UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR
Complainant

v.

TOPCO, INC.,
Respondent

Docket Nr. 97-0298

Appearances

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Before: JOHN H FRYE, III, Judge, OSHRC

DECISION AND ORDER

I INTRODUCTION

Topco, Inc., is a metal stamping company that manufactures lighting fixtures, waste receptacles, and pressed metal ceilings. Topco utilizes presses, lathes, grinders, and other large machinery in its operations, all of which tend to be noisy. Topco's plant is located in the old Singer sewing machine factory at 107 Trumbull Street, Elizabeth, New Jersey.

On November 8, 1996, OSHA Compliance Safety and Health Officer Lisa Trecartin began an inspection of the Topco factory pursuant to a referral from OSHA Compliance Safety and Health Officer Patricia Kulick. The referral raised concerns about the need for hearing conservation and respiratory protection programs. Ms. Trecartin had conducted a similar survey of the Topco factory in 1990 that resulted in the issuance of citations that included violations of §1910.95's hearing conservation program requirements (Tr. 33, 73-75; Exh. C-1). As a result of Ms. Trecartin's inspection, the Secretary issued two serious citations to Topco, one being characterized as willful. The serious citation alleged that Topco violated 29 CFR ' 1910.95(i)(2)(i) in that four employees were overexposed to noise and did not utilize hearing protection. The serious, willful citation alleged that Topco violated 29 CFR ' 1910.95(c)(1) in that Topco did not institute a continuing, effective hearing conservation program when employees were exposed to noise levels equal to or exceeding 85dBA (eight hour time weighted average). The Secretary seeks penalties of $7,000 and $55,000, respectively.

Following Topco's notice of contest, the Secretary filed a complaint. Topco, answered and subsequently amended its answer. Topco admits that it is engaged in a business affecting commerce and has not challenged the Commission's jurisdiction. This case was tried in Newark, N.J., beginning in March, 1998.

The Secretary's citations are based on the results of Ms. Trecartin's November 13, 1996, survey of the noise to which Topco's employees were exposed. Ms. Trecartin used DuPont Mark 2 audio dosimeters in this survey (Tr. 40-41, 42). Audio dosimeters continuously measure and integrate noise levels recorded during the sampling period and provide a readout of the dose percentage of accumulated noise exposure at the end of the sampling period (Tr. 50-54, 241-42, 248). The day before the survey, Ms. Trecartin tested the batteries and precalibrated the dosimeters at the Avenel OSHA Area Office to make sure they were operating properly (Tr. 41-42). She then packed the dosimeters in their cases and stored the cases in her home overnight (Tr. 43-44).

Ms. Trecartin arrived at Topco before 7:00 a.m. on November 13th and unpacked the dosimeters in an enclosed office off of the press area (Tr. 44-45, 249, 267). Assisted by Mark Kurtzman, an industrial hygiene compliance officer trainee, she then selected and equipped employees for noise sampling, starting in the Press/Stamping Department, based on which machines were running and where employees were working that day (Tr. 45-46, 202). Because many of the employees speak only Spanish or Portuguese, a Topco employee translated for Ms. Trecartin and Mr. Kurtzman (Tr. 45, 148, 154-55). Ms. Trecartin ascertained that employees selected for sampling would be working the full shift; obtained their names, addresses and lengths of employment; and noted if they wore hearing protection (Tr. 45-48, 260). She told the employees that they would need to wear the dosimeter for the entire shift; not to leave the building with the dosimeter; not to tamper with it; and to let her know if they had any problem with the dosimeter (Tr. 50). The dosimeters' microphones were clipped to employees' shirts between the shoulder and collarbone, close to their ears, in accordance with OSHA sampling procedures (Tr. 57-59).

Ms. Trecartin sampled approximately one-third of the machine operators in the three departments: 15 in the Press/Stamping Department and one each in the Tumbling and Grinding Departments, for a total of 17 employees (Tr. 56, 59-62; Exh. C-12). After the employees had been fitted with dosimeters, Ms. Trecartin and Mr. Kurtzman filled out OSHA-92 noise survey forms for each employee, then walked through the work areas, observing the employees working, checking that the dosimeters were operating and the microphones were positioned properly (Tr. 62-63, 254).

