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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. CENT 88-63 A.C. No. 32-00491-03506
v.	Falkirk Mine
FALKIRK MINING COMPANY, RESPONDENT	

DECISION

Before: Judge Cetti

This case is before me upon petition for civil penalty 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 Falkirk Mining Company (Falkirk) with 1 violation of the regulatory standard at 30 C.F.R. 50.20(a) for the failure to report an alleged occupation injury to the Federal Mine Safety and Health Administration (MSHA).

On April 16, 1987, MSHA inspector Iszler issued Citation No. 2831514 to Falkirk at its mine in Underwood, North Dakota. The citation charges that Falkirk failed to report an occupational injury of one its employees, Ronald S. Weisenberger, in violation of 30 C.F.R. 50.20(a).

The citation charges as follows:

> Records indicate this mine did not report to MSHA an occupational injury on form 7000-1. Mr. Ronald Weisenberger received a job related back injury on 6/16/86, saw a chiropractor on the 17th but did not return to work on the 18th. He took vacation time on 6/18, 19, 20, 23, 24 and returned to work on the 25th. Mr. Doug Herper with MSHA Education and Training performing the audit has indicated a violation of Section 50.20(a) exists. It is suggested form 7000-1 for this incident be completed and mailed to MSHA as required.

The violation was terminated by Falkirk reporting the alleged occupational injury on Form 7000-1 which it mailed to MSHA "under protest".

Pursuant to agreement of the parties the case was submitted on a stipulation of facts and briefs. The parties filed the following stipulation of facts:

The parties, by and through their undersigned counsel, do hereby stipulate to the following as relevant facts that may be accepted as being true and verified:

STIPULATION OF FACTS

1. Ronald S. Weisenberger ("Weisenberger") is employed by the Falkirk Mining Company at its Falkirk Mine in Underwood, North Dakota as a Utility Person and has held this position since January 2, 1980.

2. On June 16, 1986, at approximately 7:22 a.m., Weisenberger strained his lower back while helping to install a one-ton overhead crane on the ceiling of a building at the Falkirk Mine.

3. Weisenberger completed his shift, which ended at 8:00 a.m.

4. After completing his shift, Weisenberger went home and slept until about 6:00 p.m. When he got up, his back was stiff; so, he went to see a chiropractor, Dr. Lester, who is located in Bismarck.

5. The procedure performed by Dr. Lester did not help Weisenberger's back. In fact, the procedure made his back sorer than it was before. As a consequence, Weisenberger went to see a medical doctor, Dr. Johnson, at the Quain and Ramstad Clinic in Underwood, North Dakota. Dr. Johnson said Weisenberger had pulled a muscle in his lower back and prescribed a pain reliever and muscle relaxants but did not place any restrictions on Weisenberger's ability to work.

6. Before Weisenberger saw Dr. Lester, he could have worked on June 17 and 18, 1986 and performed his normal job duties. After Weisenberger saw Dr. Lester, he might not have been able to perform all of his normal job duties on those days.

7. Prior to June 16, 1986, Weisenberger scheduled vacation on June 19 through 24, 1986.

8. On June 16, 1986, Weisenberger asked and was given permission to take June 17 and 18, 1986, as vacation days, because his sister, who lives in Portland, Oregon, was coming to town, and because he wanted to attend the jubilee festival in Tuttle, North Dakota.

9. Attached hereto as Exhibit 1 and made a part hereof is a true and correct copy of the instructions for the Mine Accident, Injury and Illness Report -- MSHA Form 7000-1 which are still in use.

10. Prior to December, 1986 neither the Federal Mine Safety and Health Administration nor the Federal Mine Enforcement and Safety Administration published any document which interpreted "medical treatment" as used 30 CFR Part 50 to include chiropractic.

11. Attached hereto as Exhibit 2 and made a part hereof is a copy of Citation No. 2831514 which was issued by MSHA to the Falkirk Mining Company on April 16, 1987.

12. Attached hereto as Exhibit 3 and made a part hereof is a true and correct copy of the Conference Worksheet prepared by J.W. Ferguson of MSHA in connection with the incident in controversy.

DISCUSSION

30 C.F.R. 50.20(a) requires that an operator report an occupational injury to MSHA within (10) working days after the occupational injury occurs. The regulations specifies that the operator is to use MSHA's Form 7000-1 in making such reports.

"Occupational Injuries" is defined in 30 C.F.R. 50.20(a) as follows:

> . . . 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 an injury, temporary assignment to other job duties, or transferred to another job.

In this this case it is undisputed that Falkirk's employee on June 16, 1986 strained his lower back while helping to install a one-ton over head crane on the ceiling of a mine building approximately 30 minutes before he completed his midnight shift. He went home slept all day until he awoke with a stiff back. His stiff back was sore and painful so he went to see a chiropractor for treatment that would give him relief. When the chiropractor's treatment did not give him the relief he needed

(actually made his back sorer) he went to see a medical doctor, Dr. Johnson, at the Quain and Ramstad Clinic in Underwood, North Dakota. Dr. Johnson diagnosed his back condition as a pulled muscle in his lower back and administered medical treatment consisting of a prescribed pain reliever and muscle relaxants.

The most reasonable inference to be drawn from the stipulated facts is that the injured employee sustained injuries of his lower back consisting of a pulled muscle. After sleeping all day his injured back was so stiff and sore he went to see a chiropractor to obtain relief and when the chiropractor's treatment did not produce the desired relief he was still in need of treatment that would give his back relief. He obtained treatment from the medical doctor because his need for treatment of the condition that resulted from the original injury as well as any relief that may have been desirable from the increased pain caused by the chiropractor's treatment.

I am therefore satisfied from the evidence presented and the reasonable inferences to be drawn from the established facts that we have in this case a miner who sustained an on the job injury at a mine for which medical treatment was administered. The injury was not reported within the required time. Consequently I find there was a violation of 30 C.F.R. 50.20(a) as alleged in Citation No. 2831514.

When the parties file their stipulated facts they attached as part of the record three exhibits. Exhibit 1 which is discussed in stipulation No. 9, is a copy of the form and instructions for the Mine Accident, Injury and Illness Report--MSHA Form 7000-1. This form was in use at the time of Mr. Weisenberger's June 16, 1986 back strain. Exhibit 2 is a copy of Citation No. 2831514 which is the citation in question and Exhibit 3 which is a copy of the conference worksheet prepared by J.W. Ferguson of MSHA in connection with the incident and citation in controversy.

With respect to Exhibit 3 the Solicitor in his brief points out that the belief or opinions of investigators and supervisors held, at various points in time, on the subject of whether the violation did or did not exist, are not relevant nor are they reasonably calculated to lead to admissible evidence under Rule 2060 of the Federal Rules of Civil Procedure.

This principal has been enunciated by the Courts in a number of decisions. For example, in United States v. AT&T, 524 F.Supp. 1381 (D.C. 1981), the defendants wished to buttress the proposition that they acted reasonably, in light of FCC decisions and policies, by eliciting the testimony of the Commissioners. The Court denied them the opportunity, stating:

> "Extrinsic evidence as to how and why the FCC reached its decisions and what it intended thereby - either by Commissioner's speaking in their individual capacities or by employees of the FCC - are irrelevant to the question whether defendants' compliance was reasonable."
> ID. at 1387 (emphasis added).

The Court noted that "[i]t is likewise clear that inquiry into such matters would not yield relevant evidence," and that "it makes no difference - it is not relevant - what a particular Commissioner or staff member might say today about what he understood a particular decision to mean".

Similarly, in SEC v. National Student Marketing Corp., 68 F.R.D. 157, 160 (D.D.C. 1975), aff'd 538 F.2d 404 (D.C. Cir. 1976). cert. denied 429 U.S. 1073 (1977), defendants sought various internal documents in order to explore the "intent, reason, and motive" behind any agency memorandum. The Court found that "[n]one of the requested documents is relevant", stating:

> "The intent [or purpose] of a governmental agency . . . is a rather limited concept which cannot be determined from a random search of documents authored by agency staff or individual [officials]. . . while [officials] may in fact respect the staff's recommendations, they are not bound by them nor do such recommendations reflect the position of the agency as a whole. The great bulk of the documents requested by defendants. . . consist, with a few exceptions of memoranda among individual [agency officials], their legal assistants, and the [agency] staff. Therefore they are of little, if any, value and cannot be considered an official expression of the will and the intent of the [agency]."

In yet another action the plaintiff requested Federal Power Commission staff memoranda in various matters as to which plaintiff claimed that the Commission favored its legal position. The Court of Appeals for the Second Circuit denied disclosure, "because the views of individual members of the Commission's staff are not legally germane, either individually or collectively to the actual making final orders. They could be grossly misleading, when applied to the ultimate findings and conclusions reached by the FCC as a whole, because at best theyare only advisory in character. International Paper Co. v. Federal Power Commission, 438 F.2d 1349, 1358 (2d Cir.) cert denied, 404 U.S. 827 (1971)(emphasis added).

Here, as in the cited cases, an internal document reflecting a staff person's proposals, analyses, recommendations, and

conclusions have no value on the issue before me. The fact is that MSHA issued Citation No. 2831514 alleging a violation and has not retreated from its contention.

I have considered the statutory criteria set forth in Section 110(i) of the Act for determining the appropriate penalty for this violation. Under the facts and circumstances stipulated by the parties I find that the $20 penalty proposed by the Secretary is the appropriate penalty for the violation.

This decision was decided, written and issued on the stipulated facts submitted for decision by the parties. Before issuing the Decision I served a copy of my proposed decision on the parties on April 19, 1989, with a notice of intention to issue the decision unless the parties within ten days showed good cause in writing why the Decision should not be issued. The only response has been a motion filed April 26, 1989 to approve a settlement in the amount of $20.00. Neither the proposed settlement nor any other writing filed by the parties shows any good reason or cause why the decision should not be issued. Therefore the decision is issued and the proposed settlement disapproved.

ORDER

Citation No. 2831514 is affirmed. Falkirk Mining Company is directed to pay a civil penalty of $20.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge