

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 18, 2019

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2019-0025
Petitioner	:	A.C. No. 37-00202-481040
	:	
v.	:	
	:	
HOPKINS HILL SAND & STONE, LLC,	:	
Respondent	:	Mine: Hopkins Hill Sand & Stone

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) against Hopkins Hill Sand & Stone, LLC (“Hopkins Hill”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of \$5,903.00 for an alleged violation of this mandatory safety standard regarding timely accident notification.

Hopkins Hill filed a Motion for Summary Decision (“Resp’t Mot.”); a Memorandum in Support of Respondent’s Motion for Summary Decision (“Resp’t Mem.”), including Barry Manfredi’s Affidavit (“Manfredi Aff.”) and an attached exhibit (“Ex. A”); Joint Factual Stipulations of the Parties (“Jt. Stips.”); and a Supplemental Memorandum on Behalf of Respondent In Support of Motion for Summary Decision (“Resp’t Supp. Mem.”). The Secretary filed an Opposition to Respondent’s Motion for Summary Decision and Cross-Motion for Summary Decision (“Sec’y Mot.”); a Memorandum of Points and Authority in Support of His Opposition to Respondent’s Motion for Summary Decision and In Support of Secretary’s Cross-Motion for Summary Decision (“Sec’y Mem.”), and attached exhibits (“Exs. P-1 through P-8”), including a copy of the Citation, MSHA Inspector Jerry Anguiano’s notes, Patrol Officer Michael Dugan’s Incident Report, and Renzo Marietti’s Witness Statement; and Inspector Jerry Anguiano’s Affidavit (“Anguiano Aff.”). The following are issues for resolution in this case: (1) whether Hopkins Hill violated 30 C.F.R. § 50.10(a) and, if so, (2) whether Hopkins Hill was moderately negligent in violating the standard, and (3) the appropriate penalty.

Pursuant to Commission Rule 67(b), “[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows: (1) that there is no genuine issue as to any material fact; and

(2) that the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court has construed to authorize summary judgment only “upon proper showings of the lack of a genuine, triable issue of material fact.” *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that “the Supreme Court has stated that ‘we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion,’ and that ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’” *Id.* at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Moreover, Commission Judges should not grant motions for summary decision “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)); *but see Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that there is no genuine issue for trial unless a rational trier of fact could find for the nonmoving party).

Based on agreement of the parties to file cross-motions for summary decision and the facts, as represented by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, **AFFIRM** the Citation, and assess a penalty of \$5,903.00 against Hopkins Hill.

I. Joint Stipulations

Stipulations of Fact:¹

1. Hopkins Hill Sand and Stone (“the mine”) is an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the crushed stone mining plant at which the Citation at issue in this proceeding was issued.
2. The mine at issue is located at 190 New London Turnpike in West Greenwich, Rhode Island.
3. The mine at issue is subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges, pursuant to sections 105 and 133 of the Mine Act, 30 U.S.C. §§ 815, 823.
5. The mine is an open-pit crushed stone plant.
6. On November 29, 2018, General Manager Bernard Alderson, aged 71, reported to work at the mine site, made his rounds at the plant, left the mine site to get coffee for himself and others, drove to Warrick, Rhode Island to meet with the owner, and returned to the

¹ The Joint Stipulations have been numbered for clarity in this Decision.

mine site at about 9:45 a.m. Mr. Alderson was in the office area between 9:45 a.m. and 11:00 a.m., not performing any physical duties.

7. At about 11:00 a.m., Mr. Alderson was observed to be lying on the ground face-down by an employee of the Respondent, Kurt Wilcox. Mr. Wilcox, in turn, informed Steven Sustakowsky (dispatcher) about Mr. Alderson's situation, and Mr. Sustakowsky called "911" and then summoned Renzo Marietti, an employee of the Respondent, by radio to help Mr. Anderson. Mr. Sustakowsky called the main office at around 11:12 a.m.
8. Mr. Marietti moved Mr. Alderson to level ground and began chest compressions, which were maintained until the West Greenwich Rescue EMS arrived.
9. The EMS put a heart monitor on Mr. Alderson, but it was flat-lining as Mr. Marietti observed it.
10. At 11:24 a.m., EMS Paramedic Kelly Guastini called the death of Mr. Alderson.
11. At 11:25 a.m., Police Officer Michael P. Duggan arrived at the mine and began an investigation. Officer Duggan in his report stated that when he observed Mr. Alderson, his face was blue in color.
12. At 11:25 a.m., Barry Manfredi, the environmental health and safety director, received a phone call from Steve Cardi II, Vice President and COO, notifying Mr. Manfredi of Mr. Alderson's heart attack.
13. At 12:56 p.m., Barry Manfredi called the MSHA Hot Line to report Mr. Alderson's heart attack.
14. At 1:20 p.m., the Medical Examiner took control of Mr. Alderson's body.
15. Mr. Alderson's death was a natural death and not accident-related.

II. Factual Background

On November 29, 2018, Hopkins Hill's general manager Bernard Alderson suffered a fatal heart attack while working at the mine site, an open-pit crushed stone plant in West Greenwich, Rhode Island. Jt. Stips. 1, 2, 5, 6, 10. At approximately 11:00 a.m., Kurt Wilcox found Alderson lying face-down on the ground and informed the dispatcher, Steven Sustakowsky, who called "911," the main office around 11:12 a.m., and then requested help from Hopkins Hill employee Renzo Marietti. Jt. Stip 7. Marietti arrived on the scene around 11:15 a.m. and moved Alderson onto the ground below the stairs, where he began chest compressions until West Greenwich Rescue EMS arrived. Jt. Stip. 8; Ex. P-8. According to Marietti, Alderson was already blue, cold, and unresponsive. Exs. P-7; P-8. At approximately 11:18 a.m., EMS arrived and placed a heart monitor on Alderson, which Marietti observed flat-lining. Jt. Stip. 9; Ex. P-6 at 2. At 11:24 a.m., EMS Paramedic Kelly Guastini pronounced Alderson dead. Jt. Stip. 10; Ex. P-7. At 11:25 a.m., Vice President Steve Cardi called Hopkins Hill's environmental health and safety director, Barry Manfredi. Jt. Stip. 12. Manfredi called MSHA to report Alderson's death at 12:56 p.m. Jt. Stip. 13; Ex. P-3.

On November 30, 2018, MSHA Inspector Jerry Anguiano was assigned to investigate the death. Anguiano Aff. After inspecting the scene and interviewing witnesses, Anguiano issued the Citation at issue to Hopkins Hill for its failure to report Alderson's death to MSHA within 15 minutes of the accident. Anguiano Aff.

III. Findings of Fact and Conclusions of Law

Inspector Anguiano issued 104(a) Citation No. 9412696 on December 3, 2018, alleging a violation of section 50.10(a) that was “unlikely” to cause an injury, and was due to Hopkins Hill’s “low” negligence.² The “Condition or Practice” is described as follows:

The Mine Operator failed to notify the Mine Safety & Health Administration (MSHA) that General Manager – Bernard Alderson had suffered a fatal heart attack, while working at the Hopkins Hill Sand Stone mine site. On Thursday November 29, 2018, at approximately 11:00 a.m. the Manager was discovered facing down on the stairway and landing platform that leads to the inside of the Lab building. The West Greenwich Rescue 2 EMS – Kelly Guastini, called the time of death at 11:24 a.m. The Environmental Health & Safety (EH&S) Director – Barry Manfredi was out of town when the death occurred but, he received a cell phone call from the Vice President of Operations – Steve Cardia at 11:27 a.m. At 12:56 p.m. Mr. Manfredi dialed the 1-800 Hot Line, to notify MSHA about the heart attack. MSHA initiated an investigation on Friday November 30, 2018.

Ex. P-3. Anguiano terminated the Citation later in the afternoon of December 3, after reviewing MSHA’s accident reporting requirements with environmental health and safety director Manfredi, and Respondent established and posted a written plan highlighting the appropriate actions to be taken under section 50.10(a). Ex. P-3.

A. Fact of Violation

Hopkins Hill argues that it is entitled to summary decision because Alderson’s fatal heart attack was the result of a non-occupational illness from natural causes rather than any work-related “accident” within the meaning of sections 50.10(a) and 50.2(h)(1) and, therefore, no immediate reporting was required. Resp’t Mem. at 1-4. On the other hand, the Secretary takes the position that he is entitled to summary decision because any death occurring at a mine is a reportable accident under section 50.10(a). Sec’y Mem. at 3-4.

In relevant part, section 103(j) of the Mine Act provides:

[i]n the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary 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

² 30 C.F.R. § 50.10(a) states that: “[t]he operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving: [a] *death* of an individual *at the mine*.” (emphasis added).

realizes that the death of an individual at the mine . . . has occurred.

30 U.S.C. § 813(j). Accordingly, section 3(k) of the Mine Act defines “accident” as “a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or *death of, any person.*” 30 U.S.C. § 802(k) (emphasis added).

Section 50.10(a) of the Secretary’s regulations largely mirrors the mandate of the Mine Act, requiring that the operator report an accident at a mine once it is known or should have been known within 15 minutes. Included in the definitions of “accident” is “[a] death of an individual at a mine.” 30 C.F.R. § 50.2(h)(1). Moreover, the Commission has emphasized that questions of whether an operator should report an accident to MSHA “must be resolved in favor of notification.” *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476-77 (Mar. 2015).

Notably, the question of whether the requirement of section 50.10(a) applies to fatal heart attacks at a mine site was decided in a remarkably similar case, finding a violation, which was appealed to the Commission. *See Richmond Sand & Stone*, 41 FMSHRC 12 (Jan. 2019) (ALJ). In its recent affirmation of the decision, the Commission found that:

[T]he plain language of MSHA’s reporting regulations at 30 C.F.R. Part 50 unambiguously defines any on-site death as an “accident” subject to the immediate reporting requirement in section 50.10(a). Accordingly, [Respondent’s] failure to timely notify MSHA of a fatal heart attack at the mine site violated the standard.

Richmond Sand & Stone, LLC, 41 FMSHRC 402, 407 (Aug. 2019); *see also Consol Pennsylvania Coal Co., LLC v. FMSHRC*, 941 F.3d 95 (3d Cir. 2019) (emphasizing the clarity of section 50.10 and the critical importance of reporting). As the Commission makes clear in *Richmond*, by requiring reporting of all deaths at mine sites, the Secretary is fulfilling Part 50’s purpose to “implement MSHA’s authority to investigate, and to obtain and utilize information pertaining to, accidents, injuries, and illnesses occurring or originating in mines.” *Richmond*, 41 FMSHRC at 405; *see also* 30 C.F.R. § 50.1. The reporting scheme is critical to MSHA’s investigations to ensure prospective safety at the mines. In the moment, a miner or the operator may not be able to readily ascertain the cause of death and, therefore, failure to report could expose more miners to unknown or unidentified hazards. *See Signal Peak*, 37 FMSHRC at 477 (citing *Emergency Mine Evacuation*, 71 Fed. Reg. 71430, 71431 (Dec. 8, 2006)). Immediate reporting also allows MSHA to gather data that it can analyze in aggregate regarding the causes of deaths at all mine sites to improve miner safety. *See Richmond*, 41 FMSHRC at 405-06. All of this information is crucial for the Secretary to access, but it can only be used if it is timely gathered and preserved. Hence, the effectiveness of the reporting requirement in fulfilling the objectives of the Mine Act depends upon compliance by mine operators.

Using nearly identical language and essentially the same arguments that were unsuccessfully raised in *Richmond*, Hopkins Hill relies on *Vulcan Construction Materials* and *Hanson Aggregates Midwest* to support its contention that there was no reportable accident. Resp’t Mem. at 4-7. In these cases, judges found that *nonfatal* heart attacks were not *injuries* for

purposes of mandatory MSHA reporting under section 50.10(b).³ See *Vulcan Constr. Materials*, 35 FMSHRC 2868, 2874-75, 78 (Aug. 2013) (ALJ); *Hanson Aggregates Midwest*, 35 FMSHRC 2412, 2416 (Aug. 2013) (ALJ). Hopkins Hill's reliance on *Vulcan* and *Hanson* is misplaced, however, because these cases contemplate the reasonableness of *injuries* resulting in death, rather than deaths occurring at mines, for whatever reasons, whether natural or accident related. Likewise, Hopkins Hill's contention that my decision in *Nyrstar Gordonsville, LLC*, 38 FMSHRC 1819 (July 2016) (ALJ), was wrongly decided has been invalidated by the *Richmond* and *Consol* decisions. See Resp't Mem. at 7.

Finally, Hopkins Hill argues that sections 50.10 and 50.2(h)(1) do not provide a usable definition of "accident" because the sections presuppose a predicate accident, not defined by the regulations, and the inclusion of natural death is overly broad. Resp't Mem. at 3-4. Therefore, according to Hopkins Hill, the word "accident" should be construed according to its ordinary meaning.⁴ Resp't Mem. at 4. This argument is also misguided, as "Part 50 *unambiguously defines any on-site death as an 'accident'* subject to the immediate reporting requirement." *Richmond*, 41 FMSHRC at 407 (emphasis added).

It is undisputed that Alderson had been lying on the ground face-down and unresponsive around 11:00 a.m. At 11:15 a.m., Marietti moved Alderson and began chest compressions. By Marietti's account, Alderson was blue, cold, and never responsive, and the heart monitor placed by EMS was flat-lining. When EMS Paramedic Guastini pronounced Alderson dead at 11:24 a.m., Vice President Cardi proceeded to call environmental health and safety director Manfredi at 11:25 a.m. Based on these facts, I find that Hopkins Hill management knew or should have known of Alderson's death by 11:24 a.m. and, at that time, the 15-minute reporting interval began to run.

Under these circumstances, having found that Hopkins Hill knew or should have known that it had experienced a reportable accident at the mine by 11:24 a.m., it had a duty to notify MSHA by 11:39 a.m. Hopkins Hill contacted MSHA at 12:56 p.m., one hour and 17 minutes outside of the 15-minute window. Accordingly, I conclude that Hopkins Hill violated the reporting requirement of section 50.10(a).

B. Gravity and Negligence

Based on the clarity of the standard and regulatory definition of "accident," and the importance of timely notice to MSHA as explained in Commission precedent, Hopkins Hill's failure to report Alderson's death was a significant breach of duty. The record establishes, however, that Alderson's death did not occur as a result of an ongoing hazard affecting miners'

³ 30 C.F.R. § 50.10(b) requires the operator to immediately contact MSHA within 15 minutes of "[a]n *injury* of an individual at the mine which has a *reasonable potential to cause death.*" (emphasis added).

⁴ Hopkins Hill's reliance on a dictionary definition of "accident" sidesteps the Mine Act's and regulations' inclusion of "any death" in a mine within the ambit of the 15-minute reporting requirement.

safety, and I find that the delay in reporting the accident to MSHA had no likelihood of putting other miners in peril.

The Secretary contends that Hopkins Hill's negligence should be elevated to moderate because environmental health and safety director Manfredi stated that he knew he needed to call MSHA, but was unaware of the need to call within 15 minutes; therefore, managers who become aware of a death at a mine should be prepared to adhere to the reporting requirements of section 50.10(a). Sec'y Mem. at 6.

There is a contradiction between Anguiano's Affidavit, stating that Manfredi was aware of the reporting requirement, but unaware of the 15-minute mandate, and Manfredi's Affidavit, indicating that he believed that only work-related accidents were reportable. See Anguiano Aff. at 1-2; compare with Manfredi Aff. at 1. In fact, Manfredi claims that the report made to MSHA was merely informational rather than the result of any perceived duty. Manfredi Aff. at 1. Taking Manfredi at his word, Hopkins Hill management is responsible for knowing and adhering to the reporting regulations that govern its operations and, because Alderson's death was reported to MSHA within an hour and a half of the mandated 15-minutes, I ascribe less than ordinary negligence to the violation, consistent with the Citation, as originally issued.

IV. Penalty

While the Secretary has proposed a civil penalty of \$5,903.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). See *Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). Notwithstanding application of *Sellersburg* criteria, however, the Mine Act imposes a minimum penalty of \$5,903.00 for section 50.10 violations.⁵ 30 C.F.R. § 110(a)(2). The Commission has found that its judges are bound by the statutory minimums imposed by the Mine Act. *Consol Pennsylvania Coal Co., LLC*, 40 FMSHRC 998, 1008 (Aug. 2018), *aff'd*, 941 F.3d 95 (3d Cir. 2019) (reemphasizing that the statutory minimums imposed by 30 U.S.C. § 820(a)(4) for reviewing courts must also apply to the Commission). Therefore, in light of *Consol*, Respondent's reliance on *E.S. Stone & Structure* is misplaced. Resp't Supp. Mem.; see *E.S. Stone & Structure*, 33 FMSHRC 515 (Jan. 2011) (ALJ).

⁵ Section 110(a)(2) of the Mine Act states that an operator "who fails to provide timely notification to the Secretary as required under 103(j) of [the Mine Act] (relating to the 15-minute requirement) 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). Similarly, section 100.4(c) of the Secretary's penalty regulations states that the penalty for failure to provide timely notification to MSHA "will not be less than \$5,000 and not more than \$65,000 for the following accidents: (1) the death of an individual at the mine." 30 C.F.R. § 100.4(c). In January 2018, the minimum penalty was increased to \$5,903 and the maximum penalty was increased to \$70,834 to account for inflation. 30 C.F.R. § 100.4(c); see also *Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7, 15 (Jan. 2018).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that Hopkins Hill is a small operator, with no prior violations of section 50.10(a), and an overall violation history that is not an aggravating factor in assessing an appropriate penalty. There was no evidence proffered that the civil penalty proposed by the Secretary will affect Hopkins Hill's ability to continue in business. I also find that Hopkins Hill demonstrated good faith in achieving rapid compliance after notification of the violation. The remaining criteria involve consideration of the gravity of the violation and Hopkins Hill's negligence in committing it. I have found that this was a very serious violation, and that Hopkins Hill demonstrated low negligence in committing it. Therefore, I find that a penalty of \$5,903.00, the statutory minimum, is appropriate.

ORDER

ACCORDINGLY, the Secretary's Cross-Motion for Summary Decision is **GRANTED**, Respondent's Motion for Summary Decision is **DENIED**, and it is **ORDERED** that Hopkins Hill Sand & Stone, LLC, **PAY** a civil penalty of \$5,903.00 within 30 days of the date of this Decision.⁶


Jacqueline R. Bulluck
Administrative Law Judge

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⁶ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket number and AC number.