FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

March 31, 1999

LONE STAR INDUSTRIES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 98-16-RM
	:	Citation No. 7824109; 11/4/97
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 98-18-RM
ADMINISTRATION (MSHA),	:	Citation No. 7824110; 11/4/97
Respondent	:	
	:	Greencastle Plant
	:	Mine ID: 12-00064
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-172-M
Petitioner	:	A. C. No. 12-00064-05539
v.	:	
	:	Greencastle Plant
LONE STAR INDUSTRIES, INC.,	:	
Respondent	:	

DECISION

Appearances: William I. Althen, Esq., Heenan, Althen & Roles, Washington, DC for Lone Star Industries, Inc.;
Christine M. Kassak, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois for U.S. Department of Labor.

Before: Judge Barbour

These contest and civil penalty proceedings arise under sections 105(d), 105(a), and 110(a) of the Federal Mine Safety and Health (30 U.S.C. '815(d), '815(a), and '820(a)). They involve two citations issued to Lone Star Industries, Inc. (Lone Star) at its Greencastle Plant, a cement and limestone facility located near Greencastle, Indiana. The citations allege that Lone Star violated 30 C.F.R. '56.5050, a mandatory health standard that regulates miners= exposure to noise.[1]

[1]Section 56.5050(a) is the noise standard for surface metal and non-metal mines. Its goal is to limit exposure of an operator=s employees to noise over specified periods of time in excess of specified levels of sound. If the levels are exceeded, the standard requires the use of feasible

The citations charge that two general laborers working in the plant=s mill processing building were subjected to noise levels that exceeded the allowed limit and that the company did not implement required feasible controls. The citations also allege that the violations were serious, that they significantly and substantially contributed to a mine health hazard, and that they were the result of the company=s negligence.

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administrative or engineering controls to reduce the employees= exposure.

30 C.F.R. ' 56.5050 states:

(a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. . . . .

* * * * * *

Permissible Noise Exposures

Duration per day, hours of exposure	Sound level dBA, Slow response
8	90
6	92
4	95
3	97
2	100
1 ½	102
1	105
½	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noise shall not exceed 140 dBA, 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 levels of the table.

Lone Star sought review of the citations arguing that there were no violations; or, if the violations existed, the findings of the inspector regarding the gravity of the violations and the negligence of the company were not justified. The Secretary answered, asserting the citations were proper in all respects.

The review proceedings were assigned to me. At the parties= request, I stayed them pending the filing of an associated civil penalty proceeding. When initiation of the proceeding was delayed, the parties agreed to dissolution of the stay and to trial of the review cases. The parties understood that at the trial evidence would be taken on the civil penalty aspects of the alleged violations and that the evidence would be applied to the civil penalty case when it was filed.

The review cases were tried in Greencastle, Indiana. In the subsequently filed civil penalty proceeding, the Secretary proposed a penalty of $50 for each alleged violation. The civil penalty case herein is consolidated for decision with the contest proceedings. Counsels have filed helpful briefs.

THE CENTRAL ISSUES

The central issues are whether the Secretary proved the cited laborers were working in a violative noise environment, and, if so, whether there were feasible engineering or administrative noise controls the company should have been using (see Tr. 14-21).

STIPULATIONS

At the commencement of the hearing, the parties stipulated as follows:

> 1. The . . . Commission has jurisdiction over these proceedings.
>
> 2. Lone Star is an operator within the meaning of the . . . Act . . . and the Greencastle plant is a mine within the meaning of the Act.
>
> 3. [A]t all times relevant to these proceedings, Lone Star operated the Greencastle plant.
>
> 4. Lone Star and its . . . plant are subject to the jurisdiction of the Act.
>
> 5. [T]he plant=s operations affect interstate commerce.

6. [O]n November 4, 1997, an [MSHA inspector] . . . issued [Loan Star] Citation N[o.] 7824109 pursuant to Section 104[a] . . . of the Act . . . alleging a violation of . . . [s]ection 56.5050.

7. [O]n November 6, 1997, the . . . [MSHA inspector] issued a modification to Citation N[o.] 7824109. . . .

