

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 2, 2019

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2018-277-M
Petitioner	:	A.C. No. 21-00831-465235
	:	
v.	:	
	:	
NORTHSHORE MINING COMPANY,	:	Mine: Northshore Mining Company
Respondent	:	

DECISION

Appearances: Barbara Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;

Arthur Wolfson, Esq., Fisher & Phillips, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) against Northshore Mining Company (“Northshore”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of \$132.00 for an alleged violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a).

A hearing was held in Duluth, Minnesota. The following issues are before me: (1) whether Northshore violated section 103(a) of the Mine Act; and, if so (2) the degree of negligence to which the violation was attributable; and (3) the appropriate penalty. The parties’ Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the citation, as issued, and assess a penalty against Respondent.

I. Joint Stipulations

The parties have stipulated as follows:

1. Northshore Mining Company was an “operator” as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 803(d), at the time the citation at issue in this proceeding was issued.
2. Northshore Mining Company operated the Northshore Mining Company which was located in Silver Bay, Lake County, Minnesota at the time the subject citation was issued.
3. Northshore Mining Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to sections 105 and 113 of the Mine Act.
5. The individual whose signature appears in Block 22 of the citation at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
6. A duly authorized representative of the Secretary served the citation and termination of the citation upon the agent of Respondent at the date and place stated, therein, as required by the Mine Act, and the citation and termination may be admitted into evidence to establish their issuance.
7. The total proposed penalty for the citation at issue (\$132.00) will not affect Respondent’s ability to continue in business.
8. The citation contained in Exhibit A attached to the Petition for Assessment of Penalty is an authentic copy of the citation at issue in this proceeding, with all appropriate modifications and terminations, if any.

Tr. 5-7.

II. Factual Background

Northshore operates an iron ore processing plant in Silver Bay, Minnesota. Jt. Stips. 2-3; Tr. 74. The plant’s large concentrator building separates iron ore from waste materials. Tr. 73-76. The concentrator department includes the concentrator, fourteen other buildings, and a pipeline located along a seven-to-eight mile stretch leading to a tailings basin, where waste material is collected. Tr. 76, 89-90.

Work at Northshore is divided into day and night shifts. Tr. 72. During both shifts, seven employees are on duty in the concentrator department: six operations technicians and one

control room operator. Tr. 74-75, 89. Concentrator employees communicate with one another on personal radios set to a channel ordinarily used only by department employees. Tr. 83. Concentrator control room operator Philip Goutermont and operations technician Jamie Gnerer were working on the concentrator crew at the time of the inspection at issue. Tr. 71, 81-82, 88, 90-91.

On March 6, 2018, during the night shift, MSHA Inspector Terrance Norman arrived at the Silver Bay plant to continue an ongoing E01 inspection. Tr. 21, 23, 81-82; Ex. P-2. The regular practice at Northshore is to provide designated personnel who are available at the safety office to escort MSHA inspectors. Tr. 109-10. However, when Norman arrived at approximately 4:00 a.m., the designated safety representative was off-duty. Tr. 23, 82, 114-15. Finding no one at the safety office, Norman proceeded to the concentrator control room, introduced himself as an MSHA inspector, and asked Goutermont to find him an escort. Tr. 23, 82. Goutermont made an announcement over the department radio channel that someone was needed to go with MSHA during an inspection. Tr. 83, 86. After completing the day's inspection, Norman issued a citation to Northshore for providing advance notice of an MSHA inspection to the plant. Tr. 29-30; Ex. P-2.

III. Findings of Fact and Conclusions of Law

Inspector Norman issued 104(a) Citation No. 9380677 on March 6, 2018, alleging a violation of section 103(a) of the Mine Act that had “no likelihood” to result in an injury or illness, could not reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Northshore’s “moderate” negligence.¹ Ex. P-2. The “Condition or Practice” is described as follows:

On arrival to the Concentrators [sic] Control Room, the control room operator announced over the plant wide radio system that MSHA was in the control room and he needed someone to go with the inspector, which gave everyone in the plant prior notice of a [sic] inspection.

Ex. P-2. The citation was terminated on March 7, 2018, after Northshore issued a written policy prohibiting radio announcements and instructing its miners to contact specific personnel to secure mine escorts for MSHA inspectors. Ex. P-2.

A. Fact of Violation

In order to establish a violation of the Mine Act, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

¹ Section 103(a) of the Mine Act provides, in relevant part, that “[i]n carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person” 30 U.S.C. § 813(a).

The Secretary maintains that the prohibition on advance notice of MSHA inspections is central to enforcement of the Mine Act, and that section 103(a) proscribes giving advance notice to anyone for any reason, although “contacting a specific individual directly is an acceptable means of obtaining an escort.” Sec’y Br. at 4, 7, 9, 10 (citing *Topper Coal Co. Inc.*, 20 FMSHRC 344, 348 (Apr. 1998)). After advance notice has been provided, the Secretary contends, neither operator correction of hazardous conditions nor MSHA’s issuance of citations is relevant to whether a violation of section 103(a) has occurred. Sec’y Br. at 10. Finally, the Secretary argues that Northshore had fair notice of the requirements of section 103(a). Sec’y Br. at 14 (citing *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991)).²

Northshore contends that the Secretary must show that allegedly violative conduct was intended to provide advance notice of an MSHA inspection, and that it had “the effect of actually providing such advance notice.” Resp’t Br. at 6, 10. Northshore argues that *Topper Coal* and *KenAmerican Res., Inc.* support its position that only effective and intentional advance notice of an MSHA inspection is prohibited. Resp’t Br. at 10-13 (citing *Topper Coal*, 20 FMSHRC at 348-49; *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1943-49 (Aug. 2016) [hereinafter, *KenAmerican II*]). It primarily rests its argument on two ALJ decisions that vacated section 103(a) citations. See Resp’t Br. at 6-10 (citing *KenAmerican Res., Inc.*, 40 FMSHRC 1544 (Dec. 2018) (ALJ)³ [hereinafter, *KenAmerican III*], and *Portable, Inc.*, 36 FMSHRC 3249 (Dec. 2014) (ALJ)); Resp’t Reply Br. at 6. Additionally, Northshore rejects any legal distinction between explicit and ambiguous conduct with regard to section 103(a) violations. See Resp’t Br. at 6, 10, 12-13.

Inspector Terrance Norman came to MSHA in 2014, with thirteen years experience in the mining industry. Tr. 20-22. Norman had previously inspected Northshore in 2015 and 2017. Tr. 59-60, 61-62. He testified that Goutermont “announced on the radio that MSHA was here and [Goutermont] needed somebody to accompany [Norman] on an inspection.” Tr. 23. Norman explained that he issued the citation because “[Goutermont] was giving pre-notification to the miners inside the plant that MSHA was there and doing an inspection,” which provided “the opportunity to correct a hazard out on the floor.” Tr. 25, 36. Norman also testified that a similar incident had occurred on December 17, 2017 at a different location, the pelletizer control room, where a miner announced MSHA’s presence on-site over the radio. Tr. 34, 62-63, 65-67; Ex. P-3. He stated that, on the same day, he had informed hot side operations supervisor Jared Conboy that the announcement was prohibited and that, on December 18, he had discussed procedures for securing mine escorts with Scott Blood, area manager of safety and loss control. Tr. 34-35, 51, 65-67; Ex. P-3. Finally, Norman testified that MSHA inspections are timed so as to visit Northshore during both shifts. Tr. 29.

² Northshore makes clear that it is not raising fair notice as a defense. Resp’t Reply Br. at 8. However, whether Northshore had a heightened awareness of its duty to comply with section 103(a) is addressed in the discussion of negligence.

³ *KenAmerican III*, decided on remand by the Commission of *KenAmerican II*, is currently on appeal before the Commission.

Philip Goutermont has held the position of concentrator control room operator at Northshore for almost 30 years. Tr. 70-71. He testified that he announced over the department radio channel, “[W]e need someone to go with MSHA and inspect,” and that his radio announcement did not indicate where MSHA was planning to inspect. Tr. 83, 86. Goutermont also stated that over the course of his career, MSHA inspectors had come unescorted to the control room “about a half dozen times,” and that he had previously made radio announcements explicitly requesting MSHA escorts, without being cited. Tr. 80-81.

Operations technician Jamie Gnerer testified that she heard Goutermont’s radio announcement, responded to it, and proceeded to the concentrator control room to escort Norman. Tr. 92. Gnerer also testified that she did not know what areas of the plant would be inspected when the team left the control room. Tr. 92-93.

Jared Conboy and safety representative Luke Thun both testified that, in order to abate citations during prior MSHA inspections, they had routinely made radio announcements that mentioned MSHA, and that such conduct was not cited. Tr. 100-102, 120-121. Conboy confirmed that, in December of 2017, he and Norman had discussed the language used in radio announcements requesting MSHA escorts. Tr. 103-06. Conboy also testified that, once over the course of each inspection cycle, MSHA makes a night shift inspection. Tr. 110.

Scott Blood testified that he became aware of the December 2017 incident only after Norman issued the March 2018 citation. Tr. 134. He denied having had a conversation with Norman in December of 2017 about the pelletizer control room incident. Tr. 134.

The Commission has found that explicit “warning of the inspection clearly is sufficient to establish a violation.” *Topper Coal*, 20 FMSHRC at 348. Additionally, intent can be relevant to the fact of violation where conduct is ambiguous. *See KenAmerican II*, 38 FMSHRC at 1948-49. The plain language of section 103(a) “focuses on whether advance notice of an inspection was in fact provided,” and its purpose is “to ensure the efficacy of inspections by preventing operators from concealing hazards before an inspector can observe them.” *Id.* at 1949 (citing S. Rep. No. 95-181, at 27 (1977)).

In the instant case, the evidence establishes that, at Norman’s behest upon entering the concentrator control room, Goutermont announced to the entire concentrator crew over the department radio channel that an escort was needed for an MSHA inspection.

Northshore’s argument that “intent” and “effect” are elements required to prove section 103(a) violations finds no support in *Topper Coal* and *KenAmerican II*. In *Topper Coal*, the Commission affirmed a violation of section 103(a) where the president of the mine, above ground at the time, had telephoned a miner underground and said that “two federal inspectors” were in the mine and he wanted the miners to “watch out and be careful.” 20 FMSHRC at 346 (quoting *Topper Coal Co., Inc.*, 17 FMSHRC 945, 946 (June 1995) (ALJ)). According to Northshore, the Commission’s finding that the conduct in question constituted a “warning of the inspection” is evidence that only advance notice that effectively impedes an inspection is prohibited. Resp’t Br. at n.13 (citing *Topper Coal*, 20 FMSHRC at 348). However, the Commission’s use of the word “warning” relates to the effectiveness of the communication in

conveying information, rather than the effectiveness of the communication in impeding the inspection. See *Topper Coal*, 20 FMSHRC at 348. Northshore also contends that *Topper Coal* supports an intent requirement for establishing section 103(a) violations. Resp't Br. at 10-11; Resp't Reply Br. at 4. While it is true, as Northshore points out, that *Topper Coal* "does not establish a point of law that violative advance notice may occur regardless of intent," that case establishes neither an intent nor an effect requirement. See Resp't Reply Br. at 4.

The facts in *KenAmerican II* involve a contested exchange wherein miners underground asked if there was "company outside," and a dispatcher may have responded "yeah. I think there is." 38 FMSHRC at 1944. The Commission found that the judge erred by granting summary decision for *KenAmerican* because there remained a "genuine issue of material fact" as to "the meaning of the communication." *Id.* at 1948. Northshore argues that "nothing in the decision limits consideration of intent only to statements that are ambiguous." Resp't Br. at 12. However, while the Commission stated that intent can be considered in a summary decision where it is an "essential element" of the claim, its discussion of the Secretary's burden in proving section 103(a) violations merely indicates that intent can be relevant where the conduct at issue is ambiguous. *KenAmerican II*, 38 FMSHRC at 1947. The Commission did not establish intent as an element of all section 103(a) violations.

Likewise, the ALJ decisions that Northshore cites do not establish that intent and effect are requirements for establishing section 103(a) violations. In *KenAmerican III*, the judge decided the case on credibility grounds that were directly tied to its unique facts, finding that the miner who was asked whether there was "company outside" had responded "I don't know," a statement that did not constitute advance notice. 40 FMSHRC at 1552. The facts in this case, involving a department-wide announcement, are entirely distinguishable.

In *Portable*, the judge found that communications with a single miner regarding an MSHA inspection were intended to secure an escort, and that there was no evidence that the operator had taken corrective actions after notice had been provided. 36 FMSHRC at 3257-58. Again, at issue here, by contrast, is the effect of communication to the entire concentrator crew. Ex. P-2.

The Commission, establishing in *Topper Coal* that "warning of the inspection clearly is sufficient to establish a violation," indicated that explicit advance notice of an MSHA inspection, once conveyed, is sufficient to constitute a violation, regardless of intended meaning or whether advance notice actually impeded the inspection. 20 FMSHRC at 348; see also *KenAmerican II*, 38 FMSHRC at 1949 ("[The] plain language [of section 103(a)] . . . focuses on whether advance notice of an inspection was in fact provided"). Read together, *Topper Coal* and *KenAmerican II* establish that intent is relevant where ambiguous conduct is involved, but where the meaning of the conveyance is clear, no intent inquiry is necessary to determine whether advance notice occurred. See *Topper Coal*, 20 FMSHRC at 348; *KenAmerican II*, 38 FMSHRC at 1948-1951.

This reading of section 103(a) is consistent with the enforcement goals of the Mine Act. Congress viewed the prohibition on advance notice as a crucial part of MSHA's "broad right-of-entry" to make unannounced inspections, noting "the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained." S. Rep. No. 95-

181, at 27 (1977). The unequivocal language of section 103(a) and its related criminal provision demonstrate how seriously Congress viewed the consequences of advance notice. *See* § 110(e), 30 U.S.C. § 820(e).

In this case, the communication at issue was explicit, “[W]e need someone to go with MSHA and inspect,” and the meaning of the message to the entire concentrator department was clear, i.e., that MSHA was on-site for an inspection. Based on these facts, I find that advance notice of the MSHA inspection was provided to the plant on March 6, 2018 and, accordingly, the Secretary has established a violation of section 103(a).

C. Negligence

The Secretary argues that moderate negligence is appropriate because Northshore had been cautioned previously about violating section 103(a) in December of 2017. Sec’y Br. at 11-12. Norman and supervisor Conboy establish that they had discussed advance notice following the pelletizer control room incident in December of 2017. Putting their conversation in context, i.e., following a radio call announcing MSHA’s presence during the inspection, it is clear that Northshore’s awareness of prohibited advance notice was, or should have been, heightened a mere three months prior to the instant violation, and is an aggravating factor. However, Goutermont, Conboy, and Thun’s collective, uncontroverted testimony of inconsistent MSHA enforcement of section 103(a) constitutes a mitigating factor. *See Mach Mining, LLC*, 809 F.3d 1259, 1265-66 (D.C. Cir. 2016); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 2305, 2310 (Oct. 1984). Given these considerations, I find that Northshore was moderately negligent in violating the advance notice prohibition of section 103(a).

IV. Penalty

While the Secretary has proposed a civil penalty of \$132.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff’d* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based on a review of MSHA’s online records, I find that Northshore is a medium-sized operator, with an overall history of violations that is neither a mitigating nor aggravating factor in assessing the appropriate penalty.⁴ The record indicates that Northshore demonstrated good faith in achieving rapid compliance after notice of the violation. Ex. P-2. Northshore has stipulated that imposition of the proposed penalty will not adversely affect its ability to remain in business. Jt. Stip. 7.

The remaining criteria involve consideration of the gravity of the violation and Northshore’s negligence in its commission. Because providing advance notice compromises the integrity of an inspection and endangers the health and safety of miners, this is a serious violation, and I have found that it was caused by Northshore’s moderate negligence. Therefore,

⁴ In the fifteen months preceding the inspection, the operator had been cited for 240 violations, unrelated to the standard at issue in this proceeding.

considering my findings as to the six penalty criteria, I find that a penalty of \$132.00, as proposed by the Secretary, is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 9380677 is **AFFIRMED**, and that Northshore Mining Company **PAY** a civil penalty of \$132.00 within thirty days of this Decision.⁵ **ACCORDINGLY**, this case is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

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⁵ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.