

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 23, 1998

BHP COPPER COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 98-189-RM
v.	:	Citation No. 7922328; 3/13/98
	:	
SECRETARY OF LABOR,	:	San Manuel Mine
MINE SAFETY AND HEALTH	:	ID No. 02-00151
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION GRANTING CONTESTANT-S MOTION FOR SUMMARY DECISION

This contest proceeding was brought by BHP Copper, Inc., (ABHP) under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(d) (the AMine Act or AA ct). BHP contests Citation No. 7922328, issued on March 12, 1998, alleging a violation of section 103(a) of the Mine Act. The condition or practice section of the citation states:

The operator impeded MSHA's investigation into a March 4, 1998, fatal accident by withholding vital information requested by the MSHA accident investigation team. At a meeting at 9.00 am on March 6, 1998, between MSHA and operator representatives, the MSHA accident investigation team requested the address and telephone number of Ronald Byrd, an employee of BHP Copper and a miner at the San Manuel Mine, who had been injured in the accident. Ronald Byrd was an essential witness in the accident investigation, and the MSHA accident investigation team needed to contact him for an interview. The mine operator refused to provide MSHA with this information. Operator representatives at the meeting included Ward Lucas, Safety Manager, BHP Copper; Warren Traweck, Manager Safety, Health & Security, North American Division, BHP Copper; and Mark Sivit of Patton Boggs, legal counsel for BHP Copper.

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

Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines each year for the purpose of ... (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 For the purpose of making any inspection or investigation under this Act, the Secretary ... or any authorized representative of the Secretary ... shall have a right of entry to, upon, or through any coal or other mine.

BHP filed a motion for summary decision under 29 C.F.R. § 2700.67. BHP contends that there are no genuine issues of material fact and that it is entitled to summary decision as a matter of law. The Secretary opposes BHP's motion. She contends that there are material facts in dispute and that, on the basis of facts not in dispute, BHP is not entitled to summary decision. The Secretary also filed a cross-motion for summary decision on the fact of violation based on the undisputed facts in this case.

I. THE UNDISPUTED FACTS

These undisputed facts are taken from the affidavits submitted by the parties. In instances where there are conflicts in testimony, I accept the account submitted by the Secretary. In some instances, I summarize the conflict below.

On March 4, 1998, there was a fall of ground at the Sun Manual Mine that killed a miner and injured a second miner. On March 5, 1998, MSHA supervisor Richard Lauferberg and Inspector Arthur Ellis arrived at the mine to begin an investigation into the accident. The MSHA representatives conducted a physical inspection of the accident site on that date.

On March 6, 1998, the MSHA representatives interviewed a number of BHP employees and reviewed BHP documents. The MSHA representatives were unable to interview Ronald Byrd, the employee who was injured in the accident, because he was not at the mine. MSHA Inspector Lauferberg asked BHP representatives about Mr. Byrd's medical condition. BHP representatives informed MSHA that it was BHP's understanding that Mr. Byrd was being released from the hospital that day. Mr. Lauferberg asked for Mr. Byrd's address and telephone number. Mr. Sivit, who was present at the mine, advised Mr. Lauferberg that BHP considered the telephone numbers and addresses of its employees to be confidential and that BHP would not provide this information. Inspector Lauferberg does not recall that anyone from BHP offered to call Mr. Byrd to obtain his consent. Warren Traweck, BHP's manager of Safety, Health, and Security, recalls that BHP made an offer to contact Mr. Byrd to determine if he would consent to BHP providing MSHA with his address and phone number. Mr. Traweck does not recall whether MSHA representatives responded to this offer.

During these discussions, BHP representatives indicated that they believed that Mr. Byrd lived in Superior, Arizona. On Saturday March 7, Inspector Lauferberg traveled to Superior to attempt to locate Mr. Byrd. Ronald Byrd was not listed in the phone book and the police department did not have any information about him. Inspector Lauferberg called Ward Lucas, the manager of safety for the San Manuel Mine, at his home to inform him that he could not locate Mr. Byrd in Superior. Lucas told Lauferberg that Byrd may be staying with relatives. Lauferberg advised Lucas that he would try calling persons listed in the phone book with the surname AByrd, but that if he was unsuccessful, he would turn the matter over to the Solicitor's office. Lauferberg testified that Lucas replied that if he could not find Byrd to Acall him back. Lauferberg testified that Lucas did not offer to find or provide the requested address and phone number. Lucas testified that when Lauferberg asked him if he had Byrd's address or phone number, he replied that he did not have that information but that he would try to get it for him. Mr. Lucas testified that he obtained this information that day, but that Inspector Lauferberg never called him back.

After the telephone conversation between Lauferberg and Lucas, the inspector called a Robert Byrd listed in the phone book. Robert Byrd was a relative of Ronald Byrd and he provided the inspector with the necessary information.

II. SUMMARY OF THE PARTIES ARGUMENTS

A. BHP

BHP states that the essential facts in this case are not in dispute and that it is ripe for decision. It argues that section 103(a) of the Mine Act does not require mine operators to provide information to MSHA unless such information is required to be kept and made available to the Secretary in the Mine Act or the Secretary's regulations. BHP contends that the Secretary requires operators to keep certain categories of records and information which must be made available to MSHA inspectors. Section 103(d) specifically grants the Secretary this authority when there are accidents at a mine. BHP argues that it was obligated under the Mine Act was to provide access to the mine site and to records and information that are required to be kept under the Mine Act or the Secretary's regulations.

In this case, MSHA demanded that BHP search its personnel records to find the information it wanted. BHP states that this type of search is beyond the warrantless search authority granted the Secretary under section 103(a). Section 103 does not authorize the nonconsensual warrantless search of files and records in a mine office.

BHP maintains that the information sought by MSHA is the private information of the employee and that it was within its right to withhold this information. BHP contends MSHA must permit the company to seek an employee's consent before disclosing private information about the employee. It believes that it could be subject to civil liability if it releases private employee information without the consent of the employee.

BHP also argues that the Secretary may not impose sanctions in this case because it did not first file a civil action under section 108 of the Mine Act. BHP contends that MSHA must obtain an injunction or other appropriate order from the District Court before it can obtain sanctions for refusal to comply with a warrantless search.

BHP contends that its refusal to provide the personal information did not impede MSHA's investigation because MSHA has multiple methods to compel production. For example, MSHA could have used the powers in section 103(b) of the Mine Act to issue a subpoena for the subject information. MSHA could also have sought this information from other sources, such as Mr. Byrd's union representatives, the United Steelworkers.

Finally, BHP notes that during an interview of a BHP employee on March 6, the employee refused to provide his address and phone number to MSHA. The MSHA representatives told the employee that it was within his right to withhold this information. BHP argues that if an employee has the right to refuse to provide this information, his employer cannot take that right away from him by providing the information without the employee's consent.

B. Secretary of Labor

The Secretary contends that material facts are in dispute which prevent summary decision in BHP's favor. She contends that BHP did not offer to provide the address and telephone number of Mr. Byrd if it were able to obtain his consent. She also disagrees with Mr. Lucas's statement that he told Inspector Lauferberg during the March 7 telephone call that he would try to find Byrd's telephone number.

The Secretary argues that the uncontested facts show that she is entitled to summary decision. The facts reveal that BHP unreasonably withheld vital information during an investigation thereby interfering with and obstructing an investigation into a fatal accident in violation of MSHA's right of entry under section 103(a). This refusal to provide information delayed MSHA's investigation by one day. This conduct effectively frustrated the investigation and denied the Secretary the full right of entry granted under section 103(a). She disagrees with BHP's position concerning its obligations to provide information during an MSHA investigation.

The Secretary argues that any professed derivative privacy interest⁶ in Mr. Byrd's address and phone number is outweighed by the needs of the investigation. She maintains that her strong public policy and humanitarian interests⁷ supersede BHP's Affim sy⁸ concern for the privacy interests of Mr. Byrd. Because immediate recollections are the best recollections, MSHA must conduct a swift investigation. BHP should not be allowed to stand in Mr. Byrd's shoes because he had developed a potentially adverse interest⁹ to BHP as a result of his injuries.

The Secretary maintains that she is not required to resort to section 108 of the Mine Act before imposing a penalty for a violation of section 103(a). She contends that the Commission has long recognized this right.

III. ANALYSIS OF THE ISSUES

A motion for summary decision can be granted only if the entire record shows that there is no genuine issue as to any material fact and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). I find that there are no genuine issues as to any material fact. For purposes of considering the parties' motions, I accept the facts as set forth in the declaration of MSHA Supervisor Lauferberg. I also find that BHP is entitled to summary decision as a matter of law, as set forth below.

The briefs filed by the parties make broad and sweeping arguments concerning their interpretation of the law and MSHA's policies. I confine my decision to those issues that are necessary to resolve this case. Many of the arguments made by the parties go beyond what is before me in this case.

BHP refused to provide MSHA with the name and address of Mr. Byrd without first obtaining his consent. His address and telephone number were not within the personal knowledge of the BHP officials present during the MSHA investigation. To obtain the information requested, BHP would have been required to retrieve his personnel file. Neither the Mine Act nor the Secretary's regulations require mine operations to keep a list of its employees with addresses and phone numbers or to make such information available to MSHA inspectors.

Section 103(d) requires operators to investigate accidents and to make available to the Secretary records of such accident investigations. Section 103(h) requires operators to establish and maintain such records, and make such reports, and provide such information, as the Secretary ... may reasonably require from time to time to perform his functions under this Act. This requirement is in addition to any records that are specifically required to be kept under the Act.

The Secretary's regulations concerning accidents and records are in 30 C.F.R. Part 50. These regulations contain detailed requirements concerning the information that must be gathered by mine operators and provided to MSHA following accidents. Nothing in the regulations requires that operators provide MSHA with the addresses and telephone numbers of miners.

The broad issue is whether section 103(a) when read with section 103(h) requires mine operators to immediately provide MSHA with the names and telephone numbers of its employees without the consent of the employees, when such employees are potential witnesses to a fatal accident. In the context of this case, the issue is whether BHP impeded MSHA's investigation of the accident in violation of section 103(a) of the Act as alleged in the

citation when it refused to provide MSHA with the address and telephone number of Mr. Byrd, without first obtaining his consent. I hold that BHP did not impede MSHA's investigation by its actions and that it did not violate section 103(a).

The declaration of Mr. Lauferberg reveals that at about 1 p.m. on March 6, he asked Mr. Lucas about the status of Mr. Byrd. Mr. Lucas replied that Byrd was being released from the hospital. Mr. Lauferberg asked for his home address and telephone number. Mr. Savit told Lauferberg that BHP considered this information confidential and that the BHP would not provide this information. Lauferberg then asked for the name of the city in which Mr. Byrd lived and Lucas replied that he thought that he lived in Superior. Lauferberg does not recall Lucas or Savit offering to contact Byrd to obtain his permission to release his phone number. No BHP representatives provided Lauferberg with the address or phone number of Byrd or indicated that they had contacted Byrd to obtain his consent.

When Lauferberg was unable to make contact with Byrd in Superior, he called Lucas at home. Lucas told Lauferberg that Byrd may be staying with relatives but he did not state that he would attempt to obtain Byrd's address and phone number. Lucas simply told Lauferberg that if he could not find Byrd, he could call Lucas back.

I hold that BHP was within its right to refuse to immediately provide the information requested without obtaining Mr. Byrd's consent. The Secretary's right to inspect mines without a search warrant has been broadly construed and approved by the courts. The Secretary does not have broad authority to search an operator's business records without the operator's consent. See e.g. *Sewell Coal Co.*, 1 FM SHRC 864 (July 1979)(ALJ). In effect, MSHA Inspector Lauferberg asked BHP to search the company's personnel files to obtain the requested information. A mine operator has a legitimate right and perhaps a legal duty to protect private information contained in the personnel files of its employees. The fact that MSHA only requested information for one employee as opposed to many employees does not change the result. MSHA cannot require mine operators to immediately provide confidential information from mine employee personnel files under the warrantless inspection authority of section 103(a) in the absence of compelling circumstances. The mine operator has a right to require that the miner consent before such information is provided or to require the Secretary to follow the procedures of section 108 of the Act. The Supreme Court, in upholding warrantless searches of mines by MSHA, held that section 108(a) provides an adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interest that the mineowner might have. *Donovan v. Dewey*, 452 U.S. 594, 604-05 (1981).¹

¹ I do not reach the issue concerning whether the Secretary is required to seek an injunction under section 108 before she can impose a penalty for a violation of section 103(a).

