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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 PROCEEDING

v.

Docket No. WEVA 87-26
A.C. No. 46-06870-03510

HIGH POWER ENERGY, RESPONDENT

HIGH POWER ENERGY, CONTESTANT v. SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION (MSHA), RESPONDENT

CONTEST PROCEEDING

Docket No. WEVA 86-408-R
Citation No. 2566728; 6/30/86
Twenty Mile Surface No. 901

DECISION

Appearances: Virginia K. Stephens, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Secretary of Labor;
Roger L. Sabo, Esq., Millisor & Nobil, Columbus, Ohio,
for High Power Energy.

Before: Judge Melick

These consolidated cases are before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", to challenge the issuance by the Secretary of Labor of a citation charging High Power Energy with a violation of the regulatory standard at 30 C.F.R. 77.1303(uu). The general issues before me are whether High Power Energy violated the cited standard and, if so, whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a 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 Section 110(i) of the Act.

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The citation at bar, No. 2566728, charges as follows:

Two workmen (blasters) proceeded to re-enter a charged area after an electrical storm had approached the blast site. A premature ignition occurred resulting in fatal injuries to the workmen. This condition/practice was determined by an examination and investigation at the site.

The cited standard, 30 C.F.R. 77.1303(uu), provides that "when electric detonators are used, charging shall be suspended and men withdrawn to a safe location upon the approach of an electrical storm."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 on Saturday, June 28, 1986, at 1:15 p.m. an unintentional detonation of explosives occurred at High Power Energy's Twenty Mile Surface Mine causing the deaths of employees Randall Roop and Michael Roop. The incident occurred at what was known as work site "A" in an area 30 feet wide and 128 feet long being prepared for blasting. Within this area 17 56-foot deep holes had been drilled and loaded with approximately 748 pounds of ANFO explosive and an electric blasting cap each. The shots were thereafter wired in series by Michael Roop, Randall Roop, and Lee Horrocks, each admittedly an experienced and qualified blaster.

According to Horrocks, when he arrived on the blast site around 11:30 that morning, all but three holes had already been loaded with explosives. The weather at that point in time continued to be "nice". As they were wiring up the holes and connecting a lead line, gray clouds began to appear. According to Horrocks, as he was then stretching the lead line away from the blast site, he saw it begin hailing about 100 feet away "down the hill" and saw lightning "some distance away". By that time, however, the blast area had already been evacuated. As he finished stretching the lead line to the blasting truck parked in a safe area previously designated for the ignition, it began to rain. It took only a minute from the time he began stretching the lead line to the time he arrived at the truck.

Michael Roop, Gary Collins, and Horrocks entered the truck cab to get out of the rain. Shortly thereafter Randy Roop approached the truck and reported that upon checking with a galvanometer, he found the shot to be dead (meaning that there was a defect in the electrical system preventing the planned ignition). Horrocks told Randy Roop to get into the truck so he would not get wet. Randy stepped up to the truck momentarily then, apparently changing his mind, stepped off and said, "That's all right".

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According to Horrocks, Michael Roop then asked for two raincoats and left the truck following Randy Roop. A minute or so later Horrocks saw lightning in the rear-view mirror, followed immediately by the unplanned shot blast that killed both Roops. The storm lasted only three or four minutes and the sky cleared again.

Gary Collins testified that after he finished drilling the holes for the explosives, he parked the drill truck on the upper bench road and returned to help stem the holes loaded by the blasting crew. Collins recalled seeing lightning about one minute before the shot went off but this lightning was about 10 miles away and came only after he was already in the blasting truck. According to Collins, everyone was out of the blast area when the black cloud first came over the mountain.

Chilton Holcomb testified that he arrived at the blast site around 11 that morning and helped load the ANFO into the holes. The holes had already been loaded and the wires connected when Holcomb first saw a flash of lightning one to three miles away in the hollow below. There were also dark clouds over the hollow but they were some distance away. It was not clear to him which way the storm was then moving and the sun was still shining overhead. Holcomb then drove the drill rig to a safe area around a protected curve in the upper bench road where Blasting Foreman Billy Collins also waited. Collins gave three siren signals announcing the "all clear" for the shot but the shot failed to fire. Holcomb testified that he then proceeded around the protected curve with Billy Collins to see what was going on and he then saw lightning, followed by the blast.

High Power Energy's Blasting Foreman, Billy Collins, had supervised blasting crews since 1975. He testified that Randy and Michael Roop, the deceased, had worked for him for 17 years and he considered them to be the best explosives loaders and the best "safety wise" of all the employees he ever had. When Collins arrived at the blast area, the drill had already pulled out and all but two holes had already been loaded. He recalled warning the blasting crew about a black cloud he saw on the horizon, but at that point they had only one or two holes to complete. They had already hooked up the lead line when Collins left in his truck to warn the "dumping crew" of the impending shot. Collins proceeded to the far end of the upper bench road, waved to Randy Roop signalling that the shot was ready, then pulled some 450 to 500 feet away around the bend and out of sight in an area protected from the blast. It was not raining at that point and Collins blew his siren three times as a preblast warning. At that point a thunderstorm appeared from the other

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direction over the top of the mountain behind him. Three or four minutes elapsed after the siren blast and nothing happened. Collins then returned around the bend to see the blast site and saw two men returning to the shot. As he was exiting his truck, the shot prematurely detonated.

Thomas Dickerson, the inspector from the Federal Mine Safety and Health Administration (MSHA) who issued the citation at bar, opined that if Foreman Billy Collins had been present at the blasting truck, the accident would not have happened. Dickerson acknowledged that there was no industry practice or standard requiring a foreman to be present at the triggering location at a blasting site. Dickerson also observed that many mines do not even have a blasting foreman and that it was not contrary to safe industry practice to not have a foreman present at the actual blast site.

The Secretary concedes in this case that the blasting crew, and, in particular,, Randall and Michael Roop, were experienced in blasting and aware of the procedures for withdrawing from a blast site when electrical storms are approaching. Indeed, the Secretary acknowledges that the fatalities occurred when the victims, who knew an electrical storm was present, failed to comply with a known company policy and federal regulations requiring persons to be withdrawn to a safe location away from the blast area during an electrical storm.

The evidence is clear that there was a violation of the cited standard in this case but that such violation was solely the result of the unforeseeable and aberrational behavior of the two deceased employees. The employees were indeed in the process of evacuating the blast site and most likely had already evacuated the blast site to a safe area upon the first evidence of an approaching electrical storm. It is acknowledged that the deceased employees were highly qualified and experienced blasters who were well-trained and knew of the prohibitions against being on a blast site during an electrical storm. Under the circumstances, it could not reasonably be foreseen that those employees would, in the midst of a downpour and evidence of an electrical storm, return to the blast site. It is conceded by the Secretary that it was not standard or accepted industry practice to require a blasting foreman to be present at the triggering location and, indeed, it was acknowledged that Foreman Billy Collins' presence to block one entrance to the blast site on the upper bench road was not inconsistent with safe practices.

The law is well established, however, that an operator is liable for violations of the Act committed by its employees,

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even if it is totally without fault. Sewell Coal Co. v. FMSHRC, 686 F.2d 1066 (4th Cir.1982); Allied Products Co. v. FMSHRC, 666 F.2d 890 (5th Cir.1982); Secretary v. Asarco, Inc., 8 FMSHRC 1632 (1986); Southern Ohio Coal Co., 4 FMSHRC 1459 (1982); American Materials Corp., 4 FMSHRC 415 (1982); Kerr-McGee Corp., 3 FMSHRC 2496 (1981); El Paso Rock Quarries, Inc., 3 FMSHRC 35 (1981).

It is also clear from the evidence in this case that the violative condition was of high gravity and "significant and substantial". Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). In assessing a penalty herein I have also considered that the mine operator is of modest size and has no real history of prior violations. Most significantly, however, I find that the violation was not the result of any operator negligence. Indeed, as previously indicated, the evidence clearly shows that the violation was the result of unanticipated and aberrational employee behavior beyond the control of the operator's agents.

Within this framework of evidence, no more than a nominal penalty of \$1 is appropriate.

ORDER

Contest proceeding Docket No. WEVA 86-408 is denied. Citation No. 2566728 is affirmed and High Power Energy is directed to pay a civil penalty of \$1 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge