FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20004-1710

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2013-211
v.	:	
KENAMERICAN RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involves a single citation issued to KenAmerican Resources, Inc. ("KenAmerican") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citation alleges that a communication during a mine inspection, in which a caller asked if there was "company outside" and the dispatcher responded "yeah, I think there is," conveyed advance notice of an inspection, in violation of section 103(a) of the Act.[1] 37 FMSHRC 1809, 1811 (Aug. 2015) (ALJ).

KenAmerican filed a motion for summary decision, which the Secretary opposed. The Judge found that there were no genuine disputes of material fact regarding the issue of whether a violation occurred, that the cited communication was vague and ambiguous, and that he was unable to conclude that it conveyed prohibited advance notice of an inspection. Accordingly, he granted KenAmerican's motion and vacated the citation. *Id.* at 1811-12. The Secretary seeks review of the Judge's grant of summary decision.

We conclude that the Judge erred in granting KenAmerican's motion. When the record is viewed in the light most favorable to the Secretary (the party opposing summary decision), an inference could reasonably be drawn that the communication was meant to convey advance notice of an inspection. Accordingly, we vacate the Judge's grant of summary decision and remand the matter for further proceedings.

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[1] Section 103(a) states in relevant part that "no advance notice of an inspection shall be provided to any person." 30 U.S.C. § 813(a). The Act does permit advance notice for certain activities, such as investigations to gather or information on health and safety conditions, or inspections in response to imminent danger complaints. *See* 30 U.S.C. §§ 813(a), 813(g)(1).

I.

Factual and Procedural Background

The following facts are undisputed. MSHA Inspector Doyle Sparks and six others traveled to KenAmerican's Paradise No. 9 Mine, to conduct an investigation in response to a hazard complaint. Before traveling underground, the inspectors took control of the mine's communication system. While monitoring the system, approximately 30-35 minutes after his arrival at the mine, Sparks overheard a call from underground. The caller asked if there was "company outside," and the dispatcher responded "yeah, I think there is."[2] Sparks asked who was on the line and received no response.[3] He determined that the communication was advance notice of an inspection and issued Citation No. 8502992, which states that "[d]uring a Hazard Compliant [*sic*] inspection conducted on 04/20/2012 . . . mine personnel provided advance notice to miners underground that MSHA inspectors were on mine property."

KenAmerican contested the citation before the Commission and filed a motion for summary decision, requesting that the citation be vacated because the undisputed material facts "cannot and do not amount to a violation." KenAmerican argued that the citation fails on its face to allege *advance* notice of an *inspection* because it alleges only that a communication "during" an inspection conveyed notice that inspectors were "on mine property." KenAmerican also noted that inspectors can be on-site for many reasons, including some for which advance notice is permitted.[4] In addition, KenAmerican argued that the cited communications were general statements which did not indicate that inspectors were about to inspect the mine. Therefore the Secretary had no evidence to support the violation, and KenAmerican was entitled to summary decision.

KenAmerican also claimed that enforcing section 103(a) in these circumstances would constitute a content-based restriction of free speech, in violation of the First Amendment. KenAmerican stated that section 103(a) should be narrowly tailored to prohibit only communications that contain specific content concerning an inspection, and intentionally or knowingly convey advance notice.

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[2] KenAmerican accepts the dispatcher's alleged response for purposes of summary decision, but notes that it will dispute the content if a hearing becomes necessary.

[3] This fact only appears in the Secretary's version of events. Resp. to Mot., Ex. C. However, it has not been contested by KenAmerican, and in the summary decision context we look at the record in the light most favorable to the non-moving party. *See, e.g.*, *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). Accordingly, for these purposes, we accept the fact as true and undisputed.

[4] KenAmerican specifically noted that advance notice is encouraged when dealing with a hazard complaint involving an imminent danger. 30 U.S.C. § 813(g)(1). KenAmerican then argued that, because the inspectors were investigating a hazard complaint, the inspection at issue was exempt from the prohibition on advance notice. We find that the Judge properly rejected this argument, as there is no indication that an imminent danger was present. 37 FMSHRC at 1811.

The Secretary filed an opposition, stating that KenAmerican was not entitled to summary decision because "KenAmerican violated section 103(a) of the Mine Act and . . . there are genuine issues as to the material facts relating to the gravity and negligence of the citation issued." Resp. to Mot. at 3-4. The Secretary did not specifically identify any disputed facts, or offer a theory as to why the cited language conveyed prohibited advance notice of an inspection. The Secretary did restate the undisputed facts – that while inspectors were preparing to begin an inspection, a miner called to inquire if there was "company outside," and was told that there was. *Id.* at 4. The Secretary also noted that the inspection at issue constituted direct enforcement activity which included an impact inspection, and was therefore not exempt from the prohibition on advance notice. *Id.* at 5. As for the First Amendment claim, the Secretary noted that no court has ever found section 103(a) unconstitutional, and permitting advance notice would interfere with enforcement of the Act. *Id.*

In addressing KenAmerican's motion, the Judge first found that there were no genuine issues of material fact with respect to the existence of the violation, because the content of the cited communication was undisputed, and the Secretary only alleged disputes as to gravity and negligence. 37 FMSHRC at 1811. He then found that the undisputed statements were ambiguous and vague, and was "unable to conclude as a matter of law" that the statements conveyed prohibited advance notice. *Id.* The Judge stated that where (as here) the non-moving party would have the ultimate burden of proof at trial, summary decision is appropriate where the non-movant is unable to meet its ultimate burden. *Id.* at 1811 n.2. He found that the Secretary had failed to "marshal evidence that would at least support a reasonable inference" that the cited communications conveyed advance warning, and therefore concluded that a trial would serve no purpose, and that KenAmerican was entitled to summary decision as a matter of law. *Id.* Accordingly, he granted the motion for summary decision and vacated the citation. The Judge did not reach KenAmerican's First Amendment claim.

On appeal, the Secretary argues that the Judge erred by granting KenAmerican's motion for summary decision. Specifically, the Secretary states that the Judge erred by: interpreting section 103(a) to exclude advance notice conveyed through ambiguous language; failing to make an inference in the non-movant's favor regarding the intent of the cited communication; and finding insufficient evidence in the record to support a reasonable inference of advance notice. Ultimately, the Secretary argues that the Judge "should have . . . concluded that a hearing was necessary to develop the facts regarding the context for and intended meaning of the exchange." S. Br. at 1.

Also before the Commission is KenAmerican's motion to strike the majority of the Secretary's brief. KenAmerican argues that the Secretary has raised several theories on appeal which were never presented to the Judge, including issues of statutory interpretation, intent, coded or euphemistic language, and the proper drawing of inferences. The Secretary counters that his position on appeal is merely a refinement of his position below and that, regardless, where good cause exists, the Commission may consider new theories on appeal.

II.

Framework

Commission Procedural Rule 67 provides that summary decision shall only be granted if the entire record shows 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). We have long analogized summary decision to summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g.*, *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). As with summary judgment under Rule 56, appellate review of summary decisions is *de novo*, in that the reviewing court applies the same standard as the trial court. *See, e.g.*, *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). When the Commission reviews a summary decision and determines that the record before the Judge contained disputed material facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining Co.*, 17 FMSHRC 1313, 1316-17 (Aug. 1995).

Addressing Rule 56, the Supreme Court has emphasized that the party moving for summary judgment bears the initial burden of showing that there are no genuine disputes as to material fact. *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If the moving party carries its burden of showing that there is no genuine dispute as to material fact and that the movant is entitled to judgment as a matter of law, then the burden shifts to the non-movant to establish a genuine dispute as to material fact. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587 (1986).

If the moving party fails to meet its burden, then summary decision must be denied, regardless of the sufficiency of the opposition. Even the absence of an opposition does not entitle the movant to summary decision, if the motion is not adequately supported. *See Adickes*, 398 U.S. at 159-61 (summary judgment must be denied where the evidence in support of the motion does not establish the absence of a genuine issue, even if no opposing evidence is presented). *See also In re Rogstad*, 126 F.3d 1224, 1227-28 (9th Cir. 1997); *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55-56 (4th Cir. 1994).

In determining the universe of material facts and whether such facts are undisputed, the Judge should not rely solely on the parties' claims, but should conduct an independent review of the record. *See, e.g., Adickes*, 398 U.S. at 153; *Campbell*, 21 F.3d at 55-56; *Hanson Aggregates*, 29 FMSHRC at 10-11. When making such a determination, the Supreme Court has stated that "[w]e look at the record on summary judgment in the light most favorable to . . . the party opposing the motion." *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). Additionally, "the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Central to our analysis in this case is the principle that "material fact" for purposes of defeating a summary decision can also be an inference, drawn from the evidence on record, as to a factual element of the claim. Accordingly, even if the basic factual scenario – the "actuality of

circumstances" – is undisputed, there may still be a genuine issue of material fact. *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238, 244-45 (2d Cir. 1984). Summary decision is precluded if, when the record is viewed and reasonable inferences are drawn in the light most favorable to the non-movant, "there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed." *Ideal Dairy Farms, Inc. v. John Labatt Ltd.*, 90 F.3d 737, 744 (3d Cir. 1996) (quoting *Nathanson v. Med. Coll. Of Pa.*, 926 F.2d 1368, 1380 (3d. Cir. 1991).

Even intent or motive can be a material fact for summary decision purposes, where it is an essential element of the underlying claim. If opposing inferences regarding intent or motive can reasonably be drawn, summary judgment is inappropriate. In *Hunt v. Cromartie*, for example, the Supreme Court reversed a grant of summary judgment in favor of residents alleging that a redistricting plan violated the Equal Protection Clause. The Court found that "reasonable inferences from the undisputed facts" could be drawn in favor of either a legally permissible or an impermissible motivation for the redistricting. Accordingly, triable issues of material fact existed, and resolution at the summary judgment stage was inappropriate. A dispute as to motivation was sufficient to render summary judgment improper. 526 U.S. 541, 548-52 (1999); *see also Ideal Dairy Farms*, 90 F.3d at 744-45 (summary judgment regarding a time-barred contract claim was inappropriate where the facts could suggest intent to terminate in 1987 or 1990); *Katz*, 737 F.2d at 244-45 (summary judgment was inappropriate where there was a dispute as to intent to change domiciles).

Summary judgment should not be granted "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." *Campbell*, 21 F.3d at 55 (quotation omitted). For summary judgment to be appropriate, the evidence must do more than *allow* the court to find in the movant's favor, it must "*require* that the court do so." *Hunt*, 526 U.S. at 552 (emphasis in original). If, when viewing the evidence and drawing all permissible inferences in favor of the non-movant, the record could support either party, then resolution at the summary judgment stage is inappropriate. *Id.*; *Anderson*, 477 U.S. at 251-255.[5]

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[5] Contrary to the dissent's suggestion, our holding below is consistent with *Celotex*. In *Celotex*, the Supreme Court noted that the "party seeking summary judgment always bears the initial responsibility" of identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." 477 U.S. at 323. The Court explained that the movant need not produce evidence, but may meet its burden by "pointing out to the district court [ ] that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Here, as discussed below, KenAmerican has failed to demonstrate an absence of evidence to support the Secretary's claim of a section 103(a) violation. The communication described by the Secretary (in his pleadings and in the inspector's affidavit) is sufficient to show a dispute as to the material fact of intent, i.e., whether the cited communication referred to the presence of MSHA inspectors at the mine. Significantly, the communication described by Inspector Sparks included not only the back-and-forth conversation between the underground miner and the dispatcher but also the inspector asking the miner for his name and the miner refusing to answer. It is worth noting that *Celotex,* unlike the present case, involved an issue of pure physical fact –

III.

Disposition

The Judge erred in granting KenAmerican's motion for summary decision. As explained below, when the record is viewed and inferences are drawn in the light most favorable to the Secretary (as the non-moving party), one could reasonably infer from the underlying facts that the cited communication was meant to convey advance notice of an inspection. There is a genuine dispute as to the meaning of the communication, resolution of which could allow the Secretary to prevail. As KenAmerican failed to establish that there was no genuine issue of material fact and that it was entitled to summary decision as a matter of law, the Judge erred in granting the motion.

We reverse the Judge, not because the Secretary established that summary judgment was improper, but because neither the record nor KenAmerican's motion establish that the requirements for summary decision have been met.[6] To meet its burden here, KenAmerican must show that the record *cannot* establish that the purpose of the communication was to convey prohibited advance notice of an inspection. We find that KenAmerican failed to meet that burden.

Although it is undisputed that a miner called the dispatcher to ask if there was "company outside," that the dispatcher responded, "yeah, I think there is," and that when Sparks took the phone and asked the caller who was on the line, he received no response, these facts do not encompass all material facts necessary to resolve the proceeding. *Cf. Hanson Aggregates*, 29 FMSHRC at 10-11 (the parties' stipulations did not encompass all material facts). The intent or meaning of the cited communication is also a material factual question – it is the ultimate question needed to be resolved in this case. *Cf. Hunt*, 526 U.S. at 549.

Intent is generally inferred from underlying facts; when making such an inference, the underlying facts are viewed, and the inference drawn, in the light most favorable to the party opposing summary decision. *See id.* at 548-52; *Ideal Dairy Farms*, 90 F.3d at 744-45. Here, when the undisputed circumstances surrounding the communication are viewed in the light most favorable to the Secretary, they suggest a miner underground may have become aware that inspectors were on site to conduct an inspection and called the dispatcher to confirm.

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whether the plaintiff's deceased husband was exposed to a product containing asbestos which was manufactured or distributed by Celotex. There was no issue of intent. *Id.* at 319.

[6] Accordingly, we need not address KenAmerican's motion to strike. In the summary decision context, filings in opposition need not be considered if the moving party fails to meet its initial burden. *See Adickes*, 398 U.S. at 153; *Campbell*, 21 F.3d at 55-56. Having found that KenAmerican failed to meet its initial burden, the Secretary's opposition plays no part in our decision. As a result, any new issues raised on appeal would have no impact on the outcome of this analysis.

When viewing the record in this light, one could reasonably infer that "company outside" was meant to inquire whether MSHA was present to conduct an inspection. The dispatcher's affirmative response of "Yeah, I think there is" could be inferred as advance notice of an inspection in violation of section 103(a). Moreover, one could infer that the caller's failure to identify himself in response to the inspector's request is evidence that the caller's question was intended to determine whether an MSHA inspection was occurring.[7]

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. Indeed, because the communication at issue does not explicitly discuss inspectors or inspections, its intent is only material if non-explicit language can be violative. This reading of section 103(a) is consistent with its plain language, which focuses on whether advance notice of an inspection was in fact provided. It is also consistent with the purpose of section 103(a), which is to ensure the efficacy of inspections by preventing operators from concealing hazards before an inspector can observe them. *See* S. Rep. No. 95-181, at 27 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 615 (1978) (noting the "ease with which many safety or health hazards may be concealed if advance

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[7] Our dissenting colleagues acknowledge that when considering a motion for summary decision, a judge must give the non-moving party the benefit of every "reasonable inference." Slip op. at 13 (citations omitted). However, they apparently disagree that in this case the potential inference which could be drawn in the Secretary's favor – that the statement "company outside" referred to MSHA inspectors – is a reasonable one.

The use of coded language to warn of MSHA inspections is a documented problem in the mine industry. For example, in the recent criminal prosecution of former Massey CEO Don Blankenship (which in part involved charges stemming from the 2010 explosion at the Upper Big Branch "UBB" Mine), a federal district court judge discussed the use of coded language for the purposes of advance notice in denying the defendant's motion for judgement of acquittal on all counts. *U.S. v. Blankenship*, No. 5:14-cr-00244, 2015 WL 8731688 (S.D.W.Va. Dec. 9, 2015). Specifically, the judge stated:

> As to the issue of advance notice, the Court notes as a preliminary matter the evidence in the record that advance notice was a common practice at UBB and other mines during the time period of the indictment. Several witnesses . . . testified that in their work at UBB, they provided advance notice to underground miners and other UBB employees about the arrival of MSHA inspectors, and that they were instructed to do so by supervisors at UBB. . . . Stanley Stewart also testified that when the crews underground at UBB received advance notice of an inspection from a dispatcher, often by means of code words, such as "it's cloudy out there today," the crews would "[t]ry to clean up anything we could find." . . . Viewing these [and other] facts in the light most favorable to the United States, the Court finds them sufficient for a jury to infer that providing advance notice of MSHA inspections was a frequent practice at UBB . . . .

Id. at *6. Thus, a judge could reasonably infer that the use of coded language while mine inspectors were on KenAmerican's property was a reference to those inspectors.

warning of inspection is obtained"). KenAmerican does not disagree that coded or ambiguous language can support a violation of section 103(a), *if* the context establishes that it conveys advance notice of an inspection. *See* Resp. Br. at 15-17.

