

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 28, 2011

CAM MINING, LLC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2008-390-R
	:	Citation No. 7428799; 12/07/2007
v.	:	
	:	Docket No. KENT 2008-391-R
SECRETARY OF LABOR,	:	Citation No. 7428800; 12/07/2007
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA,	:	Mine ID 15-17659
Respondent	:	Three Mile Mine #1
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA,	:	Docket No. KENT 2008-942
Petitioner	:	A.C. No. 15-17659-145919
	:	
v.	:	
	:	Mine: Three Mile Mine #1
CAM MINING, LLC.,	:	
Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
Mark E. Heath, Esq., Spilman, Thomas, & Battle, PLLC, Charleston, West Virginia, for Cam Mining, LLC.

Before: Judge Weisberger

These cases are before me based upon Notices of Contest filed by the operator, Cam Mining, LLC., (“Cam”), and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary.”) These filings were in response to two citations the Secretary issued to Cam alleging, respectively, violations of 30 C.F.R. § 77.1000 (failure to follow the mines ground control plan), and 30 CFR § 77.1303 (h) (failure to remove persons from a blasting area). The cases were scheduled and heard in Kingsport and Jonesboro, Tennessee. Post-hearing, following the granting of various requests for extensions of time, each party filed a brief. The parties were afforded an

opportunity to file a reply brief. Cam filed a reply brief; the Secretary did not.

Subsequently, in a telephone conference call, the parties were informed that their initial briefs did not clearly discuss various matters at issue. On December 29, 2010, an order was issued (“Order”) directing the parties to file a post-hearing statement. On February 18, 2011, the Secretary filed a “Response to Order,” (“Response”) and Cam filed a “Post-Hearing Statement” (“Statement”).

I. Introduction

Cam operates the Three Mile Mine #1, a surface mine. As part of Cam’s normal coal mining process, surface material is removed by blasting. In July 2007, 92 blasting holes had been drilled, each approximately 20 feet deep. The holes, seven and seven eighths inches in diameter, contained approximately ten feet of explosives. Bags of dirt materials were placed in some of the holes to limit the explosive force and control the direction of the blast. The parties stipulated that the “minimum hole spacing is 12 feet by 12 feet; the maximum is 25 feet by 25 feet.” (Tr. 324-26). There was at least 18 feet of material beyond the first row of holes toward the “free space of the open face.”¹ (Tr. 424).

On July 16, 2007 at approximately 4:35 p.m., two shots were detonated in sequence along the edge of the area in question.² These shots resulted in flyrock,³ which traveled in excess of 1,570 feet, and struck a mechanic working in an equipment staging area, killing him instantly.

The Three Mile Mine had not had any previous incidents of material leaving the blasting area, and there were no previous incidents of flyrock on the Three Mile Job.⁴

¹The parties stipulated regarding that the term “open face” means “that it’s daylight, there’s no longer material there.” (Tr. 424).

²The shots were referred to as “no spoil” shots, meaning the shot is designed so that rock and overburden does not leave the permitted area boundary.

³Flyrock is defined as “material that leaves the blasting shot and the blasting area set up by the blaster as a safety zone.” (Joint Stipulation, Par. 6)

⁴The Three Mile Job is the site in question.

II. Citation No. 7428800

A. Violation of Section 77.1000, supra

Citation No. 7428800 alleges a violation of section 77.1000, *supra*, which provides that “[e]ach operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971 which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.”

In her initial brief, the Secretary asserted that the ground plan “was not sufficient to prevent the creation of flyrock during the shot that fatally injured the victim.” (Sec. Br. at 8). Subsequently, in a response to the order issued on December 29, 2010,⁵ the Secretary asserts inter alia, as follows:

“the ground control plan did not provide sufficient protection to assure proper drilling and blasting precautions to provide adequate burden to prevent blowout of blast holes along the blast site.”⁶

(Response p. 13).

The record contains three pages from the ground control plan for the mine at issue. (Gov. Ex. 2 pp. 1-3). It does not appear that there is any material on these pages that pertain specifically to certain drilling or blasting requirements or procedures to eliminate or minimize the creation of flyrock. Nor does the plan stipulate specific steps to be taken to avoid, eliminate, or cure conditions that could lead to flyrock. It is significant to note that Respondent does not refer to any references in the ground control plan pertaining to avoidance of flyrock.