8. Citation [No.] 7824109 and the modification where properly served .

9. [O]n November 4, 1997, [the MSHA inspector] . . . issued . . . Loan Star . . .Citation N[o.] 7824110 pursuant to Section 104[(a)] of the . . . Act . . . alleging [a] . . . violation of . . . [s]ection 56.5050.

10. [O]n November 6, 1997, the [MSHA inspector] issued a modification to Citation N[o.] 7824110.

11. Citation N[o.] 7824110 and the modification were properly served .

(Tr. 9-11; see also Joint Exh. 1)

THE FACTS

The Kiln, The Burner Pipe , And The Replacement Of The Pipe

One of the processes undertaken at the plant is the burning of coal in a kiln. The kiln is operated at extremely high temperatures. Fuel is fed into the kiln through a Aburner pipe@. The burner pipe usually needs to be replaced once or twice a year. When the time comes, the kiln is shut down, the pipe is removed, and a new pipe is readied for insertion into the kiln. Once the new pipe is installed and operating, the pipe requires no further maintenance, and the kiln is operated twenty four hours a day, seven days a week until the pipe again is replaced (Tr. 174-175).

Before a new burner pipe can be installed in the kiln, the pipe must be insulated to protect if from the kiln=s high temperatures. This is done by standing the pipe upright, setting a two-part form around the pipe, and pouring refractory material into the form.[2] An overhead came is used

[2]ARefractory@ is AA material of a very high melting point with properties that make it suitable for such uses as furnace linings and kiln construction@ (U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 908 (1968)). (The witnesses also referred to

to lift the pipe and to move the two parts of the form into position.

After the refractory is poured, the pipe and the material are allowed to set for a day or two after which the form is removed, and the pipe is moved to a furnace where the insulation is heat cured. Once the refractory is cured, the insulated pipe is inserted into the kiln, and the kiln is restarted.

The process of changing the pipe usually involves two workers. Until November 1997, the job was done in the plant=s machine shop (Tr. 131). The machine shop has an overhead crane that can lift the pipe and the two-part form, and it has a work area that can accommodate the pipe, form, and laborers (Tr. 127-128). The machine shop is a very quiet area of the plant.

In 1997 Lone Star decided it would experiment with a new type of pipe (Tr. 171, 175). The new pipe was longer than the pipe it was using and its diameter was different. The company hoped that the new pipe would result in the more efficient burning of fuel in kiln, the release of less emissions, and a better product (Tr. 174).

In November the time came to replace the burner pipe with the new and longer pipe. Because of the length of the new pipe, the machine shop could not be used as the work site. Rather, the company decided to use its mill processing building because it had a overhead crane that was high enough to accommodate the new and longer pipe (Tr. 131-132, 137, 156).

The Mill Processing Building

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refractory as Acastable@.)

The mill processing building contains three overhead mills **C** two finish mills and one raw mill.[3] The work area in the mill processing building measures approximately 87 feet by 29 feet. The finish mills were located over the area, approximately 15 to 17 feet above the floor (Tr. 140, 145; Conts. Exhs. 6, 7). The raw mill had to be shut down in order safely to transport the pipe two-part form to the work area under the crane, to erect the pipe, and to put the form in place. However, the finish mills continued to operate (Tr. 132).

When the mills are operating it is very noisy in the building. Usually, no one is assigned to work in the building for an extended time. Miners only access the building for short periods to do maintenance work, to cleanup, or to traverse the building to get from the shop to the office area (Tr. 189-190). Because of the noise the company has posted signs at various entrances to the building. The signs advise miners to limit their time in the building.[4]

The Laborers

[3]All of the overhead mills grind material. The finish mills grind clinker into cement (Tr. 130).

[4]According to Lone Star=s manager of maintenance and engineering, Fred Dismukes, the signs advise miners to limit their time from one and three fourths hours to six hours. They are directed at miners who are not wearing ear plugs (Tr. 183-184, 188).

When the work of replacing the pipe was announced, two laborers, Steven Welker and Ron Costin, bid for and were awarded the job. They bid pursuant to the company-union labor agreement (Tr. 60, 123, 125). Under the agreement, laborers who then worked at the plant had the right to bid for the job on the basis of seniority.[5] The job was classified higher than the work of a general laborer, and Welker and Costin were entitled to more pay as a result (Tr. 124-125, 170).

Welker and Costin began the job on November 4. Their work shift was approximately 6:30 a.m. and 3:30 p.m. The job required them to be in and out of the mill processing building. Welker described their duties in the morning:

> We . . . went over to the carpenter shop and got our tools and started by getting the tow motor . . . and bringing the back form [into the mill processing building] and setting it up and chaining it off. And then we brought the burner pipe in and for that we had to use the . . . crane to pick that burner pipe up and set it in the form, and then we used the tow motor to bring in the back part and then [we] bolted it together (Tr. 118-119, see also Tr. 138).

The laborers completed this part of the job by their lunch break. After lunch they:

> had to go outside and get the mixer and bring it in and . . . had to go over to the other side and get a pallet and set the mixer on [it] to raise it up off the floor. We had to bring in the refractory and other stuff to mix it with, so we were in and out [of the mill processing building] in the afternoon (Tr 119; see also Tr. 126).

The laborers spent between six and seven hours doing the job. They worked between five and five and one half hours in the mill processing building (Tr. 119, 177, 192). During all the time they worked on the job they were wearing company provided ear plugs.

The laborers believed they were the workers with the most experience in insulating the burner pipe and that they were the best people available for the job (Tr. 126-128). Welker stated, A[W]e had been there the longest and were the most senior people and had been around that kind of stuff probably more than the other people had been@ (Tr. 146). Further, he and Costin were the workers most experienced when it came to using the overhead crane (Tr. 142). (Costin was the one who actually operated the crane (Tr. 138).) Welker explained, A[Y]ou have to be shown how to run [the crane] . . . to be broke in on it before you can run it@ (Tr. 151). In Welker=s view, if he and Costin had been rotated out of the job part of the time, the company would have lost the use of its most experienced people and the job would have taken more time to complete (Tr. 143,

[5]In November 1997, in addition to Welker and Costin, there were four or five other laborers at the plant (Tr. 120, 175).

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The Inspector, The Inspection, And The Citations

In November 1997, William Oglesby, an inspector from the Secretary=s Mine Safety and Health Administration (MSHA), was scheduled to conduct his first regular inspection of the Greencastle Plant. The inspection was going to include testing the noise levels to which Lone Star=s employees were exposed.[6]

On the morning of November 4, Oglesby went to the plant. Oglesby explained to Dismukes that he needed to test employees= noise exposure to determine if there were any Acompliance problems@ at the plant (Tr. 32, 170). Oglesby asked Dismukes to select two laborers for noise testing (Tr. 170). Dismukes called the plant foreman on the mine telephone and the foreman sent Welker and Costin to the office. Prior to their arrival, Oglesby checked two dosimeters he had in his possession to make sure the instruments were working properly (Tr. 40). They were, and when the men arrived, Oglesby fitted them with the dosimeters (Tr. 56, 60, 176).[7] Once the dosimeters were in place, the men wore them for the rest of the work day. Dismukes explained to Oglesby that the job the laborers were going to do was not their regular of work (Tr. 62).

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[6]Oglesby began working for the agency in April 1994. During his time with MSHA, Oglesby conducted between 60 and 70 noise surveys (Tr. 28).

[7]A dosimeter is an electronic device that measures noise exposure. The dosimeter contains a memory cell that is sensitive to all sound. The cell stores information relating to cumulative noise exposure during a shift. The cell is read by the inspector at the end of the shift and based on the reading the inspector determines whether the miner has been exposed to more noise then is allowed under section 56.5050. The dosimeter usually is placed in the miner=s shirt pocket and a microphone is attached to the miner=s collar. The microphone is approximately six to eight inches away from the miner=s ear (Tr. 37,39, 41-42, 161).

Oglesby inspected other parts of the mine while the miners were working, but he visited the miners three times, at 11:00 a.m., 2:20 p.m, and at the end of their work period. At 11:00 a.m. the dosimeters indicated Welker was exposed to an average noise level of 132.3 % and Costin to an average noise level of 122.7% (Tr. 86-87; Conts. Exhs. 1 and 2). At 2:20 p.m. the dosimeters showed readings of 132.4% for Welker and 141.4% for Costin (Tr. 87; Conts. Exhs. 1 and 2). The last time Oglesby read the dosimeters was at the end of the laborers= shift, and the readings respectively were 181.5% and 171.5% (Id.). (Oglesby=s tests were the only ones conducted on November 4. The company did not perform its own tests.)

Oglesby matched the sound level readings of the dosimeters against those of his sound level meter (SLM). He found the readings were the same (Tr. 58-59). From the results of the dosimeter readings, he calculated Welker and Costin respectively were exposed to time-weighted average exposures of 94.3 and 93.7 dBA during the period they worked. This was more than the level allowed by section 56.5050 (Tr. 58-59).[8] Because Oglesby also believed Lone Star was not using feasible engineering or administrative controls, he issued citations to the company.

Citation No. 7824109 is based on the noise levels to which Welker was subjected and Citation No. 7824110 is based on the dosimeter readings with regard to Costin. The citations as issued stated that A[f]easible engineering controls were not being used to eliminate the need for hearing protection@ (Cont. Exh 1 at 1, Cont. Exh. 2 at 1). Later in the day on November 4, Oglesby modified both citations to indicated A[f]easible engineering or administrative controls were not being used@ (Id. at 2). Oglesby could not recall whether or not he talked to anyone at MSHA about the modifications (Tr. 70). He agreed, however, that in issuing the citations he did not make a significant analysis with regard to either engineering or administrative controls (Tr. 71-72).

Sources Of The Noise And Their Control

All of the witnesses testified that the mill processing building was very noisy. Welker believed that although sound came from Aall around,@ due to the finish mills Amore sounds [came] from above@ (Tr. 145). Costin testified that most of the noise was from overheard, or, as he put it, from Athe mills right above you@ (Tr. 16). Oglesby, who admitted he was Anot very familiar@ with the plant (Tr. 47), testified the sound to which the laborers were exposed was coming from above, from the side, and that some was reverberating off the concrete floor (Tr. 62-63).

The noise coming from overhead was produced by the Abig steel balls [in the mills] that roll[ed] around and crush[ed] [the material in the mills into smaller particles@ (Tr. 47). Oglesby

[8]MSHA determines compliance with the standard based on the percent of dos. A dosimeter reading of over 100% indicates an exposure of more than 90 dBA. Because of the error factor of a dosimeter, MSHA does not cite a violation of section 56.5050 until a dosimeter reads more than 132% (Tr. 242, 244).

described the noise as Alike a bolt or something that fell out of your pocket in the washing machine [and] that was banging up against the sides@ (Tr. 64).

In Oglesby=s opinion there were engineering controls the company could have used to reduce the miners= noise exposure. Although it was not practical to install engineering controls to dampen the sound from the overhead mills, he thought that Lone Star could have installed local sound barriers, or as he described them Asome small [wooden] barriers,@ around the work area (Tr. 55, see also Tr. 72-73). As he envisioned it, the barriers could have been eight to ten feet high, Alike partitions in offices, but . . . [with] sound absorbing type material@ (Tr.55). He also described ten to twelve feet high lead-lined partitions (Alead curtains@) that could have been installed where the men were working (see Tr. 216-218). He believed that either kind of partition could have offered Asome reduction@ in noise (Tr. 218). Further, he suggested panels of sound absorbing material could have been placed over the laborers' heads, between the men and the mills (Tr. 102). He acknowledged, however, that given the fact the insulation of the burner pipe was infrequently performed in the mill processing building and that it was essentially a Aone-day job@, installation of engineering controls might be Aridiculous@ (Tr. 75).

In addition to Oglesby=s opinions, the Secretary offered the testimony of George Schorr, an MSHA industrial hygienist. At the time of the hearing, Schorr, who holds a masters degree in industrial hygiene and safety, had worked for MSHA for five years (Tr. 196-201). Schorr=s testimony was based on his expertise in the field of noise and its control, on his review of Oglesby=s notes, and on hearing the testimony of Oglesby, Welker, Costin, and Dismukes.

Schorr shared Oglesby=s view that partitions could have been used as noise barriers. He suggested panels made of lead, or vinyl, or plywood (Tr. 220-221). He was of the opinion that just using plywood would result in a Asubstantial drop@ in the noise level (Tr. 221), but he did not know how much noise reduction could be expected Awithout monitoring or testing, without taking a look at noise reduction ratings in the specifics of the room@ (Tr. 222).

Like Oglesby, Schorr seemed to have doubts about engineering controls. When asked what his opinion was with regard to cutting down noise exposure in the area where the pipe was erected, he replied:

> [W]ithout looking at specific information on the cost of the materials, it would be hard to give . . . an estimate. You could probably do it for less than $10,000, but it would probably cost you more than a couple hundred dollars. . . . I didn=t look at engineering controls specifically because we were more interested in administrative controls (Tr. 223).

He added, AMy opinion is that engineering controls, although available, may not be feasible, the cost may be significant@ (Tr. 212).

David Starr is the general manager and chief consultant of American Star International, a firm that specializes in vibration and noise analysis. Since 1983, he has conducted approximately 60 noise analyzes at various companies (Tr. 168). Starting in February 1998, he conducted such an analysis at the Greencastle Plant. He not only evaluated noise sources in the mill processing building, he also evaluated them in the pump room, the compressor room, in the warehouse, and in other areas of the plant. He took up to 60 noise readings throughout the entire plant (Tr. 270-274). He testified as an expert in noise analysis (Tr. 270, 279).

Starr did not believed engineering controls were feasible. Based upon his noise analysis, he concluded that in the mill processing building the dominant noise was coming from the overhead finish mills (Tr. 273). In his view, there was no way to meaningfully diminish this noise. Partitions were not practical because they did nothing to stop the noise coming from overhead. The only way to interdict that the noise would be to put panels or a Aceiling@ between the men and the mills. This was not possible because the ceiling would have prevented use of the overhead crane (Tr. 275). Asked if he was able to suggest any effective engineering control, Starr responded Anot really@ (Tr. 276).

The real focus of the Secretary=s suggestions with regard to noise control was the administrative area. Oglesby believed the company should have rotated its employees so that laborers in the area were limited to four hours of work (Tr. 55, 88-89). He thought the company had laborers available who could have been rotated (Tr. 56). However, he did not do noise tests on any other miners on November 4, nor did he or anyone else from MSHA conduct a noise survey of the plant. Therefore, he did not know what the noise level was for laborers who might have replaced Welker and Costin, nor could he give a knowledgeable opinion as to the noise level to which Welker and Costin reasonably could have been expected to be subjected once they were replaced (Tr. 101).

Schorr, Lone Star's expert, also believed there were feasible administrative controls that the company could have instituted. Lone Star could have broken up the job over two, three, or four days, exposing Welker and Costin to reduced noise levels each day. Or, it could have used two different crews (Tr. 227, 239). Since the total time worked would have been the same, the cost to the company of instituting the controls would not have been significant, or out of proportion to the benefit expected (Tr. 230, 232, 239). Finally, Schorr suggested the company could have eliminated the problem altogether by doing the work outside the mill processing building (Tr. 228). If he had been in charge, it is how he would have solved the problem (Tr. 240).

Not surprisingly, perhaps, Lone Starr=s employees doubted the efficacy of the suggested administrative controls. With regard to rotating employees, Welker stated:

> In my opinion, it wouldn=t have been feasible to bring someone new into the job. They don=t know where we left off, what bolts we tightened, what we hadn=t tightened. To me, it

> wouldn=t make sense to switch people out of a job like that. If it was a simple job that anybody could do . . . it might be okay. But it wouldn=t make any sense to do it on that job (Tr. 144).

