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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 82-33-M
A.C. No. 29-00159-05018

v.

Tyrone Mine & Mill

PHELPS DODGE CORPORATION,
RESPONDENT

Appearances: Marigny A. Lanier, Esq., Office of the Solicitor,
U. S. Department of Labor, Dallas, Texas, for
Petitioner, MSHA James G. Speer, Esq. and
Stephen W. Pogson, Esq., Evans, Kitchen &
Jenckes, P.C., Phoenix, Arizona, for Respondent

DECISION

Before: Judge Merlin

This case is a petition for the assessment of a civil
penalty filed by the Secretary of Labor against Phelps Dodge
Corporation for an alleged violation of 30 C.F.R. 55.9-2.

Section 55.9-2 provides as follows:

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

The subject citation which is dated May 15, 1981 reads as
follows:

After talking with Kim Kersey, Maintenance Foreman,
Kaye Staley, Driver, Milo Lambert, Miners
Representative and Dave Kuester, Miners Representative,
I have reason to believe there was a safety defect
affecting safety on the #214 Muck Truck involving the
front suspension in that prior to my arrival on the
property there had been much controversy

about the suspension. The drive[r] went so far as to ask for a blue card in order to go to the doctor if not taken off the truck or the truck repaired. On 5/8/81 a telephone call was received by the MSHA Office in Carlsbad, N.M. to voice their complaint. They were advised to contact Milo Lambert or Dave Kuester the Miners Representatives. I arrived on the property at approximately 1800 hours on the 13th of May 1981 on other business. We returned the following morning to complete the other business and to serve other complaints. When we arrived we noted that the #214 Muck Truck was in the truck shop being repaired. The morning of the 15th of May 1981 we served the complaint on the #214 truck. We learned that the #214 truck had been put into the shop for a routine maintenance service on the same morning that we were driving to Silver City, N.M. in that the company was aware that we were on the way over, because of a phone call to the company made by Sidney R. Kirk, Supervisory Inspector MSHA concerning the investigation of an accident.

The inspector who issued the citation testified that a miner complained to MSHA that the suspension on the No. 214 haulage truck was bottoming out and represented a hazard to safety (Tr. 10-11). As a result of this complaint the inspector was told to visit the mine and check out the truck (Tr. 10-11). At the hearing the inspector was confused and inconsistent about when he visited the mine and talked to the drivers (Tr. 11, 14, 17, 25, 27-28, 33-34, 41-47, 55). After reviewing his testimony I find that on or about May 15 during the day he visited the repair shop at the mine and spoke to the repair shop foreman about the 214 truck (Tr. 27-28, 34, 43). When the inspector arrived the front suspension already had been removed and a new suspension had been installed (Tr. 14, 73-74). The shop foreman complained to the inspector about spending \$6,000 to replace a front suspension that was still good but he said that the replacement was being done because it was called for under the company's preventive maintenance schedule (Tr. 15-16, 55-58). The old suspension was in the back of the shop where the inspector could have seen it but he did not (Tr. 191-192, 194). The inspector admitted that he had no personal

knowledge of the condition of the removed suspension and that he was not familiar with the company's preventive maintenance schedule (Tr. 31-33, 48-50). The inspector told the operator's safety inspector that he would decide whether or not to issue a citation after he had spoken to the drivers of the 214 truck (Tr. 21-22, 25).

That evening the inspector spoke to several drivers of the 214 truck including Kay Stailey, Pedro Mondragon, K. W. Donaldson, Emory Baker, Juan Verdugo, and Ramon Nava (Tr. 36-37, 45-46). According to the inspector they told him that because of worn out suspensions the truck bottomed out, was unstable and control of its steering could not be maintained (Tr. 17-18, 36). They also advised the truck rode rough and Ms. Stailey who told the inspector she drove the truck on May 8, said she had hurt her back because of the bad suspension (Tr. 46-48). Based upon what the drivers told him the inspector decided to issue a citation, wrote it up 2 days later and then mailed it to the operator (Tr. 20-22, 54). However, the inspector erroneously put down the issuance date as the day he had spoken to the foreman and the drivers (MSHA Exh. No. 1).

Five of the drivers who had operated the 214 truck testified at the hearing. The first and most important was Ms. Stailey. It was she who complained to MSHA that on May 8 when driving the truck she injured her back due to the bad suspension (Tr. 47-48, 85). She repeated these complaints at the hearing, testifying that on May 8 the truck drove like a jackhammer due to bad suspension (Tr. 85-86, 92). She also contended that the cab and back of the truck were loose (Tr. 86, 93). She said she had complained three times that night and finally because her back hurt she asked for a blue card which would have enabled her to go to the hospital (Tr. 87-88). On cross examination Ms. Stailey agreed that according to established procedures the drivers fill out a checklist for each truck they drive (Tr. 95). If more than one truck per shift is driven by a driver, the driver must fill out a checklist for each truck (Tr. 128). The checklist sets forth several items including suspension, with respect to which the driver is supposed to report any problems or deficiencies (Tr. 96, Optr's. Exh. Nos. 2-8). There is also a place on the form for driver comments. The checklist which Ms. Stailey filled out for May 8 indicates she drove the 219 truck, not the 214 (Optr's. Exh. No. 2). Ms. Stailey contended that she made her 9's like 4's but the operator produced her checklists for the period April 1 through May 16 (Tr. 103-104, Optr's. Exh. Nos. 2 and 3). It is clear

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from an examination of these lists that Ms. Stailey does not make her 9's like 4's and at the hearing MSHA did not produce any evidence or even argue in support of Ms. Stailey's contention. I find that on May 8 Ms. Stailey drove the 219 truck. I also find in accordance with the checklist that the last day she drove the 214 truck was April 6 (Op'tr's. Exh. Nos. 2 and 3). Ms. Stailey admitted that the April 6 checklist did not indicate any problem with the suspension but she said she orally told her foreman the suspension was bad (Tr. 109).

In addition, on cross examination Ms. Stailey admitted that on May 4 she had an accident driving the 217 truck when she ran into a berm (Tr. 109). She also admitted that on May 5 she received a written warning from the operator for her failure to report the accident and for damage to the 217 truck from the accident (Tr. 112). At first she denied there was any damage, but subsequently she acknowledged there had been some to the truck's ladder (Tr. 110, 118, 121). Finally, when asked whether she had visited a doctor on May 6 on her own volition, Ms. Stailey first stated it was for allergies but when confronted with the medical report of that visit agreed it was for back pain (Tr. 112-114).

Based upon the foregoing I do not find Ms. Stailey a credible witness in any respect. I conclude she last drove the 214 truck more than a month before she complained to MSHA. Moreover, she complained to MSHA only a few days after she had an accident with another truck, received a warning from the operator and visited a doctor for back pain. These circumstances demonstrate that her assertions regarding the alleged lack of safety on the 214 truck due to bad suspension cannot be accepted.

As already noted, four other drivers of the 214 truck testified. Mr. Mondragon who according to the checklist drove that truck only on April 5 and April 25, stated it rode rough and fishtailed although he did not indicate this on his checklist (Tr. 125-126, 131, Op'tr's. Exh. No. 4). He said he orally told the dispatcher in the tower about the rough riding and fishtailing and that the dispatcher was supposed to tell the foreman (Tr. 132). However, he admitted that management "chewed out" drivers who did not complete accurate list (Tr. 134).

Similarly, Mr. Baker testified that when he drove the 214 truck, it rode rough but his checklist for May 3, the only date he drove it after April 1, did not contain anything about the suspension (Tr. 141, Optr's. Exh. No. 5). He said it must have slipped his mind but alleged that he orally told the dispatcher about the suspension (Tr. 147-148). I conclude the weight to be accorded the allegations of these two witnesses regarding the suspension on the 214 truck is greatly diminished because they did not put anything on their checklist although they knew this was required. Moreover, these two drivers drove the 214 truck on few occasions.

A third driver, Mr. Verdugo, did indicate a suspension problem on his checklist for May 2 when he drove the 214 truck (Optr's. Exh. No. 7). However, he acknowledged he did not drive the 214 truck very often since his assigned truck was the 216 (Tr. 174). Even more importantly, Mr. Verdugo's complaints regarding the rough riding of the 214 truck must be viewed in light of the fact that he had a severe back problem, was operated on for a ruptured disc on July 28, 1981 and was out of work for this condition from June 17, 1981 to October 7, 1981 and from November 7, 1981 to January 4, 1982 (Tr. 183-184). Finally, Mr. Verdugo continued to complain about rough riding on the 214 truck after the suspension had been replaced (Tr. 180-182). In light of the foregoing circumstances, I do not find Mr. Verdugo's testimony persuasive regarding alleged safety hazards and the nature of the ride on the 214 truck.

The fourth driver who testified was Mr. Donaldson. He was assigned to the 220 truck but because he traded shifts with a driver named Dave Brown, he drove the 214 truck around the time Ms. Stailey made her complaint (Tr. 150-151). Mr. Donaldson said that the 214 truck rode rough compared to the other trucks but the only checklist he completed for the 214 truck which mentioned the suspension was dated May 12, 4 days after Ms. Stailey complained (Tr. 151-152, Optr's. Exh. No. 6). Mr. Donaldson admitted he did not always fill out the lists accurately (Tr. 157). He stated that he did not know for sure whether he had noted the suspension as a problem on May 12 because Ms. Stailey had spoken to him about her complaint, but he readily admitted he wished to help her (Tr. 167, 171-172). Even more importantly, Mr. Donaldson admitted that he did not consider the 214 truck unsafe for him when he was driving it (Tr. 171). I find Mr. Donaldson's opinion regarding the safety of the 214 truck which was given with candor to be persuasive and I accept it.

The operator submitted copies of all checklists for the 214 truck from April 1 to May 13 (Optr's. Exh. Nos. 2-8). Many items needing repair were noted on these lists but the front suspension was identified as a problem only three times. Even rough riding, without specifying the cause, was noted only eight times (Optr's. Exh. Nos. 2-8). Also the drivers who testified did not use the 214 very often. The checklists for the 214 truck reveal other drivers used that vehicle with greater frequency than those who testified.

The operator's repair shop foreman, Mr. Kersey, testified that haulage trucks are given priority in maintenance and repairs because they are essential to production (Tr. 66-67). Suspensions are changed on haulage trucks every 9,000 to 10,000 hours (Tr. 70, 201). On April 17 a work order was issued to change the suspensions on the 214 because it was the truck whose suspensions had the most hours (Tr. 68-70). On April 21 and May 2 the operator received rebuilt suspensions which were installed on the 214 truck on May 13 (Tr. 78, 83). The foreman looked at the suspensions before and after they were changed and he saw no defects (Tr. 211). As already noted, the inspector did not see them. In addition, x-rays of the suspensions taken off the 214 truck showed no cracks (Tr. 204). The foreman stated that when the suspensions were removed, "donuts", which are rubber cushions in the suspensions and which would have disintegrated if there had been a bottoming out of the truck, were found to be intact (Tr. 198, 204-205, 216). The foreman further testified that the suspensions were being replaced pursuant to the company's maintenance program and he said that up to the time of the inspector's visit he did not know of any miner complaint to MSHA about the 214 truck (Tr. 69-70, 203, 208-209). I find the foreman credible and I accept his testimony. I conclude therefore, that the suspensions were being replaced pursuant to the regular preventive maintenance program and I reject any suggestion they were changed in order to avoid issuance of a citation because a complaint had been made to MSHA. I further conclude that the suspensions were free from defect and that there was no bottoming out on the 214 truck.

Mr. Chandler, the parts and service consultant for the manufacturer of the 214 truck, testified that he had driven every truck Phelps Dodge had and that trucks like the 214 tend to drive bumpy (Tr. 230). Both Mr. Kersey and Mr. Chandler listed a number of factors which would cause a rough riding truck including speed and road conditions (Tr. 209, 230-231). Finally, the 214 truck as described by

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Mr. Kersey and as shown by photographic evidence is a massive off-the-highway vehicle designed for hauling heavy loads over rough terrain (Tr. 194-196). Its enormous dimensions are apparent when it is pictured next to an ordinary sized pick-up truck (Optr's. Exh. No. 10).

Based upon all the evidence I conclude that there were no defects in the suspension of the 214 which affected safety. For reasons already noted, the principal complainant upon whom MSHA relied is not credible. But to the extent that some of the other drivers believe the 214 was unsafe because of the suspension, I find more persuasive the contrary evidence of the operator which demonstrates that there was nothing wrong with the suspensions and that they were being replaced pursuant to routine maintenance procedures. I already noted the opinion of one of the drivers, Mr. Donaldson, that the 214 truck was not unsafe but only rough riding and I rely also upon the infrequency with which the checklist for the 214 identified suspension as a problem.

I recognize that under the Act miners are strongly encouraged to participate in the preservation and maintenance of health and safety in the mines. They are after all, the ones whose lives are on the line. But the positions miners take and the complaints they make must be supportable and prevail over contrary evidence produced by operators accused of violations. In this case MSHA failed to prove a violation. The great weight of probative evidence favors the operator.

ORDER

Accordingly, it is ORDERED that Citation No. 173586 be Vacated and that the petition for the assessment of civil penalty be DISMISSED.

Paul Merlin
Chief Administrative Law Judge