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SOL (MSHA) V. ROCKVILLE MINING  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. WEVA 82-10  
A.O. No. 46-02558-03013H

v.

No. 1 Strip Mine

ROCKVILLE MINING COMPANY, INC.,  
RESPONDENT

DECISION

Appearances: Joseph T. Crawford, Attorney, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for the petitioner Neil A. Reed,  
Esquire, Kingwood, West Virginia, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a penalty assessment for an alleged violation of mandatory safety standard 30 CFR 77.1300.

Respondent filed a timely answer in the proceedings denying the alleged violation, and pursuant to notice a hearing was convened in Morgantown, West Virginia, on April 22, 1982, and the parties appeared and participated fully therein. The parties waived the filing of written post-hearing arguments, but were afforded an opportunity to make oral closing arguments on the record, and I have considered these arguments in the course of this decision.

Issues

The principal 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 penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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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.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 20 CFR 2700.1 et seq.

#### Discussion

The civil penalty proposal filed by the petitioner on November 18, 1981, seeks a civil penalty assessment of \$1,200, for an alleged violation of mandatory safety standard 30 CFR 77.1300. The citation on which the penalty proposal is based, No. 855434, was issued by MSHA Inspector Ronald B. Marrara on June 8, 1981, and it is an imminent danger order issued pursuant to section 107(a) of the Act. The conditions or practices cited by the inspector are as follows:

Explosives and detonators were not being handled, charged, fired, or otherwise used in accordance with provisions of 77.1301 through 77.1304 inclusively. Blasting operations were being conducted without ample warning given before blasts were fired and without persons cleared and removed or protected from concussion or flyrock in the blasting area (77.1301(h)).

Safety fuses 12 inches long (approximately 45 second burntime) was being used in violation of 77.1303(c). The blasting area where charged holes were awaiting firing, were not guarded or barricaded and posted against unauthorized entry. In a pattern of approximately 17 holes with 15 holes charged the blasting foreman was "getting rid of the water in the holes" by dropping a fused capped Gulf Deta-GEL primer in them. The 4 men on the drill bench gathered, unprotected approximately 130 feet from the closest hole that was detonated. There were also 3 men and this inspector in the pit area below where such shots were fired. The inspector observed 2 such shots (holes) being detonated. It appears that numerous such shots have been fired this day and this is a common practice.

Stipulations

The parties stipulated to the following (Tr. 4-7):

1. Petitioner's exhibits P-1, P-3, P-4 and P-5, which are copies of the citation, a modification to the citation, a computer print-out of respondent's history of prior violations, and a previous section 104(d)(1) order issued on January 6, 1981, may all be admitted as part of the record in this case.
2. Payment of the maximum civil penalty assessment in this case will not adversely affect respondent's ability to remain in business.
3. Respondent's annual coal production in 1980 was 253,813 tons, and respondent has approximately 54 employees on its payroll.
4. Respondent is a small-to-medium sized mine operator.

Testimony and evidence adduced by the petitioner

MSHA Inspector Ronald B. Marrara testified that he has been employed as a surface coal mine inspector for approximately five years and that prior to that time, between 1974 and 1977, was employed as a foreman with the Comet Coal Company in Kingwood, West Virginia. During his tenure as an inspector, he has taken training courses in surface blasting and explosive techniques and safety. He confirmed that he was at the mine in question on June 8, 1981, to conduct a spot inspection and to abate a previously issued citation. He arrived at the site at approximately 9:45 a.m., and while on the road leading to the 7500 Pit, he encountered a bulldozer operator working on the road. He advised the worker that he was there to make an inspection, and at about the same time foreman Kermit Galloway approach him. He advised Mr. Galloway that he was there to make a spot inspection and to abate a previous citation, and Mr. Galloway told him to "go ahead", but that he did not have time to accompany him (Tr. 8-11).

Mr. Marrara stated that after leaving Mr. Galloway, he decided to walk into the site rather than to drive and disturb the dozer operator's road work. At approximately 9:54 while walking along the pit high wall area, he heard two explosions go off and material was thrown into the air. The explosions took place above the high wall on a drill bench area where holes were being drilled and shot. He was almost directly under the holes when they went off, and he then went back to his vehicle and drove to the pit. He arrived there at 10:00 a.m., and found four people working on the "drill bench". Mr. Donald Jordan, the blasting foreman, was supervising the work of two drill operators and one blasting helper. After arriving there, Mr. Jordan advised him that they "were getting rid of water in the holes by dropping a fused capped primer". The primer was a one-pound Gulf

Deta-Gel primer with a safety fuse and cap. He

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determined that the crew which was present were 145 feet from the furthest hole which had been detonated, and they were in front of a pump truck. Mr. Marrara observed approximately 17 holes in the area, 15 of which were charged and primed in some way, with electrical wires running out of the holes, and some of the holes were fully charged with AMFO, an ammonia nitrate fertilizer mixture which is used as an explosive. (Tr 12-15). Mr. Jordan stated to him that he was using twelve inches of fuse, with an approximate burn time of 45 seconds (Tr. 12-15).

