

CCASE:
SOL (MSHA) V. ANACONDA COMPANY
DDATE:
19800613
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING
DOCKET NO. WEST 79-128-M
MSHA NO. 24-00689-05003

v.

THE ANACONDA COMPANY,
RESPONDENT

Mine: Weed Concentrator

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor,
United States Department of Labor, 1961 Stout Street,
Room 1585, Denver, Colorado 80294, for the Petitioner
Edward F. Bartlett, Esq., and Karla M. Gray, Esq.,
Anaconda Copper Company, P. O. Box 689, Butte,
Montana 59701, for the Respondent

Before: Judge John J. Morris

In this civil penalty proceeding petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, the Anaconda Company, violated safety regulations promulgated under authority of the Federal Mine Safety and Health Act of 1969 (amended 1977), 30 U.S.C. 801 et seq.

Pursuant to notice, a hearing on the merits was held in Butte, Montana on March 11, 1980.

The parties waived their right to file post trial briefs.

ISSUE

The issue is whether the violation occurred.

ALLEGED VIOLATION

Citation 341994 alleges a violation of 30 C.F.R. 55.16-9 which provides as follows:

55.16-9 Mandatory. Men shall stay clear of suspended loads

The evidence is evenly balanced.

MSHA's evidence is to the effect that the inspector observed a 300 to 400 pound cabinet being moved laterally as it was suspended by a crane. The cabinet was some 6 to 7 feet above the floor; the worker alongside of the cabinet had both hands beneath it. (Tr 9-14, 16-20, 193-194).

Anaconda's evidence shows that at all times the metal cabinet was no more than 8 to 10 inches above the floor. The worker was not under the load but he was moving it laterally (Tr 105-111).

DISCUSSION

The burden of proving all elements of an alleged violation rests with MSHA, 5 U.S.C. 556(d). Brennan v. OSHRC, 511 F.2d 1139 (9th Cir. 1975), Olin Construction Company v. OSHRC, 575 F.2d 464 (2d Cir. 1975).

Where witnesses stand before the Court, equal in character, equal in interest, and equal in opportunity to know the facts, and they have made irreconcilable contradictory statements and neither is corroborated, there is no "preponderance." The party who has the burden to go forward, has failed to sustain his burden. Bishop v. Nikolas, 51 N.E. 2d 828 (1943),

~1416

and see Aluminum Co. of America v. Preferred Metal Products, 37 F.R.D. 218 (1965), aff'd 354 F.2d 658.

Since MSHA has failed to carry its burden of proof I conclude that Citation 341994 and all proposed penalties therefor should be vacated.

Inasmuch as the citation is to be vacated it is not necessary to consider Anaconda's motions at trial (Tr. 97-100).

SETTLEMENT

The parties further filed a stipulation and motion to approve a settlement agreement. In support of the motion the parties stated that the amount of the proposed settlement for all citations excepting No. 341994 is \$661. The amount of the original proposed penalties was \$1010.

The motion contains an analysis of the criteria to be followed in determining the appropriateness of the penalty. Documentation was submitted in support of the motion.

Having analyzed the operator's history of previous violations, the appropriateness of the penalty to the size of the business, the degree of negligence, the effect on the operator's ability to continue in business, and the good faith achievement of normal compliance after notification of violation, I conclude that the agreement should be, and it is APPROVED.

It is FURTHER ORDERED that respondent pay the agreed amount within 30 days of this order.

Based on the foregoing findings of fact and conclusions of law and the settlement agreement, I enter the following:

ORDER

1. Citation 341994 and all proposed penalties therefor are VACATED.

2. The following citations and the proposed amended penalties, as noted, are affirmed.

~1417

CITATION	AMENDED PENALTY
341981	\$ 61
341984	56
341985	38
341988	130
341989	52
341992	44
341993	52
341961	72
341962	61
341965	52
341966	44

John J. Morris
Administrative Law Judge