ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. KENT 2013-0211
v.	:	
KENAMERICAN RESOURCES, INC.	:	
Respondent.	:	

PETITION FOR DISCRETIONARY REVIEW

The Secretary of Labor petitions the Federal Mine Safety and Health Review Commission (Commission) for review of the decision of a Commission administrative law judge (ALJ) in the above-captioned case. The ALJ decision vacated a Mine Safety and Health Administration (MSHA) citation alleging that KenAmerican Resources, Inc. (KenAmerican) provided advance notice of an inspection in violation of Mine Act § 103(a). It is undisputed that, in connection with an April 20, 2012 MSHA inspection at KenAmerican's Paradise #9 mine, an underground miner inquired of the dispatcher over the mine's phone system, "Do we have company outside?" to which the dispatcher answered either "I don't know" or "Yeah, I think we do."

The ALJ vacated the citation on grounds that, as a factual matter, the dispatcher's response was "I don't know" which could not have constituted advance notice. In addition, the ALJ found that even if the exchange gave notice that MSHA

inspectors were onsite, it did not give notice that MSHA inspectors were there to conduct "an inspection" and therefore was not advance notice. He also found that § 103(a)'s advance notice prohibition applies differently based on mine size and frequency of MSHA presence and that various exceptions to the prohibition exist based on the operator's reasons for the advance notice (such as arranging transportation).

The Secretary seeks review of the ALJ's decision on the grounds that (1) the decision is contrary to law and Commission rules and precedent, (2) a substantial question of law and policy is involved, and 3) a finding of material fact is not supported by substantial evidence. *See* 30 U.S.C. § 823(d) (2) (A) (ii); Commission Procedural Rule 70(c), 29 C.F.R. § 2700.70(c).

The Secretary urges the Commission to grant the petition for discretionary review, reverse the ALJ's decision and remand the case to the ALJ to determine, after applying the appropriate legal analyses, whether the exchange constituted advance notice.

ISSUES

(1) Whether the ALJ erred in summarily concluding that the exchange did not constitute advance notice.

(2) Whether the ALJ erred in interpreting Mine Act § 103(a) to prohibit only specific notice of an "inspection" and to contain exceptions based on mine size, frequency of MSHA presence, and the operator's reasons for the notice.

(3) Whether substantial evidence supports the ALJ's factual findings regarding the content of the exchange, to the extent those findings are material.

STATUTORY BACKGROUND

Section 103(a) of the Mine Act prohibits advance notice of MSHA inspections. It states in relevant part: "Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines . . . In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person . . ." 30 U.S.C. § 813(a).

In enacting section 103(a)'s prohibition against advance notice, Congress recognized that the MSHA inspection process can be easily frustrated by advance warnings of inspections. The Senate Committee stated:

> The Committee intends to grant a broad-right-of entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act without first obtaining a warrant. This intention is based upon the determination by legislation. The Committee notes that despite the progress made in improving the working conditions of the nation's miners under present regulatory authority, mining continues to be one of the nation's most hazardous occupations. Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.

S. Rep. No. 95-181, at 27 (1977).

The prohibition on advance notice is central to enforcing the Mine Act. In *Donovan v. Dewey*, 452 U.S. 594 (1981), the Supreme Court recognized that section 103(a) of the Mine Act authorizes warrantless inspections by granting MSHA inspectors the right of entry to, upon, or through any mine, without advance notice, to determine if there is compliance with mandatory health and safety standards. *Donovan*, 452 U.S. at 602-03 (1981); *John Richard Constr.*, 39 FMSHRC 959, 962 (May 2017). Consistent with *Donovan*, the Commission has long held that the

legislative history clearly shows that Congress did not intend for mine operators to have advance notice of MSHA inspections. *Nolichuckey Sand Company*, Inc., 3 FMSHRC 1060, 1063 (April 1981) (finding that Congress intended for MSHA inspectors to be able to enter into all mines for purposes of inspecting them without having to give advanced notice); *J.A.D. Coal Company, Inc.*, 7 FMSHRC 733, 741 (May 1985) (finding Congress did not intend for any representative of the Secretary of Labor to give advance notice of an inspection).

