# Warning! Mine Commission Finds Employer Gave Advance Notice Of Safety Inspection In Violation Of The Law

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The Federal Mine Safety and Health Review Commission just concluded that an employer was being untruthful when it claimed that it did not provide advance warning to fellow workers about an imminent mine inspection, taking the extraordinary step of overturning an administrative law judge's credibility determination and sending a warning to all employers. Yesterday's decision in *Secretary v. KenAmerican Resources* upheld a violation of Section 103(a) of the Mine Act, which prohibits any person from giving advance notice of inspections, and offers a lesson about the proper way you should handle such inspections should an investigator descend on your workplace.

The case began with an anonymous hazard complaint to the Mine Safety and Health Administration (MSHA) about a workplace safety concern at the Paradise No. 9 underground coal mine in Kentucky. This led the government to launch an investigation of a potential Section 103(g) hazard, including a surprise site visit and inspection. The MSHA inspectors arrived and requested escorts and transportation into the mine from company supervisors. In response, the mine's dispatcher called underground and spoke with miners. But while the dispatcher talked to the miners, an inspector listened on the mine phone and heard someone ask, "Do we have any company outside?"

What was said in response is in dispute. At a later administrative hearing before an administrative law judge (ALJ), the dispatcher testified that he responded by saying, "I don't know." He said he based his decision to answer in this vague manner on the training he had received about the need not to provide advance warning. The MSHA representatives prosecuting the case disputed the dispatcher's testimony. They argued that his response was, "yeah, I think there is," or something equivalent.

The distinction is critical. Section 103(a) of the Mine Act, which requires the government to carry out regular mine inspections – and to investigate alleged safety concerns – also mandates that such inspections be done without any prior notification. The law specifically warns that "no advance notice of an inspection shall be provided to any person."

The ALJ believed the company dispatcher and ruled in the employer's favor. He credited the dispatcher's testimony as being more believable than the MSHA inspector's because the inspector could not remember precisely what the dispatcher said. The ALJ further noted that the mine was large with had a near-constant MSHA presence, making it common to communicate that MSHA inspectors were present without violating the advance notice prohibition. Once he found that the

inspectors were present without violating the advance notice prohibition. Once he found that the MSHA inspector's testimony was not credible, the ALJ vacated the citation and cleared the employer of any wrongdoing.

But on appeal, the Commission overturned the ALJ's ruling and concluded that the employer violated the advance notice provision. The Commission found "compelling reasons to take the extraordinary step of overturning the Judge's credibility determination" to uphold a violation of advance notice. It concluded, among other things, that the ALJ failed to reconcile his factual finding regarding the dispatcher's response against relevant conflicting record evidence including the inspector's contemporaneous notes, which read, "yeah I think there is." Further, the Commission found that, despite testifying coded language was never used at the mine, the dispatcher understood "company" to mean MSHA.

But most importantly, the Commission rejected the ALJ's conclusion that the miner's question – "Do we have any company outside?" – was innocent and not intended to solicit advance notice. According to the Commission, "proof of intent is not required" to prove a violation of advanced notice of an inspection.

The Commission remanded the case back to the ALJ, who has now been instructed to assess a civil penalty for the violation consistent with section 110(i) of the Mine Act.

This decision provides a valuable lesson to mine employers across the country. It reinforces the need to train your workers on the best ways to respond should MSHA or any other state or federal government investigator shows up to the worksite. Further, managers and others interacting with investigators should feel comfortable knowing the extent to which they should remain present with the inspectors during their time at the workplace. And, as this decision demonstrates, contemporaneous notes – or notes taken immediately after the investigator departs – might be a critical piece of evidence in any later legal proceeding relating to the inspection. You should make sure to train your workers on the importance of complying with the Mine Act, and, just as importantly, the crucial role in documentation to support your compliance.

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