

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 30, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 98-189-RM
	:	
BHP COPPER, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

This contest proceeding brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against BHP Copper Inc. (“BHP”). The citation charged BHP with violating section 103(a) of the Mine Act,¹ 30 U.S.C. § 813(a). Administrative Law Judge Richard Manning granted BHP’s motion for summary judgment and dismissed the citation. 20 FMSHRC 634 (June 1998) (ALJ). Following the judge’s decision, the Commission granted sua sponte review, pursuant to section

¹ 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 (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, . . . 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. . . . For the purpose of making any inspection or investigation under this Act, . . . any authorized representative of the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

113(d)(2)(B) of the Act, 30 U.S.C. § 823(d)(2)(B).² For the reasons that follow, we reverse the judge's determination.

I.

Factual and Procedural Background³

On March 4, 1998, a fall of ground at BHP's San Manuel Mine in Arizona resulted in the death of one miner and serious injury to a second, Ronald Byrd, who was hospitalized following the accident. 20 FMSHRC at 634-35. On March 5, MSHA supervisor Richard Laufenberg and Inspector Arthur Ellis came to the mine to begin their investigation into the accident and made a physical inspection of the accident site. *Id.* at 635. On March 6, the MSHA representatives interviewed a number of BHP employees and reviewed BHP documents relating to the accident. *Id.* However, they were unable to interview Byrd, the miner injured in the accident, because he was hospitalized. *Id.* Consequently, they intended to contact Byrd's family and interview him in the hospital. S. Cross Mot. for Partial Summ. Dec., Laufenberg Decl. ¶ 4 [hereinafter "Laufenberg Decl."]. When BHP representatives informed Laufenberg that Byrd was going to be released from the hospital that day, Laufenberg asked for Byrd's home address and telephone number. 20 FMSHRC at 635. BHP's counsel responded that BHP considered its employees' telephone numbers and addresses confidential and that it would not provide that information. *Id.* No one from BHP offered to contact Byrd to ascertain whether he would consent to BHP's supplying MSHA his telephone number and address.⁴ *Id.*; Laufenberg Decl. ¶ 7. However, Ward Lucas, BHP safety manager at the San Manuel Mine, told Laufenberg that he thought that Byrd lived in Superior, Arizona. 20 FMSHRC at 636.

² Following the Commission's direction of review, BHP filed a petition for writ of mandamus from the United States Court of Appeals for the Ninth Circuit in which it requested, inter alia, that the court order the Commission to vacate its direction of review. The court denied BHP's petition in an order dated September 8, 1998.

³ Because the case was decided on a motion for summary decision, the facts, as found by the judge, were taken from the affidavits submitted by BHP and the Secretary. Where there were conflicts in testimony, the judge stated that he accepted the account provided by the Secretary, the party against whom summary decision was granted. 20 FMSHRC at 635, 638.

⁴ The judge noted in his decision that there was disputed testimony about whether there was an offer to contact Byrd at the meeting on March 6. 20 FMSHRC at 635. BHP's corporate safety manager, Warren Traweek, stated in his affidavit that BHP offered to contact Byrd to see whether he would consent to BHP giving his telephone number and address to MSHA. BHP Mot. for Summ. Dec., Ex. D ¶ 5 [hereinafter Traweek Decl.].

On March 7, Ellis and Laufenberg again met with BHP officials, who did not disclose Byrd's address or telephone number or indicate that anyone had sought to obtain his consent to release the information. Laufenberg Decl. ¶ 8. Following the meeting, Laufenberg traveled to Superior, Arizona to attempt to locate Byrd. 20 FMSHRC at 636. Laufenberg was unable to locate Byrd's telephone number in the telephone book for Superior. *Id.* He asked a local police officer for help in locating him, but to no avail. *Id.* He then contacted BHP Safety Manager Lucas at his home and told him that he was having difficulty locating Byrd. *Id.* Lucas responded that Byrd might be staying with relatives. *Id.* Laufenberg told Lucas that he would try calling persons listed in the telephone book with the surname "Byrd," but that if he was unsuccessful he would turn the matter over to the Solicitor's office. *Id.* Although Lucas did not offer to provide the telephone number or address, he told Laufenberg to call him back if he could not locate Byrd.⁵ *Id.* After Laufenberg spoke with Lucas, he called a "Robert Byrd" listed in the telephone book. *Id.* Robert Byrd was a relative of Ronald Byrd and was able to supply the necessary information so that Laufenberg could contact him. *Id.*

On March 12, MSHA issued a citation charging BHP with a violation of section 103(a) of the Act. *Id.* at 634. The citation stated that BHP impeded MSHA's accident investigation by withholding the address and telephone number of Ronald Byrd, whom MSHA needed to interview because he was an essential witness in the investigation. *Id.*

Thereafter, BHP filed a notice of contest challenging MSHA's citation, and the matter was assigned to an administrative law judge. Stating that the essential facts were not in dispute, BHP filed a motion for summary decision. The Secretary opposed BHP's motion, arguing that there were disputed issues of fact. In the alternative, the Secretary filed a cross motion for summary decision. The judge concluded that there was no genuine issue of material fact and that summary decision in favor of BHP was appropriate. 20 FMSHRC at 638. The judge noted that neither the Act nor the Secretary's regulations (30 C.F.R. Part 50) required mine operators to maintain a list of employees with addresses and phone numbers. *Id.* Thus, the issue, as the judge analyzed it, was whether section 103(a),⁶ when read with section 103(h),⁷ requires mine operators

⁵ Lucas stated in his declaration that he told Laufenberg that he did not have Byrd's telephone number and address but that he would try and find it. BHP Mot. for Summ. Dec., Ex. E ¶ 6 [hereinafter "Lucas Decl."]. He further stated that he then contacted BHP offices and obtained the information but that Laufenberg never called back. *Id.* at ¶ 7.

⁶ The judge specifically quoted the language of section 103(a)(4), which governs the Secretary's right to conduct inspections at mines to determine whether there are violations of standards, instead of section 103(a)(1), which specifies the Secretary's right to conduct investigations to obtain information relating to the causes of accidents. 20 FMSHRC at 635; *see* 30 U.S.C. § 813(a).

⁷ Section 103(h), 30 U.S.C. § 813(h), provides:

to immediately provide MSHA with the names and telephone numbers of its employees, who are potential witnesses to a fatal accident, without their consent. *Id.* at 638. The judge concluded that BHP did not impede MSHA’s investigation in violation of section 103(a) when it refused to provide MSHA with the address and telephone number of Byrd without first obtaining his consent. *Id.* at 638-39.

In support of his conclusion, the judge reasoned that, while the Secretary’s right to inspect mines without a search warrant has been broadly construed, the Secretary does not have broad authority to search an operator’s business records without his consent. *Id.* at 639. “MSHA cannot require mine operators to immediately provide confidential information from mine personnel files under the warrantless inspection authority of section 103(a) in the absence of compelling circumstances.” *Id.* Rather, the judge held that a mine operator has the “right” to protect the privacy of its employees and to require that the miner consent before confidential information is disclosed. *Id.* The judge noted that Inspector Laufenberg did not ask BHP to attempt to obtain Byrd’s consent to release his address and telephone number. *Id.* at 640. The judge further found that BHP’s refusal to provide the information did not impede the investigation, noting that MSHA obtained the information through other means in about 24 hours. *Id.* at 640-41. The judge vacated the citation and dismissed the proceeding. *Id.* at 641.

II.

Disposition

A. Adequacy of Direction for Review and BHP’s Motion to Strike

Initially, BHP argues that the Commission’s sua sponte direction for review was impermissibly vague because “the Commission simply restates the question that had been put before [the judge] below.” BHP Br. at 5. BHP argues that the Commission failed to specify the

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. The Secretary or the Secretary of Health, Education, and Welfare is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this Act may be published from time to time, may be released to any interested person, and shall be made available for public inspection.

legal or policy error that was the basis for its review under the Act, 30 U.S.C. § 823(d)(2)(B). *Id.* at 5-8. In response, the Secretary argues the Commission's direction for review is not vague, noting that the judge's decision adequately framed the legal issues on review. S. Resp. Br. at 2-4.

BHP previously filed a motion to dismiss the direction for review on the same grounds that it now presents in its brief. The Commission denied that motion by Order, dated September 2, 1998. We see no reason to overturn that order. We note that the Direction for Review stated that review was ordered because the judge's decision may be contrary to law or presents a novel question of policy. The direction further stated that review is directed on "the issue of whether an operator impeded an accident investigation in violation of section 103 of the Mine Act, 30 U.S.C. § 813, when it refused to release the address and telephone number of an injured miner, who also was a witness in the investigation." Order dated July 22, 1998. We agree with the Secretary that the direction for review, particularly when read against the backdrop of the judge's decision, more than adequately informs the parties of the issues before the Commission.

