KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 Bridge Street
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC Decision + Order No 266

(97-76)

April 27, 1976

KOSHRC # 97

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

TAPPAN COMPANY - MURRAY OPERATION — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

STOWERS and UPTON, Commissioners:

A Recommended Order of Hearing Officer John T. Fowler, Sr., dated February 20, 1976, is before this Commission for review.

The major issue presented for resolution is whether Respondent should be required to implement engineering controls to reduce noise levels which are in violation of OSH Standard 29 CFR 1910.95(b)(1), Table G-16, even though 1) Complainant cannot prove such engineering controls would reduce the noise to limits permissible by the Standard; and 2) Respondent alleges that such controls are not economically feasible and would cause Tappan to close down its operation in that area of business.

It is well-settled in OSHA law that employers must do all they can to reduce noise in the workplace FIRST through engineering and administrative methods and only last resorting to personal protective equipment when these methods fail. However,

if even the most advanced and vigorous engineering methods still fail to bring noise down to Table G-16 requirements, and then only, at prohibitive expense to the Company, resort must be made to personal protective equipment as the only remaining method capable of protecting employees from eventual hearing loss.

The Hearing Officer arrived at this decision after a hearing on the facts and a review of the precedental case law, especially noting Continental Can Co., Inc., OSHRC Nos. 3973, 4397, 4501, etc., as compelling and applicable. We agree with the Hearing Officer's conclusions in this regard that Complainant's burden of proof must include a showing that the noise level will be reduced at least to Table G-16 levels by feasible engineering or administrative controls before a citation under 1910.95(b)(1) may be sustained. Complainant herein admits its inability to fulfill this burden of proof. It is therefore the majority decision of the Review Commission that the decision of the Hearing Officer be AFFIRMED, and that Citation No. 1 stand VACATED as proposed in the Hearing Officer's Recommended Order. It is further ordered that all other findings of the Hearing Officer not inconsistent with this opinion shall be affirmed.

H. L. Stowers, Chairman

/s/ Charles B. Upton
Charles B. Upton, Commissioner

Dissenting:

/s/ Merle H. Stanton
Merle H. Stanton, Commissioner

DATED: 4/27/76
Frankfort, Kentucky

DECISION NO. 266

KOSHRC # 97
(Decision and Order of Review Commission)

This is to certify that a 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
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Thomas M. Rhoads
Assistant Counsel

The Honorable Irving Berger (Certified Mail #467286)
JONES, DAY, REAVIS & POGUE
1700 Union Commerce Building
Cleveland, Ohio 44115

Mr. D. J. Scurci, Assistant Secretary (Certified Mail #467287)
The Tappan Company-Murray Operation
East Main Street
Murray, Kentucky 42071

This 27th day of April, 1976.

Iris R. Barrett
Executive Director

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KOSHRC Decision + Order No 227

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 Bridge Street
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

February 20, 1976

KOSHRC # 97

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

TAPPAN COMPANY - MURRAY OPERATION — RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

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

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

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber
Assistant Counsel

The Honorable Irving Berger (Certified Mail # 456122)
JONES, DAY, REAVIS & POGUE
1700 Union Commerce Building
Cleveland, Ohio 44115

Mr. D. J. Scurci, Assistant Secretary (Certified Mail #456123)
The Tappan Company-Murray Operation
East Main Street
Murray, Kentucky 42071

This 20th day of February, 1976.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 97

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

TAPPAN COMPANY - MURRAY OPERATION — RESPONDENT

* * * * * * * * * *

Hon. Peter J. Glauber, Assistant Counsel, Department of Labor, Frankfort, Kentucky, Attorney for Complainant.

Hon. Irving Berger, Attorney, 1700 Union Commerce Building, Cleveland, Ohio 44115, Attorney for Respondent, and Jones, Day, Reavis & Pogue, Attorneys of Counsel for Respondent, 1700 Union Commerce Building, Cleveland Ohio 44115.

FOWLER, Hearing Officer

This is a case which was referred to the present Hearing Officer due to the death of the previously assigned Hearing Officer, and one which the Hearing Officer decides on the record, the stipulations of fact and the briefs of the respective parties, without the benefit of any hearing, as such.

The record indicates that as a result of an inspection by the Department of Labor on August 20, 1974, at a location on East Main Street, in Murray, Kentucky, there was a citation issued October 23, 1974, listing one citation and containing four items of alleged violation.

The items which the Respondent is alleged to have violated are as follows:

Item 1, 29 CFR 1910.95(b)(1) "Employees in the foundry area (air grinder operators and shake-out workers) were being exposed to noise levels in excess of those permissible in Table G-16, referenced standard, without engineering and/or administrative controls."

There was a formula suggested for abatement consisting of a program and monthly reports and a final abatement or a noise control program being October 23, 1975.

Item 2, 29 CFR 1910.93(c) "Employee in foundry area (shake-out worker) was being exposed to respirable silica dust in excess of that permissible in Table G-3, referenced standard, without respiratory protection or administrative and/or engineering controls."

There was by way of abatement a program set forth for a control of the dust alleged in the violation.

Item 3, 29 CFR 1910.141(c)(1)(vi) "Restroom (upstairs in warehouse) used by women had no covered waste receptacle." Abatement date was set at November 1, 1974.

Item 4, 29 CFR 1910.141(g)(3) "Cardboard boxes throughout the plant were being used as trash containers for food scraps. These cardboard containers were not of smooth, easily cleanable construction." Abatement date for this violation was set for November 15, 1974.

The items alleged to have been violated were all of a non-serious nature and no penalty was proposed for any of the alleged violations.

The pertinent procedural information is as follows:

1. Inspection, August 20, 1974.

2. Citation issued October 23, 1974.

3. Notice of Contest received November 1, 1974, contesting all items.

4. Notice of Contest with copy of citations and proposed penalty transmitted to the Review Commission, November 6, 1974.

5. Notice of Receipt of Contest mailed November 8, 1974, and Certification of Employer Form received November 13, 1974.

6. Complaint was received on November 14, 1974, and Answer filed December 6, 1974.

7. The case was assigned to Hearing Officer, Lloyd Graper, on December 9, 1974, and a hearing was scheduled, January 8, 1975, at 11:00 A.M., in Murray, Kentucky.

The record indicates that the case was continued on several occasions and that subsequently on July 18, 1975, the parties entered into a stipulation of fact, and no hearing, as such, was, therefore, held.

The stipulation of fact, among other things, provides that the Respondent is withdrawing its denial of paragraphs 6 B (c) (d) of the Complaint,

being Items No. 2, 3, and 4, as set forth herein, and that therefore, such Items are not contested with the stipulation also being provided that the alleged violations have been at the time of the filing of the stipulation abated. Thus, the remaining Item under contest and the sole Item to be determined by the Commission is the question arising under Item 1, concerning the noise levels and whether or not feasible engineering can correct such levels.

A brief for the Complainant was filed with the Hearing Officer on October 7, 1975, and an initial brief for the Respondent was filed October 10, 1975. There was a reply brief filed by the Respondent under date of October 20, 1975.

All of the briefs were exhaustive and comprehensive in setting forth the positions of the parties, and a brief recitation of some of the contents of the stipulation of fact is necessary in order to properly review the question in issue.

It is agreed that the noise levels would have exposed workers in the Respondent's plant to noise levels in excess of the permissible range if they had not been using personal hearing protective equipment. It is further stipulated that certain engineering measures could be undertaken that would reduce the noise levels in the grinding areas below the level found by the Compliance Officer. It is, however, further stipulated that the Department would not, in any trial of this matter, adduce evidence that the engineering measures referred to would reduce noise levels which would be permissible under the regulation. The Respondent makes the point of its total sales and the fact that it lost a considerable amount of money during 1974, and that matter is not in controversy by the stipulation. Respondent also states and the Department would not attempt

under the stipulation, to controvert the evidence that if the Respondent were required to undertake measures which would reduce the noise levels that they would in all probability have to discontinue their operation and seek the production of the parts through independent contractors.

The point in question, thus, appears to be primarily that although engineering controls could be exercised which would reduce the noise levels, they would not and could not reduce the noise levels to a range permissible under the regulation.

The Department of Labor contends that the use of personal protective equipment is secondary when specific engineering controls are impossible to utilize or fail to bring the sound to an acceptable level. In the furtherance of this position, the Department of Labor relys heavily on the case of, B. F. Goodrich, OSHRC Docket no. 2038, (E. S. H. G.) 17, 818, ~~a case in the~~ 6th Circuit Court of Appeals, in which ~~case~~ the 6th Circuit remanded the case for a more definite statement as to whether the feasible controls ordered will bring the noise levels to levels tolerable under the regulation.

The case at hand stipulates that the controls suggested will not reduce noise levels to a tolerable degree under the regulation, therefore, the engineering controls, even if made, would not correct the condition of which the Department complains. The Department also cites, C.F. and I. Steel Corp. OSHRC Docket No. 6027, February 11, 1975 CCH Employment Safety and Health Guide, paragraph 19,302, and Conco, Inc., December 9, 1975, OSHRC Docket

No. 6355, CCH Employment Safety and Health Guide para. 19,390, in addition to U.S. Ring Binder Corp., February 19, 1975, OSHRC Docket No. 4927-P, CCH Employment Safety and Health Guide, para. 19,571. Your Hearing Officer has read all of those decisions and is not convinced that they are dispositive of the issue raised in this question. Respondent makes the point that the regulation requires feasible engineering controls to be used in the attempt to reduce noise levels. Thus, we arrive at a point of determination of what, in fact, is feasible.

