

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 2, 2024

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2020-0278
v. :
 :
AMERICAN SODA, LLC :

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation to American Soda, LLC,¹ alleging that the operator failed to immediately contact MSHA, as required by 30 C.F.R. § 50.10(b), after a miner suffered an injury which had a reasonable potential to cause death. American Soda contested the citation before a Commission Administrative Law Judge. After a hearing on the merits, the Judge found that the Secretary demonstrated that the operator violated the mandatory safety standard.² 43 FMSHRC 477 (Nov. 2021) (ALJ). American Soda then filed a petition for discretionary review, which the Commission granted.

The Commission vote is split on whether to affirm the decision of the Judge. We, Chair Jordan and Commissioner Baker, write first and vote to affirm the Judge’s decision; the separate opinions of our colleagues follow. In the absence of a majority decision, the Judge’s decision shall stand as if affirmed. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563 (Aug. 1990), *aff’d on other grounds*, 969 F.2d 1501 (3rd Cir. 1992).

¹ At the time the citation was issued and during the proceedings before the Judge, American Soda was known as Solvay Chemicals, Inc.

² The Judge also affirmed the citation’s significant and substantial designation and found that the violation was the result of a moderate degree of negligence. He assessed a \$6,159 civil penalty. The “significant and substantial” terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d)(1).

I.

Factual and Procedural Background

A. Factual Summary

On January 31, 2020, at approximately 11:05 a.m., a section of roof fell at American Soda's underground trona mine in Sweetwater County, Wyoming. Rock struck and injured miner Delbert Hauser.

Prior to the roof fall, Hauser had been operating a bore miner. The bore miner's shear pin became damaged during active mining operations. Hauser backed the machine out from the cut. Hauser then gathered his tools and attempted to make repairs at the front of the machine, in close proximity to the recent cut and unbolted roof. Miner Shane Dodge came over to assist. As they were working, a section of the unbolted roof collapsed, striking Hauser.³ Tr. 259.

Hauser further testified that a large slab of rock from the roof fell onto him, dislodged his hard hat, and drove him into the ground. An additional smaller rock subsequently struck him directly on his unprotected head. Hauser stated that the second rock "rang [his] bell pretty good." Tr. 128. The larger rock tore the clothes on his back. Tr. 129. Hauser testified that immediately afterwards, he was unable to see out of his swollen right eye and his left eye was full of blood and dirt. Tr. 129. Hauser could feel blood weep from a gash on the back of his head. Tr. 133. Hauser believed that his body was going into shock. Tr. 130. Hauser gathered himself and moved to the front side of the bore miner. He testified that when one of his fellow miners saw the extent of his injuries, he observed the co-worker vomit. Tr. 131.

Dodge testified that after the fall he saw Hauser lying on the ground, without a hard hat. Tr. 209. Dodge testified that upon getting up, Hauser appeared "dazed and confused," had a gash on the back of his head and kept on saying "I'm all right." Tr. 199. Neil Mattinson, the production foreman, and Wendalle Boyd, a crew member, were standing by the rear of the bore miner when the roof fell. Mattinson called the hoistman and told him that Hauser had been struck by a rock, and needed an ambulance. Tr. 259-60, 278-81. Although Dodge, Mattinson, and Boyd were in the area when the roof fell, no one testified to seeing the roof fall or the size of the rocks that hit Hauser.

Hauser's fellow miners treated him on the scene with a first aid kit, bandaging his head and providing an ice pack. Hauser reportedly refused to be placed on a backboard or in a cervical collar. Hauser testified that he has little memory of these events. Tr. 129-32. His fellow miners testified that he appeared to be coherent. Mattinson and Dodge traveled in the mantrip with Hauser to the hoist, a journey of 20 to 30 minutes. Hauser then walked onto the hoist and rode another three to five minutes to the surface.

³ MSHA Inspector Rodney Gust testified that based on the results of his accident investigation, he believed that Hauser was standing under unsupported roof at the time of the roof fall. Tr. 42-45.

Shawn Marshall, the mine's operations manager, was on the surface when he was notified that Hauser had been injured in a rock fall underground. Marshall did not ask about the size of the fall. He told Jamie McGillis, an employee trained in first aid, that she should meet Hauser. McGillis spoke with Hauser when he returned to the surface, but did not observe his head injury as it was bandaged. Marshall observed Hauser walking on his own at the surface and did not believe that he was going to "succumb to his injuries." Tr. 184.

Hauser was evacuated by ambulance to the local hospital where medical personnel used three or four staples to close the wound on the back of his head. Tr. 135, 314. A CT scan of Hauser's head revealed that his right eye orbital socket was shattered. Hauser later underwent eye surgery at the University of Utah Hospital in Salt Lake City. Tr. 136-38.

On the day of the incident, between 11:10 a.m. and 11:30 a.m., Michael Crum, a health, safety, environment and quality manager, was notified that Hauser was being transported out of the mine after suffering an injury. Tr. 343. Crum received an update that Hauser had been struck by a roof fall, and suffered a head laceration, but was conscious and able to walk. Tr. 305, 342.

Crum did not see or speak to Hauser before he left on the ambulance to the local Rock Springs hospital. Tr. 307, 313-14. Instead, Crum talked to Marshall, who stated that when he observed Hauser on the surface, Hauser appeared coherent and walked himself to the ambulance. Tr. 307-08. Accordingly, Crum decided that Hauser's injuries did not have a reasonable potential to cause death and therefore, did not report the event to MSHA. Tr. 308, 341-42. Prior to his determination, Crum did not talk to the miners who were in the vicinity of the roof fall when it occurred (Boyd, Dodge, or foreman Mattinson). Tr. 346-47.

Marshall traveled to the hospital. Per Crum's instruction, Marshall asked an attending doctor whether Hauser's injuries were life threatening. According to Marshall, the doctor responded that the injuries were not. Tr. 173, 317. Marshall informed Crum.

Back at the mine, Mattinson, along with Tyler Hanks, the shift foreman, traveled underground to perform an investigation, including measuring the area from which the rock fell. Hanks determined that it was approximately five feet wide, by ten feet long, and one to three inches thick. Mattinson testified that the rock that fell was mainly trona, which is very dense and hard. After the investigation was complete, mining resumed. Had the accident been reported to MSHA, the Mine Act would have required that the operator preserve the scene for investigation.

On February 1, 2020, the next day, MSHA received an anonymous report that a roof fall at the mine had injured a miner. Inspector Rodney Gust travelled to the mine to investigate. Gust was unable to measure the material that fell because the operator did not preserve the accident scene. However, based on the impression in the roof, nine feet above the ground, it was obvious from where the material originated. The resulting void was approximately five feet long, twelve and a half feet wide, and one to three inches thick. Tr. 37, 67. Inspector Gust concluded that approximately 800 to 900 pounds of material fell from the roof. He determined that based on the information known to the operator immediately after the accident, MSHA should have been called.

On February 4, 2020, Gust issued Citation No. 9475179 to the operator for an alleged violation of 30 C.F.R. § 50.10(b). Gust testified that concussions and blunt force trauma to the head, neck and upper torso have a reasonable potential to cause death.

Hauser testified at the hearing that he has continued to suffer from a variety of disabling ailments including a constant migraine, occasional nausea, short term memory loss, vision problems, neuropathy in his fingers, dizziness, and balance issues. As a result of the injuries, Hauser testified that he walks with a cane, is unable to watch TV for more than a short period of time, drives less, and spends a significant amount of time sitting in the dark. Tr. 138-39.

