FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

Jason W. Hardin, Esq., Fabian VanCott, Salt Lake City, UT, for the Respondent.

Before: Judge L. Zane Gill

This case resulted from a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against KenAmerican Resources, Inc. ("KRI"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (the "Act" or "Mine Act"). The court made a record of the parties' testamentary and documentary evidence at a hearing held in Henderson, Kentucky. The parties filed post-hearing briefs.[1]

The Secretary alleges that a prohibited advance notice of inspection occurred when someone from inside the mine asked over the mine phone/PA system whether there was "company outside," and the mine dispatcher answered by saying either "Yeah, I think there is," (the Inspector's version) or "I don't know" (the dispatcher's version). The Secretary alleges that the dispatcher's answer violated section 103(a) of the Mine Act and proposes a penalty of $18,742.00.

[1] The Court had granted Respondent's Motion for Summary Decision. 37 FMSHRC 1809 (Aug. 2015) (ALJ). That decision was appealed to the Commission, which remanded it with instructions to hold a hearing to develop a record to reveal the context of the statements the Secretary claims violated the prohibition of giving advance notice of an MSHA inspection, 30 U.S.C. § 813(a). 38 FMSHRC 1943, 1953 (Aug. 2016).

For the reasons developed below, I vacate Citation No. 8502992. The Secretary failed to prove by a preponderance of the evidence that the contested communication constituted an actionable "advance notice of an inspection."

I. PRINCIPLES OF LAW

A. Burden of Proof and Credibility

In order to establish a violation of a safety standard or provision of the Act, the Secretary must prove "by a preponderance of the credible evidence" that a violation occurred. *Keystone Coal Mining Corp*., 17 FMSHRC 1819, 1838 (Nov. 1995), *citing Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC at 2152-53, *citing Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *see also Eagle Energy, Inc.*, 23 FMSHRC 1107, 1118 (Oct. 2001).

The weight of evidence is a measure of the believability or persuasiveness of evidence. To satisfy the burden of proof—preponderance of the evidence—the Secretary must convince me that the evidence in support of his case outweighs the evidence offered by the Respondent.

To determine whether the Secretary met this burden, I am required to make credibility determinations, one of the most important and difficult responsibilities an ALJ must complete. *See N. Idaho Drilling, Inc*., 35 FMSHRC 2472, 2473-74 (Aug. 2013) (ALJ) (explaining that credibility determinations are part of the process of determining whether the Secretary has met his burden of establishing a violation by a preponderance of the evidence, and the primary issue is determining whether witness testimony is worthy of trust and belief in the context of the record). Credibility can be defined as "the quality that makes something (as a witness or some evidence) worthy of belief." *Credibility*, Black's Law Dictionary 448 (10th ed. 2014). According to *Secretary of Labor v. Rag Cumberland Resources Corporation*, 22 FMSHRC 1066, 1071 (Sept. 2000), consistent with the "preponderance of the evidence" standard, the Secretary must "persuade the judge that it [is] more likely than not" that the key factual predicate needed to support a violation occurred.

In this case, the key elements are: (1) what the dispatcher understood and said; (2) what the words heard and spoken meant in the context in which they were communicated; and, (3) whether the words conveyed advance notice of an MSHA inspection. I am convinced by the weight of the evidence that the Secretary failed to prove an essential element of the prima facie case, i.e., whether the words spoken by the dispatcher conveyed advance notice of an MSHA inspection.

II. SUMMARY OF EVIDENCE AND FINDINGS OF FACT

Inspector Doyle Sparks issued Citation No. 8502992 to KRI on April 20, 2012, alleging that miners had violated section 103(a) of the Mine Act. The citation alleges, "[d]uring a Hazard

Complaint inspection [. . .] mine personnel provided advance notice to miners underground that MSHA inspectors were on mine property." (Ex. S–1) (emphasis added)

The day before, April 19, 2012, someone lodged a section 103(g) hazard complaint about KRI's Paradise #9 mine. (Tr.20:25-21:7; 41:7-42:11; 52:25-53:13) In response, Inspector Sparks and five[2] other MSHA inspectors traveled to the mine on April 20, 2012, to investigate. (Tr.20:25-21:7; 64:9-65:1; 65:20-25; Ex. S–2) They arrived at 5:10 p.m., approximately two hours after the evening shift had begun.[3] (Tr.50:7-14; 65:2-13; 76:18-23; 86:7-18; Ex. S–2) They first met with Charles Kapp, mine foreman, to inform him of the hazard complaint and the resulting inspection. (Tr.66:1-67:9; 106:9-23; 111:5-15) Then, four of the six inspectors, including Sparks and Inspector Tim Gardner, went to the mine's new portal; the other two went to the dispatch shack at the old portal. (Tr.22:6-10; 160:5-14)

