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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

v.

CONSOLIDATION COAL CO.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. VA 87-27
A.C. No. 44-04856-03521

Buchanan No. 1 Mine

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Michael R. Peelish, Esq., Consolidation Coal Co., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary of Labor (Secretary) seeks a civil penalty for an alleged violation of 30 C.F.R. 50.20(a) for failure to properly report an occupational injury occurring August 25, 1986, resulting in a lost workday. Respondent, Consolidation Coal Co. (Consol), denied the alleged violation. The parties agreed to submit the case for decision on the depositions of the injured miner, Timothy Smith, and Federal Mine Inspector Kenneth Shortridge, the exhibits submitted at the depositions, an affidavit of the superintendent of the subject mine, Joseph Aman, and the computer printout of Consol's assessed violation history from March 1, 1986 to February 29, 1988. (I do not know the relevance of these dates, but since the parties have agreed on a penalty amount if a violation is found, it is unimportant.)

On April 5, 1988, the Secretary filed a Motion for Summary Judgment with a Memorandum in Support of the Motion. On February 11, 1988, Respondent filed a Response in Opposition to the Motion. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Consol was the owner and operator of an underground mine in Buchanan County, Virginia, known as the Buchanan No. 1 Mine; Timothy Smith was employed at the subject mine as a miner. Smith worked the midnight shift as a general inside laborer. On August 25, 1986, at about 1:45 a.m., Smith's right little finger and thumb were injured when his hand was caught between two timbers. He left the mine and was driven to the Buchanan General Hospital. He was examined there by Dr. Yusuf Chanhry. The diagnosis was fracture of the right hand fifth finger. He applied a splint and referred Smith to an orthopedist, Dr. Bendigo. Dr. Chanhry stated that Smith was disabled for work and would be able to return to light work September 1, 1986, and to regular work September 15, 1986. Smith was driven back to the mine from Buchanan General, arriving between 4 and 5 a.m. The shift foreman told him to clean up and go home. However, Smith rode to and from work with two other miners, so he waited in the car for them. He was unable to sleep because the car was uncomfortable and his finger (thumb?) nail was throbbing. The shift ended at 8:00 a.m. and they left the mine about 8:45 or 9:00. Smith arrived home at about 9:30 or 9:45. He ate breakfast and called Dr. Bendigo's office. He received an appointment to see him at 2:00 p.m. the same day, and was instructed to have an x-ray taken at about 1:00.

Smith then went to bed and slept about an hour and a half. He drove to the office where the x-ray was taken, and then to Dr. Bendigo's office. He was seen by Dr. Bendigo at about 3:00 p.m.. The doctor put a cast on the hand running up to within about 3 inches of the elbow. He also drilled two small holes in the thumb nail which relieved the discomfort in the thumb. Smith was also given a prescription for pain medication, and told to return "in a couple weeks." He drove home, arriving at about 5:00 p.m. After eating dinner, he decided to call his supervisor to tell him he would not be in because he had not had much sleep. He called his shift foreman but was unable to reach him, so he called his utility foreman (his "immediate boss") and told him he would not be in. He did not tell him why. The foreman, who was aware of Smith's injury, merely said "okay." Smith testified initially that he merely told the utility foreman that he would not be in ("I just told him I wouldn't be in. And he said, 'okay' "). (Smith dep. 19) Later he testified that he told him he was going to take a "Consol day." (Smith dep. 22) It was Smith's normal practice to leave home for the mine at about "a little after 10:00 p.m.," and he would arrive at the mine about 11:00 or 11:15. He normally slept from about 10:00 a.m. to 5:00 or 6:00 p.m., a total of at least seven hours.

Smith began working at the subject mine in June 1986. When he was hired he was told that he would have two days off per year (known as "Consol days") which he could take whenever he wanted "as long as it didn't interfere with the company." Advance notice is not required, but a request to take a Consol day must be cleared with the shift foreman who has responsibility for ensuring that he has sufficient manpower on his shift. Consol does not provide sick leave, and at the time of his injury, Smith had not worked long enough to have earned vacation days.

When Smith returned to work the following day, the shift foreman asked if he could have worked the previous day. Smith stated that this was "the first time I had been confronted with the idea, that I sort of felt why is he asking me. And I said "yes'." (Smith dep. 31) Smith continued working. He made an appointment to return to Dr. Bendigo, but did not keep it since he removed the cast himself and his finger "felt fine."

In April 1987, Federal Mine Inspector Kenneth Shortridge conducted a Part 50 audit at the subject mine, and reviewed the form 7000A1 submitted by Consol on Smith's injury. He asked why Smith did not work on the shift following the injury and was told that Smith had been up all day, asked for and was granted the next day off. Smith issued a 104(a) citation charging a violation of 30 C.F.R. 50.20(a) because the form submitted by Consol indicated that the injury did not cause any lost workdays.

REGULATION

30 C.F.R. 50.20(a) provides in part:

* * * Each operator shall report each accident, occupational injury, or occupational illness at the mine . . . in accordance with the instructions and criteria in 50.20A1 though 50.20A7.

30 C.F.R. 50.20A7(a) provides in part that the operator shall:

. . . Enter the number of workdays . . . on which the miner would have worked but could not because of occupational injury or occupational illness. The number of days away from work shall not include the day of injury If an employee loses a day from work solely because of the unavailability of professional medical personnel for initial observation or treatment and not as a direct consequence of the injury or illness, the day should not be counted as a day away from work.

Whether the absence of an employee from work on the day following an occupational injury because necessary medical treatment on the day of the injury resulted in his loss of sleep constitutes a day away from work because of the occupational injury?

CONCLUSIONS OF LAW

Consol is subject to the provisions of the Mine Safety Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding. The facts in this case are clear and uncomplicated. A miner received a significant injury to his hand at work. He was given initial medical treatment and referred for specialist treatment. As a result of the referral, he was awake during nearly all of the period when he usually slept. In fact, he slept for about one and a half hours. Because of his lack of sleep, he decided to take the following day off, although he testified that he could have worked. The employee's opinion that he could have worked is of some significance, but is not conclusive. In fact he did not work, and his failure to work is related to the injury because it is related to the medical treatment which was necessary because of the injury. I conclude that the employee's absence from work on August 26, 1986, resulted from his occupational injury on August 25, 1986.

The fact that the employee regarded the day off as a "Consol" day and that Consol so recorded it, is, of course, not determinative, or even relevant in deciding the issue whether the day away from work resulted from the injury.

Consol seems to argue that the day away from work resulted from the unavailability of professional medical personnel for initial observation and treatment and therefore should not be recorded as a day away from work resulting from the occupational injury. I do not so interpret the facts. Professional medical personnel were available for initial observation and treatment. Whether or not the referral to the orthopedist was part of the initial observation and treatment, the lost work day did not result from the unavailability of the orthopedist. The orthopedist was available. The lost work day resulted from the time spent receiving treatment and diagnosis, including necessary travel, all of which resulted in a loss of sleep. Therefore, I conclude that the lost workday resulted from the loss of sleep, which resulted from the necessary medical care which resulted from the injury. It should have been reported as a day away from work because of the injury. The citation properly charged a violation of 30 C.F.R. 50.20(a).

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The parties have stipulated that if I find a violation, the proposed penalty of \$200 is an appropriate penalty under the statutory criteria. I accept the stipulation.

ORDER

Based upon the above findings of fact and conclusions of law, the Secretary's Motion for Summary Decision is GRANTED; Respondent is ordered to pay within 30 days of the date of this decision the sum of \$200 for the violation found herein.

James A. Broderick
Administrative Law Judge