FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 1, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2006-120
Petitioner	:	A.C. No. 15-18280-74581
v.	:	
	:	
CENTRAL APPALACHIA MINING, LLC,	:	Hunts Branch Freeburn
Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner
Mark Heath, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of the Respondent

Before: Judge Barbour

This case is before me on a petition for the assessment of civil penalties filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration (MSHA) against Central Appalachia Mining, LLC (Central Appalachia or the company) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (the Mine Act or Act) (30 U.S.C. §§ 815, 820). The Secretary alleges Central Appalachia is responsible for two violations of the Secretary's safety standards for surface coal mines. She also alleges the violations were significant and substantial contributions to mine safety hazards (S&S) and were caused by the company's moderate negligence. The Secretary seeks civil penalties totaling $5,228. The company denies the allegations. The case was tried in Pikeville, Kentucky. The parties have submitted helpful briefs.

The citations involve events surrounding the blasting of a highwall at Central Appalachia's Hunts Branch Freeburn Mine, a surface coal mine located in Pike County, Kentucky. The highwall was drilled, loaded and blasted by Virginia Drilling, the company's independent contractor.[1] The blast went awry, sending flyrock into the area below and in front of

[1]Roger Cantrell, Central Appalachia's safety director, testified Virginia Drilling contracts "to do the drilling and the blasting for surface coal mines in different areas of [Kentucky]." Tr. 202. At the mine, Virginia Drilling did everything with regard to explosives. In Cantrell's opinion, it provided a "complete turn key job." Tr. 203; *see also* Tr. 203-204.

the highwall ("the pit"), an area where miners were working.[2] A miner was struck and injured. MSHA investigated and, as a result of the investigation, the agency alleged the company's ground control plan failed "adequately [to] provide precautions . . . to prevent flyrock or to remove miners to a safe location" and the company failed to give "an ample warning" to miners in the pit prior to the blast. Gov't Exh. 7, Gov't Exh. 6.

THE ACCIDENT AND THE INVESTIGATON

Robert Bellamy works for MSHA as a mining engineer in the agency's Pikeville, Kentucky, office. As a member of the Roof Control and Impoundments Department, his duties include reviewing mining plans submitted to MSHA, plans dealing with roof control, impoundments, and ground control. He also investigates accidents for the agency. Tr. 26. Prior to joining MSHA, Bellamy worked for three to four years as a certified blaster. Tr. 27, 115.

On July 13, 2005, Bellamy learned there had been an accident at the company's mine. He was assigned to investigate it, and on the following day he went to the mine. Tr. 30-31. On July 14, the accident site was essentially the same as on July 13, the day the accident occurred. Tr. 32. Bellamy took several photographs of the site. He took a photograph from the top of the high wall. Tr. 35, 38. Gov't Exh. 1. The photograph shows several pieces of equipment in the pit. Two are red in color. The largest of the two is the highwall miner. It is the piece of equipment closest to the highwall. Tr. 36-37; Gov't Exh. 1. The smaller piece of equipment pictured to the right of the highwall miner is the generator. Tr. 37; Gov't Exh. 1. Behind the miner and sloping away from the highwall is a ramp of coal. Tr. 38; Gov't Exh. 1.

Bellamy also took a second photograph from the top of the highwall, but from a location closer to the equipment. The photograph shows the same equipment and the same coal ramp depicted in the first photograph (Gov't Exh. 1). Tr. 39-44; Gov't Exh. 2.

Bellamy took a third photograph from the floor of the pit. The photograph depicts the highwall miner and a blue supply truck. The supply truck is next to the highwall miner. The photograph also depicts a yellow loader to the left of the miner and a white pickup truck to the right of the miner. Tr. 45, 49-50; Gov't Exh. 3.[3] Although the damage is not visible in the photograph, Bellamy testified the highwall miner, the blue supply truck, the yellow loader and the white pickup truck were hit and damaged by flyrock. Several pieces of flyrock are visible in the photograph. Tr. 49; Gov't Exh. 3.

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[2]"Flyrock" is defined in part as, "The rock fragments which are thrown and scattered during quarry . . . blasting." U.S. Department of the Interior, *A Dictionary of Mining Mineral, and Related Terms* 1968 at 450 (*D.M.M.R.T.*).

[3]The pickup truck was used by then pit foreman, Dave Nichols. Tr. 51. At the time of the hearing, Nichols no longer was employed by Central Appalachia. Tr. 186.

A fourth photograph shows the side of the highwall miner. To the left of the miner the rear end of the blue supply truck is visible, as are pieces of the truck's front fender. The fender was hit by flyrock, some of which is depicted. Tr. 46-47, 50; Gov't Exh. 4.

A fifth, and final, photograph shows the front of the blue supply truck. In addition to the damaged fender, the photograph reveals "extensive damage" (*Bellamy's words*, Tr. 51) to the truck's engine compartment. Tr. 47-48; Gov't Exh. 5. The white pickup truck is pictured in back of the supply truck. Its passenger side door is damaged. Tr. 51; Gov't Exh. 5.

Bellamy "informally" interviewed and questioned those working in the pit at the time of the accident. Tr. 52. Bellamy learned the shot causing the accident consisted of approximately 48,000 pounds of AN-FO. Tr. 52.[4] He also learned the highwall miner was moved into the pit six days before the accident. Once the miner was in the pit, two shots were fired. The shots were closer to the highwall miner than the July 13 shot, which meant on July 13, material from the previous shots was piled in front of the July 13 shot area. Tr. 126-127. No flyrock traveled into the area of the highwall miner during either of the pre-July 13 shots, which is one reason neither Virginia Drilling nor the company anticipated flyrock problems on July 13. Tr. 53.

Central Appalachia's foreman, Dave Nichols, testified on July 13, Jay Stewart, Virginia Drilling's blaster, spoke with him shortly before 4:05 p.m. As Nichols recalled, Stewart told him the blasters were "going to put a shot off [,] that . . . [Nichols and his crew] were not in the blast area, that . . . [they] were safe, [but] to . . . [stay clear of] the highwall in case . . . [the shot] shook the ground and something loose fell off." Tr. 190, Tr. 123-124. Nichols was sure Stewart did not say to remove miners from the area in front of the highwall. Tr. 123,190. Nichols was not surprised by this because the shot on July 13 was farther away from the highwall miner than the previous shots. Tr. 190.

After talking to Stewart, Nichols advised his crew Virginia Drill was going to fire a shot and to watch for rocks coming off the highwall after the shot. Tr. 134, 191. When Nichols spoke to the crew, the engines of the generator, the highwall miner and the loader were running. Tr. 192. Nevertheless, Nichols believed the crew heard what he said. However, after the accident, he learned the crew did not hear him. Tr. 192.

Nichols then went to the tailgate of his pickup truck. The shot was fired shortly thereafter. Tr. 56. Miners Steven Tackett and Travis Tackett were working near the highwall miner changing the miner's air compressor. Tr. 56. Steven Tackett told Bellamy they were not advised the shot would be detonated. There was no warning signal. They first learned about the shot when the AN-FO exploded. Tr. 55.

Upon detonation of the shot, Steven Tackett jumped behind the miner, and Travis Tackett dove under the supply truck. Travis Tackett was not fast enough. He was struck in the leg by

[4]AN-FO is defined as "Amonium nitrate fuel oil blasting agents." *D.M.M.R.T.* at 38.

flyrock. Tr. 58. He suffered a compound fracture. Tr. 58.[5]

Although affected miners in the pit did not hear a warning, Bellamy learned that five minutes prior to the shot, Virginia Drilling sounded an initial warning signal. Then, one minute before the shot, Virginia Drilling sounded a second signal. Bellamy agreed Virginia Drilling was responsible for signaling miners to warn them when a shot was about to go off. Tr. 123-124. The signal was required so miners in the blasting area could leave or take cover. Tr. 66. To meet its responsibility, Virginia Drilling used a truck-mounted siren. Tr. 63. During the investigation, Bellamy asked Virginia Drilling personnel to position the truck where it had been on July 13, and to sound the siren when the equipment in the pit was running. When this was done, he could not hear the siren. Tr. 60-63, 135; *see* Gov't Exh. 4.

Nichols also did not hear the five-minute and one-minute warnings. Tr. 195. Nichols testified this was because of the noise level in the pit. Tr. 196. Because it was not unusual for the noise in the pit to mask the sound of the siren, Nichols testified he relied on oral warnings from the blasters. He never questioned what they told him. Tr. 197, 200.

