

NO. 62893-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

BALFOUR BEATTY CONSTRUCTION, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR
& INDUSTRIES,

Respondent.

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Appeal from Superior Court of King County
08-2-10695-1 SEA

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. RESPONSE

- A. The Board's Finding of Fact No. 2 may support a general violation of WAC 296-817-20005, but pursuant to RCW 49.17.180(6) it is insufficient to establish a "serious" violation.

As previously set forth in the Appellant's Opening Brief, pursuant to RCW 49.17.150 the Employer accepts the Board's Findings as conclusive. The Board reversed the Industrial Appeals Judge's Proposed Decision and Order (BR 79 – 86) which vacated Citation 1, Item 1, the only remaining citation on appeal.

In the Memorandum portion of the Proposed Decision & Order, BR 82, lines 3 – 17, the IAJ declared as follows:

(Item No. 1-1) The Department's hearing conservation regulations are set out in WAC, Chapter 296-817. WAC 296-817-20005 requires an employer to conduct noise exposure monitoring if there is reasonable information to believe that employees may be exposed to noise levels exceeding 85 decibels on an 8-hour time-weighted average. WAC 293-817-30010 defines the purpose of such monitoring as to determine the total daily noise exposure for employees. That regulation states: 'A noise dosimeter is the basis for determining total daily noise exposure for

employees. However, where you have constant noise levels, you may estimate employee noise exposure using measurements from a sound level meter.’ The employer is specifically permitted to calculate employee noise exposure levels by using the equation set out in Table 3, WAC 296-817-30015. Exhibit No. 5 is the employer’s noise and vibration plan developed for the downtown Seattle transit tunnel retrofit and expansion. This plan called for the monitoring of five sensitive locations, identified on Exhibit No. 3. The noise monitoring at those locations used a device identified as a Sound Level Instrument – Model SL 130. As can be seen from Exhibit No. 5, this meter is a ‘Type 2’ meter that conforms to ANSI standards, and specifications set out in WA 296-817-30010.

Additionally, the IAJ further noted that the Department did not allege that any Balfour Beatty employee was overexposed to noise. BR 82, lines 30 – 31.

After accepting the Department’s Petition for Review, the Board modified Finding of Fact No. 2 as follows:

“On or about December 8, 2005, the employer Balfour Beatty Construction, Inc. did not conduct noise exposure monitoring to determine employee noise exposure monitoring to determine noise exposure during excavation and concrete pouring operations as required by WAC 296-817-20005. The employer conducted noise exposure readings

in certain locations on and near the worksite. The monitoring was designed to measure noise exposure in the vicinity to ensure that the project complied with City of Seattle noise ordinances. The monitoring did not cover certain areas where the Balfour Beatty Construction, Inc. employees were actually working at the time of the inspection. The employer was performing an excavation that was 65 feet deep at the time of the inspection. There was no monitoring within the excavation. Several pieces of loud equipment were operating within the excavation at the time of the inspection.

Noticeably absent from the Board's Findings of Fact and the Memorandum portion of the Order is *any* finding that the employees exposed to noise in the excavation was exposed to noise above the PEL based on an 8 hour time weighted average. Moreover, there was no finding from the Board that failure to use the correct sound meter actually exposed any of the employees to hearing loss.

Rather, without any factual basis the Board concluded that:

Since hearing conservation is at stake, we agree with the classification of Item No. 1-1 as a serious

violation and we affirm all of the penalty calculations. BR 4, lines 20 – 21.

This was the extent of the Board’s analysis on why the citation should be classified as a “serious” violation.

With all due respect to the Board, the cited standard is part of the hearing conservation standards, but the Department provided, and the Board found no evidence to establish that using the incorrect method of monitoring the noise levels created a substantial probability of serious injury to any of the Balfour Beatty employees. This is in direct violation of RCW 49.17.180(6) which defines a “serious” violation.

RCW 49.17.180(6) declares:

(6) For the purposes of this section, a serious violation shall be deemed to exist in a work place **if there is a substantial probability that death or serious physical harm could result** from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. (Emphasis added).

