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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 PROCEEDINGS Docket No. YORK 81-67-M A.C. No. 18-00481-05007
v.	
A. H. SMITH STONE COMPANY, RESPONDENT	Docket No. YORK 82-5-M A.C. No. 18-00481-05008 Brandywine Pits and Plant

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner Wheeler Green, Branchville, Maryland for Respondent

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act," alleging violations of mandatory health and safety standards. The general issues are whether A.H. Smith (Smith) has violated the regulations as alleged in the petitions filed herein, and, if so, whether those violations are "significant and substantial". An appropriate civil penalty must also be assessed for any violation found.

Contested Citations

Citation No. 302475 charges a violation of the mandatory standard at 30 C.F.R. section 56.5-50, specifically alleging that the noise level around the operator of the "clam" shovel was 189% of the permissible limit. According to the charges, neither feasible engineering nor feasible administrative controls were being used to reduce the level of noise to eliminate the need for personal hearing protection. The citation was issued on July 19, 1978, and the operator was initially given until September 20, 1978, to abate the condition. Further extensions were granted as follows: (1) on February 1, 1979, an extension was granted to April 18, 1979, on the grounds that sound absorption material had been ordered by the operator but had not yet arrived; (2) on May 2, 1979, an extension was given to July 10, 1979, because the sound

aborption material had still not arrived; (3) on August 1, 1979, an extension was granted to August 21, 1979, after a noise survey performed on July 31, 1979, showed that the noise level around the operator of the cited shovel was 196% of the permissible limit (at the time of that survey, a sound barrier curtain had been installed but apparently had not been installed tightly against the ceiling and walls of the cab); (4) on February 6, 1980, an extension was granted to March 26, 1980, because the plant had been shut down and the inspector was therefore unable to perform a noise survey; (5) on June 4, 1980, an extension was granted to July 3, 1980, because the shovel had broken down and the noise survey could not be completed.

Precisely one year later, on June 4, 1981, a section 104(b) withdrawal order (FOOTNOTE 1) was issued (Order No. 312018). The order provided as follows:

> "No apparent effort was made by the operator to reduce the noise level of the Manitowac clam shovel in order to eliminate the need for hearing protection on five previous attempts to survey this machine. It either broke down early in the survey or was not running at all during an inspection of this plant. The operator had insulated curtains installed on the shovel but they were not being used. The noise level on the shovel was 192% of the permissible limit at 5 hours of the survey when this machine went out of service again. Ear plugs [sic] worn by operator of shovel.

Four days later, on June 8, 1981, the withdrawal order was modified after the soundproof curtains were reinstalled by the operator and a muffler was placed over the exhaust. A sound level meter indicated a reduction in noise levels from "102 dBA's to 92 dBA's". Additional controls were accordingly required to bring the noise level to within permissible limits. No subsequent action has apparently been taken on this equipment as the operator has withdrawn it from service.

There is no dispute in this case that the cited Manitowac shovel emanated noise levels above those permitted by the cited regulation, and indeed, that the shovel emanated noise when first cited at 189% of the permissible level. Smith's principal defense rests upon the language of the cited regulation which provides in part as follows:

When employees' exposure exceeds that listed * * *, feasible administrative or engineering control 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 did exist and the operator failed to implement them. Smith maintains, on the other hand, that the proposed administrative and engineering controls were not, and are not now, feasible, emphasizing that such controls are not economically viable under the circumstances.

As I observed in Secretary of Labor v. Callanan Industries, Inc., 3 FMSHRC 168, pet. for rev. granted February 18, 1981.

> The term "feasible" as used in a similar noise standard promulgated in regulations under the Occupational Safety and Health Act (29 CFR section 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, 1966 through 1967 CCH OSHD %5721,009 4 BNA OSHC 1541 (1976). The OSHRC stated therein that 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 costs 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. [See also Samson Paper Bag Co., 8 BNA OSHC 1515, 1980 CCH OSHD %57 24,555 (No. 76-222, 1980)].

Just as in the Callanan case, I find in this case that the test applied by the OSHRC to essentially the same regulatory standard is relevant and reasonable and, in the the absence of precedent from the Mine Safety and Health Review Commission, I apply that test to the facts of this case. As I also observed in the Callanan case, the Federal Circuit Court in the RMI decision, again citing OSHRC decisions on point, also concluded that the Secretary has the burden of proving both the technologic and economic feasibility of the proposed controls and of showing that a violation of the noise standard has occurred. RMI, supra at page 574, Anaconda Aluminum Co., 9 BNA OSHC 1960, 1981 CCH OSHD %57 25,300 (No. 13102, 1981). See also Administrative Procedure Act, section 7(d), 5 U.S.C. section 566(d) and Diebold, Inc. v. Marshall, 585 F.2d 1327, 1333 (6th Circuit 1978). I find similarly in this case that MSHA has that burden here.

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. MSHA specialist John Radomski testified at hearing in this regard that, based on his experience with many shovels similar to the Manitowac clam shovel here cited, noise reduction in the cab area of such shovels can easily and economically be attained by installing a sound barrier between the motor and cab area and by installing safety glass or plexiglass windows in the cab. Radomski testified that he knew of several diesel shovels under similar circumstances that had been brought into compliance with the noise standard by the installation of a sound barrier alone. According to Radomski, for $100 or less the operator could have constructed his own barrier made of plywood and soundproof material or, for $400 to $500, the operator could have purchased an installed prefabricated sound barrier curtain. Prefabricated curtains were then available on the market and at the time the citation was issued Radomski provided Mine Superintendent Dennis Critchley with the name and address of a company producing such curtains. Radomski also concluded that it would cost $100 to $200 to install safety glass in the windows of the cited shovel. Finally, Radomski concluded that if the sound proof barrier and safety glass windows were not sufficient to bring the shovel into compliance, most certainly the addition of a muffler costing from $50 to $100 (installed cost) would bring the shovel into compliance. According to Radomski's calculations based on 1978 cost estimates, the operator could have brought the cited shovel into compliance with the cited standard for $600 or less.

By way of defense the operator argues that the actual cost of the sound proofing material alone was $948.70. While the operator does not challenge

the cost estimates cited by Inspector Radomski for the purchase and installation of safety glass and a muffler, it nevertheless maintains that the proposed engineering controls were economically infeasible. I disagree. Even assuming, as the operator contends, that the soundproofing material cost $948.70, and that a muffler would cost $100, safety glass, $200, and additional labor costs, $150, I do not find this economic burden unreasonable to bring the cited shovel into compliance. In reaching this conclusion, I find from the uncontradicted testimony of Inspector Radomski that other similar shovels have been brought into compliance with similar or even less modification. Accordingly, I find on the facts of this case ample assurance that there would be full compliance with the standard resulting from a relatively modest outlay of financial resources.

I find, in addition, that the administrative controls proposed by MSHA were also feasible. Based on his analysis of the noise level, Inspector Radomsky concluded that the cited shovel could be operated in compliance with the standard by utilizing two shovel operators, each on a four hour shift. According to Radomski, the operator of the cited shovel was then being paid less than $5 an hour, although the normal pay for that job was then between $7 and $10 an hour. He observed that Smith also employed other skilled workers such as truck drivers, front end loaders, and two other shovel operators. Industry pay scale for loader operators was then from $7 to $9 an hour. Within this framework it appears that other multiskilled workers then employed by Smith or newly hired could have been rotated to work the cited shovel on four-hour shifts and to operate other equipment for the remainder of their shift without any additional cost (or with only minimal additional cost) to the mine operator.

Under all the circumstances, I find that the Secretary has carried his burden of proving the violation of the standard at 30 CFR section 56.50(b) as alleged. Anaconda Aluminum Co., supra.

Whether that violation was "significant and substantial" depends on whether that violation could be a major cause of a danger to safety or health and whether there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). In this regard, Inspector Radomski testified that the exposure of the shovel operator to the level of noise cited would result in hearing loss over a period of time. He admitted that he did not know how long such an exposure would be required to result in hearing loss but speculated that it would be more than five years continuously. No scientific or medical evidence was produced to substantiate Radomski's testimony in an area that indeed requires some specialized expertise. The inspector's testimony in this regard is particularly inadequate in light of the evidence that the shovel operator was apparently wearing personal hearing protection. In light of this, and the rather speculative testimony offered, I cannot properly assess the probabilities. I do not find therefore that the evidence as presented in this case is sufficient to demonstrate that the cited violation was

"significant and substantial" under the National Gypsum test. For the same reasons, I do not find sufficient evidence to establish a high level of gravity.

I do find, however, that the operator was negligent in regard to this violation in failing to conduct its own noise survey on equipment that, based upon the undisputed noise levels found, must obviously have been emanating excessively high noise levels. Also significant in this case is the lack of good faith shown by the operator herein in failing to achieve compliance after notification of the violation. The citation was issued on July 19, 1978, and the violation still had not been abated nearly three years later when the section 104(b) withdrawal order was issued on June 4, 1981. While Smith did apparently purchase over $900 in noise abatement material during this time, it did not put forth a genuine effort to properly install that material. In determining the amount of penalty, I have also considered the operator's previous history of seventeen violations and that the operator is small in size. No evidence has been submitted to indicate that the operator would be unable to pay the penalties here assessed. Under all the circumstances, I find that a penalty of $300 is appropriate for the violation.

