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SOL (MSHA) V. THOMAS DETAMORE  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

December 5, 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-416-M
Petitioner	:	A.C. No. 46-02793-05533-A
v.	:	
	:	Mercer Crushed Stone Mine
THOMAS DETAMORE, employed by	:	
POUNDING MILL QUARRY CORP.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-417-M
Petitioner	:	A.C. No. 46-02793-05534-A
v.	:	
	:	Mercer Crushed Stone Mine
EDWARD T. SONGER, employed by	:	
POUNDING MILL QUARRY CORP.,	:	
Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
Petitioner;  
Mr. Edward T. Songer, Ripplemead, Virginia, pro  
se;  
Mr. Thomas Detamore, Rocky Gap, Virginia, pro se.

Before: Judge Fauver

These consolidated civil penalty proceedings were brought by the Secretary of Labor under 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Section 110(c) of the Act provides:

(c) Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

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Respondents are each charged with knowingly authorizing, ordering, or carrying out two corporate violations: a violation of 30 C.F.R. 56.6311(b) and a violation of 30 C.F.R. 56.9314.

Section 56.6311(b) provides:

Only work necessary to remove a misfire and protect the safety of miners engaged in the removal shall be permitted in the affected area until the misfire is disposed of in a safe manner.

Section 56.9314 provides:

Stockpile and muckpile faces shall be trimmed to prevent hazards to persons.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the Findings of Fact and further findings in the Discussion below:

#### FINDINGS OF FACT

1. The Mercer Crushed Stone Mine is a limestone operation in Mercer County, West Virginia. At all relevant times, it was operated by Pounding Mill Quarry Corporation, employing 27 miners, in producing limestone for sale in or substantially affecting interstate commerce.

2. At all relevant times, Respondent Thomas Detamore was General Superintendent at the mine, and Respondent Edward T. Songer was Foreman at the mine, and each Respondent supervised miners and was responsible for the operation of all or part of the mine.

3. On July 1, 1992, a fatal explosives accident occurred at the Mercer Crushed Stone Mine. The accident was investigated by Charles W. McNeal, MSHA Supervisory Inspector, and Carl W. Liddeke, MSHA Inspector, and they co-authored MSHA's official Accident Investigation Report regarding the accident.

4. The following material facts are provided in the official MSHA Accident Investigation Report and were proved at the hearing:

Danny R. Whitt, shovel operator, age 39, was fatally injured at about 9:40 a.m., on July 1, 1992, when explosives in the muckpile detonated dislodging boulders which struck the shovel and crushed him. Whitt had a total of 10 years mining experience; 8 years as an equipment operator with this company.

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The last production shot on this bench was fired on June 18, 1992. At least four holes misfired and were re-shot. On June 26, an undetonated cast primer and blasting cap were found in the muckpile. When this discovery was reported to Edward Songer, foreman, he removed the explosives from the site. He instructed the shovel operator to continue mucking and to be careful. On June 29, another undetonated cap and part of a primer were discovered. Again, the foreman was summoned and took the explosives away.

\* \* \*

On the day of the accident, Danny Whitt (victim) reported for work at 7:30 a.m., his normal starting time. He was to operate the shovel on the lower bench. Although this was not his regular job, he was a relief shovel operator and had performed this job before. Whitt had loaded about 12 truckloads of rock when an explosion occurred in front of and above the shovel in the muckpile. This explosion and subsequent movement of material apparently dislodged a large boulder from the spoil pile which sheered the cab from the shovel crushing the victim. Other large rocks struck the front of the shovel boom and broke off the bucket.

5. MSHA Supervisory Inspector McNeal issued two citations to the corporate mine operator, Pounding Mill Quarry Corporation, on July 6, 1992. Citation No. 3871242 charged a violation of 30 C.F.R. 56.6311(b), as follows:

A production shot was fired on June 18, 1992. Four misfired holes were discovered and re-blasted. On June 29 and 30, 1992, undetonated explosives (PETN primers and caps) were found in the muckpile and given to the mine operator. The mine operator did not change the loading cycle in order to dispose of any other undetonated explosives in a safe manner. An unplanned detonation of explosives occurred in the muckpile on July 1, 1992, which caused a slide of material on the muckpile which resulted in the death of the shovel operator.

