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MSHA V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 31, 1989

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

v. Docket No. WEVA 88-176

CONSOLIDATION COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) ("Mine Act" or "Act"), involves a citation issued to Consolidation Coal Company ("Consol") alleging that it violated 30 C.F.R. 50.10 by failing to notify immediately the Department of Labor's Mine Safety and Health Administration ("MSHA") of a reportable unplanned roof fall. 1/

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1/ 30 C.F.R. 50.10 provides:

> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582.

30 C.F.R. 50.2(h)(8) defines "accident," in relevant part, as

follows:

"Accident" means,

An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use;

Commission Chief Administrative Law Judge Paul Merlin concluded that Consol violated section 50.10 and, finding the violation to be serious in nature, assessed a civil penalty of $500. 10 FMSHRC 1633 (November 1988)(ALJ). For the following reasons, we affirm the judge's finding of violation, reverse his determination as to the gravity of the violation and reduce the penalty.

Consol owns and operates the Humphrey No. 7 Mine, an underground coal mine in Monongalia County, West Virginia, utilizing longwall mining. On Friday, November 13, 1987, at about 2:00 p.m., an unplanned roof fall occurred in the headgate entry of the 2-southwest longwall section. The fallen roof covered the crusher and resulted in 2"2Â feet of debris between the ribs and the sides of the crusher.

At the time of the roof fall, Sam McLaughlin, Consol's longwall coordinator, was approximately 1,500 feet from the face. He was notified immediately and proceeded to the area of the roof fall. Once there, he communicated by mine telephone with the longwall section foreman, who was at the longwall face inby the fall, and learned that no one had been injured and that ventilation was not impaired. McLaughlin directed the section foreman to send the miners out through the longwall tailgate entry. (The normal route of egress from the longwall face was through the headgate entry.) McLaughlin next telephoned Blaine Myers, Mine Superintendent, informed him of the roof fall and that the miners were leaving through the tailgate entry, and requested assistance in timbering the area of the fall.

While at his surface office, Stanley Brozik, Consol's safety supervisor and the person designated by Consol to notify MSHA of reportable accidents, was informed of the roof fall in a telephone call received a few minutes after 2:00 p.m. Brozik was told that there were no injuries and that the miners were retreating through the tailgate entry. Brozik proceeded underground and reached the roof fall site in approximately 35 minutes. He spent about 45 minutes determining the extent of the fall and examining conditions at the site. Brozik devoted his attention primarily to determining whether the fall affected the area above the anchorage zone of the roof bolts. He testified that because "the men had got off the back end of the storage loader," he "never really reported this incident as being impassable." Tr. 46.

Brozik thereafter left the site and returned to the surface, which took him about 20 to 25 minutes, and he then telephoned MSHA to report the roof fall. The recorded time of the telephone call to MSHA was 3:58 p.m., approximately two hours after the roof fall had occurred. Brozik testified that he could have made the call to MSHA from an underground mine telephone.

MSHA inspector Lynn Workley inspected the mine on the following Monday, November 16, 1987. He issued a citation to Consol, pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), for what he regarded as the late reporting of the roof fall. In his citation, the inspector

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> or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage....

mentioned that the unintentional roof fall was a reportable accident because it had occurred "above the anchorage zone of roof bolts [and] interfered with passage of persons...." The Secretary subsequently proposed a penalty of $250 for the alleged violation, determining that the violation was not of a serious nature. The matter proceeded to hearing before Chief Judge Merlin.

The parties stipulated that the roof fall was an unplanned roof fall within the meaning of section 50.2(h)(8). In his decision, the judge examined the specific grounds upon which the fall constituted an "accident" within the purview of that provision. While Consol's witness Brozik testified that he had focused his inquiry on whether the fall extended above the roof bolt anchorage zone, the judge determined that passage was impeded and that the roof fall, therefore, constituted an "accident" within the meaning of section 50.2(h)(8). 10 FMSHRC at 1635-36.

The judge next focused on whether Consol's notification to MSHA was "immediate" within the meaning of section 50.10. He found that "[i]f the safety supervisor [Brozik] or others had taken the moment or two necessary to ask the obvious questions [about the passage being impeded], they would have known immediate notification was required and so would have called MSHA before going underground." 10 FMSHRC at 1637. The judge determined that the procedures followed by Brozik and other management officials failed to satisfy the requirements of the regulations. 10 FMSHRC at 1636. In reaching this conclusion, the judge considered Consol's argument that an operator must have an opportunity to conduct a "reasonable" investigation in order to determine whether notification of MSHA is required under section 50.10. He found that Consol, with a minimum of effort, could have ascertained the facts necessary to determine the requirement of immediate notification. 10 FMSHRC at 1637. The judge noted that "even after his investigation, [Brozik] waited until he was above ground to notify MSHA although he could have telephoned MSHA from below ground 20 or 25 minutes earlier." Id. He concluded that the operator's position in this case "would mean that instead of being 'immediate', notification would be virtually the last thing to be done and accorded little, if any, priority." Id. In considering the appropriate penalty, the judge rejected the Secretary's position that the violation was not serious. 10 FMSHRC at 1637-38. Based on his belief that Part 50 violations are intrinsically serious, the judge found a high degree of gravity and assessed a civil penalty of $500. 10 FMSHRC at 1638.

The Commission granted Consol's Petition for Discretionary Review ("PDR") challenging the judge's finding of violation and his determination as to the gravity of the violation.

With respect to the issue of violation, Consol argues on review that under the circumstances of this case it satisfied the immediate notification requirement of section 50.10. Consol asserts that an operator should be allowed a reasonable opportunity to investigate a roof fall to determine its duties under the Secretary's regulations, viz., whether a particular roof fall is, in fact, reportable. Consol contends that it was not instantly obvious that the roof fall was

reportable under section 50.10 and that once "the proper management persons determined the roof fall was reportable they 'immediately' report[ed] the roof fall to MSHA." PDR 8. Consol bases this contention on Brozik's investigation of whether the roof fall affected the area above the anchorage zone of the roof bolts--a task that Brozik testified took him some 45 minutes to complete. Consol argues that, once it became evident to Brozik that the roof fall was reportable because it was above the anchorage zone of the roof bolts, he made the call to MSHA within 20 minutes. Consol asserts that this was sufficiently "immediate" notification to meet the requirements of the regulation. Under the facts presented, we disagree.

Section 50.10 provides that operators "shall immediately contact" appropriate MSHA representatives regarding specified "accidents," including certain "unplanned roof falls." For present purposes, the key regulatory consideration is that such accident notification must be made "immediately."

There is no definition of the term "immediately" in the Secretary's regulations. It is, however, a common term. The relevant ordinary meaning of the word "immediate" is: "occurring, acting or accomplished without loss of time: made or done at once: instant...." Websters Third New International Dictionary (Unabridged) 1129 (1986 ed.) See also Random House Dictionary of the English Language (Unabridged) 956 (2d ed. 1987). "Immediately" is defined as "without interval of time: without delay: straightaway...." Webster's, supra.

Although the regulation requires operators to report immediately certain "accidents" as defined in section 50.2(h), it must contemplate that operators first determine whether particular events constitute reportable "accidents" within that definition. Section 50.10 therefore necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. Such internal investigation, however, must be carried out by operators in good faith without delay and in light of the regulation:s command of prompt, vigorous action. The immediateness of an operator's notification under section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting.

Applying these considerations to the present case, we agree in result with the judge that Consol violated section 50.10. The judge concluded that the actions of Brozik, the Consol official responsible for making the accident report, violated the regulation in two respects: (1) in view of the information conveyed during the initial telephone call from the longwall section notifying him of the roof fall, he should have

determined that passage was "impeded" in the entry; and (2) after his investigation at the site, he could have reported the accident to MSHA using the underground telephone rather than waiting 20 to 25 minutes to make the call from the surface. 10 FMSHRC at 1636-37. Even were we to agree with Consol's position that Brozik did not violate the regulation by not contacting MSHA prior to his onsite investigation, we nevertheless conclude that, under the circumstances involved, an unreasonable amount of time elapsed between his arrival underground and

his call to MSHA.

As the judge recognized (10 FMSHRC at 1635-36), an unplanned roof fall in active workings is a reportable "accident" if it occurs at or above the anchorage zone where roof bolts are in use, or if it "impairs ventilation" or "impedes passage." Section 50.2(h)(8), n. 1 supra. Substantial evidence supports the judge's finding that the roof fall impeded passage in the headgate entry: the roof had fallen on the crusher and there was debris 20-1/2 feet high between the ribs and the sides of the crusher. Tr. 40, 44, 48-50, 53. It was obvious that passage was "impeded" in the headgate entry. As noted above, miners in the area were evacuated through the tailgate entry, not through the headgate entry, which was the normal route of travel. Considering his testimony, Brozik may have believed that a roof fall had to render a passage impassable before the reporting requirement is triggered. See Tr. 44, 46, 49-50. The regulation, however, speaks in terms of impeded passage, not impassability. In addition, once Brozik arrived at the site, he proceeded to spend 45 minutes investigating the fall and then another 20-25 minutes traveling to the surface before contacting MSHA. We are satisfied that, upon observing the roof fall, Brozik should have reported the accident to MSHA at some time prior to his 4:00 p.m. notification. Under the circumstances, the 4:00 p.m. notification was not "immediate" and a violation of the regulation occurred.

With respect to the penalty, section 110(i) of the Mine Act grants the Commission final authority to assess civil penalties for all violations under the Act and sets forth six criteria, including "gravity of the violation," that the Commission shall consider in assessing penalties. 30 U.S.C. 820(i). The Secretary proposed an assessment of a $250 penalty based, in part, on her determination that the gravity of the violation was of a low degree. The judge rejected the Secretary s position concerning gravity and assessed a penalty of $500. The judge based his gravity finding on a per se determination that all violations of section 50.10 are intrinsically serious. 10 FMSHRC at 1637.38. On review, Consol asserts that the judge abused his discretion in rejecting the Secretary's position on gravity and argues that if there is a violation in this case, it is not of a serious nature.

The Commission has repeatedly made clear that assessment of appropriate civil penalties based on the criteria specified in 30 U.S.C. 820(i) is de novo before the Commission and that Commission judges an the Commission are not bound by the Secretary's proposed penalties or her views as to any of the specific penalty criteria. See, e.g., Sellersburg Stone Co., 5 FMSHRC 287, 290-93 (March 1983), aff'd, 736 F.2d 1147, 1151-52, (7th Cir. 1984).

With respect to the merits, we perceive no warrant for adopting a per se rule that all violations of section 50.10 necessarily reflect a high degree of gravity. Here, the accident report was made, and was made within two hours of the accident. During a considerable portion of that time, the responsible person was engaged in a good faith investigation into the particulars of the accident. Also, we note that the MSHA representative's initial post-accident visit to the mine the following Monday generated no indication in the record that any

necessary corrective action was frustrated by the delayed accident report. The Secretary initially determined that the violation was not serious. In considering gravity, the judge relied in part upon prior litigation involving reporting violations by Consol. However, we note that in the earlier case, Consol actually failed to file the required accident and injury reports. Consolidation Coal Company, 9 FMSHRC 727 (April 1987)(ALJ).

Thus, we conclude that substantial evidence of record does not support the judge's finding that the violation in this case reflected a high degree of gravity and, accordingly, we vacate that finding. "While a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal by the Commission." United States Steel Corporation, 5 FMSHRC 1423, 1432 (June 1984). Discounting the judge's finding as to gravity, we hold that a civil penalty of $250 is appropriate and consistent with the statutory criteria.

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For the foregoing reasons, we affirm the judge's finding of violation, reverse his determination as to the gravity of the violation, and assess a civil penalty of $250.

L. Clair Nelson, Commissioner

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