

CCASE:

MSHA V. ANACONDA

DDATE:

19810220

TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

February 20, 1981

SECRETARY OF LABOR

MINE SAFETY AND HEALTH

ADMINISTRATION (MSHA)

Docket Nos. WEST 79-128-M

WEST 79-130-M

WEST 79-137-M

v.

THE ANACONDA COMPANY

#### DECISION

We granted review of these three cases to determine whether the judge's decisions satisfied the requirements of section 8(b) of the APA, 5 U.S.C. •557(c), and our Procedural Rule 65, 29 C.F.R. □2700.65, and, if so, whether they are supported by substantial evidence. 1/ We find that they do not satisfy the APA and our rule and remand for findings of fact, conclusions of law, and the reasons for them.

The APA and our rule require findings of fact, conclusions of law, and supporting reasons in order to prevent arbitrary decisions and to permit meaningful review. As the D.C. Circuit has emphasized, these requirements "are not mere procedural niceties; they are essential to the effective review of administrative decisions." U.S.V. Pharmaceutical Corp. v. Sec'y of HEW. 466 F.2d 455, 462 (1972). Our function is

---

1/ 5 U.S.C. •557(c)(3) provides in part:

All decisions, including initial, recommended, and tentative decisions are a part of the record and shall include a statement of--

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record: and

(B) the appropriate rule, order, sanction, relief, or denial thereof. (Emphasis added.)

5 U.S.C. •557(c)(3) is applicable through •105(d) of the 1977 Mine Act, 30 U.S.C. •815(e)( Supp. III 1979), which provides for hearings in accordance with 5 U.S.C. •554.

Procedural Rule 65 provides in part:

(a) Form and content of the judge's decision. The judge shall make a decision that constitutes his final disposition of the

proceedings. The decision shall be in writing and shall include findings of facts, conclusions of law, and the reasons or bases for them, on all material issues of fact, law or discretion presented by the record, and an order. (Emphasis added.)

~300

essentially one of review. See 30 U.S.C. •823(d)( Supp. III 1979). Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively. See Duane Smelser Roofing Co. v. Marshall, 617 F.2d 448, 449-450 (6th Cir 1980); U.S.V. Pharmaceutical Corp., supra; UAW v. NLRB, 455 F.2d 1357, 1369-1370 (D.C. Cir. 1971); Anglo-Canadian Supply Co. v. FMC, 310 F.2d 606, 615-617 (9th Cir. 1962); R.W. Service Systems, Inc., 235 N.L.R.B. No. 144, 99 L.R.R.M. 1281, 1282 (1978).

In the very brief decisions under review, the judge determined that the Secretary had not met his burden of proof to demonstrate violations of 30 C.F.R. •55.16-9. 2/ The three cases were heard at one time with several witnesses testifying on all three alleged violations. Each decision contained a few sentences summarizing the evidence and then a section labeled "discussion." Those discussions were virtually identical and stated:

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 (2nd 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 who has the burden to go forward has failed to sustain that burden. Bishop v. Nikolas, 51 N.E. 2d 828 (1943), and see Aluminum Co. of America v. Preferred Metals Products, 37 F.R.D. 218 (1965), aff'd 354 F.2d 658.

The judge then vacated the citations and dismissed the petitions for assessment of penalties.

The facts in these cases are neither as similar nor as simple as the decisions would lead one to believe. The first case, WEST 79-128-M, involved relocation of a large metal cabinet on the ground floor of Anaconda's weed concentrator facility. Two MSHA inspectors testified for the Secretary that the cabinet was lifted six feet and an employee walked with it as it was moved 20 feet. One inspector testified that the employee "with both palms, was underneath the cabinet steadying and again guiding it as it moved laterally." Tr. 12-13. The other inspector testified that the employee walked beside the cabinet with both hands underneath it. Tr. 194. Two witnesses testified for Anaconda that the cabinet was about 10 inches

off the floor and no part of an employee's body was underneath it. Tr. 108, 187-188. They indicated that the employee walked beside the cabinet and guided it with out stretched arms. Tr. 109, 187.

---

2/ 30 C.F.R. •55.16-9 provides:

Mandatory. Men shall stay clear of suspended loads.

~301

The judge's summary reflects the foregoing testimony. The judge found the witnesses to be "equal in character, equal in interest, and equal in opportunity to know the facts" and not to have been corroborated. He made no findings of fact as to any of the events in this case and provided no reason or basis for describing the witnesses as "equally credible." In addition, the judge made no attempt to apply to the facts of this case the standard allegedly violated. Anaconda's evidence shows that the cabinet was suspended about 10 inches above the floor while an employee alongside guided it with his hands. The judge's result shows he did not believe this proved a violation of the standard. Nevertheless, we note that the standard broadly requires employees to stay "clear of," not merely out from underneath, suspended loads. Yet the judge did not discuss the elements of a violation of 30 C.F.R. •55.16-9, nor did he explain whether even Anaconda's version of events might make out a violation. In sum, without findings of fact and supporting reasons, we cannot effectively review this decision. We express no view on the correctness of the judge's conclusions; we wish to see the basis for them.

The second case, WEST 79-130-M, involved the moving of a cart containing oxygen and acetylene tanks from the second level of the weed concentrator building to the ground floor. Again the judge found the evidence to be equally balanced. The two MSHA inspectors stated that two Anaconda employees were directly beneath the cart as it was lowered and they reached up, each grabbing a wheel, to guide the cart. Tr. 23-24, 195-196. Anaconda presented one witness who stated that no employee was ever under the load and two men remained on the second level and used a tag line to guide the cart to the lower floor. Tr. 114-116. The judge's brief recitation of the evidence mentions only one federal inspector. His "discussion" again states, "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.'" This reference to the Secretary's evidence as uncorroborated is not explained. Again the judge made no findings of fact and supplied no reasons for characterizing the witnesses as equal in credibility. We express no view on the result in this case, but remand for findings of fact,

conclusions of law, and supporting reasons.

The remaining case, WEST 79-137-M, concerned the lifting and moving of a rod mill guard to its base on top of the mill. One MSHA inspector testified that an employee guiding the guard with his palms walked directly under as it was laterally moved 12 feet. Tr. 44-45. 79. The judge described this inspector's testimony, but not that of the other inspector. The second inspector indicated that a violation of the safety standard occurred after the lateral movement when the guard was hoisted over a trauma screen to be positioned on top of the mill. Tr. 199. He testified that the guard was lifted six feet and then an employee "grabbed a hold of it and swung it around." Id. He stated that a second worker stood on the opposite side of the guard within one or two feet of it. Id. Anaconda's two witnesses corroborated the second inspector's testimony regarding the final placement of the rod mill

~302

guard on top of the mill. They both stated that an employee walked over to the guard and straightened it with outstretched arms when it was hoisted about four feet off the floor. Tr. 121-122, 180-181. The employees aligned the rod mill guard both before and after it was lifted six or seven feet to clear a trauma screen. Tr. 123, 166, 180-182. Again the judge did not make factual findings or explain why he found the testimony to be uncorroborated and equally credible. Nor did he consider whether the facts on which two Anaconda witnesses and one MSHA inspector agreed--i.e. a worker used his hands to straighten a rod mill cover that was suspended four feet off the floor--described a violation of 30 C.F.R. §55.16 9. As in the other cases, the judge's conclusory decision is not sufficient, and we remand this case as well.

Finally, we note that the judge found that the Secretary failed to carry his burden because the evidence was equally balanced in each of these cases. We acknowledge that equipoise is possible. We believe, however, that such situations are exceedingly rare because proper control of the hearing and careful analysis of the evidence will ordinarily permit findings of fact and resolutions of contested matters. These decisions do not adequately explain how this phenomenon occurred in three cases with different circumstances. For the foregoing reasons, we find that these decisions have "cross[ed] the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841,852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Accordingly, the three decisions are reversed and the cases are remanded for further proceedings.

~303

Distribution

Michael McCord, Esq.

U.S. Department of Labor

Office of the Solicitor

4015 Wilson Boulevard, Suite 400

Arlington, VA 22203

Edward F. Bartlett, Esq.

Karla M. Gray, Esq.

Anaconda Copper Company

P.O. Box 689

Butte, Montana 59701

The Honorable John J. Morris

Federal Mine Safety and Health

Review Commission

333 W. Colfax Avenue

Denver, Colorado 80204

Phyllis K. Caldwell, Esq.

Office of the Solicitor

U.S. Department of Labor

1585 Federal Building

1961 Stout Street

Denver, Colorado 80294