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SOL (MSHA) V. HECLA MINING CO.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | Civil Penalty Proceeding<br><br>Docket No. DENV 79-199-PM<br>A.O. No. 10-00088-05002 |
| v. | |
| HECLA MINING COMPANY,<br>RESPONDENT | Lucky Friday |

DECISION

Appearances: Marshall P. Salzman, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the petitioner
Fred M. Gibler, Esquire, Kellogg, Idaho, for the respondent

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on January 11, 1979, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for one alleged violation of the provisions of 30 CFR 50.10. Respondent filed an answer and notice of contest and a hearing was held in Wallace, Idaho, on July 12, 1979. The parties submitted posthearing proposed findings, conclusions, and supporting briefs, and the arguments presented have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations, as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty should be assessed against the respondent for the alleged violation, based upon the criteria set forth in section 110(i) of the Act. Additional jurisdictional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated that the citation was received by the respondent, that the respondent is a large mine operator, and that any civil penalty assessed in the matter will not impair respondent's ability to continue in business (Tr. 2-3).

Discussion

Citation No. 348002, July 6, 1978, 30 CFR 50.10, states as follows:

> A serious shaft accident occurred in the #2 shaft. A miner was critically injured June 22, 1978, and has been hospitalized in an intensive care unit. The accident was not reported to MSHA officials in the Bellevue, Washington Subdistrict Office, the Western District Office, or the 24 hour answering service in Washington, DC.

30 CFR 50.10, states as follows:

> Immediate Notification.
>
> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582.

The term "accident" is defined by 30 CFR 50.2(h)(1) through (12). The pertinent definition of the term here is section 50.2(h) (2) which defines "accident" as: "An injury to an individual at a mine which has a reasonable potential to cause death."

Petitioner's Testimony

John T. Langstaff, respondent's assistant personnel director, was called as an adverse witness by the petitioner. At the time the citation was issued, he was employed as Director of Safety and training. He is familiar with the accident which occurred on the afternoon of June 22, 1978, and first learned about it on the night of June 22, when it was reported to him by telephone by one of his safety men, Bert Fetter. Mr. Fetter advised him that Mr. Cliff Miller had been involved in an accident at the mine and had been taken to the East Shoshone Hospital in Silverton, some 8 miles from the mine by a local ambulance service, Mr. Fetter further advised him that Mr. Miller had sustained "a lot of facial marks and bruises about the face, and that his left arm was bruised badly", but that Mr. Miller was conscious. Mr. Langstaff attempted to contact his supervisors to notify them about the accident, but they had already heard about the incident, but he did not know how they learned about it. That same evening, Mr. Langstaff called the hospital and spoke with a Doctor Gnaedinger, who informed him that Mr. Miller sustained bruised arms, cuts and bruises, and three fractured vertebrae, but he could not recall which vertebrae were fractured. The doctor advised that "Cliff is a tough little guy and he is okay" (Tr. 17-21).

Mr. Langstaff testified that 4 days later he learned that Mr. Miller had been moved from the Silverton Hospital to a hospital in Spokane some 80 miles away and that he was moved there because he had gotten worse the evening of June 22. He then called the hospital in Spokane to inquire about his condition, but since he was not a family member, the nurse with whom he spoke would release no information as to Mr. Miller's condition. He later spoke again with Mr. Fetter, and he subsequently learned about Mr. Miller's condition through the receipt of a doctor's report from Dr. Gnaedinger which he did not have with him at the hearing. In addition, he also received additional reports from the attending hospital doctors. Mr. Fetter advised him that Mr. Miller was in the intensive care unit and that there was a problem with internal bleeding or internal damage. At that time, Mr. Langstaff did not report the accident to MSHA. Thereafter, he kept track of Mr. Miller's condition through daily conversations with Mr. Fetter. He finally reported the accident to MSHA on Standard Form 7000-1, an accident reporting form, on June 29, 1978. He did not report the accident when he first heard from Mr. Fetter that Mr. Miller was in intensive care because 5 days had elapsed from the time of the accident and he believed it was no longer immediate. At the immediate time of the accident, he did not believe there was a reasonable chance that death would result, and when he learned that the accident was serious, it was no longer immediate (Tr. 22-32).

