

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 20, 2016

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

v.

WESCO,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2016-209-M
A.C. No. 26-00668-397355 NFU

Mine: Adams Claim Mine

DECISION

Appearances: D. Scott Horn, U.S. Department of Labor, Vacaville, CA, for the Secretary;
Tim Wright, WESCO, Salt Lake City, UT, for the Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against WESCO pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Reno, Nevada. Closing arguments were made on the record. One section 104(a) citation was adjudicated at the hearing. WESCO was an independent contractor performing blasting work at the Adams Claim Mine, a surface gypsum mine in Lyon County, Nevada. For reasons set forth below I affirm the citation and assess a penalty of \$5,000.00.

**I. DISCUSSION WITH FINDINGS OF FACT
& CONCLUSIONS OF LAW**

Citation No. 8789786 alleges a violation of section 56.6306(e) of the Secretary’s safety standards and asserts that the blast area at the mine was not being controlled to prevent flyrock from traveling off of mine property. Specifically, the citation notes that flyrock was found on a neighboring property where persons lived. Section 56.6306(e) requires that “[i]n electric blasting prior to connecting to the power source, and in nonelectric blasting prior to attaching an initiating device, all persons shall leave the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave), flying material, and gases.” 30 C.F.R. § 56.6306(e).

Inspector Joshua K. Wilmoth¹ determined that an injury was reasonably likely to be sustained and, if an injury were sustained, it could reasonably be expected to be fatal. He determined that the violation was significant and substantial (“S&S”), that one person was affected, and that WESCO’s negligence was moderate. The Secretary has proposed a penalty of \$5,080.00 for this alleged violation.

Summary of the Evidence

The Adams Claim Mine is a surface gypsum mine operated by Art Wilson Company. Tr. 7-8. Gypsum is extracted from the pit through blasting. Although Art Wilson Company was responsible for drilling blast holes at the mine, it contracted with WESCO, an explosives and blasting contractor, to load the explosives and conduct the actual blasting. Tr. 24. Blasting occurred two to three times per week. Tr. 19-20.

On October 16, 2015, WESCO personnel conducted a blast at the mine. Tr. 35. Bryan Lloyd² was the WESCO employee in charge of the blast. Tr. 36. Travess Lane and Cody Jensen, both employees of WESCO, were also present. Tr. 44, 47. Lane, a bench hand responsible for priming holes, loading and running equipment, testified that he noticed nothing abnormal about the loading and stemming for the blast. Tr. 44.

On October 19, 2015, a private citizen filed a hazard complaint with MSHA alleging that flyrock from blasting operations at the Adams Claim Mine had fallen on her residential property. Tr. 7-8, 14; Ex. P-1. The complaint alleged that she was outside at the time and could hear flyrock landing around her. Ex. P-1. In addition, the complaint alleged that this had happened two other times, once in September 2015 and once in August 2011. Tr. 13-14; Ex. P-1.³

In response to the hazard complaint, MSHA Inspector Wilmoth traveled to the mine to investigate the incident. Tr. 13. Wilmoth interviewed the private citizen who filed the complaint and credited her statements concerning the events. He photographed multiple pieces of gypsum on the individual’s residential property. Tr. 14-16, 20; Exs. P-3, -4 & -5. Wilmoth indicated on a map the location where the rocks were found. Tr. 12; Ex. P-12⁴. He did not notice any indentation marks on the ground. Tr. 30.

¹ Inspector Wilmoth has been with MSHA for over five years and works as both an inspector and special investigator. Tr. 6. In addition to standard mine inspector training, he has received training for special investigations, including training provided by the FBI regarding interviews, interrogation, and detecting deception. Tr. 7.

² Lloyd has been a blaster for 23 years and with WESCO for 5 years. Tr. 32.

³ At hearing Wilmoth confirmed that MSHA had made positive findings regarding other hazard complaints for the same thing. Tr. 27.

⁴ Wilmoth circled the area on the map where the rocks were found. Tr. 12.

