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SOL (MSHA) V. ROSE COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceedings Docket No. LAKE 79-94 A/O No. 33-01253-03001
v.		Docket No. Lake 79-100 A/O No. 33-01253-03002R
ROSE COAL COMPANY,	RESPONDENT	Rose No. 3 Mine

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner Mr. James Rose, Rose Coal Company, Jackson, Ohio, for Respondent

Before: Judge Edwin S. Bernstein

On April 8, 1980, I conducted hearings pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 801 et seq., and 29 C.F.R. 2700.50 et seq., and issued the following decisions from the bench.

Docket No. LAKE 79-94

This is my bench decision in Docket No. LAKE 79-94.

The parties have stipulated that the mine in question, Rose No. 3 Mine, was very small in size. With regard to the history of prior violations, the Solicitor stated that the history was moderately good. Mr. Rose stated that there was a small number of prior violations. I find that the history was moderately good.

With regard to the alleged violations covered by No. 7-0003, the Solicitor contended that the Respondent failed to furnish a report of a periodic survey of noise levels, and that that failure violated the health and safety standards at 30 C.F.R. 70.508(a).

Mr. Rose did not dispute the violation and did not deny that he violated that standard.

I find that the gravity was slight. In order for the violation to endanger health, prolonged exposure to noise would be required. I accept Mr. Rose's testimony that in a previous survey, noise was detected to be one-quarter of the allowable limit.

I find that the operator was negligent.

As to good faith abatement, the evidence was that the operator was slow in abating the violation.

Considering all these factors, I assess a penalty of $45 for this violation.

With regard to Citation Nos. 278782, 278783 and 278785, the Secretary of Labor contended that the operator violated the mandatory standard at 30 C.F.R. 75.503. That section reads: "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by Sections 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

With regard to Citation No. 278782, the Secretary of Labor charged that the coal drill used in the 001 section had a trailing cable that was not insulated on both sides.

With regard to Citation No. 278783, the Secretary of Labor charged that the cutting machine in the 001 section had a trailing cable that was not insulated on both sides.

With regard to Citation No. 278785, the Secretary of Labor charged that the shuttle car used in the 001 section had a trailing cable that was not insulated and had an opening in the plane flange joint at the headlight resistance compartment in excess of .005 inches.

The operator did not dispute Mr. McNece's testimony that when, on December 21, 1978, Mr. McNece inspected the equipment in the 001 section, he found that insulation was worn from the side of the drill's trailing cable, the shuttle car's trailing cable and the cutting machine's trailing cable, and that with respect to the shuttle car's headlight resistance compartment, there was an opening in excess of .005 inches. Therefore, I find that the operator violated the permissible standard as alleged in all three citations.

I find that the operator was negligent even though Mr. Rose testified that the cable had previously been painted with insulating paint. There is no indication as to when the insulation work had been done, and there was no testimony as to when this cable had been painted. A periodic inspection should have detected the fact that the insulation on the cables was worn and

that the opening was excessive. Mr. Rose testified that he made periodic inspections, but he did not indicate when prior to December 21, 1978, he inspected this equipment.

The gravity was moderate. There were few employees in this mine, and as conceded by Mr. McNece, this was a mine which had no history of being a gassy mine. Therefore, the chances of a methane explosion were slight. However, the danger to a miner who happened to touch the bare cable would have been great.

As indicated by the Secretary of Labor's witness and by the Solicitor, the operator acted in good faith and rapidly corrected these violations.

A final factor which I considered is that there is no evidence of a fine being proposed which would affect the operator's ability to continue in business.

I therefore assess the following penalties: I assess a penalty of $60 for the violation with respect to Citation No. 278782; a penalty of $60 for the violation with respect to Citation No. 278783; and a penalty of $70 with respect to the violation regarding Citation No. 278785.

The total penalties assessed for this case are $235.

Docket No. LAKE 79-100

My bench decision in Docket No. LAKE 79-100 is as follows:

The Petitioner in Citation No. 279802 has charged that Respondent and its owner, James Rose, refused an authorized representative of the Secretary

of labor, specifically Jesse Petit, right of entry in Rose No. 3 Mine on June 27, 1978.

Section 103(a) of the Federal Safety Mine Safety and Health Act of 1977 states in part:

> For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

The testimony of the witnesses indicates that on June 27, 1978, at about 7:15 a.m., Mr. James Rose refused to permit Mr. Jesse Petit, an authorized representative of the Secretary of Labor, to remain on his premises in order to conduct a safety inspection of his coal mine. This action constituted a violation of Section 103(a) of the Act.

In deciding upon the penalty to be assessed, I have considered the six factors set forth in Section 110(i) of the Act. I find that Rose No. 3 Mine was a very small mine. It had a moderately good history in connection with prior violations. There was good faith abatement of this violation.

The assessment of this penalty will have no effect on the operator's ability to remain in business since it has been undisputed that Mr. Rose, the operator, is no longer in business.

As to gravity, I find the gravity is great. The right of representatives of the Secretary of Labor to inspect coal mines and other mines is essential to the proper enforcement of the Federal Mine Safety and Health

Act of 1977 and other statutes and to the protection of the health and safety of the workers in the mines. It is essential that representatives of the Secretary of Labor be permitted to inspect mines. Refusing them access could result in serious accidents as a result of lack of enforcement of the statute.

Similarly, there is no provision in the law permitting owners of mines to decide which inspectors can enter upon their property and which inspectors cannot. Nor are mine operators permitted to select inspectors. This would result in only those inspectors that are kind to the mine operators being allowed to inspect, rather than other inspectors who may, in the course of their jobs, have offended operators.

We can see what this would lead to. It would result in a breakdown of the purpose of the law. Therefore, I find the gravity to be great.

With respect to the factor of negligence, there was undisputed testimony that on a previous occasion, Mr. Rose refused to permit inspectors to enter his property.

However, there was one factor that I did consider in mitigation that touches on the question of negligence, and that factor is that Mr. Knight has testified that he told Mr. Rose that he would make every effort not to send Mr. Petit to Mr. Rose's property. It is clear that Mr. Rose and Mr. Petit had some bad feelings. Mr. Knight told Mr. Rose that he would try not to send Mr. Petit there. Apparently, as indicated by the testimony, on June 27, 1978, Mr. Knight was on vacation. Mr. Rose was unable to reach Mr. Osborne, who was acting supervisor in Mr. Knight's place,

when Mr. Rose tried to telephone on or about 7 a.m. on that day. Mr. Rose, therefore, felt that he had an understanding with Mr. Knight, that that understanding was not being honored, and I think that chain of circumstances offers an explanation as to his conduct on that date, and is a mitigating factor. This reduces his element of fault in refusing Mr. Petit entrance on that date.

Upon consideration of these factors, I assess a fine of $700 for this violation.

That concludes my bench decision.

I hereby affirm these bench decisions.

ORDER

Respondent is ORDERED to pay $935 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge