

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 11, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 94-373-M
Petitioner : A.C. No. 24-01450-05502
QYQ :
v. : Docket No. WEST 95-76-M
: A.C. No. 24-00936-05522
: :
KONITZ CONTRACTING, INC., : Docket No. WEST 95-77-M
Respondent : A.C. No. 24-01813-05510
: :
: Zortman Mine; Konitz
: Portable Crusher; Portable
: Crusher No. 2

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S.
Department of Labor, Denver, Colorado,
for Petitioner;
William E. Berger, Esq., Wilkins & Berger,
Lewistown, Montana, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Konitz Contracting, Inc. ("Konitz"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.' 815 and 820. The petitions allege five violations of the Secretary's safety regulations. For the reasons set forth below, I affirm the citations and assess penalties in the amount of \$175.00.

A hearing was held on April 20, 1995, in Billings, Montana. The parties presented testimony and documentary evidence, but waived post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Docket No. WEST 94-373-M

On November 4, 1993, MSHA Inspector Richard S. Ferreira inspected Konitz's operation at the Zortman Mine in Phillips County, Montana. He issued Citation No. 4331677 alleging that Konitz failed to submit to MSHA for approval a training plan for its miners at the Zortman Mine. The safety regulation cited, 30 C.F.R. ' 48.23, provides that each mine operator must have an MSHA approved training plan for its employees before mining commences. The inspector determined that the violation was not serious, was not of a significant and substantial nature ("S&S"), and was caused by Konitz's moderate negligence.

At the time the citation was issued, Konitz was an independent contractor at the Zortman Mine, a surface gold mine. Konitz produced crushed rock with a portable crusher for use at the mine. Before Konitz began operating at the mine in early October 1993, employees of Zortman advised Tom Konitz, the owner, that MSHA training would be required for Konitz's employees. Mr. Konitz called the local MSHA field office about the training requirements and was referred to Mr. Rodric Breland, the MSHA District Manager, in Denver, Colorado. Mr. Breland referred Mr. Konitz to Robert Koenig, an MSHA specialist in the Denver office. Mr. Konitz described the nature of the work that Konitz would be performing at the Zortman Mine and Mr. Koenig told him what training that would be required. (Tr. 135-36). After Mr. Konitz obtained additional advice from Zortman employees, Konitz trained the four employees that would be operating the portable crusher at the mine site. The training lasted about eight hours.

As a result of his conversations with Mr. Breland and Mr. Koenig, Mr. Konitz received a letter from Mr. Breland setting forth the training that would be required. (Ex. G-2). The letter states, in part: "the following determination was made regarding training requirements for your employees working at Zortman: If your employees are experienced at their particular jobs ... they can be trained as 'Newly employed experienced miners' (48.26)." Id. MSHA officials did not advise Mr. Konitz, either over the telephone or in the letter, that Konitz was required to submit a written training plan for MSHA's approval.

Konitz has never operated at a metal mine or a coal mine. It normally operates its portable crushers at locations that are separate from other mines. These operations are subject to MSHA's training regulations at 30 C.F.R. ' Part 48, but MSHA is not permitted to enforce these requirements at Konitz's other facilities because of a provision in the Federal budget. As a

Each year the Federal budget contains a provision prohibiting the enforcement of MSHA's training regulations at certain types

consequence, Konitz has never been cited for failing to submit training plans at its other operations.

Konitz abated the violation by conducting an additional eight hour training class. Both classes were taught by Ken Bowser, the crusher operator. He testified that the training was essentially the same in both sessions. The miners involved had previously operated this portable crusher.

I find that Konitz violated section 48.23 because the operator did not have an approved training plan in place at the time of the inspection. The Commission and courts have held that the Mine Act is a strict liability statute. Asarco, Inc. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). I further find that the violation was not serious because the miners had received the same basic training during its unapproved training session. I find that Konitz negligence was very low because Konitz relied on the advice of MSHA officials in setting up its training program.

These officials unintentionally misled Konitz into believing that the training it provided complied with the requirements of Part 48. No mention was made of the need for a written, pre-approved training plan.

Section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), sets out six criteria to be considered in determining an appropriate civil penalty. Based on this criteria, I assess a nominal penalty of \$5.00 for this violation rather than the \$400 penalty proposed by MSHA. Konitz was issued seven citations in the 24 months preceding the inspection. (Ex. G-1B). I also find that Konitz is a small operator with 2,310 hours of production in 1993. (Tr. 9). I find that the civil penalty assessed would not affect Konitz's ability to continue in business and that the violation was timely abated.

B. WEST 95-76-M

of mines. In fiscal year 1994, which included October 1993, the budget contained the following language in the paragraph setting forth MSHA's appropriations: "*Provided*, That none of the funds appropriated under this paragraph shall be obligated or expended to ... carry out that portion of section 104(g)(1) of [the Mine] Act relating to the enforcement of any training requirements, ... with respect to any sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mine." H.R. Doc. No. 3, 103d Cong., 1st Sess., Budget of the United States Government, Fiscal Year 1994, at Appendix-801 (1993).

1. Citation No. 4409808

On July 26, 1994, Inspector Ferreira inspected Konitz's Portable Crusher in Fergus County, Montana. He observed a haulage truck traveling through an area where he believed a 110 volt power cord was stretched across the dirt. He observed the alleged violation while sitting in his truck some distance away.

(Ex. G-3). He issued Citation No. 4409808 alleging that a single phase, 110 volt extension cord was not bridged or protected against mobile equipment. The safety standard, 30 C.F.R.

' 56.12005, provides that mobile equipment shall not run over power conductors unless the conductors are properly bridged or protected. The inspector determined that the violation was serious, was not S&S, and was caused by Konitz's low negligence.

Konitz contends that the power cord was not located where the haulage truck was traveling, but was in a different area. (Tr. 142-44). The area that the inspector observed was a haulage road. Mr. Konitz testified that the cord was not across the haulage road. Id. He testified that the cord went to the test shack and that the only vehicle that could run over it "would be a pickup pulling up to the test shack." (Tr. 144). Konitz abated the condition by burying the electric cord.

I find that Konitz violated the safety standard because the electric cord was not protected. Although it may have not been on the haulage road, it was located in an area where mobile equipment would run over it. The insulation on the cord could be damaged by mobile equipment and an employee could receive an electric shock.

Taking into consideration the civil penalty criteria, I assess a penalty of \$20.00 for this violation. I find that the violation was moderately serious and was caused by Konitz's low negligence. My findings for the remaining penalty criteria are the same as discussed in WEST 94-373-M, except that this crusher has a history of one citation in the 24 months preceding the inspection. (Ex. G-1A).

2. Citation No. 4409809

On the same date, Inspector Ferreira issued Citation No. 4409809 alleging that a rotating shaft on the Pioneer Crusher was not protected by a guard to prevent employees from accidentally contacting the shaft. The cited safety standard, 30 C.F.R.

' 56.14107(a) provides that moving machine parts shall be guarded to protect persons from contacting shafts and other moving parts

that can cause injury. The inspector determined that the violation was serious, was not S&S, and was caused by Konitz's low negligence.

Konitz contends that the equipment in question was taken out of service two years prior to the date of the hearing. (Tr. 145, 156). The citation was issued to Orville Olson, the crusher operator. Inspector Ferreira testified that the citation was abated by installing screening material around the shaft. (Tr. 39). I credit the testimony of the inspector. The Pioneer crusher must have been removed from service at a later date.

I find that Konitz violated the cited safety standard because the rotating shaft was not guarded. An employee could be injured if he or his clothing came in contact with the rotating shaft. I agree with the inspector that the violation was not S&S because there was not a reasonable likelihood that the hazard contributed to by the violation would result in an injury. I also find that the violation was moderately serious. I affirm the inspector's finding that the violation was caused by the operator's low negligence. Miners were in the area on an infrequent basis. Taking into consideration the civil penalty criteria, I assess a penalty of \$30.00 for this violation.

