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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.

GARDEN CREEK POCAHONTAS  
COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. VA 88-9  
A.C. No. 44-04517-03595

Docket No. VA 88-10  
A.C. No. 44-04517-03596

Docket No. VA 88-11  
A.C. No. 44-04517-03598

Virginia Pocahontas No. 6 Mine

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia for  
Petitioner;  
Marshall S. Peace, Esq., Assistant General Counsel,  
Island Creek Corporation, Lexington, Kentucky for  
Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Garden Creek Pocahontas Company (Garden Creek) with 18 violations of the regulatory standard at 30 C.F.R. 50.20(a) for the failure to report certain alleged occupational injuries to the Federal Mine Safety and Health Administration (MSHA). The general issue before me is whether Garden Creek violated the cited regulatory standard in any of these cases, and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

At hearing the Secretary moved for the approval of a settlement agreement with respect to four of the citations at bar, Citation Nos. 2758998, 2759549, 2759650, and 2759655. She has submitted sufficient information to show that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly an order will be incorporated in this decision approving the proposed settlement and directing payment of \$80 in penalties for the cited violations.

The specific issue before me in the 14 remaining citations is whether the injuries suffered by the miners were "occupational

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injuries" which Garden Creek was required to report to MSHA pursuant to the regulatory standard at 30 C.F.R. 50.20(a). That standard provides in relevant part as follows:

Each operator shall maintain at the mine office a supply of MSHA mine accident injury and illness report form 7000A1 ... each operator shall report each accident, occupational injury or occupational illness at the mine ... the operator shall mail completed forms to MSHA within 10 working days after an accident or occupational injury occurs or an occupational illness is diagnosed.

The specific facts surrounding the alleged violations are not in substantial dispute and are set forth below:

Citation No. 2758999

Miner Leonard Mitchell was injured at the No. 6 Mine on September 14, 1987. He was attempting to lift a heavy object when he strained something in his lower right side. As a result of this injury Mitchell visited a physician who diagnosed abdominal muscle strain, prescribed Flexeril 10 mgs., (a muscle relaxer), and applied heat to the affected area.

Citation No. 2759648

Miner Van E. Smith was injured at the No. 6 Mine on January 8, 1987. He was apparently beating on a rock dust hose to loosen clogged dust, and accidentally got rock dust in his eye. As a result of this injury Smith visited a physician who diagnosed chemical conjunctivities in the left eye. The physician prescribed PolyPred for several days.

Citation No. 2759651

Miner Jerry L. Barrett was injured at the No. 6 Mine on March 3, 1987. Barrett had bent over to pick up an object that was frozen to the ground and injured his shoulder. As a result of this injury Barrett visited a physician who diagnosed right intrascapular strain, and prescribed Soma Compound (a pain reliever and muscle relaxer) and Darvocet (a pain reliever).

Citation No. 2759652

Miner Phillip Keene was injured at the No. 6 Mine on March 10, 1987. Keene was tightening a bolt using his foot for leverage, and sprained his right knee. As a result of this injury Keene visited a physician who diagnosed right knee sprain, wrapped the knee in an Ace bandage and prescribed Motrin (a pain reliever).

Citation No. 2759653

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Miner Kenneth R. Hicks was injured at the No. 6 Mine on March 10, 1987. Hicks was attempting to lift a heavy object when he felt a pain in his right chest. As a result of this injury Hicks visited a physician who diagnosed musculoskeletal strain of the chest wall, took an x-ray, and prescribed Tylenol No. 3 (a pain reliever) and Soma Compound (a muscle relaxer and pain reliever).

Citation No. 2759654

Miner Bobby L. Richardson was injured at the No. 6 Mine on March 16, 1987. Richardson was attempting to remove a pipe from machinery when the pipe came loose and crushed his left index finger. As a result of this injury Richardson visited a physician who diagnosed a crushing injury to the left index finger, took an x-ray, cleaned and bandaged the finger, applied a cold pack, and prescribed Darvocet (a pain reliever). Richardson had the prescription filled and used the medication.

Citation No. 2759657

Miner David Crouse was injured on May 5, 1987 at the No. 6 Mine. Crouse accidentally struck the back of his left hand with a hammer. As a result of this injury Crouse visited a physician who diagnosed a contusion of the left wrist and hand. The physician took an x-ray of the hand and prescribed Motrin (a pain reliever). Crouse had the prescription filled and used the medication.

Citation No. 2759659

Miner Randall F. Skeens was injured at the No. 6 Mine on June 24, 1987. As Skeens was exiting a bus he strained his back. As a result of this injury Skeens visited a physician who diagnosed musculo-skeletal strain. The doctor recommended rest, application of a heating pad, and prescribed Flexeril (a muscle relaxer).

Citation No. 2759658

Miner Larry D. Hale was injured at the No. 6 Mine on May 8, 1987. Hale was attempting to return a rock dust car onto the track with a bar when he strained his back. As a result of this injury Hale visited a physician who diagnosed acute lumbosacral strain and prescribed Soma Compound (a pain reliever and muscle relaxer).

Citation No. 2288707

Miner Linda Lester was injured at the No. 6 Mine on February 5, 1987. Lester was lifting cribs overhead to hand them to a miner standing on a ladder and strained her back. Lester visited a doctor as a result of this injury. The doctor diagnosed left paralumbar muscle strain, recommended a heating pad and rest, and prescribed Nalfon 600 mg. (a pain reliever).

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Citation No. 2288708

Miner Billy R. Lester was injured at the No. 6 Mine on May 20, 1987. Lester had lifted a bucket and felt a sharp pain in his left shoulder. As a result of this injury Lester visited a doctor who diagnosed a sprain of the left shoulder, gave Lester a steroid injection and prescribed Motrin (a pain reliever). Lester had the prescription filled and used the medication.

Citation No. 2288709

Miner Clarence Auville was injured on May 12, 1987 at the No. 6 Mine. Auville apparently was lifting a motor when he developed pains in his right side. As a result of this injury Auville visited a physician who diagnosed acute back strain, x-rayed Auville, and prescribed Flexeril (a muscle relaxer).

Citation No. 2288711

Miner Michael J. Lester was injured at the No. 6 Mine on September 1, 1987. While Lester was riding in a mine buggy he hit his head against the canopy and sustained a neck injury. As a result of the injury Lester visited a doctor who diagnosed a contusion to the head, severe sprain of the neck, and an axial compression injury of the neck. Lester was "given therapy" and was also x-rayed and given a prescription for valium (a medication for management of "anxiety disorders" and also for the relief of skeletal muscle spasm).

Citation No. 2759660

Miner Harvey Keith Keene was injured at the No. 6 Mine on June 22, 1987. Keene was lifting a bucket and apparently pulled a groin muscle. As a result of this injury Keene visited a doctor who diagnosed acute right groin muscle strain and applied an ice pack compress on the injured area with directions to apply a warm compress after 24 hours. The doctor prescribed Valium (a medication for management of "anxiety disorders" and for relief of skeletal muscle spasms).

The parties also agreed to the following stipulations:

With regard to each of the subject citations, the injury referred to in the body of the citation was to a miner and occurred at a mine, for the purposes of 30 C.F.R. 50.2(e).

With regard to each of the subject citations, the medication referred to in the body of the citation was a prescription medication; a written prescription for that medication was given to the individual by a physician during the course of an office visit.

With regard to Citation Nos. 2759654 and 2759657 (Docket No. VA 88-9), and Citation No. 2288708 (Docket No. VA 88-11), it is stipulated that the prescription was filled and the medication was taken by the individual to whom it was prescribed.

The injuries referred to in each citation were not in fact reported to MSHA within 10 working days of occurrence, pursuant to 30 C.F.R. 50.20 and 50.20-1.

Respondent abated each violation by completing MSHA Form 7000-1 entitled "Mine Accident, Injury, and Illness Report," and mailing it to MSHA.

MSHA Guidelines (government Exhibit Nos. 15 and 16) from 1980 and 1986 constitute MSHA's interpretations of the Part 50 regulatory reporting requirements.

The injuries referred to in the subject citation, if they are in fact reportable, would be reportable as a result of the use of a prescription medication and not for any other medical reason.

As previously noted, 30 C.F.R. 50.20(a) requires a mine operator to mail a report for each "occupational injury" to MSHA within ten days after the injury occurs. The regulation at 30 C.F.R. 50.2(e) defines the term "occupational injury" as "any injury to a miner which occurs at a 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 injury, temporary assignment to other duties, or transfer to another job".

"Medical treatment" which, if administered, renders an injury an "occupational injury" and thus reportable to MSHA, is distinguished from "first aid" at 30 C.F.R. 50.20-3(a):

(a) Medical treatment includes, but is not limited to, the suturing of any wound, treatment of fractures, application of a cast or other professional means of immobilizing an injured part of the body, treatment of infection arising out of an injury, treatment of bruise by the drainage of blood, surgical removal of dead or damaged skin (debridement), amputation or permanent loss of use of any part of the body, treatment of second and third degree burns. Procedures which are diagnostic in nature are not considered by themselves to constitute medical treatment. Visits to a physician, physical examinations, x-ray examinations and hospitalization for observation, where no evidence of injury or illness is found and no medical treatment given, do not in themselves constitute medical treatment. Procedures which are preventive in nature also are not considered by

themselves to constitute medical treatment. Tetanus and flu shots are considered preventative in nature. First aid includes any one time treatment and follow-up visit for the purpose of observation of minor injuries such as cuts, scratches, first degree burns and splinters. Ointments, salves, antiseptic, and dressing to minor injuries are considered to be first aid.

It is not disputed in these cases that the medications noted in each of the 14 remaining citations was a medication for which a prescription was written during the course of a visit to a physician's office.

The Secretary maintains that she has consistently construed the term "medical treatment" to include cases where a prescription medication is used, except where "a single dose or application of a prescription medication is given on the first visit merely for relief of pain or as a preventive treatment for a minor injury." According to the Secretary this interpretation was initially articulated in a 1980 Information Report on Part 50, of her regulations and was reiterated in a 1986 revision of the Report (Ex. GÄ15 and GÄ16).

The Secretary observes that section 50.20Ä3(a) provides that medical treatment includes, but is not limited to, the examples given. The regulation provides that "... [v]isits to a physician, physical examinations, x-ray examinations ... do not in themselves constitute medical treatment ...where no evidence of injury or illness is found...". The Secretary notes that the physicians here rendered a specific diagnosis of injury and, as a result of the injury, prescribed medication. She also observes that none of the charges in the citations at bar fall within the "single-dose" exception.

If the Secretary's proffered interpretation of the cited standard is applied hereto (i.e. the 1980 Information Report on part 50 and the 1986 revision of the report) then the use of the prescribed medication would no doubt constitute "medical treatment" within the meaning of part 50 and render the injury an "occupational injury" reportable to MSHA under the provisions of 30 C.F.R. 50.20(a). The Secretary maintains that her views on this interpretation of her regulations are entitled to controlling weight unless plainly erroneous or inconsistent with the regulation, citing *Eula v. Tallman* 380 U.S. 1 (1965) and *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, (D.C.Cir.1986), as authority.

Garden Creek argues on the other hand that the Secretary's proffered interpretation of the term "medical treatment" is indeed inconsistent with her regulations and accordingly should not be given any weight. This argument is premised on the fact that the regulations, at section 50.20Ä3, explicitly set forth only one situation (in the case of eye injuries) in which the use of

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prescription medication in itself constitutes "medical treatment". According to the Garden Creek argument, it may therefore reasonably be inferred that MSHA considered and rejected the inclusion of the use of other prescription medications alone as sufficient to constitute "medical treatment" for any other injury. Garden Creek further argues that MSHA has attempted to improperly expand the scope of her regulations through the use of an "informational report" and, implicitly, the procedural requirements for the promulgation of regulations set forth in Section 101(a) of the Act and in section 553 of the Administrative Procedure Act.

The Respondent's position is clearly the more persuasive. Under the doctrine *expressio unius est exclusio alterius*, the specific mention of one thing in a statute or regulation implies the exclusion of other things not mentioned. *Public Service Co of Colorado v. FERC*, 754 F2d 1555 (10th Cir.1985); *Tom v. Sutton*, 533 F2d 1101 (9th Cir.1976); See also *Sutherland Stat Const.* 47.23 and 31.06 (4th Ed). In section 50.203(a)(5)(ii) the Secretary has stated in plain and unambiguous language that treatment of only one specific type of injury (i.e. eye injuries) by use of a prescription medicine would constitute "medical treatment" of that injury within the meaning of Part 50. Thus by specifically mentioning in her regulations that the treatment of eye injuries by use of a prescription medicine constitutes "medical treatment" for purposes of the Part 50 reporting requirements, the Secretary has implicitly excluded the treatment of all other injuries by use of prescription medicine alone from the term "medical treatment" under Part 50.

The Secretary's attempted amendment through "informational reports" is thus clearly erroneous and inconsistent with her regulations. Such an amendment must comport with the procedural requirements of section 101(a) of the Mine Act and Section 553 of the Administrative Procedure Act. Since the Secretary has conceded that the injuries referred to in the citations would be reportable under Part 50 only because of the use of a prescription medication and for no other reason it is clear that all of the remaining 14 citations except Citation No. 2759648, must fail.

Citation No. 2759648 is unique in that it involves an eye injury for which a prescription was written. Under section 50.203(a)(5)(ii) "medical treatment" for eye injuries includes removal of imbedded foreign objects, the use of prescription medications or other professional treatment. In this case the evidence shows that a miner, Van Smith, suffered an eye injury at the No. 6 Mine on January 8, 1987, while beating on a rock dust hose. As a result of this injury Smith visited a physician who diagnosed chemical conjunctivities of the left eye and prescribed PolyPred.

Respondent argues however that in accordance with the regulatory language the Secretary has the burden of proving that a prescription medication was actually used by the miner and that the

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Secretary has failed in her burden in that regard. In support of its position, Respondent notes that although it has been stipulated that the prescription in this case, PolyPred, was written by the physician the evidence does not show that the miner actually used the medication. Indeed the evidence shows that this miner did not seek reimbursement for this prescription pursuant to his insurance coverage.

The Secretary argues that it may nevertheless be inferred that the medicine was used on the basis that the prescription was written by the physician. However an inference cannot be raised from a proven fact unless a rational connection exists between such fact and the ultimate fact presumed. Moreover an inference may not be drawn from one occurrence to another that is not specifically connected merely because the two resemble each other, but must be linked by the chain of cause and effect and common experience. See 29 Am Jur 2d Evidence 162. There is no such linkage here and the proposed inference cannot therefore be made. I therefore conclude that the Secretary has not met her burden of proving that the prescriptive medicine was actually used in this case. Even assuming, arguendo, that the inference were permitted, I find that this evidence would in any event be outweighed by the inference of non-use arising from the failure of the miner to have applied for reimbursement for purchase of the prescription. Accordingly Citation No. 2759648 must in any case be vacated for insufficient evidence.

ORDER

Citation Nos. 2758998, 2759549, 2759650, and 2759655 are affirmed. Garden Creek Pocahontas Company is directed to pay a civil penalty of \$80 with 30 days of this decision. Citation Nos. 2758999, 2759648, 2759651, 2759652, 2759653, 2759654, 2759657, 2759658, 2759659, 2288707, 2288708, 2288709, 2288711, and 2759660 are vacated.

Gary Melick  
Administrative Law Judge  
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