

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

January 12, 2011

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION, MSHA, : Docket No. WEST 2009-1274-M  
Petitioner : A.C. No. 24-02386-193778  
 :  
v. :  
 :  
E.S. STONE & STRUCTURE, INC., : E.S. Stone & Structure Mobile 2  
Respondent :

**DECISION AND ORDER**

Appearances: Matthew B. Finnigan, Esq. , Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado for the Petitioner  
Josh Shultz, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland for  
Respondent

Before: Administrative Law Judge Patrick B. Augustine

**Procedural History**

This case is before the court upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the “Act”). The parties filed joint stipulations of fact and cross-motions for summary decision. This case involves a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under Section 104(a) of the Act alleging a violation of 30 C.F.R. §50.10. The parties stipulated to the following facts:

1. Respondent E.S. Stone & Structure, Inc. (“E.S. Stone”) owns the E.S. Stone & Structure Mobile 2 Mine (Mine ID 24-02386) near Barber, Montana in Golden Valley County (the “Mine”).
2. E.S. Stone is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
3. The ALJ has subject matter and personal jurisdiction over the dispute in this case.
4. E.S. Stone is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§801-965 (the “Mine Act”).
5. The Mine is a surface, dimension stone mine.
6. Eric Johnson and Scott Puppe own E.S. Stone.
7. Bennie Jo Pearrow was an employee of E.S. Stone.
8. Mr. Pearrow was 51 years old and had worked at E.S. Stone for approximately 28 weeks as a “stacker” before April 8, 2009. In this position, Mr. Pearrow was responsible for stacking and packaging rock to be sold to customers.

9. On April 8, 2009, Mr. Pearrow began his shift at the Mine at 7:00 a.m.
10. After beginning work on April 8, 2009, Mr. Pearrow reported that he did not feel well and E.S. Stone Supervisor Clinton Theriault instructed Mr. Pearrow to go home.
11. Mr. Pearrow elected to remain at work on April 8, 2009. Mr. Theriault instructed Mr. Pearrow to work at a slow pace. He performed his regular duties, palletizing stone at a slow pace with frequent breaks.
12. Palletizing stone requires E.S. Stone's employees to stack on shipping pallets individual pieces of stone.
13. The stone that Mr. Pearrow was palletizing was various sizes. Each piece of stone weighed between approximately 10 pounds and approximately 15 pounds.
14. At approximately 11:00 a.m. on April 8, 2009, Christina Riley, Mr. Pearrow's work partner, took a short break.
15. When Ms. Riley returned to work at approximately 11:05 a.m. on April 8, 2009, she found Mr. Pearrow laying on the ground, next to the pallet that the two were stacking on the east side of E.S. Stone's processing yard.
16. Ms. Riley yelled to Jeremy Forrest, an E.S. Stone breaker operator, who was working in a nearby tent, that Mr. Pearrow needed medical assistance.
17. Upon hearing this, Mr. Forrest called Mr. Theriault via radio.
18. After Mr. Forrest's radio call, Mr. Forrest, Mr. Theriault, Ms. Riley, E.S. Stone Tumbler Operator Barry Larette, and E.S. Stone Stacker Jonathan Lambert attended to Mr. Pearrow. However, Mr. Pearrow was unresponsive, was not breathing, and did not have a pulse.
19. At 11:08 a.m. on April 8, 2009, E.S. Stone employees began performing cardiopulmonary resuscitation ("CPR") on Mr. Pearrow.
20. Also at 11:08 a.m. on April 8, 2009, an unidentified E.S. Stone employee contacted owner Eric Johnson via two-way radio to alert Mr. Johnson of what had occurred.
21. Mr. Johnson, in response, called the E.S. Stone office.
22. Both the E.S. Stone office and Mr. Theriault promptly telephoned the Golden County Sheriff's Department.
23. E.S. Stone employees continued to perform CPR on Mr. Pearrow until an ambulance arrived at approximately 11:30 a.m. on April 8, 2009.
24. Upon the ambulance's arrival, emergency medical technicians took over CPR from E.S. Stone employees.
25. At approximately 11:45 a.m. on April 8, 2009, a life flight helicopter from St. Vincent Healthcare in Billings, Montana arrived. Emergency medical technicians from the life flight administered medication and automated external defibrillation to Mr. Pearrow.
26. At 12:05 p.m. on April 8, 2009, Golden Valley County Sheriff/Coroner Floyd Fisher pronounced Mr. Pearrow dead.
27. Mr. Pearrow's body was taken via ambulance to Billings, Montana for an autopsy.
28. After Mr. Fisher pronounced Mr. Pearrow dead, Mr. Johnson spoke with Mr. Fisher to gather information to report to Mr. Pearrow's family.
29. After speaking with the medical personnel, Mr. Johnson addressed the 20-25 employees who had gathered at the scene. Mr. Johnson dismissed the employees for the day and answered questions from the employees.
30. Mr. Johnson then contacted the E.S. Stone office via two-way radio to gather

information from Mr. Pearrow's file to report to MSHA.

31. Between 12:45 and 12:50, Mr. Johnson attempted to contact MSHA to report Mr. Pearrow's death. Mr. Johnson called MSHA, however the cell phone service dropped the call and Mr. Johnson changed location to seek better reception.

32. Mr. Johnson was only able to get cell phone service utilizing the cell phone power booster and external antenna in his pickup truck, located near the work trailer on the west side of the processing yard.

33. At 12:52 p.m. on April 8, 2009, Mr. Johnson reported Mr. Pearrow's death via cell phone to Brian Goepfert of the Mine Safety and Health Administration ("MSHA").

34. MSHA issued an order pursuant to Section 103(k) of the Mine Act and instructed Mr. Johnson to secure the area.

35. At 6:34 p.m. on April 8, 2009, MSHA lifted the 103(k) order.

36. The autopsy concluded that Mr. Pearrow suffered from severe hypertrophic cardiomyopathy, which caused the heart attack that killed Mr. Pearrow.

37. Owen Erickson, an authorized representative of the Secretary of Labor, investigated Mr. Pearrow's death for MSHA.

38. Mr. Erickson interviewed E.S. Stone owners and employees, including Mr. Johnson, Mr. Puppe, and Mr. Theriault.

39. On April 8, 2009, at 6:45 p.m., Mr. Erickson issued E.S. Stone Citation No. 6451203 pursuant to Section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. §50.10. Mr. Erickson indicated in that citation that there was no likelihood of injury or illness arising from the alleged violation; that an injury or illness arising from the alleged violation could reasonably be expected to yield no lost workdays; that the violation was not significant and substantial; that E.S. Stone had engaged in moderate negligence in violating 30 C.F.R. §50.10; and that no miners were affected by the alleged violation.

40. Mr. Erickson terminated the citation at 6:50 p.m. after confirming that E.S. Stone had notified MSHA about Mr. Pearrow's death and discussing with the company's owners the requirements of 30 C.F.R. §50.10.

41. MSHA proposed a specially assessed penalty of \$5,000 for Citation 6451203.

### **The Cited Regulation**

*30 C.F.R. §50.10: The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:*

- (a) A death of an individual at the mine;*
- (b) An injury of an individual at the mine which has a reasonable potential to cause death;*
- (c) An entrapment of an individual at the mine which has a reasonable potential to cause death;*
- (d) Any other accident.*

### **Brief Summary of the Parties' Arguments**

A. Secretary of Labor:

Petitioner argues that the record clearly establishes that Respondent “failed to alert MSHA about an accident - a miner’s death - until at least 47 minutes had lapsed.” This was 32 minutes beyond the deadline proscribed in the regulation. Therefore, she asserts that the citation should be affirmed and the proposed penalty of \$5,000.00 is the minimum penalty required by Congress for such a violation pursuant to the provisions of the Miner Act, 30 U.S.C. §820(a)(2).

B. E.S. Stone:

Respondent argues that it conducted a brief, reasonable investigation into the incident prior to notifying MSHA, which is authorized and anticipated by the preamble to the regulation. Once Respondent quickly concluded that an accident had occurred, that emergency life-saving measures were exhausted, and ensured that there were no immediate dangers posed to other mine employees, Respondent immediately contacted MSHA and reported the fatality in full compliance with the regulation.

### **Discussion**

The Commission’s rules provide that a “motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits show that: (1) there is no genuine issue as to any material facts; and (2) the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. §2700.67(b). The court finds that the facts stipulated to by the parties are sufficient to render a decision on the legal issues raised in the parties’ cross motions for summary judgment.

The court summarizes the parties’ stipulations as follows: Respondent operates a surface stone mine near Barber, Montana. On April 8, 2009, Bennie Pearrow and Christina Riley were stacking cut stone onto pallets. At approximately 11:00 a.m., Ms. Riley took a short break. When Ms. Riley returned five minutes later, Mr. Pearrow was laying on the ground and unresponsive. Ms. Riley then yelled to nearby employee, Jeremy Forrest, that Mr. Pearrow needed medical assistance. Mr. Forrest immediately called Supervisor Clinton Theriault on the radio and told him of the emergency. About three minutes later, there were five employees at the scene, including Ms. Riley, Mr. Forrest, and Mr. Theriault. They assessed Mr. Pearrow and determined that he was not breathing, had no discernable pulse, and was unresponsive. One of them then began performing CPR, while at approximately the same moment, another employee informed owner Eric Johnson by radio of the event. Mr. Johnson called the main office and told them to call the County Sheriff. Mr. Theriault, separately, also called the County Sheriff. Respondent’s employees continued to perform CPR on Mr. Pearrow until an ambulance arrived at approximately 11:30 a.m., twenty-five minutes after Mr. Pearrow was first discovered. At 11:45 a.m., a medical response helicopter arrived at the site. At 12:05 p.m., Golden Valley County Sheriff/Coroner Floyd Fisher pronounced Mr. Pearrow dead. Between 12:05 p.m. and 12:45 p.m., Mr. Johnson conducted a brief investigation into the incident, which included monitoring the removal of Mr. Pearrow’s body by ambulance, speaking briefly with the Coroner, briefly addressing and dismissing the approximately twenty-five employees who had gathered at the scene, and contacting the main office by radio to gather personnel information about Mr. Pearrow in preparation for contacting MSHA. At 12:45 p.m., Mr. Johnson

then telephoned MSHA's toll-free number by cell phone. When his cell phone could not complete the call because of low signal, he immediately traveled to his truck to obtain a cell phone signal booster. At 12:52 p.m., Mr. Johnson executed the call to MSHA and reported the fatality.

MSHA Citation 6451203 alleges "[t]he mine operator failed to immediately contact MSHA at once without delay and within fifteen (15) minutes of a fatality that occurred at the processing site on April 8, 2009. A miner succumbed to an apparent heart attack and was pronounced dead at 12:05 hours MDST. MSHA was notified at 12:52 hours MDST. The mine operator was aware of the immediate reporting requirement." MSHA characterized the alleged violation of 30 C.F.R. §50.10 as a non-S&S violation with moderate negligence on the part of the operator. Despite these characterizations, Petitioner assessed a penalty of \$5,000.00 based on the statutory language regarding minimum penalty assessments for this type of violation at 30 U.S.C. §820(a)(2).

The Miner Act imposed a 15-minute time limit for reporting fatalities and serious accidents. 30 U.S.C. §813(j). As a result, in March of 2006, MSHA issued an Emergency Temporary Standard ("ETS") which modified the language of 30 C.F.R. §50.10 where operators were previously required to "immediately" report fatalities and accidents, by imposing a 15-minute time limitation. 71 F.R. 12260. In the preamble to the ETS, MSHA stated that the "ETS does not change the basic interpretation of §50.10. By the terms of the provision, an operator is required to notify MSHA only after determining whether an 'accident' as defined in existing paragraph 50.2(h) has occurred. This affords operators a reasonable opportunity to investigate an event prior to notifying MSHA. That is, mine operators may make reasonable investigative efforts to expeditiously reach a determination." *Id.* When the Final Rule on the amendment to this regulation (and others) was promulgated in December of 2006, Section 50.10 was further modified and MSHA's preamble language explaining that the amendments to 50.10 still allow a "reasonable opportunity to investigate an event prior to notifying MSHA" was removed. The preamble to the Final Rule also clearly states that "like the Miner Act, [§50.10] does not include any exceptions to the 15-minute notification provision..." 71 F.R. 71435. The preamble also clarifies, in a manner consistent with Commission case law, that incidents requiring cardio-pulmonary resuscitation (CPR) constitute "injuries which have a reasonable potential to cause death." 71 F.R. 71434. *See Cougar Coal*, 25 FMSHRC 513 (September 5, 2003).

Therefore, based primarily on the undisputed facts that: (1) Respondent's employees, in the presence of a supervisor, began performing CPR on Mr. Pearrow at 11:08 a.m. on April 8, 2009, (2) Mr. Pearrow was pronounced dead by the Coroner at 12:05 p.m., and (3) Respondent made its first attempt to contact MSHA at 12:45 p.m., the court finds that Respondent failed to comply with the requirements of 30 C.F.R. §50.10.<sup>1</sup> Respondent knew it had experienced a reportable accident arguably at 11:23 a.m. (fifteen minutes after CPR was initiated) and conclusively at 12:20 p.m. (fifteen minutes after the official pronouncement of death). The court agrees that the violation was non-S&S but does not agree that Respondent demonstrated moderate negligence in this instance. Respondent quickly implemented and exhausted life-saving efforts, conducted a prompt assessment/investigation into the situation, and then immediately proceeded to contact MSHA.

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<sup>1</sup> Although prior ALJ decisions are not controlling, the court notes that this case is distinguishable from *Premier Chemicals, LLC*, 2007 WL 2409536 (F.M.S.H.R.C. Aug. 10, 2007) in that the violation in that case occurred on July 19, 2006, while the Emergency Temporary Standard, rather than the Final Rule, was in effect.

Accordingly, the operator's negligence will be modified from "moderate" to "low."

### **Penalty**

Under section 110(i) of the Act, "the Commission shall have authority to assess all civil penalties provided in this Act." 30 C.F.R. §820(i). Although the Secretary issues citations and orders under the Act and *proposes* civil penalties, it is the Commission that is responsible for *assessing* civil penalties and providing other appropriate relief. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-91 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). The Commission's assessment of penalties is a *de novo* determination based on the six statutory criteria specified in section 110(i) of the Act. In this case, the Secretary points to the language of the Miner Act, at 30 U.S.C. §820(a)(2), which states: "The operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 813(j) of this title (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." The court notes that this penalty provision is plainly and unambiguously directed only at the Secretary of Labor, not the Commission. As further evidence of this point, one need only look to the statutory language of the following two paragraphs of the Miner Act. Section 820(a)(3)(A) provides that "the minimum penalty for any citation or order issued under section 814(d)(1) of this title shall be \$2,000.00." Section 820(a)(3)(B) similarly provides that "the minimum penalty for any order issued under section 814(d)(2) of this title shall be \$4,000.00." Clearly, the plain language of §§820(a)(3)(A) and (B) indicate generally applicable minimum penalties, while the language of §820(a)(2) applies only to the Secretary of Labor.<sup>2</sup> Therefore, consistent with long-standing precedent, the undersigned interprets these provisions as recognizing discretion on the part of the Commission in assessing penalties for violations of 29 C.F.R. §50.10. *Sellersburg Stone Co.*, supra.

Section 110(i) of the Act requires the Commission to assess civil monetary penalties considering: (1) the operator's history of previous violations, (2) the size of the business, (3) the level of negligence by the operator, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. The stipulations do not address Respondent's violation history, however, MSHA's penalty assessment form in the court's files indicate three previous violations. Respondent is a small operator, exhibiting low negligence in this instance, and demonstrated good faith in notifying MSHA of the incident forty-seven minutes after life-saving efforts ended and Mr. Pearrow was officially pronounced dead. Accordingly, the \$5,000.00 penalty proposed by Petitioner for Citation No. 6451203 will be reduced to \$2,000.00.

### **ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation No.

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<sup>2</sup> The court has also considered the language of 30 U.S.C. §820(a)(4) and concluded that it applies only to Federal appellate review in a circuit court and does not clarify the differences in the statutory language between §820(a)(2) and §§820(a)(3)(A) and (B). Accordingly, it does not dictate a different result by this court.

6451203 is hereby AFFIRMED with an ASSESSED penalty of \$2,000.00, which shall be paid by Respondent within thirty (30) days.

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PATRICK B. AUGUSTINE  
Administrative Law Judge

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