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SOL (MSHA) V. ANACONDA COMPANY
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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 79-137-M

MSHA NO. 24-00689-05012

v.

THE ANACONDA COMPANY,
RESPONDENT

Mine: Weed Concentrator

Appearances:

Ann M. Noble, 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.

ISSUE

The issue is whether the violation occurred.

CITATION 342194

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 indicates workers were under a suspended load. One worker, on the side directly underneath the rod mill guard, was guiding it with the palm of his hand (Tr. 44, 45, Exhibit P-5). The guard was moved 12 feet laterally. It was 75 inches from the floor to the bottom of the guard (Tr. 46). The guard, weighing 400 to 600 pounds, measures 5 to 6 feet in length, 4 to 5 feet wide, and 3 to 6 feet high (Tr. 47, 81, 82).

Anaconda's evidence indicates its workers were in the process of replacing the hood cover on its number 6 rod mill. At the time of this incident the workers, with a crane, were beginning to lift the guard off the floor to place it on the trauma screen (Tr. 117, 121, R1). When it was lifted 4 feet above the floor a worker with his arms extended, turned it 10 degrees. No part of any worker's body was under the cover at any time (Tr. 121,124).

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).

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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), and see Aluminum Co. of America v. Preferred Metals Producte, 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 342194 and the proposed penalty therefor should be vacated.

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 citation 344177 is \$78. The amount of the original proposed penalty was \$114.

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.

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

ORDER

1. Citation 342194 and all proposed penalties therefor are VACATED.

2. Citation 344177 and the proposed amended penalty in the amount of \$78 is AFFIRMED.

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

John J. Morris
Administrative Law Judge