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SOL (MSHA) V. KONITZ CONTRACTING, INC.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 27, 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 92-607-M
Petitioner : A.C. No. 24-01813-05508
 :
v. : Portable Crusher #2
 :
KONITZ CONTRACTING, INC., :
Respondent :

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
William E. Berger, Esq., Lewistown, Montana,
for Respondent.

Before: Judge Cetti

The Secretary of Labor (Secretary) in this civil penalty proceeding charges the Respondent, Konitz Contracting Inc. (Konitz), the owner and operator of two portable crushers, with the violation of ten (10) mandatory safety regulations promulgated under the Federal Mine Safety Act of 1977, 30 U.S.C. 801 et seq. (the Act).

Respondent filed a timely answer contesting the existence of eight (8) of the alleged violations. Pursuant to notice a hearing was held before this Judge at Livingston, Montana on July 20, 1993. Oral and documentary evidence was introduced by the parties, oral closing arguments were presented and filing of briefs were waived by both parties. This matter was submitted for decision with the filing of the transcript of the hearing on July 28, 1993.

STIPULATIONS

At the hearing the parties entered into the record stipulations as follows:

1. Konitz Contracting, Inc. is engaged in mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.

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2. Konitz Contracting, Inc. is the owner and operator of the Portable Crusher #2, MSHA I.D. No. 24-01813.

3. Konitz Contracting, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act")

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect Respondent's ability to continue in business.

8. The operator demonstrated good faith in timely abating the violations.

9. Konitz Contracting, Inc. is a small mine operator with 5657 hours worked in 1991.

10. Respondent's history of previous violations is average for an operator of its size.

11. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

Citation No. 3631657

This citation charges Konitz with the violation of 30 C.F.R. 56.18014 which is a mandatory safety standard requiring the operator to make advance arrangements for emergency medical assistance and emergency transportation for injured persons. The cited safety regulation reads as follows:

30 C.F.R. 56.18014

Arrangements shall be made in advance for obtaining emergency medical assistance and transportation for injured persons.
(Emphasis added).

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The narrative allegation of Citation No. 3631657 reads as follows:

Advance arrangements were not made to assure that emergency medical assistance and transportation would be provided at the mine site in the event of an injury of an employee.

Ronald S. Goldade, a federal Mine Safety and Health Inspector, working out of the Helena, Montana MSHA field office testified substantially as follows:

The field office in Helena makes inspections throughout the entire state of Montana. Approximately 70 to 80 percent of his inspection duties consist of inspecting portable rock crushers operating in Montana. Portable crushers are very mobile. Parts of the conveyor systems are on wheels or can be picked up and put on flatbed semi-trailers and transported to different locations in a minimal amount of time. Often people in the area are unaware of the presence of a portable crusher operating in their area. Typically most portable crushing units stay in one place in remote areas for only a week or two.

Under the provision of the cited safety standard it is expected that an operator of a portable crusher located in a remote area will have his foreman or whoever's in charge, prior to start up, contact the nearest town with ambulance service to make sure that the sheriff's department or whoever's responsible for the emergency medical assistance in the area knows the location of the site of the crusher operation.

The inspector stated that a lot of these small towns in Montana don't have full staff ambulance service and many are dispatched through the sheriff's department. By advance contact the operator is assured of learning the procedure and the method of communication needed to obtain emergency medical service and transportation when it is needed.

Turning from the general to the specifics in this case, Inspector Goldade testified he was instructed by his field office supervisor in April of 1992 to travel to Red Lodge, Montana area and make a regular inspection of the Crushing Plant Number 2 which has a mine I.D. No. 24-01813.

The inspector drove to Red Lodge, a small town with a population of 2,000 located in the southwest corner of Montana, approximately 50 miles south of Billings which is the largest nearby city.

The inspector located Portable Crusher No. 2 about 7 miles from Red Lodge. The crusher was set up in the middle of a field

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on a private ranch about 1/2 to one mile off a county road. On arriving at the site the inspector made a regular inspection. He found a number of violations and based on his inspection issued the 10 citations involved in this docket.

Inspector Goldade talked to the foreman, Ken Bowser, who was present and in charge of the operation at the site. It is undisputed that Ken Bowser had been the operator's foreman in charge of crusher operations for the past 14 years. Foreman Bowser told the inspector that no advance arrangements had been made for obtaining emergency medical assistance and transportation at the mine site in the event of an injury requiring such assistance.

