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SOL (MSHA) v. AUSTIN POWDER  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
The Federal Building  
Room 280, 1244 Speer Boulevard  
Denver, CO 80204

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

CIVIL PENALTY PROCEEDING  
Docket No. WEST 91-112-M  
A.C. No. 04-03008-05501-E24

v.

AUSTIN POWDER COMPANY,  
RESPONDENT

Docket No. WEST 91-200-M  
A.C. No. 04-03008-05502-E24

Oro Grande Mine

DECISION

Appearances: Catherine R. Lazuran, Esq., Office of the Solicitor  
U.S. Department of Labor, San Francisco, California,  
for Petitioner;  
Walter J. Davis, Director, Safety, Compliance and  
Transportation, Cleveland, Ohio,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and  
Health Administration ("MSHA") charges Respondent Austin Powder  
Company ("Austin") with violating safety regulations promulgated  
under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et  
seq. ("the Act").

A hearing on the merits was held in Ontario, California, on  
January 22, 1992.

Petitioner filed a post-trial brief. Respondent's  
representative Mr. Davis addressed the issues in his closing  
argument.

THRESHOLD ISSUE

The threshold issue is whether MSHA has jurisdiction over  
Austin.

SUMMARY OF THE EVIDENCE PERTAINING TO JURISDICTION

It is appropriate to consider the various actors involved in these cases:

VINNELL MINING COMPANY ("Vinnell") owns the mining rights at the Oro Grande Mine. Vinnell is subject to MSHA's jurisdiction but was not cited for the powder magazine violations.

AUSTIN POWDER COMPANY ("Austin") was cited for the magazine violations.

SOUTHWESTERN EXPLOSIVES ("SWE") is a subsidiary of Austin.

SPIRIT CONSTRUCTION AND BLASTING ("Spirit") by contract performs the blasting for Vinnell.

EDMUNDO ARCHULETA, an MSHA inspector for over 17 years, inspected Austin between May 31, 1990, and June 6, 1991. Austin and SWE owned the magazines that were cited and located on Vinnell's Property. (Tr. 30, 31).

Vinnell produces silica and aggregate. Its production enters interstate commerce. (Tr. 13, 14, 29; Ex. P-15).

Mr. Bean, a salesman for Austin, opened the magazines for the inspector. (Tr. 20, 21). During the inspection, Mr. Archuleta observed two Austin employees moving detonators out of a railroad car. (Tr. 30).

Davis Lucas was the general manager for either Austin or SWE. Chuck Bean and Avis Lucas were also Austin representatives. (Tr. 39).

Mr. Archuleta was informed by Mr. Lucas that Austin was moving magazines to various locations outside of Vinnell's property. They were later returned to Vinnell's property. (Tr. 32).

Inspector Archuleta agrees he did not see Austin or SWE involved in the production of minerals at the mine; nor did he see any written contracts for Austin or SWE to do any service work for Vinnell. (Tr. 32).

Mr. Lucas told Mr. Archuleta to issue any citations for any violations by Spirit to Austin. (Tr. 38). The inspector was able to enter Spirit magazines because Mr. Lucas had the keys. (Tr. 39). Citations were issued to SWE who, together with Spirit, had storage magazines on Vinnell mine property. (Tr. 44, 45).

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RONALD AINGE, a person experienced in mining, has been an MSHA inspector for 14 years. (Tr. 49).

On October 30, 1990, he was accompanied by the office administrator for SWE. (Tr. 50). Mr. Ainge discussed the map (Ex. P-14) and estimated the location of the various magazines in relation to the roadway. (Tr. 46). The inspector could not gain access to two magazines owned by Spirit. (Tr. 55).

According to information received from Chuck Bean, manager for SWE, Austin owned all of the magazines. Austin and SWE are the same company. (Tr. 57, 58).

Austin and Vinnell had entered into a lease agreement where-by Austin could store its products on the mine site. (Tr. 62). Mr. Ainge understood that Spirit does the drilling and blasting. Austin sells its explosives to Spirit. (Tr. 64).

During the inspection, Mr. Ainge saw Austin employees taking products out of the magazines for sale and the employees were off-loading the products for storage. (Tr. 58). The Austin employees were either at the railroad detonator magazine or at the railroad detonator bunker. (Tr. 58, 59; Ex. P-14). Mr. Ainge did not obtain the names of the Austin employees. (Tr. 59).

WILLIAM W. WILSON, and MSHA supervisor, inspected the Oro Grande Mine once as an inspector and once again in response to Mr. Davis's concerns in 1990. (Tr. 65, 66). In June 1990, SWE told MSHA that Austin, not SWE, was to be identified as Independent Contractor No. E24. (Tr. 67).

Chuck Dean, Davis Lucas, and Mr. McCray (manager for Vinnell) told Mr. Wilson that Austin sold powder to Spirit as well as to Vinnell. (Tr. 68). On June 15, 1990, Chuck Bean told Mr. Wilson that Austin sold eight loads of explosives during the first six months of 1990. (Tr. 69, 72). Austin had also assisted in the transportation from the explosives to the blasting site. (Tr. 72).

On June 11, Mr. Davis, Austin's corporate safety director, raised the issue of MSHA's jurisdiction (Tr. 70). Mr. Davis produced a lease between Austin and Vinnell. (Tr. 71). He further confirmed that Austin had supplied eight loads of explosives to Vinnell.

On June 15, 1990, after leaving Austin's office, Mr. Wilson went to the site and counted 11 magazines. (Tr. 73). In his opinion, since Austin owned the magazines, it could readily abate the violations and prevent their recurrence. (Tr. 81).

The Austin magazines were intermingled with the Vinnell mining activities. The son of the local manager for Austin was doing Vinnell's blasting with the company known as "Spirit." (Tr. 82).

To reach the detonator magazines, it was necessary to use the only road to the mine. After trucks are loaded, they leave the quarry, go past the magazines, and go to the plant. Any number of things could affect workers loading or unloading the explosives. (Tr. 83). If the magazines had been located where miners were not directly exposed, Mr. Wilson would have sided with Austin's position. (Tr. 83, 84). Mr. Wilson believes Austin is a large national corporation with assets in Texas, Ohio, and California. (Tr. 85).

Austin was moderately negligent and it should have known MSHA's rules. The violations were not reasonably likely to cause a serious accident. Austin abated the violations and their cooperation was excellent. (Tr. 86).

A memorandum of understanding exists between MSHA and the Bureau of Alcohol, Tobacco, and Firearms (BATF). (Tr. 86; Ex. P-12).

If MSHA and BATF regulations conflict, then MSHA inspectors are to enforce the regulations that provide for the greater safety of the miners. (Tr. 88). The differences between MSHA and BATF regulations were discussed. (Tr. 88-96). Exhibit R-4 is an MSHA/OSHA Interagency agreement. (Tr. 105, 106).

On June 11, 1990, Mr. Wilson asked Mr. Davis if Austin sold or assisted Vinnell with explosives in the last six months. Mr. Davis replied that an average of eight sales loads were sold to Vinnell to assist in its drilling. (Tr. 78). Chuck Bean also said Austin assisted Spirit in transporting explosives from the magazines to the blast site at the quarry. (Tr. 99).

Exhibit P-16, an MSHA form, contains Mr. Wilson's notes that Austin sold eight loads of explosives to Vinnell to assist their drilling. (Tr. 111).

#### AUSTIN EVIDENCE

WALTER DAVIS, Director of Safety and Compliance for Austin, testified that the company entered the Southern California explosives market several years ago. At that time, Austin leased five acres of land from Vinnell Mining Company and took over some of Vinnell's existing powder magazines.

The written lease, for an annual consideration of \$7000, was entered into on June 1, 1988, between Austin and Vinnell. The lease describes the five acres of land. Also leased by the agreement are a storage bunker, rail car, and portable magazines. In addition, office space on the Vinnell property and fixtures were leased by Austin. (Ex. R-2).

On June 1, 1989, the lease agreement was amended. The amendment provided for rent of the leased premises in the amount of \$5000 per year. The lease described the term at four years, until May 30, 1993. (Ex. R-3). Austin also applied for a license from the Bureau of Alcohol, Tobacco, and Firearms. The license approved the manufacture, distribution, and use of explosives. The magazines were inspected by BATF. (Tr. 114).

Austin believes its powder magazines were not subject to MSHA enforcement. However, MSHA inspectors could enter Austin's leased property to enforce BATF regulations as contained in C.F.R. Part 27. (Tr. 115). Austin and its subsidiary SWE were not involved in any operations such as drilling, blasting, loading, etc., at the Oro Grande Mine. Austin simply put powder in the magazines and removed it in the normal course of its business. (Tr. 117, 118).

Mr. Davis reviewed his notes of the conference with Mr. Wilson and there was no conversation regarding billing of any product to Vinnell. If he made such a statement, it was in error. (Tr. 118). Mr Davis, through his office computer and sales records, could not find the record of any billing from Austin to Vinnell from 1991 to the end of 1989. Austin performed no services for Vinnell and had no contracts with the mining company. (Tr. 118).

Austin agrees it supplies materials to Spirit and that is their only relationship. Austin is legal with ATF regulations. (Tr. 119, 121).

Austin also consulted with the Tread Corporation, a manufacturer of magazines. In its letter to Austin, Tread Corporation concluded that their magazines complied with MSHA rules. (Tr. 121, 122, Ex. R-5). Austin, on a nationwide basis, has 800 employees. (Tr. 124,125).

Austin's home office is located in Cleveland, Ohio, and its 65 distribution facilities, such as at Rio Grande, are located throughout the United States. (Tr. 125).

There are mine storage magazines at the Oro Grande Mine. Any additional magazines there would be moved from customer to customer. (Tr. 126, 127).

If someone would buy explosives at the Oro Grande Mine, then Ore Grande would generate a delivery document called a "J-ticket. The J-ticket lists the customer's name and the products sold.

#### DISCUSSION AND FURTHER FINDINGS

The evidence involves three critical credibility conflicts. First, did Austin sell explosives and furnish services to Vinnell? If that occurred, Austin was a subcontractor subject to the Mine Act as in Otis Elevator Company, 11 FMSHRC 1896 (October 1989).

I credit the evidence of Inspector Wilson that Austin sold explosives directly to Vinnell. Mr. Wilson's testimony and his conference worksheet (Ex. P-16) reflects the June 1990 telephone conferences. Among the questions noted on his worksheet were: "Has Austin Powder sold/assisted Vinnell in the last six months with powder, et al.? The answer was, "Yes - average eight sales (loads) to Vinnell to assist in their drilling." While hearsay has its limits, Mr. Wilson's testimony is also supported by the hearsay statement of Chuck Bean that Austin sold eight loads during the first six months of 1990. (Tr. 69, 72). Austin also assisted in the transportation of the explosives to the blasting site. (Tr. 72).

A further credibility issue concerns the authority of Davis Lucas to speak for Austin. The evidence shows Mr. Lucas instructed Mr. Archuleta to issue citations to Austin for any Spirit violations. (Tr. 38). The inspector was able to enter Spirit magazines because Mr. Lucas had the keys. (Tr. 39).

Chuck Dean, Davis Lucas, and Mr. McRay also told Mr. Wilson that Austin sold powder to Spirit as well as to Vinnell. (Tr. 68).

Chuck Dean and Inspector Archuleta told Mr. Wilson that Mr. Lucas was the general manager of SWE. (Tr. 149, 150).

In addition, Danny Wallace wrote MSHA on September 26, 1989, changing Austin/SWE's address. This letter was prompted by a telephone call from Mr. Lucas. (Tr. 150; Ex. P-15). Mr. Lucas wanted certain reports to go to Cleveland, Ohio. MSHA could not comply with this request without a formal letter. (Tr. 151).

Austin asserts Mr. Lucas was only a consultant for the company and did not have any authority to speak for it. Contrary to Austin's views, I find the above cited testimony to be very persuasive. In addition, Danny Wallace's letter of September 26, 1989,

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was also forwarded to W.J. Davis (Director of Safety), as well as to Mr. Lucas, and Mr. Day. It was clearly Austin company business. Finally, Davis Lucas's letter to Austin's home office, dated January 18, 1988 (seeking to change the address on the ATF license) was Austin/SWE business. (Ex. P-17). The evidence indicates that Mr. Lucas had authority to act for Austin.

The final credibility issue arises from the maps of the mine area. MSHA's testimony is that MSHA's map is superior to Austin's map. The company takes a contrary view. The evidence indicates MSHA's map was drawn the night before the hearing; Austin's map was submitted to BATF. Neither map is to scale. The maps generally show storage magazines in close proximity to the single road in the area as well as to the mining in the quarry. However, neither map delineates the Austin leasehold. Basically, the area maps do not assist the judge in making a determination of the issues.

The record, as a whole, establishes that Austin was an independent contractor on the property. Austin's activities in selling explosives and transporting such explosives for Vinnell at its mine renders Austin subject to the Act.

#### EVIDENCE ON THE MERITS

The citations were amply supported by the uncontradicted testimony of Inspectors Archuleta and Ainge. Austin offered no contrary evidence on the merits. The initial seven Citations allege Austin violated 30 C.F.R. 56.6020(e). (Footnote 1)

Citation No. 3648344 provides:

The trailer constructed of metal and used to store powder, License Plate No. KY T-22-147, and located South West of the Vinnell Oro Grande Plant was not electrically bonded or grounded. Explosives are stored in the Trailer. (Ex. P-1).

Citation No. 3648346 provides:

The explosive storage magazine constructed of metal No. 200 located S.W. of the Vinnell Oro Grande Plant was not electrically bonded or grounded. The Magazine had 2400 pounds of Emuline explosives. (Ex. P-2).

Citation No. 3648347 provides:

The Trailer Serial No. 3 INCAK used to store explosives and constructed of metal and located S.W. of the Vinnell Oro Grande Plant was not electrically bonded or grounded. Explosives are stored in the trailer. (Ex. P-3).

Citation No. 3648348 provides:

The explosive storage magazine No. 190 SWE, constructed of metal and located S.W. of the Vinnell Oro Grande Plant, was not electrically bonded or grounded. Explosives are stored in magazine. (Ex. P-4).

Citation No. 3648347 provides:

The detonator magazine No. 100 which is constructed out of metal was not electrically bonded or grounded. Detonators were stored in the magazine. (Ex. P-7).

Citation No. 3648438 provides:

The rail car detonator storage magazine constructed of metal was not electrically bond and grounded. Detonators were stored in the Rail Car. (Ex. P-8).

Citation No. 3648440 provides:

The door on the Bunker Detonator storage magazine constructed of metal was not electrically bonded and grounded. Detonators were stored in the magazine. (Ex. P-9).

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Citation No. 3647277 alleges a violation of 30 C.F.R. 56.6020 (Footnote 2) and provides:

The Cap Magazine Company number 9129 was not vented near the ceiling area. The magazine did have vents near the floor. The only people who enter this area is [sic] Austin Powder Co. employs [sic] who are knowledgeable in storage and handling of explosives. (Ex. P-10).

Citation No. 3648440 provides:

The explosive Magazine No. 190 SWE was not properly ventilated. A new wood exterior had been installed of wood but vent holes had not been drilled. Explosives are stored in the magazine. (Ex. P-5).

Citation No. 3647278 alleges Austin violated 30 C.F.R. 56.6020(i). (Footnote 3)

There was [sic] two signs visible on the approach roadway to the storage magazine on the south side of the property, if someone was to shoot through either of these signs they could strike one of several magazines in this area. There is a full-time guard at the property and the chance of this happening is unlikely. (Ex. P-11).

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Citation No. 3648350 alleges a violation of 30 C.F.R. 56.6005 (Footnote 4) and provides:

The bunker detonator storage magazine was not cleared of dry vegetation for a distance of 25 feet in all directions. Vegetation was observed on top of the magazine and in front of it. Detonators are being stored in this magazine. (Ex. P-6).

On the uncontradicted evidence, the citations herein should be affirmed.

#### MSHA VERSUS BATF REGULATIONS

Austin argues that MSHA can enforce BATF regulations but not MSHA regulations on its leasehold property. I disagree. The interagency agreement provides that MSHA will enforce the stricter requirements whether it be MSHA or BATF regulations.

On this issue I credit Mr. Wilson's testimony that the MSHA regulations are stricter than BATF. Facially, a comparison between the regulations supports Mr. Wilson's testimony.

As noted in assessing civil penalties MSHA no longer requires the grounding of metal magazines. However, the writer is required to deal with the terms of the regulation in effect at the time of the violation.

Grounding is obviously a more stringent requirement.

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Austin also asserts that OSHA's regulations should prevail here. I disagree. This site is obviously a mine generally under MSHA's enforcement jurisdiction.

I further reject the opinion of the Triad Corporation (Ex. R-5). It is ultimately an issue for the Commission whether an operator is in violation of a regulation.

#### CIVIL PENALTIES

Section 110(i) of the Act mandates consideration of six criteria in assessing appropriate civil penalties.

Austin is a large national company consisting of approximately 700 employees. (Tr. 85). The penalties set forth in the order of this decision are appropriate and should not affect Austin's ability to continue in business.

While Austin has been previously cited, there was no specific detailed evidence of such prior history. Austin was negligent as the violative conditions were open and obvious.

As noted, it is true that MSHA no longer requires that metal magazines be grounded. This would indicate the gravity as to the ungrounded magazines was not as high as MSHA originally believed.

Austin immediately abated the violative conditions and fully cooperated with MSHA. It is accordingly entitled to statutory good faith.

For the foregoing reasons, I enter the following:

#### ORDER

1. Citation No. 3648344 is AFFIRMED and a civil penalty of \$10 is ASSESSED.

2. Citation No. 3648346 is AFFIRMED and a civil penalty of \$10 is ASSESSED.

3. Citation No. 3648347 is AFFIRMED and a civil penalty of \$10 is ASSESSED.

4. Citation No. 3648348 is AFFIRMED and a civil penalty of \$10 is ASSESSED.

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5. Citation No. 3648437 is AFFIRMED and a civil penalty of \$10 is ASSESSED.

6. Citation No. 3648438 is AFFIRMED and a civil penalty of \$10 is ASSESSED.

7. Citation No. 3648440 is AFFIRMED and a civil penalty of \$10 is ASSESSED.

8. Citation No. 3647277 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

9. Citation No. 3648349 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

10. Citation No. 3647278 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

11. Citation No. 3648350 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

John J. Morris  
Administrative Law Judge

Footnotes start here:-

1. Section 56.6020 Magazine Requirements.  
Magazines shall be--  
(e) Electronically bonded and grounded if constructed of metal;
2. Section 56.6020 Magazine requirements.  
Magazines shall be--  
(g) Provided with adequate and effectively screened openings near the floor and ceiling;
3. Section 56.6020(i). Magazine requirements.  
Magazines shall be--  
(i) Posted with suitable danger signs so located that a bullet passing through the face of a sign will not strike the magazine;
4. Section 56.6005. Areas around storage facilities.  
Areas surrounding magazines and facilities for storage of blasting agents shall be kept clear of rubbish, brush, dry grass, or trees (other than live trees 10 or more feet tall), for a distance not less than 25 feet in all directions, and other unnecessary combustible materials for a distance of not less than 50 feet.