FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 27, 1996

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner v. LAC BULLFROG INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-407-M A. C. No. 26-02184-05516 Bullfrog Mine Underground
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner v. LORENZO CEBALLOS, Employed by LAC BULLFROG INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-320-M A. C. No. 26-02184-05524 A Bullfrog Mine Underground
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner v. TIMOTHY HARTER, Employed by, LAC BULLFROG INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-321-M A. C. No. 26-02184-05525 A Bullfrog Mine Underground

DECISION

Appearances: Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Charles W. Newcom, Esq., and Andrew W. Volin, Esq., Sherman & Howard L.L.C., Denver, Colorado, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against LAC Bullfrog, Inc., Lorenzo Ceballos and Timothy Harter pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that the company violated section 57.6375 of the Secretary's mandatory health and safety standards, 30 C.F.R. § 57.6375, and that Messrs. Ceballos and Harter, as agents of the company, knowingly authorized, ordered or carried out the violation. The Secretary seeks penalties of $1,500.00 against the company and $1,000.00 and $1,200.00 against Ceballos and Harter, respectively. For the reasons set forth below, I find that the company violated the regulation, that Ceballos, but not Harter, knowingly carried out the violation and I assess penalties of $1,500.00 and $500.00, respectively.

A hearing was held on November 1 and 2, 1995, in Henderson, Nevada. In addition, the parties filed post-hearing briefs in these matters.

FACTUAL SETTING

The Bullfrog gold mine in Beatty, Nevada, has both an open pit and an underground section. The underground section consists of a series of horizontal passages, called "drifts," running off of a main decline, which follow the gold vein. The drifts are identified and distinguished by their elevation in meters and whether they go north or south.

On December 7, 1993, a ground fall of about 40 to 50 tons occurred in the 906 South Drift. It was preceded by a blast in the 918 North Drift. The blast occurred in a portion of the 918 North Drift which is directly over the area in the 906 South Drift where the ground fall occurred.

Jack Bingham, the General Manager of the mine, Timothy Harter, the General Mine Foreman, and Lorenzo Ceballos, a Production Supervisor, were at the end of the 906 South Drift when the ground fell from the roof. They discovered the fallen ground when they were backing their vehicle along the drift and encountered dust and then the ground fall. The men had to leave their vehicle and climb over the fallen ground to get out of the drift.

MSHA Inspector Henry J. Mall was assigned to investigate the incident. As a result of his investigation, he issued Citation No. 4130929, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), on December 8. It alleged a violation of section 57.6375 of the Regulations because

> at approximately 845 [*sic*] AM 12-7-93 a heading in 918 North was blasted without ample warning given to the (3) employees who had entered 906 South area which was directly under the 918 North heading where the blast was to occur. The distance between the areas is approximately 8 meters (25 ft). When the blast occur[r]ed approximately 40 to 50 tons of material above the anchorage zone supported with 6 ft roof bolts came down in the 906 South travel way. The (3) employees in 906 South were approximately 300 meters (984 ft) from where the fall of ground occur[r]ed. The company has a written policy dated 12-3-92 - 3-23-92 [*sic*] on clearing the areas effected [*sic*] from [*sic*] the blasting that is to take place. On this date 12-7-93 the company failed to follow a safe practice of warning their [*sic*] employees of the blast in 918 North and did not follow company written policy. This is an unwarrantable failure.

(Govt. Ex. H.)

Special Investigator Dennis J. Palmer conducted an investigation of the incident during April 1994 for the purpose of determining if the violation had been knowingly committed by any agents of the company. As a result of his investigation, the Secretary filed civil penalty petitions against Ceballos and Harter under section 110(c) of the Act, 30 U.S.C. § 820(c).[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 57.6375 is entitled *Loading and blast site restrictions* and requires that: "Ample warning shall be given before the blasts are fired. All persons shall be cleared and removed from areas endangered by the blast. Clear access to exits shall be provided for personnel firing the rounds."[2]

The issue in this case is whether the three men were in an area endangered by the blast from which they should have been cleared and removed. I conclude that the 906 South was an area endangered by the blast and that the men should have been cleared or removed from the drift prior to the blast.