Mr. Marrara testified further that he observed no warning signs or barricades at the detonation site, heard no horns sounding a warning to persons that blasting was taking place, and no one was "cleared of the area". He therefore advised Mr. Jordan that he was issuing a section 107(a) imminent danger order because of what he observed, and he identified a copy of the order which he issued (Tr. 15-19). He believed that the fuses being used were too short because the law specifies that a fuse burn time should be a minimum of two minutes, and Mr. Jordan confirmed that the actual burn time for the fuses he was using was actually 40 seconds per foot. He should have been using a 36-inch fuse in order to comply with the required safety standard. Mr. Marrara believed that the operator was negligent and that Mr. Jordan was aware of the fact that he was in violation by placing his crew in such hazardous conditions (Tr. 20).

Mr. Marrara identified a copy of his inspector's statement (Exh. P-2), which he prepared at the time of the inspection. In regard to his notation on this form that "this type of violation occurs frequently", he explained that he had previously issued a January 6, 1981, unwarrantable failure citation to the respondent for a blasting violation (Exh. P-5), and at that time he had reviewed the blasting laws with Mr. Jordan. In addition, shortly after the imminent danger order issued, Mr. Galloway came to the scene and stated to him that "this was a common practice that was being conducted at this operation". The "common practice" being getting rid of water in the holes by blasting (Tr. 21-22).

Mr. Marrara stated that Mr. Jordan admitted that he did not look over the high wall prior to the blasting, and when he asked him whether he was aware of the fact that he was in violation and was exposing his men to a hazard, Mr. Jordan nodded his head affirmatively and stated "I guess so" (Tr. 25). Mr. Marrara also indicated that at the time he issued the previous citation he had a lengthy discussion with Mr. Jordan concerning the requirements of the standards dealing with blasting. He also discussed the regulations with the mine owners at that time (Tr. 26).

Mr. Marrara believed that the conditions he cited in his imminent danger order were serious in that he reasonably expected someone to be killed or injured "right in front of my eyes". He observed fine material being thrown into the air at the time of the explosions in question, and he was some 150 feet away. He believed that the three men in the pit area, as well as the four men on the drill bench, and himself, were all directly exposed to

the hazardous conditions he cited. He was concerned

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that the blasted materials thrown in the area could fall on someone, and they could also fall down the charged holes and set them off. In addition, a quick movement of air could generate static electricity and possibly set off the entire shot (Tr. 26-31).

Mr. Marrara stated that he determined through observation that some of the filled holes were charged, primed, and had filters in them. After the order issued at approximately 10:05 a.m., drilling operations ceased, and the men were assembled at a distance past the pump truck. He then discussed the violation and the applicable safety standards with the men, and also present were Mr. Jordan and Mr. Galloway. Mine Owner Darrell Tichnell arrived during the latter part of the discussion, and after warning signs were posted, Mr. Marrara abated the order at approximately 10:24 a.m., and the men went back to work. He confirmed that the order issued for a violation of section 77.1300, but that there were "three or four separate problems" (Tr. 32-36).

On cross-examination, Mr. Marrara confirmed that on June 8, 1981, he did not first stop at the mine office, as is his usual practice, prior to entering the mine premises. He also confirmed that the ground around the drill holes in the blasting area was "wet around the holes", but that no puddles of water were present. Based on these observations, he concluded that the water had come out of the holes. Mr. Marrara described the mining procedures, and confirmed that in a surface mining operation the top soil and overburden is removed, leaving an exposed cut-out area in the side of the hill. He confirmed that the detonations occurred in the high wall drill bench area and not down in the pit area where the coal is found, and he described the physical characteristics of the area in question (Tr. 36-44). In determining the depth of the holes he observed, Mr. Marrara stated that he did not test them, but simply concluded that they were about 45-to-50 feet deep. A normal charge for holes of this size would be about 800 pounds of explosive (Tr. 45). Assuming that the hole was 145 feet deep, and it was charged with 800 pounds of explosive, Mr. Marrara conceded that there would be no surface subsidence other than the material coming directly out of the hole. By the same token, using a one pound charge in that same hole, the most probable possibility is that water and loose rock material will come practically straight up out of the hole (Tr. 47-48).

With regard to the materials that he observed coming out of the holes which were detonated on June 8, Mr. Marrara conceded that from where he was standing 150 feet away all that he could see coming out of the holes was the mist from the water and the dust in general (Tr. 49). The workers in the pit area were also standing approximately 150 feet away, but those persons up on the bench were much closer, and he was unaware that any particles from the explosions touched them. No one complained that they had been touched by any materials coming from the holes, and no one was injured (Tr. 51).

Mr. Marrara confirmed that the blasting standards require the use of a 36-inch fuse with a two-minute burn time, regardless of whether a hole is loaded with 800 pounds of explosive or one pound. The purpose

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of the burn time is to allow the person lighting the fuse sufficient time to get away from the area. He conceded that lighting such a fuse or explosive that is openly exposed on the surface is much more dangerous than dropping it down a 145 foot hole (Tr. 52). He also confirmed that on the day in question, a one-pound charge was being dropped down 45 foot holes for the purpose of blowing out the water at the bottom of the hole, and not for the purpose of disturbing the rock strata (Tr. 53).

Mr. Marrara conceded that misfiring of charges is critical, and that from a safety standpoint, an operator has to make certain that every charge goes off, rather than having misfired charges lying around (Tr. 53). He described the procedures used to load the holes for detonation, and confirmed that the operator wants to get water out of the hole because water used with AMFO will not explode, and it is common practice in the mining industry to try to get dry holes before blasting. However, Mr. Marrara stated that there are other explosives available which do not require the blasting of water out the hole. However, using the type of explosive that the operator in this case opted to use was not illegal, and he conceded that they must strive for a dry hole and that it is dangerous to leave explosives which had not been properly detonated at the bottom of a hole is dangerous (Tr. 54-57).

Mr. Marrara stated that on all occasions prior to June 8, the operator used a pump to pump the holes dry, but he denied that the pump was broken that day. In addition, he stated that Mr. Galloway told him that when the pumps were down, it was common practice to blast water from the holes, but that both Mr. Jordan and Mr. Galloway advised him later in the day that the pump was not broken. Since the citation issued, the operator no longer blasts water from holes, and uses the pumps exclusively for this task (Tr. 59). Although conceding that the water blasted from the holes on June 8, came back down to rest three to five feet from the holes, he still believed that the drill bench crew, standing 130 feet away, were still not a safe distance, even though he could not observe any debris coming out of the holes (Tr. 60).

Regarding his prior unwarrantable failure citation, Mr. Marrara confirmed that it concerned a pick-up truck with properly inflated tires running over a blasting cap placed in a charged hole and he conceded that there have been no similar incidents at the mine (Tr. 61). However, he indicated that he has no knowledge concerning the respondent's past safety record (Tr. 62).

In response to further questions, Mr. Marrara stated that it was his understanding that Mr. Jordan lit two 40-second fuses at a time, dropped the charges down the holes, and then ran over to the area where the other members of the crew were standing. He identified a sketch of the area (Exh. P-6), which basically describes and diagrams the scene as he observed it. He believed the procedure used to light the charges would contribute to the gravity of the violations, since Mr. Jordan could stumble while

leaving the area, or he could become disoriented and drop the charge down a loaded hole which is not stemmed (Tr. 63-66).

In response to bench questions, Mr. Marrara stated that his principal concern on June 8, was the hazardous conditions which prevailed as a result of the method used to blow water out of the holes in question. He conceded that the practice of blowing water out of holes by means of permissible explosives is not per se a violation. Further, the use of AMFO as an explosive is likewise not a violation. However, he believed that a better way was to use pumps rather than explosives, and he reiterated that blasting water out of holes is not in and of itself a violation of any mandatory standard. His concern was over the fact that no warnings had been sounded and no barricades had been erected (Tr. 71-73). He was also influenced by the fact that Mr. Galloway stated that this was a "frequent practice" (Tr. 75). He also indicated that at the time he abated the prior unwarrantable citation, he went over all of the provisions of the blasting standards with Mr. Jordan (Tr. 79-80). At the time he observed the instant conditions on June 8, some of the holes were charged to break up the overburden, and while the holes were charged, he conceded that the charge wires were not connected to the blasting machine and were shunted. Even though they were shunted, he still believed that static electricity could have possibly set the charges off. He conceded that a sign indicating "blasting in progress" was posted at the site in question (Tr. 86). Even if a fuse longer than the one used was being used by Mr. Jordan, he would still be concerned over the fact that the crew would still be exposed to small flying materials (Tr. 88).

Mr. Marrara stated that he cited a violation of section 77.1300 on the face of his order, but that in his description of the conditions and practices, his intent was to charge the respondent for violations of sections 77.1301 through 77.1304, which section 77.1300 incorporates by reference. He stated that he discussed each condition cited with Mr. Jordan, as well as mine operator Darrell Titchnell. He conceded that he failed to cite a specific violation of section 77.1303(g) for lack of barricades, and he dismissed this as a "mistake" on his part. He also conceded that the "conditions or practices" recited in his order came from what he observed and from what Mr. Jordan and the crew told him (Tr. 88-94).

Mr. Marrara conceded that the possibility of material blasted from a hole with a one pound charge falling into a hole next to it and detonating it was improbable, and he has never known this to happen (Tr. 98). He also conceded that static electricity igniting properly charged holes was a very rare occasion (Tr. 98). He estimated that a safe distance for people to be in the event all of the holes in question were charged with 800 pounds of explosives each would be 2,000 feet if they were out in the open and unprotected (Tr. 100). However, in the event one shot was put off with one pound of explosive, 130 feet would be sufficient, assuming the men were protected by some structure (Tr. 102). In his view, if the men were under a piece of equipment, he would consider them to "be protected" under the safety standard (Tr. 103). He conceded that at no time did he ascertain that respondent's mine management or supervisors had instructed Mr. Jordan not to use a 36-inch fuse (Tr. 107).

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Although signs were posted at the entrance to the property stating that the blasting was taking place, there were none posted at the actual blasting area where charged holes were awaiting firing, nor were any barricades erected (Tr. 109). Section 77.1303(g) requires the posting of signs and the erection of barricades in the immediate area where the charged holes were located (Tr. 110). He did not consider Mr. Jordan's presence at the blasting site to be a suitable "guard" or barricade, nor did he consider the signs at the mine entrance to be a sufficient warning since anyone could drive directly up to the bench site where the charged holes and blasting was taking place (Tr. 112).

Testimony and evidence adduced by the respondent

Donald E. Jordan testified that he is employed by the respondent as a drill operator, but at the time the citation issued he was a shot foreman. He described the duties as a shot foreman, and stated that he served as an explosives supervisor for the respondent for some 11 years and has a blasting license issued by the State of Pennsylvania. A license is issued based on training and experience, and he confirmed that he was supervising the blasting operations on the day Mr. Marrara issued the citation in question. He identified a copy of the sketch of the scene (Exh. P-6), and agreed that it generally depicts the approximate positions of the holes being drilled that day. He explained the procedures he followed for detonating the holes, and indicated that all of them had been drilled 108 feet deep for the purpose of blasting up the overburden so that it could be removed. His intent was to blast the area in the rock strata immediately above the location of the coal. He was present when most of the holes were bored and loaded with explosives, and was in the process of loading the holes and stemming them when he first observed Mr. Marrara (Tr. 123-129).