Dismukes agreed. He stated, A[W]hen a person starts on a job, it=s our contention that [the] person should finish the job. And . . . as long as it is done safely, that=s what we do@ (Tr. 189-190). In addition, Dismukes noted that Welker and Costin were receiving an upgrade in pay for doing the job (approximately an additional $3.00 an hour), and that rotating Welker and Costin out of a job for which they had successfully bid and for which they received augmented pay could have violated the company-union agreement (Tr. 190).

Starr agreed the administrative controls could cause labor problems. He stated that Ascuttlebutt@ he hear from the crew lead him to believe Ait would be very difficult to make the work force split@ (Tr. 276) because the miners Aare pretty strong on what they want to do and don=t want to do@ (Tr. 275-276). He also stated that to evaluate the adequacy of the suggested administrative controls it was necessary to understand the noise levels of areas to which the laborers might be sent and from which they might come, something MSHA did not know (Tr. 278).

SECTION 56.5050 AND THE ELEMENTS OF PROOF

The elements of proof of a violation of section 56.5050 are set forth in Callanan Industries, Inc., 5 FMSHRC 1900, 1909 (November 1983), wherein the Commission stated that the Secretary establishes a prima facie case of violation by offering:

> (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 through 4 above, the costs of the control are not wholly out of proportion to the expected benefits.[9]

The Miners= Exposure To Noise Levels

[9]Although the language of Callanan reflects the fact the case involved the application of an engineering control to a noise source, there is not apparent reason why the same elements of proof should not be applicable to administrative controls as well.

The citations state that Welker was exposed to a noise level equivalent to 94.30 dBA for the period worked (Conts. Exh. 1) and Costin was exposed to a level equivalent to 93.89 dBA (Conts. Exh. 2). Oglesby described where he placed the dosimeters and microphones (Tr. 37, 39, 41-42, 161). He also described how he checked the dosimeters to make sure they were working properly (Tr. 40). Further, he matched the results shown by the dosimeters against the readings he obtained using a SLM (Tr. 58-59). The company did not challenge the accuracy of the dosimeters or the methods used by Oglesby to measure the sound levels. Nor did the company conduct its own noise survey (Tr. 177).

Given these factors, there is sufficient credible evidence to find that on November 4, 1997, Welker and Costin were exposed to an average noise level in excess of that specified in the standard. In other words, I find that the laborers were exposed to 94.30 dBA and 93.89 dBA for the equivalent of an eight hour day. Because the exposure level exceeded 90 dBA, both laborers= exposure exceeded that specified in section 56.5050(a).

Available Engineering Controls

It is clear from the testimony that although Welker and Costin were working in an environment where noise was emanating from multiple sources, there was one primary, overriding source **C** the overheard finish mills. Welker, Costin, and Starr, were far more familiar with the mill processing building and the noise sources than were Oglesby, who was on his first inspection of the plant, and Schorr, who never visited the plant. Welker, Costin and Star agreed that most of the sound came from above (Tr. 145, 164, 273). Thus, I find there is ample testimony to support the inference that the predominant source of the noise that caused the laborers to be overexposed was the overhead mills.

To establish the second element proof as set forth in Callanan , the Secretary had to establish the existence of a technologically achievable engineering control that could be applied to this predominant source. It would have done no good to diminish some of the ambient sound, if the noise from the overhead mills continued to descent on the laborers. Oglesby thought it would be Aalmost impossible@ to muffle the mills themselves (Tr. 72-73), and Schorr, who also had doubts about whether they could be muffled, believed that even if it were possible, control would be economically prohibitive (Tr. 212).

Therefore, the Secretary fell back on suggesting indirect engineering controls for the sound. Oglesby, and to a lesser extent Schorr, suggested Lone Star erect partitions in the mill processing building. The problem with the suggestion is the lack of any credible evidence the partitions would have lessened significantly any of the sound from above (See Tr. 62-63). Although Oglesby thought it might have been possible to put Apanels@ of sound absorbing material over the partitions and between the laborers and the mills, the fact the laborers had to work with an overhead crane and with a pipe that would have extended through part of the Aceiling@ made

the suggestion totally impractical. Moreover, the Secretary=s witnesses never explained clearly how the partitions could have been placed so as to both diminish the sound and to allow the laborers to do the job they were assigned (see Tr. 216-217). As was apparent from the testimony, the Secretary=s priorities simply were not directed at engineering controls (Tr. 75, 223).