Citation No. 311781 alleges a violation of the mandatory safety standard at 30 C.F.R. section 56.9-3. The citation alleges as follows:

> Both accuators [sic] on the rear wheels of the 980-B F.E.L. were not working. When running the F.E.L. at normal rate of speed, the loader traveled a distance of 8 feet to 10 feet before coming to a stop. This test was conducted on a flat surface.

The cited standard provides only that "powered mobile equipment shall be provided with adequate brakes". As I stated in the case of Secretary v. Concrete Materials, Inc. 2 FMSHRC 3105 (1980):

> The language of the cited standard, i.e., that "powered mobile equipment shall be provided with adequate brakes," indeed does not afford any concrete guidance as to what is to be considered "adequate brakes." A regulation without ascertainable standards, like this one, does not provide constitutionally adequate warning to an operator unless read to penalize only conduct or conditions unacceptable in light of the common understanding and experience of those working in the industry. Cape and Vineyard Division of the New Bedford Gas and Edison Light Company v. OSHRC, 512 F.2d 1148 (1st Cir. 1975); National Dairy Corporation, supra, United States v. Petrillo, 332 U.S. 1, 67th S.Ct. 1538, 91 L.Ed. 1877 (1947). Unless the operator has actual knowledge that a condition or practice is hazardous, the test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard. Cape and Vineyard, supra. The reasonably prudent man has recently been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable." General Dynamics Corporation, Quincy Shipbuilding

Division v. OSHRC, 599 F.2d 453 (1st Cir. 1979).

The initial question before me, then, is whether Smith knew that the operation of the front end loader with brakes in the cited condition would be hazardous or whether a conscientious safety expert would have protected against the brake conditions existing here because they presented a reasonably foreseeable hazard. The undisputed testimony of MSHA inspector Walter McGinn was that the brake actuators for the rear wheels of the cited front end loader were simply not working. He observed that the operator of the front end loader was not even bothering to apply his brakes but was using the reverse gear to stop. The machine operator admitted to McGinn that the brakes were not working. In a test the front end loader was driven at a "normal rate of speed" which was not more than five miles per hour. Inspector McGinn observed that the vehicle continued to travel some 8 to 10 feet after application of its brakes. According to McGinn, the loader should have stopped within one foot under the conditions of the test. When McGinn returned to abate the violation two weeks later, he observed that new brake actuators had been installed on the rear wheels, that the brakes functioned properly, and that the vehicle stopped "right away" upon application of the brakes. Within this framework of evidence, it is clear Smith had sufficient knowledge that the brakes on the cited front end loader were not "adequate" in the context of the cited standard. I also conclude that Smith, and any conscientious safety expert, would have recognized the hazardous nature of the brakes in the cited condition.

The essentially undisputed testimony of Inspector McGinn, noted above, also provides ample proof of the violation. I further find that Smith was negligent in allowing this equipment to continue operating with defective brakes, a condition admittedly known to the machine operator. I find, moreover, that the hazard presented by the defective brakes was serious. It is undisputed that at the time McGinn issued the citation, there were three vehicles in the area of the front end loader and that the three drivers were walking about in the same general vicinity. Under the circumstances, I find that injuries of a serious nature were likely to occur. The violation was accordingly also "significant and substantial." Secretary v. Cement Division National Gypsum Company, Supra., 3 FMSHRC 822. Under the circumstances and considering the criteria under Section 110(i) of the Act, I find that a penalty of $150 is appropriate for the violation.

Settlement Motio

Prior to hearings in these cases, the Secretary filed a motion for approval of a settlement agreement with respect to eight of the nine citations set forth in Docket No. YORK 81-67-M. The Secretary had initially proposed penalties of $738 for those eight violations. A reduction in penalties to $506 was proposed. I have considered the representations and documentation submitted in connection with the motion and I conclude that the proferred settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly, the motion for approval of settlement is granted.

ORDER

Docket No. YORK 81-67-M

It is ORDERED that Respondent, A. H. Smith, pay a penalty of $906 within 30 days of the date of this decision.

Docket No. YORK 82-5-M

It is ORDERED that Respondent, A. H. Smith, pay a penalty of $150 within 30 days of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

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~FOOTNOTE_ONE

1 Withdrawal orders may be issued pursuant to section 104(b) of the Act after a violation has been cited under section 104(a) and has not thereafter been time abated. The validity of the section 104(b) 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 that may be imposed.