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

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

v.

PHELPS DODGE CORPORATION,  
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. CENT 79-370-M  
A/O No. 29-00159-05508

DOCKET NO. CENT 79-371-M  
A/O No. 29-00159-05009

DOCKET NO. CENT 79-372-M  
A/O No. 29-00159-05010

MINE: Tyrone Mine and Mill

DECISION

APPEARANCES:

Marigny A. Lanier Esq.  
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United States Department of Labor  
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for the petitioner

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363 North First Avenue  
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for the respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE:

Pursuant to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the petitioner seeks an order assessing civil monetary penalties against the respondent for violations alleged in 3 citations involved in the above captioned cases. An order was issued consolidating the cases for hearing. The citations allege a violation of 30 C.F.R.

55.3-3 (FOOTNOTE.1) in case CENT 79-371-M, and separate violations o

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30 C.F.R. 55.3-5 (FOOTNOTE.2) in cases CENT 79-370-M and CENT 79-372-M. The violations allegedly took place on April 24, 1979.

The respondent admits jurisdiction of the Commission, denies all other allegations and alleges that men were not working near or under dangerous banks at its Tyrone, New Mexico mine.

FINDINGS OF FACT:

1. The alleged violations took place at respondent's open pit, multiple bench copper mine located at Tyrone, New Mexico.

2. The respondent is a large operator and the penalties proposed will not affect respondent's ability to continue in business.

3. The respondent has a history of 55 cited violations from July 20, 1978 through April 24, 1979 at its Tyrone, New Mexico mine. Of this number, there have 28 assessed violations paid.

4. In 1978 there were 723 miners employed at respondent's Tyrone Mine and 1,064,340 annual man hours were worked by those miners. (Tr. 193).

5. The violations alleged were promptly abated in good faith.

6. The mining sequence followed at the open pit mine is to drill into the material containing the ore and to set explosive charges in order to blast the material loose. The material is then scooped up and hauled away for processing.

7. As the copper ore and other material is removed, a bench slope plan is followed by the respondent. (Ex. R-6). This plan calls for the horizontal benches to be approximately 25 feet in width and the bench levels to be approximately 50 feet apart. These catch benches are separated in stair step fashion by a sloping wall.

8. The catch bench is a ledge that runs horizontally in the mine and it helps to confine or restrain loose material that may fall from higher up in the pit. (Tr. 16).

9. On April 24, 1979, at a location in the mine referred to as the Gettysburg drop cut, a decline or rim leading from one level down to another, the No. 13 electric shovel was observed by the MSHA inspector loading haul trucks with material that had been blasted previously.

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10. The walls and benches above the area where the material was being loaded into haul trucks by the No. 13 shovel extended up approximately one hundred to one hundred fifty feet to the top or crest of the bank.

11. The maximum upper reach of the No. 13 electric shovel was approximately 50 feet.

12. On April 24, 1979, at another location in the mine the No. 3 shovel was being operated to clean up rock material at the bottom of a bank or pit wall. The bank was approximately one hundred fifty to two hundred feet high. This operation was also observed by the MSHA inspector.

#### DISCUSSION:

DOCKET NO. CENT 79-372-M; Citation No. 162124:

The wall of the mine that slanted away from the work area at the Gettysburg drop cut was approximately 150 feet high. Approximately 50 feet from the top of the wall was a horizontal catch bench and 50 feet below the first bench was another catch bench. According to the bench slope plan, these benches were to be approximately 25 feet wide, from the toe of the wall out to outer edge of the bench. Photographs taken of the Gettysburg drop cut by the MSHA inspector at the time of the inspection show that the catch benches had collected a considerable amount of rocks and earthen material. Men were working near the toe of the bank which was approximately 150 feet high. The MSHA inspector observed one haul truck up next to the bank being loaded by the No. 13 shovel and another truck approximately 20 feet away from the high wall. Thus, the employees were working near or under the bank and the question presented is whether the bank or wall was dangerous.

On April 24, 1979, the No. 13 shovel was at times operating within 20 feet of the toe of the bank and the pit wall which rose approximately 150 feet above. The catch benches on the banks above the operator had almost completely filled up with rock material. Rocks which might fall from the top of the wall would not have the catch bench available to stop or at least slow the fall. The cab of the shovel operator sits approximately 25 to 30 feet above the ground. If the rocks were falling from the catch bench, approximately 50 feet up the bank from where the shovel was operating, the rocks would probably not present a hazard and the bank would not be dangerous. Since the catch benches contained a large amount of rock and earth material, a rock which might fall from the top, 150 feet up, would not effectively be restrained, slowed, or stopped by the catch benches on its way down. This condition would present a hazard to the operator of the shovel as well as the haul truck drivers and persons walking on the ground near these vehicles in performance of their duties. All of these persons were observed at the site by the MSHA inspector. The operator testified that he observed rock fall from the 100 foot level above him and that he considered this condition to be hazardous. He also

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testified that the rock could come through the cab of the shovel which he was operating. The operator had complained to his supervisor about the dangerous high wall and worked near the high wall for approximately two hours before he was told by his supervisor to take the shovel out of that location. However, no areas were barricaded or posted.

