FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 5, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2012-1283-M A.C. No. 1512905-292011-01
v.	:	
HANSON AGGREGATES MIDWEST Respondent	:	Mine: Laurel Quarry

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

In this matter, the parties filed cross-motions for summary judgment on the issue of whether the Respondent, Hanson Aggregates Midwest LLC, failed to give MSHA notice of a reportable accident within 15 minutes, pursuant to 30 C.F.R. §50.10(b). As the facts are not in dispute, this matter is appropriate for summary judgment. For the reasons which follow, as the Court finds that this was not a reportable event, it GRANTS the Respondent's Motion and DENIES the Secretary's Motion.

The agreed-upon facts may be succinctly stated. Citation No. 8640910, issued February 4, 2012 states: "A heart attack which occurred on mine property on 02/03/2012 was not reported to MSHA within the allowed time frame of 15 minutes. The mine [superintendent] knew of the condition for about 45 minutes before notifying MSHA. This is in violation of 30 CFR [§] 50.10b." To abate the alleged violation, the section 104(a) citation states that the "operator changed their policy and now have implemented the practice to call MSHA immediately following any 911 call."[1]

In its "Statement of Facts" the Secretary informs that: "On February 3, 2102, Ralph Newcomb, a miner employed at the Hanson Aggregates Laurel Quarry, began suffering chest pains at approximately 3:25 p.m. Mr. Newcomb began his shift that day at 7:30 a.m. At the time that his chest pains began, he was operating a CAT 773B haul truck hauling overburden at the spoil pile dump site on the mine property. He exited the cab of the truck and laid down beside a berm. Larry Tedders, dozer operator, saw Mr. Newcomb and went to check on him. Another haul truck driver, Cordell Burdine, also went to check on Mr. Newcomb. Mr. Newcomb, who is trained in CPR, told Mr. Tedders he thought he was having a heart attack

[1] The Secretary proposed a penalty of $5,000.00 for this alleged violation.

and asked him to call the office. Upon receiving Mr. Tedders' call, the office clerk called 911 at 3:35 p.m. At the same time, lead man Rick Wilson called Plant Manager James Kirby, and told him about Mr. Newcomb's condition. The ambulance arrived at 3:55 p.m. and transported Mr. Newcomb to the hospital. Mr. Kirby arrived at the mine site at about 4:05 p.m. as the ambulance was leaving the mine. Mr. Kirby then called Charles Sellards, Area Safety Manager at 4:10 p.m. to inform him of the incident. After talking to Mr. Kirby, Mr. Sellards called MSHA to report Mr. Newcomb's heart attack at 4:20 p.m. Mr. Newcomb was admitted to the ER and diagnosed with acute myocardial infarction as a result of a blockage in his right coronary artery. The ER doctor performed a thrombectomy that [same day, removing] the blockage. Mr. Newcomb returned to work [about six weeks later] on March 19, 2012. The operator maintained an emergency response telephone list in the mine office. This list included local emergency contact numbers only. MSHA's 1-800 number was posted on a bulletin board in the main office area where the emergency response telephone was posted, as well as in Mr. Kirby's office." Sec. Motion at 1-2. The foregoing represents the entirety of the Secretary's statement of facts. The Respondent does not challenge the Secretary statement of the facts, nor offer contrary facts.

The Parties' Contentions

The Secretary points to the wording of Section 30 CFR § 50.10(b) which requires that an "operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number . . . once the operator knows or should know that an *accident has occurred* involving . . . [b] *an injury* [of] an individual at [the] mine which has a reasonable potential to cause death." It notes that the provision "is triggered *once an accident occurs*" and that "Section 50.2(h) defines an 'accident' *as an injury* to an individual at a mine which has a reasonable potential to cause death." Sec. Motion at 2. (emphasis added).

Respondent takes note of what has been informally referred to as MSHA's "Yellow Jacket,"[2] which is more formally and accurately, identified as the "MSHA Report on 30 C.F.R. 50, from the Directorate of Technical Support," dated December 1986, PC-7014. *See*, http://www.msha.gov/stats/part50/rptonpart50.pdf. [3] This was updated in a Program Information Bulletin, No. 88-05, dated September 28, 1988. That update is useful because it presents the distinction between an *injury vs. an illness*, providing that "[t]he basic definition of an occupational injury includes those cases which result from a *work accident* or from *an exposure* involving a single instantaneous incident in the work environment. Contact with a hot surface or

[2] Inferentially, the "Yellow Jacket" name derives from the yellow cover sheet for the document.

[3] Although this is the correct link for the "Yellow Jacket," it may not appear when the link is attempted. The Court has found that searching for " MSHA Program Information Bulletin, No. 88-05, September 28, 1988," which is also described as "MSHA PC-7014 - Report on 30 CFR Part 50 - Yellow Jacket," is an alternative to lead one to the MSHA Yellow Jacket Report.

a caustic chemical which produces a burn in a single instantaneous moment of contact is an injury. Sunburn or welding flash burns which result from prolonged or repeated exposure to sunrays or welding flashes are considered illnesses. Similarly, a one-time blow which damages the tendons of the hand is considered an injury, while repeated trauma or repetitious movement which produces tensynovitis is considered an illness. The basic determinant is the single-incident concept. If the case resulted from something that happened in one instant, it is classified as an injury. If the case resulted from something that was not instantaneous, such as prolonged exposure to hazardous substances or other environmental factors, it is considered an illness." Yellow Jacket at p. 2. (Italics added).

Respondent notes that the same document describes a heart attack as an illness "because they do not normally result from work accidents or [a] single[,] instantaneous exposure in the environment." Respondent's Opposition at 2, quoting from the Yellow Jacket at p. 30. Further, Respondent notes that the preamble to the final rule for the cited provision, while listing many injuries, does not include a heart attack among them. Respondent's Opposition at 2, citing 71 Fed. Reg. 71430, 71434 (December 8, 2006). Given MSHA's own distinction between an accident and an illness, Respondent observes that "[i]f a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Id.* at 3, quoting *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 at 1193 (9th Cir. 1982).[4]

Respondent also asserts that because the Secretary has clearly articulated it's interpretation, it can't now move away from it, simply because of this litigation and, in such circumstances, no deference is due. *Id.* at 3-4, citing *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) and *United States v. Mead*, 533 U.S. 218, 227-228 (2001).[5]

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[4] Even if the provision could be stretched on the basis of the preamble's reference to "cases requiring cardio-pulmonary resuscitation (CPR)," Respondent notes that the miner did not receive CPR and that the parties so stipulated to that fact. Joint stipulation 27. The Court agrees with Respondent's point, but adds that the reference to CPR is not a stand-alone basis for the injury reporting requirement. Clearly, in context, CPR use is linked to an injury, prompting its use.

[5]Alternatively, Respondent contends that, even if the Secretary's new interpretation was accepted, Respondent's call still met the 15 minute reporting time requirement as, by Commission interpretation, that provision allows time for a mine operator to determine if an accident has occurred. Here, per the parties' stipulations, Respondent's management personnel were off site at the time of the miner's heart attack. Thereafter, they promptly investigated the event and reported it. Respondent's Opposition at 4-5, citing joint stipulations 22, 25, and 28. Given that mine operators are afforded a "reasonable opportunity to investigate an event" before the 15 minute clock is triggered, management learned of the miner's chest pain ten minutes after that occurred, then arrived at the mine 30 minutes after that notification. Following that, Respondent spent 10 minutes to discuss what had transpired and called MSHA 15 minutes after

Discussion [6]

The particular provision of the cited standard, 30 CFR § 50.10(b), requires immediate notification to MSHA for "[a]n *injury* . . . which has a reasonable potential to cause death." (emphasis added).

The Secretary has cited to *Cougar Coal Co. Inc.* 25 FMSHRC 513, 520 (Sept. 2003) ("*Cougar*"), and *Newmont USA Ltd.,* FMSHRC 391, 396 (ALJ April 2010)(*"Newmont")*. However, in the Court's view, the Commission's holdings on this issue do not support the Secretary's interpretation. In *Cougar*, a miner was working, removing electrical equipment from a high line cable, when he touched a live wire, received a 7,200 volt shock, and fell some 18 feet.[7] Clearly, an "accident" occurred in *Cougar* because there was an associated *injury* to the miner.[8]

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management's arrival at the scene. *Id.* , citing Jt. Stips. 15, 21, 22, 25, 28, and 29. Under these facts, the Court would agree that Respondent's call was timely. Because the Court finds that the duty to report never arose here, this information is relegated to a footnote.

[6] Section 30 CFR § 50.10 provides: Immediate notification. The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine; (b) An injury of an individual at the mine which has a reasonable potential to cause death; (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or (d) Any other accident.

"Accident" is defined at 30 CFR § 50.2, where, in relevant part, that definition provides: As used in this part: "(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 30 minutes or which has a reasonable potential to cause death; . . . (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." Items (4) through (11) are omitted here because they refer to events at a mine *apart from those immediately impacting an individual*. They include events such as an unplanned ignition, and an unplanned roof fall. Those events have no reference to, or requirement that, individuals are affected. Thus they are materially different from items (1) through (3) and item (12) and are not applicable here factually, nor in understanding the application of the term in the context of this litigation.

[7] Remarkably, the miner survived.

[8] As for the determination in *Newmont*, decisions of fellow ALJ's have no precedential effect beyond their persuasiveness. Even the persuasiveness consideration is not present because, unlike present matter, an accident did occur in *Newmont*: "An accident happened on 07/23/2007 in the main drift between 152 stope and the 161 laydown, where a miner was pinned between the

With no controlling precedent, the Secretary's Motion must fail for several, independent, reasons. To begin, the words of the cited standard are clear and exclude the non-work-related event which occurred at the Respondent's mine. Supporting the text of the standard, the Federal Register's preamble to the cited standard is entirely consistent with those words; it does not list a heart attack as an "injury." The whole of Part 50's obligations arise in the context of a mine accident's occurrence. The "Purpose and scope" section for Part 50 also makes clear that the duty to notify is all about accidents, requiring mine operators to "immediately notify [MSHA] of *accidents*, requires to investigate *accidents*, and restricts disturbance of *accident* related areas." 30 C.F.R. § 50.1. An "Accident," in turn, is defined by 12 separate categories, with only the second listed category, "[a]n injury to an individual at a mine which has a reasonable potential to cause death," applying here.[9]

Here, as noted, the Secretary has relied upon the definition of an "accident," particularly pointing to subsection (h)(2), which defines that category of "accident" as "[a]n injury to an individual at a mine which has a reasonable potential to cause death." Therefore, an injury must first have occurred for an accident to be reportable. Although the wording is plain and sufficient to reach the result here, as mentioned, the preamble to the final rule speaks solely in terms of a "'reasonable potential to cause death' basis *for injuries* and entrapments [and later it illustrates] some types of *'injuries* which have a reasonable potential to caused death.'" 71 Fed. Reg. 71430, 71433- 71434 (emphasis added). Not surprisingly, the examples offered in the final rule are prefaced as "*types of 'injuries* which have a reasonable potential to cause death.'" As also noted above, the Agency's Yellow Jacket confirms what the plain language of the standard provides. Thus, the Yellow Jacket is also consistent with the standard's wording. In sum, all sources point to the same conclusion: there must be an work injury for this provision to apply.[10]

MSHA's concern is about workplace health and safety. It is the intersection of work activity and an injury resulting from performing such work activity that triggers the reporting requirement. MSHA raison d'être comes into play when such *work activity* results in an injury from an accident. Here, there was no "accident" at Hanson Aggregates Laurel Quarry Mine. The miner was a haul truck operator and was simply performing that function. The truck was not in any accident; it did not crash, roll-over, or otherwise have an incident. With no accident, there was no associated injury occurring.

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rib and a haul truck, causing him to be twisted around, breaking his left femur." *Newmont* at *392.

[9] It has been noted that the definition of an "Accident," is expansive and detailed, including among the 12 categories, events such as unplanned inundations, ignitions or explosions, entrapment of an individual and any death at a mine. 30 C.F.R. §50.2(h).

[10] The only exception, in this context, is that anytime an individual dies at a mine, that is considered to be an "accident" under the provision. Thus a death creates a duty to notify MSHA apart from any injury.

Under MSHA's suggested interpretation in its Motion for summary judgment, *any* untoward event to a miner, regardless of whether it was associated with work activity, would be reportable. As applied under MSHA's theory, a duty to report would arise if a miner, while eating a donut in a break room, then choked while eating it and passed out, and then required rescue personnel to arrive at the mine to resuscitate him. In either instance; when no work activity is involved or where, as in this litigation, a miner succumbs to some medical malady, completely apart from any work activity mishap, the regulation, properly, requires no reporting requirement.[11]

Based on the foregoing, the Court finds that this was not a reportable event, and accordingly it GRANTS the Respondent's Motion and DENIES the Secretary's Motion.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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[11] Even the Agency's requirement for the abatement here was outside of its authority under the cited provision. The action to terminate states that the "operator changed their policy and now have implemented the practice to call MSHA immediately following any 911 call." Citation No. 8640910. However, nowhere in Part 50 is a "911 call" listed as a trigger to notify MSHA. Neither the cited provision, 30 C.F.R. § 50.10(b), nor the definition of an "accident," at 30 C.F.R. § 50.2(h) make any reference to 911 calls.