ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

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

BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

INTRODUCTION

This case involves an issue of statutory interpretation that the Commission has never addressed: whether Section 103(a)'s prohibition of advance notice includes notice communicated through ambiguous, coded, or euphemistic language. Advance notice communicated through such covert means must be covered by Section 103(a) because the very purpose of the provision is to prevent mine operators from concealing violations of the Mine Act before an MSHA inspector is able to observe them. That purpose would be thwarted by a rule that did not reach communications intended to provide advance notice without tipping off MSHA.

In this case, in the context of an impact inspection, an MSHA inspector took control of the mine's communication line and overheard a call in which a person working underground asked the dispatcher whether there was "company outside" and the dispatcher responded, "yeah, I think there is." The ALJ concluded on a motion for summary decision that this exchange was ambiguous, and that the ambiguity precluded a finding of advance notice as a matter of law. The ALJ should have instead concluded that a hearing was necessary to develop the facts regarding the context for and intended meaning of the exchange before determining whether the exchange violated Section 103(a).

The Secretary urges the Commission to hold that Section 103(a)'s prohibition of advance notice includes notice communicated through ambiguous, coded, or euphemistic language; vacate the judge's order granting KenAmerican's motion for summary decision; and remand the case to the ALJ to determine, after further development of the record, whether the exchange at issue in this case constituted prohibited advance notice.

ISSUES

I. Whether Section 103(a)'s prohibition of advance notice includes notice communicated through ambiguous, coded, or euphemistic language.

II. Whether the ALJ erred by granting KenAmerican's motion for summary decision.

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) (emphasis added).

Section 110(e) of the Mine Act imposes criminal liability on any person who provides prohibited advance notice. It states: "Unless otherwise authorized by this chapter, any person

who gives advance notice of any inspection to be conducted under this chapter shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both." 30 U.S.C. § 820(e).

In enacting Section 103(a)'s prohibition against advance notice, Congress expressed its recognition that the MSHA inspection process can be easily frustrated by advance warnings of inspections. In this regard, 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, 95th Cong., 1st Sess. 27 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 ("Leg. Hist.") at 615 (emphasis added).

In upholding the constitutionality of the Mine Act's authorization of warrantless inspections, the Supreme Court also recognized that advance notice of inspections "might impede the

specific enforcement needs of the Act" because safety and health hazards can be easily concealed. Donovan v. Dewey, 452 U.S. 594, 602-03 (1981) (internal quotation marks omitted). In this regard, the Court specifically noted and accepted Congress's determination that "[i]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent inspections are essential." 452 U.S. at 603 (citations omitted).

The Commission has held that Section 103(a) prohibits mine personnel from giving advance notice of an MSHA inspection to colleagues working in other areas of the mine even after MSHA has already arrived at the mine site. Topper Coal Co., 20 FMSHRC 344, 347-49 (1998). In Topper Coal, in the context of an MSHA spot saturation inspection for smoking materials, the company president called down to the working section of the mine and told a miner that "two federal inspectors" were in the mine and that he wanted the miners to "watch out and be careful." Id. at 346. The Commission concluded that the call constituted advance notice in violation of Section 103(a). Id.

Federal district courts have interpreted both Section 103(a) and Section 110(e) in a similar fashion. See, e.g., Permanent Injunction, Solis v. CAM Mining, LLC, No. 7:11-CV-00104 (E.D. Ky. July 15, 2011) (enjoining operator and agents to refrain from "giving advance notice to any person working underground of a pending inspection" after operator violated

Section 103(a) by providing advance notice to underground workers over mine phones); Consent Judgment, Solis v. Rosebud Mining Co., No. 3:10-CV-00331 (W.D. Pa. May 16, 2011) (consent judgment enjoining operator and agents to refrain from giving advance notice "to any person working underground" after Secretary alleged that Rosebud violated Section 103(a) by communicating advance notice from the surface to persons working underground); Preliminary Injunction, Solis v. Manalapan Min. Co., No. CIV 10-115-GFVT, 2010 WL 2197534, at *1 (E.D. Ky. May 27, 2010)(preliminary injunction ordering same); see also Order Denying Motion to Dismiss, United States v. KenAmerican Resources, Inc., No. 4:02-CR-18-M (W.D. Ky. Sept. 27, 2002)[1] (interpreting Section 110(e) to establish criminal liability for advance notice given by mine operators and their agents to colleagues working at the face after MSHA had arrived at the mine[2] but before the MSHA inspectors arrived at the face).

[1] Because this order is not available on Westlaw or PACER, the Secretary attaches it as Appendix A for the convenience of the Commission and opposing counsel. The mine at issue in the order is the same mine at issue in this case: Paradise #9.

[2] Indeed, the court squarely considered and rejected one of the same arguments that KenAmerican made to the ALJ in this case. In the criminal case, KenAmerican argued that notice given after MSHA inspectors entered the Paradise #9 Mine could not be considered "advance notice" because it was not in "advance" of MSHA's inspection. The court resoundingly rejected that argument, holding that "notice is certainly still 'advance' or 'furnished ahead of time' when it is given before MSHA inspectors reach a particular mine face in order to inspect that

The Commission has not had the occasion to consider whether Section 103(a)'s prohibition of advance notice includes a prohibition of ambiguous, coded, or euphemistic language that mine operators or their agents use with the intent of communicating advance notice to their colleagues without tipping off MSHA.

STATEMENT OF FACTS

On April 20, 2012, MSHA conducted both an investigation into a hazard complaint and an impact inspection. Sec'y's Ex. C. A group of seven MSHA representatives arrived at the mine to conduct the inspection. Dec. at 1. Upon arrival, the MSHA representatives met with KenAmerican representative Charles Kapp and informed him that they would be conducting a hazard complaint investigation. Sec'y's Ex. C. MSHA inspectors began reviewing the mine's examination books and documentation before preparing to travel underground to conduct the inspection. Id.

While some of the MSHA representatives were determining how the group would travel to the working section underground, MSHA Inspector Doyle Sparks monitored the mine's communication system. Sec'y's Ex. C; Dec. at 1. Inspector Sparks overheard a call made from the #4 working section to the dispatcher.

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mine." Order Denying Mot. to Dismiss at 3. KenAmerican should not be permitted to relitigate the same question here. See Consol. Edison Co. of New York v. Bodman, 449 F.3d 1254, 1257-58 (D.C. Cir. 2006) (articulating legal standard for issue preclusion).

Sec'y's Ex. C; Dec. at 1. The caller asked whether there was "company outside," and the dispatcher responded "yeah, I think there is." Sec'y's Ex. C; Dec. at 1. Inspector Sparks immediately asked who was on the line, but the caller did not respond. Sec'y's Ex. C; Dec. at 1.

That day, Inspector Sparks issued Citation No. 8502992 alleging a violation of Section 103(a). Dec. at 1.

PROCEDURAL HISTORY

After contesting the citation, KenAmerican moved for summary decision. For purposes of the motion, KenAmerican acknowledged the statements that Inspector Sparks overheard and recorded in his notes. KenAmerican Mem. at 3 n.1; KenAmerican Reply at 2 n.1.

KenAmerican argued, however, that those statements did not constitute prohibited advance notice for a variety of reasons. First, KenAmerican argued, the notice was not given in "advance" of an inspection because the inspection had already begun. KenAmerican Mem. at 4-5. Second, KenAmerican argued that there was no advance notice of an inspection because the mine personnel involved did not use words like "inspection" or "inspector." Id. at 5. Third, KenAmerican argued that the Mine Act, as interpreted in MSHA's policy documents, does not prohibit advance notice of investigative activities that are not direct enforcement activities. Id. at 6. Fourth, KenAmerican

argued that a balance must be drawn between Section 103(a)'s prohibition of advance notice and Section 103(f)'s provision of walkaround rights. Id. at 7-8. Fifth, KenAmerican argued that the words spoken were "very general and could have been made in the context of determining the availability of transportation and rides." Id. at 8. Sixth, KenAmerican argued that there was no evidence of any widespread practice of illegal advance notice. Id. at 8. And finally, KenAmerican argued that Section 103(a) of the Mine Act, as applied by MSHA in this case, violates the First Amendment to the United States Constitution. Id. at 9-12.

