from the credible evidence that there was only minimal employee exposure to the anticipated hazard but injuries from a truck backing into an employee could of course be fatal.

Citation No. 205347 charges one violation of the standard at

30 C.F.R. 56.14-35. That standard prohibits the lubrication of certain machinery while it is in motion unless it is equipped with extended fittings. It is here

alleged that the grease fitting on the east side of the No. 2 conveyor tail pulley was not extended so that the employee could safely grease the pulley bearing while the pulley was moving. There is no dispute that an employee did in fact grease the moving tail pulley at that location at least once a day but there is some dispute over the hazard presented by such a practice. Based on the photographs submitted by the operator, and the credible testimony of MSHA inspector Rezniak, it is clear to me that the cited practice constituted a hazard and the violation was therefore proven as charged. The credible evidence shows that the employee greasing the fitting would be required to extend his arms over the existing guard and in close proximity to the moving belt and tail pulley. It is my conclusion that the grease gun could in fact become engaged in the pulley possibly dragging the employee into the pulley or that the grease gun could be thrown back by the moving pulley into the arms or face of the employee. Under the circumstances, arm and head injuries would be likely. I find also that the hazard should have been obvious to the operator, particularly since the grease fitting on the opposite side of the pulley was extended as required by the cited regulation. The operator stopped the belt immediately after it was cited and replaced the fitting with an extended one.

II. Uncontested Citation

Citation No. 205346 charged one violation of the standard at 30 C.F.R. 56.12-25. That standard requires that all metal-enclosing or encasing electrical circuits be grounded or provided with equivalent protection. The parties proposed to settle this citation with a reduction in penalty to \$50. As reasons for the settlement, MSHA proffered that the cited ungrounded equipment was being used in a dry area, making it quite unlikely that the anticipated shock hazard would occur. It was further proffered that even should a shock occur it would be minimal, not causing serious injuries. As to all citations in this case, in addition to the negligence and gravity involved, I have considered evidence as to the size of the operator, the history of its violations and the demonstrated good faith of the operator in attempting to achieve rapid compliance. Under the circumstances, I find that the agreed penalty of \$50 is acceptable.

ORDER

Citation No. 204924 is VACATED. The following penalties totaling \$475 are to be paid within 30 days of the date of this decision.

Citation No.	Penalty
205343	\$125
205346	50
205347	300

Gary Melick

