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MSHA Civil Penalty Proposal Draws Fire

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In December 2014, the Mine Safety & Health Administration (MSHA) held the first two public hearings on its proposed rulemaking to modify its citation criteria and significantly change its civil penalty criteria for regularly assessed citations under 30 CFR Part 100.3. The rule was published in the July 31, 2014, Federal Register, and a summary was previously distributed in the August 2014 edition of the Law Office newsletter. ([See August Newsletter](#).)

Adele L. Abrams, president of the Law Office, was among those testifying at the December 4th hearing at MSHA headquarters in Arlington, VA, speaking on behalf of the United Safety Associates (a safety consortium of mining companies in California, in the metal/nonmetal sector). Josh Schultz, managing attorney of the Law Office's Denver office, testified at the MSHA hearing there on December 9th. Two additional public hearings are planned, for February 5, 2015 in Birmingham, AL, and February 12, 2015 in Chicago, IL. Additionally, the comment deadline will be extended so that all comments must be received or postmarked by March 12, 2015. ([See How to Submit Comments](#).)

The proposed rule would, according to many of those testifying, increase civil penalty assessments for medium and larger mine operators and contractors by 300 to 1000 percent. MSHA had declared the proposal, which retains the maximum \$70,000 regular assessment, "revenue neutral," and highlighted that, for the smallest of operators, penalties could be

reduced under the plan. This is because greater weight would be given to history of violations and repeated violations, which are likely to be higher at larger mines and for contractors who use a single mine ID number for all of their U.S. operations. In addition, the proposal specifically increases mandatory minimum penalties for Section 104(d) unwarrantable failure violations by 150 percent (from \$2,000 to \$3,000 for Section 104(d)(1) violations, and from \$4,000 to \$6,000 for Section 104(d)(2) violations).

MSHA would add a 20 percent additional penalty reduction if citations are not contested, are timely abated, and paid promptly. In response to questions raised at both hearings, MSHA has confirmed that operators who utilize MSHA's informal, pre-assessment conferences will still be eligible for the 20% "good faith" penalty reduction for not contesting the "assessment or violation."

MSHA has also proposed removing the "de novo" penalty authority of the Federal Mine Safety & Health Review Commission (FMSHRC), which currently allows judges to depart from MSHA's proposed penalties and either raise or lower them based upon evaluation of the evidence and testimony. One of the penalty criteria in the Mine Act requires the FMSHRC to consider the penalty's impact on a mine operator's ability to remain in business, and binding them to MSHA's proposed assessment could impede consideration of this factor. While not testifying at the hearings, the FMSHRC (which is an independent agency, and not part of the U.S. Department of Labor) filed comments

INSIDE THIS ISSUE

MSHA Civil Penalty Proposal Draws Fire	1
Employee Security Screenings are not Compensable Time Under the FLSA	3
EPA Maintains Coal Ash Is a Non-Hazardous Waste	3
The Federal Mine Safety and Health Review Commission Stands Firm on De Novo Civil Penalty Assessment Authority	5

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Proposal Draws Fire, Con't.

opposing this aspect of MSHA's proposal. The elimination of *de novo* penalties was also opposed by the United Mine Workers of America.

While applauding MSHA's goals of bringing more consistency to the citation-writing process and potentially reducing the rates of citation contests, Abrams noted that the proposal could have unintended consequences, including overturning more than 30 years of established case law that defines key enforcement concepts such as "significant and substantial violations," "imminent danger," "unwarrantable failure violations" (which have implications for personal civil and criminal prosecutions under Section 110 of the Mine Act), and "flagrant violations" (those eligible for heightened penalties of between \$70,000 and \$242,000).

Abrams also stressed that elimination of some categories on the citation would make it more difficult to settle cases, because most judges require "paper changes" in order to justify and approve a substantive civil penalty reduction, and this could actually increase the volume of cases proceeding to trial. MSHA has proposed the following changes in citation classifications: (1) for gravity, eliminating "no likelihood," "highly likely," and "permanently disabling" classifications; and (2) for negligence, reducing the categories to three by replacing the low, moderate and high categories with just one category termed "negligent" and making the other two choices "not negligent" and "reckless disregard." The definition of "negligent" would become: "*The operator knew or should have known about the violative condition or practice.*" This omits the current consideration of mitigating factors such as training, enforcement of work rules, safety audits, and other proactive measures taken by mine operators and contractors to help foster compliance. It also raises the due process issue of how (and if) FMSHRC judges would consider evidence on these factors, if they were no longer relevant to the adjudication of negligence.

