

CCASE:  
SOL (MSHA) V. ANACONDA COMPANY  
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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 79-136-M

MSHA NO. 24-00689-05011

v.

THE ANACONDA COMPANY,  
RESPONDENT

Mine: Weed Concentrator

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

DECISION

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.

ISSUES

The issues are whether the violations occurred.

CITATION 344173

alleges a violation of 30 C.F.R. 55.15-4 which provides as follows:

55.15-4 Mandatory. All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

The evidence is conflicting and I find the following facts to be credible.

1. Upon entering the Anaconda pipe shop the federal inspector observed three workers not wearing safety glasses (Tr 30, Exhibit P-3).
2. The workers, who apparently use this area for work breaks, were near the main door (Tr 32-66).
3. The pipe shop lathe and grinding wheel carry 480 volts; the pipe threader carries 10 volts A.C. (Tr 33).
4. Metal filings can be thrown several feet by the machines (Tr 34-34).
5. Only the large pipe machine, a slow rotating device, was running when the inspector entered the pipe shop (Tr 135, 138, Exhibit R-4).
6. The pipe machine operator was wearing protective eye glasses (Tr 136).

DISCUSSION

Anaconda's exhibit (R-4) indicates the workers that were near the main door were at least twenty-two feet from the only machine that was operating. The operator of that machine was wearing protective eyeglasses (Tr 136).

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I have placed more credence in the Anaconda exhibit which depicts the pipe shop than in the MSHA related exhibit (P-3, R-4). The Anaconda exhibit appears to be drawn to scale. MSHA's free hand drawing suffers in comparison. I place no credence in MSHA's evidence that the machines in the pipe shop could explode (Tr 33). That evidence is contradicted by Anaconda (Tr 186). In addition, there is no foundation for the witness to state such an opinion. Without a foundation I consider the evidence to be speculative.

MSHA must prove a violation of the standard as well as exposure of the workers. No exposure to the workers exists here since the best that can be said about MSHA's evidence is that metal filing can be thrown "several" feet (TR 34-35). Since MSHA failed to prove that the Anaconda workers were exposed to the hazard involved here I conclude that Citation 344173 should be vacated.

CITATION 344168

alleges a violation of 30 C.F.R. 55.15-4, cited above.

The evidence is conflicting and I find the following facts to be credible.

7. In the flotation cell area a worker was observed with his glasses off for four minutes (Tr 37-39).

8. The worker was holding the glasses in his hand (Tr 73, 126).

9. Anaconda policy is stricter than the federal regulation in that it requires that safety glasses be worn at all times in the plant (Tr 127).

The foregoing facts indicate a situation involving unpreventable employee misconduct. Here the employee momentarily deviated from established company policy. The employer could not have know of the violation nor could it have forseen it.

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However, the Commission has ruled that a mine operator is liable without regard to fault. United States Steel Corporation v. Secretary of Labor Pitt 76-160-P, September 1979. The lack of fault on the part of an operator is a matter to be considered in assessing a civil penalty. In considering the statutory criteria in connection with the flotation cell area I conclude the citation should be affirmed and a penalty of \$1 should be assessed.

#### SETTLEMENT

The parties further filed a stipulation and a 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. 344168 and 344173 is \$693. The amount of the original proposed penalties not litigated herein was \$860.

The settlement agreement indicates that Citation 344168 was settled. However, at trial the parties indicated the matters in that citation were to be heard (Tr 6). In view of the request of the parties the portion of the settlement agreement purporting to settle Citation 344168 is stricken.

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.

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

ORDER

1. Citation 344173 and all proposed penalties therefor are VACATED.

2. Citation 344168 is AFFIRMED and a civil penalty of \$1 is assessed.

3. On the proposed settlement agreement the following citations and the proposed amended penalties, as noted, are affirmed.

CITATION	AMENDED PENALTY
344072	\$ 61
344073	61
344074	16
344078	97
344079	78
344170	104
344172	78
342184	84
342186	114

Respondent is ordered to pay the agreed amount of the settlement agreement within 30 days of the date of this order.

John J. Morris  
Administrative Law Judge