FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 1, 2010

FREEDOM ENERGY MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	Docket No. KENT 2010-1352-R
	:	Citation No. 8241282; 07/26/2010
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine: #1
ADMINISTRATION (MSHA),	:	Mine ID: 15-07082
Respondent	:	

ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION
ORDER DENYING CONTESTANT'S CROSS MOTION FOR SUMMARY DECISION
ORDER DENYING CONTESTANT'S MOTION FOR EXPEDITED HEARING
ORDER TO PRODUCE REQUESTED RECORDS

Statement of the Proceedings

This Notice of Contest proceeding concerns Citation No. 8241282 filed by the Respondent against the Contestant pursuant to section 103(h) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(h). The July 26, 2010 Citation, as written, alleges as follows:

> The operator failed to produce/provide records requested by MSHA special investigators during the performance of the investigators (sic) official duties under Section 110 of the Federal Mine Act. On June 23, 2010, written request for specific documents were given to the operators (sic) legal counsel, (Jonathan Ellis, Esquire of Steptoe and Johnson). Again these records were requested on July 1, 2010, by the District Manager. On July 9, 2010, a letter received from Jeffrey K. Phillips Steptoe and Johnson, Attorneys of Law states that Freedom Energy is not willing to produce the coal production reports requested. Section 103 (a) and (h) of the Federal Mine Safety Act requires the operator to furnish information requested by the Secretary of Labor that she has determined necessary in carrying out provisions of the Federal Mine Act.

The violation was not cited as significant and substantial, but alleged to result from the operators's high negligence.

I. Procedural Background

A. The 104(d)(2) Orders

In the two months preceding issuance of the July 26, 2010 Citation at issue, MSHA issued three section 104(d)(2) orders against Contestant.

Specifically, on May 17, 2010, MSHA issued 104(d)(2) Order No. 8241080 alleging that combustible materials consisting of loose coal, coal fines, and coal dust have been allowed to accumulate on the No. 20 conveyor belt. The violation was cited as significant and substantial resulting from the operator's high negligence and constituting an unwarrantable failure to comply with a mandatory safety standard.

Also on May 17, 2010, MSHA issued 104(d)(2) Order No. 3515431 alleging failure to comply with the approved ventilation plan for the 001 MMU, despite the section 103(i) spot inspections every five days. The Order, which was to remain in effect until ventilation plan changes had been approved by the District Manager, found that the totality of violations existing during this and previous inspections demonstrated a routine practice of mining without sufficient ventilation at the working faces. The violation was cited as significant and substantial resulting from the operator's high negligence and constituting an unwarrantable failure to comply with a mandatory safety standard.

On June 10, 2010, MSHA issued 104(d)(2) Order No. 8241268 alleging a violation of 30 C.F.R. 75.400 for accumulations of loose coal in various locations along the entire length of the #17-B belt conveyor, and debris in the neutral entries from the end of the track up to the section power center. The Order found that the totality of violations found during this and previous inspections demonstrated a routine practice of allowing accumulations of loose coal, coal dust, and debris to exist in the active workings of this mine, noting that this was the 277th occurrence in the last two years. The violation was cited as significant and substantial resulting from the operator's high negligence and constituting an unwarrantable failure to comply with a mandatory safety standard.

B. MSHA's Section 110 Investigation, Request for Records, and Subsequent Correspondence With Contestant

As a result of foregoing 104(d)(2) orders, MSHA Special Investigator Alan Howell began a section 110 investigation, consisting of interviews and document review.[1] On June 23, 2010, pursuant to this investigation, Special Investigator Howell wrote Jonathan Ellis, counsel for Sidney Energy Company d/b/a Freedom Energy Mining Company for Mine #1, and specifically

[1]Section 110(c) of the Mine Act imposes personal liability on individual corporate agents if they knowingly authorized, ordered, or carried out a violation of a mandatory health or safety standard or an order issued under the Act.

requested the following information:

> Massey Energy Production Reports, dates ranging from May 10, 2010 to May 20, 2010 from the Freedom Energy Mining Company, #1, 001 Section Name, Address, Phone numbers and hours worked (time sheets) of all employees working on the 001 Section during this time frame, and the Massey Energy Production Reports for the 010 Section for the dates on June 8, 2010 to June 11, 2010.

Special Investigator Howell's letter further stated that MSHA's authority to seek records under section 103(a) of the Act mandates that "[a]uthorized representatives of the Secretary . . . 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 cause of accidents and the causes of diseases and physical impairments originating in such mines." Special Investigator Howell requested that Respondent provide the requested records by close of business June 25, 2010, otherwise the matter would be considered for legal action under section 108 of the Act.[2]

By letter dated July 9, 2010, counsel for Contestant sent an e-mail and attached a reply letter to James Poynter, the Acting District Manager at MSHA in Pikesville, Kentucky regarding the investigation of ventilation and accumulations issues at Freedom Energy #1 mine, and more specifically Special Investigator Howell's demand for time sheets and coal production reports. Contestant's July 9 letter unequivocally asserted that "Freedom Energy is not willing to produce coal production reports."[3] Contestant's July 9 letter further stated that "[p]roduction reports are not required to be created or maintained" and that section 103(h), referenced in other recent MSHA correspondence, directs that a coal operator "shall establish and maintain such records, make such reports, and provide such information, as the Secretary . . . may **reasonably require** from time to time to **enable him to perform his functions under [the Mine] Act**." (emphasis in original). In addition, Contestant indicated that MSHA had not demonstrated to Freedom Energy that the requested coal production reports are necessary for MSHA to perform any functions relating to an investigation of ventilation and accumulations in the 001 Section or how the production reports are relevant to MSHA's investigation. Accordingly, Contestant advised

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[2] Section 108 of the Act deals with injunctions and authorizes the Secretary to institute a civil action for permanent or temporary injunctive relief in federal district court whenever a mine operator or agent, inter alia, violates or refuses to comply with any order or decision issued under the Act, including a civil penalty assessment order; interferes with, hinders or delays that Secretary in carrying out the provisions of the Act; or refuses to furnish any information or report requested by the Secretary in furtherance of the provisions of the Act.

[3]That letter erroneously cited section 103(d) of the Act, instead of 103(b), as authorizing the Secretary to sign and issue subpoenas for production of relevant documents. Section 103(b) deals with public hearings.

MSHA that the production reports would not be supplied.

C. The Citation at Issue, Contestant's Motion for Expedited Hearing, and Additional Correspondence

The Secretary responded to Contestant's July 9 letter by issuing the July 26, 2010 Citation No. 8241282, which gave Contestant 15 minutes to terminate the Citation. Contestant alleges that MSHA failed to give counsel notice of the Citation until well after the termination time expired.

By letter dated July 26, 2010, MSHA's Acting District Manager Poynter wrote Sidney Coal Company, Inc. President Charles I. Bearse, III, concerning Contestant's refusal to comply with the request for coal production reports in the section 110 investigation. Poynter's July 26 letter referenced a prior July 1 letter from him advising Contestant that MSHA was seeking certain documents pursuant to its right to investigate matters occurring under the Mine Act.[4] Poynter's July 26, 2010 letter specifically advised that section 103 gives MSHA the right to demand that operators produce records reports and information the Secretary deems to be reasonably required to enable her to perform her functions under the Act. Poynter's July 26 letter also advised that one of the required functions under the Act is the investigation of allegations of willful violations by agents of an operator; that the response from Contestant's counsel refused to produce the coal production reports; that a summary of time and attendance records had been provided; and that the Act requires that an operator produce original documents for examination and copying by MSHA when requested, not a partial or selective summary, which is non-responsive and unacceptable. Poynter's July 26 letter further advised that continued noncompliance has led MSHA to consider these violations for the civil penalty provisions of section 110(b) of the Mine Act, which authorizes a daily civil penalty of up to $7500 for every day you fail to comply with our citation. Poynter's July 26 letter closed by stating that if Contestant has not produced the requested documents by close of business on July 22, 2010, MSHA will implement section 110(b) of the Act to propose civil penalties for each day that Contestant fails to comply with the request for document production.

Poynter's July 26, 2010 letter, like the instant Citation, was not served on counsel, even though the letter itself acknowledges that counsel represented Contestant in the instant matter.[5]

On July 29, 2010, Contestant filed with the Commission a Motion for Expedited Hearing "because of MSHA's unreasonable attempt to impose a monetary penalty." Contestant argued,

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[4]That July 1, 2010 letter was not included in the record submitted by either party in this proceeding.

[5]I am troubled by the fact that it appears that MSHA knowingly skipped counsel in this matter, and MSHA is admonished that it should not skip counsel in any matter that it knows a Contestant or Respondent is represented by counsel.

inter alia, that whether or not Contestant was obligated to produce the requested documents under the Mine Act is a legal question, that no safety issues are implicated by the non-production, and that the threatened daily penalty is unnecessary, arbitrary and punitive. Contestant further argued that if MSHA is permitted to impose a daily penalty of $7,500, Contestant is exposed to more than $200,000 in fines by August 27, 2010. Consequently, Contestant argued that an expedited hearing is proper because unique or extraordinary circumstances are present that result in continuing harm or hardship.

By email dated July 30, 2010, counsel for the Solicitor wrote counsel for Contestant, with copy to MSHA Special Investigator Howell and the MSHA District Office. Counsel for the Solicitor indicated that since MSHA had not received an answer from Contestant concerning resolution of this matter, MSHA was starting the process for daily penalties for non-production. Counsel for Contestant's email reply to all that same day, confirmed confidence in the legal position taken in Contestant's July 9 letter to Poynter, and confirmed that Contestant was not inclined to disseminate the coal production reports that MSHA demanded.

D. The August 4, 2010 Conference Call with the Undersigned

On August 4, 2010, I convened a conference call with counsel for the Solicitor and counsel for Contestant. In response to my questioning, counsel for the Solicitor explained why in her view, the coal production reports were relevant, necessary and reasonably requested in order for Special Investigator Howell to complete his section 110 investigation. She indicated that the documents were contemporaneous and kept in the ordinary course of business and would show who was responsible for what goes on in the working sections of the mine on the dates in question. Counsel for the Solicitor stated that she was filing forthwith a Motion for Summary Decision Concerning Notice of Contest and Memorandum in Support, with attached declarations and other supporting documents, which mooted Contestant's Motion for Expedited Hearing, particularly since no daily penalty had yet been assessed. Counsel for the Solicitor further indicated that she had offered to keep the documents that had been requested confidential for purposes of the Freedom of Information Act, but such offer was rejected by Respondent. Counsel for Contestant argued that the company-created coal production reports were not required under the Act, that the Secretary cannot independently determine what documents need to be turned over, and that perhaps the documents could be turned over in redacted form. When the Secretary objected to Contestant's unilateral determination of redaction issues, I indicated that any redaction or privilege issues would be subject to my in camera inspection.

II. The Secretary's Motion for Summary Decision

On August 5, 2010, the Secretary filed with the Commission her Motion for Summary Decision Concerning Notice of Contest and Memorandum in Support, with attached Declarations from Special Investigator Howell and MSHA Ventilation Specialist Brian Dotson.

Special Investigator Howell declares, among other things, the following:

- that his section 110 investigation of the three 104(d)(2) orders against Contestant requires an inquiry into what information was available to certain agents of the operator at the time of the violations;
- that he has past mining experience working in various counties around Eastern Kentucky as superintendent, electrician, section foreman and equipment operator;
- that he is aware of the contents of records kept by Freedom Energy, including production and time and attendance records, because of his prior coal mine employment, his work in prior investigations concerning Freedom Energy, his work on other investigations relating to mines owned or controlled by AT Massey, and his work with prior managers who worked for Massey operations in this area, including Freedom Energy;
- that as part of his section 110 investigation, he determined that the production reports for the period of May 10-20, 2010 were contemporaneous documents produced by managers and agents of the operator, which provided information relevant to the operation of the working sections and the belts carrying coal out of the mine while active mining was occurring;
- that he requested production records that were kept in the usual course of business and were made contemporaneously by agents of the operator at the time of the violations, and that such records are regularly produced by operators during investigations under the Act;
- that although the timing and attendance records were produced, the production records were not produced, despite several reasonable requests for these documents, and that reason given for non-production was that such records were not required to be maintained under the Act and the Secretary had not established that the request was reasonable;
- that MSHA and counsel for the Secretary continue to explain to counsel for the contestant that the Act requires production of records, whether required to be maintained or not, when requested by the Secretary;
- that the delay in producing the requested records has hindered his investigation under section 110 and caused lost time and resources for himself and counsel;
- that the continued refusal to produce the coal production reports establishing actions taken during production shifts around the time of the May 17, 2010 violations, causes harm to the Secretary, who must determine, which director(s), officer(s) or agents(s) of the operator, if any, authorized, ordered or carried out such violations, and causes potential harm to agents of the operator, who may be incorrectly cited for personal responsibility for said violations, but exculpated by production of such reports;
- that based on the nature of the violations, which are of the type that could

