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SECRETARY OF LABOR
Complainant,
v.
MARSHALL DURBIN
Respondent.

OSHRC DOCKET
NO. 94-0549

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 24, 1995. The decision of the Judge will become a final order of the Commission on March 27, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 16, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr./aqp

Date: February 24, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-0549

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. MARSHALL DURBIN COMPANIES, Respondent.	OSHRC Docket No.: 94-549

Appearances:

Cynthia Welch Brown, Esquire
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U. S. Department of Labor
Birmingham, Alabama
For Complainant

William E. Hester, III, Esquire
Kullman, Inman, Bee, Downing & Banta
New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Marshall Durbin Companies (Marshall Durbin) owns and operates a chicken processing plant in Jasper, Alabama. On October 25, 1993, the Occupational Safety and Health Administration (OSHA) began an inspection of Marshall Durbin's plant. OSHA compliance officer Isaac LaSalle conducted the inspection. Subsequently, the Secretary issued two citations to Marshall Durbin on January 27, 1994. Citation No. 1 contains two items, each alleging a serious violation of a provision of § 1910.95, OSHA's occupational hearing standard. Citation No. 2 contains one item, which alleges an other-than-serious recordkeeping violation under § 1904.2(a). Marshall Durbin contests all items and penalties charged in the citations.

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applied, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991). Marshall Durbin claims that the Secretary failed to prove that Thompson and Simon were not wearing hearing protection. Marshall Durbin's case is not strong. It offers no positive evidence that its employees were wearing hearing protection. It is the Secretary's burden to establish that the employees were not wearing hearing protection. The Secretary did this when LaSalle testified that Thompson and Simon told him that they did not wear any such protection during the sampled shift. It is up to Marshall Durbin to rebut the evidence. Instead, Marshall Durbin argues that LaSalle's uncontradicted testimony is insufficient to establish the company's noncompliance with the cited standard.

Marshall Durbin points out that LaSalle did not observe Thompson and Simon for the complete duration of their sampling. Exhibit C-1 indicates that LaSalle observed Thompson at 5:45 a.m., 10:55 a.m., 11:46 a.m., 1:53 p.m., 2:00 p.m., and 2:51 p.m. Exhibit C-2 shows LaSalle observing Simon at 6:22 a.m., 11:16 a.m., 11:40 a.m., 2:10 p.m., 2:18 p.m., and 2:52 p.m. Marshall Durbin argues that it cannot be inferred that LaSalle was observing Simon and Thompson during the unaccounted for time.

Such an inference is not necessary, however, because LaSalle specifically stated that he asked each of the employees whether or not they wore hearing protection, and both replied that Marshall Durbin had never required them to wear hearing protection (Tr. 21), LaSalle's testimony remains unrebutted on the record.

Marshall Thompson attempts to label LaSalle's statements regarding what Thompson and Simon told him as hearsay. Federal Rules of Evidence 801(d) provides:

> A statement is not hearsay if --
>
> . . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and . . . (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . .

Citation No. 1

Item 1: Alleged Serious Violation of § 1910.95(i)(2)(i)

The Secretary alleges that Marshall Durbin committed a serious violation of § 1910.95(i)(2)(i), which provides:

> Employers shall ensure that hearing protectors are worn:
> (i) By an employee who is required by paragraph (b)(1) of this section to wear personal protective equipment.

Paragraph (b)(1) of § 1910.95 provides:

> When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

According to Table G-16, the permissible noise exposure for an employee working eight hours is 90 decibel level (dBA). If an employee is exposed to a level greater than 90 dBA over a period of eight hours, § 1910.95(i)(2)(i) requires the employee to wear hearing protection.

LaSalle used Mark II DuPont dosimeters to sample the noise levels to which employees Anthony Thompson and Willie Simon were exposed (Tr. 14). Thompson's noise level exposure was sampled on October 26, 1993, in the hanging area. LaSalle sampled Thompson for 481 minutes. His time-weighted average (TWA) for eight hours was 93.07 dBA. LaSalle sampled Simon's noise level exposure in the washout area for 474 minutes on October 26, 1993. His TWA for eight hours was 95.5 dBAs (Exhs. C-1, C-2; Tr. 17-18). LaSalle testified that neither Thompson nor Simon were wearing hearing protection (Tr. 18).

Marshall Durbin does not dispute that the TWAs for eight hours for Thompson and Simon exceeded 90 dBAs. It does dispute the Secretary's contention that Thompson and Simon did not wear hearing protection during the entire eight-hour work shift that LaSalle sampled.

Thompson and Simon made statements to LaSalle regarding their use of hearing protection, a matter within the scope of their employment. Their statements were made during the existence of their employment relationship. LaSalle's testimony regarding their statements was, therefore, not hearsay.

