

THE “NEW” MSHA – POST ELECTION: AN OVERVIEW AND UPDATE

Presented To:

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When it matters



The Changes 2008 Brought

- **MSHA recently posted a PowerPoint to its website which shows statistical performance information for fiscal years 2000 to 2008.**
- **Interesting statistics:**
 - **Fatality rate in M/NM dropped by nearly 60% (.0248 to .0096 per 10,000 workers)**

When it matters



- **From FY 2000 to FY 2008:**
 - **The number of elevated enforcement actions for M/NM rose 21% (from 1,889 to 2,287)**
 - **The number of citations for M/NM rose by 9% (from 62,191 to 68,045)**
 - **M/NM penalties rose 253% (from \$11.6 million to \$41 million)**

When it matters



- **M/NM penalties increased by 209% from FY 2007 to FY 2008.**
- **In 2008 there were twenty-two deaths in M/NM mines.**

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Recent Decisions

When it matters



Agent Liability

- **Section 3(e) of the Mine act defines “Agent” as any person charged with responsibility for the supervision of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.**
- **In *Nelson Quarries*, 2009 WL 1034786 (Rev. Comm. 2009), the Commission held that three miners were acting as agents of the Company and their conduct was imputable to the operator.**

When it matters



- **The operator argued that even though it referred to the miners as foreman, they were only lead men who did not have the authority to hire, fire, or discipline employees, to assign equipment, or to perform any duty that was not well established by company protocol.**

When it matters



- **The three miners demonstrated that they had been charged with responsibility for the operation of part of the mine or for the supervision of employees through their action in directing the work done at plants**



- **The Commission found that the fact that none of the men “had the authority to hire, fire, or discipline employees does little to detract from the conclusion that each was an agent of the operator.”**
 - **All were involved in these decisions by making recommendations**
 - **The authority to take such actions has never been a prerequisite to a finding of agency**

When it matters



- **The following actions by the men constitute substantial evidence that they were acting as agents of the operator and that their conduct was imputable to the operator**
 - **Conducting daily examinations**
 - **Directing the work force**
 - **Representations made to MSHA concerning their authority**
 - **The manner in which they were treated by others**
 - **Actions at the time of the violations**

When it matters



USE OF § 103(K) ORDERS

- **A § 103(k) order was issued following a series of coal bounces at a longwall mine in Utah.**
- **Operator devised a plan to test the feasibility of remotely operated longwall mining.**
- **MSHA issued a modification to the § 103(k) order allowing for the implementation of the plan.**

When it matters



- **Several days after mining resumed, one of the MSHA inspectors reported coal bursts, bounces, and bumps on the longwall.**
- **MSHA issued a modification of the § 103(k) order prohibiting any additional mining in the longwall section.**



- **The operator contested the modification, arguing it was an abuse of MSHA’s discretion and the face had progressed 240 feet from the location of the initial § 103(k) order.**
- **The Secretary argued its modification was “an exercise in professional judgment” and the plan to mine remotely could not be implemented safely.**



- **In *West Ridge Resources, Inc.*, Docket No. WEST 2009-504-R (ALJ Manning, Feb. 26, 2009), the ALJ upheld the § 103(k) order and the modification.**
- **Further, the ALJ found:**
 - **Even though the modification addressed bounces in a different location than the original order, MSHA could properly issue the modification to insure the safety of miners from the same conditions.**

When it matters



- Section § 103(k) of the Mine Act allows MSHA to issue § 103(k) orders as it deems appropriate following an accident until it is convinced that mining may resume safely in the area.
- MSHA’s decision to issue the § 103(k) order modification was reasonable because its “concerns were genuine.”

When it matters



Implications of West Ridge

- **Broader areas of closure and prohibition of activities that may be unrelated to an underlying accident.**
- **Requirement of broad-based mine plans to lift § 103(k) orders**
 - **May exceed the requirements of applicable mandatory standards in M/NM**

When it matters



Successful Challenges to S&S Designations

- **An S&S designation requires “a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Rev. Comm. 1981).**

When it matters



- **In two recent cases, *Highland Mining Co.* and *Cumberland Coal Resources*, the Commission has found that the Secretary did not meet her burden of proof and rejected S&S designations.**



- **In *Highland Mining Co.*, Judge Melick rejected the Secretary's S&S designations for two oil accumulation violations and one for diesel-powered equipment air quantity requirement.**
 - **Judge Melick held that there were mitigating factors for each of the violations, which reduced them to non-S&S.**

When it matters



- **In *Cumberland Coal Resources*, Judge Zielinski found that an accumulation of coal dust was not S&S where the accumulations were not extensive, there were only potential ignition sources in the area, there was little methane in the area, and there were no nearby defects in the belt system.**

When it matters



- **These cases are important because the S&S determination affects pattern of violations (“POV”) designation.**



Pattern of Violations

- **Since June 2007, 43 operators have been notified that they are potential violators.**
- **Patriot Mining, LLC, the recipient of the first-ever POV notice by MSHA, successfully challenged its POV status after an administrative law judge modified two S&S violations, which brought Patriot Mining's total above its target rate during the evaluation period post notice.**

When it matters



Conferencing Changes

- **PIL No. I09-III-03**
- **PIB No. P09-05**
- **MSHA is currently requesting a 90 day stay after the operator files its penalty contest to have Conference Litigation Representatives (“CLR’s”) conference the enforcement action with the operator.**



- **This has led to some CLR's contacting operators, who have legal representation.**
- **MSHA is reportedly in the process of updating its Conference Litigation Manual to reflect the new changes.**

When it matters



- **What does this mean to operators?**
 - This represents an attempt to cleanup or avoid the large backlog facing MSHA and the FMSHRC contributed to by MSHA's PIL that limited safety and health conferences to unwarrantable failure and high negligence violations which led to numerous formal challenges.
 - Be prepared.

When it matters



- **Prior to the MINER Act, the Review Commission averaged 2,500 new cases per year.**
- **In fiscal year 2007, the number of new cases rose to 4,097.**
- **In fiscal year 2008, the number more than doubled to 8,924.**



Changes in Regulations

- **On January 20, 2009, President Obama's Chief of Staff, Rahm Emanuel, directed all federal agencies and departments to:**
 - **Review all proposed or final rules prior to submitting them to the OMB);**
 - **Withdraw all Federal Register notices that have not yet been published;**

When it matters



- **Consider extending the effective date of all rules that have already been published by 60 days; and**
- **Consider reopening the notice and comment period of all rules that have been published for an additional 30 days.**



- **MSHA officials have stated that there are no metal/non-metal proposed or final rules that were impacted by this action.**

When it matters



- **MSHA has begun preparing a Program Policy Letter (“PPL”) that will modify how the agency responds when notified of a reportable event under Part 50, using § 103(j), rather than § 103(k).**
 - **This will require the operator to take measures to prevent destruction of evidence that could assist in an MSHA investigation.**
 - **This will also give the Secretary authority to supervise and direct rescue activities as appropriate.**

When it matters



- **MSHA's controversial and unpopular Alcohol- and Drug-Free Mines ANPRM's status is unclear, although, as of February 6, 2009, MSHA claims it is still reviewing comments on the proposed rule.**



Legislative Changes

- It is unlikely to see immediate legislative changes because Congress' attention is focused on other more pressing issues.
- **S-MINER** is not a priority of the House Education & Labor Committee. Instead, OSHA will be a higher priority for the Committee.
 - **H.R. 2067 Protecting America's Workers Act**
 - Referred to House Committee on Education and Labor on April 23, 2009

When it matters



- **The emergence of a Voluntary Protection Program (“VPP”) for MSHA, like the one found in OSHA, is unlikely to gain traction in the current political climate.**
- **After the MINER Act is fully implemented later this year, Congress may hold hearings and examine the Act’s effectiveness. During this period, legislative changes may be examined.**

When it matters



Personnel Changes

- **On February 24, 2009, Hilda L. Solis, Congresswoman from California, was confirmed as the Secretary of Labor, with a strong pro-labor background.**
- **There has been no Assistant Secretary for MSHA appointed yet.**
- **Former Southeast District Manager Mike Davis is now the Deputy Assistant Secretary.**

When it matters



- **It has been reported that the OMB has approved four new ALJs for the Review Commission by the end of FY 2009.**
- **It has also been reported that by the end of FY 2010 there will be a total of 15 ALJs.**



MSHA Budget Increases

- **MSHA's budget climbs to \$347 million**
- **Roughly a \$15 million increase from 2008**
- **Increase will reportedly be spent on:**
 - **More money for inspectors**
 - **Specialists and support staff**
 - **MINER Act implementation**
 - **Meeting MSHA's inspection mandate**

When it matters



**For more information on these
and other occupational safety
and health topics, please visit:**

<http://safety-health.jacksonkelly.com/>

When it matters