cause serious accidents and death, it is critical that MSHA discover if particular management officials knew of the conditions or had information tending to give them knowledge; and

- that an accurate evaluation of the actions of management during the relevant time period cannot be completed without the contemporaneous, coal production reports.

Declarant Dotson avers that prior to his employment with MSHA, he worked for Massey Energy in a variety of positions, including mine superintendent; that he is aware of the production records used at mines owned and operated by Massey Energy; and that the Freedom #1 mine is under the control of Massey Energy's Sidney division. He further declares that as mine superintendent, he would review coal production records containing information relevant to operation of the section and coal belts on a daily basis, and he would make daily resource allocation decisions, based in part, on coal production records. On information and belief, he avers that the requested records may be relevant to the negligence of mine management for the cited violations at issue.

Based on the foregoing declarations and her understanding of applicable Commission law, the Secretary argues that her Motion for Summary Decision should be granted in this Contest proceeding because there are no genuine issues as to any material fact and she is entitled to judgment as a matter of law. The Secretary argues that sections 103(a) and (h) of the Mine Act require the operator to furnish information requested by the Secretary that she has determined necessary in carrying out the provisions of the Mine Act. The Secretary emphasizes that under section 103(h) of the Act, the operator must produce records related to investigations when requested by the Secretary, whether or not those records are required to be maintained by the operator. The Secretary points out that the production records in question were kept in the usual course of business and were made by agents of the operator at a time well-nigh contemporaneous with the violations. The Secretary argues that the requested records document actions that were taken or conditions that existed during working shifts at the time of the violations, and will assist in identifying managers and agents, if any, who knew or should have known of the violations and failed to act based on circumstances that could amount to aggravated conduct constituting more than ordinary negligence, which is necessary to establish section 110(c) liability. The Secretary argues that many directors, agents, and/or officers of Contestant are potentially liable for the violations under section 110 of the Act; that MSHA has an affirmative obligation to investigate such potential liability; and that the requested production records are relevant to issues presented concerning production and agent responsibility under the Act, including the actual mining cycles that occurred, the length of time the conditions were present, and the persons present at the time the violations occurred, who knew or should have known of their existence. Accordingly, the Secretary requests that Citation No. 8241282 be upheld.

III. The Contestant's Response and Cross Motion for Summary Decision

On August 18, 2010, Contestant filed its Response in Opposition the Secretary's Motion for Summary Decision Concerning Notice of Contest, with attached Affidavit of James F. Pinson, Jr.

Affiant Pinson avers as follows:

- that he has been superintendent for Contestant since July 2008, and employed by a Massey Energy subsidiary since 1994;
- that he is familiar with and reviewed the coal production reports for Contestant dated May 10-20 and June 8-11, 2010;
- that he had reviewed the three section 104(d)(2) orders set forth above;
- that Contestants's May and June 2010 coal production reports contain some information that has no relevance to said orders;
- that said coal production reports contain some information that is redundant and the same as information contained in pre-shift inspection reports, on-shift inspection reports, and/or belt examination reports;
- that said coal production reports contain some information that should not be disclosed to individuals who are not employed by Contestant, including information pertaining to the mine's cut sequence;
- that based upon his investigation, he does not believe that Contestant has previously turned over coal production reports to MSHA;
- that he was a supervisor of Brian Dotson for some of the time that Dotson was employed by a Massey Energy subsidiary, that during such time, Dotson did not work for Freedom Energy Mine Company, and that Dotson ceased employment with any Massey subsidiary in 2005;
- that the coal production reports at issue are different from, and contain additional information than, those used when Dotson was employed with a Massey subsidiary through 2005;
- that he does not recall meeting MSHA Special Investigator Howell until the summer of 2010, that he has never seen Howell underground at Freedom Energy Mine Company; and that he has no knowledge that Howell has ever been given access to, or looked at, the coal production reports at issue.