As to whose responsibility it was to move the miners out of the blast area on July 13, Bellamy stated "a lot of responsibility . . . [went] to . . . [Virginia Drilling and its] blaster." Tr. 103. He agreed, under the laws of the Commonwealth of Kentucky, "the . . . blaster [was] actually in charge of the blasting operation." Tr. 117. Therefore, when asked who should make the decision to pull miners out of the blast area in order to "get away form a shot," Bellamy stated, "I think the blaster should. And I think it is state law." Tr. 117.

State officials also investigated the accident, in part to determine the source of the flyrock. They concluded the rock originated in the right corner of the shot area, adjacent to a previously shot area. Joint Exh.1 ; Tr. 147-148. Bellamy testified there are various causes for flyrock. It can be caused by joints in the rock which direct the rock to "blow out," weak areas in the rock strata, or by a misfired shot. Tr. 79-80. Bellamy cautioned, "[E]very shot . . . is not going to go off exactly as . . . intended." Tr. 79-80.[6]

THE CITATIONS

As a result of the investigation, Bellamy issued Citation No. 7416150 to the company. The citation alleged a violation of section 77.1000, a mandatory standard requiring an operator to "establish and follow a ground control plan for the safe control of all highwalls." Under the

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[5]Because of the injury, Bellamy could not interview Travis Tackett. Tr. 57.

[6]Bellamy did not find fault with the way Virginia Drilling laid out the shot on July 13. Tr. 168. The shot was set up to produce the result Central Appalachia wanted – *i.e.*, to break "the rock up into sizes that can be handled by . . . [Central Appalachia's] equipment in order to excavate . . . and remove it." Tr. 77

standard, the plan must also "insure safe working conditions." 30 C.F.R. § 77.1000; Gov't Exh. 7; *see* Tr. 89-90. Bellamy believed Central Appalachia's established ground control plan did "not adequately provide precautions . . . to prevent flyrock or to remove miners to a safe location prior to blast detonations." Gov't Exh. 7; *see also* Tr. 96.

Bellamy explained, after the citation was issued, Central Appalachia supplemented its plan by requiring, among other things, the highwall mine foreman and production foreman to withdraw all miners in the affected blasting area to a safe distance. Tr. 100-101.[7] The purpose of the supplement was to take "some of the guesswork" out of withdrawing miners from a blast area by outlining Central Appalachia's "responsibilities as far as making sure . . . people are out of the way of the blast." Tr. 102.

With regard to Central Appalachia's ground control plan, Bellamy noted section 77.1000 requires the agency to "acknowledge" the plan, and he described the process MSHA follows. Tr.

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[7]Four procedures were specified in the supplement:

> 1. A certified blaster will directly notify the Highwall Miner Foreman and Production Foreman of the impending blast.
>
> 2. Upon receiving notification, the Highwall Miner Foreman and Production Foreman will withdraw highwall miners and other employees in the affected blasting area to a safe distance.
>
> 3. The horn or siren used by the certified blaster shall be of a sufficient decibel level to be heard by employees in the affected blast area.
>
> 4. The blast will not be detonated until all employees within the affected blast area have been withdrawn.

Gov't Exh. 9 at 3.

Subsequent to the accident, items 3 and 4 were suggested to all surface operators in the district for inclusion in their ground control plans. Tr. 157; *see also* Tr. 217. In addition, they were added to the ground control plan form MSHA makes available to operators. Tr. 104-105, 155-156.

29. The MSHA District Manager "just acknowledges that the plan [is] submitted. [The plan has] . . . not really gone through a real thorough review or an onsite investigation." Tr. 30. If MSHA believes things should be added or changed, MSHA representatives advise the operator and arrange a conference to discuss the matter. Tr. 152.

In Bellamy's opinion, the purpose of a ground control plan is to ensure the stability of highwalls, spoil banks and pits and, thus, to ensure safe working conditions. *See* Tr. 90. Therefore, he believed an adequate ground control plan should address "various aspects . . . [of] highwall configuration" Tr. 93.[8]

The plan in effect at the mine on July 13 was submitted to MSHA on June 2, 2005. It was acknowledged by the MSHA District Manager on June 7. Tr. 153; Gov't Exh. 8. At the time, MSHA did not express any concerns. Tr. 153. Nevertheless, MSHA advised Central Appalachia the plan was open to re-evaluation if experience established it was in any part inadequate or if conditions developed that were not addressed in the plan. Tr. 94-95. Bellamy identified a cover letter sent by MSHA District Manager Kenneth Murray to Cantrell. Gov't Exh. 9, Tr. 95. The letter stated in part, "[T]his plan will be evaluated any time there is a question of the adequacy of the . . . Ground Control Plan." Gov't Exh. 8.