B. The Judge's Decision

On November 9, 2021, the Judge issued a decision affirming the citation. The Judge found that Hauser was hit in the head and back by a rock with enough force to knock him to the ground. No one at the mine saw the roof fall or knew the exact size of the rock that hit Hauser in the head, but the size of the void in the roof from which the material fell was substantial. The rock knocked off Hauser's hardhat and caused serious injuries to both the back of his head and right eye. Mattinson, the crew foreman, became aware of the injury directly after it occurred. Despite this information, MSHA was not called on the day of the incident.

The Judge recognized that "getting hit on the head by a heavy object can lead to an intracerebral hemorrhage, *i.e.* bleeding in the brain" and that "[a]dverse symptoms of a brain hemorrhage will often not be visible within 15 minutes of an accident." 43 FMSHRC at 489-90.

The Judge found that given the facts, a reasonable person, presented with a similar situation, would have erred on the side of calling MSHA within 15 minutes. *Id.* at 489. The Judge noted that the "extremely short [15-minute] timeframe" requires a mine operator to make a determination "based on a very limited knowledge of the facts surrounding the injury and the nature of the accident." *Id.* at 489.

II.

Disposition

The Mine Act requires that "[i]n the event of any accident occurring in any coal or other mine, the operator shall notify [MSHA] . . . and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigation of the cause or causes thereof." 30 U.S.C. § 813(j).

In response to a series of multiple fatality mining accidents, Congress passed the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act"), which included an update to this section. S. Rep. No. 109-365, at 1-2, 9. Congress added the specific requirement that mine operators notify MSHA within 15 minutes of an accident. 30 U.S.C. § 813(j) ("within 15 minutes of the time at which the operator realizes that . . . an injury . . . of an individual at the mine which has a reasonable potential to cause death, has occurred").

MSHA promulgated an emergency safety standard, incorporating the 15-minute notification requirement at 30 C.F.R. § 50.10. Section 50.10(b) states, in pertinent part, that “[t]he operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving . . . (b) [a]n injury of an individual at the mine which has a reasonable potential to cause death.”

As the Third Circuit recognized:

[I]t is plain that the notification requirement was designed to serve the Mine Act’s unyielding purpose of protecting miners by encouraging rapid notification, thereby allowing MSHA to effectively initiate an emergency response and to ensure the preservation of evidence for use in investigations. The notification requirement should be interpreted to effectuate that purpose.

Consol Pa. Coal Co., LLC v. FMSHRC, 941 F.3d 95, 106 (3rd Cir. 2019). In *Consol*, the Third Circuit stated that in determining whether an injury has the reasonable possibility to cause death, a mine operator should be guided by principles that favor MSHA notification. In accordance with that principle:

First, reasonable doubts must be resolved in favor of notifying MSHA; second, liability must be assessed based on whether a reasonable person in the circumstances would view the injuries as having a reasonable potential to cause death; third, the totality of the circumstances must be considered; and fourth, the focus must be on the information available around the time of the injury, so post-hoc medical evidence is less probative.

Id. at 103. In total, the notification requirement “must be analyzed on an objective basis, asking whether a reasonable person in the circumstances would view a miner’s injury as having a reasonable potential to cause death.” *Id.* at 107.

The Commission has stated that given the need for prompt notification, “the nature of the accident” is highly relevant in determining whether an event is reportable. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 475 (Mar. 2015) (citations omitted). The nature of the accident includes the mechanism of the injury. *Id.* at 475-76.

The Commission reviews a Judge’s findings regarding the violation in accordance with the substantial evidence standard. 30 U.S.C. § 823(d)(2)(A)(ii)(I) (the Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing a Judge’s factual determinations). Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support [the Judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989). Substantial evidence may be met by “reasonable inferences drawn from indirect evidence.” *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 989 (Dec. 2006). Substantial evidence means “more than a scintilla but less than a preponderance.” *Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012).

As we will demonstrate, the Judge’s finding that a reasonable person would have concluded that, based on the totality of the circumstances and information available at the time of injury, that Hauser’s injuries had a reasonable potential to cause death, is supported by substantial evidence in the record.

It is undisputed that a large amount of material from the roof fell. The area from which the fall occurred was at minimum five feet wide, ten feet long, and one to three inches thick. Tr. 35-37; 208, 269, 291-92; Jt. Ex. 31. The roof was approximately nine feet high. Inspector Gust estimated that based on his own measurements, approximately 800 to 900 pounds of rock was dislodged in the fall. Tr. 63. Foreman Mattinson testified that that the rock that fell was mainly trona, which is “very dense . . . way harder than coal.” Tr. 298-99. Mattinson heard the roof fall and assisted in tending to Hauser’s resulting injuries directly thereafter.

Although it was unknown how much of this roof material hit Hauser, the undisputed evidence demonstrates that Hauser was struck with enough force to knock him to the ground, knock his hardhat off, and to cause injuries to both sides of his head. Specifically, a rock cut open the back of his head and his eye socket shattered.⁴ Hauser testified that first a large rock hit him, knocked off his hardhat and drove him into the ground; subsequently a second smaller rock hit his unprotected head. Tr. 127-28, 137. Dodge corroborated that the fall knocked off Hauser’s hardhat. Tr. 127, 209. The wound on the back of Hauser’s head was deep enough to require staples to close it. His eyes appeared bloodied and swollen. Mattinson immediately went to get the first aid kit and then called to the surface to get Hauser an ambulance. Tr. 259. Mattinson thought Hauser had a possible head and neck injury and tried to convince him to get onto a backboard.⁵ Tr. 263. Taken together, these facts would cause a reasonable person to conclude that Hauser was struck by a rock with considerable force directly in the head. As the Judge stated, because no one knew the size of the rock that hit Hauser in the head, a reasonable person should have resolved doubts on the side of notification.⁶

⁴ The Judge found that Hauser “hit the floor hard with his face.” 43 FMSHRC at 489. American Soda argues that the Judge’s finding is not supported by the evidence. We disagree. Hauser testified that he landed “face-down.” Tr. 137. Furthermore, as a result of the fall, Hauser’s eyes became swollen shut and obstructed by blood and dirt.

⁵ Although Mattinson testified that Hauser “appeared fine to me,” he acknowledged that he was unable to see the extent of Hauser’s injuries after they were bandaged. Tr. 262.

⁶ In his separate opinion, Commissioner Althen reweighs the evidence *de novo* instead of considering if substantial evidence supports the Judge’s decision, as is required of the Commission under the Mine Act. See 30 U.S.C. § 823(d)(2)(A)(ii)(I) (the Commission is bound by statute to review a Judge’s decision under the substantial evidence standard); see also *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998) and *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 185 (Feb. 1991). Commissioner Althen then independently concludes that the weight of the evidence does not support a finding that Hauser faced a reasonable potential for death. Slip Op. at 12. Because Commissioner Althen uses an incorrect standard of review, his conclusion is defective. See *Northshore Mining Co. v. Sec’y of Labor*, 46 F.4th 718, 727 (8th Cir. 2022) (“we may not reverse merely because substantial

It is well established that blunt force trauma to the head can cause an injury with a reasonable potential for death. In fact, the preamble to the safety standard at section 50.10 notes that the head injuries that result from roof falls are the types of injuries that are known to cause a reasonable potential for death. *See* Emergency Mine Evacuation, 71 Fed. Reg. 71,430, 71,434 (2006) (“Based on MSHA experience and common medical knowledge, some types of ‘injuries which have a reasonable potential to cause death’ include concussions . . . major upper body blunt force trauma . . . [t]hese injuries can result from various indicative events, including . . . roof instability”). As the Judge stated, “getting hit on the head by a heavy object can lead to an intracerebral hemorrhage, *i.e.* bleeding in the brain” and that “[a]dverse symptoms of a brain hemorrhage will often not be visible within 15 minutes of an accident.”^{7, 8} 43 FMSHRC at 489-90.

Additionally, we note that the record evidence demonstrates that the operator failed to consider the totality of the circumstances when it determined that the accident was not reportable pursuant to section 50.10(b). Michael Crum testified that the responsibility to call MSHA at American Soda lay with the safety group, which included himself.⁹ Tr. 319, 337-38. Crum was notified that Hauser was being brought to the surface after suffering an injury in a rock fall, but was conscious and coherent. Tr. 305. Crum did not personally observe Hauser, but instead relied on Marshall’s observations. Crum testified that Marshall informed him that Hauser was talking, coherent and exited the mine under his own power. Tr. 307-08. Accordingly, he did not believe that the injury was reportable. He further testified that he waited to hear a report from Marshall from the emergency room doctor before making a final determination. Tr. 353. Crum’s decision to wait beyond the 15-minute window to hear a doctor’s diagnosis from Marshall runs contrary to the Commission’s requirements for the mine operator to make a

evidence may support an opposite conclusion”). Furthermore, substantively, Commissioner Althen’s central claim – that information directly from miners on the scene of the accident informed Crum’s decision-making – was contradicted by Crum himself. Tr. 346-47 (Q: “Did you make any effort to go and talk to anybody who’d been in the vicinity of the accident when it happened on the day of the accident in order to determine exactly what had gone on and how bad the injuries might be?” A: “No”).

⁷ The lingering effects of the head trauma that Hauser continues to suffer are illustrative of the severity of unobservable injuries that often accompany such events. However, as the Judge correctly recognized, Hauser’s present condition does not determine whether the operator should have called MSHA within the 15-minute reporting window after the accident. *Id.* at 488 (“the most critical [facts] to my analysis are that no one saw the roof fall, no one knew the size of the rock that struck Hauser’s head, and that Hauser suffered a severe blow to the head”).

⁸ Section 50.10(b) does not require the Secretary to prove as a matter of medical fact that the injury suffered had a reasonable potential to cause death. *Consol Pa. Coal Co.*, 40 FMSHRC 998, 1004 (Aug. 2018).

⁹ In *Signal Peak*, 37 FMSHRC at 476, the Commission stated that “[o]nce a person with sufficient authority to call learns of an event injuring a miner, the clock begins to run on the period for evaluation of . . . a reasonable potential to cause death.”

determination immediately, prior to a clinical evaluation, and to resolve reasonable doubts at the time of the incident in favor of notification.¹⁰

Furthermore, Crum testified that he *did not* consider the nature of the accident when making his determination. Tr. 351. Crum testified that he did not talk to the miners who were in the vicinity of the roof fall and treated Hauser's injuries at the scene. Tr. 346-47. Crum's own testimony that he did not consider the totality of the circumstances, including the mechanism of the injury, is additional evidence supporting the Judge's finding that the operator violated the safety standard.¹¹ Had Crum inquired about the nature of the accident, as is required by the mandatory safety standard, he would have discovered that there was a void in the unbolted roof measuring at least 5 feet by 10 feet.¹²

As the Judge stated, the operator "should have known that a significant blow to the head could reasonably be expected to be fatal even when the injured miner was not displaying serious

¹⁰ As the Third Circuit held, "[t]he focus must be on the facts available at the time of injury, and post-hoc medical evidence can, at best, serve in the attenuated role of raising an inference about what the mine operator perceived, including the injury's apparent severity." *Consol*, 941 F.3d at 111. Similarly, we have found the relevant evidence to consist of "the evidence available at the scene of the accident, at the time of the accident, and immediately following the accident." *Consol*, 40 FMSHRC at 1003. Therefore, we have held that the operator's decision to notify MSHA under section 50.10 cannot be based upon "clinical or hyper-technical opinions as to a miner's chance of survival." *Cougar Coal*, 25 FMSHRC 513, 521 (Sept. 2003). Moreover, we have recognized that a doctor's diagnosis "will likely not materialize until the time to make a decision to notify MSHA has already passed." *Consol*, 40 FMSHRC at 1003.

¹¹ In his separate opinion, Commissioner Rajkovich expressed concern that the ALJ's decision "comes dangerously close to a holding that any blow to the head can reasonably result in death." Slip Op. at 24. However, the totality of the circumstances set forth above include the undisputed facts regarding the size and nature of the material that fell on Hauser, the impact the fall had on Hauser's body, and other relevant facts.

¹² Contrary to the separate opinion of Commissioner Rajkovich, the nature of the accident would have alerted Crum to the potential gravity of Hauser's injuries had Crum bothered to investigate. For instance, there was a large void in the unbolted roof; at the time of the fall Hauser was located either under unsupported roof or under the last roof bolt (43 FMSHRC at 478 n.5) and the material that fell from the roof was mainly trona (very dense, harder than coal). See Slip Op. at 23 n.5, 24 (Commissioner Rajkovich writing that "there is no useful information regarding the mechanics of the accident beyond the fact that the miner was struck in the head"). The fact that the falling material broke into smaller pieces upon impact (43 FMSHRC at 483) making it impossible to establish exactly how much struck Hauser does not relieve the operator of its obligation to consider *available* information regarding the nature of the accident.

symptoms immediately following the accident.”¹³ 43 FMSHRC at 490.

III.

Conclusion

It is clear that the Judge’s relevant findings are supported by substantial evidence, including his ultimate determination that a reasonable person would have notified MSHA within 15 minutes in these circumstances. In so finding, the Judge correctly applied Commission case law concerning the safety standard at section 50.10(b). Accordingly, we vote to affirm his decision.


Mary Lu Jordan, Chair


Timothy J. Baker, Commissioner

¹³ In *Cougar Coal*, 25 FMSHRC 513, 520 (Sept. 2003), the Commission held that “[w]e are not persuaded by [the operator’s] assertions . . . that because [the injured miner] was conscious and alert . . . [the operator] could reasonably surmise that [the miner’s] injuries lacked the potential to cause death.” In *Consol*, 40 FMSHRC at 1006, the Commission emphasized the importance of internal injuries, holding that a limited assessment at the mine which relied on the miner being conscious and alert would not be sufficient to determine the extent of internal injuries to a miner.

Commissioner Althen:

30 C.F.R. § 50.10(b) requires operators to notify the Mine Safety and Health Administration (“MSHA”) within 15 minutes of the time the operator knows or should know that an accident has occurred involving an injury of an individual at the mine which has a reasonable potential to cause death.

Delbert Hauser was struck on the back, causing him to fall to the floor. A rock of unknown size caused a laceration in his scalp. He also suffered an eye injury.¹ During the period before the miner was transmitted from the mine to the hospital for stitches to his head, he interacted directly with five other miners, all of whom had first aid training, and one of whom was the first aid person on the mine rescue team. Each of the miners treated the accident as serious and took steps to make sure Hauser’s life had not been threatened. However, none of them—not one—testified in a manner that supports a reasonable potential for death.²

Indeed, the miner from the mine rescue team who went to the collar when she learned of the situation testified directly and with convincing reasons that she did not think there was reasonable potential for death. As shown below, Hauser’s fellow miners acted with dispatch to assure themselves that Hauser was not facing a reasonable possibility of death.

I.

Testimony of Witnesses to Hauser’s Condition

A. Shane Dodge—Hourly Underground Production Employee

Shane Dodge had received first aid training. Tr. 196, 210. While working near Hauser, Dodge heard the roof fall. The fall hit Hauser on the back, knocking him down, but Dodge saw Hauser get up immediately after the fall. Tr. 199. Dodge testified that Hauser looked slightly confused but kept saying he was all right. When Dodge saw a cut on the back of Hauser’s head, he thought it was just a cut that probably needed stitches. Tr. 200.

After standing immediately, Hauser stepped over a trim chain bar that was three feet high. Hauser took this step over the chain bar under his own power with Dodge “just, kind of, spotting him.” Tr. 201. Hauser then walked 200 feet or more under his own power. Dodge and

¹ Chair Jordan and Commissioner Baker repeatedly refer to the eye injury suffered by Hauser. However, during the operative 15-minutes, it only appeared that Hauser had a bloody eye, which cannot be sufficient indicia of injury with a reasonable potential to cause death. To the extent post 15-minute medical evidence is relevant in this analysis, the only relevant evidence is that the doctor (at the hospital to which Hauser was taken for stitches) validated the operator’s assessment that there was not a reasonable potential for death. The doctor told an operator witness that Hauser’s injuries were not life-threatening. Tr. 173.

² The MSHA Inspector who issued the citation, Rodney Gust, never spoke with Hauser. Tr. 63.

other miners (Wendalle Boyd and Neil Mattinson) asked him questions to ensure he was all right. Hauser answered the questions correctly. They offered Hauser a backboard, but he refused it. Tr. 202. Hauser said, “I ain't getting on a f---ing backboard.” *Id.*

They put a bandage on his head that immediately stopped any bleeding. Tr. 203. Hauser walked himself into the cage for transportation to the surface. Dodge described the injuries as “They were just, I mean, very – nothing too crazy – cuts.” Tr. 209. Testifying to the general diagnosis by the crew, Dodge said, “He was walking. He was talking. I mean, he was being stubborn just like he always is. Like, everything was normal as if he just, you know, just got mildly hurt, I guess.” Tr. 210.

B. Wendalle Boyd—Shuttle Car Operator

Wendalle Boyd was a shuttle car operator who heard the rock fall. As he walked toward the area, he saw Hauser. There was some blood on Hauser’s head, but Boyd referred to the cut as a “scratch on his head.” Tr. 216. Boyd got a first aid kit. When he returned, Hauser was walking by himself toward the cage. Bandaging the cut stopped any bleeding from the cut.

Boyd and other miners asked Hauser questions as part of a concussion protocol. Hauser answered the questions correctly. Tr. 217. As other miners were getting on the cage for the surface, they continued to ask him questions. Boyd testified that there was no degradation in Hauser’s condition and that he responded appropriately. He sounded “fresh.” Tr. 219.

C. Neil Mattinson—Mine Operations Forman

Neil Mattinson, who had first aid training, testified he was nearby when the roof fall occurred. He heard Wendalle Boyd ask if everyone was okay, and they answered, “Yes.” Tr. 259. When asked how Hauser seemed, Mattinson testified that he was driving the mantrip and Hauser was fine. Tr. 262. He repeated that Hauser seemed “fine.” Tr. 295.

Mattinson asked Hauser to let them place him on a backboard or to let them give him a C-collar, but Hauser repeatedly refused. Mattinson asked Hauser questions that Hauser answered correctly. They checked Hauser’s eyes, and Hauser had regular, undilated pupils. Hauser was acting cranky which, according to Mattinson, was normal for Hauser. Tr. 264.

Mattinson testified,

Basically, I felt it's a first-aid injury. It's some staples. He's got a cut on his head. His eye's a little swollen, nothing of significance. Everything seemed pretty normal. He seemed normal. His color was good, didn't look like he was in shock or going into shock. He was talking to me the whole way out. That's it.

Tr. 265.

As other witnesses testified, Mattinson said Hauser got out of the mantrip by himself and walked into the cage to ride to the surface. Tr. 266. Under cross-examination, Mattinson testified that only 3 seconds passed between the sound of the roof fall and him seeing Hauser on his feet. Tr. 277. Mattinson told the hoistman that Hauser would probably need a couple of stitches, and that Mattinson never saw anything that would cause him to call the hoistman back. Tr. 265.

Mattinson testified he had called it a first-aid injury. Tr. 286-87. Asked to explain what he meant, he testified,

And I'm the not making light of the – it's not a big deal. It'd be like your kid having a crash on their bike, and they got a wound. And you clean it. You put some wrap on it. And then if it's deep enough, you're going to take them to the hospital to get some stitches.

Tr. 287.

Mattinson, who testified he was familiar with the conditions of shock, testified Hauser did not appear to be going into shock. Mattinson explained that he formed that opinion of Hauser by:

Just him talking to me, answering my questions that I had. I was checking – I was looking at the color of his skin. His breathing was normal. He didn't have – he wasn't, like, in a panic. He seemed normal, and he could answer all the questions that I was asking him, and he seemed aware of his surroundings.

Tr. 295.

Mattinson further testified, "I was driving the man trip, and him and I were having conversations, and he seemed perfectly fine. He was engaged in the conversations. That's one of the ways I was monitoring him on the way out." Tr. 295.

D. Shawn Marshall—Operations Manager

Shawn Marshall served on the mine rescue team for ten years. Tr. 156. He was in the mine office when a safety representative informed him of the accident. He received information that Hauser was walking onto the cage to exit the mine at the surface. Tr. 159. Marshall went to the mine collar and saw Hauser walk off the cage under his own power. Tr. 161. Marshall testified that Hauser showed no sign of unsteadiness or needing any assistance. *Id.*

When asked on examination to describe his feelings about Hauser's condition based on his observations, Marshall testified:

Q. While you were talking to him, what was your impression of his overall condition?

A. Good. Good. I mean, I observed the black eye, the cut on his eye. He had a bandage on his head. It was white. Wasn't no signs of blood or anything. The eye wasn't bleeding. He could talk. He was standing upright. He wasn't hunched over. He wasn't, you know, exhibiting any signs of internal damage or anything. So, I felt real good about him.

Tr. 162-63.

Marshall further testified that Dave Stephenson, the Mine Safety Representative, and Jamie McGillis, a mine rescue team's first aid person, were also at the collar when Hauser arrived on the surface. Tr. 161-62. Hauser was walking on his own. Hauser started to tell Marshall what had happened and to apologize for it. Tr. 162.

At that point, Hauser walked to the ambulance and entered it himself, walking up a ladder and sitting down. Marshall then called the site manager and told him Hauser had headed to the hospital, probably for stitches.

Then, Marshall saw the General Mine Manager, Mike Crum, in the office. Crum had already talked to Dave Stephenson. Marshall told Crum that Hauser would be all right. Marshall went to the hospital, where nothing occurred to change his mind about Hauser's condition. In looking at the exhibit showing the laceration on Hauser's head, Marshall testified:

Q. On the second photo for the back of his head, do you have any sense of how long that laceration to his scalp is?

A. Roughly two inches.

Q. Was it deep?

A. It didn't appear to be. But, I mean, the picture says a lot. It's not a big open, gaping wound. It's a cut to the scalp. I mean, there's not a lot of muscle or anything there. It's just skin, so.

Tr. 171.

Marshall's testimony is replete with his observation that Hauser did not appear to be in a condition that would indicate a danger to Hauser's life.

E. Jamie McGillis—Underground Utility Crew Member

McGillis had worked for thirty years at the mine. At the time of the incident, she worked on an underground utility crew. McGillis was the first aid person on the mine rescue team and had considerable ongoing training for that position. She was at the curtain when Hauser arrived on the surface. She testified that she and Hauser exchanged niceties. Then, McGillis went with Hauser to the ambulance. Tr. 226. Hauser was coherent and able to understand everything that was happening. Tr. 226-27. McGillis did not see any indication of an internal injury.

Responding to a series of questions from counsel, she testified:

Q. Any sense of what his respirations were?
A. He breathed normally.
Q. And how about capillary refill?
A. I believe the EMT that was in the ambulance did the capillary refill. We put the oxygen – oximeter on his finger.
Q. And did that give a low result, or did that give a normal result?
A. It was normal.
Q. And was he able to follow commands?
A. He followed commands. He talked to us, was coherent, knew where he was at that time.

Tr. 243.

Finally, McGillis testified that while she was with Hauser, she did not think that his injuries or symptoms had a reasonable potential to cause death. Tr. 245.

F. Michael Crum—Health, Safety, Environment, and Quality Manager

Due to his position, Michael Crum had received first aid training. Tr. 303. He went to the mine office for more information when he learned of the accident. Upon reaching the office, he learned that Hauser was conscious and coherent. Tr. 305.³ Crum went to the collar. However, Hauser had left before Cum got there.

Crum talked to Shawn Marshall, who told Crum of his observations. Tr. 307-08. Crum relied upon his conversations with another miner, Dave Stephenson, and Marshall, who had talked with the other witnesses. Based upon those reports, including, among other things, that Hauser was upright, talking, coherent, had walked from the cage to the ambulance, and got in the ambulance by himself, Crum concluded that they had not seen any symptoms indicating a reasonable potential for death. It is appropriate to observe that Crum based his decision upon firsthand information from Stephenson and Marshall, recapitulating all the preceding facts.⁴

In discussing his decision regarding calling MSHA, Crum explained:

[that Hauser] was walking . . . was coherent . . . never lost consciousness . . . had a laceration to his head, had some scrapes

³ Crum found out that Hauser had to wait two hours at the hospital for treatment. Crum instructed Marshall to follow-up at the emergency room where they went for stitching. Marshall did so and was told the injury was not life threatening. Tr. 314-15.

⁴ It is unfair for Chair Jordan and Commissioner Baker to attempt to use Crum's desire to be kept up to date on Hauser as a basis for not paying attention to the overwhelming evidence regarding a reasonable possibility of death. Such a request is the action of a responsible and thoughtful manager desiring to be assured continually of an employee's status and welfare. It speaks well of Crum and does nothing to support their erroneous view.

on his back, got out, walked to the Jeep. He was, really, kind of, directing his own care, according to the miners that were there. He walked onto the cage, walked off the cage, walked in – you know, got himself into the ambulance. At no time was anybody – at that point, no one thought that his injuries were life-threatening, including [the operator’s] . . . medical responder.

Tr. 332 (emphasis added).

On cross-examination, MSHA’s attorney asked Crum to summarize why he did not think he needed to make a 15-minute call. Crum responded:

The information we received from the hoistman from underground that Del was up, he was moving, he was conscious, he was getting in the Jeep, and they were bringing him out. There was nothing that was said that was conveyed by Neil Mattinson, by the hoistman, by Jamie McGillis, by either Shawn Marshall or Dave Stephenson that indicated that we had an injury that had reasonable potential to cause death.

Tr. 342-43.

MSHA’s attorney then elicited testimony by asking if the next piece of information Crum received was a call or a text from Shawn Marshall from the hospital saying that the doctor said that Hauser’s injuries were not life-threatening. The attorney asked specifically, “Is that the next piece of information?” Tr. 345-46. Crum affirmed that he believed it was. The doctor confirmed that the injury was not life-threatening.

II.

Disposition

For injury reporting violations, the Commission has an established formula for determining whether an operator must inform MSHA of the injury. Examining the totality of the circumstances, the Commission must determine if a reasonable person would conclude that the injury had a reasonable potential to result in death. If reports on the severity of an accident indicate a reasonable potential for death, the operator should err on the side of caution.

Regarding the scope of the probative evidence, operators need not, and indeed cannot, perform an exhaustive accident investigation or medical exam in 15 minutes but instead, are required to attempt to assess the situation in good faith and without delay. *See Consol Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). Thus, the “totality of the circumstances” encompasses only readily available information, such as any observable indicators of trauma and, to a lesser extent, the nature of the accident. *Signal Peak*, 37 FMSHRC 470, 476 (Mar. 2015), *Consol Pennsylvania Coal Co.*, 40 FMSHRC 998, 1004 (Aug. 2018) (“***Of course, the primary information relevant to the analysis is the nature of the injury and the miner’s condition***”).

The primacy of the miner’s condition is vital in this case because the ALJ gave virtually no consideration to the miner’s condition, as reported by a host of miners. Instead, the ALJ based his decision solely on the absence of evidence over the size of a rock that caused a superficial cut to Hauser’s head.

A. Totality of the Circumstances

As there were no first-hand witnesses to the instant when the fall of rock occurred, the exact nature of the accident is unknown. However, combining the testimony of the miners, the only fair summary of the facts is that some portion of the roof struck Hauser in the back with enough force to cause him to fall. A separate rock of unknown size caused a two-inch superficial cut on the top of his head. Hauser immediately stood up on his own without any loss of consciousness and stepped over a three-foot high barrier. He told another miner that he was all right and walked by himself hundreds of feet to a cage for the surface. During that time, miners quickly stopped any bleeding by applying a bandage.

Counsel for the Secretary stated in her opening statement that Hauser “brushed the rocks off of his body.” Tr. 5. Shane Dodge, the first miner to see Hauser, was asked if he saw Hauser brush rocks off his back. He testified, “Yeah, when he was getting up, there were, like, teeny tiny rocks coming off of him, yeah, nothing too crazy.” Tr. 209.

Of course, the first question in investigating an accident is: “How is the miner?” Here, multiple experienced miners with first aid training and, cumulatively, dozens of years of mining experience, testified that Hauser needed medical attention for a cut on his head but was not so hurt as to be in any potential danger of death. His condition did not create a concern of a reasonable potential for death.

Hauser’s color was good. Tr. 265. His pupils were normal. Tr. 264. His breathing and oxygenation were fine. He talked coherently. Tr. 305. He adamantly refused the offer of a backboard or any other assistance. Throughout the walk and the ride to the surface, miners asked him questions to assure themselves of his mental condition. Hauser answered the questions appropriately. At the surface, the mine emergency first aid specialist asked him questions and saw him step into an ambulance. She did not believe he was in danger of death. Tr. 234. No miner with whom he interacted testified that he/she believed there was a reasonable potential for death or that he/she had any fear for Hauser’s life at any point.⁵

⁵ In some cases, observed facts of an accident may give context to the injury and give rise to a reasonable possibility for death. For example, in *Consol Pa. Coal Co., LLC v. FMSHRC*, 941 F.3d 95 (3rd Cir. 2019), a multi-ton piece of equipment rolled into another stationary multi-ton piece of equipment crushing a miner’s abdomen between them. Fellow miners had to dislodge the injured miner from between the large pieces of equipment. On the scene, the miner lost the ability to move his legs and was showing signs of bleeding in the abdominal cavity. While it was not known with medical certainty that this injury had the reasonable potential for death, the condition of the miner—in the context of knowledge that the miner was crushed between large pieces of equipment—was sufficient to trigger the reporting requirement.

The *Secretary's counsel* chose to bring out during cross-examination the treating doctor's opinion that there was *not* a reasonable potential for death. Tr. 345. That testimony, while of minor probative value by itself, added to the overwhelming evidence that Hauser's condition did not create a reasonable possibility of death. The doctor's medical examination revealed by the Secretary did add to the quantum of evidence that the experienced miners who helped Hauser and cumulatively advised Crum were correct that the injury did not create a reasonable possibility of death, and that Crum acted reasonably in accepting their opinions.⁶

The cumulative testimony is that Hauser was conscious, aware of his surroundings, carrying on normal conversations, able to answer questions typically, walking and climbing steps by himself, had good color, did not have memory problems, and was not nauseous or feeling sick. In short, none of the reasonable miners, all with first aid training, had any concern that Hauser had a reasonable potential for death. Michael Crum, the manager and responsible official, decided not to call MSHA based on all this information regarding Hauser's physical condition.⁷ The critical question is whether Crum exercised the judgment of a reasonable person when he decided not to call MSHA. He did. The evidence noted above and immediately below demonstrate that the reports from the scene by a host of experienced miners showed that there was no reasonable cause to believe Hauser's condition posed a reasonable potential for death.

B. Reasonable Potential to Cause Death

In this case, the views of many reasonable persons weigh fully, indeed outcome determinatively, against a finding of a violation. Five miners saw Hauser after the accident and were able to examine the nature of his injuries and his general condition. No one claims that any miner acted in bad faith or gave erroneous testimony. Moreover, it is indisputable that a fact-finder could only conclude that the miners acted reasonably and with dispatch. Each took careful note of Hauser's situation and treated him appropriately. From their testimony, it is beyond

In this case, nobody witnessed the precise moment of Hauser falling to the floor. However, virtually instantly thereafter, witnesses saw Hauser brushing the small pieces of rock off his back, immediately standing up, and stepping over equipment. He had a bloody eye and a small bleeding cut on his head that immediately stopped bleeding upon application of a bandage. None of the miners that treated him testified to a lump or bump of any kind at any place on his body or on his head.

⁶ Chair Jordan and Commissioner Baker object to any reference to the doctor's opinion even though the Secretary brought out this evidence. Elsewhere, however, they mention that although no one asserted the eye injury was reasonably likely to cause death, it eventually required surgery. Slip Op. at 3. They object to relevant evidence going to the potential for death but rely upon later-learned evidence of a non-life-threatening injury.

⁷ Recapitulating Crum's testimony, he testified, "There was nothing that was said that was conveyed by Neil Mattinson, by the hoistman, by Jamie McGillis, by either Shawn Marshall or Dave Stephenson that indicated that we had an injury that had reasonable potential to cause death." Tr. 342-43.

doubt that none of these five reasonable persons viewed the injuries as having a reasonable potential to cause death.⁸

These five reasonable and experienced miners characterized the injuries as (1) “everything was normal as if he just, you know, just got mildly hurt.” Tr. 210. (2) Hauser seemed “fresh.” Tr. 219. (3) “Basically, I felt it’s a first-aid injury. It’s some staples . . . He seemed normal. His color was good, didn’t look like he was in shock or going into shock. He was talking to me the whole way out.” Tr. 265. (4) “He wasn’t, you know, exhibiting any signs of internal damage or anything. So, I felt real good about him.” Tr. 162-63. (5) “He breathed normally [his oxygen] was normal [h]e followed commands [and] was coherent.” Tr. 244.

None of the five identified any indicia of an injury that would lead a reasonable person to believe Hauser suffered a potentially fatal injury. Our colleagues do not even meaningfully discuss the case from the standpoint of Hauser’s condition. The testimony revealed that Hauser stood immediately, stepped over a three-foot high barrier, spoke coherently (indeed forcefully to Shane Dodge), had a cut that stopped bleeding with the application of a bandage, walked by himself, answered questions quickly and correctly, climbed steps into the transport, did not exhibit dizziness or nausea, had good skin color, normal eye dilation, and a good oxygen level.

Chair Jordan and Commissioner Baker correctly state that the notification requirement “must be analyzed on an objective basis, asking whether a reasonable person in the circumstances would view a miner’s injury as having a reasonable potential to cause death.” Slip Op. at 5, citing *Consol Pa. Coal Co., LLC v. FMSHRC*, 941 F.3d 95, 107 (3rd Cir. 2019). They do not claim and cannot cite evidence to assert that any experienced and trained miners witnessing Hauser’s condition were unreasonable, partly or in the aggregate. The ALJ did not find that their testimony lacked credibility. Most importantly, they are the miners who reported Hauser’s condition to Crum. He based his decision not to call MSHA on their first-hand, knowledgeable evaluations. Tr. 307. It was undoubtedly objectively reasonable for Crum to rely upon the miners’ reports in making his decision.

Elsewhere, Chair Jordan and Commissioner Baker erroneously assert that this opinion “reweighs” the evidence. Slip Op. at 7 n.6. This opinion “recites” the evidence and finds that the direct eyewitness testimony of multiple qualified witnesses as to Hauser’s actual condition rebuts, as a matter of law, the ALJ’s conclusion that, because no one had found in 15 minutes the specific piece of debris from the crumbled rocks at the scene that caused a superficial and easily stitched cut on Hauser’s head, the operator should have found a reasonable possibility of death. The ALJ’s view disregards the unanimous opinion of every miner who saw Hauser that there was *not* a reasonable possibility of death.