It its motion before the Judge, KenAmerican argued that the communication *was not necessarily* intended to convey advance notice of an inspection. KenAmerican stated that the conversation "easily could have been made in the context of determining the availability of transportation," was "consistent" with non-violative intent, and "easily could encompass" various activities which are exempt from the prohibition on advance notice. Memo Supp. Mot. at 6-8, Reply Supp. Mot. at 2. However, KenAmerican must do more than show that the record would *allow* us to conclude that the communication was non-violative; KenAmerican must show that the record *requires* us to resolve the matter in KenAmerican's favor, i.e., show that the communication was non-violative, or at least that the Secretary would be unable to prove a violation. *Cf. Hunt*, 526 U.S. at 552.

The Judge granted KenAmerican's motion, finding that the Secretary had failed to marshal evidence that would allow a reasonable person to conclude that the communication conveyed advance notice. At this stage, however, the Secretary did not bear the burden of showing that the communication had such a meaning, and viewing the record in the light most favorable to the Secretary, we infer that the communication could have conveyed advance notice of an inspection. Therefore a genuine issue of material fact exists, and summary decision was inappropriate. We note that we are holding only that the communication *could* be violative, not that it was violative. In other words, we do not hold that summary decision should have been granted for the Secretary, only that resolution prior to hearing was inappropriate. All that is required to defeat a motion for summary decision is a finding that the matter could be resolved in favor of the non-movant, when the record is viewed and all inferences are drawn in the non-movant's favor. *See Anderson,* 477 U.S. at 251-52.[8]

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[8] Our dissenting colleagues contend that "the majority completely disregards" *Anderson.* Slip op. at 15 n.3. As our colleagues state, intent was an issue in *Anderson,* but our colleagues miss the mark in equating *Anderson* with the present case. In *Anderson,* public figures (Liberty Lobby and its founder) sued investigative reporters for allegedly libelous magazine articles. Citing *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) and *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967), the Court noted that a public figure plaintiff in a libel action must prove that the defendant acted with actual malice – knowledge that the allegedly defamatory statement was false or reckless disregard of whether the statement was false or not. 477 U.S. at 244. The Court further noted that the standard of proof of actual malice was the elevated standard of clear and convincing evidence. *Id.* In reversing the Court of Appeals, the Supreme Court held only that the clear and convincing standard of proof in libel cases applied on a motion for summary judgment. Our colleagues quote the statement in *Anderson,* 477 U.S. at 254: "When determining if a genuine factual issue as to actual knowledge exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times.*" Slip op. at 15 n.3. The dissent also quotes a passage from *Anderson* that a plaintiff in a conspiracy or libel case, in response to a motion for summary judgment, must produce evidence that would support a jury verdict. Slip op. at 20 n.6. Our decision in this case is consistent with these principles. For purposes of resisting the motion for

Thus we do not suggest that the existing record compels an inference that the communication *did* convey advance notice of an inspection. We only find that one *could* reasonably reach that conclusion, particularly with further development of the record. However, that is enough to establish that a genuine dispute as to a material factual inference exists and therefore summary decision is inappropriate. *Cf. Hunt*, 526 U.S. at 552-54 (noting that "[p]erhaps, after trial, the evidence will support a finding that race was the . . . predominant motive," but that the case was not suited for summary disposition because there was a genuine dispute as to motivation under the existing record). Where, as here, opposing inferences can be drawn from undisputed facts, a genuine dispute exists and summary decision is precluded. *Ideal Dairy Farms*, 90 F.3d at 744-45.

For this reason, the Judge erred in finding no genuine issues of fact regarding the existence of a violation. He failed to recognize that, when the undisputed factual scenario is viewed in the light most favorable to the Secretary, opposing inferences can reasonably be drawn as to the intended meaning of the communication. If the proper inference is drawn, the communication *could* have referred to an MSHA inspection, and a genuine dispute exists.[9]

Our dissenting colleagues argue that when a judge, rather than a jury, is acting as trier of fact he may reach the ultimate conclusions to be drawn from undisputed facts in considering a summary decision motion. In short, our dissenting colleagues believe that ultimate inferences regarding what was meant by the term "company" can be drawn in favor of the moving party when no other facts are in dispute.

Despite the urging of our colleagues, we decline to adopt this approach,[10] which deviates from the traditional method of reviewing summary decision motions: that inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

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summary decision under Commission Procedural Rule 67 in this case, the Secretary need only show that under a standard of preponderance of the evidence, the communication could have conveyed advance notice. Considering that the communication included the unidentified miner refusing to provide his name to Inspector Sparks, a reasonable trier-of-fact could certainly conclude that the miner's question about "company outside" was a reference to the MSHA inspector he did not want to give his name to. This is "sufficient evidence to meet the [Secretary's] substantive evidentiary burden at trial." Dissent, slip op. at 15 n.3, *citing Anderson*, 477 U.S. at 254.

[9] The Secretary claims the Judge failed to draw an inference in the Secretary's favor as to whether "company" referred to MSHA. While we agree that the Judge failed to view the record and draw inferences in the light most favorable to the Secretary, we note that the Judge was not required to infer that company *did* refer to MSHA; it would have been sufficient and proper to infer that, based on the record, "company" *could* have referred to MSHA.

[10] As our colleagues recognize, the principle that a Judge in a non-jury case may, on a motion for summary judgment, draw the ultimate inference is not applicable where the case involves a credibility determination. Slip op. at 21. Here, of course, the Judge at trial will have to make credibility determinations regarding the explanation by KenAmerican's witnesses about what the phone conversation between the underground miner and the dispatcher meant.

Poller, 368 U.S. at 473. Drawing the ultimate conclusion in favor of the moving party in this case would be particularly inappropriate because here that conclusion rests on the state of mind of the dispatcher and the miner who were discussing the presence of "company" at the mine. In *Croley v. Matson Nav. Co.*, the court stated:

> The court should be cautious in granting a motion for summary judgement when resolution of the dispositive issue requires a determination of state of mind. Much depends on the credibility of witnesses testifying as to their own states of mind. In these circumstances the jury should be given the opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.

434 F.2d 73, 77 (5th Cir. 1970) (citing *NLRB v. Smith Indus., Inc.*, 403 F.2d 889, 895 (5th Cir. 1968); *Riley-Stabler Constr. Co. v. Westinghouse Elec. Corp.*, 401 F.2d 526, 527 (5th Cir. 1968) (Rives, J., specially concurring); *Consol. Elec. Co. v. United States for Use and Benefit of Gough Indus.*, 355 F.2d 437, 438-439 (9th Cir. 1966)). We believe this to be an apt observation even when a judge, rather than jury, is deciding the issue.[11]

Aside from the issue of factual disputes, KenAmerican also raised various legal arguments before the Judge as to why the citation must be vacated as a matter of law. We are not persuaded by these arguments. KenAmerican claimed that the communication could not convey advance notice because it occurred "during" an inspection. However, the Commission has found violative advance notice where miners were warned after the inspectors had already proceeded underground and begun their inspection. *See Topper Coal Co.*, 20 FMSHRC 344, 346, 348 (1998). Advance notice can still occur once an inspection is underway. We also find that the Judge properly rejected KenAmerican's claim that an exemption to the prohibition on advance notice applied. *See supra* note 1. As the Judge noted, direct enforcement activities (an impact inspection) were occurring, and there was no indication of an imminent danger. 37 FMSHRC at 1811. Finally, KenAmerican raised a First Amendment claim. As we reverse the Judge on other grounds, and the Judge declined to address this issue in the first instance (*id.* at 1812 n.3), we also decline to address this issue and find that it is more properly resolved by the Judge on remand.

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[11] The Commission's practice with regard to summary decision has generally been similar to that described by the cases cited above. As the Secretary noted in his opening brief, Commission judges have in the past held that a hearing, with the opportunity to observe a witness' demeanor, is the proper venue to determine intent and credibility, not a summary decision motion. See, e.g., *Pride v. Highland Mining Co.*, 36 FMSHRC 1792, 1797 (June 2014) (ALJ) (declining to resolve on summary decision whether complainant engaged in protected activity because the complainant's motive was relevant to the inquiry, and because the ALJ would need to make a credibility determination when assessing motive); *UMWA v. Jim Walter Res. Inc.*, 24 FMSHRC 797, 799 (July 2002) (ALJ) (denying summary decision where operator's motive for mine closure was in dispute).

IV.

Conclusion

For the foregoing reasons, the Judge's grant of summary decision is vacated, and the matter is remanded for further proceedings.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioners Althen and Young, dissenting:

The majority vacates and remands this case to the Administrative Law Judge. In doing so, it wholly discounts the failure of the Secretary to introduce any evidence supportive of his interpretation of the facts or contesting the facts set forth by Respondent. Because the Secretary failed to identify any disputed fact and did not submit any evidence to support a contrary interpretation of those undisputed facts, all that was left for the Judge to decide was the ultimate issue in the case. Overwhelming case law establishes that, under those circumstances, the Judge was entitled to draw an inference based upon the record before him. The Judge properly entered summary decision for Respondent. Accordingly, we respectfully dissent.

I. Summary of the Dissent

Federal courts of appeal uniformly hold that in a bench trial, the Judge may make an ultimate factual inference against the nonmoving party. Significantly, the District of Columbia Circuit and the Sixth Circuit, the courts with appellate jurisdiction in this case, have recognized that a dispute between the parties regarding the ultimate inference to be drawn does not preclude summary judgment when the trial court is the ultimate finder of fact.

The right of the Judge to make the ultimate inference in a case in which the facts are undisputed fulfills the purpose of summary judgment. When the nonmoving party fails to contest the material facts or to submit evidence raising a factual dispute — that is, submits to the summary judgment motion on uncontested facts — the Judge should not withhold summary judgment based on the possibility that the party might have introduced evidence to dispute the inference but failed to do so. The Judge cannot consider evidence that a party might have presented to create a dispute if the party does not introduce evidence of such dispute in response to the motion for summary judgment. Further, courts overturn a grant of summary judgment because of evidence not submitted before the summary judgment motion only if such evidence is *newly discovered*. Therefore, courts uphold summary judgment where a party later provides material, probative evidence when the party could have discovered and submitted that evidence at the summary judgment stage. To hold otherwise would allow a party to withhold material evidence at the summary judgment stage only to submit it at trial.

In addition to failing to recognize the right of the Judge to make an outcome-determinative inference when the Secretary did not contest the facts presented by the moving party, the majority also fails to recognize the importance of the Secretary's duties as the party bearing the burden of proof in responding to a summary judgment motion. The majority vacates the Judge's grant of summary decision on the basis that to grant summary judgment the Judge was required to conclude that the "record *cannot* establish that the purpose of the communication was to convey prohibited advance notice of an inspection." Slip op. at 6. That is error. The majority misconstrues the summary decision standard. It improperly reallocates the burdens of proof and production at the summary decision stage and fails to recognize that the Secretary's failure to produce any evidence in support of the citation at the summary decision unquestionably left the Judge in a position to make an inference based upon the uncontested material facts before him.

II. Summary Judgment

The Commission's summary decision standard states:

> (b) Grounds. 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) 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(b). The Commission has analogized this rule to the summary judgment standard in Rule 56 of the Federal Rules of Civil Procedure. *See, e.g.*, *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *see also* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). While the Commission "has long recognized that [] '[s]ummary decision is an extraordinary procedure,'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)) (alterations in original), it is a procedure with a purpose: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Use of summary judgment in Commission proceedings is thus consistent with the Commission's goal of streamlining its decision process where possible.[1] *See, e.g.*, 75 Fed. Reg. 81,459 (Dec. 28, 2010) (adopting rules to simplify certain civil penalty proceedings).

Under Rule 56, a "material" fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* When an inference from the facts must be drawn, "the nonmovant need not be given the benefit of every inference but only of every reasonable inference." *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989); *see also McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016) (stating that the court "draw[s] all reasonable inferences" in favor of the nonmoving party).

An inference is reasonable when a party provides sufficient evidence from which the court can make that inference: "Although the nonmoving party is entitled to have inferences drawn in his favor at summary judgment, such inferences must be supported by record

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[1] Summary judgment promotes efficiency: "The nonmovant is essentially forced to identify facts in the record that demonstrate issues of fact that need to be tried. This 'put up or shut up' feature forces the nonmovant and movant to advance cogent facts that either support or oppose summary judgment." Edward Brunet, *The Efficiency of Summary Judgment*, 43 Loy. U. Chi. L.J. 689, 691 (2012) (footnote omitted). Professor Brunet notes that federal courts had used the "put up" phrase 1,235 times by the date of his article. *Id.* at 691 n.7.

evidence." *Noll v. Int'l Bus. Mach. Corp.*, 787 F.3d 89, 97 n.6 (2d Cir. 2015). This is because "there is no issue for trial unless there is sufficient *evidence* favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely *colorable*, or is *not significantly probative*, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (emphasis added). Similarly, as the Supreme Court has stated, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

A. The Majority Misapprehends the Burdens of Proof and Production at the Summary Judgment Stage

The majority finds that KenAmerican failed to meet a burden as the party moving for summary judgment. Thus, the majority states, "summary judgment must be denied where the evidence in support of the motion does not establish the absence of a genuine issue." Slip op. at 4. For this proposition, the majority cites extensively to *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and to a lesser extent *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The majority takes the requirement that the movant must "establish" the absence of a genuine issue of fact from *Adickes*, 398 U.S. at 160. However, in *Celotex*, the Supreme Court specifically repudiated the notion of a requirement that the moving party establish the absence of a genuine issue of fact. The Court found that the moving party need only set forth uncontested facts supporting its motion and not containing evidence supporting the non-movant's case whereas the non-movant must identify facts creating a genuine dispute.

In *Celotex*, the plaintiff filed a claim against 15 defendants, alleging that the death of her husband was the result of exposure to asbestos-containing products manufactured or distributed to by the defendants. 477 U.S. 319. Several of the defendants, including Celotex, filed a motion for summary judgment. *Id.* Celotex's motion for summary judgment argued that the plaintiff had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional limits of [the District] Court." *Id.* at 319-20. The district court granted summary judgment for Celotex, and the plaintiff appealed. *Id.* at 320-21. The court of appeals reversed, stating that the "summary judgment motion was rendered 'fatally defective' by the fact that [Celotex] 'made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." *Id.* at 321 (quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985)). Much like the majority in the present case, the court of appeals cited to *Adickes* for the proposition that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 756 F.2d at 184. The Supreme Court reversed.

The *Celotex* Court quoted its statement from *Adickes* that "the burden of the moving party [is] to show initially the absence of a genuine issue concerning any material fact." *Celotex*, 477 U.S. at 325 (quoting *Adickes*, 398 U.S. at 159). However, the Court explained the meaning of those words from *Adickes*:

> We think that this statement is accurate in a literal sense, . . . [b]ut we do not think the Adickes language quoted above should be

> construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, **the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.**

Id. at 325 (emphasis added). The Court also noted the well-recognized "power [of district courts] to enter summary judgments *sua sponte*, so long as the losing party was on notice that [the party] had to come forward with all of her evidence." *Id.* at 326. Accordingly, "[i]t would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it."[2] *Id.* After *Celotex*, federal courts recognize that a movant that does not have the burden of proof/persuasion need only make a minimal showing, whereas the nonmovant has the burden of showing there are issues for trial.[3]

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[2] The Court also noted that the standard for granting summary judgment "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)." *Celotex*, 477 U.S. at 323 (quoting *Anderson*, 477 U.S. at 250). Under Rule 50(a), as under Rule 56, the moving party need not present any evidence.

[3] The majority argues that its decision is consistent with *Celotex*, asserting Kenamerican failed to demonstrate an absence of evidence to support the Secretary's claim and distinguishing *Celotex* as involving an issue of "pure physical fact" rather than one of intent. Slip op. at 5 n.5. The majority states that the mere fact of the communication "is sufficient to show a dispute as to the material fact of intent." *Id.* Yet, the Secretary both did not dispute this "material fact of intent" and did not produce any piece of evidence to render that purported dispute genuine. To the majority, its apparently fixed view that the language could have been coded makes up for the Secretary's utter failure to contest the material fact or to submit any evidence in support of a contest of material fact.

Furthermore, in making this distinction, the majority completely disregards *Anderson*, 477 U.S. 242, in which intent was the disputed issue. In *Anderson*, the Court stated that "[w]hen determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*." *Id.* at 254. In cases in which intent is at issue, the nonmoving party must provide sufficient evidence to meet the substantive evidentiary burden at trial. *Id.* That a dispute concerns intent rather than "pure physical fact" does not relieve the Secretary of this burden at the summary decision stage. *Cf. Coverdell v. Dep't of Social and Health Servs.*, 834 F.2d 758, 769 (9th Cir. 1987) ("Although summary judgment is often questionable in civil rights actions where the defendant's motive and intent are involved, . . . even in a civil rights action, [a] plaintiff may not survive a motion for summary judgment without offering some evidence in support of her claim." (citation omitted)); *Bagley v. Blagoyevich*, 646 F.3d 378, 389 (7th Cir. 2011) ("If a genuine dispute as to a material fact exists,

The Secretary bore the burden of proof, and based on the uncontested facts before the Judge resulting from the motion by Respondent and the failure of the Secretary to introduce any evidence of a violative intent, there was no evidence upon which the Secretary could preponderate to show violative conduct. In short, the Secretary failed in the most elementary duty of a party in responding to a motion for summary judgment. He failed to introduce any evidence upon which to base the need for a subsequent trial. The majority's reliance on *Adickes* is misplaced.[4]

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such as intent, summary judgment is inappropriate. But that genuine dispute must be supported by 'sufficient evidence . . . [to permit] a jury to return a verdict for' appellants." (alterations in original) (quoting *Egonmwan v. Cook Cnty. Sheriff's Dep't*, 602 F.3d 845, 849 (7th Cir. 2010)).

The majority asserts that we "miss the mark in equating *Anderson* with the present case." Slip op. at 8 n.8. They do so by arbitrarily restricting, without citation, *Anderson*'s applicability. In fact, courts have long relied on *Anderson* in summary judgment cases under the preponderance of the evidence standard. *See, e.g.*, *United States v. 2621 Bradford Drive*, 369 F. App'x 663, 665-66 (6th Cir. 2010) (civil forfeiture case); *Lemaire v. Danos & Curole Marine Contractors Inc.*, No. 00-31153, 2001 WL 872840, at *4 (5th Cir. 2001) (per curiam) (affirming memorandum opinion of district court in negligence action against employer); *Diaz v. Broglin*, No. 92-1507, 1993 WL 118066, at *2 (7th Cir. 1993) (affirming recommendation of magistrate judge in 42 U.S.C. § 1983 case); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992) (wrongful discharge case); *Winchester v. Prudential Life Ins. Co.*, 975 F.2d 1479, 1488 (10th Cir. 1992) (denial of insurance benefits case); *Thomas v. Digital Equip. Corp.*, 880 F.2d 1486, 1490 n.2 (1st Cir. 1989) (national origin discrimination case); *Richardson ex rel. Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 828 (D.C. Cir. 1988) (product liability case); *Sorba v. Penn. Drilling Co.*, 821 F.2d 200, 203 (3rd Cir. 1987) (age discrimination case). Further, they continue to not deal with the right of a trial judge to draw a reasonable inference based upon uncontested facts and arguments placed before him.

Elsewhere, the majority mistakenly asserts that upon the inspector asking the underground miner for his name, the miner refused to answer. Slip op. at 5 n.5, 8-9 n.8. The actual note is that "Sparks asked who was on the line and received no response." Slip op. at 2. The majority infers refusal from silence. However, the Secretary never asserted such an inference and most importantly did not do so in his response to the motion for summary decision. *See* slip op. at 2 n.3. The majority, therefore, draws an unrequested, unsupported inference and then piles upon it another inference that the miner's silence demonstrates advance notice.

[4] In addition to *Adickes*, the majority relies on *Hunt v. Cromartie*, 526 U.S. 541 (1999), *Campbell v. Hewitt, Coleman & Associates, Inc.*, 21 F.3d 52 (4th Cir. 1994), *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238 (2d Cir. 1984), and *Ideal Dairy Farms, Inc. v. John Labatt Ltd.*, 90 F.3d 737 (3d Cir. 1996). Contrary to the majority's position, the contexts of these cases further demonstrate that the majority's decision applies a legally incorrect summary judgment standard. In contradiction to the present case, there was ample evidence provided by the nonmoving party in each of the cited cases. *See Hunt*, 526 U.S. at 550 (highlighting specifically that the defendants submitted an expert affidavit that "weaken[ed] the probative value" of the plaintiffs' evidence by concluding that "the data as a whole supported a [valid] political

In *Grimes v. District of Columbia*, 794 F.3d 83 (D.C. Cir. 2015), for example, the plaintiff argued that the district court used an improper summary judgment standard. The plaintiff "fault[ed] the government for merely pointing out in its summary judgment motion that she lacked factual support for her claims, without citing to factual material in the record that supported the government's version of events." *Id.* at 93. The plaintiff, citing *Adickes*, stated that "it has consistently been held that the moving party bears the burden of demonstrating the absence of any genuine issue of material facts." *Id.* (quoting Appellant's Br. 8; Appellant's Reply 8).

Although the D.C. Circuit remanded on other grounds (the district court did not consider a claim that counsel had a conflict of interest prior to granting summary judgment), the court decided to "briefly reiterate the governing legal standard" for summary judgment because the district court may revisit the issue on remand. *Id.* The circuit court found that the plaintiff "fail[ed] to appreciate that the burden on a defendant moving for summary judgment may be discharged *without factual disproof of the plaintiff's case*." *Id.* (emphasis added). Thus, rather than "establishing" that there is no dispute of material fact, "[t]he burden that the movant 'always bears' is that of 'informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Id.* at 93-94 (alteration in original) (quoting *Celotex*, 477 U.S. at 323) (citing *Celotex*, 477 U.S. at 328 (White, J., concurring) (agreeing with the *Celotex* majority's summary judgment standard); 477 U.S. at 331-32 (Brennan, J., dissenting) (same)).

The First Circuit case of *Packgen v. BP Exploration*, 754 F.3d 61 (1st Cir. 2014), is also instructive. The plaintiff, Packgen, had "sought to sell oil containment boom" to two BP entities, the defendants, after the Deepwater Horizon Spill in 2010. *Id.* at 63. BP declined to purchase the boom after months of negotiations. *Id.* The defendants moved for and prevailed on summary judgment. *Id.* at 63, 64.

The plaintiff had sued on several grounds: negligent and intentional misrepresentation, breach of contract, equitable relief, quantum meruit, and promissory estoppel. Throughout the negotiations, BP agents at various times stated that they intended to purchase Packgen's full production capacity and that they would purchase the entire stock once certain specifications

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explanation at least as well as, and somewhat better than, a racial explanation."); *Campbell*, 21 F.3d at 55-58 (stating that, in stamping motions for summary judgment "GRANTED WITHOUT OPPOSITION FILED," the judge failed to show he considered answers to interrogatories and the moving parties' evidence that itself supported inferences for the nonmoving party); *Katz*, 737 F.2d at 244-45 (listing affidavits and other evidence proffered by the nonmoving party to dispute the factual inference of intent); *Ideal Dairy Farms*, 90 F.3d at 744-45 (stating that the judge should have reserved the issue of the correct interpretation for the ***jury*** because the evidence supported three possible inferences). Other issues abound, including that *Hunt* and *Katz* were both cases in which the moving party had the burden of proof at trial. *See Katz*, 737 F.2d at 243-44 (noting that the moving party's burden was the "clear and convincing evidence" standard); *Hunt*, 526 U.S. at 553 ("Summary judgment in favor of the party with the burden of persuasion, however, is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.").

were met. *Id.* at 65. However, approximately two months into negotiations, BP capped the oil well, and no longer needed Packgen's product. *Id.* at 66. BP never told Packgen to stop producing the boom, and it did not pay for any that Packgen produced. *Id.*

For the intentional and negligent misrepresentation counts, Packgen was required to show that BP made a "false representation of present fact." *Id.* (quoting *Kearney v. J.P. King Auction Co.*, 265 F.3d 27, 33 n.8 (1st Cir. 2001)). The district court granted summary judgment for the defendants because there was "no evidence in the record that any of the alleged misrepresentations were false at the time they were made." *Id.* at 67. On appeal, Packgen argued that the district court "improperly weighed the evidence in BP's favor while overlooking reasonable inferences that the jury could have drawn in Packgen's favor." *Id.* In response, the First Circuit stated:

> None of the possible inferences raised by Packgen controvert the fundamental deficiency identified by the district court, however, because Packgen still does not identify specific evidence in the record showing that any of BP's statements were false at the time they were made. A party cannot survive summary judgment simply by articulating conclusions the jury might imaginably reach; it must point to evidence that would support those conclusions.

Id. (citing *Miss. Pub. Emps.' Ret. Sys. v. Bos. Sci. Corp.*, 649 F.3d 5, 28 (1st Cir. 2011) ("With respect to each issue on which [a] plaintiff has the burden of proof at trial, it must present definite, competent evidence to rebut the motion . . . ." (internal quotation marks omitted)) (alteration in original)). Packgen argued that "a jury could reasonably conclude that BP kept making changes to its specification during the spill so that manufacturers would continue to work for BP, acceding to different requests made by BP at different times, without BP actually having to pay for the boom." *Id.* (quoting Appellant's Br. 42-43). The court stated, simply, that "[i]f a jury reached that conclusion, it would be pure speculation," because nothing in the record indicated that BP's intentions or specification changes "reflect[ed] the bad intentions that Packgen describes." *Id.* The plaintiff offered merely a conclusory assertion, and conclusory assertions are not evidence. *Cf., e.g., Teamsters Local Union No. 17 v. Wash. Dept. of Corrections*, 789 F.3d 979, 994 (9th Cir. 2015) ("Argument without evidence is hollow rhetoric that cannot defeat summary judgment."). Similarly, here, the Secretary did not introduce any evidence into the record supportive of its proffered conclusion. The Secretary simply asserted the existence of a violation. In other words, nothing in the record reflected the words could have the meaning ascribed to them by the Secretary. The Secretary did not oppose any of the facts asserted by the operator but accepted them with only a naked claim that the words violated the regulation.

B. Inferences May Be Drawn from Record Evidence

In *Spierer v. Rossman*, 798 F.3d 502 (7th Cir. 2015), a university student went missing after a night of heavy drinking, and the parents of the student brought suit against three other students who were with the student in the hours before her disappearance. *Id.* at 504. The

parents alleged negligence and violations of the Dram Shop Act. *Id.* The defendants moved for summary judgment prior to substantial discovery arguing that the plaintiffs could not prevail at trial on the issues of proximate cause or legal injury. The plaintiffs, rather than assert that discovery was required, stated: "We're not asking for anything to respond to summary judgment. We think that we are going to win . . . on the basis . . . that [the defendants] haven't met their burden." *Id.* at 507 (alterations in original). The district court granted summary judgment. *Id.* at 504.

On appeal, the plaintiffs argued, similarly to the majority's position here that the defendants did not meet their burden of production at the summary judgment stage. The Seventh Circuit rejected the plaintiffs' argument, stating that "[t]he actual requirement in Rule 56 is less specific: the moving party need only *inform* the court of the basis for the motion and *identify* supporting materials." *Id.* at 508 (citing *Celotex*, 477 U.S. at 323). Further, "[c]ontrary to plaintiffs' arguments, the only burden of production recognized in Rule 56 falls upon the nonmoving party once a basis for summary judgment has been established (and this can be initiated *sua sponte* by a court under Rule 56(f) with proper notice)." *Id.*

Thus, circuit courts agree that if the nonmoving party has the burden of production at trial, it has a burden of production at the summary judgment stage. A nonmoving party with the burden of production cannot simply assert that a trial court could make an inference from undisputed facts when that nonmoving party fails to submit evidence from which a finder of fact can draw that inference.

In addition, the Judge on summary judgment views the evidence according to the ultimate evidentiary standard. Under a preponderance of the evidence standard, "[t]he judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson*, 477 U.S. at 252. Here, the Secretary offered the Judge no evidence to raise a dispute regarding the meaning of the uncontested facts.[5]

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[5] The majority cites to *United States v. Blankenship*, No. 5:14-cr-00244, 2015 WL 8731688 (S.D.W.Va. Dec. 9, 2015), noting testimony in that case from several miners regarding the advance notice they provided as part of their work. Slip op. at 7 n.7 (quoting 2015 WL 8731688, at *6). "Thus," the majority asserts, "a judge could reasonably infer that the use of coded language while mine inspectors were on Kenamerican's property was a reference to those inspectors." *Id.* In relying on evidence not in the record and not provided to the Judge on summary decision to support an inference in this case, the majority tips its hand toward a desired outcome rather than adjudication of this case on the law and facts before us. The majority is not drawing a possible inference from the record in this case. Instead, based upon a different case, the majority speculates about what might be offered at trial that the Secretary failed to offer on summary decision. Under the correct summary judgment standard, the majority must find that *the uncontested record evidence* before the Judge on the motion for summary judgment *in this case alone* precludes the trial judge from drawing a reasonable inference.

The majority asserts that it is following "the traditional method of reviewing summary decision motions: that inferences drawn from the underlying facts must be viewed in the light

Here, the Secretary did not challenge any fact offered by the Respondent and did not suggest that he desired to contest those facts or offer any evidence related to those facts or asserting any other facts. Thus, the only reason the majority can have in reversing the Judge would be to allow the Secretary to provide additional evidence — evidence that he failed to provide at the summary judgment stage. The majority actually admits their error. *See* slip op. at 7 ("We only find that one *could* reasonably reach that conclusion, *particularly with further development of the record.*") (second emphasis added).

In arriving at this result, the majority fails to recognize that the Secretary failed in the most basic duty of opposing a summary judgment motion. He did not provide evidence at the summary judgment stage from which the Secretary could preponderate on, or from which the Judge could find, advance notice. Simply stated, the Secretary did not offer any evidence of a genuine dispute. Yet, the majority requires only that the Secretary might provide sufficient evidence at some point in the future. This is antithetical to the very purpose of the summary judgment procedure.[6] As the Supreme Court states in *Matsushita Electric Industrial Co., Ltd. v.*

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most favorable to the party opposing the motion." Slip op. at 9-10 (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). However, the majority's inferences are not made from evidence in the record but from the record of a wholly different case that went to hearing. The majority piles inference upon inference. The Secretary did not offer anything to support the Secretary's requested inference, that the statements made by KenAmerican's miners constituted advance notice. Moreover, as demonstrated, in our discussion, the trial Judge was entitled to draw a reasonable inference from the undisputed record before him.

[6] The majority, as it must, relies on pre-*Celotex*, *Anderson*, and *Matsushita* cases for its proposition that where a conclusion rests on the credibility of a witness regarding his state of mind, summary judgment is perforce inappropriate. Slip op. at 10. The majority believes that this is an "apt observation" and quotes from *Croley v. Matson Nav. Co.*, 434 F.2d 73, 77 (5th Cir. 1970), to support its contention. Slip op. at 10. *Croley*, in turn, relied in part on *Riley-Stabler Constr. Co. v. Westinghouse Electric Corp.*, 401 F.2d 526, 527 (5th Cir. 1968) (Rives, J., specially concurring), which cited to *Poller*, 368 U.S. at 473. The Supreme Court addressed precisely this aspect of *Poller* in *Anderson*.

The respondents in *Anderson* argued, almost identically to the majority in this case, that "the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue," citing *Poller*. *Anderson*, 477 U.S. at 256. The Court stated:

> We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering *any* concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is

Zenith Radio Corp., 475 U.S. 574, 586-87 (1986), when the moving party fulfills its duty under Rule 56,

> its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *DeLuca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943, 70 S.Ct. 423, 94 L.Ed. 581 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (1983); Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand.L.Rev. 493, 504-505 (1950). Cf. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is *a genuine issue for trial.*" Fed.Rule Civ.Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed.Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Cities Service, supra,* 391 U.S., at 289, 88 S.Ct., at 1592.

Because the Secretary did not provide any evidence from which the Judge could find for the Secretary, the court properly concluded that there was no genuine issue of fact in dispute. In the federal system, summary judgment is the "put up or shut up moment." *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)). Here, the Secretary did not put up.

III. When the Judge is the Ultimate Trier of Fact, the Judge May Draw the Ultimate Inference in a Summary Judgment Proceeding

The majority's summary judgment standard also is incorrect in that it fails to apply the correct summary judgment standard in a nonjury proceeding before a judge as the ultimate trier of fact. Virtually every federal circuit court explicitly and repeatedly has stated that where the Judge alone is the trier of fact and there is no genuine dispute of material fact or credibility determination, the court may draw the ultimate inference in the case, even if it is a "question of fact."[7] Therefore, in a nonjury case, a court need not withhold judgment on the basis that a

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> not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict.

Id. (emphasis added).

[7] *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 603 (1st Cir. 1995), *cert. denied*, 516 U.S. 814 (1995); *Posadas de P.R., Inc. v. Radin*, 856 F.2d 399, 400-01 (1st Cir.

hypothetical reasonable jury could make the ultimate inference for one side or the other — the court itself is the trier of fact.

For example, in *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 610 (1st Cir. 1995), *cert. denied*, 516 U.S. 814 (1995), the First Circuit affirmed a grant of summary judgment finding that a union's membership policy discriminated against minorities.[8] The parties cross-moved for summary judgment, "the Union voiced no disagreement with the facts on which the EEOC had constructed its case[, and i]t gave no indication either that it intended to introduce any additional evidence or that any such evidence existed." *Id.* at 603 (footnote omitted). Instead, "the Union's contentions centered entirely around the ultimate legal significance to be accorded to conceded facts," and the circuit court considered the dispute as submitted as "a case stated." *Id.* The circuit court provided the following summary judgment standard:

> Circuit precedent teaches that in such a situation—where, in a nonjury case, "the basic dispute between the parties concerns the factual inferences . . . that one might draw from the more basic facts to which the parties have drawn the court's attention," where

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1988); *Federacion de Empleados del Tribunal Gen. de Justicia v. Torres*, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.); *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986); *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 593 n.3 (6th Cir. 2001); *Cent. States, Se. & Sw. Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1373-74 (7th Cir. 1992); *Tripp v. May*, 189 F.2d 198, 200 (7th Cir. 1951); *U.S. Manganese Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 576 F.2d 153, 156 (8th Cir. 1978); *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 684-85 (9th Cir. 1990); *Harris v. Railway Express Agency*, 178 F.2d 8, 10 (10th Cir. 1949); *Coats & Clark, Inc. v. Gay*, 755 F.2d 1506, 1509-10 (11th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985); *Preseault v. United States*, 100 F.3d 1525, 1546 (Fed Cir. 1996); *Loglan Inst., Inc. v. Logical Language Grp., Inc.*, 962 F.2d 1038, 1040 (Fed. Cir. 1992); *Connors v. Incoal, Inc.*, 995 F.2d 245, 251-52 (D.C. Cir. 1993); *Fox v. Johnson & Wimsatt*, 127 F.2d 729, 736-37 (D.C. Cir. 1942). Of the two circuits that have not recognized this procedure, the Third Circuit has not had an opportunity to rule on it, and the Second Circuit has established a substantially similar procedure in ERISA cases. *See, e.g., O'Hara v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 642 F.3d 110, 116 (2d Cir. 2011) (allowing a judge to make findings of fact at the summary judgment stage, but stating that "it must be clear that the parties consent to a bench trial on the parties' submissions"). Lower courts in both jurisdictions, however, have recognized the right of the judge to make the ultimate inference in a nonjury case on undisputed facts. S*ee, e.g., SEC v. Credit Bancorp, Ltd.*, 738 F. Supp. 2d 376, 392 (S.D.N.Y. 2010) ("Where the only issues remaining concern the legal consequences of undisputed facts, summary judgment is appropriate."); *Chao v. Local 54, Hotel Emps. & Rest. Emps. Int'l Union*, 166 F. Supp. 2d 109, 116 (D.N.J. 2001) (stating that a court is allowed to resolve the factual question of "reasonableness" on undisputed facts "if a bench trial would not enhance its ability to draw inferences and conclusions").

[8] The court, however, vacated in part and remanded the case for a reconsideration of the district court's remedial ruling, since the partial motion for summary judgment filed by the EEOC addressed only the question of liability. *Steamship Clerks Union*, 48 F.3d at 609-10.

> "[t]here are no significant disagreements about those basic facts," and where neither party has "sought to introduce additional factual evidence or asked to present witnesses"—the district court is freed from the usual constraints that attend the adjudication of summary judgment motions.

Id. (alterations in original) (quoting *Federacion de Empleados del Tribunal Gen. de Justicia v. Torres*, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.)). In affirming the judgment on liability, the court allowed summary judgment to stand even though the union sought to rebut the EEOC's case with an alternative theory of causation in the case. The First Circuit stated that "[a]lthough this twist, if believed, might conceivably furnish an alternative theory of causation, *it is unsupported by any cogent evidence*, and, in all events, did not foreclose the district court from making a contrary, inference-based determination of causation." *Id.* at 607 n.15 (emphasis added).

The D.C. Circuit applies the same rule, first stated in *Fox v. Johnson & Wimsatt*, 127 F.2d 729, 737 (D.C. Cir. 1942): "Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court." The issue in that case was whether a resolution of a board of directors to redeem preferred stock was a binding contract or a mere statement of policy by the board. *Id.* at 733. The court admitted that "the resolution conceivably could be given the meaning for which each [party] contends." *Id.* Nevertheless, the court found that summary judgment was appropriate: "There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them respecting intention. But here was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute." *Id.* at 736.

More recently, the D.C. Circuit, although finding legal error in the case, stated that "*if* all the material facts underlying the ultimate fact of whether the operation at issue rises to the level of a 'trade or business' were undisputed, then the case might have been ripe for disposition on summary judgment." *Connors v. Incoal, Inc.*, 995 F.2d 245, 251-52 (D.C. Cir. 1993) (emphasis in original). The District Court of the District of Columbia follows this rule:

> Where . . . the Court would be the trier of fact if the case were to proceed to trial, "the 'Court is not confined to deciding questions of law, but also may . . . draw a derivative inference from undisputed subsidiary facts, even if those facts could support an inference to the contrary, so long as the inference does not depend upon an evaluation of witness credibility.'"

Gen. Elec. Co. v. Jackson, 595 F. Supp. 2d 8, 14-15 (D.D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 1032 (2011) (quoting *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 39 (D.D.C. 2005) (quoting *Cook v. Babbitt*, 819 F. Supp. 1, 11 & n.11 (D.D.C. 1993))).

Judge Posner of the Seventh Circuit has explained that any superficial tension between these precedent and Rule 56 is illusory:

> Factual disputes are not supposed to be resolved on summary judgment. The purpose of the summary judgment procedure is to determine whether there is a (material) factual dispute, in which event there must be a trial. That is the general rule, all right, but it doesn't make much sense in a case in which the only "factual" issue is one of characterization, that is, of application of undisputed lay facts, *and* the opponent of summary judgment claims no right to a jury trial. For then both the record and the factfinder are the same in the summary judgment proceeding as they would be in a trial. There is no more evidence to put in and no different trier to evaluate it. When both these conditions are satisfied, the formally "factual" dispute is properly resolved on summary judgment.

Cent. States, Se. & Sw. Areas Pension Fund v. Slotky, 956 F.2d 1369, 1373-74 (7th Cir. 1992) (internal citation omitted) (citing *Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1192 (7th Cir. 1986); *May v. Evansville–Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1116 (7th Cir. 1986)).

Accordingly, in nonjury cases, where the lay, evidentiary, or historical facts are not in dispute, even if the ultimate inference to be drawn remains in dispute, courts allow that issue to be resolved on summary judgment. *See Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978) ("If decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved."). Thus, judges may on summary judgment conclude "that there was or was not negligence, or that someone acted reasonably or unreasonably, or . . . that delay under the circumstances proved is justified or unjustified, even if that conclusion is deemed 'factual' or involves a 'mixed question of fact and law.'" *Id.* at 1124. Here, the Secretary did not raise any factual dispute, and the Judge was entitled to infer whether the uncontested facts constituted advance notice of an inspection.

IV. Summary Judgment for Respondent Is Supported by the Record

Applied to the facts of this case, the summary judgment standard compels one conclusion: the Judge properly granted summary decision for Respondent.[9] The evidentiary facts were not in dispute for the purposes of the motion for summary motion. Respondent and the Secretary both restate the facts from the MSHA inspector's citation and notes: Inspector Sparks heard a voice from the #4 unit ask if there was "company outside," and the dispatcher

[9] While the circuit courts are split in the applicable standard of review for ultimate inferences made on summary judgment — *de novo* or abuse of discretion — that issue need not be decided in this case, because the Judge should be affirmed under either standard.

responded, "Yeah, I think there is." Mem. Supp. Mot. at 3; Resp. to Mot. at 2. Sparks then asked who was on the line and received no response. Resp. to Mot., Ex. C.

Respondent argued in its memorandum in support of its motion for summary judgment that "taking the undisputed material facts as alleged by the Secretary . . . as true, the facts cannot and do not amount to a violation of Section 103(a)." Mem. Supp. Mot. at 4. Respondent also argued that company being outside was a "general statement that easily could encompass any of [several] exempted activities," *id.* at 6 n.2, and that no one discussed where an inspector would be heading, the target of any inspection, or use words such as "inspection," "investigation," "inspector," or any other words regarding inspection activities. *Id.* at 5.

The Secretary, therefore, was clearly on notice of the material facts that were undisputed and the conclusion to drawn from those facts — namely, that the uncontested facts did not demonstrate a violation. It was, therefore, the Secretary's responsibility to set forth any disputed material facts supporting a violation. Yet, the Secretary offered nothing. The Secretary simply assumed the occurrence of a violation and "assert[ed] that KenAmerican violated Section 103(a) of the Mine Act and that there [were] genuine issues as to the material facts relating to the gravity and negligence of the citation issued. Therefore, KenAmerican is not entitled to summary decision." Resp. to Mot. at 3-4.

With respect to the possible violation, therefore, the Secretary merely made a conclusory argument that based on the undisputed facts KenAmerican violated section 103(a)'s proscription against advance notice. The Secretary disputed the legal conclusion; he did not dispute the facts from which such conclusion would or would not be drawn. Further, the Secretary did not submit any evidence supporting a contradictory interpretation of the facts and, thus, submitted the motion to the court's review on the facts set forth by the Respondent.[10]

Respondent, in its reply to the Secretary's response, gave the Secretary another opportunity to provide evidence that could support a different inference:

> The Secretary . . . does not allege any dispute of material fact as to the fact of the violation itself. Any dispute of fact as to gravity and negligence should not preclude summary disposition as to the fact of the violation. . . . KenAmerican . . . has pointed out that, indisputably, "company" being "outside" (i.e., the allegedly violative communication here) is a very general statement that easily could encompass any of the exempted investigatory activities, further warranting summary decision.

Reply Supp. Mot. at 2. The Secretary did not seek to file a sur-reply in the weeks prior to the Administrative Law Judge's decision.

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[10] *See also* PDR at 9 ("The Secretary agreed that the words Inspector Sparks overheard were not in dispute. The Secretary argued that summary decision was not warranted, however, because the statements violated Section 103(a) of the Act and KenAmerican was therefore not entitled to summary decision as a matter of law." (citations omitted)).

Reviewing the evidence provided on summary decision, the Judge properly found no disputed facts. 37 FMSHRC 1809, 1809 (Aug. 2015) (ALJ). There was one witness identified, Doyle Sparks, the Judge had his complete declaration, and there was no issue of witness credibility alleged by the Secretary regarding his one witness. Thus, summary judgment was appropriate.

Additionally, the Secretary had over three years to gather sufficient evidence to overcome a motion for summary decision. The citation in this case was issued on April 20, 2012. The Secretary's penalty petition was received by the Commission on January 3, 2013. The Secretary's response to the motion for summary decision was filed on August 3, 2015. Despite the three years in which the Secretary had time to investigate and support his allegation, there were only three items of support for the citation in the record, and he provided those as exhibits to his response: (1) the original citation, issued by Doyle Sparks; (2) the inspector's notes, written by Doyle Sparks; and (3) a declaration restating the inspector's notes, also written by Doyle Sparks. No depositions were taken. The Secretary in his response did not identify any additional witnesses that would provide more illuminating testimony. Thus, the Judge heard a motion and response asserting the same, uncontested material facts, and the Secretary failed to state any material factual dispute regarding the occurrence of a violation. Thus, the facts were undisputed, and there was no issue of witness credibility to justify a hearing: Doyle Sparks was the only witness, and the Judge had his statement in triplicate.

The courts are clear — in a nonjury trial, a Judge, faced with undisputed material facts and no issues of witness credibility, may make the ultimate inference in the case without subjecting the parties to the time and expense of a trial. The Secretary, in response to a motion alleging undisputed facts, responded not with evidence, or even an argument, but merely a legal conclusion that the Respondent committed a violation: "The Secretary asserts that KenAmerican violated Section 103(a) of the Mine Act." Resp. to Mot. at 3-4. The Secretary did not assert any rebuttal evidence in responding to the motion and, thus, the motion was ripe for final adjudication regarding the inference to be drawn.

V. The Secretary's Attempt to Introduce New Evidence Before the Commission Must Be Rejected

Contrary to precedent cited above, the majority remands the case presumably to allow the Secretary to present additional evidence through affidavits, exhibits, or trial testimony that was not in the record and not presented to the Judge in opposition to the motion for summary judgment. The majority, therefore, provides the Secretary an opportunity to present evidence that it failed to produce in response to the motion for summary judgment. That decision is contrary to well-established and long-standing precedent precluding a post-decision proffer of additional evidence not provided before a court on summary judgment. Indeed, courts regularly uphold summary judgments and deny motions for reconsideration where the losing party attempts to introduce additional, material evidence along with an argument that it would have affected the outcome of the case. The majority's decision undermines the purpose of summary judgment.

The Supreme Court has stated that at the summary judgment stage:

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, . . . Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex, 477 U.S. at 324. In such a case, "the burden on the *moving* party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325 (emphasis added).

Because the nonmoving party must provide sufficient evidence from which the party can meet the burden of proof, a party has no excuse for not producing material and relevant evidence when challenged by a summary judgment motion. Courts have long recognized that one of the purposes of summary judgment, in fact, is to permit a party to pierce the allegations of fact in the pleadings, or, in other words, to require the party with the burden of production to produce evidence to support its claim.

In *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 470 (2d Cir. 1943), for example, a plaintiff sued to collect as a beneficiary of three insurance policies, and the defendant contended that in applying for the insurance the deceased husband had misrepresented the facts of his consultations with physicians. The defendant tried to depose two of the physicians, but the plaintiff claimed privilege, asserting that the conversations were confidential. *Id.* The district court granted summary judgment, and the plaintiff appealed, contending that "she was not compelled to disclose her case in advance of trial . . . and thus could rely until then upon the possibility that the doctors might show the consultation to have been on inconsequential ailments." *Id.* The Second Circuit affirmed the grant of summary judgment. *Id.* at 473. In doing so, the court noted that the plaintiff's argument would defeat the purpose of the summary judgment standard:

> If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions.

Id. To allow a party to withhold evidence on summary judgment and still proceed to trial is anathema to the purpose of the procedure. *Cf. Teamsters Local Union No. 117*, 789 F.3d at 994 (stating that the nonmoving party "may not merely state that it will discredit the moving party's evidence at trial and proceed in the hope that something can be developed at trial in the way of

evidence to support its claim" (quoting *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987))).

Furthermore, as the Seventh Circuit has repeatedly stated, summary judgment is "not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Steen*, 486 F.3d at 1022 (quoting *Hammel*, 407 F.3d at 859). Where a party has ample time to conduct discovery and develop his or her case, but fails to produce admissible evidence, courts are not required to give that party a "do over." *Winters v. Fru-Con Inc.*, 498 F.3d 734, 743 (7th Cir. 2007).

The Secretary attempts to introduce additional evidence on appeal that he failed to submit to the Judge below. *See* S. Br. at 23; Apps. B, C (providing evidence from MSHA handbooks that were not submitted to the judge on summary decision). The Secretary could and should have presented the evidence in opposition to summary judgment.

On appeal from a summary judgement, a party is permitted to rely upon only "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). In *Useden v. Acker*, 947 F.2d 1563, 1571-72 (11th Cir. 1991), for example, the circuit court upheld the district court's decision to strike an affidavit from a key witness submitted after a deadline, but prior to a hearing on the motions for summary judgment. The court refused to consider it in its review of the grant of summary judgment, stating that "[t]he content of the affidavit was not newly discovered evidence extracted from a previously missing source[, and t]he affiant was available to the appellant throughout the course of discovery and in fact provided extensive deposition testimony apart from the affidavit." *Id.* at 1572.

Here, the Secretary seeks to introduce appendices to his opening brief. However, the two MSHA handbooks and a district court order denying a motion to dismiss were available well before summary decision was entered in this case. Appendix A, the district court order, was issued in September 2002, and it was easily available with a diligent search (one the Secretary chose not to conduct until this case was on appeal). Appendix B, a coal inspection procedure handbook, was published in February 2013 by the Secretary. Appendix C, a metal/non-metal inspection procedure handbook, was published in April 2013 by the Secretary. Summary decision was entered on August 25, 2015. The Secretary obviously could have provided in the summary judgment proceeding the material he now attempts to provide to the Commission.[11]

[11] For these reasons, we would grant KenAmerican's motion to strike with respect to the appendices.

CONCLUSION

Under the proper summary judgment standard, the Judge's decision was correct. It is possible that the Secretary could have provided evidence to support his allegations at the summary decision stage, but he did not. By filing a perfunctory response, the Secretary risked and received an adverse judgment. We disagree with the majority's decision to give the Secretary a second chance. Such action in this case encourages insufficient pleadings by the Secretary. We respectfully dissent.

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