C. WEST 95-77-M

1. Citation No. 4331679

On November 17, 1993, Inspector Ferreira inspected Konitz's operation at the Zortman Mine in Phillips County, Montana. He issued Citation No. 4331679 alleging that Konitz failed to have circuit breakers or fuses for the electrical circuits at the crusher. The cited safety standard, 30 C.F.R. ' 56.12001, provides that circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type or capacity. The inspector determined that the violation was serious, was S&S, and was caused by Konitz's low negligence.

Konitz does not deny that the electrical equipment was not protected by circuit breakers or fuses. Mr. Konitz testified that magnetic starters for the equipment contained "heaters" (overcurrent devices) that adequately protected the circuits. In addition, he testified that MSHA has inspected this crusher many times over the past ten years and never mentioned that fuses or circuit breakers are required. He stated that he spent about \$10,000 to install new circuits on his two crushers. (Tr. 147-48).

I find that Konitz violated the safety standard. Over-current devices in magnetic starters are designed to protect motors from burning out, not to protect employees from electric shock, and these devices do not meet the safety standard. The portable crusher is moved around and also vibrates during operation. (Tr. 47-49). The material being crushed is very abrasive and it gets into electrical boxes and other components. The protective layer around power conductors could wear through, causing a phase-to-phase fault. Id. Fuses and circuit breakers will open the circuit in the event of a fault.

I also find that the violation was serious and S&S. The

evidence establishes that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). I recognize that Konitz has never had an electrical injury at its crushers, but assuming continuing normal mining operations, it was likely that an injury or a fatality would occur. I affirm the inspector's determination that the violation was caused by Konitz's low negligence.

Taking into consideration the civil penalty criteria, I assess a penalty of \$60.00 for this violation. My findings for the remaining penalty criteria are the same as discussed in WEST 94-373-M, above.

2. Citation No. 4409807

On July 19, 1994, Inspector Ferreira inspected Konitz's Portable Crusher No. 2 in Fergus County, Montana. He issued Citation No. 4409807 alleging that an employee was shoveling spilled material out from under the unguarded self-cleaning tail pulley on the jaw crusher. The safety standard, 30 C.F.R. ' 56.14107(a), provides that moving machine parts shall be guarded to protect persons from contacting tail pulleys and other moving parts that cause injury. The inspector determined that the violation was serious, was S&S, and was caused by Konitz's low negligence.

Konitz does not deny that a guard was not present but argues that a hazard was not created because the tail pulley was underneath the jaw crusher. The inspector observed a man reaching with a shovel under the crusher. Mr. Konitz testified that the most that could happen is that the shovel would be pulled out of the employee's hand. The pinch point of the tail pulley was about two and one half feet from the edge of the crusher. (Tr. 129-30; Ex. J-1). The inspector testified that the hands of the man who was shoveling were only inches from the tail pulley. All witnesses agreed that a hazard is presented if an employee's hands come within inches of the tail pulley. Given that the edge of the pulley was only a few feet away from the bottom edge of the crusher and the inspector saw an employee shoveling under the crusher, I find that the Secretary established a violation of the safety standard.

I also find that the violation was serious and S&S. The evidence establishes that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature, assuming continuing normal mining operations. Anyone shoveling under the crusher while the conveyor was

operating could be seriously injured. I affirm the inspector's determination that the violation was caused by Konitz's low negligence. Taking into consideration the civil penalty criteria, I assess a penalty of \$60.00 for the violation.

II. CIVIL PENALTY ASSESSMENTS

The citations are affirmed, as set forth above, and the following penalties are assessed:

<u>Citation Nos.</u>	<u>30 C.F.R. '</u>	<u>Assessed Penalty</u>
4331677	48.23	\$ 5.00
4409808	56.12005	20.00
4409809	56.14107(a)	30.00
4331679	56.12001	60.00
4409807	56.14107(a)	60.00
	Total Penalty	\$175.00

III. ORDER

Accordingly, the above-listed citations are **AFFIRMED** and Konitz Contracting, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$175.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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