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Meeting Mine Safety & Health Legislative and Regulatory Challenges

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This paper will explore the new enforcement initiatives of the Mine Safety and Health Administration (MSHA), as well as pending Congressional legislation.

Mine Act Reform Legislation

On January 25, 2011, Sen. Jay Rockefeller and three co-sponsors reintroduced MSHA reform legislation, S.153, that also includes key OSHA reform provisions in the last 30 pages of the 100-plus page measure. The legislation, entitled the Robert C. Byrd Mine and Workplace Safety and Health Act of 2011, is virtually identical to the measure that was passed by the House Education and Labor Committee in 2010, but which stalled in the Senate and during a lame duck session vote in late 2010.

The key provisions of S.153 include:

- Requiring the Secretary of Labor, in conducting health and safety related accident investigations in coal or other mines, to: (1) determine why an accident occurred and whether there were violations of law, mandatory health and safety standards, or other requirements; (2) issue citations and penalties in case of violations, and in cases involving possible criminal actions, refer them to the Attorney General; and (3) make recommendations to avoid any recurrence.

- Requiring an independent accident investigation by an independent panel appointed by the Secretary of Health and Human Services (HHS) for any accident: (1) involving three or more deaths; or (2) whose severity or scale merits an independent investigation (most likely to be conducted by NIOSH).

- Authorizing the Secretary's representatives and attorneys to question any individual privately during an inspection or investigation; and having any individual willing to speak with or provide a statement to such representatives or attorneys to do so without the presence, involvement, or knowledge of the mine operator or mine operator's agents or attorneys.

- Allowing the closest relative of a miner who is entrapped or otherwise prevented by an accident to designate a representative for the miner to participate in a mine inspection.

- Expanding subpoena power for the agency, as well as its ability to seek injunctive relief against uncooperative mine operators.

- Requiring mine inspections to be conducted during various shifts and days of the week when miners are normally present.

- Requiring the Secretary to establish a publicly available electronic database containing the safety records of each mine.

- Prohibiting an attorney from representing both a mine operator and miner during an inspection, investigation, or litigation, unless such miner knowingly waives all possible conflicts of interest.

- Setting forth requirements for mine operators having a pattern of recurring citations, withdrawal orders, accidents, injuries, or illnesses (MSHA also has offered new Pattern of Violations criteria in a February 2, 2011, proposed rule).

- Requiring the Secretary to: (1) revoke the approval of mine operator plans or programs based on certain criteria; and (2) order withdrawal of all persons from a mine, and prohibit them from entering it, until the operator submits and the Secretary approves a new plan.

- Revising civil and criminal penalties and related administrative procedures.

- Revising certain miner protections against discrimination.

- Prohibiting discrimination against a miner or other employee of a mine operator for refusing to perform duties out of a good-faith and reasonable belief that performing such duties would pose a safety or health hazard.

- Entitling a miner to full compensation by a mine operator at the regular rate of pay for the entire period for which the miner is idled because of a Secretary's withdrawal order (under current law, miners are entitled to full compensation only for the balance of their shift, and up to four hours of the next working shift if an order is not terminated beforehand).

- Requiring each underground coal mine operator to implement a communication program to ensure that each miner entering a mine is made aware, at the start of a shift, of current mine conditions.

- Mandating additional requirements for the monitoring of coal dust in underground mines.

- Requiring NIOSH, through its Office of Mine Safety and Health Research, to issue recommendations to the Secretary regarding the use of atmospheric monitoring systems in the underground coal mining industry.

- Revising Part 46 and 48 training requirements, by increasing annual refresher training from 8 to 9 hours for all miners and specifying that it must include 1 hour of training on miners’ statutory rights and responsibilities.

- Requiring supplemental training for miners if a serious or fatal accident has occurred at a mine or it has experienced above-average accident and injury rates, citations, or withdrawal orders.

- Directing the Secretary to issue mandatory standards to establish certification requirements and procedures for persons authorized by a mine operator to perform duties or provide training under such Act.

- Requiring the Comptroller General to study and report to Congress on the workforce needs of the mining industry and federal and state enforcement agencies, including the need for engineers and mine safety and health professionals.

The OSHA reform provisions in S.153 include:

- Amending the Occupational Safety and Health Act of 1970 to revise and expand whistleblower protection rights, including a six-fold increase in the statute of limitations and creation of a private right of action in US District Court.

