FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Suite 443
Denver, CO 80202-2500
303-844-3577/FAX 303-844-5268

April 14, 2010

NEWMONT USA LIMITED,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2007-743-RM
v.	:	Citation No. 6394834;08/02/2007
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Leeville Mine
ADMINISTRATION, (MSHA),	:	Mine ID 26-02512
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2008-459-M
Petitioner	:	A.C. No. 26-02512-137300
	:	
v.	:	Leeville Mine
	:	
NEWMONT USA LIMITED,	:	
Respondent	:	

ORDER DENYING THE SECRETARY'S MOTION FOR SUMMARY DECISION
ORDER GRANTING NEWMONT'S MOTION FOR SUMMARY DECISION
ORDER OF DISMISSAL

Before: Judge Manning

These cases are before me upon a notice of contest and a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The Secretary filed a motion for summary decision under Commission Procedural Rule 67. 29 C.F.R. § 2700.67. In response, Newmont USA Limited ("Newmont") filed a cross-motion for summary decision. Both parties briefed the issues.

Section 2700.67 sets forth the grounds for granting summary decision, as follows:

> 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.

On August 2, 2007, Gerald Killian with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6394834 under section 104(a) of the Act alleging a violation of 30 C.F.R. § 50.10. The citation alleges the following violation:

> An accident happened on 07/23/2007 in the main drift between 152 stope and the 161 laydown, where a miner was pinned between the rib and a haul truck, causing him to be twisted around, breaking his left femur. The miner was treated and life flighted to the hospital. MSHA notified about the accident on 7/27/2007, when an anonymous fax was received in the Elko office at 0725 hours. It has been determined that this accident meets the criteria for an immediate reportable and the company should have reported it within 15 minutes.

Inspector Killian determined that it was unlikely that the cited condition would injure a miner and that the violation was not significant and substantial. He also determined that the operator's negligence was high. The Secretary proposed a penalty of $5,000.00 for the citation.

The cited regulation 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." The term "accident" is defined by the Secretary in section 50.2(h). For purposes of this citation the applicable definition of "accident" is "[a]n injury to a miner which has a reasonable potential to cause death." 30 C.F.R. § 50.2(h)(2).

The parties stipulated to the key facts, as follows:

1. On July 23, 2007, Newmont employee Andrew Little was working on electrical power moves on the 4460 level of the Leeville Mine with Primitivo Valasquez. After the two men had moved and connected the necessary power leads and trailing cables, Little walked over to the main load center on the 4460 Level to reset the breaker for the power to the Pemco (power generation box).

2. At approximately 3:56 a.m., Little walked past the cab of haul truck 055 and made eye contact with the driver of the truck. The truck was parked and idling.

3. The opening between the truck and the rib was adequate for clearance, but the opening between the truck and the rib narrowed as Little walked further back. When Little reached the point where the clearance had narrowed to approximately 2 feet, the truck began to move.

4. As Little walked by, the tire of the haul truck ran over his right boot, and grabbed as the wheel of the truck passed by him. The tire caught the light

cord on his mine belt and twisted Little around as he was scrambling up the rib to avoid being pulled under the truck.

5. Immediately after the truck passed Little, Velasquez heard Little screaming. Little told Velasquez that his leg was broken and he was thirsty.

6. The truck continued down the drift and did not stop until after it had passed Little.

7. At approximately, 4:05 a.m., the truck driver called dispatch to report that there was a man down and that a man had been run over by a haul truck. The driver was so excited during his initial call to dispatch that some supervisors were unable to understand what he was saying. The truck driver called back a second time and stated, "We have an emergency down here at the 4460-161 and need an EMT."

8. An EMT arrived at the accident scene at approximately 4:20 [a.m]. He gave Little oxygen, put him in a cervical collar and strapped him to a stokes basket. Little was alert and responsive and his vital signs were good. The EMT's initial assessment was that Little had suffered an injury to his left femur. The EMT at no time believed that Little had suffered an injury that had a reasonable potential to cause death.

9. At approximately 4:25 a.m., the Leeville HSLP Rep notified the mine superintendent of the incident.

10. At approximately 4:30 a.m., the Leeville HSLP Rep notified the general foreman of the incident.

11. At approximately 4:40 a.m., Little was loaded on the back of a 12 passenger man trip vehicle and driven to the surface. At 4:44 [a.m.], Little was transferred to the Carlin ambulance, and ultimately flown by Access Air Helicopter to Northern Nevada Regional Hospital in Elko.

12. At the hospital, Little was diagnosed with an oblique mid shaft fracture of his femur that required surgical intervention (pinning). He remained hospitalized until July 27. Little was not released to go back to work until November 5.

13. The truck was approximately 2 feet from the rib when the truck ran over Little's right foot.

14. Little never lost consciousness during this incident.

15. Newmont did not notify MSHA that Little was injured within 15 minutes of learning of the injury.

16. On the morning of July 23, 2007, MSHA inspector Vic Peterson came to the Leeville Mine to do a quarterly inspection. Newmont employees explained to Inspector Peterson that an accident occurred that night and that they did not report to MSHA as they believed that it was not immediately reportable.

17. On July 27, 2007, Inspector Gerald Killian came to the Leeville Mine to investigate the July 23, 2007, accident.

18. On July 27, Killian stated that it was unknown if a citation would be issued for not reporting within 15 minutes.

19. On July 31, 2007, Killian determined he would write Newmont a citation for failing to report the accident to MSHA within 15 minutes.

20. On August 2, 2007, MSHA issued Citation No. 6394834 to Newmont for an alleged violation of 30 C.F.R. § 50.10 for failing to report the accident within 15 minutes.

I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that Newmont violated section 50.10 by failing to notify MSHA within 15 minutes of the accident. The Secretary argues that a fractured femur has a reasonable potential to cause death because of the risks inherent with "hospitalizations and complications in surgery." (Sec. Memo. at 5). She also argues that there are conditions linked to fractures of the femur that can cause death, such as fat embolisms and deep vein thrombosis. She concludes that there is a "potential of death, even though minimal, from a fractured femur." *Id.*

Further, the Secretary maintains that, in addition to the injury itself, the nature of the events surrounding the accident should be considered when making a determination as to whether an injury has a reasonable potential to cause death. In *Cougar Coal Co.*, 25 FMSHRC 513 (Sept. 2003), a miner was exposed to an electric shock of about 7200 volts, which in turn caused the miner to fall from a height of 18 feet, hit his head during the fall, and lose his pulse. In reversing the judge's holding that immediate notification was not required, the Commission held that the nature of the events surrounding the injury, as well as the actual injury sustained, must be considered when determining whether the accident had a reasonable potential to cause death. *Id.* at 520. In the present case, she states that "[f]or at least the first fifteen minutes after notification, everyone believed that Little had been run over by a haul truck." (Sec. Memo. at 6). The types of injuries incurred from being run over by a haul truck have a reasonable potential to cause death.

B. Newmont USA Limited

Newmont argues that the Secretary's interpretation of the cited standard is incorrect and would lead to absurd results. The potentially fatal risks incidental to hospitalization and complications in surgery for a femoral fracture are "remote, attenuated, and twice removed" from any risks that arose from the injury in this case. (Newmont Response at 3-4). Under the Secretary's theory of the case, immediate reporting would be required anytime a miner is taken to a hospital. Further, Newmont argues that, in determining whether there is a reasonable potential for death, the court should focus on the nature of the injury itself and not the nature of the events that caused the injury. Newmont argues that the injury sustained by Little did not have a reasonable potential to cause death and maintains that nothing came to the attention of the company that should have led it to believe that such a potential existed. The injured miner in *Cougar Coal*, on the other hand, was shocked by 7,200 volts of electricity, fell 18 feet, and hit his head on a power center. That miner was initially unconscious, he did not have a pulse, and he required cardiopulmonary resuscitation ("CPR"). Mr. Little was alert and responsive immediately after his injury and told Velasquez that he had broken his leg. The EMT who arrived at the scene within approximately 15 minutes, correctly diagnosed the injury to Little's left femur and at no time believed that the injury had a reasonable potential to cause death.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find that the stipulated facts are sufficiently comprehensive for me to render a decision on the legal issues raised by the parties. There are no genuine issues as to any material fact and I find that Newmont is entitled to summary decision as a matter of law.

Section 3(k) of the Mine Act provides that an " 'accident' includes a mine explosion, mine ignition, mine fire, or mine inundation, or *injury to*, or death of, *any person*." (Emphasis added). 30 U.S.C. § 802(k). The Secretary's regulations at section 50.20 (Reporting of Accidents, Injuries and Illnesses) implements this provision of the Mine Act. Operators must report all accidents to MSHA on Form 7000-1 within 10 working days. The Secretary's definition of the term "accident" in section 50.2(h) is rather confusing because this definition is quite different from the definition in section 3(k) of the Mine Act. This regulatory definition sets forth specific types of section 3(k) accidents that must be reported immediately. The question in this case is not whether the injury sustained by Mr. Little was required to be reported to MSHA; the issue is whether it was required to be reported *immediately*. It was required to be immediately reported only if the injury sustained by Little had a "reasonable potential to cause death."

I find that the Secretary failed to establish a violation of section 50.10. The regulation does not require mine operators to immediately report every injury that requires off-site emergency care at a hospital or clinic. Although it is true that any hospital surgery raises a risk that the patient may die from complications during surgery or from an infectious disease contracted at the hospital, such risks are too remote from the injury sustained in this case. Little

fractured his femur and he had surgery to repair his leg. Although there was some initial confusion about the extent of Little's injuries and what exactly had happened to him, it was clear within a few minutes after the incident that he suffered a broken leg and that this injury did not present a reasonable potential that he was going to die from these injuries.[1]

I agree with Newmont that the facts in *Cougar Coal* are easily distinguishable from the facts here. I have taken into consideration the events that led up to the injury, but these events do not lead me to conclude that an accident occurred. It became clear very quickly that the most serious injury sustained was a broken leg. The parties agreed that the company EMT who arrived at the scene within 15 minutes "at no time believed that Little had suffered an injury that had a reasonable potential to cause death." (Stip. 8). If, on the other hand, Little had been unconscious, confused, in shock, coughing up blood, or if he required CPR, then one could conclude that the extent of his injuries was unknown and immediate reporting was required. In *Cougar Coal*, the Commission held that the "decision to call MSHA cannot be made on clinical or hyper-technical opinions as to a miner's chance of survival." 25 FMSHRC at 521. In this instance, the decision was not based on such hyper-technical opinions, but was made based on the condition of Mr. Little a few minutes after he was injured. There is no evidence that his condition worsened at any time after that.

The Secretary contends that Newmont employees believed, for at least 15 minutes, that Little had been run over by a haul truck and, therefore, given the potentially fatal injuries that can be associated with being run over by a heavy truck, it was obligated to notify MSHA of the accident within that 15 minute period. The language of the Secretary's regulation is clear. An operator is required to notify MSHA within 15 minutes "once the operator knows or should know that an accident has occurred." 30 C.F.R. § 50.10. The regulation does not require reporting with 15 minutes after a miner sustains an injury. The operator must know that an accident occurred before the obligation to immediately report arises or the operator must have been in a position such that it should have known that an accident occurred. In this case, it became clear within a few minutes after Little was injured that an accident, as defined by the Secretary, had not occurred. Because there was not an accident that Newmont knew of or should have know of, the obligation to immediately report the injury did not arise.[2]

---

[1] I do not find it significant that he was taken to the hospital in Elko, Nevada, by helicopter. Nevada is a very sparsely settled state and distances can be great.

[2] In the Secretary's reply brief to Newmont's cross-motion, the Secretary provided information that was not included in the stipulated facts or in her initial memorandum in support of her motion for summary decision. This information was from written statements made by miners recounting the events following Little's injury, as provided by Newmont during discovery. The Secretary attached these discovery responses to her reply brief. This information was included in her reply brief as support for her argument that, for at least 15 minutes, Newmont believed that Little had been run over by a haul truck. Newmont moved to strike these statements from the record because they were not part of the facts stipulated to by the parties. In

I am somewhat surprised that the Secretary pressed this case. If the subject Part 50 regulations were interpreted in the manner suggested by the Secretary, MSHA would receive many more calls from mine operators reporting all kinds of "accidents" that are presently not immediately reportable. Virtually every serious injury would have to be immediately reported because the operator would have to call MSHA before it could determine whether the injury had a reasonable potential to cause death. Most of these "accidents" would probably not require an immediate investigation by MSHA, but the agency would have to spend precious resources making this determination and, in many cases, MSHA would immediately send an inspector out to conduct an investigation. The MSHA inspection force is stretched pretty thin as it is and the opportunity cost of immediately investigating these types of "accidents" could be significant.

If the Secretary would like injuries similar to the injury sustained by Little to be immediately reported, she should consider modifying her regulations. It appears that the Secretary believes that a mine operator should immediately report any serious injury, at least if off-site medical care or hospitalization is required. As stated by the Commission in *Cougar Coal*, "it would benefit the mining community if the Secretary would clarify when it is urgent to notify MSHA, when it is not, and what reports are required." 25 FMSHRC at 52.

III. ORDER

For the reasons set forth above, the Secretary's motion for summary decision is **DENIED**, Newmont's motion for summary decision is **GRANTED**, Citation No. 6394834 is **VACATED**, and these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

---

response, the Secretary argues that this case was not submitted for summary decision on stipulated facts. Rather, the case was submitted on cross-motions for summary decision that included stipulated facts. Newmont's motion to strike is **DENIED**. The proffered statements, although more detailed, are entirely consistent with the information provided in the stipulations. The statements were provided by Newmont during discovery and are not disputed.

Distribution:

Cheryl L. Adams, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103-6704 (Certified Mail)

Mark M. Savit, Esq., Patton Boggs, 1801 California St, Suite 4900, Denver, CO 80202 (Certified Mail)

RWM