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SOL (MSHA) V. LAUREL RUN MINING
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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. WEVA 89-57 A. C. No. 46-02845-03621
v.	Portal No. 1
LAUREL RUN MINING COMPANY, RESPONDENT	

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor, U.S. Department of Labor, for the Secretary; Marshall S. Peace, Esq., for Respondent.

Before: Judge Fauver

The Secretary of Labor brought this case for a civil penalty for an alleged violation of a safety standard, under 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion below:

FINDINGS OF FACT

1. The parties have stipulated that Respondent's Portal No. 1 Mine is subject to the Act.

2. Prior to June 20, 1988, a two-mile overland belt conveyor at the mine was owned and operated by Debco Power Company and was treated by the United States Department of Labor as being subject to the jurisdiction of its Occupational Safety and Health Administration, rather than its Mine Safety and Health Administration.

3. On June 20, 1988, the ownership and operation of the overland belt were taken over by Respondent without a stoppage of the belt operation. Under the Department of Labor's guidelines, the belt became subject to the jurisdiction of MSHA instead of OSHA on that date. Because of this change, Respondent requested

MSHA to conduct a "compliance assistance inspection" (or "courtesy inspection") of the overland belt. Such an inspection, also known as a "compliance assistance visit" (CAV), is intended to assist an operator who is starting up new equipment or a new process, by pointing out conditions that require correction to comply with mine safety or health standards. On such visits, MSHA does not issue penalty citations, but points out conditions that would be cited as violations in an ordinary inspection.

4. Before it began operation of the overland belt on June 20, 1988, Respondent did not conduct an electrical inspection of the belt.

5. An MSHA team conducted a CAV at the mine on June 23, 1988, to inspect the overland belt. They found and pointed out numerous conditions that would have been cited as violations in a regular inspection, including the observation that, under 30 C.F.R. 77.502, Respondent had been required to conduct a complete electrical inspection of the overland belt before it began operation of the belt on June 20, 1988, and that, since it had failed to do so, Respondent was required to conduct such an electrical examination immediately, and to make and keep a record of it. MSHA personnel also advised Respondent that the other specific conditions found by MSHA should be abated in a timely manner, and that in any future inspection any violative conditions would be cited as violations.

6. On June 29, 1988, MSHA Inspector Michael Kalich, who had been part of the MSHA CAV on June 23, 1988, inspected the overland belt and found that a complete electrical examination of the belt had still not been conducted and recorded by Respondent. Based upon that finding, be issued 102(d)(2) Order 3107213 charging a violation of 30 C.F.R. 77.502, alleging that the violation was "significant and substantial" and was due to an "unwarrantable" failure to comply with the standard.

7. MSHA Inspectors Michael Kalich and Wayne Fetty, both electrical inspectors from MSHA's Morgantown District Office, Charles Wotring, a mine inspector from MSHA's Oakland Field Office, and Barry Ryan, a supervisor from the Oakland Field Office, conducted the CAV on June 23, 1988. They found and pointed out fifteen different electrical deficiencies on the overland belt, in addition to a number of other unsafe conditions on the belt, which would have been cited as violations if this had been a regular inspection.

8. At the conclusion of the CAV on June 23, 1988, a close-out conference was held. The problems noted were gone over and discussed with mine management and union representatives. It was emphasized by the MSHA electrical inspectors that a complete electrical examination of the overland belt was required by 30 C.F.R. 77.502. They pointed out that part of the reason

that this failure was deemed important to MSHA was the existence of the many electrical and other unsafe conditions on the overland belt. Respondent was also told that the complete electrical examination, which should have been performed upon takeover of the belt, had to be done immediately, and that all the other items noted must be corrected in a timely fashion. No particular date was given for the return inspection, but it was made clear by the MSHA personnel that enforcement citations and orders would be issued if violative conditions were found during the next inspection.

9. On June 29, 1988, Inspector Kalich returned for a normal spot inspection. He found that a complete electrical examination had still not been made of the overland belt. Only four of the items previously noted on June 23, 1988, had been corrected. Inspector Kalich issued six citations and one order for the conditions he found to be violations of safety standards. The order charged a violation of 30 C.F.R. 77.502.

DISCUSSION WITH FURTHER FINDINGS

Section 77.502 provides that:

> Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

Subsections of this standard provide further clarification of what is required: 77.502-1 defines who is a qualified person, and 77.502-2 states that the required examinations and tests "shall be conducted at least monthly."

Respondent contends that it was in its initial "month" of responsibility for the overland belt and therefore had until the end of the month, i.e., June 30, to complete the examination. The Secretary contends that the regulation requires a complete electrical examination before starting up a new (or newly acquired) conveyor belt system.

I find that Respondent's interpretation is not a logical position. Upon the takeover or start up of newly acquired equipment, the operator must be in compliance with the laws and regulations. There is no grace period applicable in this type of situation. The purpose of the Mine Act and its implementing regulations is to ensure the safe working conditions of those who work in the mining industry. To allow an operator a month in which to come in compliance with safety standards while the equipment is being operated would thwart the strong public policy behind the Act. The Secretary's requirement that an operator

conduct a complete electrical examination upon takeover of a conveyor belt is a logical and reasonable interpretation of 77.502.

Respondent argues that there is no requirement for a complete electrical examination. This reading of the regulation is not a reasonable interpretation. If the regulation did not require a complete examination, the purpose behind the examination would be thwarted. Section 77.502 states that an electrical examination shall be conducted to "assure safe operating conditions." If the examination is not complete, there can be no reasonable assurance that the equipment is safe.

The Secretary presented uncontradicted expert opinion testimony that this violation was "significant and substantial." This violation presented many risks to the miners' safety. Without an adequate electrical examination and the required tests, operation of the belt could result in an overload, a short circuit, overheating, or a fire causing serious injuries or even fatalities.

In addition, the Secretary presented uncontradicted expert opinion testimony that the violation was an "unwarrantable" failure to comply with the safety standerd. In order to make a finding of an unwarrantable violation, aggravated conduct constituting more than ordinary negligence must be shown. Emery Mining Corporation v. Secretary, 9 FMSHRC 1997 (1987). The operator was clearly more than just negligent in this case. On June 23, 1988, MSHA personnel observed the absence of the required electrical examination, explained what had to be done, and stated that it should be done immediately. However, six days later, on June 29, 1988, Inspector Kalich found that a complete electrical examination had still not been made and the belt system was operating with numerous safety violations. In view of the clear prior notice by MSHA, the operator's subsequent operation of the belt without a complete examination constituted an unwarrantable failure to comply with 77.502.

Considering each of the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of $500 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated 30 C.F.R. 77.502 as alleged in Order 3107213.

ORDER

Respondent shall pay the above civil penalty of $500 within 30 days of this Decision.

William Fauver
Administrative Law Judge