Bellamy also issued Citation No. 7416151 to the company for an alleged violation of section 77.1303(h). Gov't Exh. 6. Section 77.1303(h) requires: "All 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." Bellamy believed this requirement was violated. He concluded the miners were in a blasting area because "of the orientation of the location of the employees relative to the shot." Tr. 64. They were "in the direction of the free face of the shot." Tr. 64.[9] In Bellamy's opinion, "any time you're in front of that shot, in front of the free face of it, you're in the blast area." Tr. 64, *see also* Tr. 66, 81. Therefore, the miners should have been removed or been provided with shelters.

Bellamy further maintained flyrock always has to be taken into consideration. He stated, "[J]ust because you didn't have flyrock on the previous shot, that doesn't necessarily mean

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[8]Although an operator is not required to use an MSHA-provided form for its plan, Bellamy testified the agency encourages them to do so. "It makes it easier for both the operators and for . . . [MSHA] . . . . to have certain information . . . [MSHA] . . . want[s] . . . in the plan." Tr. 97. Once in possession of the form, an operator can supplement it by including its "own sketches of [its] highwall and any particular thing . . . [it] think[s] needs to go in the plan." Tr. 97, 151.

[9]According to Bellamy, the "free face" was an "area that ha[d] been already blasted in the past," an area where "the rock had already been removed." Tr. 68,

you're not going to have it on . . . [the next] one." Tr. 81; *see also* Tr. 73. "Once you set a blast up . . . [y]ou have to take all precautions to remove the people from the blast[ing] area." Tr. 65-66.

Bellamy could not say how far miners should withdraw to be outside the blasting area. He explained, "it's going to depend on a lot of different factors. The size of the shot, how much explosives are being used, how the shot's laid out, . . . the type of rock that's being shot, [and] the hardness [of the rock]." Tr. 66-67, 117.

Section 77.1303(h) also requires an "[a]mple warning . . . be given before blasts are fired." Bellamy believed the requirement was violated because although warning signals were sounded, they were not heard by the crew in the pit; nor was the crew warned of the shot by the foreman. Tr. 55, 63.

Bellamy issued the citation to Central Appalachia because Nichols, who failed to effectively warn the miners, acted for the company. As the foreman, he was responsible for the safety of those working under him. Tr. 83. In Bellamy's opinion, Nichols should have removed the employees from the blasting area or given them warning of the shot so they could take cover. Tr. 83. Nichols was wrong to rely on Stewart. Tr. 85-86. Nichols should not have taken the chance he and those under his supervision would be safe. Rather, he should have said to Stewart, "we're getting out of here." Tr. 87. Leaving himself and his miners positioned in front of the shot "was a dangerous place to be." Tr. 88.

THE VIOLATIONS

CITATION NO. 7416150

Citation No. 7416150 states:

> The ground control plan established by the operator does not insure safe working conditions. On July 13, 2005, a non-fatal accident occurred when an employee of the highwall miner crew was struck by flyrock from a nearby blast detonation. The ground control plan does not adequately provide precautions to be taken by the operator to prevent flyrock or to remove miners to a safe location prior to blast detonations.

Gov't Exh. 7.

As previously noted, section 77.1000 in part requires each operator to:

> [E]stablish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks . . . which shall be consistent with prudent engineering design and will insure safe working conditions.

The Secretary asserts section 77.1000 places a ground control plan "under the specific control of the operator." Sec. Br. 8. In the Secretary's view, "The fact Nichols felt . . . it was not his responsibility to assure the safety of his crew . . . demonstrates . . . the . . . plan was inadequate to assure the safety of the highwall crew." Sec. Br. 8.

