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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONOCO, INC., CONTESTANT	Contest of Citation
v.	Docket No. CENT 81-137-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 170624; 1/28/81 Karnes County Pits

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant; Robert A. Fitz, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Respondent.

Before: Judge Charles C. Moore, Jr.

Despite the docket number assigned to this case, it is not a coal mine case. The notice of contest was forwarded to the Commission by a letter of February 26, 1981, on Consolidation Coal Company's letterhead and the notice states in paragraph 1 that "at or about 1045 hours on September 14, 1979, Federal Coal Mine Inspector, D. J. Haupt * * * issued Citation No. 170624 * * *." I am assuming that because of this, our docket section gave this case a coal mine docket number. Actually, the mine is a uranium mine located near Falls City, Texas, but I see no necessity of going through any formal procedure to change the docket number.

This is an alleged noise violation where the noise produced by a Caterpillar scraper in the hearing zone of the operator was louder than that allowed by the noise standard but where the operator was wearing hearing protection that would reduce the sound level pressure within his ear to an amount below that allowed by the regulations. It was the opinion of the expert witnesses testifying for MSHA that if the engineering controls recommended for reduction of the noise in the hearing zone of the operator were followed by the Contestant, it would still not reduce the sound pressure level sufficiently so that the equipment operator could forego personal hearing protection. The equipment operator in this case was wearing personal hearing protection that was represented to attenuate noise by 41 decibels.(FOOTNOTE.1)

To this extent, this case is similar to the situation that was presented to me in Hilo Coast Processing Company v. Secretary of Labor, 1 FMSHRC 895 (1979). I decided that case against the Government on the basis of the economic feasibility of the engineering controls suggested by MSHA as well as the fact that I considered it improper for MSHA to issue a citation, when the operator of the equipment was wearing hearing protection and when it appeared that the mine operator was required to guess how much money and effort he should expend in trying to reduce the noise level before resorting to personal hearing protection.

The history of the Hilo case, after I decided it, is somewhat strange. The Government appealed my decision and the Commission granted discretionary review. Both of the parties filed briefs and after the briefing, Hilo filed a further pleading indicating that it was engaged in a borrow pit type of operation and inasmuch as MSHA had decided it would no longer exercise jurisdiction over borrow pits, the case should be dismissed. The Commission then wrote to the Secretary of Labor and asked if the Secretary would dismiss its case against Hilo on the grounds that he was not exercising jurisdiction over such a mine if the Commission reversed my decision. The Secretary then properly informed the Commission that the borrow pit exclusion had nothing to do with the Hilo operation and that accordingly it would not dismiss its proceeding should the Commission reverse my decision. Thereafter, without further motion from either party and without any explanation or opinion, the Commission vacated its order granting the petition for discretionary review. This leaves me, the Government and the industry, without guidance as to the Commission's views, and I refuse to speculate as to the possible reasons for the action taken.

PROCEDURAL MATTERS

When the above case was assigned to me, I had already noticed two cases for hearing in Corpus Christi, Texas, for May 27, 1981. Because I thought it might be possible to conclude those two cases in the morning, I noticed the instant case for hearing at 2 p.m. on May 27, 1981, but advised the parties that because of a previous schedule it might be May 28 before this case would commence. The notice of hearing was issued on March 26, 1981, 1 day in excess of 2 months before the scheduled hearing date of May 27, 1981. At the time I issued my notice of hearing, Eve Chesbro, Esq., was the attorney representing the U.S. Department of Labor in this case. By letter of April 8, 1981, not received until April 13, 1981, I was informed that Thomas Mascolino, Esq., would be representing the Secretary of Labor in this case. By letter dated May 6, 1981, but received May 11, 1981, I was requested by Robert A. Fitz, Esq., from the Department of Labor's Dallas office to issue a subpoena requiring Contestant "to produce its unit [No.] 482, a Caterpillar 651-B scraper, at the hearing in the subject administrative law case at 2:00 p.m., Wednesday, May 27, 1981, in Corpus Christi, Texas." Since a Caterpillar scraper is a massive piece of equipment and Falls City, Texas, is more than 100 miles from Corpus Christi and inasmuch as no justification was provided, I declined to issue

the subpoena. I did offer to stop in Falls City, Texas, and view the equipment but, as I later learned, the Government did not want

me to look at the equipment but wanted one of its experts to see it. It was subsequently arranged that the expert from the Technical Support Center in Denver, Colorado, would view the equipment on Friday, May 22, 1981.