RCW 49.17.180(6) is the exact counterpart of the federal OSHA standard, Section 17(k), 29 U.S.C. 666(j). The federal statute provides:

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

In interpreting WISHA regulations in the absence of state decisions, Washington courts look to the federal Occupational and Health Administration (hereinafter “OSHA”) regulations and consistent federal decisions. *WA Cedar & Supply Co., Inc. v. State of WA Dept. of Labor & Industries*, 137 Wn. App. 592, 604 (2007). *Inland Foundry Co. v. State of WA Dept. of Labor & Industries*, 106 Wn. App. 333, 427 (2001).

Federal OSHA decisions do not automatically classify a hearing conservation violation as a “serious” violation. Rather,

the Review Commission applies the 17(k) statute to determine whether there is any evidence to support a finding that there is a substantial probability that the violation will lead to hearing loss.

In *Secretary of Labor v. Trinity Industries*, OSHRC Docket Nos. 88-1545 and 88-1547, the Review Commission affirmed the failure to perform noise monitoring under the hearing conservation standards was a “non-serious” violation because there was no evidence that any of the employees was exposed to noise levels above the Permissible Exposure Level such that there would be any hearing loss.

In *Trinity*, the Secretary alleged that Trinity violated section 1910.95(g)(6) by not providing annual audiograms to employees found to be exposed to noise levels above the 85 decibel 8-hour TWA. At the hearing, the item was amended to also allege a violation of section 1910.95(g)(5)(i) for a failure to provide baseline audiograms within six months of an employee's first exposure to noise at or above the action level

(i.e., an 8-hour TWA of 85 decibels). The Secretary proposed a \$3000 penalty for each of the two noise items.

The OSHRC rejected the Secretary's allegation that the employer committed a "willful" violation, but affirmed that citations as a non-serious violations. With regards to the failure to perform audiometric testing, the Commission held:

Moreover, we must also consider that, even though Trinity failed to comply with the audiometric testing requirements of the hearing protection standards, the interests of the employees have been largely protected. Cf. *RSR Corp. v. Brock*, 764 F.2d at 363 (whether employer's alternative to literal compliance protected employee interests considered a factor when determining if violation was willful). While the evidence establishes that the lack of audiometric testing could have resulted in undetected hearing loss, there is no evidence of any such loss in this record. The evidence also shows that Trinity's program provided employees with protective equipment for the noise they encountered on the job. Therefore, we find that Trinity's failure to institute an audiometric testing program was not willful.

The Secretary does not allege, nor is there evidence to support a conclusion, that there was a substantial probability that the failure to institute audiometric protection could have resulted in death or serious physical harm.

Accordingly, the violation is affirmed as other-than-serious.

(Emphasis added).

Regarding the failure to re-monitor the employees in violation of 1910.95(d)(3) the Commission held:

Under the terms of section 1910.95(d)(3), [[18]] an employer is required to re-monitor its worksite whenever a change in production, process, equipment or controls could increase employee noise exposure. The record does not justify a finding that Trinity's failure to re-monitor was the result of either intentional disregard of the standard or indifference to employee safety. Trinity could well have believed that because there had been no major changes in production, it was under no obligation to re-monitor the worksite. Moreover, its hearing protection program partially fulfilled the dual purpose of the standard of identifying employees to be included in the hearing protection program and determining the proper protection to be provided to them. Therefore, we conclude that the violation was not willful.

As the judge properly found, there is no evidence to support a finding that there was a substantial probability that death or serious physical harm could result from Trinity's failure to re-monitor. Therefore, we classify the violation as other-than-serious. The judge assessed no penalty for the violation and there is nothing in the record to indicate that his determination was not appropriate.

In *Sun Shipbuilding and Drydock Company*, SHRC Docket No. 268, August 28, 1974, the Commission specifically addressed whether the hearing conservation violation should be classified as a “serious” violation. The Commission found ample evidence that exposure of the kind experienced by the employee would produce hearing impairment if the exposure was over a normal working lifetime. The Commission had little difficulty in concluding that such an exposure and hearing loss would constitute a serious injury within the meaning of section 17(k). However, the OSH Review Commission focused on the facts of the case and concluded that there was no evidence of substantial hearing loss because the evidence in the record demonstrated that the employee exposure was for 1 - 1/2 hours, and that he normally wore personal ear protective equipment, and that he applied such equipment during the course of the inspection. In short, there was no evidence from which the Commission could conclude that employee’s exposure would likely result in hearing loss or impairment. Accordingly, the evidence only established an other

than serious violation.

In *Secretary of Labor v. Hackney, Inc.* OSHRC Docket No. 88 – 0391, the Commission found that a statement made by the employer that, at certain times, noise levels would exceed 85 dBA, did not support the Secretary's contention that employees were exposed to noise above the action level.

The Commission held:

An admission that employees were exposed to occasional transient noise levels exceeding 85 dBA does not establish that the time weighted average of noise exposure would exceed a TWA of 85 dBA over an 8-hour period. The record reveals neither the duration of the noise above 85 dBA nor the actual noise levels above 85 dBA. **Without adequate sampling, which we do not have, the record does not establish that Hackney's employees were exposed to an 8-hour TWA of 85 dBA or greater. [[5]] Accordingly, items 1 and 2 must be vacated.**

(Emphasis added).

In our present case, the Department did not allege, and the Board did not find that the Balfour Beatty employees in the excavation were exposed to noise above the Permissible

Exposure Levels. The Department's contention that employee's should not have to go deaf is inflammatory and not relevant to the facts presented. The Department's argument that because the regulation involved hearing conservation is overly simplistic and makes the definition of a "serious" violation adopted by Congress in 17(k) and our state legislature in RCW 49.17.180(6) meaningless.

To merely conclude that a loss of hearing is serious defies the Department's obligation to establish its burden of proof that the violation has a substantial probability of causing serious bodily injury or death. If the Department established that the Balfour Beatty employees were over-exposed to noise, and their over-exposure and hearing loss was caused by the Employer's use of sound meters instead of the personal noise monitoring, then there would be a sufficient basis to conclude that a "serious" violation occurred. However as the Department itself agreed that the citation was not based on employees being over-exposed to noise, there was no evidence upon which the

Board could conclude that the citation was “serious” as defined by RCW 49.17.180(6).

The Department’s reliance on *Mowat v. Department of Labor & Industries*, 148 Wn. App. 920, 201 P.3d 407 (2009), is misfounded because *Mowat* can be distinguished from the facts set forth in the present case. In *Mowat* the hearing conservation issue focused on a failure to establish engineering or administrative controls where the noise levels were above the PEL. In that case, there was a direct exposure to the violative act to the potential for hearing loss to occur. In the present case, the Department did not allege that employees were over-exposed to noise above the PEL. The obvious difference is that exposure to injurious noise has a direct causal relationship to hearing loss, a serious injury. Where the injurious noise is not present and the Department offered no evidence as to how hearing loss could occur for failure to use the incorrect testing equipment, there is no evidence that the violation has a substantial probability of causing death or serious injury.

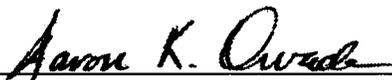
II. CONCLUSION

There is no substantial evidence in the record, nor did the Board make any findings that the failure to use the correct noise monitoring method exposed the employees to hearing loss. In light of the established and uncontradicted hearing program established by the Employer, the Board erred by classifying Item 1-1 as a “serious” violation.

For all of the above stated reasons, this Court should reverse the Board’s conclusion that Item 1-1 was a serious violation and should affirm the citation as a “non-serious” or “general” violation.

DATED this 24 day of August, 2009.

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CERTIFICATE OF SERVICE

I, Lisa Ockerman, hereby certify under penalty of perjury under the laws of the State of Washington that on August 24, 2009, I filed with the Court of Appeals Division I, via U.S. Mail, the original of the following document:

1. **APPELLANT’S REPLY BRIEF**

and that I further served a copy via fax and mail upon:

Beverly Norwood-Goetz, AAG
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SIGNED in Lacey, Washington on August 24, 2009.



Lisa Ockerman

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