

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 25 2015

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 AND ORDER

Appearances: LaTasha Thomas, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, TN, for Petitioner;

Jason Hardin, Esq., Fabian & Clendenin, Salt Lake City, UT, for
Respondent.

Before: Judge L. Zane Gill

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves a 103(a) citation, 30 U.S.C. § 813(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Kenamerican Resources, Inc. (“Kenamerican” or “Respondent”) at its Paradise #9 mine.

The parties submitted briefs, affidavits, and documentary evidence. All submissions pertain to the sole issue of whether advance notice was given in violation of Section 103(a) of the Mine Act. For the reasons stated below, I find that there is no genuine issue of material fact and the Respondent is entitled to summary decision as a matter of law.

Undisputed Facts

On April 20, 2012, MSHA Inspector Doyle Sparks and six other inspectors traveled to Kenamerican’s Paradise #9 mine to conduct an investigation into a complaint about an alleged hazardous condition. (Ex. S-B) Before the inspectors traveled into the mine to begin their investigation, MSHA seized control of the mine’s communication system. (Ex. S-C) While listening on the mine’s communication line, Sparks overheard a call from the #4 unit in which a person asked the dispatcher if there was “company outside,” to which the dispatcher responded, “yeah, I think there is.” (Ex. S-B, C) Sparks issued Citation No. 8502992 to Respondent under Section 103(a) of the Mine Act alleging that “[d]uring a Hazard Complaint inspection [...] mine personnel provided advance notice to miners underground that MSHA inspectors were on mine property.” (Ex. S-A)

Standard of Review

The Commission held that “summary decision is an extraordinary procedure.” *Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). It is “granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67. When weighing the parties’ arguments, all inferences are “viewed in the light most favorable to the party opposing the motion.” *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted).

Section 103(a) of the Mine Act¹

Section 103(a) explicitly states that “no advance notice of an inspection shall be provided to any person.” 30 U.S.C. § 813. As Congress explained:

[I]t is important that ... *no advance notice* of an inspection be given to any person [...] Indeed, *in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained*, a warrant requirement would seriously undercut this Act's objectives.

S. REP. 95-181, 1, 1977 U.S.C.C.A.N. 3401, 3427.

In *Topper Coal Company*, the Commission found that a mine operator violated the Mine Act’s prohibition against advance notice in Section 103(a) when mine management warned two underground miners that “federal inspectors” were coming and to “watch out and be careful.” *Topper Coal Co.*, 20 FMSHRC 344, 346, 348-49 (Apr. 1998) In *Solis v. Manalapan Min. Co.*, the court found that the statements “two federal inspectors [are] out there” and “shut the belts off [...] because there are six federal mine inspectors on the property” violated Section 103(a)’s prohibition against advance notice. No. CIV. 10-115-GFVT, 2010 WL 2197534, at *1 (E.D. Ky. May 27, 2010) However, the court also commented that the statements “has anyone showed up yet” and “did our company show up” were ambiguous at best and implied that they did not constitute advance notice. *Id.* at *5.

¹ Respondent relied heavily on MSHA’s Program Policy Manual; however, the Commission has repeatedly found that PPMs are not binding on the court or the Secretary. *Black Diamond Construction, Inc.*, 21 FMSHRC 1188, 1202-03; *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996). The PPM, however, codifies MSHA’s practical and functional need to create a single field rule for its inspectors and is intended as guidance to explain under what circumstances it is appropriate to give advance notice. This scenario is absent from the facts before me. Therefore, the analysis here is centered on the clear language of Section 103(a) of the Mine Act.

Analysis and Conclusion

The Secretary does not allege any dispute of material fact as to the existence of a violation, just to gravity and negligence. The alleged dispute of fact as to the secondary issues of gravity and negligence, which was not analyzed and only tangentially mentioned in the Secretary's motion papers, does not preclude summary decision as to the primary issue of whether a violation occurred. Indeed, the statements allegedly made by mine personal, which led to the issuance of a citation, are not disputed by either party. Therefore, since the Secretary did not identify any issue of material fact regarding the violation, the Respondent is entitled to summary decision as a matter of law.

Section 103(a) states that "no advance notice of an inspection shall be provided to any person." 30 U.S.C. § 813(a). There is an exception to this rule found in Section 103(g)(1), which gives MSHA the authority to notify the mine "forthwith" – a *de facto* advance notice – when a miner representative gives notice of what he believes to be an imminent danger. 30 U.S.C. § 813(g)(1). Since MSHA was on site to respond to a hazardous condition complaint and had apparently not deemed it to be an imminent danger, the analysis hinges on whether the undisputed statements made by mine personnel constituted advance notice, not whether a 103(g)(1) exception applied.

Here, a miner underground hailed the dispatcher and asked if there was "company outside," to which the dispatcher replied, "yeah, I think there is." These statements, though undisputed, do not allow me to conclude that a prohibited advance notice was communicated. They are ambiguous and vague, very similar to those made in *Manalapan* where the court commented that similar statements were ambiguous at best. Therefore, I am unable to conclude as a matter of law that these statements were prohibited advance notice.²

The lack of a genuine issue of material fact entitles Kenamerican to a summary decision as a matter of law. The vagueness of the statements precludes a finding that they constituted a prohibited advance notice in violation of Section 103(a) of the Mine Act.³

² If this case were to proceed to trial, the Secretary would have the burden of proving that the intercepted communication was an advance notice. Rule 56 of the Federal Rules of Civil Procedure ("FRCP") contemplates this scenario and justifies the granting of summary judgment where the non-moving party is unable to meet its ultimate burden. The Commission has analogized summary decision to summary judgement under Rule 56 of FRCP. *Hanson Aggregates New York, Inc.*, 29 FMSHRC at 9. If the Secretary, at this juncture, fails to marshal evidence that would at least support a reasonable inference that the subject statements, as vague as they were, still conveyed an advance warning contemplated and prohibited by the Act, a trial would be useless, and Kenamerican is entitled to judgment as a matter of law. The court may not deny summary judgment on the basis of speculation. § 2727 Grounds for Summary Judgment—Burden of Proof and Presumptions, 10A Fed. Prac. & Proc. Civ. § 2727 (3d ed.)

³ The Respondent argued that Section 103(a) as applied in this case violated its First Amendment right because it is a content-based restriction. Because there was no violation found, and in the interest of judicial economy, I decline to address this argument.

WHEREFORE, Citation No. 8502992 is **VACATED**.

A handwritten signature in black ink, appearing to read "L. Zane Gill". The signature is fluid and cursive, with the first name "L." and last name "Gill" clearly legible.

L. Zane Gill
Administrative Law Judge

Distribution: *(Certified Return Receipt)*

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