For all the above reasons, I find that, on its face, the ground control plan was not sufficient

⁵The order required the Secretary, inter alia to set forth in a statement whether she alleges either that the ground control plan was insufficient, or that the operator’s procedures violated the plan. The Secretary was further ordered as follows:

The Secretary shall set forth the opinion or evidentiary facts adduced at the hearing which support its position that either the plan was insufficient or that certain procedures violated the plan. Each opinion or specific fact alleged shall be set forth in a separately numbered sentence followed by a transcript page and lines, or an exhibit number and page.

(Order).

⁶In support of this assertion, the Secretary cites the testimony of her expert witness, Edward Lobb. In this connection, Lobb indicated that he agreed that “drilling and blasting precautions were not adequate.” (Tr. 431).

to prevent flyrock. Therefore, I find that it has been established that Cam violated section 75.1000, *supra*.

B. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981.)

In *Mathies Coal Co.*, the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor 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 in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984).

In *United States Steel Mining Company, Inc.*, the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

7 FMSHRC 1125, 1129 (Aug. 1985) (emphasis added).

As set forth above, the failure of the ground control plan to prevent flyrock resulted in the hazard of flyrock, and constituted a violation of a mandatory standard. Further, it is uncontested the blast at issue resulted in flyrock which caused a fatal accident. I thus find that the third and fourth elements set forth in *Mathies, supra*, have been met. Accordingly, I find that the violation was significant and substantial.

C. Penalty

In assessing a civil monetary penalty, the following factors must be considered: the operator's history of previous violations, the appropriateness of such penalty to the size of the operator, the operator's negligence, the effect on the operator's ability to continue in business, the gravity of the violation, and the operator's demonstrated good faith. 30 U.S.C. §820(i).

The gravity of the violation was relatively high inasmuch as it resulted in a fatal injury. There is not any evidence in the record that would argue for an increase or decrease in penalty based upon consideration of Cam's history of violations, or its size. Nor is there any evidence that the imposition of the penalty would have an adverse affect on Cam's ability to remain in operation. Cam abated the violation, and there is not any evidence that it did not act in good faith in abating the violation. There is not any evidence in the record that Cam either knew, reasonably should have known, or had been put on notice that its operating ground control plan was not sufficient. I thus find that the level of Cam's negligence was low.

For all of the above reasons, and placing significant weight on the low level of the operator's negligence, I find that a penalty of \$1,000 is appropriate for this violation.

III. Citation No. 7428799

A. Violation of Section 77.1303(h), supra

Citation No. 7428799 alleges a violation of section 77.1303(h), *supra*, which provides that “[a]ll persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.” The term “blasting area” is defined as “the area near blasting operations in which concussion or flying material can reasonably be expected to cause injury.” 30 C.F. R. § 77.2(f).

In *Hobet Mining & Constr. Co.*, the Commission held as follows:

To establish a violation of the standard based on a failure to clear and remove all persons from the blasting area, the Secretary must prove that an operator has failed to clear and remove all persons from the “blasting area” as that term is defined in section 77.2(f). This requires the Secretary to establish the factors that a reasonably prudent person familiar with mine blasting and the protective purposes of the standard would have considered in making a determination under all the circumstances posed by the blast in issue. The Secretary must then prove that the factors were not properly considered or employed.

9 FMSHRC 200, 202 (Feb. 10, 1987) (emphasis added).

Basically, the Secretary is required to (1) establish factors that would have been used by a reasonably prudent person to determine the blasting area and (2) prove that these factors were not properly considered.

1. Factors that would have been used by a reasonably prudent person

According to Arnold J. Stewart, Cam's supervisor of blasting coordinators, among the factors to be considered are the history of prior detonations, the distance between blast holes, the depth of the holes, the presence of cracks in the material to be blasted, and the amount of overburden. He indicated, in essence, that in the blasting sequence the closer the holes to be blasted get to the face, the more the amount of overburden⁷ is reduced. The blasting area should accordingly be extended to compensate for the decreased amount of overburden. He also opined that the presence of cracks in the material to be blasted increase the chances of flyrock.

