

CCASE:
SOL (MSHA) V. KENNECOTT COPPER CORP.
DDATE:
19791118
TTEXT:

~1901

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

Civil Penalty Proceeding
Docket No. DENV 79-404-PM
A/O No. 42-00176-05001

v.

Magna Concentrator

KENNECOTT COPPER CORPORATION,
RESPONDENT

Docket No. DENV 79-413-PM
A/O No. 42-00712-05003

Arthur Concentrator

DECISION

Appearances: James Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner
F. Alan Fletcher, Esq., and James and M. Elegante, Esq.,
Parsons, Behle & Latimer, Salt Lake City, Utah,
for Respondent

Before: Judge Stewart

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. 820(a). A hearing was held on these matters in Salt Lake City, Utah, on July 17, 1979. With regard to the violations alleged in Docket No. DENV 79-404-PM, Petitioner and Respondent each called two witnesses. At the conclusion of the hearing, a decision was rendered from the bench setting forth findings of fact and conclusions of law and assessing penalties:

The Solicitor has indicated that there is no history of previous violations on the part of the operator, and I so find that there is no history of previous violations.

The evidence has indicated that the operator is a large corporation and that the mining operation and the concentrator operation are large. There is no evidence that the penalty requested will affect the operator's ability to continue in business.

As to citation No. 338206, the inspector alleges that housekeeping was needed at the head pulley and the drive motor of the incline belt. The evidence has amply shown that there were pieces of conduit and pieces of wire in the area and that they could possibly constitute a tripping hazard.

Both the Solicitor's witnesses and the operator's witnesses have indicated that there was some tripping hazard. I find that the lighting was at least fair, and the conditions were visible. It was not likely that a person would trip but he would be more likely to trip in that area than other places. Therefore, a tripping hazard existed.

Another reason that the hazard was somewhat unlikely to cause injury was the fact that this area was seldom used, that is, it was used only on occasion.

I find that the condition, however, was obvious, that the operator knew or should have known of these conditions, and that it should have been corrected. The record establishes that the operator was negligent.

I find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. Even though the tripping hazard is slight, I note that the penalty requested was only \$40. The nature of the hazard was evidently considered in proposing the penalty for this violation.

As to citation 338210, I find that a violation did occur. Petitioner's inspector, Frank E. Vario, described the violative conditions as follows: In the electrical portion of the carpenter shop, the floor was saturated with oil and solvent and the solvent tank was uncovered. A cutting torch is sometimes used within about six feet.

As to the gravity of this violation, I find that there was at least a slipping hazard, acknowledged by witnesses for both the Petitioner and the Respondent. It appears that the oil and the solvent did cause the rubber mat and the covering to be slippery. It is also possible that the uncovered solvent tank and the oil solvent on the floor could also be a fire hazard. However, I do not find sufficient evidence to show that a cutting torch was actually used within about six feet of the solvent tank. I understand the inspector to mean the six-foot distance to be from the solvent tank to the cutting torch. That is not clear, and even if it should be, as to the saturated oil and solvent on the floor,

~1903

I still find insufficient evidence to indicate that a cutting torch was actually used. If the torch was used in this area, the evidence indicates that perhaps there was a door which could be closed and that the area where the cutting occurred was outside the building. Nevertheless, there is a slight possibility of a fire hazard even though the use of a cutting torch has not definitely been established.

As to the operator's negligence, I find that the condition was obvious and it should have been known to the operator, and the condition should have been corrected by the operator. The record establishes that the operator was negligent.

I find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of a violation. There were no previous violations, the operator demonstrated good faith and the possibility of an injury as a result of these conditions was slight.

I find that those conditions have been considered in arriving at a proposed penalty of \$44. I therefore find that this small penalty in the amount of \$44 is appropriate for the violation.

The Respondent is therefore ordered to pay MSHA the sum of \$84 within 30 days of the date of this citation.

The bench decision is hereby affirmed.

Counsel for Petitioner moved at the hearing to withdraw the petition for assessment of civil penalty with respect to Citation No. 338209 on the grounds that he lacked sufficient evidence of the alleged violation. The motion to withdraw Citation No. 338209 was granted by the administrative law judge and is affirmed at this time.

At the conclusion of the hearing, the parties agreed to a settlement of the second proceeding herein, Docket No. DENV 79-413-PM. Counsel for Petitioner asserted the following:

With respect to citations numbers 00336009 and 00336010, the Respondent wishes to withdraw his Notice of Contest, and the parties have agreed that the penalties which were proposed are appropriate, although we do want to put evidence in the record on that. The penalty proposed for citation No. 00336009 is \$56 and for 00336010, the penalty is \$106. The Secretary of Labor hereby moves to withdraw the Petition for Assessment of Penalty for citation No. 00336012 and the penalty for that.

~1904

With respect to the six statutory criteria underlying the proposed penalties for the two items remaining in question, the parties stipulate as follows: First of all, that the amount of penalties would not affect Respondent's ability to continue in business; secondly, as to the testimony of Mr. Pinder with respect to size will stand as to these two citations; thirdly, with respect to history, by the time these two citations were assessed, the Respondent had had a total of 20 assessed violations within the preceding 24 months and those arose out of seven inspection days.

As to the negligence and the gravity involved in both of these citations, it was slight. Both of these citations were abated within the time set forth by the inspector, which would show the Respondent's good faith in complying.

Based on those proposed criteria, we would then propose to Your Honor and the Commission that a penalty of \$56 be assessed for violation of 09 and a penalty of \$106 be assessed for violation of 10; and, finally, that Your Honor grant the motion of the Secretary to withdraw the Petition and the underlying citation for assessment of penalty and vacate the citation for assessment of penalty and vacate the citation for the last item, the last two digits being 12.

Counsel for Petitioner asserted thereafter that Citation No. 336012 was withdrawn because of difficulties of proof.

This settlement was approved by the administrative law judge at the hearing. The Respondent was ordered to pay the agreed-upon sum of \$162 within 30 days of the date of the decision approving settlement.

The decision approving settlement rendered at the hearing is hereby affirmed.

ORDER

It is ORDERED that the bench decision rendered in Docket No. DENV 79-404-PM is hereby AFFIRMED.

It is ORDERED that the granting of Petitioner's motion to withdraw Citation No. 338209 is hereby AFFIRMED.

It is further ORDERED that the decision approving settlement in Docket No. DENV 79-413-PM is hereby AFFIRMED.

~1905

If payment has not been made by Respondent as ordered at the hearing, it is hereby ORDERED that Respondent pay the sum of \$246 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge