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ENERGY WEST MINING v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Freederal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

ENERGY WEST MINING COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEST 91-83-R
Citation No. 3413924; 11/1/90

Deer Creek Mine

Mine I.D. 42-00121

DECISION

Before: Judge Lasher

This matter arose upon the filing of a Notice of Contest on November 13, 1990, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act") wherein Contestant seeks review of Citation No. 3413924 charging a violation of 30 C.F.R. 50.20 which was issued by MSHA Inspector Robert L. Huggins at Contestant's Deer Creek Mine on November 1, 1990, and which in pertinent part alleges as follows:

A [sic] accident occurred to Donald Hammond on 10-3-90 and a 7000-1 report form was not submitted to the MSHA Health and Safety Analysis Center in Denver, Colorado. Mr. Hammond was involved in an automobile accident that occurred on mine property and Mr. Hammond failed to report to his next shift of work. Mr. Hammond returned to work on 10-8-90.

By agreement, the parties have submitted this matter for decision on the basis of a stipulation of fact (with exhibits attached) and briefs.

Stipulated Facts

1. The Deer Creek Mine is owned by Contestant Energy West Mining Company ("Energy West").
2. The Deer Creek Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The presiding Administrative Law Judge has jurisdiction over this proceeding pursuant to 105 of the Act.

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4. Citation No. 3413924 (Joint Ex. 1) was issued on November 1, 1990, by Inspector Robert L. Huggins, alleging that Energy West violated 30 C.F.R. 50.20 by failing to report an injury sustained by employee Donald Hammond in an automobile accident on mine property on Wednesday, October 3, 1990.

5. The subject Citation and termination were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Energy West on the date, time, and place stated therein, and may be admitted into evidence for purposes of establishing their issuance without admitting the truthfulness or relevance of any statement therein.

6. At the time of the accident, Mr. Hammond was driving his own personal car on his way to work. He was injured when, after passing through the gate onto company property and driving uphill towards the parking lot, the engine of his car stalled and his brakes failed. The car rolled backwards down the road approximately 150 feet (see Joint Exs. 3, 4) and turned on its side into a drainage ditch on the side of the road (see Joint Exs. 5, 6).

7. The accident occurred at 7:30 a.m. as Mr. Hammond was on his way to report for his 8 a.m. shift at the time. Mr. Hammond sustained a strained neck.

8. After the accident, Mr. Hammond did not report to the 8 a.m. shift on Wednesday, October 3, 1990. He returned to work on Monday, October 8, 1990.

9. At the time of the accident and at all times relevant to the subject Citation, the road was paved, in good repair with guard rails on one side and a hillside on the other, and in substantially the same condition as the publicly maintained road leading to the entrance of the company property.

10. The accident occurred in daylight during good weather conditions and clear visibility.

11. The condition of the road was not the cause of the accident.

12. Inspector Huggins was present at the Deer Creek Mine on the day of the accident and visited the accident site. He asked Deer Creek Safety Engineer Kevin Tuttle whether Energy West planned to report the injury to the Mine Safety and Health Administration. In response, Mr. Tuttle stated his belief that the injury was not reportable, because it occurred while Mr. Hammond was on his way to work, not while he was on the job, and

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involved Mr. Hammond's personally owned vehicle. Inspector Huggins informed Mr. Tuttle that he would check to see whether MSHA thought the injury was reportable.

13. Shortly thereafter, Inspector Huggins informed Mr. Tuttle that the injury was reportable. On November 1, 1990, Inspector Huggins issued the subject Citation when no accident report was forthcoming. To abate the alleged violation, Mr. Tuttle then completed MSHA Form 7000-1 (Joint Ex. 2) on November 1, 1990, and mailed it to the MSHA Health and Safety Analysis Center, and Inspector Huggins terminated the Citation.

Exhibits

As part of their stipulation, the parties submitted the following exhibits:

Exhibit	Description
1	Reproduced copy of Citation No. 3413924, issued 11-1-90
2	MSHA Form 7000-1, filed 11-1-90, completed by Kevin Tuttle, Chief Safety Engineer
3	Enlargement of Polaroid photograph (taken April 1991) looking downhill from approximate point at which car stalled and brakes failed; car rolled downhill and to the left around curve at conveyor facility shown in center of picture.
4	Enlargement of Polaroid photograph (taken April 1991) looking downhill and showing road further downhill and around curve from Joint Ex. 3; conveyor belt in center of Jt. Ex. 3 feeds into yellow loadout shown in Jt. Ex. 4.
5	Enlargement of Polaroid photograph (taken on day of accident, Oct. 3, 1990) looking uphill and showing where car came to rest below loadout pictured in Jt. Ex. 4.
6	Enlargement of Polaroid photograph (taken on day of accident, Oct. 3, 1990) looking across the road and showing car at rest behind berm.

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Contentions of the Parties

Contestant contends that:

1. This case involves an operator's obligation to report "occupational" injuries pursuant to Section 103 of the Mine Act and Section 50.20 (Footnote 1) of the Secretary's regulations.

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2. Inspector Huggins "issued the instant citation . . . charging Energy West with violating 30 C.F.R. 50.20 by failing to report an "occupational injury."

3. The "sole issue in this proceeding is whether Section 50.20 requires Energy West to report a nonwork injury such as Mr. Hammond's, which occurred prior to the injured employee's shift and involved only the failure of the brakes on the employee's own private car as he drove to work."

Respondent MSHA contends that the injury to miner Hammond on mine property was required to be reported pursuant to 30 C.F.R. 50.20 since it was an "occupational injury" within the meaning of the standard.

Discussion, Findings, and Conclusions

Preliminarily, it is useful to determine whether the Hammond injury is reportable as an "accident," whether or not such injury be considered as "occupational."

30 C.F.R. 50.20 expressly requires a mine operator to report three categories of events: (1) accidents, (2) occupational injuries, and (3) occupational illnesses. It is significant that the word "occupational" does not precede or modify the word "accident" in view of the way "accident" is defined in the preceding regulation [Section 50.21(h)] which governs its usage in Section 50.20, to wit:

(h) "Accident" means,

(1) A death of an individual at a mine;

(2) An injury to an individual at a mine which has a reasonable potential to cause death;

(3) An entrapment of an individual for more than thirty minutes;

(4) An unplanned inundation of a mine by a liquid or gas;

(5) An unplanned ignition or explosion of gas or dust;

(6) An unplanned mine fire not extinguished within 30 minutes of discovery;

(7) An unplanned ignition or explosion of a blasting agent or an explosive:

(8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;

(9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour.

(10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;

(11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and

(12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

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An accident is thus reportable, whether or not it can be said to be "occupational," if it is, in the language of 50.2(h)(2), (Footnote 2) (a) an injury to an individual (b) at a mine which (3) has a reasonable potential to cause death. (Footnote 3) Here, the accident caused an injury to an individual at the mine and did cause a minor injury. But did it have "a reasonable potential to cause death?" I conclude that it did not. The accident occurred when the miner, Hammond, while driving to work on mine property, had the unusual event of his engine stalling and his brakes failing while he was traveling uphill. (Footnote 4) His personal vehicle then rolled backwards downhill approximately 150 feet and turned on its side into a drainage ditch on the side of the road. Scrutiny of the primary piece of evidence bearing on the potential severity of any injury--the photograph of the overturned vehicle (Joint Ex. 5)--reveals that the vehicle was not demolished or, in the vernacular of the auto insurance industry, "totaled out." In other words, the damage to the vehicle does not warrant an inference that there was a reasonable potential to cause death. While the degree of the grade of the road was not stipulated, the vehicle rolled only 150 feet before coming to rest and from this I infer that the speed at which it was traveling when it impacted the ditch was not such to have severely damaged either the vehicle or its occupant. (Footnote 5) Finally, the minor injury actually sustained by Hammond is some evidence of the magnitude of bodily harm one might reasonably expect of the accident. The injury in and of itself has no reasonable potential to ultimately result in death.

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It is therefore concluded, that the event, as an "accident," was not required to be reported by the standard.

The question remains whether Hammond's neck strain (Stipulation; Joint Ex. 2) was reportable as an "occupational injury." Hammond was off work two workdays because of the injury. (Joint Ex. 2).

"Occupational injury" is defined in the pertinent regulation [30 C.F.R. 50.2(e)] as follows:

(e) "Occupational 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.

The circumstances of Hammond's neck strain meet the definition of "occupational injury" set forth in 30 C.F.R. 50.2(e). Each element thereof is established in this matter:

"Any injury": Hammond suffered a strained neck as a result of the accident. Part 50 explicitly includes sprains and strains as a type of injury which may be reportable. (See 30 C.F.R. 50.20-3, which distinguishes first aid and medical treatment of various injuries.)

"To a miner": Hammond was a roof bolter at Energy West's Deer Creek mine. Since he works in a coal mine, his position clearly qualifies him as a "miner" under the definitions set out under the Act (30 U.S.C. 802(g) (1988) and Part 50 (30 C.F.R. 50.2(d) (1988)).

"For which medical treatment is administered, or which results in . . . inability to perform all job duties on any day after an injury . . ." Hammond's accident occurred on October 3, 1990, and he didn't return to work until October 8. (Footnote 6 The MSHA form (Jt. Ex. 2) shows that he missed two days of work, not counting inability to return to full duty right away.

