

CCASE:
SOL (MSHA) v. DUININCK BROTHERS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

DUININCK BROTHERS, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 91-50-M
A. C. No. 21-02722-05503

Docket No. LAKE 91-51-M
A. C. No. 21-02845-05504

KK004 & KK003 Crushing Unit

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U. S. Department of Labor, Chicago, Illinois, for
the Secretary of Labor (Secretary);
Paul A. Nelson, Esq., Willette, Kraft, Walser,
Nelson & Hettig, Olivia, Minnesota, for Duininck
Brothers, Inc. (Duininck).

Before: Judge Broderick

The Secretary seeks civil penalties for two alleged violations of 30 C.F.R. 56.5050(b). Pursuant to notice, the case was called for hearing in Minneapolis, Minnesota on August 13, 1991. Roy Shrake, Diane Brayden, and Richard Goff testified on behalf of the Secretary. John Davis, Virgil Gerdes, Harris Duininck, and Rick Maursetter testified on behalf of Duininck. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

1. At all time pertinent hereto, Duininck was the owner and operator of the sand and gravel mine known as the KK 004 and KK 003 Crushing Unit.

2. During the calendar year preceding the issuance of the citations involved in this case, 11,973 hours of work were performed at the subject mines.

3. On May 9, 1990, Federal Mine Inspector Roy Shrake issued a citation citing a violation of 30 C.F.R. 56.5050(b) because a tractor operator was exposed to noise in excess of that permitted by the standard. On July 18, 1990, Inspector Shrake issued a

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citation citing a violation of 30 C.F.R. 56.5050(b) because a bulldozer operator was exposed to noise in excess of that permitted by the standard. Respondent agrees that the two miners were exposed to noise in excess of the maximum noise level prescribed by the standard.

4. The parties agree that the evidence offered at the hearing with respect to Citation No. 3445314 (the tractor operator - Docket No. LAKE 91-51-M) is applicable to Citation No. 3619333 (the dozer operator - Docket No. LAKE 91-50-M).

5. The tractor operator was wearing adequate personal hearing protection at the time the citation was issued.

6. There are no feasible administrative controls applicable to the condition involved in the citation.

7. The tractor operator was operating a 1980 Model TD 25 International tractor. Noise was coming from the engine and the tracks. The unit did not have a cab, and no other engineering controls were being utilized to reduce the noise exposure.

8. The noise level to which the tractor operator was exposed was equivalent to 102 db for an 8 hour period.

9. The personal hearing protection worn by the miner, namely ear plugs, is designed to reduce the noise level by 28 decibels. This is under laboratory conditions. In fact, under field conditions, the reduction varies from 0 to 25 db.

10. At the present time, a tractor of the kind involved in this case would cost approximately \$250,000, without a cab. An enclosed cab with an air conditioner would cost an additional \$8,500 to \$9,000. To lease such a unit would cost approximately \$10,000 a month depending on its age.

11. The present value of a 1978 or 1979 unit is between \$16,000 and \$18,000. A 1985 or 1986 unit has a present value of approximately \$75,000. To retrofit a cab on one of these units would cost about \$10,000 including an air conditioner. The market value of the unit would not be increased by the addition of a cab.

12. The tractors such as are involved here have a useful life of about 20 years before they are retired. Duininck estimates that the tractor involved here (manufactured in 1980) will be used for 5 more years. When it is replaced will depend on the maintenance record and cost.

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13. In 1988, Duininck attempted, with MSHA guidance, to modify a tractor such as the one involved here by installing a windshield, and floor and ceiling sound suppressants, but discontinued the program when MSHA determined that enclosed cabs were required if other sound suppressant devices were not sufficient to bring the machine into compliance.

14. An enclosed full cab with proper acoustical treatment can be expected to lower the noise level in a tractor such as that involved here by 6 to 15 decibels. Cabs have been retrofitted on tractors under MSHA's supervision and have reduced noise levels from 6 to 15 decibels. In only one instance was it reduced to the level permitted by the standard. Where it did not, personal hearing protection would still be required.

15. The citation was terminated when the cited equipment was removed from the mine property.

REGULATION

30 C.F.R. 56.5050(b) provides as follows:

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.

ISSUE

Whether an enclosed cab retrofitted on the equipment involved herein is a feasible engineering control mandated by the standard?

CONCLUSIONS OF LAW

It is conceded that the employees' noise exposure in these cases exceeded the maximum limit of 90 decibels per 8 hours. It is conceded that engineering controls were not used to reduce the noise exposure. The evidence established that engineering controls are technically feasible and would reduce the noise exposure. The narrow issue here is whether such engineering controls are economically feasible.

In the controlling Commission decision, Callanan Industries, Inc., 5 FMSHRC at 1990 (1983), the Commission said at page 1909:

". . . we hold that the economic feasibility of the control is to be determined by consideration of whether the economic costs of the control are wholly out of proportion to the expected benefits, i.e., whether

given the reduction in noise level to which a miner would be exposed after implementation of the control, and the costs of achieving that reduction, it would not be rational to require implementation of the control."

The test therefore is the expected benefits, (the reduction in noise levels) compared to the cost of achieving that reduction. It is not the cost of achieving the reduction compared to the value of the machinery in question, as Duininck seems to contend. The benefits expected here are substantial - a reduction of between 6 and 15 decibels of noise exposure. This is especially significant in view of the testimony (not refuted) that personal protection equipment is often unreliable under field conditions, and may not result in noise reduction to the extent that the equipment manufacturers represent.

In my judgment the cost of providing such engineering controls (full cab with acoustical treatment) amounting to \$10,000 to \$13,000 is not "wholly out of proportion to the expected benefits." It is therefore rational to require implementation of the control.

I conclude therefore that Duininck failed to utilize feasible engineering controls to reduce the noise exposure of its tractor operators.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation Nos. 3445314 and 3619333 are AFFIRMED

2. Duininck shall, within 30 days of the date of this Decision, pay the following civil penalties for the violations found herein:

CITATION	30 C.F.R.	PENALTY
3445314	56.5050(b)	\$20
3619333	56.5050(b)	\$20
	TOTAL	\$40

James A. Broderick
Administrative Law Judge