WESCO personnel detonated the blast on October 16 from a position 500 feet east of the shot location. Tr. 39-40, 42. At hearing, Lloyd indicated on a map the location of the shot as well as the location from which the group detonated the shot. Tr. 39-40; Ex. R-2⁵. According to Lloyd, the group's location was chosen because it was higher up a hill and allowed them to overlook the pit area. Tr. 40. He agreed that their location was behind the shot and, while they could not see the blast pattern, they had a clear view of the sky, which was overcast. Tr. 35; Ex. R-1. Jensen agreed with Lloyd's depiction on Ex. R-2 as to their location during the detonation. Tr. 51. Jensen initially testified that their location was such that they were positioned between the shot location and the residences and any flyrock that went onto the residential property would have had to pass over top of them, but later indicated that they were not between the shot location and the residences. Tr. 47-53. Lloyd estimated that the residential property line was 770 feet from the location of the shot. Tr. 39.

Lloyd, Lane, and Jensen testified that they did not see any flyrock or hear any unusual sounds during the blast. Tr. 40, 44-45, 47, 50. However, at hearing, each acknowledged that it was possible they could have missed seeing flyrock. Tr. 46, 50. Lloyd stated that there was nothing out of the ordinary about the shot, but agreed that the blast did not go the way he wanted it to because the rocks were too big following the blast. Tr. 38, 41. As a result, WESCO, along with Art Wilson Company, changed the blast pattern after that blast. Tr. 35, 37.

At hearing, Lloyd opined that, depending on the velocity of the rocks, there would be an indentation where they hit the ground. Tr. 41. According to Wilmoth, the gypsum seen in the pictures was the same material mined at the neighboring Adams Claim Mine. Tr. 14-15. The photographs, which included a MSHA investigation folder in the frame for scale, show that the pieces of gypsum ranged in size from slightly smaller than a baseball to slightly larger than a softball. Tr. 29-30; Exs. P-3, -4 & -5. Based on the bright white color of the material and the lack of weathering, Wilmoth determined that the material was "fresh" and "didn't appear to have been there for a [long] period of time[.]" Tr. 15. Other material from the mine site was also observed on the residential property at the time, but it was easily distinguishable due to discoloration and browning from dirt buildup. Tr. 15. Wilmoth estimated that the rocks traveled between 200 and 500 yards from the location of the blast to where the rocks were found. Tr. 30.

The following day Wilmoth met with representatives from the mine to discuss the incident. Tr. 16. The mine representative, Lonnie Kleyseth, told the inspector that both Art Wilson Company and WESCO had recently altered the blast pattern to tighten it up and add more stemming. Tr. 17. According to Wilmoth, Kleyseth opined that the flyrock could have come from the use of less stemming before the pattern was changed. Tr. 17. Following meetings with the individual who filed the hazard complaint as well as representatives of the mine operator and WESCO, Wilmoth issued Citation No. 8789786 on October 23, 2015 to WESCO for an alleged violation of section 56.6306(e).⁶ Tr. 19.

⁵ The shot location is marked on the exhibit with a pushpin graphic, while the group's location during the detonation is marked with a red "X."

⁶ A second, identical citation was issued to Art Wilson Company. Tr. 24. Art Wilson Company did not contest the citation and paid the proposed penalty in full. Tr. 24-25; Ex. P-10.

At hearing, Wilmoth explained that section 56.6306(e) requires all persons to leave the blast area. Tr. 20. WESCO was responsible for determining the blast area. Because material flew out of that area to where people were, it was not in compliance. Tr. 26. Here, he cited WESCO because it did not control the blast area to prevent flyrock from leaving mine property and landing on neighboring property where a person was outside. Tr. 19, 21. Failing to control the blast area exposed miners and non-miners to potentially being struck by flyrock. Tr. 20.

Lloyd testified that he was not notified of the alleged flyrock incident until Friday, October 23, at which point he, Lane, and Jensen documented the event on company incident forms. Exs. R-1, R-3 and R-4; Tr. 33-36, 47. At hearing, Lloyd agreed that the some of the rocks found by the inspector were fairly small and it was possible they did not see them during the blast. Tr. 42.

Fact of Violation

I find that the Secretary established a violation of the cited standard. The cited standard requires that, before blasting, all persons be removed from the blast area, but provides an exception to that requirement when persons are in a blasting shelter or other location that protects them from the harmful effects of the blast. In order for an operator to comply with the standard they must not only ensure that everyone is outside of the blast area, they must also control the blast so that the concussion, flying material and gasses do not extend outside of the planned blast area. Accordingly, a violation will exist when persons are in the blast area during a blast and not in one of the excepted areas. Here, there is no dispute that the exception does not apply. As a result, the only question is whether persons were in the blast area when the blast occurred. For reasons set forth below, I find that persons were in the blast area.

The Secretary's regulations define the term "blast area" as "the area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to persons." 30 C.F.R. § 56.2. The regulation states that "[i]n determining the blast area the following factors shall be considered: (1) Geology or material to be blasted. (2) Blast pattern. (3) Burden, depth, diameter, and angle of the holes. (4) Blasting experience of the mine. (5) Delay system, powder factor, and pounds per delay. (6) Type and amount of explosive material. (7) Type and amount of stemming." *Id.* In a case involving a different subsection of the cited standard, Commission Judge Moran explained that this list of factors, "while helpful, does not represent an exclusive list of the factors that are to be considered when conducting the ultra-hazardous activity of blasting." *Lakeview Rock Products*, 34 FMSHRC 244, 246 (Jan. 2012) (ALJ); *see also Austin Powder Co.*, 35 FMSHRC 3656, 3672 (Dec. 2013) (ALJ)⁷. In *Lakeview*, Judge Moran found that, because flyrock landed on and penetrated the roof of a residence, the residence was "within the blast area." 34 FMSHRC at 249-250.

⁷ In *Austin Powder*, Commission Judge Barbour affirmed a violation of section 56.6306(e) after determining that the blast area at a limestone quarry had not been cleared of persons by the operator, in part, because the operator, in determining the blast area, had not adequately considered all of the seven factors set forth in 30 C.F.R. § 56.2.

In *Orica USA, Inc.*, 32 FMSHRC 709 (May 2010) (ALJ), Chief Judge Lesnick addressed a somewhat similar situation where an operator was cited under subsection (f) of the standard, which requires that access routes to blast areas be guarded or barricaded. A blasting contractor was alleged to have set off a production shot in a quarry which resulted in flyrock traveling off mine property and onto a highway, where it struck vehicles and caused injuries. Chief Judge Lesnick, in denying the operator's motion to dismiss for lack of jurisdiction, noted "the Secretary's reasonable interpretation that [the operator was] not absolved of its duty to protect people in the blast area from injury merely because the blast area extended beyond the legal property line of the . . . mine." *Id.* at 712. Moreover, he found that the operator should not be able "to escape liability for violations of section 56.6306 that result in injuries simply because the injuries occur off of the mine property." *Id.*

The parties offer two conflicting factual accounts. WESCO's primary argument in this matter is that the gypsum material found by the inspector on the residential property was not flyrock from the mine. The Secretary, on the other hand, asserts that the material was flyrock from the mine. For reasons set forth below, I credit the Secretary's factual account and find that the Secretary has met his burden of establishing a violation by a "preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

In support of its argument, WESCO asserts that its employees did not see flyrock leave the mine property and there was nothing unusual about this particular blast. I find these arguments unavailing. Each of the WESCO witnesses conceded that it was entirely possible that they did not see flyrock leave the mine property. Given the white color of the gypsum rock, the overcast skies that were present on the day of the blast, the relatively small size of the rocks, and the position of the individuals 500 feet away from the location of the shot, I find it likely that Lloyd, Lane and Jensen missed seeing the material travel off the mine property and onto the residential property, which was even further away from their location than the location of the shot. Moreover, while WESCO asserts that there was nothing unusual about the blast, Lloyd conceded that it did not go the way he wanted it to and, in response, WESCO and Art Wilson Company changed the blast pattern following the October 16 blast, but before the contractor was ever aware of the hazard complaint.

The Secretary's factual account, while reliant in part on circumstantial evidence, is consistent with that alleged in the hazard complaint and the credible evidence presented at hearing. The inspector found the individual who lodged the hazard complaint to be credible. I credit the inspector's testimony that the gypsum rocks he observed on the residential property were fresh and of the same type of material mined at the Adams Claim Mine. WESCO did not dispute this. While WESCO asserts that the inspector would have found indentations in the ground had flyrock landed on the property, Lloyd testified that the presence of an indentation would have been dependent on the velocity with which the rocks hit the ground. In addition, the rocks could have landed at a different location on the residential property and bounced or rolled to the location where they ultimately came to rest. As a result, the fact that the inspector did not

find indentations is not determinative of whether the material was flyrock.⁸ I find that the rocks observed by the inspector were from the Adams Claim Mine and. As a result of the blast on October 16, were propelled onto the residential property and in close proximity to the individual while she was outside. Because flyrock landed on the residential property, that area of the property was within the blast area.

I find that WESCO failed to control the blast and rocks from the mine left the planned blast area and landed on the residential property near an individual. It is clear that there was at least one person in the blast area, i.e., “the area in which . . . flying material . . . from an explosion may cause injury to persons,”⁹ in violation of section 56.6306(e)’s requirement that “all persons . . . leave the blast area” prior to either “connecting to the power source” or “attaching an initiating device[.]” 30 C.F.R. § 56.6306(e) and 30 C.F.R. § 56.2. The Secretary has proven a violation of the cited standard.¹⁰

Gravity and Negligence

I find that the violation was S&S. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC ___, slip op. at 3, No. LAKE 2013-160 (Oct. 21, 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[.]” and then determine whether “there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* at 3-4. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in serious injury.” *Newtown* at 2038; *ICG Illinois* at 4.

⁸ At hearing WESCO’s representative declined to speculate as to how the gypsum rocks ended up on the property and argued only that they were not flyrock from the mine.

⁹ WESCO did not present evidence regarding the factors set forth in section 56.2.

¹⁰ At hearing, Respondent’s representative conceded that, if the rocks were determined to be flyrock from the blast, then a violation would be proven. Tr. 55.

Wilmoth designated the violation as S&S because, given the varying sizes of the rocks that were ejected by the blast and landed on the neighboring property near at least one person, it was reasonably likely that material would strike a person and cause a serious injury. Tr. 21-22, 26-28. Wilmoth testified that flyrock striking a person have caused fatalities in the past. Tr. 12-12, 26-27; Ex. P-11.

I already determined that the Secretary established a violation of the cited standard. Here, the hazard that the standard is designed to protect against is a person being injured by the “concussion (shock wave), flying material, and gases” from a blast. The specific hazard in this instance was the private individual being struck by flyrock from the blast that traveled onto her property. Here, WESCO’s failure to control the blast resulted in flyrock leaving the property and falling around the private individual while she was outside on her property. WESCO’s failure to control the blast to prevent the rocks from going outside the planned blast area was reasonably likely to result in someone being struck by flyrock. Both WESCO and the private individual were lucky that the material fell around the individual and did not strike her. I credit the inspector’s testimony that, assuming a person was struck by flyrock of the size found on the property, an injury was likely to occur and that injury was reasonably likely to be fatal or at least very serious. The Secretary has met his burden of proving that the violation was S&S.¹¹

I find that WESCO was moderately negligent. I agree with the inspector that WESCO, as a blasting contractor, was well aware of the need to control the blast area. Tr. 23. Its failure to do so in this instance came close to resulting in a serious injury. I defer to the inspector’s moderate negligence determination.

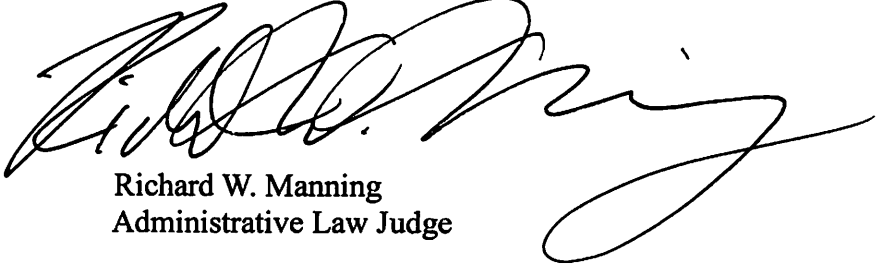
II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). The parties did not present any evidence as to WESCO’s history of previous violations but Exhibit A to the penalty petition indicates that WESCO had a history of 23 violations. The parties did not present any evidence as to WESCO’s size but Exhibit A to the penalty petition indicates that WESCO was assigned 20 penalty points, which correlates to a moderately large contractor. 30 C.F.R. § 100.3 Table V. The violation was promptly abated and payment of the proposed penalty will not have an adverse effect upon WESCO’s ability to continue in business. Sec’y Response to Request of Prehearing Report 2. The gravity and negligence are discussed above. Based on the penalty criteria, I assess a civil penalty of \$5,000.00 for Citation No. 8789786.

¹¹ At hearing, Respondent’s representative conceded that, if the material were determined to be flyrock from the blast, then the violation would be S&S. Tr. 55.

III. ORDER

For the reasons set forth above, Citation No. 8789786 is affirmed as issued. WESCO is **ORDERED TO PAY** the Secretary of Labor the sum of \$5,000.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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