

CCASE:
SOL (MSHA) & PHELPS DODGE
DDATE:
19810212
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER
UNITED STEELWORKERS OF AMERICA,
LOCAL 616,
PETITIONER

Civil Penalty Proceeding
Docket No. WEST 80-134-M
A/O No. 02-00024-05008-H
Morenci Mine and Mill

v.

PHELPS DODGE CORPORATION,
RESPONDENT

DECISION

Appearances: Alan Raznick, Esq., Office of the Solicitor, U.S.
Department of Labor, San Francisco, California,
for Petitioner, MSHA;
Angel Rodriguez, United Steelworkers of America,
Local 616, Clifton, Arizona, for Petitioner, United
Steelworkers of America
James G. Speer, Esq., and Stephen Pogson, Esq., Evan,
Kitchell and Jenckes, Phoenix, Arizona, for Respondent,
Phelps Dodge Corporation

Before: Judge Merlin

This case is a petition for the assessment of a civil
penalty filed by the Government against Phelps Dodge Corporation.
A hearing was held on January 20, 1981.

At the hearing, the parties agreed to the following
stipulations (Tr. 5-6):

1. The operator is the owner and operator of the subject
facility.
2. The operator and the mine are subject to the
jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction of this
case.
4. The inspector who issued the subject order was a duly
authorized representative of the Secretary.

5. A true and correct copy of the subject order was properly served on the operator.

6. Copies of the subject order and termination are authentic and may be admitted into evidence for purposes of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any statement asserted therein.

7. The imposition of any penalty will not affect the operator's ability to continue in business.

8. The alleged violation was abated in good faith.

9. In the 8 to 12 months prior to June 1979, the operator had 60 violations and there were 66 inspection days. This is a low history.

10. This is an open-pit mine which produced 2 million tons in 1979. It is large in size.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 17-176). At the conclusion of the taking of evidence, the parties, in an off-the-record conference, 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. A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 189-193).

BENCH DECISION

This case is a petition for the assessment of a civil penalty for an alleged violation of 30 C.F.R. 55.12-16. The subject mandatory standard provides as follows:

Electrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked-out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The alleged violation is as follows: "Lock-out procedures were not in use at the smelter jaw crusher. Men were observed working and getting into the panfeeder hopper of the jaw crusher."

Many of the essential facts are not in dispute. Rocks which had been dumped by trucks into the chute or pocket leading to the panfeeder became jammed. The crusher operator was standing on the rocks which were lying on the panfeeder inside the pocket as the inspector arrived on the scene. At that time, the panfeeder was not running since it had been turned off by pushing the button on the nearby control panel. The operator admits that the fact that the button on the nearby control panel was pushed does not constitute a lock-out procedure or otherwise satisfy the mandatory standard. The testimony makes clear that the button on the control panel could be accidentally pushed and the panfeeder started up. Also, the testimony indicates that sometimes the button got stuck because of dust.

What is involved here is an interpretation of the subject mandatory standard and certain of its specific terms. The operator contends, first, that mechanical work was not being performed. In the operator's view, dislodging the rocks does not constitute mechanical work.

I conclude that mechanical work was being done. "Mechanical" is defined in the first instance as "of or pertaining to machinery or tools." Webster's New Collegiate Dictionary, 1979 edition. This chute was an integral unit of an assemblage of parts making up a complicated machine. Also, specific tools such as a jackhammer with a long bit, a long crowbar, and a crane, were used to dislodge rocks, depending on the circumstances. The work done to restore and reinstitute operation by dislodging the rock was therefore, mechanical. There is no basis to limit mechanical work to maintenance or to work done only by mechanics. If the mandatory standard intended such a limited interpretation, it could easily have set forth such a circumscribed definition.

The next issue is whether dislodging the rocks falls within the purview of the standard's requirement that electrically powered equipment be deenergized and that, thereafter, lock-out procedures be followed. The panfeeder was electrically powered. The chute itself, of course, was not. The rocks were poured into the chute from a higher level by truck, and because of gravity, they fell downward onto the panfeeder unless, as here, they became jammed. However, after giving the matter much thought, I do not believe it makes sense to split the subject process into separate components for purposes of applying this mandatory standard. The movement of the rock was one integral process involving electrically powered equipment. This process should be viewed as an indivisible whole. This was the inspector's

view and I accept it. Moreover, as the Solicitor pointed out, to hold that the subject condition did not fall within the standard would result in not requiring any protection here, whereas if the panfeeder itself were broken, such protection would be afforded although the same injuries could result in both situations. Such inconsistent consequences are to be avoided wherever possible.

Accordingly, I conclude the subject condition is covered by the mandatory standard.

With respect to gravity, the injury was potentially serious. Standing on the rocks was unstable and if the panfeeder should start up, the individual standing on the rocks could trip, fall and be hurt. The description of the operator's witnesses as to how the individual hung onto a rope and kept one foot on a step demonstrates to me that a serious risk was involved. Nevertheless, I note that the evidence does indicate there have not been any injuries from this type of condition. In light of all the evidence in the record, I conclude the violation is serious.

I further conclude the operator was guilty of ordinary negligence.

I further bear in mind the stipulations entered into by the parties with respect to the other criteria set forth in section 110, and in this instance I note particularly the operator's low history.

In light of the foregoing, and particularly in light of the operator's low history, a penalty of \$750 is assessed.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The operator is ORDERED to pay \$750 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge