

FEDERAL **MINE SAFETY AND HEALTH REVIEW** COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 3, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-107-M
Petitioner	:	A.C. No. 02-00156-05501
v.	:	
	:	Docket No. WEST 84-55-M
PHELPS DODGE CORPORATION,	:	A.C. No. 02-00854-05503
Respondent	:	
	:	New Cornelia Branch Mine

DECISION

Appearances: John C. Nangle, Esq., Associate Regional Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner; Stephen W. Pogson, Esq., Evans, **Kitchel & Jenckes**, P.C., Phoenix, Arizona, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against Phelps Dodge Corporation. The hearing was held as scheduled on May 30, 1984.

By agreement of the parties, these cases were consolidated for hearing and decision (Tr. 5). At the hearing, the parties agreed **to the** following stipulations (Tr. 4, **6**):

1. The operator is the owner and operator of the subject mine.
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.
4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary.
5. True and correct copies of the subject citations were properly served upon the operator.

6. Copies of the subject citations and terminations are authentic and may be admitted into evidence for the purpose of establishing their issuance but not for the purpose of establishing the truth or relevancy of any statement asserted therein.

7. Imposition of penalties herein will not **affect the operator's** ability to continue in business.

8. All the alleged violations *were* abated in good **faith.**

9. The operator's previous history of violations is average. 1/

10. The operator's size is large.

11. Violations occurred in citations Nos. 2086972 and 2086671.

Citation No. 2086972

Section **55.14-1** of the mandatory standards, 30 C.F.R. § 55.14-1, provides as follows:

Gears ; sprockets: chains; drive, head, tail, and **takeup** pulleys; flywheels; **couplings**; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The citation describes the condition or practice as follows:

There was no guard to prevent a person from contacting the auxilliary (sic) rope starter on the 10 h.p. gasoline engine for the air compressor located on the bed of M-41 GMC service truck. The rope starter was about 5 feet above the ground and faced out from the truck bed. It was in motion when the motor was running and was next to the electric starter switch.

1/ The operator's brief errs in stating that the **parties stipulated** that the operator's history **was better than** average. The Solicitor stated it would be "**better**" to stipulate to an average history, not that the history was better than average (Tr. 181).

As set forth in stipulation No. 11, supra, the violation is admitted. The inspector explained that the rope starter in question was an auxiliary to the automatic starter, primarily used to start up the air compressor which pumped air into tires (Tr. 8, 26). The inspector further testified that the air compressor mounted on a truck was used on uneven ground or on ground covered with broken rock (Tr. 27-28). I accept this testimony over contrary testimony from the operator's safety supervisor (Tr. 51). I further accept the inspector's testimony that an individual could slip and lose his footing thereby coming into contact with the moving part of the machine. An injury would result (Tr. 28, 30). Accordingly, I conclude the violation was serious. I reject the argument that because the men operating the starter were familiar with it, an **accident would not happen** (Tr. 45). The history of mining is replete with knowledgeable people becoming involved in serious accidents either through their own misconduct or through events over which they had no control. The starter should not have been left uncovered. The operator was guilty of ordinary negligence.

Finally, I believe the violation was significant and substantial. The operator of the air compressor as well as others whose equipment was being serviced are routinely in the area and could stumble on the uneven ground and become caught. Any injury would be severe. The reasonable likelihood tests of the Commission are satisfied. U.S. Steel Corp., --- FMSHRC --- (July 11, 1984), Consolidation Coal Company, 6 FMSHRC 34 (1984), Consolidation Coal Company, 6 FMSHRC 189 (1984).

A penalty of \$75 is imposed.

Citation No. 2086667

Section 55.11-1 of the mandatory standard, 30 C.F.R. **§55.11-1**, provides as follows:

Safe means of access shall be provided and maintained to all working places.

The citation describes the condition or practice as follows:

An employee was observed crossing the No. 1 primary pan feeder dump to and from the dump operator's control room. By the use of the solid railroad bed, a safe access

was not provided, due to the opening on both sides of the track, use [sic] for dumping ore cars. This was not a regular travel area, company had an access on east side of the ore dump.

The operator concedes that under Commission precedent the trestle was a means of access and that it was required to be safe. Hanna Mining Company, 3 FMSHRC 2045 (1981). The operator argues, however, **that** MSHA failed to show that the trestle was not safe. This argument cannot be accepted. The trestle was eight feet wide with five feet between the rails. It was approximately 50 feet long. The trestle spanned a chasm, 14 to 15 feet deep, which was the dumping point. Trains moved along the rails and dumped onto a **pan** feeder. There was a danger of falling into the pan feeder if an individual were to trip (Tr. 81). The locomotive engineer and the dump operator, who brought the materials onto the trestle to be dumped, were required by the operator to rope themselves off. They were to place a lanyard in such a way that if they fell, they would be caught and prevented from falling into the chasm (Tr. 86). Thus, the operator itself recognized the danger of being on the trestle.

Based upon the foregoing, I conclude a violation existed and that it was serious. I further determine that the operator was negligent in not preventing use of the unsafe trestle by the workers. Finally, the violation **was** significant and substantial. It was reasonably likely that use of the trestle would result in a reasonably serious injury. U.S. Steel, --- FMSHRC --- (July 11, 1984), Consolidation Coal Company, 6 FMSHRC 34 (1984).

A penalty of \$125 is assessed.

Citation No. 2086671

Section 55.9-7 of the mandatory standards, 30 C.F.R. § 55.9-7, provides as follows:

Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

The citation describes the condition or practice as follows:

The first idle roller (about three feet) from the tail pulley of the No. 2, 42 inch wide conveyor was exposed to contact. Approximately four (4) feet from floor level and next

to about three (3) foot wide walkway, an emergency stop cord was mounted up front from the idle **roller** to where a person could not reach it if he or she had needed it in an emergency. **Exposure** would be about one person, **one** time on daily basis.

As set forth in Stipulation No. 11, su ra, the violation in this instance was admitted. The evidence demonstrates that the stop cord was missing for a relatively short distance running from the angle iron back to the tail pulley ("C" to "D", MSHA Exh. No. 11) (Tr. 119-121). The inspector and the operator's safety inspector were in conflict over whether an individual would be seriously injured if they became caught at a pinch point where there was no emergency cord (Tr. 124-125, 135-140, 154). I find the inspector's testimony more persuasive in this regard and accept it. Maintenance personnel and repairmen were in this area in the performance of their usual duties and the conveyor could be running although this would be rare (149-150). The violation was serious. I accept the inspector's evaluation that negligence was low (Tr. 124). The violation was significant and substantial because it was reasonably likely that an individual who became caught would suffer a reasonably serious injury.

A penalty of \$70 is assessed.

Citation No. 2086672

Section 55.11-1 of the mandatory standard 30 C.F.R. § 55.11-1, provides as follows:

Safe means of access shall be provided and maintained to all working places.

The citation described the condition or practice as follows:

The entire length (sic), and both sides of No. 2 conveyor had accumulations of muck with rocks up to about 8 (eight) inches in diameter in the walkways, also piles of muck up to about (three) 3 feet high. Possible tripping and/or fall hazard.

The inspector's description in the citation of the accumulation along the walkway is uncontradicted and I accept it. The operator admits that there was muck and rock

on the walkway but argues nevertheless that it was a safe means of access (Operator's Brief P. 7). The inspector testified that the risk was of someone tripping and falling (Tr. 115). I find the inspector's testimony persuasive and accept it. The operator's witness first indicated that maintenance people, when making their rounds, merely shine a flashlight down the walkway rather than traveling down it (Tr. 131-132, 150-151, 152) but later he admitted that sometimes they might travel down the walkway to check it (Tr. 151, 153). I find that maintenance and repair personnel were required to travel along the walkway in performance of their regular duties. A violation existed and it was serious. The operator was plainly negligent. Finally the violation was significant and substantial because traveling along this walkway presented a reasonable likelihood of a reasonably serious injury.

A penalty of \$100 is assessed.

Citation No. 2086674

Section 55.14-1 of the mandatory standards, 30 C.F.R. § 55.14-1, provides as follows:

Gears: sprockets; chains; drive, head, tail, and **takeup** pulleys; flywheels; couplings; shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The citation describes the condition or practice as follows:

The guards on the two oil pumps did not extend around the back side of the "v" belts, leaving an opening to where a person could make contact with the pinchpoint, both motors had about 4 inch pulley and about 10" pulley on the pumps. High point was about three (3) feet above floor level and about three (3) from the wall of the enclosure, energized and subject to start, located in the No. 2 primary gyrator oil pump house.

There is no dispute that guards were present on the two oil pumps involved in the subject citation. However, the inspector testified that there was no guard at the pinch

points where the belts met the pulleys (points "A" on MSHA Exh. No. 13) (Tr. 157-158). In the inspector's opinion, an individual's hand could become caught at this point (Tr. 160, 161, 164-166). However, the operator's witnesses testified that it was highly unlikely if not impossible for an individual to become caught at the pinchpoints in question (Tr. 175-176). Based upon the photographic evidence introduced by the Solicitor (MSHA Exh. Nos. 12 and 13), I find the testimony of the inspector more persuasive and conclude that a violation existed. Since injury could result, the violation was serious. The operator was negligent in not adequately guarding the machinery. Maintenance people were required to be in the area in the performance of their regular duties. The violation was significant and substantial because it was reasonably likely that a slipping or falling accident would expose miners near the machinery to a reasonably serious injury.

A penalty of \$75 is assessed.

Citation No. 2086888

Section 55.16-6 of the mandatory standards, 30 C.F.R. § 55.16-6, provides as follows:

Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

The citation describes the condition or practice as follows:

The acetylene and oxygen cylinders were observed in the walkway between No. 10 and 11 mills. The gauges were mounted on the **cylinders** which were in an "off" position and secured in a hand cart in an upright position. This area was traveled hourly. Also an overhead crane was in use. The cutting rig was not assigned to anyone in the area. 1100 hour to 0700 hour shift may have used them.

There is no dispute with respect to the facts. The inspector found two acetylene and oxygen cylinders in the walkway between the No. 10 and No. 11 mills. The gauges were in an "off" position (Tr. 197-198). The inspector

questioned miners in the area but no one admitted to using the cylinders (Tr. 199-200). The inspector concluded that the cylinders had been left by someone on the prior shift (Tr. 200, 205). The issue presented is whether the situation is covered by the mandatory standard. The workers in the area to whom the inspector spoke said they were not assigned to work with the cylinders (Tr. 199-200). According to the inspector the mill foreman said the cylinders might have been used on the prior shift (Tr. 200). One individual the inspector spoke to said they were going to take the cylinders back to the repair bay area (Tr. 201). The inspector concluded that on the present shift, no one was assigned to the tanks which were going to be taken to the bay area (Tr. 201). The inspector concluded that the cylinders were stored and that a violation existed because they were not protected by covers.

In Secretary of Labor v. FMC Corporation, -- FMSHRC -- (July 2, 1984), the Commission defined "storage" as follows: "In ordinary usage, the term storage, 'the act of storing or the state of being stored', covers a wide variety of meanings, including to accumulate, to supply, to amass, or to keep for future use." The Commission decided that the term was sufficiently broad to include short-term, long-term, and semi-permanent **storage**. In FMC, a blasting agent was improperly left in a supply **yard** for over an hour and some of it had not been moved for more than six hours. In this case, the shift had started at 7:00 a.m. and the inspector saw the cylinders just before 9:00 a.m. He was justified in concluding that they had been left from the prior shift. The interval in this case falls within the time frame held by the Commission to constitute "storage" under a comparable mandatory standard. Therefore, I conclude that the cylinders were being stored temporarily or semi-permanently before being transported to the bay area. Due to the lack of covers on the cylinders, a violation existed.

The inspector testified that the cylinders could become airborne projectiles if the valve stem broke while the cylinder was tipped (Tr. 202-203). I find this could easily happen since the area was traveled hourly and hoses were present on which a person could trip (Tr. 206). The violation was serious. I further find the operator was negligent. Both the foreman on the prior shift and the foreman on the shift in progress had ample time and opportunity to discover this condition and correct it. I reject the inspector's excuse for failing to cite this violation as significant and substantial, because he did not actually see anybody walking by who would cause the cylinders to be knocked over (Tr. 231). People frequently pass by this area

and could easily knock over one of the unguarded cylinders, creating a reasonable likelihood of very serious injury. Leaving potentially lethal items such as these cylinders lying about must be discouraged. Deterrence will not result from a \$20 penalty such as the Solicitor proposed here.

A penalty of \$250 is assessed.

ORDER

The operator is Ordered to pay the following amounts within 30 days from the date of this decision:

<u>Citation No.</u>	<u>Amount</u>
2086972	\$ 75
2086667	125
2086671	70
2086672	100
2086674	75
2086888	250
Total	<u>\$695</u>



Paul Merlin
Chief Administrative Law Judge

Distribution:

John C. Nangle, Esq., Associate Regional Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Stephen W. Pogson, Esq., Evans, **Kitchel & Jenckes, P.C.**, 2600 North Central Avenue, Suite 1900, Phoenix, AZ **85004** (Certified Mail)

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