Thomas Edward Lobb was offered by the Secretary as an expert in explosives and blasting.⁸ He testified that a determination of what constitutes a blasting area is based "[o]n previous issuances of flyrock, the type of material that they're (sic.) blasting, the timing of the individual blastholes, and any material that's in front of the blast, such as an old spoil." (Tr. 365) It also is based on geology, the accuracy of the drilling, and the types of explosives being used (Tr. 366).

The Secretary also infers from the testimony of Lobb that the following factors are pertinent and should be taken into account in setting the blasting area:

The blaster should have considered the diameter of the drill holes, the distance between drill holes, the amount of the rock in front of the drill holes in the empty pit, the timing of the blast, the amount of the room left by the first holes for the material in the second holes to travel, any geological conditions such as where the blast is located in relation to the crop line where the ore body meets the air on the side of the mountain, and the presence of cracks which causes loss of confinement in the blast.

(Response p. 4).

In addition, the Secretary relies on the following factors as set forth in the testimony of Stewart as apparently affecting the production of flyrock as follows: the consistency of the material being blasted, the location of the blast in relation to the distance to the open face, the pattern of shots, the presence of muck in front of the first row of loaded holes, the depth of the holes, and the amount material in front of the first holes to be blasted. (*Id.*)⁹

⁷Overburden is the amount of material between a shot hole and the open face.

⁸Respondent did not object to Lobb testifying as an expert in explosives and blasting.

⁹On direct examination, he was asked about the "... kind of numbers [that he] would have been interested in in the way the blast was set up before it was detonated." (Tr. 375). He responded as follows: "The diameter of the drill holes, the distance between the drill holes, the amount of rock in front of the drill holes into the empty pit ...the burden, the amount of rock between the drill holes and the air." (Tr. 375-376). I thus find, that the factors discussed by Lobb do not relate specifically to the determination of the blasting area.

The above cited testimony by Stewart and Lobb was not impeached or contradicted. I accordingly conclude that a reasonably prudent blaster would have used the factors testified to by Stewart and Lobb, in determining the blasting area.

2. Factors that were not properly considered

The Secretary, in her Response, sets forth various physical factors that she alleges “[t]he blaster should have considered.” (Response p. 3) It might thus be inferred that she is alleging that the factors “should have been considered,” but were not. The factors alleged are as follows:

The diameter of the drill holes, the distance between drill holes, the amount of rock in front of the drill holes in the empty pit, the timing of the blast, the amount of room left by the first holes for the material in the second holes to travel, any geological conditions such as where the blast is located in relation to the crop line where the ore body meets the air on the side of the mountain, and the presence of cracks which causes loss of confinement in the blast.

(Response p. 3).

These factors are essentially those that a reasonable prudent blaster would have considered as testified to by Lobb and Stewart at the hearing. Johnny Wayne Sexton, Cam’s drill and blasting coordinator, provided similar testimony in his deposition. (Gov. Ex. 8).

[CONTINUED ON NEXT PAGE]

However, neither of these individuals testified that any of the above factors were not considered by Goble in determining the blasting area.¹⁰

¹⁰The Secretary in support of her assertion that these factors “should have been considered” by the blaster, which implies that they were not, cites only Lobb’s testimony on the following pages of the transcript: “Tr. 375, Line 22 to 376 Line 5, Tr. 377, Lines 17- 22, Tr. 387, Lines 9-12 and Lines 22-25, Tr. 380, Lines 13-21.” (Response p. 3). The cited testimony is as follows:

- A. I would be looking for all of the construction details; the diameter of the drill holes, the distance between the drill holes, the amount of rock in front of the drill holes into the empty pit–

3. Further discussion

On July 16, 2007, John Chester Goble, II, was the blaster in charge of the shots at the site in question, and was responsible for setting the blasting area. As such, it would appear that Goble is the only individual who has personal knowledge of the blasting area that was established, and the factors that were taken into account in establishing that area.¹¹ In this connection, Respondent's

The Court: Excuse me. The amount of rock in front of the drill holes?

The Witness: Yes, sir. The burden, we call that.

(Tr. 375-76).

Q. Are there any other things you would be looking for on measurements?

A. Yes, ma'am. The timing of the blast is critical for the direction it goes. The first holes that are initiated leave room for the next holes for the material to go.

(Tr. 377).

The Court: When it hits a crack, it reflects 80 percent?

The Witness: Yes, sir. Approximately 80 percent of it reflects.

The Court: Which causes what?

The Witness: Which causes the explosives to not break the rock up really good. It also can cause loss of confinement, which is typically associated with flyrock.

(Tr. 380).

Q. That right?

A. Yes, ma'am. There were numerous rocks.

Q. Where did you see the rocks that were involved in that?

(Tr. 387).

A. Flyrocks in that area.

The Court: Okay. The record isn't that clear as to where—

Ms. Taylor: I think I can clarify it,

(Tr. 387).

The above testimony is clearly not germane to the issue at bar, and certainly does not establish that Goble did not consider any of the above physical factors in setting the blasting area.

¹¹Goble, who normally worked another shift, was assigned as a blaster to the blasting area in question on July 16. The area had been blasted the day before but the blaster on that day, Eric

proffered the deposition testimony of Goble who had been deposed by the Secretary on December 9, 2009.¹² Goble's deposition¹³ testimony indicates that he determined the blasting area, and moved a "powder truck" to "a place that [he] thought was outside the blast area." (Ex R3 p. 63). This truck was approximately 1,200 feet from the shots.¹⁴ It thus might be inferred that Goble had determined the blasting area to be approximately 1,200 feet. The balance of his testimony regarding the setting of a blasting area and its distance from the shot area is lacking in detail as to totally minimize its probative value. Thus, Goble acknowledged that he determined the blasting area but was unable to remember what he "consider[ed]" it to be (Ex. R-3 p. 64-65). Nor did he testify specifically as to the factors that he took into account in setting the blasting area. Nor did any individual testify regarding any conversations with Goble prior to the blast in which the latter stated what the blasting area was, or what the factors were that were taken into account in designating the blasting area.¹⁵

Belcher, was not called as a witness by either party to testify regarding the blasting area that he had determined.

¹²Neither party called Goble to testify at the hearing in this matter. Subsequent to the hearing, in a telephone conference call on January 21, 2011, the parties were offered an opportunity to request a supplemental evidentiary hearing to adduce further testimony. Neither party made a request to supplement the record by having Goble testify.

¹³The deposition was admitted as Exhibit R-3.

¹⁴Also, Goble had instructed a foreman, John Colvin, where to locate his truck to "guard the blast area" (Tr. 288). This truck was parked approximately 1,300 feet from the shot.

¹⁵The Secretary did not adduce any detailed evidence setting forth a specific blasting area that should have been determined prior to the blast. The only evidence relating to this issue consists of the testimony of Lobb that he would have included the parking lot as part of the blasting area. (Tr. 429) In response to a leading question, he agreed that this was "based on a reasonably prudent standard." (*Id*) However, he did not testify further regarding any specific factual basis for this opinion. Hence, it is not accorded much probative value.

[FOOTNOTE 15 CONTINUED]

I note that Goble testified in his deposition that, prior to the blast, for purposes of ascertaining the powder factor and number of yards blasted, Goble took into account the depth of the blast holes and the diameter of the drill bit, and applied a certain formula. (Ex. R-3 pp. 50-53)

Also, the Report Of Blasting Operation ("Blast Report"), that had been prepared by Goble prior to the blast on July 16 sets forth the following:

The total number of holes, the diameter of the holes, the distance between the holes, the powder factor, the depth of "stemming," the type of material blasted, the total spacing, the minimum number of holes "per delay," and maximum weight of explosives "per delay."

(Gov. Ex. 1).

Based on all the above, I find that the record fails to establish that Goble, as the blaster, did not consider any of the above factors in determining the blasting area. To the contrary, as set forth above, Goble testified that he noted the presence of cracks. This testimony was not impeached, nor was it specifically contradicted by any witness who had personal knowledge based on observations of Goble's actions. Further, the Blast Report filled out by Goble prior to the blast sets forth the following factors: the diameter of the blast holes, the distance between the holes, the amount of burden, and the "delay types." (Gov. Ex. 1.) As such, it might be inferred that these factors were considered by Goble in setting the blasting area.¹⁶

4. The Secretary's arguments regarding failure of execution and Cam's practices

In order to clarify and organize the record adduced at the trial, the order issued on December 29, 2010 required the Secretary, *inter alia*, to set forth the specific factor/factors that it alleges that were not properly considered by the operator followed by a citation to the record that establishes that the alleged factor had not been considered. The Secretary alleged several factors she considered to be "failures in execution:

a. Relevance of failures in execution and Cam's practices

The Secretary, in her response, incorporated by reference "failures in execution" set forth on page nine of MSHA's Physical Factors Report of the accident at issue. (Gov. Ex. 7 p. 9) (emphasis added). This report sets forth the following "practices that should be reexamined prior to blasting at this site" (*id*):

- The drillers and blasters do not communicate together to construct the blast as the blast was designed. . . .
- Both drillers were drilling blastholes on a smaller pattern than was reported on the blast records. . . .
- Both drillers used their own judgment to determine the location of the blastholes on the outside rows of blastholes next to the high wall. . . .
- Blasters need to pay close attention to their high wall burdens. . . .

It thus might be inferred that a number of factors set forth above were considered by Goble in making a determination as to the blasting area.

¹⁶In addition, I note that there was not any history of previous flyrock at the site at issue. Although the blasting area may not be based "solely" upon previous projections of flyrock or lack thereof, it is a factor to be considered. *See Hobet, supra*, at 203.

- Surveying equipment is available to profile the high walls¹⁷. . . .

(Gov. Ex. 7 pp. 9-10).

The Secretary also set forth the following as specific factors that were not considered:

- a. The blaster did not maintain communication with the driller;
- b. The blaster encountered cracks in the middle of loading the shot but kept no record of the location or size of the cracks ;
- c. The blaster failed to distribute the powder factor enough in the blast because of his lack of knowledge of particulars relating to the drill holes, cracks, voids, hole depth and dimensions. The powder distribution is critical in determining the blast area;
- d. The Blaster did not measure the distance between the drill holes or check each hole for voids or cracks as they were loaded;
- e. The blaster did not measure the amount of muck or spoil in front of the highwall prior to setting up the blast area;
- f. The blaster left the shot that day while the helpers loaded the holes. He was gone for a time to show the mechanics where to put a handrail on another powder truck. He was gone for about an hour that morning while the helpers stemmed the holes that had been loaded;
- g. The blaster allowed for removal of muck or spoil from the pit after the drill holes were loaded with explosives;
- h. The blaster did not measure or examine the distance between the first set of drill holes and the edge of the highwall bench set for blasting;
- i. The loaders had undercut the drill bench while removing muck as was evidenced by the physical factors from the blast.
- j. The blaster failed to distribute the powder used to execute the blast evenly which resulted in a stiff blast;

¹⁷According to the report, these practices should be reexamined “prior to blasting” at this site. (Emphasis added) (*id.*) There is not any indication in the report that these reexaminations should have been done in determining the blasting area. Further, for the reasons set forth below, evidence of practices are not germane, and are not accorded any probative value.

- k. The blaster was focused on avoiding the rock rolling off the back of the shot and leaving the permit zone;
- l. While the blaster did have a mirror for using to measure the shot, he did not use the mirrors for each hole loaded; and
- m. The blaster failed to give the persons working in the parking lot area directly in front of the shot notice that it was time for a blast

(Response pp. 5-7).

These factors and the “failures in execution” set forth in the Physical Factors Report (Gov. Ex. 7 p. 9) refer to practices and actions as opposed to physical factors. As set forth by the Commission in *Hobet, supra* at 202, the Secretary’s burden at this stage is to establish “factors” that would have been used by a reasonably prudent person in determining the blasting area. The Commission clarified the “factors” to be considered “may include, but are not limited to, the amount and type of explosives used, the depth of the holes that constitute the shot, the topography, and the experience and prior experience of the blaster.” *Hobet, supra* at 203. Thus, it is clear based on these examples, that under *Hobet, supra*, the Secretary’s burden relates to establishing the physical conditions or factors that a reasonably prudent person would have considered in determining the blasting area. As such evidence of practices or actions are not germane and are not accorded any probative value.

- b. Whether the Secretary’s assertions regarding specific practices have been established

Moreover, even assuming relevance of Cam’s practices, the evidence fails to establish her assertions as discussed below, *infra*.

