

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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September 4, 2013

WARRIOR COAL, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. KENT 2011-1259-R
v.	:	Citation No. 8503376; 07/14/2011
	:	
	:	Docket No. KENT 2011-1260-R
SECRETARY OF LABOR,	:	Order No. 8503378; 07/14/2011
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine ID: 15-17216
Respondent.	:	Mine: Cardinal Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2012-705
Petitioner,	:	A.C. No. 15-17216-280358-01
	:	
v.	:	
	:	
WARRIOR COAL, LLC,	:	
Respondent.	:	Mine: Cardinal Mine

**ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY  
DECISION AND DENYING RESPONDENT'S MOTION  
FOR SUMMARY DECISION**

Appearances: Jennifer Booth Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, Tennessee for the Secretary of Labor

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, Kentucky for Respondent

Before: Judge Steele

This case is before me upon the Notice of Contest filed by Warrior Coal, LLC, (“Warrior”) and the subsequent Petition for Assessment of Civil Penalties by the Secretary of Labor (the “Secretary”), pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”), 30 U.S.C. § 815. The parties agreed to submit this matter for resolution on motions for summary decision. They filed briefs, exhibits and reply briefs.

## **STIPULATIONS**

In its Motion for Summary Decision, Warrior Stipulates to the following facts:

1. Warrior is subject to the Federal Mine Safety and Health Review Act of 1977 (the “Act”).
2. Warrior operates the Cardinal Mine (the “Mine”), and its products enter into and affect interstate commerce within the meaning of the Act.
3. Warrior is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the Administrative Law Judge has the authority to hear this case and issue a decision.
4. The civil penalty assessed in this case will not affect the ability of Warrior to remain in business.

## **ISSUES**

At issue is whether Warrior had the obligation to provide the Secretary with the names, addresses, telephone numbers, positions and shifts worked of all of its employees in conjunction with an investigation under 110(c) of the Act. Further at issue is whether a withdrawal order under Section 104(b) is valid when no areas of the mine or miners are affected.

## **CONTENTIONS OF THE PARTIES**

The Secretary argues that his request for information was reasonable and within the scope of his investigative authority provided by the Act. He states that while miners may refuse to give the requested information to MSHA, operators have no such rights. Further, he contends that MSHA’s policy manuals are not officially promulgated and, therefore, are not binding on the Commission or the Secretary in his enforcement actions. Finally, he argues that the issuance of a withdrawal order under 30 U.S.C. § 814(b) was proper under the Commission’s decision in *BHP Copper, Inc.*, 21 FMSHRC 728 (July 1999).

Warrior argues that the information requested by MSHA is not required to be kept by the operator. Further, it contends that its employees have privacy rights that are guaranteed by the Act and MSHA’s own rules regarding special investigations. It states that this was an attempt to avoid MSHA’s rule that miners can decline to provide any personal information to MSHA.

Finally, it argues that a withdrawal order under 30 U.S.C. § 814(b) cannot be issued when no area or persons are affected.

## **LAW AND LEGAL AUTHORITY**

Section 103(a) of the Act states, in pertinent part:

(a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act.

30 U.S.C. § 813(a).

Section 103(h) of the Act provides,

In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health, Education, and Welfare may reasonably require from time to time to enable him to perform his functions under this Act.

30 U.S.C. § 813(h).

Section 104(b) of the Act states:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

Section 110(c) of the Act provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c).

## FACTS

On May 10, 2011, the Secretary issued 104(d)(1) Citation No. 8498874 and 104(d)(1) Order No. 8498875 to Warrior due to hazardous roof conditions and an inadequate preshift examination, respectively.<sup>1</sup> *See* Secretary's Motion for Summary Decision, p. 2-3. Based on the issuance of this citation and order, the Secretary commenced a special investigation under Section 110(c) of the Act. *Id.* at p. 3. The special investigators believed that the conditions subject to the citation and order may have existed for three production shifts, and they stressed the importance of interviewing all employees who may have had knowledge of the conditions during these shifts. *Id.* at p. 4. Special Investigator Michael Newcom ("Newcom") also stated that the addresses and phone numbers of these employees were necessary so that the employees could speak freely with investigators outside of the mine setting. *Id.* at p. 4. By letter dated June 21, 2011, District Manager Jim Langley ("Langley") notified Warrior representative Tommy Kessinger that MSHA was requesting the names, addresses, positions, shifts worked and telephone numbers for all of Warrior's employees at the Cardinal Mine. *Id.* at p. 5; Respondent's Motion for Summary Decision, p. 3; Government Exhibit G; Respondent Exhibit 1.<sup>2</sup> The letter asserted authority for the request under Section 103(a) of the Act.

By letter dated June 28, 2011, Warrior, through its in-house counsel, Gary McCollum, Esq., requested details regarding the purpose of the investigation and the need for the personal information requested. GX-H; RX-2. At that time, Warrior raised concerns that according to MSHA's Special Investigation Procedures Handbook, the information requested could be provided by the miners on a voluntary basis. *Id.* It also requested additional information to verify that statements were taken without duress, and no promises or commitments were made

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<sup>1</sup> These alleged violations are docketed at Docket No. KENT 2012-706 and are still at issue. The undersigned makes no judgment as to their validity at this time; rather, they are noted simply for context.

<sup>2</sup> Hereinafter, Government exhibits will be referred to as "GX" followed by a letter, and Respondent's exhibits will be referred to as "RX" followed by a number.

by the special investigators. *Id.* Langley responded to Warrior by letter on June 29, 2011, stating that MSHA was investigating a Section 110(c) case and advised Warrior to cooperate and comply with the request by July 8, 2011<sup>3</sup> or face legal action under Section 108 of the Act. GX-I; RX-3. Langley also provided Warrior with a copy of the Commission decision in *BHP Copper, Inc.*, 21 FMSHRC 758 (July 1999). *Id.* By letter dated July 1, 2011, Warrior notified Langley of its intent to comply, but again requested information concerning what MSHA was investigating and why it needed the personal information of every employee. GX-J; RX-4. This letter again raised the concern of the miners' privacy rights, and their ability to refuse to provide the information. *Id.* By letter dated July 6, 2011, MSHA provided the subject of the investigation to Warrior and also requested copies of the notes taken by Safety Director Bruce Morris ("Morris") relating to the conditions subject to the investigation. GX-K; RX-5.

On July 12, 2011, Warrior sent a letter to Langley stating that Morris had provided MSHA with a list of individuals working on the day shift for the No. 2 Unit at the time that the citation and order were issued. GX-L; RX-6. The letter further informed Langley that Morris and three other employees had agreed to participate in interviews with Newcom. *Id.* Warrior stressed that it was not refusing to comply with MSHA's demands for information; however, it was requesting a "narrower, and more focused, demand from MSHA." *Id.* It argued that MSHA's demand was so broad that it covered personal confidential information for employees that were not even miners. *Id.* Finally, it stated that the request for Morris's notes was overly broad in that, as worded, it would request Attorney McCollum's personal legal files, which it asserts implicated attorney-client privilege and/or work product protections. *Id.*

In response, on July 14, 2011 at 9:58 a.m., MSHA issued 104(a) Citation No. 8503376 to Warrior for a violation of Section 103(a) of the Act. The "Condition or Practice" section states:

The operator failed to produce/provide requested information to MSHA special investigators during the performance of the investigation duties under section 110 of the Act. By letter dated June 30, 2011, MSHA requested documents necessary to carry out its investigation under section 110 of the Act of certain citations issued by the Secretary's authorized representative. These documents have not yet been provided.

GX-M; RX-7. Newcom designated this Citation as having no likelihood of injury or illness and not significant and substantial. *Id.* He stated that no miners would be affected and no lost workdays could reasonably be expected for the alleged violation. *Id.* However, he designated Warrior's negligence as reckless disregard. *Id.* A penalty of \$555.00 was assessed for this violation.

Approximately one hour later, at 10:59 a.m., Newcom issued 104(b) Order No. 8503378 to Warrior for failure to abate. GX-N; RX-8. The "Condition or Practice" section of this Order states:

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<sup>3</sup> The letter actually states that the information must be provided by July 8, 2009. This is an obvious typographical error.

The operator provided the Safety Manager's notes from the 5/10/2011 pre-production meeting, however the operator refused to provide the additional information requested in MSHA's letter dated June 30, 2011. The reasonable time for abatement has expired and there was no justification for any additional time to allow the operator to comply with the requirements of the citation.

