

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

DEC 21 2009

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF A NOTICE OF VIOLATION)
ISSUED TO WESCO)
P.O. Box 40, Wright, Wyoming 82732)
NOV NO. 100559, Docket #4494-09)

DOCKET NO. 09-4601

BRIEF OF PETITIONER

Petitioner WESCO, through its attorney Loyd Smith of Murane & Bostwick, LLC, submits the following brief in support of its appeal to the Environmental Quality Council (“EQC”) of the Department of Environmental Quality Director’s Findings of Fact, Conclusions of Law and Decision issued in the above-captioned matter.

I. INTRODUCTION

Petitioner appeals the Findings of Fact, Conclusions of Law and Decision issued in this matter on August 18, 2009. The Director’s Decision affirmed a Notice of Violation issued by the Wyoming Department of Environmental Quality (“DEQ”) to WESCO on May 20, 2009, and imposed a penalty of \$110,000.00. Petitioner appeals on the basis that the penalty imposed by the Director exceeds the statutory maximum penalty.

II. FACTUAL BACKGROUND

The DEQ, through its attorney, filed the DEQ Administrative Record with the Environmental Quality Council on November 30, 2009. The DEQ paginated the Administrative Record from pages 00001 to 00155. Petitioner will refer to documents in the record accordingly. As noted in the Scheduling Order issued in this matter, the parties stipulate to the underlying facts and the appeal involves only a question of law. Accordingly, the following “Findings of Fact” from the Director’s Finding of Fact, Conclusions of Law and Decision and are not disputed by Petitioner:

1. Mr. Jerry Hugen's blasting certification expired on January 6, 2009. Chapter 6, Section 6 (c)(i) requires that, "All blasting operations be conducted under the direction of a certified blaster..." A number of blasts were conducted by WESCO under Mr. Hugen's direction after the expiration of his certification.

2. Sometime between February 3 and February 12, 2009; Mr. Shawn Seebaum, Mr. Hugen's supervisor, became aware of this matter and called Mr. Doug Emme on February 12, 2009. Mr. Seebaum said that no blasts had been directed by Mr. Hugen during the period of license expiration. Mr. Doug Emme offered that a class in Sheridan in February was available to allow Mr. Hugen to become recertified.

3. A memo written on February 26, 2009 by Mr. Shawn Seebaum stated that Mr. Joe Strobbe of WESCO had conducted training for, among others, Mr. Shawn Seebaum and Mr. Jerry Hugen. This letter was signed by Mr. Seebaum and Mr. Strobbe. LQD recertified those who were listed on the memo.¹

4. During a mine inspection on April 7 and 8, 2009, another LQD employee conducted a routine audit of blasting records for the North Antelope Rochelle Mine. It was discovered that Mr. Hugen, the blaster in charge, signed six blasts in January and early February, 2009 during the time period when he was not certified.

5. On April 9, 2009 Mr. Strobbe and Mr. Seebaum visited with Mr. Emme's [sic] about Mr. Hugen's certification. At that meeting, they requested that we not write an NOV. Mr. Emme informed them that when they spoke with him in February they assured him that no blasts had been certified by Mr. Hugen.

6. Sometime during the period from April 21 to 22, 2009 Mr. Emme overheard that WESCO had "dummied up" a training class.

7. In early May, 2009 Mr. Emme looked at the guard shack log and discovered that individuals who were supposed to have been at the training noted in the February 26, 2009 memo were actually at the mine site on those days. Mr. Emme later interviewed several people whom WESCO claimed had been trained. He was told that there was no class.

8. On May 20, 2009 the NOV was issued to WESCO. Additionally on this day, LQD revoked Wyoming Blaster Certificates for Shawn Seebaum, Joe Strobbe, Marty Davies and Jerry Hugen and informed

¹ The February 26, 2009 memo constitutes the misrepresentation at issue. The memo is found in the Administrative Record at p. 0048.

WESCO that LQD would not [sic] longer accept training classes by WESCO as a basis for certification.

A copy of the Director's Findings of Fact, Conclusions of Law and Decision located in the Administrative Record at pp. 0050-0054.

The Notice of Violation (NOV # 100559) issued to WESCO for a blasting certification violation by the DEQ on May 20, 2009 identifies, on page three, the nature of the violation as follows:

Nature of the Violation

WESCO is an operator under Wyoming Statute 35-11-103 (e)(ix).

On May 4, 2009 a Complaint was received by the LQD alleging a WESCO blasting recertification training event had not occurred.

LQD conducted a complaint investigation between May 4 and May 20, 2009 and found: WESCO represented to the LQD that a WESCO three day 24-hour blaster recertification training class was held February 24-26, 2009 in the WESCO Office at Wright. WESCO provided a roster of class attendees and the instructor to the LQD. The class instructor did not teach the class and the list of class attendees did not attend the class.

As a result of the class, two WESCO employees, Mr. Jerry Hugen and Mr. Marty Davies, obtained recertification based upon training credits in a WESCO class that did not occur.

The Notice of Violation, again on page three, identifies the regulation violated:

Provision(s) of the LQD coal R & R, Act or Permit Violated

LQD R&R Regulations Chapter 6, Section 6 (h)(i)(D) requires blasting certification to be revoked or suspended upon a finding that false information or misrepresentation was used to obtain certification.

A copy of the NOV is found in the Administrative Record at pp. 0040-0043. Thus, the violation identified in the NOV was a misrepresentation by WESCO that a recertification class had occurred, when the class had in fact not occurred.

The NOV also identified certain required remedial actions, including that the blasting certificates for Mr. Huguen and Mr. Davies be suspended and that both acquire Land Quality Division (“LQD”) approved training in order to renew their blasting certificates and that the blasting certificates for Mr. Seebaum and Mr. Joe Strubbe be revoked. As a further term of the remedial actions, the NOV stated that LQD would no longer accept certification credit for WESCO blaster training. The NOV imposed time deadlines for certain abatement actions by WESCO to address the required remedial actions.

On July 13, 2009, DEQ Director John Corra held an Informal Conference with representatives of WESCO and DEQ with respect to the NOV and the proposed penalty of \$120,000.00. Subsequent to the Informal Conference, on August 18, 2009, the Director issued his Findings of Fact, Conclusions of Law and Decision. In his decision, the Director reduced the penalty from \$120,000.00 to \$110,000.00. In response to WESCO’s question as to the basis for the penalty calculation, DEQ Director John Corra referenced the factors found in the LQD Rules and Regulations at Chapter 16, Section 3 (a). That section provides as follows:

Section 3. Civil Penalties.

(a) Amount – In determining the amount of the penalty, if any, to be assessed, consideration shall be given to:

(i) The operator’s history of previous violations at the particular surface coal mining operation, regardless of whether any led to a civil penalty assessment. Special consideration shall be given to violations contained in or leading to a cessation order. However, a violation shall not be considered if the notice or order containing the violation:

(A) Is or may become the subject of pending administrative or judicial review;

or

(B) Has been vacated.

(ii) The seriousness of the violation based on the likelihood and extent of the potential or actual impact on the public or environment, both within and outside the permit or exploration area.

(iii) The degree of fault of the operator in causing or failing to correct the violation, either through act or omission. Such degree shall range from inadvertent action causing an event which was unavoidable by the exercise of reasonable care to reckless, knowing or intentional conduct.

(iv) The operator's demonstrated good faith, by considering whether he took extraordinary measures to abate the violation in the shortest possible time, or merely abated the violation within the time given for abatement. Consideration shall also be given to whether the operator gained any economic benefit as a result of a failure to comply.

(v) Inability to comply, unless caused by lack of diligence.

(vi) Any information submitted to the Director by the operator within 15 days of the service of the notice or order relating to the facts surrounding the violation or the amount of penalty.

The Director reviewed the above factors and applied them to assess a penalty of \$110,000. He used factor (ii) to assess a penalty of \$90,000 based on his view of the seriousness of the violation. The director justified the \$90,000 on the basis of the number of days of training alleged to have occurred and the number of employees alleged to have attended the training. This analysis is flawed, however, because the NOV is premised on a misrepresentation that training occurred, and not on the particulars or the consequences of the misrepresentation. The misrepresentation occurred on one occasion, even though the misrepresentation may include events that occurred, or did not occur, on more than one day. The Director also utilized factor (iii) "degree of fault" to increase the penalty another \$10,000 and used factor (v) "inability to comply" to add another \$10,000 to the penalty. *See Decision*, Administrative Record, pp. 0053-0054. Finally, in further justification of the penalty, the Director stated that WESCO conducted 20 blasts from January 2009 until the NOV was issued on May 20, 2009 and he observed that the penalty, under this analysis, amounts to \$5,500 per occurrence. *Id.* at 0053-0054. This analysis

again is flawed. DEQ did not issue an NOV to WESCO for conducting blasts without properly certified blasters, which would be a necessary predicate to impose a penalty for so doing. In fact, the DEQ did issue such an NOV to Peabody Coal Company, but not to WESCO. The NOV issued to Peabody is located in the Administrative Record at pp. 0072-0075. The Director cannot assess a penalty against WESCO where the DEQ did not issue an NOV to WESCO addressing such alleged conduct.

As is apparent, the Director's Decision utilized the factors found at Chapter 16, Section 3 as separate violations, i.e. multipliers, rather than as factors to be considered in assessing the penalty within the statutory maximum of \$10,000 allowed for this single violation.

III. ARGUMENT: THE PENALTY IMPOSED AGAINST WESCO EXCEEDS THE STATUTORY MAXIMUM

The applicable statute with respect to the penalty is Wyoming Statute § 35-11-902 (b), which provides, in pertinent part:

§ 35-11-902

(b) Any person who violates, or any director, officer or agent of a corporate permittee who willfully and knowingly authorizes, orders or carries out the violation of any provision of article 4 of this act for surface coal mining operations, or any rule, regulation, standard, license, variance or permit issued thereunder, or who violates any determination or order of the council pursuant to article 4 of this act for surface coal mining operations is subject to either a penalty not to exceed ten thousand dollars (\$10,000.00) for each day during which a violation continues, or, for multiple violations, a penalty not to exceed five thousand dollars (\$5,000.00) for each violation for each day during which a violation continues, a temporary or permanent injunction, or both a penalty and an injunction.

The violation of article 4, as identified in the NOV, occurred once. The regulatory provision violated by WESCO identified in the NOV is LQD regulation Chapter 6, Section 6 (h)(i)(D) which provides, in pertinent part, that a "blasting certification will be revoked or

suspended upon finding of: providing false information or a misrepresentation to obtain certification.” The misrepresentation identified in the NOV was that:

WESCO represented to the LQD that a WESCO three day 24-hour blaster recertification training class was held February 24-26, 2009 in the WESCO Office at Wright. WESCO provided a roster of class attendees and the instructor to the LQD. The class instructor did not teach the class and the listed class attendees did not attend the class.

(NOV, Administrative Record, p. 0043).

Thus, this being a single violation of the regulation, it gives rise to the maximum penalty of \$10,000.00 under Wyoming Statute 35-11-902(b). The factors identified in the regulations at Chapter 16, Section 3 (a) provide guidance to the DEQ in determining the penalty to be applied within the range established by Wyoming Statute § 35-11-902. Those factors do not operate as a multiplier or a method of converting a single violation into multiple violations; otherwise the regulations would render the statute meaningless. Courts, in interpreting unambiguous statutes, give effect to the plain and ordinary meaning of the words. *Stewart Title Guarantee Co. v. Tilden*, 110 P.3d 865 (Wyo. 2005). The plain wording of §35-11-902(b) sets the maximum penalty at \$10,000 for a single violation.

In this case, however, the DEQ, through its Director, applied the factors as a multiplier to justify compounding the penalty for a single violation to \$110,000.00. The application by the Director of the guiding factors in the regulations as a multiplier for the maximum penalty is an error as a matter of law.

IV. ADDITIONAL COMMENTS

Not only is the violation at issue a single event allowing a penalty limited to \$10,000 as a matter of law, it is an aberration by employees of a company with an otherwise excellent

reputation with the DEQ and in the industry. At the Informal Conference, Doug Emme of DEQ stated:

I would not dispute what Tom or Joe said. I think the WESCO people as a general rule are very well trained, they are well prepared.

I audited a class that Joe put on last week because they wanted to get their training privileges back. It was a very good class. He does have some good tests that he gives those folks. He did two 10-hour days and a 5-hour day. Good class. As good a class as I've been to, and I've been through about everybody's in the business that does training.

I sat down Friday morning and wrote a memo to Don, which I'm not sure he's gotten yet, recommending that we reinstate WESCO's training privileges.

.....

So I - - I will not dispute that the WESCO training is very good training. It - - and I do recommend that we reinstate their training.

(Transcript, Informal Conference at pp. 44-45, found in Administrative Record at pp. 0132-0133).

Among the information provided by WESCO President Tom Fredrick at the Informal Conference to which Doug Emme indicated he agreed in the above passage was that WESCO's people are very well trained, the best in Wyoming, and that WESCO never puts anyone in jeopardy in its blasting operations. (Transcript, pp. 24-26; Administrative Record at pp. 0112-0114). In addition, Mr. Fredrick informed DEQ that WESCO had terminated Shawn Seebaum, the author of the memo misrepresenting that training had occurred. (Transcript, p. 20, Administrative Record, p. 0108).

Further, on July 14, 2009 Doug Emme, the blasting engineer for DEQ, authored a memorandum to John Corra, the DEQ Director and Don McKensie, the LQD administrator, in which he cited the various abatement actions taken by WESCO and stated that the abatement

actions taken by WESCO had fulfilled the remedial actions required by the NOV. (A copy of this memorandum is located in the Administrative Record at 0057-0058).

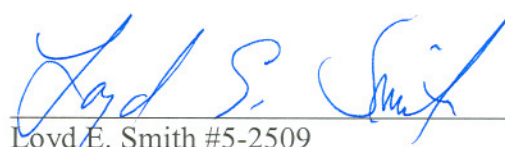
CONCLUSION

The memo authored by WESCO employee Sean Seebaum and of February 26, 2009 reporting to DEQ that WESCO had conducted a training class on February 24 -26 was a misrepresentation and cannot be justified. The misrepresentation, however, constitutes one single event, a single violation of DEQ regulations. Thus, this violation is subject to the limitation under Section 35-11-902 of a maximum penalty of \$10,000.00. The action by the Director in applying the regulatory factors as multipliers is a misapplication of the law, and enhances the penalty beyond that allowed by the Statute. For these reasons, WESCO appeals the penalty and requests that the EQC reduce the penalty to the statutory maximum of \$10,000.00.

DATED this 21 day of December, 2009.

WESCO, Petitioner

By:



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CERTIFICATE OF SERVICE

This is to certify that on this 21 day of December, 2009, a true and correct copy of the foregoing **BRIEF OF PETITIONER** was served by placing a copy of the same in the U.S. Mail addressed as follows:

John S. Burbridge
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, Wyoming 82002

A handwritten signature in blue ink, appearing to read "John S. Burbridge", is written over a horizontal line.