FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 17, 2004

NATIONAL LIME & STONE COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 2004-43-RM
	:	Citation No. 6148346; 01/13/2004
v.	:	
SECRETARY OF LABOR, Mine Safety and Health Administration, MSHA, Respondent	:	Lima Plant Mine ID 33-00120

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case is before me on a Notice of Contest filed by National Lime & Stone Company against the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The notice challenges the issuance of a citation alleging a single violation of a regulation requiring the reporting of mine accidents, illnesses and injuries. 30 C.F.R. § 50.20(a). The parties have stipulated to relevant facts and have filed cross-motions for summary decision. For the reasons set forth below, I find that there exists no genuine issue as to any material fact and that the Secretary is entitled to summary decision as a matter of law. Accordingly, the Notice of Contest is dismissed.

Facts

On January 13, 2004, an authorized agent employed by the Secretary's Mine Safety and Health Administration ("MSHA"), issued Citation No. 6148346 to National Lime charging it with a violation of 30 C.F.R. § 50.20(a), which requires that mine operators report "each accident, occupational injury, or occupational illness at the mine." Following amendment, the "Condition or Practice" portion of the citation described the violation as follows:[1]

> A miner, (payroll # 08-396), performing work at the Lima Plant mine, was exposed to poison ivy on or about May 22, 2003, and was treated by a physician on May 31, 2003, following his reaction to the poison ivy, but did not lose any

[1] Order dated August 23, 2004, granting the Secretary's unopposed motion to amend the citation.

workdays. The mine operator did not report this as an occupational illness to MSHA and did not complete and submit an MSHA Form 7000-1, Mine Accident, Injury, and Illness Report.

National Lime, which received a copy of the citation on or about January 26, 2004, duly filed a Notice of Contest, which the Secretary answered. Thereafter, the parties stipulated to the following facts:

On or about May 22, 2003, a miner was performing work at National Lime's Lima Plant, at which time he was exposed to poison ivy. The miner experienced an adverse reaction to the poison ivy and, on or about May 31, 2003, he received an injection of Methylprednisolone from a physician. The miner did not require additional injections and did not lose any work days because of his reaction to the exposure to poison ivy. National Lime did not report to MSHA either the fact of the miner's exposure to poison ivy or his subsequent office visit to a doctor, which resulted in the injection. Poison ivy is a dermatitis-producing "sensitizing plant." Allergic contact dermatitis is a delayed hypersensitivity reaction to the sensitizing plant, poison ivy.

The issue is whether National Lime was obligated to report the miner's reaction to poison ivy as an occupational illness under the subject regulation. The regulations define occupational illness as:

> *Occupational illness* means an illness or disease of a miner which may have resulted from work at a mine or for which an award of compensation is made.

30 C.F.R. § 50.2(f).

The reporting obligation imposed by 30 C.F.R. section 50.20, provides, in pertinent part:

> Each operator shall report each accident, occupational injury, or occupational illness at the mine. . . . If an occupational illness is diagnosed as being one of those listed in § 50.20-6(b)(7), the operator must report it under this part. . . .

The referenced section, 30 C.F.R. § 50.20–6(b)(7), provides instructions on filling out various items on the prescribed reporting form and provides, in part:

> (7) Item 23. Occupational Illness. Circle the code from the list below which most accurately describes the illness. These are typical examples and are not to be considered the complete listing of the types of illnesses and disorders that should be included under each category. In cases where the time of the onset of the illness is in doubt, the day of diagnosis of illness will be considered as the first day of the illness.

(i) Code 21 – *Occupational Skin Diseases or Disorders*. Examples: Contact dermatitis, eczema, or rash caused by primary irritants and sensitizers or poisonous plants; oil acne; chrome ulcers; chemical burns or inflammations.

The Secretary argues that the plain wording of the regulation dictated that the miner's reaction to poison ivy be reported as an occupational injury. National Lime argues that the regulation, taken as a whole and as discussed in MSHA publications, is contradictory and vague with respect to conditions such as reactions to poison ivy, and that its original decision not file a report was correct.

Commission Procedural Rule 67, 29 C.F.R. §2700.67, provides that a motion for summary decision shall be granted if the entire record shows that there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1944). Here, the parties have stipulated to the facts material to the question of law presented for decision, i.e., whether National Lime violated the regulation by failing to report the miner's reaction as an occupational injury.

Under the regulation there is a significant difference between "occupational injuries" and "occupational illnesses." An occupational injury is defined as:

> *Occupational injury* means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

30 C.F.R. § 50.2(e).

Minor *injuries* that do not result in certain lost time from work and are treated only with first aid, as opposed to medical treatment, are not required to be reported. Except in the case of eye injuries, a single visit to a doctor and administration of prescription medication do not constitute medical treatment that would render reportable an otherwise non-reportable minor *injury*.[2] *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148 (Nov. 1989).

In contrast, the definition of an occupational *illness*, quoted above, contains no language excluding minor illnesses. As is evident from the definition, and as explained in MSHA publications cited by National Lime, all occupational illnesses are reportable whether or not

[2] The term "first aid" is defined as "one-time treatment, and any follow-up visit for observational purposes, of a minor injury." 30 C.F.R. § 50.2(g). Section 50.20-3 specifies differences between medical treatment and first aid for a number of injuries.

medical treatment is provided.[3]

In making its argument that the regulation is contradictory and vague, National Lime points out that the citation, as originally written, referred to the miner's allergic reaction as an "injury," and stated that it was reportable because it was "medically treated." Those assertions were erroneous in several respects. Most importantly, the reaction, a "rash" or "contact dermatitis" caused by the "sensitizing" or "poisonous" plant, was clearly an occupational *illness* under the regulation, not an occupational *injury*. Because it was an illness, whether or not medical treatment was administered was irrelevant to the issue of whether it was reportable under the regulation. Moreover, the treatment received by the miner would clearly have been first aid, rather than medical treatment, such that the condition would not have been reportable had it been an injury.

These misconceptions were apparently perpetuated during various conversations with MSHA personnel around, and shortly after, the time the citation was issued, some seven months after the illness should have been reported. Counsel for the Secretary recognized that the citation erroneously alleged that the reaction was an injury and moved, with National Lime's consent, to amend it to allege an unreported occupational illness. That motion was granted.

I agree with National Lime's assertion that the regulation may appear complex, contradictory, or vague, on the issue of whether certain types of conditions should be categorized as injuries or illnesses. However, I do not find the regulation vague or misleading as to the condition at issue here. As noted above, the miner's reaction to the poison ivy fit so squarely within the regulation's language setting forth examples of occupational skin diseases or disorders, that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the regulation, i.e., that the miner's reaction was an occupational illness, which the regulation required to be reported. *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996); *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

National Lime contrasts regulatory language addressing distinctions between first aid and medical treatment with respect to the inhalation of toxic or corrosive gasses – indicating that such conditions are injuries – with other language describing "respiratory conditions due to toxic agents" as examples of occupational illnesses. It also makes reference to an MSHA publication counseling that elevated levels of lead in the blood, an occupational illness, would become reportable if the miner, *inter alia*, receives treatment for lead poisoning or to lower blood-lead levels, as contradictory of previously quoted language mandating the reporting of all occupational illnesses, whether or not medical treatment is provided.

Some conditions, especially minor ones, could certainly present difficult questions for an operator attempting to comply with its reporting obligations. National Lime has cited some

---

[3] Contestant's letter-brief at 4.

examples. There may also be a question of whether an illness is so de-minimis that reporting would not be required, e.g., would the instant miner's reaction have been reportable if it was nothing more than a small rash that cleared up in a day or two? Presumably, MSHA representatives are available for telephonic consultation on such issues, and would provide guidance on interpretation of the regulation.

This, however, was not such a case. The miner's reaction was clearly not de-minimis, and fell squarely within one of the descriptions of occupational illnesses in the regulation. National Lime apparently was aware of the miner's condition around the time that it occurred. There is no claim that it consulted MSHA and was mislead at that point. In failing to seek guidance, it acted at its peril, because an operator is strictly liable for violations of the Act, and mandatory health and safety standards and regulations enacted pursuant thereto. *ASSARCO, Inc.*, 8 FMSHRC 1632 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989); *Western Fuels - Utah, Inc., v. FMSHRC*, 870 F.2d 711 (D.C.Cir. 1989).

ORDER

Based upon the foregoing, I find that there is no genuine issue as to any material fact and that the Secretary is entitled to summary decision as a matter of law. National Lime violated the cited regulation by failing to report the miner's occupational illness within ten days of its being diagnosed. Accordingly, the Notice of Contest is **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

Distribution (Certified Mail):

Kevin Kitzler, Safety Compliance Officer, The National Lime & Stone Co., P.O. Box 120, Findlay, OH 45840

Christine M. Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

/mh