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Contestant argues, however, that the Secretary's (MSHA's) interpretation of these reporting requirements for an injury not having a causal nexus to actual mining work at a mine is wrong since such is contrary to the Mine Act itself, the legislative history and "immediate predecessors" to the current reporting regulations. Contestant also maintains that requiring reporting for non-work related injuries would be burdensome.(Footnote 7) Finally, Contestant does concede that there is Commission precedent (Freeman, infra) to the contrary of its position.(Footnote 8)

The Commission has indeed resolved the issue in this matter previously in Secretary of Labor v. Freeman United Coal Mining Company, 6 FMSHRC 1577 (July 1984). That precedent governs.

In Freeman, a plant cleaner who was putting on his boots in the mine's wash house an hour before his shift commenced experienced back pain. At the hospital he was diagnosed as having back strain and he subsequently missed 13 days' work. The administrative law judge found a "failure to report" violation under Section 50.2(e) because (1) there was an injury to a miner; (2) it occurred at a mine; and (3) medical treatment was required and it caused disability. On appeal to the Commission, Freeman argued that Section 50.2(e) contemplated a "causal nexus" between the miner's work and the injury. The Commission rejected this contention, stating:

. . . sections 50.2(e) and 50.20(a), when read together, require the reporting of an injury if the injury--a hurt or damage to a miner--occurs at a mine and if it results in any of the specified serious consequences to the miner. These regulations do not require a showing of a causal nexus.

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The Commission also determined (1) that the regulatory history of the occupational injury - reporting requirement does not show any intent to require such a specific causal connection and (2) that Section 50.20(a) is consistent with and reasonably related to the statutory provisions (Mine Act) under which it was promulgated.

Accordingly, despite the quality and thoroughness of Contestant's arguments, it is concluded that the position of Respondent MSHA (which is incorporated herein by reference) is meritorious and that the neck injury to Hammond was an occupational injury for reporting purposes in mine safety enforcement and was required to be reported pursuant to 30 C.F.R.

50.20. Since it wasn't, the violation charged in Citation No 3413924 is found to have occurred.(Footnote 9)

ORDER

Contestant's Notice of Contest is DENIED; Citation No. 3413924 is AFFIRMED; this proceeding is DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

Footnotes start here:-

1. 30 C.F.R. 50.20 pertaining to "Preparation and Submission of MSHA Report Form 7000-1--Mine Accident, Injury, and Illness Report," appears in Subpart C under the heading "Reporting of Accidents, Injuries, and Illnesses" and provides as follows:

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in 50.20-1 through 50.20-7. If an occupational illness is diagnosed as being one of those listed in 50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. When an accident specified in 50.10 occurs, which does not involve an occupational injury, sections A, B, and items 5 through 11 of section C of Form 7000-1 shall be completed and mailed to MSHA in accordance with the instructions in 50.20-1 and criteria contained in 50.20-4 through 50.20-6.

(b) Each operator shall report each occupational injury or occupational illness on one set of forms. If more than one miner is injured in the same accident or is affected

simultaneously with the same occupational illness, an operator shall complete a separate set of forms for each miner affected. To the extent that the form is not self-explanatory, an operator shall complete the form in accordance with the instructions in 50.20-1 and criteria contained in 50.20-2 through 50.20-7.

2. The other 11 categories of "accident" are not applicable here.

3. Review of the other 11 categories of "accident" reveals that any such event covered by the definition carries with it the potential for severe injuries or fatalities. The focus of the specific categories appears to be on the high degree of seriousness of potential injuries to individuals endangered by the event at the mine rather than whether the event occurred in the context of a work-related activity by the endangered individual.

4. No other causal factors, including weather, road condition, or negligence on the part of the driver or the mine operator, were involved.

5. The test here, of course, is "reasonable potential to cause death," not "reasonable likelihood" to cause serious injury.

6. See also Respondent's Brief, fn.1, pg. 2.

7. However, if there were so many accidents or injuries at a mine as to then the need of the regulating agency to have them reported - to enable investigation and exercise of judgment - would necessarily outweigh the mine operator's attendant paperwork problem. Further, as forms go, MSHA Form 7000-1 (Gov't Ex. 2) consists of one page and is not particularly elaborate whether completed for statistical purposes or for starting the process of notification, inspection, and enforcement action if called for.

8. Contestant's Brief, p. 16. Contestant's Reply Brief makes no further mention of the Freeman precedent.

9. I am unaware of any related penalty case and none has been mentioned by the parties in their stipulation or otherwise. (See Contestant's "Filing of Subsequent Modification and Motion for Leave to File Same Out of Time" dated June 21, 1991, ¶57 5, pg. 2).