In the stipulation of fact there is no mention made of cost of controls to the Respondent, only that they are such as would require Respondent to abandon its plant. Whether the Respondent would abandon its plant is important to this decision only in that, if such action were, in fact, taken justifiably, it would indicate that the controls sought to be implemented were not feasible.

To require the Respondent to initiate a program which, if successful, would not satisfy the regulation is not a proper exercise of enforcement of the regulation, in the opinion of this Hearing Officer, since it would not promote the safety of the employee which is the intent of the act. The fact that the noise levels would be reduced would not be important because the noise levels admittedly would still exceed the tolerable levels under the regulation.

The Complainant makes the point in its brief that the purpose of the requirement for specific engineering measures is to insure the installation of permanent and effective controls when it is technologically possible to do so.

Your Hearing Officer does not feel that the regulation requires that the Respondent comply with all engineering controls that are possible, but only such controls as are feasible under the conditions of the case.

The Respondent makes much of the point that it is an important industry and will, if abandoned, make a great impact upon the economy of the locality in which it is located. I do not feel that this should be considered as a portion of this decision and, therefore, reject that contention as being a factor in the decision.

It is my opinion that cost is important insofar as it shows whether or not the controls are feasible in the overall operation. If the cost of the installation is prohibitive, then I think it logically follows that the controls are not feasible. Respondent cites many cases in support of its position including the case of Secretary of Labor vs. Continental Can Co., case no. 3973, decided October 31, 1974, and Weyerhaeuser Co. OSHRC Docket No. 11869, CCH (E.S.H.G.) para. 19,995, and makes other arguments which your Hearing Officer is considering in making this recommendation.

The aforesaid hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorizes the Review Commission to hear and rule on appeals from Citations, Notifications and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Under the provisions of KRS 338.081, hearing was authorized by provisions of said Chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing and appeal, the Review

Commission may sustain, modify or dismiss a Citation or penalty.

Based on the record, stipulation of fact, the briefs of the parties, and the reading of the decisions, it appears that there is substantial evidence to support the following Findings of Fact.

FINDINGS OF FACT

1. The stipulation of fact is accepted as a part of this recommendation as a finding of fact.

2. It is found that all procedural requirements were met.

3. No question is raised concerning reasonable promptness in the issuance of the citation and, thus, is not considered.

4. It is found that the Department is in error in its contention that engineering controls must be impossible and finds that such controls need only be feasible in the case in question. It is found that cost is a factor involved, in view of the fact that if the cost of the controls is prohibitive, then the finding of fact is that it is not feasible.

5. It is found, as a part of a stipulation of fact, that the contest concerning Items 2, 3, and 4, is withdrawn and that those Items and the alleged violations should be sustained and the Order withdrawing the contest permitted.

CONCLUSIONS OF LAW

It is concluded by your Hearing Officer that the case of Continental Can Co., supra (in which the Judge stated that the rejection by the Secretary of Labor of personal protective equipment as a permanent alternative to engineering is not rationally related to the purposes of the act) and in that opinion, I concur.

Of controlling nature also, is the case of Weyerhaeuser, above referred to, and the language contained therein that earplugs, or muffs, adequately protect workers who wear them, which is the agreement and a part of the stipulation of fact in this case, that to reject their use only because some employees might refuse to wear them, exceeds the power of the secretary under the act. The refusal of some employees to wear ear plugs or muffs, is a matter of personal preference and cooperation, not a matter of safety or health.

It is further concluded as a matter of conclusion of law that the Respondent is not bound to do all that is possible to do, but under the law and the regulation, is required to do only what is feasible to do and it is concluded in this case that the controls suggested in this action are not feasible, economically or technologically because admitted cost and, more particularly, because technically it would not, even if completely successful, accomplish compliance with the regulation.

It is further concluded that for the Commission to require the Respondent to attempt to institute controls, that admittedly would not attain compliance, is unreasonable and arbitrary and, therefore, invalid. It is further concluded that the regulation and a reasonable interpretation of it, indicates that feasible engineering controls should be sought and what is feasible must be determined on an individual basis, and that protective equipment is to be used in the event feasible engineering controls cannot bring the noise levels to an acceptable range or in the event such controls are not possible, and that personal protective equipment should not be considered only as an alternate protection to the employees.

RECOMMENDED ORDER

The Respondent is permitted to withdraw its contest of Items 2, 3, and 4, of the citation and the said citations are hereby sustained, and abatement is set for a reasonable time, not exceeding 30 days from the effective date of this Order.

IT IS FURTHERED ORDERED that citation No. 1 be and the same is hereby vacated.

JOHN T. FOWLER, SR.
Hearing Officer

Dated: February 20, 1976
Frankfort, Kentucky

DECISION NO. 227