

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

December 14, 2018

MARSHALL JUSTICE,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEVA 2018-697-D
v.	:	PINE CD 2018-05
	:	
	:	
ROCKWELL MINING, LLC,	:	Mine: Gateway Eagle Mine
Respondent.	:	Mine ID 46-06618

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

This discrimination proceeding is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(3). On September 21, 2018, the Federal Mine Safety and Health Review Commission (“Commission”) received a complaint of interference filed by Marshall Justice (“Complainant”) against Rockwell Mining, LLC (“Respondent”). In his complaint, Justice alleges that Rockwell Mining has interfered with his rights as a non-employee miners’ representative to travel on section 103(f) “walkarounds” and to inspect the mine map.¹ After investigating these claims, MSHA chose not to bring a section 105(c)(2) claim against Rockwell Mining. Justice is proceeding pro se. Respondent filed its Motion to Dismiss on October 22, 2018. Thereafter, on October 29, 2018, Chief Administrative Law Judge Robert J. Lesnick assigned me this case. On November 1, 2018, the Commission received Justice’s Memorandum of Support of Claims Marshall Justice Motion to Proceed with 105(c) (hereinafter “Opposition”), in which, among other things, Justice opposes Rockwell Mining’s Motion to Dismiss in the course of 113 pages, including exhibits.

The Commission strongly discourages the disposal of pro se discrimination cases on the face of the complaint. See *Perry v. Phelps Dodge Morenci, Inc.*, 19 FMSHRC 1918, 1920 (Nov. 1996) (“In cases brought by pro se complainants, motions to dismiss for failure to state a claim should rarely be granted. Instead, in such a case, a judge should ensure that he informs himself

¹ On July 6, 2018, Justice submitted the following complaint to MSHA: “Frank Javins refused to provide [the] mine map as requested by Complainant. Respondent has failed to notify Complainant, who is a miner’s representative for Mine No. 4606618 under the Mine Act, with [the] mandatory opportunity to exercise his walkaround rights on MSHA inspections conducted during the day shift repeatedly during the past year, and including several times as indicated on the attached inspection records, during the 30 days prior to the filing of this Complaint[.] Complainant seeks cessation of these Mine Act violations, and award of costs & fees.” (Compl. at 8.)

of all available facts relevant to his decision, including the complainant’s version of those facts”) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). I construe Rockwell Mining’s Motion to Dismiss as a Motion for Summary Decision.² Summary decision is proper only when the entire record demonstrates that “there is no genuine issue as to any material fact” and that “the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b); *see Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). Commission Judges should not grant motions for summary decision “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)); *but see Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that there is no genuine issue for trial unless a rational trier of fact could find for the nonmoving party).

This proceeding is not isolated, as Justice has filed a series of complaints against the operator of the Gateway Eagle Mine. In July 2016, Justice filed a complaint with the Mine Safety and Health Administration (“MSHA”) alleging that Rockwell Mining interfered with his exercise of rights as a miners’ representative and discriminated against Justice by forcing him to work in unsafe conditions. The Secretary pursued part of Justice’s interference claim by filing a section 105(c)(2) case against Rockwell Mining in Docket No. WEVA 2018-10-D. At the same time, Justice filed a complaint under section 105(c)(3) to pursue the claims the Secretary did not take. Rockwell Mining withdrew its contest in the Secretary’s case and paid a civil penalty of \$3,700.00 on April 13, 2018. Justice’s separate proceeding, Docket No. WEVA 2018-48-D, remains in dispute and is set for hearing in January 2019. In that matter, Justice has alleged that Rockwell Mining violated section 105(d) based on Justice’s refusal to operate a piece of mining machinery because of safety concerns. Docket No. WEVA 2018-48-D stems from a complaint filed with MSHA on July 20, 2016. Furthermore, Justice has retained counsel for Docket No. WEVA 2018-48-D, whereas here he is proceeding pro se.

I. BACKGROUND AND FACTUAL ASSERTIONS

When Marshall Justice was previously employed at the Gateway Eagle Mine, which Rockwell Mining now operates, two or more of the miners there appointed him as their miners’ representative. (Mot. at 1.) Although Justice is not currently employed at the mine, he remains a non-employee miners’ representative. As such, Justice enjoys certain rights under the Mine Act, among them the right to inspect mine maps and the right to be given the opportunity to accompany MSHA inspectors during physical inspections at the mine. *See* 30 U.S.C. § 813(f). In response to an MSHA interference investigation, Rockwell Mining agreed on March 31, 2017, to telephone Justice whenever an MSHA inspector is on the premises during the evening shift. (Mot. Ex. B at 2.) Rockwell Mining’s logs indicate that, from May 10, 2017, through August 13,

² The Commission’s procedural rules do not expressly contemplate a motion to dismiss for failure to state a claim, but Commission Judges addressing such motions have looked to Federal Rules of Civil Procedure 12(b)(6) and treated such motions as motions for summary decision. *See, e.g., Sec’y on behalf of Chaparro v. Comunidad Agricola Bianci, Inc.*, 32 FMSHRC 1517, 1518 (Oct. 2010) (ALJ); *see also* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”).

2018, Rockwell Mining telephoned Justice 22 times to alert him to the presence of an MSHA inspector, but Justice came to the mine only once, on July 12, 2017. (Mot. Ex. H at 1–3.)

On April 10, 2018, Justice spoke by telephone to shift foreman Frank Javins and made two requests: (1) to be sent an up-to-date copy of the mine map and (2) to be alerted via telephone when MSHA inspectors would be present during the day shift. (Opp. at 5.) Rockwell Mining did not send Justice a copy of the mine map and has declined to telephone him about MSHA inspections during the day shift. (Mot. at 6–7, 10–11.)

Justice alleges that Rockwell Mining’s policy—that Justice travel on section 103(f) “walkarounds” during the evening shift only—is in effect to force him to interact with individuals who have assaulted him or threatened assault. (Opp. at 11.) Furthermore, Justice has described a history of alleged violent intimidation that discouraged him from viewing the mine map. (*Id.* at 4–5.) Justice states that he described these incidents to the MSHA investigation team before they declined to bring a section 105(c)(2) case. (*Id.* at 6.)

Consequently, Justice filed an interference complaint with MSHA on July 6, 2018. By letter dated August 28, 2018, the Secretary declined to bring section 105(c)(2) charges against Rockwell Mining. On September 21, 2018, Justice filed his complaint with the Commission under section 105(c)(3).

II. ISSUES

In its motion, Rockwell Mining argues (1) Rockwell Mining did not interfere with Justice’s right to inspect the mine map because miners’ representatives do not have the right to obtain copies of mine maps; (2) Rockwell Mining did not interfere with Justice’s right to accompany MSHA inspectors (on section 103(f) “walkarounds”) because any given individual miners’ representative does not have the right to accompany MSHA inspectors during *every* shift; and (3) the damages that Justice seeks are not recoverable.

The primary issue before me is whether Rockwell Mining is entitled to summary decision because there is no genuine issue of material fact about whether Rockwell Mining interfered with Justice’s rights as a miners’ representative.³

III. PRINCIPLES OF LAW—ANALYSIS—CONCLUSIONS OF LAW

A. Principles of Law—Summary Decision and Section 105(c) Interference

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if “the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any

³ Some of the arguments in Justice’s Opposition could be construed as a cross-motion for summary decision in his favor. However, the arguments in the Opposition essentially recapitulate those in the Complaint, and, for this reason, I decline to evaluate those arguments as though Justice were arguing his entitlement to a decision without a hearing as a matter of law.

material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). The Commission has consistently held that summary decision is an “extraordinary procedure” and analogizes it to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate “upon proper showings of the lack of a genuine, triable issue of material fact.” *Id.* at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and “inferences to be drawn from the underlying facts” are viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The Mine Act provides relief not only for discrimination but also “interference.” Section 105(c) of the Act provides, in relevant part, that:

[n]o person shall . . . interfere with the exercise of the statutory rights of any . . . representative of miners . . . because such . . . representative of miners . . . has filed or made a complaint under or related to this chapter . . . or because of the exercise by such . . . representative of miners . . . on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1). The Commission has not settled on the legal test for assessing claims of interference. *See Monongalia County Coal Co.*, 40 FMSHRC 679, 680–81 (June 2017). Several Commission Judges have applied the Secretary’s two-prong test, which asks, first, whether the alleged interfering actions reasonably can be viewed as “tending to interfere with the exercise of protected rights,” and, second, whether the interfering person can “justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.” *See, e.g., Pendley v. Highland Mining Co.*, 37 FMSHRC 301 (Feb. 2015) (ALJ) (applying the Secretary’s proposed test for interference). The Commission has split, however, over whether the Secretary must also demonstrate that the interfering actions were motivated by animus to the exercise of protected rights. *See Monongalia County Coal*, 40 FMSHRC at 708–29.⁴

B. Analysis

Rockwell Mining argues that, as a matter of law, Justice is not entitled (1) to a copy of the mine map, (2) to notification regarding a section 103(f) “walkaround” during day *and* evening shifts, and (3) to attorney’s fees or damages for pain and suffering. First, I will analyze the material facts regarding a claim for interference with a miners’ representative’s mine map inspection rights and section 103(f) “walkaround” rights. I will then turn to the damages issue and Justice’s other arguments in his Opposition.

⁴ In this order, I need not decide between the tests because the complaint survives the more stringent test.

1. Mine Map Inspections and Alleged Violent Threats

Justice complains that Rockwell Mining has not honored his request for a copy of the mine map. (Compl. at 8.) Rockwell Mining argues that no statute, regulation, or guidance document confers a right to miners' representatives to obtain a copy of the mine map and, accordingly, that no interference took place. (Mot. at 6–8.)

By statute, a miners' representative⁵ may inspect the mine map. *See* 30 U.S.C. § 872(b). The Mine Act also explicitly permits only the Secretary of Labor and the Secretary of Housing and Urban Development to request copies of the map, but they must keep them confidential. *See id.* In his Opposition, Justice clarifies that the alleged acts of interference include hostile confrontations while he was present at the mine as a non-employee miners' representative. Justice asserts that employees of Rockwell Mining told him that he could not view any documents posted at the mine site (Opp. at 4), and that past assaults discouraged Justice from demanding to view the mine map. (*Id.* at 4–5.) In light of this, Rockwell Mining's argument appears to be too narrow. If Justice's assertions are true, such actions would “interfere with the exercise of the statutory rights of any . . . representative of miners . . . because of the exercise by such . . . representative of miners . . . on behalf of himself . . . of any statutory right afforded by this chapter.” 30 U.S.C. § 815(c)(1). Assertions of hostility could also support a conclusion that the operator's interfering actions were the result of animosity toward Justice's protected actions as a miners' representative. *See Monongalia County Coal*, 40 FMSHRC at 708–29. Whether or not a miners' representative is entitled to a copy of the mine map under such circumstances, the record, construed in favor of the non-moving party, contains a genuine dispute of material fact. Accordingly, I conclude that summary decision against Justice is inappropriate at this stage.

2. Section 103(f) “Walkaround” Rights and Alleged Violent Threats

Justice complains that, for a year before he filed his complaint, Rockwell Mining has failed to telephone him about section 103(f) “walkarounds” during the day shift. (Compl. at 8.) Rockwell Mining argues that non-employee miners' representatives are entitled to notification of MSHA inspections during one shift only—here, they say Justice can attend the evening shift because it was the last he worked before leaving employment. (Mot. at 8–9.) The Mine Act provides that:

[s]ubject to regulations issued by the Secretary . . . a representative authorized by [the operator's] miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such

⁵ A miners' representative is “[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act” 30 C.F.R. § 40.1(b)(1). *See also Utah Power & Light Co. v. Sec’y of Labor*, 897 F.2d 447, 455 (10th Cir. 1990) (confirming that any person or organization representing two or more miners is a miners' representative under 30 C.F.R. § 40.1(b)). Rockwell Mining does not dispute that two or more miners appointed Justice as their miners' representative. (Mot. at 1.)

inspection and to participate in pre- or post-inspection conferences held at the mine.

30 U.S.C. § 813(f). MSHA's Program Policy Manual (PPM) states that, when notice of enforcement or investigation activities is given, notice should also be given to the representative of miners. *See* I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Section 103-5, at 10 (2010).

In his Opposition, Justice clarifies that the alleged acts of interference included hostile confrontations while he was present as a miners' representative at Gateway Eagle Mine. (*See* Opp. at 4, 11.) If true, these actions would constitute interference with a miners' representative's exercise of his 103(f) "walkaround" rights and would establish motivation by animus to Justice's exercise of protected rights. *See Monongalia County Coal*, 40 FMSHRC at 708–29 (articulating a test for interference that requires the operator's animus toward the exercise of protected rights). Furthermore, such hostile actions could provide context to the telephone logs created by Rockwell Mining, which show that Justice went to the mine only once for a section 103(f) "walkaround." In light of these alleged threats, the telephone logs could cut both ways: Justice's absence on section 103(f) "walkarounds" could establish that Rockwell Mining's agents are hostile rather than that Justice lacks initiative. Whether or not Justice is entitled to notification about evening *and* day shift inspections, Justice should have the opportunity to present additional evidence about these incidents. A genuine dispute of material fact precludes summary decision.

3. Recoverable Damages

Rockwell Mining argues that Justice is not entitled to the damages he seeks for "pain and suffering and inconvenience" and that he is not entitled to "all customary lawyer fees and gratuities." (Mot. at 15.) However, Commission Judges can fashion 105(c) remedies suitable to the facts of each case. *See Sec'y of Labor on behalf of Rieke v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257 (July 1997) ("The Commission enjoys broad remedial power in fashioning relief for victims of discrimination."). Justice has requested all "concession(s) available to me as permitted by [the] Mine Act . . ." (Compl. at 2.) Justice is not an attorney, *pro se*, and, consequently, cannot avail himself to attorney's fees. However, at this stage, I cannot rule out the possibility of another appropriate remedy for section 105(c) interference.

4. Other Arguments by Justice

In his Opposition, Justice makes several other arguments, which I feel compelled to construe as opposing Rockwell Mining's motion. For example, he asks for the Court to "dispense" with or "void" certain exhibits or arguments in Rockwell's Motion. (Opp. at 1, 2, 4, 6.) However, Commission Judges may admit "[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative . . ." 29 C.F.R. § 2700.63(a). He asks the Court to order MSHA to produce documents (Opp. at 6), but MSHA is not a party to this proceeding.⁶ Justice asks the Court to examine maps of Gateway Eagle Mine—which he believes may contain

⁶ A party may choose to submit a written Freedom of Information Act ("FOIA") request either to the National MSHA FOIA Officer or to an MSHA FOIA Coordinator.

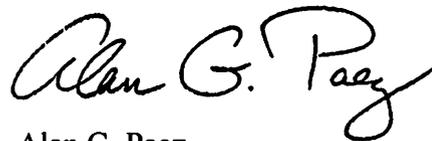
“violation[s] or imminent dangers”—for “security risks.” (Opp. at 9). In his numerous arguments, it is sometimes difficult to tell what Justice is requesting, and some requests seem unrelated to Rockwell Mining’s motion. Accordingly, I construe Justice’s various arguments not to be motions but simply statements in opposition to Rockwell’s motion to dismiss. Justice is reminded that “[w]ritten motions shall be set forth in a document separate from other pleadings.” 29 C.F.R. § 2700.10(b).

C. Conclusion

The standard for summary decision under Commission precedent is not whether the non-moving party is likely to prevail but whether the non-moving party can “prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC at 1947 (quoting *Campbell*, 21 F.3d at 55). The presence of a “genuine issue as to any material fact” means that Justice could prevail. See 29 C.F.R. § 2700.67(b). Justice makes several allegations which, when I draw all inferences in his favor, create a genuine dispute of material fact as to whether Rockwell Mining interfered with his Mine Act rights as a miners’ representative. Summary decision is therefore premature.

IV. ORDER

In light of the foregoing, it is hereby **ORDERED** that Respondent’s Motion to Dismiss is **DENIED**.



Alan G. Paez
Administrative Law Judge

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