FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 5, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2003-16 A. C. No. 46-05868-03596
v.	:	
U.S. STEEL MINING CO., LLC, Respondent	:	Pinnacle Prep Plant

DECISION

Appearances: James F. Bowman, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Mt. Hope, West Virginia, on behalf of Petitioner;
Anthony F. Jeselnik, Esq., U.S. Steel Mining Company, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against U.S. Steel Mining Company, LLC ("U.S. Steel"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a single violation of a regulation requiring the reporting of mine accidents, illnesses and injuries, 30 C.F.R. § 50.20(a), and proposes a civil penalty of $55.00. A hearing was held in Beckley, West Virginia. For the reasons set forth below, I find that U.S. Steel did not violate the regulation, as alleged, and vacate the citation.

Findings of Fact

On May 12, 2002, David Martin, a miner employed by U.S. Steel at its Pinnacle Preparation Plant, reported to the Mine Safety and Health Administration ("MSHA") that he had suffered an occupational injury two months earlier, on March 11, 2002, and that U.S. Steel had refused to submit a report of the injury to MSHA. Robert Blair, an MSHA inspector, reviewed MSHA's files and determined that no report of the injury had been submitted. He visited the plant on May 13, 2002, spoke to management officials, and determined that, on March 14, 2002, Martin reported to U.S. Steel that he had suffered an occupational injury on March 11, 2002. U.S. Steel did not submit a report of occupational injury to MSHA because it believed that Martin was not injured at the mine. Blair entertained U.S. Steel's explanation for reaching that

conclusion, but determined that U.S. Steel failed to prove that a reportable occupational injury had not occurred.

Blair issued Citation No. 7211045, citing U.S. Steel for violating 30 C.F.R. § 50.20(a), which requires that mine operators report occupational injuries to MSHA within ten working days after they occur.[1] He described the violation in the "Condition or Practice" section of the citation as follows:

> The operator fail[ed] to submit to the District Office a 7000-1 Form, in the required 10 working day [period], for an accident that happen[ed] on 03/11/2002, but was not reported to mine management until 03/14/2002. This was a lost time accident.

Ex. P-1.

Blair determined that the reporting violation was unlikely to result in an injury, that it was not significant and substantial, that it affected one person and that it was the result of the operator's moderate negligence. A civil penalty of $55.00 is proposed for the violation.

<u>The Alleged Injury</u>

Martin had been employed by U.S. Steel for over 30 years. He had a good attendance record and had suffered no previous lost-time work injuries. On March 11, 2002, he was assigned to clean the coal load-out area, which required that he open and close water valves located at the bottom of the raw coal silo. That area was dimly lit and its floor was covered with spilled coal ranging in depth from one to three feet. Martin testified that about 10:30 a.m., as he walked across the coal spillage to reach a water valve, his head struck a steel rod projecting from another valve. His protective "hard hat" was knocked off and he fell against a tank. He felt a "small burning or tingling sensation" in his neck, and rubbed it. He did not experience any pain, thought that he was "OK," and went back to work. Tr. 38-39. He did not report to management that he had been injured.[2] About 1:30 p.m., he was experiencing a severe headache and shortness of breath. He determined that he could not continue working, and called Alan Couch, a fellow miner, and asked to meet with him. Couch was a certified emergency medical technician (EMT),

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[1] The term "occupational injury" is defined in the regulations, 30 C.F.R. § 50.2(e), as follows:

> (e) *Occupational injury* means 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 duties or transfer to another job.

[2] U.S. Steel had a policy that all work injuries are to be reported immediately. Ex. P-7.

and was frequently consulted when miners suffered injuries.

Martin met Couch at a nearby building, where Couch stored some medical equipment in a locker. Ray Green, another miner, was also present. Couch examined Martin and measured his blood pressure, obtaining a disturbingly high result of 198/125. A second test administered approximately 10 minutes later produced similar results, 198/120. Couch believed that he asked Martin the history of his symptoms, but does not recall anything unusual being said. Martin did not tell Couch about hitting his head, and did not complain to Couch about neck or shoulder pain. Tr. 63-64, 107. Couch was concerned that Martin's blood pressure was high. Green told Martin that he should see a doctor before he suffered a heart attack or stroke, a comment that caused Martin to become concerned because his father had died of a brain aneurism. Couch and Martin agreed to meet on the hour for the remainder of the shift, to monitor Martin's blood pressure. After Couch departed, however, Martin decided that he would seek medical attention rather than return to work.

Martin called his wife, who checked with a doctor and advised him that the doctor was available to see him. Martin proceeded to the office of shift foreman Thurman Chapman and told him that he needed to see a doctor because his head hurt, his blood pressure was high, and he was short of breath. He did not state or indicate in any way that he had hit his head or suffered an occupational injury. Tr. 42-43, 138. Chapman later reported that Martin told him that he had been suffering from headaches for several days. Tr. 124-25. Martin denied making such a statement. Tr. 59, 62. Martin stated that if he did not come to work the next day, he would take a "personal day" off. Under the union contract, miners have five personal days that they can take off during the year, with pay. If they provide reasonable notice, they are virtually entitled to take the day off. Management has very little control over their use of personal days.

When Martin left the mine, he drove to the office of Dominador Lao, M.D. His blood pressure was measured at 174/102, and he complained of severe headache, sinus pressure, a sore throat and sinus headaches. Tr. 44; ex R-1. Dr. Lao did not testify at the hearing, and his notes in the medical records are largely illegible. However, his nurse's notes of Martin's complaints are clear and reflect that Martin did not mention hitting his head or suffering a work-related injury, which Martin acknowledged. Ex. R-1; tr. 75. Martin did not return to work, and has not worked since March 11, 2002.

That evening, Couch called Martin's home and spoke to him about 7:00 p.m. Couch was upset with Martin for not telling him that he was leaving and was going to "chew him out." [3] During that conversation, which Martin does not recall, he told Couch that he had hit his head

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[3] When Martin did not meet Couch for the follow-up blood pressure check, Couch tried to reach him by radio and became concerned when Martin failed to respond. Thinking that Martin might have lost consciousness, Couch searched for him. When he returned to his locker to change the battery in his radio, Couch encountered an electrician who told him that Martin had left to seek medical attention.

while working in the coal silo. Tr. 97. This was the first time that Martin had mentioned to anyone that he had suffered a work-related injury.

On March 12, 2002, Martin underwent a computed tomography examination (CT scan) of his head and cervical spine. The results of the test were unremarkable, i.e., minimal degenerative changes from the C4 to C7 level and some spurring encroaching on the neural foramina at the C5-6 and C6-7 levels. Ex. P-4. Dr. Lao was notified of the results. On March 13, 2002, Martin again saw Dr. Lao, who re-examined him and discussed the results of the CT scan. Dr. Lao told Martin that it was possible that he had a ruptured vertebra and a pinched nerve, and asked him if he had hit his head or neck at work. Martin, for the first time, made a connection between the March 11 incident and his current symptoms, and told Dr. Lao about hitting his head on the valve in the coal silo area. Dr. Lao asked whether an accident report had been submitted and Martin replied in the negative. Dr. Lao prepared a report, which Martin took to the plant that afternoon.

U.S. Steel's Decision Not to Submit an Accident Report

The next day, March 14, 2002, Martin went to the mine and requested that an accident report be prepared for him. He was referred to Barry O'Bryan, coordinator of outside services. Martin told him of the March 11 incident and that Dr. Lao thought that he might have a pinched nerve. O'Bryan declined to submit a report, in part, because Martin had left the mine without reporting the incident.[4] O'Bryan noted that some people have non-work related accidents and then try and get workers compensation coverage, and told Martin that he would likely get compensation, but that U.S. Steel would protest it. A union official later referred Martin to MSHA, and his visit to MSHA's office on May 12, 2002, triggered Blair's inspection the following day. Martin, in fact, did receive workers compensation benefits, although U.S. Steel's challenge to his claim apparently has not been finally resolved.

O'Bryan refused Martin's request to initiate an internal U.S. Steel report of an accident because he did not believe that Martin had been injured at the plant on March 11, 2002. As he explained at the hearing, "the stories were so contradictory, I refused." Tr. 140. In three days, the story had changed "radically" from a "sickness with blood pressure problems to an accident." Tr. 142. Donald Presley, Respondent's safety manager, testified that he did not submit an occupational injury report to MSHA because he, too, believed Martin's claim was false, a conclusion shared by other U.S. Steel mangers.

Their joint conclusion was based upon several factors. First, Martin did not report the injury when it occurred. Second, he had not told Couch or Green that he had suffered an injury when Couch, an EMT, examined him for purposes of assessing his physical condition. As O'Bryan explained, "If I'm going to an EMT and hit my head, I'm going to tell the EMT,

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[4] O'Bryan declined to prepare an internal U.S. Steel report of injury, which would have been forwarded to its safety manager, Donald Presley. Presley was responsible for preparing and submitting MSHA injury reports and workers compensation reports.

especially if my head is hurting." Tr. 148. Third, Martin had not told Chapman that he had suffered an injury during their fairly lengthy conversation on March 11, 2002. Fourth, Chapman reported that Martin had said that he had been suffering from headaches for several days, indicating that they were not brought about by an injury suffered that day. Fifth, Martin had requested a personal day off if he did not appear for work the next day. Personal days are highly valued because management has very little control over their use. Most miners hoard their personal days so that they can use them when regular vacation days would generally not be approved, e.g., holiday weeks, hunting season, or other times when many miners might want to take leave. Tr. 155-58. As O'Bryan explained, "I have never – I've been a manager for 26 years. I have never had a union employee tell me to give him a [personal] day if he's had an accident. I mean, it just totally wouldn't happen. You don't take [personal] days." Tr. 156. He was also highly skeptical of the fact that Martin's injury report was made after he had seen Dr. Lao, who was "pretty well known as a workmens comp doctor."[5] Tr. 149. O'Bryan testified that he "believed absolutely" that Martin's version of events was changed by his visit to Dr. Lao and that Dr. Lao's involvement "had a lot to do" with the decision. Tr. 149, 166.

The Citation

Blair visited the preparation plant on May 13, 2003, and met with O'Bryan. Presley, the safety manager, participated by phone. O'Bryan and Presley told Blair that they didn't believe that Martin had suffered an injury at the mine. While he did report on March 14, that he had been injured on March 11, they stated that, on March 11, he reported only that he had a headache and high blood pressure and left work to consult a doctor. Tr. 13, 22. Blair apparently accepted Martin's claim at face value.[6] He concluded that there had been a "lost time accident," that no report had been filed within the prescribed time, and issued the citation. He testified that he issued the citation because Presley and O'Bryan offered "no evidence whatsoever" to support their conclusion that Martin was not injured at the mine. Tr. 14. "They did not prove" that Martin did not sustain an occupational injury on March 11, 2002. Tr. 19.

Conclusions of Law - Further Factual Findings

The Applicable Law

The Secretary has the obligation to prove each element of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v. Keystone Coal Mining Corp.,*

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[5] O'Bryan testified that, in the previous three years, the plant had experienced over 30 cases of compensation claims based upon carpal tunnel syndrome, nearly half of the work force, and that "the vast majority of those cases went through Dr. Lao. He is pretty well know as a Comp doctor." Tr. 149.

[6] Blair testified that he didn't investigate Martin's claim. Tr. 20.

151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). In order to establish that U.S. Steel violated 30 C.F.R. § 50.20(a), the Secretary was obligated to prove that an occupational injury occurred,[7] and that U.S. Steel was aware of the injury and failed to report it to MSHA within the required time period. It is undisputed that Martin reported an injury to U.S. Steel on March 14, and that U.S. Steel did not report the injury to MSHA. The critical issue, which is hotly contested, is whether Martin suffered an occupational injury at U.S. Steel's mine on March 11, 2002.

The Alleged Occupational Injury

Martin testified that he sustained an injury when he struck his head while working in the coal silo. Medical records also lend support to his claim. Dr. Lao's largely illegible records indicate that when prompted on March 13, 2002, Martin told him about striking his head on March 11. A magnetic resonance imaging (MRI) examination performed on April 8, 2002, disclosed a herniated cervical disk with compression of the left nerve root, a condition not inconsistent with his claim. Ex. P-5. A medical consultant retained in conjunction with Martin's workers compensation claim concluded in a July 17, 2002, report that Martin "sustained a significant injury to his cervical spine in the [March 11] work related incident." Ex. P-6, p. 3.

Other facts, largely undisputed, suggest that Martin did not suffer an injury at the mine. Particularly troubling is his failure to mention striking his head to Couch or Dr. Lao. He

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[7] Respondent argues that the citation refers to an "accident," and since this incident clearly was not an accident, as defined in the regulations, the citation should be vacated. *See* 30 C.F.R. § 50.2(e). This argument is rejected. Blair's inappropriate use of the word "accident" in the body of the citation was not misleading, because it is clear from the references to a 10 day reporting period and a "lost time" incident, that the citation was issued for failure to report an occupational injury. Respondent also argues that the Secretary has failed to prove that Martin suffered an occupational injury, as that term is defined in the regulations. In order to establish an occupational injury, the Secretary must prove that a miner suffered an injury at a mine, for which he received "medical treatment," as opposed to diagnostic tests, or that prevented him from performing his normal work duties on a day following the injury. 30 C.F.R. § 50.2(e); *Garden Creek Pocahontas* Co., 11 FMSHRC 2148 (Nov. 1989); Consolidation *Coal Co.*, 11 FMSHRC 966, 972 (June 1989). Martin suffered from a very serious chronic medical condition, high blood pressure, for which he received considerable medical treatment, and which most likely played a major role in his inability to work after March 11, 2002. Neither party presented expert medical testimony on the causation issues, i.e., whether Martin received medical treatment for the blow to his head, or whether he would have been able to return to work but for the injury resulting from that impact. It appears, however, that Martin did obtain medical treatment, physical therapy and traction, as well as medication, for a diagnosed injury to his cervical spine. Tr. 79; ex. P-6. The crucial question is whether he suffered such an injury on March 11, while working at Respondent's facility.

consulted those individuals for medical treatment, and their diagnosis of his condition necessarily included an exploration of the duration and possible causes of his symptoms. His failure to relate that he struck his head is extremely difficult to understand. His request for a personal day off is also highly inconsistent with the claim that he suffered an on-the-job injury. Questions of credibility and some shortcomings in the medical evidence also weigh against finding that Martin was injured at the mine.

Though Martin impressed me as a reasonably credible witness, his testimony regarding the accuracy of his recollection was inconsistent.[8] He was under considerable physical and emotional distress on the afternoon of March 11, 2002, suffering from a severe headache and shortness of breath, and was concerned about his high blood pressure in light of his family history. Under the circumstances, his claimed inability to recall certain events is understandable.[9] However, when asked about his alleged statement to Chapman that he had been suffering from headaches for three or four days, he claimed to have a clear recollection that he made no such statement during their meeting. Tr. 59, 62. When questioned about a notation in Dr. Lao's records that might be interpreted as a report by Martin that he had suffered from headaches for several days prior to March 11, rather than denying counsel's interpretation of the notes he explained that he typically suffered from sinus headaches during that time of year. Tr. 76.

The MRI report evidences a condition consistent with an injury that could have been caused by a blow to the head. However, that examination was not done until April 8, and is of little probative value as to when or where such an injury may have been sustained.[10] The July 17 medical report[11] was related to his workers compensation claim, and is based, perhaps in

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[8] Martin was taking six medications at the time he testified, which he stated made him feel light-headed, dizzy and disoriented. Tr. 34. However, those effects were not apparent during his testimony. He recalled details, such as the results of the blood pressure tests performed on the morning of his alleged injury, with accuracy and consistency.

[9] When questioned about his failure to tell Dr. Lao's nurse about striking his head, he explained that he "wasn't thinking right, just didn't think of it." Tr. 75. He also stated that he did not tell Dr. Lao about it on March 11 or 12 because he "just couldn't remember," and that he didn't tell the individuals who administered the CT scan on March 12 because he "didn't think of it - and has trouble remembering anyway." Tr. 78, 81. He also did not recall the substance of the conversation with Couch on the evening of March 11.

[10] Martin apparently suffered a similar injury in 1992, as a result of raking leaves. Ex. P-6, p. 2

[11] The MRI exam and consultant's report were not done until after the time that the Secretary contends that U.S. Steel's reporting obligation expired. It is unclear when U.S. Steel obtained copies of the medical records and reports.

significant part, on what appears to be an erroneous premise, i.e., that Martin experienced an "acute onset of neck pain and stiffness following that injury, associated with stinging sensation in his neck." Ex. P-6, p. 1. Martin's testimony does not support that statement. He testified only that he briefly experienced "a small burning, tingling sensation" in conjunction with striking his head. Tr. 38.

Considering all of these factors, I find that the Secretary failed to prove, by a preponderance of the evidence, that Martin suffered an occupational injury at Respondent's mine on March 11, 2002.

I have also considered the fact that Martin told Couch that he had struck his head during their telephone conversation on the evening of March 11, 2002, which supports the injury claim. While O'Bryan and other U.S. Steel managers discounted that report because it followed Martin's visit to Dr. Lao, it appears that Dr. Lao did not prompt a connection between the alleged incident and Martin's symptoms until March 13, 2002. However, I do not find this fact sufficient to alter my conclusion that the Secretary failed to carry her burden of proof.

Respondent's Failure to Report the Claimed Injury was Justified

Assuming for purposes of argument, that Martin suffered an occupational injury, I find that U.S. Steel's determination not to submit a report within the required time frame was justified and did not violate the regulation.

The Secretary, in her brief, relies upon an excerpt from a December 1998 MSHA publication, identified as "Report on 30 CFR Part 50," which is intended to provide "guidance" to operators on their reporting obligations and specifically addresses "questionable injuries." Page 38 of the report purportedly contains the following question and answer:[12]

> Question 58. Should an operator report questionable injuries?
>
> Answer: Operators have an obligation to investigate all injuries happening or alleged to have happened on mine property. After an investigation has been completed, the operator must make the determination as to whether the incident is reportable to MSHA. *If he has any doubt, he should report.* If the operator's conclusion is that no incident occurred, then there is nothing to report. (emphasis in Petitioner's Brief).

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[12] The Secretary did not offer the report in evidence and did not submit a copy with her brief. She represents that the "report is published by the National Mine Health and Safety Academy and is intended for 30 CFR classroom training." Pet. Br., n.5 at p. 13. The report appears to be the latest MSHA publication of instructional guidelines for completing the injury reporting form. *See Consolidation Coal Co., supra,* 11 FMSHRC at 970.

This guideline is consistent with the regulation and is entitled to deference. *See, e.g., Garden Creek Pocahontas Co.*, *supra*, 11 FMSHRC at 2151. U.S. Steel's witnesses were very convincing in relating their belief that Martin did not sustain an injury while working on mine property on March 11, 2002. I find that their determination not to submit a report of injury to MSHA was based upon a firm conviction that no injury had occurred, a belief that they hold to this date. Their belief, based upon the factors discussed above, was reasonable. Under the Secretary's instructions, an operator who reasonably concludes that an occupational injury did not occur has "nothing to report."

The Secretary counters that U.S. Steel did not conduct an adequate investigation of the claimed injury, and therefore, cannot take advantage of the guidance. Operators are required to investigate all occupational injuries. 30 C.F.R. § 50.11. However, the thorough investigation and detailed report mandated by the regulation, which includes an explanation of the injury and a description of steps taken to prevent a similar occurrence in the future, is required only where there has been a determination that an occupational injury occurred. Here, U.S. Steel conducted a reasonable investigation and concluded that no occupational injury had occurred. It entertained Martin's report and interviewed virtually all of the persons with whom Martin had come into contact on the pertinent date. There were no physical manifestations of the occurrence or the claimed injury. Martin testified, in essence, that his hard hat was "pretty beat up" and would not have had any markings on it that could have helped to confirm his claim. Tr. 70. There is no evidence that an inspection of the scene of the claimed incident, when it was reported several days after it was alleged to have occurred, could have provided any useful information.

Conclusion

The Secretary failed to prove, by a preponderance of the evidence, that Martin suffered an occupational injury on March 11, 2002. In addition, U.S. Steel's managers conducted a reasonable investigation of Martin's claim, and concluded that Martin had not suffered an occupational injury. As instructed by the Secretary's guidelines, there was nothing for U.S. Steel to report, and it cannot be sanctioned for failing to report the alleged injury.

ORDER

The Secretary has failed to carry her burden of proving that Respondent violated 30 C.F.R. § 50.20(a), as alleged in Citation No. 7211045. The citation is, accordingly, **VACATED**.

Michael E. Zielinski
Administrative Law Judge

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