On the date of the inspection, the heavy equipment operator also observed that there were no catch benches on the high wall above the No. 13 shovel. He stated that the catch benches were filled up with material which made the benches slope at an angle instead of being flat and horizontal. In other places, the bench had been "dug back or had fallen off to be non-existent." (Tr. 116).

It is undisputed by the parties that catch benches are necessary and perform the function of restraining, stopping or slowing down rocks and materials which may fall down the face of the bank. Respondent concedes in its post hearing brief that there was rock on the benches. It further states that this is not very surprising since the purpose of the catch bench is to catch rock which may fall due to blasting or for some other reason. However, the question is what if the benches are no longer available to catch rock because they have been filled by material or are missing in some places directly above the location where the miners are working? If there are no effective catch benches above the miners, then there would be little to prevent rocks from falling unimpeded down the face of the bank.

There was testimony that the loose and unconsolidated rock material observed by the MSHA inspector and by the miners on the bank could move because of the freeze-thaw characteristics of weather, because of blasting taking place in nearby areas of the mine, because of rainfall, wind or for any other reason which might set the rock material in motion. Of particular significance is the testimony of the truck driver who was working in connection with shovel No. 13 at the Gettysburg drop cut near the time of the inspection. He testified that while he was in the cab of his empty truck waiting for another truck to finish being loaded by No. 13 shovel, part of the bank above him came down and hit the side of his truck. He looked in the rear view mirror and saw dust and some debris still falling. His truck was parked within two feet of the bank. The driver testified that he had difficulty driving away after his truck was loaded due to the rock material that had fallen under his truck from the bank.

The catch benches above the No. 13 shovel had accumulated rocks and earthen material and were no longer effective in restraining, slowing or stopping rocks from falling. This condition made the banks dangerous for the miners who were working near or under them. There was considerable risk or peril of injury to the miners if they were struck by rocks or debris falling down the side of the high bank. Thus, I find that Citation No 162124 should be affirmed.

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DOCKET NO. CENT 79-371-M, Citation No. 162126:

The width of the benches above the Gettysburg drop cut was originally approximately 25 feet and the height was approximately 50 feet. There is no evidence that these specifications were not proper by engineering standards. The MSHA inspector concluded that since the benches above had effectively filled up and could no longer serve to catch falling or sliding rocks the equipment used would have to be able to clean off potentially falling rocks from the pit wall or bank above. In this case the bank was approximately 150 feet high and the shovel had a reach of 50 feet. Thus, the shovel would be unable to reach high enough to clean off the entire bank. The inspector also testified that there would have been no violation of the regulation if the catch benches had been maintained.

The 50 foot height of the original benches was proper for the equipment used because the shovel could reach up to 50 feet and thus to the edge of the bench above. Once the benches have sloughed away in places and filled up in others it would be difficult to maintain them. A geologist who testified for the respondent stated that it would present a danger to a miner to go onto benches above and clean them off. Only smaller equipment could be used for that purpose and that equipment would not be able to reach up 50 feet to clean off the bank. (Tr. 372).

The interpretation of the standard advanced by the petitioner would require the respondent to continually maintain catch benches in locations where there was no longer any mining operation going on. The standard requires the height and width of benches to accommodate the type equipment to be used and in this case no equipment was to be used on those benches. The height and width of the benches were of proper dimensions when the mining took place. The problem arose because the benches sloughed away in some places and filled up in others after they were no longer in use, thus, making them ineffective in arresting material that could fall down the bank. It was for this reason that the conclusion was reached in the previous citation that the bank was dangerous. It was up to the respondent in that instance to promptly correct such unsafe ground conditions.

A violation of 30 C.F.R. 55.3-3 has not been proven by a preponderance of the evidence and Citation No. 162126 should be vacated.

DOCKET NO. CENT 79-370-M, Citation No. 162125:

On April 23, 1979, the No. 13 shovel was being operated to clean up material at the toe of a bank on the southside of the pit. (Tr. 126). The cab of the shovel was within approximately 20 feet of the bank and the cab was approximately 20 to 25 feet above the ground. There was also a service employee of the respondent on the ground between the shovel and the bank. The bank under which the shovel operator and the service employee were working was approximately 150 to 200 feet high. The catch benches were approximately 50 feet apart and had sloughed and

filled with rock and rock material. The shovel operator testified that a rock about half of the size of a fist had come off of the bank, struck the window of his cab and shattered the glass. The operator did finish his loading duties for that day. However, he refused to go back on the shovel at that location the





Mandatory. To ensure a safe operation, the width and height of benches shall be governed by the type of equipment to be used and the operation to be performed.

~FOOTNOTE\_TWO

Mandatory. Men shall not work near or under dangerous-banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.