

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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JUL 24 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 85-148  
Petitioner : A.C. No. 15-14218-03504  
v. :  
HARD ROCK COAL CO., INC., : No. 1 Strip  
Respondent :

DECISION

Appearances: Theresa Ball, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee  
for Petitioner;  
Frank Dossett, Esq., LaFollette, Tennessee for  
Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Hard Rock Coal Co., Inc. (Hard Rock) with one violation of the regulatory standard at 30 C.F.R. § 77.1303(uu) and thereby causing the death of miner Don Douglas on November 5, 1984. The issues before me are whether Hard Rock committed the violation as alleged and if so whether the violation was of such a nature as could have significantly and substantially contributed to the cause and effect of a coal or other mine safety or health hazard, i.e., whether the violation was "significant and substantial." If a violation is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with the criteria set forth in section 110(i) of the Act.

The one citation at issue, No. 2057047, charges a "significant and substantial" violation of the cited standard and, as amended, alleges that: "(w)here charging operations were being conducted and electric detonators were being used the operator failed to withdraw the men to a safe location upon the approach of an electrical storm." The cited standard requires that "when electric detonators are used, charging shall be suspended and men withdrawn to a safe location upon the approach of an electrical storm."

It is not disputed that during the course of the day on November 5, 1984, Robert Baird, an employee of Wash Ridge Coal Company had loaded five rows of drill holes (approximately 34 holes) with explosives in preparation for blasting overburden along the face of the Hard Rock No. 1 surface mine located in **Kensee, Kentucky.**<sup>1/</sup> Baird was loading the explosives under the general direction of his supervisor, Roger Kidd. Kidd showed Baird the type of delay blasting caps to be used in the various holes to provide a sequential blast with a 50 millisecond separation between rows. In accordance with accepted practice Baird did not connect the shot wires to the lead line in order to prevent accidental ignition from stray electrical sources or static electricity. Baird knew that the explosives could nevertheless even then be triggered by lightning.

Baird had finished loading the holes by 3:00 p.m. and at that time took his afternoon break. He was waiting for his supervisor to return to check his work and to detonate the explosives. According to Baird the shots were usually set off at **5:30** p.m. after the end of the shift.

upon his arrival at the job site around **6:30** that morning Baird found wet and muddy conditions from rain the night before. However, according to Baird, until the lightning actually struck later in the afternoon the weather was sunny and clear. As late as **3:15** in the afternoon Baird observed that the sky was clear and blue with no clouds, no rain, and no thunder. The first indication of any storm was when lightning struck and triggered the explosives. Baird recalled that even after the lightning struck there was no rain and no further lightning. Baird testified that he was

<sup>1/</sup> The evidence shows that Hard Rock Coal Co., Inc., is the owner and operator of the subject strip mine and accordingly had been issued the corresponding identification number from the Federal Mine Safety and Health Administration for the operation of that mine. On the day in question a number of employees of the Wash Ridge Coal Company, (Wash Ridge), including Robert Baird, supervisor Roger Kidd and the deceased, Don Douglas, were assigned by Danny Ray Chambers and his **father**, Dean Chambers, to work for Hard Rock. Danny Ray Chambers was at that time Superintendent for both Hard Rock and Wash Ridge and was President of Hard Rock and Vice President of Wash Ridge. Dean Chambers was then President of Wash Ridge and Vice President of Hard Rock. According to Danny Chambers, he and his father generally made all the decisions for both companies and from time to time would interchange employees as needed on various jobs. under the circumstances supervisor Roger Kidd was during relevant times an agent of Hard Rock.

aware of the dangers presented from an approaching electrical storm and that he would have moved clear of the explosives had he seen any evidence of an electrical storm.

When the lightning struck and prematurely set off the explosives the overburden was thrown upon front-end-loader operator Donald Douglas who was working in the pit below. **Douglas** was buried by the debris and asphyxiated by external chest compression as he was pinned in the cab of his loader.

Supervisor Roger Kidd was driving out of the pit along the pit road shortly after **3:00** p.m. that day with co-worker Art **Bowlen**. As they drove around a "point" on the mountain a dark cloud came into view. Kidd told **Bowlen** that they had better get Baird "off the shots" but within **30** to **60** seconds he saw the flash of lightning and the explosion. Kidd said that as soon as he saw the dark cloud he wanted to first warn Baird who was on the top of the shots and then warn Douglas who was working in the pit below. According to Kidd there was no rain or other sign of adverse weather before the dark cloud appeared and the lightning struck and even after that there was only some drizzle.

Ted Ivey was also working at the mine that day. He testified that the weather was clear before the accident and there was no sign of bad weather. Arvil Lewallen was also working at the mine. According to Lewallen the sun was shining at the time the lightning struck and there was no warning of its approach.

Other witnesses testified concerning storm activity in surrounding areas that day. MSHA Inspector James Payne recalled that there were several heavy rain storms in Jellico, Tennessee, about 2 "**air miles**" from the mine site. Payne thought that it had last rained in Jellico that day about **30** minutes before he left the office at **4:02** p.m. The weather had cleared by the time he left the office however and was clear upon his arrival at the mine site. Payne acknowledged that it was unusual for electrical storms to be in the region at that time of the year.

Helen Douglas, the widow of the deceased, testified that she left Corbin, Kentucky in her car at about **3:30** p.m. that day and was thereafter driving south on highway I-75 in and out of heavy rains and electrical storms. She recalled hearing an explosion as she drove along highway I-75 within approximately 2 miles of the mine site.

It is well established that under the Act an operator may be held liable for violations of mandatory safety standards regardless of fault. Secretary v. El Paso Rock Quarries, Inc., **3** FMSHRC 35 (1981). Thus for purposes of determining whether the cited violation occurred it is immaterial whether

the operator was negligent. There is no dispute in this case that electric detonators were being used by the mine operator, that an electrical storm did in fact approach, and that neither the shot loader, Robert Baird nor the deceased, who was working in the pit below, were withdrawn to a safe location. The violation is thus proven as charged. As the facts in this case clearly demonstrate the violation was also quite serious and "significant and substantial." Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

I find however that the operator is chargeable with but little negligence. The uniform testimony of those trial witnesses present at the mine site that day was that the weather was clear and sunny until moments before the lightning struck. Indeed one of the miners who it **would be** expected would be the most sensitive to weather conditions, Robert Baird, specifically observed that only a few minutes before the lightning struck the sky was clear. With Baird's knowledge that lightning could trigger the explosives he was standing over it is not reasonable to believe he would have remained in this area had there been any evidence of an approaching electrical storm.

In addition supervisor Roger Kidd testified that as he rounded a **"point"** on the pit road he observed for the first time a black cloud approaching. He expressed his intent to warn Baird but the lightning struck within 30 to 60 seconds before any warning could be given. In the absence of any directly contradictory evidence I am constrained to find that indeed the operator could not reasonably have known of the approaching storm in time to withdraw his miners to a safe location.

In reaching this conclusion I have not disregarded the testimony of other witnesses concerning evidence of heavy rains and electrical storms as close as 2 miles to the mine site. According to one witness however, apparently because of the mountainous terrain, it is not unusual for storms in the area to be localized. Thus Mrs. Douglas observed as she drove along highway I-75 that she was passing in and out of such storms as she passed from one hollow to another.

I have also considered the Secretary's argument that the operator was negligent for allowing the deceased, in the first place, to work in the pit area while explosives were being loaded in the overburden area above. Whether or not the operator was negligent in this regard is not however relevant to whether or not the operator was negligent in violating the specific standard at bar. The standard at bar does not forbid work in the pit area while **explosives** are being loaded in an overburden area above but rather requires only the withdrawal of miners to a safe place upon the approach of an electrical storm.

In assessing a penalty herein I have also considered that the operator is relatively small in size, has a minimal history of reported violations, and had abated the violation in good faith in accordance with the Secretary's directions.

ORDER

Citation No. 2057047 is hereby affirmed with its "significant and substantial" findings. **Hard Rock Coal Co., Inc.**, is directed to pay a civil penalty of \$100 within 30 days of the date of this decision.



Gary Malick  
Administrative Law Judge

Distribution:

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