For these reasons, I conclude the Secretary did not present sufficient credible evidence of technologically achievable engineering controls and that her case with regard to engineering controls has failed.

In view of this finding, I need not reach questions regarding the reduction in the noise level that could have been obtained or the expected cost of implementing the suggested controls. Nevertheless, I note Schorr=s admission that Awithout monitoring and testing@ and without being familiar with Athe specifics of the room@, he was not certain how much noise reduction could be expected (Tr. 222), and that even if engineering controls were achievable, they might not be feasible because of Asignificant@ costs (Tr. 212).

Available Administrative Controls

The Commission has not ruled regarding what constitutes a feasible administrative control (see A.H. Smith, 6 FMSHRC 199, 201, n.2 (February 1994)). However, it is generally accepted that Aadministrative controls@ involve the management of personnel and work practices to achieve compliance with the standard, and in Callanan, the Commission defined Afeasible@ as Acapable of being done, executed, or effected@ (5 FMSHRC at 1907, citing American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508-509 (1981)). These principles offer guidance when analyzing the Secretary's suggested administrative solutions to the laborers' noise exposure.

When implementing administrative controls it is not unusual for an operator to organize work assignments so that a miner exposed to a high noise level for part of his or her shift is moved to a different job involving less noise exposure; or for an operator to keep the miner at the same job, but reduce the time spent on the job. Also, where it is possible, it is not unusual for an operator to choose to move the work to a less noisy site. The Secretary offered all of these traditional administrative control measures as Afixes@ for Lone Star=s problem.

As I have noted, Oglesby testified the company could have rotated employees so that the laborers were limited to four hours of work in the building (Tr. 55, 88); and Schorr suggested the company could have spread the job over two, three, or even four days, thus exposing the laborers to reduced noise levels each day; or that the company could have spread the job over several days and used different crew members (Tr. 227, 239). In addition, Schorr suggested the company simply could have done the work outside rather than in the building (Tr. 228, 240).

I have found the Secretary offered sufficient credible evidence the miners were exposed to noise levels in excess of the limits specified in the standard. I also find that the Secretary

presented sufficient evidence the suggested rotation of employees was capable of being done. At the plant there were four or five additional worker who were classified as laborers (Tr. 120, 175). By establishing their availability the Secretary created a presumption that they could have been rotated into the job. Lone Star's argument that Welker and Costin were better trained for the job does not successfully rebut the presumption and overcome the Secretary=s proof. The company is responsible for training its employees, and the fact that some of its similarly classified employees were inadequately trained for a particular job cannot be used as an excuse for exposing other of its employees to a health hazard. To allow such a defense would be to place enforcement in the hands of the company.

Likewise, the company=s argument that the laborers doing a particular job are entitled to higher pay under a company-union agreement, can not be used to undermine the Secretary=s case. The company, not MSHA, has control over and responsibility for its labor contracts, and the company cannot contractually abrogate the health protections afforded by the Act.

In addition to finding the Secretary presented sufficient evidence the rotation of employees was achievable, I also find she presented sufficient evidence the job could have been spread over several days. It is certain the company was in a hurry to have the work completed and to resume full production, but nothing in the record compels the conclusion it was technologically or administratively impossible to do work over two or more days. (It might have been inconvenient for Lone Star **C** very inconvenient **C** but it could have been done.)

Having presented sufficient credible evidence of the achievability of the suggested administrative controls, it was incumbent upon the Secretary to establish the third of the Callanan elements, **C** sufficient credible evidence of the reduction in the noise level what would have been obtained had the laborers been rotated or the job extended, and here the Secretary failed. She offered no credible evidence regarding the noise level the laborers reasonably could have been expected to be subjected to once they were removed for the job site and were assigned to other work. Nor did she offer credible evidence of the noise level the laborers reasonably could have been expected to be subjected to if to the job was extended for several days and they were reassigned. Without such evidence, it is impossible to determine whether replacement or removal of the laborers would have reduced the level of their exposure.[10] In this regard, Starr's testimony was compelling.

