FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 11 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2014-219-M
v.	:	
NORTHSHORE MINING COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Althen, Commissioners

DECISION

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Secretary of Labor is appealing an Administrative Law Judge's determination that Northshore Mining Company ("Northshore") was not required to report an eye injury sustained by one of its miners to the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Judge concluded that the injury was not reportable under 30 C.F.R. § 50.20(a)[1] as an "occupational injury" within the meaning of 30 C.F.R. § 50.2(e).[2] The Judge dismissed two citations MSHA had issued to Northshore for

[1] 30 C.F.R. § 50.20(a) requires that

> [t]he 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 ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.

[2] 30 C.F.R. § 50.2(e) defines "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 an injury, temporary assignment to other duties, or transfer to another job."

failing to report the injury and for subsequently filing an inadequate report. 37 FMSHRC 2352, 2383-89 (Oct. 2015) (ALJ).

For the reasons that follow, we reverse the Judge's decision and assess the penalties stipulated to by the parties.

I.

Factual and Procedural Background

On May 23, 2013, a miner working at Northshore's taconite pellet plant felt a small particle on his right eye. *Id.* at 2384. When he was not able to flush it out with a saline solution or with tap water, a member of Northshore management took him to a clinic. *Id.* at 2384, 2387. There a doctor flushed the eye and told the miner to use artificial tears and over-the-counter painkillers. *Id.* at 2387. The doctor instructed the miner to come back if he needed further treatment. *Id.* at 2385.

The miner's first scheduled day back at work after the incident was May 29. On that day, the miner worked for four hours and then used "personal time" to take the rest of the day off. *Id.* at 2387. The miner used this time to go back to the clinic.

At the clinic, a doctor found that the miner's right eye remained irritated. Using a slit lamp and magnification, he located a foreign body on the miner's cornea, and removed it with a specialized instrument called an eye foreign body spud.[3]

The miner returned to work the following day, informed his supervisor that he had visited the clinic again, and provided a doctor's note. Sec'y Ex. 17, at 3-4. The doctor's note stated that the miner "should be off work [on May 29]" in order to rest the eye and keep "it closed as much as possible", but could return to work on May 30 with a "precaution about returning immediately [to the doctor] if the eye is not better." *Id.* at 3.

"Occupational injuries" must be reported to MSHA pursuant to 30 C.F.R. § 50.20(a).[4] Northshore did not report the miner's eye injury. The failure to report the injury was discovered by MSHA after it audited the operator's records. MSHA issued the operator Citation No. 6556658 alleging a violation section 50.20(a), attributable to a moderate degree of negligence.

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[3] A "spud" is "[a] blunt triangular knife used for removing foreign bodies from the cornea." 37 FMSHRC 2388 at n.33 (*citing The American Heritage Medical Dictionary* (2007, 2004) Houghton Mifflin Company, http://medical-dictionary.thefreedictionary.com/spuds (last visited September 11, 2015.))

[4] Form 7000-1 is the form used by mine operators to report occupational injuries or illnesses to MSHA. The form must be submitted within ten working days of an occupational injury. 30 C.F.R. § 50.20-1.

A second citation No. 6556659, was issued by MSHA because the occupational injury investigation report that was filed by Northshore to abate the violation lacked some of the information required by 30 C.F.R. § 50.11(b).[5] The citation stated that the violation had no likelihood of causing an injury or illness, and that the violation was the result of the operator's low negligence. 37 FMSHRC at 2384.

Northshore contested the two citations before a Commission Judge. The Secretary presented documentary evidence obtained in the audit, and the MSHA inspector who performed the audit testified. The operator's sole witness for these citations was the miner's supervisor. The miner who was injured had been terminated from Northshore before the hearing took place and did not appear.[6]

The Judge vacated both citations after concluding that the Secretary failed to demonstrate that the miner received "medical treatment" for the eye injury as defined by 30 C.F.R. § 50.20-3(a)(5)(ii).[7] *Id.* at 2388-89. The Judge acknowledged that the miner was unable to perform his job duties while he was at the medical clinic on May 29, but found that the Secretary did not prove that the miner received "medical treatment" rather than "first aid treatment" because the evidence in the record did not show definitively whether the foreign body was imbedded in the miner's eye. *Id.* at 2389; *see* 30 C.F.R. § 50.20-3(a)(5)(ii) "(Medical treatment cases [for eye injuries] involve removal of imbedded foreign objects, . . .").

On appeal, the Secretary argues that the Judge committed three errors. First, the Secretary argues that the Judge erred by requiring the Secretary to prove two of the outcomes

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[5] 30 C.F.R. § 50.11(b) requires that investigation reports prepared by the operator must include, among other things, the date the investigation began, a description of steps taken to prevent a similar occurrence in the future, and identification of any report submitted under section 50.20.

[6] After the hearing, the Judge issued an order sealing the record in this case. Unpublished Order dated Oct. 9, 2015. In order to protect the miner's privacy, his name has not been used in this proceeding.

[7] Section 50.20-3(a)(5) states that, for eye injuries:

> (i) First aid treatment is limited to irrigation, removal of foreign material not imbedded in eye, and application of nonprescription medications. A precautionary visit (special examination) to a physician is considered as first aid if treatment is limited to above items, and follow-up visits if they are limited to observation only.
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> (ii) Medical treatment cases involve removal of imbedded foreign objects, use of prescription medications, or other professional treatment.

30 C.F.R. § 50.20-3(a)(5)(i)-(ii).

identified in section 50.2(e) as constituting an occupational injury. Second, the Secretary argues that the Judge erred by finding that the foreign body was not imbedded in the miner's eye, and that, in conjunction with that error, he misinterpreted the meaning of "imbedded" and imposed an overly strict burden of proof on the Secretary to "definitively" show that the particle was imbedded. Finally, the Secretary argues that the Judge erred by failing to consider evidence that the miner received professional treatment and prescription medication.

Northshore contends that the Judge properly analyzed the issues. It also argues that several of the articles, definitions, and web materials that the Secretary included in his PDR should not be considered by the Commission because they were not presented to the Judge below.

II.

Disposition

The sole question before the Commission is whether the miner's injury was reportable under 30 C.F.R. § 50.20(a).[8] Upon review, we conclude that the Judge's finding that the miner's injury was not reportable is not supported by substantial evidence.[9] Uncontroverted evidence demonstrates that the miner was unable to work on the day of his second visit to the doctor. The Judge erred by failing to consider this evidence.

Section 50.20(a) requires that all occupational injuries be reported to MSHA. In 30 C.F.R. § 50.2(e), "occupational injury" is defined 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 an injury*, temporary assignment to other duties, or transfer to another job. [Emphasis added.]

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[8] At the hearing, the parties stipulated that if the miner's injury was found to be reportable, the operator would accept the section 50.11(b) violation. Tr. 47-49. The parties also agreed that if the injury was held to be reportable, Northshore would accept the Secretary's proposed gravity and negligence designations and penalties for these violations. Tr. 16.

[9] When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

In *Freeman United Coal Mining Co.*, the Commission stated that "sections 50.2(e) and 50.20(a), when read together, require the reporting of an injury if the injury . . . occurs at a mine and if it results in *any* of the specified serious consequences to the miner." 6 FMSHRC 1577, 1579 (July 1984) (emphasis added). Thus, Commission case law establishes that proving any one of these consequences makes an injury a reportable occupational injury.

In this case, the Judge's inquiry focused almost entirely on whether "medical treatment" as defined by section 50.2(e) was administered to the particle in the miner's eye.[10] As a result of the Judge's narrow focus, he largely ignored the fact that the "inability to perform all job duties on any day after an injury," by itself, constitutes an "occupational injury" under section 50.2(e).

Section 113(d)(2)(A)(iii) of the Mine Act states that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). In order for the Commission to consider an issue on review, the issue "must have been presented below in such a manner as to obtain a ruling" by the Judge. *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 6 (Jan. 2005) (*citing Beech Fork Processing*, 14 FMSHRC 1316, 1320 (Aug. 1992)).

The issue of the miner's inability to perform all of his job duties on the day of his second doctor's appointment arose several times during the hearing below and the Judge clearly had an opportunity to address it. The MSHA inspector testified that the miner's inability to work, by itself, was sufficient to make his injury reportable, and the Judge acknowledged the issue by questioning him specifically about this conclusion. Tr. 301. The operator had the opportunity to cross-examine the inspector about his statements on this issue, but did not do so. In its posthearing brief, Northshore argued that the miner did not miss any time at work due to the injury. The Judge even discussed the miner's inability to work in his opinion, although he analyzed the issue from a perspective of whether a visit to the doctor, by itself, is sufficient to make an injury reportable. 37 FMSHRC at 2388-89.

Thus, the Judge was clearly aware of the issue of the miner's ability to work and made a factual determination about it in his opinion. Consequently, the issue was sufficiently presented below to obtain a ruling.

The uncontroverted evidence demonstrates that the miner was unable to work because of his injury. The "report of workability,"[11] which was signed by the doctor, states that the miner

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[10] The Secretary focused the entirety of his posthearing brief for this citation on whether the taconite particle was "imbedded" in the miner's eye. By directing the Judge's attention away from the issue of the miner's inability to work, the Secretary likely contributed to the Judge's error.

[11] Northshore objected to the report on workability at the hearing on the basis of foundation. Tr. 291-92. However, it did not raise that objection in its brief on appeal and did not dispute the contents of the exhibit.

should not work during the remainder of May 29.[12] Sec'y Ex. 18. The report of workability carries a great deal of weight in our analysis because it reflects a doctor's contemporaneous determination that the miner was unable to do any work for the remainder of the day on May 29.

There is additional evidence in the record which shows that the miner was not able to perform all of his job duties on a day after his injury. The miner's discharge instructions were signed at 11:25 a.m. on May 29, at which point the miner still had 4.5 hours left in his shift. Sec'y Ex. 17, at 2; Tr. at 309-310. The doctor's notes from the miner's second visit reflect that there was some blurring of the miner's vision caused by the procedure. The notes also contain instructions for the miner to stay out of the wind, keep the eye closed as much as possible, and try to sleep. Sec'y Ex. 17, at 3. Northshore does not dispute these facts.

Taken together, these uncontroverted facts demonstrate that the miner was unable to perform all of his job duties for the rest of the day after he saw the doctor on May 29. This finding is dispositive because the inability to work on any day after an injury to a miner at a mine site is specified in 30 C.F.R. § 50.2(e) as establishing an occupational injury which must be reported. As discussed, *supra*, only one of these consequences must occur for an injury to be reportable. The record has established the requisite facts, and Northshore was required to report the miner's injury to MSHA.

Because we conclude that the miner was unable to work on May 29 based on the evidence in the record, we do not reach the questions of whether the particle was imbedded, the attendant issue of whether the additional materials cited by the Secretary in his posthearing brief can be considered, or whether the Judge applied the wrong standard of proof.[13]

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[12] The Judge correctly noted that the fact that the miner was not expected to return to work that day because he used personal time to take the rest of the day off was irrelevant. 37 FMSHRC at 2388.

[13] Commissioner Cohen would reverse the Judge's decision because of an additional reason: 30 C.F.R. § 50.20-3(a)(5) provides that for eye injuries, follow-up visits are considered as "first aid treatment" if they "are limited to observation only," while "medical treatment" includes "other professional treatment" (along with "removal of imbedded foreign objects" and "use of prescription medications"). Hence, irrespective of whether or not the foreign body was technically imbedded in the miner's eye, his second visit to the clinic on May 29 was not "limited to observation only." Because a medical procedure – the removal of the foreign object – was performed on May 29, this visit involved "other professional treatment," pursuant to section 50.20-3(a)(5)(ii). Consequently, the miner received "medical treatment" for his eye injury, and the injury constituted an "occupational injury" within the meaning of section 50.2(e) which Northshore was required to report to MSHA pursuant to section 50.20(a).

III.

Conclusion

We conclude that the miner's injury was reportable, reverse the Judge's determination to the contrary, and affirm both citations. Because the parties have stipulated to all of the remaining elements of both citations and agreed to a penalty amount, we assess a penalty of $117 for Citation No. 6556658 and a penalty of $100 for Citation No. 6556659.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

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