

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 31, 2024

PEABODY GATEWAY NORTH  
MINING, LLC,  
Contestant

v.

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION, MSHA,  
Respondent

CONTEST PROCEEDING

Docket No. LAKE 2023-0075  
Citation No. 9039082; 01/24/2023

Mine: Gateway North Mine  
Mine ID: 11-03235

**ORDER GRANTING SECRETARY’S MOTION FOR SUMMARY DECISION  
AND DENYING CONTESTANT’S MOTION FOR SUMMARY DECISION**

Before: Judge Lewis

This case is before me upon notice of contest filed by Peabody Gateway North Mining, LLC (“Peabody” or “Contestant”) under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

On March 6, 2023, Peabody submitted a Motion for Summary Decision and Memorandum of Points and Authorities in Support of Motion for Summary Decision. In the Motion, Peabody requested that this Court vacate this docket. On March 23, 2023, the Secretary of Labor filed a Response to Contestant Peabody Gateway North Mining, LLC’s Motion for Summary Decision, both opposing the Contestant’s motion and cross-moving for summary decision. I denied the cross-motions for summary decision on April 3, 2023, because there was not agreement on the material facts of the case.

The following day, Contestant filed an unopposed Motion for Reconsideration of this Court’s April 3, 2023, order, stating that this Court’s denial of the cross-motions was premature pursuant to Commission Procedural Rules 10(d) and 67(d), 29 C.F.R. §§ 2700.10(d) and 2700.67(d), which entitled Peabody to file a response to the Secretary’s cross-motion for summary decision. The Motion was accompanied by a Response in Opposition to Secretary of Labor’s Cross-Motion for Summary Decision. I granted Peabody’s Motion for Reconsideration on April 6, 2023. After reviewing Contestant’s Response in Opposition dated April 4, 2023, and the Secretary’s subsequent Response dated April 18, 2023, I issued an order denying the parties’ cross-motions on May 18, 2023.

Before me are Peabody’s Renewed Motion for Summary Decision dated July 18, 2023; the Secretary’s Renewed Cross-Motion for Summary Decision dated July 28, 2023; and Peabody’s Response in Opposition dated August 9, 2023. The Court may grant summary decision where the “entire record...shows: (1) That there is no genuine issue as to any material

fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b); *see also* *UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). “There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor.” *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted). The court must evaluate the evidence “in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9.

In their respective submissions, the parties have confirmed that the material facts are uncontested and have submitted facts that show as much. *Contestant’s Renewed Motion for Summary Decision*, 1; *Secretary’s Renewed Motion for Summary Decision*, 1. As agreed-upon by the parties, the relevant facts are as follows. On December 08, 2022, MSHA issued Citation No. 9541193, alleging in the Condition or Practice section that on December 05, 2022, a main fan outage occurred that required miners to be withdrawn from the mine. Miners then re-entered the mine with the section foreman and traveled back to the working sections before an examination was conducted by certified examiners as required by 75.360(h) through (e). The Citation was marked as Significant and Substantial, as well as constituting an unwarrantable failure to comply with a mandatory standard.

On January 5, 2023, MSHA issued an information request related to Citation No. 9541193, requesting, *inter alia*, the contact information for all miners working the evening shift on December 5, 2022. *Cont. Ren. MSD*, 2; *Secy. Ren. MSD*, 2. On January 17, 2023, Peabody supplied some of the information sought, but refused to produce contact information for eight miners, stating that “miners who may be considered agents of the operator on that shift may be contacted through counsel.” *Cont. Ren. MSD*, 2; *Secy. Ren. MSD*, 2, SX-B. On January 19, 2023, MSHA issued a second set of requests and, among other information sought, repeated its previous demand for the personal contact information for all miners that worked on the evening shift of December 5, 2022, including those that “may be considered agents of the operator.” *Cont. Ren. MSD*, 2; *Secy. Ren. MSD*, 2, SX-C. Peabody responded on January 23, 2023, by again refusing to supply the contact information of the eight miners “who may be considered agents of the operator,” and stating that those miners “may be contacted through counsel.” *Cont. Ren. MSD*, 5; *Secy. Ren. MSD*, 2, SX-D. On January 24, 2023, MSHA issued Citation No. 9039082 for Peabody’s refusal to provide the contact information of the eight miners that it stated were agents of the operator. *Cont. Ren. MSD*, 6, CX-H; *Secy. Ren. MSD*, 2.

The Condition or Practice section of Citation No. 9039082 alleges as follows:

On January 5, 2023, the Mine Operator received a request for information from MSHA regarding case VINC-CSI-2023-02. The Mine Operator was given 11 days to comply with the due date of January 16, 2023. The Operator did not request an extension or provide all of the requested information. On January 17, 2023, the Operator sent a partial inadequate response to the request for information. On January 19, 2023, MSHA requested additional information and requested that the original request be complied with fully by January 23, 2023 by 12:00 p.m. Central Time. As of 12:00 noon on January 23, 2023, the Operator has not responded in

full by providing the information from items #2 and #3 on the initial request. At this time the operator has not complied and daily penalties will be requested to gain compliance from the operator.

The Operator's failure to provide the requested information is a violation of Section 103(a)(h) of the Mine Act.

Contestant, in its briefs and exhibits, provides ample evidence that the eight individuals in question could be considered agents of the operator on the date in question, and the Secretary argues that the status of these miners is irrelevant. *Secy. Ren. MSD*, 3. Therefore, for the purposes of this analysis, this Court will assume that the eight miners are agents and address the validity of Citation No. 9039082.

Section 103(a)(h) of the Mine Act, which the Citation alleges was violated, states as follows:

- (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare 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, (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. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.
- (h) 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.

30 U.S.C. § 813(a)(h).

Citing the Seventh Circuit case, *Big Ridge v. FMSHRC*, 715 F.3d 631 (7<sup>th</sup> Cir. 2013), Contestant argues that under applicable law, a request by MSHA under Section 103(h) for documents or information not required to be maintained must be “reasonable.” *Contestant’s Memorandum of Points and Authorities*, 7. Specifically, a reasonable request must be limited in scope, manner, and time, which it interprets as “information needed by the agency to verify a specific point of compliance and is conducted by appropriate means.” *Id.* at 7-8. The Contestant states that with regard to the contact information of miners that were agents of the operator, “MSHA presumably made this request so that it could have contacted agents without company counsel’s involvement,” and that such a request is unreasonable under *Big Ridge*. *Id.* at 8. Contestant argues that as agents of the operator, these miners’ statements may be imputed to the company for purposes of negligence and unwarrantable failure. *Id.* at 10-11. Citing attorney-client privilege and the transcript from an ALJ hearing, the Contestant argues that MSHA was not permitted to interview a supervisor without company counsel present. *Id.* at 11-12.

The Secretary similarly cites *Big Ridge* to argue that its request for the contact information for the eight miners at issue under Section 103(h) was reasonable. *Secy. Ren. MSD*, 4-5. In the instant case, MSHA argues that its requests were limited to personal contact information of miners working on a single relevant shift and that they were necessary to offer confidential interviews to miners during the course of an investigation. *Id.* 4-6. Furthermore, it argues that Contestant’s claims are not ripe for determination because MSHA routinely contacts miners during an investigation and offers them the ability to give a confidential interview. *Id.* 6. It is only if a miner declines to act as a government informant that MSHA has an obligation to determine if the miner is an agent and represented by counsel. *Id.* The Secretary argues that the Contestant’s allegations that it is trying to circumvent counsel for illegitimate purposes are premature and incorrect. *Id.* at 6-7.

Section 103(h) of the Mine Act provides that, “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 ... may reasonably require from time to time to enable him to perform his functions under this Act.” 30 U.S.C. § 813(h). In *Big Ridge*, the Seventh Circuit considered whether MSHA had the authority under Section 103(h) to require mine operators to permit MSHA inspectors to review employee medical and personnel records in order to verify that operators were not underreporting injuries and illnesses. The Court affirmed MSHA’s authority to demand such documents, holding that “the [Mine] Act grants MSHA broad inspection and document review powers, including the

power to ‘reasonably require’ mines to provide information that would enable MSHA to perform [its] functions under [30 U.S.C. § 813(h)]” 715 F.3d at 638. The Court defined a “reasonable” demand as one that is “limited in scope, manner, and time.” *Id.* at 641-642. In *Big Ridge*, the Court found that the scope was reasonable because it included only the information needed to verify injury and illness reporting compliance; the manner was reasonable because MSHA requested “only to inspect and copy the relevant records, not to rummage through mine offices;” and the time limits were reasonable because they only covered records for one year. *Id.* at 642. Furthermore, the Court highlighted that “verifying compliance with the Mine Safety Act and relevant regulations is one of the express purposes for which Section 813(a) authorizes MSHA to inspect and investigate mines.” *Id.*

Applying the *Big Ridge* test for reasonableness to the instant case, I find that MSHA’s request for the personal contact information of the miners working on the shift at issue was reasonable. MSHA issued its information request in this case as part of an investigation into an alleged fan outage and subsequent failure to perform a Section 313(d) investigation on December 05, 2022. The request was limited in scope as it did not demand the personal contact information of all miners, but only those related to the investigation into the alleged violation. The request was limited in time as it only asked for the contact information of the miners working on a single shift on the date of the alleged violation. Lastly, the manner here was reasonable because MSHA asked the company to provide relevant records it had on hand rather than sending inspectors to “rummage through mine offices” for the personal contact information of miners.

The Secretary has stated that the primary reason it needs the personal contact information of the miners who worked the shift at issue is to offer them confidential interviews as government informants. The Secretary’s right to interview miners is central to the functioning of the Mine Act. *See BHP Copper, Inc.*, 21 FMSHRC 758, 765 (July 1999) (“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.”). Miners who participate in MSHA interviews are entitled to have their identities withheld in order to prevent retaliation. The Mine Act and its legislative history highlight the importance of providing confidentiality to government informants. Section 103(g)(1) of the Act requires that the names of miners who complain of safety violations be removed from the notice provided to operators. 30 U.S.C. § 813(g)(1). The legislative history of the Mine Act explained the reasoning for such confidentiality:

The Committee is aware of the need to protect miners against possible discrimination because they file complaints, and accordingly, the Section requires that the name of the person filing the complaint and the names of any miners referred to in the complaint not appear on the copy of the complaint which is served on the mine operator. While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under Section [103(g)(1)] is absolutely essential.

S. Rep. No. 95-181, at 29, *reprinted in Legis. Hist.* at 617, *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977* (1978). Citing to this legislative history, the Commission stated that:

The reasoning behind this right to confidentiality is considered so persuasive that the Commission adopted a version of the right for Commission proceedings, recognizing that witnesses who qualify for it should generally be protected by the informant's privilege. *See Sec'y on behalf of Logan v. Bright Coal Co.*, 6 FMSHRC 2520, 2524-25 (Nov. 1984); *see also* Commission Procedural Rule 61, 29 C.F.R. § 2700.61 (“A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.”).

*Sec'y obo McGary and Bowersox, et al. v. Marshall County Coal Co., et al.*, 38 FMSHRC 2006, 2014 (Aug. 2016). MSHA has a right and responsibility to contact miners during an investigation to offer them the opportunity to make confidential statements as government informants. Therefore, similar to the facts in *Big Ridge*, MSHA's information request here is also “relevant to the goals of the statutory scheme and the government's interest in miner safety.” 715 F.3d at 646.

The Contestant argues that since the miners at issue were agents of the operator, then MSHA can only contact them through counsel. However there appears to be no justification in the Mine Act or caselaw that miners who are supervisors, or otherwise can be considered agents of the company, lose their rights under the Mine Act to make confidential safety complaints to MSHA. To require MSHA to have company counsel present while informing miners of their rights to make confidential complaints, and while conducting confidential interviews, would effectively strip these miners of their rights. The Secretary is limited in certain ways that it can interview agents of the operator, but not in providing a miner the opportunity to make confidential safety complaints to the government.<sup>1</sup>

This Court is in agreement with the Secretary that many of Contestant's claims and arguments are premature and speculative. Contestant argues that MSHA is attempting to circumvent counsel and violate attorney-client privilege by requesting the personal contact information of miners. *Cont. Ren. MSD*, 10-12. While there is certainly the possibility that MSHA would abuse the information it received, there is no evidence in this case that it planned to do so.<sup>2</sup> If, at some future point, the Secretary were to use the personal contact information of a miner agent to interview him after he declined to serve as a government informant, then the Contestant would not be without recourse. As illustrated by Contestant's citation to the transcript provided in CJ-X, where Judge McCarthy struck the testimony of a miner after determining that the witness was a supervisor and MSHA had not notified company counsel of the interview,


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<sup>1</sup> Obviously, nothing would prevent Contestant prior to its disclosure of requested contact information to MSHA, from notifying employees whom it deemed to be agents of the operator during the time period in question, to seek, if they so wished, advice from Contestant's counsel, before speaking with MSHA.

<sup>2</sup> Indeed, in almost every legal proceeding, there is the possibility that a lawyer will abuse information that it receives, leak discovery documents, or otherwise act in an unethical manner. However, courts must presume that lawyers will act in an ethical manner, absent evidence to the contrary.

Contestant can object to the use of any improperly gathered information from the miners at issue. However, the possibility that MSHA may misuse the contact information provided is not grounds for withholding it in advance, in violation of Section 103(h).

Accordingly, the Secretary's Motion for Summary Decision is **GRANTED** and the Contestant's Motion for Summary Decision is **DENIED**. Citation No. 9039082 is **AFFIRMED** and Contestant is **ORDERED** to provide MSHA the information sought in the January 5, 2023, and January 19, 2023, information requests within 30 days of this Order.

  
John Kent Lewis  
Administrative Law Judge

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