Was the 906 South an area endangered by the blast?

The Commission has not had occasion to address the issue of what constitutes an area endangered by the blast with regard to this regulation. However, it has discussed section 77.1303(h), 30 C.F.R. § 77.1303(h), having to do with surface coal mining, which has a similar requirement.[3] With regard to that regulation, the Commission held that:

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[1] Section 110(c) provides, in pertinent part, that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . ."

[2] This regulation was effective until December 31, 1993. It has since been replaced by section 57.6306(f), 30 C.F.R. § 57.6306(f).

[3] Section 77.1303(h) provides that: "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."

> 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 of the circumstances posed by the blasting issue.

Hobet Mining & Construction Co., 9 FMSHRC 200, 202 (February 1987). The Commission went on to say that "[a]n operator's pre-shot determination of what constitutes a blasting area is based not only upon the results of prior shots, but also depends upon a number of variables affecting the upcoming shot." *Id.*

Although section 77.1303(h) uses the term "blasting area" and section 57.6375 uses "area endangered by the blast," they mean essentially the same thing. Thus, it would follow that if the company had not included the 906 South in the area endangered by the blast in the 918 North, the "reasonably prudent person" test would be applied to determine whether it should have been included. However, it is not necessary to go through the requirements of the test in this case because it is undisputed that it was the mine's practice to clear the level above and the level below the level being blasted.

Since the 906 South is the level below the 918 North and since two miners were, in fact, cleared from that area before the blast, the company obviously had determined that it was an area endangered by the blast. Therefore, the Respondents' argument, in their brief, that the 906 South was not an area endangered by the blast under the "reasonably prudent person" test, is inapposite. The company is bound by its pre-shot determination.

Were the miners in the endangered area at the time of the blast?

Having determined that the 906 South was an area endangered by the blast, the next issue is whether Bingham, Harter and Ceballos were in the endangered area at the time of the blast. They argue that they did not enter the 906 South until sometime after the blast in the 918 North. On the other hand, the Secretary submits that the men were at the end of the 906 South when the blast occurred. Finding the Respondents' statements made at the time of the incident more credible than the testimony

at the hearing, I determine that the men were at the end of the 906 South at the time of the blast.

Inspector Mall arrived at the mine on the afternoon of the incident and began his investigation. Nevada State Inspector Edward M. Tomany arrived to investigate the incident the next day. On December 8, they interviewed several of the witnesses together.

According to their notes taken at the time, Louis Schlichting, who did not testify at the hearing, told them that he was the assistant foreman in charge of the blasts in the 918 North and South. He further told them that he cleared two employees out of the 906 South when getting ready to blast the 918 North, but that he did not barricade the 906 South or do anything to prevent anyone from entering it during the blast. Finally, he told them that he assumed that the 906 South was clear when he blasted and that he would not have blasted the 918 North if he had known that anyone was in the 906 South.

According to their notes and testimony at the hearing, Lorenzo Ceballos told them that he knew that both the 918 North and South were going to be blasted and that while on the decline between the 918 and the 906 he heard a blast which he assumed was the 918 North. Additionally, he told them that the three supervisors were at the end of the 906 when the 918 North was blasted. Inspector Mall testified at the hearing that Ceballos later told him that the blast he heard was the first blast (apparently the 918 South) and that the second blast occurred while he was in the 906.

Tim Harter told the inspectors that he was not aware that the 918 North was going to be shot. There is no indication that either inspector asked him where he was when the blast and the ground fall occurred. However, other employees of the mine gave the inspectors the impression that the blast and the ground fall had happened while the supervisors were in the 906 South.

Inspector Mall concluded that the blast heard on the decline must have been the 918 South and that the 918 North blast occurred while the supervisors were at the end of the 906 South. Consequently he wrote the citation in question. On receiving the citation and at the close-out conference, no one from the company suggested to the inspector that he had his facts wrong.

Inspector Tomany apparently came to the same conclusion as Inspector Mall. His notes state that he notified his boss that “3 employees, J. Bingham, T. Harter, L. Ceballos were at the face

of the 906 s when the 918 north blast dropped ground to obstruct exit of the 906 south." (Govt. Ex. V at 5.)

It appears that no one talked with Bingham during the investigation and he evidently was not present at the close-out conference. However, Special Investigator Palmer interviewed him in April 1994. Palmer testified, and his notes indicate, that Bingham, who was no longer working for the company, told him that he felt the second blast while backing out of the drift and that they later came across dust and the ground fall.

Palmer also interviewed Ceballos and Harter. By this time, Ceballos' story had changed somewhat. He said that the blast in the 918 South had to have gone off first; that the blast the supervisors heard while on the decline was in the 918 North. He stated that the 918 South is a long drift and the 918 North a shorter drift and that Schlichting told him in a discussion after Mall's investigation that he had set off the 918 South first because it would be dangerous to light the fuses in any other order.

Harter told Palmer that he assumed that the blast he heard on the decline was the 918 South because that was the only blast that he expected. He claimed that he did not find out that there was a second blast until after he got out of the mine. He further averred that he would not have gone into the 906, or allowed anyone else to go into the 906, if he had known a blast was going to be directly above it.

In December 1994, Ceballos and Harter were informed that MSHA intended to seek civil penalties against them under section 110(c) of the Act. On December 21, they sent a letter to MSHA requesting a conference on the matter and setting out their position. In the letter, they summed up their position as follows:

> [W]e believe that MSHA may have the mistaken impressions that three employees entered the 906 south prior to the 918 north blast (the final blast), that the blast caused the ground fall, and that the three employees were non-supervisory. None of these impressions are [*sic*] accurate. Instead, as the facts recited above show, Ceballos knew there would be blasting in the 918 north, the three of them did not enter the 906 south until after the 918 blast took place, the ground fall did not occur as part of the blast, but took place approximately 15 to 20 minutes later . . . .

(Govt. Ex. G at 2.)

By the time of the hearing, the Respondents had added more details to their version of the incident. For the first time, they claimed that the blast in the 918 South was a "slab" round while the blast in the 918 North was a "face" round. The significance of this is that a slab round uses less explosive than does a face round and is, therefore, not as loud. Thus, at the hearing, Ceballos testified, "I knew there was two blasts that were going to go off, but I only expected to hear one." (Tr. 335.)

With regard to what he initially told the inspectors, Ceballos testified as follows:

> Q. Did you tell Inspector Mall or Inspector Tomany that you heard a blast while you were on the decline on December 7?
>
> A. Yes.

Q. Did you tell them whether or not you thought that blast was from the 918 North or the 918 South?

A. I don't recall exactly if I told them it was.

Q. Did you tell Inspectors Mall or Tomany that you heard the blast of the 918 North while you were in the 906 South?

A. No, I didn't.

Q. Do you recall whether or not Inspector Mall accused you of mistaking the blast that you heard on the decline for the 918 South blast as opposed to the 918 North blast?

A. I know there was a lot of confusion in there when they were asking a lot of questions. I was really confused in that open discussion.

(Tr. 342.)

Obviously, when an inspector arrives to investigate an accident after it has happened he must rely on what the witnesses tell him and what physical evidence is available. In this case, Inspector Mall did just that and concluded that a violation of section 57.6375 had occurred. While the company argued with him about the citation after he gave it to them, and during the close-out conference, no one asserted that he had the facts wrong.