Ms. Trecartin also took a series of spot sound level meter readings at different times during the workshift for each employee being sampled to check against the dosimeter results for consistency (Tr. 63-65). The spot sound level meter readings are shown on the OSHA-92 noise survey form for each employee with the time each reading was taken, the number of the machine at which the employee was working and whether the machine was operating at the time (Tr. 110-11; Exh. C-12).

Mr. Gindoff told Ms. Trecartin that the day she sampled was a typical workday (Tr. 87). In the Press/Stamping Department, there was constant noise from presses and machines operating at the same time. Employees also moved around to work on different machines (Tr. 56, 65, 253, 274). Employees in the Tumbling and Grinding Departments were exposed to noise from the tumbling and grinding machines (Tr. 60-61).

At the end of the workshift, Ms. Trecartin, assisted by Mr. Kurtzman, removed the dosimeters from the employees; took dose percentage readouts from the dosimeters; post-calibrated the dosimeters to ascertain that they were still properly calibrated; and recorded the information on OSHA-92 noise survey forms (Tr. 69-71, Exh. C-12). An OSHA-92 noise survey form for each employee contains dosimeter dose percentage readouts at the 80 and 90 dB thresholds and the equivalent 8-hour TWA

sound level (in decibels) that Ms. Trecartin calculated from the dose readouts using the logarithmic formula provided in Section II of Appendix A of §1910.95 (Tr. 110-11, 252-56, Exh. C-12, pp. 2-18).[1]

The noise survey showed that employees were exposed to higher noise levels in the Press/Stamping Department in November 1996 than at the time of Ms. Trecartin's 1990 inspection (Tr. 113-14, 129). Mr. Gindoff told Ms. Trecartin that it was louder at the time of the 1996 sampling than the 1990 inspection due to the addition of new machines (Tr. 87-88, 118-19, 129, 626, 628; Exh. C-14, p. 3). Following OSHA practice, Ms. Trecartin allowed a margin-of-error of two decibels in Topco's favor in determining whether sampled employees were exposed to noise above the action level and the permissible exposure limit (Tr. 52, 54-55, 72, 11). She determined that 15 out of the 17 employees sampled, including employees in each of the three departments surveyed, were exposed to noise above the action level, and four of the 15 employees, all of them in the Stamping/Press Department, additionally were overexposed to noise (Tr. 71-72, 105-108, 110, 112, 115-17, 124, 127, 131-132; Exh. C-12). Only the two machine operators in the Tumbling and Grinding Departments were wearing hearing protection during the noise survey (Tr. 66, 109, 121-22; Exh. C-12, pp. 1, 9, 10). At the time of the inspection, ear plugs were available for employee use, but Topco did not require employees to use hearing protection (Tr. 49, 86, 117, 124-25, 654-555).

At the time of the 1996 OSHA inspection, Topco was aware of the representative monitoring, audiometric testing, hearing protection and employee training requirements of §1910.95 because it had

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[1] The dosimeter's 80-decibel threshold integrates noise levels of 80 decibels and above; the 90-decibel threshold integrates noise levels of 90 decibels and above (Tr. 51-54, 248-50). The 80-decibel threshold is used in determining exposure to noise at or above the action level ("action level" is defined as a dose of 50%, equivalent to an 8-hour TWA of 85 dB, in §1910.95(c)(2) and Appendix I of §1910.95). A dose of 100% is equivalent to an 8-hour TWA of 90 dB, the maximum permissible daily noise exposure (Tr. 54).

received citations for violating those hearing conservation program requirements in 1990 (Exh. C-1, pp. 4-6). Topco's president and vice president, Henry Zuk and Martin Gindoff respectively, also had been told by Ms. Trecartin during the 1990 inspection and Area Director Dennis Gaughan at a subsequent informal settlement conference that Topco was required to do annual audiometric testing and employee training for employees exposed to noise above the 85 dB action level and that use of hearing protection was required for employees exposed to noise above 90 dB (Tr. 73-75, 339-40, 342).