The elimination of "highly likely" means that citations classified as only "reasonably likely" to occur could be written as imminent danger orders, which are considered elevated actions for pattern of violation purposes. This would upset established case law concerning Section 107(a) of the Mine Act. The merging of "high" negligence into the consolidated "negligent" category suggests that this could also lead to either plain "negligent" citations being issued under Section 104(d) of the Act (triggering possible "agent"

civil prosecutions under Section 110(c)) or (more likely) to what would otherwise be "high negligence" citations being written as "reckless disregard," which in turn leads to more frequent criminal referrals even in non-accident cases.

Finally, to be assessed outside the regular penalty framework as a "flagrant" violation, MSHA's current policy states that the citation has to have potential for at least "permanently disabling" injuries and be either "high" or "reckless disregard" in terms of negligence. This raises questions as to whether, using the new categories, a citation that is rated as only a "lost workday" potential injury and only "negligent" in terms of negligence could be subject to a maximum \$242,000 penalty as a "flagrant" violation. MSHA did not clarify its intent at the hearings.

Abrams and other witnesses also focused on MSHA's changes to the definitions of "reasonably likely" and "occurred" in the rulemaking proposal. While MSHA representative Patricia Silvey said that it was not the agency's intention to change the definition of "S&S," but that MSHA would need to retrain the inspectors on how to issue them in light of changes to the classifications.

Many witnesses pointed out that the new rule would define "Reasonably Likely" as a "*condition or practice cited is likely to cause an event that could result in an injury or illness*" and would define "Occurred" as a "*condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness.*" These terms are not currently defined in Part 100.3 but in case law when analyzing whether the violation is "reasonably likely" to result in at least a "lost workday" type of injury, when the court is defining S&S.

The shift to consideration of whether an "event" is likely (or has occurred) rather than whether an injury or illness is likely (or has occurred) could push many more citations into being deemed S&S, which are the type that count toward a mine's pattern of violations. The FMSHRC has held that to establish that a violation of a mandatory safety or health standard is "S&S," the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety or health standard; (2) a discrete safety or health hazard -- that is, a measure of danger to safety or health -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury or illness; and (4) a reasonable likelihood that the hazard contributed

Proposal Draws Fire, Con't.

to will result in an injury or illness; and (4) a reasonable likelihood that the injury or illness in question will be of a reasonably serious nature. All four of these findings must be made before a violation can be designated as "S&S."

After catching heat over these changes at the D.C. area hearing, the Agency announced in Denver that they will likely revise the definition of "occurred" to remove the "could have resulted" clause under likelihood. Witnesses had stressed that the words "could have resulted in an injury or illness" may be easily applied to many conditions previously cited under a lower designation where no injury occurred. MSHA said they will remove this clause from the proposed rule.

However, if the shift toward likelihood of "events" remains in the rule, one consequence could be to make most citations S&S, reserving the non-S&S classification primarily for paperwork violations. More "reckless disregard" citations and "imminent danger" orders could also be the result of this rulemaking.

Mine operators and contractors are encouraged to weigh in on the impact upon their operations. If assistance is needed in preparing comments, please contact the Law Office at 301-595-3520 (DC area), 303-228-2170 (Denver), or 304-543-5700 (WV).

US Supreme Court: Employee Security Screenings are not Compensable Time Under the FLSA

By: **Amged M. Soliman, Esq.**

To the great benefit of employers nation-wide, the United States Supreme Court has ruled that time spent by employees waiting for and undergoing antitheft security screening is not compensable time under the Fair Labor Standards Act (FLSA). The Court's December 2014 ruling was unanimous and it reversed a 9th Circuit US Court of Appeal ruling that had ignited numerous class-action lawsuits brought by employees seeking back-pay for time spent on security screenings.

The Court's decision was born from, *Busk, et al., v. Staffing Solutions*, where warehouse workers, employed by Integrity Staffing to work in Amazon.com shipment fulfillment centers, argued that they should be compensated for time spent in security checkpoints. The plaintiffs argued that their time spent waiting to go through metal detectors was beyond *de*

minimis (or negligible) and should have been compensable because that time was solely for the benefit of the employers and their customers. The Supreme Court, however, found that argument altogether lacking, noting Congress' passing of the Portal-to-Portal Act which exempted employers from FLSA liability for claims based on "activities which are preliminary to or postliminary to" the performance of the principal activities that an employee is employed to perform.

In its prior rulings, the Court has held that the term "principal activities" includes all activities which are an "integral and indispensable" part of the employee's duties. The Court further stated that an activity is "integral and indispensable" if it is an intrinsic element of the employee's principal activities and one with which the employee cannot dispense if he or she is to perform his or her principal activities.

In short, the Court ruled that going through a security screening has nothing to do with an employee's ability to retrieve and wrap merchandise at shipment fulfillment centers, or other similar circumstances. The Court further elaborated that the amount of time spent on security screenings is an issue properly presented at the bargaining table and not to a court in an FLSA claim.

