FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004 1710

AUG 22 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 2014-816
CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). Consol Pennsylvania Coal Company, LLC ("Consol") appeals an Administrative Law Judge's decision upholding a citation issued to it by the Department of Labor's Mine Safety and Health Administration ("MSHA"). 39 FMSHRC 1279 (June 2017) (ALJ). The citation alleges a violation of 30 C.F.R. § 50.10(b)[1] for Consol's failure to immediately contact MSHA after learning that a miner had sustained an injury that had "a reasonable potential to cause death."

We conclude that substantial evidence supports the Judge's finding that Consol had a duty to contact MSHA immediately after the accident. We also conclude that the Judge did not err in his penalty determination. Accordingly, we affirm the finding of a violation and the assessed penalty.

[1] 30 C.F.R. § 50.10(b) states: "The 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 . . . ."

I.

Factual and Procedural Background

A. Factual Summary

This case arose from an injury to a miner at a large underground coal mine in Pennsylvania. In August 2013, miner Robert Stern, an employee of GMS Mine Repair and a contractor at the mine, was helping scoop operator Daniel Greathouse free a scoop weighing 5-10 tons which had become stuck on a 5-ton rail car.[2] At approximately 3:15 a.m., Stern stepped between the two machines to assess the problem when the rail car suddenly became dislodged. Due to slack in the rail car's chain, it drifted back towards Stern, crushing him against the scoop bucket. Greathouse immediately reversed the scoop, moving it forward, and Stern fell to the ground.

The mine section foreman, John McDonald, and miner Colby Watson, who were working about 900 feet away, arrived on the scene within three to four minutes of being notified of the accident. When McDonald arrived, Stern was conscious and lying on his side. Stern said that he had been pinched and that he was in a lot of pain. He could not move his legs and could only feel a pinch in one leg. When Stern's legs were moved, he screamed in extreme pain.

McDonald immediately got on the radio and urged Consol Fire Boss and certified emergency medical technician ("EMT") Shannon Smith to get to the scene right away because there was "a man crushed." Tr. 165. He instructed Watson to get a gurney and the EMT kits. McDonald then called the Bunker to request that an ambulance be called and to have haulage cleared so that Stern could leave the mine quickly. As they removed Stern from the mine, he instructed the Bunker to call Life Flight, an emergency helicopter service. Shift Foreman Donny Tomlin, who was in a different part of the mine and one of Consol's employees responsible for notifying MSHA of reportable accidents, was also notified of the incident over the radio.

Within 10 minutes of receiving McDonald's call over the radio, EMT Smith, along with fellow Fire Boss Donald Wolfe, arrived on the scene. Smith noticed that Stern's leg was bent awkwardly, as if it was broken, and he could not move or feel anything in one leg. Wolfe applied a cervical spine brace to Stern's neck to hold it straight in case there was a spinal injury. There were abrasions and bruising on the right side of Stern's waist and hip area, as well as a small amount of blood.

As they were leaving the mine with Stern, Smith and McDonald noticed that Stern's abdomen was swollen or distended causing them to become concerned about internal bleeding. Stern also stated that it felt like something was coming out of his penis. Smith checked Stern's genitalia but did not see anything wrong. Smith performed an assessment on Stern called DCAPBTLS, in which he checked for deformities, contusions, abrasions, punctures,

---

[2] A scoop is a type of diesel or battery-operated equipment with a scoop attachment for cleaning up loose material, for loading mine cars or trucks, and hauling supplies. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 484 (2d ed. 1997).

bruising/burns, tenderness, lacerations, and swelling. Upon completion of the assessment, Smith testified that he knew that "we had to get Stern out of the mine . . . fairly quickly." Tr. 183. As they were removing Stern, Smith called the Bunker to have Life Flight waiting. Smith and McDonald testified that internal bleeding can cause death. Tr. 179-80, 225.

Stern asked Smith to tell his wife and family that he loved them if something happened to him. Smith checked Stern's pulse and determined it was not elevated. It took approximately 40-45 minutes to get Stern out of the mine from the time of the accident. When Smith turned Stern over to paramedics, he gave them his notes on what had occurred.

Meanwhile, Eric Cecil, who was working in the Bunker, called Mine Supervisor Michael Tennant at home at about 3:30-3:45 a.m. to notify him about the accident and that EMTs were on the way. Tennant, who is also responsible for notifying MSHA of accidents, immediately called his boss Eric Shuble, the mine general superintendent, to inform him of the accident. Tennant then headed to the mine. While en route, Tennant received a second call from the Bunker, in which additional details of the accident were provided, including the fact that Life Flight had been called.[3] He arrived at the mine at around 4:50 a.m., roughly 20 minutes after Stern had left for the hospital. Although Tennant, a licensed EMT, did not drive to the mine every time there was an accident, he chose to on this particular occasion because he stated that "an employee [had been] pinched between two large pieces of equipment." Tr. 243, 268.

At 5:09 a.m., roughly two hours after the accident had occurred, Tennant called MSHA and the Pennsylvania Department of Environmental Protection to report the accident.

According to the MSHA Escalation Report, Tennant notified MSHA of the accident at 5:09 a.m. MSHA Inspector Thomas Bochna learned of the accident at about 5:30 a.m., shortly after arriving to work. Bochna's investigation revealed that the accident occurred at about 3:15 a.m. The report also described the injuries as "unknown." Tr. 53; Ex. GX-3.

Bochna arrived at the mine at 7:00 a.m. the same day to begin an investigation. He proceeded to interview a number of Consol and GMS employees who were present during or immediately after the accident. Bochna interviewed Stern at the Health South Rehab Facility on September 4, 2013. He did not speak with any medical personnel who had treated Stern on the day of the accident or check with the hospital regarding Stern's injuries or condition. Roy Cumberledge, GMS Coordinator for the mine, told Bochna that a doctor at the hospital had opined that Stern's bleeding would stop on its own. Bochna did not ask anyone if they thought Stern's injuries had a reasonable potential to cause death nor did he ask about Stern's vital signs. According to statements by witnesses at the hospital, Stern suffered a broken pelvis bone and some internal bleeding that stopped on its own before surgery. He underwent surgery at about 1:00 p.m. to repair his pelvis.

A company-generated handout provided during the operator's safety talk following the accident described Stern's accident as having "a high potential for fatal accident." Ex. GX-10.

---

[3] Calls were also placed to Stern's wife and to representatives of GMS.

Similarly, an internal Consol Report of Personal Injury (RPI) rated Stern's accident as having a fatal potential of 5 out of 5 rating, with 5 having the highest potential of fatality.

Upon completion of his investigation and 43 days after the incident, Bochna issued a citation for Consol's failure to notify MSHA immediately of the accident as required by 30 C.F.R § 50.10(b). Consol contested the citation.

B. Judge's Decision

A Commission Administrative Law Judge affirmed the violation. He found that "reasonable potential to cause death" in section 50.10(b) is a clear and unambiguous standard. He determined that a "totality of the circumstances" test should be used when analyzing the reporting requirement, and that it is reasonable that the Secretary consider the circumstances that resulted in an injury. 39 FMSHRC at 1294-95.

In considering the "totality of the circumstances," the Judge determined that when considering "mental and physical signs and symptoms, this Court has given much more probative weight to the evidence of injury available *at the scene of the accident and at the time of the accident and immediately thereafter*." *Id.* at 1295 (emphasis in original). He opined that, when assessing the propriety of the operator's section 50.10(b) determination, less weight is given to medical information gathered at the hospital and thereafter. Guided by Commission precedent, the Judge reasoned that "the need for a *prompt* determination is inherent in section 50.10 and that permitting operators to wait for a medical or clinical opinion would frustrate the immediate reporting of accidents." *Id.*

The Judge found that given the protective purpose of the Act, the applicable standard, and the totality of the circumstances, a prudent operator, knowledgeable of the industry, should have known that Stern's injuries had a reasonable potential to cause death. The Judge identified specifically that Stern was crushed between two multi-ton pieces of equipment, had abdominal swelling and severe pain, felt a bizarre sensation of something coming out of his genitals, had an oddly bent leg, inability to move his legs properly, visible abrasions and some blood loss, and made a dying proclamation. The Judge found these were signs and symptoms indicative of a potentially fatal injury. He also concluded that Consol's decision to call Life Flight was made because of justifiable concern that Stern might have internal bleeding, which could be life threatening. *Id.* at 1292-98.

The Judge rejected Consol's fair notice argument, reasoning that the circumstances presented here demanded that a reasonably prudent person would believe that Stern's condition had the potential to cause death. *Id.* at 1298-99.

For the same reasons, the Judge affirmed the Secretary's assessment of moderate negligence. He found that the available signs and symptoms indicated that Consol knew or should have known that an accident occurred that had a reasonable potential to cause death. Although he acknowledged that Consol reacted quickly and efficiently to help Stern and that it did eventually alert MSHA, the Judge did not find that these sufficiently mitigated its negligence. After considering the six statutory penalty criteria found at 30 U.S.C. § 820(i), the Judge also determined that the Secretary's proposed statutory minimum penalty of $5,000 was appropriate. *Id.* at 1298-1300.

II.

Disposition

Section 50.10(b) provides in pertinent part that an "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." 30 C.F.R. § 50.10(b) (emphasis added). The Commission has held that section 50.10 is triggered by the occurrence of an "accident," as defined in 30 C.F.R. § 50.2(h). *Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003).[4]

The Mine Act and MSHA regulations do not define "reasonable potential to cause death," and the Commission has not found it necessary to do so. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 474 (Mar. 2015).[5] However, the Commission has held that "an operator, in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification." *Id.* at 477.

The Commission has also held that when determining whether a generally worded standard is intended to apply to a specific situation, the evidence must be evaluated under the "reasonably prudent person" test. *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) ("given the broad wording of this standard intended to be applied to myriad factual contexts, . . . it is appropriate to evaluate the evidence in light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard."); *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1617-18 (Sept. 1987); *see also* Emergency Mine Evacuation, 71 Fed. Reg. 71,430, 71,433-34 (Dec. 8, 2006) ("In using the 'reasonable potential to cause death'" basis for injuries and entrapments, the MINER Act[6] and the final rule retain an element of judgment . . . . [T]he

---

[4] Section 50.2(h)(2), for purposes of this citation, defines "accident" as "[a]n injury to an individual at a mine which has a reasonable potential to cause death." 30 C.F.R. § 50.2(h)(2). The regulation implements section 3(k) of the Act, which states that "'accident' includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k).

[5] Commissioner Cohen continues to believe, as he stated in *Signal Peak*, 37 FMSHRC at 474 n.8, that the Commission should adopt a definition for "reasonable potential to cause death," and suggests the following definition: "The reporting requirement of section 50.10(b) is triggered when a miner is injured in a manner that would cause a reasonably prudent mine operator to consider the possibility that the injured miner's life may be in jeopardy. Obviously, because the extent of an injury is not always immediately apparent, the totality of the circumstances, including how the injury occurred, should be considered by the mine operator."

[6] Congress enacted the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 ("MINER Act") in response to fatal accidents at underground coal mines.

operator's decision as to what constitutes a 'reasonable potential to cause death'. . . is based on what a reasonable person would discern under the circumstances.") (internal citations omitted).

Therefore, consistent with our holding in *Signal Peak*, when assessing the merits of a violation under section 50.10(b), the Commission employs a reasonable person standard, resolving reasonable doubt in favor of notification. 39 FMSHRC at 474, 477.

A. "Totality of the Circumstances"

Consol argues that the Judge incorrectly applied a "totality of the circumstances" test, maintaining that the Commission expressly rejected such test in *Signal Peak, supra.* We disagree. The operator erroneously construes the Commission's declining to further define the term "reasonable potential to cause death" in *Signal Peak* as a rejection of the principle that the "totality of the circumstances" must be considered when assessing a violation under section 50.10(b). *See Signal Peak*, 37 FMSHRC at 474.

On the contrary, we have held that "[t]he immediateness of notification under section 50.10 must be evaluated on a case-by-case basis, *taking into account . . . all relevant variables affecting reaction and reporting.*" *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3517 (Dec. 2013), *quoting Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989) (emphasis added). Given the inability to acquire quickly a clinical diagnosis and the need for prompt reporting, readily available information such as the nature of the accident and any observable indicators of trauma are relevant and proper for consideration in assessing whether an injury is reportable. *Signal Peak*, 37 FMSHRC at 476.

