

CCASE:

HOBET MINING & CONSTRUCTION v. SOL (MSHA)

SOL (MSHA) v. HOBET MINING & CONSTRUCTION

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

HOBET MINING & CONSTRUCTION
COMPANY,

CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. WEVA 84-113-R
Order No. 2272702; 12/22/83

Docket No. WEVA 84-114-R
Citation No. 2272703;
12/22/83

No. 21 Surface Mine

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 84-209
A.C. No. 46-04670-03520

No. 21 Surface Mine

HOBET MINING & CONSTRUCTION
COMPANY,
RESPONDENT

DECISION

Appearances: Deborah A. Persico, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, for the Secretary of Labor; Laura E.
Beverage, Esq., Jackson, Kelly, Holt & O'Farrell,
Charleston, West Virginia, for Hobet Mining and
Construction Co.

Before: Judge Broderick

STATEMENT OF THE CASE

On December 22, 1983, Federal Coal Mine Inspector James E.
Davis issued an order of withdrawal to Hobet Mining &
Construction Company (Hobet) under section 107(a) of the Federal
Mine Safety and Health Act of 1977 (the Act), and a citation
under section 104(a) of the Act charging a significant and

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substantial violation of 30 C.F.R. 77.1303(h). The order and citation were issued as a result of an investigation of a blasting accident on December 19, 1983 in which a miner was seriously injured. Both the order and the citation charged that:

. . . a practice prevailed of the blasting crew being permitted to position themselves in the open blasting area and not under suitable blasting shelters to protect the miners endangered from flyrock. Also, the blasting area from which the blasting was detonated, ranged in distances from approximately 700 to 1115 feet from the material to be blasted and on numerous occasions the flyrock extended to the area where the blast was detonated and beyond.

The order prohibited all blasting operations in the Numbers 2 and 4 pits. The order was modified 3 1/2 hours later to permit the resumption of blasting operations so that a new blasting procedure could be evaluated. The order was terminated on January 10, 1984 after additional safety training for blasting personnel was completed and a new blasting procedure was implemented.

Hobet filed an Application for Review of the withdrawal order and a Notice of Contest of the citation. It denied that it had violated 30 C.F.R. 77.1303(h) and denied that an imminent danger existed as alleged in the withdrawal order. Thereafter the Secretary filed a Petition for the Assessment of a Civil Penalty for the alleged violation.

Pursuant to notice, the case was heard in Charleston, West Virginia, on May 7 and 8 and May 23 and 24, 1985. At the commencement of the hearing I ordered the three dockets consolidated for the purpose of hearing and decision since they all grew out of the same incident on December 19, 1983.

James E. Davis, Curtis Chandler, Bart B. Lay, Danny Lee Smith, Jackie Dell Collins, and Joseph Fiedorek testified on behalf of the Secretary; David Pauley and James D. Ludwiczak testified on behalf of Hobet. Both parties have filed post-hearing briefs. I have carefully considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

Hobet is the owner and operator of a surface mine in Boone County, West Virginia known as the No. 21 Surface mine.

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Hobet is a large operator. The subject mine employs approximately 200 persons. Its history of prior violations--98 in the 24 months prior to the contested order and citation--is not such that a penalty otherwise appropriate should be increased because of it. There is no evidence that the assessment of a civil penalty will affect Hobet's ability to continue in business.

At the subject mine, coal was extracted from two pits after the "overburden" and "innerburden" covering the coal seams were removed by blasting. The No. 2 pit had a 50 foot overburden (the mountain top) which covered the 5 block coal seam. Under that seam there was an innerburden, 86 feet thick, covering the upper stockton coal seam. Under that seam was ten feet of innerburden covering the middle stockton seam. As of December 19, 1983, the overburden, the 5 block coal, the first innerburden and the upper stockton coal had been removed. It remained to remove the 10 feet of innerburden to uncover the middle stockton seam. The blasting to remove this innerburden was called a "bottom shot."

HOBET'S PRACTICE IN BLASTING INNERBURDEN

Prior to December 19, 1983, Hobet blasted the innerburden to uncover the middle stockton coal seam in essentially the following manner: On the shift prior to the blasting operation, the drilling crew would drill holes in the innerburden down to the coal seam. When the blasting crew arrived at the pit, the blasting crew foreman would ascertain the number of holes which had been drilled and their depth, and inform the certified blaster. The holes generally varied in depth. It was Hobet's practice to measure the depth of approximately half of the holes before they were loaded. The blaster then would proceed to the cap house to obtain the necessary explosives and caps, and lay out the caps and primers next to each hole. The blasting crew would then place the caps and primers in each of the holes. The holes were then loaded with ammonium nitrate (ANFO), an explosive agent. Ordinarily, the ANFO is loaded through a chute into each hole from a truck with an 11 ton tank (the bulk truck). The amount put in the hole is determined by the blaster. If the holes are wet, the ANFO is loaded in prepackaged "wet bags" rather than from the bulk truck--to keep water from the explosive. The wet bags come in various sizes--from 15 to 50 pounds, from 5 1/2 inches to 9 inches in diameter, and from 14 to 30 inches long. After the holes are loaded with ANFO, they are "stemmed," that is, filled with dirt and drill cuttings in order to confine the explosion within the hole to the extent possible. The wires from the caps in each hole are tied together and to a lead wire on a roll or drum. The operators

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of mobile equipment are then directed to move their vehicles from the pit area, generally by a hand signal from the blasting crew. The lead wire is then "run out" away from the pit to where the shot is expected to be detonated. There was no general rule as to the how far from the pit the crew should remove itself before detonating the shot. It was the practice to run out the remainder of the roll of lead wire plus an additional complete roll. A full roll contains 500 feet of wire. The distance was generally determined by the blasting crew member who was running out the wire. The average distance from the pit to where the shot was detonated was about 700 feet. The crew, or at least the blaster and the one setting off the shot, were generally in the open when detonating so that they could have "eye contact" with the shot. The mobile equipment which was moved from the pit area, was generally in the vicinity from which the shot was detonated. The equipment operators were never told where to place their equipment during blasting, nor how far to remove it from the pit area. The operators usually remained in the cabs of their vehicles when the shots were detonated.

Flyrock, meaning rock being propelled through the air outside of the immediate blast site, was common when bottom shots were blasted. In the two months prior to December 19, 1983, flyrock occurred in about 90 percent of the shots. On many occasions, it travelled in excess of 1000 feet from the site of the blast. Most of these instances involved shots of 150 holes or more. On a few occasions flyrock was propelled beyond the blasting crew into the woods, approximately 1400 or 1500 feet from the pit. These incidents also involved shots of 150 holes or more.

When the crew saw flyrock coming, it was their practice to jump or dive under the equipment parked in the area. There was no standard procedure made known to the employees as to where they should go when flyrock was observed.

THE BLASTING ACCIDENT DECEMBER 19, 1983

On December 19, 1983, the regular blasting foreman on the day shift, Eddie Hutton, was off. His replacement was Danny Smith who was normally the purchasing agent for the mine, but who had replaced the blasting foreman on other occasions. Prior to the beginning of the shift, Smith went to the pit and talked to the driller. He learned that there were approximately 50 to 100 holes, varying in depth from 3 1/2 feet to 12 feet. He reported this information to the blasting crew who loaded the holes. In fact there were 91 holes 7 7/8 inches in diameter, spaced on 14 foot centers in the shot. The holes were loaded under the direction of the certified

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blaster, David Pauley. Pauley had been a blaster since early 1982 after working on the blasting crew from December, 1979.

Only a few of the holes were actually measured by the blasting crew. After the caps and primers were placed in the holes, they were loaded with wet bags of ANFO because the bulk truck had broken down. The bags used that day were of 2 sizes--one weighing 15 pounds, about 14 to 16 inches long and 5 1/2 inches in diameter; the other weighed 40 pounds was 32 to 33 inches long and 6 1/2 inches in diameter. The larger bags were put in the deeper holes which were in the "back" of the shot pit and the smaller ones in the 3 1/2 foot holes. The holes were then "stemmed," that is, rock and dirt and cuttings were shovelled into the holes. The strata being shot was largely slate. The wires from the caps were tied together and to a lead wire on a roll. the mobile equipment was directed out of the pit area. The lead wire was run out a distance of 500 feet (the length of the roll). The end was then spliced to another 500 foot roll in order "to get back to where the rest of the guys were so we could drink coffee and talk all together." (Tr. II, 38) The decision to go out 1000 feet was made by Bart Lay. Lay was employed as a shooter/loader, and had a total of about 4 or 5 months experience on the blasting crew, 2 or 3 months in 1982, and from about November 1983 to December 19, 1983. He was not directed as to the distance to "run out" from the pit by the acting foreman or the blaster. The mobile equipment operators were not directed where to park their vehicles during the blast.

The crew then told acting foreman Smith that they were ready to shoot. Bart Lay and David Pauley stood in front of the endloader, out in the open. The other members of the crew were nearby, also out in the open. The acting foreman was in his pickup truck approximately 80 feet away. David Pauley detonated the shot and when the crew saw flyrock, they ran toward the equipment, trying to get between the endloader and the rock truck which were less than 2 feet apart. Bart Lay was struck by a piece of flyrock. He was approximately 1115 feet from the blasting pit. He sustained serious injuries and is paralyzed from the chest down. He has not worked since the injury.

REGULATORY PROVISIONS

30 C.F.R. 77.1303(h) provides in part:

All persons shall be cleared and removed from the blasting area unless suitable blasting shelters

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are provided to protect men endangered by concussion or flyrock from blasting.

30 C.F.R. 77.2(f) defines "blasting area" as:

The area near blasting operations in which concussion or flying material can reasonably be expected to cause injury.

ISSUES

1. Whether the conditions and practice described in the withdrawal order existed and constituted an imminent danger?

2. Whether the evidence establishes that a practice prevailed at Hobet of not clearing and removing all persons from the blasting area or providing such persons with suitable shelter?

3. If such a practice did prevail, whether the violation was significant and substantial?

4. If a violation is found, what is the appropriate penalty?

CONCLUSIONS OF LAW

At all times pertinent to these proceedings, Hobet was subject to the provisions of the Act. I have jurisdiction over the parties and subject matter of the proceedings.

I. IMMINENT DANGER

Section 3(j) of the Act defines imminent danger as "the existence of any condition or practice in a . . . mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The contested order issued under section 107(a) of the Act charged that "a practice prevailed of the blasting crew being permitted to position themselves in the open blasting area and not under suitable blasting shelters to protect miners endangered from flyrock. Also, the blasting area from which the blasting was detonated, ranged in distances from approximately 700 to 1115 feet from the material to be blasted and on numerous occasions, the flyrock extended to the area where the blast was detonated and beyond." The order is thus based on an alleged violation of 30 C.F.R. 77.1303(h) quoted above. I conclude that if the described conditions and practices existed, and a violation of the mandatory standard is established, an imminently dangerous condition or practice is

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thereby shown. Such a condition or practice if it existed could reasonably be expected to cause death or serious physical harm before it could be abated. Therefore, I will turn to the question of the alleged violation.

II. 30 C.F.R. 77.1303(h)

A. The Blasting Area

The critical issue in this case is whether there was a practice at Hobet of blasting from an open area where flyrock could reasonably be expected to cause injury. I have found that the blasting crew or some members of the crew were commonly in the open and not under cover when the shot was detonated. I have further found that flyrock was common in the case of bottom shots. I have found that flyrock on many occasions travelled more than 1000 feet from the site of the blast, and that the average distance the crew withdrew from the site of the blast was about 700 feet. Can it be concluded from these facts that Hobet followed a practice of blasting from an open area where flyrock could reasonably be expected to cause injury?

Joseph Fiedorek, a mining engineer with substantial experience in explosives, testified on behalf of MSHA that based on prior instances involving flyrock and the fact that the shot was being fired from in front of the open face, flyrock distance cannot safely be predicted and the shot should always be fired from under protective equipment. Based on the past history of flyrock, it was Fiedorek's expert opinion that no one should have been permitted in the open area when the shot was fired.

James D. Ludwiczak, President of a private concern involved in blasting and mining consultation, testified on behalf of Hobet that information concerning the distance that flyrock has travelled in the past would not in itself permit a determination of the blasting area, but the type of shot, the number of holes, and the blaster in charge would be important factors. He also testified that it is important to watch a shot being detonated.

I conclude that the evidence of many prior bottom shots throwing flyrock in excess of 1000 feet establishes a blasting area--that is, an area in which flying material could reasonably be expected to cause injury--in excess of 1000 feet. I further conclude that Hobet did not clear or remove all persons from the blasting area before detonating shots. It is true that the size of the shot (number of holes), and the shot pattern may affect the size and location of the blasting area,

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and that these factors played some part in determining where the miners positioned themselves before detonation. However, the evidence clearly establishes that Hobet followed a practice of blasting from an area where flyrock frequently occurred. It did not have or follow a plan which would ensure the removal of miners from areas where flyrock could reasonably be expected.

B. The December 19, 1983 incident

Mr. Fiedorek was of the opinion that in the blast of December 19, 1983 some of the boreholes lacked adequate stemming and that this increased the likelihood of flyrock. He also testified that the use of ANFO cartridges 6 or 6 1/2 inches in diameter caused a void between the AFO and the walls of the boreholes (7 7/8 inches in diameter), and could result in "blown out shots" and flyrock.

Mr. Ludwiczak disagreed and felt the stemming in the holes on December 19, 1983 was adequate and the burden in the 3 1/2 foot holes was not too great. Based on the information given him, he stated that he would expect flyrock to be propelled about 300 feet from the December 19 shot. He was not able to account for the flyrock actually travelling 1115 feet, but "guessed" that it may have resulted from a wet hole or a crack in the strata or an upheaval of the rock. Since the order and citation here charge a violation and danger related to a practice, and are not limited to the December 19, 1983 incident, a resolution of the issue is important only insofar as it may be evidence of a practice. I conclude that some of the holes were inadequately stemmed on December 19, 1983, and that this may have caused or contributed to flyrock being propelled 1115 feet when the shot was detonated. I also conclude that the place from which the shot was detonated was not chosen on the basis that it was outside the blasting area.

C. Suitable Shelters

As I previously found, it was the practice at Hobet to detonate shots from the open area. They were generally fired from an area in which mobile equipment was present, but there were no guidelines as to how the equipment might be used to shelter the men from flyrock. I conclude that under the circumstances suitable blasting shelter was not provided. The fact that equipment is available to dive under when flyrock is seen does not meet the requirement that suitable shelter be provided.

D. The Austin Powder and Rockville Mining cases.

The case of Secretary v. Rockville Mining Company, Inc., 4 FMSHRC 1590 (1982) (ALJ) and Secretary v. Austin Powder Company, 5 FMSHRC 81 (1983) (ALJ) both involve alleged violations of 30 C.F.R. 77.1303(h) where the Respondent was charged with failing to remove all persons from the blasting area. These cases involved alleged single incident violations and not a violative practice. Judge Koutras found as a fact that the blaster removed himself and his crew to a safe distance under the circumstances of the cases before him. He further held that the fact that a crew member was in fact struck with flyrock did not in itself show a violation. The case before me is distinguishable in that it involves a practice which I have found violative of the section. The decision of the Circuit Court of Kanawa County, Hobet Mining and Construction Company v. Walter Miller, Civil Action No. 85-C-AP-3, brought under the state of West Virginia mining regulations, cited in Hobet's brief, relies on Austin Powder, and is not determinative of the issues before me.

I conclude that the evidence establishes a practice at Hobet's mine of permitting the blasting crew to be in the blasting area and not under suitable shelter when the shots were detonated. I conclude that this practice was an imminent danger and was a violation of 30 C.F.R. 77.1303(h).

III. CIVIL PENALTY

The violation established is a very serious one. It was likely to and actually did result in serious injury to a miner. The practice resulted from Hobet's negligence, since it was aware or should have been aware of the violation and its danger. Under the National Gypsum test the violation was significant and substantial, that is, there was a reasonable likelihood that the hazard contributed to would result in serious injury. The violation was abated promptly and in good faith. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$5000.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. The Order of Withdrawal No. 2272702 issued December 22, 1983 is AFFIRMED.

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2. The Citation No. 2272703 issued December 22, 1983, is AFFIRMED as issued.

3. Hobet shall within 30 days of the date of this decision pay the sum of \$5000 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge