NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

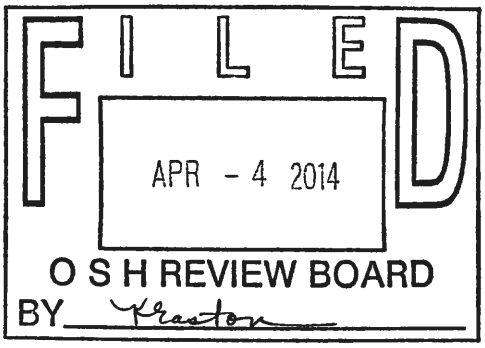
Complainant,

vs.

SGS NORTH AMERICA INC., a Delaware corporation registered to do business in Nevada,

Respondent.

Docket No. RNO 14-1683



DECISION

This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 12th day of March 2014, in furtherance of notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA). **MR. RICK ROSKELLEY, ESQ. and MS. JAMIE CHU, ESQ.** counsel appearing on behalf of Respondent, **SGS NORTH AMERICA INC.**

Jurisdiction in this matter has been conferred in accordance with Chapter 618 of the Nevada Revised Statutes.

The complaint filed by the OSHA sets forth allegations of violation of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto.

The alleged violation in Citation 1, Item 1 referenced 29 CFR

1910.95(g)(1). The respondent employer was charged with a failure to establish and maintain an audiometric testing program for employees exposed to an 8-hour time-weighted average equal or above 85 dBA as provided in the cited standard. The violation was classified as serious and a penalty proposed in the amount of $1,200.00.

Documents and photographs were stipulated in evidence as complainant Exhibits 1 and 2. Respondent evidence subject of stipulation consisted of Exhibits A-L.

Complainant presented testimony and documentary evidence to establish the alleged violation. Witness, Mr. Ee F. Lee identified himself as a Compliance Safety and Health Officer (CSHO) and Industrial Hygienist (IH). Mr. Lee referenced his narrative report at pages 5 through 7 at Exhibit 1 and testified as to his inspection, findings, and recommendations for violation. On July 2, 2013 he conducted a planned inspection of the respondent facility site in Elko, Nevada. The respondent employer contracts with local mining companies to analyze ore samples for gold content. The facility includes a "Prep Lab" for the preparation of ore samples where employees perform rock splitting, crushing, and pulverizing. They then prepackage and classify ore samples for other mineral testings or assay work to be performed elsewhere. During the course of investigation CSHO Lee reviewed respondent's hearing conservation program. He conducted testing and reviewed respondent's **dosimetry** test results. CSHO Lee discovered no **audiometric** testing was conducted by respondent for employees exposed to noise levels equal to or exceeding the 8-hour time-weighted average of 85 dBA. He concluded the respondent failed to provide audiometric testing to employees working in areas of high noise and determined it constituted a violation of the applicable hearing conservation program

standard. He testified the hazard exposure to employees of potential irreparable hearing loss supported a **serious** classification for the violation.

Mr. Lee met with respondent employees Gonzalez and Vasquez who informed him they had conducted audiometric testing, monitoring, and time-weighted averages but could not produce any evidence for same. He found the company hearing conservation program adequate except for the lack of **audiometric** testing. Mr. Lee testified the respondent's own March 13, 2013 dosimetry test results demonstrated six employees were exposed to dBA above the standard proscribed threshold and not subject to **audiometric** testing.

CSHO Lee testified audiometric testing is important because it is the only way to know what "dose of noise" an employee is subjected to during the course of employment. The test results enable the employer to implement appropriate employee protection from the potential of irreparable hearing loss. Mr. Lee found from his test results at least three employees in the Prep Lab had exposure to above 85 dBA.

On cross-examination Mr. Lee testified he never found any lack of employee hearing protection, training or related violations. He testified that testing was done in both labs, but his focus was on the Prep Lab where the 85 dBA threshold was reached or surpassed. Mr. Lee stated that noise levels vary from day to day dependent upon the workload at the facility. He testified that increases in noise levels should be expected with increased workloads when all or most of the machinery is engaged in pulverizing material and grinding underway. He stated that pounding noises are also part of the crushing and pulverizing process to reduce the ore samples to a condition for assay analysis.

Mr. Lee testified the standards require action for audiometric testing **within six months** after finding levels at or above the 85 dBA threshold. He confirmed the employer had in fact completed audiometric testing on or about July 10, 2013 and within the six month time parameter required under the OSHA regulation paragraph referencing 29 CFR 1910.95(g)(5)(i).

Complainant represented witness testimony from Mr. Rich Meier who identified himself as an OSHA supervisor. Mr. Meier explained the OSHA methodology for noise level measurement and testing. He described the basis for the **serious** classification of the cited violation due to the "irreparable harm" that can result from hearing loss. He explained in his testimony that without baseline information on an 8-hour time-weighted average there could be no assurance of employee hearing protection.

On cross-examination Mr. Meier testified the amount of work activity and size of a room have a substantial affect on dBA levels. Mr. Meier described the "ebb and flow" of the respondent business to have a direct relationship on increased noise levels and therefore concerns for employee hearing protection.

Respondent presented testimony and documentary evidence through Mr. Doug Leeber. He identified himself as a health safety and environmental (HSE) manager of the respondent and responsible for overseeing approximately 60 facilities. Mr. Leeber described the Elko facility operations of intaking ore samples, grinding, crushing and preparing them for packaging and shipment to assay labs for determination of valued mineral content. He identified Exhibit A-15 as a copy of the SGS hearing program test levels of the dBA in the Prep Lab. Noise levels from the test conducted in March of 2013 demonstrated dBA above the 85

threshold. He identified Exhibit B and testified with regard to testing performed in the same facility by SGS in 2011. The testing showed at that time dBA levels reaching only 75.7 dBA and well below the threshold standard of 85 dBA.

Mr. Leeber testified all employees are required to wear hearing protection regardless of noise levels. He identified each of the respondents exhibits, including the disciplinary program for any employees who do not comply with the company hearing protection safety plan.

On cross-examination Mr. Leeber testified he completed testing required by the standards in 2011 and 2013 but not in 2012. He described the ebb and flow of the workload and noise levels resultant in the facility. Mr. Leeber testified that once noise levels were found to be above 85 dBA in March of 2013, the company performed required audiometric testing within six months as permitted under the OSHA standards. The work was completed and compliance effectuated by July 10, 2013.

On cross-examination Mr. Leeber testified the potential for noise level increase exists in the facilities based upon the amount of work underway in the lab.

At the completion of evidence and testimony counsel presented closing argument.

Complainant argued the issue before the board was very simple asserting the standard requires "audiometric testing must be done when the described noise levels are reached or exceeded . . .". Counsel argued there was no question audiometric testing was not done prior to the inspection, but the employer knew or should have known excessively high noise levels existed prior to the OSHA inspection. The evidence

shows respondent knew noise levels increase when production is up. The employer cannot simply rely on an argument that it "didn't know" there were high levels until OSHA discovered them and thereafter effectuated the audiometric testing compliance under the standard. Counsel asserted they "should have known . . ." and the evidence shows they did know the noise levels were up by virtue of the work production increase. Counsel argued that "deliberate blindness" is no excuse for non-compliance with the law. There are no exceptions in the standard and no exculpatory verbiage to relieve the employer.

Counsel further argued that it is important to regularly perform audiometric testing to determine whether there are any increases in noise levels to assure employee protection. In the event of any noise increase, employee hearing loss could occur based upon an increase in the noise levels or other factors. Without a baseline provided under the audiometric testing requirements, employees are exposed to potential serious injury of irreparable hearing loss.

Complainant counsel asserted that if an employer does not test or waits years to test or only tests after OSHA discovers a problem, employees are exposed but the company saves a great deal of money. It is very simple to wait until OSHA discovers the problem and then within six months take action to conduct the testing. While that may appear compliant, it delays the needed baseline criteria information which comes from the audiometric testing. Counsel further asserted the irreparable loss of hearing potential was unrefuted so negates any reduction in classification of the violation from serious to "other than serious".

Respondent counsel presented closing argument. He asserted the complainant burden of proof for violation of the standard was not met.

He argued the respondent was fully compliant with the specific terms of the standard. Once the respondent employer became aware there were increases in the noise levels, it completed the audiometric testing and well within the six months permitted for compliance. The previous tests performed by respondent in 2011 did not place them on notice of any need for additional testing given the low levels found at that time. Counsel argued that given the extensive company hearing and safety program including strict requirements for compliance there was no potential for serious injury or hearing loss because every employee is fully protected. The evidence of extensive hearing protection was undisputed and no facts found for citation by the CSHO. As of the 2011 testing nothing showed any need for additional noise level testing because 75 dBA was far less than the 85 dBA threshold. There was no indication of a potential for harm. Nevertheless, the company implemented a mandatory hearing protection program so even if the levels would ever become higher all the employees were protected.

Counsel asserted the respondent did what the OSHA standards required in approximately four months although permitted six months to complete the audiometric testing.

Counsel identified two issues for board review:

First to determine if any violation existed, which he argued could not be found from the evidence because of the documented timely respondent compliance.

The second issue relates to the serious classification which counsel asserted cannot be supported under the facts in evidence.

Respondent counsel further argued the employer had no **knowledge,** nor could it be charged with same constructively, that noise levels would have increased dramatically from 2011 to 2013 and trigger

audiometric testing before the need was discovered in March of 2013. When discovered, the requried audiometric testing was completed within the time permitted by the OSHA standards.

In reviewing the facts, documents and testimony in evidence must measure same against the established law developed Occupational Safety and Health Act Code of Federal Regulations (CFR) and Nevada Revised Statutes (NRS).

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. N.A.C. 618.788(1).
>
> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
>
> To prove a violation of a standard, the Secretary must establish (1) the **applicability** of the standard, (2) the existence of **noncomplying conditions**, (3) **employee exposure** or access, and (4) that the **employer knew** or with the exercise of reasonable diligence could have known of the violative condition. See *Belger Cartage Service, Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003).

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;

2. The situation was in compliance; or lack of access to a hazard. See *Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

A "serious" violation is established upon a preponderance of evidence in accordance with NRS 618.625(2) which provides in pertinent part:

> . . . a serious violation exists 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 at that place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know the presence of the violation. (emphasis added)
>
> 29 CFR 1910.95(g)(1): The employer **shall establish and maintain an audiometric testing program** as provided in this paragraph by making audiometric testing available to all employees whose exposures equal or exceed an 8-hour time-weighted average of 85 dBA. (emphasis added)
>
> 29 CFR 1910.95(g)(5)(i) provides in pertinent part: **Within 6 months of an employee's first exposure** at or above the action level, the **employer shall** establish **a valid baseline audiogram** against which subsequent audiograms can be compared. (emphasis added)

The board finds the preponderant evidence did not prove a violation. The respondent was in compliance with the applicable governing occupational safety and health law.

To sustain a serious violation at Citation 1, Item 1, the complainant was required to prove the respondent failed to meet the terms of compliance once noise level exposure reached or exceeded the proscribed threshold at or above 85 dBA. It is unrefuted the respondent completed audiometric testing as required under the standards at paragraph 95(g)(5)(i) by submitting the results on or about July 10, 2013 within the permitted six month time period.

Complainant asserts the respondent deliberately evaded the law by failing to recognize a logical relationship between a substantial increase in the workload to a substantial increase in noise level thereby promptly requiring audiometric testing. However, that extension of responsibility is not proscribed in the OSHA standards, nor does reasonable interpretation permit a finding of violation based upon the inference.

There was no evidence the respondent evaded any responsibility of

compliance under the standard. The testimony of Mr. Leeber was credible and unimpeached.

> When the Secretary has introduced evidence showing the existence of a hazard in the workplace, the **employer may, of course, defend by showing that it has taken all necessary precautions to prevent the occurrence of the violation.** *Western Mass. Elec. Co.*, 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981). (emphasis added)

The board is confronted with a need in the present case to extrapolate a violation without sufficient evidence, factual data or terms in the standard, despite the elements of proof required by a preponderance of evidence under occupational safety and health law.

> . . . The Secretary's obligation to demonstrate the alleged violation by a preponderance of the reliable evidence of record **requires more than estimates, assumptions and inferences** . . . [t]he Secretary's **reliance on mere conjecture is insufficient to prove** a violation . . . [findings must be based on] 'the kind of evidence on which responsible persons are accustomed to rely in serious affairs.' *William B. Hopke Co., Inc.*, 1982 OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ) (citations omitted). (emphasis added)

To find a violation the complainant requires this board to engage in an expansion of the standard through statutory interpretation. However, under the recognized "**plain meaning rule**", the board must review and interpret specific standards in accordance with a fair, reasonable and plain meaning. *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1916) (citations omitted.

The board cannot find substantial or preponderant evidence of non-complying conditions or employer knowledge, direct or through the exercise of reasonable diligence, to satisfy the proof elements for a violation. The standards permitted audiometric testing within a six month time period. Under a plain meaning interpretation of the OSHA standards the respondent was in compliance.

Clearly it would be better if any employer engaged in extreme or high noise level work commences audiometric testing as early as possible. While this board may recommend early testing for all newly hired personnel as soon as employment commences, it cannot infer terms in the specific standard that congress did not draft into the legislation. Logic does indicate that an increased workload can increase noise levels but, again, the recognized case law does not permit findings of violation by "inference, estimates or assumptions" (see *William B. Hopke Co., Inc., supra)*

It is the decision of the Nevada Occupational Safety and Health Review Board that no violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1910.95(g)(1). The violation, serious classification and proposed penalty in the amount of $1,200.00 are denied.

The Board directs counsel for the **Respondent, SGS NORTH AMERICA INC.**, to submit proposed Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel within twenty (20) days from date of decision. After five (5) days time for filing any objection, the final Findings of Fact and Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD.**

DATED: This 4th day of April 2014.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOE ADAMS, Chairman