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OSHA & MSHA Penalties Significantly Raised

By: Adele L. Abrams, Esq., CMSP

On July 1, 2016, the US Department of Labor (DOL) issued an interim final rule raising civil penalties by nearly 80 percent in some cases, for occupational and mine safety and health violations, and certain other types of employment law infractions. The compliance date is unclear since the Federal Register notice indicates that comments will be accepted on the new criteria through August 15, 2016, but it also states that the rule takes effect on August 1, 2016.

The notice covers not only penalties issued by OSHA and MSHA, but also those issued by other DOL agencies, including the Employment and Training Administration, the Office of Workers' Compensation Programs, the Wage and Hour Division (covering overtime, minimum wage, and child labor law violations), the Office of the Secretary (covering the Contract Work Hours and Safety Standards Act and the Walsh-Healey Public Contracts Act) and the Employee Benefits Security Administration. The stated goal for the increase in all agencies was to conform to the Federal Civil Penalties Inflation Adjustment Act, as amended in 2015, and the increases contained in the final rule will continue to be adjusted annually for inflation based on the Consumer Price Index in the future.

However, OSHA penalties had not been adjusted in many years, and last fall (in the debt ceiling legislation), a provision was included directing OSHA to hike its fines by nearly 80 percent – the largest increase of all the affected DOL agencies. Consequently, the maximum OSHA penalty – applicable to citations classified as “willful” or “repeat” – will rise on August 1, 2016, from the current \$70,000 ceiling to a new high of \$124,709. OSHA has already indicated that the heightened penalties will be applied, retroactively, to inspection events predating

August 1st if the penalties and citations were not yet issued by that date. So any inspections not yet assessed that occurred in February 2016 or later can be subject to the new civil penalty structure. OSHA also said that citations issued after the August 1, 2016, effective date of the rule will be subject to the higher maximum penalty for “repeat” violations if the prior violation occurred after November 2, 2015. However, the repeat “lookback” period will still include all citations under the same standard or involving similar hazards that became final within a five-year period prior to the new alleged violation.

The maximum penalty is not the only change affecting OSHA, as shown on the chart below.

Type of Citation	Revised
Other-than-Serious	\$12,471 max
Serious	\$12,471 max
Repeat	\$124,709 max
Willful	\$124,709 max
Willful minimum	\$8,908 min
Failure-to-abate (per day)	\$12,471 max

While not mentioned in the final rule, it should be noted that OSHA Section 11(c) actions against employers, for discrimination against safety and health whistleblowers and those engaged in protected activities, are now also subject to OSHA civil penalties (in addition to OSHA prosecuting to obtain “make whole” relief such as reinstatement and back pay) under the new system. OSHA added the ability to issue civil penalties and citations as part of the Electronic Recordkeeping rule (29 CFR 1904.35 and 1904.36) and those provisions will now take effect on November 1, 2016 (a postponement from the original August 10, 2016, effective date; delayed to permit OSHA to issue guidance on contested provisions on Section 11(c) enforcement, which are now in litigation).

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In addition, under the revised “Enforcement Weighting” internal criteria released by OSHA last year, OSHA office management personnel at the regional/local levels will get greater credit toward meeting their inspection quotas for certain categories of inspections (e.g., process safety management, fatality investigations, ergonomic inspections, and health inspections involving sampling for noise and dust), rather than for short-term, more routine inspections. But the highest number of “inspection credits” is given for those inspection events resulting in at least \$100,000 in proposed penalties, known as “significant” cases. Under the new penalty criteria, a single willful or repeat citation can result in a “significant” case.

On the Mine Safety & Health Administration (MSHA) side, penalties have also changed but some categories actually decreased while others were raised considerably. In addition to covering traditional mine operators, contractors of all types (e.g., electrical, mechanical, service personnel for mobile and other equipment used at mines, roofers, pavers, masons, demolition, tunneling, and general construction) fall under MSHA jurisdiction when they perform any type of work at a plant, mine or quarry regulated by that agency – even if the contractor is not engaged in mining activities per se. In addition to civil penalties against the employer, MSHA can also issue personal fines against “agents of management” under Section 110(c) of the Mine Act, and these cases are reviewed for criminal referral as well, regardless of whether any accident or injuries occurred.

MSHA currently has a \$70,000 maximum for regularly assessed citations, and a \$112 minimum penalty. The maximum will fall slightly, due to the inflation adjustment, to \$68,300, while the minimum will go up to \$127. MSHA often provides a 10 percent “good faith reduction” to citations that are promptly abated, and where no adverse “operator tactics” are involved, so that can bring penalties down further. MSHA’s daily fine for failure to timely abate an alleged violation, which MSHA requires even if the citation is contested, will rise from \$6,500 to \$7,399.

However, MSHA has a separate category – analogous to an OSHA “willful” – called a “flagrant” violation. These are issued under Section 104(d) of the Mine Act, and are the types that can lead to personal prosecutions. There are also non-flagrant Section 104(d) citations and orders issued, which are called “unwarrantable failure” violations. The current maximum penalty for flagrant violations is \$242,000 but that will rise to \$250,433 per citation effective August 1, 2016. In addition, MSHA has increased the minimum penalties for unwarrantable failure citations and orders, from \$2,000 to \$2,277 for Section 104(d)(1) citations and orders, and from \$4,000 to \$4,553 for Section 104(d)(2) orders.

The bottom line is that safety and health violations will bring significantly higher consequences for employers.

Extreme Heat – Risks and Best Practices to Avoid

By: Sarah Korwan, Esq.

On May 26, 2016, the National Security Council and the Office of Science and Technology Policy (OSTP) held a webinar, “Building Community Preparedness to Extreme Heat”, which was part of an interagency collaboration to provide background information on extreme heat risk and related available resources.

Kelly Schnapp, who directs OSHA’s Office of Science and Technology Assessment, addressed the risks faced by outdoor workers. Employers are responsible for providing workplaces free of known safety hazards under OSHA’s General Duty Clause, and this includes the hazards associated with extreme heat. A majority of recent heat-related deaths investigated by OSHA involved workers on the job for three days or less. In fact, 80% of heat stroke or deaths occur to new workers within the first 3 days of work. This is usually the result of new workers not knowing their limits and/or not wanting to appear slow or lazy. In addition, workers may be lacking “climatization”, becoming acclimated to the heat, which generally takes 10-14 days, and is critical to avoiding heat related illness or death. The fact that such deaths occur early in employment further highlights the need for employers to ensure that new workers become acclimated to the heat when starting or returning to work.

OSHA’s buzz words for avoiding heat stroke or exhaustion are water, rest and shade. Supervisors have a unique role in encouraging workers to take water and rest breaks and seek shade on a regular basis. Others ways to avoid heat stroke or death include training supervisors and workers to be aware of and alert to the symptoms of heat exhaustion, which include headache, dizziness, nausea, cramps and vomiting. Signs of heat stroke also include high temperature, confusion, convulsion, and fainting. Employers should consider establishing a buddy system, so that workers can team up and monitor one another, as, often, someone experiencing heat exhaustion or stroke may not even have the ability to be cognizant of the onset of such condition.

OSHA has a heat safety tool for smartphones. The application, which is available for iPhones and Androids, allows workers and supervisors to calculate the heat index for their worksite and, based on the heat index, displays a risk level to outdoor workers. In addition, app users can get reminders about the protective measures that should be taken at that risk level, such as drinking enough fluids, scheduling rest breaks, planning for and knowing what to do in an emergency, adjusting work operations, gradually building up the workload for new workers, training on heat illness signs and symptoms, and monitoring each other for signs and symptoms of heat-related illness.

Stay Out and Stay Alive! Old Mines Are Dangerous!

By: Sarah Korwan, Esq.

Whether hiking, exploring, hunting, camping, or simply just enjoying the countryside, outdoor activities are a source of enjoyment for millions of Americans each year. But outdoor recreation also requires caution -- especially near abandoned mines. Every year, dozens of people are injured or killed while exploring or playing on active and abandoned mine property. Some of the biggest hazards are water-filled quarries and pits. These areas can hide rock ledges, old machinery, and other hazards and can be deceptively deep and dangerously cold. It is estimated that more than 60% of deaths at abandoned mines are due to drowning while swimming, diving, partying, boating or fishing in quarry lakes. Other hazards of abandoned mines include: open shafts, horizontal openings as well as unstable vertical cliff-like highwalls, rusting machinery, and defective explosives from surface mines.

Last month, the Mines Safety and Health Administration issued an alert to Metal and Nonmetal Mine Operators regarding the hazards of abandoned mines. MSHA reported that thirty members of the public lose their lives at mines each year. No one knows the exact number or location of all abandoned surface and underground coal mines in this country, but estimates are in the thousands, primarily in the eastern coal-producing states, such as Pennsylvania, West Virginia, Virginia, and Kentucky. In western states like Colorado, Arizona, Montana, and Utah there are also abandoned "hard-rock" non-coal mines that pose additional dangers.

The alert issued by MSHA is to remind industry and raise public awareness of the "Stay Out – Stay Alive" campaign, which is an effort to prevent trespasser fatalities on mine properties. MSHA encourages mine operators at active mines to assess the hazards at their sites, construct or repair fences, gates and berms, post additional signage, publish or broadcast public service announcements in the local media, or participate in local news television or radio talk shows to discuss the hazards. All miners can warn their family, friends and neighbors, especially young persons, to "Stay Out and Stay Alive" through word of mouth and social media.

OSHA Electronic Reporting and Anti-retaliation Rule Update

By: Gary Visscher, Esq.

The May 2016 newsletter reported on OSHA's final rule, issued on May 12, 2016, which requires most employers with 20 or more employees (at any time in the previous year) to electronically submit injury and illness (I/I) records to OSHA. The requirement to electronically file I/I records becomes effective January 1, 2017, with the first reports (with information for calendar year 2016) due July 1, 2017. Beginning in 2019, the filing date moves from July 1 to March 2 of each year.

Along with the new mandate to electronically file I/I records, the final rule also included several provisions aimed at what OSHA believes is under-reporting of injuries and illnesses due to employers discouraging or deterring employees from reporting injuries and illnesses.

The new rule adds a new section to OSHA's recordkeeping regulations in 29 C.F.R. Part 1904. The new subsection, 1904.35, requires employers to inform each employee about the procedure for reporting a work-related injury or illness, and insure that the procedure is "reasonable." To be "reasonable," the procedure may not "deter or discourage" an employee from "accurately reporting" an injury or illness. In addition, subsection 1904.35 requires employers to inform each employee that "employers are prohibited from discharging or in any manner discriminating against employees for reporting" a work-related injury or illness.

Finally, § 1904.35 (b)(1)(iv) makes it a violation of OSHA's recordkeeping rule to discharge or in any manner discriminate against an employee for reporting a work-related injury or illness." OSHA has considered interfering with or discouraging or deterring employee reports of injuries to be a form of discrimination actionable under section 11 (c) of the OSH Act. The new regulation also makes such actions a violation of OSHA's recordkeeping rule. Under section 11 (c), the employee must file a complaint for discrimination with OSHA, which OSHA then investigates, and may, if warranted, file an action on the employee's behalf in federal district court.

Under the new provision in the recordkeeping rule, no employee complaint is necessary, an OSHA inspector could determine whether the employer had discouraged or deterred any employee from reporting an injury or illness. Contested citations and penalties would go before the Occupational Safety and Health Review Commission. According to the preamble to the final rule, the test that OSHA will use to determine whether an employer has discouraged or deterred an employee from reporting an injury or illness is whether the employer's policies or actions "'could well dissuade' a reasonable employee from reporting an injury or illness."

Importantly, the § 1904.35 "anti-discrimination" provisions apply to all employers, not only to employers required to electronically submit I/I records. In the preamble to the final rule, OSHA discussed three specific employer practices which OSHA believes may deter or discourage employee reporting of injuries and illnesses. The first is having "vague" safety or work rules which, according to OSHA,

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may be used as a pretext for to discipline workers when they report an injury or illness. According to the preamble, “a legitimate workplace safety rule should require or prohibit specific conduct related to employee safety or health so it can be applied fairly and not used as pretext for retaliation.”

Second, OSHA states that “blanket post-injury drug testing policies deter proper reporting.” The preamble to the rule states that post-incident testing must be limited to situations “in which employee drug use is likely to have contributed to the incident.” Only in specific instances where there is a “reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness” is post-incident drug testing allowed, according to the preamble.

Third, the preamble reiterates OSHA’s belief that incentive programs that condition a bonus or reward on achieving low injury rates or zero injuries deter or discourage employees from reporting injuries.

The restrictions on post-incident drug testing and incentive programs are not included in the regulation itself, but are only described in the preamble to the rule. Whether OSHA has authority to restrict or prohibit employee drug testing and incentive programs in this manner has been challenged in federal court. On July 8, 2016 several business associations and individual companies filed a lawsuit in U.S. District Court in Texas, asking the court for injunctive and declaratory relief against the rule insofar as it would apply to employers’ safety incentive programs and drug testing programs.

The “anti-retaliation” provisions in § 1904.35 were scheduled to take effect on August 10, 2016, 90 days after the rule was promulgated. However, OSHA has announced that it is delaying enforcement until November 1, 2016, in order to allow OSHA more time to develop enforcement guidance and educational materials.

Commission Decides

Standard of Care for Workplace Exams

By: Gary Visscher, Esq.

Even as the Mine Safety and Health Administration (MSHA) hears testimony this month on expanding operators’ obligations for workplace exams under section 56/57.18002 (see June 2016 Special Release Newsletter for full discussion of the proposed rule), the Federal Mine Safety and Health Review Commission recently issued a decision that expands the reasons an operator may be cited under the current standard. The workplace exam standard, 56/57.18002, currently requires that a “competent person” examine each working place at least once per shift. The standard requires that the operator keep a record that such examinations were conducted and promptly initiate appropriate action to correct conditions that may adversely affect health or safety.

The current regulation does not describe the thoroughness

or quality of the workplace exam, beyond the requirements that it include “each working place” and be conducted by a “competent person.” MSHA’s proposed rule, which is currently in the comment period, requires that the operator maintain a written record of each location inspected, any conditions or defects that were found, and how those conditions or defects were corrected, as well as adding other requirements.

The recent Commission decision interprets the current regulation. The facts in Sunbelt Rental (July 12, 2016) involved the workplace examination of a preheat tower at a cement plant. Sunbelt Rentals, which was a subcontractor on maintenance work on the tower, erected scaffolding reaching to the sixth level of the tower. There was a separate exterior staircase that reached the seventh level and a small window to view inside of the tower at that level, but Sunbelt Rental’s employee who conducted the exam on that particular day only climbed to the sixth level scaffolding to examine the inside of the tower. Subsequently, during the work shift, material fell from the tower and injured a worker working below. The MSHA inspector who responded climbed the exterior staircase to the seventh level and observed a buildup of material which could have fallen where the miner was working.

MSHA cited Sunbelt Rentals (as well as the cement plant and the main contractor) for a violation of 56.18002(a). At Hearing, the administrative law judge found that the current standard requires an operator to conduct a workplace exam, but does not address or set standards for the “adequacy” of the exam. Only if it was found that the workplace exam ignored or failed to identify “numerous, obvious, or egregious” hazards could the operator be cited.

On appeal, the Commission reversed the ALJ and said that the standard does regulate the “adequacy” of workplace exams. The Commission said that where, as in 56.18002, a standard is silent as to the standard of conduct applicable, the Commission has applied a “reasonably prudent person” test. Thus, the Commission said, “an examination of working places, to comply with 30 C.F.R. § 56.18002 (a) must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize.”

The Commission remanded the case to the ALJ to determine whether the “reasonably prudent competent examiner” standard was met in this case, as well as whether the seventh level of the preheat tower was a “working place.”

Sunbelt Rentals also argued that it did not have “fair notice” of MSHA’s interpretation that 56.18002 could be cited not only for failing to conduct the workplace exam, but also for an “inadequate” exam. The Commission said that operators are responsible for recognizing “the

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specific prohibitions or requirements of the standard” that would be recognized by a “reasonably prudent person.” To the extent that the workplace exam is found to not meet the standard of care of a “reasonably prudent person” in this case, the Commission said, the operator also had fair notice of those requirements.

MSHA cited not only Sunbelt Rentals but also the owner of the plant, Roanoke Cement, and the main contractor, LVR, for also failing to conduct an adequate workplace examination. Roanoke Cement and LVR sought to have the citations against them dismissed on grounds that Sunbelt Rentals was responsible for the examination of the area and the standard does not require multiple exams of the same workplace. The Commission majority declined to dismiss Roanoke and LVR from the case, stating that the basis for the citations against Roanoke and LVR should be considered by the ALJ. Two commissioners dissented with regard to the continued presence of Roanoke and LVR in the case.

American Coal: Commission Discusses Its Authority In Settlement Motions

By: Ryan Horka, Esq.

On July 14, 2016, during a public meeting, five Commissioners on the Federal Mine Safety and Health Review Commission (FMSHRC) gave every indication that each of them would hold that ALJ William Moran did not abuse his discretion in rejecting a proposed settlement between MSHA and Murray Energy Corporation’s American Coal Company, Docket No. LAKE 2011-13.

This case, which each Commissioner referred to as a “test case,” involved a settlement proposal in which the Secretary and the Operator agreed to a flat 30% reduction in penalties across all citations without any paper changes. In submitting the settlement proposal to the ALJ for approval, the Secretary provided no facts in support of the penalty reductions. Instead, the Secretary simply pointed to the facts set forth in the citation documentation and the “uncertainties of litigation.” After receiving the proposed settlement, ALJ Moran requested that the Secretary provide some facts in support of the penalty reductions but, in response, the Secretary simply submitted a nearly identical settlement proposal, asserting that no further facts were required for the ALJ to approve the settlement. ALJ Moran rejected the settlement proposal.

The Secretary’s refusal to provide any factual support for this proposed settlement is what led the Commissioners to refer to it as a “test case” and what led Commissioner Cohen to refer to the Secretary’s actions as “doubling down.” In other words, the Secretary wanted the ALJ to reject the settlement so that he could appeal it up to the Commission, and likely

up to the Court of Appeals after that. In most circumstances, the Secretary would have provided some factual support and, most likely, the ALJ would have approved the settlement. In fact, according to a Special Report in Mine Safety and Health News, ALJs have only rejected .04% (18/35,501) of settlement proposals in cases over the past 5 years, raising the question that was discussed at both the arguments and the open meeting, might the Secretary be proposing a solution in search of a problem?

In *Black Beauty*, 34 FMSHRC 1856, the Commission held that they have wide discretion to reject settlements under Section 110(k) of the Mine Act, which states that “[n]o proposed penalty which has been contested . . . shall be . . . settled, except with the approval of the Commission.” At arguments for the American Coal matter, on July 12, 2016, the Secretary proposed a more narrow authority for the Commission than that which was set forth in *Black Beauty*. The Secretary pointed to *Heckler v. Chaney*, a case brought by prison inmates against the Secretary of Health and Human Services claiming that the FDA should be forced to take enforcement actions to prevent the use of lethal injection drugs. In that case, the Supreme Court ruled that the decision was “committed to agency discretion” and was not subject to judicial review. In arriving at this decision, the Supreme Court pointed out that agency decisions are not reviewable unless: (1) Congress has indicated an intent to restrict agency discretion and (2) Congress has provided meaningful standards for defining the limits of that discretion.

As the Secretary pointed out in his brief for the American Coal matter, Section 110(k) of the Mine Act satisfies the first requirement. However, there are no meaningful standards set forth to define the limits of MSHA’s discretion and, therefore, the second requirement is not satisfied and, according to the Secretary, the Commission should grant deference to MSHA and its enforcement authority when reviewing proposed settlements.

Commissioner Cohen criticized the Secretary for seemingly arguing that FMSHRC is a generalist court. In his opinion, this assertion cannot square with Section 113(a) of the Mine Act, which provides for a five member panel made up of Commissioners appointed by the President due to their qualifications, including training, education, and experience. In response, MSHA’s counsel, Sara Johnson, praised the Commissioners for their wealth of knowledge and experience but expressed concern with the fact that this power is pushed from the Commissioners to the ALJs, especially after the *Black Beauty* decision. Cohen also questioned how the Secretary’s interpretation of Section 110(k) could square with the legislative history surrounding the Mine Act. In doing so, he pointed to the Secretary’s brief which set forth ten pages worth of legislative history and, yet, failed to mention that part of the discussion

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surrounding Section 110(k) and the review of settlements was the result of earlier issues with “off the record, behind closed doors” negotiations.

In articulating their positions – which can still be altered while preparation of the formal decision is pending – all of the Commissioners seemed to agree that across the board penalty reductions may be acceptable as long as there are facts provided to support the reductions. Unfortunately, given the facts – or lack thereof – in this case, the Commissioners were not able to determine whether the ALJ abused his discretion, nor were they in a position that required them to articulate any specific standard of review. As Commissioner Young stated and the other Commissioners seemed to agree with, due to the lack of facts provided, neither decision by the ALJ in this matter would have constituted an abuse of discretion.

The Commissioners seemed to agree that Section 110(k), especially considering the legislative history surrounding it, clearly grants the Commission greater reviewing power over settlements than simply a rubberstamp. With that said, as mentioned in the preceding paragraph, the Commissioners were not in a position that necessitated a standard of review be set forth. The Secretary argued that the Commission should utilize the 2nd Circuit Court of Appeal’s Consent Judgment standard of review when reviewing settlements. The Consent Judgment standard of review looks at “fairness and reasonableness” and, according to the Secretary, does not require “rubberstamping,” but simply gives “significant deference” to the Secretary.

Under the Consent Judgment standard of review, four factors would be considered: (1) basic legality of the settlement, (2) whether the terms of the settlement were clear, (3) whether the settlement reflects a resolution of the citations/orders, and (4) whether the settlement is tainted by improper collusion or corruption of some kind. During arguments, Commissioner Althen pointed out that there is also a D.C. Circuit Court of Appeals standard of review which includes adequacy as one of the factors. However, in response, Johnson made it clear that the Secretary does not believe adequacy should be taken into account in the analysis.

The Commissioners did seem to agree with portions of the Secretary’s arguments regarding information that MSHA may not want to disclose during settlement for strategic reasons. For example, Johnson argued that there may be tactical information that MSHA shouldn’t disclose, such as the retirement of an inspector. As Johnson argued, this information could inhibit MSHA’s settlement position, not only in that particular case but also in several other cases involving that inspector. Johnson also pointed to MSHA’s enforcement plans and initiatives, and their internal strategy regarding high priority and low priority matters. As she stated, sometimes MSHA may decide to settle some low priority matters in an effort to utilize more resources for their higher priority matters.

While the purpose of the Mine Act is to protect miners, and the Secretary is supposed to be primarily focused on the public interest, not governmental interests such as financial and personnel resources, Commissioner Althen and Commissioner Young agreed that it is unreasonable to believe that expenses are not a consideration. In addition, the Commissioners seemed to be in agreement that there could be circumstances, such as the retired inspector example, where particular tactical information could be left out of the settlement motion, or relayed to the ALJ in another manner. However, what they all clearly agreed upon was that the Secretary has to give the ALJ some kind of factual support for the paper modifications and/or penalty reductions within the proposed settlement.

That is not to say that the “uncertainties of litigation” and “nature of the citations” cannot be considerations. In fact, the Commissioners seemed to agree that those are inherently important considerations. It is only to say that there must be facts to demonstrate to the ALJ that uncertainties of litigation do in fact exist. If the facts do support this conclusion, the ALJ should approve the settlement. Commissioner Cohen made it clear that if there is a case where an ALJ imposes his or her own opinion upon the settlement itself, it should absolutely be brought up to the Commission. Along the same lines, Commissioner Young stated that if an ALJ has something in front of them that constitutes a legitimate policy decision by the Secretary they need to have humility in reviewing the settlement and in making their decision.

This statement was in reference to Commissioner Althen’s earlier point that ALJs, as well as the Commissioners, and all judges for that matter, must take on the difficult task of practicing two conflicting traits, confidence and humility, in their decisions and interactions with parties.

This case will most likely be appealed to a federal Court of Appeals, where the Secretary will argue for the narrowing of the Commission’s power to review settlements. For more information on the American Coal case, or copies of the Commission decision once it is released, please contact the Law Office.

MSHA Workplace Exam Rule Faces Scrutiny At Hearing By: Adele L. Abrams, Esq., CMSP

On July 26, 2016, the Mine Safety & Health Administration (MSHA) held its third public hearing at agency headquarters in Arlington, VA, concerning its proposed rule to modify the existing metal/nonmetal standard governing workplace examinations. The rulemaking affects 30 CFR 56/57.18002.

Currently, a workplace exam must be conducted once per shift by a “competent person” designated by the mine

operator, to inspect all active working places at the mine for conditions which may adversely affect safety or health. A record must be created that lists the name of the examiner, date and shift, and area examined, but it does not require any additional details of the examination. MSHA policy calls it a “best practice” to record the hazards identified and corrective actions, but it is not mandated.

Workplace examination records currently must be maintained for 12 months, and made available to MSHA upon request, but MSHA’s Program Policy Manual currently says that records can be disposed of after an MSHA inspection occurs, as long as the company will certify that all 12 months of inspections were completed. The current rule also specifies that the competent person must promptly initiate corrective action of any hazardous conditions in the working place, and that if an imminent danger is identified, the mine operator must withdraw affected miners, other than those involved with abatement of the hazardous condition.

At the public hearing, MSHA heard from a variety of mining associations, including the Industrial Minerals Association – North America (IMA-NA), the National Stone, Sand & Gravel Association (NSSGA), the Colorado Stone, Sand & Gravel Association (CSSGA), the American Iron & Steel Institute (AISI), and the National Lime Association (NLA), the “Mining Coalition” (who testified through its counsel) as well as individual representatives from mining companies – all of whom opposed the proposal, in whole or in part. In addition, representatives of the United Mine Workers of America and the United Steelworkers unions testified in full support of the proposed rule. Law Office President Adele Abrams testified as counsel for the IMA-NA as part of its presentation on the rulemaking.

MSHA director of standards Shelia McConnell presided over the hearing and noted that MSHA is amending its current rule, in part because faulty workplace examinations were contributory violations in multiple metal/nonmetal fatalities in recent years. She outlined the main changes proposed by the agency, including:

- Requiring examinations to be done before miners enter a working place, rather than anytime during the shift;
- Requiring exam records to document every hazard identified, as well as the corrective action taken (and the date of that correction);
- Requiring exam records to be signed by the workplace examiner as well as by the person(s) recording the subsequent corrective action;
- Requiring the records to be maintained for 12 months, and made available to both MSHA’s authorized representatives and also to miners’ representatives;
- Requiring the competent person conducting the exam to provide “notice” to affected miners of any hazards identified in the working place.

The definitions of “competent person” and “working place” would remain the same as under current law (using definitions codified at 30 CFR 56/57.2) but MSHA has

solicited comment on whether specialized training or experience should be required in order to be a competent person. While industry witnesses generally opposed any new requirements and noted that task training is already required under Part 46/48 for workplace examiners, the UMWA representative favored requiring “mine foreman certification” for anyone performing this task.

MSHA also currently permits examiners to be either supervisors or hourly miners, although its policy favors having an “agent of management” conduct the inspections, and the Federal Mine Safety & Health Review Commission has held that hourly workers who perform workplace exams under this standard are “agents” for purposes of personal Section 110(c) civil penalties and criminal prosecution under the Mine Act.

The industry representatives supported allowing both salaried and hourly personnel to perform this task, noting that it is often part of “employee empowerment” responsibilities under safety and health management programs. Several witnesses did urge the agency to refrain from classifying hourly workers as “management” and personally prosecuting them, simply because they perform workplace examinations. It was noted repeatedly that if only managers are expected to watch for and remediate hazardous conditions, this could adversely impact safety and health because rank-and-file miners might feel this was no longer their responsibility or they would assume that the work area was “pre-inspected” and was therefore hazard-free. Dynamic work environments at mines require constant vigilance by all workers, regardless of rank.

MSHA specifically seeks comment on whether it should require that examinations be conducted within a period of time – e.g., two hours – before work commences in an area. The unions supported this requirements, while industry representatives noted that any hard time limit would work against the needed flexibility when tasks change unpredictably that require either early or delayed entry into a working place, and several commented that requiring the exam to be conducted before the start of a shift would mean that examiners would be often checking for hazards in the dark, which could adversely impact the thoroughness of the inspections for conditions including highwall issues, berms, and guarding. While there was general support for requiring exams to be done before miners enter an area, the consensus was that exams must not be required for the entire mine prior to the start of a shift.

Many witnesses also took aim at MSHA’s current policy, which permits “double dipping”: issuing citations for the hazards observed by an agency inspector, then tacking on another citation for “inadequate” workplace examinations (and sometimes a third citation, for inadequate task training). A recent FMSHRC decision, in Sunbelt Rentals, reversed a long line of ALJ cases and held that there is an “adequacy” requirement implicit in the

Workplace Examination Hearing, Con't

workplace examination standard. They also expressed concern that the Mine Act's strict liability framework and a lack of any statute of limitations could permit inspectors to review up to a year's work of records, and issue citations for recorded hazardous conditions that violated a standard, even though the conditions had already been corrected.

The IMA-NA urged MSHA to adopt a policy comparable to the Occupational Safety & Health Administration's "safe harbor" policy for workplace audits, in which OSHA generally refrains from citing violations listed in audit reports as long as those conditions were already abated prior to an inspector arriving on site. Several witnesses advocated eliminating the requirement to add "corrective actions" to the mandatory record because it would add little value for safety purposes.

Another issue that kept recurring was MSHA's lack of an appropriate cost-benefit analysis for the rule. MSHA has admitted that it was unable to quantify any monetary benefits for the more stringent standard, and while the agency claimed that the expanded recordkeeping requirements (listing observed hazards and recording corrective actions) would only add "five minutes" to the examinations, commenters were quite skeptical of this claim. Some witnesses said that the rule, if fully adopted, could require mines to hire personnel to do nothing but workplace exams in light of the expanded recordation requirements, and that this was not factored into MSHA's cost estimates. The agency was urged to revise and expand its economic impact analysis, before proceeding to a final rule.

Most witnesses had no problem with the new requirement to notify miners of any hazards observed in the work area, but some questioned what type of "notice" would satisfy MSHA – written or verbal, and how much notice would be required. While the requirement to withdraw miners if an imminent danger is observed would not be altered by the proposal, the recent FMSHRC holding that a non-significant & substantial (non-S&S) violation could be sufficient to support an imminent danger order raised concerns about what degree of hazard would trigger the withdrawal requirement in the future. The agency was urged to clarify that only S&S hazards that are highly likely to result in harm would be covered.

The proposed rule was published in the June 8, 2016, Federal Register, and the formal comment period ends September 6, 2016. However, MSHA acknowledged requests for an extension, which it indicated was under consideration. There is a final public hearing August 4th in Birmingham, AL. The proposed rule applies to both surface and underground mines, and to both production operators and independent contractors at these facilities. For more information or assistance in preparing comments on this key rulemaking proposal, contact Adele Abrams at safetylawyer@aol.com.

ADELE ABRAMS SPEAKING SCHEDULE

August 8: Chesapeake Region Safety Council, Baltimore, MD, seminar on OSHA's Crystalline Silica Rule

August 30: AHMP Conference, Washington, DC, speak on OSHA General Duty Clause

August 31: National Business Institute, Baltimore MD, speak at one day employment law seminar

September 22: ASSE Region VI PDC, Myrtle Beach, SC, speak on Legal Liability for Safety & Health Professionals

October 5, Chesapeake Region Safety Council Annual Conference, Baltimore, MD

October 17: National Safety Council Annual Congress, Anaheim, CA, speak on Legally Effective Incident Investigation

November 1: MSHA Southeast Mine Safety Conference, Birmingham, AL, speak on crystalline silica

November 29: Northern Region Assn. of Safety Professionals, Fargo, ND, speak on OSHA Update, and Legal Liability Issues for ESH Professionals

December 13: Oregon independent Aggregates Assn./SafePro Inc., Albany, OR, speak on Mine Safety Legal Issues