

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 6, 2018

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

v.

KNIGHT HAWK COAL, LLC,  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2016-0489  
A.C. No. 11-03147-419437

Docket No. LAKE 2017-0024  
A.C. No. 11-03147-421267

Mine: Prairie Eagle Underground

**DECISION AND ORDER**

Appearances: Travis W. Gosselin, Esq., U.S. Department of Labor, Two Pershing Square Building, 2300 Main Street, Suite 1020, Kansas City, Missouri, for the Petitioner

Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, 300 Kanawha Boulevard East, Post Office Box 273, Charleston, West Virginia, for the Respondent

Before: Judge Rae

I. **STATEMENT OF THE CASE**

These cases are before me upon two petitions for assessment of civil penalties filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). At issue are two citations issued to mine operator Knight Hawk Coal, LLC (“Knight Hawk”) under section 104(d)(1) and 104(a) of the Mine Act: Citation No. 9039437 in Docket No. LAKE 2016-0489 and Citation No. 9039438 in Docket No. LAKE 2017-0024.

A hearing was held in St. Louis, Missouri at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I vacate both citations for the reasons set forth below.

## II. JOINT STIPULATIONS

The parties have entered into the following stipulations:

1. Knight Hawk Coal LLC is an “operator” as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d), at the coal mine at which the citations at issue in these proceedings were issued.
2. Prairie Eagle Underground mine is operated by the Respondent in this case, Knight Hawk Coal LLC.
3. Respondent’s Prairie Eagle Underground mine is located in Perry County, Illinois.
4. Prairie Eagle Underground mine is subject to the jurisdiction of the Mine Act.
5. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
6. The individual whose name appears in Block 22 of the citations at issue in these proceedings was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
7. A duly authorized representative of the Secretary served the subject citations and terminations of the citations upon the agent of the Respondent at the dates and place stated therein as required by the Mine Act, and the citations and terminations may be admitted into evidence to establish their issuance.
8. The total proposed penalties for the citations at issue in these proceedings will not affect Respondent’s ability to continue in business.
9. The citations contained in Exhibit A attached to the Petitions for Assessment of Penalty for these dockets are authentic copies of the citations at issue in these proceedings with all appropriate modifications and terminations, if any.

## III. BACKGROUND

These proceedings arise out of a May 9, 2016, incident in which miner Jonathan Wink was injured while working as a continuous miner operator at Prairie Eagle Underground coal mine operated by Knight Hawk Coal in Perry County, Illinois. Tr. 25.

On May 9, 2016, at about 11:10 p.m. Jonathan Wink<sup>1</sup>, a miner at Knight Hawk, was cutting a crosscut looking outby for a shuttle car travelling to pick up the next load of material. Tr. 255, 279. While facing outby, a rock fell from the roof, hit him from behind, and at least one

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<sup>1</sup> Jonathan Wink began working in the coal industry in 2009 for Willow Lake roof bolting, shoveling, and “a little bit of everything.” Tr. 253. He worked there for almost two years; then went to Prairie State for approximately two and a half years as a continuous miner operator and roof bolter. Tr. 253. He then worked at White Oak as a continuous miner operator for approximately a year. Tr. 254. In 2014, he began working for Knight Hawk in many roles including as a continuous miner operator, a roof bolter, and car operator. Tr. 254-55.

of Wink's legs was pinned under the rock. Tr. 256. It is unclear whether the rock bounced before hitting Wink. Tr. 40. The rock was triangular shaped and was 8.5' long, 4'1" wide at the larger end, and 16" wide at the narrow end of the rock. Ex. R-1, 6<sup>2</sup>. The rock was approximately 16" thick at the wide end and 9" thick at the narrow end. Ex. R-1. Wink was lying on his side when the smaller end of the rock fell on him and his leg became stuck under the rock from the knee down, and possibly up to the hip. Tr. 257-58.

Wink began yelling for help. Tr. 256-57. Kalin Rains, a car driver, heard Wink yell and came to try and free Wink from under the rock. Tr. 42-43. Rains was unable to lift the rock off Wink alone, so he called for help. Tr. 42-43. Miners Justin Raben, Dustin Bush, and Zack Guill arrived to help. Tr. 43, 247; R-1. Rains, Bush, and Raben then lifted the rock off Wink, while Guill pulled Wink out from beneath. Tr.43, R-1. Wink began complaining of right leg and hip pain, and his work belt was removed. Tr. 258.

Soon after the accident, Dave Stritzel<sup>3</sup>, the section supervisor during that shift, saw Eric Heinz running past him for EMT supplies and was told about a rock falling on Wink. Tr. 204-05. Stritzel called the warehouse for an ambulance, and Darrel McCombs<sup>4</sup>, the shift foreman, asked what happened. Tr. 206-07. Stritzel told McCombs that Wink was injured by a rock fall and that he would be packaged and sent out of the mine. Tr. 206-07. Stritzel then traveled to the accident site where Wink was already pulled out from under the rock. Tr. 205. Stritzel asked Wink how he was, and Wink told Stritzel about his leg and hip pain. Tr. 205. Stritzel observed that Wink was conscious and talking coherently. Tr. 206. Wink was then loaded onto a board, and

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<sup>2</sup> Respondents exhibits will be cited to as Ex. R- followed by its corresponding number and the Secretary's exhibits will be cited to as Ex. S- followed by its corresponding number.

<sup>3</sup> Dave Stritzel was the section supervisor at Knight Hawk Coal. Tr. 202. He began working in the mining industry in 1991. Tr. 202. Stritzel had 27 years coal mining experience. Tr. 202. He worked as a surveyor for Zigler and Old Ben until 1997; then worked various positions at American Coal, including as an equipment operator. Tr. 202-03. In 2004, Stritzel became a supervisor and a shift manager from 2005-2008. Tr. 203. He began working at Knight Hawk in 2008 where he became the section supervisor. Tr. 203. He oversaw the safety and production of daily activities of the section. Tr. 204.

<sup>4</sup> Darrell McCombs was the shift foreman for Knight Hawk Coal. Tr. 270. He began working in coal mines in 1976. Tr. 270. McCombs worked at Freeman United Coal for 8 ½ years; then he worked for three years at Arch surface and underground mines. Tr. 271. Following that, McCombs took eight years off from mining, cumulatively working approximately 34 years in mining. Tr. 270. After returning to mining, McCombs worked as a leadman at Peabody Coal for two to three years. Tr. 271.

McCombs began working at Knight Hawk in Marcy 2009. Tr. 271. At Knight Hawk, he worked as a continuous miner, and then quickly became a shift manager. Tr. 272. As the shift manager, he ran the entire shift. Tr. 272. Approximately 80 people worked on a shift. Tr. 272. He was the responsible person on a shift. Tr. 273. McCombs was responsible for reporting 15-minut §50.10 accidents to MSHA. Tr. 274

packaged to be removed from the mine. Tr. 206-07.

On the way out of the mine, Jonathan Beckman, a miner and EMT-B,<sup>5</sup> met Wink in the dinner hole to assess Wink. Tr. 207. Beckman spoke with Wink and determined that Wink had a broken leg and found no signs of internal bleeding. Tr.228-29. Beckman cut off Wink's boot and his pant leg and performed an assessment of Wink's physical and mental status. He splinted the miner's leg and accompanied him out of the mine to the waiting ambulance. Tr. 228-31.

Once Wink was transported out of the mine, his care and transportation were taken over by the ambulance crew. Tr. 263. He was brought to a smaller hospital where he waited approximately one hour before being transferred to a larger hospital where a rod was surgically placed in his leg. Tr. 263. Wink was diagnosed with a broken fibula, tibia and three fractures in his hip. Tr. 153, 263. No treatment was given for Wink's pelvic fractures, and no internal bleeding was diagnosed. Tr. 263-65. After his leg surgery, Wink was transferred to another hospital for rehabilitation and began using his leg the following day. Tr. 264-65. He reported back to work in December 2016. Tr.265.

Management at Knight Hawk did not notify MSHA of Wink's accident until four days later when, on May 13, 2016, Corporate Safety Director Bill Jankousky submitted a 7000-1 Form to MSHA. Tr. 190-91; R-9. He also sent in forms he prepared describing a timeline of the accident and talking points for a conference with a CLR concerning the accident. Tr. 190-91; Ex. R-5, 9.

Jeffery Williams, an MSHA Roof Control Supervisor, was assigned to investigate the accident on Monday May 16, 2013. Tr. 16, 21. Williams interviewed the miners who came to Wink's rescue as well as mine supervisors. Williams took photographs of what he believed to be the accident site, where Stritzel painted a shadow of the area where the rock fell. Tr. 30. The rock, car, and Wink were no longer present by the time Williams investigated the accident scene. Tr. 30-31. The roof was bolted and the area was rock dusted at that time. Tr. 31; S-3. However, Williams was able to obtain photographs of the accident scene from Illinois Mines and Minerals accident investigation. Tr. 36. Williams interviewed Wink by telephone several days later and learned that that a rod was surgically put in his leg from knee to ankle and his pelvis had three fractures, which were left to heal on their own. Tr. 66-67.

Upon completion of his investigation, Williams issued two citations to Knight Hawk on May 31, 2016 which gave rise to this litigation. He issued Citation No. 9039437 for a violation of 30 C.F.R. § 50.10(b) by failing to notify MSHA of the accident within 15 minutes of the time management knew or should have known that Wink had sustained injuries having a reasonable potential to cause death. Citation No. 9039438 was issued for a violation of 30 C.F.R. § 50.12,

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<sup>5</sup> Jonathan Beckman was a repairman and an EMT at Knight Hawk. Tr. 220. Beckman began working for Knight Hawk in May 2005 on the surface, and then started working underground in 2008. Tr. 220. He worked as a roof bolter, ram car operator, and then became a repairman. Tr. 221. Beckman maintained face papers, mine examiners papers, mine managers papers, and electrical cards. Tr. 221.

altering the scene of an accident without permission granted by MSHA upon completion of its investigation.

#### IV. THE VIOLATION AND ADDITIONAL FINDINGS OF FACT

A. Citation No. 9039437 (Docket No. LAKE 2016-489) alleges:

The mine operator failed to notify MSHA immediately at once without delay and within 15 minutes at the toll free number once the operator knew that an accident occurred involving an injury of an individual at the mine which had a reasonable potential to cause death. On May 9, 2016 at 2310 hrs. a serious accident occurred which resulted in injuries to a continuous miner operator that had a reasonable potential to cause death. The continuous miner operator was struck by a piece of roof material measuring 8.5 feet in length, up to 4 feet in width and as much as 20 inches thick and weighing in excess of 4,000 lbs. The continuous miner operator was entrapped between the large piece of rock and the mine floor from his waist to his feet. The injured miner was complaining of pain in his legs and pelvic area once extricated. The size and weight of the rock required 4 miners in order to extricate the injured miner. Mine management has engaged in aggravated conduct constituting more than ordinary negligence in that they knew the miner was seriously injured and knew the reporting requirement yet failed to notify MSHA for 4 days. This is an unwarrantable failure to comply with a mandatory standard. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1.

The standard alleged to have been violation is 30 C.F.R. §50.10(b), which provides: “The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-553, once the operator knows or should know that an accident has occurred involving... [a]n injury of an individual at the mine which has a reasonable potential to cause death.”

##### B. The Nature of the Accident

Williams interviewed mine management at the start of his investigation on May 16, 2017. After speaking with mine management, Williams learned that Wink had sustained non-compound fractures to the tibia and fibula. Tr. 25-26. He then interviewed the miners who responded to the accident. Based upon his notes, Williams testified that Kalin Rains was closest to the accident and the first to respond. He heard Wink holler from the other side of the curtain and went to him. Tr. 28, Ex.S-2. Rains believed the rock hit the ground and then struck Wink. Reins tried to move the rock himself was not able to so he ran to the cross-section to signal the bolters for help. When Dustin Bush, Zack Gull and Justin Raben arrived they lifted the rock off of Wink and pulled him out. Wink was complaining of leg and hip pain. Rains stayed on the unit as Wink was carried away. According to Rains, there was no blood at the scene.

Williams made a sketch of the scene upon speaking with Rains which depicts Wink

under the small pointed end of the rock. Ex. S-2 pg. 25. This comports with the drawing and notations made by McCombs and the testimony of Dave Stritzel who assisted the State investigators in taking measurements and photos of the scene. Ex. R-1 and 3, Tr. 210-11. The photograph at R-3 clearly depicts the rock laying on top of the trailing cable outby the miner where Wink was located.

Dave Stritzel was the section foreman working at the time of the accident. Stritzel was informed by Eric Heinz that a rock had fallen on Wink and he was running to get EMT supplies. When Stritzel arrived on the scene, Wink had been removed from under the rock and was complaining of leg and hip pain. He was conscious and speaking. Stritzel went on to call McCombs to summons an ambulance. Tr. 204-206. Once loaded on a backboard, Wink was transported to the dinner hole where he was met by John Beckman, an EMT. Tr. 207. Stritzel then returned underground and took measurements of the rock and outlined in spray paint the area on the ceiling from which the rock fell. Tr. 210 -14, Ex. S-3. Stritzel provided the measurements to the Illinois Department of Natural Resources Office of Mines and Minerals for their investigation and taking of photographs of the scene, which were in turn, provided them to Williams. Tr. 85, 210-11. Ex. R-3 and 4.

There is some divergence in testimony as to exactly what part of Wink was pinned under the rock. Rains, the first responder, told Williams that the rock covered Wink from the knees down while others said it was from the waist down. Tr. 42, 92. It was established through witness testimony that Wink was lying on his side when the rock fell on him although it is not clear which side was to the ground. Stritzel told Williams that he was lying on his right side while Wink testified he wore his rescuer on his right side and did not fall with it underneath him because he was lying on his left side. Tr. 42, 258. In either case, it is clear that the small end of the rock landed on top of the trailing cable of the miner and Wink's lower extremities while he was positioned on his side, rather than lying flat with the full weight of the rock on top of him.

Taking the measurements given to him by McCombs and Stritzel, Williams calculated the weight of the rock and thereby determined that the injury was life threatening. He explained his calculations thusly:

I used the average width, the average thickness, and the average – well, I didn't do average length, the length was what it was, so the width was 4 foot 1 inches is what they said, so I took 49 inches by 16, divided it in half, converted it to feet, took the thickness, it was 20 by 9, so I took, I think, it was 14 and a half, converted that to feet, multiplied the feet times the length and to the cubic feet. The specific gravity of, of shale is anywhere from 2 – well, gray shale is 2.4 – is 2.8, black shale is 2.7 to 2.8, and limestone is 2.3 to 2.7. I took the lowest of 2.4 specific gravity and converted that, that's in grams per cubic centimeter, I converted that to pounds per cubic centimeter. I converted that to per cubic foot multiplying 2.4 by 62.4, which is the conversion factor, and then multiplied that by the cubic feet, and it came out to just over 4000 pounds or two-ton.

Tr. 74-75.

Williams went on to say that his estimation of the thickness of the rock was “not necessarily completely accurate” as he used the photograph of the roof area from which the rock fell to make that determination. Tr. 39. He further testified that the operator did not contest his calculations he wrote in the citation. However, he admitted on cross-examination that he wrote his citation at 3:30 am on May 31st in his office and did not bring it out to the mine on that date as indicated on the citation. Ex. S-1. It was presented to the operator at a later date by Inspector Burtis and Williams had no idea that the operator did complain to Burtis about the weight calculation. Tr. 101.

Williams also interviewed Dale Winter<sup>6</sup> and learned that McCombs had gathered the information regarding the accident and passed it along to him. Winter testified that he was familiar with the reporting requirements under section 50.10 for all types of injuries. Tr. 144-46. He stated that non-compound fractures – those that do not puncture the skin or bleed – are not 15 minute reportable injuries. Tr. 146. He confirmed that all Responsible Persons are trained on the requirements of the section. Tr. 150-51. They are also required to fill out a Patient Information Report whenever any medical assistance is given regardless of the level of injury. Tr. 144. After speaking with McCombs who informed him that Wink had broken his leg, was alert and conscious, had normal vital signs and was joking with other miners, Winter made the decision that it was not a reportable injury under section 50.10. Tr. 152. The following day, Winter received an update on Wink’s condition and was informed that Wink had been diagnosed with fractures to his leg for which surgery was required, and hairline fractures to the pelvis which did not require medical attention. Again, he determined that Wink’s injuries were not reportable as having a reasonable potential to cause death. Tr. 153-54.

Williams acknowledged that he is not a trained EMT and has no medical training. Tr. 99. He also acknowledged that he did not speak with EMT Beckman nor did he review Beckman’s Patient Information Report to determine what information the operator had at the scene of the accident. In fact, Williams only learned that Beckman was an EMT and had treated Wink at the scene of the accident when he sat in on Beckman’s deposition. Tr. 99, 126. He was also unaware that Beckman had communicated his medical findings to McCombs while Wink was being brought out of the mine. Tr. 128. Williams testified that, in fact, he felt Beckman’s examination results were not “relevant” because the mine does not have a CT scan or x-ray underground. Tr. 123-24. Williams did acknowledge, however, that a non-compound broken leg is not an immediately reportable injury nor is a fractured pelvis that requires no medical treatment as this incident proved to be. Tr. 130. He also admitted that screaming in pain is not an indication of the severity of an injury. Tr. 133. Yet, Williams concluded from the size of the rock, the height from which it fell, that Wink was screaming in pain, and the fact that the rock “crushed his hip, crushed his mid-section area...and fractured both bones in his leg” that there “was a very distinct possibility that he had internal injuries.” Tr. 72.

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<sup>6</sup> Dale Winter received a bachelor’s degree in Mine Engineering from the University of Missouri in 1984. Thereafter, he was employed in engineering positions until 2003 when he went to work for Knight Hawk Coal. He has been the Underground Mine Superintendent since 2006 responsible for overall operations underground, compliance with MSHA and State law, and long and short term planning, budgeting, acquisitions and personnel. Tr. 140-41.

### C. The Totality of the Circumstances

John Beckman testified that he was certified by the State of Illinois Public Health Department as an EMT. Tr. 221. Certification required 120 hours of classroom instruction and 120 hours of home assignments. Tr. 222. The training included “clinicals,” which were ten-hour observations that must be done in an emergency room or with an ambulance service, and EMT’s were required to pass a state certified test. Tr. 222.

Beckman became an EMT in December 2009 and received his EMT card in January 2010. Tr. 223-24. He completes 50 hours of continuing education every five years. Tr. 224. His certification as an EMT-B (EMT-Basic) is the second level of certification and differs from EMT-I (Intermediate) and EMT-P (paramedics) in that he is not authorized to administer IVs or certain other medications but is authorized to perform all other functions. He is also qualified to work on an ambulance crew or with a fire department crew. Tr. 224-25.

On the night of the accident, Beckman was informed by the face boss that a miner had just been hurt and he was told to go to Unit 2. When he arrived at the dinner hole he saw the lights from the mine car approaching so he waited there for Wink to be brought to him where the lighting was better and first aid supplies were nearby. Tr. 227. Beckman began his examination by speaking with Wink and noting his mental status. Wink appeared to be alert, responded verbally to questions and stated that his leg was hurting. Tr. 227-28. Beckman called for supplies to splint and stabilize Wink’s leg. He then cut Wink’s boot and pant leg off and noted that his leg was broken but there was no bleeding at the wound site and no blood pooling under the skin indicating good capillary refill and good circulation. He further checked to make sure there were no arteries that were pinched and that he had good circulation in the broken leg. Tr. 229. He then examined Wink’s hips for crepitus which would indicate a crushed pelvis. He found no unnatural movement only pain, indicating no crush injury. He then palpated the four abdominal quadrants by using a rolling motion with his hands ranging from soft to hard pressure to determine if there were any abnormalities in the abdominal area. There were none and there was no sign of pain caused by the examination. Tr. 230-31. Once his examination was completed, Beckman splinted Wink’s leg with a SAM splint and rubber boot to stabilize the leg for transport. Tr. 231. He described Mr. Wink as talking and complaining about his new boot being cut off of him. Beckman stated that Wink was more concerned about his new boot being ruined than his injuries. Tr. 232. Beckman performed a mental status examination as well as a physical one and testified that Wink’s pupils were of equal size and reacted appropriately to light. This indicated that there were no signs of a brain injury or shock. Tr. 238, 251. He was fully oriented to date, name and location. At no time did Beckman see any indication of internal bleeding. Tr. 233. He did administer oxygen as a precaution as it can treat shock but also has the “placebo” effect of calming the patient and is “just good practice.” Tr. 233-34. Throughout the process of readying Wink for transport from the dinner hole until he was turned over to the ambulance crew, Beckman continued to monitor Wink’s pulse, observe his skin color and appearance for approximately one hour. Tr. 250. Although his pulse was slightly elevated at 80 beats per minute, had there been internal bleeding, his pulse would be elevated to 100 to 120 beats per minute in an effort to supply blood to the extremities while the body was losing blood. Tr. 234. Wink’s vital signs remained normal throughout; his skin remained normal in its color and was dry also indicating normal circulation, no shock and normal mental status. Tr. 235. At

no time did Beckman feel there was a potential for death from Wink's injuries. Tr. 235. His findings and observations were recorded on the Patient Information Report form he completes any time he administers any sort of care. Tr. 236, Ex. R-2. At the time Beckman met up with the ambulance crew, Wink was talking to others at the scene, joking and telling them about his new boot being cut off. Tr. 242-43. Beckman passed along his findings to McCombs about the accident upon bringing Wink out of the mine. Tr. 242. Mc Combs then passed along the information to Winter who determined that the injury was not life threatening. Tr. 152,242.

William Jankousky, Knight Hawk's Corporate Safety Director, is also a trained EMT. He testified that Knight Hawk encourages its employees to become EMTs. If a miner voices an interest in being certified, he will contact Eastern Illinois Community College to find an upcoming course. Once the miner passes the written test, the company will pay for the remainder of their training and pay an annual bonus of \$3000. In a company with approximately 200 employees, 22 are trained EMTs. Tr. 174-75. Jankousky stated that there are posters entitled "One Call Does It All" instructing mine operators to immediately call the toll free number when any of the listed conditions are met which are the same as those enumerated in section 50.10. Ex. R-8, 180. He testified that the posters are located throughout the mine. Tr. 181. He considers injuries that have a reasonable potential to cause death those that involve an unconscious individual, uncontrollable bleeding, a severed limb, someone needing CPR, someone not breathing or without a heartbeat. A broken limb does not qualify as such an injury unless there is a compound fracture with uncontrollable bleeding. Tr. 182, 184. He also would consider a fractured pelvis to such an injury if it was a crush-type injury and the pelvis was not intact. Then it would be necessary to check for pooling of blood and capillary refill to check for internal bleeding. If there was proper profusion with all other signs being normal, then it is not an immediately reportable injury. Tr. 184. Any Responsible Person ("RP") can call in without first asking permission from he or Mr. Winters. Tr. 186. There are generally three or four RPs on each shift and a shift manager who is designated as the RP for that shift. Tr. 179.

Jankousky reported the accident to MSHA on May 13 th. Tr. 191, Ex. R-6. He also was present when Inspector Burtis presented Williams' citation on September 16th. Jankousky objected to the weight of the rock stated in the narrative but was not given any conferencing rights at that time. He also told Burtis that they did not agree with either of the citations issued. Burtis replied, "don't shoot the messenger." Tr. 195-96. Jankousky also requested a closeout conference to contest the citations on June 10, 2016. Tr. 191. Ex. R-9. When the conference took place in September, he told the conference officer that he had consulted with the EMT at the time of the accident and based upon his thorough assessment of Wink, no one thought the injury had a reasonable potential to cause death. Tr. 192, 195. Jankousky also explained that their EMTs are all trained, if there is any doubt in this regard, they are to call for a helicopter as well as an ambulance. If the helicopter EMTs do not think a life flight is needed, they will send the miner by ambulance and not charge the operator for calling for one. Tr. 193.

## V. ANALYSIS

In the instant matter, the Secretary argues that the totality of the circumstances extends only to the nature of the accident – that is, the fall of a large heavy piece of rock from the roof that partially pinned a miner. Inspector Williams testified, "the size of the rock...the height that

it fell, knowing that it came to rest on top of Wink, and Mr. Wink was screaming in pain, that it crushed his hip, crushed his mid-section area where his pelvis was, fractured...his lower leg, just the mechanism of injury” would indicated that there was a “possibility” of internal injuries. Tr. 72.

Knight Hawk argues that the totality of the circumstances must include the medical evaluation of the miner done at the scene just shortly after the accident occurred which provided reliable indications that the injury actually sustained by Wink had no reasonable potential to cause death and was therefore not reportable under section 50.10(b). In this particular case, pertaining only to the facts here, I agree with Respondent.

I take issue with the Secretary’s position on several points. First, the nature of the accident is not the controlling factor here in determining that this injury had the reasonable potential to cause death. The Secretary’s reliance solely on the nature of the accident is not in accord with the law. Secondly, the nature of the injury as stated in the citation is not accurate. Finally, considering the totality of circumstances known to the operator at the time of the accident and immediately thereafter, there was additional information which would reasonably lead one to a different conclusion but was not properly taken into account by the Secretary.

In its most recent decision, the Commission has reiterated its holding that under this generally worded standard, the evidence is to be evaluated under the “reasonably prudent person” test. *Consolidation Pa. Coal Co.*, 40 FMSHRC \_\_\_, slip op. at # 5, No. PENN 2014-816 (August 22, 2018), citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990). In its current decision, the Commission again cites to the “totality of circumstances” first iterated in *Signal Peak Energy, LLC*, 37 FMSHRC 470 (Mar. 2015), as the appropriate principle to consider when determining when a violation of section 50.10(b) has occurred. In doing so, the circumstances to consider are not only the nature of the accident or mechanism causing the injury but also any observable indicators of trauma and signs and symptoms readily available at the time of the accident or immediately following. “The outcome determinative inquiry in [this] case is whether responsible...employees had information that would lead a reasonable person to conclude there was a reasonable potential for death based upon the nature of the injury **and the totality of the circumstances.**” *Consolidation Coal Co.* at 8 (emphasis added).

Both the Secretary and the Respondent cite to the preamble to the final rule which acknowledges that there is always “an element of judgment” involved in assessing whether a certain injury has a reasonable potential to cause death. It goes on to set forth certain injuries that are known to fall into that category. They include concussions, cases requiring CPR, amputations, blunt force trauma to the upper body and cases of unconsciousness. Emergency Mine Evacuation, 71 Fed. Reg. 71, 433-34 (Dec. 8, 2006). While the list is not exhaustive, the examples are instructive in that they involve far more severe medical signs and symptoms than those here. It also underscores that fact that medical triage at the scene is relevant and important in exercising judgement in this area.

The Commission has confirmed that medical information is also relevant in evaluating violations of section 50.10 under the controlling principle of the totality of circumstances known to the operator at the time of the accident or immediately thereafter. *See Consolidation*

*PA Coal Co.*, at 6; *Signal Peak Energy* at 476. While the nature of the accident is highly relevant, medical information is also necessary to consider. Beckman, who is a highly qualified EMT, spent approximately one hour with Wink immediately after the accident. Throughout this period of time, he performed numerous tests and made careful observations of the injured miner, all of which, as he articulated in great detail, were designed to detect internal bleeding, crush-type injuries, shock and changes in circulation and mental status. Combined with being able to speak to Wink about the location and level of pain, his assessment led him to the conclusion that Wink had suffered a non-compound fracture to his leg with no instability in his pelvic area and no signs of internal injury or bleeding. While the focus of this violation is what is known to the operator within a short period of time after the injury has occurred, it is clear that shortly after arrival at the hospital, Beckman's assessment was found to be accurate. Wink was left in the ER without treatment and then transferred to St. Louis where he waited for 12 hours before his leg was surgically repaired. Tr. 262-63. This information was available to Williams during his investigation but he felt that neither Beckman's nor the ambulance crew's nor the hospitals' records were relevant and he did not collect them. He did not even recognize that there had been an EMT at the scene until he sat in on Beckman's deposition many months later. I find this is relevant in that it underscores the fact that Beckman was correct in his assessment as he performed an adequate examination to make such a determination and that the information was available before Williams wrote the citation. Had Williams at the very least spoken to Beckman to learn what information was available to the operator on the scene, it would make his evaluation somewhat more credible. Williams, without any medical training, essentially chose to make up his mind as to what sort of injuries Wink might have sustained while ignoring the medical signs and symptoms collected at the scene by a well-trained medic that indicated there was not a reasonable potential for death.

The Secretary relies on several cases in order to fortify his position that the nature of the injury in this case should have put a reasonable person on notice that there was a reasonable potential for death. He cites *Signal Peak*, in which a roof caved in causing a blast of air, which damaged approximately 78 stoppings, and threw a miner 50-80 feet. In that case the miner was in severe pain, had difficulty breathing and moving, had a significant lump on his back and said he was not okay. The medic on the scene was not able to do a full assessment but did note trouble breathing accompanied by back and chest pain, a head laceration, noticeably broken ribs and signs of shock. *Id.* Clearly, the types of injuries *Signal Peak* were similar, if not identical, to those listed in the preamble including blunt force trauma to the torso and head as well as broken bones that could easily puncture a lung or other vital organs. But again the Commission in *Signal Peak* confirmed that the operator is afforded a reasonable opportunity for investigation of the surrounding circumstances in making the determination whether the injury is life-threatening.

Also cited by the Secretary is *M-Class Mining LLC*, 39 FMSHRC 1013 (May 2017) in which I determined that an injury was immediately reportable. In that case what was significant to me was the fact that the miner had been injected with hydraulic fluid through his work clothes into his rectum at 4200 psi. He immediately lost control of his bowels, was in extreme pain and was bleeding profusely from his rectum. He told the first responder that he was not okay and he felt like his intestines were "hanging out" and that there was "something wrong inside." He was described as frantic to get out of the mine and was in shock. He was bleeding so

profusely that it pooled in the mine car and run down the side. *Id.* at 1021. As in *Signal Peak*, it was obvious that there were serious internal injuries, shock and blunt force trauma to the torso. In the Commission's latest decision, *Consolidation Pa. Coal Co. supra*, the miner was crushed between a rail car and a scoop bucket. While he was conscious at the scene, he had no feeling in his legs, was in extreme pain, his abdomen was swollen and distended, there was some blood at the scene and the miner said he felt like his guts were coming out of his penis and he bid his family goodbye. Due to the obvious severity of the injury, lift-flight was called for evacuation. All of the signs indicated spinal cord and internal injuries were very likely present. The Commission found, considering the totality of the circumstances, that any reasonable person in that situation "possessing the available information would have concluded there was a reasonable potential for death." *Id.* at 9.

I find the cases cited by the Secretary are readily distinguishable from this instance. All of them involve instances where the injuries very clearly presented as those similar to the ones listed in the preamble. That is, blunt force trauma to vital organs, head injuries, spinal cord injuries and the like which are known to cause internal injury, bleeding and death. The only indication that Wink was likely to have suffered such severe injuries is the Secretary's description of the accident. Williams testified that Wink sustained crushing injuries to his mid-section and pelvis. He further stated that rock that struck Wink weighed 4000 pounds. The preponderance of the evidence does not support either of these conclusions, however. Williams' calculation is beyond comprehension and completely unverifiable. The Secretary claims the operator did not question the calculation. However, I find there is credible evidence that the operator was not given the opportunity to challenge Williams when he wrote the citation. Williams wrote the citation in his office at 3:30 in the morning and gave it to another inspector to present to the operator days after the fact. When Inspector Buris presented the citation, Jankousky did challenge the calculations only to be told "don't shoot the messenger." TR195-96. They were not given an adequate opportunity thereafter to challenge the information and, in fact, Williams was not even aware that they had questioned it. Tr.101. I find this representation that the operator did not object is inaccurate and undermines the credibility of the Secretary's evidence.

Furthermore, the description of the nature of Wink's injuries would lead one to believe that the full weight of the rock landed on the miner crushing him flat underneath it which is inaccurate. Both Williams' sketch of the scene made from interviewing Kalin Rains and the operator's sketch depict Wink being under just the smaller tip of the triangular-shaped rock. Ex. S- 2 at 25; Ex. R -1. There is no evidence given as to the weight of the section of the rock that landed on Wink but it is clearly far less than the weight of the entire rock. Additionally, it was established by the respondent that Wink was not flat on his back or stomach but on his side so that the rock did not land on his mid-section. Tr. 42, 258. Based upon the statements by the miners who responded to Wink, he was pinned either from the hip or the knee to the lower legs. Tr. 42, 92. There were no signs of injury to his mid-section or internal organs and no irregular movement in his hips suggesting any injuries to internal organs or the spine. I find that the evidence best supports that the rock was triangle shaped, and the smallest triangular part of the rock is what pinned Wink to the ground. R-1, 3, 4. While one miner was unable to lift the rock and free Wink, three miners were able to do so without the help of any mechanism or machine. R-1, 3, 4. Furthermore, the location of the rock which landed primarily on Wink's leg, in

conjunction with his resulting pain and the EMT's evaluation indicate that an injury with the potential to cause death did not occur. R-1 and 2.

I find the operator made a timely and diligent effort to determine the nature and extent of Wink's injuries on the scene. Beckman's medical assessment included a physical examination which assessed the physical and mental status of the miner. He had the opportunity to monitor Wink for approximately one hour before the ambulance transported the miner to the hospital. Beckman's examination was neither cursory nor rushed. There were no signs of internal injury, no blood, no crush injuries and no changes in circulation, pallor, or alteration of mental status, complaints of severe pain or alarming feelings of internal organs coming out of the body or fear of dying. He had the opportunity to speak with Wink throughout the course of his rescue from the mine. Wink maintained consciousness and was alert throughout. He was joking with his fellow miners about having his new boots cut off of him and complained primarily of leg pain. Beckman determined that the injury was a non-compound fracture of the lower leg and a non-crush injury to the hip which Williams confirmed are not immediately reportable injuries likely to cause death. Tr.130. Jankousky, an experienced EMT confirmed that Beckman's assessment was properly done and evaluated. Had Williams asked whether there had been a medical evaluation at the scene, spoken to Beckman or obtained his medical assessment report, it would have presented a far more accurate picture of what had occurred and what information was known to the operator at the time of the accident. The investigation took place days after the accident, there was no urgency involved in collecting all relevant information and doing so would not have presented an impediment to completing a timely investigation. Yet, this was not done leading the Secretary to rely solely on the nature of the injury rather than the totality of circumstances as required by law.

For the reasons discussed above, I find that when examining the nature of the accident and the relevant totality of the circumstances, the Secretary has failed to meet its burden that an injury occurred involving an accident with the reasonable potential to cause death. Consequently, there was no 30 C.F.R. § 50.10(b) violation. Because the regulation has not been violated, the citation must be vacated.

VI. Citation No. 9039438 (Docket No. LAKE 2017-24)

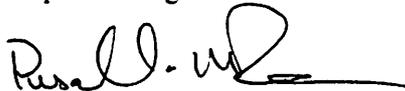
Citation No. 9039438 was issued on May 31, 2016, by MSHA Roof Control Specialist Williams. S-1. This citation was issued due to Respondent's failure to preserve the accident site where Wink was injured in violation of 30 C.F.R. § 50.12, which requires:

Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

Under this standard for a violation to have occurred it presupposes that a section 50.10 violation transpired. As the nature of the accident and injury in this case did not arise to a section 50.12 violation, it was not necessary for the area of the accident to be preserved. Accordingly, there could be no section 50.12 violation, and this citation must also be vacated.

**ORDER**

It is hereby **ORDERED** that Citation Nos. 9039437 and 9039438 are **VACATED**.  
Because no issues remain for adjudication, these proceedings are **DISMISSED**.

A handwritten signature in black ink, appearing to read "Priscilla M. Rae", with a long horizontal flourish extending to the right.

Priscilla M. Rae  
Administrative Law Judge

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