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SOL (MSHA) V. PHELPS DODGE
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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	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 80-349-M
v.	A/C No. 29-00159-05012
PHELPS DODGE CORPORATION, RESPONDENT	MINE: Tyrone Mine & Mill

Appearances:

Linda Bytof Esq. Office of the Solicitor
United States Department of Labor
11071 Federal Building, Box 36017, 450 Golden Gate Avenue
San Francisco, California 94102,
Appearing on behalf of the Petitioner

James Speer Esq. and Stephen Pogson Esq.
Evans, Kitchel & Jencks
363 North 1st Avenue, Phoenix, Arizona 85003,
Appearing on behalf of the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent Phelps Dodge Corporation (Phelps Dodge) with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held on March 25, 1982 in Phoenix, Arizona. At the conclusion of the evidence the parties waived their right to file post trial briefs and they further requested a bench decision.

Based on the evidence I issued the following bench decision:

JURISDICTION

The parties in the pleadings filed in this case admit that the Federal Mine Safety and Health Review Commission has jurisdiction over the parties.

SETTLED CITATIONS

Petitioner has moved to vacate citations 162308, 162309, 162310 and to vacate all penalties in connection with those citations. The motion to vacate is granted. The citations and penalties should be vacated.

Respondent has also moved to withdraw its notice of contest to Citation 162205 and pay the proposed penalty. That motion is granted. Citation 162205 the proposed penalty is $72.00 should be affirmed.

CITATION 162203

The petitioner in this citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.9-11 which provides as follows:

> Mandatory. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.

ISSUES

The issues are whether respondent violated the regulation and, if a violation occurred, what penalty is appropriate.

FINDINGS OF FACT

Furloughed MSHA Inspector Bill Novinger testified for the petitioner. On March 11, 1980, inspector Novinger was at the Phelps Dodge mine arriving there about 7:30 a.m. At that time he saw a Caterpillar loader in the respondent's crushing area next to the primary crusher. It was parked 35 to 50 yards from the primary crusher. The Caterpillar is a large rubber tired vehicle with a cab that can be entered seven feet above the ground. Access to the cab is provided by a ladder.

Inspector Novinger observed that the upper glass of the cab window was shattered on the left side and short pieces of glass were protruding. The window itself measures 20 inches wide and 30 inches high. The entire upper window was broken into four or five pieces. The lower window was missing altogether.

The inspector and a company representative had the pieces of glass removed with the worker holding a cloth to protect his hand. The hazard here was that the glass could fall out and strike a worker either inside or outside the cab. Vibration could also cause the glass to jiggle out and

strike the driver. The citation was abated the following day. The inspector extensively reviewed the company records and reached a conclusion that some of the shop people were not aware of some of the defects in the equipment.

DISCUSSION

Witnesses Terrazas and Shupe offered by the respondent, in my view, do not establish a defense for this violation. Witness Terrazas reviewed the company records and they indicated that two days before this citation was issued the loader was in the repair shop for some welding work. Ordinary procedure would require somebody in the welding shop to have repaired the broken window. This was apparently not done and there was no record from the shop of it having been done.

Respondent's code of safety practices and the operator's checklist (R1 and R2) merely establishes that the company has an internal procedure to be followed if defective equipment enters the repair shop. However, there is no evidence indicating that the window was repaired when the loader was in the shop for other repair work.

The most devastating evidence offered by the government in this particular citation is that this equipment was in close proximity to the workers and sitting on the ready line where any worker could use it. In this condition, there was no reason it couldn't have been seen by a supervisor and ordered removed from service. I further note that when the MSHA representative and the company official called for a worker to start the equipment, he was able to do so. The equipment, at that time, was obviously not locked out, nor had it been removed from service.

The law is clear in these circumstances that where defective equipment is available for use, the mine operator must be held in violation of the mandatory standard.

CIVIL PENALTY

The criteria for establishing a penalty and for assessing such a penalty is contained in 30 U.S.C. 820(i). Considering that statutory criteria, I deem that the proposed civil penalty of $48 for the violation of citation 162203 is appropriate and should be affirmed.

CITATION 162312

Petitioner in this citation alleges that respondent violated Title 30, Code of Federal regulations, Section 55.9-2 which provides as follows:

> Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

FINDINGS OF FACT

MSHA representative Charles Price inspected the Phelps Dodge work site in March 1980. The inspector observed an "electra-haul" vehicle which has a hauling capacity of 170 tons. The vehicle has six large tires each with a diameter of ten feet, six inches. A strip of rubber (two inches deep by two and a half to three feet long) was missing on the outside portion of the rear tire. "Electra-Haul" vehicles move at 5 to 30 miles per hour in a pit area which has a number of grades in it.

On the same day of the inspection, witness Jack M. Alexander was present. Mr. Alexander has attended a number of training schools on the functions and hazards of tires and their rim components. He has studied the company literature on the matter and has extensive work dealing with Goodyear tires in his last 30 years in that particular field.

The particular tire on this truck was manufactured by the Goodyear Company. The tires are made from a radial base ply and there are six steel breakers above the body ply. The tread is 2-1/4 inches deep when the tires are new. The purpose of the rubber tread is for traction and the steel breakers are made of steel. The missing portion of the tire tread had come off near the shoulder of the tire. It was possible to see the top breakers. The strength of this tire was as good as the one next to it. There were 3,000 to 5,000 miles of safe operation left in this particular tire. The missing tire tread was not in contact with the pavement. A blowout would not occur unless at least three to four metal breakers are disrupted. The metal in this tire was in good condition.

DISCUSSION

The regulation at Part 55.9-2 has two facets. The first portion concerns whether there is an "equipment defect."

Petitioner can establish a prima facie showing of a defect by proving that the equipment was being used in a different condition from that in which it was received from the manufacturer. Obviously, Goodyear Tire does not supply tires with portions of the tread missing. Accordingly, I conclude that an "equipment defect" existed. (FOOTNOTE 1)

The second requirement of the standard is whether the equipment defect "affected safety". In this regard, I find the witness, Jack M. Alexander, to be credible as he has broad experience in tires of this type. On the other hand, petitioner's witness, MSHA inspector Price, disavows any claim of expertise as to tires. Inasmuch as I find witness Alexander to be credible, I believe his testimony that the equipment defect involved here did not affect safety. For that reason, I conclude that citation 162312 should be vacated.

Petitoner's counsel argues in her closing argument that the term "affecting safety" should be broadly construed. I agree. The regulation is a broad umbrella inasmuch as the purpose of the Federal Mine Safety and Health Act of 1977 and its predecessors is to promote the safety of miners. I also have no quarrel with the cases she cites that safety had been affected in situations involving loose lug nuts, a rusted out brake, and inoperative rear signals. However, dealing with the evidence in this case, I do not find that the defect on this tire was one that "affected safety."

Counsel for the petitioner also argues that there was a lack of balance in the defective tire. This condition could put more pressure on one tire than the other. That may be, but the evidence fails to establish that such a lack of balance was one that would affect safety.

Based on the foregoing findings of fact, the conclusions of law, I enter the following order:

ORDER

1. Citation No. 162203 and the proposed penalty of $48 are affirmed.

2. Citation No. 162308 and all penalties therefor are vacated.

3. Citation No. 162309 and all penalties therefor are vacated.

4. Citation No. 162205 and the proposed civil penalty of $72 is affirmed.

5. Citation No. 162310 and all penalties therefor are vacated.

6. Citation No. 162312 and all proposed civil penalties are vacated.

POST TRIAL ORDCER

The foregoing bench decision is affirmed.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

In Allied Chemical Corporation, WEST 79-165-M (March 1982) (pending on review) a violation of this standard was ruled to have occurred when the mine operator used equipment that did not contain an integral part (a chock) originally provided by the manufacturer.