CCASE:
SOL (MSHA) V. KONITZ CONTRACTING INC.
DDATE:
19941006
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 94-76-M
	:	A.C. No. 24-02023-05501
v.	:	
	:	Docket No. WEST 94-279-M
	:	A.C. No. 23-02023-05503
KONITZ CONTRACTING, INC., Respondent	:	
	:	Mine: Konitz #3
	:	
	:	Docket No. WEST 94-277-M
	:	A.C. No. 24-01450-05501 QYQ
	:	
	:	Mine: Zortman
	:	
	:	Docket No. WEST 94-278-M
	:	A.C. No. 24-01813-05509
	:	
	:	Mine: Portable Crusher #2

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Tom Konitz, President, Konitz Contracting, Lewistown, Montana, Pro Se.

Overview

These cases arise out of three inspections of Respondent's worksites by the Mine Safety and Health Administration (MSHA). The first (Docket WEST 94-278-M) involves a citation for excessive noise exposure issued during an inspection of Konitz's portable crusher # 2. The second inspection (Dockets WEST 94-76-M and 94-279-M) occurred at a "rip-rap" operation in Fergus County, Montana, over which Respondent claims MSHA had no jurisdiction. The third inspection (Docket WEST 94-277-M)

involves a citation alleging an improper splice in an electrical cable, and was issued at a time when portable crusher #2 was operating near Zortman, Montana (Footnote 1).

Docket WEST 94-278-M

On April 29, 1993, MSHA Inspector Seibert Smith inspected a mine site at which Respondent was engaged in crushing rock to be used in road construction (Tr. 27-28). Smith sampled the noise exposure of the operator of Respondent's D8L Caterpillar bulldozer with a dosimeter (Tr. 27-45). The results of this sampling showed that the employee was exposed to 635% of the permissible exposure limit for noise (Exh. G-6, Tr. 36-44). This correlates to an 8-hour time weighted average of 103.5 dba, compared with the permissible limit of 90 dba set forth in 30 C.F.R. 56.5050. Periodic Sound Level Meter readings showed instantaneous noise levels of between 94-104 dba (Exh. P-6, Tr. 37).

The bulldozer operator was wearing earplugs which had a noise reduction rating (NRR) of 33 dba (Exh. P-6) (Footnote 2). Therefore, Inspector Smith issued Respondent citation 4331385 alleging a non-significant and substantial violation of section 56.5050(b), which requires a mine operator whose employee(s) are exposed to noise levels in excess of the permissible exposure limit to reduce these levels to below the permissible limit through the implementation of feasible engineering or administrative controls. A $50 civil penalty was proposed for this citation.

Respondent abated this citation by installing a cab on its bulldozer at a cost of approximately $4,000 (Tr. 183). Mr. Konitz's reason for contesting the civil penalty for this citation is that "I disagree that when operators can wear ear protection, and they do, that this kind of money should be spent for a cab (Tr. 183)." Respondent's disagreement is also due to the denouement of a prior citation he received in May, 1990, alleging excessive noise exposure for the operator of the same bulldozer (Exh. P-5).

In May, 1990, Mr. Konitz wrote MSHA asking for technical assistance in abating the prior citation (Exh. P-3). An MSHA technical advisor performed what Mr. Konitz believes was a cursory inspection of his equipment and them wrote a report

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1 Apparently other citations, for which the penalty was contested, were issued during this inspection. However, they are not included in any of these dockets and are not before me.

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2 The noise reduction rating (NRR) of ear muffs and ear plugs is determined by the U. S. Environmental Protection Agency through laboratory tests, Appendix B to 29 C.F.R. 1910.95.

recommending that a cab be installed on the bulldozer (Exh. P-4, Tr. 182). The report recommended that, if the cab failed to bring the employee's noise exposure below 90 dba, that acoustic foam be installed on the walls and roof of the cab, plus belting and an acoustic mat on the floor (Exh. P-4, page 4).

Mr. Konitz did not install the cab in 1990. He did put rubber conveyor belting on the floor and side of tanks of the bulldozer (Tr. 203), and asked MSHA to resample for noise. Inspector Fran Maulding sampled the bulldozer operator's exposure in May, 1991, and measured it at 126% of the permissible exposure limit (Exh P-5, page 3). Since this measurement was within the 33% error factor for such sampling, Respondent was considered to be in compliance with the standard and the citation was terminated.

The Secretary's burden of proving a violation of 56.5050 is set forth in the Review Commission's decision in Callahan Industries, 5 FMSHRC 1900 at 1909 (November 1983). The Secretary must prove: 1) a miner's exposure to noise levels in excess of the limits specified in the standard; 2) sufficient credible evidence of a technologically achievable engineering control; 3) sufficient credible evidence of the reduction in noise level that would be obtained through implementation of the engineering control; 4) sufficient evidence of the expected economic costs of the control; and 5) a reasoned demonstration that, in view of elements 1-4 above, the costs of the control are not wholly out of proportion to the expected benefits.

The Secretary has easily met his burden of proof for the first 4 elements of the Callahan standard. Inspector Smith's dosimeter readings establish the bulldozer operator's overexposure to noise. The report of MSHA's technical expert (P-4), which followed the 1990 noise citation and the installation of the cab by Mr. Konitz, establishes that a technologically achievable engineering control was available. Mr. Konitz provided the evidence regarding the cost of this control--$4,000. Finally, the evidence of noise reduction is provided at page 4 of the instant citation (numbered 4331385-1 in the upper right hand corner). On November 17, 1993, the noise exposure of the bulldozer operator was sampled at 74% of the permissible exposure limit, after the cab had been installed.

The fifth element of the Callahan test requires some discussion because Respondent has at least a facially appealing argument as to whether the $4,000 he spent to abate the citation was not wholly out of proportion to the benefits to his employee. That employee was wearing ear plugs with a noise reduction rating of 33 dba. If the employee actually obtained the 33 dba reduction, only 80 dba of noise reached his inner ear.

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MSHA and its counterpart for non-mining industries, the Occupational Safety and Health Administration (OSHA), have long wrestled with this issue, See Commissioner Lawson's dissent in Callahan. Both agencies have generally assumed that personal protective equipment often does not provide the noise attenuation in the workplace that it does in the laboratory where the noise reduction ratings are determined. Indeed, the agencies have assumed that, unless ear protection is worn properly and its use is closely monitored, it may provide little protection.

OSHA's response to this problem, with regard to general industry (manufacturing) only, was to promulgate a detailed hearing conservation standard, which requires, for example, regular audiometric testing for employees who must wear ear plugs or ear muffs, 29 C.F.R. 1910.95(c). In light of this regulation, OSHA has also modified its noise enforcement policy in general industry. The OSHA Field Operations Manual provides in Chapter IV, paragraph C. 3, BNA Occupational Safety and Health Reporter paragraph 77:2513-2514:

> Current enforcement policy regarding 29 CFR 1910.95(b)(1) allows employers to rely on personal protective equipment and a hearing conservation program rather than engineering and/or administrative controls when hearing protectors will effectively attenuate the noise to which the employee is exposed to acceptable levels as specified in Table G-16 or G-16a of the standard. Professional judgment is necessary to supplement the general guidelines provided here.
>
> a. Citations for violations of 29 CFR 1910.95(b)(1) shall be issued when engineering and/or administrative controls are feasible, both technically and economically; and
>
> (1) Employee exposure levels are so high that hearing protectors alone may not reliably reduce noise levels received by the employee's ear to the levels specified in Tables G-16 or G-16a of the standard. Given the present state of the art, hearing protectors, which offer the greatest attenuation, may not reliably be used when employee exposure levels border on 100 DBA...,or
>
> (2) The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.
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> ***
>
> b. A control is not reasonably necessary when an employer has an ongoing hearing conservation program

> and the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees...

I take judicial notice of the OSHA Field Operations Manual and conclude that ear plugs and/or ear muffs in the absence of the kind of hearing conservation program that complies with the OSHA standard does not reliably protect employees from noise levels in excess of the permissible exposure limits in 30 C.F.R. 56.5050. I, therefore, conclude that on this record, th $4,000 cost of a cab for Respondent's bulldozer is not wholly out of proportion to benefits to Respondent's employees. I, thus, affirm citation 4331385.

I assess a $20 civil penalty for this citation, rather than the $50 penalty proposed by MSHA. Respondent had been cited for a noise violation previously on the same piece of equipment and had not implemented MSHA's suggested engineering solution. However, I regard Respondent's negligence very low since MSHA's noise sampling in 1991 indicated to Mr. Konitz that he could comply with the standard by merely installing rubber conveyor belting on the machine.

Respondent obviously demonstrated good faith in abating the violation by spending $4,000 to install the cab. Finally, given the fact that the exposed employee wore ear plugs, the gravity of the violation does not warrant a higher penalty. The other section 110(i) penalty criteria; size, prior history, and Respondent's ability to stay in business, do not warrant either a higher or lower penalty.

Dockets WEST 94-76-M and WEST 94-279-M

On August 25, 1994, Inspector Smith visited a worksite west of Utica, Montana, at which Respondent was engaged in producing "rip-rap", large rocks used in road building or to reinforce riverbanks (Tr. 14-16). When Smith arrived at the site there were two employees of Konitz Contracting present and a subcontractor who was engaged in drilling and blasting rock (Tr. 14-16). One of Respondent's employees was operating a front-end loader. With this loader he drove up a ramp and deposited rock into a hopper, which was covered with a "grizzly." The function of the grizzly is to separate the larger rocks, the rip-rap, from smaller materials not suitable for use as rip-rap.

Respondent contends that this worksite, designated as Konitz # 3, was not subject to MSHA jurisdiction because no rock-crushing was performed at the site. For this reason he neither notified MSHA before starting work at this site, nor filed a legal identity report for the site, MSHA form 2000-7.

Inspector Smith issued Respondent citation 4331469 for failure to notify MSHA, alleging a violation of 30 C.F.R. 56.1000. He also issued citation 4331470, alleging a violation of 30 C.F.R. 41.20, for failure to file the identification form

I conclude that Konitz # 3 was operating as a "mine" as that term is defined in section 3(h) of the Federal Mine Safety and Health Act, 30 U.S.C. 802(h). "Mine" is defined in that section as, "...(A) an area of land from which minerals are extracted in nonliquid form...." The site, at which Respondent was operating on August 25, 1993, was an area of land from which minerals (rock) was being extracted in nonliquid form (by drilling and blasting).

Furthermore, Congress in section 3(h) delegated to the Secretary of Labor some degree of discretion in making determinations which worksites are subject to the Mine Safety Act or to the OSH Act. The Secretary exercised this discretion in an interagency agreement between MSHA and OSHA in 1983, BNA Occupational Safety and Health Reporter paragraph 21:7071. This agreement is entitled to deference from the Commission, Donovan v. Carolina Stalite Company, 734 F.2d 1547 (D.C. Cir. 1984).

Appendix A of the Interagency Agreement sets forth specific areas of MSHA authority. It provides:

> Following is a list with general definitions of milling processes for which MSHA has authority to regulate subject to paragraph B6 of the Agreement. Milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying...(emphasis added)

Sizing is defined as:

> ...the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes.

BNA Occupational Safety and Health Reporter, at page 21:7073.

I find that Konitz Contracting's plant number 3 was engaged in sizing, an activity that is within MSHA jurisdiction. A similar operation previously found to be within MSHA jurisdiction was the passing of sand through a screen for use on icy roads, New York State Department of Transportation, 2 FMSHRC 1749 (ALJ July 1980); Also see, Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981) [driving an exploratory shaft in search of commercially exploitable material found to be subject to MSHA].

Having found Respondent's # 3 plant subject to the Act, I affirm citations 4331469 and 4331470. The Secretary proposed a $50 civil penalty for each of these citations. As Respondent's delict is essentially the same for both citations--failing to inform MSHA of a new operation, I conclude that a single penalty is appropriate for the two citations. Considering the six statutory criteria, I assess a $50 penalty.

As Mr. Konitz points out, Respondent has diligently reported the commencement of his various operations to MSHA in the past. Nevertheless, I believe he had a duty to check with MSHA as to whether the "rip-rap" operation had to be reported, rather than unilaterally assuming that it was not subject to the Act. Given the fact that the rip-rap operation could expose employees to hazards indistinguishable from hazards in his other operations, such as elevated ramps, inadequately protected pulleys and drive shafts, and electrical hazards, the assumption that the rip-rap operation was exempt from MSHA jurisdiction, was not reasonable. The degree of negligence in not contacting MSHA is sufficient to warrant a $50 civil penalty.

The Berm Citation

Inspector Smith observed Respondent's front end loader operator drive his vehicle up a ramp which had no guardrails or berms on either side (Tr. 20-21). The ramp was relatively short in length, possibly less than ten feet long (Tr. 112-13, Exhibits 2a & b). However, there was only one foot clearance on each side of the ramp for the loader (Tr. 26, 113). The ramp was elevated 4-5 feet on one side and about 6-8 feet on the other (Tr. 23-25).

Smith issued Respondent citation 4331471 alleging a significant and substantial violation of 30 C.F.R. 56.9300. The inspector concluded that an accident was reasonably likely due to the narrow width of the ramp, and that it was reasonably likely that such an accident would result in death or serious injury--particularly since the loader driver was not wearing a seat belt (Tr. 25, 108, 205).

Given the short length of the ramp and the fact that the operator would normally not turn the steering wheel, I conclude that, in the normal course of mining operations, it is not reasonably likely that an accident would occur. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). However, given the extreme seriousness of an accident if one did occur, I find the six penalty criteria (particularly gravity) warrant the assessment of a $100 civil penalty.

The Unguarded Tail Pulley

During the August 25, 1993 inspection of Respondent's rip-rap operation, Smith observed a self-cleaning, or fin-type tail

pulley on a conveyor under the hopper that was unguarded (Tr. 52-53, Exh. G-7). He observed an employee walk across the steel frame behind this pulley on two occasions (Tr. 55-56). Smith issued Respondent citation 4331474 alleging a significant and substantial violation of 30 C.F.R. 56.14107(a). Given the obvious hazard of the exposed pulley and equally obvious exposure of a miner to the pinch-point of the unguarded pulley, this violation clearly meets the criteria of Mathies Coal Co. for a significant and substantial violation.

I assess an $80 penalty. Both the gravity of the violation and Respondent's negligence in not protecting the pulley warrant at least an $80 penalty.

Unguarded Belt and Pulley on Generator

Inspector Smith also observed an employee turn a generator either on or off on three different occasions (Tr. 57-61, 121-23, Exh. G-8). Two feet below the on/off button manipulated by the miner was an unguarded pulley and drive belt (Tr. 63). The area in front of the generator was slick and muddy, which led the inspector to conclude that it was reasonably likely that an employee could fall and contact the unguarded pulley or belt (Tr. 121-26).

Smith issued Respondent citation 4331475 alleging an "S&S" violation with regard to the generator. Although as the inspector admitted, an employee who slipped might grab the top of a pump or fuel filter before contacting the pulley or belt (Tr. 124-126), I conclude that in the course of continued mining operations, it is reasonably likely for a miner to come in contact with the hazard. Therefore, I affirm the citation as a significant and substantial violation.

The Secretary proposed an $81 civil penalty for this citation; I assess a $60 penalty. I consider the gravity of this violation to be less than that of the unguarded tail pulley since contact was much less likely to occur.

Fire-fighting Equipment and Records Violations

The inspector asked Respondent's employees where their fire-fighting equipment was located; they could not tell him (Tr. 63-64). Respondent has not asserted that fire-fighting equipment was at the site. Therefore, I affirm citation 4331477, which alleges a violation of 30 C.F.R. 56.4200(a), and assess a $50 civil penalty.

Smith asked Respondent for records of continuity and resistance tests on its electrical grounding systems. No such records were provided and Respondent has not contended in this proceeding either that the records were kept or that the tests

were made (Tr. 64-68). I, therefore, affirm citation 4331478 which alleges a non-significant and substantial violation of 30 C.F.R. 56.12028 and assess a civil penalty of $40.

Inspector Smith also asked to see records of the workplace examinations required by 30 C.F.R. 56.18002 (Tr. 68-71). Although Smith did not recall whether he asked Mr. Konitz for these records, Respondent did not come forth at hearing with any evidence that it either performed the required examinations or kept the records of such examinations that must be maintained and provided to the Secretary by section 56.18002(b). I, therefore, affirm citation 4331479 and assess a $25 civil penalty.

Prior Arrangements for Medical Assistance

Section 56.18014 provides that:

> Arrangements shall be made in advance for obtaining emergency medical assistance and transportation for injured persons.

During the inspection, Smith determined that the only arrangements made by Respondent for obtaining emergency medical assistance were directing employees to go to the nearest ranch house and call 911 (Tr. 74, 143-45, 151). Inspector Smith concluded that this did not satisfy the requirements of the regulation because the standard requires that emergency personnel be informed before an emergency as to the exact location of a worksite and how to reach it (Tr. 127-33).

I agree with the inspector and affirm citation 4331581. When the standard requires that arrangements be made in advance, it is obviously not satisfied by a 911 call after an accident has occurred. The standard can only be satisfied by arrangements made before work commences that emergency assistance and transportation will be available to a specific worksite, whose location is known to emergency personnel. I assess a $25 civil penalty for this violation.

Toilet Facilities

It is uncontroverted that there were no toilet facilities at the rip-rap site (Tr. 75-77). Inspector Smith visited the site on its third day of operation and employees either had to relieve themselves outside or travel to a nearby ranch house (Tr. 75-77, 196). Respondent was issued citation 4331583 alleging a violation of 30 C.F.R. 56.20008(a). That regulation requires, at a minimum, that clean and sanitary portable toilets be provided on the mine site. I, therefore, affirm the citation and assess a $30 civil penalty.

On November 4, 1993, MSHA Electrical Inspector Richard Ferreira visited the Zortman surface gold mine in Phillips County, Montana, at which Respondent was working as a contractor with portable crusher #2 (Tr. 158-159). At this site he observed a power cable with an inadequate splice. The outer jacket bonding was not sufficient to cover the individual conductors and, therefore, might not exclude moisture from infiltrating the conductors (Tr. 160-173, Exh. G-10)

Ferreira issued Respondent citation 4331678, alleging a non-significant and substantial violation of 30 C.F.R. 56.12013(c) (Footnote 3). That standard requires tha permanent splices and repairs in power cables be provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Inspector Ferreira cited the violation as non-significant and substantial because the improper splice was behind an I-beam and not particularly accessible to employees. This violation is uncontroverted and, thus, I affirm the citation. I assess a $30 civil penalty, noting that the record is devoid of evidence regarding the degree of Respondent's negligence as to this violation.

Other Contentions

Respondent contends that the citations in these cases, particularly those involving his rip-rap operations, are the result of retaliation on the part of MSHA for letters he wrote to his congressmen regarding the agency (Tr. 184-86). I find no evidence to support this belief.

I do not construe Mr. Konitz's objections to the rip-rap citations as contending that the operation was not subject to commerce clause of the Constitution. In any event, the rip-rap was sold to the Federal Highway Administration for use of roads leading to an Air Force missile site (Tr. 198-99) and was mined in part with equipment produced outside the state of Montana (Tr. 197). Therefore, the rip-rap operation was clearly affecting interstate commerce.

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3 As noted previously, Inspector Ferreira issued other citations which are not before me.

ORDER

The citations are affirmed as discussed above and the following civil penalties are assessed:

4331385	$ 20	
4331469	$100	
4331470	$ 50	in conjunction with 4331471
4331474	$ 80	
4331475	$ 60	
4331477	$ 50	
4331478	$ 40	
4331479	$ 25	
4331481	$ 25	
4331483	$ 30	
4331678	$ 30	
Total:	$510	

These penalties shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

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