Central Appalachia responds it did not violate any provisions of the plan in effect on July 13. To draft the plan, the company used forms provided by MSHA, and there was nothing on the forms requiring information regarding the control of flyrock. The company notes that prior to the accident the agency never raised concerns regarding blasting security in the context of the company's ground control plan. Cent. Ap. Br. 7. Central Appalachia also states it knows of no other instance in which an operator has been cited for failing to have an adequate plan after its plan was "acknowledged" by MSHA. Cent. Ap. Br. 12. Moreover, it argues section 77.1000 does not address blasting procedures but rather focuses on the "safe control of all highwalls, pits and spoil banks." Cent. Ap. Br. 12 (*quoting* section 77.1000). In Central Appalachia's view, section 77.1000 "is simply inapplicable to the acts MSHA alleges have been committed." Cent. Ap. Br. 13. It is the Secretary, not the operator, who "ultimately bears responsibility for a mine plan's silence . . . ." *Id.* 13.

I am not persuaded by the company's arguments. As I read the standard, among its requirements is the provision all surface coal mine operators, of whom Central Appalachia is one, submit a ground control plan "which . . . will insure safe working conditions." The requirement to "insure safe working conditions" is a mandate over and above the particular requirements contained in the plan itself, which means although an operator may comply with all parts of its submitted and acknowledged plan, it may still be in violation of the standard if the plan does not provide a safe workplace. While it is true the Secretary must acknowledge the plan, it is the operator first and foremost who must make certain the plan "insure[s] safe working conditions," and if the plan does not, the operator violates the standard.

It is clear Central Appalachia's plan did not "insure safe working conditions," because it did not require miners in the blasting area to be removed to a safe location or to be provided with shelter prior to the shot. As the testimony establishes, on July 13 those working in the pit had no knowledge the shot was about to be fired. As a result, they scrambled for cover as flyrock flew toward them. With no provision to insure the miners were out of the affected area or were otherwise out of the way of possible flyrock prior to the shot's detonation, safe working conditions were not insured, the plan was defective and section 77.1000 was violated.

I have no doubt it is exasperating for an operator to submit a ground control plan by essentially completing a form provided by MSHA, to have the plan acknowledged by the MSHA district manager, and then to learn, based on a subsequent event, the acknowledged plan does not meet the requirements of the standard. However, the scenario does not contravene the Act. The burden of compliance is the operator's, not, as counsel for the company incorrectly implies (Cent. Ap. Br. 15), the Secretary's. Moreover, it is far from unusual for a post-event investigation to result in the issuance of a citation for something neither the operator nor the agency contemplated. Just as post-event revelations inform our everyday lives, so knowledge growing out of an investigation informs the agency's ongoing enforcement activities. This stated, the fact neither party anticipated the company's section 77.1000 compliance responsibilities revealed as necessary by the accident is not without a consequence, for while the lack of foresight does not excuse the violation, it impacts the negligence attributable to Central Appalachia.

S&S AND GRAVITY

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). A violation is properly designated S&S, "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 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

Given my conclusion the Secretary established a violation of section 77.1000, the first of the *Nat'l Gypsum* factors has been met. Next is the question of whether the record supports finding the failure to ensure miners were out of the affected area or were otherwise out of the way of flyrock prior to the detonation of a shot posed a discrete safety hazard. There is no doubt it did. The hazard was the subjection of the miners to possible injury from flyrock. In other words, the hazard was exactly what happened. Moreover, as the July13 incident showed, the failure to ensure the miners were removed or otherwise protected prior to detonation was reasonably likely to result in a serious, if not a fatal, injury. Once flyrock was set in motion, miners in the affected area had but seconds to react and protect themselves as best they could. Given the amount of flyrock that could be produced, the short time miners had to react and the limited areas within which they could take cover, I conclude there was a reasonable likelihood failure to ensure miners were out of the area before the detonation or were otherwise protected would result in an injury or injuries of a reasonably serious nature. Indeed, in the instance at hand, Travis Tackett was lucky he was not killed. For these reasons, I find the violation was S&S.

I also find the violation was serious. The effect of the failure to ensure the miners were removed from the affected area or were otherwise protected prior to the detonation was the direct result of Travis Tackett's injury, and others in the affected area of the pit were fortunate to escape his fate.

NEGLIGENCE

Inspector Bellamy found the violation was due to Central Appalachia's "moderate" negligence. Gov't Exh. 7. I conclude, however, the company's negligence was low. While it is true the gravity of the likely injuries caused by flyrock warranted preventative vigilance on the company's part, a finding of negligence must take into consideration all of the circumstances surrounding the violation. Those circumstances include the fact Central Appalachia reasonably believed the care it exercised met the circumstances it faced.