BHP also filed a motion to strike portions of the Secretary's opening brief. Specifically, BHP asserts that the Secretary's brief raised "a host of new arguments, and references a variety of new evidence and expert testimony." BHP Mot. to Strike at 1-2; *see also* BHP Suppl. Mot. to Strike at 2.

In *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319-21 (Aug. 1992), the Commission refused to consider a new theory (a presumption regarding an S&S designation of a violation, rather than application of the record facts under the Commission's test in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984)), not previously presented to the administrative law judge. In rejecting consideration of the Secretary's new theory, the Commission stated that a matter raised on review must have been at least "implicitly" raised below or "intertwined" with an issue tried before the judge in order to be considered on appeal. *Id.* at 1321.

The Secretary's arguments made to the judge and the Commission address the meaning and interpretation of section 103(a). While the points raised by the Secretary before the Commission are not identical to those raised before the judge, they are "sufficiently related" to those raised in support of the Secretary's interpretation of section 103(a) that the Commission can consider them. *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10 n.7 (Jan. 1994). None of these arguments are comparable to the novelty of the legal theory raised for the first time on appeal in *Beech Fork*. Accordingly, we deny BHP's motion to strike the Secretary's legal arguments regarding section 103(a).⁸

In its Supplemental Motion to Strike, BHP also requests that the Commission strike from the record the Secretary's statement that BHP possessed Byrd's home telephone and address.

⁸ We do not reach the Secretary's additional argument that the scope of review for sua sponte review pursuant to section 113(d)(2)(B) is different than the scope of review for a direction for review pursuant to section 113(d)(2)(A). S. Resp. to Mot. to Strike at 2-8.

BHP Suppl. Mot. to Strike at 2-3. However, BHP's request to strike is at odds with Lucas' declaration in which he stated that he obtained Byrd's address and telephone number from the person at BHP who handled its industrial claims but that Laufenberg never called him back. Lucas Decl. ¶ 7. Therefore, we deny the motion to strike that statement. Lastly, as to BHP's motion to strike the secondary materials cited in the Secretary's brief (BHP Mot. to Strike at 2, 9-10), we have disposed of the legal issues in the case without resort to those materials. It is therefore unnecessary to rule on this aspect of BHP's motion to strike. *Southern Ohio Coal Co.*, 12 FMSHRC 1498, 1502 n.7 (Aug. 1990).

B. Violation of Section 103(a)

The Secretary contends that sections 103(a) and (h) of the Act obligate a mine operator to provide the address and telephone number of a miner where that information is necessary to enable MSHA to conduct an effective accident investigation in a timely manner. S. Br. at 5-8, 10; S. Resp. Br. at 1. The Secretary asserts that, if section 103(h) cannot be read to create such an obligation, then section 103(a), which grants MSHA a broad investigatory mandate, should be read to create the obligation because locating and interviewing miner witnesses is an essential part of an accident investigation. S. Br. at 7, 14. The Secretary further argues that it would be impossible to include in her regulations every type of information that could be the subject of a mine accident investigation. S. Resp. Br. at 4-5; *see id.* at 10-14. The Secretary relies on *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to support her position.

BHP contends that *Chevron* deference is due only to duly promulgated regulations and published statements of policy, not to arguments made in litigation. BHP Resp. Br. at 5-7; BHP Reply Br. at 2-6. BHP asserts that nothing in the Act or regulations requires that mine operators maintain records with miner addresses and telephone numbers and, therefore, there is no obligation to supply them on demand. BHP Br. at 9; BHP Resp. Br. at 4, 7-14; BHP Reply Br. at 6-9. BHP further contends that the Secretary may not have access, without a search warrant, to any information that an operator is not required by regulation to maintain. BHP Br. at 9-10; BHP Resp. Br. 13-14 & nn.15, 17. BHP argues that the Secretary was required by the Act to seek injunctive relief, pursuant to section 108 of the Mine Act, 30 U.S.C. § 818, in order to obtain the requested information.⁹ BHP Br., Ex. 2 at 6-8.

⁹ BHP argues in its motion to strike that the Secretary improperly raised on review the issue of resort to injunctive relief pursuant to section 108. BHP Suppl. Mot. to Strike at 3-4. However, the Secretary made this argument *in response* to a point made by BHP in its opening brief. S. Resp. Br. at 14-18. Accordingly, BHP has waived any objection to the Commission's consideration of the argument. More significantly, the judge considered section 108(a) and its injunctive relief provisions in his decision (20 FMSHRC at 639), and it is therefore appropriate for the parties to address it. *See Morton Int'l, Inc.*, 18 FMSHRC 533, 536 n.5 (Apr. 1996).

The Secretary responds that she was not required to resort to the injunctive relief provisions of the Act prior to issuing a citation for an operator's refusal to provide the requested information. S. Resp. Br. at 14-18. The Secretary challenges BHP's arguments that a mine operator has a legal duty to protect information in employee personnel files and that a miner's right to privacy and confidentiality can outweigh MSHA's right to conduct a mine accident investigation. S. Br. at 20-29 & n.9. Finally, the Secretary argues that the judge ignored Mine Act policy favoring a miner's right to participate in investigations in weighing the miner's right to privacy in not having his home address disclosed. *Id.* at 18-19. The Secretary therefore concludes that BHP's refusal to turn over the requested information or to even request the miner's permission to release the information unlawfully impeded MSHA's ability to investigate the accident. *Id.* at 30-32.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union No. 1261, UMW v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).¹⁰ If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron IP*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997), *citing Chevron*, 467 U.S. at 843; *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).¹¹

Although it is not apparent from the plain language of section 103(a) of the Act, we agree with the Secretary that section 103(a) can be reasonably interpreted to require a mine operator to disclose information such as that sought here that enables MSHA to conduct an accident

¹⁰ The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron P*" analysis. *See Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

¹¹ BHP's argues that *Chevron* deference is due only to "statutory interpretations embodied in the agency's duly promulgated, long-standing regulations and published policy statements." BHP Resp. Br. at 5 (emphasis omitted). Under analogous circumstances, however, the Secretary's litigation position has been found to be entitled to deference under the Occupational Safety and Health Act. *Martin v. OSHRC*, 499 U.S. 144, 156-57 (1991).

investigation in an expeditious manner. *See Chevron*, 467 U.S. at 842-43.¹² Section 103(a) provides, inter alia, that the Secretary is authorized to conduct inspections and investigations to “obtain[], utiliz[e], and disseminat[e] information relating to health and safety conditions, [and] the causes of accidents.” 30 U.S.C. § 813(a). To that end, the Secretary’s Program Policy Manual provides that an operator may not interfere, directly or indirectly, with MSHA’s right to inspect or investigate. I MSHA, U.S. Dept. of Labor, *Program Policy Manual*, I.103-1 (1996). Information that allows MSHA to identify and contact witnesses to mine accidents is absolutely essential to MSHA’s ability to conduct a thorough and effective investigation. In this connection, the Program Policy Manual also provides, “[b]ecause observations can be distorted with time and because conditions can change, all witnesses to the accident should be interviewed as soon as possible.” *Id.* at I.103-4a (1988). In addition, the MSHA Handbook Series (No. I-1 July 1988), *Investigation of Mining Accidents*, emphasizes the importance of witness statements (*id.* at 12-13), and provides for interviews of witnesses who are injured or hospitalized because of their involvement in an accident (*id.* at 35-36).

The legislative history of the Mine Act supports a broad interpretation of the Secretary’s power to investigate mine accidents and to obtain assistance from the operator. The Senate Report explicitly articulates the Secretary’s responsibility “to determine the cause of the accident and thereby prevent the future occurrence of a similar accident.” S. Rep. No. 181, 95th Cong., 1st Sess. 29 (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*, at 617 (1978) (“*Legis. Hist.*”). The Senate Report also emphasized the importance of the Secretary’s investigative power, stating: “Section [103](a) authorizes the Secretary . . . to enter upon, or through any mine for the purpose of making any inspection or investigation under this Act. This is intended to be an absolute right of entry without need to obtain a warrant.” *Legis. Hist.* at 615. In addition, the Conference Report provides in regard to present section 103(j):¹³ “Both the Senate bill and the House amendment contained substantially similar provisions, . . . requiring operators to take steps to assist in the investigation of accidents.” *Legis. Hist.* at 1325. While that statement pertains to another provision in section 103 dealing with the investigation of accidents and the preservation of evidence, Congressional intent to require operator assistance under section 103 in the investigation of mine accidents is clear.

Commission precedent also supports the Secretary’s position regarding access to accident witnesses. In *U. S. Steel Corp.*, 6 FMSHRC 1423 (June 1984), the Commission considered

¹² Because we base our holding on section 103(a), we do not address the Secretary’s alternative argument that section 103(h) obligated BHP to disclose the miner’s address and telephone number.

¹³ Section 103(j), 30 U.S.C. § 813(j), provides in relevant part that, in the event of a mine accident the operator “shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof.”

whether an operator violated section 103(a) when it restricted access to an accident scene and insisted on the presence of corporate counsel during an investigative interview of one of its foremen. In ruling that the operator violated the Act when it denied access to the MSHA investigator (who was at the mine conducting a regular inspection), we held that section 103(a) conferred broad authority on MSHA to conduct mine inspections. *Id.* at 1430-31. We also concluded that the operator violated section 103(a) when it insisted that its attorney be present during MSHA's interview of a foreman pursuant to an accident investigation, and then failed to produce the attorney or specify when he or she would be available. We held that this impeded the accident investigation in violation of section 103(a). *Id.* at 1433.

Unless the Secretary's right to be on mine property and investigate accidents is a hollow one, it must carry with it the right to interview witnesses. In the present proceeding, MSHA was lawfully at the mine site, pursuant to section 103(a)(1), to conduct an accident investigation. BHP's blanket refusal to provide Byrd's telephone number and home address, coupled with its failure to contact Byrd to get his permission to release the information (Traweek Decl. ¶ 5; Lucas Decl. ¶¶ 4-5), had the effect of unreasonably delaying the accident investigation. As a result of BHP's conduct, MSHA experienced a delay of at least one day in obtaining sufficient information to contact Byrd. 20 FMSHRC at 640-41; *see* Laufenberg Decl. ¶¶ 5, 9-12. BHP's actions in denying MSHA the information necessary for it to contact an eyewitness to a fatal accident impeded the investigation and therefore violated the Mine Act.

We are not persuaded by BHP's argument that, during an investigation, section 103(a) only requires an operator to supply MSHA with information that it is required by regulation to maintain. Nothing in section 103(a) or any other provision of the Mine Act limits the Secretary's investigative powers to such information. Moreover, it would be contrary to the purposes and policies of the Mine Act to interpret the Act in a manner that encumbers the Secretary's ability to effectively and expeditiously investigate accidents.

In opposing the Secretary's interpretation of section 103(a), BHP relies on *Donovan v. Dewey*, 452 U.S. 594 (1981), to argue that the Mine Act does not grant the Secretary authority to demand employee addresses and telephone numbers without utilizing the injunction provisions of section 108. BHP Br., Ex. 2 at 6-9. Contrary to BHP's argument, the Secretary's decision to proceed against it with a citation and penalty, instead of an injunction under section 108, is proper. In the *Dewey* case, the Secretary had successfully sought injunctive relief requiring an operator, Waukesha Lime and Stone Company, to permit entry to MSHA inspectors without a warrant. Subsequently, in *Waukesha Lime & Stone Co.*, 3 FMSHRC 1702 (July 1981), the Commission held that, even though the Supreme Court in *Dewey* had upheld the validity of warrantless inspections at Waukesha under the injunctive relief section of the Mine Act, the Commission was still required to determine whether the operator's refusal to permit an inspection was a violation of the Act for which a penalty must be imposed. *Id.* at 1703. The

Commission rejected the argument that the Secretary's exclusive remedy was under section 108(a) and held that dual remedies exist. *Id.* at 1704; *see also Tracey & Partners*, 11 FMSHRC 1457, 1462 n.3 (Aug. 1989).¹⁴

In *Dewey*, the Supreme Court upheld the Secretary's authority to periodically inspect mines, pursuant to section 103(a) of the Mine Act, without obtaining a search warrant. 452 U.S. at 602. In approving the Secretary's authority to engage in warrantless inspections of mines, the Court noted in particular the strong federal interest in improving the health and safety of mines, which a warrant requirement might impede, and the pervasive federal regulatory scheme with which mine operators must comply. *Id.* at 602-603. We recognize, as did the Court in *Dewey*, that the bounds of the Secretary's authority are not without limits, and that section 103 provides the "certainty and regularity of its application" that is a substitute for a warrant. *Id.* at 603. In this regard, section 103(a) limits the Secretary's investigatory authority to "obtaining, utilizing, and disseminating information relating to . . . the causes of accidents." 30 U.S.C. § 813(a). The telephone number and home address of a miner witness sought in the instant proceeding falls well within those bounds. By its nature, the scope of an accident investigation will be broader than a quarterly inspection. However, it is still the case that "the standards with which a mine operator is required to comply are all specifically set forth in the Act or in Title 30 of the Code of Federal Regulations." *Dewey*, 452 U.S. at 604. Those standards govern the general course of MSHA's investigation and the issuance of citations. Thus, as the Court further stated in *Dewey*: "The discretion of Government officials to determine what facilities to search and what violations to search for is . . . directly curtailed by the regulatory scheme." *Id.* at 605.¹⁵

¹⁴ The "procedural safeguards provided in the Act that allow the operator to raise privacy concerns prior to the imposition of sanctions," which BHP states are necessary to make the Secretary's inspection authority constitutional (BHP Br. at 12), are present regardless of whether the Secretary proceeds under section 108 or by issuing a citation under section 104(a). An operator who has been issued a citation can contest it, along with any proposed penalty, before an administrative law judge, as BHP did here, subject to discretionary review by the Commission and an automatic right of review by the court of appeals. *See Dewey*, 452 U.S. at 597 & n.3 and 604-05.

¹⁵ BHP relies on *Sewell Coal Co.*, 1 FMSHRC 864 (July 1979) (ALJ), to support its argument that MSHA cannot obtain information concerning employees that neither the Mine Act or regulations require it to keep. At issue in *Sewell* was the Secretary's right to review employee personnel files to verify the mine operator's accident, illness and injury reporting under Part 50. *Id.* at 865. The judge concluded "that the Mine Safety and Health Act does not authorize wholesale warrantless, nonconsensual searches of files and records in a mine office." *Id.* at 872. This case, in contrast, presents a limited request for information that would have assisted MSHA in making expeditious contact with an eyewitness to a fatal accident. MSHA is not requiring BHP or any other mine operator to maintain records or disclose information that would establish a violation of the Mine Act or the regulations. *Compare Sewell*, 1 FMSHRC at 873. Consequently, our holding is fact-specific and we do not address disclosure of other information

BHP further defends its refusal to supply Byrd's home address and telephone on the basis of its claim that the Secretary's interpretation and application of section 103(a) impinges on employee privacy and confidentiality. We conclude that, in the circumstances present here, concerns about employee privacy and confidentiality do not insulate BHP from providing a home address and telephone number for an employee who was essential to MSHA's investigation of a fatal accident.

In addressing the constitutional right of privacy,¹⁶ "[t]he Supreme Court has limited the . . . right . . . to interferences with 'a person's most basic decisions about family and parenthood . . . as well as bodily integrity.'" *California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996) (citations omitted), *cert. denied*, 517 U.S. 1216 (1996), quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992). However, it is generally accepted that "[a] phone number is not among the select privacy interests protected by a federal constitutional right to privacy." *Id.* The result is no different for an unpublished telephone number. *See id.* at 1362. Similarly, an individual's name and address is a matter of public record in motor vehicle registration and licensing records and therefore not encompassed within the right of privacy because there is no expectation of confidentiality. *Condon v. Reno*, 155 F.3d 453, 464-465 (4th Cir. 1998).

BHP has not cited any authority contrary to these principles. Instead, it cites to cases arising under the Privacy Act, 5 U.S.C. § 552a (1988 ed.) and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1997). However, these laws apply only to the dissemination of information by federal agencies. Thus, neither these statutes nor the cases litigated under them are determinative of the propriety of BHP's refusal as a private sector employer to release the telephone numbers and home address of one of its employees to MSHA during an investigation under the Mine Act.¹⁷

not at issue in this case. We also note that *Sewell*, which predates *Dewey*, was not reviewed by the Commission and, therefore, is not binding precedent. Commission Procedural Rule 72, 29 C.F.R. § 2700.72.

¹⁶ In addressing the individual's constitutional right of privacy, although not free from doubt, there appears to be sufficient authority to support BHP's standing to assert the right of privacy of its employees, as it did in the instant proceeding. *See United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 574 (1980); *see also NLRB v. British Auto Parts, Inc.*, 266 F. Supp. 368, 373 (C.D. Cal. 1966), *aff'd* 405 F.2d 1182 (9th Cir. 1968) (assuming without deciding that an employer had standing to raise the constitutional rights of its employees).

¹⁷ We find more analogous and persuasive case law under the National Labor Relations Act, involving private sector employers. When employees file a petition requesting an election to vote on union representation (*see generally* 29 U.S.C. § 159(e)), the National Labor Relations Board ("NLRB") requires an employer to supply a list of the employees in the bargaining unit in which a union election will occur and their home addresses. The NLRB, in turn, supplies that list to the petitioning union. *See Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). In *NLRB v.*

Consequently, BHP's reliance on *Department of Defense v. FLRA*, 510 U.S. 487 (1994), is misplaced. In that case, the Court held that FOIA did not require the agencies to divulge addresses, and that, accordingly, the Privacy Act prohibited their release. *Id.* at 502. However, the Court's decision was in large part based on "the negligible FOIA-related public interest in disclosure" in that case. *Id.* In contrast, as we have made clear, there is a compelling interest in MSHA's ability to conduct a thorough investigation of a mine accident. In short, BHP has not persuaded us that its employees have a right to confidentiality or privacy¹⁸ with respect to their phone number or home address that trumps the broad wording of section 103(a).

We conclude that, on the record before us, the judge erred in concluding that BHP's refusal to disclose an employee's address and telephone number did not violate section 103(a). While in this case MSHA was ultimately able to obtain Byrd's whereabouts through a relative, investigations into fatal accidents should not turn on such circumstances when an operator can supply the needed information.¹⁹

British Auto Parts, 266 F. Supp. at 373, an employer challenged the disclosure of its employees' names and addresses to the NLRB on the grounds that it violated the employees' right of privacy. The court rejected this challenge, reasoning that the NLRB's *Excelsior* rule, which mandated access to the electorate by all participants in an NLRB-conducted election, did not disclose employees' beliefs or associations, and did not require employees who were visited by union members at their homes to allow them in. *Id.* The court also dismissed the employer's argument that there was an implied right of confidentiality in the information. *Id.* at 374.

¹⁸ In addition to the federal constitutional right of privacy, an individual may have a common law tort action for damages suffered as a result of an improper invasion of privacy. Concerning this common law right of privacy, the "mere publication of a person's address, no matter what the circumstances, could not constitute an invasion of his privacy." Philip E. Hassman, Annotation, *Privacy — Publication of Address as well as Name of Person as Invasion of Privacy*, 84 A.L.R. 3d 1159, 1160 (1978). A plaintiff with an unlisted telephone number failed to make out a case of invasion of privacy where he sued the telephone company that released his address. *Montinieri v. Southern New England Tel. Co.*, 398 A.2d 1180 (Conn. 1978), *cited in* 1 A.L.R. 4th, 209, 215-216; *see* Charles C. Marvel, Annotation, *Telephone Company's Liability for the Disclosure of Number or Address of Subscriber Holding Unlisted Number*, 1 A.L.R. 4th 218 (1980). Finally, BHP has not cited any case in which an employee brought an action against an employer for release of information similar to that which was sought here.

¹⁹ Contrary to our dissenting colleague's suggestion (slip op. at 15), we do not find that the record supports that MSHA's attempt to obtain the address and telephone number of a witness to a fatal accident was "confrontational." Nor do we agree that the requested information was an "ancillary" issue (slip op. at 15), since the information was necessary to locate a key witness in an accident investigation.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision and remand the proceeding to the judge for imposition of an appropriate penalty.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Riley, concurring in part and dissenting in part:

I agree with my colleagues on the analysis and interpretation of section 103(a). However, based on the facts of this case even taken in a light most favorable to the Secretary, I cannot agree that the Secretary established that BHP impeded or interfered with MSHA's investigation. The delay in obtaining the information necessary to contact Byrd was insubstantial. Moreover, like the judge, 20 FMSHRC at 641, I note that MSHA could easily have contacted Byrd's union representative to locate him. Nor is it apparent that MSHA, working with information provided by BHP, could not have expeditiously used other sources of information, including the Internet and state drivers' license data bases, to locate Byrd without having to travel to Superior, Arizona or waiting 24 hours. Thus, I would affirm the judge in result.

James C. Riley, Commissioner

Commissioner Verheggen, dissenting:

I agree with my colleague Commissioner Riley that, for the reasons stated in his decision, the Secretary failed to prove that BHP materially impeded her investigation. *See Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987) (“In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation”); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). I therefore join with Commissioner Riley in affirming the judge in result.

But I do not join Commissioner Riley and the rest of my colleagues in their decision that the Secretary’s interpretation of section 103(a) is correct. In light of my disposition of this case, I need not, and do not, reach the merits of this issue. I note with regret, however, that the majority has neglected to place any limits on the ruling it announces today. I fear that this may be a case where bad facts make bad law.

I believe that we should encourage through our decisions the consensual exchange of information between MSHA and operators, especially when the information has anything to do with an accident at a mine. In this case, I fault MSHA for failing to attempt to obtain information on Byrd’s whereabouts in a less confrontational manner¹ — for example, by asking BHP to help arrange a meeting with Byrd.² The judge noted that Inspector Laufenberg “[did] not recall [BHP’s representatives] offering to contact Byrd to obtain his permission to release his phone number.” 20 FMSHRC at 639. But I also fail to find anything in the record to suggest that MSHA made any such request — and the agency, after all, was supposedly in the best position to make such a request initially. MSHA’s job was to obtain information regarding a fatal accident, not to take a stand on an ancillary issue such as this.

I also fault BHP for failing to offer “to contact Byrd to obtain his permission to release his phone number.” *Id.* Given the lack of any privacy interest in addresses and phone numbers (slip op. at 11), which I regard as a matter of common sense given the ease with which such information can be obtained over the Internet or elsewhere, I find BHP’s conduct in this case unfortunate. I fully appreciate the need for operators to proceed with caution in their dealings with MSHA during accident investigations because the operators and their agents face potential

¹ Confrontational, that is, insofar as a citation was issued and a litigation pursued over information that was obtained quickly from other sources with relative ease.

² Ironically, even had BHP immediately acceded to MSHA’s request, it is not at all certain that the inspectors would have found Byrd any quicker because apparently, he may have been staying with relatives. 20 FMSHRC at 636. It also appears that BHP may have needed some time to obtain the information MSHA requested. *See Lucas Decl.* at ¶ 7. Indeed, I find the majority’s statement that “[a]s a result of BHP’s conduct, MSHA experienced a delay of at least one day in obtaining sufficient information to contact Byrd” (slip op. at 9) an overstatement that is unsupported by the record.

section 104 or 110(c) liability. But here, BHP's confrontational actions go beyond any reasonable degree of caution.

From this scenario, today's decision would have better served the interests of the consensual exchange of information by assigning blame where it belongs — on *both* parties — for allowing this dispute to grow far out of proportion. Instead, the majority makes the broad pronouncement that “section 103(a) can be reasonably interpreted to require a mine operator to disclose information such as that sought here that enables MSHA to conduct an accident investigation in an expeditious manner.” Slip op. at 7-8. The Mine Act places strict limits on how the Secretary may obtain information that is not required to be kept under the Act. *See, e.g.*, 30 U.S.C. §§ 813(b) and 818(a).³ I believe that we must adjudicate disputes over where these limits lie with far greater care than that shown by the majority today.

Having found the need to reach the ultimate issue here, despite the evidentiary weaknesses of the Secretary's case, the majority ought to have at least limited the scope of its decision to addresses and phone numbers. I fear that by failing to do so, the majority has invited the Secretary to push the limits of the Mine Act further by demanding, for instance, warrantless access under section 103(a) to disciplinary and medical records contained in personnel files — and no one can deny that enormous privacy interests surround such information.⁴

Theodore F. Verheggen, Commissioner

³ I hope that in the wake of this dispute, the Secretary will move to amend her accident report regulation under which operators must investigate mine accidents and report the results of their investigations to MSHA. *See* 30 C.F.R. § 50.11(b). Section 50.11 provides that any such report must include “[t]he name, occupation, and experience of any miner involved” in the accident. The Secretary should amend this regulation to say “name and contact information” instead, under which provision BHP would have been obligated to provide to MSHA the information at issue here.

⁴ I also find the majority's reliance on *U.S. Steel Corp.*, 6 FMSHRC 1423 (June 1984), misplaced. This case arose over a disagreement concerning the ability of MSHA to obtain information without a warrant which the operator maintained in its personnel files. The *U.S. Steel* case, on the other hand, involved an operator denying MSHA physical entry to an area of its mine, as well as stalling MSHA's investigation by insisting on a right to counsel, then failing to supply such counsel in a timely fashion. I fail to see how any two cases could be any more different.

Distribution

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Mark Savit, Esq.
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

Administrative Law Judge Richard Manning
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1244 Speer Blvd., Suite 280
Denver, CO 80204