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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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 87-352
A.C. No. 46-01436-03699

v.

Shoemaker Mine

CONSOLIDATION COAL COMPANY,
RESPONDENT

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U.S.
Department of Labor, Pittsburgh, Pennsylvania, for Petitioner.
Paul T. Boos, Esq., Consolidation Coal Company, Wheeling,
West Virginia, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company for six alleged violations. All involve 30 C.F.R. Part 50.

Citation Nos. 2945442, 2945443, 2945446,
2945455, 2945456

These citations were originally assessed at \$250 each. The parties have agreed to settle them for \$170 apiece. (Footnote 1) The Solicitor advises that in these cases the miners failed to report the alleged injuries promptly and the operator had reason to believe the injury was nonoccupational and occurred off mine

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property. The negligence factor is therefore, greatly reduced. After considering these matters in light of six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977, I conclude the settlements may be approved.

Citation No. 2899820

This item involves an alleged violation of 30 C.F.R. 50.20(a). However, it was not settled and was heard on the merits on May 17, 1988.

The subject citation reads as follows:

"The mine operator did not fill out and mail to M.S.H.A. within 10 calendar [sic] days, Form 7000Ä1, "Mine accident, Injury and Illness Report," for an occupational injury that occurred to Donald Chamber on 12.5.85, which resulted in lost work days."

Section 50.20(a), 30 C.F.R. 50.20(a), of the regulations provides:

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000Ä1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. * * * The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.

* * *

And section 50.2(e) 30 C.F.R. 50.20(e) states:

(e) "Occupational injury" means any injury to a miner which occurs at the mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

On December 5, 1985, Donald Chambers, a mechanic at the operator's Shoemaker mine, left the mine because he was suffering chest pains. Later that day he was admitted to Reynolds Memorial Hospital where he subsequently was diagnosed as suffering a myocardial infarction. Five days later he had a stroke. He was then transferred to Western Pennsylvania Hospital where cardiac catheterization disclosed a blockage in the anterior descending branch of the left coronary artery which practically totally occluded the vessel (Exhibit D). He was discharged from Western Pennsylvania Hospital on January 4, 1986. The evidence also discloses that Mr. Chambers is a long-standing diabetic and a heavy smoker (Tr. 23, 50). Mr. Chambers admitted that until the time of the heart attack he smoked a pack a day or two packs every three days (Exhibit N, p. 13; Tr. 50).

A dispute exists over the etiology of Mr. Chambers' chest pains. Hospital records upon admission to Reynolds Memorial state that Mr. Chambers reported chest pains of three days duration (Exhibit B). In the discharge summary dated December 30, 1985, Dr. Baysal, Mr. Chambers' personal physician, stated that upon admission the duration of symptoms were a little bit questionable, but nevertheless appeared to be of 24 hours duration (Exhibit C, p. 1). Dr. Baysal also reported in the discharge summary that on December 16, Mr. Chambers and his family told him that Mr. Chambers had been struck with a live electrical wire at work on the day of admission and that the chest pains developed about 1/2 hour to one hour following this incident (Exhibit C, p. 2). In his subsequent deposition dated May 13, 1987, during the workmen's compensation proceedings, Dr. Baysal changed his story and stated that Mr. Chambers had told him about the electrical shock one or two days after his hospital admission (Exhibit O, p. 12). In his first workmen's compensation deposition dated August 20, 1986, Mr. Chambers asserted he had had no chest pains until after the electrical shock (Exhibit N, p. 6). But in his second deposition, a year later on September 11, 1987, he stated he had had indigestion for about three days before the heart attack (Exhibit M, p. 6). He repeated the indigestion allegation at the hearing in this proceeding, asserting that indigestion was the pain referred to in the hospital admission reports (Tr. 24, 45). At the present hearing, Mr. Chambers admitted he had not reported the alleged electrical shock to anyone at the mine before he left (Tr. 16, 42).

There is also a dispute in the medical evidence over whether the electrical shock, assuming it did occur, caused Mr. Chambers' heart attack. Dr. Baysal expressed the opinion that the electrical shock had caused the infarct, noting that Mr. Chambers previously had been asymptomatic from the standpoint of a pre-existing heart condition (Exhibit O, pp. 12 & 13). However, Dr. Baysal admitted that Mr. Chambers showed no evidence of a burn or coagulation necrosis from the alleged shock (Exhibit O, p. 40). Dr. Baysal also referred to the fact that a single vessel disease is rare in a diabetic (Exhibit O, p. 14).

Dr. Wurtzbacher, a consultant engaged by Consol to review the medical evidence, expressed medical opinions contrary to those of Dr. Baysal. Dr. Wurtzbacher stated that there was no medical evidence of a direct relationship between the electrical shock and subsequent myocardial infarction (Exhibit F). He further stated that although multiple vessel atherosclerosis is seen in most cases involving diabetics, a single vessel disease in diabetics can be seen infrequently (Exhibit G). Finally, he described the cardiac symptoms and failures as caused by diabetes (Exhibit G).

The Secretary's allegation of a reporting violation is based upon the assertion that Mr. Chambers suffered an electrical shock which constituted a reportable injury under Part 50. The Solicitor also argues that even if there was no electrical shock, a report should have been made because Mr. Chambers had chest pains at the mine.

After a review of all the evidence I find that Mr. Chambers was not shocked on December 5, 1985. I carefully observed and listened to the testimony of Mr. Chambers and his co-worker Mr. McLaughlin regarding the alleged occurrence of an electrical shock. I did not find them credible. As already noted, Mr. Chambers changed his story several times and as the operator's brief points out, his account became more elaborate and detailed -- and more obviously self-serving, with each telling. If the alleged shock were as severe as he alleged, it is incredible he did not tell anyone about it at the time. The same is true of Mr. McLaughlin's testimony, because he also told no one about the alleged shock. I find persuasive the contemporaneous evidence which shows that when admitted to the hospital, Mr. Chambers did not relate anything about an electric shock, but rather described chest pain of three days duration. I also note the section foreman's testimony that on December 5 Mr. Chambers complained of chest pain upon entering the mine before he began working (Tr. 96, 97). In addition, on the discharge summary dated December 30, 1985, Dr. Baysal, described chest pain on admission as having been present for 24 hours and said that Mr. Chambers did not allege an electrical shock until December 16, ten days after his hospital admission (Exhibit C).

Dr. Baysal's subsequent turnabout with respect to when Mr. Chambers first told him about the alleged shock, is not convincing. Even apart from the fact that the Secretary failed to produce Dr. Baysal to testify in these proceedings thereby resulting in his unavailability for cross-examination by the operator, Dr. Baysal's contradictory statements fall far short of providing a basis for the Secretary to sustain her burden of proving a shock occurred. In addition, Mr. Chambers had no evidence of burns and he never was unconscious (Tr. 36-38). Based upon the foregoing, I conclude Mr. Chambers did not suffer

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an electrical shock and therefore, the operator committed no violation in failing to report it.

I reject the Solicitor's argument (p. 11 of her brief) that even if an electrical shock did not occur, a violation occurred because the operator was obliged to report Mr. Chamber's chest pains. The MSHA publication "Information Report on 30 C.F.R. Part 50" February 1980 attached to the Solicitor's brief as Government Exhibit 7, states in pertinent part at page 6:

"* * * The MSHA management concept on a dividing line between injury and illness states that an injury results from a recognizable single incident, i.e., a worker harmed by a single incident would be injured.
* * *"

The Solicitor attempts to describe the heart attack as a single event which had to be reported. But she offers no evidence to show when the heart attack occurred and cannot equate the particular chest pains Mr. Chambers experienced at the mine with the precise onset of the heart attack, since he had been having such pains long before he went to work on December 5. Therefore, these chest pains were not a recognizable single incident within the meaning of the regulations and MSHA publication.

Finally, the Commission's decision in Freeman Mining Company, 6 FMSHRC 1577 (July 1984), is of no benefit to the Solicitor here. In that case the Commission referred to an injury as "an act" that damages, harms or hurts, 6 FMSHRC at 1578. Once again, there is no such single act present in this case. And the issue of causal nexus is not involved here as it was in Freeman. If an electrical shock had occurred here, there would be no question that it was work related, which was the question presented in Freeman. If there had been a shock, the only inquiry would be whether it had any of the prescribed consequences such as medical attention or lost work days. Even assuming an electrical shock had occurred, I still would not find a violation. Medical attention and lost work days resulted from a heart attack, which the great weight of the evidence demonstrates was in turn caused by long-standing diabetes and heavy smoking, not from the electric shock as the Secretary alleges.

Accordingly, I conclude there was no violation and that Citation No. 2899820 must be VACATED, and that the penalty petition be dismissed insofar as this citation is concerned.

As indicated above, the briefs filed by counsel which were most helpful, have been carefully reviewed. To the extent they are inconsistent with anything herein, they are rejected.