First, Central Appalachia believed its ground control plan, as acknowledged my MSHA, was adequate. The agency provided Central Appalachia with the MSHA-made form for its plan and, once the plan was submitted, the agency acknowledged without comment the plan's receipt. In addition, as Bellamy admitted, prior to July 13, MSHA did not require anything dealing with flyrock to be included in an operator's ground control plan. Only after the accident did MSHA require provisions ensuring miners hear warning signals and be removed from a blast site before a detonation. Tr. 98-99. All of these things gave the plan as submitted and acknowledged MSHA's imprimatur and lead to the company's good faith, reasonable belief it was in compliance.

Second, MSHA did not dispute the testimony of Cantrell regarding the services provided the company by its contractor, Virginia Drilling (Tr. 202-204). It is clear from the testimony Virginia Drilling was completely in charge of the blasting operation. Tr. 203. The contractor

provided everything with regard to explosives. It also is clear prior to the accident MSHA understood Virginia Drilling's role at the mine, including the contractor's determination of the blasting area and its sounding of the siren prior to detonation. Despite this knowledge, and its knowlege of the contents of the plan, MSHA did not express a single safety concern to Central Appalachia. *See* Tr. 215.

Given the lack of concern by MSHA prior to the accident and the reasonable reliance by Central Appalachia on its plan as acknowledged and on Virginia Drilling, I find the company's lack of care is greatly mitigated.

CITATION NO. 7416151

Citation No. 7416151 states:

> An ample warning was not given to the miners working on the highwall miner crew in the . . . pit on July 13, 2005, on the second shift prior to a blast detonation which produced flyrock that caused an injury to a miner. The miners were not removed from the affected area and a warning signal which was audible to the high-wall miner crew was not given.

Gov't Exh. 6.

Section 77.1303(h) requires:

> Ample warning [shall be] given before blasts are fired. All 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 Secretary argues the standard should be interpreted from the standpoint of "a reasonable person with knowledge of the particulars of the shot." Sec. Br. 9. She states a reasonable person in Nichols' position would have "consider[ed] all possible consequences and outcomes including where flyrock might land during . . . [the] blast." *Id.* 10. She argues Nichols failed to consider whether flyrock might occur and where the affected area would be if it occurred. Based on what actually happened, the Secretary finds it "clear" Nichols did not act reasonably. *Id.*

The Secretary also observes Nichols was unaware crew members did not know when the explosion would occur. This, too, was not in keeping with the "reasonable person" standard. Sec. Br. 10. The Secretary sums up:

> A reasonable surface foreman . . . would have known first that there are signals which are required to be sounded to assure that persons in the blast area know about a forthcoming blast and second that miners working in the zone where flyrock could occur should be given that warning or removed from the danger zone. Nichols did neither of these things.

Tr. 11.

Central Appalachia concentrates its argument on the definition of "blasting area."[10] The company points to the Commission's holding in *Hobet Mining and Construction Company*:

> To establish a violation of . . . [section 77.1303(h)], 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 a determination under all of the circumstances posed by the blast in issue. The Secretary must prove that the factors were not properly considered or employed.

9 FMSHRC 200, 202 (February 1987) (*citations omitted)*.

[10]"Blasting area" is defined in section 30 C.F.R. §77.2(f) 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).

Under this holding, the company argues a "blasting area" can be based on several factors including: the results of prior shots, the amount and type of explosives used, the depth of holes constituting the shot, and the topography. Cent. Ap. Br. 16-17. Virginia Drilling's blasters determined the affected miners were not in a blast area based on the fact two prior shots had been detonated closer to the highwall miner pit without incident and rubble from the prior shots created a buffer between the shot and the crew. *Id.* 17. Thus, according to Central Appalachia, the decision of the blasters as to what constituted the blasting area was reasonable.

The company also argues the Secretary did not establish the lack of an "ample warning" to the affected miners. In the company's view, since there is no regulatory definition of "ample warning," the term must be defined in the context of the facts of the case. Central Appalachia notes the blaster sounded two siren warnings before the blast, in accordance with state law. In addition, Stewart told Nichols the shot would be fired and Nichols, in turn, told his crew. It is Central Appalachia's contention the siren's soundings and the oral warning taken together constitute an "ample warning" and come within the meaning of the standard. Cent. Ap. Br. 18.

