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ISSUE 8
DECEMBER 8, 2014
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Federal Court Upholds OSHA's Expansive Subpoena Power By: Adele L. Abrams, Esq., CMSP

The United States District Court (E.D.N.Y.) recently ruled that the Occupational Safety & Health Administration (OSHA) has authority to issue administrative subpoenas *duces tecum* for documents that fall outside the subject matter of the agency's initial incident investigation as long as the information is relevant to "any" inquiry that OSHA is authorized to undertake. This is yet another decision increasing the agency's power to get into potentially incriminating documents, including self and third party audits that reveal conditions that are in violation of agency standards.

While OSHA does have a safe harbor of sorts for audits, and typically will not issue citations related to audit findings, unless the conditions have not been remediated, in 2011, a different federal district court, in Illinois, upheld a similar subpoena for audit and other documents prepared or held by the employer's insurance company. In that case, the reports were used as evidence against the employer to prove willful violations. Such violations can be the basis for criminal prosecution, if a fatal accident is involved, so the stakes can be quite high.

The latest decision, issued in July 2014 in *Long Island Precast, Inc. v. US Department of Labor*, ruled on the employer's motion to quash the administrative subpoenas issued by OSHA. The motion was granted in part, and denied in part ... effectively splitting the baby!

The employer is a manufacturer of pre-

cast concrete products, operating out of a 14 acre facility in New York. The local OSHA office received a call about a fall from machinery accident and opened an investigation, on site for two days. A worker had fallen over 9' feet while loading concrete catch basins onto a forklift. OSHA was alerted to multiple purported hazards, including: (1) employees were climbing the faces of product rather than using a ladder; (2) there was no fall protection in place at the time of the worker's accident; and (3) there were deficiencies in the forklift used at the time of the accident. During the second day of the investigation, the inspector observed an employee riding on the side of a forklift while it was in motion. This second forklift also had safety deficiencies.

As a result of the observations and information garnered from employees during the interviews, OSHA decided a subpoena was needed to obtain more information and issued both a subpoena for documents and three subpoenas to compel testimony of witnesses employed by the company. These are different from depositions and document requests issued in the course of post-citation litigation because in litigation you know what you've been accused of and questions and document requests must be relevant to the accusations. Here, by contrast, the agency goes on something of a fishing expedition and then decides what to accuse in a subsequent citation. In this case, the subpoenas demanded information related to both employees and the forklifts. The testimonial subpoenas were for the company president, manager, and sales manager

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OSHA Subpoena Power, Cont.

to testify concern in working conditions at their facility.

The standard for determining the validity of an administrative subpoena (which is issued by the agency itself rather than needing to seek permission of a court) was set forth in a Supreme Court decision, *Morton Salt Company*, which predates the existence of OSHA! In essence, a subpoena is valid if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant. The agency may exercise its power "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."

Documents under dispute for the forklift included voluminous records on testing, evaluation, training, lists of operating personnel, drawings, bills of lading, manufacturer information, and more. Among the HR-type documents under dispute were a list of all individuals who have performed work of any kind for the employer, their home information, employment dates, rate of pay and whether they were full or part time; payroll records for all employees during the specified period; cash disbursement records for all employees, including any paid "off the books," and significant financial interest data for the company owners. Documents obtained by OSHA can be used as the basis of additional prosecutions concerning misclassification of workers as contractors, and for wage violations under the Fair Labor Standards Act.

The employer sought to limit inquiries only to those issues related to the workplace accident. The court shot down that argument and said OSHA has authority to issue subpoenas and that the company overlooked the second-day personal observations of the inspector, which broaden the scope of inquiry. It did, however, find that the first inquiry related to anyone having worked for Precast was overly broad and limited the scope to Precast's employees.