If Mr. Byrd were at the mine on the day of MSHA's investigation, MSHA could not require him to provide his address and telephone number and MSHA could not compel him to submit to an interview. BHP should not be required to waive Mr. Byrd's rights without legal process. I hold that BHP had the right to protect the privacy of its employees. I do not agree with the Secretary's position that this privacy right is outweighed by the needs of the investigation or that BHP's concerns are affirmatively outweighed. MSHA can obtain the information it needs without interfering with the rights of miners. The Secretary's authority under section 103(h) to require operators to provide such information as MSHA may reasonably require is not without limits. It was not unreasonable for BHP to refuse a request for personal information about Mr. Byrd without his consent.

It is important to understand that when Inspector Lauferberg was told that this information was confidential, he did not ask BHP to attempt to obtain Mr. Byrd's consent. Indeed, he did not bring up the issue again until he called Mr. Lucas the next day. During that conversation, Lucas told Lauferberg to call him back if he was unable to locate Byrd. The Secretary emphasizes that BHP did not obtain the consent of Mr. Byrd to release his address and telephone number. It is not the obligation of an operator to volunteer information during an MSHA accident investigation. An operator must cooperate, but it cannot be cited for the failure to voluntarily provide information. If Inspector Lauferberg formally requested BHP, orally or in writing, to obtain the consent of Mr. Byrd and BHP failed to timely respond to the request or otherwise interfered in Mr. Byrd's right to consent, there may have been a violation of section 103(a) for failure to cooperate with the investigation. That is not the case here, however, because Inspector Lauferberg did not follow up on his request.

I find that BHP's refusal to provide the information requested did not impede the investigation. The Secretary cites a number of Commission cases to support its position, but these cases do not involve a refusal to provide information personal to a miner. In *U. S. Steel Corp.*, 6 FM SHRC 1423, 1433 (June 1984), the operator would not permit MSHA to interview a foreman unless an operator attorney were present. In its decision, the Commission assumed that the operator had the right to have an attorney present. The facts reveal that when the operator requested that its attorney be present during the interview, the MSHA inspector told the mine's safety supervisor that arrangements should be made to provide an attorney as soon as possible. *Id.* The safety supervisor indicated that he would let MSHA know when an attorney would be available, but he did not propose a specific date. Two days later, the inspector returned to the mine and was informed by the safety supervisor that he had not heard back from company headquarters. The Commission affirmed the judge's finding of a violation of section 103(a) on the basis that the safety supervisor's failure to specify a date certain when an attorney would be present, combined with the failure to produce an attorney, had the effect of unreasonably delaying the accident investigation. *Id.*

This case is distinguishable from *U.S. Steel*. Inspector Lauferberg did not ask BHP representatives to attempt to obtain the consent of Mr. Byrd to provide his address and telephone number. In addition, MSHA obtained the information it requested through other means in about 24 hours. MSHA may have been able to get the information even more

quickly through Mr. Byrd's Steelworkers representatives. BHP was not the only source for this information and, contrary to the argument of the Secretary, BHP did not force Inspector Lauferberg to travel to Superior. Finally, Mr. Lucas's statement to Inspector Lauferberg to call him back if Lauferberg was unable to locate Mr. Byrd shows that BHP was attempting to cooperate with MSHA. I conclude that BHP's action in not immediately providing the telephone number or address of Mr. Byrd without his consent did not have the effect of unreasonably delaying the accident investigation. 6 FM SHRC at 1433.

IV. ORDER

For the reasons set forth above, the motion for summary decision filed by BHP Copper Company, Inc., is GRANTED; the Secretary's cross-motion for partial summary decision is DENIED; Citation No. 7922328, issued March 13, 1998, is VACATED; and this proceeding is DISMISSED.

Richard W. Manning
Administrative Law Judge

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