FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 16 2020

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

BEFORE: Jordan, Young, Althen, and Traynor, Commissioners[1]

DECISION

BY: Jordan, Young, Althen, and Traynor, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act") and concerns a citation issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to KenAmerican Resources, Inc. The Secretary alleges that KenAmerican's mine-phone dispatcher provided advance notice of an inspection in violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a).[2] The Secretary asserts that the mine dispatcher answered in the affirmative when a miner underground asked "do we have any company outside?"

KenAmerican contested the citation and the associated penalty of $18,742 before a Commission Administrative Law Judge. Initially, KenAmerican filed a motion for summary decision arguing that even if the Secretary's allegations were substantiated, the exchange did not violate section 103(a). The Judge granted summary decision and vacated the citation after finding that the Secretary did not establish a violation. 37 FMSHRC 1809 (Aug. 2015) (ALJ).

The Secretary filed a petition for discretionary review, which the Commission granted. On August 25, 2016, the Commission reversed the Judge and remanded the case with instructions that the Judge hold a hearing. 38 FMSHRC 1943 (Aug. 2016). The Commission concluded that there was a material fact at issue, i.e., whether the cited conversation referred to an MSHA inspection. *Id.* at 1951. Accordingly, the Commission held that summary decision was improper.

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[1] Chairman Marco M. Rajkovich is recused from considering this matter.

[2] Section 103(a) states in pertinent part that "no advance notice of an inspection shall be provided to any person . . . ."

On December 14, 2018, the Judge issued a decision after a hearing, finding that the Secretary failed to establish a violation. 40 FMSHRC 1544 (Dec. 2018) (ALJ).

The Secretary filed a second petition for discretionary review, which we granted. On appeal, the Secretary contends that the Judge's factual findings and conclusions are erroneous. We agree and reverse the Judge's decision.

I.

Factual and Procedural Background

KenAmerican's Paradise No. 9 mine is a large underground coal mine in Kentucky. On April 19, 2019, someone filed an anonymous hazard complaint regarding conditions at the mine with MSHA pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 813(g).[3] On April 20, 2012, during the second shift, six MSHA inspectors arrived at the portal and informed the foreman of the complaint. Two inspectors then traveled to the dispatcher's shack and warned Lance Holz, the dispatcher, not to provide notice of the impending inspection. Holz called for a miner to return to the surface with a man-trip. Meanwhile, MSHA inspector Doyle Sparks surreptitiously monitored a mine-phone receiver from which he could hear Holz.

Sparks testified that he overheard an underground miner from the number four unit get on the phone and ask Holz "[d]o we have any company outside?" Tr. 23. Sparks heard Holz respond "yeah, I think there is." Tr. 24. Further, Sparks memorialized this conversation in his notes. Gov. Ex. 2.[4] Sparks asked the miner to identify himself, but received no response. Tr. 24.

Holz also testified that a miner asked him if "company" was outside. Tr. 163-64. Importantly, he understood the miner to be inquiring about MSHA inspectors.[5] Tr. 164-65, 172. Therefore, he knew the question presented a request for advance notice. Holz recalls responding "I don't know," but testified that it was "possible" that he instead said "yeah, I think there is." Tr. 163-64, 172. Holz heard Sparks ask who was on the phone and receive no response. Tr. 166.

In summary, Holz and Sparks both testified that an underground miner solicited advance notice of an MSHA inspection over the mine-phone and that Holz responded to the miner's

[3] Section 103(g)(1) provides that "[w]henever a representative of the miners or a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists . . . such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary . . . ."

[4] "While manning the phone communication someone on the #4 unit called dispatcher and asked if there was company outside and the dispatcher (Lance) told him yeah I think there is." Gov. Ex. 2, at 2-3.

[5] Holz inferred that the miner was referring to MSHA because it was a Friday after a shift change, a time when corporate representatives would be unlikely to visit. Tr. 165.

solicitation. Sparks asked the miner to identify himself and was met with silence. The only material inconsistency between their testimonies concerns the substance of Holz's response.

The Judge determined that Holz most likely stated "I don't know" and thus found no advance notice. 40 FMSRHC at 1549, 1552 ("This is dispositive and ends the inquiry."). The Judge also made an alternative holding: even if Holz actually responded "[y]eah, I think there is" the Secretary failed to prove that Holz *intended* to provide advance warning of an inspection. *Id.* at 1554. Because Holz's response was intertwined with a request to procure transportation for the inspectors, the Judge believed that even an affirmative response would not have violated section 103(a).

On review, the Secretary contends that the Judge erred in his articulation of the law. The Secretary maintains that the Judge failed to properly weigh and address the record evidence. The Secretary also alleges that the record evidence leads to the conclusion that KenAmerican violated section 103(a).

KenAmerican maintains that the Commission should defer to the Judge's factual findings. In addition, KenAmerican argues that section 103(a) regulates only the Secretary's conduct and is applied inappropriately in this instance. Finally, KenAmerican maintains that the Secretary is infringing on its First Amendment rights.

II.

Disposition

A. The record compels the conclusion that Holz provided an affirmative response to a request for advance notice; the Judge abused his discretion in determining otherwise.

The outcome of this case hinges in large part on the Judge's determination of witness credibility. The Judge credited Holz's testimony that he said "I don't know" in response to the solicitation for advance notice. The Judge did not credit Holz's testimony that it was "possible" that he said "yeah, I think there is" in response, even though this particular response was corroborated by inspector Sparks' testimony and his contemporaneous notes regarding what had been said.

A Judge's decision to credit the testimony of a witness is entitled to great weight and may not be overturned lightly. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). The Commission reviews a Judge's credibility determinations under an abuse of discretion standard. *See Jim Walter Res., Inc.*, 37 FMSHRC 1868, 1871 (Sept. 2015). There must be "compelling reasons" to take the "extraordinary step" of reversing a Judge's credibility determination. *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (quoting *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (Nov. 1986)).

However, the Commission will not affirm credibility determinations if they contradict record evidence or are supported by no evidence or dubious evidence. *In re: Contests of*

Respirable Dust Sample Alteration Citations, 17 FMSHRC 1819, 1878, 1881 n.80 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Although the Commission only overturns a Judge's credibility determination in rare circumstances, we will not rubber stamp them.[6] *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1391-92 (Dec. 1999).

The Commission's approach is fully consistent with the approach taken by the courts of appeals. For example, the Fifth Circuit has recognized that "if a credibility determination is unreasonable, contradicts other findings of fact, or is 'based on an inadequate reason, or no reason at all,' [the court] will not uphold it." *NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 928 (5th Cir. 1993) (quoting *NLRB v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978)). Similarly, the D.C. Circuit has held that "utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible" may justify overturning a Judge's credibility finding. *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445 (D.C. Cir. 1996) (quoting *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984)) (alteration in original).

We conclude that there are compelling reasons to take the extraordinary step of overturning the Judge's credibility determination and to find an advance notice violation. The Judge failed to reconcile his factual finding regarding Holz's response against relevant conflicting record evidence, made contradictory findings, and provided a rationale that is otherwise unreasonable.

First, the Judge completely failed to consider the content of Sparks' contemporaneous notes. Sparks documented hearing Holz say "yeah I think there is." Gov. Ex 2, at 3. The content of the notes corroborates a factual account that is both consistent with Sparks' own testimony and the alternative testimony provided by Holz. The Judge's failure to attempt to reconcile the content of the notes against a credibility determination is an abuse of discretion.[7] *Morgan*, 21 FMSHRC at 1391 ("Before a judge credits any testimony, he must reconcile all record evidence that is inconsistent with that conclusion."); *Cf. Pappas v. CalPortland Co.*, 40 FMSHRC 664 (May 2018) (affirming the Judge's decision to credit a witness because the Judge considered and reconciled the record evidence that detracted from the witnesses' testimony).

Second, the Judge further erred in relying upon the testimony of KenAmerican's Director of Safety, Shannon Baker, that personnel did not use coded language or provide advanced notice

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[6] The substantial evidence standard of review requires a weighing of all probative record evidence and an examination of the fact finder's rationale in arriving at the decision. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). A Judge must sufficiently summarize, analyze, and weigh the relevant record and explain their reason for arriving at a decision. *Consolidation Coal*, 11 FMSHRC 966, 974 (June 1989) (citations omitted).

[7] Instead of considering the content of the notes, the Judge focused his analysis on what was not in the notes. 40 FMSHRC at 1551. The Judge found that Sparks' failure to document his investigation into the identity of the anonymous miner detracted from the note's veracity, and accordingly the Judge disregarded the notes entirely. *Id.*

at the mine. 40 FMSHRC at 1552 ("I find Baker's testimony to be credible, and it tends to support Holz' claims."). The only "claim" of Holz in dispute is the content of his response. Baker was not on the mine-phone during the call and has no knowledge as to what Holz said. Accordingly, Baker's testimony cannot support the Judge's decision.

In fact, Holz's testimony regarding the use of coded language at the mine refutes Baker's testimony. Baker testified that coded language was never used at the mine in context with advance notice. *Id.* at 1552 (citing Tr. 140 ("we just never had any kind of euphemisms or anything, any kind of coded language . . . .")). The Judge credited Baker. *Id.* In contrast, Holz testified that he understood the question about "company" to be directed at determining whether MSHA was present.[8] Tr. 164-65, 172; *supra* at 2 n.5. The Judge credited Holz on this point. 40 FMSHRC at 1549 n.8 ("I credit Holz' statement and find 'company' was in reference to MSHA."). Therefore, the Judge himself recognized the inquiring miner was using coded language. The Judge's contradictory findings undermine his credibility determination.

Third, the Judge provided a rationale for his determination that is not supported by the record. The Judge believed that Sparks misunderstood the law and that Sparks had issued the citation merely because a miner had *solicited* advance notice.[9] *Id.* at 1549. In fact, Sparks testified that he considered the question *and answer* to constitute advance notice. Tr. 103 ("I don't necessary think it's a violation if they said we got company outside. I think what brought the problem on was when they said, yeah, I think there is.").

Fourth, the Judge made unreasonable assumptions. For instance, the Judge found that it was unlikely that Holz would have given an answer that violated the law in the presence of two MSHA inspectors. In so concluding, the Judge did not acknowledge that the inspectors at the dispatcher's shack were not on the mine-phone, could not hear the preceding question, and would not have been aware of the significance of Holz' response. In fact, Holz testified that it was "possible" that he had given the affirmative answer in the presence of the inspectors.[10]

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[8] The Judge also found that Inspector Sparks was not able to substantiate that "the question he heard over the mine-[phone] system was consistent with such coded language." 40 FMSHRC at 1550. As previously stated, there is not a factual dispute on this issue; Holz understood the term "company" to mean MSHA. Tr. 25, 164-65, 172.

[9] Inspector Sparks testified as a fact witness. The legal conclusions of an inspector are neither binding nor dispositive. *Big Ridge, Inc.*, 37 FMSHRC 213, 216 n.6 (Feb. 2015) (citing *Penn Allegh Coal Co.*, 4 FMSHRC 1224, 1227 n.2 (July 1982)).

[10] We note that the Judge found that Holz had no reason to skew his testimony as he was longer employed by KenAmerican. In so finding, the Judge failed to consider that Holz faced the possibility of criminal prosecution. 30 U.S.C. § 820(e). The refusal to follow a Judge's credibility determination is particularly justified where the testimony in question is given by an interested witness and relates to his own motives. *Morgan*, 21 FMSHRC at 1391. Indeed, we note that two mine superintendents and a foreman working at the Paradise No. 9 mine were previously convicted of the crime of providing advance notice. *United States v. Gibson*, 409 F.3d 325, 333 (6th Cir. 2005).

Moreover, the Judge erred in finding no violation on the grounds that the miner might have asked the question for many reasons, such as the need to provide mantrips. He held that Holz's confirmation of visitors was only a violation if Holz intended to convey advance notice. That is incorrect. Advance notice of an inspection is a violation. Proof of intent is not required. *Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014). If the effect of the communication is to convey advance notice then the violation is complete. Here, Holz thought the caller was asking whether MSHA inspectors were on site and Holz's statement informed him that inspectors were present. At that point, the violation occurred.[11]

Finally, the operator argued before the Administrative Law Judge and before us that the language of section 103(a) applies only to the Secretary. The Judge correctly rejected that argument. The Commission's application of section 103(a) to operators in *Topper Coal Co., Inc.*, 20 FMSHRC 344 (Apr. 1998), is consistent with the statutory text and the Mine Act overall, including section 110(e), which provides that it is a crime for "*any* person" to provide advance notice of an inspection. 30 U.S.C. § 820(e) (emphasis added). In short, the plain language of the Act is flatly inconsistent with the operator's argument.[12]

For all the aforementioned reasons, we find that the Judge abused his discretion. While it is the province of the Judge to access credibility, it "involves more than a witness' demeanor and comprehends an overall evaluation of testimony in light of its rationality it's or internal consistency and the manner it hangs together with other evidence." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586, at 578-79 (2d ed. 1995).

We conclude that the record evidence demonstrates that Holz said "yeah, I think there is" in response to the miner's question. *See ICG Hazard, LLC,* 36 FMSHRC 2635, 2640 (Oct. 2014) ("Where the evidence supports only one conclusion, remand on that issue is unnecessary.") (citations omitted).

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[11] Advance notice cases may not always be resolved easily. In some instances, if a miner seeks advance notice from a dispatcher or other employee, it may be difficult to discern whether a superficially noncommittal response is affirmative or affirmatively coded language. Operators must train miners not to seek advance notice. Ambiguities that may exist in any interchange can produce situations that are difficult to judge. In such cases, the Judge must exercise his/her discretion in light of the totality of the circumstances.

Second, we recognize that requests for mantrips and personal observations by miners may lead individual miners to infer the presence of inspectors. Inferences drawn by individual miners from their observations are not violations but such personal inference may not lead to advance notice to other miners. Operators must avoid to the extent possible the occurrence of such inferences.

[12] We similarly reject the Judge's attempt to limit *Topper Coal's* holding to mines of small size. *See* 40 FMSHRC at 1554-55. Section 103(a) by its plain language applies to "coal or other mines." 30 U.S.C. § 813(a). The definition of a "coal or other mine" in section 3(h) of the Mine Act is broad, sweeping and expansive. *See Jim Walter Res., Inc.*, 22 FMSHRC 21, 24 (Jan. 2000). Section 103(a)'s prohibition against advance notice clearly applies to mines of all sizes.

B. The Secretary did not infringe on KenAmerican's First Amendment Rights.

KenAmerican argues that section 103(a) has been applied in a manner which infringes on its freedom of speech in violation of the First Amendment. We disagree.[13]

The Commission has jurisdiction to consider constitutional challenges raised against the enforcement of the Mine Act. *Sec'y of Labor v. Kenny Richardson*, 3 FMSHRC 8, 18-21 (Jan. 1981). The First Amendment guarantees that "Congress shall make no law abridging the freedom of speech." U.S. Const. amend 1. The First Amendment requires a heightened scrutiny whenever the government regulates speech because of a disagreement with the message it conveys. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (citations omitted). Content-based restrictions on speech may be justified only if the government proves that it is narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992).

Even if we were to assume that sanctioning KenAmerican for providing advance notice of an impending inspection is a restriction on protected expression, we conclude it is narrowly tailored to allow a meaningful inspection of the mine. The Supreme Court's decision in *Donovan v. Dewey*, 452 U.S. 594 (1981), made clear that unannounced inspections of mines under the Act are vital and fully constitutional. Congress enacted the Mine Act to ensure the health and safety of all miners. 30 U.S.C. § 801(a)-(f). In order to comply with Congress' directives, MSHA must conduct inspections that reflect the normal day-to-day working conditions of the mine. Such meaningful inspections cannot occur when the mine environment is altered by advance notice of an inspection. *Donovan v. Dewey*, 452 U.S. at 603 ("[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential."); *see also Solis v. Manalapan Min. Co.*, No. 10-115-GFVT, 2010 WL 2197534, at 5 (E.D. Ky. May 27, 2010)[14] ("The giving of advance notice prevents the discovery of safety and health violations and allows potential hazards to be concealed."); S. Rep. 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) (recognizing the "notorious

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[13] The Secretary did not respond to this argument. Instead, he contends that KenAmerican is impermissibly attempting to enlarge its rights on review. The Secretary is incorrect; KenAmerican had previously presented this argument to the Judge. 40 FMSHRC at 1556 n.15; KA Post-Hearing Br. at 22-25. On appeal, a prevailing party may defend a decision based on anything in the record without filing a cross-appeal. *Mass. Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976); *Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1528-29 (Aug. 1990).

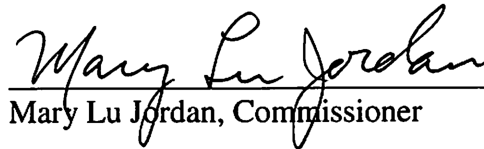
[14] In *Manalapan*, a federal district court judge granted the Secretary's motion for a preliminary injunction ordering the defendant mine operators to comply with section 103(a)'s prohibition against advance notice. MSHA cited the mine operators for violations of section 103(a) after its inspectors allegedly overheard advance notice of an inspection provided over the mine's phones. Slip op. at 2, 5.

ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained.").[15]

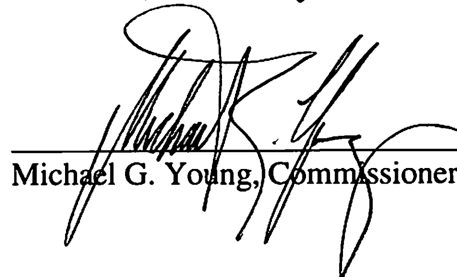
III.

Conclusion

In summary, we conclude that the evidence in the record compels the conclusion that advance notice of the MSHA inspection was provided by the operator. For the reasons herein, we reverse the decision of the Judge and find that KenAmerican violated section 103(a). The case is remanded to the Judge so that he may assess a civil penalty for the violation consistent with section 110(i) of the Mine Act, 30 U.S.C. § 820(i).[16]

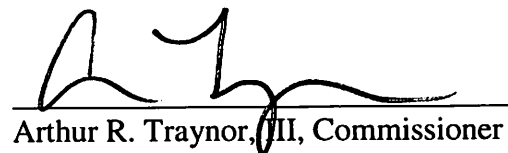


Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

[15] Furthermore, KenAmerican has not demonstrated that the Secretary is applying the law in a way that inhibits its statutory right, pursuant to section 103(f), for an escort to accompany the inspection. Section 103(a) does not prohibit the mine operator from simply calling a miner to return to the surface.

[16] The Judge's analysis regarding whether KenAmerican was negligent in violating the Act is more appropriately confined to the penalty assessment for the violation.

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