6. Citation No. 3871243 charged a violation of 30 C.F.R. 56.9314, as follows

A fatal accident occurred at this operation on July 1, 1992, on the bottom bench at the base of the muckpile at the west end of the quarry. A large boulder estimated to weigh 190 tons slid down the muckpile, struck the operator's cab of the 180-D track mounted shovel that was being used to load out the shot rock. The shovel operator was fatally injured.

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7. Pursuant to 110(a) of the Act, Pounding Mill Quarry Corporation paid a civil penalty of \$9,500 for the corporate violation of 30 C.F.R. 56.6311(b), and a civil penalty of \$9,500 for the corporate violation of 30 C.F.R. 56.9314. These are the two underlying violations for which Respondents are charged with knowing violations as agents of the corporation, under 110(c) of the Act.

#### DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

The Commission has defined the term "knowingly" as used in 110(c) of the Act as follows

"Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. [Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (1981), 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).]

The Commission has also ruled that a "knowing violation under 110(c) involves aggravated conduct, not ordinary negligence." Bethenergy Mines, Inc., 14 FMSHRC 1232, 1245 (1992).

#### Violation of 30 C.F.R. 56.6311(b)

A preponderance of the evidence shows that each of the Respondents knowingly authorized, ordered, or carried out the cited violation of 56.6311(b).

Five miners testified at the hearing: (1) Roger Whitt, lead man, (2) Dewey Whitt, shovel operator, (3) Robert Musick, drill helper, (4) Jack Billings, front-end loader operator, and (5) Jess Fisher, haulage truck operator. Each of them testified that both Respondents, Detamore and Songer, knew that there were undetonated explosives still left in the muckpile prior to the fatal accident.

Prior to the fatal accident, Dewey Whitt, the regular shovel operator, found an undetonated cast primer and blasting cap in the muckpile on June 26, 1992. He reported this to Respondent

~2437

Songer and gave him the cast primer and blasting cap for disposal. On June 29, 1992, Dewey Whitt discovered another undetonated cap and part of a primer in the muckpile. Again, Respondent Songer was summoned and took the explosives away.

After finding the undetonated primers and caps in the muckpile and giving them to Songer, Dewey Whitt asked to be pulled out of the area and told Songer that he was concerned about remaining explosives going off in the muckpile. However, he was told by Songer that the company wanted to get the clean rock that was in there and that after the July 4th holiday, they would pull out. Dewey Whitt also complained to Detamore about the misfires, but Detamore would not listen, and told Whitt that if he did not want to work in that area, "get your dinner bucket and go home." Tr. 113.

After these incidents, and before the fatal accident, Songer, the Foreman, reported to Detamore, the General Superintendent, that the undetonated explosives had been found in the muckpile. Despite this information, Detamore told Songer to instruct the miners to keep mining. Songer ordered the miners to just go ahead and keep digging, that is to keep producing limestone in the regular production mode, but to "be careful."

The discovery of the undetonated primers and blasting caps in the muckpile clearly indicated that at least one unfired hole was still left in the muckpile. Despite this extremely hazardous situation, both Detamore and Songer ordered the men to just keep on digging and producing the limestone, but to "be careful." This was like playing "Russian Roulette" with the lives of the miners working in the muckpile.

Under 30 C.F.R. 56.6311(b), only work necessary to remove a misfire and protect the safety of miners engaged in the removal shall be permitted in the affected area until the misfire is disposed of in a safe manner. Both Detamore and Songer clearly violated this mandatory safety standard when they ordered the miners to keep mining in the regular production mode after they (Detamore and Songer) were informed of the undetonated explosives in the muckpile.

When the undetonated primers and blasting caps were discovered in the muckpile before the accident, Detamore and Songer should have stopped production in the muckpile and called the blasting company, Austin Sales, Inc., to come back to search for the remaining misfired holes. Or, if they were going to search on their own, the search had to be done with great precaution in order to protect the safety of the miners, as they did when they abated the violation after the fatal accident.

However, Detamore and Songer did not call the blasting company to come back to search for misfired holes after the

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undetonated primers and blasting caps were discovered in the muckpile. Nor did they stop production and proceed on their own with great precaution to search out the misfired holes. Instead, Detamore and Songer ordered the miners to continue mining in the regular production mode, but to be careful. This was a knowing violation of 30 C.F.R. 56.6311(b) and each of the Respondents is responsible.

Violation of 30 C.F.R. 56.9314

The boulder dislodged by the explosion weighed about 110 tons and was situated about 100 feet above the muckpile where the miners were working.

About two years earlier, MSHA Inspectors Darrel Porter and Charles Vance told Detamore and Songer that the area below the large boulder was dangerous and had to be bermed or barricaded off, and that if they were going to do any work in that area in the future, they needed to get up on top and cut the boulder down or shoot it down so that it would not fall on the miners. At that time, the area below the large boulder was not being worked, and Detamore and Songer did berm the area.

Both Detamore and Songer were thus pre-warned by MSHA that the large boulder was hazardous, and that if they decided to work in the area below it, they had to remove it so that it would not injure anyone. Cutting the boulder down, shooting it down, or pushing it down with a dozer would each come under the term of "trimming" required in 30 C.F.R. 56.9314.

At the time of the accident, only about one third of the boulder was visible but observers could easily see that it was big. After the undetonated primers and blasting caps were found, Dewey Whitt, Danny Whitt, and some of the other miners expressed their fear that somebody was going to get killed either by the explosives or the big rock. Danny Whitt tried to get Detamore to let him push the large rock down with the dozer, but Detamore would not let him do it.

Section 56.9314 requires that any place that presents a hazard of material falling off a highwall, a muckpile, or a spoil pile must be trimmed for the safety of the miners working below. This mandatory safety standard applied to the large boulder. The boulder was clearly hazardous and Detamore and Songer should have gotten rid of it, particularly since they had reason to know that there were undetonated explosives still left in the muckpile where the miners were working.

I find that Respondents Detamore and Songer each knowingly violated 30 C.F.R. 56.9314 as charged.

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The actions of Respondents with regard to both violations were highly negligent. Both violations were very serious in that they were contributing factors to the fatal accident.

Taking into consideration the criteria in 110(i) of the Act, I find that the following civil penalties are appropriate:

(a) A civil penalty of \$5,500.00 against Respondent Thomas Detamore for knowingly violating 30 C.F.R. 56.6311(b);

(b) a civil penalty of \$5,000.00 against Respondent Thomas Detamore for knowingly violating 30 C.F.R. 56.9314;

(c) a civil penalty of \$4,500.00 against Respondent Edward T. Songer for knowingly violating 30 C.F.R. 56.6311(b);  
and

(d) a civil penalty of \$4,000.00 against Respondent Edward T. Songer for knowingly violating 30 C.F.R. 56.9314.

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent Thomas Detamore knowingly violated 30 C.F.R. 56.6311(b) as charged
3. Respondent Thomas Detamore knowingly violated 30 C.F.R. 56.9314 as charged
4. Respondent Edward T. Songer knowingly violated 30 C.F.R. 56.6311(b) as charged
5. Respondent Edward T. Songer knowingly violated 30 C.F.R. 56.9314 as charged

#### ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent Thomas Detamore shall pay civil penalties of \$10,500 within 30 days of this decision.
2. Respondent Edward T. Songer shall pay civil penalties of \$8,500 within 30 days of this decision.

William Fauver  
Administrative Law Judge

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