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MSHA Inspections: The New Rules of Engagement

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Introduction

Congress enacted the first federal mine safety laws in 1891, well over 100 years ago. At the time, mining fatalities were common. Over 2,000 miners died in coal mines alone in 1910, the year that Congress created the Bureau of Mines. Thankfully, the safety and health of miners here in the United States has improved dramatically since the turn of the last century. In 2008, 51 miners lost their lives in our nation's mines, representing an all time low and a 31% drop from the 2007 toll. The injury and illness rate has also declined dramatically.

The work within the mining industry is certainly not done. Mine operators have much to do keep this trend moving in the right direction. Our nation's mines have become safer, and federal mine safety and health laws have evolved. Understanding this evolution and the latest changes to federal mine safety and health law and enforcement is vitally important. Our goal here is to provide a very broad overview of the most recent changes along with a few basic rules to follow to better navigate a tough regulatory environment.

It has been thirty-five years since Congress created the Mining Enforcement and Safety Agency (MESA), the forerunner to the Mine Safety and Health Administration (MSHA). Congress created MSHA in 1977 with the passage of the Federal Mine Safety and Health Act (Mine Act), the most sweeping and inclusive federal mine safety and health law ever enacted. Since then, MSHA has grown and promulgated (and vigorously enforced) a host of new regulations.

Historically, tragic mine disasters spur Congress to enact new mine safety and health legislation. In 1968, an explosion at a coal mine in Farmington, West Virginia took the lives of 78 miners. Congress passed the Federal Coal Mine Health and Safety Act a year later. In 1976, a series of explosions at the Scotia Mine in Kentucky killed 23 miners, including three federal mine inspectors. Congress enacted the Mine Act a year later.

The most recent change in federal law since the Mine Act is the Mine Improvement and New Emergency Response Act of 2006 (MINER Act). Congress enacted the MINER Act after a series of mine disasters in 2006. In January of 2006, an explosion at the Sago Mine in West Virginia killed 13 miners. A few weeks later, a fire at the Aracoma Alma Mine in West Virginia killed three miners. Around-the-clock television news coverage and significant domestic and international media attention once again spurred Congress to act. The MINER Act has ushered

in a dramatic set of changes federal mine safety and health law and it has heralded a new attitude at MSHA toward the coal and the metal/nonmetal sectors of the mining industry.[1]

Many provisions of the MINER Act pertain specifically to the coal mining industry. However, there are numerous provisions of the MINER Act that clearly have implications for *both* the coal and the metal/non-metal mining sectors.

The MINER Act now requires all operators to notify authorities within 15 minutes of an accident and dramatically increases fines and penalties for those who commit safety violations. Congress amended Section 103(j) of the Act to require operators of *any* mine to notify MSHA of an accident "within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred."

Operators who fail to provide such timely notification "shall be assessed a civil penalty between $5,000 and $60,000." It is important to remember that although the MINER Act requires 15-minute notification for only three types of accidents, MSHA's Emergency Temporary Standard requires 15-minute reporting for all 12 types of "accidents" listed in 30 C.F.R. § 50.2.

The primary impact of the MINER Act, especially for small mine operators, comes from its amendments to Section 110 of the Act. The MINER Act amends Section 110 to increase fines for those who commit criminal violations, sets higher minimum penalties for violations and authorizes MSHA to close mines when operators fail to pay civil penalty assessments.

The MINER Act provides penalties of up to $250,000 and/or imprisonment of up to a year for those convicted of willfully violating a mandatory health or safety standard or knowingly violating or failing or refusing to comply with any order issued under Sections 104 or 107. Subsequent convictions may be punishable by a fine of up to $500,000 and/or imprisonment of up to five years (a felony). The MINER Act also establishes a $2,000 minimum penalty for citations or orders issued under Section 104(d)(1) and a $4,000 minimum penalty for citations or orders issued under Section 104(d)(2).

Moreover, operators who commit "flagrant" violations may be assessed a civil penalty of up to $220,000. Flagrant violations are defined as "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

In addition to the MINER Act of 2006, several other changes have taken place at MSHA that warrant mine operators to be well advised. For the first time in its history, in 2008 MSHA

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[1] In 2007, another major accident occurred at the Crandall Canyon Mine in Huntington, Utah, again drawing the public's (and Congress') attention to mine safety and health. Members of Congress drafted and introduced the Supplemental MINER Act (S-Miner Act), a bill that would radically alter federal mine safety and health law. The House of Representatives in the 110th Congress passed the S-MINER bill. The Senate, however, did not act on the bill. We expect the bill to return in the 111th Congress. With substantial majorities in both the House and Senate and a President who has signaled his support for the legislation, there is a very good chance that a version of the S-MINER Act will be enacted sometime in the next two years.

completed all the regular inspections required by the Act. MSHA has hired over 300 new inspectors, and it is working to hire more. Enforcement activity has increased dramatically, and penalties have skyrocketed. While Congress was debating the MINER Act, MSHA promulgated changes to a key part of its regulations establishing the amounts and basis for the penalties MSHA assessed for regulatory violations.

More specifically, MSHA modified 30 C.F.R. Part 100 (Criteria and Procedures for Proposed Assessments of Civil Penalties) to significantly increase the civil penalties for violations of the Act and MSHA's regulations. In addition to increasing the dollar amount of those penalties, MSHA also changed the criteria is used to assess or assign penalties, adjusting the fines dramatically upward based on factors such as a mine's violation history.

MSHA enforcement activity since the MINER Act passed has, as you might imagine, increased in volume and changed in tone. There has been a significant increase in both the frequency of citations issued as well as the dollar amount assessed for those citations. In 2008, MSHA assessed 198,700 civil penalties, up from 130,100 in 2007. The total dollar amount for assessed penalties more than doubled during that time, from $74.5 million in 2007 to $194 million in 2008. MSHA has also more than quadrupled the number of flagrant penalties assessed. In 2007, it assessed 15 flagrant penalties totaling $2.5 million. In 2008, it assessed 74 flagrant penalties totaling $11.4 million. Today, a single flagrant penalty for a violation will average well over $165,000. Mine operators have seen a 150-300% increase in penalties since Congress passed the MINER Act and MSHA modified 30 C.F.R. Part 100. Mine operators should expect the trend toward dramatically higher penalties to continue.

MSHA is primarily focused on enforcement, and that is unlikely to change in the next four years. While we expect MSHA to promulgate a host of new regulations over the next four years, MSHA's focus on enforcement is not likely to abate.

With this increased pressure and MSHA's new enforcement authority, mine operators are facing a more severe civil and criminal liability than at any time since enforcement activities began. It is critical that management realize that there are steps to be taken and/or revisited in order to limit their culpability during MSHA inspections.

There are a handful of simple rules that, if followed, will enable a mine operator and their representative to better manage their exposure to civil and criminal liability. The goal is here is to improve compliance while reducing your regulatory, civil and criminal liability.

Rule Number 1 is *never* lie to an inspector or investigator or falsify or alter any document. There are *no exceptions* to this rule. The potential consequences for violations of Rule Number 1 are incredibly serious. Specifically, lying to federal agent or falsifying a document are *felonies* punishable by significant jail time and major criminal fines. Section 110(c) of the Act also authorizes MSHA to fine *individuals*, not just mine operators.

Rule Number 2 is to know your rights under the Act. Miners *and* mine operators have rights under the Act. For example, your employees should know that miners have the right not to speak with MSHA. A miner (and virtually everyone working at a mine qualifies as a "miner" under the Act) has the right to speak with MSHA and the right not to speak with MSHA. MSHA cannot legally interfere with that right and neither can a mine operator. Another example: Mine operators have the right to accompany MSHA inspectors during their inspections.

Rule Number 3 is to plan ahead and be prepared for MSHA inspections. You should never be surprised by an MSHA inspection. In a given year, you will not (or should not) know exactly when an MSHA inspector will arrive at your mine to conduct an inspection, but you know (or certainly should know) that MSHA will inspect your mine at least twice a year if it is a surface operation or four times a year if its an underground operation. In other words, MSHA is definitely coming, although you don't know exactly when. To prepare, develop and adopt formal guidelines before your next MSHA inspection to properly manage MSHA inspections. In addition to confirming that your paperwork and recordkeeping are up-to-date, management should have a clear understanding of how best to conduct themselves during an MSHA inspection. An MSHA inspector is a federal law enforcement officer and should be treated as such.

Rule Number 4 is to ensure that management puts their best foot forward. From the minute an MSHA inspector sets foot on your property, what the inspector sees and hears will affect the inspector's opinion of you as a mine operator. Emphasize the positive actions or changes that have occurred since the last inspection. The inspector, whether on a repeat visit or new to your site will have access to previous inspections and will be looking for evidence of management's commitment to a safe workplace. That commitment must be demonstrated by concrete actions and by attentiveness to MSHA's concerns, and the value in pointing out concrete areas of improvement cannot be overstated.

Putting your best foot forward does not mean that you should not disagree with or correct an MSHA inspector. Rather, when you disagree with an MSHA inspector's position or opinion, explain why in polite and professional manner. Simply asking an inspector to point out which regulation he thinks is applicable to the condition or practice and why is one the best and most simple ways of resolving disputes.

Rule Number 5 is to know how to get help and when to ask for it. The last rule is specifically for the managers at the mine site. They need to keep in mind that they are not alone in their dealings with MSHA. Managers should rely on safety professionals and, where necessary, legal counsel to provide them with support, training and guidance before, during and after MSHA inspections. Managers should know who to call for help and when to make that call. If the inspector is not acting in a professional manner, know who to call. Similarly, the issuance of an imminent danger order, an unwarrantable failure allegation, or an allegation of reckless disregard should all trigger an alarm that signals the potential need to seek help. If you receive a visit from an MSHA Special Investigator, that alarm should be ringing loudly. The point is that help is available and there is ample reason in this new enforcement environment to use it.