FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2014-429-M A.C. No. 48-00007-343734 J2W
v.	Mountain Cement Company
YENTER COMPANIES, Respondent	

DECISION

Appearances: Laura Ilardi Pearson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Rodney L. Smith, Esq., Sherman & Howard, LLC, Denver, Colorado, for 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 Yenter Companies ("Yenter"), 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 Denver, Colorado, and filed post-hearing briefs. A section 104(d)(1) citation and order were adjudicated at the hearing. Yenter Companies is an independent contractor performing blasting operations at a quarry operated by Mountain Cement Company near Laramie, Wyoming.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. In resolving conflicts in the testimony, I have taken into consideration such factors as the interests of each witness, the consistency of each witness's testimony, and the consistency of each witness's testimony with the testimonies of other witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all of the evidence.

Yenter is a drilling, blasting, and rock stabilization contractor that has been in business since 1977. Yenter has conducted all blasting operations for Mountain Cement Company at its Laramie, Wyoming, quarries for about 25 years. The blaster in charge is Jim Wasmuth and his

assistant is Norman Jariell. Wasmuth has several pertinent blasting certifications and he has been in charge of the blasting operations for Mountain Cement since 1989.

A. Order No. 8754714

On January 7, 2014, MSHA Inspector John C. Kalnins[1] issued Order No. 8754714 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.6306(a) of the Secretary's safety standards. (Ex. P-1). The citation alleges that there was no barricade at the blast area in the quarry to keep miners from entering a live blast area. The order further states that the blaster was on the blasting site getting ready for the blast and that, if a miner entered the area, he may have received fatal injuries.

Inspector Kalnins determined that an injury was reasonably likely to occur, that the violation was of a significant and substantial ("S&S") nature, and that any injury could reasonably be expected to be fatal. He determined that Yenter's negligence was high and that one person would be affected. Section 56.6306(a) mandates that "[w]hen explosive materials or initiating systems are brought to the blast site, the blast site shall be attended; barricaded and posted with warning signs, such as 'Danger,' 'Explosives,' or 'Keep Out;' or flagged against unauthorized entry." 30 C.F.R. § 56.6306(a). The Secretary proposed a penalty of $2,000.00 for this order.

Discussion and Analysis

MSHA cited Yenter for failing to barricade the blast site in order to keep miners from entering a live blast area. Yenter was responsible for the shot blasting area at that time. (Tr. 179). The parties disagree as to the presence of any barricades or blasting notices on the day of the blast. The Secretary's only witness, MSHA Inspector John Kalnins, testified that on January 7, 2014, the requisite barriers or blasting notices were not present when he entered the quarry owned by Mountain Cement. (Tr. 14). Inspector Kalnins also testified that only after Wasmuth noticed that a MSHA inspector was present did Wasmuth start to put up cones barricading the blast area. (Tr. 22). Wasmuth, on the other hand, testified that the "Blasting Today" sign was opened by Jariell, his assistant. (Tr. 93). Jariell likewise testified that he opened the "Blasting Today" sign around 7:00 a.m. (Tr. 133) and that both he and Wasmuth attended the site in order to prevent anyone from entering it for the entire time they loaded and wired the shots. (Tr. 137). Wasmuth further testified that he placed three cones on the access road prior to the blast, but had removed the center cone the day of the blast so he could access the site. (Tr. 94-5). Mountain Cement safety manager, Charles Murphy, testified that he did not see any cones barricading the blast area upon entering the area with Mr. Kalnins, but that he did see the Danger - Blasting sign to the right of the blast site access road. (Tr. 183-84).

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[1] Kalnins had been an inspector with the MSHA Denver field office for six years at the time of the hearing. (Tr. 7). Prior to his employment with MSHA, he worked at open-pit sand and gravel operations and in construction as a laborer, foreman, and project manager. (Tr. 8). Inspector Kalnins testimony at the hearing was often confusing and muddled. Although I do not question his honesty, his memory of the events that transpired the day of the inspection was often inaccurate. I find that his testimony was not persuasive with respect to several key issues.

The parties disagree as to the requirements of the safety standard. The Secretary contends that the standard "requires that when explosive materials or initiating systems are brought to a blast site the operator [is required to] ensure that the blast site is (1) attended, (2) barricaded, *and* (3) posted with warning signs." (Sec'y Br. 9) (emphasis added). In the alternative, the operator has the option of flagging the site against unauthorized entry. *Id.* Yenter, on the other hand, argues that the safety standard presents alternatives that an operator may use to comply. It notes that the standard uses the word "or" rather than "and" in the list of options available to an operator. In support, Yenter points to the preamble to the safety standard, which provides:

> Moreover, the final regulation gives operators compliance flexibility by providing alternative methods on how to demarcate the blast site. Under this final regulation, once initiation systems are brought to the blast site, mine operators must either: (1) attend to the blast site; (2) barricade and post the blast site with warning signs, such as "Danger," "Explosives," or "Keep Out;" or (3) flag the blast site, to be in compliance with paragraph (a).

61 Fed. Reg. 36790, 36793 (July 12, 1996).

I find that the Secretary did not establish that Yenter violated the safety standard. The language of the safety standard is clear; it provides several alternatives for compliance. "Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171(Sept. 2010). The intent of the Secretary, as set forth in the preamble, supports the plain language in the safety standard itself and this clear meaning would not lead to absurd results.

One of the alternatives for compliance is for the blast site to be "attended" by the operator. The term "attended" means the "presence of an individual or continuous monitoring to prevent unauthorized entry or access." 30 C.F.R. § 56.2. The term "blast site" is defined, for purposes of this case, as an "area where explosive material is handled during loading, including the perimeter formed by the loaded blastholes and 50 feet (15.2 meters) in all directions from loaded holes." *Id.* Both Wasmuth and Jariell spent the morning in the blast site loading and wiring the explosives. Wasmuth and Jariell were present at the blast site from the time they started working until they exited the area to initiate the blast. The only way to access the blast site was via the road they used to enter the area earlier that morning. (Ex. J-1). The area surrounding the blast site was open land with sparse vegetation. (Ex. R-1). A person could not have approached the blast site without being seen by either Wasmuth or Jariell. (Tr. 101, 137-38). I find that the evidence establishes that the blast site was "attended," as that term is defined by the Secretary.

Although it is not critical to my holding, I credit the testimony of Jariell that he opened the "Blasting Today" sign the morning of January 7, 2014. That sign warns anyone entering Mountain Cement's quarry site from the public road that blasting would be occurring that day.

(Ex. R-8). The sign does not prevent anyone from driving along the main access road and onto the secondary roadway that leads to the blast site.

There had been three orange cones across this secondary roadway, but when Wasmuth entered the area at the beginning of his shift that day, he removed the center cone to drive into the area and did not stop to replace the center cone. Thus, there were two orange cones on the roadway, but a vehicle could still pass through even though the roadway was only the width of one vehicle. (Tr. 16). Wasmuth also testified that he placed a sign along the side of the secondary roadway about 100 yards beyond the two cones when he first entered the area. (Tr. 95). The sign said "Danger, Blasting, Keep Away." (Tr. 95-96). Inspector Kalnins testified that he observed Wasmuth putting up the danger sign only when he saw the inspection party approaching the blast site around 1:00 in the afternoon. (Tr. 21). Murphy, who drove the inspector to the quarry, did not see Wasmuth pull the danger sign from his truck as the inspection party approached. He testified that the sign was already present along the side of the road as they entered. (Tr. 182, 197). I credit the testimony of Murphy and Wasmuth on this issue. Wasmuth replaced the missing middle cone just before the blast countdown was commenced. (Tr. 106).

The Secretary takes the position in his brief that because the secondary roadway leading to the blast site was not barricaded against entry, a violation was established. He states that "Wasmuth's failure to replace the cone constitutes a violation of the cited standard by Yenter." (Sec'y Br. 10). He concludes that "[e]ven if the Court finds that the site was appropriately attended and warning signs were posted, the site was not barricaded while explosives were present. Therefore, Respondent violated Section 56.6306(a)." (Sec'y Br. 11). His position is contrary to the plain and clear wording of the safety standard which requires that a blast site be attended, barricaded and posted, or flagged against authorized entry. Yenter attended the blast site and posted danger signs. Those actions complied with the safety standard. For these reasons, the citation is **VACATED**.

B. <u>Citation No. 8754730</u>

On January 7, 2014, MSHA Inspector Kalnins issued Citation No. 8754730 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.6306(g) of the Secretary's safety standards. (Ex. P-3). The citation alleges that after a blast in the quarry, miners went into the blasting area before the area had a post-blast examination. The citation further states that a miner entering the blasting area before it is examined for misfires could receive fatal injuries.

Inspector Kalnins determined that an injury was reasonably likely to occur, the violation was S&S, and that an injury could reasonably be expected to be fatal. He determined that Yenter's negligence was high and that one person would be affected. Section 56.6306(g) mandates that "[w]ork shall not resume in the blast area until a post-blast examination addressing potential blast-related hazards has been conducted by a person with the ability and experience to perform this examination." 30 C.F.R. § 56.6306(g). The Secretary proposed a penalty of $2,000.00 for this citation.

Discussion and Analysis

MSHA cited Yenter for allowing unauthorized persons to enter the blast area before a post-blast inspection was completed and an all-clear notice was given. Yenter's company policy allows for the assistant blaster to perform all of the blaster in charge's duties, save clearing misfires, so long as the former is under the supervision of latter. (Tr. 157). Jariell testified that he performed the post-blast inspection immediately after the blast and issued an all-clear. (Tr. 143). Jariell and Wasmuth testified that only one person, Mountain Cement pit boss Scott Swinford, entered the blast area before an all-clear was given. (Tr. 117,148). This testimony was corroborated by Charles Murphy, the safety manager for Mountain Cement. (Tr. 201). Inspector Kalnins, on the other hand, testified that several Mountain Cement employees entered the blast area before the all clear was given. Swinford had witnessed blasts performed by Yenter in the past but Wasmuth, Jariell, and Murphy testified that they had not previously observed Swinford enter a blast area prematurely as he did in this instance. (Tr. 116-17, 149, 187, 191)

I find that the Secretary established a violation. The evidence establishes that, once the shot was fired, Swinford drove his vehicle down the access road and "parked just in front of the face of the shot[.]" (Tr. 203, 196). The all-clear had not been given at that time. Inspector Kalnins believed that several other people entered the blast area, but the evidence clearly demonstrates that only Swinford prematurely traveled to the blast area.[2] (Tr. 117, 148, 204). Mountain Cement disciplined Swinford by suspending him for three days without pay. (Tr. 205). Inspector Kalnins issued an imminent danger order and the section 104(d)(1) citation and order that are the subject of this case after observing Swinford drive to the blasting area.[3]

Yenter argues that although Swinford wrongfully entered the blast area before the all-clear signal was given, the Secretary did not establish a violation because there is no evidence that Swinford entered the blast area before Jariell finished examining the blast area for misfires. Yenter also argues that there was no proof that Swinford conducted any "work," as that term is used in the safety standard, before the all-clear was given. The Secretary only proved that Swinford drove into the blast area.

I reject Yenter's argument. It is clear that Swinford entered the blast area prematurely. It is possible, but unlikely, that Swinford arrived at the blast area after Jariell completed his post-blast examination but before he actually gave the all-clear signal. It would not have taken Swinford as long to drive to the blast area as it would take Jariell to complete his examination.[4] While it is true that Swinford did not walk upon the blast area to conduct any "work," he did drive into the blast area for a work-related purpose. Given the purpose of the safety standard, the

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[2] The term "blast area" includes a much larger area than a "blast site." "Blast area" is defined, in part, as "the area in which concussion (shock wave), flying materials, or gases from an explosion may cause injury to persons." 30 C.F.R. § 56.2.

[3] Yenter did not contest the imminent danger order.

[4] Swinford no longer works for Mountain Cement and he did not testify at the hearing.

term "work" should be interpreted broadly to include the act of entering the blast area before the post-blast examination has been completed.

I find that the Secretary did not establish that the violation was the result of Yenter's unwarrantable failure to comply with the safety standard.[5] The citation alleges that "[b]laster Jim Wasmuth engaged in aggravated conduct constituting more than ordinary negligence in that he knew the proper blasting procedures and still let miners access the hazardous area." The evidence establishes that Wasmuth did not permit miners to enter the blast area before he completed his examination. At some point Wasmuth saw Swinford's truck in the blast area, but he did not authorize or permit him to enter the area.[6] (Tr. 117-18). Swinford was an employee of Mountain Cement, not Yenter. The primary dispute between the parties with respect to this issue is whether Swinford habitually entered the blast area prematurely. The Secretary argues that Swinford frequently traveled to the blast area immediately following a blast before the post-blast examination had been completed. He maintains that Wasmuth, acting on behalf of Yenter, did not take any steps

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[5] The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has explained that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: (1) the length of time that the violation has existed; (2) the extent of the violative condition; (3) whether the operator has been placed on notice that greater efforts were necessary for compliance; (4) the operator's efforts in abating the violative condition; (5) whether the violation was obvious; (6) whether the condition posed a high degree of danger; and (7) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

[6] During the blast, two groups of miners blocked access to the blast area. Swinford used his truck to block the main haulage road to the south of the access road to the pit and the blast area. Other personnel were in that area, including Inspector Kalnins and Murphy who were in the same vehicle during the blast. Others blocked the access from the north along the same haulage road. Murphy testified that, as they watched Swinford drive toward the blasting area, he told Inspector Kalnins that he did not know why Swinford had left the area before the all-clear was given. (Tr. 186). Murphy further testified that when he asked Kalnins whether he should contact Swinford on the radio, Kalnins replied "No, let's just see where he is headed." *Id.* Kalnins, on the other hand, testified that Murphy tried to contact Swinford, but was not successful. (Tr. 61-62). Given the inspector's confusion about the events of the day, I credit Murphy's testimony.

to stop this practice. Respondent maintains that Wasmuth and Jariell made sure that people did not prematurely enter the blast area until the all clear signal was given, in accordance with Yenter policy.

Swinford had witnessed many blasts conducted by Yenter. Both Wasmuth and Jariell testified that they had never observed Swinford drive to the blast area before the post-blast examination was completed. (Tr. 117-18, 149) I credit their testimony. Murphy testified that he overheard Swinford tell Inspector Kalnins that "he has always done it that way." (Tr. 190). This testimony is hearsay and it is not clear what the phrase "done it that way" means with respect to Swinford's conduct. It could simply mean that he is always the first Mountain Cement employee at the blast site, not that he always jumped the gun and entered the blast area before Yenter had completed its post-blast examination.[7]

Although Yenter, as the blasting contractor, "has a duty to ensure the safety of miners within the blast area," its failure to prevent Swinford from entering the blast area in this instance did not rise to the level of aggravated conduct. *Orica Nelson Quarry Services*, 35 FMSHRC 3004, 3012 (Sept. 2013)(ALJ). The violation occurred instantaneously without warning. The Secretary argues that the violation was extensive because it was a regular practice for employees to enter blast areas before the all-clear had been given. I credit the testimony of Wasmuth and Jariell that they followed Yenter's blast security measures and prohibited others from entering the area before their post-blast examination had been completed. (Tr. 116-17, 148). The Secretary did not establish that Yenter habitually allowed Mountain Cement employees to enter the blast area before completion of the post-blast examination. Yenter had not been put on notice that greater efforts were necessary to comply with the safety standard. For the same reason, I find that Wasmuth and Jariell, acting for Yenter, did not know that Swinford would attempt to enter the blast area prior to the all-clear being given. As a consequence, Yenter did not have an opportunity to abate the violative condition prior to its occurrence. Traveling into a blast area before the all-clear signal is given creates an obvious and serious safety hazard. Because Yenter did not know that Swinford would enter the blast area prematurely until the moment he did so, Yenter did not have knowledge of the violation prior to its occurrence.

I find that Yenter exhibited moderate negligence. In determining whether an operator has met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the safety standard. *JWR Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). I find that Yenter was not indifferent to the necessity to prevent miners from entering the blast area before the area was examined and its conduct in this respect did not amount to a serious lack of reasonable care. Neither Wasmuth nor Jariell knew or expected that Swinford would drive into the blast area. Yenter had a policy that prohibited miners from entering a blast area until the all-clear notice was given. (Tr. 161-62; Ex. R-5 at 9-10).

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[7] Inspector Kalnins wrote in his notes "miners went into the blasting area before the area had a post blast examination. The miners stated that this was the way it was always done." (Ex. P-4). As stated above, the inspector erroneously believed that many miners had prematurely entered the blast area. This written statement suffers from the same ambiguity due to the inspector's confusion about the events that took place at the quarry that day.

I find that the Secretary established that the violation was S&S.[8] There was a violation of a safety standard that created a discrete safety hazard. The hazard included the risk of a misfire and the possible presence of noxious gasses. Explosive material could have ignited on its own or as a result of Swinford's presence upon exiting his vehicle.

Whether it was reasonably likely that the hazard contributed to by the violation will result in an injury is the closest issue. The "reasonably likely" requirement does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Resources*, 33 FMSHRC 2357, 2365 (Oct. 2011). I find that entering a blast area before it has been examined and cleared is hazardous and that a serious injury is reasonably likely given continued mining operations. I find that the hazard created by this violation was reasonably likely to lead to an injury and that such an injury would be of a reasonably serious nature.

The gravity of the violation was serious for the reasons described above. The violation could have contributed to a fatal or permanently disabling injury.

I **MODIFY** Citation No. 8754730 to a 104(a) citation with moderate negligence. In all other respects the citation is affirmed. Although I am not bound by the penalty point system developed by MSHA, I note that if the penalty is recalculated using MSHA's system taking into consideration my moderate negligence finding, the penalty would be $392.00 with the reduction for good faith abatement. 30 C.F.R. § 100. 3. I find that a penalty of $400.00 is appropriate for this violation. I considered all of the penalty criteria in assessing this penalty. I took particular note of Yenter's small size and its lack of any previous history of violations.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The parties stipulated that Yenter has no history of previous MSHA

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[8] 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) (2006). 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). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

violations during the relevant time period. (Tr. 5). Respondent is a small independent contractor. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Yenter to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

Order No. 8754714 is **VACATED** for the reasons set forth above. Citation No. 8754730 is **MODIFIED** to a section 104(a) citation with moderate negligence. Yenter Companies is **ORDERED TO PAY** the Secretary of Labor the sum of $400.00 within 30 days of the date of this decision.[9]

Richard W. Manning
Administrative Law Judge

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[9] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.