As the testimony was uniform in assessing Hauser’s condition, it would be improper for the Commission to craft uncertainty where none existed. Before rebuking

⁸ The ultimate question is whether Crum acted reasonably in deciding that the event did not require a call to MSHA to report a reasonable potential for death. The reports of these miners and other managers were the totality of information available to him. This information synthesized, distilled, and reported to him demonstrate that Crum’s decision was reasonable.

the operator for failing to err on the side of caution by reporting an injury, the Commission must be able to identify specific fact-based reasons that should have caused miners to fear for Hauser's life. Uninformed fears by a Judge hundreds of miles from the scene months after the accident and not taking into consideration evidence of the miner's condition is wholly inadequate. Reasons for doubt arise from the facts of the case—witnesses' testimony and other evidence. Such doubts depend upon whether reasonable persons viewed the injuries as having a reasonable potential to cause death and the totality of the circumstances.⁹

The ALJ issued an insupportable decision without medical testimony, opinion, or support. Neither the ALJ's decision nor the opinion of Chair Jordan and Commissioner Baker attempts to cite any medical expert or any medical evidence that every cut on a scalp creates a potential for death. Only pebbles or small pieces of rock remained at the scene. The ALJ concluded on his own without supportive evidence that every cut from an impact to the head, superficial or not, created a reasonable potential for death. He cannot and does not cite any authority for that proposition. Thus, his conclusion had no evidentiary, scientific, or medical basis.¹⁰

Lastly, although the circumstances of the accident are less relevant to the analysis, I note that the 15-minute time frame is brief and often does not leave any time for miners to consider the full circumstances of the accident. Indeed, the immediately identifiable facts of the accident do not establish that a potentially fatal accident occurred. As recited above, witnesses within seconds of the incident saw Hauser brush off small rocks or pebbles, stand, go over a barrier, answer questions coherently, and obtain relief from a small cut on his head by application of a bandage. Taken as a whole, the testimony demonstrates that none of the witnesses who examined him and bandaged the superficial cut on his head considered there was a reasonable potential for death, and that Crum reasonably relied upon them.

⁹ It would be foolish to submit that "reasonable doubt" simply adds an additional round of potentiality to the analysis meaning the Mine Act would provide for reporting if there were "a reasonable potential of a reasonable potential for death." Reasonable potential must mean witness testimony or other evidence that demonstrates observations or occurrences that may have led a reasonable person to think that there was a reasonable potential for death.

¹⁰ Obviously, the absence of medical evidence that every cut creates a potential for death does not mean that such injuries should be shrugged off or treated as matters of no concern. The proper course of action is exactly what was done by the miners in this case. The injured miner must be immediately assisted and evaluated. The miner must be treated and transmitted to a facility for attention to cuts or other injuries. However, it is contrary to the Mine Act to fabricate a reasonable potential for death where the evidence demonstrates such potential did not exist. All the evidence that was discovered and known in this case compel against finding a duty to call MSHA.

III.

Conclusion

The evidence demonstrates that substantial evidence does not support a finding that Hauser's injury created a reasonable potential of death. No medical evidence supports a finding that every cut creates a reasonable potential for death. The overwhelming weight of the evidence demonstrates that substantial evidence does not support a finding that Hauser faced a reasonable potential for death.

The finding of a violation should be reversed.



William I. Althen, Commissioner

Commissioner Rajkovich:

Operators generally have ten working days to report accidents, occupational injuries, or occupational illnesses to the Mine Safety and Health Administration (“MSHA”). 30 C.F.R. §§ 50.20, 50.20-1. However, if the operator knows or should know of an accident involving an “injury . . . at the mine which has a reasonable potential to cause death,” the operator must notify MSHA within 15 minutes.¹ 30 C.F.R. § 50.10(b). To determine whether this increased burden applies, the Commission must ask whether, based on the totality of information available at the time of the accident, a reasonable person would view the injuries as having a reasonable potential to cause death. *Consol Pa. Coal Co. LLC v. FMSHRC*, 941 F.3d 95, 103 (3rd Cir. 2019). There is no presumption that every head injury is to be considered potentially fatal. With that in mind, a reasonable person could not have considered the information available at the time and concluded that Delbert Hauser faced a reasonable prospect of dying due to his accident. Accordingly, substantial evidence does not support the Judge’s finding of a violation.

The totality of information available to the operator² in the short-term aftermath of the accident was as follows:

- Mechanics of the Accident: During a roof fall, some amount of rock struck miner Delbert Hauser. The size and weight of the rock that hit Hauser was (and still is) unknown. The only information available regarding the force of the impact is that it was heavy enough to dislodge Hauser’s hardhat and knock him to the ground, but light enough that he could push off the fallen rock and stand up.³ Tr. 127-28, 186, 209.

¹ By its plain language, this increased reporting burden applies to accidents which have a *reasonable prospect of killing the injured miner*, not just a reasonable potential for serious injury or a remote possibility of death.

² Here, Michael Crum, manager of health, safety, environment and quality, was the person responsible for deciding whether MSHA needed to be contacted immediately. Chair Jordan and Commissioner Baker take issue with Crum’s decision-making process, specifically his reliance on others’ observations and his failure to consider the nature of the accident. Slip Op. at 8-9. Five witnesses testified that they observed and treated Hauser’s injuries, and confirmed he had a 2-inch laceration to his scalp and bruising around his right eye, but he was coherent and able to walk under his own power. Tr. 160-62, 199-200, 202-04, 210, 218, 232-34, 263-67. It was not unreasonable for Crum to rely on multiple consistent reports, given the need for a prompt decision. Regardless, any investigative failures on Crum’s part are harmless in this instance. Based on the testimony of those who *did* personally observe Hauser, the field of available information simply did not suggest a reasonable potential for death. Nothing in the record suggests Crum could have gained additional information beyond these listed facts that would have changed his determination.

³ The *total amount* of fallen rock was subsequently estimated at 800 to 900 pounds, but no one saw the rock strike Hauser. Tr. 41, 207. As Hauser was able to stand up again, we can rationally assume he was *not* struck with the entire weight. Chair Jordan and Commissioner Baker note that section 50.10 is partly intended to ensure the preservation of evidence. Slip Op.

- Physical Injuries: Hauser had a two-inch cut on the back of his head, and one eye was swollen and bleeding. Tr. 129, 133, 199-200, 226-27, 233.
- Indications of Trauma: Hauser was a bit dazed immediately after the accident (Tr. 199) but was conscious, coherent, able to talk, and able to walk to the ambulance unassisted. Tr. 184, 226, 307.

As discussed below, these facts are insufficient to reasonably suggest (or even raise reasonable doubts regarding) a reasonable potential for death.

Some types of injuries have been recognized as posing a reasonable potential for death, such as concussions, cases requiring CPR, limb amputations, major upper body blunt force trauma, or extended unconsciousness. Emergency Mine Evacuation, 71 Fed. Reg. 71,430, 71,434 (2006). While this list is non-exhaustive, it clearly indicates the standard is meant to address injuries that pose a reasonable risk of brain trauma, cardiac arrest, internal injury, or severe external blood loss. Here, it cannot reasonably be argued that the visible injuries themselves (the head laceration and swollen eye) were potentially fatal. Accordingly, the question is whether the totality of circumstances reasonably suggested a hidden potentially fatal condition such as brain trauma or internal injury.

The facts in this case are significantly distinguishable from other cases in which the Commission has found an immediately reportable injury based on the totality of circumstances. In *Consol*, a miner was conscious and had a strong pulse, but had been crushed between two multi-ton pieces of equipment, was in severe pain, could not move or feel his legs, and had a distended stomach. 941 F.3d at 114. In *Signal Peak Energy LLC*, a miner had no obvious signs of concussion but had been propelled 50-80 feet, had difficulty moving and breathing, and had a significant back protrusion. 37 FMSHRC 470, 475 (Mar. 2015). In *Cougar Coal Co.*, a miner was conscious and alert but had fallen 18 feet, hit his head on a power center on the way down, and had no pulse when he was first found. 25 FMSHRC 513, 520 (Sept. 2003). In each case, circumstantial facts regarding the mechanics of the injury and the miners' physical symptoms reasonably suggested internal bleeding, spinal injury, brain injury, and/or cardiac arrest.

Here, in contrast, a miner was conscious and alert, had been hit in the head by a rock of unknown weight (heavy enough to knock him down but not keep him down), and had a two-inch laceration on his head and a swollen and bloody eye. While the accident was clearly painful and potentially serious, none of those facts, taken together or in concert, reasonably suggest internal bleeding, brain injury or other potentially fatal conditions.⁴

at 4. In this instance, however, even if the fallen rock had been left on the ground, it is hard to imagine how observing the fallen material could have assisted in determining *which portion* struck Hauser.

⁴ Chair Jordan and Commissioner Baker note that a miner being conscious and alert, in and of itself, is insufficient to conclude that there was no reasonable potential for death. Slip Op. at 9 n.13, citing *Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003); *Consol Pa. Coal Co. LLC*, 40 FMSHRC 998, 1006 (Aug. 2018). That is true but inapposite. A miner's alertness may not conclusively establish that (s)he was not in fatal danger, but it is still part of the totality of

Chair Jordan and Commissioner Baker emphasize the importance of the mechanism of injury. Slip Op. at 5, citing *Signal Peak*, 37 FMSHRC at 475. It is appropriate to consider the nature of the accident as part of the totality of circumstances, and known facts regarding the mechanism of injury can carry great weight in some instances. However, this is a very different case from *Signal Peak*, in which the operator was aware that the miner had been thrown 50-80 feet. 37 FMSHRC at 475 n.10. Here, the available information regarding the mechanism of injury did not reasonably imply a reasonable potential for death, for the simple reason that *no useful information regarding the mechanism of injury was available*.

As the Judge conceded, all the operator had were “known unknowns” (43 FMSHRC at 489)—Hauser had been struck with some amount of rock, but there was no way to determine from the physical evidence of the rock fall *how much* of the rock hit him, *i.e.* the force of the impact.⁵ All the operator could know was that Hauser *could have* been struck with considerable force, and that is true of every unobserved impact injury. Section 50.10 is analyzed under a reasonable person standard. *Consol*, 941 F.3d at 107. A reasonable person would not assume every unobserved impact injury carries a reasonable potential to cause death.⁶ The lack of information regarding the mechanism of injury does not weigh in favor of an immediately reportable accident in this case.

Chair Jordan and Commissioner Baker also emphasize the general dangers of head trauma, agreeing with the Judge’s statement that “a significant blow to the head could reasonably be expected to be fatal even when the injured miner was not displaying serious symptoms immediately following the accident.” Slip Op. at 9, citing 43 FMSHRC at 490. Of course,

circumstances and may be considered. (After all, if a miner was *not* conscious and alert, that would certainly be considered evidence of a concussion). In the cited cases, the fact that the miner was alert was insufficient to overcome numerous indicators of potentially fatal injury. Here, there are no indicators of potentially fatal injury to overcome.

⁵ The inspector subsequently determined the size and weight of the entire rock fall. However, this is not *useful* information regarding the mechanics of the accident because (1) it was not available at the time and (2) Hauser was not struck by the entire rock fall. Useful information in this context would be the size and weight of the portion of the rock fall that actually struck Hauser, *i.e.*, the force of the impact. This was not available. It may sometimes be possible to infer the force of an impact from other facts, such as the miners’ injuries. Here, however, no other available information supports an inference of sufficiently considerable force to create a reasonable potential for death. See p. 24, *infra*.

⁶ Chair Jordan and Commissioner Baker cite the proposition that reasonable doubts should be resolved in favor of immediate notification. *Consol Pa. Coal Co. LLC v. FMSHRC* 941 F.3d 95, 103 (3rd Cir. 2019). I would emphasize that doubts must be *reasonable*, and doubts without at least some basis in fact are inherently *unreasonable*. The requirement to resolve reasonable doubts in favor of notification does not require operators to resolve *all unknowns* in favor of notification. Here, there are no facts regarding the mechanism of injury from which reasonable doubt might arise. It is not reasonable to be told “someone was hit in the head with a rock, I don’t know how hard” and be concerned that person might die.

serious blows to the head can pose very real dangers. However, the question is not whether serious blows to the head can be fatal, but whether *this* blow to the head was serious enough to be potentially fatal.

Consistent with the framework in *Consol*, 941 F.3d at 103, whether a particular blow to the head was serious enough to reasonably pose a risk of death must be determined based on the totality of circumstances. Looking at all the information available to the operator at the time of the accident, there must be some fact(s) to reasonably suggest a potentially fatal condition. These may be physical symptoms such as loss of coherence, or information regarding the mechanics of the accident such as the weight or distance involved. *See, e.g., Consol*, 941 F.3d at 114 (miner crushed between multi-ton equipment); *Signal Peak*, 37 FMSHRC at 475 (miner propelled 50-80 feet).

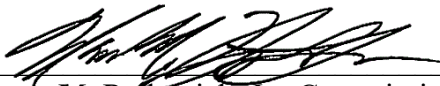
Here, as discussed above, the mechanics of the injury provided no useful information regarding the force of the impact that struck Hauser. *See* Slip Op. at 23, 23 n.5, 21 n.3 *supra*. As for physical symptoms, Hauser was conscious and alert and appeared to have suffered no effects aside from the two-inch cut, the swollen and bloody eye, and having been temporarily knocked down. Aside from the basic fact that Hauser was hit in the head, there are no circumstances that would suggest brain trauma or internal injury to a reasonable person. Nonetheless, based on those same facts, my colleagues conclude that the impact was “considerable” enough to reasonably result in death.⁷ Slip Op. at 7.

This comes dangerously close to a holding that *any* blow to the head can reasonably result in death, and therefore any blow to the head is immediately reportable, regardless of any (lack of) evidence regarding the impact of the blow. In other words, blows to the head would be *per se* immediately reportable accidents. The Secretary does not propose, and we should not adopt, such an approach. Where (as here) there is no useful information regarding the mechanics of the accident beyond the fact that the miner was struck in the head, and none of the physical repercussions of the accident suggest an injury with a reasonable potential to cause death, it is only reasonable to expect the injury to be fatal if *every* blow to the head can reasonably be expected to be fatal. Common sense tells us this is not so.

There is no question that Hauser has suffered an unfortunate injury with long-term ramifications. However, Section 50.10(b) requires immediate reporting where, based on the totality of information available at the time, a reasonable person would believe there is a reasonable potential for death. That standard is not met here. The information available to the operator was that a miner had been hit in the head with some amount of rock sufficient to temporarily knock him down, cause a two-inch cut on his head and damage his eye, but not cause him to lose consciousness or become disoriented. No reasonable person would conclude, based on that information, that Hauser had a reasonable prospect of dying from his injuries.

⁷ Rather than referring to Hauser’s eye as swollen and bloody, the opinion of Chair Jordan and Commissioner Baker specifically notes that his eye socket was shattered. Slip Op. at 6. However, that information was not available until after Hauser had been medically evaluated. Post-hoc medical evidence regarding the seriousness of Hauser’s eye injury—which *still* carried no risk of fatality – carries little weight, if any. *Consol*, 941 F.3d at 111.

Accordingly, I would overturn the Judge's finding of a violation.



Marco M. Rajkovich, Jr., Commissioner

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