- i. “The Blaster did not maintain communication with the driller.” (Response p.5).

The Secretary’s assertion of a lack of proper communication is predicated upon the testimony, inter alia, of Lobb who conducted an investigation of the accident at issue and interviewed a number of the principals including “a driller and one of the blasters.” (Tr. 392). According to Lobb, these persons indicated different distances between the blast holes. However, the record lacks critical information regarding the identity of these individuals, and the specific statements they made.¹⁸ Thus, Lobb’s testimony is not accorded much weight.

¹⁸MSHA’s Report of Investigation states only that “miners and mine management officials, deemed to have knowledge of the facts regarding the accidents were interviewed on two separate occasions.” (Gov Ex 3 p. 2). Robert J. Newberry, MSHA’s accident investigator listed in the Report of Investigation, did not testify at all regarding any interviews with miners.

The Secretary also relies on the testimony of a foreman, John Colvin, that the blaster was responsible for instructing a driller how to drill. Colvin did not specifically testify to any lack of communication between Goble and the driller. I thus find that Colvin's testimony does not support an assertion that Goble did not communicate with the driller.

Also relied upon is the testimony of James Gregory Clevinger who worked the shift that ended on the morning of July 16, 2007. However, he did not specifically testify regarding any communication or lack of communication between Goble and the driller.

Considering all the above, I find that the evidence fails to establish any alleged failure by the blaster to communicate with the driller.

- ii. "It is alleged that the blaster failed to distribute the power factor enough in the blast because of his lack of knowledge of particulars relating to the drill holes, cracks, voids, hole depth, and dimensions."(Response p. 6).

The record does not contain any factual support for this assertion. In support of its assertion the Secretary cites only the following testimony of Lobb:

- A. The powder distribution is the critical thing. Their powder factor that they used was good, but their powder distribution wasn't distributed enough.

(Tr. 474).

This testimony set forth Lobb's opinion that powder distribution was not distributed "enough." (*Id.*) However, he did not indicate the factual basis for this opinion. More importantly, Lobb did not adduce any facts regarding the blasters "lack of knowledge of particulars relating to the drill holes, cracks, voids, hole depth and dimension as alleged by the Secretary. (Response p. 6). Hence, I find that the record does not support this assertion.

- iii. "[T]he blaster did not measure the distance between the drill holes or check each hole for voids or cracks where they were loaded." (*Id.*)

The Secretary's factual assertions are not supported by the testimony of any person with personal knowledge of the asserted facts. As support for its assertion, the Secretary cites the following testimony of Lobb:

- Q. What significance did you find in what you've heard about the communication between the blaster and the driller?

- A. I did talk to a driller and one of the blasters, and no one could tell me the same numbers for the blast that was initiated that was involved in the

accident. I've heard 15 feet. I've heard 18 feet.

The Court: That is the distance between what and what, sir?

The Witness: Between the blast holes. On the blaster's report, it was supposed to be 18 feet; and I've heard reports of 15 feet, 18 feet and 16 feet, so. . . And one person told me 14 feet.

By Ms. Taylor:

Q. Then you said something about drilling blast holes in a smaller pattern than was reported on the blast records?

A. That's correct.

Q. What lead you to believe that?

A. Different people had different distances.

(Tr. 392).

Q. Did he take any measurements of the space between the holes?

A. I can't remember that, no.

Q. Did you ever see him measure the distance between the front, the open space, and the first row of holes?

A. I didn't see him measure between holes.

(Tr. 248).

This testimony relates solely to a discrepancy between persons whom Lobb interviewed regarding the spacing between holes. Neither of the individuals are mentioned by name, nor was any testimony adduced from such individuals. Also, Lobb's testimony does not set forth any facts, based on personal knowledge, that Goble did not check for cracks or voids as the holes were loaded with explosives.

The Secretary also cites the testimony of John Henry Holbrook, who helped Goble with the shot on the date in question. Holbrook testified with regard to the taking of measurements by Goble as follows:

Q. Did he take any measurements of the space between the holes?

A. I can't remember that, no.

Q. Did you ever see him measure the distance between the front, the open space, and the first row of holes?

A. I didn't see him measure between the holes.

(Tr. 248).

I find this testimony too ambiguous and thus not sufficient to meet the Secretary's burden of establishing by a preponderance of clear and convincing evidence that the blaster did not measure the distance between the holes. Also, for the same reasons, I find Holbrook's testimony insufficient to contradict Goble's deposition testimony that he (Goble) checked the blast holes for cracks, and sealed them with bags of dirt that he placed in the holes (Ex. R-3 pp. 32-35). I thus find that the Secretary has failed to establish the above assertion.

iv. “[T]he blaster did not measure the amount of muck or spoil in front of the highwall prior to setting up the blasting area.”
(*Id.*)

The Secretary cites Holbrook's testimony as the basis for its allegation that Goble failed to measure the amount of muck as follows:

Q. Did you ever see Mr. Goble get down in the area that was in front of the first—below the first shot in the open shot

A. No, not that I know of. I don't know.

(Tr. 254).

I find this testimony insufficient to contradict Goble's testimony that on the day of the shot in issue he measured fifteen feet out from the first row of holes, and marked that distance with colored boxes that he set out. (Ex. R-3 p. 26). I also note the following deposition testimony of Goble:

Q. So there is spoil that goes out at least fifteen feet in front of the highwall that's going to be your first shot?

A. Well, more than that, probably.

(*Id.*)

Thus, it can reasonably be inferred that Goble did take cognizance of at least fifteen feet of spoil in front of the shots that he measured. I thus find that the Secretary has failed to establish the above assertion.

v. “[T]he blaster did not measure or examine the distance between the first set of drill holes and the edge of the highwall

bench set for blasting.” (Id.)

I note that Goble, in his deposition, set forth various measurements that he made regarding the distance between the first set of drill holes and the edge of the highwall bench. The Secretary has not presented the testimony of anyone with personal knowledge to contradict that testimony. Therefore, I find that the Secretary has not established the above assertion.

- vi. “[T]he loaders had undercut the drill bench while removing muck as was evidenced by the physical factors from the blast.” (Id.)

In support of this assertion the Secretary cites the testimony of Lobb as follows: “ So the procedures that I heard when I was at the mine site, as well as the observation of the area, left me the conclusion that a good portion of the highwall had been over-dug to get that much flyrock.” (Tr. 413). I find the testimony too vague and unspecific to establish the Secretary’s factual assertion of the Secretary regarding any action of loaders. I thus find that the Secretary has failed to establish the above assertion.

- vii. “[T]he blaster failed to distribute the powder used to execute the blast evenly which resulted in a stiff blast.” (Id.)

In support of the above assertion the Secretary relies on Lobb’s testimony as follows:

Q. Does the powder factor play any role if you have a rigid pattern setup?

A. The powder factor is important. It’s been used for over 180 years for blasting design, but, also, powder distribution is the important part of blasting.

An example, if you put 1,000,000 tons of explosives under the middle of a mountain and blow it up, you know, you could have a powder factor like they used here of .5 or .5, and you wouldn’t get a good break on the mountain. But if you distribute that same powder in a thousand blastholes, the rock would break uniformly, or more uniformly. So the powder distribution is as important or more so than what the powder factor is.

Q. Is there anything in the powder distribution in this blast that concerned you?

A. I think the powder distribution is too concentrated. In other words, the holes are too big in diameter.

Q. Too what? Answer: Too large a drill hole. Question: Why is that?

- A. Because the stiffness ratio that we just discussed is 1 instead of 3 to 4.
- Q. Why would it be necessary to have a less concentrated powder distribution when you have that stiffness ratio?
- A. If we distribute the powder more evenly, then when the explosives detonate, the intersecting cracks in the rock have less chance to break up the blast forces and you have more uniform breakage of the rock and a lot less potential for flyrocks. Question: Would one – Could you read the last answer back, please. (The last answer was read back.) Okay.
- Q. How would the powder distribution have been– in your opinion, if a reasonably prudent blaster had done this blast, how would the powder distribution, the design of the blast change?
- A. A reasonable prudent blaster should have used smaller drill holes and more of them. The powder factor was reasonable and the other parameters of the burden and so forth were reasonable, but the holes were too big for this area.

(Tr. 397-99).

I find this testimony unclear and confusing, and accord it little probative value. Further, the testimony does not set forth with any degree of specificity the factual basis for the conclusion asserted by the Secretary that the blaster failed to distribute the powder used to execute the blast evenly. Nor does it provide any factual basis as to how the powder was actually distributed. I thus find that the Secretary has failed to establish the above assertion.

- viii. “[T]he blaster was focused on avoiding the rock rolling off the back of the shot and leaving the permit zone.” (Response p. 7).

In support of the above assertion the Secretary relies on Stewart’s testimony as follows:

- Q. Is there some kind of violation with the Office of Surface Mining or with the state DNR if you have rock that goes beyond the permit line?
- A. Yes, there are
- Q. And do you know what the ramifications of that is?
- A. It varies. It’s according to the severity of the flyrock.
- Q. So is every rock that goes beyond the permit line considered flyrock?

A. Yes, if it leaves the permitted area.

Q. You can get different amounts of civil penalties?

A. Exactly.

Q. Can it also be taken into consideration on granting further permits?

A. Yes.

Q. As a blaster, do you take very careful consideration of where the permit line is when you get close to it?

A: Yes, I do.

Q. Okay. Do you develop – and do you call all the shots that are close to that permit line “no spoil shots”?

A. Yes.

(Tr. 63).

I find that the above cited testimony fails to establish the Secretary’s assertion of what Goble was “focused on.” (Response p. 7).

In the same fashion, The Secretary also relies on the following testimony by Stewart:

Q. So you’re getting the very last burden off you can get without messing up and going off permit there?

A. Exactly. Question: So it’s critical to stay and make it all go in one direction; is that right?

A. Yes.

(Tr. 91).

I find that the Secretary’s assertion as to what Goble was focused on to be hypothetical and without support in the record regarding his state of mind. I further find that the cited testimony of Stewart relates solely to general blasting practices, and does not address the specific factors not considered by Goble.

ix. “[W]hile the blaster did have a mirror for using to measure the shot, he did not use the mirrors for each hole loaded.” (Response p. 7).

In support of the assertion that Goble did not use the mirrors for each hole loaded, the Secretary relies on the testimony of Holbrook who was present on the date in issue. Holbrook was asked whether he did it for every hole and his answer is as follows: "I don't think he used them on every hole, but he usually does." (Tr. 248). I find this testimony to be insufficient to establish, by a preponderance of clear and convincing evidence, that Goble did not use mirrors in every hole. I thus find that the above assertion has not been established.

- x. "[T]he blaster failed to give the persons working in the parking lot area directly in front of the shot notice that it was time for a blast." (Response p. 7).

In support of this assertion the Secretary relies on the testimony of Terry Monroe Adams, Jr. who was on the site on July 16 working with mechanics. He was asked whether anybody told him or whether he heard on the CB radio that there was going to be a blast. He answered as follows: "nobody commented on it." (Tr. 265). This testimony certainly falls far short of establishing that a notice was not given regarding a blast. Moreover, the fact that any warning had not been communicated to Adams is not sufficient to negate the testimony of Goble, based on his own action on the day in question, that he gave a siren warning and said into the CB radio: "fire in the hole." (Ex. R-3 p. 66).

B. Conclusion

Based on all the above, I conclude that (1) the Secretary failed to establish a preponderance of clear and convincing evidence the blasting area that was designated by Cam prior to the blast, (2) the Secretary has failed to establish the specific blasting area that a reasonably prudent person familiar with mine blasting would have established prior to the blast, *See Central Appalachian Mining*, 29 FMSHRC 430 (June 2007) (ALJ); *Austin Powder Co.*, 5 FMSHRC 83, 122 (Jan. 1983) (ALJ), and (3) The Secretary has failed to establish the specific physical factors that would have been used by a reasonable prudent blaster in establishing a blasting area that were not considered by Cam.

For all these reasons, I conclude that the Secretary has failed to establish that Cam violated section 77.1303(h), *supra*.

ORDER

It is ordered that Citation No. 7428799 be dismissed. It is further ordered that within 30 days of this decision, Cam shall pay a civil penalty of \$1,000 for the violation of section 77.1000, *supra*

Avram Weisberger

Administrative Law Judge

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