

CCASE:

MSHA V. IDEAL BASIC INDUST.

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

April 10, 1981

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

Docket No. SE 79-16-M

v.

IDEAL BASIC INDUSTRIES,
CEMENT DIVISION

DECISION

This is a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). At issue is whether the administrative law judge erred in vacating a citation that alleged a violation of 30 CFR §56.9-2. That standard provides:

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

While inspecting the Castle Hayne Quarry and Mill on July 25, 1978, a Mine Safety and Health Administration inspector cited Ideal Basic Industries for violating 30 CFR §56.9-2. The citation (No. 103843) alleged:

The hydraulic side coupling for the track mobile No. 1 was broken. Railroad cars could not be stopped due to this in case of an emergency.

After an evidentiary hearing, the administrative law judge vacated the citation. 1/ For the reasons that follow we reverse.

The track mobile involved is a vehicle similar to a locomotive. It is used to push or pull railroad freight cars loaded with bulk cement. At the time of inspection, one end had a defective hydraulic coupling; the "knuckle" was not functional. 2/ The other end of the mobile had a manual coupling which did work. Neither party disputes that the hydraulic coupling was inoperable. The Secretary claimed that the track mobile had been in use, even if the defective coupling had not been used; the operator countered that the track mobile, if used at all, was only used with the working manual coupling.

1/ The judge's decision is reported at 2 FMSHRC 1352 (June 9, 1980)

2/ The term "knuckle" refers to a mechanism on the locomotive that

holds "onto the coupling on the railroad cars." Tr. 163.

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The judge vacated the citation based on his finding that the Secretary "failed to establish by a preponderance of the evidence that the defective coupling in question was in fact used prior to the time it was replaced by a new one." 2 FMSHRC at 1363. The Secretary contends that the judge has construed the standard too narrowly, arguing that a violation occurs if the equipment is used and the defective component could be used. Ideal Basic argues that the question need not be reached because, it contends, the record fails to even establish that the track mobile was used. We first address the proper interpretation of the standard, and then Ideal Basic's contention.

We hold that the judge's interpretation of the standard is too narrow. As appears from his application of the standard to the facts in this case, under the judge's interpretation a defective component does not "affect safety" if it is not used, even if the equipment containing the defective part is used.

The Secretary correctly points out, however, that the defective coupling could have been used while the track mobile was in operation--nothing precluded such use. 3/ Although the plant manager testified that the employees had been instructed not to use the faulty coupling, the plant administrator testified that the hydraulic coupling was identical in appearance to the operable manual coupling. There was no evidence presented that the defective coupling had been conspicuously marked. Thus, the defective coupling could have been used inadvertently.

Accordingly, we hold that use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation of 30 CFR §56.9-2. This interpretation is more likely to prevent accidents, a primary goal of the Act. Under the judge's interpretation, one gets much closer to an accident occurring before correction is required.

Our interpretation of the standard is consistent with our decision in Eastern Associated Coal, 1 FMSHRC 1473 (October 23, 1979). The operator had been cited for an inoperable parking brake on a jitney. We held that the violation was not abated (i.e., the violation still existed) by placing a danger tag on the jitney, which remained operable in a working area:

3/ If the defective coupling were used, obvious dangerous hazards would occur. Because the mobile was used to push railroad cars, using the end with the broken coupler could likely lead to cars not in fact coupled to the mobile freewheeling through the yard. (The braking system of the track mobile is used to brake the railroad cars that it

is pushing.)

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We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored.

1 FMSHRC at 1474. The reasoning of Eastern Associated is applicable here as well, where there was not even a danger tag placed on the defective coupler.

We turn now to Ideal Basic's evidentiary argument that the track mobile itself was not used. Although the judge did not specifically find that the track mobile was used, we believe he did so impliedly. In his summary of the evidence he refers to the inspector's testimony that, while he did not see the mobile in operation, he was told by unidentified employees that the mobile had been used while the coupling was defective. He also cites Ideal Basic's testimony that this track mobile was the company's only working track mobile at the time of the inspection (its other track mobile was in the repair shop at the time), that employees had been instructed not to use the faulty coupling, that at the time of the citation the track mobile was parked at the pack house (which is a shipping point where the railroad cars are loaded), and that cars were loaded the day before the inspection. There is no testimony that the track mobile was not used after the coupler became defective. In light of this testimony and the Secretary's unrefuted evidence, though hearsay and circumstantial, we conclude that the track mobile had been operated while the coupler was broken and that the judge so found (even though he found no evidence that the coupler itself had been used).

Even if, however, the evidence were insufficient to establish that the track mobile was operated while the coupler was broken, we find that the mobile was nonetheless "used" within the meaning of the standard. If equipment with defects affecting safety is located in a normal work area, fully capable of being operated, that constitutes "use". Here, at the time of the inspection, the mobile was parked in a usual location, right next to the area where railroad cars--which the mobile is used to move--are loaded. It was neither rendered inoperable nor in the repair shop. To preclude citation because of "non-use" when equipment in such condition is parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives. In summary, we believe the evidence establishes "use" of the track mobile. Accordingly, the judge's decision on this citation is reversed and remanded for assessment of a civil penalty.

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