FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 9, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. SOLVAY CHEMICALS, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2020-0278-M A.C. No. 48-01295-511817 Solvay Chemicals

DECISION

Appearances: Francesca Cheroutes, U.S. Department of Labor, Office of the Solicitor, Denver, Colorado for Petitioner;
Erik Dullea, Husch Blackwell, LLP, Denver, Colorado for Respondent.

Before: Judge Manning

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Solvay Chemicals Inc. ("Solvay") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a video conference hearing and filed post-hearing briefs and replies. Citation No. 9475179, alleging a violation of section 50.10(b), was adjudicated at the hearing.[1] For reasons set forth below, I **AFFIRM** the citation but modify the degree of negligence to moderate.

Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments. The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony.

[1] This docket also contained Citation No. 9475178. On July 14, 2021, the Secretary agreed to vacate that citation so it is no longer at issue in this case.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Solvay operates the Solvay Chemicals Mine (the "mine"), an underground trona mine in Sweetwater County, Wyoming. On January 31, 2020, Delbert Hauser[2], an underground miner employed by Solvay, was assigned to operate the 6 Bore Miner (the "bore miner"[3]) during the day shift.[4] Tr 122. At some point during the shift a shear pin at the front of the bore miner broke. Tr. 125. In response, Hauser backed up the bore miner to where he could see a roof bolt in front of the machine.[5] Tr. 125, 152. Hauser then gathered his tools, went to the front of the machine, and attempted make the repair. Tr. 126. After Hauser struggled with the repair work for some time, Shane Dodge,[6] one of the other crew members in the area, asked if he could help. Tr. 126. Hauser got down off the bore miner and Dodge crawled up to begin working on the shear pin. Tr. 127, 197-199.

Shortly after Hauser crawled down off the machine there was a sound from above and a fall of roof struck him.[7] Tr. 127. Hauser did not see the size of the roof fall that hit him but knew that a large slab of the roof struck him, knocked off his hardhat and drove him face first into the ground before a second, smaller rock hit him directly in the head.[8] 127-128. Dodge, who heard but did not see the roof fall, turned and saw Hauser, without his hardhat, laying on the ground,

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[2] Hauser worked at Solvay for over 11 years. Tr. 121.

[3] Bore miners, which are akin to continuous mining machines found in underground coal operations, are used to cut material at the face. Solvay uses bore miners and longwalls to cut all material in the mine. Tr. 18. The bore miner in question had cutting heads on the front, top, bottom and sides of the machine.

[4] The other crew members included the foreman, Neil Mattinson, as well as Wendalle Boyd, Shane Dodge, Dave Acosta, and Troy Sinclair. Tr. 126, 197.

[5] At hearing, the witnesses offered conflicting testimony as to whether the roof in front of the parked bore miner was bolted or unbolted. However, for purposes of this decision, I need not resolve the conflict.

[6] Dodge has 16 years of underground mining experience, previously was a member of a mine rescue team, and has received first aid training. Tr. 196.

[7] Although it was Solvay's policy for miners to not work under unsupported roof and to bar down loose material that was observed, Hauser testified that roof conditions were always a "big issue" in the mine. Tr. 123-124, 143, 146.

[8] At the hearing Hauser testified that the second rock "rang [his] bell pretty good," but he could not recall whether he lost consciousness. Tr. 128

pushing rocks off him and beginning to get up.[9] Tr. 199, 209. At hearing, Dodge testified that Hauser appeared "kind of, dazed and confused" as he stood up. Tr. 199. Dodge observed that Hauser had a two-inch cut on the back of his head that would need stitches, a torn shirt, and a "light abrasion, scratch" on his back. Tr. 199-200. According to Dodge, Hauser repeatedly stated that he was alright when asked. Tr. 199.

At the time of the roof fall Neil Mattinson,[10] the production foreman for the crew, and Wendalle Boyd,[11] a crew member, were positioned at the rear of the bore miner. Tr. 215, 257. Both heard the roof fall, but neither saw it.[12] Tr. 216, 258, 280, 298. While walking toward the front of the bore miner Boyd could see Hauser picking himself up off the ground. Tr. 216. Mattinson and Boyd observed that Hauser had a cut on his head and was bleeding. Tr. 216, 258, 277. In response, Mattinson and Boyd went to retrieve the first aid kit from the lunch niche. Tr. 216, 260-261, 278. Meanwhile, Dodge assisted Hauser along the side of the bore miner to the rear. Tr. 200.

After helping Boyd gather the necessary first aid supplies Mattinson called the hoistman from the lunch niche to tell him that Hauser had "possibly [been] struck by a rock," had blood on his face, and an ambulance was needed at the collar.[13] Tr. 259-260, 278-281. Mattinson testified that at the time he spoke with the hoistman he did not knew where Hauser had been hit but based on the blood on Hauser's face, he would probably need to go to the hospital for stitches. Tr. 279, 281. On cross-examination Mattinson testified that the closest he got to Hauser before calling the hoistman was 30 feet and agreed that he did not know the seriousness of the injury at that time. Tr. 282. Mattinson told the hoistman that he would update him if anything new developed. Tr. 265. While Mattinson was on the call, Boyd returned to the last open crosscut, where he met Dodge and another crew member that had helped Hauser into a mantrip. Tr. 200-201, 216-217.

The crew members bandaged Hauser's head and asked questions to ensure he was coherent. Tr. 202, 217. Dodge, Boyd and Mattinson all testified that Hauser was coherent and refused, multiple times, to be placed on a backboard, but did accept an ice pack to place on his

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[9] Although Dodge speculated that the rock that fell "hinged" and did not directly strike Hauser, he also conceded that he did not see the rock fall out of the roof or how it struck Hauser. Tr. 199, 204, 207.

[10] Mattinson has worked at Solvay for 26 years and has been a mine operations foreman for 8 years. As mine operations foreman he monitors a crew and is responsible for doing workplace examinations at the start of every shift. Tr. 254.

[11] Boyd, a shuttle car operator and bolter operator, has 23 years of mining experience and had been with Solvay for approximately one and a half years at the time in question. Tr. 213.

[12] Mattinson testified the fall sounded "normal" and "like nothing really of significance." Tr. 259. However, on cross-examination he conceded that, having since learned the dimensions of the rock that fell, the sound he heard made him think the roof fall was smaller than it actually was. Tr. 277-291-292.

[13] The collar is where the hoist exits the mine at the surface.

eye, which had begun to swell. Tr. 202, 204, 210, 218, 263-264, 284. Hauser also refused to be placed in a "c-collar." Tr. 202-203, 218, 263. Notably, although Mattinson stated that he did not know if Hauser had a head or neck injury, he nevertheless testified that Dodge told him that Hauser had been hit on the back of the head, and that any time a miner is hit in the head or back they should be put on a backboard. Tr. 287-289. According to Mattinson, he did not believe Hauser was in shock because Hauser was talking, answering questions, breathing normal, was not panicking, and his skin appeared normal. Tr. 294-295. However, Mattinson conceded that he did not have much experience with serious accidents and had never had to treat one. Tr. 295-296.

At hearing, Hauser convincingly testified that he had little memory of events after he was moved to the side of the bore miner and did not recall being asked if he wanted a backboard. 129-132. Based upon his years of experience on the mine rescue and first aid teams, Hauser knew that he was starting to go into shock due to faster breathing and a decreasing lack of awareness as to what was going on around him. Tr. 130, 132-133. Moreover, although he was not sure if anything was broken, Hauser knew he had blood on the back of his head, his back hurt, his right eye was swelling so much that he could not see out of it, and the other eye was full of blood and dirt.[14] Tr. 129-130.

Hauser, Mattinson, and Dodge traveled in the mantrip to the hoist – a trip which takes between 20 and 30 minutes - where Hauser, under his own power, walked onto the hoist, rode three to five minutes to the collar, exited the hoist and walked to Solvay personnel waiting on the surface.[15] Tr. 203-204, 226, 265-267. Hauser testified that, although he remembers the mantrip making a beeping sound as they traveled to the hoist, he does not remember walking to the vehicle or where he sat in the vehicle and has no recollection of getting off the hoist or seeing anyone at the collar. Tr. 134, 153.

According to Mattinson, despite nothing preventing him from doing so, he never provided additional information to the hoistman regarding Hauser's condition because the hoistman never asked and Mattinson thought the injuries required only first aid and possibly some staples.[16] Tr. 265, 281-282, 284, 286. At hearing, Dodge testified that he did not think Hauser's injuries were severe, and that "everything was normal as if he just . . . got mildly hurt[.]" Tr. 210.

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[14] Hauser opined that, based on his experience on the mine rescue and first aid teams, if he had done an assessment of someone in his situation, he would have notified the hoistman and requested a life flight. Tr. 133. According to Hauser, a patient, especially one with a head injury, does not have control of the situation. Tr. 133-134. Moreover, Hauser stated that he should have been placed on a backboard given that the rock hit him on the head and back. Tr. 134.

[15] Mattinson testified that Tyler Hanks met the group at the bottom of the hoist. Tr. 285. According to Mattinson, between the time the group arrived at the bottom of the hoist and Hauser's departure for the hospital, he told Hanks everything he knew about the incident. Tr. 285-286.

[16] Mattinson likened the injuries to those a child would suffer in bike crash which required a wound to be cleaned, bandaged, and possibly stitched if it was deep enough. Tr. 287.

Shawn Marshall,[17] the mine operations manager, was on the surface when he was notified by safety personnel that Hauser had been hit by a rock. Tr. 157-158, 175. On cross-examination Marshall agreed that the safety personnel did not say what size rock hit Hauser, nor did Marshall ask. Tr. 175. Marshall contacted the hoistman for more details and was told that Hauser had been hit, had cuts on his eye and the back of his head, and was being brought out. Tr. 159, 176. Marshall testified that the hoistman relied on the crew and foreman to determine the actual extent of the injuries but acknowledged that none of the crew were first aid responders. Tr. 176-177. According to Marshall, he knew that the roof fall was not substantial, i.e., did not fall from above the anchorage point, because it would have been relayed to him differently. Tr. 158. Rather, he figured there had been a delamination of trona that fell and hit Hauser. Tr. 158. At some point Marshall told Jamie McGillis,[18] who was also on the surface, that Hauser had been injured and she should go to the collar. Tr. 224-225, 231.

Michael Crum,[19] the mine's Health, Safety, Environment and Quality Manger, was on the surface when he was notified by someone sometime between 11:10 and 11:30 AM that Hauser had been injured and was being brought out of the mine. Tr. 300, 304, 343. On the day in question, he was individual responsible for making the decision whether to immediately notify MSHA of any injury. Tr. 180, 337-338. After leaving his office, Crum received an update and learned that Hauser had been hit by a piece of rock from the roof, had a laceration on his head, but was conscious and coherent. Tr. 305. While waiting for another update, Crum gathered his safety gear and headed to the collar. Tr. 307. At the hearing, Crum testified that even though he knew the rock that hit Hauser was loose material that fell from the roof, he did not know the size of the rock or whether it was more than one rock. Tr. 343-344.

Marshall, McGillis and others were at the collar when the hoist cage arrived at the surface. Tr. 160-161, 226, 267. According to Marshall, Hauser walked off under his own power toward the ambulance while some of the crew members held a light grip on his arms.[20] Tr. 160-161. Despite a black eye, a cut near his eye, and a bandage on his head, Marshall's impression was that Hauser was in good overall condition but would probably need stitches. Tr. 162, 167.

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[17] Marshall has been with Solvay for 25 years and has been active in the mining industry for 33 years. Tr 155-156. Marshall was not a member of the mine's rescue team at the time in question but served on the team for approximately 10 years at one point and was trained in first aid. Tr. 156.

[18] McGillis was an underground utility worker, as well as the first aid person on the mine's rescue team. Tr. 162, 225. She had been with Solvay for 30 years prior to her retirement between the time the events occurred and the time of the hearing. Tr. 222-223. McGillis was trained in first aid and certified in CPR. Tr. 223.

[19] Crum has worked at Solvay for approximately two years but has 27 years of mining experience. Tr. 301. In his job, he manages three departments, including the mine's safety department. Tr. 302.

[20] Marshall acknowledged that, had a backboard been used, that would have an indication Hauser was in severe trouble. Tr. 184. However, according to Marhsall that was not the case and Hauser walked out of the hoist cage on his own. Tr. 184.

Marshall explained that he did not try to find out the size of the rock because he did not need to do so at that time. Tr. 185. He testified that, based on what he observed, Hauser was not going to "succumb to the injuries" and the information regarding the size of the rock could be gathered during the mine's preliminary internal investigation. Tr. 184-185.

McGillis saw that Hauser's head had been bandaged and he had an eye injury that was not bandaged. Tr. 226. As a result, she treated his injuries as a head injury. Tr. 233. However, because of the bandage, she never saw the laceration on the back of Hauser's head. Tr. 234, 237. McGillis briefly spoke to Hauser at the collar and determined he was coherent and able to understand what was going on. Tr. 227. She then helped load Hauser into the waiting ambulance and traveled with him to the local hospital. Tr. 224. At hearing, McGillis agreed that head injuries can be serious, and in some cases potentially fatal, and it would have made a difference to her what size rock hit Hauser, whether he was hit by more than one rock, and whether his hard hat was knocked off and he was hit on the bare head with rocks. Tr. 231-232, 238-239, 245-246. However, according to McGillis, she never learned how large the rock was and did not recall if she asked Hauser how large the rock was. Tr. 232.

On the way to the hospital McGillis looked Hauser over head to toe, took his vitals, washed the eye injury, which was swollen and bleeding, administered oxygen, measured blood pressure, asked questions, and observed his demeanor. Tr. 227, 232-234. According to McGillis, aside from complaining about the cut on his head bothering him, Hauser mentioned no other injuries and showed no signs of internal injury or shock during the ride. Tr. 229-230. However, on cross-examination McGillis conceded that she thought he was "in some degree of shock." Tr. 233-234.

Crum arrived at the collar after the ambulance had departed. Tr. 307, 313-314. When asked about the injuries, Marshall told Crum that that Hauser was walking, talking, and coherent. Tr. 308. Crum testified that at that time he was aware Hauser had a laceration to his head, as well as some scrapes and bruising to his face, and believed Hauser would only need stitches and then he would be back at work as soon as the stitches were removed. Tr. 308, 314. Based on the information they had, Marshall and Crum agreed that that the injuries were not that severe and Hauser was going to be fine. Tr. 167, 308. According to Crum, at no point was there a discussion about a deep penetrating head wound, internal injuries, or abdominal injuries. Tr. 314.

Once at the hospital, Hauser received a CT scan of his head that revealed his orbital right eye socket was shattered. Tr. 135. Hospital personnel stapled shut the wound on the back of Hauser's head but were unable to suture the area around his eye. Tr. 135.

Marshall visited Hauser in the hospital and took photos of the cuts to Hauser's face and back of his head. Jt. Ex. 25 pp. 2, 3. Marshall was not present when the doctors examined Hauser. However, at Crum's instruction, Marshall asked one of the doctors whether Hauser's injuries were life threatening, to which, according to Marshall, the doctor responded that they were not. Tr. 173, 317. Marshall then relayed this information to Crum. Tr. 349. According to

Crum, it was not until Marshall contacted him that he became aware Hauser had fractured orbital bones.[21] Tr. 314-315.

Meanwhile, back at the mine following Hauser's departure, Mattinson, along with Tyler Hanks, the shift foreman, traveled underground to conduct a preliminary investigation of the incident, during which they measured the rock that fell. Tr. 208, 269, 286; Jt. Ex. 31. Although the rock had broken into smaller pieces, Hanks was able to measure the void from which it fell and determined that the rock was approximately five feet wide, by ten feet long, by one to three inches thick. Tr. 208, 269, 291-292; Jt. Ex. 31. Mattinson testified that Hanks spent approximately 15 to 20 minutes in the area completing the investigation. Tr. 291. According to Mattinson, the rock that fell was mainly trona, which is "very dense. . . [and] way harder than coal[,]" with a thin layer of shale. Tr. 298-299. At some point that afternoon Hanks informed Mattison that the investigation was complete, and mining could resume in the area. Tr. 208, 271.

Hauser was eventually released from the local hospital the same day and taken by ambulance to the University of Utah Hospital in Salt Lake City, where a surgical specialist sutured the area around his eye. Tr. 135-136. However, due to swelling, surgery to correct the fractured eye socket could not be completed that day. Tr. 138. As a result, Hauser was again released, but returned a week later for the procedure. Tr. 138.

Hauser has been disabled since the events at issue in this proceeding and is currently on long term disability. Tr. 121; Jt. Stip. 16. At hearing, he explained that since being struck by the rock he has suffered from a number of ailments, including a constant migraine, occasional nausea, double vision in one eye, short term memory loss, neuropathy in his fingers, dizziness and balance issues, decreased peripheral vision, and PTSD. Tr. 138-139, 143. Further, as a result of the injuries suffered, Hauser now walks with a cane, is unable to watch TV for more than a short period of time, drives less, and spends a significant amount to time sitting in the dark. Tr. 138-139.

On February 1, the day following the incident, MSHA inspector Rodney Gust[22] traveled to the mine to investigate an anonymous complaint alleging that there had been an injury due to a fall of roof. Tr. 19. When Gust arrived, he was told that the miner, Hauser, had been struck by loose material in the 6 Bore Miner Panel, but was doing well after having gone to the hospital. Tr. 33. Gust learned that the miner had been struck on the head, had a cut on the back of his head, swelling around his right eye, and possibly some scrapes and cuts on his back. Tr. 55-56.

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[21] Crum offered a great deal of testimony regarding Solvay's internal process for evaluating the severity of injuries, as well as the forms and guidance relied upon during that process. Tr. 311-317; Jt. Ex. 13.

[22] Inspector Gust has been with MSHA for close to 20 years. Tr. 12. During that time, he has held positions including inspector, supervisory inspector, district safety specialist, accident investigator coordinator, and staff assistant to the district manager. Tr. 12-13. He has investigated between 30 and 40 serious or fatal accidents, some of which involved roof falls. Tr. 14-15.

Gust traveled to the 6 Bore Miner Panel but, because the scene of the incident had not been preserved, was unable to measure the material that had fallen from the roof. Tr. 23, 34-36, 50. However, according to Gust it was obvious from where the rock had fallen due to the impression that remained in the roof nine feet above the ground. Tr. 35-36, 52. Gust measured the impression in the roof from which the rock had fallen and estimated that the size of the rock was approximately twelve and half feet long, by five feet wide, by one to three inches thick. Tr. 35-37. Gust estimated that a rock of that size would weigh approximately 800 to 900 pounds.[23] Tr. 63.

Gust, through interviews, determined that no one saw the roof fall strike Hauser. Tr. 37-39, 41. Although mine personnel told Gust they believed the rock hinged underneath a bolt plate, swung and hit Hauser, he disagreed. Tr. 43. Gust testified that, in his experience, rocks do not hinge and go sideways. Tr. 44, 47. Moreover, the impression in the roof he measured was nowhere near a bolt plate. Tr. 47.

Gust opined that the cited standard requires mine operators to quickly and prudently investigate both the injury itself and the mechanism that caused the injury and, if necessary, notify MSHA within 15 minutes after management becomes aware of the injury. Tr. 25, 29-30. He explained that depending on where a rock strikes a miner there can be severe injuries, including injuries that have a reasonable potential to cause death. Tr. 15. According to Gust, concussions and blunt force trauma to the head, neck and upper torso body areas are the types of injuries that have a reasonable potential to cause death.[24] Tr. 25-28. Consequently, consideration must be given to the mechanism of a large slab or rock falling and striking an individual on the head, neck and back. Tr. 27. Gust agreed that some falls of roof are small enough that they do not cause much damage and do not need to be immediately reported. However, here, given the size of the rock as determined by measuring the impression and estimating the weight, the height from which it fell, and the fact that the miner had lacerations and took a severe blow to the back of the head and the face, Gust determined that there was a reasonable potential to cause death. Tr. 57, 63, 66-67. According to Gust, severe blows to the head can result in brain swelling, which has the reasonable potential to cause death. Tr. 57. Because no one witnessed the incident, Gust was unable to definitively determine if the rock grazed the miner or directly struck him. Tr. 63. However, given the severity of the injuries sustained, as well as Gust's familiarity with similar accidents that ended up in fatalities,[25] he determined that the incident was immediately reportable. Tr. 63-64. Gust explained that, when an operator is not sure of the extent of an injury, they should report it to MSHA. Tr. 30.

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[23] Gust testified that, even if he were to use the mine's measurements of the rock, the rock would have still weighed 800 pounds. Tr. 67.

[24] Gust explained that when a concussion occurs one cannot know the severity right away, nor can one know the short-term or long-term effects of the injury. Tr. 26.

[25] Gust testified that he was aware of a fatality at another mine where loose material fell from the roof, struck a miner, and drove them to the ground. Tr. 14-15, 64. In that instance the miner passed while being transported to the hospital. Tr. 64. In a separate matter at another mine an individual was struck by a piece of rock smaller than what fell here and the miner made it to the hospital before dying from their injuries weeks later. Tr. 64.

Gust explained that the purpose of 50.10 is to prevent accidents and injuries. Tr. 31. If the incident had been properly reported, the scene would have been preserved and MSHA could have gone to the 6 Bore Miner Panel and found other loose roof that needed to be scaled or supported, thereby preventing miners from being further exposed to potential injury.[26] Tr. 31-32. According to Gust, notification prevents injuries not only at the mine in question, but also similarly situated mines. Tr. 32.

On February 4, based upon what he observed and learned during his investigation, Gust issued Citation No. 9475179 to Solvay under section 104(a) of the Mine Act for an alleged violation of section 50.10(b). Tr. 92-93; Jt. Ex. 2.

Crum was surprised to receive a citation given the operator's conclusion that Hauser's injuries never met the requirements for immediate reporting, and the deadline for filing a normal 7000-1 form had not passed. Tr. 331-332. Crum testified he had a conversation with Gust during which he mentioned that Hauser had only a laceration to his head and some scrapes on his back, was walking and directing his own care, and at no point did anyone, including Crum, think the injuries were life threatening. Tr. 332, 335-336. However, according to Crum, Gust told him that all head injuries and blunt force trauma are life-threatening. Tr. 332. Notably, at hearing, Crum testified that he had no idea how much the rock, as measured, would have weighed. Tr. 337, 352.

Crum testified that he or someone else from the safety department is responsible for making the call to MSHA when necessary. Tr. 319. He explained that the foreman closest to the incident is not always near a phone, but they can contact the hoistman, who can relay the message. Tr. 320. He explained that if a supervisor or foreman is taking care of an injured individual, then that is their primary responsibility. Tr. 320.

Citation No. 9475179

Citation No. 9475179 alleges a violation of Section 50.10(b) of the Secretary's safety standards. The Condition or Practice section of the citation states as follows:

> On January 31, 2020 a miner was struck by a large slab receiving trauma to head and neck area. Management did not immediately notify MSHA at once without delay and within 15 minutes to the MSHA toll-free number.

Inspector Rodney Gust determined that a fatal injury was reasonably likely to be sustained as a result of the violation. Gust further determined that the cited condition was significant and substantial (S&S), affected one person, and was the result of Respondent's high negligence. The Secretary proposed a penalty of $6,159.00 for this alleged violation.

[26] Gust testified that when traveling to the site of the incident he observed loose material in many areas, including an area only a couple feet from where Hauser was injured, that needed to be scaled or supported. Tr. 31-32, 35, 54-55, 71. Based on his observations, and a review of the preshift reports, Jt. Ex. 10, he did not believe the operator was doing enough scaling. Tr. 53, 55.

Fact of Violation

Brief Summary of the Parties' Arguments on the Fact of Violation

The Secretary argues Respondent failed to properly notify MSHA that a miner had suffered an injury with a reasonable potential to cause death. The Secretary asserts that Respondent had 15 minutes from the time a person of sufficient authority learned of the event injuring the miner to conduct its evaluation and determine whether it needed to notify MSHA. Here, Respondent failed to perform an adequate investigation and, in turn, made a cursory decision to not report the incident to MSHA even though the totality of the circumstances and the evidence available at the time of the injury causing event would have allowed Respondent to infer the miner had suffered an injury with the reasonable potential to cause death. Given that Commission case law requires operators to err in favor of reporting when there are reasonable doubts, the Respondent violated the standard when it failed to immediately report the subject injury. Accordingly, the Secretary argues that Citation No. 9475179 should be affirmed.

Respondent raises three primary arguments in support of its request that that the citation be vacated. First, Respondent argues that a reasonably prudent person would not have determined that Hauser's injury had the reasonable potential to cause death. Specifically, Respondent argues that it was reasonable for the crew foreman and other personnel who responded to incident, as well as the members of management who relied on information from the foreman, to assume that Hauser was not directly hit by a large rock and had not suffered injuries that required immediate notification. Hauser's condition did not indicate that he was stuck by a rock large enough to cause a fatal injury. Moreover, medical records and pictures introduced into evidence corroborate the injury assessment of Solvay personnel that responded to the incident.

Second, Respondent argues that the Secretary did not meet his burden of proving each element of the cited standard. In making this argument Respondent asserts that the Secretary's assertions about the severity of the injuries are not supported by evidence. Further, Respondent questions the credibility of the Secretary's witnesses, and argues that Commission precedent dictates that Hauser's injuries, when viewed under the totality of the circumstances, were not as severe as those suffered in other cases where immediate notification was required.

Finally, Respondent argues that it was not provided fair notice of the Secretary's interpretation that a head injury caused by a roof fall has a *per se* reasonable potential to cause death.

Discussion

Section 50.10(b) provides that "[t]he 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]n injury of an individual at

the mine which has a reasonable potential to cause death[.]" 30 C.F.R. § 50.10(b).[27] Section 50.10 is triggered by the occurrence of an "accident," as defined in 30 C.F.R. § 50.2(h).

Neither the Mine Act nor the Secretary's regulations define when an injury has the "reasonable potential to cause death." However, Commission case law provides a framework for making that determination.

In *Consol Pennsylvania Coal Company, LLC*, the Commission explained that, when assessing the merits of a violation under 50.10(b) the court should "employ[] a reasonable person standard, resolving reasonable doubt in favor of notification." *Consol Pennsylvania Coal Company, LLC*, 40 FMSHRC 998, 1003 ("*Consol*") (citing *Signal Peak Energy, LLC*, 37 FMSHRC 470, 474, 477 (Mar. 2015)). Under the reasonable person standard, the court must "evaluate the evidence in light of what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Ideal Cement Co*., 12 FMSHRC 2409, 2415 (Nov. 1990). The Third Circuit Court of appeals, in an opinion affirming the Commission's decision in *Consol*, held that the purpose of notification requirement in 50.10(b) is "to encourage rapid notification so that MSHA can respond effectively in an emergency and preserve evidence to facilitate later investigation." *Consol Pennsylvania Coal Co., LLC v. FMSHRC*, 941 F.3d 95, 105 (3d Cir. 2019).

In *Consol* the Commission endorsed consideration of the "totality of the circumstances" when assessing whether a violation of the standard has occurred, and stated that, "[g]iven the inability to acquire quickly a clinical diagnosis and the need for prompt reporting, readily available information such as the nature of the accident and any observable indicators of trauma are relevant and proper for consideration in assessing whether an injury is reportable." *Consol* at 1003. Further, the "scope of the relevant evidence available to assist for purposes of section 50.10(b) generally will consist of the evidence available at the scene of the accident, at the time of the accident, and immediately following the accident." 40 FMSHRC at 1003. Moreover, "[w]hile the record will often contain subsequent relevant information from medical professionals, this information will likely not materialize until the time to make a decision to notify MSHA has already passed. Therefore, it is less probative in a section 50.10(b) analysis." *Id*.

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[27] 50.10(b) implements section 103(j) of the Mine Act, 30 U.S.C. § 813(j), which states, in pertinent part, as follows:

> In the event of any 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. For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred.

I find that the Secretary established a violation of the cited standard. In reaching this conclusion I have focused upon the following critical facts. First, no one observed the roof fall that struck Hauser. Second, Hauser suffered a serious blow to his head and back that knocked him to the ground. Third, it was unknown what size rock stuck Hauser in the head. Fourth, Hauser suffered visible lacerations to the back of his head and the area around his right eye and, due to swelling, he was unable to see out of that eye. Fifth, Mattinson, the crew foreman and a member of management, became aware of the incident only moments after it occurred. Sixth, Respondent did not notify MSHA of the incident at any point on January 31, 2020. Seventh, and finally, the void from which the rock fell was later measured to be anywhere from five feet wide, by ten to twelve and half feet long, by one to three inches thick. Of the above listed facts, the most critical to my analysis are that no one saw the roof fall, no one knew the size of the rock that struck Hauser's head, and that Hauser suffered a severe blow to the head.

It is undisputed that no one saw the roof fall or how it struck Hauser. Dodge, who was closest to Hauser at the time of the incident, conceded that he did not see the roof fall or how it struck Hauser. Although Dodge speculated that the falling rock "hinged" and did not directly strike Hauser, his testimony was just that, speculation. Accordingly, I accord his testimony on that issue no weight.[28] Similarly, Boyd and Mattinson, who were positioned at the rear of the bore miner, testified that they heard but did not see the roof fall. Respondent's other witnesses were on the surface at the time of the incident. Because none of these individuals saw the roof fall or how it struck Hauser, it stands to reason that none of them knew the size of the rock that struck Hauser in the head.[29] The facts were all "known unknowns," i.e., information Respondent was aware, or should have been aware, that it lacked regarding the gravity of the injury.

In addition to the "known unknowns" discussed above, I find that Respondent was aware, or should have been aware that Hauser had suffered a severe blow to the head and back that drove him into the ground. When Dodge first observed Hauser after the roof fall, Hauser was laying on the ground, pushing rocks off him and beginning to get up. While Hauser had scratches on his back, it was clear that the bulk of the observable indications of trauma to his body were on

[28] Gust testified that during his investigation Respondent stated that the rock may have hinged on a roof bolt plate and swung and hit Hauser. He disagreed with this theory and testified that the impression in the roof from which the rock fell was nowhere near a bolt plate. I credit Gust's testimony on this point.

[29] Mattinson, Marshall and Crum, the three mine management officials who appeared at hearing, all testified regarding their lack of knowledge regarding the size of the rock that struck Hauser in the head. Notably, McGillis, a trained first aid responder, agreed that head injuries can be serious and it would have made a difference to her what size rock had hit Hauser. However, that information was never offered, nor was it available. This lack of knowledge regarding a critical piece of information needed to evaluate the nature of the injury is at the core of my finding a violation in this case. However, it is important that the parties recognize that in finding a violation I am not faulting Respondent for the fact that it lacked knowledge regarding the size of the rock that hit Hauser, but rather because Respondent did not recognize it lacked this critical information. In failing to recognize that it lacked this information, management knowingly made, or at the very least should have known it was making, an uninformed decision regarding whether to immediately report Hauser's injury.

his head, i.e., lacerations to the back of his head and eye, bleeding, and swelling around his eye. Common sense dictates that he had suffered a blow to the head as a result of the roof fall. The force of the blow is demonstrated by the fact that he did not have time to cushion his fall by stretching out his arms, which is the natural reaction, but instead hit the floor hard with his face. Given the seriousness of head injuries, I find that a reasonable person, when presented with a similar situation where there are multiple "known unknowns" regarding the circumstances that caused head trauma, would have erred on the side of notification at that point. However, Respondent chose not to do so. Although I have no difficulty finding a violation based on this analysis, further discussion is helpful.

It is important to recognize that Congress added the 15-minute time requirement to the Mine Act when it passed the MINER Act in 2006. This extremely short timeframe requires mine operators to make a "yes" or "no" decision on whether to call MSHA before it can conduct a comprehensive investigation into the extent of the miner's injuries. Instead, the decision whether to immediately call MSHA must be made based on a very limited knowledge of the facts surrounding the injury and the nature of the accident.

Mine management's primary responsibility after an accident is, of course, to tend to the injured miner and get him or her any necessary medical help. Preforming this triage will provide an initial indication of what type of care the miner will need. Management may be able to complete this triage within 15 minutes, but it often will take longer depending upon such factors as location of the accident within the mine, whether other miners saw the accident so that they have some idea of the location and nature of the miner's potential injuries, and the extent of these injuries.

A mine operator must quickly make the determination whether to call MSHA under stressful and rather chaotic circumstances. In this case, management knew or should have known, within the 15-minute reporting period, that a rock fell from the top and at least part of the rock hit the back of Hauser's head, the blow threw Hauser to the ground with great force, knocked off his hard hat, smashed his face into the ground, and caused a significant cut to the back of his head. The 15-minute reporting period was over by the time Hauser was transported to the bottom of the hoist, so management had to decide whether to call MSHA only knowing these facts.

Solvay contends that because Hauser appeared to be conscious, cogent and was able to exit the mine with only minimal assistance, it reasonably concluded that his injuries did not pose a reasonable potential to cause death. I disagree. The accident occurred in 2020, not 1920. It is now well known that significant blows to the head can lead to serious consequences that do not immediately manifest themselves. The condition of an injured person immediately after suffering a head injury often does not reveal whether that person will die from the blow, suffer significant lingering problems, or be back to normal within a month.

For example, getting hit on the head by a heavy object can lead to an intracerebral hemorrhage, i.e., bleeding in the brain. One of the most common causes of a brain hemorrhage is head trauma. This fact is now common knowledge and is certainly something management of a large mine should know. These hemorrhages have a reasonable potential to cause death if not

diagnosed and treated quickly. Adverse symptoms of a brain hemorrhage will often not be visible within 15 minutes of an accident.

Given the wound at the back of his head and the force with which his face was slammed into the ground, it is obvious that the blow to Hauser's head and body was quite severe and traumatic. Joint Exhibit 25 shows the nature of his injuries. Common sense dictates that Solvay should have immediately notified MSHA. Relying on Hauser's condition immediately after being hit was unreasonable because latent conditions can develop from trauma to the head that can reasonably lead to death. Even though Hauser did not die, his mental condition was severely affected by the accident and he continued to be on long-term disability at the time of the hearing, which was held about 18 months after the accident. This fact demonstrates that the extent of injuries following head trauma will generally not be known within the required 15-minute reporting time. Mine management assumed that Hauser would be returning to work within a few weeks after the accident. Although that was a possibility, there was also reasonable potential for the trauma to lead to his death. Simply put, managers at the Solvay Mine should have known that a significant blow to the head could reasonably be expected to be fatal even when the injured miner was not displaying serious symptoms immediately following the accident.

Solvay contends that it was not provided with fair notice of the Secretary's interpretation that a head injury caused by a roof fall has a *per se* reasonable potential to cause death. First, the Secretary is not required to provide notice of the medical fact that head trauma can result in death even when the injured person appears to be in relatively good condition immediately after suffering the trauma. Second, the Secretary is not arguing that all head injuries caused by material falling from the top are per se immediately reportable. Rather he contends that when a very large chunk of the roof falls on a miner and it is not clear how much of the rock hit the miner's head, a mine operator is required to resolve reasonable doubt in favor of immediate notification. It was known that Hauser was hit by a large piece of rock, but it was not known how much of the rock hit his head. However, the gash on the back of his head indicated that his head was hit hard by the rock. The rock that fell was approximately five feet wide, ten feet long, one to three inches thick, and weighed hundreds of pounds. Solvay was provided with all the notice it needed that immediately calling MSHA was required.[30]

The purpose of the 15-minute reporting requirement is to prevent injuries to other miners from the same or similar conditions that may be present in the mine and to preserve evidence so that the accident can be properly investigated, and corrective measures determined. In view of the above analysis, and taking into consideration the information known to Respondent in the immediate aftermath of the injury, I find that based on the totality of the circumstances a

[30] At least one other Commission judge has reached the same conclusion. In *Red River Coal Company Inc*., 39 FMSHRC 368 (Feb. 2017) (ALJ), former Judge Feldman affirmed a violation of 50.10(b) where a miner was struck in the head by a 50-pound metal disc. In affirming the citation he stated that "[b]lunt force trauma to the head, even in circumstances where a miner demonstrates stable vital signs and minimal blood loss, must be considered potentially fatal. For it is common knowledge that potential swelling or bleeding in the cranial cavity poses a significant risk of death. Notably, the preamble to the final rule for section 50.10 includes concussions and major upper body blunt force trauma as types of injuries that must be immediately reported[]." *Id*. at 391-392 (internal citation omitted).

reasonably prudent person familiar with the mining industry and the protective purpose of both the Mine Act and the cited standard, would have at the very least resolved the numerous doubts regarding the nature of the injury in favor of notification, as is required by Commission case law. Citation No. 9475179 is **AFFIRMED** with the modification discussed below.

Gravity and S&S

A S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove "(l) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC l, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[,]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id*. at 2475-2476. This determination must be made "based on the particular facts surrounding the violation[.]" *Id*. The third step then requires the judge to assume the existence of a hazard and assess whether the hazard "was reasonably likely to result in serious injury." *Newtown* at 2038; *ICG Illinois* at 2476.

Gust determined that a fatal injury was reasonably likely to be sustained and that the violation was S&S. According to Gust, a purpose of the cited standard is to prevent similar accidents and injuries from occurring in this mine, as well as other mines, by enabling MSHA to protect miners through prevention, education and awareness after the agency has been notified. Tr. 69. Gust explained that, here, because notification was not properly provided, miners in the area of the bore miner were exposed to loose roof that remained.[31] Tr. 70-71. In his experience, a mine conducting an injury investigation would have noticed loose material around the accident and shut down the section to scale and support the roof where needed. Tr. 71. However, here the crew resumed mining activities only a few hours after the incident. Tr. 72.

Gust determined any injury could reasonably be expected to be fatal based on his knowledge that roof falls of similar size have killed miners. Tr. 72. He testified regarding two other situations he investigated where miners were struck and killed by falling loose material. Tr.

[31] I credit Gust's testimony that during his investigation he observed loose material throughout the mine both as he traveled to the 6 Bore Miner Panel, as well as in the immediate vicinity of where the subject roof fall occurred. Had Solvay properly notified MSHA of Hauser's injury, an investigation may have discovered that loose material before miners in the area were exposed to further potential injury. Notably, mining resumed in the panel later the same day Hauser suffered his injury.

72-73. According to Gust, Solvay knew Hauser was driven face first into the ground, causing lacerations, immediate swelling, and scrapes down his back. Tr. 73-74. Gust explained that the mechanism of injury was "quite substantial," and the miner's injuries included a potential concussion and blunt force trauma to the head, neck and back. Tr. 74.

I find that the Secretary established that the violation was S&S. I have already found that Solvay violated the cited standard by failing to properly notify MSHA. The hazard to which the violation of 50.10(b) allegedly contributes is MSHA being precluded from investigating the cause of the accident and, in turn, being unable to identify similar hazards that may require correction. *See Signal Peak Energy, LLC*, 37 FMSHRC 470, 480 (Mar. 2015). Here, Solvay's failure to properly report Hauser's injury created a discrete safety hazard in that it precluded MSHA from exercising its investigatory authority to determine the cause of Hauser's injury, i.e., a roof fall, and eliminate similar hazardous conditions. Given the loose material observed by Gust throughout the mine, as well as the fact that mining resumed in the area of the accident later the same day, I find that there existed a reasonable likelihood another miner would have been injured by falling loose material. As evidenced by what happened to Hauser, a loose roof which goes uncorrected has the potential to result in an extremely serious injury. Accordingly, I find that the gravity of the violation was quite high, and that the Secretary's S&S designation should be affirmed.

Negligence

The Commission has recognized that "[e]ach mandatory standard … carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted). High negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co*., 20 FMSHRC 344, 350 (Apr. 1998) (internal quotation omitted).

The Secretary argues that Solvay exhibited high negligence when it relied on incomplete, incorrect information and assumptions when it decided that the accident was not immediately reportable. Further, the Secretary asserts that Solvay's failure to address easily scalable loose ground conditions in the area of the accident prior to sending miners back in the area was highly negligent.

I find that the Secretary did not establish that Solvay exhibited an aggravated lack of care that was more than ordinary negligence. Solvay failed to immediately report the accident to MSHA based on an incorrect assumption that because Hauser was walking and talking when he was escorted out of the mine, he was not seriously injured. I find that this conduct constituted only ordinary negligence. Solvay's assumption was incorrect, but I find that it did not suggest an "aggravated lack of care." In his brief, the Secretary, in part, relies on the fact that when Inspector Gust conducted his investigation, he discovered loose ground that Solvay had not

addressed in the same area of the mine and miners were required to resume mining in the area the day of the accident without first scaling down the roof. I credit the inspector's testimony in this regard but find that it relates to the gravity of the violation rather than to the degree of negligence that can be attributed to Solvay for the violation adjudicated in this case.[32] I find that the violation of section 50.10(b) was the result of Solvay's moderate negligence.

III. APPROPRIATE CIVIL PENALTY

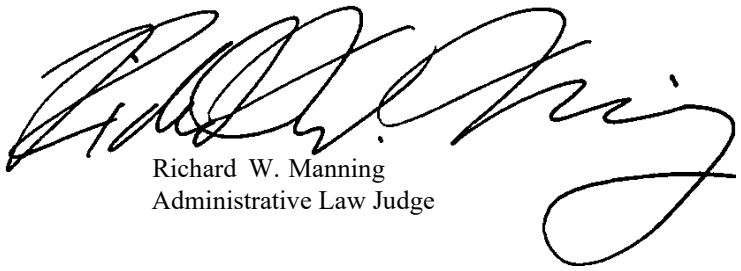
Section 110(a)(2) of the Mine Act requires that an operator who fails to timely provide notification as required under section 103(j) of the Mine Act "shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000." 30 U.S.C. § 820(a)(2). 50.10(b) of the Secretary's regulations implements Section 103(j) of the Act. Accordingly, violations of 50.10(b) are subject to the statutory minimum set forth in the Act. The minimum penalty in the Mine Act remains unchanged. However, in January 2020, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, the minimum penalty for violations of 50.10(b) was increased to $6,159 for penalties assessed by the Secretary in 2020. The Secretary proposed a penalty of $6,159.00 for the citation at issue in this proceeding.

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). According to MSHA's Mine Data Retrieval System website, Solvay worked over 750,000 hours in 2020 and over 900,000 hours in both 2019 and 2018, which correlates with a large metal/non-metal operator. 30 C.F.R. § 100.3 Table III. The parties have stipulated that the penalty as proposed will not affect Solvay's ability to remain in business. Following the hearing the Secretary submitted a copy of Solvay's certified violation history, which was accepted into evidence as Joint Exhibit 34. The violation history indicates no prior violations of section 50.10(b), and an overall violation history one would expect for an operator of this size. The history warrant's neither an increase nor decrease in the penalty. The gravity and negligence of Citation No. 9475179 are discussed above. Exhibit A to the petition for penalty reflects that the citation was timely abated. Based on the penalty criteria I assess a penalty of $6,159.00 for Citation No. 9475179.

[32] I note that Inspector Gust issued four citations for these conditions during his inspection of the No. 6 panel where the accident occurred. I approved a settlement of these citations on August 5, 2021, in WEST 2020-0315-M. All four citations were designated as significant and substantial and Solvay did not dispute that designation in reaching a settlement.

IV. ORDER

For reasons set forth above, Citation No. 9475179 is **MODIFIED** from high to moderate negligence, but otherwise **AFFIRMED** as issued. Solvay is O**RDERED TO PAY** the Secretary of Labor the sum of $6,159.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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