Mr. Jordan explained that some of the holes contained underground rain water, and he explained how he attempted to remove that water by blasting. He confirmed that mine management had never instructed him as to the length of the fuses to be used, and confirmed that on the day in question he was using a fuse and a cap and a one pound stick of Delta Jell to blow the water out of the holes. He described the Delta Jell as two inches in diameter and eight inches long, and weighing one pound. The charge was dropped down the holes, which were five and five-eighths inches in diameter, and they were dropped to the bottom of the holes where the water was located. He and his helper both lit the Delta Jell together, and each of them would go to two different holes located fifteen feet apart, drop them down the holes and then leave the area. The resulting blast would propel "muddy water" out of the holes, spreading it about six or eight feet around the holes (Tr. 130-137).

Mr. Jordan stated that at the time the holes in question were blasted, he believed his employees were at a safe distance away, and that after he and his helper dropped the charges down the holes they retreated

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through an unobstructed path back to the truck. He and his helper made their way to the truck for a distance of 130 feet and "stood there awhile before it went off" (Tr. 139). The force of the blasts propelled water some 50 feet in the air from the surface, and it came straight down in a circumference of some six feet around the hole. He recalled seeing no other debris or rock, other than dust, being propelled out of the hole (Tr. 139-141). In his view, none of the one-pound explosives used in the 108 foot deep holes could have jarred or caused the other charged holes to explode, and his opinion in this regard was based on the fact that the primed and charged holes were fifteen feet apart (Tr. 143). Prior to the setting off of the charges, he would have signaled the men in some fashion, as is his usual practice, and his crew were all experienced miners. When he dropped the charges down the hole, he had no way of knowing that Inspector Marrara was on the premises, and in his view, he was not within any dangerous proximity of the one-pound charge (Tr. 146-147). However, his presence on the coal pit, had the entire shot of all the holes gone off, would have placed him in danger since he was directly below the shot. However, he did not see Mr. Marrara, and the other men in the pit were some 294 feet from where the water was shot out of the holes (Tr. 148).

Mr. Jordan stated that blasting shelters are sometimes used on the site, but that a common practice is to use vehicles for protection. In response to a question concerning any hazards, he stated as follows (Tr. 149):

Q. Except for the length of the fuse that was used, by you and your helper, was there anything that you or your helper or anyone in the area did that considered a hazard to their own or other people's health and safety? Except Mr. Marrara. Not counting Mr. Marrara was there anybody there doing anything that was careless aside from the length of the fuse?

A. Not to my knowledge.

Regarding the use of a pump to remove water from the holes, Mr. Jordan stated on the day in question it was either "broke down or plugged, I don't remember", and he made the decision to blast the water out (Tr. 154). He also indicated that it was an "acceptable practice" in the mining industry to use small explosive charges to remove water from a drill hole (Tr. 155). Although Mr. Marrara subsequently advised him that he could use this method as long as three foot fuses were used, other safety inspectors told the mine owners that water could not be blasted out of holes under any circumstances (Tr. 156). He could not recall Mr. Marrara discussing the length of fuses with him during the time he issued the previous citation for a pick-up running over a charged hole.

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Mr. Jordan confirmed that he made the decision to use a one-foot fuse on June 8, 1981, because he believed this would allow him and his helper enough tolerance to get away from the hole once the charge was dropped in, and to his knowledge respondent has never had any industrial mining accidents, and he believes the company has a good safety record (Tr. 157-158). Mr. Jordan stated that before placing off the "big charge", he would have sounded a horn device, but that this is not normally done for small charges to dispel water from a hole because everyone within the proximity of the charge is within sight and would know that it was going to be shot (Tr. 168).

On cross-examination, Mr. Jordan could not recall the total number of holes, and doubted that half of them were filled with water. On the day in question, he believed that only two holes were blasted and these were the ones that the inspector heard. He confirmed that from where he was standing he did not see Mr. Marrara in the pit at the time the holes were blasted, and conceded that he did not look into the pit immediately prior to the blasting, nor did he give any warnings in the pit area. He also conceded that he used a foot-long fuse to set off the charges in question, and indicated that he was taught to use 12 inch fuses by Mr. Darwin Titchnell, one of the mine owners. Mr. Jordan also confirmed that he had received explosives training in Pennsylvania, that he holds a blaster's license from the State, but stated that his knowledge of the use of fuses is what he learned from Mr. Titchnell. Although Mr. Marrara discussed the use of proper fuses with him at the time the citation in question here was issued, Mr. Jordan could not recall Mr. Marrara discussing this with him on the prior occasion when he issued a citation (Tr. 168-175).

Mr. Jordan identified a copy of a sketch of the area where the blasting was taking place (Exh. P-6), and conceded that no signs were posted in the immediate area where the holes in question were drilled. He considered that to be the "shot area", and he indicated that signs have been posted in the past, and this would be on the road 300 or 400 feet away. On the day in question, he observed no large debris come out of the holes which were blasted. He confirmed that he is presently employed as a drill operator, which is a "step up" from a shot foreman, and he no longer supervises. He requested to be reassigned because of "the aggravation of that worrying about just having everything up to specifications. Meeting the law" (Tr. 182).

