

CCASE:
SOL (MSHA) V. MOUNTAIN PARKWAY STONE
DDATE:
19900530
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 89-27-M
A.C. No. 15-15676-05511

v.

Staton Mine

MOUNTAIN PARKWAY STONE,
INCORPORATED,
RESPONDENT

DECISION ON REMAND

Before: Judge Weisberger

STATEMENT OF THE CASE

On May 23, 1990, the Commission issued a decision pursuant to the Secretary's petition to review my decision in this matter issued on July 14, 1989. In essence, the Commission found that Respondent violated 30 C.F.R. 57.9002 as alleged in a citation issued by MSHA Inspector Eric Shanholtz on August 17, 1988. (Mountain Parkway Stone, Inc., 12 FMSHRC, (Slip op., May 23, 1990)). The Commission reversed by decision with respect to the vacation of the citation in issue, and remanded the matter ". . . for determination of the allegation that the violation was of a significant and substantial nature and for assessment of an appropriate civil penalty." (Mountain Parkway Stone, Inc., supra, at 4).

I.

In its decision, the Commission noted Shanholtz's detailed testimony regarding the numerous equipment defects affecting safety that prompted his citation. (Mountain Parkway Stone, Inc., supra, at 3). It further found that "The evidence that the C-50 boom truck had defects affecting safety was largely uncontroverted" (Mountain Parkway Stone, Inc., supra, at 3). The Commission summarized the largely uncontroverted testimony of Shanholtz with regard to the various defects affecting safety, and the hazards of these defects as follows:

Specifically, the inspector noted that there were no stabilizing jacks on the truck. (Stabilizing jacks are outriggers that are used to support a boom truck when the boom is raised. Tr. 232.) Without such stabilizing jacks, the truck could overturn if it were "utilized in the wrong capacity." Tr. 233. Shanholtz additionally noted several hydraulic leaks in the boom controls and in the boom's left cylinder that presented both fire and slipping hazards and allowed the boom to drop. The doors of the truck were missing and the truck did not have seat belts. In Shanholtz's opinion, these conditions presented the hazard of allowing a driver to fall from the vehicle if it took a sharp turn. Shanholtz further observed that the truck did not have front or rear lights, although it was apparently used underground. Finally, Shanholtz noted that a rag was used as a gas cap on the gas tank. Shanholtz testified that the rag could act as a wick for the gas and present an explosion or ignition hazard. Tr. 232-34. (Mountain Parkway Stone, Inc., supra, at 2).

Shanholtz opined that the violation herein was significant and substantial based on his finding that "[t]he likelihood of something happening was reasonably likely in that if an injury or fatality would occur, then it would be serious." Tr. 239. Shanholtz indicated that illness and injury was reasonably likely to occur because "just accumulation of the defects in themselves presented a reasonable likelihood of an injury occurring" (sic) Tr. 238. He essentially agreed with the counsel for petitioner that, with regard to each of the dangers he testified to that were involved in each of the defects he cited, the dangers would be reasonably likely to occur.

I find, based on Shanholtz's basically uncontradicted testimony, as noted by the Commission, that with regard to the defects he noted, which constituted a violation of section 57.9002, supra, there were discrete safety hazards contributed to by the violation herein. (See, Mathies Coal Company, 6 FMSHRC 1, 3 (1984)). In order for the violation herein to be considered significant and substantial, it also must be established, as set forth in Mathies, supra, at 3-4, that there was "a reasonable likelihood that the hazard contributed to will result in an injury." The Commission in Consolidation Coal Company, 6 FMSHRC 189, 193 (1984), explained that this element "embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not."

Although Shanholtz described the hazards involved in each of the safety defects in question, and concluded that these were reasonably likely to occur, he did not provide the basis for this conclusion. Nor does the record contain sufficient facts to

~1150

support this conclusion. Thus, I find that it has not been established that the hazards involved in the various safety defects were reasonably likely to occur. As such, it must be concluded that it has not been established that the violation herein was significant and substantial (Mathies, supra, Consolidation Coal, supra).

II.

The testimony of Shanholtz is essentially uncontradicted with regard to the existence, at the date of the inspection, of numerous defects in different parts of the truck in question. Also uncontradicted is Shanholtz's testimony, as summarized above (I., infra), with regard to the specific hazards attendant upon the various safety defects. Also the Commission noted that the record establishes that the truck had been used while it had the cited safety defects. I thus conclude that the violation herein was of a moderately high level of gravity. Taking into account the remaining statutory factors set forth in section 110(i) of the Act, as stipulated to by the parties, as well as the history of violation as indicated by Exhibit 1, I conclude that a penalty of \$98 is proper for the violation found herein.

ORDER

It is ORDERED that within 30 days of this decision, Respondent shall pay \$98 as a penalty for the violation of Citation No. 3253338.

Avram Weisberger
Administrative Law Judge