THE ALLEGED VIOLATIONS

The Secretary charged Topco with two violations: one of ' 1910.95(i)(2)(i), alleging the failure to require the use of hearing protective equipment, and the other of ' 1910.95(c)(1), alleging the lack of a hearing conservation program. Topco asserts that it reasonably relied on the Secretary's advice with regard to the abatement of the 1990 violations; that this advice did not indicate a need to comply with the cited standards; and that, as a result, Topco lacked fair notice of the requirements being imposed on it and that the Secretary is estopped from enforcing these standards against it.

Topco's position is based on its understanding of OSHA's position taken in the closing conference in February 1990. According to Topco, Ms. Trecartin provided Topco management with specific instructions on how to abate the violations of Section 1910.95 found in the 1990 inspection. Topco summarizes the information on which it relied as follows at pages four and five of its brief:

> * * * Indeed, Trecartin herself testified that during the closing conference she instructed Topco's President Henry Zuk and Vice President Martin Gindoff that (1) no representative monitoring program was needed because her lone noise survey was sufficient to satisfy that requirement (Tr. 220-221); (2) only baseline audiograms were needed if noise levels went below the threshold 85 dBA level (Tr. 219; 221); (3) because no employee was exposed to noise over 92dBA, Topco merely had to make hearing protectors "available" (Tr. 215-216; 221); and (4) a

single training session on hearing conservation be conducted. (Tr. 222). (Tr. 339-341; 426-427; 434-435; 438-439; 443-446). It is undisputed that at no time during this conference did Ms. Trecartin instruct Mr. Zuk and Mr. Gindoff that they were required to institute a comprehensive hearing conservation program. Thus, Mr. Zuk and Mr. Gindoff reasonably believed that compliance with the noise standard required no more than abiding by Ms. Trecartin's specific abatement instructions. (Tr. 339-341; 426-427; 434435; 438-439; 442-446).

Trecartin's instructions -- and Topco's reliance on those instructions -- were further reinforced by OSHA Area Director Dennis Gaughan during an informal conference in March 1990. (Tr. 427-428; 435-436). Mr. Gindoff testified -- without contradiction -- that at that conference he was instructed by Mr. Gaughan that, in order to meet the standard's requirements, (1) OSHA's 1990 noise survey constituted a sufficient representative monitoring program and no further monitoring was required (Tr. 434-435); (2) a baseline audiogram be conducted (Tr. 436); (3) hearing protectors merely be made "available" (Tr. 440); and (4) a training program be conducted. (Tr. 441). These instructions -- which were identical to those provided by Trecartin -- were memorialized by Mr. Gindoff in a handwritten abatement note. (Exh. R-6).

Topco points to *Miami Industries, Inc.*, 15 OSHC 1258 (1991), where the Commission vacated a citation because the employer had reasonably relied on abatement instructions from an OSHA compliance officer provided during an earlier inspection. In rendering its decision, the Commission held that because of the employer's reliance on these instructions -- which were corroborated by an abatement letter from the area director -- it lacked fair notice of the standard's requirements. In addition, the Commission concluded that because of the employer's compliance with OSHA's previous abatement instructions, the Secretary was equitably estopped from enforcing the standard. *See also Hamilton Die Cast, Inc.*, 11 OSHC 2171 (1986), where the Commission vacated a citation where it was found that the employer had relied upon previous OSHA instructions in abating violations of the same standard.

The flaw in Topco's position is that in both *Miami Industries* and *Hamilton Die Cast*, the standard involved was a general one, intended to apply to a great variety of situations. Thus, the position of OSHA with regard to the compliance with that standard of specific measures applied to a specific machine carried great weight. Here, ' 1910.95 is specific. It requires certain specific actions in certain

well-defined situations. Accepting Topco's position here would have the result of permitting an OSHA position with regard to one specific condition to apply to other specific conditions in derogation of the terms of the standard. Topco would rely on OSHA's position that where no employee was exposed to noise over 92dBA, Topco merely had to make hearing protectors available, apply to situations in which the employee exposure was sufficiently greater to trigger the mandatory use of hearing protection under ' 1910.95(i)(2)(i). Similarly, Topco cites OSHA's position that only baseline audiograms were needed if noise levels were below the threshold 85 dBA level to justify its failure to conduct a hearing conservation program when noise rose above that level, as required by ' 1910.95(c)(1). Topco's reliance on *Miami Industries* and *Hamilton Die Cast* is misplaced, and this defense is rejected.

Citation 1 alleges a violation of § 1910.95(i)(2)(i) in that wearing of hearing protectors was not required for four employees operating press machines in the Stamping/Press Department. The citation alleges that these employees were exposed to noise levels that called for the use of hearing protection pursuant to § 1910.95(b)(1). Section 1910.95(i) states:

> (2) 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[.]

§ 1910.95(b)(1) states:

> 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.

Table G-16 limits exposure to a maximum of 90 dB over an eight hour day without use of hearing protection.

Topco made hearing protective equipment available, but did not require its use by employees. (Tr. 86, 117, 124-25, 654-55). Ms. Trecartin's noise survey indicated that four machine operators in the Stamping/Press Department, Alex Rodriguez, Alfred Quinones, Paccuel Torrs and Anthony Hill, were exposed to noise levels of 99.79, 98.18, 96.63 and 92.37 dB, 8-hour TWA, respectively, on November 13, 1996 (Tr. 242, 249-50; Exh. C-12, pp. 1-5). Table G-16 limits each employee's exposure, without use of hearing protection, to no more than two, three, three, and six hours respectively. Ms. Trecartin's notes (Ex C-12) indicate that at one specific time during the workday, these four employees were not wearing hearing protective equipment. These notes do not indicate how long that state of affairs may have continued.

Topco argues that the failure to indicate the duration of the employees' exposure without hearing protective equipment is fatal to the Secretary's case, citing *Morrison-Knudsen, Inc.*, 13 OSHC 1121 (1987), where the Commission vacated a similar citation because the Secretary failed to "present sufficient evidence to meet his burden of proving that [the employees] did not wear hearing protection on the day of the alleged violation." The Commission concluded that because the compliance officer only intermittently observed the employees without hearing protection, the Secretary could not show that the employees were not wearing hearing protection for the required amount of time under the standard. Id. at 1124. *See also Collier-Keyworth Co.*, 13 OSHC 1208, 1229 (1987).

Topco's argument would be well-taken if Topco required the use of hearing protective equipment. However, it forthrightly admits that it did not. The standard requires that the employer "shall ensure that hearing protectors are worn." Topco, by its own admission, did not comply with that directive. Thus, if Ms. Trecartin's employee monitoring data are accepted, Topco was in violation of this standard.

Citation 2 alleged a violation of § 1910.95(c)(1) in that respondent's failure to institute a continuing, effective hearing conservation program for employees operating machines in the Stamping/Press, Tumbling and Grinding Departments. Ms. Trecartin's survey showed that these employees were exposed to noise ranging between 87.5 and 99.79 dB, exceeding an 8-hour TWA of 85 decibels. Section 1910.95(c)(1) provides:

> The employer shall administer a continuing, effective hearing conservation program, as described in paragraphs (c) through (o) of this section, whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A scale (slow response) or, equivalently, a dose of fifty percent. For purposes of the hearing conservation program, employee noise exposures shall be computed in accordance with appendix A and Table G-16a, and without regard to any attenuation provided by the use of personal protective equipment.

Topco violated §1910.95(c)'s requirements because it did not administer a continuing, effective hearing conservation program, as described in paragraphs (c) through (o) of §1910.95. The Secretary points out that Topco did not:

perform noise exposure monitoring (§1910.95(d));

provide an audiometric testing program (§1910.95(g));

> ensure use of hearing protection by employees exposed to noise above the action level who had not yet had baseline audiograms (§1910.95(i)); and

provide annual employee training on noise and hearing protection (§1910.95(k)).

Except for making ear plugs available to employees for their voluntary use, Topco did not have any element of a continuing hearing conservation program at the time of the November 1996 inspection (Tr. 49, 86, 120, 124-25). Topco did not monitor employee noise exposure after installing additional presses and other machinery in its Stamping/Press Department, although vice president Gindoff was aware in March or April of 1996 of the need for a noise survey due to increased noise levels (Tr. 127-28, 454,

656). Respondent did not provide audiometric testing after the initial baseline audiograms of 27 employees in May 1990 (Tr. 88, 95, 129). Only one of the 15 employees sampled by Ms. Trecartin in November 1996, Fernanda Casalandeira, had had a baseline audiogram done in 1990 (Exhs. C-11, p. 10, and C-12, pp. 1 and 7). Topco did not ensure that employees who had not been given baseline audiometric tests, but were exposed to noise above the 85 dB action level (including the 4 machine operators who were overexposed to noise), wore hearing protection (Tr. 117-18). And Topco did not provide annual training on noise and hearing. Mr. Gindoff testified that respondent's plant manager gave new employees training on noise and hearing protection, but did not know what the plant manager actually told them (Tr. 473-74). Respondent did not call the plant manager to testify at the hearing.

Compliance Officer Lisa Trecartin's noise survey indicates that, in addition to the four employees exposed to excessive noise, discussed above, nine of the 11 other employees sampled in the Stamping/Press Department and the two employees sampled in the Tumbling and Grinding Departments were exposed to noise exceeding the 85 dB action level at which a continuing, effective hearing conservation program is required (Tr. 72, 127; Exh. C-12).

Topco offers two defenses. First, Topco points out that within months of OSHA's 1990 inspection -- and OSHA's indication that if the noise went down, no hearing conservation program was needed -- Topco experienced a sudden downturn in business with a number of attendant consequences. (Tr. 325). First, Topco experienced a substantial decrease in production and sales volume. (Tr. 324-326; 351-352; Exh. R-2).[2] Second, because of the decrease in production and sales volume, Topco laid

[2] As of May 31, 1990, Topco had approximately $2,390,000 in sales. (Tr. 351). By May 31, 1993, that number had dropped to $1,560,000 - almost a 35 percent decrease in sales from 1990. (Tr. 351).

off a substantial number of press operators. (Tr. 324-325).[3] Finally, because of the decrease in press operators, there was a significant decrease in machine hours. (Tr. 354; 359). Thus, between 1990 and 1993, Topco experienced a decrease from 200 to 135 machine hours per day. (Tr. 356-357).

Topco points out that the downturn in business and corresponding decrease in machine operations resulted in workplace noise levels well below the marginal levels present during OSHA's 1990 inspection. (Tr. 357; 424). Indeed, Mr. Zuk testified that after OSHA's 1990 inspection, "[t]he noise level went down" -- so low that "[i]t was extremely noticeable." (Tr. 357-358; 424). Similarly, Mr. Gindoff testified that beginning in mid-1990, "the noise level in the plant had reduced... and remained down" until 1996 when Topco slowly began to add presses that were acquired from a competitor in December 1995. (Tr. 453; 457). Mr. Mirailh, the local union representative, also testified that during a visit to Topco in 1993, the sound level had decreased so much that "I could hear myself talk" and "it was obvious there was no business." (Tr. 483). Finally, this decrease in noise was confirmed by Topco's worker's compensation carrier's inspector who, after conducting workplace inspections, issued reports stating that Topco's "power punch press and stamping machines ... do not appear to exceed the allowable maximum decibels." (Tr. 361; 367-368; 404-406; 447-; 449-450; Exh. R-3; R-4).

Topco argues from these facts the Secretary cannot show -- as she must -- that Topco knew or should have known of a violation of Section 95(c)(1). For this reason, Topco asserts that the citation must be vacated.[4] However, Topco ignores the fact that Mr. Gindoff was aware that noise levels were increasing as a

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[3] In fact, the number of press operators decreased from 42 in May 1990 to 32 in May 1991 and remained below 30 until May of 1996 (Tr. 328-326; Exh. R-2). This was confirmed by Manny Mirailh, the local union representative for United Steelworkers of America. Mr. Mirailh testified that as a result of Topco's decrease in business between 1990 and 1993, the number of Topco union employees dropped from 85 to 40. (Tr. 482).

[4] Topco cites *Morrison-Knudsen, Inc.*, 13 OSHC 1121, 1124 (1987) and *Longview Brass & Aluminum Company*, 1 OSHC 3364 (1974).

result of the addition of machinery and that a noise survey would need to be done. (Tr. 454-55, 656-57.) At a minimum, Topco was aware of increasing noise levels and the need to ascertain whether the cited standard required that it take some action. This defense is rejected.

Topco's second defense centers on flaws in Ms. Trecartin's survey. Topco's expert witness, Lewis Goodfriend,[5] is a consulting engineer specializing in acoustics who has written over 100 articles on noise sources and measurements of noise, done studies to determine noise exposure to employees in the workplace, and conducted workshift noise sampling over 100 times (Tr. 538; 541 545; 548). Mr. Goodfriend concluded that there were critical flaws in Ms. Trecartin's survey, each of which, standing alone, would be sufficient to invalidate their results. (Tr. 558-564):

First, Mr. Goodfriend pointed to significant inconsistencies between the duration of time the employees wore the dosimeters and the total time recorded on the dosimeters. (Tr. 559). For example, the noise survey report for Alex Rodriguez indicated that his dosimeter was attached at 7:41 a.m. and removed at 3:18 p.m. for a total time of 457 minutes. (Tr. 246; Exh. C-12). Yet, the dosimeter recorded a total time of only 436 minutes. (Tr. 246; Exh. C-12). When asked why the dosimeter indicated a different time, Ms. Trecartin replied only that "it shouldn't really." (Tr. 246). Mr. Goodfriend testified that this kind of discrepancy amounted to a lack of effective control. (Tr. 559).

The Secretary responds that the OSHA-92 noise survey reports show that in most cases, including the four employees sampled in the Stamping/Press Department that were found overexposed to noise, the on/off time was longer than the dosimeter "total time" (Exh. C-12, pp. 2-5, 8, 11-13, 15 and 17). The "time off" noted on each OSHA-92 noise survey form was not obtained from the dosimeters but from Ms. Trecartin's or Mr. Kurtzman's watches; the Secretary argues that it has no effect on the dosimeter dose percentage readout, based on the dosimeter's measurement and integration of noise levels over the time period sampled, or the equivalent

[5] The Secretary has renewed her motion to strike Mr. Goodfriend's testimony. That motion is denied.

8-hour TWA sound level derived from the dose percentage (Tr. 70, 249-50). Ms. Trecartin testified that the sampled employees returned their dosimeters in "a big rush" at the end of the workshift (Tr. 69, Exh. C-12). The OSHA-92 noise survey reports show that all 15 employees sampled in the Stamping/Press Department returned their dosimeters at 3:18 p.m.(Exh. C-12, pp. 2-8, 11-18). Ms. Trecartin, assisted by Mr. Kurtzman, removed the dosimeters and microphones from the employees, then put the dosimeters in standby mode, which does not measure noise (Tr. 69, 248). After all the dosimeters were returned, they took readouts; post-calibrated the dosimeters; and recorded the information recorded on OSHA-92 noise survey forms (Tr. 69-70).

Second, a two and one-half hour time gap existed between the time the dosimeters were attached and the first sound level meter reading. (Tr. 558). Ms. Trecartin failed to take any sound level meter readings until after 10:00 a.m., while the dosimeters were put on between 7:26 and 8:36 a.m. (Exh. C-12). Thus, for a substantial period, Topco argues that Ms. Trecartin had no way of knowing whether the dosimeters were accurately recording workplace sound levels. Topco also asserts that the sound level meter readings were invalidated by Ms. Trecartin's practice of attaching the microphone to a clipboard. (Tr. 560). Mr. Goodfriend testified that the sound level meter microphone must be "in a space free of immediate reflecting surfaces" in order to get valid sound levels. (Tr. 560).

The Secretary responds that noise survey results are not based on the sound level readings. Ms. Trecartin relied on the spot sound level meter readings as a check of the dosimeter results at the end of the sampling period. The spot sound level meter readings were generally consistent with each dosimeter's results. Had there been a large discrepancy, that dosimeter results might have been thrown out. (Tr. 63-65, 252-56).

Third, Ms. Trecartin failed to observe the sampled employees throughout the day. (Tr. 559-60). For example, Ms. Trecartin and Mr. Kurtzman left the Topco factory for a period of 45 minutes in order to eat lunch. (Tr. 147). A review of Exh. C-12 indicates that Ms. Trecartin failed to record what each operator was doing at each press. (Tr. 561,). On at least two occasions, machines stopped operating during the sampling. (Tr. 199, 202). Mr. Goodfriend testified that Ms. Trecartin didn't "know what the employee was doing, where

the individual wearing the dosimeter was at those times, whether that employee left the area or whether that employee was assigned to another machine." (Tr. 561).

The Secretary responds that it is neither practical nor necessary to staff a noise survey to continuously observe employees working in different areas and moving around in their work because dosimeters continuously integrate the noise to which the employees are exposed (Tr. 50-54, 241-243, 248). The Secretary believes Ms. Trecartin exercised sufficient control by checking from time to time during the sampling period whether the dosimeter on each employee was operating and the dosimeter microphone positioned properly (Tr. 62-63, 254).

Fourth, the sampling was not conducted for a sufficient period of time. (Tr. 562). The noise sampling results are based on only one day of workshift sampling. Mr. Goodfriend testified that to conduct a valid representative survey, sampling should took place over at least a two day period. (Tr. 562). Moreover, although Ms. Trecartin had access to as many as 100 employees, which included setup men, die setters and maintenance mechanics, she chose to sample only 17 press operators. (Tr. 318; 139-141). Ms. Trecartin indicated that her selection of the 17 press operators was "random" and based on "who was available" at the time. (Tr. 236-237). Topco asserts that her sampling was hardly representative of the workplace sound levels experienced by most employees. According to Mr. Goodfriend, at least half of the 52 press operators should have been surveyed. (Tr. 562). He believes that the inadequate scope and duration of the survey invalidates the results. (Tr. 562-563).

The Secretary responds that this shortcoming does not affect the results showing that 15 of 17 machine operators sampled in three departments were exposed to noise above the 85 dB action level and four machine operators in the Stamping/Press Department were exposed to noise above the 90 dB permissible exposure limit (Exh. C-12). Ms. Trecartin testified that more sampling should have been done in order to assess the impact of certain machines that were not operating and allegedly were a major source of noise (Tr. 86-87, 178-79).

Fifth, Ms. Trecartin did not remove the dosimeters during the employees' lunch break. (Tr. 152). Topco urges that her failure to do so is fatal to her survey because, as Mr. Goodfriend testified, the employees

could easily have gone into a non-work environment with increased noise levels. (Tr. 563). The Secretary responds that Ms. Trecartin sampled employees during their half-hour lunch break because they did not leave the workplace and it was part of their workday (Tr. 68-69, 137, 151-52). There is no evidence that any sampled employees were exposed to loud music or used an air hose to clean their clothes on their lunch or work breaks.

The Secretary's responses to the criticisms leveled at the survey are well taken. While Dr. Goodfriend has identified shortcomings which undoubtedly tend to raise questions concerning the reliability of the survey, they do not individually or collectively rise to the level of invalidating the survey for purposes of this proceeding. Under the two standards cited by the Secretary, it is necessary only to conclude that noise levels are above either 85 or 90 dB. Most of the values recorded in the survey are substantially above the applicable threshold. Moreover, OSHA allows a two decibel margin of error in the employer's favor. Given the logarithmic nature of the scale, this is a substantial safeguard against unreliability. I conclude that it is more probable than not that the results indicated by the dosimeters accurately reflect conditions existing on the day of the survey.

In addition, Topco's position seems to assume that the noise levels for an entire work area must rise above the 85 dB level in order to trigger the requirements of ' 1910.95(c)(1). While the standard leaves some room for doubt, the Secretary has approached the question on the assumption that demonstrating that some employees within a work area are exposed to noise levels above the 85 dB level is sufficient to trigger the standard. This is a reasonable interpretation and, under the holding of *Nooter Construction Co.*, 16 OSHC 1572, 1574 (Rev. Com. 1994), I defer to it. I conclude that Topco was violating " 1910.95(i)(2)(i) and 1910.95(c)(1) as charged.

The Secretary urges that the latter violation was willful within the meaning of Section 17(c) of the Act. A willful violation is one committed with intentional, knowing, or voluntary disregard for the Act's requirements, or with plain indifference for employee safety and health. *V.I.P. Structures, Inc*, 16 BNA

OSHC 1873, 1875 (No. 91-1167 1994); *Falcon Steel Co., Inc.*, 16 BNA OSHC 1179, 1181 (Nos. 89-2833 & 89-3444 1993); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2012 (No. 85-369 1991).