Based on the foregoing affidavit, Contestant essentially cross moves for summary decision, conceding that there is no genuine issue as to any material fact. Contestant does point out, however, that it is unclear whether that Secretary seeks summary decision on the "high" negligence designation or simply on the dissemination of the coal production reports. In this regard, Contestant argues that there is no basis for finding that it knew or should have known of the violative practice by refusing to provide a production report, and, since there are mitigating circumstances for the non-production, the high negligence designation is baseless.

Contestant advances two principal arguments on cross motions for summary decision. First, it asserts that the Secretary's demand the coal production reports is *ultra vires* because it exceeds an express statutory limitation on the Secretary's power to demand information from coal operators. Second, Contestant argues that the Secretary's demand for coal production reports violates the Fourth Amendment.

With regard to the first argument, Contestant notes that the Secretary relies almost entirely upon section 103(h), with passing reference to section 103(a) of the Act, neither of which, in Contestant's view, require a coal operator to furnish all information "requested by the Secretary of Labor that she has determined necessary in carrying out the provisions of the Federal Mine Safety Act." Nowhere has Congress bestowed on MSHA such unfettered discretion to dictate what a coal operator must turn over during an MSHA investigation. Rather, the information must be necessary to enable the Secretary to perform her functions under the Act, Contestant argues. Contestant further contends that "[t]he Secretary has, to date, steadfastly refused to explain how the requested records are necessary to her discharge of her statutory duty, saying instead only that she has a secret reason that she cannot reveal." Contestant notes that it was not until the Secretary filed her Motion for Summary Decision that Contestant learned that the three section 104(d)(2) orders gave rise to the special investigation, and Contestant argues that the time sheets, pre-shift inspection reports, on-shift inspection reports, and belt books, which were already turned over, contain all the relevant information that it is obligated to disclose to MSHA.[6]

With regard to its second argument, Contestant argues that the Supreme Court in *Donovan v. Dewey*, 452 U.S. 594, 599 (1981), held that searches under the Mine Act do not violate the Fourth Amendment as long as they are authorized by law or necessary for the furtherance of federal interests. Contestant argues that the Secretary's production demand 1) is not authorized by law because it exceeds her statutory authority to require production of information, and 2) does not further federal interests because she has refused to identify specifically why she seeks the information instead of stating only that she has a secret reason for requesting it. In addition, Contestant argues that since the "heavy regulation" of the Mine Act does not require Contestant to maintain the sought-after records, the operator maintains a reasonable expectation of privacy in those records, akin to the third prong of *Dewey*, where random, infrequent, or unpredictable inspections may trigger a warrant requirement to protect against unbridled discretion of executive or administrative officers. Response at 8-10. In conclusion, Contestant argues that the Mine Act does not give the Secretary the power to demand that Contestant produce the sought-after records. Rather, to gain access to Contestant's "proprietary" coal production reports, the Fourth Amendment and applicable case law require a warrant, Contestant argues.

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[6]Contestant challenges the evidentiary basis for the Secretary's claim (Motion at 6) that the operator has produced similar production records during regular inspections of the mine has a pattern of disclosing production reports.

IV. Analysis With Findings and Conclusions

A. Applicable Legal Principles

Under Commission Rule 67(b), 29 C.F.R. § 2700.67(b), a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, show 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.

Section 103(h) of the Act states in pertinent part that "[i]n addition to such records as are specifically required by the Mine Act, every operator of a coal or other mine shall establish and maintain such records, make such records, and provide such information, as the Secretary . . . may reasonably require from time to time enable him to perform his functions under this Act . . . . 30 U.S.C. § 803(h).[7]

Section 110(c) of the Mine Act provides that whenever a corporate operator violates the 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).

As set forth in the Secretary's Motion, to establish Section 110(c) liability, the Secretary must prove that an individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992), citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 559, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981). Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). That is, as a predicate to individual liability, a corporate operator's agent must be privy to knowledge or information that gives him reason to know of the existence of a violative condition under circumstances wherein his failure to act amounts to aggravated conduct constituting more than ordinary negligence. *Johnson Paving Company, Inc., and William T. Pinson*, 31 FMSHRC 1246, 1255 (Oct. 2009) (ALJ Barbour).

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[7] The legislative history of the Mine Act states that the Secretary's determinations concerning requests for records should be final and the request should minimize the burden on operators consistent with her need to efficiently and effectively perform her enforcement responsibilities. Senate Report, No. 95-181, page 28, 95th Congress 1st Session, as reported in U.S. Code Cong. & Admin. News 1977, page 3428.

B. Application of Legal Principles to the Facts

Contrary to Contestant's arguments that the Secretary's production demand exceeds her statutory authority and does not further federal interests, I find that under Section 103(h) of the Act, the Secretary's demand for coal production reports is a request that is reasonably required by the Secretary from time to time to enable her to perform her functions under the Act. Section 103(h) of the Act specifically states "[i]n addition to such records as are specifically required by the Mine Act, every operator of a coal or other mine shall establish and maintain such records, make such records, and provide such information, as the Secretary ...may reasonably require from time to time enable him to perform his functions under this Act . . . ."[8]

The coal production reports, although not specifically required by the Act, have been created and maintained by Freedom Energy in the ordinary course of business, and are reasonably necessary for the Secretary to perform her functions under the Act. One such function, clearly communicated to the Contestant in the Secretary's July 26, 2010 letter, is the investigation of allegations of willful [or knowing] violations by agents of the operator. Similarly, Citation No. 8241282 essentially informs Contestant that the requested records were required to be produced under section 103(h) so that the Special Investigator could perform official investigative duties under section 110.

Furthermore, I find that the Secretary clearly advised Contestant during the August 4, 2010 conference call with the undersigned, and again in the instant Motion for Summary Decision, that the contemporaneous production records taken during working shifts on the dates surrounding the 104(d)(2) orders, are relevant to identify managers and agents who knew or had information that would lead them to know of the violations occurring on May 17 and June 10, 2000. I further find that the Secretary has established that the requested coal production records are relevant to the special investigation. The Secretary's affidavits establish that the records are relevant to conducting an investigation under section 110 and that the Secretary is required to perform such an investigation. Specifically, Special Investigator Howell's declaration establishes that production reports produced by managers and agents of the operator provide information relevant to the operation of the working sections of the mine and the belts carrying coal out of the mine while active mining transpired. Declarant Dotson, a former mine superintendent at mines owned and operated by Massey Energy, states that he reviewed coal production records containing information relevant to operation of the section and coal belts to make daily resource

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[8]Contestant argues that it not required to turn over business records that are not required to be kept by the Act. Contestant does not point to any authority that allows for such an exemption to the requirements of section 103(h). In fact, section 103(h) explicitly states that, "*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] may reasonably require* . . . ." (emphasis added). In these circumstances, I reject Contestant's argument *under Chevron USA Inc. v. Nat'l Res. Defense Council,* 467 U.S. 837 (1984), that its contrary interpretation is clear and unambiguous.

allocation decisions, and therefore, the requested records may be relevant to the negligence of mine management for the cited violations in the section 104(d)(2) orders.

Although Contestant attempts to counter the import of such declarations with a rather vague and nonspecific affidavit from Mr. Pinson to the effect that the coal production reports are different from those used since 2005 and contain some irrelevant, redundant, or proprietary information, I find the declarations of Special Investigator Howell and Mr. Dotson sufficiently probative to establish the relevancy of the requested information to the section 110 investigation at issue. Furthermore, I find that Contestant has not raised any specific, legitimate and substantial confidentiality interest, and even had it done so, it has sought no accommodation from the Secretary.[9] In fact, the Solicitor stated during the conference call that the Secretary offered to keep the coal production reports confidential for Freedom of Information Act (FOIA) purposes, but Contestant rejected any such accommodation. Nor has Contestant submitted the coal production reports for in camera inspection, which I indicated that I would order should counsel raise privilege or redaction issues. In sum, I conclude that the Secretary's request for coal production reports satisfies the "reasonably required" standard of section 103(h) of the Act.

I also reject the Contestant's argument that the Secretary's request for coal production records is an unreasonable search and seizure under the Fourth Amendment and must be predicated on a warrant. In *Donovan v. Dewey*, 452 U.S. 594, 599 (1981), the Supreme Court established that inspections of commercial property may be unreasonable "[1] if they are not authorized by law or [2] are unnecessary for the furtherance of federal interests . . . . [or] [3] if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." As explained above, the Secretary's production demand does not violate the Fourth Amendment since it is authorized by law under section 103(h) of the Act and necessary to further a federal interest, the attribution of appropriate individual liability during a section 110 investigation predicated on 104(d)(2) orders. In addition, given the heavy regulation under the Mine Act, and the specific language of section 103(h) and section 110(c) of the Act, the Contestant lacks a reasonable expectancy of privacy, under the third prong of *Dewey*, in contemporaneous business records that may show who had knowledge of violations for Section 110 investigation purposes, which investigations are required by statute from time to time, particularly in the context of extant 104(d)(2) orders. Because the operator of a mine in such a pervasively regulated industry cannot have a reasonable expectation of privacy in business records to which Congress has allowed the agency access, a warrantless demand for such records does not violate the Fourth Amendment. Cf. *Peabody Coal Co.*, 7 FMSHRC 183 (Feb. 14, 1984) (no search warrant necessary for special investigator to require mine operator to produce certain accident and illness reports required to be kept under the Act, in response to section 103(g) investigative request that was not a regular inspection and could not be predicted). As noted above, the fact that the instant production records were not required, but have been created and

[9]Cf. *Pennsylvania Power and Light*, 301 NLRB 1104, 1105-1106 (1991).

maintained by the operator, makes no difference under the express language of section 103(h) because they have been shown to be reasonably necessary for the Secretary to perform her investigative functions under section 110 of the Act.

Finally, I note that Contestant has challenged the "high" negligence designation set forth in the July 26, 2010 Citation at issue. I find that the operator's level of negligence was cited appropriately. In reaching this conclusion, I have considered the fact that MSHA is alleged to have skipped counsel when issuing Citation No. 8241282 and its July 26, 2010 letter to Contestant. Nevertheless, by July 26, 2010, through both said Citation and letter, Contestant was apprised that the coal production reports were requested pursuant to section 103(h) so that the MSHA special investigator could perform investigative functions under section 110. In the August 4, 2010 conference call, counsel for the Solicitor again made clear that the requested coal production reports were relevant, necessary and reasonably requested in order for Special Investigator Howell to complete his Section 110 investigation and establish who was responsible for working sections of the mine on the dates in question and attribute appropriate individual agent liability, if any, under section 110(c) of the Act. Counsel for the Solicitor further made this purpose clear in her instant Motion for Summary Decision. Thus, counsel for Contestant's representations in Contestant's August 18 Response at 5 that "[t]he Secretary has, to date, steadfastly refused to explain how the requested records are necessary to her discharge of a statutory duty," is a factual contention that lacks evidentiary support under Fed. R. Civ. P. 11(b)(3), applicable in this forum by § 2700.1(b) of the Commission's Procedural Rules. Rather, to date, the Contestant has refused to abate the cited violation and has hindered the Secretary's time-sensitive investigation under section 110 of the Act. See Howell Declaration at 3.

Having considered the entire record, I conclude that Respondent's adamant and continued refusal to provide the requested records and work towards an accommodation with the Secretary is designed to frustrate the imposition of potential individual liability for the section 104(d)(2) violations being investigated and warrants a finding of high negligence. Accordingly, I find a reduction in the challenged negligence designation is not warranted.

ORDER

In light of the foregoing, the Secretary's Motion for Summary Decision is **GRANTED**, the Contestant's Cross Motion for Summary Decision is **DENIED**, the Contestant's Motion for Expedited Hearing is **DENIED** given my disposition of the Cross Motions for Summary Decision and the fact that no daily penalty under section 110(b) has yet been imposed, and the Contestant is **ORDERED** to produce the contemporaneous coal production reports for the dates

requested immediately to prevent any potential daily penalties under section 110(b) of the Act from continuing to accrue should the Secretary seek to impose penalties under that section of the Act for Contestant's continued intransigence.

Thomas P. McCarthy
Administrative Law Judge

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