STATEMENT OF THE CASE

On April 20, 2012, six MSHA inspectors visited the Paradise #9 mine to investigate a hazard complaint and conduct an impact inspection.[1] December 14, 2018 Decision (Dec.) at 2; October 3, 2017 Trial Transcript (Tr.) 20:25-21:7; 64:9-65:1; 65:20-25. The inspectors arrived after a shift change, when miners and transportation were already underground. Dec. at 4; Tr.69:17-70:7. This situation normally involved KenAmerican's dispatcher calling underground personnel and telling them to bring a ride to the bottom. Tr.74:24-76:23.

MSHA Inspector Doyle Sparks monitored the mine's phone system. Dec. at 5; Tr.23:10-14; 113:16-25. Sparks heard someone underground ask KenAmerican dispatcher Lance Holz, "Do we have company outside?" Dec. at 5; Tr.23:15-25; 55:11-24. Sparks testified that Holz responded, "Yeah, I think we do;" Holz testified that he said, "I don't know" (although he acknowledged that he was not certain and

[1] Although not dispositive of this case, we note that in 2003, KenAmerican, two superintendents, and two foremen were convicted of (among other criminal violations of the Mine Act) providing advance notice of inspections at this mine. *See United States v. Gibson*, 409 F.3d 325, 333–34 (6th Cir. 2005).

could have responded differently). Dec. at 5, Tr.163:9-16. Sparks testified that, after Holz responded, Sparks said to the unidentified caller, "Who is this?" The caller responded, "Who is this?" Sparks said, "This is Doyle Sparks at MSHA, who is this?" Then there was silence.

Based on this exchange, Sparks issued Citation No. 8502992, alleging that Holz provided advance notice "to miners underground that MSHA inspectors were on mine property."

THE ALJ'S DECISION

The ALJ vacated the citation for two reasons. First, the ALJ credited Holz's testimony that he responded "I don't know" when asked whether there was "company outside," and discredited Sparks's testimony that Holz responded, "Yeah, I think we do." Dec. at 6-9. From this factual finding alone, the ALJ determined that Holz's response did not give advance notice. *Id.* at 9.

Second, the ALJ interpreted section 103(a) to prohibit only advance notice of an "inspection." *Id.* at 9-13. The ALJ held that notice may be given of MSHA's presence or activities, as long as no advance notice of an "inspection," specifically, is given. *Id.* at 11. The ALJ also opined that in large mines like Paradise #9, MSHA inspectors are present almost every day for many reasons, not just to conduct inspections. *Id.* In addition, he suggested there may be reasons it is necessary for operators to give notice that MSHA has arrived to conduct an inspection, such as when arranging for escorts or rides for inspectors. *Id.*

STANDARD OF REVIEW

The Commission reviews ALJs' conclusions of law de novo. *Contractors Sand & Gravel, Inc.*, 20 FMSHRC 960, 967 (Sept. 1998), *rev'd on other grounds*, 199 F.3d 1334 (D.C. Cir. 2000). The Commission will uphold an ALJ's findings of fact if substantial evidence supports them. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the ALJ's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Commission "must consider anything in the record that 'fairly detracts' from the weight of the evidence that supports a challenged finding." *Id.* (quoting *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997)).

ARGUMENT

1. Even assuming that Holz responded "I don't know," the ALJ erred in summarily concluding that such an exchange did not constitute advance notice.

Even under the ALJ's version of the conversation, the ALJ should have evaluated the evidence to determine whether the exchange constituted advance notice. *See Cannelton Indus., Inc., et al.*, 20 FMSHRC 726, 732 (July 1998) (an ALJ must "weigh all probative record evidence [for the Commission to] examine the [ALJ's] rationale in arriving at his decision"). Instead, he summarily concluded that the response "I don't know" meant that advance notice was not provided.

The ALJ failed to analyze the significance of the question, "Is there company outside?" in combination with any answer other than "no."[2] With regard to this exact phrase, the Commission has recognized that "one could reasonably infer that 'company outside' was meant to inquire whether MSHA was present to conduct an inspection." *KenAmerican*, 38 FMSHRC at 1949.[3]

In evaluating both the "company" question and the "I don't know" response, the ALJ failed to consider evidence that coded language is used generally in the mining industry to communicate advance notice. *See* Tr. 24–26; *KenAmerican*, 38 FMSHRC at 1949 & n.7. "I don't know" easily could have been the coded response at Paradise #9 indicating MSHA was onsite; the ALJ should have evaluated the evidence of that.

Likewise, in determining the significance of the question, the ALJ did not analyze Sparks's follow-up after the exchange. Sparks asked the underground caller to identify himself, but received no response. *See* Tr. 24, 55–60, 165–68. The Commission has recognized "that the caller's failure to identify himself in response to the inspector's request [may be] evidence that the caller's question was intended

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[2] Even "no" could be a part of a code constituting advance notice, although the record in this case reflects no evidence of that.

[3] Indeed, in this case the ALJ found that the question was meant to do just that. Dec. at 6 n.8. However, as will be discussed, because the ALJ believed that such a question (even if the answer is "yes") constitutes notice only that MSHA is on the premises and not notice of an "inspection," its significance was of no consequence to him.

to determine whether an MSHA inspection was occurring." *KenAmerican*, 38 FMSHRC at 1949.

Finally, as explained below, the ALJ applied an incorrect interpretation of section 103(a) to find that, even if the response had been "Yeah, I think so," the exchange was not advance notice. The ALJ's decision should be vacated and remanded for consideration of the evidence of advance notice in light of the correct legal standard.

2. The ALJ erred in interpreting section 103(a) to prohibit only specific notice of an "inspection" and to contain exceptions based on mine size, frequency of MSHA presence, and the operator's reasons for the notice.

The ALJ's decision incorrectly interpreted the prohibition of advance notice to include unduly restrictive parameters and exceptions that do not exist, and interpreted the prohibition differently based on the size of a mine or how often MSHA inspectors are at a mine.

First, the ALJ erred in concluding that an operator may give advance notice of MSHA's presence as long as the operator does not specifically give notice of an "inspection." Dec. at 10–11. This undercuts the purpose of the prohibition on advance notice, which is to prevent operators from concealing hazards or violations. *See* S. Rep. No. 95-181, at 27 (1977); *Donovan*, 452 U.S. at 602–03. When MSHA personnel are at a mine to conduct an inspection, even if they are conducting other activities, it undermines that purpose to give notice that "MSHA is here," even if the operator does not say, "MSHA is here to conduct an inspection." If MSHA is onsite for a reason for which advance planning is desirable (for example, to conduct

interviews), presumably MSHA personnel will have made that clear. In this case, the MSHA inspectors were unannounced and gave no indication they were visiting under circumstances in which notice would be acceptable.[4]

Second, the ALJ erred in concluding that advance notice of inspections is permitted when it is "necessary to arrange escorts and rides for [inspectors] from the surface into the mine." Dec. at 11. There is no such exception to the prohibition on advance notice, *see* 30 U.S.C. § 813(a), and section 103(a) should not be interpreted as containing this exception. *See Cannelton Indus., Inc.*, 26 FMSHRC 146, 153 (Mar. 2004) (citations omitted), *aff'd sub nom. Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82 (D.C. Cir. 2005) ("it is not the role of the Commission to read into a [statute] words that simply are not there"); *cf. Topper Coal Co.*, 20 FMSHRC 344, 348 (Apr. 1998) (rejecting operator's argument that advance notice was necessary in order to ensure that the unannounced inspectors would not be inadvertently injured). It is not necessary that an operator tell miners underground *why* a person or ride is needed at the surface; it is sufficient for an operator simply to say *that* a person or ride is needed at the surface. This interpretation is compelled by the plain language of section 103(a) or is at least reasonable, and the Commission should defer to it. *Am. Coal Co. v. FMSHRC*, 796 F.3d 18, 23–24 (D.C. Cir. 2015) (if the meaning of a statutory provision is clear, that meaning controls,

[4] In fact, the MSHA inspectors affirmatively reminded the dispatcher not to give advance notice of their presence. Tr. 160.

but if the provision is ambiguous, the Commission and the courts defer to the Secretary's reasonable interpretation of it).

Third, and similarly, the ALJ erred by suggesting that advance notice of inspections may be given at large mines or mines at which MSHA personnel are often present. *See* Dec. at 10–11. Section 103(a) does not contain exceptions for either of these circumstances. *See* 30 U.S.C. § 813(a); *Cannelton Indus.*, 26 FMSHRC at 153. The ALJ suggested that advance notice is harmless in large mines because miners "underground would not know where MSHA would be going, even if they had advance notice that MSHA was on site to conduct an inspection." Dec. at 11. However, miners still would know that MSHA is inspecting at that time and would have the opportunity to conceal hazards or violations even if they did not know with certainty which part of the mine would be inspected. For the same reason, MSHA's frequent presence at the mine does not permit advance notice; if miners are informed that MSHA is conducting an inspection at that time, they will have the opportunity to conceal or correct hazards or violations at that time, notwithstanding how often MSHA is at the mine generally. The ALJ's interpretation of the prohibition on advance notice is inconsistent with the language and purpose of section 103(a) and, if not corrected, could have the effect of substantially restricting MSHA's enforcement powers and broad right of entry to mines.

