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MSHA V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 27, 1989

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

v. Docket No. VA 87-27

CONSOLIDATION COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Ford, Chairman; Backley, Doyle and Nelson, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $$ 801 et seq. (1982)("Mine Act"), the issue before us is whether Consolidation Coal Company ("Consol") violated 30 C.F.R. $ 50.20(a), a standard that requires reporting lost work days resulting from occupational injuries. 1/ In

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1/ 30 C.F.R. $ 50.20(a) states in part:

> Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1.... Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria

in $$ 50.20-1 through 50.20-7.... The operator shall mail completed forms to MSHA within 10 working days after an accident or occupational injury occurs or an occupational illness is

lieu of a hearing, the parties submitted the case for decision on the basis of the written record. Commission Administrative Law Judge James A. Broderick granted the Secretary's motion for summary decision, holding that Consol violated the standard. The judge assessed a civil penalty of $200. 10 FMSHRC 560 (April 1988)(ALJ). We granted Consol's petition for discretionary review. Because we hold that substantial evidence does not support the judge s finding of a violation, we reverse.

Consol owns and operates the Buchanan No. 1 mine, an underground coal mine located on Keen Mountain, Buchanan County, Virginia. Timothy Smith, the miner whose injury gave rise to the allegation of violation, had been employed at the mine since June 24, 1986, as a general inside laborer on the midnight to 8 a.m. shift. Smith's usual duties included building cribbing, loading conveyor belts, shoveling belts and loading cable. 2/ At about 1:45 a.m., on the morning of August 25, 1986, Smith was setting timbers for cribbing in the 2 West left return when his right hand was caught between two timbers. Smith's fellow worker escorted him to the service shaft where he was met by the shift foreman, who took him to the surface. After observing that Smith's hand was swollen and the nail on the right thumb was smashed, the foreman ordered that Smith be driven to Buchanan General Hospital in Grundy, Virginia, a distance of 15 or 20 miles, requiring about 30 minutes' travel time.

At the hospital, Smith was examined by Dr. Yusuf Chanbhry, whose report listed the injury as a "Fracture (R) Hand 5th Finger." JX-4. The report also stated that Smith could return to "light work" by September 1, 1986, and to "regular work" on September 15, 1986. Id. The doctor placed a splint on the finger and referred Smith to an orthopedist, Dr. L. Bendigo, in Richlands, Virginia.

Smith was driven from the hospital back to the mine, arriving there shortly before 5 a.m., and was told by the shift foreman that he could go home. Smith, however, had to wait until the end of the shift for a ride home. Smith left the mine at about 8:45 a.m., and arrived at his home in North Tazwell, Virginia, at about 9:30 a.m. He then telephoned Dr. Bendigo's office, obtained a 2:00 p.m. appointment, and was told to get an x-ray by 1:00 p.m.

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diagnosed.

30 C.F.R. $ 50.2(e) defines "occupational injury" as:

> [A]ny 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/ The facts relevant to Smith's injury and subsequent absence from work are based, except as indicated, upon Smith's deposition testimony under questioning by counsel for the Secretary.

Smith slept for "a few hours," got up about noon, and made the 30 minute drive to Richlands, Virginia, for an x-ray, after which he was seen by Dr. Bendigo, at about 3:00 p.m. Dr. Bendigo's report diagnosed the injury as a fracture of the right 5th finger and subungual hematoma of the right thumb. JX-4. Dr. Bendigo aspirated the thumb, drilling two small holes in the nail to relieve the discomfort, and fitted a hard cast to the palm of Smith's hand and arm. The cast covered Smith's third and fourth fingers, extending from the base of the thumb up the right arm to within about three inches of the elbow. Smith was also fitted with an arm sling and given a prescription for an analgesic, which he had filled that same afternoon. Smith took only two of the tablets, and never returned to the doctor, removing the cast himself several weeks later.

Smith arrived home about 5:00 p.m. and ate dinner "around 6:00 or 7:00 p.m." Dep. 19. He stated that he normally left home for work "a little after 10:00 p.m., and would arrive at the mine "around 11:00 or about 15 after 11:00." Dep. 20. Smith stated that because he "hadn't been in bed very much" he decided, while eating dinner, that he would just call in and tell them I wouldn't be in." Dep. 19. 3/ When Smith was unable to reach Roy Duty, the shift foreman, at Duty's home, to advise him that he would not be coming to work, he called utility foreman Kenny Maxfield at home, telling him he wouldn't be in to work that night. Maxfield replied: "0.K." Dep. 20. Smith testified that he gave no explanation to Maxfield as to why he would not work his shift telling Maxfield that he "was going to take a Consol day." Smith did not offer Maxfield any further explanation because "I didn't think there was any need to, because they said we could take two days when we wanted them." 4/ Dep. 23.

Smith explained why he decided to take a "Consol day" in the following exchange with counsel for the Secretary:

> Q. Why did you decide to take a Consol day? Why didn't you go to work that night?

3/ In response to questioning by counsel for the operator, Smith stated he normally got about seven hours sleep between shifts but on the evening in question, while eating dinner, he had decided I was comfortable at home, and decided I'd stay there." Dep. 38.

4/ Smith described a "Consol day" as two days per year given to employees, in addition to other holiday or vacation days, to be taken by an employee as desired, for any personal reason, including illness, subject only to the personnel requirements of Consol for

the particular shift missed. Dep. 21-26 36.38. Mine Superintendent Joseph Amar, in his Affidavit, described Consol days" as two paid days per calendar year, taken at the discretion and prerogative of the employee that can be requested at any time by the employee, subject to the "sufficiency of manpower that exists on the shift the employee expects to miss." Amar stated that there is no requirement that the request be in writing or that it be submitted "within a certain amount of time prior to an employee's request." Affidavit 1-2.

A. Well, I hadn't had much sleep, and I just felt like, you know -- I don't like working, without having the amount of sleep that I like to have.

Q. Did you feel that you could safely work?

A. Yeah. I could have worked. I mean I've went in to work with a lot less sleep.

Dep. 22.

On his return to work the next day, Smith told Roy Duty that he had not had much sleep and since he had two days that he had to use sometime, he had decided to take the day off. When asked by Duty if he could have come to work, Smith replied, "Yes." Dep. 23, 31.

On September 2, 1986, Consol's mine safety inspector, Richard French, filed with MSHA a Mine Accident, Injury and Illness Report Form 7000-1, reporting Smith's occupational injury. The form indicated "0" as the Number of Days Away from work" after the injury. 5/ As required, a copy of the form was kept at the mine office. See 30 C.F.R. $ 50.20-1; JX-2.

During April 1987, MSHA Inspectors Kenneth Shortridge and Ronald Blankenship conducted an audit at the Buchanan No. 1 mine of all the Forms 7000-1 filed by Consol in order to review Consol's compliance with Part 50. In reviewing the form filed for Smith's accident, Shortridge noticed that Smith had not worked the shift following the injury. Shortridge stated that when he asked why Smith did not work on the shift following the injury, he was told that Smith "hadn't had his sleep" and had asked for and was granted the next day off. Dep. 21. 6/

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5/ 30 C.F.R. $$ 50.20-1 through 50.20-7 list the instructions and criteria for completing MSHA Form 7000-1. With regard to Item 30 on Form 7000-1, number of days away from work, section 50.20-7(c) states:

> Item 30. Number of days away from work. Enter the number of workdays, consecutive or not, 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 or onset of illness or any days on which the miner would not have worked even though able to work. 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.

6/ Under questioning by counsel for Consol, Shortridge stated that he had not interviewed Smith at the time of the audit and had not talked with him since that time. Dep. 10. Shortridge also stated he had not

In December 1986, MSHA had issued instructional guidelines for completing MSHA Form 7000-1. 7/ The 1986 guidelines replaced guidelines issued by MSHA in 1980. Shortridge stated that he used the 1986 guidelines in conducting the Part 50 audit at the mine. Dep. 12. Shortridge also stated that, as he interpreted the 1986 guidelines for determining the number of days away from work, only if an employee had "pre-arranged" a day off prior to the occurrence of an injury could the employee's absence not be counted as a lost-time accident. Id. 8/

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reviewed any of the medical reports on Smith's injury.

7/ The 1986 instructional guidelines are contained in MSHA Report on 30 C.F.R. Part 50. The guidelines for determining the number of lost workdays to be indicated in Item 30 of form 7000-1 state:

> Item 30: Enter the number of workdays, consecutive or not, that the employee would have worked but could not because of the occupational injury or illness. The number of days away from work should not include the day of injury or onset of illness or any days that the employee would not have worked even though able to work. 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. If an employee, who is scheduled to work Monday through Friday, is injured on Friday and returns to work on Monday, the case does not involve any "Days Away From Work" even if the employee was unable to work on Saturday or Sunday. If this same employee had been scheduled to work on Saturday, even if that Saturday constituted overtime, the Saturday would be counted in the "Days Away From Work", and the case would be classified as Lost Workday Case. [An injured or ill employee cannot avoid accumulating lost workdays by being placed on vacation or personal leave. If the employee had been scheduled to work the days the employee lost due to his or her injury or illness would be counted as lost workdays.] Do not include in the lost workday count holidays or any days on which the mine was not operating for any reasons.

(Emphasis in original). JX-7, p.7. The two sentences within the brackets were not contained in the 1980 guidelines. The rest of the paragraph is essentially the same.

8/ The 1986 guidelines also state that "If the employee had been scheduled to work, the days the employee lost due to his or her injury ... would be counted as lost workdays." The preceding sentence states that an injured employee "cannot avoid accumulating lost work days by being placed on vacation or personal leave." This restriction has no

Based on his conversations with Consol's management and his interpretation of the guidelines, Shortridge concluded that Smith's accident and consequent loss of sleep "indirectly" caused him to miss a day's work. Dep. 21-22. Therefore, Shortridge issued to Consol a citation charging a violation of section 50.20(a), which states:

> An inaccurate mine accident, injury and illness report, Form 7000-1 was submitted to MSHA concerning an accident on 8/25/86 that injured Timothy W. Smith which resulted in one lost workday. The accident was reported as no lost workdays.
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> This citation was issued as the result of a Part 50 audit.

In support of her motion for summary decision, the Secretary argued that Smith's absence was caused by his lack of sleep due to the time spent seeking medical treatment for his injury and that his absence was required to be reported as a lost workday. Br. 9. Consol contended that Smith's decision not to work was entirely voluntary.

The judge upheld the violation, finding that, as a result of a significant injury to his hand, Smith had to receive initial and specialized medical treatment which resulted in his being awake "during nearly all of the period he usually slept." 9 FMSHRC at 563. The judge found Smith's opinion that he could have worked, but chose not to do so, "of some significance" but "not conclusive." Id. He further found "not determinative, or even relevant," the fact that both Smith and Consol regarded the day off as a "Consol day." Id. The judge concluded that "the lost work day resulted from a loss of sleep, which resulted from the necessary medical care which resulted from the injury," and that it should have been reported as a day away from work because of the injury. Id.

On review, Consol argues that Smith's decision not to work was entirely voluntary and uninfluenced by management, and that his testimony demonstrates that he was able to work the next shift had he so desired. The Secretary argues that the judge's decision is supported by substantial evidence of record and that Consol violated section 50.20 by failing to report Smith's absence as a lost workday.

Section 50.20(a) requires each operator to "report each accident [or] occupational injury at the mine ... in accordance with the instructions and criteria of $$ 50.20-1 through 50.20-7." Section 50.20-7(c) requires the operator to "[e]nter the number of workdays ... on which the miner would have worked but could not because of

bearing on the "direct consequence" relationship that must be established between an injury and a lost workday (see p.7 infra), but we note that it might cloud the issues in this case if read in isolation. In any event, we need not consider in this case the effect of this restriction on lost work days reporting since the challenged report by Consol was made and submitted several months before the 1986 guidelines were issued.

occupational injury." Thus, the question before the judge was whether Smith's absence from work on the day following the injury constituted a day away from work because of the occupational injury. The judge concluded that it was. The question before us on review is whether substantial evidence supports this conclusion.

In resolving the question, we first look to the language of the Secretary's regulations to determine what constitutes a "lost workday" reportable on MSHA Form 7000-1. 30 C.F.R. $ 50.1 explains that the purpose of requiring operators to maintain and file with MSHA reports of occupational injuries is to implement MSHA's authority "to investigate and to obtain and utilize information pertaining to accidents, injuries and illness occurring or originating in mines." Specifically as to "days away from work," section 50.1 states: "MSHA will develop data respecting injury severity using days away from work activity ... as criteria." Under section 50.20-7(c), an operator is required to report as "days away from work" the number of workdays on which the miner "would have worked but could not because of occupational injury." The last sentence of section 50.20-7(c) provides that a lost workday should not be counted if it is not "a direct consequence of the injury or illness" and specifically excludes days lost solely because of the unavailability of medical personnel for initial observation or treatment. This exclusion recognizes that the unavailability of medical treatment is not a "direct consequence" of an injury and that it does not reflect the severity of the injury involved, MSHA's stated concern under this regulation. In other words, MSHA recognizes that other factors may result in lost work days, apart from the severity of the injury. Similarly, where, as here, the scheduling of medical treatment results in loss of sleep, such an event bears no relationship to the severity of the injury involved and is tantamount to another form of unavailability of medical treatment.

The Secretary's instructional guidelines also emphasize that there must be a direct cause and effect relationship between the "days away from work" reported under Item 30, and the inability of the injured miner to work as the result of an occupational injury. Under both the 1980 and 1986 guidelines, the operator is instructed to "Enter the number of work days ... that the employee would have worked but could not because of the occupational injury." (Emphasis in original.) Both guidelines reiterate that, if the lost workday is not the "direct consequence of the injury or illness, the day should not be counted as a day away from work." JX 7, p.7.

We find no basis either in the Secretary's regulations or

guidelines to support a conclusion that, absent a direct cause and effect relationship between an injury and a lost workday, an employee's failure to work following an injury necessarily constitutes a reportable day away from work. Thus, to establish a violation, the Secretary must prove that such a connection exists, i.e., that the lost workday is the direct consequence of the injured miner's inability to work as the result of the injury. In the case at hand, this means that in order to establish the alleged violation of section 50.20(a), the Secretary must establish that Smith "would have worked but could not because of occupational injury." 30 C.F.R. $ 50.20.7(c).

The judge found a violation of section 50.20(a) based on his conclusion that the lost workday resulted from the loss of sleep caused by the time and travel involved in receiving necessary medical treatment for the injury. 9 FMSHRC at 563. We agree with the judge that Smith's injury required treatment that, because of the appointment time, resulted in a loss of sleep. We find, however, that the record does not support a conclusion that because of the loss of sleep, Smith could not work the next day.

Smith's own words weigh heavily against such a finding. When asked by counsel for the Secretary why he decided to take a Consol day following the accident, Smith replied that, while he "had not had much sleep," he "just didn't feel like going to work that day." Dep. 22, 23. When asked by counsel the critical question of whether he could have worked safely the day following the accident, Smith replied "Yeah. I could have worked" and then voluntarily added "I've went into work with a lot less sleep." Dep. 22. In addition, Smith stated that when he was later asked by Consol's mine safety inspector Richard French whether he could have worked the day following the accident, he answered "yes," and when asked by counsel for the Secretary whether he had told management personnel that the had been "up all day" and was having "some pain and ... had taken medication," Smith stated that he could not recall having said that. Dep. 31, 33-34.

Smith's unrebutted testimony, rather than establishing that because of the injury and related loss of sleep he could not have worked the next day, establishes that he considered himself capable of working safely. The sole evidence with respect to Smith's loss of sleep and its effect on his ability to work the next shift was that of Smith himself. A fair summary of his testimony is that although he could have worked, he decided that, rather than work, he would use one of the two Consol days available to him. Dep. 22. 9/

The Mine Act imposes on the Secretary, in a civil penalty proceeding, the burden of proving the violation alleged by a preponderance of the evidence, and imposes a substantial evidence test for Commission review. See 30 U.S.C. $ 823(d)(2); Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n.7 (January 1981). Here, the Secretary chose to bring her case, and the judge's decision rests, not on the severity of Smith's occupational injury, or the difficulty of performing his regularly assigned duties because of that injury, but on the loss of sleep incurred in receiving medical treatment as a result of the injury. To prove her case, the Secretary was required to establish that as the result of his loss of sleep,

Smith could not have worked the

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9/ Smith testified that he was away from home obtaining medical treatment for a total of four to five hours during the thirteen-hour period between his arrival home from work and his usual time of departure back to the mine sometime after 10:00 p.m. Although he was obviously inconvenienced as to his normal routine, had he not decided early in the evening to stay home, the actual time available to him for rest would not have been significantly less than his usual seven-hour period.

next shift. As we have noted, the sole witness on this dispositive issue was Smith himself who testified that, although he had not gotten his usual amount of sleep, he could have safely worked his next shift, and who voluntarily reinforced that opinion by stating he had worked previously "with a lot less sleep." If Smith did not mean to say what he clearly said, the Secretary had full opportunity while deposing Smith to correct the record, but did not do so. Nor do we find any record inference or evidence to suggest that Smith's decision not to work, or his testimony at deposition, was motivated by concern for his job or by any other inducement on the part of management. Having produced no probative evidence to overcome Smith's assertions that he could have worked despite his loss of sleep, we conclude that the Secretary has failed to meet the requisite burden of proof necessary to establish the alleged violation.

The substantial evidence standard of review requires a weighing of all probative record evidence and an examination of the fact finder's rationale in arriving at the decision. Se Universal Camera Corp. v. NLRB, 30 U.S. 474 (1951); Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977). Judges must sufficiently summarize, analyze and weigh the relevant testimony of record, and explain their reasons for arriving at their decision. See Secretary v. Michael Brunson, 10 FMSHRC 594 (May 1988), Bjes v. Consolidation Coal Co., 6 FMSHRC 1411 (June 1984), Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Here, the judge summarily dismissed without explanation as "not conclusive" Smith:s testimony that he could have worked and he ignored Smith's statements that he could have worked safely, that he had done so in the past on less sleep, and that he had told his shift foreman that he could have worked. While the judge found that the lost workday resulted from loss of sleep, there is no evidence in this record that Smith:s loss of sleep prevented him from being able to work safely the day after his injury. Smith stated unequivocally that he could have worked safely and his testimony is the entire evidence of record on this issue. While we have previously stated that we do not lightly overturn a judge's factual findings and credibility resolutions, neither will we affirm such findings if there is no evidence or dubious evidence to support them. See e.g., Krispy Kreme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB 635 F.2d 1255, 1263 (7th Cir. 1980).

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Accordingly, and for the foregoing reasons, we find that the judge's decision is not supported by the substantial evidence of record and we reverse.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Commissioner Lastowka, dissenting:

While performing his duties as a general inside laborer at Consolidation Coal Company's Buchanan No. l Mine, Timothy Smith suffered a fractured finger when his right hand was caught between two timbers being set as roof support. Because Smith worked on the midnight t.o 8:00 a.m. shift, the medical treatment necessitated by his injury was administered during the period of his daily routine normally devoted to sleep. As a result, Smith, with notice to Consol, stayed home rather than reporting to work for his next scheduled shift.

My colleagues conclude that the administrative law judge erred in upholding the Secretary of Labor's assertion that Consol's failure to report Smith's absence as a lost workday resulting from his injury violated the Secretary's accident and injury reporting regulations. They conclude that the judge's finding that Smith's absence occurred because of his injury is not supported by substantial evidence. Instead, they conclude that a "direct cause and effect relationship between [the] injury and [the] lost workday" was not established by the Secretary. Slip op. at 7.

I must respectfully disagree. In my opinion, the Secretary's interpretation of her regulation concerning the reporting of accidents and injuries is reasonable and deserving of weight. Secretary on behalf of Bushnell v. Cannelton Industries, 887 F.2d 1432 (D.C. Cir., 1989). Furthermore, the judge's application of the law to the facts not only is supported by substantial evidence, but also is eminently sensible. Therefore, the judge's opinion should be affirmed.

The dispute in this case is not over whether Smith suffered an occupational injury; Consol duly reported Smith's injury to the Secretary. Instead, the issue is whether in reporting the injury Consol accurately represented that the injury had not resulted in a lost workday. It seems to me that the material facts establish on their face, that Smith's injury resulted in a lost workday, to wit: while performing his job Smith's hand was caught between two timbers; upon "observing that Smith's hand was swollen and the nail on the right thumb was smashed.'" Smith's foreman sent him to the hospital (slip op. at 2); Smith's injury was diagnosed as a "Fracture (R) Hand 5th Finger," Exh. JX-4); the hospital report recommended a return to light work in one week and a return to regular work in three weeks (id.); later that same day, Smith's hand was x-rayed confirming a fracture of his little finger, his thumbnail was aspirated, his arm placed in a cast from his hand to within three inches of the elbow,

and pain medication prescribed (10 FMSHRC at 561); since Smith worked the midnight to 8:00 a.m., shift, this medical treatment was administered during the time of day he normally slept; therefore, following his injury Smith stayed home from work for one scheduled shift by invoking his right to a day of personal leave. 10 FMSHRC at 562. (Consol does not provide sick leave and Smith had not yet earned any vacation time. id.)

On these facts, I believe that it certainly was reasonable for the Secretary to insist, and for the judge to find, that Consol should have reported Smith's absence as a lost workday caused by his accident. The majority concludes otherwise, however, and their rationale must therefore be examined. As discussed below, I find the grounds relied on for reversal unconvincing.

The violation in this case turns on whether Item 30 on MSHA Form 7000-1 was correctly completed. Item 30 provides: "Number of Days Away From Work (if none, enter 0)." As previously indicated, Consol represented that Smith was away from work "0 days despite his absence on the day following his injury. My colleagues base their rejection of the Secretary's and the judge's determinations that Smith's one day absence should have been indicated in item 30 on their interpretation of 30 C.F.R. 50.20-7(c), which sets forth "criteria" for completing item 30. This section provides:

> Item 30. Number of days away from work. Enter the number of workdays, consecutive or not, 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 or onset of illness or any days on which the miner would not have worked even though able to work. 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.

(Emphasis added).

Although the majority concludes that the emphasized portion of these instructions proves fatal to the Secretary's charge of violation, I submit that their conclusion stems from a too narrow reading of the Secretary's reporting requirements and a shortsighted view of the facts. Reduced to its essence, the majority's position is that Smith's absence on the day following his injury was not due to his injury, but rather to a lack of sleep, and that even given his loss of sleep Smith still "could" have worked. In their view, Smith's lack of sleep is an intervening event interrupting the "direct cause and effect relationship between an injury and a lost workday" that is the intended focus of item 30. Slip op. at 7. Thus, in their view, the Secretary did not prove "that the lost workday [was] the direct consequence of the injured miner's inability to work as the result of the injury." Id.

On the basis of the record before us, I would find, as did the Secretary and the judge, that Smith's absence was a direct consequence of his injury. In fact, no reason or motivation for his absence other than his injury is even remotely suggested or alluded to in the record. My colleagues downplay and diminish

the impact of the disruption in Smith's daily routine caused by his injury and medical treatment (see. e.g., slip op. at 8 n.9), but this view proves too grudging. To make the point, l must ask: if one of my colleagues were to suffer a similar injury on the job and found it necessary to spend the night obtaining necessary medical treatment, would they not be surprised to have their absence from work on the following day challenged on the ground that it was not caused by their work-related injury?

Insofar as Smith's statement that he "could have worked" is concerned, I believe that the judge's assessment that this remark "is of some significance, but is not conclusive" (10 FMSHRC at 563), is closer to the mark than is the majority's view that it proves fatal to the Secretary's case. Smith himself

explained that he wondered why he was being asked this question. Smith deposition at 31; 10 FMSHRC at 562. Furthermore, in purely literal terms, Smith's response is probably true; despite his injury and lack of sleep, it was physically possible for him to report to work. I doubt, however, that the "could not work" phraseology in the Secretary's instructional criteria was meant to be read that an injured miner must be totally incapacitated before any resulting "day away from work" must be reported. Such a constrained reading would mean that only the most debilitating injuries absolutely precluding a miner's arrival at the job site would be reportable under item 30. Nothing in the Secretary's regulations, instructions or Form 7000-1 suggests that such a narrow scope was intended, and the Secretary disavows this reading of her requirements. Instead, a reasonable reading must be given to this safety and health regulation and under such a reading, and the facts before us, the view that Smith could not work his next shift due to his injury certainly is plausible. Secretary v. Cannelton Industries, supra, 867 F.2d at 1435, 1438.

My colleagues acknowledge that they are bound by the substantial evidence standard of review. Slip op. at 9; 30 U.S.C. $823(d)(2)(a)(ii)(1). They nevertheless proceed to substitute their finding as to whether Smith "could" work for that of the judge by claiming that "there is no evidence" to support the judge's finding that Smith's lost workday resulted from the loss of sleep caused by his injury. Slip op. at 9 (emphasis in original). Contrary to this assessment, however, ample support for the judge's finding is found in the extensive record evidence describing Smith's injury, the nature of the medical treatment necessitated by the injury and the major disruption in Smith's daily routine caused by the injury and its treatment. Smith's statement that he could have worked, viewed by the majority as "the entire evidence of record on this issue" (Slip op. at 9), was correctly viewed by the judge as only part of the record evidence bearing on the factual question before him. Because the evidence relied on by the judge constitutes "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion", the substantial evidence standard imposed on us by the Mine Act requires affirmance of the judge's finding. Consolidated Edison Co. v. NLRB, 805 U.S. 197, 229 (1938); Chaney Creek Coal Corp. v. FMSHRC, 866 F.2d 1421, 1431 (D.C. Cir. 1989).

In the end, the soundness of the judge's conclusion is perhaps most effectively demonstrated by setting forth his own words. As he stated:

> 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. ****

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 workday 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. $ 50.2O(a).

10 FMSHRC at 563.

I believe that this analysis by the judge reflects a reasonable interpretation of the reporting requirement and arrives at a conclusion supported by substantial evidence of record. Accordingly, I dissent from the reversal of the administrative law judge. l would affirm Judge Broderick's finding of a violation.

James A. Lastowka, Commissioner

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