The Secretary opposed KenAmerican's motion for summary decision. The Secretary agreed that the words Inspector Sparks overheard were not in dispute. Sec'y's Resp. at 2, 4. The Secretary argued that summary decision was not warranted, however, because the statements violated Section 103(a) of the Act, id. at 4, and KenAmerican was therefore not entitled to summary decision as a matter of law. The Secretary cited the Commission's decision in Topper Coal in support of his theory of the case. Id.

The Secretary argued that the implied exception for investigatory, non-enforcement activities did not apply because MSHA's activities at the site were direct enforcement activities that included an impact inspection. Sec'y's Resp. at 5.

Finally, the Secretary argued that Section 103(a) as applied by MSHA does not violate the First Amendment, and that the federal district court in Manalapan Mining had noted that it is "beyond dispute" that providing advance notice interferes with enforcement of the Mine Act. Id.

In reply, KenAmerican argued that the Commission's decision in Topper Coal is distinguishable because the communication in that case was explicit, and the communication in this case was "vague and nonspecific." KenAmerican Reply at 3. KenAmerican also argued that the district court's discussion in Manalapan Mining favored KenAmerican because the court discussed both clear instances of advance notice and more general statements that the court characterized as "ambiguous." Reply at 4.

THE ALJ'S DECISION

The ALJ granted the operator's motion for summary decision and vacated the citation. Dec. at 3-4. The ALJ concluded that there was no dispute about the material facts because both parties agreed about the words Inspector Sparks overheard on the communication system. Id. at 3 ("While listening on the mine's communication line, Sparks overheard a call from the #4 unit in which a person asked the dispatcher if there was 'company outside,' to which the dispatcher responded, 'yeah, I think there is.'").

The ALJ concluded that the operator was entitled to summary decision as a matter of law because he held that the statements were "ambiguous and vague" and therefore did not qualify as prohibited advance notice. Id. The judge explained:

> These statements, though undisputed, do not allow me to conclude that a prohibited advance notice was communicated. They are ambiguous and vague . . . . Therefore, I am unable to conclude as a matter of law that these statements were prohibited advance notice. . . . The vagueness of the statements precludes a finding that they constituted a prohibited advance notice in violation of Section 103(a) of the Mine Act.

Id. (emphasis added). The ALJ compared the statements to those discussed by the district court in Solis v. Manalapan Min. Co., No. CIV 10-115-GFVT, 2010 WL 2197534, at *1 (E.D. Ky. May 27, 2010), and concluded that the analysis in that case supported his decision here.

The ALJ considered, but rejected, KenAmerican's argument that an exception to the prohibition of advance notice applied. Dec. at 3.

The ALJ declined to reach KenAmerican's argument that Section 103(a) as applied by MSHA in this case violated its First Amendment rights. Dec. at 3, n.3.

STANDARD OF REVIEW

Commission Procedural Rule 67 establishes procedures for Commission administrative law judges to resolve cases through summary decision. Under the Commission's rule, a judge may

grant a party's motion for summary decision only "if the entire record . . . 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 noted that summary decision is an "extraordinary procedure" that should be employed only when the rule's exacting standards are satisfied by the moving party. See Energy West Mining Co., 16 FMSHRC 1414, 1419 (1994).

The Commission's application of Rule 67 is informed by the Supreme Court's interpretation of Federal Rule of Civil Procedure 56. Hanson Aggregates New York, Inc., 29 FMSHRC 4, 9 (2007). Under the Supreme Court's standard, the judge must view the record in the light most favorable to the party opposing the motion, and all inferences must be drawn in favor of the non-moving party. Id.

When a legal question at issue on summary decision turns on the Secretary's interpretation of the Mine Act, the Commission and its judges must apply the deferential standard of review required by Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), to the Secretary's interpretation. The American Coal Co. v. FMSHRC, No. 14-1206, 2015 WL 4590330, at *4 (D.C. Cir. July 31, 2015) (citing Martin v. OSHRC, 499 U.S. 144, 156-57 (1991)). If the statute is unambiguous, the provision's clear meaning is controlling. Id. On the other

hand, if the statute permits more than one meaning, the Commission must defer to the Secretary's interpretation unless it is unreasonable. Id.

The Commission reviews a judge's summary decision order de novo, under the same standard employed by the judge. Hanson Aggregates, 29 FMSHRC at 9. When the Commission concludes that the judge erred in granting summary judgment, "the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing." West Alabama Sand & Gravel, Inc., ___ FMSHRC ___, SE 2009-870-M, slip op. at *4 (Sept. 18, 2015).

ARGUMENT

I. SECTION 103(A)'S PROHIBITION OF ADVANCE NOTICE INCLUDES A PROHIBITION OF ADVANCE NOTICE COMMUNICATED THROUGH AMBIGUOUS, CODED, OR EUPHEMISTIC LANGUAGE

A. The Plain Meaning of Section 103(a) Encompasses Advance Notice Communicated Through Ambiguous, Coded, or Euphemistic Language

The text, purpose, and history of Section 103(a), and the structure of the Mine Act as a whole, all support reading Section 103(a) to encompass a prohibition of advance notice communicated through ambiguous, coded, or euphemistic language.

The text of Section 103(a) supports the Secretary's reading because it does not require the "advance notice" to have any particular content or take any particular form. It simply says, "no advance notice of an inspection shall be provided." "Notice" is a "formal or informal warning or intimation of

something: announcement." Webster's Third New International Dictionary (Unabridged), 1544 (2002) (emphasis added). An oral exchange that has the effect of warning mine personnel of an inspection falls within Section 103(a)'s prohibition because Congress spoke to the end result (notice), not to the means used (explicit words, code words, non-verbal signals, etc.).

To require a mine operator or agent to say specific words for MSHA to establish a violation of Section 103(a) would not only go beyond the terms of Section 103(a), it would undercut the very purpose of Section 103(a), and would contradict the relevant legislative history. The purpose of Section 103(a)'s prohibition of advance notice is to prevent mine operators from concealing violations of the Mine Act before an MSHA inspector is able to observe them. See Leg. Hist. at 615; Donovan v. Dewey, 452 U.S. at 602-03. To read Section 103(a) to permit advance notice provided through code words or euphemisms would be to permit operators to engage in the very concealment that Congress intended to prevent.

Finally, the structure of the Mine Act also supports the Secretary's reading because Congress included both a civil prohibition of advance notice and criminal sanctions for "any person" who violates that prohibition. Congress's inclusion of criminal sanctions underscores the seriousness with which it viewed the practice of concealing violations, and suggests that

mine operators should not be permitted to circumvent liability by using code words or euphemisms to do what Congress said they may not do.

B. Federal District Court Decisions Support the Secretary's Interpretation, Not KenAmerican's

Federal district courts have considered facts involving ambiguous language or signals when deciding injunction motions and criminal cases, and have read the prohibition of advance notice to include notice communicated through ambiguous, coded, or euphemistic means. In such cases, the courts examined the context to determine whether the communications qualified as prohibited advance notice.

In Manalapan Mining, the case upon which KenAmerican and the ALJ relied, the court recognized that Section 103(a) prohibits advance notice communicated through ambiguous, coded, or euphemistic language. See 2010 WL 2197534 at *5. In the Memorandum Opinion and Order, the district court granted the Secretary's motion for a preliminary injunction. Id. at *1. The court described the testimony from the MSHA inspector monitoring the mine phones, noting that he heard both clear statements of advance notice (e.g., "two federal inspectors are out there") and "ambiguous" statements (e.g., "has anyone showed up yet" and "did our company show up"). Id. at *5. Because the court relied on the clear statement to conclude that the

Secretary had a strong likelihood of prevailing on the merits, it did not need to resolve whether the ambiguous statements qualified as advance notice. The court noted, however, that the defendants had given a plausible explanation for the "ambiguous" statements, see id. at *5, suggesting that such statements could have qualified as advance notice if the context and circumstantial evidence had shown that "anyone" and "company" were euphemisms for MSHA.