Marshal Durbin complains that it would have been more probative for the Secretary to call Thompson and Simon as witnesses. Calling the employees as witnesses, however, was not necessary to establish the Secretary's case. Marshall Durbin could have called the employees as witnesses if it believed that their testimony would have rebutted that of LaSalle.

The Secretary established that Thompson and Simon were exposed to noise levels in excess of 90 dBAs over an eight-hour TWA. The employees were not wearing hearing protection during this time. LaSalle testified that supervisors were in the areas where the employees were working (Tr. 23-24). The Secretary has established that Marshall Durbin violated § 1910.95(i)(2)(i).

The Secretary charges that the violation was serious. A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), if it creates a substantial probability of death or serious physical harm. LaSalle testified that the hazard to which Thompson and Simon were exposed was occupational hearing loss (Tr. 24). Marshall Durbin argues that "[i]n one day's period, there would be no measurable harm" from being exposed to a noise level of 93.07 dBA (Tr. 137). The record establishes, however, that Thompson and Simon were never required to wear hearing protection, so their exposure was greater than one day's period. Bill Ashenfelter, Marshall Durbin's director of human resources, confirmed to LaSalle that the company's approach to the use of hearing protection was optional: "If their ears hurt, wear them" (Tr. 22). The standard presumes that, once the threshold levels of noise as listed in Table G-16 have been exceeded, hearing loss can result if hearing protection is not used. Marshall Durbin's violation of § 1910.95(i)(2)(i) is serious.

Item 2: Alleged Serious Violation of § 1910.95(i)(5)

Section 1910.95(i)(5) provides:

> The employer shall ensure proper initial fitting and supervise the correct use of all hearing protectors.

LaSalle observed employee Debra Winchester, in the hanging department, and employee Portia Hubbard, a machine operator in the eviscerating area, both of whom were wearing hearing protectors (Tr. 31). LaSalle testified that Winchester and Hubbard were wearing their hearing protectors incorrectly because he believed that most of the hearing protectors were outside of the employees' ears (Tr. 32-33). The decibel level to which Winchester was exposed was 94 dBA. Hubbard was exposed to a decibel level of 97.5 dBA (Exhs. C-3, C-4; Tr. 31). LaSalle testified that supervisors were in the areas where the employees were working (Tr. 34).

Exhibit C-5 is a photograph showing Winchester's head in profile. The photograph is blurry. It is unclear from the photograph whether the hearing protector is being worn correctly or not. Exhibit C-6 is a photograph of Hubbard. She is facing the camera and her left ear is visible. A hearing protector inserted into her ear can be seen.

The Secretary's evidence regarding this item is slight. LaSalle claims that the hearing protectors were worn improperly, but that is not apparent from the photographs introduced to show the violation. LaSalle is an experienced compliance officer and a credible witness, but he has scant training in occupational hearing conservation (Tr. 51-52).

Marshall Durbin, however, did nothing to rebut LaSalle's assertion that Winchester and Hubbard were wearing their hearing protectors incorrectly. The company failed to call any employees or supervisors as witnesses to testify that the hearing protectors were being worn properly. Marshall Durbin called only one witness, James Davidson, the director of audiology for Acoustic Consultants Industrial Health (Tr. 118). Davidson examined exhibits C-5 and C-6 and conceded that the ear protectors were "not being worn ideally" (Tr. 159).

Based on what evidence there is, it is concluded that Marshall Durbin violated § 1910.95(i)(5). Marshall Durbin's supervisor failed to ensure that Winchester and Hubbard wore their hearing protectors correctly.

The Secretary alleges that the violation is serious. LaSalle stated that the hazard was occupational hearing loss (Tr. 35). LaSalle admitted he did not know what, if any, reduction in the decibel level the hearing protectors would provide while being worn incorrectly (Tr. 66-67). Davidson, on the other hand, testified without contradiction that, even being worn improperly, the hearing protectors would provide sufficient protection to reduce the employee's exposure to less than 90 dBA:

> [Winchester] would not suffer any harm, and I feel clearly that this ear plug would reduce her exposure below 90 dBA, which is the limit.

(Tr. 142).

> I believe there would be no harm [to Hubbard]. They were ear plugs with a rating of 29. Even incorrectly worn, they should clearly provide at least six or seven decibels of attenuation.

(Tr. 143).

The Secretary has not established that Marshall Durbin's failure to ensure that Winchester and Hubbard worn their hearing protectors properly could result in serious physical harm. Item 2 will be affirmed as other-than-serious.

Citation No. 2

Item 1: Alleged Other-Than-Serious Violation of § 1904.2(a)

The Secretary charged Marshall Durbin with an other-than-serious violation of § 1904.2(a), which provides:

> (a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar

with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

LaSalle reviewed Marshall Durbin's OSHA 200 logs and discovered that the log for 1993 did not include entries for two employees who were reported to have experienced threshold shifts greater than 25 dBA (Exh. C-7; Tr. 38-39). A threshold shift is a change in hearing threshold compared to the baseline audiogram of 25 dBA at 2,000, 3,000, and 4,000 hertz frequency. Threshold shifts greater than 25 dBA must be recorded on the OSHA 200 form within 6 days of the assessment being made (Tr. 39, 42).

LaSalle obtained the 1993 audiograms and the baseline audiograms from Marshall Durbin (Tr. 76, 88). He compared the documents and found that employees Anthony Thompson and Felicia Clay had experienced threshold shifts in excess of 25 dBA. LaSalle computed a threshold shift of 46.6 dBA on Clay's left ear and a threshold shift of 77.3 dBA on both of Thompson's ears (Tr. 41-42).

Marshall Durbin does not dispute any of these facts. Marshall Durbin argues that Davidson reviewed the audiograms for Clay and Thompson and determined that they were invalid. Davidson sent a letter to Marshall Durbin informing the company that the audiograms of Thompson, Clay, and one other employee were invalid (Exh. R-4; Tr. 133). Marshall Durbin claims that it had no obligation to record the results of tests that had been determined to be invalid.

But Davidson also sent a handwritten note on a copy of a test result to Marshall Durbin which stated (Exhibit C-10, *emphasis in original*):

> These 2 workers [one of whom was Thompson] have had a 25 dBA decline in hearing. The audiograms look suspect. I suggest you have them retested by a local audiologist and send me the results to review before you list them on OSHA form 200.

Davidson had written "Important!" with an arrow pointing to a paragraph which stated:

> These workers must be entered on OSHA Form 200. They must be refitted and retrained in the use of hearing protectors and be given more effective hearing protectors if necessary.

Section 1910.95(g)(7)(ii) provides:

> If the annual audiogram shows that an employee has suffered a standard threshold shift, the employer may obtain a retest within 30 days and consider the results of the test of the annual audiogram.

Thus, the employer has two options. It can retest the employee within 30 days and use the results of that test, or it can use the original test results. But the employer must record the threshold shift within six days after receiving the information. "Recordkeeping Guidelines for Occupational Injuries and Illnesses,"[1] section B-19 of chapter V contains this question and answer (p. 32):

> Q. Must occupational injuries and illnesses that are disputed be recorded?
>
> A. Within 6 workdays after receiving information that an injury or illness has occurred, the employer must determine whether the case is recordable. Questionable cases should be entered on the log, OSHA No. 200, and lined out at a later date if they are found not recordable.

The Secretary has established an other-than-serious violation of § 1904.2(a).

PENALTY DETERMINATION

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission mst give "due consideration" to four criteria: the size of the employer's business; gravity of the violation; good faith; and prior history of violations. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J. A. Jones*, 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

Hern Iron Works, Inc., 16 BNA OSHC 1247, 1994 CCH OSHD ¶ 30,155 (No. 88-1962, 1994).

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[1] Such publications constitute reasonable interpretations of the regulation and are accorded great weight in determining which injuries should be recorded on the OSHA 200. *Kohler Co., and UAW*, 16 BNA OSHC 1769, 1994 CCH OSHD ¶ 30,457 (No. 88-237, 1994).

Marshall Durbin employed approximately 325 employees at its Jasper, Alabama, plant. It employs approximately 2,000 employees company-wide (Tr. 29). The Secretary had cited Marshall Durbin for serious violations of the Act within the three years prior to the instant inspection (Tr. 30). There was no evidence of lack of good faith on Marshall Durbin's part.

The gravity of the violation of § 1910.95(i)(2)(i) (item 1 of Citation No. 1) is high. The employees used no hearing protection whatsoever and were subjected to noise levels in excess of 90 dBA. Continued exposure to such noise levels without hearing protection can cause hearing loss. A penalty of $5,000.00 is appropriate.

The gravity of the other-than-serious violation of § 1910.95(i)(5) (item 2 of Citation No. 1) is low. It is not expected that serious physical harm would result when the hearing protectors (even though improperly worn) reduced exposure from noise levels recorded for those areas. However, without proper supervisor, employees' use of hearing protectors will predictably be ineffective. A penalty of $300.00 is assessed.

The other-than-serious violation of § 1904.2(a) is a violation of the regulatory standard intended to assist in identifying the extent of injuries occurring at an employer's facility. Marshall Durbin was recording the injuries and illnesses of its employees as required by the Act. It failed to record the threshold shifts of Thompson and Clay because it was told that their audiograms were invalid. While Marshall Durbin should have either retested the employees or recorded the suspect test results, its failure to do so was not without some basis, however misguided. A penalty of $100.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Item 1 of Citation No. 1 is affirmed, and a penalty of $5,000.00 is assessed;

2. Item 2 of Citation No. 1 is affirmed as other-than-serious, and a penalty of $300.00 is assessed; and

3. Item 1 of Citation No. 2 is affirmed and a penalty of $100.00 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: February 16, 1995