In *Trinity Industries, Inc.*, 15 OSHC 1985, 1992 (November 18, 1992), the Commission defined "willful" as follows:

> A violation of the Act is willful if "it was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety." [citation omitted]. Trial of the issue of willfulness focuses on the employer's state of mind and general attitude toward employee safety to a greater extent than would trial of a non-willful violation.

Consistent with the "heightened degree of culpability" necessary to show a willful violation, the Commission, in *Williams Enterprises, Inc.*, 13 OSHC 1249, 1256-57 (1987), emphasized that:

> It is not enough to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation, serious or nonserious.... A willful violation is differentiated by a heightened awareness -- of the illegality of the conduct or conditions and by a state of mind -- conscious disregard or plain indifference.... It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation.

The Secretary maintains that, at the time of the OSHA inspection in November 1996, Topco had a heightened awareness of the monitoring, audiometric testing, hearing protection and training requirements of OSHA's hearing conservation standard because Topco had been cited for violations of these requirements; Topco's vice president, Martin Gindoff, testified that he understood from that inspection that Topco had to do audiometric testing when employees were exposed to noise above 85 dB; and Mr. Gindoff had a copy of §1910.95 which he had read (Tr. 461-63).

Ms. Trecartin testified that during a meeting with Mr. Gindoff on November 20, 1996 to review her noise survey results and obtain additional information, he told her that Topco did not continue annual

audiometric testing after May 1990 for two reasons: "its a lot of money" and "time goes by and you get sloppy" (Tr. 85, 130-31). He said that twice, adding "I probably shouldn't be so honest with you." (Tr. 621-22). Mr. Gindoff denied making those statements in his testimony, relying on his recollection (Tr. 457, 621-23, 653-54, 661). Ms. Trecartin was so struck by Mr. Gindoff's reasons that she wrote down what he told her immediately after leaving his office; Mr. Gindoff made no notes of the meeting (Tr. 616-17, 621-22, 661; Exh. C-14, pp. 1-2). The Secretary argues that Mr. Gindoff's candid admission establishes respondent's voluntary disregard of the Act's requirements; its plain indifference to employee hearing loss; and its willful violation of §1910.95(c)(1).

First, Topco counters that it is ludicrous to charge it with knowledge of the standards requirements in light of the advice that it received from OSHA in connection with the 1990 inspection. This argument must be rejected for the same reasons as those given above in connection with Topco's estoppel argument. Second, Topco denies that Mr. Gindoff made the statement attributed to him by Ms. Trecartin and attacks the position that, if made, it provides support for a willful classification. Topco urges that Mr. Gindoff simply reiterated to Ms. Trecartin what the undisputed evidence of Topco's drop in business activity confirms -- that "because the noise level in the plant had reduced...and remained down" he did not believe further audiograms were needed. (Tr. 456-457; 653-654). Topco points out that this fact was confirmed by Mr. Busicchia who testified that he told Topco in 1990 that it did not have to conduct further audiometric testing.[6] (Tr. 975).

Topco's position is well taken. Even assuming that Mr. Gindoff did make the disputed statement, that in itself is insufficient to support a willful classification given the totality of the circumstances. Topco had been told that it did not need to take action so long as the noise levels remained down, and it recognized that the

[6] At the time, Mr. Busicchia was acting in his capacity as a Compliance Officer.

addition of machinery was elevating those levels and would require it to conduct a new survey. Thus, while Topco may have been sloppy, its conduct did not illustrate conscious disregard or plain indifference. Given Mr. Gindoff's recognition that increasing noise levels required him to take some action, his alleged statement that "time goes by and you get sloppy" indicates no more than carelessness or lack of diligence. The statement, "its a lot of money," in this context is simply insufficient to show willfulness.

CONCLUSIONS OF LAW

The Commission has jurisdiction of this matter pursuant to ' 10(c) of the Act.

Respondent, Topco, Inc., was in serious violation of the standards set out at 29 CFR " 1910.95 (i)(2)(i) and 1910.95(c)(1). The violation of ' 1910.95(c)(1) was not willful. Civil penalties of $7,000 and $3,500, respectively, are assessed.

ORDER

Citations 1 and 2 are affirmed as serious violations of the Act. A total civil penalty of $10,500 is assessed.

JOHN H FRYE, III
Judge, OSHRC

Dated:
Washington, D.C.