Ultimately this ruling benefits employers not only by declaring that security screenings are not compensable, but also by helping to clarify the principles used to establish what constitutes compensable activities. Employees and employers will no doubt continue to debate what are "integral and indispensable" duties, in other forms, and what are not, but this latest ruling by the Court is certainly a win for employers.

EPA Maintains Coal Ash Is a Non-Hazardous Waste

By: **Tina M. Stanczewski, Esq., MSP**

On December 19, 2014, The Environmental Protection Agency (EPA) established new requirements for the disposal of coal ash (coal combustion materials (CCR)) under the Resource Conservation Recovery Act (RCRA). RCRA regulates solid and hazardous waste products. Coal ash is the waste product produced from the burning of coal, often at coal-fired electric power plants. When power plants burn coal, some residue is expelled

Coal Ash, Con't.

through the smokestack, but a good portion remains inside the boilers and plants resulting in a waste product. With increased requirements for “scrubbing” the expelled coal, more residue remains.

The new rule maintains coal ash is a solid waste, under Subpart D, instead of categorizing it as a hazardous waste which would have had a harsh economic impact on the industry. The key provisions of the rule entail the disposal of coal ash and determining how coal ash is reused in commercial products. The American Coal Ash Association (ACAA) estimated that in 2012, 39 million tons of coal ash was reused beneficially. Coal ash can contain low levels of arsenic, mercury, chromium and thallium which the EPA wanted to ensure did not pose an environmental hazard.

Beyond disposing of it, some businesses use coal ash in products such as concrete, wallboard, roofing materials, and brick. This is considered an encapsulated beneficial use. The rule requires businesses to determine whether their end-result is a beneficial use for products starting after the rules effective date (180 days after publication in the Federal Register). Currently, the definition of beneficial use remains under the Bevill Amendment, which exempted “special wastes” such as coal ash from RCRA in 2000. The EPA definition for beneficial use is a material that “provides a functional benefit — that is, where the use replaces the use of an alternative material or conserves natural resources that would otherwise be obtained through extraction or other processes to obtain virgin materials.” (epa.gov).

An unencapsulated use, such as sludge has little data to support an analysis and the EPA anticipates having a conceptual model for unencapsulated beneficial uses in 2015. Some unencapsulated uses that the EPA has voiced concern over include CCRs in road embankments and agricultural applications. Further, the regulation does not apply to fly ash, bottom ash, boiler slag, and flue gas desulfurization (FGD) materials produced at non-electric power plants. However, the EPA determined that it will analyze these uses and possibly implement a separate regulation after further analysis.

Beyond using coal ash in products, the primary regulatory focus has been its safe disposal. With around 110 million tons of coal ash being produced each year, its disposal is a daunting task. Landfills and surface impoundments have been the primary

disposal units in the past.

There have been two significant spills which encouraged the environmental lobbyists to pursue heightened regulation of CCRs disposal. Recently, in 2014, North Carolina faced a spill of coal ash into a river that resulted in increased arsenic in the water supply. To prevent occurrences such as this, the new rule enacts several provisions involving disposal of coal ash:

- *Reduce risk of catastrophic failure at surface impoundments.* This provision becomes effective six months to two years after the rules publication. It details structural integrity design criteria and tasks owners/operators with periodic structural assessments to ensure the impoundment will not fail. Owners/operators must also create emergency plans for a catastrophic event.
- *Protect groundwater.* This provision becomes effective 30 months after the rules publication. It requires owners/operators to install monitoring wells, conduct periodic monitoring, and analyze the data. If a non-compliant level exists, corrective action must be taken. Further, there are specific requirements taking effect.
 - *Placement* [effective 18 months after publication]: Landfills and surface impoundments face five location restrictions (cannot be placed (1) above the uppermost aquifer, (2) in wetlands, (3) in fault areas, (4) in seismic impact zones, and (5) in unstable areas). Units that cannot become compliant need to be closed.
 - *Liner design* [effective 18 months after publication]: requires a composite liner for new landfills, impoundments, or lateral expansions.
- *Management of day-to-day operations* [effective six months after publication]: Establishes criteria to prevent public health and environmental impacts such as preventing run off, managing discharges, minimizing erosion, and managing releases into the air.
- *Recordkeeping* [effective six months after publication]: Owners/operators must record compliance with the rule, notify state of

Coal Ash, Con't.

decisions, and maintain a publically available website with compliance data.

Opponents of coal ash continue to push for categorization as a hazardous waste. For now, there is little impact to businesses engaging in the beneficial use of an encapsulated form of coal ash under the Federal law. Even though businesses disposing of coal ash face new requirements with an economic impact, the impact is much simpler with the classification as non-hazardous waste. However, states are considering stricter regulations. North Carolina reacted strongly after its spill and other states may follow its lead. If further spills occur from shuttered or active plants, the EPA may revisit the regulatory agenda and states may implement much stricter, cost-prohibitive requirements.