In response to further questions, Mr. Jordan stated that he did not believe that any debris from the blasted water holes could set off the other charged holes because they were stemmed and covered. In addition, since the cap wires were shunted, he considered them to be safe. He conceded that had a sign been posted at the "shot area", the inspector would be unable to see it until he was almost at the shot, and he also indicated that the inspector could not have seen it from where he was located prior to the time the shot went off. He also indicated that 12

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inch fuses are not used to blast overburden because more time is required to get away from flying materials, but he does not believe that using such fuses to blast water out of a hole is dangerous, but conceded that a premature shot would be serious. He does not like using longer fuses for shooting water because the caps have longer to become wet and several misfires have occurred because of this. He conceded that had pumps been used, misfires would not be a problem and the citation probably would not have issued. However, the law does not require the use of pumps (Tr. 182-192).

Mr. Jordan stated further that since there was 15 feet of solid rock between in each loaded shot, and each hole was 108 feet deep, he did not believe the loaded holes could have been set off by the blast which occurred. He explained how he stemmed and covered the holes, and he did not believe that such a hole charged with 800 pounds of explosive could possibly have set all of the others off (Tr. 196).

Kermit Galloway, general superintendent, testified that he has observed the manner in which water was removed from holes by Mr. Jordan. He indicated that no one has ever been injured during any blasting at the mine, and safety is always of prime concern. He indicated that he usually accompanied the inspector during his rounds, and that he would stop by the office. However, on the day in question he met him at the "backfill", and he did not first stop at the office. Had he stopped by the office, he could have radioed ahead to any areas where blasting was taking place to alert the crews that he was in their area. He indicated that it has always been a common practice to shoot water out of holes. The pumps were purchased in 1976, and on the day the citation was issued the pump was either broken down or plugged, but he could not recall. He has never been instructed as the length of fuse to use for small charges, and that the electronic method is used for major charges. The only time fuses are lit with matches is when water is blown out of a hole, and Mr. Marrara has never discussed this procedure with him. He still considers the practice to be safe, but since the citation issued, pumps are used exclusively to dispel water from holes (Tr. 201-215).

On cross-examination, Mr. Galloway confirmed that when he first encountered Mr. Marrara at the site, he did not ask him to report to the office, and simply told him to go where he had to but that he did not have the time to go with him (Tr. 221). Mr. Galloway knew that the holes were being cleared of water by blasting, but did not tell Mr. Marrara because he did not consider it dangerous. A sign was posted on a road, but the inspector came in by a different one (Tr. 222). He did not consider that Mr. Marrara was in any danger when he headed to the pit to check on an abatement for a citation issued on a broken windshield (Tr. 226).

Rebuttal witness

MSHA Inspector Charles J. Bush, testified that prior to his

ten-year employment with MSHA, he was employed as a resident engineer by the Consolidation Coal Company. He testified as to his training regarding

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safe explosive practices, and indicated that he holds an instructor's certificate in explosives and has taught courses in the subject (Tr. 244). In answer to a hypothetical question as to the probability or possibility of a one pound charge placed into a 108 deep hole detonating other fully charged holes located within 15 feet, Mr. Bush stated that "it is probable" (Tr. 249). He explained his answer, and indicated that it was possible for the other charged holes to be detonated by the concussion of the initial first one-pound charge, and he indicated that "the probability is there" (Tr. 252).

With regard to the actual distance of 130 feet that the men in question were standing from the two water holes which were blasted on the day the citation issued, and whether they were a safe distance, Mr. Bush candidly admitted that "I've got to say that was a pretty substantial distance, for those two bore holes in general" (Tr. 253). However, had the fully charged holes all gone off, the 130 feet would not be sufficient because there are too many variables. In his view, a half-mile distance would not be safe if a total of 4500 pounds of explosives were used (Tr. 255).

On cross-examination, Mr. Bush confirmed that wind conditions will effect the direction of any materials coming out of a blasted hole, and that anyone standing 130 feet from the hole which was charged to blast out the water would be at a safe distance (Tr. 258). Mr. Bush also confirmed that he has been at the mine site in question, but has not examined the rock strata at the location where the shots in question were fired, nor has he inspected the site since 1976 (Tr. 262). He confirmed that it was highly probable that one of the charged holes where the water was located could have detonated the other charged holes, and when asked why it didn't on the day in question, he answered "Lucky, this time" (Tr. 260).

Mr. Bush indicated that his prior experience includes ten years of demolition duty with the City of Pittsburgh, and stated that he has never lit a one pound charge with a fuse 12 inches or shorter, and that he has always used 36 inch fuses. He confirmed that he assisted in the drafting of the mandatory safety standard in issue in this case, and stated that he has never seen anyone shoot water out of holes in Preston County (Tr. 262).

In response to bench questions as how he would propose to dispel water from a hole, Mr. Bush stated that water gel slurries may be used, but they are expensive. He also indicated that MSHA's technical personnel can assist a mine operator if he has a water problem. He indicated that blasting water out of a hole with AMFO is not a violation of any mandatory standard per se, but that doing so with adjacent holes being charged adds to the gravity of the situation (Tr. 268). He also conceded that no one has determined precisely what a safe distance is when blasting holes, and while conceding that he had no knowledge of the rock strata at the blasting site, his prior opinion as to a safe distance was based on "past experience" (Tr. 269-270).

Mr. Bush stated that had he been in Inspector Marrara's position, and faced with the same conditions, he too would have issued an imminent danger order, and that his concern would have been over the safety of the men at the site in the event the rest of the holes were set off. Even if the other 15 charged holes were not present, he would still consider

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it an imminent danger because the man lighting the short 12 inch fuse and dropping the charge in the hole would be in danger (Tr. 271-273). When asked whether the use of a 36-inch fuse would also be a hazard, he responded as follows (Tr. 272-274):

JUDGE KOUTRAS: Simply dropping a one pound charge down a hole to dispel water with a thirty-six inch fuse would be a hazard?

THE WITNESS: To me I think it would still be a hazard.

JUDGE KOUTRAS: Well, wouldn't the operator be in compliance?

THE WITNESS: Yes, sir, I know he would.

JUDGE KOUTRAS: But, why then, with that thinking then the operator could never get rid of water by using a charge? Even using a thirty-six inch fuse.

THE WITNESS: Most of your explosive manufacturers consider this as a bad practice, to get water out of a hole.

JUDGE KOUTRAS: Then why doesn't MSHA promulgate a standard that says, thou shalt not get water out of a hole using any explosive device, period?

THE WITNESS: We have on different instances submitted our memos and recommendations which MSHA has asked for, from all different districts, I think several different areas that it was brought about, in reference to Kentucky and Tennessee, these past couple months. It's hard to get something substantial to cover all phases of explosives.

#### Petitioner's arguments

At the close of the hearing, petitioner's counsel summed up his case by asserting that Inspector Marrara found a set of circumstances in connection with the blasting of water out of holes that violated certain specific standards under section 77.1300. A violation occurred when the respondent used fuses of improper length during the blasting, namely, 12 inch fuses rather than the required 36 inch fuses. In addition, failure by the respondent to give any warnings prior to the shots being detonated also constituted a violation, as well as the failure to post a sign at the blasting site (Tr. 281-282).

#### Respondent's arguments

With regard to the lack of any warnings, respondent argued that it is clear that warnings were given to everyone in close proximity to the explosive charge, since it is obvious that Mr. Jordan's crew was

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participating in the blasting itself and were verbally warned. In addition, it is clear that signs were posted in accordance with the requirements of the standards (Tr. 283).

Concerning the use of the fuses in question, respondent's counsel conceded that the regulations specifically require the use of 36-inch fuses, and that Mr. Jordan was using 12-inch fuses. However, given all of the prevailing circumstances, counsel views this violation as a "technical" violation committed by Mr. Jordan, who by experience and judgment believed that the use of 12-inch fuses to blow water out of a hole was safe. He also pointed out that the men were at a safe distance from the two holes which detonated, and that MSHA's witness Bush agreed that this was the case (Tr. 284).

Respondent's counsel argued further that the only thing that makes this situation concerning the blasting of holes an "imminent danger" in the eyes of the inspector, is MSHA's "theory and speculation" as to the probabilities of the other charged holes being detonated by one charge. However, counsel points out that the practice utilized by Mr. Jordan to dispel water from a hole was designed to result in a complete, free, and unobstructed "straight-up" shot from a hole 108 feet deep. There is no credible evidence as to the rock formations, strata, or whether the pit area would have been affected by any premature charge going off (Tr. 286).

With respect to Mr. Marrara's claims that he had previously advised the respondent about the requirement for using 36-inch fuses, counsel points out that Mr. Jordan testified that this conversation took place after the instant citation issued. Given all of the circumstances of this case, counsel maintained that the proposed civil penalty is excessive and exorbitant, and that a fine of \$25 or \$50 would be more appropriate (Tr. 287).

#### Findings and Conclusions

##### Fact of Violation

As stated earlier in this decision, Citation No. 855434 is an "imminent danger" order issued by the inspector pursuant to section 107(a) of the Act. The inspector subsequently modified the citation to show that it was also a citation issued pursuant to section 104(a). The validity of the order itself, that is, whether the inspector was correct in his judgment that the conditions he cited in fact constituted an imminent danger is not in issue in this case. Any hazard or danger connected with a violation of any mandatory safety standard will be dealt with in connection with my gravity findings.

Inspector Marrara conceded that the use of explosives to dispel water from drilled holes is not per se a violation of any mandatory safety standard. His concern was that the respondent did this as a "regular practice" and the inspector believed that a better way of drying out the holes was through the use of pumps. However, on the facts

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presented in this case, the manner in which the respondent was drying out the holes is not a significant issue, unless of course the petitioner can establish that in the course of the blasting the respondent violated certain mandatory safety standards.

In its proposal for assessment of civil penalty filed in this case, the petitioner sought a civil penalty for "each alleged violation set forth in attached Exhibit A". Exhibit "A" is a copy of MSHA Form 1000-179, which is the proposed assessment served on the respondent. That form reflects that MSHA's Office of Assessments waived the normal assessment procedures found in Part 100, Title 30, Code of Federal Regulations, and "specially assessed" a civil penalty in the amount of \$1200 for the citation in question. That "special assessment" was made on an alleged violation of mandatory safety standard section 77.1300, and the "narrative findings" of the assessment officer reflects that the civil penalty assessment levied by him was made on the basis of his "special findings" connected with an alleged violation of section 77.1300. In short, MSHA's Office of Assessments treated the conditions or practices described on the face of the citation as one violation of section 77.1300. However, during the hearing, Inspector Marrara testified that his intent was to charge the respondent with separate violations of sections 77.1301 through 77.1304, in addition to section 77.1300, a general standard which incorporates section 77.1301 through 77.1304 by reference. Under these circumstances, it is first necessary to determine precisely what the respondent has been charged with in this case.

The "conditions or practices" described by Inspector Marrara on the face of the citation which he issued contains a narrative of certain conditions and practices which he observed. The "part and section" of the law cited by Mr. Marrara on the face of the citation form is section 77.1300, and that is the section cited by the petitioner in its proposal for assessment of civil penalty. MSHA's initial assessment was made on the basis of an alleged violation of that section by the respondent. However, in the narrative description of the "conditions or practices" described by the inspector on the citation form, Mr. Marrara inserted references to mandatory standard sections 77.1303(h) and 77.1303(u), and these are shown as follows:

Blasting of pit holes were being conducted without ample warning given before blasts were fired and without persons cleared and removed or protected from concussion or flyrock in the blasting area (77.1303(h)).

Safety fuses 12 inches long (approximately 45 second burntime) was being used in violation of 77.1303(u).

In addition, the citation states that "the blasting area where charged holes were awaiting firing, were not guarded or barricaded and posted against unauthorized entry." Although Mr. Marrara did not include a reference to any specific safety standard, he testified that his intent was to charge the

respondent with a violation of section 77.1303(g), and the omission of a reference to this section was a "mistake" on his part.

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Section 77.1300, Title 30, Code of Federal Regulations, provides in pertinent part as follows:

(a) No explosives, blasting agent, detonator, or any other related blasting device or material shall be stored, transported, carried, handled, charged, fired, destroyed, or otherwise used, employed or disposed of by any person at a coal mine except in accordance with the provisions of 77.1301 through 77.1304, inclusive.

Sections 77.1301 through 77.1304 of the standards dealing with blasting and explosives contain approximately four pages of detailed mandatory safety requirements dealing with explosives, magazines, vehicles used to transport explosives, explosives handling and use, and special provisions dealing with blasting agents. Under these circumstances, I believe that it is incumbent on the petitioner to specifically detail in its proposal for assessment of civil penalty the precise sections of the standards for which it seeks civil penalty assessments. In this case, the petitioner attached an exhibit which is an initial civil penalty assessment dealing with section 77.1300, for which an assessment of \$1200 was levied. In short, it would appear from the pleadings that the petitioner had one violation in mind, while the inspector who issued the citation had two or three in mind when he issued the citation. Under these circumstances, it is necessary to determine whether the record here supports a conclusion that the respondent was put on notice as to what it was being charged with and whether it has had a fair opportunity to meet those charges.

Although the pleadings and citation issued in this case are not models of clarity, I believe that the record establishes that the respondent knew what it was being charged with and has had a full and fair opportunity to defend itself. While the proposal for assessment of civil penalty lists only section 77.1300 on "Exhibit A", the citation issued by the inspector was included as part of the pleadings, and the conditions or practices detailed in the citation was discussed by the assessment officer as part of his "Narrative Findings." In addition, respondent's answer to the proposal for assessment of civil penalty suggests that it was aware of the charges since respondent specifically entered a denial as to each of the essential allegations made by the inspector in the citation. Further, the inspector testified that he discussed each of the mandatory safety sections with Mr. Jordan and mine operator Tichnell (Tr. 93), the record here reflects that respondent has had a full opportunity to cross-examine the inspector and to present testimony and evidence in support of its defense, and the respondent has not claimed prejudice or surprise.

The fact that MSHA opted to treat the conditions and practices cited by the inspector as one violation rather than three for purposes of an assessment of civil penalty has not prejudiced the respondent. By the same token, since I am not bound by MSHA's penalty assessment procedures, I conclude that for purposes of my findings and decision in this case I may treat I may make findings concerning each of the standards cited by the

inspector and render my decision accordingly. My findings and conclusions in this regard follow below.

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30 CFR 77.1303(u)

Respondent does not dispute the fact that the use of the twelve inch fuses by Mr. Jordan during the blasting of water from the two holes which were shot on June 8, 1981, was contrary to, and in violation of section 77.1303(u), which required the use of 36-inch fuses. Petitioner has established a violation of this section by a preponderance of the evidence adduced in this case, and that portion of the citation charging a violation of section 77.1303(u) is AFFIRMED.

30 CFR 77.1303(g)

The citation asserts that "the blasting area where charged holes were awaiting firing, were not guarded or barricaded and posted against unauthorized entry". Section 77.1303(g) requires that "Areas in which charged holes are awaiting firing shall be guarded, or barricaded and posted, or flagged against unauthorized entry."

The term "blasting area" is defined by section 77.2(f) as "the area near blasting operations in which concussion or flying material can reasonably be expected to cause injury". The cited standard does not use the term "blasting area"; it simply refers to areas in which charged holes are awaiting firing. Shot foreman Jordan testified that while some of the drilled holes which constituted the "shot" were charged, the holes were stemmed and covered and that the cap wires were shunted. He believed that the immediate area where the drilled and charged holes were located constituted the "shot area", but that the posting of a sign at that location would be of no value since someone would be "on the shot area" before seeing any such sign.

Respondent has established that it had a sign posted on one of its mine roads indicating that blasting operations were taking place at the mine. While it is true that the inspector may have used another road to gain access to the mine, it is also true that he did not check into the mine office before proceeding to the pit area. Superintendent Galloway testified that had he done so he would have been alerted to his presence near any areas where blasting was to be done and he could have radioed the blasting crew to be alert to the fact that the inspector was near their operation. Since it was common practice to shoot water out of a drilled hole with a small charge, Mr. Galloway did not believe that the inspector was in any precarious position.

On the facts of this case it seems clear to me that the two "shots" which were fired caught the inspector off guard and surprised him. He probably would not have been so surprised had he checked into the mine office before proceeding to the pit area. Mr. Jordan testified that he first observed the inspector while he was in the process of loading and stemming the shot holes. Since two of the holes contained water, Mr. Jordan, following his usual practice, dropped a one-pound charge down the holes to dispel the water, and he obviously did not believe the inspector was in any jeopardy. The "shots" actually heard by the

inspector were those fired off by Mr. Jordan to dispel water from the holes in question and were not the normal "shots" used to blast overburden.

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Assuming that the only blasting operation taking place at the time the inspector arrived on the scene was the use of a one-pound charge to dispel water out of a hole, and assuming further that the term "area" used in section 77.1303(g) can be construed to mean "blasting area", then I would have to conclude that the posting of a sign or barricade was not required since the evidence here establishes that it was not reasonable to expect any injuries from concussion or flying material from a one pound charge. The evidence establishes that the only material dispelled from the holes in question was water and some dirt which was propelled vertically from the holes and fell in close proximity to the holes. However, since the standard in question requires guards, barricades, or posting in areas where charged holes are awaiting firing, the question presented is whether they were required in this case.

The facts of this case reflect that no signs, barricades, or guards were in fact erected at the immediate area where the charged holes were located. The intent of the standard in requiring such devices is not only to alert persons who may wander into the area that a shot will be fired, but also to allow anyone in close proximity to the shot to seek refuge or protection against any flying debris. Although respondent had established that a sign was posted along one of the roads leading into the mine, no signs or barricades or guards were posted in the immediate area where the charged holes were awaiting firing. Accordingly, I conclude and find that a violation of section 77.1303(g) occurred and that portion of the citation charging a violation of this mandatory safety standard is AFFIRMED.

30 CFR 77.1303(h)

The citation charges that blasting of pit holes was being conducted "without ample warning given before blasts were fired and without persons cleared and removed or protected from concussion or flyrock in the blasting area". Although petitioner cited section 77.1301 when it filed a typewritten copy of a "legible citation", the original citation, as confirmed by the inspector, cited section 77.1303(h). That section requires an ample warning to be given before blasts are fired. It also requires that all persons be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

It is clear from the evidence established in this case that the charged "shot" was not fired or blasted at the time the inspector was on the scene. The only "shot" fired was the two one-pound explosions to dispel water from two drilled holes. Respondent had established that the blasting crew had been removed to a safe distance and were standing by some trucks which the inspector indicated would suffice as "suitable shelters". MSHA Inspector Bush testified that the men standing 130 feet from the water holes which were blasted were at a safe distance, and the facts reflect that the holes which were blasted only propelled water vertically out of the holes and that there was no flyrock or debris thrown out to endanger anyone nearby. As for

any warnings, I accept the fact that the crew had been verbally instructed to remove themselves

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to a safe distance from the water holes. Under these circumstances, I conclude and find that the respondent was in compliance and that the petitioner has not established a violation of section 77.1303(h). Accordingly, that portion of the citation is VACATED.

#### Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business.

The parties stipulated that the respondent is a small-to-medium operator and that the penalties assessed will not adversely affect its ability to continue in business. I adopt these stipulations as my findings on these issues.

#### History of Prior Violations

MSHA's computer print-out of prior paid civil penalty assessments reflects a total of 8 paid citations issued at the mine in question for the period June 9, 1979 through June 8, 1981. Considering the size and scope of respondent's mining operation, I consider this to be a good safety record not warranting an additional increase in any penalty assessments levied by me for the citations which I have affirmed.

#### Negligence

I conclude and find that the respondent should have been aware of the requirements of the cited safety standards, and that its failure to exercise reasonable care to prevent the violations in question constitutes ordinary negligence as to both citations which I have affirmed.

#### Good Faith Compliance

Since the violations resulted in a withdrawal order, good faith abatement is really not an issue. Abatement was apparently achieved by the inspector instructing the respondent on the proper blasting procedures. In any event, the inspector indicated that abatement was "normal", and I accept that fact.

#### Gravity

I conclude that on the facts of this case the failure to post a sign or otherwise guard the area where the charges were awaiting firing was a nonserious violation. Here, the shot foreman had the immediate control of his men, had pulled them back to a safe distance, and did all that was reasonable to assure that no one known to be in the area was in jeopardy as a result of the blasting of the two water holes in question.

With regard to the citation for the failure to use 36-inch fuses, I conclude and find that this was a serious violation in that it presented

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a possible hazard and injury to the blasting foreman and his helper in that the use of so short a fuse in the event of a miscalculation on their part during the blasting process would have shortened the time for them to react and to retreat to a safe area.

#### Penalty Assessments

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been affirmed as follows:

Citation No.	Date	30 CFR Sections	Assessment
855434	6/8/81	77.1303(g)	\$ 25
		77.1303(u)	275
			\$300

#### ORDER

Respondent IS ORDERED to pay the civil penalties assessed in this matter, in the amount shown above, within thirty (30) days of the date of this decision, and upon receipt of payment by the petitioner these proceedings are DISMISSED.

George A. Koutras  
Administrative Law Judge