> Q. With respect to exposure to noise by splitting a shift in half, that would, only work to split the noise in half if the noise was equal over the entire shift; wouldn=t that be true?

[10]How the Secretary chose to elicit such evidence was for the Secretary to decide. She might have had her expert conduct a noise survey at the plant. She might have offered testimony regarding what was reasonable to expect the laborers to be doing when they were not working at insulting the burner pipe and what was reasonable to expect sound levels at those jobs to be. She pursued neither of these possibilities, nor did she attempt to pursue others.

A. Yes.

Q. So . . . if a miner were in . . . 105 decibel noise for the first 15 minutes of the shift and then in much lower decibel noise for the rest of the shift, to split it in the middle really wouldn=t affect the exposure significantly, would it?

A. No.

Q. If a worker leaves one location after four hours and then goes to another work location, does the worker=s exposure to noise stop?

A. No.

Q. And depending upon where the worker went, could that noise exposure actually go up?

A. Oh, yes.

Q. So to know if . . . by removing one worker and putting another worker in is going to actually reduce either worker=s exposure to noise, you would have to know their respective noise levels, wouldn=t you?

A. That=s correct.

Q. And if you didn=t know that, you couldn=t make an evaluation?

A. No.

Q. Would that also be true . . . with respect to doing a job over several days? For example, if you did . . . half a job one day, went someplace else for the rest of that day and came back another day and did the second half of that job, [and] went someplace else, could you determine the effect of that noise level on either of those days without knowing what noise . . . those workers were in on the second half of the days that they weren=t doing the job?

A. No (Tr. 280-282).

The deficiencies in the Secretary=s proof were exemplified by Oglesby=s and Schorr=s testimony. Oglesby did not know the noise levels of areas to which Welker and Costin reasonably could have been expected to be subjected after they were rotated (Tr. 101). Schorr had no knowledge of other work the laborers might have done while the job was extended and the noise levels that could have been expected at those other jobs.[11] Starr=s testimony that at the plant there are very noisy areas within a few feet of very quiet areas meant that without testimony from the Secretary=s witnesses as to reasonable expectations regarding work assignment areas and noise levels of those expected work areas, implementation of administrative controls could not be assumed to reduce the displaced miner=s exposure (Tr. 282).

The Secretary's evidentiary failing was highlighted by Oglesby.

> Judge:
>
> [H]ow can you know . . . that administrative controls are feasible when you don=t know what the average noise the people outside are going to be exposed to? [I]sn=t it conceivable that they could be exposed to noise that would be above 90 [dBA]?
>
> Witness:
>
> Right. What we would look for are administrative controls because everything below 90 is not what you want. What you want to do is find an area of your facility where people could work for a period of time below 90[d]BA. (Tr. 245).

To meet her requirements under Callanan, the Secretary should have offered credible proof of the area to which Oglesby referred. She did not, and for the reasons stated above, I conclude the Secretary has failed to carry her burden of proof by establishing the third element of the Callanan elements as it relates to worker rotation and job extension.

Finally, I reject Schorr=s unsupported suggestion the work could have been done outside the mill processing building. Dismukes testified without dispute that there were no outside areas where the pipe could be secured properly and the refractory material poured (Tr. 171-173). Further, Secretary's own witness, Oglesby, questioned whether the temperatures were warm enough in November to do the job outside and to do it safely (Tr. 155-157).

CONCLUSION AND ORDER

Because the Secretary failed to prove the existence of feasible engineering or administrative controls to reduce the laborers= exposure to noise, Citation No. 7284109 and

[11]Lone Star could not be expected to remove the laborers from the mill processing building and excuse them from work altogether.

Citation No. 7284110 are **VACATED**. Lone Star=s contests (Docket Nos. LAKE 98-16-RM and LAKE 98-18-RM) are **GRANTED.** The Secretary=s civil penalty petition (Docket No. LAKE 172-M) is **DISMISSED**.

David Barbour
Administrative Law Judge

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