The Federal Mine Safety and Health Review Commission Stands Firm on De Novo Civil Penalty Assessment Authority

By: Sarah G. Korwan, Esq. & Nicholas W. Scala, Esq., CMSP

The Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., ("Mine Act"), and regulations promulgated by the agency defines the system for determining penalty assessments for issued citations and orders. These regulations are found at 30 C.F.R. Part 100. Save small changes over the years, the civil penalty assessment criteria have remained largely the same since its creation. However, in July 2014, Mine Safety and Health Administration (MSHA) proposed sweeping changes to 30 C.F.R. Part 100 and the penalty assessment process. Since the proposed rule's publication, MSHA has claimed this change is needed to promote consistency, objectivity, and efficiency in the citation/order writing and contest processes. However, MSHA's proposed rule also contains language that would alter and control the impartial review power of the Federal Mine Safety and Health Review Commission ("Review Commission") and its Administrative Law Judges ("ALJ"), power authorized by statute.

Currently, the Review Commission is an impartial, independent agency, which hears cases between mine operators and MSHA regarding the issuance of citations, orders, whistleblower claims, penalty assessments, and any other matter under the Mine Act. As an impartial decision maker, the Review Commission and its ALJ's currently hold *de novo*

authority regarding any and all MSHA assessed penalties. This means that the Review Commission and its judges are not bound by the penalty amount proposed by MSHA, and once the matter is brought to a hearing before the Review Commission ALJ, the penalty can be decreased or increased based on the evidence and mitigating factors presented.

MSHA seeks to handcuff the Review Commission and its judges through the proposed rule for civil penalty reform. The proposed rule contains language that would revoke *de novo* penalty review authority from the Commission and require the Review Commission and its judges to assess penalties according to the same point system in Part 100 that MSHA uses for non-specially assessed citations and orders. For obvious and justifiable reasons, this is a hotly debated issue with strong opposition from the overwhelming majority of mine operators, the United Mine Workers of America, and the Review Commission itself.

In formal comments regarding the proposed rule, the Review Commission strongly opposes the sections outlining MSHA proposed restrictions on the Commission's review authority. Specifically the Review Commission opposes the proposal based on eight elements, including but not limited to:

1. The Mine Act and Legislative History show that Congress intended the Review Commission have independent and exclusive authority to assess civil penalties;
2. The Proposed Rule conflicts with procedural rules and Executive Order No. 12866;
3. The Proposed Rule is inconsistent with 36 years of legal practice under the Mine Act and applicable caselaw; and
4. The Mine Act's rulemaking provision cannot be used to override specific statutory language and Congressional intent.

The Review Commission's *de novo* authority to assess civil penalties is well established. However, when deciding the final penalties to be assessed, §110(i) of the Mine Act establishes that the Review Commission and its judges must take into consideration six (6) criteria:

1. The operator's history of previous violations;
2. The appropriateness of such penalty to the size of the business of the operator charged;

Civil Penalty Assessment Authority , Con't.

3. Whether the operator was negligent;
4. The effect on the operator's ability to continue in business;
5. The gravity of the violation; and
6. The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Although these criteria correspond with the penalty assessment system currently used by MSHA under 30 C.F.R. Part 100.3, the Review Commission is not required or confined by the penalty point system that MSHA employs in the course of regular penalty assessment. Instead the Review Commission and its judges offer the opportunity for both MSHA and mine operators to present the facts at a full evidentiary hearing before an unbiased third party. The presentation of facts can include both incriminating and mitigating evidence regarding the alleged violation. Further, the operator can then present evidence of the companies past successes in safety or financial difficulties.

Once each party has been able to present its case, it is then that the assigned judge or commission will assess

a penalty based on the record created. The decision maker will consider each of the six elements listed above, and will assess what is believed to be an appropriate penalty based on those criteria and the information provided by both parties. Depending on the individual case and judge, different elements may be given lesser or greater weight in deciding the final assessed penalty.

In addition to the statutory authority granted to the Review Commission under the Mine Act, and the clear Congressional intent, existing caselaw regarding both the Review Commission and its Occupational Safety and Health Act counterpart, the Occupational Safety and Health Review Commission ("OSHRC"), firmly state that although the Secretary of Labor, through either MSHA or OSHA, may propose penalties to operators, only the Review Commission or OSHRC can assess those penalties against the operators. The processes are defined as "separate and independent" and therefore the Review Commission should not be bound by the same strict MSHA regulatory scheme as the agency party appearing before it. This would affect the ability of the Review Commission act as an impartial decision maker.

Notice: As of January 1, 2015:

All employers must report to OSHA:

All work-related fatalities within 8 hours

Within 24 hours, all work-related:

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Call your nearest OSHA area office, during normal business hours
(www.osha.gov/html/RAmap.html)