The phrase "totality of the circumstances" describes the scope of the available evidence considered when making a section 50.10(b) determination. As the Judge correctly noted, the scope of the relevant evidence available to assist for purposes of section 50.10(b) generally will consist of the evidence available at the scene of the accident, at the time of the accident, and immediately following the accident. 39 FMSHRC at 1295. While the record will often contain subsequent relevant information from medical professionals, this information will likely not materialize until the time to make a decision to notify MSHA has already passed. Therefore, it is less probative in a section 50.10(b) analysis.

Here, the Judge considered the totality of the relevant evidence available to Consol management during the period immediately surrounding Stern's injury. Specifically, he reviewed the signs and symptoms of injury,[7] such as whether Stern was conscious and alert, his complaints of pain, apparent physical abnormalities, and the cause of Stern's injury. The Judge also considered the response Consol deemed necessary to insure Stern's health and safety. *See Cougar Coal*, 25 FMSHRC at 520 (considering foreman's performance of CPR on unconscious miner who became conscious and alert shortly thereafter).

---

[7] Consol also characterizes the Judge's consideration of the "signs and symptoms" of injury as yet another distinct standard erroneously applied by the Judge. However, the signs and symptoms of a victim's injury will be the crux of an analysis used to determine whether an injury has a "reasonable potential to cause death." Consequently, this argument is without merit.

Accordingly, we conclude that the Judge's analysis was proper and entirely consistent with Commission precedent.

B. "Reasonable Potential to Cause Death"

Consol primarily bases its defense upon the definition of the term "accident" in 30 C.F.R. § 50.2(h). In particular, Consol focuses upon the key phrase – the definition of an "injury to an individual at a mine which has a reasonable potential to cause death." 30 C.F.R. § 50.2(h)(2). In turn, section 50.10(b) uses that terminology in identifying accidents an operator must report immediately.

Consol asserts that the definition of an immediately reportable accident necessitates a fact-based analysis of whether the injuries to the injured miner as a matter of medical fact caused a reasonable potential for death. Applying this view, Consol asserts the Secretary must prove by a preponderance of evidence that the injured miner actually faced a reasonable potential for death.[8]

Consol then contends that the evidence in this case shows that there was not an actual reasonable potential for death, and the Secretary did not introduce any evidence proving such potential. Consol asserts that its employees never thought there was a potential for death, that the internal bleeding which did occur stopped on its own, and that the hospital waited more than seven hours to perform surgery to repair the miner's broken body. Thus, Consol argues that the evidence does not demonstrate that Stern's injuries resulted in a reasonable potential for death.

The fundamental problem with Consol's defense is that it misinterprets the regulation. Consol's error lies in the perspective from which it evaluates the miner's injuries. The notification requirement does not, and cannot, rest upon a post-medical treatment analysis of the likelihood of death from the injuries. The regulation does not create grounds for a guessing game regarding whether an injury, as a matter of post-hoc analysis, created any degree of danger to the miner's life. *See Cougar Coal*, 25 FMSHRC at 521 (the decision to call MSHA "cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival.").

The decision whether to call must be made immediately and often by persons with little medical expertise. The Commission has held 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 whether the injury presents a reasonable potential to cause death and a determination of whether a call is required." *Signal Peak*, 37 FMSHRC at 476. The regulation, therefore, does not look to an opinion of a medically qualified expert.

A person with sufficient authority to call must make the decision whether to call based upon whether a reasonable person with the information known by him/her would have considered the injuries as creating a reasonable potential for death. Of course, the primary

---

[8] Consol asserts: "To meet his burden of proof, the Secretary is required to present competent and convincing evidence that the injury sustained had a reasonable potential to cause death. 30 U.S.C § 813(j); 30 CFR § 50.10." PDR at 10.

information is the nature of the injury and the miner's condition. However, as noted above, relevant information includes the totality of circumstances including the nature of the event causing the injury. The outcome determinative inquiry in this case is whether responsible Consol employees had information that would lead a reasonable person to conclude there was a reasonable potential for death based upon the nature of the injury and the totality of the circumstances. The Judge found such information existed. We agree.

In the instant matter, Section Foreman McDonald, who had EMT training, and EMT Smith were among the earliest persons to arrive on the scene of the accident. They immediately determined that Stern had been pinned between two large machines, weighing between 5 and 10 tons. He was lying on the ground in extreme pain and had complained that it felt as if "his guts" were coming out of his genitals. There was swelling in Stern's abdomen, which indicated possible internal bleeding, and he could not move or feel one of his legs, which suggested a possible spinal injury.[9] *See Signal Peak*, 37 FMSHRC at 475-76 (concluding that the miner's "initial condition presented a sufficient possibility of internal injury and spinal damage that a reasonable person should have recognized that an injury with a reasonable potential to cause death had occurred."). Shortly after the accident, much of this information was also relayed from the Bunker to Mine Supervisor Michael Tennant who is a licensed EMT as well. Tr. 232-34.

Obviously, Stern had suffered a host of extremely painful and very serious injuries. There was an odd bend to his leg as if it were broken, and there were abrasions and bruising on the right side of his waist and hip area with a small amount of blood. Stern also asked Smith to tell his wife and family that he loved them if something were to happen to him, an indication that Stern was in extreme pain and believed that he might die. 39 FMSHRC at 1296-99. All of these symptoms reveal severe injuries. Perhaps most importantly and certainly outcome determinative here, when Smith and McDonald were taking Stern out of the mine, they became aware of possible internal bleeding, knew such bleeding could cause death, and asked for a Life Flight due to concern over the nature and severity of Stern's injuries, including the circumstances which caused them.

Smith testified that he had called Life Flight because he wanted to err on the side of caution regarding internal bleeding, which he acknowledged could be fatal. 39 FMSHRC at 1297. McDonald candidly testified that when he observed Stern's abdomen, he "got nervous" because he knew there could be internal bleeding, which he knew had a "reasonable potential to cause death." Tr. 225, 229. Tennant also agreed that Stern's accident had a high potential to be

---

[9] Based on MSHA's experience and common medical knowledge, some types of "injuries which have a reasonable potential to cause death" include concussions, cases requiring cardio-pulmonary resuscitation (CPR), limb amputations, major upper body blunt force trauma, and cases of intermittent or extended unconsciousness. These injuries can result from various indicative events, including an irrespirable atmosphere or ignitable gas, compromised ventilation controls, and roof instability. 71 Fed. Reg. at 71,434. However, this passage clearly indicates that this list was not intended to be exhaustive, and was meant to provide a sample of *some* injuries that could have a reasonable potential to cause death, as well as *some events* that could produce such injuries.

fatal. Tr. 247. Smith further stated that this was the first time Life Flight had been called since he began working at the mine.

In light of the knowledge and training possessed by Tennant, McDonald, and Smith, we conclude that someone with sufficient authority at Consol was aware of Stern's injury-causing event. These employees surely realized from their training that, when a miner is pinched between major pieces of equipment and then suffers from a distended and hardened abdomen, there is a high potential if not a likelihood of internal bleeding. In turn, nearly every knowledgeable witness testified to the obvious – namely, internal bleeding is a potential cause of death.[10] Under these circumstances, the evidence overwhelmingly demonstrates that a reasonable person possessing the available information would have concluded there was a reasonable potential for death.

Testimony that Stern was conscious, alert, talking, and presented no elevated pulse or obvious signs of breathing problems does not alter this conclusion. The Commission has previously rejected the assertion that because a miner is conscious and alert following an accident, management could reasonably conclude that there was no potential for death. *Cougar Coal*, 25 FMSHRC at 520; *see also Signal Peak*, 37 FMSHRC at 476 (noting that while the miner presented some stable vital signs, all vitals were not taken, thus evaluation was not exhaustive or conclusive and did not establish that the miner's injuries posed no reasonable potential for death). Indeed, Consol's limited assessment of Stern's vital signs could not readily determine the extent of any internal bleeding, its cause, or the potential for additional tears or damage to internal organs or other factors. Under these circumstances, knowing that internal bleeding may cause death, any reasonable person could not conclude otherwise than that a potential for death existed.[11]

---

[10] Consol argues that the Judge failed to address a significant conflict between section 103(j) of the Act, 30 U.S.C. § 813(j), and 30 C.F.R. § 50.10(b). It contends that section 103(j), which states that an operator must call MSHA when it "*realizes*" an injury has occurred, conflicts with section 50.10(b), which states that MSHA must be called when an operator "*knows or should know*" that an accident has occurred. PDR at 31-32. We need not consider that argument. In this case, there is no doubt that a reasonable person evaluating the known facts would have found a reasonable potential for death. The operator knew the requisite information.

[11] Although the hardening of Stern's abdomen could have been the result of other types of injuries, the symptoms occurred after pinching between large pieces of equipment. And while the bleed turned out to be non-fatal, this in no way negates the finding that the nature of Stern's injuries, as readily observed by Smith and McDonald, presented a reasonable *potential* to cause death. Under this regulation, operators are not expected to know with absolute certainty the extent of a miner's injuries because this is simply impossible within the short window in which they must make the determination. Additionally, as noted above, the Commission has explicitly emphasized "that an operator, in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification." *Signal Peak*, 37 FMSHRC at 477.

Consol also argues that the Judge gave undue weight to the cause of injury, because the regulation is injury-based, not incident-based. However, the Commission has repeatedly held that the nature of the accident is relevant in determining whether an injury is reportable under section 50.10. *Signal Peak*, 37 FMSHRC at 475-76 (holding that a miner being propelled 50-80 feet due to blast and having a significant back protrusion indicated a reasonable potential to cause death); *Cougar Coal*, 25 FMSHRC at 520-21 (holding that an electric shock, 18-foot fall, and head injury had a "per se" reasonable potential for death); *see also Mainline Rock & Ballast, Inc.*, 693 F.3d 1181, 1189 (10th Cir. 2012) (stating that an operator should have been alerted to the potential for death by the fact that the miner was pulled through a roller).

Consol acknowledged the high danger of a pinch point injury. Foreman McDonald testified that red zone training is frequently given at the mine not only because of the tight areas and mobile equipment there, but *because* red zone violations are considered particularly dangerous. Tr. 224. Consol even used the accident involving Stern as an example in its Pinch Point/Red Zones training handout, which specifically noted that this particular accident "had a high potential for a fatal accident." Ex. GX-10; Tr. 212-14. Similarly, in Consol's internal RPI, which discusses incidents at all company mines and assigns them fatal ratings between 1 and 5, Stern's mechanism of injury was rated as having a fatal potential of 5 out of 5. Exs. GX-14, RX-5; Tr. 260-67.

Consol also argues that Bochna performed an inadequate investigation because he failed to acquire medical records and statements from medical personnel to support the conclusion that Stern's injuries had a reasonable potential to cause death. However, as we emphasized above, section 50.10 requires operators to notify MSHA "immediately . . . at once without delay and within 15 minutes" once an operator knows that an accident has occurred. 30 C.F.R. § 50.10. Therefore, "[g]iven the need for a prompt determination inherent in section 50.10 . . . permitting operators to wait for a medical or clinical opinion would 'frustrate the immediate reporting of near fatal accidents.'" *Signal Peak*, 37 FMSHRC at 476 (citation omitted); *see also* 71 Fed. Reg. 71,433-71,434 ("the operator's decision as to what constitutes a 'reasonable potential to cause death' 'cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival'. . . . The decision to call MSHA must be made in a matter of minutes after a serious accident.") (internal citation omitted).[12]

Lastly, Consol argues that it lacked fair notice of how the regulation would be applied because neither the Commission nor MSHA has defined "reasonable potential to cause death." However, the Commission has held that in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and

---

[12] *See Consolidation Coal*, 11 FMSHRC at 1938 (finding that section 50.10 "accords operators a reasonable opportunity for investigation," but that the investigation "must be carried out . . . in good faith without delay and in light of the regulation's command of prompt, vigorous action"); *see also* 71 Fed. Reg. 12,252, 12,260 (Mar. 9, 2006) (noting that "[t]aking too much time to determine whether . . . an accident occurred" is a common reason for violations of section 50.10).

the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC at 2416.

Under the circumstances presented in this case, a reasonably prudent person familiar with the protective purpose of section 50.10(b), would have recognized that a miner who had been pinned between two multi-ton machines and who suffered from Stern's symptoms had sustained an injury with a "reasonable potential to cause death," and that MSHA should have been immediately notified. The Judge's application of the standard is in harmony with the Commission's decisions in *Signal Peak* and *Cougar Coal*. Therefore, we reject Consol's notice argument.

Accordingly, we conclude that based on the substantial evidence presented in this case, a reasonably prudent miner, familiar with the mining industry and the protective purpose of section 50.10(b), would have concluded that Stern's injuries had a "reasonable potential to cause death" and would have immediately reported the injuries to MSHA.

C. Penalty

Finally, Consol argues that the Judge erred in failing to consider a penalty lower than the statutory minimum of $5,000 because the Commission assesses penalties de novo and is not bound by section 110(a)(2) of the Act. Section 110(a)(2) states that an operator "who fails to provide timely notification to the Secretary as required under section [103](j) of this [Act] (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000."[13] 30 U.S.C. § 820(a)(2).[14] The operator contends that because this section refers to the Secretary's penalty assessment, it does not bind Commission judges. We reject this contention.

The Commission has determined that an assessment of penalty for a non-flagrant violation of section 50.10(b) is governed by section 110(a)(2) of the Act, which, as noted, imposes statutory minimum and maximum amounts. 30 U.S.C. § 820(a)(2); *Signal Peak*, 37 FMSHRC at 484 n.22. Thus, the Judge here was simply unable to consider a penalty less than the minimum imposed by Congress when it passed the Miner Act.

We base our conclusion in large part on the Miner Act's legislative history. In briefly discussing the section that amends the statutory reporting requirements, the Senate Report states:

---

[13] In January 2018, the minimum penalty was increased to $5,903 and the maximum penalty was increased to $70,834 to account for inflation. 30 C.F.R. § 100.4(c); *see also* Department of Labor Federal Penalties Inflation Adjustment Act Annual Adjustments for 2018. 83 Fed. Reg. 7, 15 (Jan. 2018). However, the minimum penalty in effect at the time of the violation, i.e., $5,000, applies here.

[14] Section 103(j) requires an operator to notify the Secretary "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." 30 U.S.C. § 813(j). This is the same conduct required by sections 50.10(a), (b), and (c) of the Secretary's regulations.

> Section 5 requires MSHA notification within 15 minutes for a subset of situations which are currently defined as accidents under regulation [30 C.F.R. § 50.2(h)]. . . . [It] is the intent of the committee that the minimum fine of $5,000 be assessed only for those accidents described in 30 CFR 50.2(h)(1), (2) and (3) [which include an injury to an individual at a mine which has a reasonable potential to cause death]. . . .
>
> . . .
>
> Section 5–Prompt Incident Notification. This provision codifies the recent MSHA emergency regulation which requires that operators make notification of all incidents/accidents which pose a reasonable risk of death within 15 minutes of when the operator realizes an accident has occurred. *It would fix a minimum civil penalty of $5,000, up to $60,000 (which is the current maximum) for failure to do so.*

S. Rep. No. 109-365 at 9, 13 (2006) (emphasis added). This is the extent of the discussion. There is no reference to the fact that the Secretary proposes penalties and Commission judges assess them. The Senate Report simply states that a minimum penalty of $5,000 is to be imposed.

In addition, section 110(a)(4) states that "[i]f a court, in making such review, sustains the order, the court shall apply at least the minimum penalties required under this subsection [section 110(a)]." 30 U.S.C. § 820(a)(4). A statutory scheme that permits the Commission to assess any penalty, however minimal, but requires a reviewing court to impose a penalty of at least $5,000, makes no sense.

Therefore, because assessment of Consol's violation of section 50.10(b) is governed by section 110(a)(2) of the Act, the Judge properly assessed a penalty of $5,000.

III.

Conclusion

For the reasons set forth above, we conclude that substantial evidence supports the Judge's finding that a reasonable person, familiar with the mining industry and the protective purpose of section 50.10(b), would have concluded that Stern's injuries had a reasonable potential to cause death and that Consol should have called MSHA immediately upon learning of the injuries giving rise to such potential. We also conclude that the Judge properly applied the requirements of section 110(a)(2) of the Act and did not err by imposing the penalty of $5,000. Accordingly, the Judge's decision is affirmed.

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Christopher D. Pence, Esq.
Hardy Pence PLLC
500 Lee Street, East, Suite 701
P.O. Box 2548
Charleston, WV 25329

Jennifer L. Gold, Esq.,
Office of the Solicitor
U.S. Department of Labor
170 S. Independence Mall West, Suite 630E
Philadelphia, PA 19106-3306

Ali Beydoun, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

April Nelson, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Administrative Law Judge John Lewis
Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
7 Parkway Center
875 Greentree Road, Suite 290
Pittsburgh, PA 15220