

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 Pennsylvania Avenue NW, Suite 520N  
Washington, D.C. 20004

**JUL 28 2016**

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

v.

NYRSTAR GORDONSVILLE, LLC,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2015-136-M  
AC No. 40-02213-370090

Mine: Cumberland Mine

**SUMMARY DECISION**

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“the Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) against Nyrstar Gordonsville, LLC (“Nyrstar”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of \$5,000.00 for an alleged violation of his mandatory safety standard regarding timely accident notification.

Nyrstar filed a Motion for Summary Decision and Supporting Memorandum of Points and Authorities (“Resp’t Mot.”) with attached exhibits (“Exs. R-1 through R-6”), including a copy of the citation, MSHA Inspector James Hollis’ notes, an autopsy report, affidavits and phone call logs of Adolph Minert and Eric Steidl, and a copy of MSHA’s Escalation Report. The Secretary filed a Response to Respondent’s Motion for Summary Decision/Cross-Motion for Summary Decision (“Sec’y Mot.”) with Nyrstar’s Assessed Violation History Report (“Ex. P-1”) and Joint Stipulations (“Jt. Stips.”) attached. Nyrstar then filed a Reply in Opposition to the Secretary’s Cross-Motion for Summary Decision (“Resp’t Reply”). The following are issues for resolution in this case: (1) whether Nyrstar violated 30 C.F.R. § 50.10(a); and, if so (2) whether Nyrstar was highly 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)).

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, as modified, and assess a penalty against Nyrstar.

## I. Joint Stipulations

### Stipulations of Fact:

1. Mine Superintendent Adolph Minert was not at the Cumberland Mine on Sunday, November 16, 2014.<sup>1</sup>
2. At approximately 13:08 [1:08 p.m.], on November 16, 2014, hoistman Donald Gentry, an hourly non-management employee, called Mr. Minert to inform him that Danny Thom was found in the change house and that Mr. Thom had killed himself. The change house is located on mine property at the Cumberland Mine.
3. Mr. Minert drove to the Cumberland Mine immediately after the call from Mr. Gentry and arrived at approximately 13:19 [1:19 p.m.].
4. While Mr. Minert was in transit to the Cumberland Mine, he called Eric Steidl, Operations Manager for Middle Tennessee Mines, which includes the Cumberland Mine, and informed him that Danny Thom was found in the change house and it appeared he had committed suicide.
5. At the Cumberland Mine, Mr. Minert was not permitted to enter the change house where Mr. Thom’s body was found. Mr. Minert spoke with mine personnel, the police, and EMS responders who were at the scene on the mine site.
6. After hearing back from Mr. Minert, Mr. Steidl called the MSHA Hotline at 1-800-746-1553 at approximately 13:31 [1:31 p.m.] to report the incident.

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<sup>1</sup> The relevant date has been corrected. *See* Resp’t Reply at n.1.

7. No one answered the call, so Mr. Steidl left a message reporting an apparent suicide at the Cumberland Mine and left his name and contact number for a call back. MSHA recorded Mr. Steidl's phone call as being received at 13:33 [1:33 p.m.]. MSHA called Mr. Steidl back to collect the necessary information.

8. After an inspection of the scene and interviewing witnesses, Inspector James (Mike) Hollis issued Citation No. 6464299 to Nyrstar Gordonsville, alleging a violation of 30 C.F.R. § 50.10(a).

#### General Stipulations:

A. Respondent is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.

B. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

C. Respondent has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.

D. Respondent operates the Cumberland Mine, Mine ID 40-02213.

E. The citation in this docket is complete, authentic, and admissible.

F. The inspector's notes for the citation (identified in Paragraph E above) are complete, authentic, and admissible.

G. The exhibits and affidavits, and attachments thereto, filed with Respondent's Motion for Summary Decision are complete, authentic, and admissible.

H. Respondent is a zinc mine with more than 250,000 hours worked in 2014.

I. The citation in this docket was properly served on Respondent by a duly authorized representative of the Secretary on the date stated therein.

J. The civil penalty proposed in this docket will not affect Respondent's ability to remain in business.

## II. Factual Background

Nyrstar operates the Cumberland Mine, an underground zinc mine, in Smith County, Tennessee. Jt. Stips. D, H. At 1:08 p.m. on Sunday, November 16, 2014, hoistman Donald Gentry called Mine Superintendent Adolph Minert at his home to report that miner Danny Thom had killed himself inside the mine's change house. Ex. R-4 at 2; Jt. Stips. 1, 2. Minert lives about 10 minutes from the mine, and drove there immediately upon receiving the call from Gentry. Ex. R-4 at 2; Jt. Stip. 3. While en route to the mine, he called Nyrstar Operations

Manager Eric Steidl to inform him that Thom was found in the change house and it appeared that he had committed suicide. Ex. R-4 at 2, Ex. R-5 at 2; Jt. Stip. 4. Later, on December 16, a county medical examiner confirmed the cause of Thom's death as suicide. Ex. R-3 at 4.

At 1:19 p.m., Minert arrived at the mine and told Steidl that he would call him back as soon as he gathered more information. Ex. R-4 at 2; Jt. Stip. 3. While police on-site prevented Minert from entering the change house, he spoke with them, Gentry, geology technician Joe Spoon, and EMS responders. Ex. R-4 at 2; Jt. Stip. 5. At 1:31 p.m., immediately following Minert's follow-up call, Steidl called MSHA to report Thom's death based on Minert's report to him. Ex. R-5 at 2; Jt. Stip. 6. No one answered the initial call at MSHA, so Steidl left a voicemail at 1:33 p.m. Ex. R-6; Jt. Stip. 7. MSHA returned Steidl's call at 1:38 p.m. and gathered the necessary information. Ex. R-6; Jt. Stip. 7.

After inspecting the scene and interviewing witnesses, MSHA Inspector James (Mike) Hollis issued the citation in question to Nyrstar for failure to report Thom's death to MSHA within the mandated 15-minute reporting period. Ex. R-2 at 16; Jt. Stip. 8.

### **III. Findings of Fact and Conclusions of Law**

Inspector Hollis issued 104(a) Citation No. 6464299 on November 16, 2014, alleging a violation of section 50.10(a) that had "no likelihood" of causing an injury, and was due to Nyrstar's "high" negligence."<sup>2</sup> The "Condition or Practice" is described as follows:

The company failed to immediately contact MSHA at once without delay and with-in the 15 minutes, when the death of an individual was discovered at the mine on November 16, 2014. A company agent knew of the incident at approximately 13:08 [1:08 p.m.] and MSHA was not notified until approximately 34 minutes later.

Ex. R-1. The citation was terminated on November 25, 2014, after Nyrstar held meetings with management, and included instructions addressing the requirements of section 50.10(a) in its emergency procedures.

#### **A. Fact of Violation**

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone*

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<sup>2</sup> 30 C.F.R. § 50.10(a) provides that "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."

*Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The Secretary argues that he is entitled to summary decision as a matter of law because Nyrstar knew or should have known that a reportable death had occurred at the mine when Minert received the call from Gentry at 1:08 p.m. and, therefore, further investigation before calling MSHA was unnecessary. Sec’y Mot. at 1, 7-8. The Secretary supports these contentions by arguing that no reasonable inference can be drawn from the record that undermines the truthfulness of Gentry’s report to Minert, and that the 2006 revisions to section 50.10, and the Commission’s decisions in *Consolidation Coal*, 11 FMSHRC 1935 (Oct. 1989); *Wolf Run Mining*, 35 FMSHRC 3512 (Dec. 2013); and *Signal Peak Energy*, 37 FMSHRC 470 (Mar. 2015), only permit an operator to perform a pre-reporting investigation to determine whether a reportable death has occurred at the mine. Sec’y Mot. at 5-6, 8. Furthermore, the Secretary argues, the judge’s reasoning in *Premier Chemicals*, 29 FMSHRC 686 (Aug. 2007) (ALJ), which permitted an operator to perform an investigation after management knew of a reportable event, is irreconcilable with Commission precedent and has not been followed in later cases. Sec’y Mot. at 6 n.6.

In response, Nyrstar contends that it is entitled to summary decision as a matter of law, arguing that the 15-minute notification requirement was triggered at 1:29 p.m., when Minert verified Thom’s death to Steidl after concluding a reasonable investigation into the information conveyed by Gentry. Resp’t Mot. at 4, 7-8. Nyrstar further argues that to reduce the risk of frivolously notifying MSHA of non-reportable accidents, Minert, as a management employee, should have been permitted to conduct a first-hand investigation before calling MSHA because the initial report, coming from rank-and-file miner Gentry, was not enough to constitute knowledge on the part of Minert. Resp’t Reply at 5, 8-9. In support of this contention, Nyrstar interprets *Consolidation Coal*, 11 FMSHRC 1935; *Wolf Run*, 35 FMSHRC 3512; *Signal Peak*, 37 FMSHRC 470; *Hanson Aggregates Midwest*, 35 FMSHRC 2412 (Aug. 2013) (ALJ); and *Premier Chemicals*, 29 FMSHRC 686, as affording it an opportunity to investigate potentially reportable accidents before calling MSHA, irrespective of the rank-and-file miner’s veracity. Resp’t Reply at 4-6, 9.

The Commission has stated that the investigation period prior to reporting only lasts until the operator knows or should know that a reportable event has occurred; once a person with sufficient authority to call MSHA learns of a reportable event, the reporting period is triggered. *Signal Peak*, 37 FMSHRC at 476; *Wolf Run*, 35 FMSHRC at 3518. In *Signal Peak*, there was sufficient information to trigger the reporting period when a shift foreman encountered a miner who had been thrown 50-80 feet from a roof fall and sustained a back injury. 37 FMSHRC at 476, 477 n.7 (stating that the determination of whether an incident is reportable “must resolve any reasonable doubt in favor of notification”). The Commission has also found that an underground foreman’s statements that “we had a mine explosion or something in here” and “get mine rescue here right now” to a manager on the surface were enough to create knowledge of a reportable accident under section 50.10. *Wolf Run*, 35 FMSHRC at 3516-18. In *Wolf Run*, the Commission explained that *Consolidation Coal* merely “stands for the proposition that although an operator should be afforded a reasonable opportunity to investigate, once it is determined that

a reportable accident has occurred, an operator must act immediately to report the incident.”<sup>3</sup> 35 FMSHRC at 3518.

Nyrstar cites *Premier Chemicals* and *Hanson Aggregates* in support of the operator’s right to investigate whether a reportable accident has occurred prior to the 15-minute time frame in which it must contact MSHA. In *Premier Chemicals*, the judge found the safety coordinator’s 20-minute investigation reasonable because, despite notice of a miner’s collapse at the mine, the cause of death was not immediately known, the possibility of an ongoing risk to other miners existed, the investigation was prompt and MSHA was notified shortly thereafter, and the miner’s death was confirmed to have resulted from natural causes. 29 FMSHRC at 690-92. Similarly, a citation charging a violation of section 50.10 was vacated upon a finding that a non-fatal heart attack was not a reportable injury, and an alternative finding that the 15-minute reporting requirement was not breached because operators are afforded a “reasonable opportunity to investigate an event” before the reporting requirement is triggered. 35 FMSHRC at 2414 n.5, 2416-17.

Nyrstar’s reliance on *Premier Chemicals* and *Hanson Aggregates* is misplaced. These cases were decided before the Commission’s *Wolf Run* and *Signal Peak* decisions, which made clear that a pre-reporting investigation is not a *per se* guarantee, but rather an opportunity that ends once an operator knows or should know that a reportable accident has occurred. Furthermore, there is no indication in *Signal Peak*, *Wolf Run*, or *Consolidation Coal* that knowledge of a reportable event is contingent upon management’s opportunity to observe the event first-hand. In fact, such a limitation would effectively undermine the Commission’s direction to “resolve any reasonable doubt in favor of notification.” *Signal Peak*, 37 FMSHRC at 477. Thus, Nyrstar was not entitled to perform a pre-reporting inspection simply because Gentry was a rank-and-file miner rather than a management-level employee.

Under the circumstances of the instant matter, it is undisputed that Gentry informed Minert via a phone call at 1:08 p.m. that Thom had killed himself. Therefore, Minert was aware that the cause of Thom’s death, by its very nature, foreclosed any reasonable inference that other miners were exposed to an ongoing hazard. Furthermore, no reasonable inference can be drawn from the established facts to suggest that Gentry’s report was not clear or credible, or that he had reason to falsely report the incident. Drawing all reasonable inferences in favor of Nyrstar, I find that Minert had been given all the information that he needed during the 1:08 p.m. phone call to know that a reportable accident had occurred, and that the 15-minute reporting timeline had been triggered at that time.

Accordingly, I find that Nyrstar violated the reporting requirement in section 50.10(a) when Thom’s death was untimely called in to MSHA 23 minutes after the operator was put on notice of its occurrence, and exceeded the 15-minute rule by eight minutes.

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<sup>3</sup> The pre-2006 version of section 50.10 involved in *Consolidation Coal* and *Wolf Run*, required an operator to “immediately contact” MSHA in the case of a reportable event, with no mention of a specific time frame for reporting. The final rule changing the provision to include the “within 15 minutes” language became effective in December 2006. See 71 Fed. Reg. 71430 (Dec. 8, 2006).

## B. Gravity and Negligence

The record establishes that Thom's death did not arise from an ongoing hazard affecting miners' safety, and that the delay in reporting the incident to MSHA had no likelihood of exacerbating his condition or putting others in peril. The Commission has found a violation of section 50.10 to have resulted from high negligence where the operator had no intention of reporting the incident or intentionally delayed reporting. *See Wolf Run*, 35 FMSHRC at 3518 (finding the operator highly negligent because the record "strongly suggest[ed]" that "management was motivated not to contact MSHA immediately in order to avoid enforcement"); *Rex Coal Co.*, 38 FMSHRC 208, 210, 213 (Feb. 2016) (affirming the operator's high negligence when a miner searched for another miner instead of calling MSHA regarding a reportable event, which MSHA learned of through a news report).

Minert arrived at the mine 11 minutes after receiving the call from Gentry. Another 12 minutes elapsed between Minert's arrival on-site and Steidl's call to MSHA. Despite the inference drawn in favor of Nyrstar, that its management personnel held a good-faith belief that an investigation into Thom's death was warranted prior to contacting MSHA, it was unreasonable to assess the information initially conveyed to Nyrstar as insufficient notice of a reportable incident requiring immediate contact with MSHA; Gentry's call clearly conveyed that a death had occurred inside the change house and that suicide was the probable cause. It was reasonable for Minert and Steidl to agree that Minert follow up with his own investigation, but only after MSHA had been contacted without delay. After all, Nyrstar was always free to supplement its report to MSHA as more information became available. All things considered, however, including the promptness with which Nyrstar called MSHA after concluding its 12-minute in-house investigation, I find no indication that Nyrstar intended to avoid or even forestall enforcement. Therefore, Nyrstar's conduct constituted no more than ordinary, or moderate, negligence.

## IV. Penalty

While the Secretary has proposed a civil penalty of \$5,000.00, 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 Act imposes a minimum penalty of \$5,000.00 for section 50.10 violations. 30 C.F.R. § 110(a)(2).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that Nyrstar is a large 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.<sup>4</sup> As stipulated, the proposed civil penalty will not affect Nyrstar's ability to continue in business. Jt. Stip. J. I also find that Nyrstar demonstrated good faith in achieving rapid compliance after

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<sup>4</sup> Nyrstar's motion to strike the Elmwood/Gordonsville mine's violation history from Ex. P-1, opposed by the Secretary, is **DENIED**, inasmuch as the appropriate weight has been accorded to that evidence.

notification of the violation. The remaining criteria involve consideration of the gravity of the violation and Nyrstar's negligence in committing it. These factors have been discussed fully. Therefore, considering my findings as to the six penalty criteria, the penalty is set forth below.

It has been established that this violation of section 50.10(a) had no likelihood of resulting in an injury, that Nyrstar was moderately negligent, and that the violation was timely abated. Therefore, I find that a penalty of \$5,000.00, the statutory minimum proposed by Secretary, 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 the Secretary **MODIFY** Citation No. 6464299 to reduce the level of negligence to "moderate," and that Nyrstar Gordonsville, LLC, **PAY** a civil penalty of \$5,000.00 within 30 days of the date of this Decision.<sup>5</sup>

  
Jacqueline R. Bulluck  
Administrative Law Judge

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<sup>5</sup> 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.