Inspector Sparks considered the Paradise #9 mine to be large in scale. (Tr.96:7) There were four to five miles of belt lines in the mine. (Tr.95:1-9; 145:14-24) According to Sparks, this hazard complaint inspection could have involved many possible inspection areas. (Tr.95:25-96:9)

The size of the mine also accounted for the fact that MSHA or state mine inspectors were present at the mine site nearly every day. (Tr.98:8-23; 142:24-144:9) Using VPID data, there were 735 inspection days during the 15-month period from January 21, 2011, through April 20, 2012, meaning that there were one or more MSHA inspectors at the mine frequently enough to total 735 inspection days during that 15-month (455-day) period. (Tr.99:13-101:14) There was an E01 inspection going on nearly every work day, usually involving multiple MSHA inspectors. (Tr.102:1-24; 142:24-143:8)

Mine personnel were aware that inspectors were on the property essentially all the time because the inspectors would typically show up before shift changes and be seen on the site and heard on the phones. (Tr.143:9-144:9)

Witnesses discussed various scenarios where MSHA could be on site for reasons other than to conduct a covered inspection. Giving notice of MSHA's presence under such circumstances would not violate the regulation. (Tr.63:3-64:8) For example, MSHA could be on site to interview people as part of an investigation (Tr.63:9-11), to take photos and gather information as part of an investigation (Tr.63:12-16), to review exam records (Tr.63:17-22), or to merely meet with the safety department of mine management. (Tr.63:24-64:1) In addition, any

[2] It is unclear whether there were five, six, or seven MSHA personnel on the mine site to respond to the hazard complaint. At various places in the record witnesses testified that all three numbers of inspectors responded to the hazard complaint on April 20, 2012. (Tr.21:1-7; 53:10-13; 64:9-15; 65:20-25; 76:18-23; 82:25-83:16; 84:5-14; 120:22-121:4; Ex. S–2) The exact number is unimportant for this decision. For clarity and consistency I speak of six inspectors.

[3] KRI had three shifts on April 20, 2012 (Tr.72:25-73:9): the "first" or day shift (Tr.73:16-22), the "second" or evening shift (Tr.73:23-74:1), and the "third" or midnight shift, which was non-production and used for maintenance. (Tr.74:2-11)

imminent danger situation constitutes an exception to the advance notice prohibition. (Tr.43:21-44:1; 112:3-11)

Whenever an inspection occurred, MSHA inspectors needed escorts and rides into the mine.[4] (Tr.69:17-70:7) Safety directors were designated to escort MSHA inspectors. (Tr.138:24-139:5) As a courtesy, inspectors tried to coordinate with the safety directors to minimize logistical issues. (Tr.74:24-75:11) Still, it was easier to find rides and escorts for the inspectors if they showed up at or before the shift change because the miners were already at the rendezvous points and did not need to return from inside the mine to pick up an inspector. (Tr.85:24-86:6) But, when the inspectors arrived at the mine after the normal shift change time (as happened here), the logistics could become awkward. If the escort personnel were already underground when MSHA arrived for an inspection, someone (typically the dispatcher) had to communicate (typically with the mine phone/PA system) with the underground miners to summon them back to rendezvous with and transport the MSHA inspectors. (Tr.74:24-76:23)

The mine dispatcher operated the mine's interconnected page phone system. (Tr.22:21-23:7; 157:20-24) When the dispatcher wanted to call a particular location, his summoning call could be heard through the whole mine. (Tr.158:6-12) There was no way to limit the call to just one place in the mine. (Tr.37:9-38:1) If the dispatcher wanted to speak only with a person on unit four, for example, he called out for unit four on the page phone. (Tr.158:20-159:3) When a person on unit four picked up a phone and responded, the conversation became private. (Tr.38:9-39:4; 159:4-14) If someone else picked up a phone at the same time, he would be able to hear what the others were saying since it was a party line. (Tr.39:5-10; 159:16-19) Similarly, if someone underground wanted to call the dispatcher, the page to the dispatcher would be heard throughout the mine until the dispatcher pushed a button making the call private. (Tr.89:6-90:3)

Lance Holz, the dispatcher on duty in the dispatch shack at the old portal on April 20, 2012, was the person who made the statement that Inspector Sparks interpreted to be a prohibited advance notice.[5] (Tr.155:4-15; 157:17-19) Among other duties, Holz coordinated rides into the mine for MSHA inspectors, when needed. (Tr.154:16-23; 161:16-162:6) In this instance, Holz was working the phone system from the dispatch shed at the old portal to get rides for the six MSHA inspectors who responded to the hazard complaint (Tr.69:17-22; 161:12-22), while two of the inspectors looked through record books kept in the dispatch shack. (Tr.161:4-11) As was customary in such cases, one of the MSHA inspectors—in this instance, Gardner, initially—monitored the mine's phone system. (Tr.21:8-20; 40:5-11; 160:7-14) Significantly, Holz testified that the inspectors reminded him not to give any advance notice of inspection, which was consistent with the training he had received from KRI. (Tr.160:7-161:2)

The dispatch shed at the old portal was about six miles away from the new portal where Inspector Sparks was. (Tr.34:12-22; 36:14-20; 167:23-168:6; Ex. R–12) From his location at

[4] MSHA inspectors were routinely escorted and transported into the underground parts of the mine by miners (consistent with the Section 103(f) "walk-around rights"). (Tr.85:13-23); *see Consolidation Coal Co.*, 2 FMSHRC 1403 (June 1980) (ALJ); 30 U.S.C. § 813(f).

[5] Holz worked as a dispatcher at KRI from 2010 to 2015. (Tr.153:6-25) During that time he was an hourly employee and reported to the mine foreman. (Tr.155:23-156:14)

the new portal, Sparks was also able to monitor phone traffic over the mine's phone system. (Tr.37:1-8) At one point, he took over monitoring the mine's phone system from Gardner. (Tr.23:10-14; 113:16-25) While monitoring the phones, Sparks testified that he heard someone from the #4 unit ask, "Do we have any company outside?" (Tr.23:15-25; 55:11-24) This is undisputed. Sparks' testimony suggested that he considered the inquiry whether there was "company outside" to be advance notice, regardless of any response by Holz. (*See* Tr.24:21-25:10; 61:3-8) Sparks claimed that Holz answered, "Yeah, I think we do"[6] (Tr.23:15-24:1; 55:11-25), which Sparks also considered prohibited advance notice.[7] (Tr.24:2-14; 28:17-25) However, Sparks never said that he knew or factored in the requirement that the advance notice had to convey advance warning of an inspection to be a violation.

What dispatcher Holz said in response is disputed. While Sparks testified that he heard Holz say, "Yeah, I think we do," Holz testified repeatedly to the contrary that he said "I don't [know]." (Tr.163:9-16) Holz further denied giving or intending to give advance notice. (Tr.166:23-167:5) He agreed that someone underground asked if there was company outside, but he assumed that the voice was asking whether MSHA was present (in the context of arranging rides and escorts). (Tr.172:13-16) At the hearing, each time Holz was asked what he responded, he said that his response was, "I don't know." (Tr.163:9-16; 174:21-22) On further questioning, he allowed that he might have said something else (Tr.163:17-19), but his routine and training was to answer indefinitely. (Tr.162:22-163:8) The indefinite response was the norm in situations such as this—if anyone asked why they needed to come to the surface, the standard response was "I don't know" or "I can't say." (Tr.164:2-10; 172:17-19) Sparks confirmed that mine personnel were in the habit of using such vague language whenever they called into the mine to have miners come out when MSHA was on site in order to avoid violating the advance notice prohibition. (Tr.81:22-82:24)

Consistent with Sparks' statement, it appears that miners often suspected or were aware of the presence of MSHA inspectors and had developed a practice of intentional vagueness when asking and answering why they were being summoned to the surface. Given the fact that MSHA inspectors were at the mine almost daily for inspections, the necessity of summoning escorts and rides for the inspectors from underground, and the reality that the only way to summon rides was to use the mine phone system (Tr.158:16-159:1), the dispatcher and other miners involved adopted a communication technique that feigned ignorance about what was happening whenever MSHA inspectors were on site for an inspection. (Tr.81:22-82:24) Since miners were trained that they were prohibited from giving any advance notice of an MSHA inspection (Tr.140:7-19; 160:15-161:2), under the typical scenario, a dispatcher would page into a unit in the mine and say generically that he needed someone to come to the surface. (Tr.161:23-162:6) If a miner from underground had a question about why he was being summoned to the surface, the dispatcher adopted the ruse of not knowing—or at least telling the underground miner he did not

[6] Sparks later testified that Holz said, "Yeah, I think there is." (Tr.55:25; 62:16; 79:6; 81:6; 103:15) This minor semantic inconsistency does not change my analysis, and I will refer to both ("Yeah, I think we do" or "Yeah, I think there is") interchangeably throughout this decision.

[7] Sparks later clarified that only the response could constitute a violation, not the question whether there was "company" outside. (Tr.103:2-19)

know—why the miner was needed at the surface. (Tr.161:23-164:10) Holz' had been trained and knew that he could not say that there were inspectors at the surface needing a ride to conduct an inspection. (Tr.160:5-161:2; 163:2-16)

III. ANALYSIS

A. Credibility Assessment

A full analysis of this controversy requires that I consider both the question about "company," which is undisputed,[8] and Holz' response to determine which scenario is better supported by the record. Holz recalled saying, "I don't know." Inspector Sparks, on the other hand, testified that Holz replied, "Yeah, I think there is." The Commission is reluctant to set aside a judge's credibility finding based on the judge's evaluation of conflicting oral testimony. *Austin Powder Co.*, 21 FMSHRC 18, 22 (Jan. 1999). This rule appropriately recognizes the importance of the judge's observation of witness demeanor. *Id.* at 24. For the reasons explained below, I find dispatcher Holz' testimony that he said "I don't know" more credible than Inspector Sparks' recollection of what he heard while monitoring the mine phones.

1. Sparks' Credibility

Three items cast a shadow over Sparks' credibility and bolster my conclusion that Holz answered, "I don't know" instead of "Yeah, I think there is."

First, it is apparent to me that this citation was written under the mistaken assumption that the question about "company" alone was all that was needed to make out a violation of this section of the Mine Act. When Sparks decided to cite KRI for the violation, he believed and concluded that the question alone gave prohibited advance notice of an MSHA inspection. The citation and the transcript of Sparks' testimony bear this out. (*See* Tr.24:21-25:10; 60:10-61:8) When pressed on the issue, he agreed that it was the response that would complete the inchoate advance notice. (Tr.103:2-19) (emphasis added) Only the putative statement "Yeah, I think we do [have company]" would violate the statute. (Tr.23:15-24:1; 55:11-25) I am convinced by a preponderance of the evidence that Sparks paid closer attention to the undisputed question whether there was "company" on site than he did to the response.

[8] While it is undisputed that somebody from Unit #4 asked about "company," Respondent argues that "company" could have meant KRI safety department personnel or Murray Energy corporate personnel. (Resp't Br. 16) In fact, Joe Myers, Corporate Safety Director, was on site that day. (Tr.116:1-11) At hearing, Holz testified that "company" could have meant one of a few things, but he assumed that the person calling probably was asking about MSHA, especially given that it was a Friday evening after a shift change. (Tr.164:23-165:11) I credit Holz' statement and find that "company" was in reference to MSHA.

Second, in general, Sparks came across as overly convinced of his position and unwilling to admit to any alternate interpretation of the facts.[9] He was assertive and forceful in defending his belief that what he claimed to have heard was advance notice of an inspection. (*See, e.g.*, Tr.62:3-6) Sparks' demeanor in delivering his testimony created the impression that the level of credibility accorded his testimony should increase due to the fervor of its delivery, despite obvious shortcomings with some points of fact. For instance, Sparks categorically denied that it was possible that he misheard the statements. (Tr.81:1-6)

Importantly, Sparks claimed that in "every place" where he had been associated with miners, the miners used surreptitious and coded language on a regular basis to convey prohibited advance notice of MSHA inspections. (Tr.26:1-3) He claimed that what he heard on April 20, 2012, was an example of this. (Tr.24:21-25:10) He gave two examples of how miners used code words to give advance notice that MSHA was on site: (1) a miner asks another, "Is it raining?" and the other says, "Yes" (Tr.25:13-20); and (2) a miner asks about a belt that does not exist. (Tr.25:21-25) These examples were apparently taken from Sparks' experience as an inspector but had no discernable connection to the facts of this event.[10]

It is clear that Sparks' state of mind when he issued this citation was that coded language was commonly used to convey advance notice, and that the question he heard over the mine PA system was consistent with such coded language. Sparks' claim of widespread advance notice given through coded language suffers from the logical fallacy of *a dicto simpliciter ad dictum secundum quid*, i.e., a general rule is taken to be universal. Here, despite a dozen previous inspections at the Paradise #9 mine, Sparks never had any issues with miners giving advance notice at this mine until he issued Citation No. 8502992. (Tr.26:4-22) Additionally, Sparks was not aware of any prior section 103(a) violations at the Paradise #9 mine. (Tr.117:14-21) In fact, despite the alleged advance notice pervasive in the industry, Sparks had issued only one advance notice citation before this one (Tr.32:14-18)—it was at another mine and the miners in that instance admitted that they were giving advance notice. (Tr.30:17-31:3; 32:14-24) The evidence simply did not support his sweeping and categorical statement that such cryptic language was

[9] At one point in his testimony, Sparks equivocated and said, "However, I think what he said —. He said, do we have any company outside? And he said yeah, I think we do; I think there is." (Tr.55:23-25) (emphasis added)

[10] During the hearing, counsel for the Secretary mentioned in her argument opposing Respondent's oral Motion for Directed Verdict that there was "a pattern throughout the mine industry of documented coded [sic] to alert to [sic] inspectors [. . .] that MSHA inspectors are going around." (Tr.126:7-12) Counsel also referred to language in the Commission's remand decision about "advance notice [. . .] be[ing] conveyed through ambiguous language." (Tr.126:18-20); *see* 38 FMSHRC at 1949 n.7. However counsel's argument is not evidence that I can consider. *See Sec'y of Labor on behalf of Jackson v. Mountain Top Trucking Co., Inc.*, 21 FMSHRC 1207, 1213 (Nov. 1999) (noting that statements of counsel are not evidence). Nor is the Commission's dicta footnote a holding that might become law of the case. There is no testimony, Commission authority, nor any exhibits providing me with a factual basis or binding precedent against which to evaluate the otherwise unsupported and sweeping statement from Sparks that the practice of giving advance notice was a given in every mine he had ever dealt with. (Tr.24:21-26:3)

commonly used at "every" mining facility he had had experience with, and, specifically, at this mine.

Third and finally, Sparks' testimony was out of step with common sense and the contemporaneous records made at the time he issued the citation regarding several important points. Sparks never interviewed Holz, nor presumably his fellow inspectors, to confirm his conclusion that Holz had given a prohibited advance notice of an MSHA inspection. (Tr.34:12-35:3; 87:13-18; 168:24-169:19) Sparks instead relied solely on his perception and recall of what he heard to conclude that advance notice had been given. (Tr.54:16-20) I am aware that it was several miles from where Sparks was to the dispatch shack where Holz and the other inspectors were (Tr.34:12-19), but it seems obvious and prudent that such an interview would be helpful and not prohibitively onerous. More diligence in this regard might have had a positive impact on my assessment of Inspector Sparks' credibility.

Interestingly, despite not interviewing Holz to confirm what he thought he heard, Sparks did talk to other workers at the mine. He testified that he immediately went outside the dispatch shack and told Joe Myers, the assistant corporate safety director, what had happened and that he was going to issue a citation. (Tr.24:2-14) Sparks also testified that he interviewed rank-and-file miners on the #4 unit as well as the section foreman on April 20, 2012. (Tr.33:4-34:11) He testified that nobody knew who called or admitted to asking about "company." (Tr.33:10-34:11) However, Sparks' field notes, written on the day of the inspection, contained no mention of these potentially corroborating conversations. (Tr.33:11-23; Ex. R–2) Also, in his sworn declaration filed in opposition to the Respondent's Motion for Summary Decision (Ex. R–7), he failed to mention any conversation with miners on the day of the citation. The declaration was prepared on July 20, 2015, nearly three years after the events in question but still nearly two years before the hearing. (Tr.58:3-15; Ex. R–7)

Sparks also testified that Holz hesitated before responding to the person on the phone system (Tr.79:8-15), but he omitted this detail from the notes he made about this incident at the time he issued the citation. (Tr.79:16-18; 81:7-9) Sparks testified that after a couple of seconds' delay he asked the other person on the phone, "Who is this?" to which there was no answer. (Tr.24:7-14) Again, he failed to document this alleged interchange at the time it happened. (Tr.81:10-15) When contrasted with the granular detail of his hearing testimony on these points, this inconsistency created the impression that Spark's recollection of specific events—notably undocumented and unconfirmed events—nearly five years before the trial date, became more detailed and precisely tailored to the elements of the Secretary's case as the time for trial approached. The effect of this is to undermine his credibility.

Sparks' belief that coded language was common and lay at the root of what happened here is simply unsubstantiated. (Tr.24:21-26:8) His emphasis on this point early on in his testimony created the impression that he was already "leaning" toward concluding that what he heard that day was a violation. Sparks' failure to verify by interview, his failure to document some of the key points he raised in his testimony, and his vehemence that his memory was unassailable created an abiding impression of tainted perception and enhanced recall.

2. Holz' Credibility

On the whole, Holz' testimony was more credible than Sparks' and his version of the events more believable for three reasons.

First, Holz testified that he had been trained not to say anything that could be taken as an advance warning of an MSHA inspection while at KRI. (Tr.160:15-161:2) Shannon Baker, KRI's safety director at the time of this citation, testified that his miners did not use coded language to circumvent the advance notice rule. (Tr.140:12-19) In his eight years at the mine, Baker never witnessed anyone giving advance notice of an inspection. (Tr.141:8-13) He testified that, to his knowledge, no coded language was ever used (Tr.141:17-22), and he was not aware of any prior advance notice citations at the Paradise #9 mine. (Tr.141:23-142:23) Indeed, as mentioned above, prior to Citation No. 8502992, Sparks had never had an issue with anyone giving advance notice with or without the use of coded language at the Paradise #9 mine. (Tr.26:4-23) Nothing in the record undermines Baker's testimony. I find Baker's testimony to be credible, and it tends to support Holz' claims.

Second, nearly five years passed between the contested events and the hearing. By then, it had been two years since Holz had left his dispatcher job at KRI. (*See* Tr.153:23-25) His leaving KRI had nothing to do with these events. (Tr.153:14-18) There was no evidence to suggest that Holz had any reason to skew his testimony in favor of this former employer. His statement that he believed that it was more likely that he said, "I don't know" (Tr.163:15-19; 164:2-4), did not sound self-serving.[11] The record contains nothing to suggest that Holz had a reason to bolster or misstate his recollection of these events. *See, e.g., Sunny Ridge Mining Co.*, 16 FMSHRC 1797, 1818 (Aug. 1994) (ALJ) (where the ALJ was persuaded by the credible testimony of respondent's former employees).

Third and most notably, Holz was in the presence of two MSHA inspectors at the time the contested statements were heard, and the inspectors explicitly cautioned him against giving prohibited notice. (Tr.160:7-14) This fact alone very convincingly undercuts Sparks' recollection. It is difficult to believe that Holz would not only go against his training and give prohibited advance notice but would risk doing so in a confined space (*see* Ex. R–12) in the presence of two MSHA inspectors who had just warned him not to.

I find that a preponderance of the evidence makes it more believable and consistent that Holz' answer to the question about "company" was "I don't know" and not "Yeah, I think there is." Accordingly, I find no advance notice was given and, therefore, there was no violation.

B. <u>Only Advance Notice of an Inspection is Prohibited</u>

I have already found Holz to be a more credible witness than Sparks and, thus, have found that Holz said, "I don't know" in response to the question of whether there was company outside. This is dispositive and ends the inquiry. Nevertheless, even assuming Sparks' version of Holz' answer—"Yeah, I think there is"—was what was actually uttered, the Secretary has

[11] This was the only time Holz was ever cited for anything at KRI. (Tr.160:1-3) He claimed to remember it well. (Tr.159:21-160:4)

failed to prove that Holz provided advanced notice of an inspection in violation of section 103(a).

Section 103(a) plainly prohibits advance notice of an inspection: "In 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) (emphasis added). The Commission's decision in the prior appeal did not change this requirement: "Inherent in our analysis is an understanding that ambiguous language can violate section 103(a), if context establishes that it conveyed advance notice of an inspection." 38 FMSHRC at 1949 (emphasis added).[12]

The statute's limited scope recognizes the reality that certain mines, like the Paradise #9 mine, have a constant MSHA presence on site and harmonizes this with the need to prevent the sort of advance notice that would defeat the specific purposes of section 103(a), i.e., "determining whether an imminent danger exists, and [. . .] determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act." 30 U.S.C. § 813(a). It is consistent with this limited scope that communicating that MSHA was on site was only prohibited if it gave or effected notice of an inspection. Giving notice of MSHA's presence under other non-inspection circumstances is not prohibited. Thus, saying, "Yeah, I think there is," is not necessarily a prohibited communication even though it happens in connection with an MSHA inspection.

Here, the citation does not allege nor does any other evidence prove that the overheard language actually did or even intended to give advance notice of an MSHA inspection. (Ex. S–1) In the citation, Inspector Sparks documented what he believed to be the *sine qua non* of the alleged violation: "[E]vidence was provided to MSHA that mine personnel provided advance

[12] Respondent makes a novel, creative argument that the plain language of section 103(a) indicates it applies only to the Secretary of Labor and the Secretary of Health, Education, and Welfare, but not to mine operators. (Resp't Br. 6) Instead, Respondent argues, section 110(e) is the clear mechanism for preventing and enforcing advance notice violations. (*Id.* at 8) I am not convinced. The applicable statutory language ("In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person [. . .] .") is an imperative sentence with no clear subject. While the subject could be the Secretary of Labor or the Secretary of Health, Education, and Welfare, as Respondent argues, I note that the "no advance notice of an inspection" clause is found in the only sentence in section 103(a) that utilizes an implied subject. Although Respondent would have me believe the language is plain and unambiguous given that the language of the surrounding sentences explicitly apply to the Secretary of Labor and/or the Secretary of Health, Education, and Welfare, I conclude this particular clause and sentence is ambiguous because it is unclear who the implied subject is. Therefore, I defer to the Secretary's reasonable interpretation of section 103(a) that nobody—whether MSHA or mine employees—is permitted to give advanced notice of an inspection. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1334-36 (June 2016) (deferring to Secretary's reasonable interpretation of section 104(b)), *aff'd*, 875 F.3d 279 (6th Cir. 2017).

notice to miners underground that MSHA inspectors were on mine property."[13] (*Id.*) (emphasis added) When pressed to confirm whether he believed the mere act of giving notice of the presence of MSHA personnel was a violation, he reiterated that such was his understanding and frame of mind when he wrote the citation. (Tr.60:10-61:16) This, of course, is wrong. Only advance notice of an inspection is prohibited.

MSHA was present at the Paradise #9 mine nearly every day. (Tr.102:7-24; 142:24-143:8) It was a fact of life at this mine that miners were constantly aware of MSHA's presence. (Tr.144:3-9) There were multiple reasons why MSHA inspectors could be on the mine site that had nothing to do with conducting inspections. *See* discussion *infra* Part II. In all of these scenarios, it is common and appropriate (not prohibited) to communicate that MSHA inspectors are present. Even in the instances where MSHA inspectors were on the site to do inspections, it was necessary to arrange escorts and rides for them from the surface into the mine. So, assuming that Holz said, "Yeah, I think there is," instead of "I don't know," or something of similar import, there is only a small subset of facts where such a statement would be prohibited, e.g., if Holz intended to convey the message that MSHA inspectors were on the premises to conduct an inspection and he intended his statement to be an advance warning instead of one of the many other possible and innocuous scenarios. It is the Secretary's burden to prove this intent by a preponderance of the evidence.

Even assuming Holz intended to convey advance notice of an inspection, it would have been very difficult to effectively do so. Neither Holz nor the other person on the phone said anything about where Sparks would be traveling. (Tr.72:15-20) In fact, Sparks testified that he did not think it was even possible for the miners to know where MSHA inspectors were going. (Tr.72:21-23; 96:24-25) There were several miles of belts in this mine. (Tr.95:1-9) With such a large mine and the fact that this was a hazard complaint inspection (Tr.95:25-96:5), the men underground would not know where MSHA would be going, even if they had advance notice that MSHA was on site to conduct an inspection. (Tr.96:10-25) Furthermore, because all of the MSHA inspectors had to be escorted into the mine and needed rides (Tr.69:17-22), they were trained not to tell escorts where they were going until they were underground. (Tr.70:22-71:8) Consistent with this practice, Sparks would not tell his escort where he intended to go until they got underground. (Tr.69:23-70:21) Even though MSHA notified mine management that they were at the mine in response to a hazard complaint (Tr.66:1-67:9), until the MSHA inspectors were underground, no one at the mine knew where they were going. (Tr.71:22-72:3)

To bolster his argument, the Secretary cites extensively to *Topper Coal Company*, 20 FMSHRC 344 (Apr. 1998), in which the Commission affirmed the Judge in finding that the operator violated section 103(a). In that case, three MSHA inspectors arrived at Topper Coal Company and told Gary Fields, the company's president, that they were there to conduct a spot inspection and explicitly instructed him not to telephone underground to alert miners. *Id.* at 345. Fifteen to 20 minutes after this instruction, and while two of three inspectors crawled into the mine to conduct the inspection, Fields telephoned the working section and told a miner that "there are two federal inspectors in there. Tell the men to watch out and be careful." *Topper Coal Co.*, 17 FMSHRC 945, 946 (June 1995) (ALJ).

[13] The Petition does not allege that advance notice of an inspection was given. It only incorporates the language in the citation. (Ex. S–1) The citation is attached to the Petition.

The facts in *Topper Coal* are clearly distinguishable from those here. First, the mine in *Topper Coal*, the No. 9 mine, was significantly smaller than the Paradise #9 mine.[14] Unlike the Paradise #9 mine, the No. 9 mine in *Topper Coal* presumably did not have MSHA inspectors present on an almost-daily basis. Thus, any notification of MSHA's presence, even if for a non-inspection purpose, would likely have triggered higher levels of unease and suspicion for the miners at the No. 9 mine. Additionally, and importantly, given the smaller size of the mine in *Topper*, with one working section and only nine miners underground, Fields knew where the inspectors were heading. *Topper Coal*, 20 FMSHRC at 345 n.3, 346. By contrast, the Secretary has not established here that anybody other than the inspectors knew with any degree of specificity where the inspectors were ultimately going.

Second, in *Topper Coal* there was no good reason for Fields to contact any of the miners working underground. Unlike this case, where there was a legitimate need to arrange rides and escorts, the inspectors in *Topper* did not require rides or miners to escort them. *Id.* at 345. Nevertheless, Fields proactively and intentionally called the working section despite the MSHA inspectors' explicit warning not to.

Finally, the advance notice of an inspection that Fields gave the underground miner over the telephone was explicit and its contents uncontested. Although Fields argued at hearing that he made the call because of his concern for the safety of the inspectors who might otherwise be run over by shuttle cars, the Judge discredited this explanation, reasoning that Fields had not previously expressed concern for the inspectors' safety before calling and there was no reason Fields needed to specifically identify the people entering the mines as "federal inspectors." *Topper Coal*, 17 FMSHRC at 950-51. Here, by contrast, Holz contested ever saying the purported violating language—"Yeah, I think so"—in response to the question whether there was "company" outside. Furthermore, Holz' alleged statement is ambiguous and its intent and effect are unclear, particularly in light of the circumstances surrounding the need for escorts and rides.

Ultimately, there is nothing but Sparks' pre-formed and unsupported opinion—that covert and coded language was used on a regular basis to circumvent this prohibition—to support the essential component of the prima facie case that the notice given pertained to an MSHA inspection. The fact that MSHA's presence was quotidian, that no evidence shows that anyone but Sparks, his fellow inspectors, or Mine Foreman Kapp knew why these specific MSHA inspectors were on site, and that there were several permissible reasons to tell miners underground that MSHA personnel were on site significantly dilutes the convincing power of Sparks' testimony and the Secretary's argument. The most a fair assessment of the evidence yields is that the language Sparks claimed he heard might have given notice that MSHA personnel were present.

[14] At the time of the violation, Topper Coal Company produced 135,401 production tons per year, and its No. 9 mine produced 29,716 production tons per year. *Topper Coal Co.*, 17 FMSHRC at 955. By way of comparison, at the time of this alleged violation, KRI produced 27,688,481 production tons per year, and the Paradise #9 mine produced 1,758,880 production tons per year. (Ex. R–4) In other words, the Paradise #9 mine at issue in this case produced 59 times as much coal as the No. 9 mine in *Topper Coal*.

Asking whether "company" was present may well have become part of a prohibited advance notice if the answer completed the communication in a way that could be understood to give advance notice of an MSHA inspection. If, however, the question about "company" was asked in the context of whether people underground needed to stop what they were doing and report to a rendezvous point to provide rides and escorts for people at the surface, even if they were MSHA inspectors, neither the question nor the response communicated prohibited advance notice of an MSHA inspection. In the context of Holz' trying to arrange rides for the MSHA inspectors (Tr.161:12-22), it is more consistent with his training, his memory, and the facts on the ground and in the record, that the question about whether "company" was present was an innocuous inquiry relating to the need for rides and escorts rather than a precursor to prohibited advance notice of an MSHA inspection, the details of which were yet to be revealed to anyone by the MSHA inspectors. Thus, even though Holz' alleged statement could appear to be a violation, seen in the larger context, I find it is more believable that it was made with the intent to facilitate finding escorts and rides for the MSHA inspectors. *See, e.g.*, *Portable, Inc.*, 36 FMSHRC 3249, 3257-58 (Dec. 2014) (ALJ) (where the Judge found that notifying a crusher operator of an inspection for the purpose of securing an escort did not constitute advanced notice of an inspection in violation of section 103(a)).

Considering the entirety of the record, the preponderance of the evidence stops short of proving that Holz gave or even intended to give advance notice of an inspection.[15]

IV. SUMMARY AND ORDER

I find that dispatcher Holz' testimony about what he said in response to the query, which Inspector Sparks thought constituted an advance notice of MSHA presence on the mine site, was more credible than Sparks' recollection. Sparks appeared to be focused on the question based on a mistaken belief that it alone could violate the prohibition against giving advance notice of an MSHA inspection per section 103(a) of the Mine Act. As a result, Sparks' recollection of what he thought he heard in response is less convincing than Holz' testimony that his response was "I don't know." I find that the communication Sparks alleged was advance notice of MSHA presence at the mine site was not intended to be, nor was it by its very content, advance notice of an MSHA inspection. As a result, the Secretary has failed to prove by a preponderance of the evidence an essential element of the prima facie case, and the citation issued on April 20, 2012, must be vacated.

[15] Respondent makes another novel, interesting argument that section 103(a), as applied to KRI here, violates the first amendment because the violative communication was non-specific and occurred while KRI was attempting to exercise its section 103(f) rights. (Resp't Br. 22-24) As KRI has already prevailed, I see no need to address this argument.

Accordingly, it is **ORDERED** that Citation No. 8502992 is hereby **VACATED**.

L. Zane Gill
Administrative Law Judge

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