The Commission should reverse the ALJ's decision and remand it for consideration of the evidence of advance notice under an appropriate § 103(a) analysis.

3. Substantial evidence does not support the ALJ's factual findings regarding the content of the exchange, to the extent those findings are material.

As discussed, the ALJ's decision is legally incorrect and should be reversed regardless of whether Holz said "I don't know" or "Yeah, I think we do;" the "I don't know" response to the "company" question may well have constituted advance notice. However, to the extent that Holz's exact response is material, the ALJ's factual finding that Holz said "I don't know" should be reversed and remanded for a reasoned consideration of key evidence.

Although an ALJ's credibility determinations "are entitled to great weight and may not be overturned lightly," the Commission "will not affirm such determinations" if they are unsupported by the evidence, unreasonable or self-contradictory, or based on inadequate or no reason. *Consolidation Coal Co.*, 20 FMSHRC 315, 319, 321 (Apr. 1998). The ALJ discredited Sparks because Sparks was "overly convinced of his position" and credited Holz despite his repeated testimony that he was not sure how he responded and might have said something other than "I don't know." The decision was not clear why these behaviors and testimony reasonably would lead to a conclusion that Sparks was untruthful.

The ALJ also failed to explain why evidence that corroborated Sparks's testimony—such as the fact that he immediately alerted mine management, parts of his contemporaneous notes, and Holz's corroborating testimony that Sparks

asked "Who is this?" but received no response—did not lend credence to Sparks's testimony that he heard advance notice. Similarly, although the ALJ relied heavily on the presence of two other inspectors near Holz during the conversation to find it incredible that Holz would have said "Yeah, I think so," there was no evidence that the two inspectors heard the question posed – that is, no evidence that the inspectors could have put Holz's half of the conversation in context. *See* Tr. 160–61 (Holz's testimony that inspectors were at the portal, but not listening to the phone; Holz was not sure whether they were even near him at the time of the communication, or what they were doing); *see, e.g.*, *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1391–92 (Dec. 1999) (Commission cannot affirm credibility determination that ignores evidence tending to call that determination into question); *Cannelton Indus.*, 20 FMSHRC at 732 (ALJ should have addressed testimony that detracted from a finding based on credibility).

The ALJ also found it difficult to believe that Holz would have said "Yeah, I think so" given that the two inspectors had reminded him earlier not to give advance notice. Dec. at 9; Tr. 160. However, it is not reasonable to believe that one who is aware of a law will not break it. *See, e.g.*, *In re: Contests of Respirable Dust Sample Alteration Citations Keystone Coal Mining Corp.*, 17 FMSHRC 1883, 1914 (Dec. 1995) (Comm'r Marks, dissenting) ("the judge's credibility determinations are based on an illogical assumption—that people do not violate the law because they are aware of criminal and civil penalties . . . Jails are full of people who are aware that their acts could result (and had resulted) in criminal sanctions") (quotation

omitted). This is particularly true given the opportunity in this case; presumably, Holz knew the inspectors could not hear the question and did not know a third inspector was monitoring the phone system.

For these reasons, substantial evidence does not support the ALJ's factual finding that Holz said "I don't know."

CONCLUSION

The Commission should grant the petition for discretionary review, reverse the ALJ's decision and remand the case to the ALJ to determine, after applying the appropriate legal analyses, whether the exchange constituted advance notice in violation of Mine Act § 103(a).

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

APRIL E. NELSON
Associate Solicitor

ALI A. BEYDOUN
Counsel, Appellate Litigation

s/ Emily Toler Scott
Attorney
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety & Health
201 12th Street South, Suite 401
Arlington, VA 22202
(202) 693-9336
(202) 693-9392 (fax)
scott.emily.t@dol.gov

Attorneys for the Secretary of Labor

CERTIFICATE OF SERVICE

I certify that on January 14, 2019, a copy of the foregoing petition for discretionary review was served by email on:

Jason W. Hardin, Esq. and
Artemis Vamianakis, Esq.
215 South State Street
Suite 1200
Sault Lake City, UT 84111
jhardin@fabianvancott.com and
avamianakis@fabianvancott.com

s/ Emily Toler Scott