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SOL (MSHA) V. KENNECOTT COPPER  
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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

v.

KENNECOTT COPPER CORPORATION,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

DOCKET NO. WEST 81-17-M  
A.C. No. 42-00712-05015  
MINE: Arthur Concentrator

DOCKET NO. WEST 80-474-M  
A.C. No. 42-00149-05013 I

DOCKET NO. WEST 80-360-M  
A.C. No. 42-00149-05011 H

MINE: Bingham Canyon

Appearances:

James R. Cato Esq. Office of the Solicitor  
United States Department of Labor  
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Kansas City, Missouri 64106,  
for the Petitioner

Kent W. Winterholler Esq. and John B. Wilson Esq.  
Parsons, Behle & Latimer  
79 South State Street  
Salt Lake City, Utah 84147,  
for the Respondent

Before: Judge Virgil E. Vail

DECISION

STATEMENT OF THE CASE

The above three cases, which were consolidated for hearing, involve alleged violations of Section 110(a) of the Federal Mine Safety and Health Act of 1977 (hereinafter the Act), 30 U.S.C. 820(a) (Supp. III, 1979).

A hearing on the merits was held in Salt Lake City, Utah on April 27, 1982, where the parties were represented by counsel. Post hearing briefs were waived.

STIPULATIONS

At the outset of the hearing, the parties stipulated as follows:

1. The Bingham Canyon Mine and Arthur Concentrator of Kennecott Minerals Company are subject to the Federal Mine Safety and Health Act and the jurisdiction of the Federal Mine Safety and Health Review Commission.

2. The past record of citations against the Bingham Canyon Mine and Arthur Concentrator are such that it would neither warrant an increase or decrease in the amount of a penalty, if the Court should decide that a penalty was warranted in either one of the three cases.

3. The Bingham Canyon Mine and Arthur Concentrator of Kennecott Minerals Company are considered large in their relationship to other operations of this type.

4. The two individuals who issued the citations involved in this case are duly authorized representatives of the Secretary.

ISSUES

Whether the respondent violated the Act or regulations as charged by the Secretary and, if so, the amount of the civil penalties which should be issued.

DECISION

At the hearing, documentary exhibits were received and witnesses testified on behalf of the operator and MSHA. At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench. That decision which appears below with only nonsubstantive corrections is affirmed as my final decision at this time. (FOOTNOTE 1)

DOCKET NO. WEST 81-17-M

This involves Citation No. 577414 issued on June 4, 1980, and involves a 104(a) violation of mandatory safety standard 55.12-19 which states as follows:

Where access is necessary, suitable clearance shall be provided at stationery electrical equipment or switch gear.

~1086

The citation No. 577414 reads as follows:

Suitable clearance and/or adequate access was not observed to the six electrical disconnect switches/starters/circuit breakers at the east end of the tripper floor. Access clearance was blocked and made difficult by the following materials stacked in and around the electrical switches: (1) Numerous grease/ oil-soaked cardboard boxes partially filled with oily rags; (2) two dollies; (3) one empty large cardboard box; (4) one 18" x 18" (approx.) piece of heavy metal; (5) one 24" x 30" piece of thick rubber-like material; (6) several long pieces of wood. Employees are in this area daily. (FOOTNOTE 2)

The issue in this case is whether or not suitable clearance was provided in the area near and around the switch boxes, described as the east end of the tripper floor? Petitioner argues that there was not suitable clearance or what I interpret to mean access for personnel to the particular switch boxes located in the tripper area. Respondent argues that it was not necessary for there to be access to these switches, as there were other places where the equipment that was hooked up to the electrical boxes could be disconnected or the electricity turned off. Respondent further argues that if quick access was required to the particular disconnect switches to the machinery in the area cited herein due to an emergency, there were other ways to deal with this and it would not be necessary to use the switches at the east end of the tripper floor.

I find a preponderance of the evidence shows that in the area cited under Citation No. 577414, particularly the pictures, demonstrate graphically there was considerable debris, clutter, and material which prevented quick access to these particular electrical boxes. Evidence shows that those electrical boxes would be of considerable help in case there was an emergency where it would be necessary to have a quick disconnect of electricity to machinery in the area. Depending upon where the person who was to be responsible for turning the equipment off was located, he would have a difficult time getting through the debris that existed in this area. Exhibits P-3, P-4 and R-1 shows the various items of debris that the MSHA inspector observed at the location covered under the citation. There appears, from looking at Exhibit R-1, to be space to the right side of the debris where a person could walk through. However, a broken 2 x 4 on the floor, as well as the other debris, I feel constitutes a violation of 55.12-19.

I find the proposed assessment amount of \$195.00 is reasonable in view of the fact that this is an area where the respondent's employees would go

~1087

regularly to use products from a grease cabinet located in the area and would be aware of the conditions that existed there.

DOCKET NO. WEST 80-360-M

Docket No. WEST 80-360-M involves a 107(a) order of withdrawal and a 104(a) citation for a violation of mandatory safety standard 55.12-14 which states in part as follows:

Power cables energized to potentials in excess of 150 volts phase-to-ground shall not be moved with equipment unless sleds or slings, insulated from such equipment are used. When such energized cables are moved manually, insulated hooks, tongs, ropes or slings shall be used unless suitable protection for persons is provided by other means. . . .

Citation No. 576222 issued in this case states as follows:

The Michigan front-end rubber tire dozer was moving the energized 5000 volt power cable to the No. 45 shovel on the 6440 level with the dozer blade causing a potential shock hazard. The slings on either side of the protective insulated mats were not being used. The employee on the ground near the front end dozer was using tongs to help move the cable. (FOOTNOTE 3)

The issue is whether the power cable was being moved in such a manner as to jeopardize the employees health and safety?

Petitioner alleges that the testimony of the inspector should be believed in that he observed this activity of the dozer moving the sled upon which the cable was located and in so observing saw the cable come in contact with the blade of the dozer. He also testified he saw an employee in contact with the equipment.

Respondent argues that they were not in violation of 55.12-14 for the reason that they were using a sled and that the cable did not come in contact with the equipment nor did the employee come in contact with either the cable or the end loader.

I find the most credible evidence in this case is that of the operator of the end loader and respondent's employee who testified that he assisted

~1088

in moving the cable with a hook. Testimony in the case was that the cable lay in a trough through a mat of rubberized material (sled) covered with another strip of material on top of the cable. In the process of moving the sled the strip of material covering the cable came loose and that this is probably what the inspector saw and thought was the cable coming in contact with the blade. The fact that the inspector was not at the area where this was taking place, but observed it from afar (estimated to be 150 yards) makes the credibility of the two other witnesses more believable, and based upon that evidence I am going to vacate Citation No. 576222.

DOCKET WEST NO. 80-474-M

Docket No. WEST 80-474-M involves a 104(a) violation of mandatory safety standard 55.9-22 which provides as follows:

Berms or guards shall be provided on the outer bank of elevated roadways.

Citation No. 576220 which states as follows:

12 feet of the outer bank on the 6040 level haul road was not provided with a berm to prevent the electrical preventive maintenance truck No. 803 from going over the elevated bank, injuring two employees. The distance from the 6040 level to the 5990 level is approximately 50 feet.

Both parties stated that there were no witnesses to what happened and a decision as to what occurred must be based upon a careful review of all of the evidence. The evidence that was admitted in the manner of exhibits and testimony does not clearly point to what actually occurred. I see the issue, having heard all of the evidence and observed all of the exhibits that were submitted, is, whether the area where the truck went over the bank had fallen prior to its arrival there eliminating the berm or collapsed from the truck backing up to near the edge causing the bank to fall?

Respondent argues, based on the testimony of the driver, that he backed up to approximately 8 to 10 feet from the edge of the bank and stopped preparing to go ahead when the truck went over the embankment. Further, that members of respondent's safety investigative team were of the opinion that material at the bottom of the embankment resulted from the sloughing (FOOTNOTE 4) when the truck backed up to this point and went over the bank. Respondent further argued that Kennecott management has a good berm policy and they inspect for berms all the time which makes it unlikely that there was not a berm at this particular location.

Petitioner argues that based on the testimony of the inspector who arrived at the scene shortly after the accident and the pictures and other documents submitted in the way of evidence, that the material at the bottom of the area that apparently sloughed off does not indicate that it happened at the time the truck went over the bank and, therefore, there wasn't a berm at the top. Petitioner maintains this particular area had sloughed prior to the time the truck backed up there.

It is not a question so much as to whether or not at one time there had been a berm at this location, because the evidence shows a berm on both sides of the area where the truck went over which appears to have been adequate when it was installed. The question here is whether the embankment fell at sometime eliminating the berm prior to the electrical maintenance truck backing up here, or did the truck's presence and weight cause the bank to collapse thus eliminating the berm at that time?

Delbert S. Tapp, driver of respondent's truck involved in this accident, was asked on direct examination whether or not there was a berm where the accident occurred and he stated: "No, I didn't notice" (Tr. 170). On cross examination, Mr. Tapp was again asked if he saw a berm at this location and answered: "Not necessarily, I can't say as I did or didn't, because I wasn't paying attention" (Tr. 177-178). The witness was vague about this. I realize he was called by the petitioner to testify and I had the impression he was uncomfortable. I was surprised that it was his and everyone else's observation of the facts that Tapp stopped at the distance that he said he did from the edge of the bank (8 to 15 feet) and did not observe a berm, if one existed. I further find that the photographic evidence, and particularly Exhibits P-15 and P-16 show a large indentation and gapping hole on the top of the embankment, and Exhibit P-19 shows a large sloughed area, yet there is not a great amount of loose material shown at the bottom of the embankment as might be expected if the area caved when the truck backed onto the top area. I also note in Exhibit P-10 that there is little evidence of material around the truck where it ended up on its side after going over the bank. There is some material near the truck shown on the photos but with the size of the area that was supposedly sloughed off, I would expect a larger amount of material at the bottom and some on top of the truck which I don't see in the pictures.

I find that the most credible evidence is that the driver of the truck backed up and over the edge of the embankment causing the truck to fall to the bottom. I'm convinced that there was not a berm at this particular location and that it was eradicated when the area sloughed off at an earlier time. I further find that respondent had a policy of inspecting the respondent's mine for berms and repairing them when they needed repairing but they failed to see the need for repair in the area involved in this accident. Respondent should have observed this condition if their policy was working but apparently it is not infallible.