Now the company alleges that is exactly what happened. However, I do not credit the revised version for the following reasons. The statements given by witnesses at the time closest to the incident, when the details are freshest in their minds, and before they have had the opportunity to formulate statements favorable to their own, or the company's, cause, are more reliable than the witnesses' later statements.[4] Further, the Respondents did not raise this new scenario when given the citation or at the close-out conference. Nor did they question the inspectors facts. Finally, Jack Bingham, General Manager of

[4] At the hearing, Ceballos only specifically denied telling the inspector that he heard the 918 North blast while in the 906 South. He either could not "recall" making other statements or was "confused."

the mine, unequivocally stated that he felt the second blast while at the end of the 906 South.

Respondents have attacked Bingham's credibility on the grounds that his statement is hearsay, that his ability to distinguish sensations is questionable, apparently because he was not wearing his hearing aid underground, and that the slab round in the 918 South was too small to be heard. While it is true that Bingham's statement is hearsay, I credit it because at the time that it was made, it was an admission, or, at a minimum, a declaration against interest, and because Respondents had *subpoenaed* Bingham to testify at the hearing, but announced at the beginning of the second day that they did not intend to call him. Since they had the opportunity to rebut or explain the hearsay statement by the author of the statement, but chose not to, they cannot now argue that the statement is unreliable.

With regard to Bingham's ability to distinguish sensations, I note that he stated that he *felt* the blast, not that he *heard* it. Furthermore, while there is no evidence concerning the extent of his ability to hear, other than that he wore a hearing aid, there is evidence that he, Ceballos and Harter held a discussion in the 906 so that he must not have been totally deaf.

Finally, there is nothing in the record to indicate that the slab round in question could not be heard. In fact, Harter stated that he was expecting a slab round to be used in the 918 South and when he heard the blast on the decline, assumed that was what he had heard.

I find that Bingham, Harter and Ceballos were in the 906 South at the time of the blast in the 918 North and the resulting ground fall. Since the company had determined that this was an endangered area for such a blast, I conclude that the company violated section 57.6375 by not clearing them from the area before blasting.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the 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." 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); Austin *Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Applying the *Mathies* criteria, I have already found (1), that the company violated a mandatory safety standard. I further find: (2) That this violation contributed to a measure of danger to safety, *i.e.* blasting is inherently dangerous, those within an area endangered by a blast could be blown up, hit by flyrock, or, as occurred in this case, caught by a ground fall; (3) That there is a reasonable likelihood that a ground fall would result in an injury; and (4) That there is a reasonable likelihood that the injury would be reasonably serious in nature, involving significant cuts and bruises, broken bones or death.

Unwarrantable Failure

The inspector found this violation to be the result of an “unwarrantable failure” on the company’s part. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). “Unwarrantable failure is characterized by such conduct as ‘reckless disregard,’ ‘intentional misconduct,’ ‘indifference’ or a ‘serious lack of reasonable care.’ [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991).” *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

Ceballos and Harter both stated that they would not have gone into the 906 South if they had known that there was going to be a blast in the 918 North. Thus, they were clearly aware of

the danger involved. Ceballos thought that it was safe to go into the 906 because he assumed that the blast he heard on the decline was the 918 North blast.

There is no evidence of intentional misconduct in this case. I believe the Respondents when they state that they would not have gone into the 906 if they had known the 918 was going to be blasted. However, that does not remove this case from the unwarrantable failure category.

Ceballos, a miner with at least 18 years experience, the person normally in charge of blasting operations, knew that plans had changed from blasting the 918 South to blasting the 918 North and South. He knew this because Schlichting told him so just prior to the men going down the decline past the 918s to the 906. He heard one blast and concluded that the 906 was safe. I find that this conclusion was not a reasonable one. *Cf. Wyoming Fuel Co.* at 1628-29.

A supervisor in his position and with his experience should have done more. Knowing that there were going to be two blasts, and hearing only one, made it incumbent on him to verify that both blasts had been performed before entering the 906. While failure to do that does not rise to "intentional misconduct" or even "reckless disregard," it is more than ordinary negligence.

I conclude that the failure to confirm that the 918 North had been blasted before entering the 906 constitutes "indifference" or a "serious lack of reasonable care" and that, therefore, the violation resulted from the company's unwarrantable failure.

Section 110(c) violations

The Secretary has alleged that Ceballos and Harter "knowingly" violated section 57.6375 and are personally liable under section 110(c) of the Act.[5] Based on the evidence, I find that Ceballos "knowingly" carried out the violation, but Harter did not.

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held, however, that to violate section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, *supra* at 1630; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, *supra* at 2003-04.

In *Roy Glenn*, 6 FMSHRC 1583, 1586 (July 1984), the Commission expanded the test to cover a situation where the violation does not exist at the time of the agent's failure to act, but occurs after the failure, when it said:

> Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted 'knowingly', in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps.

That describes the situation in this case.

As a supervisor, Ceballos was in a position to protect employee safety by not taking the tour into the 906 South until after the blast in the 918 North. He knew, based on what Schlichting told him, that both sections of the 918 were going to

[5] *See* n.1, *supra,* for the provisions of this section.

be blasted. He knew that if they went in the 906 before the 918 North blast that he would be in an area endangered by the blast. Finally, he failed to take appropriate preventative steps, that is to insure that the 918 North blast had occurred before entering the 906 South.

As set out above, this was aggravated conduct involving more than ordinary negligence. Accordingly, I conclude that Lorenzo Ceballos knowingly carried out the violation of section 57.6375 and is, therefore, personally liable under section 110(c).

The same, however, cannot be said about Harter. He knew only that the 918 South was to be blasted. No one knew that both the North and South were going to be blasted until Schlichting informed Ceballos of that during the tour. While Harter was present when Schlichting told Ceballos of the change, neither Schlichting nor Ceballos could say whether Harter heard the conversation. Both doubted it. Ceballos said that Schlichting spoke directly into his ear because there was a fan in the area.

Ceballos testified that when they passed the 918 on the decline he informed Harter that they could not go into that area because they were blasting. Harter maintained that he did not hear Schlichting tell Ceballos that the 918 North was also going to be blasted and that he did not know that the 918 North was blasted until after he got out of the mine.

Since there is no evidence to contradict it, I credit Harter's claim that he thought only the 918 South was to be blasted and that when he heard the blast he thought it was safe to enter the 906 South. Ceballos' statement about not being able to go into "that area" because they were blasting was not specific enough to put Harter on notice that the situation, as he understood it, had changed. Consequently, I conclude that Timothy Harter did not knowingly carry out the violation of section 57.6375 and is not personally liable under section 110(c).

CIVIL PENALTY ASSESSMENT

The Secretary has proposed civil penalties of $1,500.00 for the company and $1,000.00 for Ceballos for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984).

In connection with the six criteria, I note from the pleadings that the Bullfrog mine is a medium size gold mine and that LAC Bullfrog, Inc., is a medium size company. The violation history does not indicate an excessive number of violations. There is no evidence that payment of a civil penalty will adversely affect the company's ability to remain in business. On the other hand, the gravity of the violation is serious and involved a high degree of negligence. Taking all of this into consideration, I conclude that the penalty proposed by the Secretary is appropriate.

Obviously, except for the gravity of the violation, none of the penalty criteria apply to an individual. However, taking into consideration the gravity of the violation and Mr. Ceballos' position with the company, I find that the penalty proposed by the Secretary is somewhat high. I conclude that a penalty of $500.00 is appropriate in this case.

ORDER

The civil penalty petition against Timothy Harter is **DISMISSED**. Citation No. 4130929 issued to LAC Bullfrog, Inc. and the civil penalty petition alleging that Lorenzo Ceballos knowingly carried out the violation in the citation are **AFFIRMED.** Accordingly, LAC Bullfrog, Inc., or its successor,[6] and Lorenzo Ceballos are **ORDERED TO PAY** civil penalties of **$1,500.00** and **$500.00**, respectively, within 30 days of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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[6] In a subsequent hearing involving this company, counsel for the Respondent advised that the mine was now owned by Barrick Bullfrog, Incorporated.

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