United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,

v.

POWDER ROCK, INC.
Respondent.

OSHRC DOCKET NO. 96-0372

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 25, 1996. The decision of the Judge will become a final order of the Commission on August 26, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 14, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Date: July 25, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 96-0372

NOTICE IS GIVEN TO THE FOLLOWING:

Associate Regional Solicitor
Office of the Solicitor
Chambers Bldg., Highpoint Office
Center, Suite 150
100 Centerview Drive
Birmingham, AL 35216

Richard Wyatt, Esq.
Wallace and Wyatt
215 North 21st Street
Suite 801
Birmingham, AL 35203

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
1365 Peachtree St., N. E.
Suite 240
Atlanta, GA 30309 3119

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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 Peachtree Street, N.E., Suite 240
Atlanta, Georgia 30309-3119

Phone: (404) 347-4197 Fax: (404) 347-0113

SECRETARY OF LABOR, Complainant,	
v.	OSHRC Docket No. 96-372
POWDER ROCK, INC., Respondent.	**E-Z**

Appearances:

Kathleen G. Henderson, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Richard Wyatt, Esquire
Wallace and Wyatt
Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Powder Rock, Inc., is a small drilling and blasting company. It has been in business since 1994 (Tr. 12, 92). In 1995, Jordan Excavating Equipment, a general contractor, contracted with Powder Rock to blast out rock along a trench line for a new gravity sewer in Jefferson County, Alabama (Tr. 15). In December 1995, Occupational Safety and Health Administration (OSHA) compliance officers Mary Kay Prino and Robin Taylor began a complaint investigation of a blasting accident involving Powder Rock's and Jordan's employees (Tr. 224, 244). Powder Rock contests one of the two citations issued to it on February 15, 1996, as a result of that inspection. The Secretary asserts violations of § 1926.100(a) (item 1) for failure to wear hard hats; of § 1926.909(a) (item 2a) for failure to train employees on and to ensure use of the "Code of Blasting Signals"; and of § 1926.909(e) or, in the alternative, of § 1926.909(b) (item 2b) for failure to insure that employees

were out of the "blasting area" or, were a "safe distance" before blasting was initiated.[1] Powder Rock disputes the violations for items 2a & 2b and argues that the proposed penalty for item 1 is excessive.

This case was heard on May 30, 1996, pursuant to the "E-Z" trial procedures set out in Commission Rules §§ 2200.200-211. E-Z trial is a pilot program designed to provide simplified proceedings for contests under the Occupational Safety and Health Act of 1970.

Background

The new sewer line extended 11,000 feet through a rural area of Alabama. A 30 to 50 foot wide swath of trees was cleared through the terrain to enable Jordan and Powder Rock to lay the line. Because of the underlying rock formation, almost the entire trench line had to be blasted. Powder Rock performed all necessary blasting. To fulfill the requirements of its contract, Powder Rock first conducted a series of primary blasts. If Jordan later determined that the rock was not broken to the desired depth, two of Powder Rock's employees would return to do "secondary" blasting (Tr. 16, 23-24, 52-53, 65). During the period around November 30, 1995, Powder Rock conducted secondary blasting almost every day (Tr. 117).

On November 30, 1995, Powder Rock's blaster, Ricky Whitlow, and assistant blaster, John Pope, prepared to do secondary blasting at the base of the partially excavated trench. A drilling machine was brought in to drill holes 6¾ inches in diameter, down 8 feet below the rock (Tr. 64, 70). Pope and Whitlow packed these holes with the sticks of dynamite and detonators, attached detonators to the lead-in line, and moved back from the blast (Tr. 71).[2] The excavator operator returned to the trench and covered the charges with 10 to 13 feet of gravel and dirt (called "stemming") (Tr. 73-74). He laid the excavator bucket over the charges to protect the pipe from the blast and left the equipment (Tr. 24-25, 82).

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[1] As discussed *infra*, a final decision on the Secretary's proposed amendment under E-Z procedures need not be made.

[2] For purposes of this decision, the drilled holes are referred to as "blast holes"; the jobsite location west of the blast holes is referred to as "in front of the blast hole"; and the area located east of the blast holes is "behind the blast hole" (Exh. C-7).

Pope and Whitlow notified employees behind and in front of the blast holes that they were ready to detonate the charges. These employees confirmed to Pope and Whitlow that they understood and were prepared for the blast. Pope screamed, "fire in the hole," and Whitlow detonated the charges (Tr. 33, 139, 145, 152). Unexpectedly, a large amount of rock and debris shot straight up from the trench approximately 50 to 60 feet and began spreading while in the air (Tr. 185-86, 214). Most of the Jordan employees ran or sought cover nearby, depending upon their location relative to the rising debris. Cunningham had never seen such a large amount of debris from a blast at any time during his construction experience (Tr. 186). As Cunningham explained (Tr. 183):

> When he shot it, I saw it spew up and [saw] it was out of control, and I hollered to whoever was there to run it, and I took off running with them.

Whitlow and Pope, on the other hand, looked up to check where the debris was headed. They did not leave their positions. As the debris rained down throughout the worksite, one of Jordan's employees, Colin Glen, who had run 50 to 100 feet by that time, was hit in the upper back by a grapefruit-sized piece of debris. Glen was severely injured. At the time of the hearing, Glen remained unable to return to work because of his injury. Another Jordan employee was hit on the hand by the debris, and still others spoke of close encounters with falling debris (Tr. 114, 149, 186-87, 196 , 209).

Serious Citation No. 1

Item 1: Alleged Violation of § 1926.100(a)

The Secretary alleges that Powder Rock committed a serious violation of § 1926.100(a), which provides:

> (a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

By its terms, the standard speaks of head protection where there is a "possible danger" from flying objects. Using explosives to blast rock presented the possibility of the hazard. The grapefruit-sized rock which fell and gravely injured Jordan employee, Colin Glen, on November 30, 1995, substantiates that possibility as well as the potential seriousness of the hazard. Neither the blaster

nor his assistant, the only two Powder Rock employees on site when the accident occurred, wore a hard hat (Tr. 106). At the close of hearing, Powder Rock conceded the violation. It argues that the penalty the Secretary proposed was excessive (Tr. 286).

The Commission is the final arbiter of penalties in all contested cases. It must find and give "due consideration" to the size of the employer's business, the gravity of the violation, the employer's good faith, and history of past violations in determining an appropriate penalty. *J. A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.,* 15 BNA OSHC 1481, 1483 (No. 88-691, 1992). Considerations of gravity include how many employees were exposed, the duration of the exposure, precautions against injury, and the degree of probability that an accident would occur. *Caterpillar,* 15 BNA 2153, 2178 (No. 87-0922, 1993).

Powder Rock employed no more than seven individuals at any one time (Tr. 92). The Secretary allowed a full reduction of 60 percent based on Powder Rock's small size. Powder Rock had not previously been investigated and had no past history of violations (Tr. 259). Weighing toward good faith is the fact that the company cooperated with the investigation (Tr. 90). Weighing more heavily against that finding, however, is the fact that Powder Rock had no ongoing safety program. It provided no formal instruction in safety, not even in safe blasting-related practices, the area of its expertise (Tr. 13, 29, 153). After identifying "fly rock" (debris forcefully expelled during a blast) as a potential hazard during blasting, Powder Rock's president and owner, Edward Sheehan, concluded that "[a] hard hat might be a good idea" (Tr. 106). Powder Rock did little or nothing to enforce the standard's requirement. The blaster and assistant blaster were directly exposed to head injuries during the regularly recurring periods when they prepared charges in excavated areas and when they exploded the charges. They were potentially exposed during longer periods whenever unexploded charges had been set but not detonated. The proposed penalty of $325 is considered moderate and is affirmed.

<u>Item 2a: Alleged Violation of § 1926.909(a)</u>

The Secretary alleges that Powder Rock committed a serious violation of § 1926.909(a) which provides:

> (a) A code of blasting signals equivalent to Table U-1, shall be posted on one or more conspicuous places at the operation, and all employees shall be required to familiarize themselves with the code and conform to it. Danger signs shall be placed at suitable locations.
>
> Table U-1 consists of three signals:
>
> WARNING SIGNAL -- A 1-minute series of long blasts 5 minutes prior to blast signal.
> BLAST SIGNAL -- A series of short blasts 1 minute prior to the shot.
> ALL CLEAR SIGNAL -- A prolonged blast following the inspection of blast area.

Table U-1 signals serve the purpose of standardizing communication between actors and observers during a blasting operation. A miscommunication involving use of explosives presents inherent hazards. Powder Rock admits that it did not post or provide the Code signals (or an equivalent of Table U-1) for its or for Jordan's employees. Nor did Powder Rock use the standardized Code signals on the Jordan job. Powder Rock did not alert employees of upcoming explosions by giving either a 5-minute or a 1-minute warning blast. After the explosion, the blaster and Pope generally dug up the last cap to insure that each charge had exploded. Yet, they gave no all-clear signal to indicate when it was safe to approach the trench (Tr. 13-15, 36, 161).

Powder Rock argues, however, that the testimony of assistant blaster Pope demonstrated his knowledge of the required signals. It also contends that it was unnecessary to use specific Code signals since the Jordan job was so small. Powder Rock is incorrect in its contention that Pope knew the Code signals. Pope was a relatively new employee with only 2 or 3 months' experience when the accident occurred. Even by the time of the hearing, he was hesitant and confused about the meaning of specific Code signals (Tr. 161-162). Powder Rock is also wrong in its second contention. Knowledge and use of standardized signals is not mere form over substance. Their use eliminates confusion and clearly defines what will be done. Were this not so, different blasters could use different signals. Different employees could interpret nonstandard signals in various ways. These are uncertainties the standard seeks to avoid.

In this case, both Whitlow and Sheehan acted as blasters on the Jordan jobsite. Employees worked at various locations there, both in front of and behind the blast hole (Tr. 32-33, 147). Employees could not hear the spoken word from one side of the jobsite to the other. Heavy

equipment and pumps were left running and created noise (Tr. 205). Moreover, Powder Rock did not discuss or brief Jordan on the signals it would use, and it did not explain to them how Jordan's employees should indicate that they understood Powder Rock's signals. As Jordan's superintendent, Brian Cunningham, explained, he "just knew" the signals (Tr. 175). These included alternate signals that the blast was ready: hands with thumbs up, other physical signs, or verbal instructions. Employees indicated their understanding by using hands and thumbs up, waving, nodding or giving verbal agreement (Tr. 145, 168, 183). Powder Rock's president, Sheehan, knew these types of signals were being used (Tr. 147).

On November 30, employees on the jobsite were, in fact, aware that the blast was imminent. Employees appeared to correctly interpret the intended signals (Tr. 182). The fact that employees chanced to understand non-standard or improvised signals reduces the gravity of the violation for penalty purposes. It does not alter the fact that the Code signals were not posted and were not used. Powder Rock violated the standard.

If an accident occurred because of a misunderstanding during use of explosives, the probable result would be serious injury or death.

Penalty for Item 2a

Failure to use uniform signals exposed two Powder Rock employees, six Jordan employees and a county inspector to the hazard (Tr. 32). Powder Rock's employee Pope did not know code signals even by the time of the hearing, raising questions about abatement. A grouped penalty of $225 was recommended for Items 2a and 2b. Although grouped by the Secretary, the original proposed penalty may be imposed for either or both violations. Here, considering item 2a alone, and even allowing for Powder Rock's small size and the fact that employees were aware of the blast, a penalty of $225 is appropriate and is assessed.

<u>Item 2b: Alleged Violation of § 1926.909(e)
or, in the Alternative, of § 1926.909(b)</u>

<u>Amendment of the Citation</u>

Before the case was designated as "E-Z," the Secretary filed his complaint. The complaint and underlying citation alleged a violation of § 1926.909(e) for item 2b. The factual and legal allegations of the violation were set out in the Pre-Hearing Conference Order. The evening before

the hearing, the Secretary telefaxed a Motion to Amend Complaint, which sought to allege § 1926.909(b) as an alternative violation for item 2b. The Secretary characterized the amendment as one made in an abundance of caution because Powder Rock had not specifically identified facts relevant to its defense.[3] The proposed amendment asserted an alternate legal theory but relied on the same facts as originally alleged. Powder Rock's attorney did not see the motion until the morning of the hearing. Powder Rock objected to the amendment as untimely and claimed that granting the amendment constituted a violation of due process (Tr. 7).

Having determined that the Secretary's amendment was not intentionally delayed or timed to secure unfair advantage, the Motion to Amend was granted at the beginning of the hearing. Powder Rock now seeks reconsideration on its original grounds and, additionally, objects to the amendment as contrary to "E-Z" procedures.

