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SOL (MSHA) v. THE ANACONDA COMP
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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
v.

CIVIL PENALTY PROCEEDINGS
DOCKET NO. WEST 79-128-M
DOCKET NO. WEST 79-130-M
DOCKET NO. WEST 79-137-M

THE ANACONDA COMPANY,
RESPONDENT

MINE: Weed Concentrator

DECISION AFTER REMAND

On February 20, 1981, the Federal Mine Safety and Health Review Commission remanded the above cases for additional findings of fact, conclusions of law, and the reasons therefor.

My prior ruling was that the evidence in these three cases is so equally balanced that it is impossible to make actual findings of fact. In response to the Commission's order of remand, I have set forth below all the relevant evidence presented at the trial. After a careful review of the record, I again conclude that these cases are in equipoise. The Secretary failed to present the required preponderance of evidence. The Secretary did not sustain his burden of proof. The law, therefore, dictates that the citations be vacated.
WEST 79-128-M

In this case, involving Citation 341994, the Secretary alleges respondent violated 30 C.F.R. 55.16-9. The cited standard provides as follows:

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

Secretary's evidence:

1. An MSHA inspection was made at respondent's Weed Concentrator. The inspection party consisted of MSHA inspector Ketron and MSHA trainee inspector Shanholtz for petitioner; company representatives were safety engineer Merritt, and general foreman McHugh. In addition there were two union representatives [unidentified]. Ketron observed a large metal supply cabinet being relocated on the ground level (Tr. 7-11, 18, 204).
2. The cabinet was five feet wide, four feet long, and six feet high; it was being moved by an overhead crane (Tr. 11, 12).
3. It was approximately six feet from the bottom of the supply cabinet to the ground level (Tr. 12).
4. As the cabinet descended and began moving laterally

it jerked or moved abruptly. At this point an employee was underneath the cabinet steadying it and guiding it with both palms (Tr. 12-13).

5. The heavy cabinet, 300 to 400 pounds, neither ascended nor descended as it moved laterally approximately 20 feet. There was no tag line on the cabinet (FN.1) (Tr. 13, 14).

6. Merritt said the crusher operator was with the group on the floor. An individual (not identified) said this is the way we do it all the time. Merritt moved quickly to get the man out of the position he was in (Tr. 17-19).

7. MSHA Inspector Shanholtz was also on the third floor. He stated that the cabinet had to be lifted 6 to 7 feet to clear a cone crusher. Ketron testified the cabinet was lifted 8 to 10 feet to pass the cone. After Shanholtz observed the cabinet move laterally over the top of a cone crusher he saw an employee walking along the side of the cabinet with both hands underneath it. The palms of both hands were at about shoulder level (Tr. 60, 193-194).

8. After Ketron and Shanholtz got down [to ground level] a worker explained this happened because the crane was overtravelling (Tr. 194-195).

Respondent's evidence:

9. Witness Merritt, Anaconda's safety engineer, was with MSHA witness Ketron at the time of the incident. Merritt accompanied the inspectors throughout the inspection which took place between November 28, 1978 and January 11, 1979 (Tr. 103, 105, 106).

10. Ketron and Merritt were two feet apart and they were looking at the same metal cabinet on the first floor of the crusher. Merritt testified that the cabinet was 8 to 10 inches above the floor (Tr. 107-108, 160-161) when the inspector said the employees didn't have a tag line on the metal box (Tr. 107-108, 160-161).

11. No employee or any part of his body was underneath the load. During the entire time span Merritt never saw a worker with his palms up on the bottom of the cabinet (Tr. 108, 148). Merritt's eyes were on the cabinet during the entire time except when he went downstairs (Tr. 108, 148).

12. An employee was holding the cabinet at arm's length to steady it as it was moved laterally to a position 10 feet from the stairway. In Merritt's opinion the employee was clear of the load and not in a position of danger (Tr. 108, 110).

13. Merritt ran down the stairs because Ketron told him the suspended load lacked a tag line and there was a man under the load. At the trial Merritt denied that there was a miner under the load (Tr. 107).

14. As the cabinet moved laterally the employee was walking along with his palms alongside the cabinet (Tr. 109).

15. At no time did Merritt observe the cabinet any higher than 6 to 8 inches from the floor. The cabinet had to be suspended so a forklift could pick it up. Nothing in the movement of the cabinet required that it be raised higher than 6 to 8 inches (Tr. 109, 110).

16. When Merritt was on the third level he assumed he would receive a tag line citation. However, he didn't know the nature of the citation until the end of the day (Tr. 111).

17. Merritt testified the tag line standard was advisory and not mandatory at the time of the inspection (Tr. 111).

18. Anaconda's witness McHugh, general foreman at the Weed Concentrator, was on the third level with Ketron, Shanholtz, and Merritt. He was in a position to observe the cabinet (Tr. 107).

19. According to McHugh the cabinet was lifted 10 to 12 inches (Tr. 187).

20. McHugh testified that the employee guided the cabinet with his arms outstretched and no part of his body was under it (Tr. 187-188).

DISCUSSION

The standard at issue simply states that "men shall stay clear of suspended loads." The term "stay clear of" should be construed in a way that promotes safety. Old Ben Coal Company VINC 74-11, IBMA 75-52, Volume 1 No. 9, FMSHRC Decisions, 1954 (Dec. 1979).

In view of the ordinary meaning of the words I construe the term "stay clear of" to mean that employees shall remain a sufficient distance from a suspended load to protect themselves from injury.

What constitutes a safe distance might be best approached by determining the converse, or, an unsafe distance. Initially, any employee under the load would not be clear of it and would be in an unsafe position. In addition, the unsafe area should be extended to include that area which the load would strike in falling, or after impact, in toppling over, and that area encompassed by the possible spilling of any contents.

The position of the miner in relation to the suspended load is the pivotal factor which determines whether the standard has been violated. As

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to this element, the parties presented contradictory evidence. Other factors to be considered in determining a violation are the shape, height and weight of the suspended load, whether there is the possibility of a spillage of contents from the object being moved, and the balance of the load while it is suspended. There was no evidence that the cabinet while suspended was unbalanced. It was rectangular in shape and weighed 300-400 pounds. The cabinet did not have any objects in it that could spill and neither its shape nor its size presented an additional risk if it would fall from the hoist at any height. The distance it was held above the floor is determinative of the danger involved if it were to fall. Each party testified to irreconcilable distances.

Merritt's actions in running down the stairs might well indicate an inference that the worker was under the suspended load and in danger. However, Merritt's explanation is logical and reasonable. He says he ran down the stairs because Ketron said the suspended load didn't have a tagline; further, Ketron added there was a man under the load. Merritt said there wasn't a man under the load. If the man was under the load as Ketron allegedly expressed, that allegation did not work its way into the citation he issued to respondent. The citation states: "An employee was observed guiding by hand, a metal supply cabinet which was suspended from the overhead crane in the secondary crusher."

Inspector Shanholtz talked to the worker on the floor (8). The statement from the worker that this happened all the time because the crane was over travelling does not relate to the citation.

Inspectors Ketron and Shanholtz further testified that they saw the cabinet move over the top of a cone crusher (7). This is not determinative of whether a violation occurred since the action of the employee took place after the cabinet was raised over the cone crusher. This evidence raises a credibility conflict since Merritt indicated that nothing in the movement of the cabinet required that it be raised higher than 6 to 8 inches (15).

Respondent's evidence, considered by itself, places the bottom of the load from 8 to 12 inches above the floor. Merritt testified the cabinet was 8 to 10 inches above the floor (10). He also indicated he never saw it higher than 6 to 8 inches (15). I do not consider that this conflict destroys the credibility of Merritt's testimony since the evidence presented both by the Secretary and respondent was only an estimate of the distances. Those estimates were made on the third level above the ground floor where the cabinet was being moved.

Respondent's evidence further places the employee standing beside the cabinet with his palms alongside of it and his arms outstretched (12, 14, 20). This directly conflicts with the testimony of the MSHA inspectors who stated that the miner was underneath the load (4, 7).

Respondent's evidence fails to establish a violation of 30 C.F.R. 55.16-9. The worker was an arm's length from the load and not under it. There was no danger of injury, hence, the worker was clear of the load.

