Administrative Law Judge Jacqueline Bulluck

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.
RICHMOND SAND & STONE, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. YORK 2018-0031-M
A.C. No. 37-00156-453924

PETITION FOR DISCRETIONARY REVIEW PURSUANT TO SECTION 2700.70 OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION PROCEDURAL RULES

I. Now comes the Respondent in the above matter and hereby petitions for discretionary review as follows:

Under Section 2700.70, "Petition for Discretionary Review," subsection (c), "Grounds," Respondent hereby states that:

The Decision issued by Administrative Law Judge Bulluck in her "Summary Decision" dated January 17, 2019, is erroneous in that:

1. The legal conclusion is erroneous.
2. The Decision is contrary to law and the applicable citations.
3. A substantial question of law is involved.

II. Respondent supports its Petition as follows:

1. That the Decision misconstrues the meaning and intent of 30 CFR Section 50.2, in that the term "accident" does in fact mean "a death of an individual at a mine." (The Respondent argues that the death of an individual must be pursuant to an "accident" and not a natural death). Section 50.2(h) clearly presupposes that an accident has occurred, i.e. subsection (h) "accident means: 1) a death of an individual at a mine."

   Since there was no accident in this matter but a natural death, there is no reporting requirement within the fifteen minute section as noted above. Respondent further states that there is no definition of "accident" in the regulation and therefore, the word "accident" should be construed in its ordinary and clear meaning. "Accident" does not mean a natural death. In the above section (50.2(h)) an accident includes accidental death of an individual in the true meaning of the word "accident" in Dictionary.com defines an "accident" as "an undesirable or unfortunate happening that occurs unintentionally and usually results in harm, injury, damage, loss, etc." and

further defines accident as "an unplanned event that results in personal injury or property damage."

Therefore, a natural death is not an accident, since no accident occurred at the mine as stipulated by the Parties.

2. By construing accident to include a natural death, the court is attempting to "legislate" the word "accident" in meaning that a natural death is in fact an accident.

3. The Decision is contrary to other decisions rendered by the same court. See, *Secretary of Labor vs. Hanson Aggregates Midwest, Decided on August 5, 2013, Docket No. Kent 2012 1285 MAC No. 1512905-292011-01*, whereby the court granted the Respondent's motion for summary judgment whereby a heart attack was not reported to MSHA within the allowed fifteen minutes.

III. CITATIONS

Mine Safety and Health Subpart (B), "Notification," investigation, etc., Section 50.10 states:

> "The operator shall immediately contact MSHA at once without delay and within fifteen minutes . . . once the operator knows or should know that an accident has occurred involving a death of an individual, an injury or an entrapment." (Emphasis applied.)

Subpart (C), Section 50.20 states:

> "The operator shall mail completed forms to MSHA within ten (10) working days after an accident or occupational injury occurs . . . when an accident specified in 50.10 occurs, which does not involve an occupational injury . . . Form 7000 – which should be completed . . ." (Emphasis applied.)

Citation in dispute is Citation No. 9367109, with a date of October 11, 2017.

In the matter of *Secretary of Labor v. Hanson Aggregates Midwest* , decided on August 5, 2013, Docket No. KENT 2012-1283, M.A.C. No. 1512905-292011-01, the court granted the respondent's motion for summary judgment whereby a heart attack was not reported to MSHA within the allotted fifteen minutes.

The court in its discussion stated:

> "The words of the cited standard are clear and exclude the non-work related event which occurred at the respondent's mine. Supporting the text of the standard, the Federal Registers preamble

> to the cited standard is clearly consistent with those words; it does not list a heart attack as an "injury." The whole of Part 50's obligations arise in the context of a mine accident's occurrence." Page 3 of 4.
>
> "Here, as noted, the Secretary has relied upon the definition of an "accident" particularly pointing to subsection (H)(2), which defines the category of "accident" as an injury to an individual at a mine which has a reasonable potential to cause death. Therefore, an injury must first have occurred for an accident to be reportable." Page 4 of 4.

"Based on the foregoing, the court finds that this was not a reportable event and accordingly it grants the Respondent's motion and denies the Secretary's motion."

In addition, in the matter of *Secretary of Labor v. Vulcan Construction Materials LP*, decided August 30, 2016, the issue is whether the respondent violated the accident notification requirement of 30 CFR Section 50.10(b), when it failed to report the employee's heart attack.

The court further held that:

> "The regulations never explicitly mentioned a heart attack; it has no special regulatory meaning that would preclude consideration of the ordinary meaning of the term."
> (Decision, page 7).

Further quoting:

> "The explicit language of Section 50.10 requires immediate notification only when there has been an accident involving a death, an injury which has a reasonable potential to cause death, an entrapment which has a reasonable potential to cause death, or another accident. It says nothing about disease. But the explicit text of Section 50.10(b) doesn't exclude disease either. Section 50.10(b) requires an operator to contact MSHA within fifteen minutes once it knows or should have known that an accident has occurred involving an injury at a mine which has a reasonable potential to cause death. Thus, if a heart attack is a disease process and the regulations meaning of injury does not implicitly contemplate disease, then a heart attack is not subject to the immediate notification requirement. If, however, the regulation could implicitly include "disease" within the meaning of "injury

> with a reasonable potential to cause death," the meaning of injury might be ambiguous."
>
> "The plain text of regulation does not contemplate this result. Conspicuously absent from the definition of "accident," is any reference to illness or disease. Nor does Section 50.20 make any distinction between accidents that do and do not involve occupational illnesses, as it does with occupational injuries." Page 11.
>
> "This complete lack of mention leads to the conclusion that the meaning of injury does not, by virtue of intent of the drafters or reasonable interpretation, include mere illness or disease, and hence, does not include heart attacks."

The court vacated the citation stating, "The employee's heart attack did not constitute an immediately reportable accident because it was not an injury under 30 CFR 50.10(b)." Further stating on page 8, "Thus, if a heart attack is a disease process and the regulations meaning of injury does not implicitly contemplate disease, then a heart attack is not subject to immediate notification requirements."

Respondent submits that the Administrative Law Judge Bullock issued an erroneous decision in the matter of *Secretary of Labor v. Nyrstar*, Docket No. SE 2015-136-M AC No. 40-02213-370090, in ruling that a natural death is in fact an accident.

WHEREFORE, Respondent prays that the Decision of the Honorable Jacqueline R. Bullock be reversed.

Respectfully submitted,

RICHMOND SAND & STONE, LLC
By their Attorney,

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CERTIFICATION

I hereby certify that on the 22nd day of January, 2019, the within document was mailed to the following:

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With a copy to:

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