

ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH  
REVIEW COMMISSION

WARRIOR COAL, LLC,	)	
	)	
Petitioner	)	Docket Nos. KENT 2011-1259-R
	)	KENT 2011-1260-R
v.	)	KENT 2012-705
	)	
SECRETARY OF LABOR,	)	
MINE SAFETY AND HEALTH	)	
ADMINISTRATION,	)	Mine: Cardinal Mine
	)	
Respondent.	)	

RESPONSE BRIEF OF THE SECRETARY OF LABOR

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## STATEMENT OF THE ISSUES

1. Whether, during an investigation by the Mine Safety and Health Administration (“MSHA”) into possible knowing and willful violations of the Federal Mine Safety and Health Act of 1977 (the “Mine Act” or the “Act”) by a corporate mine operator and its agents, the operator must provide to MSHA the names and basic contact information of miner witnesses upon MSHA’s request for such witness information.

2. Whether MSHA may issue an order pursuant to Section 104(b) of the Act for a mine operator’s failure to timely abate a violation when such order does not require the withdrawal of miners from any area of the mine.

## STATEMENT OF THE CASE

### 1. Statutory and Regulatory Background

The Mine Act establishes a comprehensive federal regulatory program for the purpose of improving and promoting safety and health in the Nation’s mining industry. 30 U.S.C. § 801 (“[T]here is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation’s coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines.”). *See generally Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (holding that the Mine Act establishes a warrantless inspection scheme); *Big Ridge, Inc. v. Fed. Mine Safety & Health Comm’n*, 715 F.3d 631, 634 (7th Cir. 2013) (“Congress passed the 1977 Mine Safety Act to strengthen the government’s ability to ensure mine safety” and “found

that the stronger Mine Safety Act was needed because earlier laws had proven too weak and mines still had appalling safety records.”).

The Secretary of Labor (“the Secretary”) is charged with administering and enforcing the Mine Act through the promulgation of mandatory health and safety standards, 30 U.S.C. § 802, the regular inspection of mines, *id.* at § 813(a), and the investigation of mine accidents, claims of discrimination, and possible knowing or willful violations of the Act, *id.* at §§ 813(a); 815(c); 820(c). The Secretary’s inspection and investigation authority under Section 103(a) is “broad,” *Big Ridge*, 715 F.3d at 641, and serves multiple purposes, including

(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, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, 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.

30 U.S.C. § 813(a).

In order to assist the Secretary in carrying out these duties, mine operators must “provide such information, as the Secretary ... may reasonably require from time to time to enable him to perform his functions under the Act.” 30 U.S.C. 813(h). MSHA is not required to identify ahead of time in notice-and-comment rulemaking the information that it will require of mine operators; instead, under Section 103(h) MSHA may demand the information from operators that will “enable him to perform his functions under the Act” as long as this requirement is “reasonable.” As the Seventh Circuit recently explained:

Section 103(h) provides that MSHA may “reasonably require” mines to produce non-required records when the additional information would enable MSHA “to perform its functions” under the Act. This text permits MSHA to make information demands for a wide range of purposes – any reasonable requirement that would help MSHA fulfill the purposes of the Mine Safety Act.

*Big Ridge*, 715 F.3d at 641.

As is true when the Secretary is denied entry to a mine site, the Act grants MSHA a dual remedy if a mine operator refuses to provide information that the Secretary reasonably requests in order to perform his statutory duties. *Sec’y of Labor v. BHP Copper, Inc.*, 27 FMSHRC 758, 766-67 (July 1999). The Secretary may issue a Section 104(a) citation for a violation of Section 103(h) of the Act, which may be challenged by the operator in proceedings before the Federal Mine Safety and Health Review Commission (“the Commission”), with a right of appeal to a federal circuit court of appeals. *See generally Big Ridge*, 715 F.3d at 634 (reviewing a Section 104(a) citation issued under Section 103(h) for an operator’s failure to provide information required by the Secretary). In addition, the Secretary may institute a civil action in district court pursuant to Section 108 of the Act in a number of circumstances, including when an operator or his agent “(B) interferes with, hinders, or delays the Secretary ... in carrying out the provisions of this Act, ... (E) refuses to furnish any information or report requested by the Secretary ... in furtherance of the provisions of this Act, or (F) refuses to permit access to, and copying of, such records as the Secretary ... determines necessary in carrying out the provisions of the Act.” 30 U.S.C. 818(a)(1).

The present case involves an investigation by the Secretary to determine (1) whether a corporate mine operator “willfully” violated the mandatory safety standards pertaining to rib control and preshift examinations in violation of Section 110(d) of the Act, 30 U.S.C. § 820(d) and/or (2) whether any agent of a corporate operator “knowingly authorized, ordered, or carried out” a violation of those mandatory standards in violation of Section 110(c) of the Act, 30 U.S.C. § 820(c). “Willful” violations by mine operators or “knowing” violations by their agents are punishable by civil money penalties and criminal sanctions. 30 U.S.C. §§ 820(a); 820(c); 820(d).

## 2. Factual Background

### A. *The Underlying Roof Control and Preshift Examination Violations*

Warrior Coal, LLC operates the Cardinal Mine (“the mine”), an underground coal mine in Hopkins County, Kentucky. On May 10, 2011, an MSHA inspector found serious and extensive roof and rib control problems on the #2 unit of the 2nd West Panel of the mine. Throughout the active working section the inspector found adverse roof features including slickensides, clay veins, stack rock, and loose draw rock. Ex. A.<sup>1</sup> The mining height was excessive, surpassing more than eleven feet in places. Ex. B. There were loose ribs along the length of the last open crosscut of the working section beginning in the #1 entry and continuing across to the #5 entry. Ex. A. In the last open crosscut between the #1 and #2 entries, a large rock measuring three feet by four feet by 18 inches had fallen. Ex. A.

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<sup>1</sup> Citations to alphabetical exhibits refer to the exhibits attached to the Secretary’s motion for summary decision. Citations to numerical exhibits refer to the exhibits attached to the operator’s motion for summary decision.

The risk to miners posed by the deteriorating roof and rib conditions was immediate. The inspector noted that the roof and ribs in the section were “still working.” *Id.* Indeed, the inspector issued an oral imminent danger order pursuant to Section 107(a) of the Act to remove the roof bolters from the vicinity of a loose corner in the #3 entry. Ex. E. When pulled down, the loose rock was found to measure up to five feet in length, three feet thick, and two feet wide. Ex. E.

In addition to the imminent danger order, the inspector issued an “unwarrantable failure” citation pursuant to Section 104(d)(1) of the Act for a violation of 30 CFR § 75.202(a), a standard requiring that roof and ribs in an underground coal mine be “supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” The inspector noted in the citation narrative that a face boss and a mine foreman were present on the working unit at the time the poor rib conditions were found. Ex. A.

In addition, the inspector issued a withdrawal order pursuant to Section 104(d)(1) of the Act for an “unwarrantable failure” to comply with 30 CFR § 75.360, a standard requiring that a certified person to conduct a preshift examination within three hours of each shift “to examine for hazardous conditions” in several essential areas, including “working sections.” The inspector indicated in the order that, although the hazardous rib conditions had existed for at least three shifts, none of them had been noted in the preshift examination record book. Ex. B.

As a result of the poor conditions, the operator ceased mining in the affected area from entry #1 through entry #5. Ex. A.



B. *MSHA's Section 110 Investigation*

Based on the serious rib control and preshift examination violations discovered on May 10, 2011, MSHA opened an investigation to determine whether the violations of the mandatory safety standards were committed willfully or knowingly. By letter of June 21, 2011, MSHA requested in writing that Warrior Coal provide the names, positions, shifts worked, home addresses, and telephone numbers of the employees at Cardinal Mine. Ex. G. In the letter, MSHA informed Warrior Coal that its information request was part of an agency investigation of a "possible willful/knowing violation" under Section 110. *Id.*

Warrior Coal, through corporate counsel at its parent corporation, Alliance Resource Partners, LP ("Alliance"), objected to the information request by letter dated June 28, 2011. Ex. H. In his letter, corporate counsel acknowledged that MSHA had requested the names and contact information of the miners as part of a Section 110 investigation, but declined to provide the information until the MSHA District Manager provided "more details regarding the alleged 'possible willful/knowing violation' and the precise events that caused you, as District Manager, enough concern to initiate a special investigation." *Id.* at 2. Corporate counsel went on to state that the contact information was "not required to be kept by Warrior under the Mine Act," and that, by seeking this information from Warrior rather than directly from miners, MSHA was "side-step[ping]" the right of miners to not provide their contact information to MSHA. *Id.* at 3.

On June 29, 2011, MSHA again requested the information from the operator, reiterating that the information was being sought in reference to a Section 110 investigation. Ex. I. MSHA attached to its June 29 letter a copy of the Commission's decision in *BHP Copper*, which held that a mine operator is obligated under Section 103(a) of the Act to provide the address and telephone number of miner witnesses to MSHA where that information is needed to enable MSHA to conduct an effective investigation in a timely manner. 21 FMHSRC at 764-65.

On July 1, 2011, Alliance's corporate counsel again declined in writing to provide the names and contact information for Warrior Coal's employees. Ex. J. In the July 1 letter, corporate counsel indicated that Warrior Coal would provide the names and contact information for its employees only if MSHA first allowed Warrior Coal to approach the miners directly regarding MSHA's information request. Corporate counsel indicated that, at the time Warrior Coal would inform the miners of MSHA's Section 110 investigation, provide them with a "review of the miners' rights, including the miners' right to voluntarily choose whether or not they provide personal information to MSHA," and inquire whether the miners wished to execute signed authorizations for the release of their contact information to MSHA. *Id.* at 2. The letter went on to state that MSHA's current approach -- demanding the contact information from Warrior Coal without authorizations from the miners -- violated federal and state law and could result in litigation by Warrior Coal and miners against MSHA and its personnel. *Id.* at 3 ("Warrior believes such actions by MSHA (or MSHA officials acting in their individual capacities) can and should be

construed as a violation of federal and state law, for which Warrior and/or its miners could potentially seek damages.”).

On July 6, 2011, MSHA again requested the employee information in writing and explained that the subject of the Section 110 investigation was the Section 104(d)(1) citation and Section 104(d)(1) order issued on May 10, 2011. Ex. K.

On July 12, more than three weeks after the original information request, Alliance’s corporate counsel again declined in writing to provide the requested information. Corporate counsel stated that MSHA had already been provided with the names (but not the contact information) for the miners who were assigned to the #2 unit during the May 10 shift when the inspector issued the underlying citation and order, and suggested that MSHA had no reason to require additional information pertaining either to those miners or any other miners. Ex. L at 2. Even as he maintained that Warrior Coal was “not refus[ing]” to provide information to MSHA, corporate counsel repeated his prior characterization of MSHA’s information demand as “nothing more than an end-run around the miners’ rights of every miner working at Warrior’s Cardinal Mine.” Ex. L at 2 (emphasis in original).

On July 14, MSHA issued a Section 104(a) citation to Warrior Coal for its failure to produce the requested names and contact information for Cardinal Mine employees during the course of the Section 110 investigation. Ex. M. After the citation was issued, the operator continued to withhold the requested contact information. When the time fixed for abatement in the citation expired, the

inspector determined that there was no justification for granting any additional time to allow the operator to comply given the position taken by Warrior Coal. Accordingly, he issued a Section 104(b) order for failure to timely abate the violation. Ex. N. Warrior Coal contested the Section 104(a) citation and Section 104(b) order the next day.

On July 27, 2011, corporate counsel wrote another letter to MSHA in which he alleged that the citation and order “should never have been issued” and “should be vacated immediately.” Ex. 10. In the letter, corporate counsel faulted MSHA for not availing itself of the option that he had proposed in his July 1 letter -- the option to have Warrior Coal managers approach miners directly to inform them of the Section 110 investigation, advise them of the voluntary nature of MSHA interviews, and inquire if they wished to execute signed releases. *Id.* Corporate counsel then wrote that Warrior Coal had unilaterally gone ahead with this proposal with the result that 52 miners, approximately 15% of the total number of miners, agreed to release their information. *Id.* Accordingly, corporate counsel indicated that Warrior Coal would provide MSHA with a “spreadsheet that provides the names, current home address, and current home telephone numbers” of the 52 miners who had agreed to the release of such information, but not the information of the remaining 85% of employees. Corporate counsel stated that the employee contact information provided on the spreadsheet had been “on file with Warrior.” *Id.*

### 3. The Judge's Decision

During contest proceedings before the administrative law judge (“ALJ”), both parties moved for summary decision in cross-motions. The ALJ granted the Secretary’s motion. In so doing, the ALJ followed the Commission’s holding in *Big Ridge* that Section 103(h) of the Act requires operators to comply with “reasonable requests for information” made by MSHA. ALJD at 6 (citing *Big Ridge*, 34 FMSHRC 1003, 1012-13 (May 2012), *aff’d*, 715 F.3d 631 (7th Cir. 2013)). The ALJ found that MSHA’s information request was “reasonable and for a legitimate government purpose.” ALJD at 6-7. The ALJ noted that MSHA believed the extensive rib control violations that were found on May 10 had existed for multiple shifts, and that MSHA needed to contact miners in order to perform its investigation. ALJD at 7. The ALJ found that a request for the basic contact information of its employees “placed almost no burden on Warrior,” reasoning that any employer maintains basic contact information for its employees for “any number” of business reasons. ALJD at 7.

The ALJ further held that Section 104(b) of the Act authorizes the issuance of failure to abate orders even though the inspector had concluded that there was “no area affected” by the failure to timely abate the violation. The ALJ based his decision on the Secretary’s interpretation and Commission precedent, as well as policy reasons. ALJD 8-9 (finding that a “no area affected” Section 104(b) order “creates balance in inducing operators to abate violations, while acknowledging that miners are not necessarily endangered by every infraction”).

## ARGUMENT

### I.

#### PRINCIPLES OF STATUTORY INTERPRETATION AND DEFERENCE

This case involves questions of statutory interpretation which are governed by the two-step analysis that applies when a court reviews an agency's construction of the statute which it administers. First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. *City of Arlington, Tex. v. FCC*, \_\_ U.S. \_\_, 133 S.Ct. 1863, 1868 (2013) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). To determine whether the statute's meaning is plain, the court begins with a reading of the text itself, including the language and design of the statute as a whole. *Wolf Run Mining Co. v. Fed. Mine Safety & Health Review Comm'n*, 659 F.3d 1197, 1200 (D.C. Cir. 2011) (quoting *City of Tacoma v. FERC*, 331 F.3d 106, 114 (D.C. Cir. 2003)). If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *City of Arlington*, 133 S.Ct. at 1863 (quoting *Chevron*, 467 U.S. at 842-42).

If the statute is silent or ambiguous with respect to the specific issue, the question for the court is “whether the agency's answer is based on a permissible construction of the statute” and therefore entitled to deference. *City of Arlington*, 133 S.Ct. at 1863; *Wolf Run Mining*, 659 F.3d at 1200-01 (quoting *Chevron*, 467 U.S. at 843). Under the split enforcement and adjudicative scheme of the Mine Act,

the Commission and the courts owe deference to the Secretary's permissible construction of the Mine Act when the statutory terms are silent or ambiguous with respect to a specific issue. *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 5-6 (D.C. Cir. 2003) (citing *Sec'y of Labor ex rel. Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989)). In the statutory scheme of the Mine Act, "the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a ... health and safety standard,' and is therefore deserving of deference." *RAG Cumberland Res. v. Fed. Mine Safety & Health Review Comm'n*, 272 F.3d 590, 596 n.9 (D.C. Cir. 2001) (quoting *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991)). Accord *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 5 (D.C. Cir. 2003); *Pattison Sand Co. v. Fed. Mine Safety & Health Review Comm'n*, 688 F.3d 507, 512 (8th Cir. 2012); *Vulcan Constr. Materials, LP v. Fed. Mine Safety & Health Review Comm'n*, 700 F.3d 297, 312-16 (7th Cir. 2012). But see *North Fork Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 691 F.3d 735, 742-43 (6th Cir. 2012) (according *Skidmore* deference to the Secretary's litigating positions).

Because the Mine Act is remedial in nature, its terms are to be "construed broadly" to effectuate its safety purpose. *Pattison Sand*, 688 F.3d at 513 (citing *Cannelton Indus.*, 867 F.2d at 1437).

## II.

### THE OPERATOR VIOLATED THE ACT BY FAILING TO COMPLY WITH MSHA'S REASONABLE REQUEST FOR THE NAMES AND CONTACT INFORMATION OF THE OPERATOR'S EMPLOYEES DURING THE SECTION 110 INVESTIGATION

The information request at issue in this case – requiring a mine operator to provide the names and contact information of potential witnesses in its employ – goes to the heart of MSHA's ability to conduct effective investigations. Section 103(h) obligates a mine operator to provide to the Secretary, upon reasonable request, the information that will enable the Secretary to perform his statutory duties, including the duty to conduct investigations. 30 U.S.C. § 813(h); *Big Ridge*, 715 F.3d at 631. As the Commission has already held, obtaining the home address and telephone number of prospective witnesses is “absolutely essential to MSHA's ability to conduct a thorough and effective investigation.” *BHP Copper*, 21 FMSHRC at 765 (finding that an operator's duty to supply witness contact information is implied by Section 103(a), since without such information the Secretary would not have timely access to witnesses and his investigative functions would be impeded). As discussed in greater detail below, the requested witness information would have enabled the Secretary to conduct an effective Section 110 investigation, and his request was reasonable and imposed little burden on the operator. Therefore, Warrior Coal violated Section 103(h) when it failed to provide the requested information regarding its employees.<sup>2</sup>

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<sup>2</sup> In *BHP Copper*, the Commission relied exclusively on Section 103(a) to reach its conclusion that the Act requires an operator to provide witness contact information to the Secretary during investigations. 21 FMSHRC at 765 n.12. Consistent with that view, the



Warrior Coal proffers a number of explanations for why its refusal to provide the requested information did not violate the Act. These fall into two general categories that dispute (1) the meaning of Section 103(h) and (2) the reasonableness of the Secretary's information request. First, Warrior Coal contends (a) that Section 103(h) does not obligate operators to provide information to the Secretary unless the Secretary has promulgated a regulation regarding the information he is seeking, and (b) that the Judge should have used a "relevant and necessary" standard rather than the "reasonable and for a legitimate government purpose" standard when evaluating the Secretary's information request. Second, Warrior Coal suggests that MSHA's information request was not reasonable because, in Warrior's view, MSHA investigators could have conducted an effective Section 110 investigation by either (a) approaching miners at the mine site regarding their willingness to be contacted at a later time for off-site interviews, or (b) allowing Warrior Coal to approach

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inspector's citation in the present case alleged a violation of Section 103(a), not Section 103(h). However, it is not accurate to state that "Section 103(h) was not advanced as the provision violated by Warrior in this case." Br. at 8 n.4. In both the Secretary's motion for summary decision and his response to Warrior's motion for summary decision, the Secretary invoked Section 103(h) as an alternate basis for establishing Warrior Coal's liability for its failure to provide the requested information. Sec'y's MSD at 7, 10, & 11; Sec'y's Resp. to Resp.'s MSD at 2-5. The Judge agreed, and affirmed the citation based largely on Section 103(h) and a recent Commission decision applying that provision of the Act. ALJD at 6-8 (citing *Big Ridge*, 34 FMSHRC 1012-13).

The Commission could affirm the citation in this case as a violation of Section 103(a), as it did in *BHP Copper*, or in the alternative, it could affirm the citation as a violation of Section 103(h), as the Secretary argued below and argues now on appeal. The Secretary may allege alternative violations as long as the operator is able to "discern what conditions require abatement" and can "adequately prepare for a hearing on the matter." *Empire Iron Mining P'ship*, 29 FMHSRC 999, 1003 (Dec, 2007) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993)). Those conditions were met here because the Secretary repeatedly invoked Section 103(h) as his authority for the information request during the summary decision motions practice, and because the method for abating the violation under either provision of the Act was to provide the requested information.

miners directly to inquire about their willingness to be contacted by MSHA regarding possible knowing and willful violations by the operator and its agents. As discussed in turn below, none of Warrior Coal's arguments are convincing.

1. Under Section 103(h), a Mine Operator Must Provide, Upon Reasonable Request, Information that Will Enable the Secretary to Perform His Functions, Whether or Not a Prior Rulemaking Required Such Information to be Provided

First, Warrior Coal mistakenly suggests that the Secretary must promulgate a regulation "pursuant to notice-and-comment rulemaking that deal[s] directly with the records being requested" in order to require an operator to provide information. Br. at 5. The Judge was wrong to rely on the Commission and court decisions in *Big Ridge*, Warrior Coal asserts, because the Secretary's "authority to demand the production of records" in that case "derived from a regulation that specifically authorized MSHA to inspect and copy records relating to Part 50 audits." Br. at 5.

The Commission and the Seventh Circuit already rejected this precise argument in *Big Ridge* in decisions that were based on the statutory text. 34 FMHSRC at 1012 ("The language of section 103(h) does not limit the Secretary's access only to records that are specifically required to be maintained or prescribed by regulation, but instead gives her authority to request whatever information she deems relevant and necessary."). Section 103(h) states that, "in addition to such records as are specifically required" by the Act, an operator must produce such information as the Secretary "may reasonably require from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h). Given the wording of Section 103(h), the Commission determined that the Secretary could require mine operators

to provide information “from time to time,” regardless of whether a regulation also required such information. *Id.* at 1012-13 (“[S]ection 103(h) creates a legitimate basis for enforcement of reporting requirements even without the Part 50 rules.”).

The Seventh Circuit agreed entirely. As the court observed,

[S]ection 813(h) does not indicate that MSHA must promulgate a specific regulation via notice-and-comment rulemaking any time it wishes to make records subject to section 813(h). The section does not say MSHA ‘may reasonably require through rulemaking’ but instead says only ‘from time to time.’ We interpret the phrase as more likely to mean that demands may be made from time to time.

715 F.3d at 643.

Second, Warrior Coal contends that the Judge erred by evaluating the Secretary’s information request under a “reasonable and for a legitimate government purpose” standard when, according to Warrior Coal, he should have used the “relevant and necessary” standard discussed in *Big Ridge*. Br. at 5-6. As an initial matter, it is not apparent that there is a meaningful distinction between these standards, but assuming for the sake of argument that there is, the “reasonableness” standard used by the Judge comports with *Big Ridge*. As the Seventh Circuit stated, “Section 103(h) provides that MSHA may ‘reasonably require’ mines to produce non-required records when the additional information would enable MSHA ‘to perform its functions’ under the Act.” 715 F.3d at 641 (quoting 30 U.S.C. § 813(h)). This formulation, which tracks the statutory language, appears to be substantially identical to the standard used by the Judge in this case: “reasonable and for a legitimate government purpose.”

The Seventh Circuit addressed the “relevant and necessary” standard in *Big Ridge* only because the Secretary had alleged a violation of both Section 103(h) and, in the alternative, 30 CFR § 50.41, a regulation requiring an operator to provide to the Secretary such information as is “relevant and necessary” to determine compliance with the Part 50 accident and injury reporting regulations. But it is unmistakable both from the plain language of Section 103(h) and from repeated statements in *Big Ridge* that the touchstone for evaluating the Secretary’s information requests is indeed “reasonableness.” *E.g.*, 715 F.3d at 641 (“[Section 103(h)] permits MSHA to make information demands for a wide range of purposes – any *reasonable* requirement that would help MSHA fulfill the purposes of the Mine Safety Act”) (emphasis added); *id.* at 641-42 (“Section 813(h) permits MSHA to require mines to produce documents not otherwise required to be maintained as long as it does so ‘*reasonably*’ and in order to ‘enable it to perform its functions under the Act.’”) (emphasis added); *id.* at 642 (“[S]ection 813 gives MSHA the authority to make *reasonable* records demands that it deems necessary to fulfill its purposes under the statute...”) (emphasis added); *id.* at 643 (“We read the plain text of the statute as not requiring MSHA to promulgate specific rules whenever it wants to be able to make *reasonable* demands for records under section 813(h).”) (emphasis added). The “reasonable and for a legitimate government purpose” standard used by the Judge was correct.

2. MSHA's Request for the Names and Contact Information of Mine Employees Was Reasonable

Obtaining the names and contact information for prospective witnesses enables MSHA to perform effective and efficient investigations, and MSHA's request for such information from Warrior Coal was reasonable.

First, obtaining the home contact information of potential witnesses allows MSHA to improve the accuracy of its investigations, since miners may be more candid when they are interviewed off of the mine site away from operator or coworker observation. The concern about improper influence from managers or other persons during MSHA investigations is not speculative. Unfortunately, experience shows that an operator who suspects that a miner has communicated with MSHA may take retaliatory action. *See Moses v. Whitley Devel. Corp.*, 4 FMSHRC 1475, 1481 (Aug. 1982) (affirming a Section 105(c) discrimination violation where the miner was discharged because the operator suspected that he had reported an accident to MSHA). Similarly, a mine operator may attempt to pressure a miner to make false statements during upcoming MSHA interviews in an effort to influence the outcome of the investigation. *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 959 (D.C. Cir. 1984) (affirming a Section 105(c) discrimination violation where the miner was discharged because she refused management requests to provide a false statement to an MSHA special investigator). Indeed, the risk of operator interference during an MSHA investigation may be especially acute during Section 110 investigations, the express purpose of which is to determine if a

corporate operator or any of its agents should be held civilly or criminally liable for knowing or willful violations of mandatory standards. 30 U.S.C. §§ 820(a), (c), & (d).

Obtaining off-site contact information for an operator's employees is a prophylactic measure that serves the same purposes as the Commission's rule that prohibits judges from ordering the disclosure of miner informant identities except in "extraordinary circumstances." 29 CFR § 2700.61. The "miner informant privilege" embodied in Procedural Rule 61 is based on the "well-established right of the government to withhold from disclosure the identity of persons furnishing information of violations of the law to law enforcement officials." *Sec'y of Labor ex rel. Logan v. Bright Coal Co.*, 6 FMSHRC 2520, 2522 (Nov. 1984) (citing *Roviaro v. United States*, 353 U.S. 53, 59 (1957)). Miners will be less likely to cooperate with investigators if they fear their status as informants will be revealed, whether during preliminary MSHA investigations or during the course of litigation before the Commission. Making contact with miner witnesses away from the mine site is an important way for the Secretary to reduce the likelihood that mine managers or other third parties will learn about a miner's informant status, the same purpose served by Procedural Rule 61 during Commission proceedings.

In addition, obtaining the names, job positions, and assigned shifts for *all* of Warrior Coal's employees would have enabled the Secretary to efficiently identify and interview prospective witnesses. By obtaining such information at the beginning of its investigation, MSHA could have readily identified and contacted those individuals with pertinent information, and, as the investigation progressed

and more facts became known, it could have expanded its list of miners to be interviewed without alerting the mine operator to the direction of the Section 110 investigation or the identities of new interviewees.

In correspondence to MSHA, corporate counsel opined that MSHA had enough information to conduct its Section 110 investigation once Warrior Coal provided the names of the miners who were working on the #2 unit at the time the inspector found the violations. Ex. L at 2. Such a suggestion does not account for the nature and scope of Section 110 liability. An agent of an operator commits a “knowing” violation under Section 110(c) if he “fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.” *Cougar Coal*, 25 FMSHRC at 517. At the beginning of its Section 110 investigation, MSHA could not have known how long the rib control and preshift examination violations had existed, which agents knew or had reason to know of their existence, and whether the violations occurred because of broader practices occurring elsewhere at the mine site beyond the #2 unit. Accordingly, MSHA could not have known the identities of all employees who had pertinent information regarding these issues, and it reasonably requested the information for all employees so that it could conduct an efficient and complete investigation without having to return to the operator with additional information requests each time it identified a new group of potential witnesses.

When determining the reasonableness of the Secretary’s information request, it is important to consider that the request was not onerous. *In re Admin.*

*Subpoena*, 253 F.3d 256, 268 (6th Cir. 2001) (determining the reasonableness of an administrative subpoena by balancing the likely relevance of documents against the burden of their production).<sup>3</sup> As the Judge found, it “placed almost no burden” on Warrior Coal to provide employee contact information because any employer must maintain such information in order to conduct its business. ALJD 7. Corporate counsel acknowledged as much in a letter to MSHA by stating that Warrior Coal had the contact information for its employees “on file” and could deliver it to MSHA in a spreadsheet. Ex. 10, at 3. The Secretary’s request for information therefore comported with Section 103(e) of the Act, which requires the Secretary to obtain information “in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses.” 30 U.S.C. § 813(e). A party opposing a subpoena *duces tecum* on the ground that it is “unduly burdensome” must show that compliance would “seriously disrupt its normal business

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<sup>3</sup> It is appropriate to look to case law from the administrative subpoena enforcement context when evaluating the reasonableness of the Secretary’s demand for information pursuant to Section 103(h). *Big Ridge*, 715 F.3d at 645-46 (applying precedent involving administrative subpoenas and administrative demand letters). While Section 103(h) does not provide the Secretary with general subpoena authority to compel the production of documents from *non*-operators, Warrior Coal’s assertion that MSHA lacks the authority to compel production of documents from operators ignores Section 103(h). Br. at 8. As the Seventh Circuit explained:

Although the Mine Safety Act does not expressly refer to MSHA’s document review power as the power to issue an “administrative subpoena,” the authority the Act confers upon MSHA amounts to an administrative subpoena in substance. It is the authority to inspect and copy specific documents in the possession of mine operators and the authority to issue citations and orders and impose penalties if mine operators do not cooperate.

715 F.3d at 646.



operations.” *EEOC v. Randstad*, 685 F.3d 433, 451 (4th Cir. 2012). Warrior Coal has not and cannot show that production of the basic contact information requested by MSHA imposed an “unreasonable” or “undue” burden on its operations.

3. Warrior’s Suggestions For How the Secretary Should Have Conducted His Section 110 Investigation are Unworkable and Fail to Protect the Exercise of Miners’ Rights

Both in its brief and in the letters from its corporate counsel, Warrior Coal contends that MSHA’s information request was unreasonable because, in Warrior Coal’s view, MSHA could have gone about seeking the employee contact information differently. Evaluating Warrior Coal’s proposed alternatives help illustrate why the Secretary’s requests in this case were reasonable.

First, in its brief, Warrior Coal suggests that MSHA “could have easily asked the miners working on the relevant unit to provide their private contact information and asked them whether they would be willing to submit to a more in-depth off-site interview.” Br. at 6. In practice, however, such an arrangement would be both unworkable and harmful to the exercise of miners’ rights. As a practical matter, it serves neither agency nor operator resources for MSHA to travel to an underground mine and have the operator bring its miners to the surface one by one or otherwise take them out of production just so that MSHA can inquire about their willingness to be interviewed again in greater depth at another location. This laborious process would delay MSHA’s investigation and strain agency resources, the same concerns that prompted the Commission to conclude that an operator’s failure to promptly provide witness contact information in *BHP Copper* “impeded the investigation and

therefore violated the Mine Act.” 21 FMSHRC at 766. *Accord U.S. Steel Corp. v. Sec’y of Labor*, 6 FMSHRC 1423, 1433 (June 1984) (affirming a Section 103(a) violation where the operator delayed MSHA’s witness interviews).

Furthermore, requiring MSHA investigators to approach miners at the mine to request their cooperation in a Section 110 investigation needlessly exposes miners to the risk of undue pressure or reprisal. MSHA investigators cannot realistically go about a mine site asking miners whether they wish to speak privately, off-site with MSHA, especially when the topic of the interview is the possible knowing or willful violation of the Act by the operator or its agents. Even when MSHA investigators interview miners privately behind closed doors at a mine site, a miner may reasonably fear that an operator’s agent will suspect a miner’s cooperation with MSHA based on clues such as how long the miner’s closed-door discussion with MSHA lasts. Under Section 105(c), a miner has a protected right to testify freely in mine safety proceedings, a right that has been interpreted to “encompass[] the giving of statements to MSHA personnel conducting preliminary investigations.” *Stafford Constr.*, 732 F.2d at 959. Miners should not be put in the position of having to make a potentially observable choice at the mine site regarding their willingness to exercise the right to speak with MSHA regarding violations of the Act.

Second, in pre-litigation correspondence to MSHA, corporate counsel repeatedly proposed that MSHA allow Warrior Coal to approach its employees directly to inform them of MSHA’s Section 110 investigation, advise them of the

voluntary nature of MSHA interviews, and inquire if they wished to execute signed authorizations for the release of their contact information to MSHA. Ex. J, at 2; Ex. L, at 2; Ex. 10. However well-intentioned this proposal may have been, it is not acceptable to the Secretary to allow a mine operator to screen its employees regarding their willingness to be in contact with MSHA regarding a Section 110 investigation into possible knowing and willful violations by the operator and its agents.

Indeed, under some circumstances, efforts by an operator to question its miners regarding their willingness to cooperate with an MSHA investigation could violate Section 105(c)'s prohibition on unjustified interference with the exercise of statutory rights. As mentioned above, miners have a protected right to give statements to MSHA investigators, *Stafford Constr.*, 732 F.2d at 959, and operator questions regarding a miner's willingness to be in touch with MSHA investigators may have a chilling effect on the exercise of that right. When evaluating Mine Act claims of unjustified interference with the exercise of protected rights, the Commission looks to case law arising under the anti-interference provision of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) ("NLRA Section 8(a)(1)"). *Sec'y of Labor ex rel. Gray v. North Fork Mining, Inc.*, 27 FMSHRC 1, 9-11 (Jan. 2005). Under NLRA Section 8(a)(1), an employer may commit an interference violation when its actions force employees to make an "observable choice that demonstrates their support for or rejection of the union," *Allegheny Ludlum Co. v. NLRB*, 301 F.3d 167, 176 (3d Cir. 2002), or when its actions tend to "instill in employees a

reasonable belief that the employer is trying to find out whether they support or oppose the union.” *Id.* at 175 (quoting *Allegheny Ludlum Co. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997)). Under both the Mine Act and the NLRA, prohibited interference may occur in the absence of any intent by the employer to interfere with protected rights. 27 FMSHRC at 8-9; *Allegheny Ludlum*, 301 F.3d at 176 (explaining that the test in “polling” cases “is an objective test in which the employer’s intent is irrelevant and the proper inquiry is the impression of a reasonable employee”). Therefore, regardless of the operator’s intent, inquiries by an operator into whether a miner will execute a signed release of his contact information to MSHA during an MSHA investigation could be considered a form of “polling.” There is little information in the record regarding how Warrior Coal sought the authorization of its miners to release their contact information to MSHA, but the fact that only 15% of miners executed those releases does raise questions about whether the process was coercive. Ex. 10, at 2.

In its brief, Warrior Coal claims that it resisted MSHA’s information request out of a desire to protect the “rights of the employees not to provide any information to a special investigator.” Br. at 7. (Indeed, Alliance’s corporate counsel warned MSHA’s personnel during the investigation that they could be held individually liable for violations of state and federal law if they persisted in demanding the home addresses and telephone numbers. Ex. J, at 3.) In support of this argument, Warrior Coal relies on a snippet of Chapter Five of MSHA’s *Special Investigations Procedures Handbook*, PH05-I-4 (“the *Handbook*”), which deals with witness

interviews and states that a witness may decline to provide information to an MSHA special investigator, including his or her contact information. Br. at 6-9. That snippet, however, merely stands for the proposition that MSHA witness interviews are voluntary, and a witness who is unwilling to share information with a special investigator cannot be forced to do so. As the Judge correctly observed, “the Secretary is requesting the contact information from Respondent, not the miners,” and “[i]f miners choose not to provide any information when contacted, it is clearly their right to do so.” ALJD at 8. The *Handbook* does not sanction Warrior Coal’s resistance to the Secretary’s information request. While miner witnesses may decide for themselves whether to speak with MSHA, a mine operator may not take it upon itself, in essence, to decide for miners whether to speak with MSHA by depriving the Secretary of employee contact information.

Finally, the fact that the Secretary requested private information regarding Warrior Coal’s employees – home addresses and phone numbers – did not justify Warrior Coal in refusing to provide the information to the Secretary. As must any government agency charged with protecting the public and enforcing the law, MSHA must access private information from time to time in order to perform its lawful governmental functions. *Cf. Big Ridge*, 715 F.3d at 658 (“While the petitioners raise important privacy concerns, Justice Holmes reminded us to ‘remember that the machinery of government would not work if it were not allowed a little play in its joints.’”) (quoting *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931)). Certainly, the home address and phone number information sought in this

case do not raise privacy concerns of the same order as those raised by the disclosure of medical records in *Big Ridge*. See *State of California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996) (“A phone number is not among the select privacy interests protected by a federal constitutional right to privacy.”). Even so, the Secretary is under statutory and regulatory duties to avoid unwarranted disclosures of private information, and he is committed to doing so for the information contained in the files of his special investigators. *Big Ridge*, 715 F.3d at 650-51 (discussing prohibited disclosures of personal information under the Privacy Act, 5 U.S.C. § 552a, the exceptions to disclosure of personal information under the Freedom of Information Act, 5 U.S.C. § 552, and internal Department of Labor training and protocols regarding the confidentiality of personal information in investigative files).

### III.

#### SECTION 104(b) OF THE ACT REQUIRES THE ISSUANCE OF AN ORDER WHEN AN OPERATOR FAILS TO TIMELY ABATE A VIOLATION

Warrior Coal contends that the Secretary had no authority to issue a Section 104(b) order because the inspector determined that there was “no area affected.” Br. at 9-11. The Secretary disagrees. Indeed, the Secretary reads Section 104(b) as not only authorizing, but requiring the Secretary to issue a Section 104(b) whenever a mine operator has failed to totally abate a citation within the time prescribed for abatement.

Section 104(b) states:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he *shall* determine the extent of the area affected by the violation and *shall* promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b) (emphases added).

As Warrior Coal itself notes, the word “shall” generally creates a mandatory, non-discretionary duty. Br. at 10 (citing *Sierra Club v. Alabama*, 557 F.2d 485 (5th Cir. 1977); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). Given this mandatory language, the plain terms of Section 104(b) indicate that the Secretary must issue an order whenever a citation “has not been totally abated within the time period fixed for abatement” and “the period of time for the abatement should not be further extended.” Once these two conditions have been met, the Secretary is required to determine whether an area of the mine is affected and, if so, to withdraw miners from that area. However, the language of the provision does not state that, if no area of the mine is affected, he shall not issue an order. Instead, the Secretary is instructed to “promptly issue an order” whether or not the Secretary’s representative determines that the operator’s failure to abate affects an area of the mine. In the present case, the Secretary did what Section 104(b) required him to do.

It is important to note that Section 104(b) failure-to-abate orders have legal consequences even if they do not result in a withdrawal of miners from an affected area, and mine operators should not be allowed to avoid those consequences simply because the violation that underlies a Section 104(b) order does not directly affect any physical area of a mine. First, under MSHA's pattern of violations guidelines, a mine's history of receiving Section 104(b) failure to abate orders may count as elevated enforcement actions, prompting review for pattern of violation designation. *See* 30 CFR § 104.2(a)(2). Second, regulations promulgated by the Securities and Exchange Commission pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act require certain mine operators to include the "total number of orders issued under section 104(b)" in their periodic reports. 17 CFR § 229.104(a)(ii). For these reasons, even where a Section 104(b) order is designated as one affecting "no area," the issuance of such an order serves the salutary purpose of inducing timely compliance with the Act, as the Judge recognized. ALJD at 8-9 (finding that "no area affected" Section 104(b) orders "induce operators to abate violations while acknowledging that miners are not necessarily endangered by every infraction"). The Judge's conclusion was correct because of the plain terms of Section 104(b) and because interpreting Section 104(b) to permit the issuance of failure-to-abate orders whenever an operator fails to timely abate a violation promotes the safety and health compliance goals of the Act. *See Pattison Sand*, 688 F.3d at 513 (stating that the Mine Act is to be "construed broadly" to effectuate its remedial purpose).



CONCLUSION

For the foregoing reasons, the Section 104(a) citation and the Section 104(b) order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response Brief of the Secretary of Labor was served by facsimile, electronic mail and U.S. Mail this 3rd day of January, 2014, on:

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