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SOL (MSHA) V. A. H. SMITH
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 29, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. YORK 81-67-M

A. H. SMITH

DECISION

This consolidated civil penalty and contest of citation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp V 1981). At issue is an alleged violation of 30 C.F.R. $ 56.5-50, a mandatory standard, regulating miners' exposure to noise, applicable to sand, gravel and crushed stone operations. 1/ A.H. Smith was issued a citation for allegedly failing to implement feasible administrative or engineering controls on a diesel shovel to reduce the shovel operator's noise exposure to within the levels required by the standard. The administrative law judge found a violation and assessed a civil penalty. 4 FMSHRC 1371 (July 1982)(ALJ). For the reasons that follow, we affirm.

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1/ 30 C.F.R. $ 56.5-50 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 Sl.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication 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 Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration. (Footnote continued)

On July 19, 1978, a Department of Labor Mine Safety and Health

Administration (MSHA) inspector conducted an inspection at Smith's Brandywine Pits and Plant, a sand, gravel and concrete operation. As part of this inspection, a noise survey was conducted on a diesel-powered clam shovel. This shovel, manufactured in the 1940's and purchased by Smith in 1956, had no barrier between the operator's cab and the engine compartment, no glass in the window openings of the operator's cab, and no muffler on the engine's exhaust. The noise survey results showed that the shovel's operator had been exposed to a noise level 189 percent greater than permitted under section 56.5-50. Smith was issued a citation for violation of the standard. Based on his previous experience with other shovels, the MSHA inspector suggested to Smith that a sound absorption barrier be erected between the cab and engine compartment. Two possible methods were suggested: constructing a permanent barrier out of plywood covered with sound absorption material or installing a prefabricated sound-barrier curtain. The inspector estimated the cost of these methods as between $100-$300 and $400-$500, respectively. Smith requested the name of the supplier of the prefabricated curtain, which the inspector provided to him.

MSHA reinspected the shovel in May 1979. At that time the MSHA inspector observed that the sound-barrier curtain was installed with large gaps at the ceiling. The sides of the curtain were not attached to the shovel. A noise survey taken at that time revealed a reduction in the noise level in the cab, but a continued exposure in excess of permissible limits. Smith was informed of the need to install the curtain properly. Additionally, the inspector suggested that window glass be installed in the openings around the cab to further insulate the operator from the noise.

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Fn. 1 continued

PERMISSIBLE NOISE EXPOSURE

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1B	102
1	105
l/2	110
l/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises 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.]

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MSHA reinspected the shovel in June 1981. At that time the sound-barrier curtain was on the floor of the engine compartment and window glass had not been installed. A noise survey established that the shovel operator remained exposed to excessive noise. The inspector issued a withdrawal order. The need for the window glass and proper installation of the curtain was reiterated, and the use of a muffler proposed. Four days later MSHA reinspected the shovel. A muffler had been added to the exhaust, but no glass was in the windows and the curtain was still improperly installed. Subsequently, for reasons not reflected in the record, the operator withdrew the shovel from use.

In his decision the Commission administrative law judge concluded that, in order to establish a violation of this standard, the Secretary carried the burden of proving an excessive noise level, as well as the technological and economic feasibility of the proposed noise controls. Because it was uncontradicted that there was excessive noise, the judge framed the issue as whether MSHA had met its burden of proving the feasibility of the proposed controls. In finding that MSHA had met its burden, the judge relied on the testimony of the inspector with respect to his experience with similar shovels. The judge found that the Secretary's evidence established that installation of the sound barrier, window glass, and muffler would have brought the shovel into compliance, and that the cost would have been S600 or less at the time of inspection. He concluded that even if the operator's later actual cost of $948.75 for the sound-barrier curtain were added to the inspector's "high" estimates of $450 for muffler, glass, and labor, this sum (about $1,400) was not an unreasonable economic burden in order to achieve full compliance with the standard. 4 FMSHRC at 1375. 2/

We granted Smith's petition for discretionary review. Subsequently, in Secretary of Labor v. Callanan Industries, Inc., 5 FMSHRC 1900 (November 1983), the noise standard at issue here was interpreted for the first time by the full Commission. The broad question before us in the present case is whether the judge's decision can be sustained in light of Callanan.

The cited standard provides that no miner shall be permitted exposure to noise levels in excess of those established by the standard. When noise levels exceed the limits established by the standard, "feasible administrative or engineering controls shall be

utilized" by the operator to reduce the miner's exposure to within permissible limits. If such controls fail to reduce exposure to within permissible levels, personal protective equipment must be provided and used. In Callanan, after an extensive discussion of the history of the standard, we concluded that no special meaning was intended for the word "feasible" in this standard. We therefore used the Supreme Court's statement of the plain meaning of the word as "capable of

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2/ The judge further found that MSHA's proposed use of multiple shovel operators, to reduce an individual's exposure to permissible levels, was a feasible administrative control. On review, Smith also challenges this aspect of the judge's decision. The Secretary has not addressed directly Smith's arguments concerning the alleged infeasibility of the suggested administrative controls. Because of the paucity of evidence and focused argument on this issue, and in light of the potential importance of the general question of what constitutes a feasible administrative control, we do not reach that issue in this case. Rather, because we find that the feasibility of engineering controls was established, we rest our decision on this basis alone.

being done, executed, or effected." 5 FMSHRC at 1907, citing American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508-509 (1981). We also held 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." Id. Thus, we established in Callanan that:

> [I]n 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 elements 1 through 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.

5 FMSHRC at 1909.

In this case, the administrative law judge appropriately placed the burden of proof on the Secretary. Additionally. the first element of establishing a violation, credible proof of over-exposure to noise, was uncontroverted. The second element concerns proof of the technological achievability of the proposed engineering control. Smith, in essence, argues that MSHA itself did not know precisely what engineering controls would be sufficient to abate the violation. Smith contends that the Secretary utilized a "trial and error" approach in determining which engineering controls would abate the citation. Whatever the possible merits of Smith's "trial and error" objection to proof of a violation of the noise standard, on the facts of this case we find the argument unpersuasive. The Secretary presented credible evidence that the excessive noise levels resulted from the fact that the operator's cab was not segregated sufficiently from the engine compartment and other noise sources. The noise controls proposed by the Secretary are all basic and uncomplicated, and involve no complicated studies or experimental technology. Rather, several self-evident, readily available controls were suggested. In our view, the Secretary presented sufficient credible evidence establishing several technologically achievable engineering controls that could have been applied to Smith's equipment.

The third element of proof concerns the reduction in noise level that would be attained if the proposed controls were implemented. We conclude that the Secretary presented sufficient credible evidence in this regard. The inspector testified that he had experience with abatement of noise violations involving similar diesel shovels, using engineering controls such as those recommended in this case. Although the inspector did not predict the exact amount of noise reduction achievable from each proposed control, based on his past experience he indicated that each control would reduce the noise level

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and that compliance could be achieved by a combination of the proposed controls. On this record the Secretary thus established that the proposed engineering controls would reduce the noise level.

The fourth element requires proof of a reasoned estimate of the expected economic cost of the controls. In this instance, based on his previous experience the inspector was able to estimate a cost for the controls. He testified that another operator had installed a commercial sound curtain for approximately $500. He also testified that he told Smith that two other operators had successfully built homemade barriers to bring their equipment into compliance at a cost of $100 or less. An installed muffler was priced at between $50 and $1OO. The inspector estimated the cost for the window glass at between $100 and $200. Although these estimates are not documented

beyond the inspector's personal knowledge and experience, we conclude that the inspector established sufficient experience with these proposed noise controls to make his testimony credible as a reasoned estimate of their cost. Smith did not rebut the testimony on the costs of glass and muffler and only demonstrated that the actual cost of the curtain, months after the inspection and original estimate, was more than predicted.

The final element of the Secretary's proof is a demonstration that the cost of the suggested controls is not wholly out of proportion to the expected benefits. Again, the facts support the conclusion that the Secretary met this burden. The estimated total cost of the engineering controls suggested by the Secretary ranged from a low estimate of $600 or less to a high estimate of about $1,400. The benefit to be attained from installation of the controls apparently would be full compliance with the standard by reducing the miner's exposure to noise to permissible levels. We agree with the judge that even if the higher cost estimates are used, it cannot be said that these costs are unreasonable or wholly out of proportion to the expected benefits to be attained. 3/ Thus, we conclude that the Secretary established a violation of 30 C.F.R. $ 56.5-50.

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3/ In view of the amount of the maximum estimated costs of the engineering controls. this case also does not require us to address in detail the "prohibitively expensive" test of economic feasibility suggested by the Secretary. See Callanan, 5 FMSHRC at 1908. As in Callanan, under any reasonable interpretation of that phrase the costs of the controls at issue here can not be considered "prohibitively expensive."

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Accordingly, the judge's finding of a violation and assessment of a $300 civil penalty are affirmed.

Commissioner Lawson concurring:

I agree with the majority as to the result reached and would, therefore, affirm the finding of a violation by the judge below. However, for the reasons expressed in my dissent in Callanan Industries, Inc., supra, I disagree with their requiring the Secretary to establish as part of his prima facie case the economic feasibility of technologically feasible controls.

A. E. Lawson, Commissioner

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