The Blasting Area

The citation charges the July 13 detonation produced flyrock and "miners were not removed from the affected area." Gov't Exh. 6. The company does not dispute the allegations. It also agrees blasting shelters were not provided for the miners. The unresolved question is whether the miners were in a "blasting area."

The Secretary bears the burden of proof when alleging a violation. As the Commission has pointed out and as Central Appalachia has noted, when the Secretary charges miners were not removed from a "blasting area," she must establish what reasonably could have been expected to constitute the area. *Hobet Mining,* 9 FMSHRC 200, 202 (February 1987). It is not enough to reply on the fact flyrock landed in the area. 9 FMSHRC at 202-203. Rather, the Secretary must consider "the results of prior shots . . . [and] a number of variables . . . . includ[ing], but . . . not limited to, the amount and type of explosive used, the depth of the hole that constitute the shot, the topography, and the expertise of the blaster." 9 FMSRHC at 202-203.

Although inspector Bellamy testified the blasting area has to be "defined for each individual shot," and a determination as to what constitutes a blasting area has to be "based on a lot of different factors" (Tr. 80), such as "[t]he size of the shot, how much explosives are being used, how the shot's laid out, . . . the type of rock that's being shot, [and] the hardness [of the rock]" (Tr. 66-67, *see also* Tr. 117), the Secretary presented no cogent testimony linking such factors to what reasonably could have been expected to occur on July 13. For example, Bellamy noted 48,000 pounds of AN-FO were used in the shot (Tr. 52), but there was no follow-up testimony as to what this might (or might not) signify. Bellamy also testified he did not conduct a complete investigation of how the holes containing the explosives were arranged; nor did he thoroughly investigate other details of the shot. Tr. 168. In addition, there was no testimony regarding the specific topography of the shot area and its impact, if any, on a reasonable

determination of the extent of the blasting area, except for Bellamy's agreement that material from two prior shots had piled between the affected miners and the site of the detonation. Tr. 127, 130.[11] Moreover, the Secretary did not subpoena the blasters, so there was no direct testimony from those who knew best about how the blasting area was determined.

Rather than provide evidence regarding the variables the Commission stated go into the making of a blasting area determination, the main thrust of the Secretary's testimony centered on Bellamy's assertion the location of the affected employees in front of the free face virtually guaranteed they were in the blasting area. *See, e.g.,* Tr. 64 (miners were in the blasting area "because of the orientation of the location of the employees relative to the shot"); *See also* Tr. 64 (miners working in front of a free face are in the blast area); *and see* Tr. 81 (flyrock can occur "on any shot," and miners should not "work in front of [a] shot.") It may be that considering an area in front of a shot to be the sole or nearly sole determinant of a "blasting area" is a perfectly reasonable way to construe the standard. However, without more testimony regarding why that determinant should override other potential determinants and why the determinant makes the others irrelevant, there is an insufficient evidentiary basis to conclude all persons were not "cleared and removed from the blasting area" as required by section 77.1303(h).

Ample Warning

The question remains whether an "ample warning [was] . . . given before [the blast] was fired." The citation charges it was not, because there was no "warning signal which was audible to the highwall miner crew." Gov't Exh. 6. I agree. Although "ample" is not defined in the regulations or the Act, its meaning is commonly understood to connote something that is "marked by extensive or more than adequate size, volume, space or room." *Webster's Third New International Dictionary* (1993) 74. In the context of the regulation, the warning signal must be "more than adequate," which, among other things, means it must be heard. Here, there is no dispute the signals given on July 13 – the sirens and Nichols' vocal message to the miners – were not heard by the miners. Tr. 55, 59, 63, 122, 192. Therefore, the warning signals were not "ample," and Central Appalachia violated this part of the regulation.[12]

S&S AND GRAVITY

I have found the failure to provide the miners in the pit a warning they could hear prior to detonation of the shot was a violation of section 77.1303(h). I also find the violation created a

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[11]The presence of the material, if anything, supports Central Appalachia's contention Virginia Drilling's blasters acted reasonably, as do the facts on two prior shots no flyrock was produced (Tr. 53) and the shot resulting in the accident was farther away from the affected miners than the two prior shots. Tr.190.

