FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

February 23, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 95-71-M
v.	:	A. C. No. 37-00070-05501 TMC
WESTERN MASSACHUSETTS BLASTING CORPORATION, Respondent	:	J.H. Lynch & Sons Pit & Mill

DECISION

Appearances: David Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner;
Richard O. Lessard, Esq., Warren, Rhode Island, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Western Massachusetts Blasting Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. A hearing was held on December 12, 1995, and the parties have submitted post hearing briefs.

Section 110(a) of the Act, 30 U.S.C. § 820(a), provides that a mine operator of a facility covered under the Act where a violation of a mandatory health and safety standard occurs, shall be assessed a civil penalty. Where a violation is proved, section 110(i), 30 U.S.C. § 820(i), sets forth six factors to be considered in determining the appropriate amount of a civil penalty which are as follows: gravity, negligence, prior history of violations, size, ability to continue in business, and good faith abatement.

The two alleged violations in this case were contained in a citation and order issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). That section provides that where there is a violation that is both significant and substantial and due to unwarrantable failure, a citation should be issued containing such findings. If within 90 days the inspector finds another violation due to unwarrantable failure, a withdrawal order shall

be issued.

Section 56.6202 of the Secretary's mandatory standards, 30 C.F.R. § 56.6202 provides in pertinent part:

> (a)(8)(i) Vehicles containing explosive material shall be secured while parked by having the brakes set.
>
> (ii) Vehicles containing explosive material shall be secured while parked by having the wheels chocked if movement could occur.
>
> (b)(1) Vehicles containing explosives shall have no sparking material exposed in the cargo space.

Citation No. 4293626, dated September 28, 1994, charges a violation of the mandatory standard in 30 C.F.R. § 56.6202(b)(1) for the following condition:

> The blasting Superintendent, Robert Whitlock, was in charge of and in fact did load 5 - 55 lb. cases of Ireco ExGel 40 explosives into the partially unlined bed of the Ford F-250 pickup truck VIN - 1FTHF25HOLNB24031. The floor of the pickup was lined with ¾" plywood as was the tail gate. The steel sides of the bed were exposed as was the steel powder box magazine and the steel detonator magazine in the pickup cargo bed. Also in the bed was a steel bladed shovel. This vehicle was parked at the blast site in the quarry. This is an unwarrantable failure.

The inspector who issued the citation found the violation significant and substantial and due to unwarrantable failure.

Order No. 4293627, also dated September 28, 1994, charges a violation of the mandatory standard in 30 C.F.R. § 56.6202(a)(8)(i) for the following condition:

> The parking brake was not set nor were the wheels chocked to prevent movement of the Ford F-250 explosive truck VIN - 1FTHF25HOLNB24031. This vehicle was within 15' of a 25' high highwall. Vertical drop would be about 25' from this bench to the bench below. Explosives and detonators were in the magazines located in the cargo area of the bed. Truck was parked on a very slight grade

> in the quarry. There were several Lynch employees within several hundred feet of this area. This is an unwarrantable failure.

The inspector found this violation significant and substantial and due to unwarrantable failure.

At the hearing the parties agreed to the following stipulations (Tr. 9):

1. Respondent is an independent contractor who was performing work at the subject site;

2. Respondent is a mine operator under section 3(d) of the Federal Mine Safety and Health Act and the independent contractor and the mine are subject to the jurisdiction of the Act;

3. The administrative law judge has jurisdiction of this case;

4. The inspector who issued the subject citation and order was a duly authorized representative of the Secretary;

5. True and correct copies of the subject citation and order were properly served upon the respondent;

6. Respondent demonstrated good faith abatement;

7. Respondent has no prior history of violations;

8. Respondent is small in size with 16 employees;

9. Respondent has had no fatalities or lost time injuries.

<u>Citation No. 4293626</u>

The inspector testified that when he visited the mine he saw the blasting supervisor sitting in a pickup truck near the blast site (Tr. 24). The supervisor had just finished loading a shot and was doing paperwork as he sat in the cab of the truck (Tr. 22-23, 80). The inspector saw five cardboard cases filled with sticks of dynamite in the bed of the truck. The explosives were EX-Gel 40 consisting of blasting powder with nitroglycerine and ammonium nitrate (Tr. 24-26). One of the boxes did not have a lid (Tr. 26). The bed of the truck and the tailgate were lined with plywood, but the steel sides were exposed (Tr. 26). The inspector was of the opinion that if the truck were in motion, the sides, magazines, and shovel would present a sparking hazard (Tr. 27-29). The movement of the truck could cause the shovel

to hit either the sides of the pickup's bed or the magazines, thereby creating a spark which could ignite the explosives (Tr. 28-29). A spark also could have occurred when the shovel was placed in the truck bed (Tr. 29). The danger was that the spark could ignite the explosives in the cardboard boxes (Tr. 31). If the truck did not move, detonation would be very unlikely (Tr. 66). According to the inspector, the individuals in the immediate area were the foreman and his helper (Tr. 27). The situation was abated when the foreman put the explosives in the magazines (Tr. 31-32).

The blasting supervisor agreed that the explosives were in cardboard boxes in the bed of the truck (Tr. 80). The shovel had been used in preparing the blast and was not in the bed of the truck when he put the explosives there (Tr. 93, 80-81). He was not aware the shovel was there (Tr. 80). When he finished the paperwork, he intended to put the explosives in the magazines (Tr. 80, 90-91).

There is, therefore, no conflict over the conditions and practices which the inspector found. However, a conflict exists with respect to whether the supervisor intended to drive to the next blasting site before he put the explosives in the magazines. The inspector testified that the supervisor told him that he was going to move to the next blasting site without placing the explosives in the magazines (Tr. 29-30, 55-57, 62-63). But the supervisor maintained that before driving to the next site, he intended to put the explosives in the magazines and said that is what he does all the time (Tr. 82-83). After carefully observing and listening to the witnesses, I find the testimony of the supervisor more credible and accordingly find that he would have placed the explosives in the magazines prior to going to the next blasting site.

I have not overlooked the supervisor's admission that prior to being cited he had moved the truck about thirty feet when it was in the same condition as the inspector saw it (Tr. 57, 80, 91). The supervisor moved the truck so that its underside would not become entangled with tubing being used in connection with the blasting (Tr. 57-58, 60, 87). The supervisor was trying to improve safety, but he was wrong in thinking he could move the truck a short distance without putting the explosives away (Tr. 87, 89-90, 92). Nevertheless, I find that his candor in acknowledging his actions enhances his overall credibility.

Section 56.6202(b)(1) of the regulations, quoted above, is clear. Vehicles containing explosives shall have no sparking materials in the cargo space. The exposed steel sides of the truck, the magazines, and the steel shovel could have sparked,

setting off the exposed explosives. Just throwing the shovel in the truck bed could have created a spark. Accordingly, I find a violation existed.

The inspector found that the violation was "significant and substantial" within the meaning of the Act. The Commission has established a four part test to determine whether a violation is significant and substantial. The Secretary must prove (1) the existence of an underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is a measure of danger to safety; (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. National Gypsum Company, 3 FMSHRC 822 (April 1981); Mathies Coal Company, 6 FMSHRC 1 (January 1984); Peabody Coal Company, 17 FMSHRC 508 (April 1995).

The exposed explosives presented a measure of danger since a spark could have been created, setting off the explosives. However, the Secretary has failed to establish reasonable likelihood because the inspector was not asked and did not address the issues of whether the occurrence of an injury was reasonably likely and whether a reasonably serious injury would result. On this basis the finding of significant and substantial is vacated because the Secretary has not sustained his burden of proof. However, it is also noted that the blasting supervisor's intent to put the explosives away before moving to the next site precludes a finding of reasonable likelihood. The inspector admitted that detonation would be very unlikely if the truck did not move (Tr. 66).

The violation is however, of some gravity. A violation can be serious even though it does not meet the criteria required for significant and substantial. Consolidation Coal Company, 15 FMSHRC 34, 41 (Jan. 1993); Consolidation Coal Company, 10 FMSHRC 1702, 1706 (December 1988); Columbia Portland Cement Company, 10 FMSHRC 1363, 1373 (September 1983), See also, Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987); Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (September 1987). Here the exposed explosives and the presence of sparking materials presented a degree of danger, although the Secretary has failed to prove reasonable likelihood and the facts do not show it.

As set forth previously, in order for a citation to be issued under section 104(d)(1) of the Act, it must be both significant and substantial and due to unwarrantable failure. Since the Secretary has failed to sustained the significant and substantial finding, the citation must be modified from a 104(d)(1) citation to a 104(a) citation.

The inspector also determined that the operator's negligence was high. I credit the statement of the blasting supervisor that he was unaware of the shovel in the truck bed and that the shovel was not readily visible (Tr. 80-81). In addition, he intended to put the explosives in the magazines before he drove to the next blasting site (Tr. 82-83). Finally, this citation was the first issued to the operator under the Act. The statement of the operator's owner that the company has never received a citation from the State or any other Federal agency, is undisputed (Tr. 101). This is not to say, however, that the operator is without fault. It should have been aware of Federal laws governing its activities. Under the circumstances I conclude that the operator's conduct did not amount to high negligence but is more properly characterized as ordinary negligence.[1]

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[1] **Since the violation was not significant and substantial, a finding on unwarrantability is not necessary to modify the order. I do, however, note that the Commission has determined that unwarrantable failure means aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004, (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). Therefore, even if the Secretary had met his burden with respect to significant and substantial, the operator's conduct did not rise to the level contemplated by Commission for unwarrantable failure.**

Citation No. 4293627

The inspector testified that he saw the blasting supervisor a second time (Tr. 32, 72). There is no dispute that the parking brake was not set (Tr. 32, 85, 87). The inspector relied upon subsection (a)(8)(i) of section 56.6202 of the mandatory standards, supra, which requires that vehicles containing explosive materials must be secured while parked by having the brakes set. Accordingly, a violation existed with respect to the parking brake.