THE EVIDENCE

On January 28, 1981, Inspector Haupt conducted a noise survey on four pieces of equipment being operated in Contestant's Karnes County Pits. For various reasons, he issued no citations concerning the front-end loader operator, the truck driver, or the backhoe operator. He did issue a citation concerning the scraper operator. He placed the dosimeter in the hearing zone of the scraper operator and left it there for a period of 10 hours and 45 minutes. A dosimeter when properly calibrated does not record any sound level less than 90 decibels. The readout is not in decibels but in a percentage of the allowable noise level for an 8-hour shift. The reading in the case of the scraper was 793.9 percent which is the equivalent of 105 dBA during the shift. At five different times during the 10-hour and 45-minute shift, Inspector Haupt checked the scraper with his sound level meter and found that it registered 90 dBA when idling and 104 dBA when the engine was revved up.(FOOTNOTE.2) This served as a check on the dosimeter and buttressed the 793.9-percent reading that the dosimeter had given.

The operator of the scraper was wearing the E.A.R. brand of personal ear protection. This is a fibrous-type of plug that is inserted in the ear. Each of the personal ear protection devices has been rated by MSHA as to the amount of sound attenuation it can produce. Each device is assigned an "R" factor and a "D" factor. The "R" factor is the number of decibels that the device can subtract from the noise entering the outer ear shell to obtain the noise impinging upon the tympanic membrane (eardrum). In the case of the E.A.R. device, the "R" factor is 41 decibels meaning that the eardrum receives 41 decibels less than the noise existing just outside of the outer ear. The "D" factor assigned to the E.A.R. device is .0034 and this is a figure which is to be multiplied by a dosimeter percentage reading in order to get the percentage of the allowable sound level that actually reaches the eardrum when the device is being worn. When the recorded dosimeter percent of 793.9 is multiplied by .0034, the result is 2.699 percent of the allowable noise limit. When 41 decibels is subtracted from the recorded 104 on the sound level meter, it leaves 63 decibels. Both of these figures are well below the allowable noise level.

Contestant's Exhibit No. 1 is a letter addressed to Mr. Patts, an employee of Contestant, by Leonard C. Marraccini, Chief of the Field and

Applications Branch, Physical Agents Division of MSHA's Pittsburgh Health Technology Center. Attached to the letter are the "R" and "D" factors for numerous types of personal ear protection. Only the E.A.R. devices (see page 6 of exhibit) and the Deci Damp manufactured by Marion Health and Safety Inc. (see page 11 of exhibit), have "R" factors as high as 41 decibels. There was also evidence that the Federal Aviation Administration had tested numerous hearing protection devices and decided that the E.A.R. was the best. During the hearing, I announced to the parties that on my way to Corpus Christi, I had visited the flight line of the Navy Jet Training Base at Beeville, Texas. Personnel on the flight line are required to wear personal hearing protection and the devices that were given to me to wear appeared to be the same as the E.A.R. devices.

Mr. Larry Rabius is an industrial hygienist and he is the previously referred to expert witness from the Denver Technical Support Branch of MSHA. He examined the scraper in question and made certain suggestions as to how the noise produced by the machine could be reduced. These included checking the canopy to see if it was generating or reflecting noise, checking the fire wall floor and possibly lining them and checking the engine cover itself. He suggested that belt material could be used for some of the shielding and speculated that if his suggestions were all followed a 4- to 5-decibel reduction might be achieved. While such a reduction is substantial, it is nowhere near the 41-decibel reduction which the personal ear protection supplies and it does not bring the noise level down to that level where no personal ear protection would be required. The evidence was inconclusive as to the cost of the suggested modifications and as stated the 4- to 5-decibel attenuation was stated more as speculation rather than as an expert opinion.

