



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

John Y. Brown, Jr.
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

April 14, 1980

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #565

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

A. O. SMITH CORPORATION

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

BY THE COMMISSION:

A Recommended Order of Hearing Officer Charles A. Goodman III, issued under date of January 28, 1980, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Complainant.

The case below involved a citation for employee exposure to noise levels exceeding permissible limits. A violation of 29 CFR: 1910.95(a), 1910.95(b)(1) and 1910.95(b)(3) (as adopted by 803 KAR 2:020) was alleged.

The case is somewhat unusual in that the citation was designated as nonserious and no penalty was proposed. This action, by the Complainant, resulted from the particular circumstances at hand. A re-evaluation inspection had established compliance by the Respondent; therefore, it was stipulated that no abatement issue was before the Commission.

The citation was based upon the noise exposure of Alan Sallee, an employee of the Respondent and operator of an electrically powered lathe. The Complainant's Industrial Hygienist, on September 14, 1978, measured Mr. Sallee's exposure by use of a DuPont dosimeter and a Type Two sound level meter.

A continuous dosimeter recording was taken for a period of 5 hours and 19 minutes. Four periodic sound level meter readings were also recorded between 9:00 a.m. and 10:45 a.m. on the inspection date. According to the Complainant's witness, the dosimeter readout was 140 percent of the permissible level, a decibel equivalent of 93.9. The average of the sound level meter readings was 125 percent of permissible exposure. Because the dosimeter reading exceeded 130 percent, a figure allowing for inherent instrument error, it served as the basis for the citation.

The Compliance Officer-Industrial Hygienist contended that the main noise sources contributing to the exposure were the air nozzle and an air leak on the gasket of the rotameter device.

The Complainant's witness acknowledged that there were times in which he did not directly observe Mr. Sallee while the dosimeter was recording. It was further admitted that the testing procedures employed, taking only four sound level meter readings, varied from the procedures of the Industrial Hygiene Field Operations Manual. The sound level meter readings alone would not have justified a citation, and additional testing was contemplated but never accomplished.

A witness for the Respondent testified that at the time of inspection the air hose was equipped with a safety noise muffler nozzle. It was also alleged that Mr. Sallee, at times during the testing period, operated the air hose higher and closer to his body than prescribed by standard operating procedures.

A reevaluation inspection, on November 10, 1978, after repair of the rotameter gasket leak, indicated no excessive noise levels from the particular lathe operation.

The Respondent, on January 1, 1979, attempted to reenact the gasket leak and introduced evidence to establish permissible levels would have existed even with the presence of the additional noise level.

In the Recommended Decision, as a preliminary matter, Hearing Officer Goodman excluded from consideration the Respondent's evidence concerning the attempt to recreate the conditions in existence upon the initial inspection. After disposing of that matter, attention was directed to whether the Complainant's evidence was sufficient to establish a prima facie case of excessive exposure.

Mr. Goodman holds that the failure to comply with the procedures of the Industrial Hygiene Field Operations Manual and the absence of sound level meter verification of the dosimeter results are procedural nonconformities mitigating against the Complainant's case.

The fundamental issue, as formulated in the decision below, is whether the duration, amount and source of the readings constitute a representative sample of the noise exposure level sufficient to establish a prima facie case.

In addressing the issue the Hearing Officer holds that the average of the sound level meter readings, 125 percent of permissible levels, is not, standing alone, enough to establish the prima facie case. It is further found that the dosimeter results alone may not be considered competent evidence to establish the Complainant's case and the combined results in this action are likewise insufficient. The Recommended Order thus dismisses the citation.

On review this Commission finds that the decision below is in error concerning the validity and competency of dosimeter evidence.

Mr. Goodman cites the federal case of Seaboard Coastline Railroad Co., 1974-75 OSHD(19,620) which vacated a noise citation derived from primary reliance on a dosimeter reading and notes that, in the absence of a clear directive from this Commission, he must follow the reasoning of that case.

This Commission and its Hearing Officers frequently consult the published decisions of the Federal Review Commission and the Administrative Law Judges. These decisions, involving essentially the same standards and obligations, are not binding before this Commission but are advisory in nature and are highly persuasive.

On review this Commission takes note of the decision in Love Box Co., 1975-76 OSHD(20,588). In Love Box significant reliance was placed upon the dosimeter readings and the Review Commission held that the use of an audio dosimeter was not precluded by 1910.95(a). The standard was further interpreted as not requiring the use of a sound level meter as an exclusive measuring instrument. We unanimously agree with this interpretation of the standard and find that the decision comports with our holding in Imco Container Co., KOSHRC #252. The dosimeter is a device "capable of accurately gauging the nature of the noise to which the employee is exposed."

The validity of dosimeter measurement is also reflected in the 1979 Industrial Hygiene Field Operations Manual. The 1976 manual was characterized as "a set of policies of good industrial hygiene practices." The most recent edition provides, in part, that the audio dosimeter meets A.N.S.I. accuracy requirements for a Type 2 sound level meter, is used to determine exposure and generally the results are the basis for a citation.

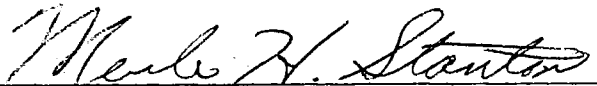
Although the dosimeter may validly be the sole measuring device employed, to sustain a violation the recorded readings must be considered along with the representative nature of the sample and all other relevant factors in the record.

As noted by the Hearing Officer, verification or contradiction of dosimeter readings by sound level meter readings will significantly effect the proof and outcome in a noise exposure case. We find that the sound level meter reading of 125 percent exposure is merely an average, and there were not sufficient readings taken to properly calculate exposure and verify or deny the dosimeter results.

There are other important considerations in the record which tend to weaken the Complainant's case. The air hose, described as a primary noise source, was, according to a witness for the Respondent, equipped with a safety nozzle. The Compliance Officer's description of the function of the rotameter was erroneous. There were allegations of employee involvement intended to invalidate the measurements, and it was acknowledged that, at times, the worker was not under observation. The 140 percent dosimeter reading is admittedly borderline, considering the inherent error, and the Compliance Officer testified that further testing was intended but never accomplished.

We reaffirm the validity of measuring employee exposure solely by the use of a dosimeter; but in consideration of the totality of the circumstances in this particular record, the Hearing Officer's dismissal of the citation is affirmed.

Now therefore IT IS ORDERED that the Recommended Order dismissing the alleged nonserious violation of 29 CFR 1910.95(a), 1910.95(b)(1) and 1910.95(b)(3)(as adopted by 803 KAR 2:020) is hereby AFFIRMED.



Merle H. Stanton, Chairman

s/Charles B. Upton

Charles B. Upton, Commissioner

s/John C. Roberts

John C. Roberts, Commissioner

DATED: April 14, 1980
Frankfort, Kentucky

DECISION NO. 855

Copy of this Decision and Order has been served by mailing or personal delivery on the following:


Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Frederick G. Huggins (First Class Mail)
Deputy General Counsel
Department of Labor
801 West Jefferson Street
Louisville, Kentucky 40202

Hon. Charles M. Chadd (Cert. Mail #PO4 3613995)
Pope, Ballard, Shepard & Fowle
69 West Washington Street
Chicago, Illinois 60602

Mr. Joe C. Craft, Safety Supervisor (First Class Mail)
A. O. Smith Corporation
Route 4 - Stop 27A
Mt. Sterling, Kentucky 40253

This 14th day of April, 1980.


Iris R. Barrett
Executive Director