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

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | CIVIL PENALTY PROCEEDING<br><br>Docket No. CENT 89-16-M<br>A.C. No. 16-00509-05569 |
| v. | Avery Island Mine |
| INTERNATIONAL SALT COMPANY,<br>RESPONDENT | |

DECISION

Appearances: Mary Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner;
James M. Day, Esq., Cotten, Day & Selfon, Washington, D.C. for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the International Salt Company (International) with one violation of the regulatory standard at 30 C.F.R. 57.19024(d). The general issue before me is whether International violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation 3270248 issued pursuant to section 104(a) of the Act alleges a "significant and substantial" violation and charges as follows:

> The South skip rope was not removed from service at the production shaft. A nondestructive test was conducted on the 1 7/8 inch 6 by 27 Type H bright purple plus extra improved plow steel flattened strand right lang lay rope. The rope strength now showed a loss of 10 percent. The rope along its length contained pitting showing advanced stages of corrosion and erosion between the pits. The pits could be seen with the naked eye. The type instrument used for the test was Model No.

> LMA-250 manufactured by NDT Technology. The employees on 3-shifts ride the North skip and the South skip rope due to its strength loss could snap exposing personnel to the broken rope and skip.
>
> The cited standard provides, as relevant herein, as follows:
>
> Unless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs: . . . (d) Rope deterioration from corrosion. . . (h) Loss of more than 10 percent of rope strength as determined by nondestructive testing.

Subsection (h) of the above standard sets forth at least one purportedly objective measure to determine when a wire rope must be retired i.e. when there is a loss of more than 10 percent of rope strength as determined by nondestructive testing. In a nondestructive test performed on the subject rope including the area deemed to be in the worst condition by the Secretary, the Respondent's expert witness, David Hall, President of Halkin Services, Inc., found the loss of strength in the subject rope to have been no greater than 9.1 percent.

The Secretary's principle expert on the issue, Dennis Poffenroth, an MSHA electronic engineer, also performed a nondestructive test on the rope and found a maximum "loss of metallic cross sectional area" of 9.75 percent. According to Poffenroth however the finding of loss of metallic content cannot accurately be correlated to determine the loss of strength in a rope. Indeed, according to Poffenroth, loss of strength in a wire rope cannot, under the current state of the science, be accurately determined by nondestructive testing. He believed therefore that subsection (h) did not provide a valid standard for wire rope testing.

In any event the Secretary does not disagree that the subject rope did not at any point suffer a loss of strength of as much as 10 percent. It is apparent from the credible evidence that since the Secretary could not prove under the objective standard of subsection (h) that the rope should have been retired that she then resorted to the subjective and essentially arbitrary provisions of subsection (d), i.e. that the rope should be retired from service upon the existence of "rope deterioration from corrosion."

In order to pass constitutional muster, the interpretation to be given such a vague, indefinite and

uncertain regulation must appropriately be measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts particular to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. See Alabama By-Products Corporation, 4 FMSHRC 2128 (1982). In this case the expert witnesses, all of whom may be considered to be reasonably prudent persons familiar with the factual circumstances surrounding the allegedly hazardous condition, sharply disagreed over the extent of the alleged corrosion.

MSHA Inspector Benny Lara testified that he observed pitting and erosion which he said was due to corrosion between the pits on the cited South rope. MSHA expert Dennis Poffenroth visually examined the area found to be the worst section of the South rope through nondestructive testing and observed pitting in the outer surface of the crown wires and erosion between the pits evidencing, what he believed to be "advanced corrosion". According to Poffenroth no one can safely predict when a corroded wire rope will fail and in his opinion with the amount of pitting he found the rope should have been removed from service immediately.

Poffenroth also cited texts in the subject area supporting his view that the pitting of wire ropes is a cause for immediate removal from service. He also referred to the "Roebling Wire Rope Handbook" which at page 132 states that "where corrosion is present all the known methods for estimating the remaining strength of a wire rope become useless."

International's expert witnesses, not surprisingly, disagreed with the MSHA experts. David Hall, President of Halkins Services, Inc., disagreed with Poffenroth's conclusion that you could not interpolate from loss of metallic area in a wire rope to obtain a reliable and valid determination of loss of rope strength. He has found his formula for determining loss of strength from loss of metallic area to be reliable and valid. According to Hall's findings of loss of metallic area and his computations, he found the actual maximum loss of strength in the cited wire rope to be 9.1 percent. Hall also found however "well established moderate corrosion" throughout the rope and found that the corrosion was "indicative of internal corrosion". Hall performed his test on the rope on June 18, 1988, and recommended on June 20, 1988, as follows: "due to the trend and the ELMA and loss of

strength over the past two tests conducted by "Rotesco' and the ELMA and strength loss depicted in this test it is recommended that this rope be replaced within the next 30 days following this test." (See Exhioit R-4).

In his report and at hearing, Hall did not however find that the subject rope met any of the retirement criteria under 30 C.F.R. Part 57, and concluded that the rope was in satisfactory condition at the time of the test.

Another expert witness for International, Dennis Weaver, a graduate civil engineer and former employee of the Bethlehem Steel Wire Rope Division testified concerning destructive tests he performed in July 1988 on a portion of the subject rope. In his report Weaver stated as follows:

> The ultimate failure of the returned sample was 356,000 pounds. The catalog rated strength for new rope is 372,000 pounds. Our records show the as--manufacturer breaking strength was 377,000 pounds. Therefore, it appears the actual loss of strength is approximately 5.5%.

This test was allegedly performed on a section of the wire rope deemed worst by the MSHA inspection. According to Weaver there was only "scattered rust" on the outer surface of the wire rope and he acknowledged that this could have been the "moderate corrosion" that Hall had found.

While the experts may have therefore disagreed over the extent of rope deterioration from corrosion in this case the Secretary did not disagree that there was no need to then remove the subject rope from service. Indeed I find that the Secretary's claim of a violation in this case is completely undermined by the fact that after Inspector Lara issued the citation at bar (charging a violation of the standard at 30 C.F.R. 57.19024 which mandates that wire ropes be removed from service under the prescribed conditions) he nevertheless allowed the rope to remain in service for a week thereafter. In addition, in spite of the regulatory requirement for the mandatory retirement of ropes meeting the prescribed criteria another MSHA official granted an additional week's extension of time in which to replace the cited rope. Thus the Secretary allowed the cited rope to remain in service for two weeks after the profferred regulation would have mandated its retirement and in the face of her own representations that up to 30 miners were thereby exposed to the reasonable likelihood of fatal injuries.

These actions by the Secretary are inconsistent with her simultaneous claim that the subject rope was so corroded that it met the criteria for immediate retirement. At the same time these actions are consistent with the findings of independent expert David Hall who opined that the cited rope would not further deteriorate to meet the regulatory retirement criteria, including the criteria under subsection (h), for another 30 days from the date of his test. Under these circumstances I accord the greater weight to the opinions of the operators' independent experts and conclude that the subject rope did not in fact on the date of this citation, June 16, 1988, meet the retirement criteria under the provisions of 30 C.F.R. 57.19024(d) or (h). Within this framework of evidence I conclude that the Secretary has failed to sustain her burden of proving the violation as charged and the citation must accordingly be vacated.

ORDER

Citation No. 3270248 is vacated.

Gary Melick
Administrative Law Judge
(703) 756-6261