

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 7, 2020

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

v.

KENAMERICAN RESOURCES, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-0211
A.C. No. 15-17741-305075

Mine: Paradise #9

DECISION ON REMAND

Before: Judge Miller

This case is before me upon petition for assessment of a 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. § 815(d) (“the Act”). This case was remanded by the Commission to determine an appropriate civil penalty for Citation No. 8502992, issued pursuant to Section 103(a), with a total proposed penalty of \$18,742.00.

I. HISTORY OF THE CASE

This case was originally assigned to Administrative Law Judge L. Zane Gill. On July 24, 2015, KenAmerican Resources (“KenAmerican”) filed a motion for summary judgment, alleging that the Secretary’s claims were unsubstantiated and that there was no violation of section 103(a) of the Mine Act. That section of the act, states in pertinent part that “no advance notice of an inspection shall be provided to any person,” 30 U.S.C. § 813. KenAmerican’s motion was granted and the citation was vacated. *Sec’y of Labor v. KenAmerican Resources, Inc.*, 37 FMSHRC 1809 (Aug. 2015) (ALJ). On August 25, 2016, following a petition for discretionary review, the Commission found that the summary decision was improper and reversed and remanded the case with instructions to hold a hearing. *Sec’y of Labor v. KenAmerican Resources, Inc.*, 38 FMSRC 1943 (Aug. 2016). After an evidentiary hearing of the case, Judge Gill issued a decision on December 14, 2018, finding that the Secretary failed to establish a violation. *Sec’y of Labor v. KenAmerican Resources, Inc.*, 40 FMSHRC 1544 (Dec. 2018) (ALJ).

Following Judge Gill’s decision, the Commission granted the Secretary a second petition for discretionary review. After briefing and argument, the Commission determined that a violation had occurred as set forth in the citation issued by the Secretary and determined that the case should be remanded for the assessment of a penalty consistent with section 110(i) of the Act. 30 U.S.C. § 821(i). The Commission decision constitutes the law of the case. *See Pepper*

v. United States, 131 S. Ct. 1229, 1250 (2011). Following the unexpected passing of Judge Gill on June 23, 2020, this case was reassigned to determine the appropriate penalty. For the reasons set forth below, I assess the penalty in the amount proposed by the Secretary.

II. ISSUE ON REMAND

On April 20, 2012, MSHA Inspector Doyle Sparks and six other inspectors traveled to KenAmerican's Paradise #9 mine to conduct an investigation in response to a complaint of an alleged hazardous condition. Before the inspectors traveled into the mine to begin their investigation, MSHA inspectors instructed the miners on the surface not to warn underground personnel that MSHA inspectors were present. While inspector Sparks monitored the mine's communication system, he heard an exchange between two miners that appeared to be providing advance notice to the miners underground. Sparks overheard a call from the #4 unit in which a miner asked the dispatcher if there was "company outside," to which the dispatcher responded, "yeah, I think there is." Tr. 23-24, 163-164. Sparks asked the underground miner to identify himself, but received no response. Once underground, Sparks made a second attempt to identify the miner, but again received no response. The Commission found that Holz, the dispatcher, agreed that a miner asked him if "company" was outside and that he understood the unidentified miner's question to be an inquiry into the presence of MSHA inspectors. "Therefore, he knew the question presented a request for advance notice." *Sec'y of Labor v. KenAmerican Resources, Inc.*, 42 FMSHRC 1, slip op. at 2, No. KENT 2013-0211 (Jan. 16, 2020).

Sparks issued Citation No. 8502992 to Respondent pursuant to Section 103(a) of the Mine Act alleging that mine personnel provided advance notice to underground miners that MSHA inspectors were on site during a hazard complaint inspection. Tr.10. Section 103(a) of the Mine Act authorizes the mine inspectors to conduct inspections and investigations of coal and other mines. This section also requires that "In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person...." Similarly, a person who provides advance notice of an inspection may face the possibility of a criminal prosecution. 30 U.S.C 820(3). The citation, after amendment, was issued as a significant and substantial violation and the result of high negligence. The Commission upheld the citation as issued and remanded the case solely for the assessment of civil penalty. The penalty assessment is based upon the Commission's decision on remand and the record in its entirety, including the hearing transcript and the briefs filed by the parties in the case.

III. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). Commission Judges are not bound by the Secretary's penalty regulations. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i).

The Secretary has proposed a penalty of \$18,742.00 for the violation. I have considered and applied the six penalty criteria found in Section 110(i) of the Act. I have reviewed the history of this operator and taken note of the fact that two mine superintendents and a foreman were previously convicted of the crime of providing advance notice at this mine.¹ I have also considered that this is a large-sized operator, and that the parties have stipulated to the ability to pay. No issue was raised by either party about a lack of good faith abatement.

The violation was assessed as significant and substantial and was the result of high negligence. The Commission made no change to these findings in its decision and I accept the findings in determining a penalty. The violation was significant and substantial, given the importance placed on the notice requirement in the Act and that providing notice could result in a criminal prosecution. In addition, giving advance notice allows a mine operator the opportunity to alter violative conditions prior to the arrival of an MSHA inspector and allows the continuation of operations under violative conditions after an inspector departs. Therefore, the gravity of the violation is serious, and the penalty is intended to reflect that it is serious.

The Commission has recognized that “[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Newtown*, 38 FMSHRC at 2047; *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). While the Secretary’s Part 100 regulations evaluate negligence based on the presence of mitigating factors, Commission judges are not limited to that analysis. *Brody*, 37 FMSHRC at 1702-03. Rather, Commission judges consider “the totality of the circumstances holistically” and may find high negligence in spite of mitigating circumstances. *Id.* at 1702. The Commission has recognized that “the gravamen of high negligence is that it ‘suggests an aggravated lack of care that is more than ordinary negligence.’” *Id.* at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

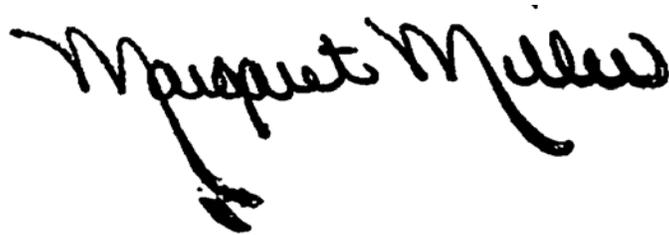
In reviewing the record as a whole and the Commission decision, I find that the designation of high negligence is well supported. The record clearly indicates that an affirmative response was provided to a request for advance notice from an underground miner, even after the inspectors warned the miners at the surface not to engage in that conduct. Management’s failure to instruct or ensure that no advance notice was given prior to inspections constitutes more than

¹ See *KenAmerican Resources*, slip op. at 5 (Jan. 16, 2020)(noting that “two mine superintendents and a foreman working at the Paradise No. 9 mine were previously convicted of the crime of providing advance notice.” (citing *United States v. Gibson*, 409 F.3d 325, 333 (6th Cir. 2005)).

ordinary negligence. *See Ky. Fuel Corp.*, 40 FMSHRC 28 (Feb. 2018) (in which the Commission approved a judge's decision that similarly concluded that high negligence was appropriate due largely to an operator's failure to provide adequate training and materials to prevent a violation). A finding of high negligence is further supported by the circumstances surrounding the violation, in particular the unidentified miner's refusal to identify himself on the phone or in person when Sparks arrived underground and Holz's admission that he knew he was prohibited from providing advance notice of MSHA's presence to underground miners.

IV. ORDER

I have reviewed the record in its entirety and find that the Secretary's proposed penalty is appropriate in this case. Accordingly, Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$18,742.00 within 30 days of the date of this decision.

A handwritten signature in black ink, reading "Margaret Miller". The signature is written in a cursive style with a large, sweeping initial "M".

Margaret A. Miller
Administrative Law Judge

Distribution: (Electronic Mail with Appeal cover sheet)

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