Dr. Garson testified on behalf of the Contestant. It was his testimony that the damage from excessive noise does not occur in the outer portions of the ear, but to the small hairs in the spiral organ of corti which is located in the snail like bone called the cochlea. Any device that can reduce the noise level reaching the eardrum reduces the likelihood of damage to the "outer hair cells" of the spiral organ of corti. His testimony was that the EAR devices would serve that purpose.

There was some evidence that the R and D factor might not be as great as those listed on the MSHA publication that was attached to Contestant's Exhibit No. 1. There was also evidence that some miners found personal ear protection uncomfortable and did not wear it, but there was no disagreement as to the operator of the caterpillar scraper involved in this case. He was wearing ear protection and he was wearing the best type available. MSHA deducts 10 decibels from the R factor as an allowance for a possible poor fit when considering how much sound pressure actually reaches the inner ear through an ear plug type device. If that allowance is made, the EAR device will reduce the noise factor by 31 decibels.

While there was some evidence that the dosimeter sometimes

records sounds at 89 decibels, it is designed to record only that sound that exceeds 90 decibels and it stores that sound in an electronic manner similar to the way a

battery is charged. If properly adjusted, the dosimeter will convert the stored electric charge to a percentage of the allowable sound level above 90 decibels during an 8-hour work shift. As indicated earlier, if the work shift exceeds 8 hours, an adjustment is made to allow for the fact that the standard is written in terms of an 8-hour shift. The mine operator's witness, Dr. Garson, agreed with the inspector's action in adjusting the readout to accommodate an equivalent 8-hour shift readout.

The standard in question requires that a mine operator exercise feasible administrative or engineering controls to reduce the noise level before resorting to the use of personal hearing protection. The kind of controls suggested by Mr. Rabius are engineering controls. Administrative controls would be having a sufficient number of equipment operators work on this particular scraper during a shift, so that no individual would exceed his accumulative allowable noise level. The standard allows a miner to work for only 1 hour at 105 decibels. To work an 8-hour shift on this piece of equipment it would require eight operators to each work 1 hour and then be given some other job for the remainder of their shift in which the sound level would be 90 decibels or less. If the noise of the scraper were reduced by 5 decibels and produced only 100, a miner could work for 2 hours on the scraper and it would thus require four miners to operate such a scraper for an 8-hour shift. Administrative controls are thus not practical.

The standard in question says that administrative or engineering controls should be used but it is MSHA's position that both administrative and engineering controls should be used before resorting to personal hearing protection. The coal mine regulations use the word "and" instead of "or." I agree with MSHA that the word "or" in the metal and nonmetal standard conveys the same meaning as "and" but it does not matter in this case. MSHA has the burden of proving feasibility and it has not done so. I find that neither engineering nor administrative controls or a combination of both would be feasible in this case. An air-conditioned noise-proof canopy would protect the miners' ears without personal hearing protection, but attempts to retrofit scrapers with that type of device have been unsuccessful. The Goverment witnesses so testified.

I see no need in this decision to reexamine the position I took in Hilo. In the instant case, I find that there were no feasible administrative or engineering controls that Contestant should have tried before resorting to personal hearing protection. The EAR plugs were necessary to protect the miners' hearing and there was nothing short of a new piece of equipment with a factory-installed, air-conditioned cab (air conditioning because temperatures of over 100 degrees for a number of days in a row are common in this part of Texas) would have protected the miners' ears and MSHA does not contend that Contestant should have replaced the scraper in issue with a new one.

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The citation is VACATED and the case is DISMISSED. All proposed findings not included in the above opinion are REJECTED.

Charles C. Moore, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE

In this decision I am using the word "decibel" and the term "dBA" interchangeably even though technically there is a difference because the latter term is weighted to allow for different frequencies.

~FOOTNOTE_TWO

The difference between the 104 dBA measured by the noise level meter and the 105 dBA figure measured by the dosimeter is attributable to the fact that total sound during a 10-hour, 45-minute shift must be considered as though an 8-hour shift were involved.