Under conventional procedures, the Commission has long approved the type of amendment sought by the Secretary. *See e.g., Paschen Contractors, Inc.*, 14 BNA OSHC 1754, 1757 (No. 84-1285, 1990) (Secretary encouraged to employ alternative pleading); *A.L Baumgartner Constr. Inc.,* 16 BNA 1995, 1997 (No. 91-2277, 1994) (no prejudice in late alternative amendment where factual allegations were the same). This outcome conforms with Rule 15(a), Fed.R.Civ.P., which provides that "leave shall be freely given" to a party to amend a pleading "when justice so requires."

E-Z proceedings present additional considerations. It could be argued that since discovery is limited under E-Z procedures, permissive amendment of the pleadings should be allowed. The E-Z Rules imply the contrary. Commission Rule 207(b) provides that "[e]xcept under extraordinary circumstances, any affirmative defenses not raised at the pre-hearing conference may not be raised later." A similar limitation would seem to apply to any change in the Secretary's legal theory. The Secretary did not allege the alternative argument at the pre-hearing conference. There was no showing of "extraordinary circumstances" to support the last-minute amendment. Because the decision on the merits in this case finds that neither standard was violated, it is unnecessary to make

[3] The Secretary furnished photographs and documents beyond what was required under E-Z procedures. To the extent that Powder Rock had documents relating to its defense, it was to furnish them to the Secretary. Powder Rock determined that it did not have documents and, thus, did not provide them.

a final ruling on the appropriateness of the Secretary's proposed alternate amendment under E-Z procedures.

Allegations

The Secretary would allege that Powder Rock committed a serious violation of § 1926.909(e) or of § 1926.909(b). The standards, respectively, provide (emphasis added):

> (e) Before firing an underground blast, warning shall be given, and all possible entries into the blasting area, . . . shall be carefully guarded. The blaster shall make sure that all employees are out of the *blast area* before firing a blast[; or]
>
> (b) Before a blast is fired, a loud warning signal shall be given by the blaster in charge, who has made certain . . . and all employees, vehicles and equipment are a *safe distance*, or under sufficient cover.

On November 30, employees were at relatively the same distances they had been for Powder Rock's 40 to 50 prior secondary blasts (Tr. 32). Of the employees in front of the blast, Pope and Whitlow were the closest. They were 130 to 150 feet from the explosives inside the trench.[4] Willie Caddell stood 50 feet further back from Pope and Whitlow, almost directly behind them (Exh. C-7; Tr. 32, 78, 140, 241). Cunningham and Colin Glen stood by a fire which was also 50 to 70 feet from Pope and Whitlow. Since they stood further west, however, Cunningham and Glen were closer to the blast hole than was Caddell. Some days after the incident, Cunningham stepped off the distance between the remnants of the November 30 fire and the middle of the trench. Having determined that each of his steps was approximately 3 feet, Cunningham concluded that he and Glen stood about 130 feet from the blast. This distance may have been greater.[5] On the back side of the worksite, two of Jordan's employees and the county inspector were 50 feet behind the blast hole (Tr. 138, 144, 155, 177-78, 207). After detonation, debris fell on both sides of the worksite.

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[4] Although this distance varies in the record, it is considered that 130 to 150 feet reflects the more credible evidence.

[5] Cunningham's rough measurements were the only measurements taken. All other testimony was based on estimates. Cunningham's measurements are called into question somewhat because he was not at the worksite during an intervening workday between the accident on Thursday and his measurement the following Monday. Cunningham stated that additional lengths of pipe may have been laid by the time OSHA came on site that same Monday. It is unclear whether the additional pipe was laid before Cunningham stepped off the distance and whether this affected his measurement.

Discussion

The parties dispute the meaning of "blast area" and "safe distance" as used in the standards. They agree that the definitions should be fact specific. The Secretary argues, in effect, that since debris fell throughout the area where employees stood, they were inside of (or not at a safe distance from) the blast area. Powder Rock also relies on hindsight. It argues that previous blasts established the parameters of the safe area and that employees were well outside the blast area. The imprecision of these terms constitutes Powder Rock's main argument.

Standard Not Unconstitutionally Vague

Powder Rock first contends that the standards are so inexact as to deprive it of due process. Due process requirements are met if a standard is "drafted with as much exactitude as possible in light of the myriad conceivable situations . . ." *J. A. Jones*, 15 BNA OSHC 2200, 2205-2206 (No. 87-2059, 1993). Even if these standards do not specify distances, "mathematical precision or impossible specificity" is not required. "It is clear that the use of [broad terms] in a statute or standard does not, in and of itself, render the statute or standard unconstitutionally vague." *Ormet*, 14 BNA OSHC 2134, 2135-2136 (No. 85-531, 1991). A reasonable employer may have knowledge to afford broad terms specific meaning. Powder Rock is a blasting contractor. A reasonably prudent employer in the blasting industry should have sufficient information to understand the terms "blast area" and "safe distance" in relation to use of blasting materials. This is not to say that whatever the employer chooses to understand by the terms defines them. The standards give fair notice of the requirements. Fair notice overcomes Powder Rock's due process argument.

Definitions

Subpart U (§§ 1926.900 - .914) governs "Blasting and the Use of Explosives" for the construction industry. These standards variously limit access to the "blasting area," "blast area," "blasted area" (.900(2) & .910) and "danger zone" (.911). The terms appear to have related, if not identical, meanings. The standards also require positioning at a "place of safety" (.907(m)) or "safe distance"(.909). Of these terms, only "blast area" is defined in Subpart U, § 1926.914(c), as: "[t]he area in which explosives loading and blasting operations are being conducted." This definition is not particularly helpful in determining how far from the blast hole the blasting "area" extends. Nor does the record disclose relevant scientific or industry sources to assist in defining the terms.

The Secretary primarily objects to Powder Rock's safety procedures, which he sees as lax. He argues that Powder Rock failed to maintain blasting records, failed to establish blasting distances, and failed to provide its blasters with training or assistance in making necessary safety evaluations.[6] Even if his assertions were true, the Secretary's arguments do not establish the violation. The issue is limited to whether employees were within the "blast area" or were not at a safe distance from it on November 30, 1995. On this issue, the Secretary's evidence was unconvincing. Compliance Officer Prino offered questionable criteria to establish the definition, such as whether individuals could see into the area where the charges were set. Her suggestions lacked a foundation and were contradicted by witnesses with knowledge of the industry. The Secretary provided no expert testimony.

The more credible evidence was the opinion testimony of Powder Rock's president and owner, Edward Sheehan. His opinions were bolstered by the testimony of other employees. According to Sheehan, employees had positioned themselves at the generally accepted distances and were at a safe distance from the blast -- not in the blast area. He based this opinion on his experience and, particularly, on his experience at the Jordan worksite. In previous similar blasting, when the charges were detonated, the ground rose up no more than 2 to 3 feet and immediately settled back down (Tr. 77, 148). Pope described this as a "poof" (Tr. 150).

Sheehan considered the employees' locations from the blast to be appropriate even though employees were engaged in secondary blasting. A potential danger with secondary blasting was that unexploded charges may remain within the trench to be ignited when other blasting is conducted. In his opinion, there were no indicators that any unexploded charges remained in the trench. Powder Rock never determined the cause of the massive explosion of debris on November 30, 1995 (Tr. 79). Sheehan concluded that there was no reason to anticipate that any employee would be harmed by fly rock where any of the employees positioned themselves on the jobsite. The occurrence of the

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[6] The record includes evidence which supports the Secretary's concern. Powder Rock's president placed excessive reliance on the fact that the blasters "would not put themselves in jeopardy. They value their lives" (Tr. 78). His direction about a safe buffer zone was limited to telling the blasters to back up further than previous fly rock had gone (Tr. 29). This would not be helpful in establishing limits in the first instance or in recognizing when specific conditions would require special precautions. This also affected employees who assessed their safety based on actions of the blasters. As Caddell noted, "I always stay behind the man doing the shooting because I feel that he won't blow hi[m]self up" (Tr. 220).

unexpected, and still unexplained, event of November 30, did not change the parameters of the blast area.

In these factual circumstances there is insufficient evidence to conclude that employees were within the blast area or at an unsafe distance from it on November 30, 1995. Item 2b is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed.R.Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

Item	Standard	Disposition	Penalty
1	§ 1926.100(a)	affirmed	$325
2a	§ 1926. 909(a)	affirmed	$225
2b	§ 1926.909(e) or .909(b)	vacated	- 0-

NANCY J. SPIES
Judge

Dated: July 12, 1996
Atlanta, Georgia