The narrative portion of the citation also describes the failure to chock the wheels. Subsection (a)(8)(ii) of section 56.6202, supra, requires that vehicles containing explosives must have their wheels chocked if movement could occur. The inspector did not cite that subsection but the operator has raised no issue regarding lack of notice. I find the operator was fully apprised of this charge. The inspector and the supervisor agreed that the truck was parked on a very slight grade (Tr. 32, 70, 86). They disagreed on how the vehicle was parked. The inspector testified that the truck was parked at an angle to the highwall, but the supervisor said it was parked parallel (Tr. 70, 85). The truck was in low gear (Tr. 86). Based upon the evidence, I find that movement could have occurred. The standard applies wherever there is a possibility of movement, without reference to any degree of probability. Based upon the fact that the truck was on a slight grade, I find that movement could have occurred and conclude, therefore, that a violation existed.

In view of the modification of the previous citation, the subject citation must be considered as though it were the initial 104(d)(1) citation. The inspector found the violation significant and substantial within the meaning of the Act. Under the interpretation adopted by the Commission, the first two requirements to support the inspector's characterization are present. A violation existed. And there was a measure of danger, because if the truck were to move and turn over, the explosives could detonate (Tr. 34). However, the Secretary has failed to prove reasonable likelihood because the inspector was not asked and did not address whether the occurrence of an injury was reasonably likely or whether it was reasonably likely that a reasonably serious injury would result. On this basis the finding of significant and substantial is vacated because the Secretary has not sustained his burden of proof. It is also noted that the

very slight grade, the parallel position of the vehicle, and that the vehicle was in low gear would preclude a finding of reasonable likelihood.

Accordingly, in this instance also the Secretary has failed to sustained the significant and substantial finding. Therefore, the order must be modified from a 104(d)(1) order to a 104(a) citation and a determination of unwarrantable failure is again unnecessary.

With respect to the negligence finding, the blasting supervisor testified that he forgot to set the brake because he was upset over the first citation (Tr. 87, 88). The inspector confirmed this (Tr. 33). The supervisor's conduct, therefore, amounted to only a momentary lapse in judgment which is explained, if not justified, by the circumstances. Such behavior does not rise to the level of high negligence as rated by the inspector. The degree of negligence was ordinary.[2]

Determination of Appropriate Penalty Amount

As set forth above, under section 110(i) of the Act six criteria must be taken into account in fixing the amount of penalty. Findings with respect to gravity and negligence for each of the violations have been made.

Another factor specified in section 110(i) is the effect of a penalty upon the operator's ability to continue in business. The operator has submitted evidence regarding its financial situation. Due to the Rhode Island banking crisis the operator lost its line of credit with a Rhode Island bank (Tr. 105). Also, its present loan balance of $220,000 with another bank has been placed in collection (Tr. 109). The operator's tax returns show losses of $25,507 in 1992 and $34,855 in 1993 (Op. Exh. O34; Tr. 109). Working drafts from the operator's accountant show losses of $20,317 for 1994 and $45,419 for 1995 (Op. Exh. O34, Tr. 109). Based upon the foregoing, I find that imposition of substantial penalties would impair the operator's ability to continue in business.

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[2] **For the reasons given in footnote 1, the unwarrantability finding could not be upheld even if the violation had been significant and substantial.**

Also identified by the Act as a relevant factor is the operator's history of prior violations. Here the operator has no prior history. I recognize that the operator did not obtain an MSHA I.D. number until the subject violations were issued (Tr. 36-37). However, the fact remains that there is no prior history and the Act directs that this be taken into account in setting a penalty amount. In addition, the evidence is uncontradicted that the operator received no citations from the State. Again, these circumstances militate against imposition of a heavy penalty.

It has been stipulated that there was good faith abatement and that the operator is small in size.

In light of all the evidence and in accordance with applicable provisions of the law, I determine that penalties of $125 be assessed for the violation in No. 4293626 and $100 for the violation in No. 4293627.

The operator should understand that these modest penalties which represent substantial reductions from the original assessments, are based in part upon the absence of a prior history. This circumstance will, of course, not be present in a future proceeding. It is the operator's responsibility to familiarize itself with the requirements of the Act as they apply to its activities. The operator's belief that it is acting safely is not a defense to the charge of a violation.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDER

It is **ORDERED** that the findings of a violation for Citation No. 4293626 and Order No. 4293627 be **AFFIRMED.**

It is further **ORDERED** that Citation No. 4293626 and Order No. 4293627 be **MODIFIED** to delete the significant and substantial designations.

It is further **ORDERED** that Citation No. 4293626 be **MODIFIED** from a 104(d)(1) citation to a 104(a) citation and to reduce negligence from high to ordinary.

It is further **ORDERED** that Order No. 4293627 be **MODIFIED** from a 104(d)(1) order to a 104(a) citation and to reduce negli-

gence from high to ordinary.

It is further **ORDERED** that a penalty of $225 be **ASSESSED** and that the operator **PAY** $225 with 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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