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SOL (MSHA) V. AUSTIN POWDER
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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. PENN 82-63 A.O. No. 36-02695-03001 F E24
v.	Docket No. PENN 82-33 A.O. No. 36-02695-03012 F
AUSTIN POWDER COMPANY, DOAN COAL COMPANY, RESPONDENT	Doan Strip Mine

DECISIONS

Appearances: Robert Cohen, Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner
William M. Hanna, Esquire, Cleveland, Ohio, for the respondent Austin Powder Company
Robert M. Hanak, Esquire, Reynoldsville, Pennsylvania, for the respondent Doan Coal Company

Before: Judge Koutras

Statement of the Proceedings

These proceedings involve proposals for an assessment of civil penalties brought by the petitioner against the respondents pursuant to 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1978), for three alleged violations of 30 C.F.R. 77.1303(h). The citations were the result of a blasting fatality which occurred at the Doan Strip Mine on July 30, 1981, and a resulting MSHA accident investigation with regard to the fatality. One of the citations was issued on July 31, 1981, and was served on the respondent Doan Coal Company, the operator of the mine in question, and the other two were issued on July 31 and August 6, 1981, and were served on the respondent Austin Powder Company, an explosives company who MSHA claims was performing blasting activities on the mine property.

The cases were heard in Pittsburgh, Pennsylvania, and all parties appeared and were represented by counsel. All parties were afforded an opportunity to file posthearing proposed findings, conclusions, and briefs. MSHA and respondent Austin Powder filed post-hearing arguments, but respondent Doan Coal Company did not, but has opted to join the arguments advanced by Austin Powder. All arguments presented by the parties, including those made at the hearing on the record, have been considered by me in the course of these decisions.

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, 29 CFR 2700.1 et seq.

Issues

The issues presented in these proceedings include (1) whether the named respondents have violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against each respondent for the alleged violations 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.

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.

Additional issues, as stated by petitioner MSHA in its post-hearing brief, are as follows:

1. Do the facts in this case support the conclusion that Austin Powder performed services at the Doan Strip Mine and therefore is liable under the Act for any violations resulting from the actions of its agents? Can Austin Powder limit its liability under the Mine Act pursuant to its service contract with Doan Coal?

2. Is the concept of strict liability applicable to the alleged violations of 30 CFR 77.1303(h) at issue?

3. On July 30, 1981, were the miners at the Doan Strip Mine given ample warning that a blast was about to occur?

4. If the violations of 30 CFR 77.1303(h) did occur, were they caused by the negligence of either Austin Powder and/or Doan Coal?

The issues, as stated by respondent Austin Powder Company in its post-hearing brief, are as follows:

1. No violation of 30 C.F.R. 77.1303(h) in fact occurred.

2. Austin Powder was not, at the time of the alleged violations, and is not now, an operator, agent, or independent contractor within the meaning of the Act, and is not subject to the jurisdiction of MSHA with regard to the actions and events alleged in this proceeding.

3. All individuals allegedly committing violations were, as a matter of law, not employees or agents of Austin Powder at the time of the alleged violations.

4. The regulation which Austin Powder is charged with violating is unenforceably vague and ambiguous, as applied to the facts here.

Discussion

On Thursday, July 30, 1981, a fatal blasting accident occurred at the Doan Coal Company's strip mine, No. 1 Pit (stock pile area). Dennis Alvatroha, a laborer employed by Doan Coal Company, was observing the blasting operation from a stock pile, and while seated at, or running from that location, was struck by flyrock and other debris from the blast. The actual blasting work was being performed by Austin Powder Company, in the person of a licensed blaster, Jeffrey Lucas and his crew, and the blasting work was performed at the specific request of Doan Coal Company, who had no experienced blasters of its own. MSHA conducted an investigation of the accident, and at the conclusion of same issued the three citations in question. All of the citations charge the named respondents with violations of mandatory safety standard 30 CFR 77.1303(h), which provides as follows:

> Ample warnings shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

The citations which were issued in these proceedings were issued after the investigation conducted by MSHA to determine the facts and circumstances surrounding a fatality which occurred when a miner was struck by flyrock during blasting of overburden. None of the conditions or practices cited as alleged violations were actually observed by the inspectors, and they issued the citations on the basis of information which came to their attention during the investigation. Two of the citations served on respondent Austin Powder Company by MSHA Inspector Lyle F. Bixler are as follows:

Section 104(a) Citation No. 1041342, July 31, 1981, which states the following conditions or practices:

> All persons were not cleared and removed from the blasting area and suitable blasting shelters were not provided to protect men endangered by concussion or flyrock from blasting at the No. 1 Pit in that the contracted Austin Powder Co. blaster, Jeffery A. Lucas stated during testimony that flyrock fell across him and up to 30 feet behind him while he was detonating a charge. This citation will not be terminated until all persons are instructed on the hazards of flyrock. This citation was issued during an investigation of a fatal accident.

Section 104(a)-107(a) Citation/Order No. 1041345, August 6, 1981, which states as follows:

> The proper warning was not given by the contract blaster Jeffery A. Lucas, Austin Powder Co., prior to detonation of a shot at Pit 010 of Doan Coal Co. according to the posted requirements. This is a violation of 77.1303(h) Part 77, 30 CFR. The blast signals which were posted at the mine entrance were: 3 ten second signals, 5 minutes before blasting and short pulsating signals 1 minute before blast, all clear, 1 prolonged 30 second blast (air horn) according to testimony given during the investigation of a fatal blasting accident that occurred on 7/30/81 Pit 001, Doan Coal Co., the signal given was three blasts (air horn) that were sounded 30 seconds to 1 minute before the shot was detonated. This Order will not be terminated until this unsafe practice is eliminated by the employees being properly instructed on the safe procedures of blasting and such procedures are observed by an authorized Representative of the Secretary at Doan Strip mine I.D. 36 02695.

The third citation was served on the respondent Doan Coal Company by MSHA Inspector Michael Bondra, on July 31, 1981, and the conditions or practices cited are as follows:

> All persons were not cleared and removed from the blasting area and suitable blasting shelters were not provided to protect men endangered by concussion or flyrock from blasting at the No. 1 Pit (001) in that Dennis Alvatrona, laborer was fatally injured by flyrock when blasting was done. This citation was issued during a fatality investigation and will not be terminated until all persons are instructed on the hazards from flyrock when blasting is done and remove themselves to a safe area. Dave Doan was Supervisor.

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Testimony and evidence adduced by MSHA

Jeffrey A. Lucas testified that he is employed by the Austin Powder Company as a licensed blaster for approximately a year and a half, and that prior to that time he worked as a laborer helping on shots and loading trucks. He was licensed by the State of Pennsylvania at the time of the shot in question on July 31, 1981, and he gained his experience as a blaster while working part time with Austin Powder while he was in school. He stated that he was faimilar with Doan Coal Company's strip mining operation, and he confirmed that he went to the mine site on July 30, 1981, for a "shot", and he did so after being requested to go there by Doan Coal. He stated that the mine site is some 20 to 25 miles from his office, and that prior to the shot in question he had been at the Doal strip mine four or five times a week with other blasters. During 1981, he spent 50% of his work time at the Doan strip mine performing blasting, and that he usually spends from two to five hours a day there, or as long as it takes to get the job done (Tr. 23-26).

Mr. Lucas stated that when he goes to the Doan strip mine he does so in response to a specific telephone or other request from Doan. He has a two or three man crew who assists him during the blasting operation, and he is in charge of his crew. He gives them their work assignments, and depending on the job, two or three vehicles are taken along with the crew. The vehicles are driven off mine property at the end of the day and are not left there. He explained that the first thing he does when he arrives at the mine site is to locate the shot area so as to determine whether the drilling has been completed. The site of the shot is given to him by Doan Coal, and his job is to load and shoot the shot. This entails the wiring of the shot, and one of his drivers will notify Doan Coal's employees where the shot will be fired, and this is usually done approximately ten minutes before the shot is fired so that everything is shut down (Tr. 26-29).

Mr. Lucas stated that blasting signs are posted "coming into" the Doan property, but not at every shot blasting area. After the shot is wired and the circuits tested, all mine machinery is shut down, and it is the usual practice for one of his truck drivers to sound a signal. The usual procedure calls for him to tell the driver to sound a signal, and he does so by means of an air horn. At the time of the shot in question, the signal used was three 20-second blasts immediately prior to the shot. The siren would be sounding for at least a minute prior to the blast, but prior to that signal, no horns would be sounded. He believed this was enough time for anyone to get out of the area because the area is actually cleared before these signals are given. He explained that it was his responsibility to clear the blasting area, and he indicated that he did so by notifying everyone initially by radio and visually. The radio notification is usually given 10 to 15 minutes before the actual detonation, and everyone at the mine who has a radio is on the same frequency. Those not in radio contact are notified personally (Tr. 29-33). However, he acknowledged that prior to a shot he does not actually ascertain what every employee on mine property

happens to be doing before he notifies them all individually by telephone, but that a call is made to the mine superintendent's office (Tr. 26).

Mr. Lucas defined the "blasting area" as "an area that is safe when the blast goes off" (Tr. 37). He indicated that this area would vary depending on the size of the shot and how it is loaded, and the terrain. He also indicated that he has "a good idea" as to what this area is before blasting (Tr. 38). He stated that since the events of July 30, 1981, the signalling procedure has changed so that five minutes before any shot is fired, three 20-second blasts of a horn are sounded, and one minute prior to the actual shot there is a one minute blast (Tr. 29). He examined a photograph (exhibit G-7-k), of a sign, and he indicated that he believed, but was not sure, that such a sign was posted on July 30, and that it calls for three 10-second signals five mintues before detonation and short pulsating signals one minute before the blast, and that it also calls for an "all clear" signal (Tr. 41). He believed that an all-clear was given, but again was not sure since he indicated that the actual signalling responsibility is delegated to his truck driver (Tr. 41).

Mr. Lucas confirmed that he detonated the blast in question, and that he was positioned about 300 feet away when he set it off. He indicated that he was positioned "behind the blast", and he explained that the blast is put into an open space or cut, and that the blast "is going the opposite direction from me" (Tr. 44). He examined several exhibits, but could not state where he was located at the time of the actual shot, but did state that it was "in from the scale house" (Tr. 47).

Mr. Lucas stated that after the shot was wired, five to ten minutes elapsed before it was actually shot, and that he observed no one inside the blasting area during this time. He further defined the "blast area" as "anywhere that you suspect rock might fall", and he conceded that he was responsible to make sure that anyone in that area is in a safe location or protected (Tr. 50). He confirmed that he spent three hours at the Doan mine on July 30, and that he is paid by Austin Powder Company (Tr. 51).

On cross-examination, Mr. Lucas stated that when he arrived at the blast scene, and before setting off the shot, he secured the area by making a determination that no one was in the foreseeable danger area of the blast, and as far as he knew the area where the victim was found had been cleared. Part of the procedure for securing the area included calling the mine office over the telephone and his truck driver went to the scale house to notify persons of the blast. All mine equipment was shut down prior to the blast, and while he did not personally hear the radio announcement, he is sure it was made (Tr. 51-52). He indicated that Austin Powder's policy is to give radio warnings of impending blasts, and that policy is still in use. This is in addition to the sounding or air horn signals and personal contact (Tr. 55). He secured the area on the day in question and he did not see the victim when the area was secured.

Mr. Lucas confirmed that as a result of the accident, the State of Pennsylvania suspended his blaster's license for 90 days, and it was restored after he took a test before the 90 days

were up. He does not

know the specific reasons for the suspension, but he confirmed that he had a license when the blast in question was set off (Tr. 58).

Mr. Lucas stated that a dragline was located some 75 feet from the shot, but that several loaders and the scale house were three to four hundred feet away and he could not see them from where the blasting took place (Tr. 60). In his view, the loaders and scale house were out of danger, but whether they were in the "blast area" would depend on the definition of that term. The drag line was shut down and the operator was secure before the blast, and the other locations would normally be advised personally to shut down and secure (Tr. 62).

Mr. Lucas stated that at the time of the blast they were using Austin 80% extra gel dynamite and Austinite 15 ammonium nitrate blasting agents and that 24 holes were charged to a depth of some 45 to 50 feet. Each hole contained approximately 400 or 450 pounds of explosives, but each hole was detonated on a delayed basis, and did not go off all at once (Tr. 64). When asked how one determines what is a safe distance from such a shot, he stated that "there is no set formula for figuring the safe distance, * * * it is pretty much from experience you know where the shot is going" (Tr. 66). He also indicated that a drill rig, a shot truck, and a driller's maintenance truck were all present near the blast site and that these constituted suitable blast shelters. If one is at a safe distance, there is no reason to crawl under these vehicles. The shot was triggered electrically, and he confirmed that during 1981 he was at the Doan Coal site three or five times a week performing blasting, and that 20 to 40 holes are usually charged at any given time (Tr. 69). He also confirmed that he is paid by Austin Powder Company, and that Austin Powder also provides and pays for other benefits such as vacation and insurance (Tr. 70). He does not belong to any union, and has performed blasting work for other strip mine operators similar to the work performed for Doan (Tr. 71).

