Mine Commission Upholds Safety Agency's Demand for Records in Split Decision

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Practices

Workplace Safety and Health

The Federal Mine Safety and Health Review Commission has upheld a judge's decision favoring the government over a Western Kentucky coal operator who had refused to honor a directive to provide federal authorities with a roster of its employees. However, two commissioners dissented, asserting the government trampled on the operator's constitutional rights. *Sec'y of Labor – MSHA v. Warrior Coal, LLC*, Docket Nos. KENT 2011-1259-R, 2011-1260-R and 2012-705 (May 17, 2016).

The majority relied heavily upon a 2012 Commission decision, upheld by an appeals court, which said the Mine Safety and Health Administration had authority to cite Illinois operator Big Ridge, Inc. for the coal producer's refusal to provide MSHA with medical records and payroll information. MSHA had sought the documents to facilitate an agency audit of the operator's accident, injury, and illness records.

The Kentucky case was sparked by an inspector's enforcement action in May 2011 against Warrior Coal, LLC after the inspector allegedly found multiple unsafe roof and wall conditions at the company's Cardinal Mine. Based on MSHA's suspicion the conditions had existed over several shifts, the agency launched a special investigation to try and determine if liability for the alleged problems extended to corporate officials. To that end, the agency directed Warrior to supply it with the names and contact information of every mine employee. Warrior balked, triggering an MSHA citation for failure to provide the information. In the face of continued operator resistance, MSHA then issued a failure to abate order. Warrior appealed.

In 2013, a judge ruled for MSHA, calling the agency's request "reasonable and for a legitimate government purpose." The judge relied, in relevant part, on Section 103(h) of the Mine Act, which requires operators to "provide such information, as the Secretary [of Labor] . . . may reasonably require from time to time to enable him to perform his functions under this Act." The judge's final order included a $555 fine.

On appeal to the five-member Commission, Warrior argued that Section 103 does not give MSHA authority to compel Warrior to provide contact information on its employees to MSHA investigators. In addition, Warrior contended that the Commission's *Big Ridge* decision was limited to the "relevant and necessary" language in Part 50.41, a regulatory provision addressing verification of reports.

The Commission majority disagreed. It noted that the appeals court in *Big Ridge* did not restrict itself to the language of Part 50; rather, the U.S. Court of Appeals for the Seventh Circuit (in Chicago) held that Section 103(h) gave MSHA wide latitude, so long as its demand represented a reasonable attempt to fulfill the agency's statutory responsibilities. Agreeing with the judge, the commissioners said MSHA's request to Warrior was reasonable. Warrior was directed to pay the fine and, unless it had already done so, to provide the information as well.

The Commission majority observed the Seventh Circuit stated that although the Mine Act does not give MSHA administrative subpoena authority during an investigation, MSHA's power to request information under Section 103(h) amounts to an administrative subpoena. "Our determination that the Secretary's request is reasonable is fully consistent with the broad authority the federal courts have accorded agencies' enforcement of administrative subpoenas," the majority wrote.

In dissent, Commissioner Michael Young said the majority's decision was based on a "mistaken assumption." Congress, he said, gave MSHA no such authority, and what is more, lawmakers also designed the law "to preclude any inferences in favor of that power." The Commissioner seemed especially troubled that the request was an "unbounded inquisition" that appeared to be a classic – and forbidden – "fishing expedition" into the operator's affairs. Pointing to *Donovan v. Dewey*, a 1981 Supreme Court decision involving inspections under the Mine Act, Young contended that the agency's request "disregards *Donovan* and its constitutional underpinnings" under the Constitution's Fourth Amendment, which protects businesses against what the Court called "'unbridled discretion [of] executive and administrative

officers.'"

Commissioner William Althen concurred with the majority opinion, but noted separately that Warrior was not offered a hearing before being assessed a proposed civil penalty for failing to comply with the roster demand. "The right to a fair hearing at a meaningful time and in a meaningful manner is a fundamental requirement of the due process clause of the Fifth Amendment," Althen said. He suggested constitutional concerns could be assuaged if in the future MSHA issued a technical violation over a demand for documents, followed by an expedited hearing for the operator on the matter.

Ironically, despite its insistence it needed employees' contact information to complete its special investigation, MSHA apparently finished its corporate liability inquiry without ever receiving the information, according to Althen. He added that if the case were analogous to an administrative subpoena (as the majority contended), then when MSHA closed its investigation, the motion the agency made to compel compliance with a subpoena would have become moot. The outcome also means Warrior must pay a penalty for a citation that was rendered worthless when MSHA closed its inquiry.

Jackson Lewis can provide an in-depth analysis of this ruling and its implications for those under MSHA jurisdiction.