

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE  
DENVER, COLORADO 80204

25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
	)	
Petitioner,	)	DOCKET NO. WEST 79-301-M
	)	MSHA CASE NO. 05-02356-05003
v.	)	
	)	
CLIMAX MOLYBDENUM COMPANY,	)	
	)	MINE: CLIMAX OPEN PIT
Respondent.	)	
	)	

DECISION

APPEARANCES:

Robert Bass, Esq., and Eliehue Brunson, Esq., Office of T. A. Housh, Regional Solicitor, United States Department of Labor, Kansas City, Missouri, for Petitioner,

Richard W. Manning, Esq., Climax Molybdenum Company, Golden, Colorado for the Respondent.

Before: Judge John J. Morris

Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, Climax Molybdenum Company, failed to immediately notify MSHA of an accident on mine property. MSHA asserts Climax thereby violated two standards promulgated under authority of the Federal Coal Mine Health and Safety Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

STATEMENT OF THE CASE

Climax allegedly violated 30 C.F.R. 50.10 and 30 C.F.R. 50.12. The standards provide as follows:

Subpart B - Notification, Investigation, Preservation of Evidence

§ 50.10 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

§ 50.12 Preservation of Evidence.

Unless granted permission by a MSHA District Manager or Subdistrict 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.

FINDINGS OF FACT

The evidence is essentially uncontroverted. I find the following facts to be credible.

1. Climax employee Roger Persichini was injured on November 6, 1978 when a truck tire weighing approximately 7,000 pounds fell on him (Tr 15 - 39).
2. Persichini suffered fractures of the left femur, the pelvis, and the right hip (Tr 831'.
3. An initial examination took place in the Climax infirmary. It was conducted by Dr. James Bane and Nurse Anderson (Tr 88, 98).
4. The medical personnel in the infirmary were familiar with Persichini's medical profile from previous examinations. His history identified him as a healthy white male (Tr 75 - 94).
5. In the infirmary, Persichini's vital signs were stable and he was cooperative (Tr 74 - 94).
6. The injured man was removed to St. Vincent's Hospital in Leadville, Colorado. Thereafter, he was transferred to St. Anthony's Hospital in Denver, Colorado (Tr 87, 88).
7. James Keith, the Climax safety director was advised by the Climax nurse and physician that Persichini's condition was serious but not life threatening (Tr 48 - 74).

8. On November 7, 1978, Persichini, while in St. Anthony's Hospital, developed a fat embolism. A fat embolism, which can occur as a result of a fracture of a large bone, normally does not develop until twelve hours after the fracture. Such a condition is not life threatening (Tr 88, 95 - 102).

9. The fractures, according to the Climax physician, were serious but not life threatening (Tr 95 - 102).

10. Climax's head nurse, Ann Anderson, continually monitored Persichini's condition while he was hospitalized. She terminated this monitoring when she visited him in St. Vincent's Hospital on November 9, 1978 (Tr 74-94).

11. Persichini returned to work on November 11, 1979 (R1).

12. Climax reported the accident to MSHA on Form #7000-1 on November 10, 1978 (R1).

13. Climax did not preserve the accident scene (Tr 73).

#### ISSUE

The primary issue is whether Climax violated the standard. The underlying fact issue is whether the injuries to Persichini had a "reasonable potential to cause death."

#### DISCUSSION

Petitioner, in his post trial brief, initially contends that the injury sustained by Persichini constituted an accident as defined by 30 C.F.R. 50.2(h)(2). Secondly, petitioner asserts that the Climax safety director did not rely on the medical opinions of the company nurses and physicians. Thirdly, MSHA argues that the accident scene must be preserved when there is a serious injury until mine management has determined whether the accident

is reportable under 30 C.F.R. 50.10. Finally, MSHA declares that an operator must notify MSHA "whenever the injury is serious and there exists any question as to whether it is life threatening." In short, MSHA says the operator should err on the side of immediate notification.

I reject the above arguments. Concerning the first contention, it appears that 30 C.F.R. 50.2(h)(2) defines as accident as follows:

(h) "Accident" means (2) An injury to an individual at a mine which has a reasonable potential to cause death.

Simply stated, MSHA did not establish a factual situation within the above definition of an accident.

I agree with MSHA that remedial legislation should be broadly construed; however, there must first be operative facts to establish the applicability of the regulation.

MSHA's reliance on Secretary v. Hecla Mining Company 1 MSHC 2270 is misplaced. In that case Administrative Law Judge **George A. Koutras** ruled, as I do, that no reasonable potential for death was shown in the case. In Hecla, the victim was taken to the hospital and moved to intensive care.

MSHA misconstrues it's regulation. Immediate reporting is not required if the accident is serious and there exists "any question" as to whether it is threatening.

As a general rule the strained construction of a standard relating to safety and health should be avoided. Cf Diamond Roofing Company v. OSHRC 528 F 2d 645 (5th Cir., 1976), Dunlop v. Ashworth 538 F 2d 562 (4th Cir., 1976); Brenner v. OSHRC (Ron M. Fregen, Inc.) 513 F 2d 713 (8th Cir., 1975); Usery v. Kennecott Copper Corp. 577 F 2d 1113 (10th Cir., 1977).

MSHA's second contention that the Climax safety director did not rely on the opinions of its medical staff ignores the evidence to the contrary (See Fact 7 and 9).

MSHA's third argument that an operator must preserve the site until management has determined whether the accident is immediately reportable misconstrues the regulations. An operator may be acting at its peril in not preserving the site if it develops that the injury does have a reasonable potential for death. However, the necessity to preserve does not occur *until* the reasonable potential for death has arisen.

MSHA's final contention that notification is required "whenever there exists any question as to whether it is life threatening" lacks merit. If MSHA desires a regulation in line with the above requirements, then it should redraft one under its rule making procedures.

At trial, MSHA argued that immediate reporting was required due to a combination of circumstances. Namely, the injuries were serious, a fat embolism developed, intensive care was required, and Persichini was moved to three different treatment facilities.

In considering the above elements, I rule as a matter of law, that a "serious injury" is necessarily something less than one that has "a reasonable potential for death." Climax's evidence shows that a fat embolism is not "life threatening." Further; intensive care is a facility where more specialized nursing care and observation are available. Finally, the evidence shows that the transfer to three medical facilities <sup>1</sup> was due to the areas of specialization of the particular facilities.

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<sup>1/</sup> Climax infirmary, St. Vincent **Hospital** in Leadville, **Colorado**; then St. Anthony's Hospital in Denver, Colorado.

CONCLUSIONS OF **LAW**

1. **MSHA** failed to prove that worker Persichini sustained an injury that had a reasonable potential for death and accordingly Climax did not violate **30 C.F.R.** 50.10.

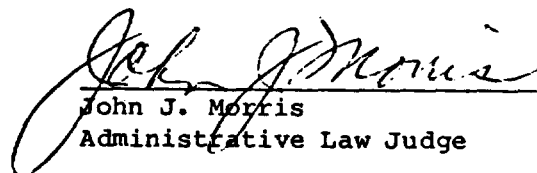
2. Persichini sustained an occupational injury as defined by 30 C.F.R. **50.2(e).**<sup>2</sup>

3. If no immediate notification was required by 30 **C.F.R.** 50.10, then no violation of 30 C.F.R. 50.12 can **occur.**

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

Citations 333661 and 333662 and all proposed penalties **therefor** are vacated.

  
John J. Morris  
Administrative Law Judge

Distribution:

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2/ This definition provides as follows: **(e) "Occupation/injury"** means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.