Mr. Tom Konitz, called by Respondent's counsel, testified that he was the owner and president of Konitz Contracting, Inc. He has been in the business of operating portable rock crushers since he bought Portable Rock Crushers No. 1 and No. 2 in 1979. Mr. Konitz stated that he is aware of the cited regulation 30 C.F.R. 56.18014 and believed he had complied with it by posting on the bulletin board inside the crusher van the phone number of the sheriff's department and all other emergency phone numbers required by 30 C.F.R. 56.18012. (It is undisputed that Konitz was not cited for this latter safety standard.)

Konitz stated that the portable crusher is moved frequently over long distances in Montana, most of the time in rural, sparsely populated areas. At the time of the inspection the crusher was set up in a field on a private ranch. The crusher was set up and operating about half a mile off Highway 99 and could be seen from the highway. In the event a need for emergency medical service arose, it was Konitz's policy to have the foreman go to the closest farmhouse with a phone and dial the sheriff's office or 911. Konitz stated he has never done more than this the past 14 years before this citation was issued and had never been previously cited for violation of the safety standard in question. Evidence was presented that the closest phone to the crusher site was at a farmhouse across the road "approximately a mile or two at the most" from the crusher site. Konitz stated he assumed the farmhouse was not locked but did not know whether it was locked or not or whether anyone would be at the farmhouse in the event emergency use of the phone was needed.

Konitz stated that since the issuance of the citation he has contacted ambulance service and hospitals with unimpressive results. He stated sometimes they'll listen and "take the information down" and "sometimes they'll not show much interest." He stated "they advertise throughout the state (Montana) that the 911 and the sheriff's office" is the correct way to obtain emergency assistance in the rural areas of Montana.

Inspector Goldade stated he has no problem with Mr. Konitz calling the sheriff's office as his "first avenue of contact"

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before operating the crusher in a remote area, giving the location of the crusher site and determining in advance of starting operations at the new site the procedures needed to obtain the emergency medical services specified in the cited safety standard.

DISCUSSION AND CONCLUSION

It is Respondent's position that he was complying with the cited safety standard by posting on the bulletin board that is kept in the crusher van the appropriate sheriff's department and other emergency phone numbers. This may well have satisfied the requirements of C.F.R. 56.18012 but not the clear mandate of the cited standard 30 C.F.R. 56.18014 that arrangements must be "made in advance" for obtaining emergency medical assistance and transportation for an injured person. A crusher operator must comply with both safety standards. Compliance with one safety standard is not a defense to the violation of the other safety standard. A reasonably prudent person would have recognized this in view of the clear, plain language of both of these safety standards. The safety standard cited clearly requires that the arrangements for emergency medical assistance and transportation for an injured person must be "made in advance" of starting operations at a new mine site.

The evidence presented establishes a violation of the clear mandate of the 30 C.F.R. 56.18014. The citation is affirmed.

PENALTY

Respondent is a small mine operator. I concur in the inspector's evaluation of the operator's negligence as moderate since the operator should have been aware of the requirements of the cited safety standard. On consideration of all the statutory criteria in section 110(i) of the Act I conclude that the appropriate penalty in this case for Respondent's failure to make the required arrangements in advance, is the \$50 penalty proposed by MSHA.

DISPOSITION OF THE REMAINING CITATIONS

On the record the parties at the hearing advised that they had reached an amicable settlement of the remaining nine citations in this docket and jointly offered for approval an agreement covering these citations.

Under the proposal offered for approval the Respondent agrees to pay in full the MSHA proposed penalties of \$50 for each of the violations alleged in Citation Nos. 3631649, 3631652, 3631654, 3631655 and 3631656 totaling \$250. At least two of the \$50 penalties in the sum of \$100 have already been paid.

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In addition, the Petitioner moves for leave to vacate four of the citations on the grounds of insufficient evidence. These citations are Citation Nos. 3631648, 3631650, 3631651 and 3631653.

I have considered the evidence, the representations and the stipulations received at the hearing and I conclude that the proffered settlement of the remaining nine citations referenced above is appropriate under the criteria set forth in section 110(i) of the Act and it is approved.

ORDER

1. Citation Nos. 3631648, 3631650, 3631651 and 3631653 are VACATED.

2. Citation Nos. 3631649, 3631652, 3631654, 3631655, 3631656 and 3631657 are AFFIRMED and a civil penalty of \$50 is assessed for each of these violations.

3. RESPONDENT SHALL PAY a civil penalty in the sum of \$300 to the Secretary of Labor within 40 days of this decision and order with full credit for all payments that have been previously made.

August F. Cetti
Administrative Law Judge

Distribution:

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