On the testimonial subpoenas, the employer argued that they were invalid because "witness fees and mileage" were not paid at the time of issuance. This was not disputed by OSHA, but the court held that the relevant rule applied only to court-issued subpoenas and not to agency administrative subpoenas. Therefore, the subpoenas were proper and the officials and managers would have to testify. OSHA would still be liable for payment of the fees in the end.

This case demonstrates the broad scope of information available to OSHA by using administrative subpoenas. It also illustrates the importance of having counsel challenge such subpoenas to quash them, in whole or part, or limit the extent of information as much as possible. Any pre-citation information obtained in this manner can and will be used against you.

FMSHRC Unanimously Reverses Judge's Decision on Training Order

By: Diana Schroeder, Esq.

After reviewing an unpublished decision by ALJ Margaret Miller, the Federal Mine Safety and Health Review Commission will reverse the ALJ and hold that an operator was not provided adequate notice of MSHA's interpretation of a training regulation. *Secretary of Labor v. Packer Engineering nka D.Q. Fire and Explosion Consultants, Inc.*, Slip Op., WEVA 2011-602 (ALJ Miller, August 13, 2012).

This case dates back to the Upper Big Branch Mine accident, where 29 miners perished in an underground explosion in May 2010. As part of the company's investigation, explosives experts were hired to assist, including expert Chris Schemel, President of D.Q. Fire and Explosion Consultants, Inc. Schemel was provided Part 48 hazard training prior to proceeding underground. Schemel was part of a team that accompanied MSHA and others underground over 25 times over a three-month period following the accident. Three months into the accident investigation, MSHA cited Schemel as an independent contractor and required him to complete 40-hour new miner training under Part 48.5, issuing a 104(g)(1) training order. Schemel received the training and continued to provide expert services to the company. The company contested the training order, which was upheld by Judge Miller. The Commission then granted review.

The three sitting Commissioners held a public meeting on October 22, 2014 and announced their intent to unanimously reverse Judge Miller on the narrow issue of fair or adequate notice. Applying the reasonably prudent person test, the Commissioners agreed that MSHA knew that Schemel had only been given hazard training, yet permitted him to proceed underground for a period of three months before deciding to cite Schemel as an operator and require Part 48.5 new miner training. Remarkably, after citing Schemel for lack of new miner training, MSHA permitted Schemel to go underground another 4 times without this training. The Commissioners agreed that if MSHA didn't have a clear enough view of the regulation (MSHA failed to enforce it for 3 months), how could Schemel be expected to know how MSHA would interpret the regulation? The Commissioners cautioned that this fair notice decision should be narrowly construed, and was based on the particular facts presented in this case. The Commission decision should be released soon.

Fall 2014 Regulatory Agenda Released

By: Gary Visscher, Esq.

Last month, just before Thanksgiving, the Obama Administration released its most recent listing of upcoming regulatory actions – the Fall 2014 Unified Regulatory Agenda. The release of the government-wide agenda received additional attention this year because of last month's election results. The Administration's ambitious regulatory agenda will be a source of conflict with Congress over the coming months, and Congress may seek to stop action on several regulations, or pass new requirements that agencies must meet in promulgating regulations.

OSHA's portion of the agenda lists 26 standards and regulations that the agency is currently working on. Notably absent from this agenda are combustible dust and injury and illness prevention programs (I2P2). Their absence does not mean that OSHA has dropped or discontinued work on them, only that other standards and regulations are now higher priorities. Among the items on OSHA's agenda is respirable crystalline silica. The agenda indicates that OSHA is currently reviewing comments submitted before, at, and after the public hearings. The agenda does not project a date for publication of a final rule, but it seems likely, barring the unforeseen, that it will occur in the second half of 2016.

Also on the agenda, in the "pre-rule" stage (meaning that the agency has not yet issued a proposed rule for public comment) are regulatory actions on infectious diseases (which is currently the subject of small business/small entity review prior to OSHA proposing a standard), chemical management and permissible exposure limits (PELs), changes to the process safety management (PSM) standard, and emergency response and preparedness. The latter two items stem from Executive Order 13650 issued after the tragic fire and explosion that killed 15 workers, many of them emergency responders, at a fertilizer plant in West, Texas, in April 2013.

OSHA's agenda also indicates that more changes in injury and illness recordkeeping and reporting requirements are coming. In September 2014, OSHA issued a final rule that changed reporting requirements when injuries occur – formerly incidents involving hospitalization of 3 or more employees, or a fatality, were required to be reported to OSHA within 8 hours. Under the new rule any fatality must be reported to OSHA within 8 hours, and any hospitalization or amputation or loss of an eye from a work-related incident must be reported to OSHA within 24 hours. That rule goes into effect on January 1, 2015.

OSHA has proposed additional changes to reporting requirements, specifically, to require worksites with 250 or more employees to electronically submit their injury and illness records to OSHA on a quarterly basis, and require worksites of more than 20 employees to electronically submit annual summaries of injuries and illnesses to OSHA. OSHA has indicated that it plans to post the information on its website. OSHA's regulatory agenda projects that the final rule on electronic submission of records will be issued in August 2015, which, if met, would likely mean that the requirements could go into effect beginning with 2016.

The regulatory agenda indicates that OSHA intends to complete final rules in the coming months on two standards that OSHA has worked on for many years – a construction standard on confined spaces, and a general industry rule on "walking-working surfaces and personal fall protection." The confined space rule is currently at OMB for review; OSHA projects that the final rule will be issued in March 2015. The final rule on "walking working surfaces" (on which OSHA first issued a proposed rule in 1990) is projected for June 2015.

MSHA's agenda lists one upcoming final rule, on proximity detection systems for continuous mining machines in underground coal mines, and several other items of significance that are being worked on. MSHA's civil penalty assessment rule is currently in the comment period, and public hearings are scheduled for this month. The agenda lists the post hearing comment period ending January 9, 2015. MSHA must assess the comments, but could issue a final rule at any time thereafter.

MSHA also lists respirable crystalline silica on its agenda, though as before, MSHA indicates that it will rely on OSHA's work on health effects and risk assessment for its standard. MSHA's agenda projects a proposed rule by October 2015. Two new items made MSHA's agenda, one dealing with exposure of miners to diesel exhaust, and the other beginning possible rulemaking to amend the "examination of working places in metal and nonmetal mines" in 56/57.18002. MSHA has often tried to expand the requirements of the standard through individual enforcement cases, but now is considering doing so through amendments to the standard.

The Regulatory Agenda is not binding on the agencies, and certainly the stated timelines for regulatory actions will change, but the agenda does give the public some indication of each agency's upcoming actions and priorities. If you have any questions about any of the items mentioned or other upcoming regulatory actions, please let us know.

Former CEO Indicted on Criminal Charges; MSHA Continues 110(c) Action Against Small Operators

By: Sarah G. Korwan, Esq.

The Mine Safety and Health Administration's (MSHA) determination and efforts to pursue members of management at all levels now goes far and wide. It appears that the agency is prosecuting all levels of management, from the corporate suite to the hourly foreman, and MSHA will employ any variety of practices necessary to obtain its desired results, be it a conviction or penalty.

It took 4 ½ years (just squeaking under the 5-year statute of limitations) and two government agencies, the Department of Labor's Mine Safety and Health Administration and the Department of Justice, to finally reach the top of the corporate ladder with the indictment of Don Blankenship. Blankenship, the CEO of Massey Energy from 2000-2010, was indicted for allegedly conspiring to cover up mine safety violations and obstruct federal enforcement efforts by providing advance warning of government inspections. This indictment follows an unprecedented government effort to connect safety violations stemming from the 2010 Upper Big Branch disaster (UBB), and other Massey mines, to mine management. However, it is also noteworthy as this is the first indictment reaching the highest level of the corporate ladder. The four count indictment, filed in U.S. District Court, includes two counts of conspiracy to violate federal mine safety and health standards, while the other two counts relate to making false statements to the Securities and Exchange Commission, before and after UBB. It is alleged that the statements were intended to inflate and/or maintain stock prices, thereby appeasing stockholders. The four charges carry a maximum of 31 years combined sentence.

The participants of the conspiracy are not named, but are identified as "known and unknown" individuals. Although, to date, three other members of mine management, Hughie Elbert Stover, David Hughart and Gary May have either been convicted or pleaded guilty to charges related to the 2010 explosion. These defendants were likely encouraged to cooperate in the federal investigation of Blankenship in an effort to reduce their own sentences, which ranged from 3 ½ years to 21 months imprisonment. Additionally, May was fined \$20,000.00.

Although MSHA has no legal power to subpoena witnesses on its own, state governments do hold that power, and may exercise that power in conjunction with MSHA investigations.

Stover, convicted in December, 2011, was the first prosecution in relation to UBB. In part, the Department of Justice relied upon witnesses who were subpoenaed by the West Virginia Office of Miners' Health, Safety and Training (WV OMHST). Although the information was obtained by the WV OMHST, MSHA was most likely heavily involved with the interviews. Stover was sentenced to 3 years in prison, which, at the time, was the longest sentence handed down in any mine safety case. He appealed the sentence to the Fourth Circuit Court of Appeals, but such appeal was denied.

Even with small mining operations, MSHA continues to take a hardline approach regarding penalties, even with hourly foreman. In 2009, MSHA issued eleven citations/orders against Mize Granite Quarries, Inc., (MGQ) a stone quarry in Elberton, Georgia. Additionally, MSHA issued one citation and three orders directly to MGQ's owner, Robert Mize, and 18 year employee and foreman, Clayborn Lewis. After a hearing, the ALJ dismissed one order but found violations with respect to the remaining citation and orders against both Mize and Lewis. The investigation had resulted in proposed personal penalties of \$13,600.00 against both Mize and Lewis respectively.

Following the submission of post hearing briefs and additional evidence, the Judge ultimately reduced the penalties against Mize and Lewis to \$1,500.00 and \$900.00, respectively. Notably, Lewis, who was represented by Mize at hearing, did not provide the Judge with financial information. Despite this lack of evidence, the Judge determined that his ability to pay was likely not better than that of his employer's. Ultimately, the Secretary appealed and, the Commission affirmed, but remanded for various reasons, two times. On the third appeal, the Commission found that the Judge made a reasonable inference based upon substantial evidence in the record, and did not abuse her discretion, again affirming her decision. Fortunately for the 110(c) respondents in *Sec. of Labor v. Mize Granite Quarries, Inc., Robert W. Mize II; and Clayborn Lewis*, 2014 WL 6629588, (Nov. 14, 2014), the Secretary did not prevail, even after multiple attempts on review before the Commission.

This recent pattern of actions by MSHA seem to imply that they will pursue anyone at any level for as long as it may take to obtain a conviction or penalty against an individual. Such perceived distinctions between management, such as salary versus hourly compensation, are not a bar to MSHA pursuit of personal penalties under section 110(c) of the Mine Act, and we anticipate such charges and investigations will become more prevalent throughout the mining industry, for both CEO's and hourly foreman.

Guarding Citations are Still the Most Issued by MSHA at Surface Nonmetal Mines

By Amged Soliman, Esq.

For the year 2014 (to date) MSHA has cited surface-nonmetal mines under standard 30 C.F.R. §56.14107(a), which requires moving machine parts to be guarded, more than any other standard. Issuances written under 56.14107(a) constitute 6.49% of citations/orders issued to surface-nonmetal mines between January 1, 2014 and the present.¹ This continues a trend which dates back for at least five (5) years, with 56.14107(a) being one of, if not the, the most frequently issued standards. With this in mind, MSHA inspectors are likely to continue to pay close attention to this guarding and mine operators are well-advised to be prepared.

