

INTERIOR BOARD OF LAND APPEALS

Marion T. Cross, Jr.

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MARION T. CROSS, JR.

IBLA 94-285

Decided January 29, 1996

Appeal from a decision of the Director, Knoxville Field Office, Office of Surface Mining Reclamation and Enforcement, revoking Federal Blaster Certification. Permit No. TN-004.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Generally

OSM properly revoked a blaster certification under 30 CFR 850.15(b) and 30 CFR 955.15(a) after determining that the blaster failed to comply with an approved blasting plan and accepted safety procedures in setting off a blast that resulted in the death of a passenger in a car passing by the blast site.

APPEARANCES: Michael Hatmaker, Esq., Jacksboro, Tennessee, for appellant; Margaret H. Poindexter, Esq., Office of the Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Marion T. Cross, Jr., has appealed from a November 24, 1993, decision of the Director, Knoxville Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), revoking his Federal Blaster Certification, effective June 16, 1993. Cross was employed as the certified blaster for Sugar Ridge Coal Company's Permit No. TN-004 in Campbell County, Tennessee, lying adjacent to the northbound lane of Interstate 75. The mine plan called for removal of overburden by fragmentation with explosives, followed by movement of the blasted material with trucks and heavy equipment. The permit boundary was the same as the eastern boundary of the interstate right-of-way. Because of the mine's proximity to the interstate, the permit contained a special blasting plan that was required to be implemented whenever the company was blasting within 150 feet of the interstate right-of-way.

On June 4, 1993, Cross fired a shot that projected flyrock over 300 feet onto the interstate. Debris was hurled into a passing car in the northbound lane and a passenger in that car was fatally injured. Appellant had not implemented the special provisions of the blasting plan because he estimated that the blast was not within 150 feet of the right-of-way. OSM investigated the blast, issued a cessation order to Sugar Ridge, and on June 16, 1993, gave notice to Cross of the immediate suspension of his blaster certification under 30 CFR 955.17(a)(2) because he was the blaster in charge on June 4. An informal hearing was held on September 8, 1993, pursuant to 30 CFR 850.15(b), and on November 24, 1993, OSM issued the decision at issue, revoking Cross' certification effective June 16, 1993.

Cross does not dispute the facts of this matter. He admits that several provisions of the general blasting plan were violated, including an increase in hole size without required prior OSM approval, alteration of the burden and spacing pattern, and inadequate stemming (placement of inert material in the drill hole above the explosive, so as to confine the explosion during detonation). He also admits that part of his duty as certified blaster was to ensure each hole was adequately drilled and stemmed and that at the time of the blast he knew they were not (Statement of Reasons (SOR) at 3). Cross testified he did not have the final say on drill pattern but that he was responsible for loading the holes. He also admitted that he failed to comply with special provisions for blasting within 150 feet of the interstate because he incorrectly estimated the distance involved. These special provisions included a requirement the drill holes be decked with a double delay. It was also required that the blast be directed away from the interstate, with the shot to be set off from a location adjacent to the interstate while observing traffic, and after waiting for a seven second delay in the traffic pattern before blasting.

Despite these admissions, Cross argues that indefinite revocation of his blasting certification is too harsh a punishment in light of his otherwise spotless record. He contends that revocation is an extreme penalty that should be reserved for cases of criminal or deliberate conduct, whereas reckless or negligent conduct should be punished with suspension. He asserts that the hearing officer did not find his conduct to be deliberate or willful. Cross states his actions were based on a miscalculation of the distance from the blasting site and the interstate right-of-way and that he did not deliberately disregard the blasting plan. Therefore, he argues, his conduct should be considered to be negligent or reckless and punished with a suspension for a definite time; moreover, he asserts, his mistakes do not indicate an inability to make proper decisions in the future.

[1] Blasting must be conducted to prevent injury to persons as well as damage to public or private property outside the permit; this is done

largely through the control of airblast, flyrock, and ground vibration. 30 CFR 816.67. All blasting operations must be conducted under the direction of a certified blaster. 30 CFR 816.61(c).

The regulations list the general requirements for blaster certification, including that the blaster "[b]e competent, possess practical knowl-edge of blasting techniques, understand the hazards involved in the use of explosives, and exhibit a pattern of conduct consistent with the acceptance of responsibility for blasting operations." 30 CFR 955.11(d). A blaster certification may be suspended or revoked after written notice and opportunity for hearing for any reason specified in 30 CFR 850.15(b), including noncompliance with any order of the regulatory authority. The nature and duration of a suspension, revocation, or other action is to be commensurate with the circumstances of each individual case. 30 CFR 955.17(a).

The hearing officer found that the blasting accident was "the consequence of two independent, yet coincident, actions. First, the flyrock landing on the highway, and second the vehicle traveling on the highway at the same time. If either action had not occurred the fatality would not have happened" (Hearing Officer's Report (Report) at 4). Cross had an opportunity to control both elements found to be the cause of the fatal accident. Had he followed the approved blasting plan, flyrock would have been significantly reduced, if not eliminated. The general blasting plan required 10 feet of stemming into solid material but Cross admits he failed to comply with that requirement (SOR at 3). He also testified that the drillers did not alert him to the presence of soft clay material in the holes they drilled and that if he had known about the clay he would have loaded the shot differently (Transcript (Tr.) at 13). Nonetheless, the regulation specifically states that "[b]lasters shall not delegate their responsibility to any individual who is not a certified blaster." 30 CFR 850.15(e)(3). It was up to Cross to inquire about the presence of unusually soft material and load the shot accordingly.

It was also Cross' responsibility to determine whether the special provisions of the blasting plan should be implemented. He did not implement those provisions because he visually estimated the distance to the interstate at more than 150 feet rather than making an exact measurement. The record shows that 22 of the 28 holes were within 150 feet of the interstate, the closest being 70 feet from the right-of-way (Report at 2). If Cross had implemented the special provisions and monitored the traffic flow, waiting for a seven second gap as required by the special provisions, the victim's car would not have been struck, even if there had been flyrock from the blast.

By failing to follow the provisions of the approved blasting plan and prudent blasting practice, Cross acted contrary to the mandate of his Federal blasting certificate. He disregarded the requirements of the Federal permit. Those requirements were designed to protect the traveling public from harm. Such disregard constitutes a violation of applicable laws and

regulations and provides an adequate basis for revocation of his permit. 30 CFR 850.15(b).

Cross argues that the hearing officer did not find his conduct to be deliberate or willful; such a finding, however, is not necessary to revoke a blaster certification. The regulation states OSM "may, and upon a finding of willful conduct, shall suspend or revoke the certification of a blaster \* \* \* [for] noncompliance with any order of the regulatory authority." 30 CFR 850.15(b). Thus, a finding of willful conduct requires action, but the lack of such a finding does not prohibit suspension or revocation of a certificate. It leaves the decision to the discretion of the regulatory authority whether to suspend or revoke a certificate for failure to comply with an order. Failure to comply with the blasting plan is noncompliance with such an order.

Cross also alleges that Sugar Ridge placed him in a work environment that prevented him from ensuring full compliance with the blasting plan. This argument ignores the responsibilities placed upon him as a certified blaster. As the certified blaster on the permit, it was his job to ensure compliance with the plan. Any interference with his ability to perform his duty as a blaster should have been brought to the attention of his employer or OSM. Further, the record shows that he testified that he did not think he was rushed on the shot, but that he was allowed the time and opportunity to properly supervise the blast (Tr. at 8). That testimony contradicts his allegation on appeal that his employer frustrated his compliance with the blasting plan.

The regulations require that OSM make the nature and duration of a suspension or revocation commensurate with the cause of the action. 30 CFR 955.17(a)(3). Appellant admits he failed to follow the stemming requirements of the general plan as well as the special blasting provisions and that, as a consequence, a person died. Revocation of his certification is not too extreme a punishment under the circumstances of this case.

Cross contends that an indefinite revocation eliminates his primary means of earning a living and jeopardizes his economic livelihood. He argues that this Board should follow the policy of the National Transportation Safety Board (NTSB) and reserve revocation for cases of deliberate and criminal conduct and for those individuals who no longer possess the qualifications necessary of a certified blaster. He cites NTSB decisions where pilot licenses were suspended but not revoked even where life was endangered when there had been no previous violations. One of the conclusions of the hearing officer, however, was that there was "ample reason to lack confidence in Mr. Cross' ability to make proper judgments and carry out safe blasting" (Report at 9). He concluded, based on the record before him, that Cross did not possess one of the qualifications of a certified

blaster, that of someone who could accept the responsibility of the position.

The regulations governing the examination of candidates for blaster certification include not only technical aspects of blasting but also whether the person is responsible. To ensure that a candidate for blaster certification is qualified, OSM verifies that there is sufficient practical field experience to qualify the candidate to "accept the responsibility for blasting operations" and that the person "has exhibited a pattern of conduct consistent with the acceptance of responsibility for blasting operations." 30 CFR 850.14(a)(2). As explained in the preamble to the regulations, OSM changed the minimum age of 18 in the proposed regulations to 21 in the final regulations because it was concluded that "21 years is the minimum age at which a person reasonably might be expected to have sufficient training, knowledge, experience and competence to accept responsibility for conducting blasting operations." 51 FR 19448 (May 20, 1986). OSM's blasting certification regulations make individual responsibility an essential qualification for blaster certification in order to achieve safe operation and protect the public. The record shows that Cross failed to accept that responsibility. There is sufficient evidence to support OSM's determination that he was lacking an essential qualification to be a certified blaster and revocation of his certification was proper.

Cross compares his situation to that of a chauffeur in Tennessee. He argues that, in Tennessee, revocation of a chauffeur's license is mandatory upon a conviction for manslaughter or vehicular homicide but that the period of revocation extends only for the time of imprisonment. Once the chauffeur is released upon parole his license can reissue upon passage of a test, petition of the parole officer, and approval of the Commissioner of Safety. The chauffeur can then resume his primary occupation. Citing Tenn. Code Ann. § 55-50-501(a)(1) (1988). In all other cases where the chauffeur's license is revoked for the first time, the individual can apply for a new license six months after the date of revocation. Citing Tenn. Code Ann. § 55-50-502(e)(4) (1988). Cross argues he should not be treated more harshly than drivers convicted of a felony and should receive a suspension for a definite period.

However, like the chauffeur and his driver's license, Cross may reapply for a blaster certification. The regulation states that "OSM shall reissue an OSM blaster certificate to an applicant whose certificate was revoked" if certain conditions are met, including showing that the cause of the revocation has been corrected. 30 CFR 955.17(e)(2). Revocation, therefore, is not necessarily a permanent loss of certification. Cross has suggested that this Board order certain classes and after the successful completion of those classes his certification should be reinstated. It is, however, the responsibility of OSM to determine what classes or other action Cross might take in order to qualify for reissuance of his blaster certification in accordance with the regulations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Franklin D. Amess  
Administrative Judge

I concur.

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Bruce R. Harris  
Deputy Chief Administrative Judge