Mr. Lucas stated that he was "surprised" by the blast of July 30, in relation to other shots that he had in the same cut, and a lot more fly rock came out of the holes than he had expected. Some rock weighing approximately a pound or so, and four inches diameter landed near him, but most of the material was mud. He and his crew were around the truck, but no one was under it, and he was 20 feet from the truck while the closest Mrock fell about six feet from where he was standing. Everyone had hard hats on, and no none from his crew advised him that any rocks had fallen near where they were standing (Tr. 73). He confirmed that he was standing some 300 feet from the blast itself, and he stated that the charged holes were vertical and that the shot went out from the open cuts that had been charged (Tr. 74). Mr. Lucas stated that Doan Coal Company does not have any licensed blasters, and since he has been working at the Doan Strip Mine they have never had any licensed blasters of their own (Tr. 74-75).

Theodore R. Williams, Blasting Inspector, State of Pennsylvania Department of Environmental Resources, testified that is a qualified blaster, and he described the types of blaster classifications and the training required by the State. He stated that warning signs concerning blasting are usually posted at the entrance to the job site, and on occasion he has observed such a sign posted in the blast area itself. The purpose of such signs is to warn people entering the mine site or to control the blasting area. He believed that information on the warning signs should be the same as the actual warning signals given. He identified exhibit G-7(k) as a photograph of a warning sign showing the blasting signals which are to be used, and he believed the exhibit depicted a proper or adequate warning system. He believed it was adequate since the signal system depicted gives a signal five minutes before any blast, provides for pulsating blasts before the actual blast, and this sequence would be ample time for anyone to get clear of the blast. He did not believe that a one minute signal before the actual blast would be adequate (Tr. 84-93).

On cross-examination, Mr. Williams conceded that in a noisy strip mining operation where a horn blast signal possibly could not be heard, he would personally contact people to warn them of any impending blast (Tr. 95). He also agreed that personal contact or radio contact would be sufficient notice to employees of any blasting. He also agreed that means other than a posted sign would be adequate notice to employees in any given circumstances (Tr. 96-97), and he explained this further when he stated (Tr. 98-99):

> Q. So, what is posted on a sign is not determinative, is not adequate notice in a particular factual situation?
>
> A. The sign itself should be proper as far as signals; however, to have communication with your employees with equipment on the site, there is no doubt in my mind that this would have to do with communication to the operator, however, the signals should be sounded properly for people on the job that are not on equipment and otherwise.
>
> Q. The important factor is to make sure that those employees do have notice that a blast is about to take place, right?
>
> A. This is my concern. I think they should be notified.
>
> Q. The method by which those employees are notified will carry from one situation to another, depending on the factual circumstances?

A. Definitely.

Q. You cannot say here as based on your experience as a blaster that there is one particular method which is mandated to be followed in all instances everywhere?

A. No.

Mr. Williams also indicated that any posted sign signals should be followed, and ever though hand signals or radio communications are used, the posted warning signals should definitely be followed (Tr. 99).

David Potempa, testified that at the time of the blast in question he was employed by Doan Coal doing "a little bit of everything", but that he is no longer employed there. He was at the mine site at the time of the blast, and he stated that he arrived there in a pick-up and went to the scale house. He arrived at the mine property "about less than five minutes before the blast" and was on the main road and driveway to the scale house. No one told him to take cover, but he knew there would be a shot, and when he got out of his truck he went to the scale house to get a can of pop, but he did not go there for the specific purpose of getting out of the blast area (Tr. 100-102).

Mr. Potempa stated that the scale house is a "good 300 to 400 feet" from the area where the blast was fired, and when asked whether he believed the scale house is a designated "safe area", he replied "it depends on what you are hiding from". He believed it was probably safe from any blasting, but indicated that the scale house was not posted with any blasting warning signs. He also stated that a member of mine management, in the person of the owner's grandson, told him to go to the scale house. In addition, Mr. Potempa stated that he heard the blast warning signals as soon as he pulled up in front of the scale house and he shut off the pick up. The blast went off "probably less than a minute after the last warning signal was given, and he was in the scale house when the blast went off. He looked out the window and saw "all kinds of rock and debris thrown all over the place", but none hit the scale house, and none came close enough to cause any danger (Tr. 105).

Mr. Potempa stated that when the blast was over, he drove his truck to the stockpile area which he described as being "off to the right" of the blast area, and while he was there he observed the accident victim lying on the roadway leading to the stockpile. His hard hat was off, and he was at the edge of the stockpile. Mr. Potempa stated that he did not believe the accident victim's body was "inside the blasting area", which is described as "probably about 300 feet away", but that the victim was found "probably close to 300 feet" (Tr. 107).

Mr. Potempa testified that he was familiar with the posted blasting warning signs which were on the mine property, and he indicated that the signals given on the day in question were the "same type as the sign", but he could not specifically recall how

many signals were sounded because he did not pay that much
attention to it because "it is really

like an everyday thing to me" (Tr. 107). The roadway he used to get to the scale house was not barricaded, and he knew that there would be a blast because he observed the trucks coming on to mine property and he also saw the victim earlier in the day. He knew when the blast was going off when he drove up to the scale house and heard the warning signals go off five minutes before the blast, and one minute before it was actually detonated. He believed that he received adequate warning of the blast and he also believed that he was in no danger because he was not in the blast area (Tr. 109). He observed no trucks driving around immediately before the blast, and he confirmed that he saw rock into and around the coal pile where the victim was found. He also confirmed that he could not see the blaster from the scale house (Tr. 110).

On cross-examination, Mr. Potempa confirmed that he knew the accident victim, and that when he first discovered him he was about 300 feet from the actual location of the blast. He knew that the victim was working near the stockpile on a crusher, and his normal work station would be "the back part of the stock pile" (Tr. 112). His normal work station was farther from the blasting area than where he found him (Tr. 113).

Mr. Potempa stated that he went to the scale house for some shovels for Mr. Doan's grandson Mike Stiles, and the scale house was located "on the other side of the hill from the blasting area". He heard no call over his pick-up radio because he had turned off the motor and was outside the truck. He also stated that "there wasn't a bit of danger over there" (Tr. 114). He described his normal procedure for shutting down prior to a blast as follows (Tr. 116-118):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: Had you just been out on the road when you heard the last one minute signal prior to the blast, what would you have done?
>
> THE WITNESS: I would have stopped and shut the pickup off.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Why would you have shut the pickup off?
>
> THE WITNESS: It is a natural thing. We always do it when they are going to shoot. If you are within so much range, because you know, the vibration, well, not too much in the pickup, but the dozer when it is run, it will crack the crank on it.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: You are saying regardless of where you are on the mine site, if there is a blast, the normal procedure for all equipment is to stop it even though you are outside the danger zone?

THE WITNESS: Yes, it depends what job you are on or how close you are, but everyone shuts down.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Back up a little bit. Prior to this particular blast, had you been on the mine property when other blasts were shot by Austin Powder?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: And is the procedure that you followed on those other occasions approximately the same as on this date?

THE WITNESS: Right, right.

MSHA Inspector Michael Bondra confirmed that he conducted an investigation of the blasting fatality on July 31, 1981, and he identified exhibit G-4 as a copy of the report he prepared. He stated that he measured the distance from the actual blasting location to where the accident victim was last seen and it was 223 feet. He observed large rocks and clay in the area where the victim was found, and his investigation disclosed that the victim was struck by a single large rock weighing approximately 39 pounds (Tr. 125-129).

Mr. Bondra stated that based upon interviews and measurements, he determined that there was a clear view from the area where the victim was last seen and the location where the blast occurred. The distance from the shot to the blasting portion was 300 feet, and Mr. Bondra believed that if the blaster were looking where the victim was last seen he should have seen his yellow hard hat (Tr. 130).

Mr. Bondra stated that the distance from the blasting location to the scale house was 400 feet, and that the house did not have a sign on it designating it a "safe area". In his opinion, the persons inside the house would not have been protected from a rock the size of the one which struck the victim in the event that it hit the roof (Tr. 131). The scale house had a metal roof and framed material, and he believed the rock would have gone through (Tr. 132).

Mr. Bondra identified a sketch which he made as part of his investigative report, and in which he labeled an area 100 feet long by 100 feet wide as the "blasting area". He stated that this was a mistake, and that this area should have been labeled "blasting location". The "blasting area" is defined by section 77.2, and it means "the entire area around the blasting location where the blasting is being done shall be cleared in which concussion or flyrock material can reasonably be expected to cause injury" (Tr. 136).

Mr. Bondra believed that the victim, the scale house, and the blaster and his crew were all within the "blasting area", and he reached this conclusion because flyrock and debris from the

blast went beyond the areas where they were all located (Tr. 137).

Mr. Bondra testified that during his investigation, a truck driver (Martz) from another company who had just driven to the scale house told him that he saw the victim near the stockpile prior to the blast. Mr. Martz knew that there would be a blast when he came to the scale house (Tr. 143). Mr. Bondra confirmed that he observed a blast warning signal sign posted on the property, and he also confirmed that such a sign is not required by any MSHA standard (Tr. 145).

Mr. Bondra confirmed that he issued the citation charging a violation of section 77.1303(h), and he did so because the victim, the blaster, his crew, and the people in the scale house were not removed from the blasting area. He determined there were no suitable shelters by the scale house, and he considered the violation to be very serious. He issued the citation to Doan Coal because as the mine operator, Doan has the responsibility to comply and cannot delegate to this to an independent contractor. He believed that Doan should have been aware of the fact that all of the individuals mentioned were in the blasting area, and Doan should have seen to it that they were all removed. When asked what he believed to be a "safe haven for miners", he replied "out, say 500 feet" (Tr. 148-150).

Mr. Bondra confirmed that he interviewed loader operator Bloom who told him that he had received the blast warning over the radio and that he in turn gestured to the accident victim. The victim then started to go back to the scale house, and Mr. Bloom assumed that's where he was going (Tr. 153). Mr. Bloom told Mr. Bondra that his motion to the victim was to "shut down your equipment" (Tr. 155).

Mr. Bondra believed that Mr. Bloom should have seen to it that the victim went to a safe place, and that his negligence in failing to do so is Doan Coal's negligence, and that Doan Coal should also have blocked the road to and from the scale house and posted someone there to secure the area (Tr. 156, 160).

On cross-examination, Mr. Bondra testified that he is not a licensed blaster and is not trained in the use of explosives or in geology. He stated that his opinion that 500 feet would be a "secure area" was "an arbitrary stab" on his part, and that he does not have the background in explosives to say it is safe or unsafe (Tr. 161).

Mr. Bondra conceded that his investigation report abstract, at page 4, contained a statement that "the accident occurred when Dennis Alvatrona went to observe blasting operations" (Tr. 166). Mr. Bondra also conceded that it was his reasonable belief that the victim, Mr. Alvatrona, walked in to view the blasting operation" (Tr. 167). He also conceded that Mr. Alvatrona must have been notified of the impending blast because he went in to view it (Tr. 167).

Mr. Bondra confirmed further that he has never had a blaster's license, has never taken a blaster's test, had had no training or education in blasting, has never read any blasting

literature, and does not hold himself out as an expert in
explosives or blasting (Tr. 171).

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Mr. Bondra confirmed that at the time he conducted his investigation none of the people he interviewed were under oath, they were not given an opportunity to sign any statements, no transcript was prepared, and the persons interviewed did not review their purported statements. He also confirmed that his accident report was compiled from notes made by him and others, that the purported statements made by individuals interviewed are not verbatim (Tr. 171-173).

Mr. Bondra stated that a piece of equipment can be a blasting shelter, and he confirmed that a drill rig was near the blaster. He also stated that the rig would be a sufficient shelter if the blaster were under it or very close to it (Tr. 182). He believed that the blaster should be in a safe position in a sheltered area so he can jump back where no flying material will strike him (Tr. 182). He indicated that his investigation did not determine where the trucks were located, and as far as he is concerned the only safe area within the 500 blast area was under the drill rig (Tr. 185).

Mr. Bondra confirmed that there would be no violation if the blasting crew were under the trucks, and while he also confirmed that he heard Mr. Lucas testify that his crew took cover by or under the trucks, he stated that he was not aware where the crew was (Tr. 188).

In further response to questions from the bench, Mr. Bondra stated as follows (Tr. 193-196):

> Q. You were influenced by the fact that you had some testimony by the blaster himself that the debris went sailing over his head, right?
>
> THE WITNESS: Yes.
>
> Q. You came to the conclusion that these guys were in the blasting area and were not safe and were exposed to a hazard, right?
>
> THE WITNESS: In a sense, yes.
>
> Q. Well, I mean that is a fact, is it not?
>
> THE WITNESS: Yes.
>
> Q. Had the fact shown that no debris went as far as the scale house and no debris went as far as the blaster, then those two people would not have been in the blast area, would they have, in your opinion? You would not have concluded that in your report?
>
> THE WITNESS: According to the definition of blasting area, no.

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> Q. So, the definition of blasting area that you applied in this case was directly related to the force of the

blast and how far the material went, right?

THE WITNESS: In this case.

Q. In any case? What I am suggesting to you, sir, is that the only way a blaster can guarantee what the blasting area is is to blast first to find out how far the debris goes, and then blast again to make sure everybody is out beyond that; is that correct?

THE WITNESS: No. Would his experience tell him what the blast area is?

Q. Did you hear Mr. Lucas' testimony in this case that based on his experience he felt he had his men removed from the blasting area; and, later on in his testimony, he said that this was an unusual blast?

THE WITNESS: Was that an opinion?

Q. Well, do not the regulations put the responsibility on the blasting man to determine what a reasonable distance is?

THE WITNESS: Yes.

Q. I am trying to determine what is the blasting area. What if the blaster came to you and said, Mr. Inspector, I would like you to give me your opinion of what you believe the blasting area is. I have 24 holes loaded, and we are ready to shoot. Before I shoot, I want to make sure I am in compliance with the standard. I need some technical advice from you, and I would like you to tell me how far I have to remove these guys, my crew, to make sure that none of them are hurt by flying debris. What would you tell them, or what would you in a position like this advise him?

THE WITNESS: I am not really in a position, but the State has a ruling of 500 feet, and we have accepted that for a long time.

Q. The State has what?

THE WITNESS: They have a rule in effect approximately 500 feet. They have issued that situation, and I think -- I don't know how -- like I said, I'm not a state inspector.

Q. The State has some specific standard that has set down in some kind of regulatory language what would be a safe distance from a blast?

THE WITNESS: Not in the regulations, I don't think.

MSHA Inspector Lyle F. Bixler, confirmed that he was at the mine on July 31, 1981, to assist in the accident investigation. He stated that he has underground blasting experience, and he indicated that a sketch labeled "Doan exhibit 4" fairly depicts the area he observed on July 31, except for the presence of a crusher near the stock pile. He indicated that the distance from the blast to where the victim was sitting was 223 feet, and that the distance from the blast to where the blaster was located was 300 feet (Tr. 204-208).

Mr. Bixler confirmed that he issued a citation to the Austin Powder Company, exhibit G-2, and he did so because of MSHA's policy to serve both the contractor and mine operator when their personnel are involved. He believed that Doan Coal Company depended on Austin Powder to provide a service safety. Austin Powder had a continuing presence at the mine because "they would be there pretty much of the time" on six or seven blasting jobs for Doan Coal (Tr. 212).

Mr. Bixler confirmed that he issued the citation to Austin Powder because the blasting crew was not out of the blasting area, and he determined this fact "because of the flyrock and debris that fell around the blasting area". He also stated that he did not know whether it was unusual for a blaster to be within 300 feet of a shot area, and he "guessed" that the size of the explosive shot and the terrain would have a bearing on this question (Tr. 214). He believed that the citation was very serious in that more people could have been killed or injured, and he also believed the citation was "significant and substantial" because it was likely that serious injuries could have occurred because of the flying debris and rock that fell around the blaster (TR. 216).

Mr. Bixler stated that he considered Mr. Lucas to be an employee of Austin Powder, and he believed that Austin Powder was negligent for not removing the blaster and his crew from the blasting area. He confirmed that he filled out an "inspector's statement", and that he indicated that he stated that Austin Powder, as the "operator", was responsible for the blast and for clearing the area. As the employer of the blaster, he considered that Austin Powder was responsible for the blaster's actions. He also believed that three or four people were exposed to a hazard, namely, the blasting crew, the blaster himself, and the people in the scale house (Tr. 219-221).

Mr. Bixler also confirmed that he issued a second citation to Austin Powder on August 6, 1981, for a separate violation of section 77.1303(h), namely, that portion that requires an ample warning to be given before any blast (Tr. 222). He made the determination that no ample warning was given on the basis of

statements made by persons during his investigation.

Those statements indicated that the actual warning signals which were given were different from those posted on a sign on the mine road. He did not believe that three 2-second blasts within a minute or less gives any one ample time to get to a safe area, but that following the warnings shown on the sign would have (Tr. 223).

Mr. Bixler stated that during his investigation Mr. Bloom stated that he motioned the accident victim that a shot was going to be fired, but that he (Bixler) did not follow up and ask Mr. Bloom what he meant by his motions to the victim (Tr. 224). Mr. Bixler also concluded that since the victim was only 223 feet from the blasting location, "he probably wasn't warned" (Tr. 225). Mr. Bixler believed that the blaster was negligent is not following the posted warning sign (Tr. 228).

On cross-examination, Mr. Bixler confirmed that most of the findings made in MSHA's accident investigation report were made by Inspector Bondra, and that he (Bixler) assisted in the making of the measurements reflected in the report (Tr. 228). Mr. Bixler conceded that at the time he issued the citation to Austin Powder, he did not take into account Mr. Lucas' assertion that he believed 300 feet to be a safe distance from the blast. Mr. Bixler also stated that he could not recall discussing this with Mr. Lucas, and that he did not take into account any geological or atmospheric conditions which may have been considered by Mr. Lucas prior to the blast (Tr. 231). Mr. Bixler also conceded that Mr. Lucas did have the safety of his crew in mind prior to the blast, but probably did not anticipate the actual force of the blast (Tr. 234).

In response to further cross-examination, Mr. Bixler confirmed that he is not a blaster and has never held a blaster's lincense. He also indicated that he has never done any surface blasting, is not a blasting expert, and that in the event he has need for information concerning blasting techniques or procedures he would have to consult a blasting expert (Tr. 236). In this case, he indicated that he spoke with Austin Powder's licensed blasting technical representative Ray Thrush, but he was not aware of the fact that Mr. Thrush holds a certificate from MSHA qualifying him to train other blasters. He could not recall Mr. Thrush telling him that Mr. Lucas acted in a normal and prudent manner at the time of the blast in question, nor could he recall Mr. Lucas and Mr. Thrush advising him that the particular flyrock shot in Mr. Lucas' direction could not have been anticipated (Tr. 237).

Mr. Bixler identified a copy of his "inspector's statement" which he filled out on July 31, 1981, with respect to citation no. 1041342, (exhibit AP-8). He confirmed that he marked the first block under the heading "negligence" to show that the condition or practice cited "could not have been known or predicted, or occurred due to circumstances beyond the operator's control". He also confirmed that he explained this under the "remarks" column of the form where he indicated that "the blaster notified all persons of the impending blast about 10 minutes

before

blasting and again half to one minute prior to blasting. Blast holes do not normally blow out". He explained the last remark as "that meant that it was not anticipated or capable of being anticipated that this blast hole would blow out and send fly rock back that far away from the front of the face" (Tr. 238-240).

Mr. Bixler confirmed that when he submitted his inspector's statement of July 31, 1981, it was returned to him by his supervisor who advised him that the form had been returned by someone in the "Washington Solicitor's Office" who advised his supervisor that he (Bixler) could not conclude that Austin Powder was not negligent (Tr. 242). Mr. Bixler did not know the identity of the solicitor, and on the basis of instructions received from his own supervisor, Mr. Bixler prepared another form stating that Austin Powder was negligent (exhibit ALJ-1), and that form was resubmitted on November 16, 1981. He reached his "new" opinion that Austin Powder should have cleared everyone from the area on the basis of his observations on how far the flyrock went after the occurrence (Tr. 243; 257-261).

Mr. Bixler stated that he did not have the technical background or expertise to question Mr. Lucas' judgment that he believed he was at a safe distance prior to the blast (Tr. 244). Mr. Bixler believed that the drill rig at the blast area was a "safe area" if men were under or in it (Tr. 244). He also believed that the blaster "should be at least close enough to it that in the event he needs to get under it, he could" (Tr. 244). In the instant case, he believed that Mr. Lucas "should have been closer to the drilling rig", and did not think that he could have gotten under it from a distance of 25 or 30 feet. Mr. Bixler also stated that Mr. Lucas probably thought he was at a safe distance, and when asked what advice he would give someone who may ask him how far back from a blast would be "safe", he replied "on the side of safety; and, from what we found out here, I would say at least 500 feet. That's a rough guideline" (Tr. 245-246). However, he also stated as follows (Tr. 246):

> Q. You would say that in very instance blasters should be at least 500 feet?
>
> A. Not necessarily, no.
>
> Q. It could vary depending upon a number of factors?
>
> A. Sometimes 500 feet, it wouldn't be enough.
>
> Q. Other times it would be more than enough?
>
> A. That's right.
>
> Q. And you really do not have the technical expertise or background to give advice to someone on whether he would be in violation of the law or whether he would be safe at a certain distance?

A. That's why I would go on the side of safety.

Q. Because you really do not know enough about blasting techniques and safety factors to know how far back would be safe under particular factual circumstances?

A. Under normal conditions, yes, but under extreme conditions, no.

With regard to his conclusions that an adequate blast warning was not given to employees in this case, Mr. Bixler testified as follows (Tr. 247-250):

Q. The purpose of this statute is to make sure that those employees who were in the area would be given a sufficient opportunity to go to a safe place; isn't that correct?

A. That's correct.

Q. And any warning device which is understood by the blaster and the other employees and which provides that type of notice would be adequate under the statute, would it not?

A. Would you repeat that again, please?

Q. Any warning, technique or procedure which is understood by the blaster and by the employees on the premises and which gives the employees that notice so that they can go to a safe area would be sufficient under the statute, would it not?

A. In this case, it was posted, and I would think that the signal given could be misleading.

Q. But do you know whether or not Mr. Alvatrona relied upon the sign?

A. That I couldn't say.

Q. You have no way of knowing that one way or the other?

A. No.

Q. You have no way of knowing what Mr. Alvatrona understood by the motion from Mr. Bloom?

A. I have no way of knowing that either.

Q. And you did not follow up with Mr. Bloom and ask him what that motion meant and whether based upon his working relationship with Mr. Alvatrona he could testify to what Mr. Alvatrona understood the motion to mean?

A. Mr. Bloom stated that he motioned Mr. Alvatrona to shut down.

Q. You were satisfied at that point that those employees at Doan understood that motion to mean he was supposed to shut down because the blast was going to take place?

A. Yes.

Q. That is why you did not feel it necessary to ask Mr. Bloom any further questions about the motion and the meaning of the motion?

A. That's right.

Q. And any warning device or procedure or technique which furnishes an employee with the information the blast is about to take place and sufficient time to find a safe haven does satisfy the statues, does it not?

A. I would say so, yes.

Q. And certainly direct personal knowledge to an employee given to him either over the radio or in person would be sufficient notice?

A. Probably would be, yes.

Q. You do not have any factual basis for any opinion on whether Mr. Alvatrona would be alive today under any different hypothetical circumstances with regard to notice of hypothetical conduct on the part of anyone else who was on that property, do you?

A. Would you repeat that, please.

Q. Surely. Do you have any factual basis for drawing any conclusion as to whether Mr. Alvatrona would be alive today based on any hypothetical actions or conduct by anyone else who was on the Doan Coal Company property on that day in July of 1981?

A. That I wouldn't know.

Q. It is complete speculation?

A. That's right.

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Testimony and evidence adduced by Respondent Doan Coal Company

Albert Bloom, testified that he is employed by Doan Coal Company as a loader operator and was so employed on the day of the accident. He confirmed that he and the victim Dennis Alvatrona were co-workers and on the day of the accident Mr. Alvatrona was operating the crusher near the coal stock pile and Mr. Bloom was operating a loader. Mr. Bloom stated that ten minutes before the blast he received notice of this over the company radio installed in his loader. He was called by the dragline operator, and told to shut the equipment down. Since the crusher had no radio he motioned and signaled Mr. Alvatrona to shut the crusher down. The hand signal he used is a standard procedure which everyone understands. He had used them before and he believed Mr. Alvatrona understood them and he shut the crusher down. After he shut down, Mr. Bloom observed Mr. Alvatrona heading in the direction of the scale house, and he indicated that he habitually spent most of his time there (Tr. 272-279).

Mr. Bloom stated that it was company policy to warn employees of impending blasts personally or over the radio. He confirmed that he heard three airhorn blasts immediately before the blast on the day in question, but it was his view that such warning sounds cannot be heard over the noise of back-up alarms and loaders (Tr. 281).

On cross-examination, Mr. Bloom stated that he never saw Mr. Alvatrona or any other employees inside the blast area prior to the blast. He had no idea as to why anyone would walk into a blast area "unless it fascinated you to watch it" (Tr. 284). Mr. Bloom stated that no barrier was on the road coming onto mine property, that he had never seen such a barrier in the past, and he did not believe it possible that Mr. Alvatrona was serving as a guard the day of the blast (Tr. 286). He confirmed that five to seven minutes, and at most 10 minutes, elapsed between the time he received the radio information about the blast and the actual blast (Tr. 286). He confirmed that the "blow out" surprised him because there was more fly rock than usual. He had no contact with the blaster prior to the shot, and when he saw Mr. Martz driving into the area he stopped him and told him to shut his truck down by means of a hand signal, and this was before the warning signals were sounded (Tr. 288).

In response to further questions, Mr. Bloom stated that he stayed inside his loader where it was parked and that he did not consider himself to be in danger. Since he saw Mr. Alvatrona heading for the scale house he assumed that is where he was going and did not speak to him further (Tr. 291). He believed he was safe, and if he observed fly rock going over him after the blast, he would not stay in the same location the next time a blast was fired (Tr. 293). Other similar shots had been fired the same day of the accident (Tr. 294). He had never known Mr. Alvatrona to go and observe shots in the past, and he did not know what he was doing the day he was killed since "after he got passed a a certain point I couldn't see him" (Tr. 296).

Mr. Bloom confirmed that it was normal procedure to shut down all equipment as soon as notice of a blast is received, and if others around him did not have radios, he would notify them personally (Tr. 300). He also confirmed that he determined the safe blasting area for himself, no supervisor told him what it was, and he did not know how much explosives were going to be set off since he did not speak with the blaster (Tr. 301).

Alvin Mitchell, testified that he is an engineer and safety director for Doan Coal Company, and was so employed at the time of the accident. He confirmed that the company has a qualified training program, that he is in charge of it and is certified to conduct training, and that he trained Mr. Alvatrona. He identified exhibit R-1 as a copy of Mr. Alvatrona's training certificate, and indicated that he was trained in hazards identification as well as in the use and danger of explosives (Tr. 312). Mr. Mitchell testified as to the company's blasting signal policy and procedure, and confirmed that there are 33 mobile radio units at the mine on most of the equipment. He also confirmed that he was present during the accident investigation, and stated that the distance from the shot area to where Mr. Alvatrona's body was found was 260 feet, and he indicated the normal route he would have taken to get to the scale house from the stock pile area.

Mr. Mitchell confirmed that the location of the blast where the drill holes were at was at the edge of the pit and that Mr. Alvatrona would have no reason to be in the area where he was found (Tr. 319). Mr. Mitchell stated that part of Mr. Alvatrona's training included procedures concerning the shutting down of equipment and blasting signals (Tr. 322). Mr. Mitchell also indicated that the procedure followed by Mr. Bloom in notifying Mr. Alvatrona about the blast, as well as the mine procedure for notifying other employees was normal and no different from any other day (Tr. 323). Mr. Mitchell identified several photographs depicting the spoil pile where it is believed Mr. Alvatrona was sitting at the time of the blast, and the general scale house area (Tr. 323-328; exhibits AP-1 through AP-7).

Mr. Mitchell testified that he was at the blast scene after the accident, and in his opinion had Mr. Lucas been looking in the direction of the spoil pile he could have seen Mr. Alvatrona (Tr. 333). Mr. Mitchell identified exhibit G-7(k) as a photograph of a typical blasting signal sign posted at the entrance to the mine property, but could not say whether that particular sign was posted on the day of the blast. However, he did indicate that a similar sign was posted, and that the men are instructed to listen for the signals depicted on the sign (Tr. 334). He did not know whether the mine road is normally barricaded because he is not at the mine when blasting takes place (Tr. 335). Mr. Mitchell stated further that the spoil pile was 13 to 14 feet high, and that Mr. Alvatrona's work would not require his presence there (Tr. 338).

Mr. Mitchell considered the scal house, the drill truck, and

the loader and crusher to be suitable blasting shelters (Tr. 343). Mr. Mitchell conceded that Mr. Lucas may not have followed the literal blasting

warning signals shown on the sign posted on mine property, and he explained this by stating that Austin Powder's personnel are not trained at the same time as Doan's employees (Tr. 357). Mr. Mitchell stated that on the particular shot in question, a distance of 200 feet would probably not be a safe distance, and had he known that 24 holes were loaded with 400 pounds of explosives that he would have ordered men to be removed 200 feet since there was a chance that flyrock would reach that distance. However, the blaster was 300 feet away and he believed this was safe (Tr. 362).

David G. Doan, testified that he is the managing owner of Doan Coal Company and that he has been in the coal business since 1944. Mr. Doan stated that all mine equipment except for bulldozers are equipped with radios and that everyone on the site is given actual notice, either personally or by radio, before a blast is fired. Everyone on the site is notified to shut down and await the shot regardless of how far away from the actual blast they are located. Mr. Doan confirmed that he is experienced in the use of explosives, and as far as he is concerned the use of air horns is not effective because of the roar of the equipment and that is why mine procedure calls for the shut down of all equipment before a blast and personal notification given to all employees (Tr. 365-371).

Mr. Doan stated that the scale house was a secure area and that "there is no way that a rock could go through the scale house" (Tr. 372). He also indicated that the crusher is made of structural steel and would make "a wonderful shelter" (Tr. 372), and that since he has been in the coal business he has never had any problems with notifying employees and clearning out blast areas. He confirmed that the accident in question was his first fatality, and that there have never been any explosive related injuries at the site since he has been in business (Tr. 373-374). With regard to the signals given and the definition of "blast area", Mr. Doan testified as follows (Tr. 376-377):

> Q. Mr. Doan, you mentioned that the victim was personally told that there was going to be a blast.
>
> A. Well, he was personally notified with the signals.
>
> Q. There is a distinction between personally told and personally signaled; would you not agree?
>
> A. Well, that depends on how fine a little thin line you want to draw. He personally understood the signals because he had been taking them and giving them up until then. It was nothing new that he got. The signals that he got that day were the same as he always got.
>
> Q. Do you mean he never got them before on the radio?

A. If he was at a machine with a radio he got them. If not, he got them from Mr. Bloom, his buddy that he worked with. Because Mr. Bloom always had a radio where he was.

Q. You heard the safety director testify or state that he believed that the victim at the time of the blast was in the blast area. Would you agree with that?

A. No. It has not been defined to me yet where the blast area is. I have sat in this Court for two days now. I haven't heard anybody define the blast area. It seems that the blast area, according to MSHA, is anyplace a man can get hurt. There doesn't seem to be any regulation to it that I can understand from what I have listened to.

Austin Powder Company's Testimony

Jeffrey A. Lucas confirmed that he is a licensed blaster and holds a college B.S. degree in mathematics. He stated that the warning signals used before and during the blast in question consisted of radio contacts ten to fifteen minutes before the blast and three signals immediately prior to the blast, and no one ever requested that this be changed. To his knowledge he has never known of any Doan employee to ignore the signals, and he had no reason to believe that anyone did not understand them. He believed he was in a safe location on the day of the incident, that the shot was laid out to go away from where he and the crew were located, and that he had previously made five to six previous shots at that location (Tr. 400, 412). There were no blowouts from the previous shots, and had the one in question gone the same as the others no one would have been in danger 100 feet from the shot. There was nothing unusual about the size of the shot in question, and in relation to the others they were all the same, including the amount of explosive used (Tr. 402).

Mr. Lucas stated that he believed his crew was in a safe location and he also believed that the scale house was safe because it was further from him and away from the shot location. He confirmed that he was looking at the blast area and he indicated that he prefers not to be under a truck because he wants to view the blast and can always move away from any flyrock. On the day in question, he never expected the flyrock to come as far as it did and he was not aware that anyone was on the spoil bank and saw no one in the area that he considered to be the blast area (Tr. 408). After the incident, MSHA suggested to him that he move further back, seek some sort of protection, and suggested a 500 foot distance as a guideline. He personally would not like to be 500 feet from a shot and would prefer to be somewhere where he can see it (Tr. 409).

Mr. Lucas testified that from where he was standing at the time the blast was set off he was unable to see the crusher because it was behind the coal stock pile and there was line of trees in the area. He personally

did not walk to the crusher area, but he sent the truck driver to notify anyone in the area and he believed the area was a safe area (Tr. 415). Mr. Lucas identified a copy of exhibit G-8 as a company blast report which he filled out immediately following the shot, and he confirmed that. He concluded the scale house as a "possible hazard" on the form. He explained that this was done because the State requires buildings and houses to be identified on the form (Tr. 420).

Mr. Lucas explained the characteristics of a "blowout", and he confirmed that he checked all of the holes for potential signs of such an incident. He explained the wiring and detonation of the shot, and he confirmed that since the accident he has changed his signaling procedure to comply with the blast warning sign which is on the property, but that the radio signal system is also being used (Tr. 441-446).

Ray Thrush, testified that he has been employed with Austin Powder for approximately eleven years as a sales and technical representative. He confirmed that he has been a licensed blaster since 1967 and is licensed in the States of Pennsylvania, Maryland, and West Virginia. He also indicated that he is an MSHA certified surface and underground blasting instructor. Mr. Thrush confirmed that he has been going to Doan Coal's property since 1971, and prior to his employment with Austin Powder he was on the site doing blasting work with the National Powder Company. He also indicated that prior to July 30, 1981, and before radios were obtained, the warning signals which were used were "personal contact with all machinery". Since that time radio contact is used, and the three-blasts on an air horn was also used as a signal within the past several years and before July 30, 1981 (Tr. 454-458).

Mr. Thrush confirmed that he was at the mine the day after the accident during the investigation and was familiar with where Mr. Lucas was positioned at the time of the blast. In his opinion, Mr. Lucas was at a safe distance, and he indicated that based on the number of holes and the amount of the powder used, he could have been 100 feet closer and still been safe. Mr. Thrush described the 24 charged holes as a "small one", and he also indicated that as a blaster, he would like to be positioned so that he can observe a shot. He also indicated that during his conversation with Inspector Bixler, Mr. Bixler indicated to him that he could not find anyghing wrong with what Mr. Lucas had done (Tr. 458-462).

Mr. Thrush indicated that he was present when MSHA Inspector Zangary terminated the citation and he indicated that he did so by coming to the mine to observe the manner in which another shot was fired. The shot was in front of the spoil pile and the crew and the inspector were by an old equipment trailer when the blast was fired. Inspector Zangary indicated that this was sufficient coverage. However, the shot could not be seen, and after the blast two boys on trailbikes came out of the nearby woods, and Mr. Thrush stated that when he asked Mr. Zangary how he would characterize the event if the boys had ventured into the shot

area and been killed, Mr. Zangary replied that it would have an "accident" (Tr. 464).

Mr. Thrush confirmed that Mr. Lucas was not reprimanded or disciplined by Austin Powder and he stated that had he been there he would have acted just as Mr. Lucas did in firing off the shot (Tr. 469-470). Mr. Thrush believed that the "sphere of danger" on the day of the accident was about 200 feet from the blast site, and that would be the area he would have been concerned about keeping secured (Tr. 471). Mr. Thrush confirmed that he has had some 30 years experience working in coal mines and gas fields "shooting gas and oil wells and stripping" (Tr. 472).

The Jurisdictional Question

Apart from any factual disputes concerning the alleged violations, there is no jurisdictional dispute between MSHA and the respondent Doan Coal Company. Doan Coal is a Pennsylvania strip mine operator and it concedes that its mining operations are subject to the Act and to MSHA's enforcement jurisdiction. The jurisdictional dispute in this case is between MSHA and the respondent Austin Powder Company.

The Nature of Austin Powder's Business

In its posthearing brief, Austin Powder states that it is a manufacturer and supplier of explosives to a number of different industries, including the coal mine industry (Tr. 466, 507). To ensure the safe use of its products and safety of both its customers and the general public, Austin Powder, at no charge, provides technical expertise and advice to those customers who desire such assistance (Tr. 465, 476). As one component of the assistance which is available to the customer, Austin Powder has licensed blasters who may be loaned to a customer upon request, but Austin Powder is not obligated to provide a blaster to a customer, nor is there any guarantee that at any particular time a blaster will be available (Tr. 508). Austin Powder maintains that this situation must be contrasted with that of a contract blaster who enters into a contract with an individual to perform blasting services. In such arrangements, the contract blaster is contractually obligated to provide blasting services and is paid for such services. In contrast, there is no obligation whatsoever upon Austin Powder to provide blasting services for customers, and if a blaster is made available no charge is paid for such service (Tr. 465-466).

Austin Powder maintains that in instances where a customer desires to utilize Austin Powder's technical expertise, the parties enter into a service agreement. Under the agreement, Austin Powder agrees to lend the customer the temporary use of Austin Powder's employees and equipment free of charge (Tr. 465, 476). In return, Austin Powder states that the customer agrees that while it is using such employees and equipment, the employees are under the sole supervision and control of the customer and that all work and services performed by such individuals are at the sole risk and responsibility of the customer.

Austin Powder states that on January 19, 1981, it entered

into a service agreement with the respondent Doan Coal (A.P. Exh. No. 11).

Doan Coal would periodically order explosives from Austin Powder and would utilize Austin Powder's technical expertise to detonate the explosives it purchased from Austin Powder. However, Austin Powder asserts that Doan Coal determined the number of holes to be drilled, the location of the holes, and the holes' depth, and the coal company drilled all the holes (Tr. 340-342, 366, 410-411). Moreover, Doan Coal decided when to blast and had the right to control the details of the blast (Tr. 410-411).

Whether Austin Powder is an "Operator" within the Meaning of the Act

Austin Powder maintains that before MSHA can assert jurisdiction in this matter it must establish that Austin Powder is an "operator" within the meaning of 30 U.S.C. 802(d). Austin Powder states that it is abundantly clear, and that MSHA has conceded as much, that Austin Powder does not own, lease, operate, control or supervise a coal mine. Although MSHA does allege that Austin Powder was an independent contractor performing blasting services for Doal Coal on the day in question and as such was subject to MSHA's jurisdiction, Austin Powder asserts that MSHA's position is wholly untenable because the clear evidence establishes Austin Powder was not an independent contractor performing blasting services.

Austin Powder argues that before it can be found to be an independent contractor under the Act, MSHA must establish the existence of a contract between Austin Powder and Doan Coal whereby Austin Powder contracted to provide services for Doan Coal. Austin Powder maintains that MSHA has failed to introduce any evidence that such a contract existed. In fact, it states that MSHA has not even tried to establish the existence of such a contract.

Austin Powder maintains that it is not, and was not a contract blaster, has no drilling capacity, and does not contract blasting services. Rather, it is a manufacturer and supplier of explosives to numerous industries, including the coal industry, and that it entered into a sales agreement with Doan Coal in which Doan Coal purchased a quantity of explosives. To ensure the safe use of its products, Austin Powder, pursuant to a service agreement voluntarily entered into by the parties, allowed Doan Coal to draw upon its technical expertise to assist in detonating the explosives. The agreement is a legally binding, valid document whereby Austin Powder loaned Doal Coal its employees for Doan Coal's use. Citing: New River Crushed Stone v. Austin Powder, 210 S.E.2d 285 (N.C. 1974); Fralin v. American Cyanamid Co., 239 F. Supp. 178 (W.D. Va. 1965); Oregon Portland Cement Co. v. DuPont, 118 F. Supp. 603 (D. Ore. 1953); Hercules Powder Co. v. Campbell & Sons Co., 144 Atl. 510 (Md. App. 1929). No charge was made for this technical expertise (A.P. Exh. No. 11; Tr. 466, 512). Moreover, Austin Powder states that it had no obligation under the service agreement to provide such technical service, and if its people were not available, Doan Coal could not require that Austin Powder furnish blasters. In short, Austin Powder maintains that the loaning of its employees to Doan Coal to ensure safe use of its product was a

gratuity and not required by contract.

Austin Powder concludes that since the record is absolutely void of any evidence even suggesting the existence of an implied or express contract between Austin Powder and Doan Coal requiring the provision of services, MSHA has failed to establish Austin Powder was an independent contractor as defined by the Act. Since Austin Powder does not otherwise fall within the Act's definition of "operator," it maintains that it was not subject to MSHA's jurisdiction.

Austin Powder argues that on the facts of this case, those individuals who allegedly committed the cited violations were, as a matter of law, Doan Coal Company employees, and not employees of Austin Powder. In support of this argument, Austin Powder argues that the express terms of the service agreement clearly and unambiguously state that while the Blaster Lucas and his crew were on Doan Coal property they were for all intents and purposes Doan Coal employees. Doan Coal had the sole right to supervise and control the activities of Lucas and his crew, and Doan Coal performed all the drilling and decided how many holes to drill, the depth of the holes and the location of the holes (Tr. 410). Doan Coal had the right to supervise the details of the blasters' work and when a question arose, the blaster looked to Doan Coal for direction (Tr. 411).

Austin Powder asserts further that Courts have long held that the paramount consideration in determining whether an independent contractor or an employer-employee relationship exists is who has the right to control and supervise the details of the work activity. See e.g. Joint Council of Teamsters No. 42 v. N.L.R.B., 450 F.2d 1322 (D.C. Cir. 1971); Assoc. Independent Owner-Operators, Inc. v. N.L.R.B., 407 F.2d 1383 (9th Cir. 1969). In this case, given the service agreement's clear language and the actual uncontradicted testimony of the witnesses, Austin Powder concludes that it is clear that Lucas and his crew were, as a matter of law, Doan Coal employees and accordingly, Austin Powder cannot be held subject to MSHA's jurisdiction.

Finally, Austin Powder maintains that MSHA's latest policy memorandum concerning the identification of independent contractors under the Act makes it clear that Austin Powder falls outside the scope of an "operator" as defined by the Act. Under this memorandum, before a company will be considered an independent contractor for the purposes of the Act, it must, inter alia, perform both drilling and blasting services, the precise services which a contract blaster provides. Austin Powder notes that it is significant that MSHA chose the conjunctive in this subsection, but in all other subsections where more than one factor was listed chose the disjunctive, thereby clearly intending to include the definition of an independent contractor only to those companies which provide both drilling and blasting services. Since it is not a contract blaster, Austin Powder concludes that it falls outside of MSHA's own criteria for determining whether an individual is an independent contractor and is not subject to MSHA's jurisdiction.

MSHA's Arguments

In its posthearing brief, MSHA denies Austin Powder's assertion that the its service agreement with Doan Coal somehow transforms blaster Jeffrey Lucas into an employee of Doan Coal under Doan's direct control and supervision. MSHA maintains that the evidence in this case supports the opposite conclusion. Namely, that the blaster, Jeffrey Lucas, was a full time employee of Austin Powder, whose services were paid for by Austin Powder as part of the price from selling explosives to mining companies.

MSHA argues that as a private business, Austin Powder has a right to conduct its business in a manner which it finds the most convenient in accordance with general industry practice, and that MSHA has no objection to "service contracts" per se, between companies providing services to coal mining companies, like Doan Coal. However, MSHA maintains that it should be obvious that the Secretary of Labor and the Federal Mine Safety and Health Review Commission are not bound to accept, on face value, the so called "gratuitous nature" of a service contract, especially if its intended purpose is to limit liability which would otherwise be imposed under the Act. MSHA asserts that to follow Austin Powder's viewpoints with regard to its attempt to award liability in this matter would amount to a total disregard of the Congressional intent expressed in the 1977 Mine Act, of placing liability for violations according to actual conduct.

MSHA maintains that a review of the service contract entered into between Austin Powder and Doan Coal indicates that it has little to do with any actual services performed by Austin Powder, and that it is merely an indemnification agreement which Austin Powder requires its customers to sign prior to allowing them to use its blasting services. MSHA states that the customer is really not given any choice and is required to assume all the risks and responsibilities inherent in an extremely dangerous occupation.

MSHA points to the fact that Jeffrey Lucas, the blaster, testified that he considered himself a full time employee of Austin Powder, was never told anything to the contrary, believed that he was in charge of the blasting area, and acknowledged that it was up to him to make sure that everyone in the blasting zone was notified (Tr. 29). It was his function to check the wiring for the explosives prior to the blast and notify members of his crew when to give the signal that a blast was going to occur, after he checked the pit area visually.

MSHA also points out that Mr. Lucas' presence at the Doan Strip Mine was long term and continuous, and that Mr. Lucas testified that at least 50% of his blasting work was at the Doan Strip Mine and he was generally on the property four to five times a week for up to five hours a day. Also, Mr. Lucas usually brought a crew of men with him to assist them with the blasting operations and proceeded directly to the pit area without waiting for any instructions from the supervisory personnel employed by Doan Coal. Under the circumstances, MSHA submits that

Austin Powder's argument that blaster Lucas was under the direct control of Doan Coal is totally without merit and should be

rejected.

In addition, MSHA submits that Austin Powder's attempt to limit its liabilities and responsibilities under the Mine Act is against public policy. Recognizing that private parties can contract between themselves to limit their respective liabilities to each other, MSHA asserts that the courts have frowned on attempts by private parties to limit their public duties under Federal law and generally will not enforce ageeements of that nature. MSHA concludes that companies like Austin Powder who perform vital services for mining companies on mine property have specific responsibilities and liabilities under the 1977 Mine Act, and that their statutory obligations cannot be contracted away or limited since the duty to the public is paramount. Citing: Southwestern Sugar and Molgasses Company, Inc. v. River Terminals Corporation, 360 U.S. 411 (1959), Headnote 9, Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253 (1965), and Conco, Inc. v. Andrews Van Lines, Inc., 526 F.Supp. 720 (1981).

Findings and Conclusions

The Jurisdictional Question

Section 3(d) of the Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervisors a coal or other mine or any independent contractor performing services or construction at such mine;" (emphasis added).

Section 3(g) defines "miner" as "any individual working in a coal or other mine", and section 3(h)(1) defines "coal or other mine" as including, inter alis, "lands, excavations, structures, facilities, equipment, machines, tools, or other property %y(2)5C used in, or to be used in * * * the work of extracting such minerals from their natural deposits * * * ".

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14: Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

Doan Coal's mine engineer and safety director Ray Mitchell testified that Doan conducts its own drilling of the blast holes, and determines the specific locations of the holes, including the depth and diameter of the holes. After the drilling is completed, Doan then calls Austin Powder to come in and do the actual blasting. If Doan Coal decided not to blast on any given day, it would send Austin Powder away and instruct them to come back another time. Doan has also used other blasters, and if Doan had a preference it may determine the direction that it wishes the blast to go. While Doan may prefer that the blast be directed away from equipment, the direction of the blast would be left to the blaster (Tr. 340-342). Mr. Mitchell stated that during his three and one-half years at the mine Austin Powder conducted 90 percent of the blasting which was done at the mine site (Tr. 353). The only thing he is required to do insofar as Austin Powder's employees are concerned is to insure that they have signed the hazard recognition sheet before they enter the mine site (Tr. 355).

Blaster Jeffrey Lucas confirmed that Doan Coal Company determines the number of blast holes to be drilled, as well as the diameter and depth of the holes. Doan Coal also determines when the holes are to be loaded and then notifies Austin Powder. Should a hole be plugged, Austin Powder will attempt to take care of the problem, but "if there is anything out of the ordinary Doan Coal will tell us how they want things done" (Tr. 411).

Mr. Lucas testified that he considered himself to be an employee of Austin Powder Company and has never considered himself to be employed by Doan Coal (Tr. 416). None of his supervisors have ever advised him to the contrary, and he considered the services he was performing at the mine to be an important part of the mining process. He conceded that he was at the Doan site performing a service, but he denied that Doan Coal paid for his services. He explained this by stating that Doan buys powder from Austin and he makes up the billings for the shots and there is no specific charge for his services. He had no knowledge that the charges for his services, which are paid for by Austin, are included in the price that Doan pays for the powder which is used (Tr. 418).

Austin Powder's technical representative Ray Thrush identified exhibit AP-11 as the "service agreement" between Austin Powder and Doan Coal, and he confirmed that he signed it on behalf of Austin Powder, and that it was the only agreement between the two companies. */ He denied that Austin Powder is a "contract blaster", and he defined

that term as someone who "goes and shoots for other people" (Tr. 466). When asked to explain the difference between what Austin Powder does and what a "contract blaster" would do, he stated "we manufacture and sell and we assist the customer in his blasting procedures" (Tr. 466). Mr. Thrush indicated the agreement was in effect in the summer of 1981, and he indicated that Austin Powder's invoices and price quotations to a customer is for the amount of powder used and that there is no separate charge for blasting. He could not state for sure whether or not other powder manufacturers have similar agreements.

Mr. Thrush confirmed that the term "blaster" means "the man who is in charge of detonating the explosive, securing the area, making sure everything is done right", and confirmed that his technical expertise is relied upon in firing the shot and removing the overburden. He also indicated that as part of the selling of the powder, Austin Powder provides its technical experience or advice in detonating the powder which it sells, and the electronic detonating devices are owned by Austin Powder (Tr. 466-468). He also confirmed that the blaster is responsible for the safety of the blast (Tr. 468).

Mr. Thrush could not state how much business Austin Powder did with Doan Coal in 1981, and he had no knowledge as to any prior business volume between the two companies. He indicated that Austin Powder probably has no more than ten blasters working in the State of Pennsylvania, and that customers are not charged for their services. When asked about the cost of trucks and blasting equipment, he answered "the same setup" (Tr. 476). When asked whether these costs are passed on to the customer as part of the purchase price of the dynamite he replied "I guess" and "that is very possible" (Tr. 477).

With regard to the service agreement, Mr. Thrush stated that a new one is executed every year, and that it is not done on a job-by-job basis. The services performed under the agreement are on a continuing basis for a year (Tr. 477). Mr. Thrush indicated that when he worked for the National Powder Company, there were no such service agreements in effect, but he did not know why "because I was not involved" (Tr. 478). Mr. Thrush confirmed that the Austin Powder agreement is signed every year on the advice of the company's counsel (Tr. 479).

Contrary to Mr. Thrush's testimony that his previous employer did not have a "service contract" with its customers, Austin Powder's counsel asserted that "virtually all" of its competitors have such contracts and that "it is an industry practice" (Tr. 512). Counsel also contended that when the blaster, Mr. Lucas, goes to Doan Coal's property to perform his blasting chores under the service agreement he is Doan Coal Company's employee (Tr. 513-514). However, counsel conceded that Austin Powder still pays all of Mr. Lucas' regular benefits, such as health coverage for his family (Tr. 514). With regard to the right of Doan Coal to supervise Mr. Lucas, Austin Powder's counsel took the position that mine operator Doan believed that he may exercise supervision or control over

anyone that is on his property, and that Mr. Lucas is not an employee of Mr. Doan for lawful purposes until he comes on the property (Tr. 515). With regard to any supervisory control by mine operator Doan over blaster Lucas, counsel stated as follows (Tr. 515-519):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: When he comes on the property to do blasting Mr. Doan is not sitting there looking over his shoulder as to how he loads the holes and wires up the shots, is he?
>
> MR. WALL: I am not aware that he commonly does. He could if he wanted to.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Do you mean that he could supervise Mr. Lucas in the manner he wires up and loads the shots and puts them off?
>
> MR. WALL: He certainly could.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Why doesn't Mr. Doan do the blasting himself? He could save a little bit of money.
>
> MR. WALL: Mr. Doan does not want to do the blasting anymore. He has other things to do. He started out with a small operation. Now he has some ten pits. He has a larger operation and has other people doing lots of things that he used to do himself.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Wall, if you know, with regard to the activities of Austin Powder, is this a common arrangement in strip mining in this area to have the manufacturer of the explosives do the actual blasting for the mine operator?
>
> MR. WALL: It is not at all unusual, no. I cannot say that it is the normal practice in every instance. Because I am not familiar with the practices here. But I know that most of the larger manufacturers also have similar arrangements.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Again, I am not making light of this service agreement. In the section where it says Austin Powder Company is not engaged in blasting work. How can one say that Austin Powder is not engaged in blasting work when, in fact, they set the wheels in motion? They dispatch three people when the call comes. Three people, vehicles, equipment and the product come. They charge the holes, the blast goes off. Now, you say that is not blasting? Is that blasting work, setting the charge and blasting?

MR. WALL: Certainly.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That is blasting work?

MR. WALL: Absolutely.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Under this service agreement the blasting work is performed by Doan not Austin Powder?

MR. WALL: That is correct. It is an arrangement which is made in our industry as well. It is not uncommon for example, for heavy equipment with its operator to be loaned to another employer. A crane, for example, could be loaned to some particular employer with its operator for use during a particular period of time.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Yes, but usually in those kinds of arrangements they pay for them, do they not? In this case had MSHA opted not to cite Austin Powder as a respondent in this case and decided only to go against Doan Coal Company and issued the citations only to Doan and sought the maximum civil penalties in this case on the theory that Mr. Lucas as an employee of Doan Coal Company was negligent and, therefore, that negligence is imputed to his employer Doan Coal Company. How do you think Mr. Hanak sitting next to you would be arguing in that case?

MR. WALL: I cannot speak to that.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Hanak, does your client realize that this service agreement, when those people and equipment come in the Government would consider those people to be his employees from now on?
MR. HANAK: We have never thought of the impact as far as any criminal action like here.

During the course of the hearing, Austin Powder's counsel indicated that the company sells explosives "in about 37 states" (Tr. 507). He also indicated that in terms of sales volume, Austin Powder ranks second or third in terms of national sales volume, but emphasized the fact that there are only "a handfull of explosives manufacturers" (Tr. 507).

During the hearing, Doan Coal's counsel took the position that in the event that it is decided that Austin Powder is not subject to MSHA's enforcement jurisdiction and are found not to be liable because of the service agreement, this would serve as a basis for immediately imputing Austin Powder's liability to Doan Coal simply because of the agreement (Tr. 479). Austin Powder's response was that "Austin is not within the reach of MSHA's inspectors because they are not in the mining business and they are not subject to the act as operators or independent contractors" (Tr. 480).

Austin Powder's counsel agreed that the reason Doan Coal Company utilizes Austin Powder's expertise rather than conducting its own blasting operations is that Doan Coal would prefer to have "an expert" do the job rather than to subject itself to possible citations for violations of MSHA's blasting regulations (Tr. 508-509). Austin Powder's counsel also conceded that it was not unique for a mine operator to utilize experts in the field of drilling or blasting (Tr. 509). In summarizing his position concerning the blaster's "independent contractor" status in this case, Austin Powder's counsel argued as follows (Tr. 510-512):

> MR. WALL: There are two reasons. One is that under the service agreement it is the intention of the parties that Mr. Lucas and others be loan servants in essence of Doan Coal. Loan servants is a well established common law concept. It has been accepted in the industry in every state. The normal detriment of the status of the particular individual is the intention of the party at the time. That intention is clearly explained here in that document. The intention of the parties is that Mr. Lucas be, for lawful purposes, freed as an employee of Doan Coal Company at the time so that Austin Powder as a corporate entity would not have liability.
>
> Mr. Lucas while at Doan Coal Company is under the control of Doan Coal Company. When Mr. Lucas is at a mine operator's property Austin Powder does not have control over those operations. It does not have insurance for those operations. It does not anticipate having liability for those operations and seeks to be protected from that, is willing to furnish that service to a customer in exchange for the customer's agreement to be responsible for any of the actions and to be responsible for that employee while he is on the property.
>
> The second factor is that there are very few guidelines in the statute for the regulation for what constitutes an operator. One goes back to the history of the 1977 Amendment of the Bituminous Coal Association's argument. Because they were upset with construction companies who were coming on to their property and committing violations for which the mine operators were held responsible. If one looks at the limited guideline that is available and that limited guideline is in the regulation. The regulatory definition of an operator there is that there is a requirement that there be a contract for services.
>
> In this instance there is no such contract wherein Austin Powder is contractually bound to provide any services. Hence, within the strict technical means of

> that regulatory definition from MSHA Austin Powder is not in the position as a contract driller who comes in and for a fee will drill holes. Some companies use contract blasters. That is a common practice. Some use contract drillers. Some use consultants and a variety of things. In each instance normally there is a charge for those people and they come in on a contract basis and are paid for this. This is not an arrangement of that type.

I take note of the fact that MSHA considered Austin Powder as an "independent contractor" subject to the Act, and in fact assigned Austin Powder a contractor Identification Number. While the assignment of such an identification number does not ipso factor bestow "contractor" status on any company, I find nothing in the record to suggest that Austin Powder has protested MSHA's characterization of its activities in this regard. MSHA's Independent Contractor regulations found in Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq., defines an "independent contractor" as follows at section 45.2(c):

> "Independent Contractor" means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; * * *

Although Part 41, of the regulations dealing with the application of the requirements of section 109(d) of the Act that mine operators submit certain "legal identity" information to MSHA does not apparently cover "independent contractors", Part 45 does. Further, other regulatory requirements such as those found in Parts 48 and 50, Title 30, Code of Federal Regulations, require contractors to comply with certain training and recordkeeping requirements of the law. As a matter of fact, in this case Austin Powder's technical representative Ray Thrusy is an MSHA certified blasting instructor, and the blaster Lucas testified that he regularly performed blasting at Doan's mine. This being the case, I assume that Mr. Lucas is "MSHA certified" to perform the duties required by blaster's under Part 77, Title 30, Code of Federal Regulations, and that Mr. Thrush also has MSHA's stamp of approval to train blaster's in accordance with MSHA's requirements.

In addition to the foregoing, I take note of the fact that in response to my Order directing MSHA to submit any evidence concerning Austin Powder's history of prior violations, MSHA submitted a copy of a Decision and Order by Judge Kennedy on November 26, 1980, approving a settlement between Austin Powder and MSHA providing for the payment of $20,000, for five violations served on Austin Powder in 1979 for five violations of several mandatory blasting standards found in Part 56, Title 30, Code of Federal Regulations. Although a copy of the "compromise settlement agreement" executed by Austin Powder's counsel Wall and MSHA's counsel contains a

"disclaimer" as to MSHA's jurisdiction, counsel Wall nonetheless indicated his understanding that "the agreement to pay the proposed settlement amounts will be considered a history of prior violations in future proceedings (if any), brought by the Secretary of Labor under the provisions of the Mine Safety and Health Act" (pg. 2, settlement agreement), MSHA v. Austin Powder Company, Docket No. YORK 80-82-M.

Although the aforesaid "settlement agreement" also contains a statement that it is the "intent of the parties" that the settlement approved by Judge Kennedy shall not be "offered, disclosed, used or admitted in evidence" in future litigation involving the parties except for the limited purpose of showing prior history by Austin Powder, I am not bound by the parties intent in that case. It seems to me that the payment of $20,000, by a company who vigorously disclaims it is covered by the Act is somewhat contradictory. If Austin Powder is not subject to the Act as a mine operator or independent contractor, the question of prior history is totally irrelevant. Further, in at least one decision concerning the approval by a judge of a settlement entered into by the parties, the Commission has not recognized the use of "disclaimers" or "exculpatory language" in its review of approval or disapproval of settlements in such settlement negotiations when it appears that the use of such language is for the purpose of insulating an operator from further enforcement jurisdiction. See: MSHA v. Amax Lead Company of Missouri, 4 FMSHRC 975 (1982). See also, Co-Op Mining Company, 2 FMSHRC 3474 (1980), where the Commission rejected a Judge's approval of a settlement when it appeared that no violation of any mandatory standard had occurred.

In my view, Austin Powder is more than a mere sales conduit for blasting powder and explosives used in the removal of overburden by mine operators for the express purpose of mining the coal which lies immediately below of the surface. Austin Powder is directly involved in the coal removal process when it provides the blaster, trucks, equipment, and trained personnel to do the actual blasting and removal of overburden. Under these circumstances, Austin Powder is an independent contractor within the reach and jurisdiction of the 1977 Mine Act. Austin is no different from other independent contractors who are retained by coal companies for the express purpose of utilizing their expertise and experience in different phases of the coal extraction process. For example, a mine operator may retain the services of a contractor to sink mine shafts or to construct other necessary facilities such as cleaning plants, tipples, or even bathhouses, or to perform certain drilling or mine excavation work. As a matter of law, these contractors are "operators" under the Mine Act's definition. On the facts of the instant proceedings, the citations issued to Austin Powder described conditions or practices by an employee of Austin Powder relating to the work that Austin Powder was engaged to perform. As a matter of fact, Austin Powder was directly involved in the abatement of the citations attributed to its alleged violations.

Notwithstanding Mr. Thrush's "loss of memory" concerning the

matter of who absorbs the costs of the services provided by the blaster, and

Austin's assertion that there is no charge for these services, there is a strong inference in this case that these costs are included in the price of the explosives and powder used by Doan Coal Company. I assume that Austin Powder is in business to make money, and I assume further that its success has not come from "free services". In any event, even if Austin gave its powder away I would still conclude that it was engaged in provided a blasting service, albeit gratuitously.

It seems clear to me from the record in this case, that contrary to any intent on the part of the parties as to the status of the blaster Lucas, he is in fact an employee of the Austin Powder Company. It is also clear to me that on the day of the accident in question Mr. Lucas was performing an important service at the Doan Mine site and that this service was directly related to the extraction of coal. While it may be true that anyone on Doan's mine property is subject to the "control" of the mine owner and operator, this is no different from the "control" that any land owner of businessman exercises over persons who come onto to his property or enter his business establishment. The critical question here is whether Doan Coal exercises supervision and control over Austin Powder's blaster while the blaster is performing his blasting duties.

I conclude and find that while engaged in the work of the actual blasting and removal of the overburden on the day of the accident, the blaster, Mr. Lucas, was performing his duties as a "miner" as defined by section 3(g) of the Act, that he was not under the control of Doan Coal Company while performing these duties, but rather, acted as an employee and agent of the Austin Powder Company. In addition, I also find and conclude that as the licensed blaster Mr. Lucas acted independently from any direct supervision or control by Doan Coal Company, and that in his capacity as the licensed blaster he exercised direct supervision and control over his crew, all of whom are in the employ of Austin Powder, and that he also had direct control of the trucks and equipment owned by Austin Powder and used in the blasting process. Further, Mr. Lucas had full responsibility for the blast, including the charging of the holes, and the final detonation. He was also responsible for insuring the safety of his crew and other miners, and he issued the order to shut down all mine equipment immediately preceding the blast. As a matter of fact, Doan's own safety director Mitchell testified that once the blasting crew comes onto mine property, the only contact he has with them is to make sure that they have signed a "hazard recognition" form.

After careful consideration of all of the evidence and testimony adduced in this case with respect to the jurisdictional question, including the arguments advanced by the parties in support of their respective positions, I conclude and find that for the purposes of this proceeding, Austin Powder Company is an independent contractor who was performing blasting services at the mine site in question on the day of the accident and as such is, as a matter of law and fact an "operator" within the meaning of the Act and is therefore subject to the Act as well as to

MSHA's enforcement jurisdiction. I reject Austin Powder's
"common law loan servant"

argument, and I also reject its arguments that the "service agreement" fixes the parameters of MSHA's enforcement jurisdiction, and that the agreement places Austin Powder beyond the reach of the Act. I also reject the notion that before Austin Powder can be considered an independent contractor there must first be in existence an implied or express contract between Austin Powder and Doan Coal requiring the provision of services. It seems clear to me on the facts of this case that Austin Powder did in fact provide rather extensive and continuous services for Doan Coal Company, and that the services provided were directly related to the mining of coal. Austin's attempts to limit its liability through the use of a "service agreement" may be recognized as valid as between the parties, but I reject it as a means of absolving Austin from any responsibility or accountability under the Mine Act. I accept MSHA's arguments that acceptance of Austin Powder's attempts to limit its liability by means of the "service contract" would amount to a total disregard of the Congressional intent expressed in the Act of placing liability for violations according to actual conduct, and would be contrary to public policy.

Fact of Violation - Citation No. 1041345, August 6, 1981, 30 CFR 77.1303(h)

Citation No. 1041345 was issued because the inspector believed that Mr. Lucas failed to give "a proper warning according to the posted requirements", and that his asserted failure to do so constituted a violation of section 77.1303(h). The first sentence of this standard states that "Ample warning shall be given before blasts are fired".

The requirement stated in section 77.1303(h) is that an ample warning be given before a shot is fired. MSHA's position in this case appears to be that by failing to follow the blasting warning signal system which was posted on a sign on the road coming onto the mine site, Mr. Lucas failed to give the kind of warning required by the standard. In short, MSHA contends that the signal system posted on the sign was required to be followed by Mr. Lucas, and when he failed to follow it he violated section 77.1303(h). A short answer to this argument is that the standard itself does not provide for any specific signals to be given. It seems to me that since blasting and the use of explosives is inherently hazardous, MSHA should as a minimum promulgate a standard that makes it absolutely clear as to what is required. The use of such broad language as "ample warnings" leaves much to the imagination, and the instant case is a classic example of this. MSHA's counsel conceded during the hearing that the cited regulation does not require the use of any particular signal system, the posting of signs, barricades, or road guards for the purpose of warning persons about blasting.

MSHA's counsel conceded that there is no specific regulatory standard as to what constitutes a "proper" or "ample" warning signal prior to the detonation of any shot (Tr. 42). His position is that if a sign gives sufficient warning of a pending blast and gives the mine operator's and contractor's employees

time to remove themselves from a blast area, if that sign is followed, then ample warning is given (Tr. 43). Given the

facts in this case, MSHA's position appears to be that since the accident victim was killed when struck by flyrock from the blast, the signal which was given by the blaster was obviously per se inadequate to properly warn the victim.

Section 77.1303(h) only requires that an ample warning be given. The term "ample warning" is not further defined, and MSHA's counsel conceded that the question as to what constitutes an "ample warning" within the meaning of the standard "has to be determined by the facts" (Tr. 78). Further, since the standard itself does not require any particular form of warning such as signs, flags, barricades, or the sounding of horns, MSHA's arguments that the blaster was required to follow the signal system posted on a sign which was located on a mine road leading onto the property is rejected.

MSHA's counsel conceded that there is no requirement for the use of blast warning signs, and there is no requirement that such a sign be posted on the mine roadway (Tr. 451-452). As a matter of fact, the sign which was on Doan's property and which has been referred to in this case was in fact a sign approved or furnished by the Office of Surface Mining (OSM), U.S. Department of the Interior (Tr. 450). However, counsel took the position that if the sign is posted, it becomes the blast warning plan, and the operator should follow it (Tr. 452). Absent any showing that the mine operator or contractor in this case were required by any MSHA standard to adopt a signal system and post it on such a sign, I cannot conclude that Mr. Lucas' failure to do so ipso facto constitutes a violation of the warning requirements of the cited regulation. MSHA has conceded as much when it agreed that the question of what constitutes an "ample warning" has to be determined by the facts of any given case. Further, I believe that the question as to whether any blasting warnings are "proper", as charged in the citation in question, is a highly subjective matter which is not even addressed by the regulatory language in question. What may be "proper" to an experienced and licensed blaster who is at the blast site supervising a shot, may not be "proper" in the judgment of an inspector who is called upon (in hindsight) to render a judgment after an accident such as the one which occurred in this case.

In a case decided by Judge Broderick on October 13, 1981, MSHA v. Domtar Industries, Inc., 3 FMSHRC 2345 (1981), a salt mine operator was charged with a violation of section 57.6-175, an underground blasting regulation, the first sentence of which is identical to the first sentence of section 77.1303(h). In that case two miners were killed in a blasting accident, and MSHA charged that the blasting crews had failed "to use effective voice communications between themselves to provide ample warning when firing blasts". Although Judge Broderick ruled that since two miners were killed it was obvious that they were not warned, he also observed that oral communication is not the only way to provide "ample warning" in compliance with the standard, and he rejected MSHA's suggestions to the contrary.

MSHA's conclusions at page nine of its posthearing brief that "the blast warning signals given by the blaster apparently varied from day to day" are unsupported conclusions by counsel and he cites no transcript references or testimony in this regard. Further, MSHA's reliance on the opinion by State Inspector Williams that the warning signals used by the blaster on the day of the accident did not constitute a "proper warning" to miners is rejected. I conclude and find that the respondents in these proceedings presented credible evidence and testimony that Mr. Lucas did all that could reasonably be expected of him on the day in question to insure that miners were apprised of the fact that there would be a shot or blast, and my reasons for these findings follow.

Mr. Lucas' unrebutted testimony is that five-to-ten minutes elapsed between the time the shot was fired and actually detonated. During this time a call was placed over the mine radio communications system advising the personnel in the scale house, as well as the mine office, that the blast would be set off and that all equipment should be shut down. In addition, prior to the actual detonation, three 20 second blasts of an air horn were sounded, and a siren signal was sounded for at least a minute prior to the blast.

David Potempa testified that when he arrived on mine property some five minutes before the blast, he knew there was going to be a blast because he had seen the blasting crew earlier in the day, and he went directly to the scale house. He also testified that he knew the shot would be fired because he heard the warning signals go off five minutes before the blast and one minute before it was actually detonated. He believed that he received adequate warning, did not feel that he was in danger, and believed that the signals sounded on the day in question were the same as those posted on the signal sign by the mine roadway.

Crusher operator Albert Bloom testified that ten minutes before the blast he received notice over the company radio installed in his loader, and he received the notice from the dragline operator who instructed him to shut the equipment down. Since the crusher where the accident victim Alvatrona was working had no radio on it Mr. Bloom signaled him by hand to shut the crusher down, and Mr. Alvatrona complied. Mr. Bloom indicated that the hand signal which he gave to Mr. Alvatrona to shut down the crusher was one that is regularly used and it is a procedure that everyone knew and followed. As a matter of fact, he indicated that when he observed truck driver Martz driving into the area he signaled him to stop his truck and to shut it down. Once the loader and crusher were shut down, Mr. Bloom observed Mr. Alvatrona heading toward the scale house and he assumed that he was going there and did not speak to him further. Mr. Bloom also confirmed that company policy calls for personally advising all employees of an impending blast over the radio communication system, and that five to seven or ten minutes elapsed between the time he received the radio notice and the actual blast. He also confirmed that it was normal operating procedure to shut down all equipment as soon as a notice of a blast is received, and if any

of his fellow workers do have radios,

he personally sees to it that they are notified. Further, Mr. Bloom indicated that in addition to personal notification, he also heard three airhorn signals sounded immediately before the blast.

In view of the foregoing, I conclude and find that the signal system used on the day of the accident, namely the sounding of air horns, coupled with the direct personal contact made over the mine radio communications system was an ample warning within the meaning of the first sentence of section 77.1303(h). Accordingly, respondent Austin Powder Company was in compliance with the cited standard and the section 104(a) Citation No. 1041345 IS VACATED.

Fact of Violation - Citation No. 1041342, July 31, 1981, 30 CFR 77.1303(h)

Citation No. 1041342 contains two "specifications" which the inspector apparently believed constituted violations of the second sentence of mandatory safety standard section 77.1303(h). The citation asserts that (1) "all persons were not cleared and removed from the blasting area", and (2) that "suitable blasting shelters were not provided to protect men endangered by concussion or flyrock from blasting". The pertinent portion of section 77.1303(h), is as follows:

> All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

The alleged failure to clear persons from the "blasting area"

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". MSHA's theory in this case seems to be that since someone was killed, the victim was obviously not removed or cleared from the blasting area. In the circumstances, MSHA argues that since the standard deals with explosives and blasting, an operator is absolutely liable for any resulting injuries or deaths. MSHA's theory of absolute liability was expounded on by its counsel during the course of a colloquy from the bench (Tr. 177-182). MSHA's counsel takes the position that since the standard deals with explosives there is absolute liability when the operator fails to remove all persons from the blasting area, even though the operator may have made a reasonable physical search of the area prior to blasting. MSHA's position is highlighted by its answer to the following question asked by me during the course of the hearing (Tr. 181):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: If some back packer came on the site, crawled in his sleeping bag and fell asleep; and, during the hoot owl shift, a shot fired off, the mine operator took reasonable steps to remove and to account for all of his people, and every man was

taken

away from the shot, and the next morning they found this guy that was knap sacking killed, would you have a citation, and would you charge the operator for failing to insure that that kid was not removed from the site prior to the shot?

MR. COHEN: It may be a technical violation, no negligence, but you are dealing with explosives, and we do think there is an absolute liability to remove all persons.

In the Domtar Industries case, supra, MSHA amended the citation after the action before Judge Broderick was begun to include an allegation that the two men who were killed were not cleared and removed from areas endangered by the blast as required by the second sentence of section 57.6-175. This standard uses the phrase "areas endangered by the blast" rather than "blasting area". In affirming the violation, Judge Broderick ruled that "the fact that the miners' bodies were found in that area is irrefutable proof" that all persons were not cleared from the area endangered by the blast. In a footnote to this ruling, Judge Broderick stated as follows at 3 FMSHRC 2348:

> The Mine Act is generally a strict liability statute. The language of the cited standard and the wording of 110(a) of the Act make it plain that unforeseeability is not a defense to a violation, nor can the operator avoid a violation by placing the blame on a careless employee. MSHA v. El Paso Rock Quarries, 3 FMSHRC 35 (1981); Hendensfels v. Drilling Co., 2 FMSHRC 790 (1980).

In the instant case, MSHA does not cite the Domtar Industries decision or the cases cited by Judge Broderick in support of a strict liability theory. MSHA's brief simply states that the use of explosives have generally been considered areas where strict liability concepts are specifically applicable, and concludes that the language of section 77.1303(h) "directly incorporates the strict liability principals applicable to blasting, into its requirements". MSHA argues that the mere fact that the blast victim and blaster and his crew were not clear of the area where flyrock from the blast did fall is sufficient to impose liability under section 77.1303(h).

I agree with the position taken by Austin Powder Company in its posthearing arguments that before MSHA can establish that all persons were not cleared from the blast area, it has the burden of first establishing what that area is. As correctly pointed out by Austin Powder's counsel in his brief, MSHA has attempted to establish the "blast area" in two ways. First, MSHA maintains that the blast area was an area within 500 feet of the actual blasting location, and it arrives at this distance by citing and relying on a State of Pennsylvania regulation which only requires that machinery within 500 feet be shut down and that persons retreat to a safe distance.

MSHA's second attempt to establish the parameters of the blast area was to determine after the accident during its investigation how far the furthest flyrock traveled. Anything inside that area would be considered the "blast area", and anything beyond the farthest point where the rock landed would be outside the "blast area" and presumably in the "safe zone".

MSHA's interpretations and arguments with respect to what the "blasting area" should be in this case border on fantasy. It seems to me that when one is dealing with regulations concerning explosives and blasting, the standards sought to be invoked by MSHA should be clearly and precisely drawn and applied by the inspectors in the field so that they are readily understood by those being regulated, as well as those who have the enforcement responsibility for insuring compliance. The theories advanced by MSHA in this case are different from those recently advanced in another blasting case concerning a mine operator in Pennsylvania, and a discussion of this case follows.

On August 25, 1982, I issued a decision in the case of MSHA v. Rockville Mining Company, Docket No. WEVA 82-10. The case concerned an allegation that a Pennsylvania mine operator failed to clear and remove miners from a blasting area in violation of section 77.1304(h). Even though the mine was located in Pennsylvania, MSHA made no mention of any 500 foot requirement or absolute liability, and the inspector who issued the citation, as well as a second inspector who was a qualified MSHA explosives instructor, said absolutely nothing about any 500 foot "safe distance" requirement. In fact, the instructor gave an opinion that based on the size of the charge in the two bore holes in question, 130 feet was a safe distance, and the inspector who issued the citation rendered an opinion that if all of the holes in question were charged with 800 pounds of explosives each, a safe distance would be 2,000 feet away. In short, in the Rockville Mining case, the question as to what constituted the "blasting area" was dependent on a number of variables, such as the amount of explosives used, the number and depth of the holes which constituted the "shot", the topography, and the expertise of the blaster.

On the facts of the instant case, I conclude and find that in order to establish a violation of the first specification noted in the citation MSHA must establish by a prepondance of the evidence that Austin Powder failed to insure that persons within the "blasting area", as that term is defined by section 77.2(f), were not cleared or removed prior to the blast. I reject MSHA's "absolute liability" theory, and I also reject the notion advanced by MSHA that the mere fact that the blast victim and the blaster and his crew were in an area where flyrock fell is sufficient to impose liability under section 77.1304(h). In order for this standard to make any sense at all, it seems to me that it has to be interpreted rationally and consistently. "Hindsight" and after-the-fact interpretations for the purpose of laying the blame on someone for an unfortunate accident do not in my view advance the interests of safety, particularly when the standard in question is obviously being inconsistently applied

and interpreted.

In this case, MSHA also advances the argument that the blaster should have followed the recommendations or requirements of Pennsylvania State law and positioned himself 500 feet from the blast. I find nothing in section 77.1304(h) that supports this theory, and as correctly pointed out by Austin Powder's counsel, the state code provision relied on does not define the "blast area", and counsel's observations that requiring mine operators to follow different state law regulations on this issue can only lead to chaos are well taken. In my view, if MSHA believes that such state requirements should be followed then it should promulgate an appropriate standard and say so. Here, although MSHA fixes the "blasting area" by measuring the distance where the farthest rock fell, it also takes the position that 500 feet was a safe distance for people to be. Had the rock only gone 100 feet, that would have fixed the "blasting area", yet MSHA would probably still insist that miners be cleared to a distance of 500 feet. I simply cannot accept such contradictory interpretations and applications of the cited standard, and I reject MSHA's "500-foot theory".

While I agree with the argument that the blaster in this case had a duty under section 77.1304(h), to locate anyone who happens to be in the "blasting area" prior to the shot and to insure that he is removed and cleared away, I disagree with MSHA counsel's argument that the blaster has such a duty even though he may not be able to visually observe such a person prior to the shot (Tr. 34-35). I conclude and find that in light of the definition of the term "blasting area", the blaster has a duty to take reasonable and prudent measures to insure that all persons are cleared and removed from the "blasting area" as reasonably and prudently determined by him at the time of the shot, and not as determined by non-experts after the fact.

In the instant case, MSHA conceded that the procedures followed by the blaster were technically correct. MSHA found nothing wrong in the manner in which Mr. Lucas loaded, wired, and fired the shot. Further, as the record here established, at the time the citation was issued Inspector Bixler filled out an "inspector's statement" in which he candidly acknowledged that the accident could not have been predicted and that it resulted from circumstances beyond the operator's control. He later filled out a new statement at the direction of his supervisor after someone from the solicitor's office made a "lawyer's judgment" that the case obviously could not be defended on its merits. Mr. Bondra candidly admitted during the hearing that the sketch of the "blasting area" as shown in his accident investigation report was a mistake.

Mr. Lucas testified that he and his crew were positioned some 300 feet from the blast, and he confirmed that in determining what constitutes the "blasting area", he takes into consideration the size of the shot, the manner in which it is loaded, and the surrounding terrain. On the day in question, he determined that the shot would go in the opposite direction from where he and his crew were located, but that for some unexplained reason there was a "blowout" which caused the flyrock in

question.

The record reflects that at the time of the blast, Mr. Lucas was an experienced and licensed blaster. He holds a college degree in mathematics, and as indicated earlier, MSHA's investigation disclosed nothing wrong with the manner in which the shot was fired. Further, since Inspectors Bondra and Bixler are not blasting experts, do not hold blaster's licenses, and have no experience in surface blasting, they were in no position to offer any credible testimony as to the technical aspects of the shot or the "blowout". Mr. Bixler conceded that at the time he issued his citation he did not take into account Mr. Lucas' opinion that 300 feet was a safe distance from the blast, and he also conceded that Mr. Lucas did have the safety of his crew in mind prior to the blast.

Mr. Lucas testified that prior to the "blowout" he had made five to six other shots using the same amount of explosives and that there was nothing unusual about those shots. Under the circumstances, he obviously had no reason to believe that a "blowout" or flyrock would occur, and he confirmed that prior to the detonation of the shot, he checked all of the charged holes for potential signs of a "blowout". Further, as indicated earlier in my findings concerning the sounding of a warning, Mr. Lucas did all that was reasonably possible to alert all persons within the blasting zone of hazard to shut down all equipment and to seek shelter.

I conclude and find that Austin Powder Company has established by a preponderance of the evidence adduced in this case that prior to the detonation of the blast in question, Mr. Lucas acted in a reasonable and prudent manner in securing the area, and that he removed himself and his crew to a safe distance and to a location which he reasonably believed was outside the "blasting area" as defined by section 77.2(f). I also conclude and find that Mr. Lucas acted in a reasonable manner in clearing all other persons from the blasting area, and that he did all that could be expected of a reasonable and prudent blaster to insure that all persons, including the accident victim, were outside the blasting area. Under these circumstances, I conclude that MSHA has failed to establish a violation and that portion of Citation No. 1041342, which charges Austin Powder with failing to remove and clear all persons from the blasting area IS VACATED.

The alleged failure to provide suitable blasting shelters

Citation No. 1041342 also charges Austin Powder with a failure to provide suitable blasting shelters. Section 77.1303(h) 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. The regulations do not specify what a "suitable blasting shelter" is, and this matter is apparently left to the discretion and judgment of the blaster.

MSHA's counsel asserted during the course of the hearing that the citation was issued in part for failure to remove persons from the scale house, a location which counsel asserts

was inside the blasting area (Tr. 132-134)

In an attempt to justify the inspector's opinion that the scale house was not a suitable shelter, he was asked to speculate on whether or not a large rock would crash through the roof of the scale house, and when he answered in the affirmative, counsel grasped at this as evidence that the scale house was not a suitable shelter. I find this conclusion on the part of the inspector to be sheer speculation and a feeble attempt to justify his after-the-fact lay opinion that the scale house was not a suitable shelter and that the failure to remove personnel from that location also constituted a violation of section 77.1303(h).

I take note of the fact that nowhere in the official MSHA report of investigation compiled by Inspector Bondra is there any mention of the fact that the scale house was not a suitable shelter, or that the failure to remove persons from that location concerned the inspector. Further, I take note of the fact that the conditions or practices described by Inspector Bondra on the face of his citation do not even mention the scale house or anyone in it as part of the alleged violative conditions or practices. His citation is limited to an assertion that the accident victim was not removed to a safe area, and his conclusions in this regard were obviously based on the fact that the accident victim suffered fatal injuries as a result of being struck by flyrock. Since the citation was issued after the investigation was completed, and since it is based on information which came to the inspector's attention in the course of that investigation, one would think that the inspector would have included the "scale house theory" in the citation. I believe that his failure to do so stemmed from the fact that at that point in time Mr. Bondra did not believe that the scale house was in the blasting area. I also believe that the inclusion of the scale house personnel during the course of the hearing was an after-thought to bolster MSHA's theory of the definition of "blasting area".

Although Mr. Lucas conceded that there were no designated blasting shelters at the location of the shot, a drill rig, a shot truck, and a driller's maintenance truck were present and he considered this equipment to be suitable blast shelters (Tr. 67-69). However, in his opinion, if the men are at a safe distance there is no need for them to crawl under the equipment. As for himself, he conceded that he was not in or under any piece of equipment because he believed he was at a safe distance some 300 feet from the actual blast operating his detonating device. Aside from the fact that he believed he was at a safe distance, Mr. Lucas also was of the opinion that a blaster must be able to observe the blast so as to detect any misfires and to insure that the proper blasting sequence takes place. Mr. Doan testified that the scale house was in a secure area and that a rock would not penetrate the roof. He also testified that the crusher is constructed of structural steel and was a "wonderful shelter".

Inspector Bondra conceded that a piece of equipment can serve as an adequate blasting shelter, and he confirmed that the drill rig which was some thirty feet from where Mr. Lucas was standing at the time of the detonation would be a shelter. Even

though he indicated that his

investigation did not determine where the other trucks were located or where the crew was standing, his opinion was that the only safe shelter within 500 feet of the blast was under the drill rig. He also confirmed that had the blasting crew been under the trucks, he would not have issued the citation for this violation.

I have some difficulty in comprehending precisely what MSHA's position is with respect to the alleged failure by Austin Powder to provide the type of shelter contemplated by the second sentence of section 77.1303(h). I suspect that the inspector decided to include this specification in his citation after determining during his investigation that Mr. Lucas was standing some thirty feet from the drill rig and was not under it when debris from the blast went over his head. Since the inspector apparently did not determine where the rest of the crew was positioned, I have no way of knowing what he had in mind with respect to the rest of the crew.

As I interpret the cited standard, if suitable blasting shelters are provided, there is no requirement that persons be cleared and removed from the blasting area. Conversely, if persons are not within the blasting area, there is no logical reason for requiring suitable blasting shelters. The language of the standard leaves much to the imagination, and I suspect that this is the reason for MSHA's anemic argument which appears at pg. 8 of its brief as follows:

> * * * the fact that there were some trucks inside the blasting zones at the time of the blast is not a substitute for specifically designating and providing suitable shelters for the protection of miners. Unless the miners are trained in using shelters and know where the designated shelters are, they do not serve their intended purpose.

On the facts of this case, it would appear that the fatality which occurred prompted the inspector to conclude that suitable shelters were not provided. However, a fatality, in and of itself, does not establish a violation of any mandatory safety standard. On the facts of this case, I cannot conclude that MSHA has established by a preponderance of any credible evidence, that Austin Powder failed to provide suitable shelters. To the contrary, I conclude and find that the evidence establishes that suitable shelters, within the language of the cited standard, were in fact provided. If MSHA chooses to penalize a mine operator or its independent contractor everytime a fatality occurs, without regard to whether or not the facts presented justify such a course of action, then I suggest it seriously consider completely outlawing blasting or the use of explosives, or in the alternative, promulgating standards which make sense. I conclude and find that MSHA has failed to establish that suitable shelters were not provided, and that portion of the citation which alleges that were not IS VACATED.

Docket No. PENN 82-33

Fact of Violation - Citation No. 1042215, July 31, 1981, 30 CFR 77.1303(h)

This citation was served on Doan Coal Company, and it seems clear that the inspector issued it because of the fatality. An identical citation was served on Austin Powder Company after the inspector concluded that blaster Lucas was not under a suitable shelter because debris from the blast in question flew over his head while he was standing some thirty feet from a drill rig which the inspector believed constituted a suitable shelter. Here, since the victim was struck and killed by flyrock while apparently sitting on a spoil pile observing the blast, the inspector concluded that a suitable shelter was not provided, and that the accident the victim was not cleared and removed from the blasting area.

For the same reasons articulated in my findings and conclusions concerning Austin Powder's alleged failure to provide suitable blasting shelters or to remove persons from the blasting, I conclude and find that MSHA has failed to establish violations of the part of respondent Doan Coal Company. I find that Doan Coal took all reasonable steps to remove persons from the blasting area prior to the detonation. Once the call came over the mine radio communications system, the loader operator, Albert Bloom, signaled the victim to shut down the crusher, and when last seen by Mr. Bloom the victim was walking on the road in the direction of the scale house. I conclude that the victim must have known about the impending blast since he shut down his equipment and apparently decided to go on a frolic of his own to the coal spoil pile to view the blast. In these circumstances, I conclude that Doan acted reasonably, and absent any requirement that a mine operator take a physical inventory of all of its personnel and lead them individually to a safe shelter, I cannot conclude that Doan Coal Company could have done anything else to prevent the tragic accident which occurred in this case. Under the circumstances, the specification in the citation charging Doan Coal Company with failing to remove all persons from the blasting area IS VACATED.

With regard to the charge that Doan Coal Company failed to provide suitable blasting shelters, I conclude and find that the primary responsibility for providing such shelters fell on Austin Powder. MSHA's attempts to hold Doan Coal Company responsible after the fact on the theory that the scale house was not a suitable shelter and did not have a sign posted on the door identifying it as such is rejected. If MSHA believes that a mine operator should label every piece of equipment or building as a "suitable blast shelter", similar to those buildings labeled "civil defense shelters" to be used in the event of a nuclear holocust, then MSHA should seriously think about promulgating some standards and guidelines in this regard. This specification noted in the citation is also VACATED.

ORDER

In view of the foregoing findings and conclusions, MSHA's proposals

for assessment of civil penalties against the named respondents
are rejected, and these proceedings are DISMISSED.

George A. Koutras
Administrative Law Judge

*/ A copy of the "Service Agreement" is included herein as
an attachment to this decision, and the document is incorporated
herein by reference.

SERVICE AGREEMENT
AUSTIN POWDER COMPANY
Cleveland, Ohio

Dated JANUARY 19, 1981

WHEREAS, the undersigned customer may hereafter, from time to time, request certain assistance of Austin Powder Company in connection with the performance of certain blasting work; and

WHEREAS, Austin Powder Company is not engaged in blasting work, its business in explosives being confined solely to the manufacture and sale thereof, but to assist the said customer, the said Austin Powder Company has agreed, at certain times, to permit said customer the temporary use, free of charge, of the services of said company's employees, together with or without certain needed equipment.

NOW, THEREFORE, the undersigned customer hereby expressly agrees that, while engaged in said work, said employees and equipment are and shall be, on each occasion, to all intents and purposes, the employees and equipment of the said customer and subject to said customer's sole supervision and control in all respects, and that all work and services so performed shall be at the sole risk and responsibility of the said customer. The undersigned customer further expressly agrees to indemnify and hold harmless the Austin Powder Company, its employees and agents, from any and all liabilities, damages, losses or claims of any character, whether caused by negligence or otherwise, as a result of injuries to any property, any person or the said customer from such services or work (excepting only liability for injury or death of Austin Powder Company employees). The undersigned customer hereby expressly recognizes and assumes sole and absolute responsibility for the result of the services or work of such employees or the use of equipment gratuitously furnished by said Austin Powder Company.

This agreement shall continue in force until either party notifies the other, in writing, of its desire to terminate the same, but such termination shall not relieve either party of any liability arising thereunder prior to such termination.

AUSTIN POWDER COMPANY — Doan Coal Company, Customer

By Ray Thrush Dist. No.023 — By David G. Doan