The standard requires that “moving parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.” 30 C.F.R. §56.14107(a). It is also helpful to note that MSHA’s Program Policy Manual specifies that the use of chains to rail-off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with the standard. In addition to restrictions on how operators must apply guarding, it is equally important for them to know what need not be guarded. Per §56.14107(b), guards “shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.” Additionally, per the Policy Manual, conveyor belt rollers are not to be construed as “similar exposed moving machine parts” under the standard and cannot be cited for the absence of guards and violation of the standard where skirt boards exist along the belt.

Ultimately, MSHA will be looking to ensure that guards at conveyor locations are present and extend a distance sufficient to prevent any persons from accidentally getting behind the guard and resulting in entanglement. Operators are urged to continue providing proactive safety training to miners and emphasizing the importance that thorough workplace exams lead to prompt correction of any potential hazard.

FMSHRC Stresses Unwarrantable Failure Criteria; Vacates Flagrant Designation Where Secretary Did Not Establish Violation

By: Joshua Schultz, Esq., MSP

In a recent case, *ICG Hazard, LLC*, 21 MSHN D-2752 (Oct. 7, 2014), the Federal Mine Safety and Health Review Commission reaffirmed the criteria for an “unwarrantable failure” and held that the Secretary must prove a flagrant violation for the imposition of a civil penalty greater than \$70,000.

The Commission ruled on an appeal of a decision by ALJ Miller in which she affirmed two 104(d)(1) orders, Nos. 8315597 and 8316130, one of which was ruled flagrant despite a joint stipulation in which the Secretary agreed not to pursue the flagrant designation. Chairman Nakamura, and Commissioners Cohen and Althen, unanimously modified Order No. 8315597 to a 104(a) citation and reduced the flagrant designation on Order No. 8316130 while reducing the penalty from \$138,500 to \$70,000 – the maximum penalty for a non-flagrant violation.

Regarding Order No. 8315597, the Commission noted that the ALJ did not make an explicit finding of unwarrantable failure and did not examine the specific criteria for establishing an unwarrantable failure. The criteria requires consideration of the following factors in determining whether conduct is “aggravated:”

- (1) the extent of the violative condition;
- (2) the length of time that the violative condition existed;
- (3) whether the violation posed a high degree of danger;
- (4) whether the violation was obvious;
- (5) the operator’s knowledge of the existence of the violation;
- (6) the operator’s efforts in abating the violative condition; and
- (7) whether the operator had been placed on notice that greater efforts were necessary for compliance.

The ALJ did not examine these factors in the decision and did not make a finding with respect unwarrantable failure, thus the Commission ruled that the Secretary had not established a 104(d)(1) violation and reduced the citation. It is noteworthy that the

¹ MSHA’s list of top 20 violations for surface-nonmetal mines can be found on-line at <http://www.msha.gov/STATS/top20viols/top20home.asp>

Flagrant Criteria, Cont.

Secretary took the unusual step of recommending the citation be reduced in MSHA's brief to the Commission.

The Secretary and the mine submitted joint stipulations agreeing not to pursue a flagrant designation for Order No. 8316130. Additionally, the Secretary did not present any evidence at the ALJ hearing related to the elements of a flagrant violation. The Judge's decision did not make any mention of the flagrant designation, but affirmed the order and assessed a \$138,500 penalty against the mine. The Commission ruled this penalty improper, noting that the Mine Act limits penalties for non-flagrant violations to a maximum of \$70,000.

The MINER Act of 2006 allows penalties up to \$242,000 for violations deemed flagrant. A violation is deemed to be flagrant if it is "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that . . . reasonably could have been expected to cause death or serious bodily injury."

This case emphasizes that MSHA has the burden to prove all elements of a standard including whether an alleged violation is an unwarrantable failure or flagrant violation. Additionally, the Judge's decision must notate how and why the alleged violation meets these elements. If these elements are not included in the record, an operator will have grounds to have a citation reduced or vacated.