- Prescribing an employee's victim rights before the Secretary or before the Occupational Safety and Health Review Commission with respect to: (1) inspections or investigations of employer violations of federal occupational safety and health standards; or (2) a work-related bodily injury or death.

- Mandating immediate abatement of serious, willful, or repeated violation of federal occupational safety and health standards pending contest, but including procedures for a hearing on any motions to stay abatement within 15 days of the citation's issuance.

- Increasing civil penalties for OSHA violations.

- Increasing criminal penalties for knowing violations that cause or contribute to the death of an employee (10 years imprisonment), as well as new criminal penalties (5 years imprisonment) for a knowing violation that causes or contributes to serious bodily harm to any employee but does not cause any employee's death.

The legislation has been referred to the Senate Health, Education, Labor and Pensions Committee.

MSHA Policy and Enforcement Initiatives

Although MSHA is prohibited by the Administrative Procedure Act from announcing policy that expands any legally binding new requirements and – similarly – MSHA can withdraw or modify non-binding policy at any time, the agency has been extremely active in the Obama administration in releasing dictates via policy that certainly come close to crossing the line into actual rulemaking (if not actually crossing that line). For example, in late 2010, MSHA released a modification of its workplace examination policy that added content requirements to the mandatory records – stating via policy that the workplace exams under 30 CFR 56.18002 must list every hazard identified … in essence, a mini-audit on a per shift basis.

The problem was that no such requirement was in the codified standard; only the identification of the examiner, the date/shift and the area examined were required. Moreover, given that the Mine Act is a strict liability statute, any listed hazards that constituted a violation of a mandatory MSHA standard could be cited by MSHA (since there is no statute of limitations and the records must be maintained and made available for 12 months to MSHA inspectors). Consequently, the policy not only expanded regulatory requirements but it also would require mine operators to waive their constitutional rights against self-incrimination. After this was brought up to the agency, the policy was rescinded and – as discussed below – reissued in early 2011.

MSHA Enforcement of Health Survey Standard

On October 22, 2010, MSHA announced via Program Policy Letter (P10-IV-2 – "PPL") a new enforcement initiative involving 30 CFR §§ 56/57.5002, "Surveys for Airborne Contaminants." The PPL emphasizes that mine operators must demonstrate compliance rather than relying on enforcement interventions, and must:

- Plan - A system to survey for dust, fume, gas, and mist to determine adequacy of control measures.
- Prevent - Miners' exposure to these hazards.
- Protect - Miners from health hazards.

In accordance with 30 C.F.R. §§ 56/57.5002, mine operators are required to conduct dust, gas, mist, and fume surveys as frequently as necessary to determine the adequacy of control measures. In inspections; MSHA will be evaluating operator activities to verify evidence of surveys. To conduct an effective survey, persons conducting the sampling must be knowledgeable or experienced on how to measure a particular contaminant, the policy stresses. If the result of any samples taken during a survey under 30 C.F.R. §§ 56.5002 and 57.5002 indicates that a miner's exposure to a dust, gas, mist or fume is greater than the exposure limit, MSHA expects the operator to adjust control measures and conduct additional surveys to determine whether control measures are adequate. Thereafter, the operator is required to survey as frequently as necessary to determine the adequacy of control measures.

MSHA's new health chief, Dr. Reginald Richards, discussed the enforcement initiative with some mining association representatives, and indicated that the agency will ask for the actual sampling results from surveys conducted (rather than accepting a certification that it was done, or production of receipts for sampling from outside IH companies), to serve as evidence that surveys were actually conducted. Although Richards indicated that MSHA will not cite for over-exposures shown in the survey data, the agency will emphasize the importance of operators handing over the data. Failure to do so could result in a citation for violation of Section 103(a) of the Mine Act (obstructing an inspection or investigation) or trigger an injunction suit by the agency in U.S. District Court under Section 108(a)(1)(E) of the Mine Act.

However, no such document production is required in the standard itself, raising the question of whether the new enforcement policy has crossed the line into rulemaking without benefit of procedural safeguards contained in the Administrative Procedure Act. 5 U.S.C. 551 et seq. Because the Mine Act is a strict liability law, without any statute of limitations, even though it has informally said it will not pursue this approach, MSHA could issue citations for any reports that show there were overexposures to air contaminants, even if those violative conditions were immediately remediated and the operator is in full compliance at the time that the older results are produced to MSHA for review.

MSHA guidance on ways in which inspectors will conduct the special emphasis enforcement program on compliance with §56/57.5002 was released on March 3, 2011, and includes the materials used to train inspectors for enforcement of this standard. However, the documentation remains ambiguous, using terms such as "survey" and "as frequently as necessary." Speaking with stakeholders shortly after the PIB was released, Metal/Nonmetal Administrator Neal Merrifield tried to reassure industry that the enforcement initiative is not intended to be a "gotcha program," but is instead an effort to ensure that operators are complying with the vaguely-worded standard.

MSHA is also addressing what "surveys" can mean during its Spring Thaw training sessions around the U.S. At one recent class, the agency representative explained that "surveys do not necessarily mean sampling." He added that the inspector will determine what is "frequently enough." In essence, though, MSHA regards a survey as any information collection method concerning miners' exposures to air contaminants and the effectiveness of operator controls. Persons conducting surveys to comply with 56/57.5002 must be trained and knowledgeable, but need not be industrial hygienists. It likely will be important for a mine operator to be able to produce task training documentation for conducting surveys in the event that MSHA questions the competency of the surveyor.

Examples of types of "surveys" that MSHA will consider are: exposure monitoring, workplace inspections, inspection of equipment, injury/illness tracking, occupational health assessments, and input from workers (speaking to inspectors). The frequency of surveys should be determined, based on a number of parameters including: dust collection system effectiveness; sampling results; changes in job or hazards; results of workplace or equipment inspections and maintenance; and issues identified by miners. Evidence that MSHA may request to ascertain compliance includes: exposure monitoring records; maintenance records; interviews with miners; visual inspections; and "other evidence presented by the mine operator," the representative said.

MSHA has provided additional information on its website (www.msha.gov) to assist mine operators in planning and implementing a system to conduct surveys as frequently as necessary to determine the adequacy of control measures. The sampling and analytical methods used by the mine operator for surveys conducted under §§ 56/57.5002 must be consistent with established principles, such as the National Institute for Occupational Safety and Health's (NIOSH) Manual of Analytical Methods, or MSHA's Metal and Nonmetal Health Inspection Procedures, which are used by MSHA inspectors.

Workplace Examination Policy Ebbs and Flows

On February 17, 2011, MSHA issued a new version of its Program Policy Letter concerning workplace examinations at metal/nonmetal mines, conducted pursuant to 30 CFR §§ 56/57.18002. The standard at issue requires that:

a. A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

b. A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

c. In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

The terms "competent person" and "working place," used in §§ 56/57.18002(a), are defined in §§ 56/57.2. This provides that a "competent person" is "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned." The phrase "working place" is defined in 30 CFR §§ 56/57.2 as: "any place in or about a mine where work is being performed." As used in the standard, the phrase applies to those locations at a mine site where persons work in the mining or milling processes.

MSHA's Program Policy Manual (PPM) clarifies that the record of examination must include: (1) the date the examination was made; (2) the examiner's name; and (3) the working places examined. In addition, §§ 56/57.18002(a) require daily workplace examinations for the purpose of identifying workplace safety or health hazards. The policy stresses that "Prudent operators should include a description of the conditions found which may adversely affect safety or health in the examination record." As noted above, in November 2010, MSHA issued a PPL that mandated such information be included in the required workplace examination reports, but that PPL was withdrawn after mining groups protested that this added a substantive recordkeeping requirement that was not contained in the mandatory standard and that the agency had violated rulemaking requirements by doing so. Now, only the instructive language is included.

In order to comply with the clear terms of the record retention portion of §§ 56/57.18002(b), operators must retain workplace examination records for the preceding 12 months. MSHA is no longer accepting an alternative to the 12-month retention period, which the old PPM permitted (where mine operators only had to retain records since the most recent MSHA inspection, as long as the workplace examiner could certify that the full 12 months of workplace examinations had been conducted). The revised policy adds, "Evidence that a previous shift examination was not conducted or that prompt corrective action was not taken constitutes a violation of §§ 56/57.18002(a). This evidence may include information which demonstrates that safety or health hazards existed prior to the working shift in which they were found."

Truck Scales Targeted by Policy

In 2010, MSHA started a new unofficial campaign to require mid-axle berms or rails along truck scales at mines (citing to 30 CFR 56.9300). However, in July 2010, an Administrative Law Judge ruled in Secretary of Labor v. Knife River Corporation, that MSHA failed to demonstrate that there was a hazard of a truck overturning or injury the driver on truck scales that had an elevation ranging from 24 to 36 inches. As a result, in October 2010, MSHA issued a policy bulletin stating that all scales with 16" or greater drop-off must be bermed/railed.

A number of companies have alleged that MSHA has engaged in illegal rulemaking, as it has not demonstrated that there is a hazard under all circumstances with 16" drop-off and it never subjected the limit to notice-and-comment rulemaking. The cited berm standard contains no elevation specifications.

There have also been concerns expressed that MSHA's suggested abatement measures in the policy document are not feasible in many circumstances and may be contrary to the advice of scale manufacturers (e.g., building up ground around scales may interfere with servicing and calibration);

ironically, some manufacturers say that mid-axle rub railings may cause damage to truck wheels and lug-nuts and actual pose a greater hazard. Moreover, MSHA has not released any data suggesting any injuries or fatalities have occurred as a result of overtraveling at truck scales and in a pending case has admitted that it cannot point to a single incident that resulted in a reportable lost time or restricted duty injury (or worse). However, MSHA's response was an attempt to neutralize the Knife River ruling and it does eliminate the "fair notice" affirmative defense that many operators who were cited pre-policy can point to, given that the truck scales were never previously required to have mid-axle rails.

Mobile Equipment Access Policy Clarifies Requirements

Another new enforcement initiative that triggered subsequent policy development concerns access to work platforms on mobile equipment such as haul trucks, excavators and drills. After first issuing many citations without notice on equipment that was previously deemed compliant, MSHA was challenged by multiple mining associations as well as equipment manufacturer organizations, about inspector demands that railings be retrofitted on platforms for relatively new equipment that met international consensus standards in its design.

As a result, on June 16, 2010, MSHA issued Program Information Bulletin No. P10-04 on safe access and fall protection for mobile equipment. It applies to miners operating, conducting maintenance or service activities, or accessing work platforms of self-propelled mobile equipment in metal/nonmetal mining. Although the policy was supposed to resolve the issue, it is less than clear and it is not being recognized by all MSHA inspectors. The policy appears to recognize ISO 2867 and SAE J185 standards (applicable to platforms less than 2 meters high) as providing engineered "safe access" but it puts the burden of demonstrating certification on the mine operator. Many manufacturers are now making letters confirming such consensus standard compliance for specific models available to mine operators and counsel. If this is not the case for equipment that an operator owns, it is critical to get cooperation from manufacturers to document ISO/SAE compliance for selected equipment.

The policy also provides MSHA's recommendations for ensuring safe access on such platforms and equipment:

- Equipment should be inspected for icy, wet, or oily areas at the start of each shift and whenever conditions dictate. Before climbing on, off or around mobile equipment, footwear should be free of mud or other substances that could cause slipping.

- Persons climbing on or off mobile equipment should face the machine, and both hands should be free for gripping the ladder, handrail, or handhold.

- Walkways should be no narrower than their original manufactured widths, constructed with slip-resistant surfaces, and securely attached.

- Unobstructed access should be provided to all areas of the machine where a person might travel.

- Handholds or handrails should be within easy reach at critical locations.

The policy further states: “Any modifications to mobile equipment should generally not be made without an engineering evaluation and concurrence by the manufacturer of the equipment.” If this is not followed, it could be cited under 56. 14205! Mine operators should be aware that if they are cited and the equipment was previously inspected without citation, it may raise the “fair notice/due process” defense. Because this has become an enforcement priority for MSHA, prudent operators should look for feasible ways of using fall protection in addition to following the tips above (e.g., portable ladders; manlifts; extending grease lines; retractable lanyards with 5,000 lb. anchorage point; rail systems that can go on either side of equipment while it is inspected/serviced).

“Rules to Live By” Campaign Results in Elevated Actions

On the Ides of March 2010, just weeks before the Massey Upper Big Branch explosion killed 29 miners and refocused national attention on mine safety issues, MSHA kicked off a new initiative it calls “Rules to Live By.” It targets 13 metal/nonmetal standards (12 surface and 1 underground) and 11 coal standards for increased enforcement emphasis by the agency. Citations and orders issued under these are presumptively significant and substantial, many are rated as “high negligence” (because of MSHA’s heavy publicity of the program), many are also issued as “unwarrantable failure” citations/orders under Section 104(d) of the Mine Act (which makes them susceptible to “flagrant violation” classification and maximum $220,000 penalties), and all are reviewed for special monetary assessment beyond the regular penalty point system in Part 100.3.

