

CCASE:  
SOL (MSHA) V. PHELPS DODGE CHINO INC.  
DDATE:  
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TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
1244 SPEER BOULEVARD #280  
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May 7, 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 92-266-M  
Petitioner : A.C. No. 29-00708-05546  
:  
v. :  
:  
PHELPS DODGE CHINO INC., : Chino Mine  
Respondent :

DECISION

Before: Judge Lasher

After prehearing preparation and discovery, on March 5, 1993, Petitioner moved to vacate the Citation in this matter, No. 3556068, on the basis of insufficient evidence. (Footnote 1)

On April 2, 1993, Respondent filed its "Motion of Phelps Dodge Chino Inc. To Dismiss With Prejudice Or In The Alternative For Declaratory Relief."

On April 14, 1993, Petitioner filed a letter stating:

We have received Respondent's Motion ... to Dismiss With Prejudice, etc. We have no objection to your dismissing the citation with prejudice as you did in Homestake Mining Co., 13 FMSHRC 988. Such action would moot Respondent's request for any declaratory relief, which is requested "in the alternative" if you do not vacate the citation with prejudice.

Respondent responded by letter, saying:

We wish to note an important consideration in response to the government's current statement that it has no objection to dismissal with prejudice: such dismissal must be in accordance with Rule 41, Federal Rules of Civil Procedure. That is, dismissal will operate as

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1 It is noted at the outset that at the time the motion to vacate was filed, while Respondent had submitted a motion for summary judgment, such had not been ruled on or determined, the factual prerequisites of this case had not been established, no trial had been conducted and a record developed, nor had findings of fact been scrutinized and determined.

an adjudication on the merits. Such a result is consistent with the ultimate resolution in *Homestake Mining Company v. Secretary of Labor, et al.*, United States Court of Appeals for the District of Columbia Circuit, Docket No. 91-1423. In *Homestake*, the case was dismissed with prejudice and the Secretary was "not to issue a new citation for violation of the same regulation" under analogous facts.

As counsel for Petitioner urges, in *Homestake Mining Co.*, 13 FMSHRC 988 (June 21, 1991), I set forth my understanding what dismissal with prejudice meant. In sum,

1. abandonment of the instant prosecution by the Petitioner;
2. prohibition against seeking future action on the citation being vacated.

Dismissal with prejudice does not mean enjoining the enforcement agency, MSHA, from future use of the safety standard involved, or applying the standard to "the same mine area described in the subject Citation." As I noted therein, expanding the concept of dismissal with prejudice to these latter concepts would in effect be (a) granting the Contestant's declaratory relief request without benefit of due process, hearing, and normal adjudication processes.

Respondent urges that the dismissal with prejudice of the citation involved in this proceeding "operate as an adjudication on the merits" and alleges that such is "consistent with the ultimate resolution in *Homestake Mining Company v. Secretary of Labor, et al.*, U.S. Court of Appeals for the D.C. Circuit, Docket No. 91-1423. If adjudication on the merits is intended to mean that Respondent's view of the law, arguments, and positions as to factual happenings, are adopted, such is rejected. The ultimate resolution in the cited *Homestake* decision of the D.C. Circuit grew out of this question: What should be the Secretary's ability to issue a new citation for violation of the same regulation on the identical facts? When the Secretary indicated that she would not issue a new citation for violation of the same regulation on the identical facts on which she issued the citation which she was vacating, the court held that such response rendered the case "moot and not suitable for declaratory relief." The court considered that "any future enforcement action must be based on a different set of facts."

I do not find the decision of the Court of Appeals inconsistent with the holdings of my decision in *Homestake*, which was not reviewed by the Commission. The Order set forth below is intended to effectuate the principles set forth herein.

ORDER

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1. Petitioner's action to vacate Citation No. 3556068 is GRANTED.

2. Citation No. 3556068 is VACATED WITH PREJUDICE.

3. Respondent's Motion in the alternative for Declaratory Relief is DENIED.

4. Petitioner shall not initiate any future enforcement action under the same regulation against Respondent on the identical facts; any future enforcement action must be based on a different set of facts.

Michael A. Lasher, Jr.  
Administrative Law Judge

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