

CCASE:
MSHA V. MOUNTAIN PARKWAY STONE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 23, 1990

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

v. Docket No. KENT 89-27-M

MOUNTAIN PARKWAY STONE, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

The issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act"), is whether Commission Administrative Law Judge Avram Weisberger erred in concluding that Mountain Parkway Stone, Inc. ("Mountain Parkway") did not violate 30 C.F.R. 57.9002 (1988), a mandatory safety standard that required that "[e]quipment defects affecting safety shall be corrected before the equipment is used." 11 FMSHRC 1289 (July 1989). 1/ For the reasons that follow, we hold that the judge erred and we reverse.

Mountain Parkway operates the Staton Mine, an underground limestone mine and surface plant equipped with crushing and screening facilities, located in Powell County, Kentucky. On August 17, 1988, during a regularly scheduled inspection of the Staton Mine, Eric Shanholtz, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a citation to Mountain Parkway alleging a violation of section 57.9002. Inspector Shanholtz issued the

1/ 30 C.F.R. 57.9002 (1988) was revised as of July 1, 1988, and

transferred along with 30 C.F.R. 56.9002, 56/57.9001, and 56/57.9073 to 30 C.F.R. 56.14100 and 57.14100. 53 Fed. Reg. 32497, 32504 (August 1988). Sections 56.14100 and 57.14100 became effective on October 24, 1988. 53 Fed. Reg. 32496 (August 1988). Therefore, at the time of the inspection on August 17, 1988, former section 57.9002 was still in effect.

citation because he believed there were defects affecting safety in a C-50 boom truck parked at the mine. 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.

At the time of the inspection, the C-50 boom truck was parked at the mine and was not "tagged out," i.e., did not have any tags on it to indicate that it was in need of repair. Tr. 203-04. In addition, the truck was in "turn-key" condition; the only step required to start the truck was to turn the ignition key. Tr. 203-04, 249; Exhs. 8-10, 15-16.

Shanholtz testified that there were tire tracks around the truck that he believed to be fresh and that the truck had been used whenever there was a need to load. Tr. 183, 189-90. Shanholtz further testified that Gary Parks, a mechanic employed by Mountain Parkway, informed him that the truck had been used during the night shift immediately prior to the inspection of August 17, 1988. Tr. 181-82, 477. Shanholtz testified that Mr. Parks also informed him that the boom had dropped while the truck was being used to load. Tr. 239.

Based upon his observations and his discussions with Mountain Parkway employees, Shanholtz issued to Mountain Parkway a citation pursuant to section 104(a) of the Act, 30 U.S.C. 814(a), alleging that it had violated section 57.9002 and that the violation was of a significant and substantial nature. The basis for Shanholtz's determination that the violation was significant and substantial was 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 also noted that the mine operator was highly negligent because the operator should have observed the condition of the truck. After the Secretary of Labor proposed a civil penalty for the alleged violation, the matter proceeded to hearing before Judge Weisberger.

Before the judge, Mountain Parkway contended that it could not be cited for a violation of section 57.9002 because the truck was not actually being used. Mountain Parkway presented testimony by some of its employees that at the time of the August 17 inspection, the truck had not been used for a period of time. According to these witnesses, during that period five of the operator's seven employees were engaged in paving at a site 10 to 12 miles away from the mine, an activity that

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did not require use of the truck, and they were not engaged in excavation at the mine, which might have required use of the truck. In its Answer to the Secretary's Petition for Assessment of Penalties, Mountain Parkway also stated that it was planning to remedy any defects on the truck prior to the resumption of excavation work at the mine.

In his decision, the judge determined, without citing any precedent, that section 57.9002 requires "safety defects to be corrected as a condition precedent to the use of the equipment" and that there could be "no violation in the absence of evidence of the equipment being used." 11 FMSHRC at 1295. The judge determined that there was no evidence that the truck "was being used" and, therefore, "dismissed" the citation. *Id.* 2/ The Commission granted the Secretary's subsequent petition seeking review of the judge's decision. On review, the Secretary argues that the judge misconstrued section 57.9002 and improperly vacated the citation. We agree.

In *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843 (April 1981), the Commission construed the concept of equipment use in 30 C.F.R. 56.9-2 (1978) which, like section 57.9002, identically provided that "equipment defects affecting safety shall be corrected before the equipment is used" (emphasis added). The Commission reviewed the evidence in order to determine whether a track mobile with a defective coupling had actually been used. After answering that question in the affirmative, the Commission explained that even if the evidence was insufficient to prove actual use of the track mobile while the coupling was defective, the mobile had been nonetheless "used" within the meaning of the standard. The Commission based the latter holding, in part, upon the fact that the equipment was located in a normal work area, was capable of being used, and had not been removed from service. 3 FMSHRC at 844-45. See also *Allied Chemical Corp.*, 6 FMSHRC 1854, 1859 (August 1984) (similarly construing 30 C.F.R. 57.9-2 (1978), the identical regulatory predecessor of section 57.9002).

Ideal's principles are dispositive of the issue presented in this case. The evidence that the C-50 boom truck had defects affecting safety was largely uncontroverted. The only evidence that Mountain Parkway presented to counter Shanholtz's testimony regarding the multiple defects existing on the truck was that of Charles Williams, one of its employees, who testified that he had seen stabilizing jacks on the truck close to the time of the inspection on August 17, 1988. This was insufficient to overcome Shanholtz's detailed testimony regarding the numerous equipment defects affecting safety that prompted his citation.

The judge's focus on whether the boom truck "was being used" is too

narrow. Under the standard a violation occurs if equipment "is used" while in an unsafe condition. Here although the equipment was not in actual use at the time of citation, the record establishes that the

2/ We assume that the judge intended to vacate the citation in accordance with the provisions of section 105(d) of the Mine Act, 30 U.S.C. 815(d).

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boom truck had been used while it had the cited defects affecting safety. Shanholtz's testimony that Parks had informed him that the boom was dropping while the Mountain Parkway employees were using the truck to load was unrefuted by Mountain Parkway witnesses. Tr. 239. (Shanholtz had also testified, without contradiction, that the truck had multiple hydraulic leaks that had allowed the boom to drop. Tr. 233.)

In this instance, however, and more compelling is the undisputed evidence that, at the time of the inspection, the truck was parked in the mine in turn-key condition and had not been removed from service. In light of *Ideal*, supra, this evidence established use of equipment within the meaning of section 57.9002, obviating any need to show that the defective truck was in actual use at the time of the inspection. We also reject Mountain Parkway's apparent defense that it intended to remedy any defects prior to the resumption of excavation work. No evidence was presented at trial that the truck was "under repair." There was no evidence that any employee had been assigned to repair the boom truck and no evidence that anyone was actually engaged in repairing the truck on August 17, 1988, or at any other time. See, e.g., *Allied Chemical*, 6 FMSHRC at 1860.

Accordingly, we hold that Mountain Parkway violated section 57.9002, and conclude that the judge erred in vacating the citation in issue.

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For the foregoing reasons, the judge's decision with respect to this citation is reversed and this matter is remanded for determination of the allegation that the violation was of a significant and substantial nature and for assessment of an appropriate civil penalty.

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