The hazards addressed in the campaign include: Falls from Elevation; Falls of Roof and Rib; Operating Mobile Equipment; Maintenance; Lock and Tag Out; and Blocking against Motion. The metal/nonmetal standards targeted are:

- **56.9101 -** Operating speeds and control of equipment
- **56.12017 -** Work on power circuits
- **56.14101(a) -** Brake performance
- **56.14105 -** Procedures during repairs or maintenance
- **56.14130(g) -** Seat belts shall be worn by equipment operators
- **56.14131(a) -** Seat belts shall be provided and worn in haul trucks
- **56.14205 - Machinery, equipment, and tools used beyond design**
- **56.14207 - Parking procedures for unattended equipment**
- **56.15005 - Safety belts and lines**
- **56.16002(c) - Bins, hoppers, silos, tanks, and surge piles**
- **56.16009 -** Persons shall stay clear of suspended loads
- **56.20011 -** Barricades and warning signs
- **57.3360 -** Ground support use

The eleven coal priority standards are:

- **75.202 -** Roof, face, and ribs shall be supported and no person shall work or travel under unsupported roof
- **75.220(a)(1)** - Develop and follow approved roof control plan
- **75.511** - No electrical work shall be performed on energized low, medium, or high-voltage distribution circuits or equipment …
- **75.1403-10(i) -** Off-track haulage roadways shall be maintained…

- **75.1725(a)** - Equipment shall be maintained in safe operating condition or, removed from service
- **75.1725(c)** - No repairs until power off and blocked
- **77.404(c)** - No repairs or maintenance shall be performed until the power is off and machinery is blocked
- **77.1607(g)** - All persons shall be clear before starting or moving equipment
- **77.1607(n)** - Mobile equipment shall not be left unattended unless brakes are set, chocked…
- **77.1710(g)** - Safety belts and lines shall be used where there is a danger of falling
- **77.1710(i)** - Seatbelts shall be worn in a vehicle where there is a danger of overturning and where roll protection is provided.

On November 18, 2010, MSHA launched round two of its Rules to Live By campaign, this time exclusively focusing on the coal sector. "Rules to Live By II: Preventing Catastrophic Accidents" was developed from data gathered by reviewing accidents that resulted in five or more fatalities, as well as from incidents caused by fires or explosions that had the potential to result in more fatalities.

MSHA analyzed citation data from eight accidents at underground coal mines that took place between 2000 and 2009, and resulted in the deaths of 47 miners. These accidents occurred at Willow Creek, Jim Walters No. 5, McElroy, Sago, Aracoma Alma Mine No. 1, Darby Mine No. 1, R & D Coal Co. and Crandall Canyon. In developing the second phase of "Rules to Live By," MSHA reviewed these accidents to identify conditions and practices contributing to the accident, safety standards violated, root causes and abatement practices. The April 5 explosion at the Upper Big Branch Mine is not included, but MSHA plans to update "Rules to Live By II" when the investigation of that accident is complete.

Enforcement personnel will focus more attention on these standards through enhanced enforcement and increased scrutiny for violations of these standards. Inspectors will be instructed to carefully evaluate gravity and negligence, consistent with the seriousness of the violation, when citing violations of standards that may cause or contribute to mining fatalities. It is expected, as with phase one of RTLB, most citations will be specially assessed and many will be written as “unwarrantable failure” under Section 104(d) of the Mine Act, because of the “advance notice” that MSHA is giving operators about the need to conform to the specified standards.

The priority coal standards in the new campaign are:

- **75.203(a)** - The method of mining shall not expose any person to hazards caused by excessive widths of rooms, crosscuts and entries, or faulty pillar recovery methods.

- **75.223(a)** - Revisions of the roof control plan shall be proposed by the operator when conditions indicate that the plan is not suitable...

- **75.333(h)** - All ventilation controls, including seals, shall be maintained to serve the purpose for which they were built

- **75.337(f)** - Welding, cutting, and soldering with an arc or flame are prohibited within 150 feet of a seal.
- **75.360(a)(1)** - A certified person must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work

underground.

- **75.360(b)(3)** - Preshift examinations shall include the working places, approaches to worked-out areas and ventilation controls on these sections. The examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

- **75.370(a)(1)** - The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.

- **75.1504(a)** - Each miner shall participate in a mine emergency evacuation training and drill once each quarter

- **75.1505(b)** - All maps shall be kept up-to-date and any changes shall be shown on the maps by the end of the shift on which the change is made.

The Return of Pre-Penalty Conferences?

The 19,000-case backlog at the Federal Mine Safety & Health Review Commission that resulted from a significant spike in contested citations triggered – at least in part – by MSHA's actions abolishing pre-penalty conferences caught Congress' attention. MSHA claimed that the contests were due to companies trying to avoid being placed on a Pattern of Violations; industry countered that MSHA now refused to discuss citations at all until after a formal penalty contest was filed, which automatically gets the case docketed in the FMSHRC system and counted among the backlog.

Consequently, MSHA has launched a pilot program of restoring pre-penalty citation conferences under Part 100, upon filing of a conference request letter with the District Office within 10 days of the citations' issuance, in one metal/nonmetal and two coal districts. The agency is now reviewing the data to see if the program is actually reducing formal contests and what the results have been, before expanding it to other areas. A preliminary report from the Metal/Nonmetal Southeast District indicated the following:

- There were 2,292 inspections conducted during the first year, and 6,250 citations were issued;
- 26 percent of the citations were S&S and 24 percent had "elevated negligence" (high negligence, most issued under Section 104(d) of the Mine Act under the "Rules to Live By" initiative);
- Mine operators conferenced only 66 inspections (2.9%) – although of course, many others simply by-passed this step and filed notices of contest and/or penalty contests under FMSHRC rules;
- A total of 174 citations/orders were conferenced, resulting in 13 alleged violations being vacated, 9 being modified from S&S to non-S&S, 14 having negligence reduced, and 13 having other modifications;
- Approximately 56 percent of the operators who conferenced citations/orders were not fully satisfied and indicated they would still proceed to formal litigation.

If MSHA continues the program in the 3 current districts or further expands the programs, does it benefit mine operators to participate? The answer is, "it depends." The "Pros" of conferencing early are that it can reduce the number of contested cases if issues on negligence/gravity can be resolved early in the process; it may be opportunity to address infeasible abatement requirements;

and, if Section 104D citations can be reduced to Section 104(a), or vacated entirely, it eliminates personal liability under Section 110 (civil and criminal prosecution) potential and related special investigations.

On the other hand, MSHA specifically states these are not "settlements" and so all information submitted can be used against mine operator and agents in court. If the same conference memo or discussion is held after the mine operator files a contest, the discussion is deemed a settlement negotiation and is barred from being used in court under the Federal Rules of Civil Procedure. Moreover, MSHA can make citations worse (not just give relief) based upon what information the operator discloses in conference … and because of the hasty 10-day nature of the conference, mistakes can easily be made if issues are not thoroughly research or discussed with counsel. In addition, MSHA states it will only consider factual information (not legal arguments), and the agency will not share its file information with operator so operator will not know the strength of agency's evidence.

The bottom line? Following the following precautions:

- Make sure no statements are incriminating;
- Check with counsel if discussing any 104D citations/orders, get advice on whether to have counsel prepare conference statement or handle telephonic conference - and do NOT have the "target" present at the conference;
- Do not provide MSHA with any privileged documents (could waive privilege for others);
- Recognize that MSHA will rarely vacate anything in conference;
- If a citation/order issued under Section 104(d) is involved or there are significant abatement issues, it may be sensible to file a notice of contest within 30 days (rather than waiting for the penalty to be proposed and contested) and request an expedited hearing;
- Remember that the mine operator can still contest the citation/order and penalties if it does not agree with conference outcome;
- Make sure no statements are incriminating;
- Check with counsel if discussing any Section 104D citations/orders, get advice on whether to have counsel prepare conference statement or handle telephonic conference - and do NOT have the "target" of any possible Section 110 actions present at the conference;
- Do not provide MSHA with any privileged documents (as this could waive privilege for other documents later in the process);

In summary, while there may be benefits of exhausting every appeal opportunity – starting with pre-penalty conferences – care must be taken not to make a bad situation worse, and operators should not be deterred from proceeding further in the process if they do not get the desired relief because they will eventually get a second look at the citation or order by an attorney for MSHA who may have a more objective view as to its legitimacy.

Pattern of Violations Is Key Rulemaking Activity

On February 2, 2011, the Mine Safety & Health Administration (MSHA) issued its anticipated proposal to drastically revise its Pattern of Violations (POV) criteria, aimed at allowing the agency to crack down more quickly on mine operators it deems to be "chronic violators" of mandatory standards who have "demonstrated a disregard for the safety and health of miners." Although it is tempting to welcome a rulemaking, after several years in which MSHA has (without rulemaking)

abruptly issued, then modified its POV criteria and has – in the process – created a byzantine system that is indecipherable to most in the industry, the proposed rule raises more questions than it answers. It is, in many ways, a charade of a rulemaking. The comment period was set to close on April 4, 2011, but could be extended if public hearings are requested.

A bit of background on POV may be helpful in providing context for the rulemaking. The POV language actually comes from Section 104(e) of the 1977 Mine Act, which provided MSHA with POV as an additional enforcement tool in addition to the issuance of citations, civil penalties, withdrawal orders, and injunctive relief that were established under different sections of the Act. Language in the legislative history references the tragic Scotia mine disaster, where 26 persons (miners and mine inspectors) were killed. That mine, Congress noted, had a chronic history of persistent and serious violations that were cited and abated, but kept recurring. The mine operator has the ultimate responsibility for ensuring safety and health at the mine, and the POV provisions were a sanction to require remedial action from those operators who did not respond to MSHA's other enforcement tools.

MSHA took its first shot at establishing POV rules in 1980, with a proposed rulemaking. Predictably, industry was overwhelming opposed to the proposed actions, and in 1985, MSHA withdrew the proposal. At issue, during round one, was the pending issue of what constituted a "significant and substantial" (S&S) violation. MSHA quickly tried again, issuing an advance notice of proposed rulemaking, asking for input on whether to focus on S&S violations of a particular hazard or S&S violations throughout the mine, as well as whether having a mine in the "D chain" (under a Section 104(d)(2) unwarrantable failure sequence) was indicative that other enforcement measures had been ineffective. A proposed rule followed in 1989, containing the criteria and procedures for identifying mines with a pattern of S&S violations. That proposal was adopted in July 1990 as a final rule, codified at 30 CFR Part 104.

However, despite these regulations spelling out POV criteria and process, MSHA made zero use of it until after the agency came under scrutiny by Congress in 2006, following the Sago mine disaster. In oversight hearings that ultimately led to the passage of the 2006 MINER Act, MSHA was repeatedly asked why it neglected to use the POV tools that had been at its disposal since enactment of the 1977 Mine Act. The agency's response, in 2007, was to issue its first POV "policy" establishing how it would screen mines for a "Potential Pattern of Violations" (PPOV) finding, what mines would have to do to avoid being formally placed on a POV, and what had to be done to be removed from POV once placed there. The criteria have been tweaked several times since then, most recently in 2010.

One thing consistent in all POV rules and policy to date was that only "final orders" could be considered in placing a mine on POV status, although "issued" (but not finally adjudicated) citations and orders could be used for initial screening along with other criteria, such as injury/illness incidence rates. The current policy also provided for a 24-month "lookback" period to consider only S&S citations/orders that were final in making the POV determination.

This approach, of course, allowed for elimination of any contested citations/orders that were either vacated by the agency, modified to non-S&S in a settlement, or vacated or modified to non-S&S by an Administrative Law Judge or the Federal Mine Safety and Health Review Commission (or a federal appeals court) after litigation. This also allowed mine operators to exercise their due process rights – being innocent until proven guilty – before having an "issued" citation that the agency had not yet proven to be a violation to be used against it for POV qualification purposes.

That has all changed under this proposal. The most notable policy shift incorporated into the rulemaking would grant MSHA the ability to place a mine on POV simply on the basis of the "issued" but not adjudicated S&S citations/orders and other elevated actions, even when those actions are still in contest before the Commission. The agency has also moved away from any predetermined "lookback" period and does not state any specific threshold number of S&S citations that would trigger a POV finding (unlike current policy, which stipulates a fairly large number of violations that would be a minimum for POV consideration).

Although MSHA seems to indicate that it would further refine its criteria put "put it on the website" after the final rule is adopted, it is disingenuous to ask the mining community to comment on such a vague process. It is, for all purposes, impossible to reasonably comment on a rule whose precise criteria are being kept secret until after the rule is finalized … and making this criteria via policy so that it can be modified in virtually any manner in the future to either tighten – or broaden – the POV net depending upon how many mines any current MSHA administration wishes to shut down in whole or part.

MSHA also proposes to eliminate the current "PPOV" phase in the process – which involved placing a mine on notice that it had potential POV exposure, then meeting with the District Manager to come up with actions that the mine would voluntarily take to see if they resulted in a lowering of the number of subsequent S&S citations issued, improvements in the mine's injury/illness rates, or both. I participated in one such PPOV meeting and, after it was pointed out to the District Manager that most of the citations triggering the proposed finding were under contest and that the mine had concurrently received accolades from MSHA for its successful injury-free performance, the POV action was tabled. No such meetings will be available under the newly proposed POV criteria.

Instead, MSHA promises that it will publish on its data retrieval system some method for individual mines to see how "close" they may be to a POV finding under the "to be revealed" guidelines, and the mine can "voluntarily" submit a safety and health management program to the District Manager. If the plan is approved by the District, and is implemented by the mine operator (and presumably implemented with tangible results in terms of future violations and injuries), then a POV will not be issued. Adoption of this plan falls within the "mitigating circumstances" that the agency will consider in determining whether an operation fits the POV criteria, under proposed standard 30 CFR 104.2(a)(8). There is no actual provision for what constitutes an acceptable safety and health management program in the actual standard's text, although the program is referenced in the preamble.

If programmatic action is not taken (or is taken but does not yield the desired results), and the mine subsequently meets the POV criteria, any S&S citation issued within 90 days of the POV finding will serve as a shut-down order for that area of the mine or affected equipment. The mine will stay on POV until it has an inspection completely free of S&S citations – in other words, any inspector can ensure that a mine remains on POV indefinitely just by issuing a single S&S citation (even if it is subsequently vacated or modified to non-S&S).

As far as the safety and health management program, MSHA has declined to provide details as to what this would require, but the agency economic impact analysis projects that 50 mines per year would adopt such programs to keep from receiving a POV finding, at a cost of about $22,000 per program. In response to my question at the briefing for the POV rule, MSHA's representative said

that this is not the same “safety and health management program” as would be required under the separate rulemaking of the same name now underway.

The other pattern criteria, to the extent that the rule defines them, include:

- Citations for significant and substantial violations (number to trigger POV unknown);
- Orders under Section 104(b) for not abating S&S violations (number unknown);
- Citations and orders under Section 104(d) for unwarrantable failure to comply with mandatory standards (number unknown);
- Imminent danger orders under Section 107(a) (number unknown);
- Order for training violations under Section 104(g) (number unknown);
- Enforcement measures, other than section 104(e) of the Act, which have been applied at the mine (undefined, but one can expect that actions brought under Section 103(a), 103(j), 103(k), and any injunctions obtained could fall within this category); and
- “Other information that demonstrates a serious safety or health management problem at the mine such as accident, injury, and illness records (again, no threshold values are provided to know what the agency would deem a “serious problem”).

Although POV carries no monetary penalty, neither does the proposed rule provide for any right of review, or any recourse to the courts in the event that an operator believes it has been improperly put under POV. Because the PPOV phase is being removed, a mine operator can find itself under POV without any advance notice other than constant monitoring of the MSHA website and the mine’s inspection record. Appealing citations will not help, nor – it seems – will being victorious in contesting citations, as there is no mechanism proposed that would lift the POV finding if the “elevated actions” constituting the POV are withdrawn or vacated after POV has been imposed.

These are all significant issues that need to be raised by the mining community before the rule is fast-tracked into law. Congress has been pushing MSHA to place more mines on POV, and this ambiguous rulemaking could certainly do the trick.

Conclusion

As is evident, mine operators face ever-increasing enforcement initiatives from MSHA and a genuine desire by the agency and Congress to see “bad actors” punished severely monetarily as well as through personal civil and criminal prosecution under Section 110 of the Mine Act. Perhaps the next shoe to drop will be the MSHA mandate – now the subject of ongoing rulemaking – to establish and implement a safety and health management program at every mine. Although OSHA, too, has such a rulemaking in progress (the “I2P2” initiative), it is a different story when imposing such a broad-ranging mandate in the context of a strict liability statute.

Although legislative measures would not appear to be likely to be adopted, given the split between the House and Senate party-wise, mine safety legislation has always been “event-driven” (see, for example, the 2006 MINER Act that was adopted by a Republican Congress and signed by President Bush just six months after the tragedy at the Sago Mine) and if industry, labor and the agency cannot work together to advance safety, more tragedies will likely trigger more stringent sanctions for violative behavior and conditions.