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SOL (MSHA) V. KENNETH DENSON
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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

v.

KENNETH DENSON,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 82-191-M
A.C. No. 04-04521-05002 F

Denson Mine

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco, California,
for Petitioner;
(Respondent failed to appear).

Before: Judge Vail

STATEMENT OF THE CASE

This civil penalty proceeding was filed by the Secretary of Labor (Secretary) against Kenneth Denson (Denson) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards. Pursuant to an Order to Show Cause dated December 2, 1982, Denson sent a letter dated December 19, 1982, which letter has been accepted as his answer to the Secretary's petition. In this answer, Denson stated that he thought the proposed penalties were considerable and that payment would cause him financial distress.

Notice of Hearing was mailed to the parties on March 3, 1983 setting the hearing for July 7, 1983. The Secretary filed a motion requesting that the hearing be continued to a later date. An order rescheduling the hearing was issued on May 23, 1983, setting the matter for July 20, 1983 in Sacramento, California. The Counsel for the Secretary appeared at the hearing on the day and at the time set. Denson failed to appear. Prior to the hearing date, numerous unsuccessful attempts were made to contact Denson by telephone. Also, Denson had refused to accept certified letters mailed to him with a return receipt attached. The last Notice of Hearing was sent by both certified mail and regular mail.

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After waiting a period of time, Counsel for the Secretary advised the Judge that he had two witnesses present and wished to proceed with the hearing and present his evidence. This was granted.

On July 28, 1983, an order was sent to Denson to show cause why he should not be held in default for his failure to appear at the hearing and have penalties assessed against him. Denson replied by letter received in my office on September 1, 1983 and stated that his wife had marked the wrong date for the hearing on his calendar. He included the July page of a 1983 calendar showing the date of July 26, 1983 as the date for the hearing.

Denson further stated that he did not wish to have everybody go to the expense of another hearing and again stated his argument that high penalty assessments in this case would cause him extreme financial hardship. I accept his reply to the Order as consent on his part to have a determination made on the record in this case without the need for a second hearing. A copy of the above letter and attachments were forwarded to the Secretary for his comments but none were forthcoming.

ISSUES

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) The operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

DISCUSSION

On June 30, 1981, an accident occurred at the Denson Mine located approximately 12 miles north of Nevada City, Nevada. A 1964 Hough Model 120C, serial No. 1210383, front-end loader driven by Gary Gray went over the edge of an elevated roadway falling into the pit at the mine. Gray suffered severe injuries, including the loss of one leg. A second employee, Edward Grebel, who was riding on the loader, was killed.

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During an investigation of this accident on July 7, 1981, MSHA Inspector Thomas Hubbard issued to Denson, as owner and operator of the Denson Mine, a 107(a) order No. 601630 charging a violation of 30 C.F.R. 55.9-3.1 This order removed the Hough front-end loader involved in the accident from service due to defective brakes. On the same day, citation no. 601631 was issued alleging a violation of 30 C.F.R. 55.9-22.2 for failure to have a berm on the elevated roadway into the pit.

The evidence shows that Gray and Gerber were new employees of Denson at his gold mine. On June 3, 1981, Gray was driving the front-end loader and showing Gerber how it operated. They had driven to the refueling area, filled the tank and were proceeding down the elevated road into the pit when the engine quit. This caused a loss of the hydraulic steering power. The loader went over the side of the elevated road and fell 15 feet into the pit. Both Gray and Gerber were pinned under the machine.

During a conversation between MSHA Inspectors Hubbard and George W. Constanich, testified to at the hearing, Denson admitted the brakes on the front-end loader were very poor (Transcript at 10 and 21). Also, Constanich observed the repairs made to the brakes of the Hough front-end loader which involved replacement of a grease seal on the right front wheel, replacement of a brake fluid line, and adding fluid to the brake system (Exhibit P33).

Both inspector Hubbard and Constanich testified that the elevated roadway into the pit at the Denson Mine lacked any type or semblance of a berm. The roadway was 10 to 18 feet wide, 200 yards in length, and had approximately a 4 percent grade from the top to the pit floor. At the point where the loader went over the side, it was approximately 15 feet from the edge of the roadway to the pit floor (Tr. at 9, 28).

I find that the evidence establishes the two violations, the one contained in citation No. 601630 for defective brakes and that described in 601631 as to the lack of a berm on the elevated roadway. Denson never denied these charges in either his letter of December 2, 1982 treated as an answer, or in the one received by me on September 1, 1983. Denson did allege in the latter letter that the State of California's penalties for the same violation was "about \$170.00" based on lack of evidence to prove the charge of defective brakes on the loader. However, I have

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found that the evidence does prove the brakes were defective on the Hough front-end loader from the testimony of the two MSHA inspectors.

PENALTIES

I find that the evidence establishes that the Denson Mine is a small gold mine employing two miners to work with the owner-operator. There is no history of prior violations as this was a new mine listing with MSHA.

As to negligence, I find that Denson was negligent in allowing two new men to operate the Hough front-end loader without adequate brakes. The testimony of the inspectors proves Denson knew the brakes were as he stated "very poor."

The lack of a berm on the elevated roadway is evidence also that Denson was negligent, as this would be obvious to him as he was working at the pit with the employees.

The gravity of the violations is serious as evidenced by the resulting injuries to Gray and death of Grebel. Either effective brakes or a berm on the elevated roadway could have prevented this accident. Both factors contributed to the result.

The Secretary proposed a penalty of \$4,000.00 be assessed for the violation of 55.9-3 and a penalty of \$2,500.00 for a violation of 55.9-22. Denson contends that penalties of this size would cause him extreme financial hardship. At the hearing, the Secretary recognized that this was Denson's main defense and agreed to the receipt in the hearing record of Denson's income tax returns for 1981 and 1982. These returns show that Denson suffered a financial loss during both years. Also, presented as evidence was the fact that Denson had a large trust deed (loan) against the land on which the mine was located and that these payments were a financial hardship.

There is sufficient evidence in this case that the imposition and collection of large penalties against Denson would affect his ability to continue in business. Also, the evidence shows that Denson did demonstrate good faith in achieving compliance with the Act.

For the above two reasons and the fact that this is a small mining operation, a reduction in the amount of the penalties proposed by the Secretary is warranted. However, the degree of negligence and the gravity of these violations cry out for penalties that would be effective in securing the cooperation of this operator

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in following the Act in the future. The fact that it is a small operation with only two employees and in financial trouble does not alone warrant small penalties. The Act is designed to protect the health and safety of miners working in small mines as well as those in the larger ones, and probably is needed more than the larger more responsible mine operators do. I find that a penalty of \$200.00 for the violation in citation No. 601630 and \$200.00 for the violation in citation No. 601631 is reasonable and appropriate in each instance.

ORDER

The respondent is ORDERED to pay civil penalties in the total amount of \$400.00 within 40 days of the date of this decision and order, and upon receipt by MSHA, this case is dismissed.

Virgil E. Vail
Administrative Law Judge