# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

June 18, 1998

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 97-114 |
| Petitioner | : | A.C. No. 46-07537-03549 |
| v. | : | |
| | : | |
| APPALACHIAN MINING, INC., | : | |
| Respondent | : | Alloy No. 1 Mine |

## DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Petitioner;
Julia K. Shreve, Esq., Jackson & Kelly, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the "Act," charging Appalachian Mining Inc., (Appalachian) with one violation of the standard at 30 C.F.R. ' 77.1700, and seeking a civil penalty of $157.00 for the alleged violation. The general issue before me is whether Appalachian committed the violation as alleged and, if so, what is the appropriate civil penalty considering the criteria under Section 110(i) of the Act.

Citation No. 4203309 alleges a "significant and substantial" violation of the standard at 30 C.F.R. ' 77.1700 and charges as follows:

> Ben Rucker, an employee of Austin Powder Company, doing contract blasting for Appalachian Mining Inc., was observed working in the Scrabble Creek point area of the mine, preparing a shot, and did not have any communications with other employees at this mine, nor was Mr. Rucker in sight of any other employees of the mine. The explosive truck No. 20323 being used was not equipped with two-way communications.

The cited standard, 30 C.F.R. ' 77.1700, provides as follows:

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

It is undisputed that on the morning of March 5, 1997, prior to the 8:15 a.m. issuance of the citation at bar, Ben Rucker, was working in the Scrabble Creek area of the subject mine and was neither in sight, nor within hearing distance, of any employee and was without two-way communication. Rucker was an employee of Austin Powder Company, which was performing contract blasting for Appalachian

Rucker=s testimony is undisputed. Rucker was a certified surface blaster and had been since August 1992. On March 5, 1997, he arrived at his work site at the Scrabble Creek area around seven or 7:30 a.m., and loaded three or four holes before the MSHA inspectors arrived. At each of these holes, he had inserted a cap into the primer, placed it into the hole, loaded the ANFO explosive and shoveled drill dust into the hole. The holes were 25 feet deep on the outside of the drill bench and 15 feet on the inside of the bench. The drill bench was muddy from the rain the night before and was flat. The holes were 6 and 3 1/4 inches in diameter with surrounding dust mounds two to eight inches high. The nearest person was a mile away.

According to Rucker, both the primer and the cap are explosive and if you drop a primer forcefully it could detonate. In addition, if a primer should become stuck in a drill hole and, if in trying to remove it, the trunk line snaps, it could also detonate. Rucker acknowledged that there are occasions when he tugs on a primer and cap to see if it is stuck in a drill hole but asserted there is a difference between gently tugging on the line and pulling it strongly, which could detonate the cap. Rucker observed that the dust piles remaining from drilling constituted a tripping hazard and the ground in this area was muddy. On this occasion he had been carrying 50 pound bags of the ANFO from the explosives truck to the holes he was loading.

According to Rucker, his next step that morning would have been to drive the truck that was at the Scrabble Creek site to another truck which had communications so he could contact his boss and ask for a warning horn. He would then have returned to the shot area, wired the shot and strung out the trunk line. His boss, Roger Mason, would then make sure the area was clear. Rucker would then blow his warning horn, wait three minutes and set off the shot.

Leo Inghram has been an MSHA inspector since 1975. He also has 30 years experience in the mining industry and certifications as a fire boss, underground blaster and mine foreman. Inghram testified that if a primer became stuck while being loaded and if you pulled the primer out of the detonator it could explode in the hole. He was also concerned with a tripping hazard on the bench with Rucker carrying 50 pound bags of ANFO.

MSHA supervisory inspector, Aubrey Castanon, is a 26-year MSHA employee. He also

has seven years additional industry experience. He accompanied Inghram on this inspection. Castanon described the bench area as 15 to 20 feet wide, relatively level with several holes drilled and several loaded with trunk lines emanating from the holes. Castanon also observed three or more dust mounds in the area 8 to 10 inches high and ruts 3 to 4 inches deep. Castanon testified that loading explosives is indeed hazardous noting that the explosive cap has to be inserted in the primer correctly and that if it is done improperly and you tug on it, it could explode. He also observed that if a cap were laid beside a hole before priming and stepped on, it could accidentally go off. Castanon was also concerned about carrying 50 pound bags of ANFO in an area where you could trip or fall into a hole or trip on one of the trunk lines.

Within this framework of evidence, I find that the Secretary has established the elements of a violation of the cited standard. The hazards associated with handling explosives and carrying 50 pound bags of ANFO over the subject terrain clearly constituted hazards within the meaning of the standard. Indeed, even Roger Mason, Appalachian=s superintendent at the time, acknowledged that handling explosives is hazardous. While Kenneth Purdue, manager of safety for parent company Pittston Coal Company, testified that he had heard of lab tests that purportedly demonstrated you cannot stretch the trunk line and break it, thereby causing an explosion, I give but little weight to this testimony. None of the purported laboratory studies or results were brought to hearing to be scrutinized by cross examination. In addition, in rebuttal, MSHA Supervisory Inspector Castanon, testified that there have been actual cases of "snap and shoot" detonations. He referred to a case involving ICA Explosives Company, in which an employee had backed his "Bronco" over a trunk line, severed the trunk line and detonated the explosives.

The Secretary also maintains that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury 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 explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> *See also Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).
>
> The third element of the *Mathies* formula requires that the Secretary establish a

reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Considering the credible evidence presented by the Secretary in this case, I conclude that indeed, there was a reasonable likelihood that reasonably serious injuries could result or be aggravated by the inability of Mr. Rucker to have been able to communicate or contact other persons in the event of serious injuries resulting from slipping, falling, breaking a leg, or from inadvertent detonation. It is reasonably likely that such an incident would result in reasonably serious injuries. The violation was therefore "significant and substantial" and of serious gravity.

In reaching this conclusion I have not disregarded Appalachian=s reference in its brief to Inghram=s testimony that he did not "think that it was reasonably likely that an explosion was going to occur." However, it is apparent that Inghram=s testimony in this regard was misconstrued in that this testimony was directed to the possibility of an explosion if Rucker tripped and fell with a 50 pound bag of ANFO.

I do not find however, that Appalachian is chargeable with significant negligence. While the Secretary argues that the cited truck had been without two-way communications for three or four months, it is undisputed that before this date Rucker either worked with a partner or had another truck present with proper communications available. It appears therefore, that this event was isolated and was the first occasion Rucker had been assigned to work alone without two-way communications. He was under the direct and immediate supervision of contractor, Austin Powder Company, and it cannot be inferred that Appalachian had any advance knowledge of the violation or that it reasonably could have had such knowledge under the circumstances. There is no evidence of any prior similar violations. Under these circumstances, indeed, Appalachian is chargeable with but little negligence. In assessing a civil penalty I have also considered the prior history of violations, the size of the operator, and the good faith abatement.

## ORDER

Citation No. 4203309 is affirmed and Appalachian Mining Inc., is directed to pay a civil penalty of $75.00, within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Javier I. Romanach, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203 (Certified Mail)

Julia K. Shreve, Esq., Jackson & Kelly, P. O. Box 553, Charleston, WV 25322 (Certified Mail)

\mca