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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 83-104-M
A.C. No. 48-00155-05511

v.

Alchem Trona Mine

ALLIED CHEMICAL CORPORATION,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., and Margaret Miller, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
John A. Snow, Esq., VanCott, Bagley, Cornwall &
McCarthy, Salt Lake City, Utah,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Allied Chemical Corporation (Allied) with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Act).

After notice to the parties, a hearing on the merits was held on March 5, 1985 in Salt Lake City, Utah.

Issues

The issues are whether the evidence establishes that an accident occurred within the meaning of the MSHA regulations. If such an accident occurred, then the operator was obliged to immediately report the event to MSHA.

Citation 2082864

This citation alleges respondent violated 30 C.F.R. 50.10, which provides 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.

The Secretary's regulations further defines the term "accident" as being "an injury to an individual at a mine which has a reasonable potential to cause death", 50.2(h)(2).

Stipulation

At the hearing the parties stipulated that Allied, a large operator, is subject to the Act. Further, the proposed penalty will not affect the company. Finally, the operator established its good faith in abating the citation (Tr. 44, 45).

Summary of the Evidence

William W. Potter, an MSHA mine inspector, received an anonymous telephone call advising him that a worker had been electrocuted at Allied. The inspector confirmed this information the following day (Tr. 10-12). At that time he learned that a mechanic, William H. Carter, had been shocked while getting on the top of a miner to do some welding (Tr. 13). When this occurred Carter's clothes, boots and gloves were wet from having washed down the miner. His Lincoln arc welder had an amperage setting on 300. In the inspector's opinion Carter was shocked by 70 volts of electricity. This occurred when Carter, laying on his right side over the miner, grabbed the energized portion of the electrode (Tr. 15-17). Carter could not let go of the electrode once he had contacted it. A fellow worker took it out of his hand (Tr. 17).

Carter was hospitalized and observed for approximately 12 hours. While hospitalized his heart beat was monitored and he received an IV (Tr. 17, 18). Dr. Collins, the treating physician, advised the inspector that the patient was monitored for 12 to 18 hours because there was still a potential for death (Tr. 18).

Eight days before the Carter incident a miner at a different company had been shocked by an arc welder. In the performance of his duties Inspector Potter advised Allied, as well as other companies, that such an accident was immediately reportable to MSHA (Tr. 19-20).

Terrance D. Dinkel, an electrical engineer for MSHA at the Technology Center in Denver, was familiar with the effects of electricity on a body (Tr. 22-24).

Death can be caused by fibrillation of the heart which is induced by a low current of electricity. In such a case death might not be instantaneous but the heart can last as long as six

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hours. Generally, industry considers that .05 amps can cause fibrillation of the heart (Tr. 25, 26). Above four amps the heart can be stopped by the muscles seizing (Tr. 26, 27). If there is an exposure below five amps (50 milliamps) a fatality will not result unless the exposure is over a period of time (Tr. 28, 29). A worker can be shocked by momentarily touching 50 milliamps of electricity (Tr. 28, 29). Exposure to ten milliamps can result in a fatality (Tr. 30, 34). An average person's heart will fibrillate if exposed to 100 to 200 milliamps. Fibrillation may also result from a shock as low as 50 milliamps (Tr. 120).

A second cause of death can be a high current of electrical shock which burns the flesh and body tissues (Tr. 25).

In the situation at Allied the flow of the current through Carter's body would depend on the voltage of the arc welder and his body's resistance. The amperage on the arc welder was 300. Industry generally accepts a wet body's resistance at 1000 ohms (Tr. 31).

The fact that Carter could not let go of the arc welder indicates he received a shock of 10 milliamps (.01 amps). For such a low electric current to cause death it must pass through the heart (Tr. 32). Whether this particular electric shock would kill Carter depended on the path of the electricity through his body (Tr. 32, 34, 38-39). If Carter had been in a different position on the miner the current could have gone through his heart. But the electricity was most likely grounded by the miner because he was laying across it (Tr. 35). If Carter's fellow worker had not released him from the electrode, death could also have resulted (Tr. 36). Ten milliamps of electricity can cause death as well as a locking of the victim's muscles (Tr. 36).

After his contact with the electrode was broken the circumstances still exposed Carter to a reasonable potential for death. Fibrillation might manifest itself after a number of hours (Tr. 36, 37).

Inspector Dinkel was aware of five fatalities related to situations where workers with wet clothes had been shocked by 70 to 80 volts of electricity (Tr. 37, 38). In these cases fibrillation caused death by cardiac arrest (Tr. 38).

Respondent's witnesses were William Carter, John Doake, Randall Dutton and Dr. Gordon Balka.

Carter generally described and confirmed the events of the day he was shocked (Tr. 47-65). The only discomfort after being shocked was a cramped feeling, like a charley horse in his leg (Tr. 54). He also had a chill. He was removed by ambulance to the hospital and released the following day (Tr. 58). In the hospital he only received an IV. In addition, his heartbeat was monitored for 18 to 20 Hours (Tr. 59, 65).

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John Doake, an electrical engineer, testified the arc welder had 70 volts. Witness Doake testified how electrical current affects the body. He further testified as to an accepted formula to calculate the amount of electricity entering a body (Tr. 110-113; Exhibit R4). In his opinion approximately 40 some odd milliamps of electricity passed through Carter's body (Tr. 110, 111).

Randall O. Dutton, Allied's superintendent of safety and loss prevention, didn't believe the injury to Carter had a reasonable potential to cause death (Tr. 68). The emergency medical technician advised Dutton that Carter had been shocked but otherwise appeared to be "Okey" (Tr. 69). Carter was admitted to the hospital for observations and was released the following morning (Tr. 69, 70). Allied's procedure is to transport any workers to the hospital by ambulance (Tr. 70).

Gordon Lee Balka, M.D., experienced in the hazards of electrical shock, indicated that death from shock can be caused by cardiac arrest due to fibrillation or cardiac standstill; or by respiratory arrest due to muscle contraction; or by electrical burns and soft tissue injuries (Tr. 76-79). Kidney failure is also a potential result of electrical shock (Tr. 79, 84). Symptoms of arrhythmia or fibrillation would manifest themselves. Cardiac arrest, due to electrical shock, cannot occur as a primary event after electrical shock. As a secondary event it would be a condition of arrhythmia (Tr. 82). If the condition of respiratory paralysis occurs it is immediately observable in 99 percent of all shock victims (Tr. 84).

An electrical shock can cause a burn on the skin. An untrained person could see such a burn (Tr. 84, 85).

The hospital records, including the electrocardiogram, blood check and urinalysis do not indicate that Carter sustained any adverse health effects (Tr. 88-94; Exhibit R2). Based on the conditions found after the shock, as evidenced by the hospital reports, Dr. Balka expressed his opinion that Carter's condition would not have caused his death (Tr. 93).

In cross examination the witness agreed that there are rare occurrences of fibrillation or cardiac arrest occurring after the shock itself (Tr. 92). However, he disagreed with MSHA's witness Dinkel that fibrillation could occur as late as 6 to 10 hours after the shock (Tr. 98).

Dr. Balka indicated that Carter's shock was serious. The treatment that followed, including hospitalization, conforms to standard medical procedures (Tr. 99).

Discussion

The regulation, 50.10, requires that the respondent immediately notify MSHA if an accident occurs. Such an accident is defined as an injury which has a reasonable potential to cause

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death 50.2(h)(2). The issue thus presented is whether the electric shock to Carter had a reasonable potential to cause his death.

The evidence relating to the accident itself is uncontroverted. Carter's clothes, gloves and boots were wet from when he washed down the miner. While lying on the miner he was shocked by 10 to 40 some odd milliamps from his arc welder. Had this low current passed through his heart it would have killed him (Tr. 32). However, the shock went to ground without passing through his heart.

These facts establish that Carter was injured and that the injury had a reasonable potential to cause his death. It was merely fortuitous that the electrical shock went to ground without passing through his heart.

Allied correctly recites that the evidence shows that Carter received an electrical shock which caused chills and that he had a cramp in his right leg. Further, there was no evidence of burns or other adverse effects other than temporary muscle soreness resulting from the shock.

Allied argues from these facts that MSHA's view of the regulations would bring within its ambit every accident at the mine because any accident could have caused death if the circumstances were different. Basically Allied states that it is the injury which must have the potential to cause death, not the incident causing the injury. Therefore, the operator asserts that, since there was no medical opinion that Carter's life was in danger, the regulation was not violated.

Allied's initial position lacks merit. Every accident would not come within the ambit of the regulation because the regulation requires that the potential to cause death must be a "reasonable" one. 50.2(h)(2).

Further, I am not persuaded by Dr. Balka's opinion. It is not directed to the pivotal issue of whether the 10 to 40 milliamps coursing through Carter's body would have killed him if it passed through his heart. On the contrary, the doctor's opinion focuses on Carter's condition in the hospital. At this point Carter had already, fortunately, survived the shock.

In short, the evidence of MSHA's witness Dinkel that 10 milliamps passing through Carter's heart would have killed him is uncontroverted. This evidence clearly establishes the potential for death.

In evaluating the circumstances here I consider that the shock to Carter had more than a reasonable potential to cause death. In my view, there was a reasonable likelihood that his death would result. Simply put, he was lucky.

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This decision does not turn on Exhibit R4 which outlines the effect of electrical shock on the average human. The exhibit supports the theories of both of the parties to this litigation. The exhibit, as witness Dinkel testified, is a chart of a general average, which can vary either way (Tr. 118-121).

In support of its position Allied relies on Climax Molybdenum Company, 2 FMSHRC 1967 (ALJ Morris) and Hecla Mining Company, 1 FMSHRC 1872 (ALJ Koutras).

The initial case, decided by the undersigned, is not controlling. The Secretary's case failed in Climax because he did not offer any credible evidence that the severe occupational injury sustained by the employee had a reasonable potential to cause his death.

In Hecla Commission Judge George Koutras ruled to the same effect. Namely, MSHA must establish that the injuries sustained by an accident victim have a reasonable potential to cause death, 1 FMSHRC at 1888. The rulings in the cited cases coincide and the cases do not support Allied's position.

As noted in this case, the uncontroverted evidence clearly establishes that Allied violated the regulation in failing to immediately report the accident when there was a reasonable potential to cause Carter's death.

In short, Allied claims that it did not violate the regulation because Carter survived without serious injury. This is a correct analysis of the evidence but I find the following evidence to be credible: if the electrical current had passed through Carter's heart he would have died; further, Carter could have died if a fellow worker had not released him from his contact with the energized electrode (Tr. 33, 39).

The citation should be affirmed.

Civil Penalty

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act, now codified at 30 U.S.C. 820(i)

In considering the criteria, I find that the evidence fails to establish any adverse history of previous violations. Respondent is a large operator and the minimal proposed penalty will not affect the company. Further, I find the company was negligent. Since this violation is a reporting requirement the gravity is minimal; however, the gravity of the actual incident giving rise to the reporting requirement was high. The operator's statutory good faith is apparent in abating the violation.

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Based on the above criteria, I am unwilling to disturb the proposed minimal penalty of \$20.

Briefs

Counsel for both parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent violated 30 C.F.R. 50.10.
3. Citation No. 2082864 and the proposed penalty therefor should be affirmed.

ORDER

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

1. Citation 2082864 and the proposed penalty of \$20 are affirmed.
2. Respondent is ordered to pay the sum of \$20 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge