

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

September 24, 2009

NICHOLS CONSTRUCTION, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. VA 2007-17-R
v.	:	Citation No. 7316750;11/17/2006
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Buchanan Mine
ADMINISTRATION, (MSHA),	:	Mine ID 44-04856 PZF
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. VA 2007-24
Petitioner	:	A.C. No. 44-04856-106332 PZF
	:	
v.	:	
NICHOLS CONSTRUCTION, INC.,	:	Buchanan Mine
Respondent	:	

DECISION

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor, Mine Safety and Health Administration (“Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act”), charging Respondent Nichols Construction, Inc. (“Nichols”) with one violation of 30 C.F.R. § 50.10 and proposing a civil penalty of \$60.00. The general issue before me is whether Nichols is an “operator” within the meaning of 30 C.F.R. § 50.2(c) and, if so, whether it violated 30 C.F.R. § 50.10 by failing to report the accident at issue within the specified time period. If a violation is found it will then be necessary to determine an appropriate civil penalty under the criteria set forth in Section 110(i) of the Mine Act.

On May 4, 2006, Richard Cox, an employee of Nichols, was fatally electrocuted while clearing brush along a right-of-way beneath an electrical line at the Buchanan Mine No. 1 Preparation Plant, operated by Consolidation Coal Company (“Consol”). On November 17,

2006, Citation No. 7316750 was issued to Nichols for a violation of 30 C.F.R. § 50.10.¹

A hearing was originally scheduled for August 13, 2009. However, on July 14, 2009, the parties submitted a Joint Motion to Cancel Hearing and to Submit Case on Stipulated Record and Briefs, which was granted July 17. The parties each filed their initial briefs on August 13, 2009, and their reply briefs on August 20.

The parties stipulated to the following facts:

1. Nichols Construction, Inc. (hereinafter “Nichols”) was a construction contractor performing electrical work for CONSOL Energy, Inc. at the Buchanan Mine site and property, which is a “coal or other mine[“] as defined in section 102(h)(1) of the Federal Mine Safety and Health Act, 30 U.S.C. § 802(h)(1).
2. Nichols was performing service or construction duties at the Buchanan Mine site and property at which the citation at issue in this proceeding was issued.
3. MSHA Inspector Delmer Hess was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation involved in this proceeding was issued.
4. A true copy of the citation that is at issue in this proceeding, along with all continuation forms and modifications, was served on Nichols Construction, Inc. or its agent as required by the Mine Act.
5. An electrocution accident occurred at approximately 1:00 p.m., May 4, 2006, resulting in fatal injuries to Richard Cox, an employee of Nichols Construction, Inc., while performing work at the Buchanan Mine site and property.
6. Nichols Construction, and Mr. Cox specifically, were performing brush clearing operations along the right of way beneath an electrical line operated by Consol. While clearing brush Mr. Cox came in contact with a guy wire for a pole that was not properly secured, contacted the energized wire on the pole, and was subjected to an electrical shock.
7. The accident site was located in the proximity of pole-mounted transformers providing power to an electric motor driven pump utilized to deliver water to the Consolidation Coal Company Buchanan Mine #1 Preparation Plant. The pump was located in a pump-house adjacent to the pole on which the transformers were mounted. This area was a remote and normally unoccupied location.
8. Shortly before 1:00 p.m. Jason Jackson, a foreman for Nichols, made a call on a mobile radio to Nichols’ Vansant, Virginia office to report the accident and request an ambulance.
9. Christopher Ratliff, a Foreman employed by Nichols, received the mobile radio call from Jason Jackson. Ratliff telephoned “911” emergency assistance at 12:55:55 p.m.

¹ An identical citation was issued to Consol for the same accident involved in the case at bar. *See Consolidation Coal Co.*, VA 2007-38. That citation was the subject of a previously approved settlement agreement.

- requesting an ambulance, as noted in the Buchanan Sheriff's Office Call Report. Thereafter, Ratliff responded to the accident site.
10. At approximately 1:30 p.m., Christopher Ratliff attempted to contact Mike Horn, Chief Engineer for Consolidation Coal Company's Buchanan Operation. Horn did not answer the telephone and Ratliff left a message on the answering machine regarding the accident. Christopher Ratliff did not speak with Mike Horn on May 4, 2006.
 11. At approximately 1:55 p.m., Christopher Ratliff arrived at Clinch Valley Medical Center (CVMC), Richlands, Virginia, in the ambulance with the victim. Mr. Ratliff was performing CPR on the victim while he was transported.
 12. At approximately 2:00 p.m., Christopher Ratliff contacted an electrician employed by Consol Energy who was working at the Consol Energy Buchanan Mine #1 Preparation Plant.
 13. At 2:15 p.m., S. Shoursky, M.D. pronounced the death of the victim at the CVMC Emergency Room, as stated in the Report of Investigation by Medical Examiner.
 14. At 3:30 p.m., Christopher Ratliff contacted Kim Noah, Safety Supervisor for Consolidation Coal Company. Ratliff informed him of the accident, and requested the numbers for the state and federal mine safety offices. Mr. Noah informed Mr. Ratliff he (Noah) would make the notifications.
 15. Kim Noah contacted the MSHA Vansant Virginia Field Office by telephone at 3:45 p.m. and reported the accident to Linda Coleman, MSHA Health Department secretary, Vansant field office, Vansant (Oakwood), Virginia.
 16. Linda Coleman advised Kim Noah to contact Richard Salyers, Assistant District Manager, MSHA, in Norton, Virginia.
 17. Shortly after his conversation with Linda Coleman, Kim Noah contacted Richard Salyers, informing him of the accident.
 18. Neither Christopher Ratliff, Foreman, nor anyone else employed by Nichols, reported the fatal accident directly to MSHA.
 19. Joint Exhibit 1 is an authentic copy of Citation No. 7316750, with the abatement, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
 20. The gravity of this violation is low because it was not reasonably likely to result in a reasonably serious injury or illness, and it was not "significant and substantial."
 21. The failure to observe the standard was due to a moderate degree of negligence on the part of the operator.
 22. The violation involved in this matter was abated in good faith.
 23. The sixty dollar (\$60.00) penalty proposed for this violation will not affect the ability of Nichols to remain in business.
 24. Nichols is a small operator.
 25. No citations or orders were issued to Nichols in the 24 month period preceding the accident.
 26. This violation meets the criteria for a single penalty assessment of \$60.00 pursuant to 30 C.F.R. § 100.4.
 27. Based on the factors set forth at Section 110(i) of the Act, 30 U.S.C. § 820(i), including

the degrees of negligence and gravity, the size of the operator, the operator's history of violations, the operator's good faith in attempting to abate the violation, and the effect on the operator's ability to continue in business, if the citation is upheld the proposed penalty of \$60.00 is reasonable and will serve the purpose of the Act in the event that a violation is found to have occurred.

(Joint Proposed Stipulated Record).

Nichols argues in its briefs that it is not an "operator" within the definition contained in Section 50.2(c)(1) and therefore is not subject to the reporting requirements of Section 50.10. Nichols bases this argument on the fact that Section 50.2(c)(1)'s definition of "operator" is a narrow definition that only applies to an entity that "operates, controls, or supervises a coal mine," and Nichols contends that it had no degree of ownership or control over mining operations at the Buchanan Mine.

Nichols also argues that, assuming *arguendo* that it is considered to be an "operator" and thus subject to Section 50.10, it nonetheless met its reporting obligations under the regulation by conferring with Consol shortly after the accident. Nichols argues that the record demonstrates that its foreman, Christopher Ratliff ("Ratliff") attempted to contact Consol several times immediately following the accident for the purposes of conferring and coordinating their notification to MSHA. Once Ratliff first spoke with a Consol employee, Kim Noah, Safety Supervisor, Mr. Noah notified MSHA within 15 minutes of speaking with Ratliff. That, argues Nichols, meets the notification requirement of Section 50.10.

The Secretary argues in her briefs that Nichols is an "operator" as defined in Section 50.2(c)(1) because that definition of "operator" is identical to and incorporates the definition of "operator" contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 ("Coal Act"), which includes construction contractors like Nichols. The Secretary cites to the Fourth Circuit's decision in *Bituminous Coal Operators' Association, Inc. v. Secretary of the Interior*, 547 F.2d 240 (4th Cir. 1977) to support the proposition that construction contractors, like Nichols, can be considered "operators" within the meaning of the Coal Act if it supervises a specific area of a coal mine. It is the Secretary's contention that Nichols was supervising and exercising control over the area where the accident occurred.

Furthermore, the Secretary argues, Nichols did not meet its reporting requirement as required by Section 50.10. It is the Secretary's position that Nichols had many opportunities to contact MSHA, and Nichols' delay in notification was not justified by its attempt to coordinate its compliance efforts with Consol. Furthermore, the Secretary argues, Nichols did not have to confer with Consol because Ratliff knew himself that it was a reportable accident. Therefore, the Secretary maintains that a \$60.00 civil penalty should be imposed.

30 C.F.R. § 50.10 states 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.” Therefore, the threshold inquiry is whether Nichols qualifies as an “operator” within the definition contained in Section 50.2(c)(1) and thus subject to the requirements of Section 50.10. The Part 50 definition of “operator is, “(1) Any owner, lessee, or other person who operates, controls, or supervises a coal mine.” 30 C.F.R. § 50.2(c)(1). There is no dispute that this is the definition to be applied.²

It is a well-established rule of construction that when the language of a regulatory provision is clear, the terms of that provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Here, there is no evidence of contrary intent on the part of the regulator, and enforcing the language as written would not lead to absurd results. Therefore, looking to the plain language of the Section 50.2(c)(1), it appears that Nichols meets the definition of an “operator” because it was exercising supervision and control over the work being done in this remote area of the mine site. From the stipulated record, I find that Nichols was exercising supervision and control over the work being performed at that particular area of the mine. Consol had no representative or foreman supervising the work and, to the contrary, Nichols had its own foreman present to supervise. Therefore, I find that Nichols was an “operator” within the meaning of Part 50.

Having determined that Nichols is an “operator” as enumerated in the Part 50 definition, the next question is whether Nichols violated the reporting requirements imposed by Section 50.10. As stated above, Section 50.10 requires mine operators to “*immediately* contact MSHA at once without delay and *within 15 minutes . . .* once the operator knows or should know that an *accident* has occurred.” (Emphasis added.)

An “accident” is defined as, “(1) A death of an individual at a mine; (2) An injury to an individual at a mine which has a reasonable potential to cause death.” 30 C.F.R. § 50.2(h)(1), (2). With the benefit of hindsight, it is clear that this was an “accident” within the regulatory definition because the incident resulted in a death. Therefore, at 2:15pm on the day of the incident, when Mr. Cox was pronounced dead, the incident was clearly a reportable accident within the meaning of Section 50.2(h)(1).

However, a reportable accident could also stem from “[a]n injury to an individual at a mine which has a reasonable potential to cause death.” 30 C.F.R. § 50.2(h)(2). What exactly constitutes an injury with a “reasonable potential to cause death” is not defined in the regulations,

² Nichols also meets the statutory definition of “operator” contained in the Mine Act i.e. “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d).

but the Commission has provided some guidance on this issue. The Commission has held that a miners' near electrocution, combined with an 18-foot fall in which he hit his head on a hard surface constituted a *per se* reasonable potential to cause death. *Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003). Also, the Commission has held that the very fact that CPR is necessary is sufficient to establish that a particular injury had a reasonable potential to result in death. *Id.*

There is evidence in the stipulated record that Ratliff was performing cardio-pulmonary resuscitation (CPR) on Mr. Cox in the ambulance on their way to the hospital at between 12:55 p.m and 1:55 p.m. Under *Cougar Coal*, 25 FMSHRC at 520, the fact that CPR was performed is *per se* evidence that the injury had a reasonable potential to result in death. Therefore, it is clear that this was a reportable accident at the time that Ratliff was performing CPR on Mr. Cox.

The regulation requires that an accident be reported "immediately . . . without delay." However, there is no definition of "immediately" contained within the regulations. The Commission has interpreted the immediacy requirement of Section 50.10 to afford the operator "a reasonable opportunity for investigation into an event prior to reporting to MSHA. . . . [This investigation] must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous actions." *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). Furthermore, the immediateness of an operator's notification shall be evaluated "on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting." *Id.*

In the case at bar, the evidence demonstrates that MSHA was not notified of the accident until 3:45 p.m. This was almost three hours after the incident took place, and approximately two hours from the time that this incident could first reasonably be considered an "accident" within the meaning of Section 50.2(h)(2).

For the aforementioned reasons, I find that Nichols violated Section 50.10. The parties have stipulated that the \$60.00 proposed civil penalty is reasonable under the "Section 110(i)" criteria and I agree. Therefore, Nichols is **ORDERED** to pay the proposed \$60.00 civil penalty within 40 days of this Order.

Gary Melick
Administrative Law Judge
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