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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 79-130-M

MSHA NO. 24-00689-05005

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.

alleges a violation of 30 CFR 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 shows that the federal inspector observed a cart containing a tank of oxygen and acetylene. It was being lowered from the second floor to the first floor. Two workers, neither of them looking up, were directly under the load.

A fatality could result in these circumstances (Tr 21-28).

Anaconda shows that no workers were under the load at any time. One worker, on the second floor level, was feeding the tag line as the cart lowered to the first floor (Tr 112-116).

DISCUSSION

MSHA carries all the burden of providing all the elements of an alleged violation, 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 that 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 Metal Products*, 37 F.R.D. 218 (1965), *aff'd* 354 F.2d 658.

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Since MSHA has failed to carry its burden of proof I conclude that Citation 342176 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 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 Nos. 341867, 341869, and 342176 is \$569. The amount of the original proposed penalties was \$1020. MSHA moved to vacate citations numbered 341867 and 341869.

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. The following citations and all proposed penalties therefor are VACATED.

No. 341867

No. 341869

No. 342176

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

CITATION	AMENDED PENALTY
342000	\$ 30
342174	60
341862	48
341863	51
341864	48
341865	48
341866	61
341870	28
341871	47
341873	40
342175	38
342177	9
342178	61

John J. Morris
Administrative Law Judge