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As to the interest of Merritt, it is my view that he has no more of an "interest" than do the MSHA safety inspectors. All witnesses are interested in seeing their views sustained. If I should rule that respondent's witnesses have an interest that destroys their credibility, such a ruling would be tantamount to ruling in favor of MSHA in all cases. The financial interest of Anaconda in the outcome of this case does not taint its evidence. No doubt, if Anaconda loses, it will pay the total proposed penalties of \$829.00. Considerably more than that has been spent on these cases. If the mere payment of a fine causes Anaconda's witnesses to be affected by its financial exposure, then MSHA's witnesses would likewise be affected since penalties accrue to the Treasury of the United States, 30 U.S.C. 820(j).

Since the Secretary has the burden of proof, (FN.3) he should be prepared to offer additional evidence when the facts are as evenly balanced as in this case. Additional evidence that might have been offered is the testimony from the two union representatives who accompanied the inspection party. An invaluable witness would have been the worker whom inspector Shanholtz talked to on the floor, or the worker who was guiding the cabinet.

All four witnesses were in the same relative position on the third level above the ground floor. There is nothing in the record that can resolve the conflict as outlined above. Having observed the witnesses and their demeanor I could not determine any reason to believe one over the other. The MSHA witnesses are not entitled to greater credibility because they are government inspectors. Conversely, the respondent's witnesses are not entitled to greater credibility because they are Anaconda's personnel. The record fails to establish any interest or bias of any witness; hence they are equal in interest. Accordingly, I find that the evidence of each party is equally credible. The Secretary has failed to sustain his burden of proof.

For the foregoing reasons I conclude that Citation 341994 and all proposed penalties therefor should be vacated.

WEST 79-130-M

In this case Citation 342176 alleges a violation of 30 C.F.R. 55.16-9, cited supra.

Secretary's evidence:

1. While in the Anaconda Weed Concentrator MSHA inspector Ketron was accompanied by MSHA inspector Shanholtz and company representatives Merritt and McHugh (Tr. 21).
2. Ketron observed that a cart containing oxygen and acetylene bottles was being transported from the second floor to the first floor (Tr. 22).
3. While standing at the edge of the catwalk, inspector Ketron observed the crane operator move the crane to the load, pick it up, and move it laterally. He watched the load descend to the ground floor (Tr. 22).
4. As the cart descended from the second to the first floor two employees were directly underneath it (Tr. 23).
5. Neither employee was looking up as the load descended (Tr. 23).
6. As the load descended the two employees simultaneously reached up. Each worker grabbed one wheel and turned the load as it descended (Tr. 24).
7. Lateral movement stopped as the load descended (Tr. 24, 25).
8. The attached tag line was not touched before the cart was set on the ground (Tr. 25).
9. The correct method would be for the two employees to remain several feet back until the load was a few inches above the flat surface of the ground level (Tr. 26).
10. The balance of the cart was quite good and it was not leaning one way or the other (Tr. 26).
11. The hazard here was that two employees put themselves in a position of danger in the event of an electrical or mechanical failure of the hoist (Tr. 27).
12. Inspector Ketron notified Merritt at the time that the cart movement was a violation. The citation was written at the end of the day (Tr. 62).
13. Merritt stated the employee should not have been in that position (Tr. 27).
14. MSHA inspector Shanholtz testified that the two workers were directly underneath the cart as it was being lowered (Tr. 196).

15. Inspector Shanholtz indicated the employees initially used the tag line to steady the load off of the second floor (Tr. 196).

Respondent's evidence:

16. Anaconda's witness Merritt was with the inspection party consisting of Inspectors Ketron and Shanholtz and company representative McHugh (Tr. 114).

17. Merritt recalled that there weren't any employees on the first floor. Further Ketron stated to Merritt that there weren't any employees on the floor (Tr. 114).

18. Merritt testified that when he first observed the suspended load two employees on the second floor were near the cart. They then followed the load down to the first floor after the cart was on the floor (Tr. 116).

19. One employee on the second floor had the tagline and he walked over to the handrail and as the load descended to the floor he kept feeding off the tagline (Tr. 114, 115).

20. When the load got down to the basement floor he dropped the rope (Tr. 114).

21. The employee who was operating the tagline was clear of the load while the cart was being lowered (Tr. 115).

22. The second employee who was involved in the incident was giving hand signals to the crane operator (Tr. 115).

23. The employee gave the hand signals from the second floor (Tr 115).

24. There wasn't any employee under the load as it was being lowered (Tr. 115, 116).

DISCUSSION

The determinative fact here is whether one or more employees were under the descending load. MSHA's evidence and Anaconda's evidence is directly conflicting and diametrically opposed.

The only hazard alleged was that two employees were standing under the suspended cart. Ketron stated that the balance of the cart was "quite good" (10). There was no evidence that there was a danger that the tanks could fall from the cart. Respondent refuted the existence of this hazard by presenting evidence that miners were never under the load but were on the second level until the cart was resting on the ground level (17 - 24).

Nothing in this record permits a determination to be made for or against either party. The witnesses were in the same location at the time of the incident. I made the same observations as to their demeanor and credibility as expressed in

the previous case. The mere fact that two witnesses testified for the Secretary as against one for Anaconda does not give me cause to rule that the Secretary has carried his burden of proof.

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There was testimony that inspector ketron notified safety Engineer Merritt at the time that the cart movement was a violation. Merritt denies that Ketron notified him of a violation before that evening (Tr. 116-117).

Two items of uncontroverted evidence should be reviewed. The Secretary's evidence establishes that Merritt stated that the employee should not be under the load (13). Also uncontroverted is respondent's evidence that inspector Ketron stated there weren't any employees on the floor (17). Each of these statements is a damaging admission attributed to each of the parties. However, they leave the decision-maker in the same quandary, namely, the evidence remains evenly balanced.

The Secretary has the burden of proving his case. He should, therefore, in circumstances such as this be prepared to offer additional evidence to corroborate the testimony of his inspectors. In this case an invaluable witness would have been one or both of the workers whom the Secretary asserts were under the descending load. Even their names gleaned from inspector's notes, or otherwise, would help to resolve the conflict in the evidence.

For the above stated reasons I conclude that Citation 342176 and all penalties therefor should be vacated.

WEST 79-137-M

In this case Citation 342194 alleges a violation of 30 C.F.R. 55.16-9, cited supra.

Secretary's evidence:

1. During the inspection of Anaconda's Weed Concentrator witness Ketron, in the presence of Shanholtz and Merritt, observed an employee underneath a suspended load (Tr. 44, 45). Ketron also observed another miner holding a tag line which was attached to the load (Tr. 45).
2. The object being moved was a guard (fn.4) for the rod mill. It weighed 400 to 600 pounds and was 4 to 6 feet long, 4 to 5 feet wide, and 3 to 6 feet high (Tr. 44, 47, 82).
3. When Inspector Ketron observed the individual under the load he stated to Jack Barnes that it was a violation (Tr. 79-80).
4. Witness Shanholtz made the following observations: the guard was raised six feet off of the floor, an employee grabbed hold of it, there was another employee on the other side of the load standing one to two feet from the guard, and he was holding the tagline (Tr. 199.)

5. After Ketron informed Barnes there was a hazard, the employees were moved away (Tr. 199).

Respondent's evidence:

6. Anaconda's witness Merritt observed the overhead crane begin to lift the box from the floor (Tr. 121, 122).
7. One employee with a tag line on the south side was steadying the load (Tr. 121).
8. All other employees were out of the area except one employee on the north side of the guard (Tr. 121).
9. When the cover was lifted off the floor about 3 to 4 feet this employee went over and turned the cover approximately 10 degrees so it would be straight (Tr. 121-122, 162).
10. At that point the bottom of the cover was 3 1/2 to 4 feet from the floor (Tr. 122).
11. While straightening the cover, no part of the employee's body was under the cover. His arms were extended outward horizontally as he pushed on the load approximately in the center of the cover (Tr. 122, 125).
12. At no time did Merritt observe any employee under the cover.
13. Witness Barnes, Anaconda's maintenance superintendant was supervising the foreman in charge of replacing the load (Tr. 180).
14. Barnes watched the load when they started lifting it from the floor to return it to the mill (Tr. 180).
15. Barnes did not observe any employee under the load at any time when it was being returned to the mill (Tr. 180).
16. When Barnes observed that the load was first off the ground, 3 to 4 feet off the floor, a steelworker walked over and straightened it out with his hands out-stretched (Tr. 162, 180-181).
17. The crane made no movement when the worker was near it. Other than the one worker who touched the cover twice, the nearest workers were 20 feet away (Tr. 181-183).
18. Ketrone came over and said "that is not safe" and Barnes asked the worker to move away (Tr. 123, 181).
19. The worker did not again approach the cover until it was six inches, or less, away from the base (Tr. 181).

DISCUSSION

One of the mine inspectors, (FN.5) Ketron, places a worker under the load. The other inspector, Shanholtz, did not support this evidence. Shanholtz's testimony is so factually vague that it is of no value. Shanholtz said the steelworker "grabbed a hold" of the cover. What Shanholtz meant or how a person would accomplish the feat of grabbing a hold of a box estimated at 4 to 6 feet long, 4 to 5 feet wide, and 3 to 6 feet high is not further developed in the record. (Exhibit R-1 is a photograph of the cover).

The Commission in its decision remanding the case states that Shanholtz testified that a violation of the standard occurred after the lateral movement when the guard was hoisted over the trauma screen to be positioned on top of the mill. Shanholtz's testimony is unclear as to when Ketron informed Superintendent Barnes that there was a violation. However, Ketron testified that the violation occurred when the guard was being moved laterally from point A to point B (Tr. 79, 80). Barnes stated that when the guard was 3 to 4 feet off the floor a steelworker walked over to it and straightened it out. It was then that Ketron told him it was unsafe. Barnes countered Ketron's testimony by stating that an employee was never "under the load" while the cover was being returned to the mill (15). Barnes asked the employee to move away from the guard. The miner did so, but came back to the guard after it was positioned six inches above the base where it was to be placed. At that time, the miner adjusted the guard so that it would set properly on the base (Tr. 180-182). Neither the citation nor the record indicates that Anaconda was charged with a violation for the adjustment of the cover immediately before its final placement on the base.

I consider in this circumstance that the evidence is equally balanced. All the witnesses in the rod mill were equally in a position to know the facts. No other person, such as the steelworker who moved the cover, was offered as a witness.

An additional issue is whether respondent's witnesses established a violation of 30 C.F.R. 55.16-9. Witnesses Merritt and Barnes stated that the bottom of the cover was 3 1/2 to 4 feet from the floor when a steelworker walked over with his arms extended, pushed on the center of the guard and straightened it out about ten degrees (10, 11, 12, 16).

I construe the standard in the same manner as in WEST 79-128-M, supra, and I find that the actions of the steelworker as described by the respondent do not constitute a violation. Respondent's version of the facts places the guard 3 1/2 to 4 feet above the floor. The miner's arms were extended horizontally when he pushed on the center of the guard. He was not under the suspended load. There was no evidence that the guard was unbalanced, or of such a size or shape that it was difficult for the crane to hold it securely above the floor. The miner being at least at arm's length from the guard was "clear of" the suspended load.

During the cross examination of Merritt he admitted that he saw "very little danger" when the cover was 3 1/2 to 4 feet off the floor (Tr. 122). He disagreed with MSHA's counsel on how much danger there was (Tr. 150-152). I do not take Merritt's statements to be an admission of a violation. The record taken as a whole aptly conveys Merritt's denial of a violation.

For the foregoing reasons I conclude that Citation 342194 and all proposed penalties should be vacated.

ORDER

Based on the stated facts and for the reasons indicated I enter the following Order:

1. In WEST 79-128-M: Citation 341994 and all proposed penalties are vacated.
2. In WEST 79-130-M: Citation 342176 and all proposed penalties are vacated.
3. In WEST 79-137-M: Citation 342194 and all proposed penalties therefore are vacated.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

1 The inspector did not know but he believed the tag line regulation, 30 C.F.R. 55.16-8 was advisory and not mandatory at the time of the inspection. The tag line standard provides as follows:

55.16-8 Taglines should be attached to suspended materials that require steadying or guidance.

~FOOTNOTE_THREE

3 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).

~FOOTNOTE_FOUR

4 Called load, guard, box or cover by various witnesses.

~FOOTNOTE_FIVE

5 The citation in this case alleges the worker was under the load while it was suspended 7 feet above the floor.