CCASE:
TODILTO EXPLORATION V. SOL (MSHA)
DDATE:
19840417
TTEXT:

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

TODILTO EXPLORATION AND DEVELOPMENT CORPORATION, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. CENT 79-91-RM Citation/Order No. 151433; 1/31/79
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Haystack Underground
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 79-310-M A.C. No. 29-01650-05003
v.	Haystack Underground
TODILTO EXPLORATION AND DEVELOPMENT CORPORATION, RESPONDENT	

DECISION

Appearances: U. Sidney Cornelius, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Mr. G. Warnock, President, Todilto Exploration & Development Corporation, Albuquerque, New Mexico, Pro Se.

Before: Judge Vail

STATEMENT OF THE CASE

This is a consolidated civil penalty and contest of citation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1976 & Supp. V 1981). The case was originally heard by Judge Jon D. Boltz on May 21, 1981. On July 21, 1981, Judge Boltz issued a decision in which he found that the respondent had not violated 30 C.F.R. 57.5-50, the noise standard applicable to metal-nonmetallic underground mines. (FOOTNOTE 1) The issue decided was whether, in order to be

"feasible" within the meaning of 57.5-50(b) cited in Citation No. 151433, an engineering control must reduce a miner's exposure to the permissible levels set forth in subsection (a) of the standard. The Judge answered this question in the affirmative.

The Secretary filed a petition with the Commission seeking discretionary review of the Judge's decision. The Secretary's petition was granted on August 28, 1981.

The Commission issued its decision on November 9, 1983, wherein they disagreed with Judge Boltz's findings on "feasibility" and held that an engineering control may be "feasible" even though it fails to reduce a miner's exposure to noise to the permissible levels set out in the standard.(FOOTNOTE 2) This decision was consistent with a prior Commission decision in Callanan Industries, Inc., 5 FMSHRC 1900 (York 79-99-M, November 9, 1983). In the Todilto decision, the Commission determined that a question remained as to whether the Secretary had proven a violation of the standard for failure to implement a feasible engineering control consistent with their findings in Callanan Industries, Inc., supra. The case was remanded to me on November 16, 1983, to allow the parties an opportunity to present additional evidence and submit further arguments in light of the considerations set forth by the Commission in Callanan.

On December 1, 1983, I advised the parties that I intended to set this matter for a rehearing on January 20, 1984, in Albuquerque, New Mexico. Respondent replied by letter received on December 12, 1983, stating that they had no additional evidence to offer in this case. The Secretary subsequently indicated that he also had no new evidence to offer and was willing to submit the matter for decision based on the existing record. Both parties waived further briefing of the issues. This was subsequently confirmed in a stipulation received on February 10, 1984. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. On January 31, 1979, Donald L. Harlen, an authorized representative of Mine Safety and Health Administration (MSHA), conducted an inspection of the Haysack Underground Uranium Mine operated by the respondent.

2. Inspector Harlen, using a dosimeter, conducted a noise survey on a jackleg percussion rock bolt drill being operated in the 440 South drift of respondent's mine.

3. As a result of a full shift noise sample, it was determined that the drill operator was exposed to an average of 114 dBA which was determined to be 2634 percent in excess of that permitted by standard 57.5-50(b).

4. The inspector also measured instantaneous exposures as high as 118 dBA with a sound level meter.

5. During the time period of this inspection and noise sample, the jackleg drill operator was wearing both ear plugs and foam muffs. The drill was not equipped with a muffler of any kind.

6. As a result of the noise monitoring tests, the inspector issued Citation No. 151433 citing a violation of 57.5-50(b) and alleging the drill operator was exposed to a noise level which was 2634 percent of the permissible limit for an eight hour period.

7. Subsequently, MSHA terminated the citation after respondent installed a muffler on the jackleg drill. The cost of this type of muffler was $110.00. Sound level meter readings taken during operation of the drill with the muffler installed measured 110 and 113 dBA which still exceeded the permissible level under the standard.

ISSUE

The question before me is whether, the Secretary proved respondent violated 57.5-50(b) for failure to implement a "feasible" engineering control.

REGULATORY PROVISIONS

30 C.F.R. 57.5-50 provides:

> (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 party hereof, or by

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 Nonmetallic Mine

PERMISSIBLE NOISE EXPOSURE

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 noise 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.
(Emphasis added.)

DISCUSSION

The Commission, in its decision in the Callanan, case, interpreted the term "feasible" as contained in 56.5-50(b). (FOOTNOTE 3) They concluded that economic as well as technological factors must be taken into account in determining whether a noise control is "feasible" under the standard. Also, they rejected the argument that a "cost-benefit analysis", as that term is commonly understood and used, is the appropriate analytical method for determining whether a noise control is required (5 FMSHRC 1901).

Further, the Commission concluded that the determination of whether use of an engineering control to reduce a miner's

exposure to excessive noise is capable of being done, involves consideration of both technological and economic achievability. The three suggested components of a feasible engineering control to reduce noise levels are: (1) That it result in a reduction of the noise level to which a miner is exposed, (2) That it is technologically achievable, and (3) That it be economically achievable. The Commission further held that the test of economic feasibility of the control is to be determined by consideration of whether the economic costs are wholly out of proportion to the expected benefits (3 FMSHRC 1907, 1908).

In addition to the above, the Commission suggests the following in order for the Secretary to establish his case in a noise level case:

> Our next consideration is the appropriate burden of proof to be applied. We hold that in order to establish his case the Secretary must provide: (1) sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard; (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source; (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control; (4) sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of the elements 1 and 4 above, the costs of the control are not wholly out of proportion to the expected benefits. After the Secretary has established each of the above elements, the operator in rebuttal may refute any of the components of the Secretary's case. The burden borne by the operator is one of production; the burden of proof remains on the Secretary.

The facts in the present case are not in dispute. Respondent in its reply brief to petitioner's request for discretionary review states as follows: "With only minor variations, the Secretary's statement of the technical aspects of this case are correct." (Respondent's brief at 3).

As to the first requirement necessary to be proven by the Secretary, the record establishes that the operator of the jackleg drill was exposed to an excessive noise level amounting to a noise dose over an eight hour period which was 2634 percent in excess of that permitted by the standard. This was based upon an average of 114 decibels ("dBA") (Tr. 16-18). This establishes without any question, an exposure in violation of that provided in the standard.

The next consideration is whether the Secretary presented credible evidence as to the availability of a technologically achievable engineering control capable of reducing the drill operator's exposure to excessive noise. Although Judge Boltz made no specific findings in this regard, the facts show that a muffler for the jackleg drill was available and in fact was installed in order to abate the citation. The evidence also shows that after installation of the muffler, the sound level meter showed noise exposure range between 110 and 113 dBA. This reading compared with the prior noise level readings of 114 dBA and higher reflect a reduction in the noise level even though not sufficient to bring the level to that required by the standard. This clearly shows that the muffler was a technologically achievable engineering control capable of reducing the drill operator's noise exposure.

The third consideration is whether the muffler as a feasible engineering control is economically achievable. The muffler installed on the drill in this case is stated by the respondent to cost $110.00 which is certainly not an unreasonable cost. In light of the reduction in noise level from 114 dBA to 110 to 113 dBA, I find that the cost at $110 is neither prohibitively expensive nor wholly out of proportion to the benefit achieved by its use. The reduction in noise level, even though not large, is significant over an extended period of time. Also, the standard distinctly states that when the employees exposure exceeds that listed in the table, "feasible administrative or engineering controls shall be utilized" (emphasis added). As I have found that the muffler meets the requirement of being both technologically achievable and not unreasonable in cost, it was feasible.

The Commission stated in Callanan, supra, that economic feasibility of a control, such as the muffler in this case, is to be determined by consideration of whether the economic cost is wholly out of proportion to the expected benefit (5 FMSHRC 1909). I find, as stated above, that the cost in this instance of $110 is reasonable for the benefits achieved.

Therefore, based upon the credible evidence in this case, and the Commission's decision in Callanan, I find that the Secretary has proven the respondent violated mandatory standard 57.5-50(b) by failing to implement the feasible engineering control (muffler) which was available to it. The fact that the muffler did not reduce the noise level to that required by the standard is not a proper reason for an operator to avoid the control and go directly to personal protection equipment. The standard contemplates the use of such personal equipment only after all other "feasible" engineering controls are installed to achieve the best results possible.

PENALTY

The evidence establishes that the respondent's history of prior violations is neither substantial or significant and does not warrant either raising or reducing the penalty for the violation at issue here. The proposed penalty by the Secretary is appropriate for the size of the operator and would not affect its ability to continue in business. The operator was negligent in failing to install the available control (in this case the muffler) to reduce the noise level of the operator of the jackleg drill. However, the gravity does not appear great, in that personal protection equipment was being utilized. The operator demonstrated good faith by achieving rapid compliance by installing a muffler on the drill. I find that the proposed penalty of $114 is appropriate in this case.

ORDER

Respondent is ORDERED to pay a civil penalty of $114 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

ÄÄ

~FOOTNOTE_ONE

1 The judge's decision is reported at 3 FMSHRC 1824 (1981).

~FOOTNOTE_TWO

2 The Commission decision is reported at 5 FMSHRC 1894 (1983).

~FOOTNOTE_THREE

3 This standard is identical to the   57.5-50)b) being considered in this case as applied to metal-nonmetallic underground mines.