FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 23, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-128-M
Petitioner	:	A.C. No. 03-00876-83577 E24
	:	
v.	:	Docket No. CENT 2006-159-M
	:	A.C. No. 03-00876-86215 E24
AUSTIN POWDER COMPANY,	:	
Respondent	:	Granite Mountain Quarry #2

DECISION

Appearances: Thomas A. Paige, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, and Ronald M. Mesa, Conference & Litigation Representative, Mine Safety and Health Administration, Dallas, Texas, for Petitioner;
Adele L. Abrams, Esq., Beltsville, Maryland, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Austin Powder Company ("Austin Powder"), 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"). Austin Powder contested two citations issued by the Secretary under section 104(a) of the Mine Act. An evidentiary hearing was held in Little Rock, Arkansas. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. THE CITATIONS AT ISSUE

McGeorge Contracting Company ("McGeorge") operates the Granite Mountain Quarry #2 in Pulaski County, Arkansas. Austin Powder is an independent contractor at the quarry. The parties agree that both McGeorge and Austin Powder are subject to the jurisdiction of the Mine Act. As an independent contractor, Austin Powder delivered and stored explosive materials at the quarry but it did not provide any blasting services at the mine.

MSHA Inspector Steve Medlin inspected the quarry on December 6, 2005. Inspector Medlin issued Citation No. 6250692 to Austin Powder under section 104(a) of the Mine Act alleging a violation of section 56.6132(a)(5) as follows:

> The vents in the cap magazine number 8 [were] covered up. This hazard exposes miners to the possibility of receiving injuries should the explosives become over-heated. The foreman stated, new wood had been installed in the magazine, and was not aware the vents had been covered.

Inspector Medlin determined that an injury was unlikely but that any injury resulting from the violation is likely to be fatal. He determined that the violation was not of a significant and substantial nature ("S&S") and that Austin Powder's negligence was moderate. The safety standard provides that "[m]agazines shall be – [v]entilated to control dampness and excessive heating within the magazine." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Medlin also issued Citation No. 6250695 to Austin Powder under section 104(a) of the Mine Act alleging a violation of section 56.6132(a)(4) as follows:

> The top of magazine number eight was not covered with non-sparking material. This hazard exposes miners to the possibility of receiving injuries should the electric blasting caps become set off. This area is traveled on a daily basis to get supplies for the day's shot.

Inspector Medlin determined that an injury was unlikely but that any injury resulting from the violation is likely to be fatal. He determined that the violation was not S&S and that Austin Powder's negligence was moderate. The safety standard provides that "[m]agazines shall be – [m]ade of nonsparking material on the inside." The Secretary proposes a penalty of $60.00 for this citation.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Plain Language of the Secretary's Explosives Standards.

The parties do not dispute that the conditions described in the citations existed at the time of the inspection. They also do not dispute that two products manufactured by Austin Powder were in the magazine, Electro-Star detonators and Rock Star detonators. Nothing else was stored in the magazine. Finally, the parties agree that both of these products are detonators, as that term is defined at 30 C.F.R. § 56.6000, as follows:

> Any device containing a detonating charge used to initiate an explosive. These devices include electric or nonelectric instantaneous or delay blasting caps and delay connectors. The term "detonator" does not include detonating cord. Detonators may be either "Class A" detonators or "Class C" detonators, as

classified by the Department of Transportation in 49 CFR 173.53 and 173.100.

The Department of Transportation ("DOT") has modified its system of classifying explosive materials. "Class A" explosives are now known as "Division 1.1" explosives and "Class B" explosives are now called "Division 1.4" explosives. (49 C.F.R. § 173.53). According to the specification sheets for Electro-Star and Rock Star detonators, they are classified as Division 1.4 explosives.[1] (Exs. D-6 & D-7). These specification sheets also make clear that they are electric detonators.

There are several sections in MSHA's explosives standards that are relevant in these cases. These standards have a number of provisions relating to the storage of explosive materials.[2] First, the safety standards provide that detonators shall not be stored in the same magazine with other explosive materials. (30 C.F.R. § 56.6100(a)). Clearly, Austin Powder did not violate this safety standard at the cited magazine. Blasting agents, on the other hand, may be stored in the same magazine as other explosive material, as long as they are separated to prevent contamination. (Section 56.6100(b)). Explosives and electric detonators must be stored in nonconductive containers. (Section 56.6102(b)). All detonators and explosives must be stored in magazines. (Section 56.6130(a)). The storage requirements for blasting agents differ from the requirements for explosives and detonators. For example, packaged blasting agents are not required to be stored in a magazine. (Section 56.6130(b)).

The Secretary has defined "Magazine" as a "bullet-resistant, theft resistant, fire-resistant, weather-resistant, ventilated facility for the storage of explosives and detonators (BATF Type 1 or Type 2 facility)." 30 C.F. R. § 56.6000. The term BATF refers to the Bureau of Alcohol, Tobacco and Firearms of the U.S. Department of Justice. The BATF regulations define "Type 1" facilities as "[p]ermanent magazines for the storage of high explosives." (27 C.F.R. § 55.203(a)). "Type 2" facilities are "[m]obile and portable indoor and outdoor magazines for the storage of high explosives." (27 C.F.R. § 55.203(b)). Both regulations provide that "[o]ther classes of explosive materials may also be stored" in these magazines.

The plain language of these standards makes clear that explosives and detonators must be stored in magazines that are bullet-resistant, theft resistant, fire-resistant, weather-resistant, and ventilated. As stated above, magazines are classified as BATF Type 1 or Type 2 magazines. Blasting agents, on the other hand may be stored in other storage facilities. The Secretary defines a "storage facility" as "the entire class of structures used to store explosive materials." (30

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[1] DOT defines Division 1.1 as "explosives that have a mass explosion hazard." 49 C.F.R. § 173.50. "A mass explosion is one which affects almost the entire load instantaneously." *Id.* Division 1.4 is defined as "explosive devices that present a minor explosion hazard." *Id.*

[2] The Secretary defines "Explosive Material" to include "explosives, blasting agents, and detonators." 30 C.F.R. § 56.2.

C.F.R. § 56.2). This definition goes on to state that a " 'storage facility' used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility."[3] Thus, blasting agents may be stored in storage facilities that do not fit within MSHA's definition of "magazine."

Under the Secretary's safety standards, magazines must be made of nonsparking material on the inside and must be ventilated. (Section 56.6132(a)(4) & (a)(2)). There is no dispute that the cited magazine did not meet these requirements.

Austin Powder argues that when MSHA incorporated the BATF definitions of magazine types, as discussed above, it incorporated the BATF's entire enforcement structure. As stated in footnote 3, below, the BATF allows detonators that do not "mass detonate" to be stored in Type 4 storage facilities. Austin Powder presented evidence that its Electro-Star Detonators and Rock Star detonators will not mass detonate. That means that if one detonator package explodes, it should not set off other adjacent packages. I credit this evidence. Austin Powder also presented evidence that the cited magazine fits within the BATF definition of a Type 4 magazine. Indeed, its witness testified that a BATF inspector visited the quarry shortly before Inspector Medlin and did not find any violation of BATF regulations.

Austin Powder contends that because the Secretary separately defined the terms "magazine" (Type 1 and Type 2 BATF facilities) and "storage facility" (Type 4 and 5 BATF facilities) she cannot take a safety standard that solely references magazines and apply it to storage facilities. "The Secretary has improperly attempted to extrapolate magazine requirements onto Type 4 storage facilities, which are unique from magazines by all definitions codified by MSHA and adopted from the BATF." (Austin Br. 9). Austin Powder contends that MSHA's safety standards make clear that only detonators that are "sympathetic or mass detonating" are required to be stored in magazines. It argues that the detonators were in a Type 4 storage facility which is not required to be in compliance with section 56.6132. "Inspector Medlin's novel interpretation of this standard's requirements as being applicable to 'storage facilities' is both contrary to the plain language of the standard and the final rule's preamble, but also contrary to the actual requirements of the BATF magazine specification requirements that MSHA incorporated by reference into the relevant explosives standards in 30 CFR Part 56." *Id.* at 11. Austin Powder also notes that it has about 150 of these Type 4 storage facilities at mines in the United States and it has never been cited for a violation of section 56.6132 or required to modify them to meet these requirements.

I reject Austin Powder's arguments. MSHA's regulations do not differentiate between different types of detonators. As stated above, section 56.6130(a) plainly and clearly provides that detonators must be stored in magazines. The Secretary's definition of detonators includes

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[3] Under the BATF regulations "Type 4" are "[m]agazines for the storage of low explosives." (27 C.F.R. § 55.203(d)). This definition goes on to state that "[d]etonators that will not mass detonate may also be stored in Type 4 magazines." "Type 5" are magazines for the storage of blasting agents."

DOT Type 1.4 (Class C) detonators. None of MSHA's explosives storage standards provide that detonators that do not "mass detonate" may be stored in a storage facility that is not a "magazine" as that term is defined by MSHA. Consequently, all detonators must be stored in magazines. MSHA's safety standards only mention "Type 4" containers in reference to blasting agents, not detonators. Under the definition of "storage facility," the Secretary provides that a facility used to store blasting agents may be a BATF Type 4 facility. (Section 56.2).

B. Regulatory History of the Secretary's Explosives Standards.

In making its argument, Austin Powder relies heavily on the preamble to a final rule published on December 30, 1993. (Ex. D-1). This final rule revised portions of MSHA's existing explosives standards. This amendment to the safety standards did not change the cited safety standard (56.6132) or the standard requiring that detonators be stored in magazines (56.6130(a)). The definition of "magazine" was revised and a definition of "storage facility" was added. The old definition of "magazine," which stated that a magazine is a "facility for the storage of explosives, blasting agents or detonators," was deleted. (Ex. D-1, 58 Fed. Reg. 69597)[4]

The Secretary makes clear in the preamble that all magazines must be constructed to comply with the BATF specifications for Type 1 or 2 magazines. *Id.*, 58 Fed. Reg. 69598. "Sections 56/57.6132 require a magazine to be structurally sound, noncombustible . . . , bullet-resistant, made of nonsparking material on the inside, ventilated to control dampness and excessive heating, ..." *Id.* The Secretary goes on to state:

> MSHA's intent is to distinguish the circumstances under which a magazine and storage facility are used. For example, paragraph (a) of 56/57.6130 requires that detonators and explosives, not blasting agents be stored in magazines; while paragraph (b) states that blasting agents may be stored either "in a magazine or other facility" but "[f]acilities other than magazines used to store blasting agents shall contain only blasting agents."

Id. This statement strongly supports the language of section 56.6130(a) and the Secretary's arguments in this case.

The preamble goes on to state:

> As used, "magazine" refers to a type of storage facility for highly sensitive explosive materials such as explosives and detonators which are subject to sympathetic detonation. Because blasting agents are not as highly sensitive as detonators and explosives,

[4] I note that this old definition is still present at section 56.2. This appears to be in error.

> blasting agents need not be stored in a magazine or facility that meets the construction criteria of §§ 56/57.6132.

Id., 58 Fed. Reg. 69599. Austin Powder argues that the preamble's reference to detonators "which are subject to sympathetic detonation" shows that the cited magazine was not required to meet the standards of 56.6132. (The term "sympathetic detonation" has the same meaning as "mass detonation"). I disagree with this argument. I find that all this language does is further explain why detonators and explosives must be stored in a magazine that meets the standards of section 56.6132. Explosives and detonators are more sensitive than blasting agents.[5] The preamble language does not clearly convey the idea that only detonators subject to sympathetic detonation must be stored in magazines. In addition, the word "which" is generally used to introduce non-restrictive clauses.

Next, the preamble states:

> In summary, MSHA's definition of the term "magazine" is consistent with the BATF regulations. In fact, the Agency's definition of "magazine" is modeled after BATF's definition, except that it explicitly lists within the definition the construction criteria for magazines used for the storage of explosive materials.

Id. I agree with Austin Powder that MSHA incorporated BATF's construction criteria for magazines when MSHA changed the definition of "magazine" in 1993, but nothing suggests that MSHA changed what must be stored in magazines at mine sites. The safety standard requiring that detonators and explosives be stored in magazines was not changed. (Section 56.6130(a)).

The preamble next summarizes the distinctions between the four types of magazines under BATF regulations. In the preamble, MSHA states that it uses the same construction criteria except that MSHA uses the term "magazine" for Type 1 and Type 2 facilities and the term "storage facility" for Type 4 and Type 5 facilities. The preamble then states:

> MSHA's final rule does not require BATF Type 4 storage facilities to be bullet-resistant. The only storage facilities that need to be bullet-resistant are magazines (BATF Type 1 and 2 facilities) used for the storage of highly sensitive explosive material such as

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Unfortunately, the Secretary's definitions of "blasting agent" are not helpful. The definition in section 56.6000 is "any substance classified as a blasting agent by the Department of Transportation in 49 CFR 173.114a(a)." The definition in section 56.2 is the same except that it makes reference to "49 CFR Section 173.114(a) (44 FR 31182, May 31, 1979)." Section 173.114 no longer exists. "Blasting Agent" is an "explosive material that meets prescribed criteria for insensitivity to initiation." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 54 (2d ed. 1997). Ammonium nitrate/fuel oil (ANFO) is an example of a blasting agent.

> explosives and detonators which are subject to sympathetic detonation.

Id. Again, Austin Powder argues that this language shows that only mass detonating detonators are required to be stored in magazines. For the same reasons discussed above, I find that this language cannot be logically used create two categories of detonators when the actual safety standards do not mention such a distinction. There is nothing in the language of the safety standards that suggests that certain types of detonators must be stored in magazines but that other types may be stored in storage facilities that do not meet the requirements of section 56.6132.

Finally, the preamble states "[i]n summary, MSHA believes that the definition of 'storage facility' as clarified by the final rule, provides mine operators with objective criteria, consistent with BATF, relative to storage requirements for the entire range of explosive materials." *Id.* Austin Powder contends this language demonstrates that the Secretary intended to incorporate all of the BATF's explosives storage regulations into MSHA explosives standards. It is clear that the BATF allows detonators that are not mass detonating to be stored in Type 4 facilities. These facilities are called "storage facilities" in MSHA's regulations and these facilities are not required to comply with section 56.6132. Thus, Austin Powder argues because the Secretary specifically stated in the 1993 rulemaking that MSHA's storage requirements were "consistent with BATF . . . for the entire range of explosive materials," the Secretary clearly intended to allow detonators that are not mass detonating to be kept in storage facilities rather than magazines.

Although Austin Powder's argument has some superficial appeal, I agree with the Secretary that MSHA's standards do not distinguish between mass detonating detonators and detonators that are not subject to mass detonation. The preamble does not support Austin Powder's arguments. The Secretary argues that "in the preamble to the explosives standards it is clear that MSHA drew the regulatory line, *not* between classes/divisions of detonators, but between *blasting agents* and *detonators*." (S. Br. 6) (emphasis in original). I agree.

C. Mining Community Provided with Fair Notice of Standard's Requirements.

Austin Powder also argues that it was not provided with fair notice of the Secretary's interpretation of the safety standard, in part because it has never been cited for storing detonators that are not mass detonating in a Type 4 storage facility rather than in a magazine. It states:

> Secretary affirmatively amended the 1991 regulation to include separate definitions for magazines and storage facilities, in response to commentators' concern over Type 4 being included with Type 1 and Type 2. This history shows an active decision to not include Type 4 within the scope of magazine requirements promulgated at 30 C.F.R. § 56.6132.

(Austin Br. 14). I agree that the Secretary distinguished magazines from storage facilities in the new standards. But the Secretary did not change the requirement that detonators must be stored in magazines that meet the construction criteria for BATF Type 1 or 2 magazines. The definition of "storage facility" clearly states that a facility "used to store *blasting agents* corresponds to a BATF Type 4 storage facility." (Emphasis added). There is no provision stating that detonators that are not capable of mass detonation may also be stored in facilities that correspond to a BATF Type 4 facility.

I find that the safety standards at issue here are quite clear. Section 56.6130(a) states that "detonators and explosives shall be stored in magazines." This standard could not be written more clearly. Although the 1993 amendments to the explosives standards clarified the definition of "magazine" and added a definition for "storage facility," MSHA did not change the requirement that all detonators, including DOT Division 1.4 detonators, must be stored in magazines. I find that Austin Powder and the mining community were provided with fair notice of this requirement.

Austin Powder also makes reference to the Memorandum of Understanding between the Secretary and BATF ("MOU"). (Ex. G-14). It states that under the MOU, MSHA "inspects magazines and storage facilities at mine sites and has adopted BATF rules and regulations." (Austin Br. 5). I disagree. The MOU simple authorizes MSHA inspectors to enforce BATF regulations at mine sites on behalf of the BATF. It does not state that MSHA has adopted BATF regulations as its own explosives standards. Indeed, the MOU provides that "[i]n the event that [BATF regulations] conflict with a MSHA requirement, MSHA shall enforce the regulations or standards which provide for the greater safety or security of persons in or around a mine." (Ex. G-14, 45 Fed. Reg. 25565).

D. Violations of Section 56.6132 and Application of Penalty Criteria.

To summarize, I find that the Secretary established the two violations of section 56.6132. The Electro-Star and Rock Star detonators stored in the cited magazine were DOT Division 1.4 explosives. MSHA defines "detonator" to include those that are classified as DOT Division 1.4 explosives. Section 56.6130(a) requires detonators to be stored in "magazines." Austin Powder stored the detonators in a facility that did not fit the construction criteria for a magazine, as that term is defined by MSHA. All magazines must comply with the requirements of section 56.6132. Because Austin Powder violated subsections (a)(4) and (a)(5) of that standard, the citations are affirmed. Although the detonators stored in the cited magazine are of the type that are not subject to sympathetic detonation, I find that such detonators are not exempted from the requirement that detonators be stored in magazines.[6] Only blasting agents are exempted from this requirement.

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[6] I note that the cited magazine also did not meet other construction requirements for magazines. It was not bullet-proof, for example. No other citations were issued with respect to the magazine.

I agree with the inspector's determination that the violations are not S&S. I further find that the gravity is somewhat lower than that determined by Inspector Medlin. Given that the detonators will not mass detonate, any injury would most likely result in lost workdays or restricted duty, at most. I also find that Austin Powder's negligence was low. Although I have found that the safety standard was clear, the preamble to the amended explosives standards is somewhat confusing. Austin Powder manufacturers, distributes, sells, and stores explosives for the mining industry throughout the United States. It also provides blasting services at many mines. It has been operating, in good faith, on the assumption that detonators that are not subject to mass detonation may be stored in storage facilities rather than magazines, as those terms are defined by MSHA. Although its assumption is not correct, the preamble to the revised blasting standards led it to believe that it could use BATF Type 4 storage facilities to store its detonators. On this basis, I find that Austin Powder's negligence was low.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that Austin Powder had not been issued any citations at the Granite Mountain Quarry #2 in the 24 months preceding the inspection. The Secretary provided an 82 page exhibit listing, on a mine-by-mine basis, all of the citations that have been issued to Austin Powder during the preceding 24 months. (Ex. G-2; Stipulation 10 in Secretary's response to hearing order). Although no total was provided, it appears that Austin Powder received one or two citations at each mine. In 2005, the mine worked about 1,035,400 total man-hours. Both of the violations at issue in these cases were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Austin Powder's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
CENT 2006-128-M		
6250692	56.6132(a)(5)	$40.00
CENT 2005-159-M		
6250695	56.6132(a)(4)	40.00

TOTAL PENALTY $80.00

For the reasons set forth above, the two citations are **AFFIRMED** as modified in this decision. Austin Powder Company is **ORDERED TO PAY** the Secretary of Labor the sum of $80.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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