*Id.* In the "Area or Equipment" section, Newcom wrote, "No area affected." *Id.*

Warrior filed its Notice of Contest with the Commission for Citation No. 8503376 and Order No. 8503378 on July 15, 2011. The case was assigned to the undersigned on November 27, 2012. *See* Order of Assignment and Pre-Hearing Order. These proceedings were initially set for hearing on April 24, 2013 in Madisonville, Kentucky; however, the parties agreed that cross motions for summary judgment were appropriate, as no material facts are in dispute. *See* Notice of Hearing and Order to File Prehearing Report.

## CONCLUSIONS

Commission Rule 67(b) sets forth the circumstances under which a motion for summary decision may be granted:

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 parties have agreed that there are no genuine issues of material fact, and the issue can be properly decided on the record before me. Based on the parties' motions, replies and evidence submitted, Respondent's Motion for Summary Decision is **DENIED** and the Secretary's Motion for Summary Decision is **GRANTED**.

Section 103(h) of the Act allows MSHA to make reasonable requests for information from operators, even when this information is not specifically required to be obtained by the Act or its regulations. 30 U.S.C. § 813(h). This was addressed by the Commission in *Big Ridge, Inc.*, 34 FMSHRC 1003 (May 2012), *affm 'd* 715 F.3d 631 (6<sup>th</sup> Cir. 2013). The Commission found that the language of Section 103(h) is expansive rather than restrictive. *Id.* at 1013. It specifically stated that "Congress gave clear instructions that 'information' that is *not* specifically required to be maintained by the Act shall, nonetheless, be provided to the Secretary to enable her to perform her functions, as long as the request is reasonable." *Id.* at 1012-1013. It notes that Congress explicitly rejected previous forms of this section, which had limited the Secretary's access to records specifically prescribed by regulation. *Id.* at 1013.

Further, although employees have privacy rights pursuant to the Act, operators cannot refuse to provide information to MSHA when it has a legitimate government purpose for

obtaining the information. In passing Section 110(c) of the Act, Congress stated that in order to induce greater compliance with the Act, it intended to hold individual officers responsible for the operation, control and/or supervision of the mine liable for violations. *See Sec'y of Labor v. Bill Simola, employed by United Taconite, LLC*, 34 FMSHRC 539, 546-547 (Mar. 2012)(Citing S. Rep. No. 91-411, at 39, *reprinted in Coal Act Leg. Hist.* at 165, *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 628-29 (1978)). Conversely, the Commission noted that protections from liability afforded by corporate shield would reduce incentive to comply with the Act's regulations. *Id.* at 547 (Citing *Richardson v. Sec'y of Labor*, 689 F.2d 632, 633-634 (6<sup>th</sup> Cir. 1982), *cert. denied*, 461 U.S. 928 (1983)).

Based on the foregoing, the undersigned finds that the Secretary's information request made pursuant to the particular circumstances of the 110(c) investigation related to this case was reasonable and for a legitimate government purpose. As contemplated by Congress, Section 110(c) of the Act encourages operators and their agents to ensure that mining operations are conducted safely and within the regulations. This in turn can help prevent the tragedies experienced in mines such as Upper Big Branch and Sago. It is also important to note that whether Warrior was required to keep the information sought by MSHA or not, it cannot realistically contend that it does not keep up-to-date contact information for the employees of a mine of this size. In 2011, Warrior's Cardinal Mine logged more than one million operator hours worked.<sup>4</sup> As with any employment setting, it can be imagined that miners take vacation, get sick and call off for any number of reasons. Warrior must have some way of contacting alternate employees to come in for a shift.

The special investigators believed that the conditions leading to the initial unwarrantable failure citation and order had existed for three production shifts. Thus, the Secretary had two options – he could request Warrior to give him the contact information for each individual specifically working on each shift of these shifts, or he could request the contact information for all of Warrior's employees. In deciding on the latter, the Secretary placed the burden of interviewing nearly 400 miners on himself, realizing that many would have no knowledge of the conditions at issue. Simply supplying the contact information for its employees placed almost no burden on Warrior. Any miners unwilling or uncomfortable discussing mine conditions with MSHA could simply refuse, as is their right.

Although it does not change the outcome, the Secretary's reliance on *BHP Copper*, 21 FMSHRC 758 (July 1999) seems a little misplaced. While the Commission states that it is not persuaded by the operator's argument that Section 103(h) only requires information that is required by regulation, the Commission also goes to great lengths to stress that an accident investigation involving a fatality was ongoing. *Id.* at 764-765, 768. In the instant case, no accident, and certainly no fatality, occurred. While investigations into operator compliance are worthy causes and can prevent future accidents, they cannot be given equal weight with investigations into injuries or fatalities to miners. The Commission's decision in *Big Ridge* more accurately relates to the given question.

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<sup>4</sup> See MSHA's Mine Data Retrieval System, <http://www.msha.gov/>.

The Secretary also argues that MSHA's policy manuals are not officially promulgated rules binding on the Commission and the Secretary in his enforcement actions. The undersigned agrees. The Commission has previously indicated that manuals are not officially promulgated and do not prescribe rules of law binding on the Commission. *King Knob Coal Company, Inc.*, 3 FMSHRC 1417, 1420 (June 1981)(citing *Old Ben Coal Company*, 2 FMSHRC 2806, 2809 (Oct. 1980)). In his decision in *Tilden Mining Company*, ALJ Paez stated that, "the express language of a statute or regulation 'unquestionably controls' over material like a manual." *Id.*, 33 FMSHRC 876, 882 (Apr. 2011)(ALJ)(citing *D.H. Blattner & Sons*, 18 FMSHRC 1580, 1586 (Sept. 1996)). The Commission also cautioned, however, that this does not mean that a manual can never be afforded legal significance. *King Knob Coal*, 2 FMSHRC at 2809. Cases may arise where documents reflect a genuine interpretation or statement of policy whose soundness commends deference. *Id.* That is not the case here, however.

The statements in the Special Investigator's Handbook states that employees may provide information to MSHA on a voluntary basis. As previously stated, the undersigned does not disagree with that statement. However, the Secretary is requesting the contact information from Respondent, not the miners. Section 103(h) specifically states that records *in addition to information required by the Act* may be reasonably required by the Secretary from time to time to perform his functions under the Act. Even if the Secretary's policy manual stated that he could not request the information, the Act would clearly overrule. Further, the Secretary is not skirting its own policy. If miners choose not to provide any information when contacted, it is clearly their right to do so.

I further find that a 104(b) order can be validly issued where no areas or persons are affected. The Commission has upheld at least one such order in the past. *See Thunder Basin Coal Company*, 16 FMSHRC 671 (Apr. 1994); also *see generally Kentland-Elkhorn Coal Corporation*, 1 FMSHRC 1833, 1834(Nov. 1979)(order did not require the withdrawal of miners from mining operations for failure to pay walk-around employee). Although not precedential in nature, the undersigned finds the conclusions made by Judge Barbour in *Hopkins County Coal, LLC*, 34 FMSHRC 789 (Apr. 2012)(ALJ) to be persuasive. In his decision, the ALJ states the operator incorrectly treated the determination of the extent of the area affected by the violation as an additional requirement to issuing an order under Section 104(b) of the Act. *Id.* at 804. He makes no attempt to determine the exact meaning for the phrase, "[the representative] shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine ... to immediately cause all persons ... to be withdrawn from ... such area until [the] ... representative ... determines that such violation has been abated." *Id.* at 805. However, the ALJ finds the Secretary's interpretation that if no area is affected, no miners need be withdrawn to be reasonable. *Id.* As such, the Secretary may issue a "no persons affected" 104(b) order. *Id.*

Here, the Secretary issued Order No. 8503378 for the failure to abate Citation No. 8503376, which was issued for the failure to provide information requested pursuant to a Section 110(c) investigation. The undersigned finds that the Secretary correctly acknowledged that the failure to provide the documents created no inherent hazard for miners and, thus, felt no need to have them withdrawn from the working area. This creates balance in inducing operators to abate



violations, while acknowledging that miners are not necessarily endangered by every infraction. Such commonsense measures are too often overlooked in the legal arena.

**ORDER**

It is **ORDERED** that the Secretary's Motion for Summary Decision is **GRANTED**. It is further **ORDERED** that Warrior **PROVIDE THE REQUESTED INFORMATION** to MSHA within 30 days of the date of this Decision. Finally, it **ORDERED** that Citation No. 8503376 and Order No. 8503378 are **AFFIRMED** as written and Warrior shall **PAY** the Secretary of Labor the sum of \$555.00 within 30 days of the date of this Decision.<sup>1</sup>

/s/ William S. Steele  
William S. Steele  
Administrative Law Judge

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<sup>1</sup>Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390