On cross-examination, Mr. Langstaff testified that during the week following the accident, he felt that the injuries sustained by Mr. Miller presented a reasonable potential for death, but this would have been at the end of the week when he reported the accident. He did not feel that way earlier in the week, but only after Mr. Miller's condition got progressively worse. At the time he filed the report with MSHA, he was following his normal routine of waiting for doctor's reports since he likes to have all of those reports before sending in the MSHA report. Mr. Langstaff indicated that he has no medical training and believed he was entitled to rely on doctor's reports in these matters. He reiterated that he spoke with Dr. Gnaedinger on June 22, who informed him that the injuries were not serious at that time, and his attempts to follow up on Mr. Miller's condition the following week were not successful because the hospital in Spokane would release no information (Tr. 32-34).

In response to subsequent questions, Mr. Langstaff testified that he filed MSHA Form 7000-1 by mail, and that is his usual practice. He did not report the accident by telephone (Tr. 39). Someone from MSHA came to see him the week following the accident, but he could not recall whether that visit predated the mailing of the report. As a matter of course, he relies on the doctor's opinion to determine whether or not an accident has occurred (Tr. 40).

Milbert Fetter, testified that in June 1978, he was employed by respondent as a safety man. He learned about the accident by a telephone call on June 22, while at home. He went directly to the hospital and spoke with Dr. Gnaedinger who advised him that after examining Mr. Miller, his left arm looked bad, but was not broken, and that his injuries were not serious. He then reported this to Mr. Langstaff, and the next day learned that Mr. Miller had been transferred to the hospital in Spokane, and he went there to visit him on Sunday where he spoke with some nurses who reported that he was "fine." The following Tuesday he visited the hospital again, and Mr. Miller's wife told him that Mr. Miller had taken a "turn for the worse." He called Mr. Langstaff the next day, on a Wednesday and informed him that Mr. Miller's condition was getting worse, but he did not know how serious he was (Tr. 40-44).

On cross-examination, Mr. Fetter testified that the accident happened after he and Mr. Langstaff's normal duty hours and that is why he was at home. Part of his duties do not include notifying MSHA about accidents, and he took an interest in Mr. Miller's condition because he is his cousin. He was at the hospital when they brought Mr. Miller in and the doctor advised him that "Cliff's tough, he is young. The arm and the knot on his head and his back. There is a problem. He will come out of it okay." He observed Mr. Miller at the hospital and spoke with him, and Mr. Miller complained about a sore arm and back. Dr. Gnaedinger came back to

see Mr. Miller two times the evening of June 22, and the doctor never advised him that Mr. Miller was in critical condition and did not indicate that he had taken a turn for the worse, nor did he express concern that there was a reasonable potential for death (Tr. 45-47).

On redirect, Mr. Fetter testified that he first learned that Mr. Miller was in the hospital the Saturday following the accident, but did not learn why. He called Mr. Langstaff either the following Monday or Tuesday, and he did so because it is his duty to report on the condition of personnel (Tr. 48). Mr. Miller's injuries were not fatal (Tr. 49).

Jurisdictional Arguments Made Orally at the Hearing

During the course of the hearing, respondent's counsel moved for dismissal of the case for lack of jurisdiction. In support of his motion, counsel pointed out that the reporting requirements of Part 50 became effective on January 1, 1978, 42 Fed. Reg. 65534, December 30, 1977. The accident in question occurred on June 22, 1978, and the citation was issued on July 6, 1978. However, counsel argues that at the time of the passage of the 1977 Amendments to the 1969 Coal Mine Health and Safety Act, section 50.10 was not a mandatory standard and therefore did not become a mandatory standard upon enactment of the 1977 Act. Since section 50.10 was not a mandatory standard in effect on November 9, 1977, the date of enactment of the 1977 Amendments, counsel argues that it was not an effective mandatory standard subject to MSHA enforcement at the time the citation was issued. In support of this argument, counsel cited section 301(b)(1) of the 1977 Act, 30 U.S.C. 961(b)(1) which states as follows:

> The mandatory standards relating to mines, issued by the Secretary of the Interior under the Federal Metal and Nonmetallic Mine Safety Act and standards and regulations under this chapter which are in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines and to coal mines respectively under this chapter until such time as the Secretary of Labor shall issue new or revised mandatory health or safety standards applicable to metal and nonmetallic mines and new or revised mandatory health or safety standards applicable to coal mines. [Emphasis added.]

Respondent's jurisdictional defense was not previously raised by the answer filed to the petition for assessment of civil penalty. When asked why it had not been previously raised, counsel asserted that respondent had retained new counsel and that he had raised it at the hearing since it was his understanding that a jurisdictional defense could be raised at any time and was not subject to any waiver

(Tr. 11). In view of the fact that the jurisdictional argument was raised for the first time at the hearing, the motion was taken under advisement, and while petitioner's counsel complimented respondent's counsel on his diligence in advancing the argument, he requested that I not rule on the motion from the bench in order to give him an opportunity to research the question and to file a posthearing memorandum on the question (Tr. 11). This request was granted, and petitioner was afforded an opportunity to file any additional arguments on the question (Tr. 59). However, the parties were afforded an opportunity to make a record on the merits of the citation in the event that the motion to dismiss was ultimately denied.

Respondent raised a second jurisdictional argument in defense of the petition. Counsel argues that a section 104(a) citation can only be issued for an alleged violation of a mandatory health or safety standard, and that a civil penalty assessment pursuant to section 110 can only be levied for a violation of a mandatory standard. Since section 50.10 was not a duly promulgated mandatory standard, respondent's counsel contends that respondent cannot be cited for such a violation, and cannot now be subjected to a civil penalty assessment for the asserted violation (Tr. 12-13).

In response to respondent's second argument, petitioner asserted that a citation pursuant to section 104(a) may be issued not only for a violation of any mandatory standard, but also for any violation of any rule, order, or regulation promulgated pursuant to the Act, and that a civil penalty under section 110(a) may be assessed for any violation of any other provision of the Act. Therefore, if it can be said that respondent violated section 104(a), then respondent may be assessed a civil penalty pursuant to section 110(a) for that violation (Tr. 12-13).

Respondent's Written Posthearing Jurisdictional Arguments

The Regulation Containing 30 CFR 50.10 Was Not in Effect on November 9, 1977, the Date of Enactment of the 1977 Act.

Respondent argues that section 301(b)(1) of the Act, 30 U.S.C. 961(b)(1), provides that the mandatory standards issued by the Secretary of the Interior under the Metal and Nonmetallic Mine Safety Act and the standards and regulations under the 1969 Coal Mine Health and Safety Act which were in effect on November 9, 1977, the date of enactment of the 1977 law, remained in effect as mandatory standards under the 1977 Act until such time as the Secretary of Labor issues new or revised standards. However, since the effective date of section 50.10 was January 1, 1978, it was not in effect on November 9, 1977, and therefore was not retained as an effective standard under the 1977 Act. Additionally, respondent argues that section 50.10 was promulgated by the Department of the Interior, and not the Labor Department as required by 30 U.S.C. 961(b)(1).

The Regulation is Not a Mandatory Health or Safety Standard, Therefore No Civil Penalty May be Imposed for a Violation.

Respondent concedes that a citation pursuant to section 104(a) of the Act may be issued for violations of mandatory health or safety standards, rules, orders or regulations, but maintains that it may only be issued in the cases of a duly promulgated mandatory standard pursuant to the 1977 Act and only if it is so promulgated by the Secretary of Labor, not the Secretary of the Interior. Since section 50.10 was not a duly promulgated mandatory standard issued by the Secretary of Labor pursuant to his authority under the 1977 Act, respondent maintains that any citation issued pursuant to section 104(a) is invalid.

With respect to the proposal for assessment of civil penalty, respondent maintains that under section 110 of the Act, 30 U.S.C. 820, which allows the imposition of civil penalties, there can be no penalty for a violation of a regulation which is not a mandatory health or safety regulation or a part of the Act itself. Since section 110(a) only allows the imposition of a civil penalty for a violation of a mandatory health or safety regulation or a violation of the Act itself, a penalty may not be imposed for noncompliance with section 50.10 because it is not a mandatory safety standard. Further, respondent asserts that the petitioner cannot be heard to argue that the regulation in question was part of the Act because to do so would render the "mandatory health or safety standard" language in section 110(a) meaningless. Also, respondent points out that the regulation was not issued under the 1977 Act, but under the Mining Enforcement and Safety Administration.

Petitioner's Jurisdictional Arguments

Petitioner concedes that the regulations found in Part 50, Title 30, Code of Federal Regulations, became effective January 1, 1978, and that they are not mandatory health and safety standards as defined in section 3(1) of the 1977 Act. Petitioner argues that section 3(1), retained from the Coal Act of 1969, defines a mandatory health and safety standard to mean either the interim standards of Title II and III or standards promulgated pursuant to Title I. Part 50 was promulgated pursuant to section 508 of Title V of the Coal Act, 30 U.S.C. 957, authorizing the Secretary to issue regulations to carry out any provision of the Coal Act, and sections 4 and 13 of the Federal Metal and Nonmetallic Mine Safety Act, formerly 30 U.S.C. 723, 732, 42 F.R. 65536. Section 508 is the general rule-making authority to promulgate regulations. Sections 4 and 13 of the Metal Act contained implied authority to promulgate necessary implementing regulations. By contrast, mandatory standards were required to be promulgated under section 101 of Title 1 of the Coal Act and section VI of the Metal Act. Since the Federal Mine Safety and Health Act of 1977 has the same definition of "mandatory health or safety standard" (section 3(1)), and the same rule-making authorities as the Coal Act,

and since under the 1977 Act all existing regulations issued under the Coal and Metal Acts are valid, the Part 50 regulations are valid regulations and not mandatory standards. Further, petitioner points out that historically, Part 50 replaced old parts 58 (Metal Act) and 80 (Coal Act) of Title 30, Code of Federal Regulations (supplemental information, 42 F.R. 65534), and that Parts 58 and 80 were promulgated under the same rule-making authorities as Part 50 and were, accordingly, promulgated as regulations and not mandatory standards (see 37 F.R. 24151; 35 F.R. 19999).

Petitioner argues that respondent's reliance on the transfer provisions of section 301(b)(1) is misplaced. In support of this argument, it is argued that 30 U.S.C. 961(b)(1) deals with standards, even though the word "regulations" is used at one point. Even there, however, petitioner points out that the context clearly implies safety and health standards and that this section of the Act was designed to refer to the transfer of standards. Petitioner believes that the controlling provision dealing with the transfer of regulations is section 301(c)(2), which provides in pertinent part "All orders, decisions, determinations, rules, regulations * * * (A) which have been issued, made, granted or allowed to become effective in the exercise of functions which are transferred under this section * * * and (B) which are in effect at the time this section takes effect [March 9, 1978] shall continue in effect according to their terms until modified, terminated, set aside * * * by the Secretary of Labor, the Federal Mine Safety and Health Review Commission, or other authorized officials * * * "[Emphasis in original.] Thus, while petitioner views section 301(c)(2) as a broad "catch all" provision, it maintains that it specifically enumerates regulations among the transferred matters which remain in effect and applicable as of March 9, 1978. And, since Part 50 are regulations and not standards as defined by section 3(1) of the 1977 Act and its predecessor, section 301(c)(2) and not (b)(1) is applicable, and by its very wording the regulation in question continued in effect and did not have to be repromulgated by the Secretary of Labor.

With respect to the imposition of a civil penalty for violation of a regulation rather than a mandatory standard, petitioner argues that section 104(a) provides for penalty assessments for violations of a provision of the Act and its implementing regulation which is not a standard. Citing the language of section 110(a) which provides for assessment of civil penalties for violations of "any other provision of this Act," petitioner maintains that it is clear that civil penalties may be assessed for violations of any regulation, rule, or order as well as any mandatory health or safety standard. The implementation of a provision of the Act by a regulation involves an inextricable relationship, so that if a regulation is violated the implemented provision of the Act is also violated. Thus, the violation can be cited and the civil penalty assessed on that basis.

Further, since section 110(b) refers to violations cited under section 104(a), an uncorrected cited violation of a regulation and a provision of the Act which are not mandatory standards is subject to section 110(b).

Finally, petitioner points out that Part 50 implements sections 103(a), (j), (d) and (h) of the 1977 Act (formerly sections 103(a), 103(e), 111(a), and 111(b), respectively, of the Coal Act). Section 50.10 implements section 103(j) of the 1977 Act (formerly section 103(e) of the Coal Act), requiring an operator to notify MSHA in case of an accident. A violation of 30 CFR 50.10 therefore constitutes a violation of section 103(j) of the Act.

Respondent's Reply Brief

In its reply brief, respondent submits that a close reading of sections 301(b)(1) and (c)(2) shows that what Congress intended was that all "mandatory" standards or regulations had to be in effect as of November 9, 1977, to remain effective under the Federal Mine Safety and Health Act of 1977 (1977 Act). Congress, in enacting 30 U.S.C. 961(b)(1), recognized that under the 1977 Act penalties could only be assessed for violations of mandatory health or safety standards, or a violation of the Act itself. Recognizing this, it was declared that all "mandatory standards" and "standards and regulations under this chapter" in effect on November 9, 1977, would remain in effect as mandatory safety and health standards. Respondent asserts that had Congress intended the effect urged by petitioner, then it would have been unnecessary to use the language contained in 30 U.S.C. 961(b)(1), and to achieve the result petitioner desires, Congress would merely have stated that all mandatory health or safety standards in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards. From respondent's point of view, the effect of 30 U.S.C. 961(c)(2) is that all non-mandatory regulations which became effective in the exercise of functions which were transferred by the section remain in effect. There is no mention of "mandatory" standards as exists under 30 U.S.C. 961(b)(1). Also, 30 U.S.C. 961(c)(2) has no reference to regulations "under this chapter."

Respondent agrees with petitioner that 30 U.S.C. 961(c)(2) is a "catch-all" provision. However, in looking at the context in which the word "regulations" is used in 961(c)(2), respondent believes that it is referring to matters which were pending in individual cases before MESA during the interim period, and that the use of the words "orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges" does not indicate it is referring to substantive matters or mandatory standards or regulations for which penalties may be assessed. On the other hand, 961(b)(1) clearly indicates it is referring to mandatory standards and regulations for which penalties may be assessed under the 1977 Act. Respondent asserts

that petitioner's argument that section 50.10 is mandatory and also transferred to MSHA under 30 U.S.C. 961(c)(2) is inconsistent because if it is mandatory, then 30 U.S.C. 961(b)(1) applies. If it is not mandatory, then 30 U.S.C. 961(c)(2) may apply, but there is no requirement of compliance with a regulation which is not mandatory.

With regard to any penalty assessment pursuant to section 104(a), respondent emphasizes the fact that the citation in this case was issued for an alleged violation of regulation 30 CFR 50.10, and not statutory section 103(j), 30 U.S.C. 813(j), and asserts that there could have been no citation issued for a violation of 30 U.S.C. 813(j), which merely requires notification of an accident with no time for such notification specified. The citation is for failure to notify immediately, which is only a requirement of the regulation and not a requirement of the Act. Moreover, 30 CFR 50.10 was not enacted pursuant to the Federal Mine Safety and Health Act of 1977, but was enacted to implement the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and Nonmetallic Mine Safety Act. Thus, it cannot be construed to be an implementation of specific provisions of the 1977 Act. Respondent argues further that the language found in section 109(a) of the 1969 Act with respect to the requirement that a civil penalty be assessed for a violation of a mandatory health or safety standard is virtually identical to the language contained in section 110(a) of the 1977 Act, the section under which petitioner is proceeding in this case. Here the injury to the miner was reported, which is all that is required by 30 U.S.C. 813(j). Petitioner seeks to assess a penalty for failure to report "immediately," which is not a requirement of the statute. Since the language of the 1977 Act is so identical to that of the 1969 Act, respondent maintains that a similar result must attach, that is, an operator may only be penalized for a violation of a mandatory health or safety standard. As stated earlier, the regulation in question here, is not a mandatory health or safety standard.

With regard to petitioner's reliance on section 110(b), 30 U.S.C. 820(a), respondent argues that it merely underscores respondent's point with regard to section 110(a). Respondent emphasizes that it has been cited under section 110(a) and not 110(b), and the two sections contain different language in that section 110(b) states that an operator who fails to correct a violation for which a citation "has been issued under Section 104(a)" is subject to penalties for each day the violation continues, while section 110(a) does not state that a penalty may be assessed for a 104(a) violation, but that a penalty may be imposed only for a violation of a mandatory health or safety standard or a violation of the Act itself.

Findings and Conclusions Concerning the Jurisdictional Question

The 1977 Act was enacted on November 9, 1977. Since section 50.10 was not promulgated as a regulation and did not become effective January 1, 1978, it is clear that on the date of enactment

of the 1977 Act it was not a viable regulation promulgated pursuant to this statute. Under the transfer provisions of section 301(b)(1), all mandatory standards and regulations issued under the Metal and Nonmetallic Metal Act and the 1969 Coal Act, which were in effect on November 9, 1977, were to remain in effect until such time as the Secretary of Labor issues new or revised standards. The transfer provisions of section 301(c)(2), which has been characterized as a "catch-all" provision by the parties, is in fact a savings provision which I believe was intended to cover all of the matters described therein during the interim period between enactment of the statute on November 9, 1977, and the effective date of the transfer of functions on March 9, 1978. While it is true that the statutory language in section 301(c) (2), which simply states "regulations," is not as specific as the language relating to mandatory standards and regulations, as used in section 301(b)(1), and gives rise to some statutory confusion as detailed in the skillful presentations and arguments made by counsel on both sides of the controversy, after careful consideration and analysis, I believe that petitioner has the better part of the jurisdictional argument and that its position is correct, and my reasons in this regard follow.

Section 301(c)(2) provides, inter alia, that

> "All regulations which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, etc., etc., by the Secretary of Labor * * *." [Emphsis added.]

I construe the use of the term regulation to include Part 50, Title 30, Code of Federal Regulations, and I conclude that they were validly promulgated by the Secretary of Interior in the exercise of his functions which were transferred to the Secretary of Labor as of March 9, 1978. The statutory accident reporting requirements which appeared in section 103(e) of the 1969 Coal Act, and section 13 of the Metal and Nonmetal Act, were the statutory requirements promulgated as mandatory regulations in Part 50, and I conclude that they were in effect and applicable at the time the citation in question here was issued. Accordingly, I accept and adopt petitioner's jurisdictional arguments with respect to the applicability of section 50.10 as my findings and conclusions on this issue and reject those advanced by the respondent, including its motion to dismiss this case on jurisdictional grounds.

Petitioner's Arguments on the Merits

Petitioner asserts that there is no dispute that respondent's employee was injured at the mine on June 22, 1978, and that respondent failed to make the immediate notification required by

section 50.10. Petitioner seeks a finding that there was a reportable "accident" within the meaning of section 50.10, and in support of its case relies on counsel's arguments made during the course of the hearing, where the issue was framed as follows (Tr. 50):

> THE COURT: The question in issue here is whether the Respondent Hecla Mining Company had knowledge of the extent of the injuries that Mr. Miller had, knowledge to the extent to conclude there was or was not a reasonable potential to cause death, imposing a duty on them to file a report?
>
> MR. SALZMAN: Yes.

I believe the essence of petitioner's arguments and the theory of its case regarding the reporting requirements of section 50.10 are set forth as follows during the colloquy appearing at pages 54-57 of the transcript:

> THE COURT: Section 50.10, subpart (b) requires immediate notification to MSHA in the event--if I can translate accident to event--of an injury to an individual that has a reasonable potential to cause death. Once the incident occurs, the operator is required under this section to immediately, meaning pick up the phone--
>
> MR. SALZMAN: That's correct. That was the purpose of my recalling Mr. Langstaff to the witness stand.
>
> There are two separate reporting requirements; one, for any kind of an injury as 50.20, you fill out this form and send it to them, and they get it sooner or later. The second one we are dealing with today is the "immediate" pick up the phone so they can go out and investigate.
>
> THE COURT: Okay now, you have an incident at a mine. So, you have the immediate notification. But that same incident again has to subsequently be reported in writing within ten days.
>
> Now, do you want to make some argument or any further observations?
>
> MR. SALZMAN: Just some brief observations.
>
> I think it's unfortunate that they have put definitions on words which are contrary to the normal usage of the term, but they have, and that's what we are dealing with.

But in that context I think given the restrictions and given the aims of the Act, I believe it should be interpreted in the broadest effect what obviously the purpose of these reporting requirements is.

I believe when you have an incident and people--no matter what the doctor may say, break a couple vertebrae, that is of some degree of seriousness.

When you learn after that the person has been moved from one hospital to another a distance of 80 miles and that person the next day goes into an intensive care unit, I think at that time you have the obligation to, that is immediately, contact MSHA.

THE COURT: What if the fellow had a total recovery the next morning? Does that make a difference?

MR. SALZMAN: After or before it was reported--to a reasonable potential to cause death, I believe that if someone--when this occurs, they have to go to the hospital, they are in an intensive care unit, I think that the operator should reasonably be required to assume--I think assumption of reporting given the goal of the statute--

THE COURT: Now, the goal of the statute is immediate notification so MSHA can go and investigate to determine what?

MR. SALZMAN: To determine the cause of the accident, the condition which may or may not have been corrected.

THE COURT: Preservation of evidence?

MR. SALZMAN: Yes, and the prevention of another accident.

THE COURT: A guy breaks a leg, and a month after something happens that makes it reportable; he takes a turn for the worse.

For a whole month there is no requirement for notification to MSHA; so there is nothing MSHA could do in terms of investigating the cause to determine preventative measures, et cetera, until 30 days after the event, in which event the guy turns for the worse, and then MSHA conducts an investigation?

* * * * * * *

MR. SALZMAN: The answer to your question, second part of your question, even 30 days later, taking that hypothetical, they still have the opportunity to go back and investigate and look at the condition which may have caused this accident and do something to prevent--

THE COURT: In those 30 days all the evidence was destroyed, the mining keeps on going.

MR. SALZMAN: May or may not. Obviously the period of time-- But 30 days is better than never.

Respondent's Arguments on the Merits

Aside from its jurisdictional arguments, respondent asserts that it should also prevail on the merits of the alleged violation. In support of its argument, respondent argues that the petitioner submitted no evidence to establish that the miner's injuries had a reasonable potential to cause death, and that the inspector who issued the citation did not even testify. Respondent maintains that it does not have employees with medical backgrounds and believes it is entitled to rely on the opinions of attending physicians as to whether an injury has a reasonable potential to cause death. In the case at hand, respondent argues that the attending physician stated this was not the case, and the mere fact that the miner was transferred to a Spokane, Washington, hospital was not "constructive" notice of injuries with a reasonable potential to cause death. Respondent asserts that the evidence showed that such transfers are routinely made for injuries which are not serious. Finally, respondent argues that the petitioner has the burden of proving that the injuries had a reasonable potential to cause death. Since this is a medical determination, and the petitioner offered no medical testimony, respondent maintains that a violation has not been established.

Findings and Conclusions on the Merits

The statutory requirement for reporting accidents is found in section 103(j) of the 1977 Act, formerly section 103(e) of the 1969 Act, and it states in pertinent part as follows: "In the event of an accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof."

It is clear from the plain wording of the statutory language that mine accidents are required to be reported to MSHA. The statute on its face places no time limitations as to when those reports are to be made. In this case, while the citation as issued does not specifically charge the respondent with failing to immediately notify MSHA, the narrative description does state that respondent

failed to notify MSHA's district office or the 24-hour answering service in Washington, D.C., and it does cite a violation of 30 CFR 50.10. Thus, I believe it is clear that respondent in this case is charged with a violation of the regulatory provisions of 30 CFR 50.10 for failure to immediately report the accident to MSHA by contacting the district or subdistrict office having jurisdiction over the mine or by telephoning MSHA's headquarters in Washington, D.C., at the toll-free telephone number listed in the regulation. The term "accident" is defined by section 50.2(h) (2) as "an injury to an individual at a mine which has a reasonable potential to cause death".

The petitioner in this case has the burden of proof to establish that the accident which occurred on June 22, 1978, was a reportable accident under the cited regulation. The question of whether the accident in question was required to be reported pursuant to section 50.10 requires the petitioner to establish that the injuries sustained by the accident victim had a reasonable potential to cause death. Recognizing the "unfortunate" use of the definitional language found in section 50.2(h) (2), petitioner nevertheless argues that the reporting requirements of section 50.10 should be given the "broadest effect to meet the obvious purpose" of the reporting requirement (Tr. 55). Although the record establishes that the initial information given to the respondent with respect to the extent and seriousness of the injuries sustained by the accident victim at the time he was taken to a local hospital, the evening of June 22, by the attending physician only indicated that he suffered cuts and bruises about the arm and face and three fractured vertebrae but was "O.K.", petitioner maintains that when the victim was then moved to another hospital in Spokane, some 80 miles away, and placed in the intensive care unit, respondent was obligated at that time to immediately report the accident to MSHA on the theory that it was reasonable at that time to assume that the victim's injuries posed a reasonable potential for death, thereby meeting the regulatory definition of a reportable accident. In short, petitioner takes the position that anytime someone is placed in an intensive care unit it is reasonable to assume that he may die. On the facts presented here, while the victim apparently sustained serious injuries, they did not result in death and he recovered.

The evidence adduced in this case reflects that the respondent was continually monitoring and receiving information concerning the accident victim's condition from the time he was taken to the first hospital and after he was transferred to the second. These reports were periodically made by the respondent's safety director, who was also related to the accident victim, after visits to the hospital and conversations with the victim, doctors, and attending nurses. The initial conversations with the attending physician at the first hospital led the respondent to believe that the victim's injuries were not serious and that he was "fine." However, the victim took a turn for the worse, and after being transferred to

the second hospital, while the initial reports from the nurses indicated that he was "fine," the victim's condition had gotten progressively worse and there were "problems" with internal bleeding and internal damage. At no time during the victim's initial hospitalization did the doctor indicate that there was reason to believe that he would die, and Mr. Langstaff, the company official responsible for reporting accidents to MSHA, testified that during the week following the accident he had no medical basis for determining that the victim's injuries were such as to allow him to conclude that they could potentially lead to death. He indicated that he followed his usual practice of awaiting the receipt of official medical reports or doctor's opinions before deciding whether to report the accident. Since 5 days or so had elapsed from the date of the accident until he learned through conversations with his safety director that the victim's condition was actually worse than initially reported, the "immediacy" of the reporting requirement had long passed and he saw no reason to file a telephone accident report at the precise moment the victim was placed in intensive care because at that time he had no official medical reports which would indicate that there was a reasonable expectation of death as a result of the injuries. Since he has no medical training, Mr. Langstaff took the position that he had to rely on the information being supplied to him by his safety director who kept almost daily contact with the hospital in an effort to obtain information concerning the victim's condition. Mr. Langstaff finally reported the accident on June 29, by executing a standard MSHA accident reporting form used for that purpose, and he apparently did so in compliance with the requirements of section 50.20, which requires that such forms be submitted within 10 days of an accident.

Respondent's defense to the citation in this case rests on its belief that the petitioner presented no credible evidence to support the assertion that injuries sustained by the accident victim had a reasonable potential to cause death. Since respondent employs no one with medical backgrounds, the argument is made that it is entitled to rely on the opinions of the attending physicians, as passed on to its safety director who made inquiries concerning the condition of the accident victim as to whether the injuries posed a reasonable potential for death. Since all of the information then available to the respondent indicated that they did not, then respondent maintains that at that point in time, the accident was not required to be immediately reported to MSHA. Since the question of whether any injuries sustained in an accident had a reasonable potential to cause death is necessarily a medical determination, and since petitioner offered no medical testimony to support its assertion that the accident was in fact of the type required by the regulatory definition of an "accident" to be reported immediately to MSHA, respondent asserts that petitioner has failed to establish a violation of section 50.10. Further, respondent maintains that the mere fact that the injured miner was transferred to an intensive care unit of the second hospital was not "constructive" notice of injuries with a reasonable potential to cause death.

I believe that the language of section 50.10 requiring the immediate reporting of an accident makes it clear that such accidents are to be reported as they occur by either contacting MSHA's local district office or by telephone call to to the toll-free number listed therein. The types of reportable "accidents" required to be reported are enumerated by definition in sections 50.2(h)(1) through (12). The particular type of accident at issue here is covered by subsection (h)(2), and in my view the definitional language leaves much to the imagination since reasonable laymen may differ as to whether any injury sustained by a person in a mine accident was such as to require it to be reported. Petitioner's counsel candidly recognized the "unfortunate" definitional language, but I take the regulatory language as I find it, and the fact that MSHA finds the prospect of being forced to present medical evidence to support a case bottomed on this section of its reporting regulation to be cumbersome is irrelevant. MSHA has the burden of proof in this proceeding and it must establish that the accident in question was reportable within the framework of its own definitional standard. That is, MSHA must establish as a matter of fact by a preponderance of credible evidence that the injuries sustained by the accident victim in this case had a reasonable potential to cause death. Once that is established, it must then prove that the accident was not reported immediately thereafter.

On the evidence presented in this case, I reject MSHA's attempt to establish that the injuries sustained by the accident victim in this case were in fact such as to raise a reasonable potential for death either at the time of the accident when the victim was taken to a local hospital, or the next day when he was transferred to the second hospital, solely on the basis of the fact that he was placed in intensive care, and that on that day respondent was required to report the accident pursuant to section 50.10, by contacting the district office or making a telephone call to Washington, D.C. I find that respondent acted reasonably in the circumstances, and that once it was informed later in the week that the accident victim's condition had worsened when it learned that he had internal injuries, the accident was duly reported by Mr. Langstaff by means of the filing of an MSHA report form used for such purposes. Although it can be argued that the respondent failed to immediately use the telephone or contact MSHA's district office when it finally became apparent, 4 or 5 days after the accident, that the victim's condition was far more serious than initially believed, the thrust of the citation and petitioner's case is the assertion that no immediate notification was made either at the time of the accident or at the time the victim was placed in intensive care. In these circumstances, I find that MSHA has failed to establish that the accident in question was in fact a reportable accident within the meaning of section 50.10. Accordingly, the citation is VACATED and this case is DISMISSED.

George A. Koutras
Administrative Law Judge