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Chapter 19

"Stand and Deliver!" Compelling the Production of Private Medical Records in the Course of Part 50 Audits

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Synopsis

§ 19.01. Introduction.

Imagine you are a safety director or human resources director for a mining company and you are preparing for a Part 50 audit, essentially a routine records request by inspectors from the Mine Health Safety Administration (MSHA) who would demand to see the MSHA Forms 7000-1 (Accident, Injury, and Illness Report) and 7000-2 (Quarterly Employment Report), together with accident investigation reports — in other words, the records you are required to maintain for this very purpose. This time, however, the auditors are not content with what was done in the past and, in addition to the usual records, also demand to inspect and copy worker compensation filings, medical histories, treatment notes, transfer records, ER notes, ambulance reports, nursing notes, and even chest x-rays for all of your miners. Your concerns over disclosing the confidential health information of your miners to inspectors are brushed aside. You next attempt to deflect the records requests by asserting that you are not required to maintain these particular records. That concern is met with the reply that medical records are relevant and necessary to determine compliance with the Mine Act. You try one last attempt to reason with the inspectors by pointing out to them that

such records are not kept in the mine offices, but instead are maintained off site by third party administrators for the company. This concern is similarly disposed of; you are asked to call those administrators and grant them permission to release the records requested from you.

Your failure to provide the records is met with a citation under § 104(a) of the Mine Act and you are now ordered to produce those records within 30 minutes or have an order issued for your continued failure. Your miners are concerned that their private medical information will now be inspected, copied, and disseminated by inspectors. They are angry with you for your failure to keep their records confidential.

At one time, the above scenario would have seemed far-fetched. Private medical records of an operator's employees did not get reviewed by MSHA inspectors. However, in a decision issued in a pair of consolidated contest proceedings,[1] Administrative Law Judge Kenneth Andrews upended the 30 years of practice between MSHA and mine operators that had long dictated the conduct of these routine audits, and instead permitted the wholesale inspection of the private medical records of mine employees. Specifically, Judge Andrews held that the "plain language" of the Federal Mine Safety and Health Act of 1977 (Mine Act), Part 50 regulations and legislative/administrative history of the same gives the Secretary authority to audit operators without being "limited to any particular records."[2]

To be sure, the consolidated contest proceedings are now on appeal to the Federal Mine Safety and Health Review Commission. Yet, if they

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1 The first consolidated proceeding is captioned Big Ridge, Inc. (Docket Nos. LAKE 2011-116-R and LAKE 2011-117-R) and Peabody Midwest Mining, LLC (Docket Nos. LAKE 2011-118-R and LAKE 2011-119-R)(collectively Peabody Energy Subsidiary cases). The second consolidated proceeding is captioned Independence Coal Co. (Docket Nos. WEVA 2011-402-R and WEVA 2011-403-R), Inman Energy Corp. (Docket Nos. WEVA 2011-398-R and WEVA 2011-399-R), Process Energy (Docket Nos. KENT 2011-255-R and KENT 2011-256-R), Spartan Mining Co. (Docket Nos. WEVA 2011-540-R and WEVA 2011-541-R), Road Fork Dev. Co. (Docket Nos. KENT 2011-305-R and KENT 2011-306-R) and Knox Creek Coal Corp. (Docket Nos. VA 2011-386-R and VA 2011-387-R)(collectively Massey Energy Subsidiary cases).

2 *See* Judge Andrews' May 23, 2011 Decision in Massey Energy Subsidiary cases at 16. (ALJ Decision at 16).

are upheld, the consequences of Judge Andrews' decision and rationale are significant.[3] For one, there are no limits on the type of private medical records the Secretary can request. So, indeed, the Secretary is free to demand the inspection of workers' compensation files, emergency room records, doctor's notes, patient histories, and EMT transportation records, to name just a few. Moreover, the lack of actual possession of those records is simply not a defense to a request for their production. That is, the inspectors may demand records that are in the possession of other entities, such as the ambulance service that transported one of your employees, and you will have to comply. A failure to provide the medical records requested will likely be met with an enforcement order, together with the assessment of significant daily penalties.

This chapter will argue that Judge Andrews' decision disregards settled case law, long-standing practices by MSHA, violates employee privacy, and permits the Secretary of Labor to avoid notice and comment rule-making.

§ 19.02. The Part 50 Regulatory Requirements.

[1] — MSHA's Authority.

This dispute between the Mine Safety and Health Administration and mine operators stems from a fundamental disagreement over the scope of the records MSHA may require operators to keep and provide for inspection. MSHA's general statutory authority to require operators to maintain records for inspection is found in § 103(h) of the Mine Act and reads:

> In addition to such records as are specifically required by this Act, every operator of a coal
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> . . . mine shall establish and maintain such records, make such reports, and provide such information as the Secretary

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[3] After this chapter was written, but just before it was submitted to the publisher, the Commission voted 4-1 to uphold the administrative law judge's decision. While the majority of the commissioners questioned the amount of daily penalty being assessed for the failure to produce the medical records, they did find support for a request for those records in the language of the Mine Act. A final written decision is not expected until sometime after publication. In the meantime, the operators are evaluating their options.