[12]I recognize this is a simple analysis, but it is all that is required for the "ample warning" allegation.

discrete safety hazard in that the miners were not given notice of the detonation and, therefore, could not take precautions to protect themselves from the shot's possible consequences. This subjected the miners to the hazard of being unable to react fast enough to avoid flyrock by leaving the affected area or by taking cover prior to the shot. Lack of notice of the shot also made it reasonably likely miners would be injured because it drastically reduced the time they had to protect themselves from the effects of the blast. Finally, as the injury to Travis Tackett showed, there was a reasonable likelihood injuries caused by the violation would be of a reasonably serious nature.

In addition to being a significant and substantial contribution to a mine safety hazard, I find the violation was serious. The effect of the failure to provide an ample warning to the miners left Travis Tackett and the others to scramble for cover as the flyrock flew toward them. Broken bones and abrasions are the least that reasonably could have been expected.

NEGLIGENCE

Bellamy believed the company was moderately negligent. Gov't Exh. 6. I find, however, its negligence was high. Nichols was the foreman. He acted on Central Appalachia's behalf. He was responsible for the safety of those he supervised. He was on site. He was aware of the noise produced by the highwall miner and by other equipment in the pit. Nichols did not hear the five-minute and one-minute sirens. Tr. 195. Nichols admitted, because of the pit noise, it was not unusual to be unable to hear such warnings. Tr. 196. Nonetheless, Nichols knew a shot was coming because the blaster told him. Tr. 190. Nichols was under an obligation to make sure those working under his supervision knew as well. It was not enough for Nichols to "tell" the miners if they could not hear him, and in view of his knowledge noise in the pit often covered other sounds, he was obligated to ensure his words were heard and understood. The potential deadly hazard faced by those he supervised required he meet a high standard of care. It was an obligation he and, thus, the company, failed to meet.

REMAINING CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The Secretary entered into evidence, over the objection of counsel for the company, a computer printout titled "Assessed Violation History Report." Gov't Exh. 10. The printout lists a total of 16 prior violations at the mine in the two years preceding the accident. Gov't Exh. 10 at 19-20. It also lists more than 300 other violations that occurred at other mines operated by companies controlled by Wexford Capitol, LLC, Central Appalachia's controlling entity. In objecting to the report, counsel for Central Appalachia pointed out the exhibit lists mines from around the country, that some of the listed violations predated the existence of Central Appalachia, and that one of the companies whose violations are included, CAM Mining, LLC, is an entirely different entity than Central Appalachia. Tr. 109-113. I admitted the exhibit subject to its being explained and subject to its consideration being argued on brief.

Counsel for the Secretary has not discussed the exhibit or the issue of its consideration. Counsel for Central Appalachia has renewed his objections to the exhibit and stated his belief "all penalties should be calculated on the history of any previous violations at Hunts Branch [Freeburn Mine] only." Cent. Ap. Br. 11 n. 2.

Without further explication from the Secretary, and noting that both the printout and Exhibit A of the Secretary's petition indicate the mine has a small history of previous violations, I find, based on the record in this case, the applicable history of previous violations is small. The finding is made on these specific circumstances and is not a global pronouncement as to what constitutes an appropriate history of previous violations.

SIZE

In proposing penalties for the alleged violations, the Secretary noted Central Appalachia was of medium size. Petition for Assessment of Penalty, Exh. A. There being no evidence to the contrary, I find this is in fact the case.

ABILITY TO CONTINUE IN BUSINESS

There is no evidence the size of any penalties assessed will adversely affect Central Appalachia's ability to continue in business, and I find they will not.

GOOD FAITH ABATEMENT

The violations were abated in good faith by Central Appalachia and in a timely fashion. Gov't Exh. 6**,** Gov't Exh. 7.

CIVIL PENALTY ASSESSMENTS

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7416150	7/14/05	77.1000	$5,000

I have found the violation was serious. I also have found that the company's negligence was low and much of its lack of care was excusable. Given these findings and the other civil penalty criteria, I conclude a penalty significantly reduced from that which is proposed is warranted. I find an assessment of $2,000 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7416151	7/14/05	77.1303(h)	$228

I have found the part of the alleged violation that was proven was serious. I also have found the company's negligence was high. Given these findings and the other civil penalty

criteria, I find a penalty significantly higher than that which is proposed is warranted. I conclude an assessment of $500 is appropriate.

ORDER

Central Appalachia **SHALL** pay total civil penalties of $2,500 within 40 days of the date of this decision, and upon payment of the penalties this proceeding **IS DISMISSED.**

David F. Barbour
Administrative Law Judge
(202) 434-9980

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