The court's separate order describing the parameters of the preliminary injunction similarly confirmed that the court had an expansive understanding of prohibited advance notice because the order enjoined defendants from communicating advance notice through signals or other non-explicit means. Order, Solis v. Manalapan Mining Co., 6:10-cv-00115-GFVT (E.D. Ky. May 27, 2010). It specifically prohibited "any means of communication, including but not limited to, the mine telephone or any other communication device and includes any use of signals or other devices intended to give notice of an inspection." Id. (emphasis added). In other words, the district court's understanding of Section 103(a) affirmatively supports the interpretation that the Secretary advances here, rather than the interpretation advanced by KenAmerican.

The extreme facts in the KenAmerican criminal case show that the district court in that case also understood "advance

notice" to include notice communicated through ambiguous, coded, or euphemistic means. They also show why KenAmerican's proposed interpretation of Section 103(a) here is implausibly narrow. In that case, the government indicted KenAmerican and several individuals for providing advance notice when, among other things, a mine superintendent "utilized a stop switch in his office for the purpose of stopping conveyor belts . . . for the purpose of precipitating phone calls from mine foremen to his office" so he could signal to them that MSHA inspectors had entered mine property. Indictment, United States v. KenAmerican Resources, Inc., No. 4:02-CR-18-M (W.D. Ky. May 8, 2002). A jury convicted KenAmerican and several individuals of violating Section 110(e). See United States v. Gibson, 409 F.3d 325, 333-34 (6th Cir. 2005). Interpreting the concept of advance notice as KenAmerican advocated before the ALJ in this case (i.e., to require the mine operator or agent to use a word such as "inspector," "inspection," "investigation," "hazard," "complaint," or something similar, see KenAmerican Mem. At 10, KenAmerican Reply at 4) would have rendered strategems used in the KenAmerican criminal case to conceal violations legal. Such a result would undermine Congress's intent and defy common sense.

C. In the Event the Commission Concludes that Section 103(a) Is Ambiguous, The Secretary's Interpretation of Section 103(a) Is Reasonable and Worthy of Deference

The Secretary's interpretation advanced here is reasonable because, as discussed above, it is consistent with Section 103(a)'s text, purpose, and history; with the Mine Act's structure; and with the reasoning of federal district courts that have applied Section 103(a) and Section 110(e) in advance notice cases.

The Secretary's interpretation is also reasonable and well-considered because it is consistent with MSHA's policy guidance. MSHA has always understood Section 103(a) to include subtle forms of communication, such as coded references, intended to disguise communications announcing MSHA's presence at a mine. See, e.g., MSHA, Coal Mine Safety and Health General Inspection Procedures Handbook, PH13-V-1 (Feb. 2013) at 2-7 ("Coal Handbook)")[3]; MSHA, Metal and Nonmetal General Inspection Procedures Handbook, PH13-IV-1 (Apr. 2013) at 17 ("Metal and Nonmetal Handbook").[4] Indeed, MSHA's handbooks use language very similar to the exchange that Inspector Sparks overheard in this case to describe a violation of Section 103(a). See Coal

[3] Available at: http://www.msha.gov/READROOM/HANDBOOK/PH13-V-1.pdf, and relevant pages attached as Appendix B.

[4] Available at: http://www.msha.gov/READROOM/HANDBOOK/PH13-IV-1MNMGIP.pdf (last visited Sept. 23, 2015), and relevant pages attached as Appendix C.

Handbook at 2-7 (identifying "company is here," or "visitors are on site" as examples of advance notice); Metal and Nonmetal Handbook at 17 (same). MSHA's experience-based inspection handbooks recognize the reality the judge failed to recognize: mine operators sometimes use code words to give advance notice of inspections.

Finally, the Secretary's interpretation is reasonable because it is consistent with other areas of law in which courts have concluded that code language cannot be used to escape civil or criminal liability for unlawful acts.

For example, in the labor relations context, the National Labor Relations Board and reviewing courts have routinely found that employer complaints about "bad attitude" and references to "troublemakers" are code words for a prounion attitude. See, e.g., Marion Steel Co., 278 NLRB 897, 899 (1986)("The Board has repeatedly found, with court approval, that, in a labor relations context, company complaints about 'bad attitude' are merely euphemisms for a prounion attitude."); Oak Ridge Hosp., 270 NLRB 918, 919 (1984) (noting that the employer's "resentment" of the employee's union activities was evident in his characterization of the employee as a "troublemaker").

Likewise, when courts hear criminal cases involving drug trafficking charges, the defendants' use of code words does not allow them to escape liability: witnesses typically assist the

jury in interpreting the code language. U.S. v. Wilson, 605 F.3d 985, 1026 (D.C. Cir. 2010) (in the absence of first-hand knowledge, witnesses testifying about terminology used in drug operations must qualify as experts under Federal Rule of Evidence 702); U.S. v. Briscoe, 896 F.2d 1476, 1496-97 (7th Cir. 1990) (noting that factfinders are commonly confronted with code words when evaluating drug trafficking charges).

Indeed, law enforcement officers serving as witnesses "commonly help interpret . . . conversations by translating jargon common among criminals." U.S. v. Prange, 771 F.3d 17, 26 (1st Cir. 2014) (internal quotation marks omitted) (affirming securities fraud conviction).

For all of these reasons, if the Commission concludes that Section 103(a)'s reach is ambiguous, the Secretary's reasonable interpretation is entitled to deference.

II. SUMMARY DECISION WAS IMPROPER

A. Summary Decision Was Improper Because the ALJ Relied on an Erroneous Interpretation of Section 103(a)

The Commission's summary decision rule, like Federal Rule of Civil Procedure 56, provides for summary decision only when the movant is entitled to decision as a matter of law. The ALJ concluded here that KenAmerican was entitled to summary decision as a matter of law, but that conclusion was erroneous because it was premised upon an unduly narrow reading of Section 103(a).

The Commission should vacate the summary decision order that was premised on an incorrect reading of the statute, and remand for further consideration. Cf. E.E.O.C. v. Abercrombie & Fitch Stores, Inc., ___ U.S. ___, 135 S. Ct. 2028, 2034 (2015) (vacating Court of Appeals' grant of summary judgment premised on a misinterpretation of Title VII and remanding for further consideration).

Upon concluding that the statements that Inspector Sparks overheard were "ambiguous and vague," the ALJ should have concluded that that a hearing was necessary to determine, based on context, what the statements meant. Instead, the ALJ concluded that "[t]he vagueness of the statements precludes a finding that they constituted a prohibited advance notice." Dec. at 3 (emphasis added). To say that the statements precluded a finding is to say that no violation could possibly be found on the basis of the statements Inspector Sparks overheard. That is an incorrect statement of the law because, as discussed above, ambiguous, coded, or euphemistic language can support an advance notice violation when the context demonstrates that the person using the language or signals intended them to provide advance notice.

Indeed, courts have recognized the need for caution in granting summary decision when the dispositive issue requires the fact-finder to determine state of mind. See § 2730 Summary

Judgment in Particular Actions and on Particular Issues – Actions Involving State of Mind, 10B Fed. Prac. & Proc. Civ. § 2730 (3d ed.) (collecting cases). As the Fifth Circuit has observed, such cases depend on witness credibility, which the fact-finder can best determine after observing the witness's demeanor. Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir. 1970).

Commission ALJs have also recognized the same. See, e.g., Pride v. Highland Mining Co., 36 FMSHRC 1792, 1797 (Jun. 23, 2014) (ALJ Gill) (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 (Jul. 5, 2002) (ALJ Melick) (denying summary decision where operator's motive for mine closure was in dispute); see also Sec'y of Labor v. Consolidation Coal Co., 17 FMSHRC 250, 256 (1995) (Chairman Jordan, dissenting) (noting that ALJs should not make credibility determinations when granting summary decision).

In light of the appropriate legal standard – which requires the factfinder to assess the operator's or its agents' state of mind – summary decision was not warranted.

B. Summary Decision Was Improper Because the ALJ Drew Impermissible Inferences in KenAmerican's Favor

Summary decision was also improper because the ALJ drew impermissible inferences in KenAmerican's favor. Under the Commission's summary decision rule, the ALJ must draw any necessary inferences in the non-moving party's favor. Hanson Aggregates, 29 FMSHRC at 9. The judge failed to do so here. Though the parties did not dispute what Inspector Sparks heard, they disputed what the exchange meant. Drawing conclusions about the meaning of the exchange required the ALJ to draw inferences. As the Seventh Circuit noted in an analogous case involving drug trafficking charges:

> Conversations regarding drug transactions are rarely clear. A fact-finder must always draw inferences from veiled allusions and code words. In this case the jury was confronted with conversations which contained 'code words' that, when considered in isolation, might seem unclear, veiled, and almost nonsensical, but when analyzed properly, in the context of the totality of the evidence, can be clearly seen to be 'code words' for drugs.

Briscoe, 896 F.2d at 1496 (quoting United States v. Vega, 860 F.2d 779, 793–94 (7th Cir. 1988)) (emphasis added); see also United States v. Gaviria, 116 F.3d 1498, 1507 n.4 (D.C. Cir. 1997) (when standard of review called for construing evidence in light most favorable to government, Court of Appeals assumed that "code words" referred to kilograms of cocaine). In this case, when evaluating KenAmerican's motion for summary decision,

the ALJ should have drawn the inference regarding the meaning of "company" in the Secretary's favor. He did not.

Even assuming, as the ALJ suggested, that the Secretary was required to marshal some evidence that would support the reasonable inference that the question about "company" conveyed an advance warning contemplated and prohibited by the Act, see Dec. 3 n.2, the Secretary presented such evidence to the ALJ.

First, the Secretary submitted a declaration from Inspector Sparks testifying to the exchange he overheard. Sec'y's Ex. C. Though the words that Inspector Sparks overheard were not alone enough to establish the violation, the exchange was enough to support a reasonable inference that advance notice had been provided because the reference to "company" is a widely known euphemism for MSHA. See, e.g., Coal Handbook at 2-7.

Moreover, Inspector Sparks' declaration provided additional evidence that the exchange was not a benign reference to something other than an MSHA inspection because Inspector Sparks also noted that he "immediately asked who was on the line and there was no response." Sec'y Ex. C. If the speakers on the mine phones had been referring to something other than MSHA inspectors, one would expect a forthright answer – not silence. That the person calling from the #4 working section neither identified himself nor offered a clarification for his question

supports an inference that he was soliciting prohibited advance notice.

Finally, the Commission can take judicial notice of KenAmerican's prior conviction for engaging in prohibited advance notice. KenAmerican's prior conviction is no substitute for adjudicating the particular facts of this case, but the conviction provides additional context to support the reasonableness of an inference that the ambiguous statements that Inspector Sparks overheard on the mine phones constituted prohibited advance notice. In light of the prior conviction, the Secretary submits that the trier of fact should have developed the record and given careful consideration to the context surrounding the exchange that Inspector Sparks overheard after MSHA took control of the mine phones.

Commission Procedural Rule 67 instructs that summary decision shall be granted only if the record evidence unequivocally supports the movant. It states: "[a] motion for summary decision shall be granted only if the entire record . . . shows . . . [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67. The record developed in these summary decision proceedings does not unequivocally support vacating the citation. Rather, because the record reflects that the miners used a common euphemism for MSHA and that the miners were not forthcoming in providing an

alternative explanation for the exchange, the ALJ should have ordered a hearing to develop the facts before resolving the contest.

CONCLUSION

For the above reasons, the Secretary urges the Commission to vacate the judge's order granting KenAmerican's motion for summary decision and remand to the judge to conduct further proceedings.

Respectfully submitted,

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