CCASE:
SOL (MSHA) V. KENNECOTT MINERALS
DDATE:
19830929
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 82-31-M A/O No: 42-01660-05002
v.	Ore Haulage Plant
KENNECOTT MINERALS COMPANY, RESPONDENT	

DECISION

Appearances: James Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 911 Walnut Street, Kansas City, Missouri, 64106, for the Petitioner Mr. Vaughan Baird, Kennecott, Utah Copper Division, Magna, Utah 84044, for the Respondent

Before: Judge Moore

At the outset of the hearing, attorney Kent Winterholler announced that he had been instructed by the client not to represent it in these proceedings. He said that Mr. Vaughan Baird would represent Kennecott. I approved the withdrawal of counsel and the substitution of Mr. Baird. At the time I did not realize that Mr. Baird was not an attorney but in any event he gave his client adequate representation.

Government counsel then announced that with respect to Citation No: 0579407 the government had agreed to modify the citation so as to eliminate the "significant and substantial" finding and Kennecott had agreed to withdraw its notice of contest. When I asked the amount of the agreed penalty, I was told that they had not discussed any penalty. Mr. Baird expressed the belief that there was a standard penalty for a non-S&S violation. He also expressed his belief that the violation would not count as prior history if it was not S&S. I explained to the parties that the Commission and its judges are not bound by Part 100 of 30 C.F.R. MSHA is of course, bound by its own regulations and if a citation is not marked as "significant and substantial", and if it is abated in the time set by the inspector it would be considered a single penalty and the assessment would be $20. If the $20 is paid in a timely manner it will not be counted as a part of the respondent's previous history of violation. Once the notice of contest is filed, however, the rules change. The Commission and its judges are then bound to assess a civil

penalty in accordance with the six statutory criteria if a violation is proved or admitted. 30 C.F.R. 100.4 does not take all of the criteria into consideration and a number of the Commission judges have refused to be guided by that section.

Mr. Baird then agreed to pay the proposed penalty of $106. I accepted that agreement.

Citation No: 579403 initially alleged a violation of 30 C.F.R. 55.9-2. At the trial, it was amended, without objection, to alternatively allege a violation of 30 C.F.R. 55.16-14(a).

The subject of the citation is an overhead crane referred to by the witnesses as a bridge crane. The crane is used in a metal building where respondent builds and repairs ore cars. The building is 400 feet in length and 50 feet in width. The crane runs on rails placed near the ceiling that are 40 feet apart and run nearly the length of the building. The operator of the crane sits in a cab halfway between the two long rails and moves with the crane as it travels east or west along the 400 foot distance. The operator does not move with the lifting device as it is moved towards one or the other of the two rails. The rails run east and west and the crane can move something from almost anywhere in the building to almost anywhere else.

The crane lifts ore cars and parts of ore cars or material for use in their repair. 30 C.F.R. 55.9-2 appears under the heading "Loading, hauling, dumping." I need not decide whether the operation of this overhead bridge crane constitutes loading, hauling or dumping, because of the amendment to allege a violation of 30 C.F.R. 55.16-14(a). The latter standard requires:

> "operator-carrying overhead cranes shall be provided with:
>
> (a) Bumpers at each end of the rail.;"

The rails supporting this bridge crane did have bumpers at the ends but they were not placed properly and the crane could come in contact with the wall of the building if the wheels went all the way to the bumpers. The inspector measured the distance between the extension of the cab and the wall as 2" . The distance between the wheels and the bumpers was 24" .

The bumper blocks had once been in a safe position but the cab of the crane was modified in such a way as to make it bigger than it had been and thus necessitate moving the bumper blocks away from the wall, and this had not been done after the modification. There is some question as to when the modification was completed, but the admittedly hearsay evidence given by the inspector is more persuasive than the direct but unprecise evidence given on behalf of the company. The inspector was told that the

modification had been completed for 30 days and that a complaint had been filed with management concerning the lack of proper bumpers. Mr. Strong, a supervisor of crane operators, realized that the crane could hit the wall but did not think it would go through. He made no measurements. He thought that 3 or 4 days before the inspectors came in, he had sent in the order to move the bumpers. He does not think that the modification had been completed for 30 days. He said the mechanics showed up on July 22 at 8:00 A.M. to make measurements in preparation for moving the bumpers. It was the same day that Inspector Palmer had shown up. He could not say, however, exactly when he placed the order nor did the company attempt to produce any records or any other witnesses to show when the work had been completed on the cab and when the order had been placed to move the blocks.

The portion of the cab which would have come in contact with the wall contained electrical circuits connected with the control of the bridge crane. As stated earlier Inspector Palmer took measurements which indicated that this portion of the cab would have gone through the metal walls if the wheels had come in contact with the bumper blocks. Safety Engineer Klobchar took measurements after the blocks had been moved which showed that the addition to the cab would have penetrated the wall only 1-1/2" . His measurements were made after the blocks had been moved. Measuring from the old holes to the new holes, and measuring the distance between the wall and the cab with the wheels up against the newly located blocks and subtracting, was his method of determining how far the extension of the cab would penetrate the wall. The method he used assumes that the same blocks were used with the holes in the same place and that no changes in configuration of the blocks were made. There is no testimony to support these assumptions. The witnesses did refer to moving the blocks, but it could just as easily have meant moving the location of the blocks with different blocks being installed. I credit the inspector's method of measurement.

Furthermore, I think it was incumbent upon management knowing, as several witnesses knew, that the extension would hit the wall, to measure and find out beforehand, how much of a hazard was involved. Instead, they just told the crane operator to be careful and move slowly as she approached the blocks.

There were people working on the floor of the building and under the objects being moved by the crane. Inasmuch as the portion of the cab that would have contacted the wall contained electrical circuits which control the operation of the crane, contact with the wall, whether it went 1-1/2" into the wall or through the wall, could have caused the operator to lose control and perhaps drop whatever load was being carried. I consider it a serious hazard.

Kennecott is a large operation but it is in serious financial condition. Its owner, however, SOHIO is financially sound. There was good faith abatement and a moderate history of prior violations. If I were absolutely sure that the modifications had been completed 30 days before the inspection, I would find gross negligence. No one from management testified that the order to move the blocks was placed when the modification was completed. The blocks should have been moved before the modification was completed, so that there would have been no overlap in operating the modified crane and having the blocks in a safe position. I find a fairly high degree of negligence but not gross negligence. The citation is AFFIRMED.

A penalty of $300 is assessed.

Respondent is accordingly ORDERED to pay to MSHA, within 30 days, a civil penalty in the total amount of $406.

Charles C. Moore, Jr.
Administrative Law Judge