

SEPTEMBER 8, 2016 | MSHA INSPECTIONS, CITATIONS & ENFORCEMENT

Mine Employee Contact Info Fair Game For MSHA Inspectors, Review Commission Finds

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Industry has been dealt a legal setback concerning MSHA's *de facto* subpoena power, with the Federal Mine Safety and Health Review Commission (the "Commission"), in a divided stance, holding that inspectors can demand all mine employees' contact information to conduct certain types of serious probes.

[The recent decision, in MSHA v. Warrior Coal LLC](#), significantly expands the authority of Agency field staff to demand employee records, possibly making it easier to collect data to support high-level enforcement actions (i.e. proving that managers and even executives knew of dangerous conditions). While some situations call  for deep probes, Congress did not intend for MSHA to have this far-reaching ability to contact individual workers outside the workplace.

The decision, rejects Warrior's argument that the Mine Act provides very narrow subpoena power to the Secretary of Labor and MSHA, and does not authorize MSHA to issue administrative subpoenas during an investigation. Rather, the Commission granted MSHA the ability to enforce what is essentially subpoena power through section 103(h) of the Act, whenever the agency's requests are determined to be "reasonable."

As one Commissioner said in a sharply worded dissent, the ruling gives MSHA vast new subpoena powers even at the lowest administrative levels – and even tramples on mine operators' Fourth Amendment rights.

Data Demand Sparks Dispute

The decision stems from an MSHA citation to Warrior Coal, following the company's failure to comply with a data request from Agency investigators. The probe started after an inspector observed miners working in close contact to "multiple hazardous roof and rib conditions," the decision states.

Investigators, suspecting that hazardous conditions may recur over work shifts, launch a 110(c) investigation (the part of the Mine Act that addresses liability for corporate directors, officers and agents). MSHA sought data regarding the position, shifts worked, and contact information for **each mine employee**. MSHA made the request pursuant to section 103(h) of the Mine Act (the relevant part of the statute), requiring operators to:

"... provide such information, as the Secretary ... may reasonably require from time to time to enable him to

perform his functions under this Act.”

Warrior contested the citation and the order before the Commission, arguing that not only does section 103 not compel a mine operator to give MSHA contact information of its employees, but the order also violated an MSHA policy manual stating that miner participating in interviews is “voluntary.”

However, the Commission affirmed an administrative law judge’s decision to uphold the citation and penalty and order the company turn over the employee data.

Several key findings come out of this decision. Broadly the Commission finds that 103(h) permits MSHA to request the employee data, though the Agency must be able to defend it as a reasonable request.

MSHA’s policy handbook dealing with special investigations, which states “all information is voluntary and may be refused” cannot be used by the operator as a basis to refuse the request: “the argument would give any operators carte blanche to refuse to participate in an MSHA special investigation, which would eviscerate MSHA’s ability to conduct a meaningful inquiry.” Rather, that section details the rights of mine employees to decline participation, the decision says.

Also worth noting: the decision is significant in the Commission finding it permissible for MSHA to exercise its 104(b) authority (failure-to-abate orders) even if the inspector determines no discrete location in the mine is affected. Warrior had argued that 104(b) could only be used if a specific area of the mine was affected, after MSHA issued a 104(b) labeled “no area affected” regarding Warrior’s refusal to provide the requested records. Although this clause rendered useless the immediate withdrawal component of the 104(b), MSHA maintained the authority to issue penalties each day until Warrior provided the records.

Overall MSHA assumes a great deal more authority than the Mine Act intended, with the Commission majority giving the Agency wide latitude.

Impact of *Big Ridge*

The Commission found some precedent for this ruling, however, by hearkening to its earlier *Big Ridge* decision (2012) which dealt with the Agency’s data-collecting authority. That case involved citations issued during an audit of accident, injury and illness reports.

As the Commission majority explained that ruling: “In *Big Ridge* we made clear that the Secretary has broad authority to request information from mine operators.” The earlier decision, they pointed out, provides:

“clear instructions that ‘information’ that is not specifically required to be maintained by the act shall, nonetheless, be provided to the Secretary to enable her to perform her functions, as long as the request is *reasonable*” (emphasis added).

The Seventh Circuit later upheld *Big Ridge*, saying section 103 “unambiguously requires mines to provide MSHA with records, reports and information beyond what mines are otherwise required to maintain.”

Commissioners in the *Warrior* case used similar reasoning, with Jordan (chairman), Cohen and Nakamura signing the majority opinion, and Commissioner Althen concurring. In a strong dissent, Commissioner Young argued that

the decision amounts to “legal error and a breach of trust” by granting the Agency powers that Congress clearly withheld.

Young also objected to the parallels with *Big Ridge*, saying that decision dealt with an information request directly from the MSHA administrator, whom Congress intended to exercise discretionary powers under the Act.

But the type of document request in *Warrior* was “not similarly graced,” Young wrote, saying that the majority, invited by the Seventh Circuit, was seeking to “engage in an alarming and unconstitutional expansion of the law, and to permit the kind of low-level policy freelancing the Supreme Court has expressly disapproved on Fourth Amendment grounds.”

While it remains possible to challenge the Commission’s decision in court through an appeal of *Warrior* or a similar case, as it stands currently, we can expect more vigorous requests and exercise with the agency’s *de facto* subpoena activity for employee records in pursuit of 110(c) cases.

Mine operators should do everything they can to be prepared for such wide-ranging requests for employee data as the ripple effects of this decision become clear. They should also be aware that MSHA may be emboldened to issue failure-to-abate citations over refusals to comply.