



**LAW OFFICE OF
ADELE L. ABRAMS P.C.**

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Executive Order Targets Federal Contractor Non-Compliance
By Adele L. Abrams, Esq., CMSP

On July 31, 2014, President Obama issued a new Executive Order concerning "Fair Pay and Safe Workplaces," affecting federal contractors with contracts for supplies and services exceeding \$500,000. The purpose of the order is to ensure that these contractors comply with employment and labor laws, including adherence to Occupational Safety & Health Administration (OSHA) requirements. In a strange omission, compliance with standards and regulations of the Mine Safety & Health Administration (MSHA) is not included in the listed laws.

The contractor must represent to the agency issuing the contract that there have been no administrative merits determinations, arbitrated awards or decisions, or civil judgment rendered against the contractor within the preceding three year period for violations of the following laws:

- Fair Labor Standards Act (which encompasses minimum wage requirements, overtime pay, and child labor restrictions);
- Occupational Safety & Health Act of 1970;
- Migrant and Seasonal Agricultural Worker Protection Act;
- National Labor Relations Act;
- Davis-Bacon Act;
- Service Contract Act;
- Executive Order 11246 (Equal Employment Opportunity);
- Rehabilitation Act (analogous to the Americans With Disabilities Act, for

government workers and federal contractors);

- Vietnam Era Veterans' Readjustment Assistance Act;
- Family and Medical Leave Act;
- Title VII of the Civil Rights Act (barring discrimination based on race, color, gender, religion and national origin);
- Americans with Disabilities Act;
- Age Discrimination in Employment Act;
- Executive Order 13658 of 2/12/14 (setting a minimum wage for federal contractors); and
- Equivalent State laws.

The contractor who has such violations will have an opportunity to disclose any steps taken to correct the violations or improve compliance, including agreements with enforcing agencies. The agency contracting officer will then determine whether the contractor is a "responsible source" that has a satisfactory record of integrity and business ethics. Contractors will also have to represent to the agency whether its subcontractors have any of the violations listed above within the preceding three-year period and must update that information every six months.

If information regarding violations of labor and safety laws is reported, the agency may take actions including: agreements requiring appropriate remedial measures; compliance assistance; contract termination; or referral to the agency suspending and debarring official.

In addition, if a federal contractor is treating an individual performing work under a contract or subcontract as an

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“independent contractor” and not an employee, the contractor will be required to provide a document informing the individual of this status. Moreover, for contracts valued at more than \$1 million, the contractor must agree that any decision to arbitrate claims arising under Title VII or any tort related to sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after the dispute arises. The same requirement applies to subcontractors where the value of supplies or services exceeds \$1 million. There is an exception to the arbitration provision for workers covered under a collective bargaining agreement between the contractor and a labor organization representing the workers.

For more information on federal contractor compliance requirements, contact the Law Office's DC area office at 301-595-3520.

Welcome Attorney Sarah Korwan



The Law Office of Adele L. Abrams, P.C. is pleased to announce that Sarah Ghiz Korwan, Esq., has joined the firm in an Of Counsel position. Although new to the Law Office, Korwan is an experienced attorney in MSHA litigation through her representation of coal operators while

working with several Charleston, WV law firms. Korwan brings a wealth of knowledge and nearly a decade of MSHA litigation experience to the Law Office.

Korwan resides in Charleston, WV with her husband and two daughters. She will remain working in Charleston as she begins her tenure with the Law Office, giving the firm added accessibility to its existing and future Appalachian clients.

Beware: Structural Defect Citations by MSHA By Amged M. Soliman, Esq.

Structural defect citations seem to be one of MSHA's new favorite issues, and that certainly isn't good news for mine operators. These citations are typically written as a 104(d) and are often associated with a 107(a) imminent danger order, which closes an area or entire operation until the structure in question is either demolished or remediated. Since these citations are not always valid, and even a short shut down puts miners and the company at risk of economic devastation, operators would be wise to prepare ahead of time to ensure they are proactive against these issues.

First and foremost, an operator's best chance at defending against such citations is to hire a third-party

licensed engineer to give an unbiased assessment of the structural integrity in question. We recommend that operators retain the engineers through legal counsel, so that the investigation results may remain confidential and may be protected from disclosure, unless and until the expert is revealed as a testifying expert.

Typically, MSHA inspectors, whom often discount the opinions of company engineers on what constitutes a “structural defect,” do not themselves hold degrees in structural engineering; thus, an operator's first move should be to hire a third-party engineer qualified to determine the safety and integrity of a structure. The licensed engineer should be capable and prepared to testify in support of their findings should the matter go to hearing. The counsel of an attorney on choosing the right engineer is key. The result of the hearing will likely turn on the engineer's testimony. Additionally, MSHA may strongly encourage the hiring of a third-party engineer for the citation to be abated. Either way, the best approach for the operator is knowledge. Knowing your site and structural stability will equip you with the tools to argue against different standards that MSHA may cite you under. Remember many of these standards are classified as Rules to Live By and can be specially assessed.

An operator should be further warned that if the structure in question was added to a “capital improvements” list, MSHA may view this as a factor in issuing a 104(d) violation due to “knowledge” over the alleged defect. Also, any company personnel involved in the improvement list runs the risk of being investigated for personal liability under section 110(c) of the Federal Mine Safety & Health Act. Accordingly, operators should take note that an MSHA inspector might be looking for such things as corrosion (holes, delamination, loss of cross-section), cracking (overload and fatigue), overloads (buckling and deflection), and impact damage. However, what might seem like a defective structure at first glance might be nothing more than a cosmetic issue and nonetheless structurally sound.

It is not uncommon for structural deficiency citations to be vacated or reduced through the professional assistance of a licensed engineer. Moreover, this office has seen 107(a) withdrawals lifted as a result of unsupported orders. While structural deficiency citations can be daunting, they need not go unchallenged.

Remembering When Reasonably Likely Required More Than a Chance Occurrence

By Sarah Korwan, Esq.



Based on a recent Administrative Law Judge decision regarding equipment guarding in underground coal mines under 30 C.F.R. §75.1722(b),

the standard for establishing a violation as significant and substantial appears to be slipping from “reasonably likely” to “there’s a chance.” In the case *Marfork Coal Company, Inc.*, Marfork challenged a \$1,111.00 citation arguing the alleged hazardous area had limited exposure and was not easily accessed. However, ALJ Margaret A. Miller affirmed the inspector’s “significant and substantial” designation and the assessed penalty. *Sec. of Labor v. Marfork Coal Company, Inc.*, WEVA 2014-374 (August 27, 2014).

The regulation requires “guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.” 30 C.F.R. §75.1722(b).

The citation alleged, in pertinent part, that “. . . the guarding around the tail roller did not extend a distance sufficient enough to prevent miners from contacting the rotating moving parts of the tail roller The tail roller shaft extended outward 2½ inches and the guarding . . . was left unsecured.”

At the hearing, the operator did not dispute that the guard was in the condition as described by the inspector. Additionally, the parties also agreed that the shaft was located under the feeder and it was partially guarded with a piece of rubber belt. However, a portion of the moving shaft extended beyond the rubber guard. To abate the citation, the operator simply extended the rubber belt guarding from 24 inches to 36 inches in length, thereby extending below the moving shaft. Moreover, the inspector alleged that the rubber guard was not secured, and while at one time it had extended the entire length of the shaft, the guard had since been trimmed with a knife.

The operator argued that the moving parts could not have been contacted even before the citation was issued and abated. It was also asserted that the rubber guarding extended a sufficient length and contacting

the tail pulley would have been unlikely. According to the operator, the shaft and tail pulley were located under a feeder and any miner in the area would be using a four foot long shovel, and the shaft was at least partially guarded.

The ALJ discussed each of the four Mathies’ elements regarding the validity of an S&S citation. The S&S challenge generally comes down to the third element of the Mathies formula, which requires that the Secretary establish there is a reasonable likelihood that the hazard will result in an injury in the context of the facts in the case. In finding the conditions did rise to the S&S level, ALJ Miller credited the inspector’s opinion regarding all elements of the citation, including the gravity. *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999). Specifically, the inspector testified that there was enough room beneath the guard for a shovel to contact the moving part, or a miner could reach an arm under the guard, even though the shaft was set back away from the working areas and beneath the feeder.

Frankly, the standard for S&S seems to have shifted from “reasonably likely” to “could” or “possibly” or “there’s a chance.” The ALJ gave substantial weight to the Inspector’s observation that, a miner trying to dislodge rocks or coal could get caught in the moving shaft, which differs from reasonably likely.

Unfortunately for operators, this is not unlike another case involving take-up rollers, in which the same ALJ rejected the company’s argument that a miner would have to deliberately reach over the existing guard in order to contact a moving part. *BLACK BEAUTY COAL CO*, June 21, 2011, Docket Nos. LAKE 2009-470 et al., 33 FMSHRC 1482, 18 MSHN 388 (ALJ Miller) (review denied) (emphasis added.) In *Black Beauty Coal*, the company had performed replacement work, and had been told by a previous MSHA inspector that the guards “looked good,” yet this carried little to no weight in the judge’s eyes.

The violation was upheld by ALJ Miller because, according to her, there was “still a chance” that a miner could come into contact with the rollers and be pulled into the belt. That doesn’t sound like “reasonably likely” to us, which should be a concern for any operators challenging an S&S citation.

OSHA Grants Temporary Relief to Crane Operators

By Adele L. Abrams, Esq., CMSP

On September 26, 2014, OSHA published a final rule in the Federal Register that announced a three-year extension on its deadline that requires employers to ensure that crane operators are certified and competent. The new compliance deadline is November 10, 2017. The announcement revises 29 CFR 1926.1427(k), the competency assessment and training provision of the cranes and derricks standard that was developed by the agency through negotiated rulemaking. The original final rule was published on August 9, 2010, as Subpart CC, and originally required compliance with the certification requirement by November 10, 2014.

The rule requires employers to ensure that crane operators are certified under one of four options, and those requirements have not been changed. The options are:

1. Certification by an independent testing organization accredited by a nationally recognized accrediting organization;
2. Qualification by an employer's independently audited program;
3. Qualification by the U.S. military; or
4. Compliance with qualifying state or local licensing requirements.

The third party certification (Option 1) is the only certification that is "portable," meaning that any employer who employs the crane operator can rely on the certification as evidence of compliance. This is the option most readily available and is expected to be most utilized, especially because as of now there is no "audited employer qualification program" available and the military option is only available to federal DOD and armed services employees. There are also few state/local certification options.

For the independent certification, a third party administers both written and practical tests that assess the operator's knowledge and skills regarding subjects covered in the revised crane standard, provides different certification levels based on the capacity and type of equipment, and has procedures for retesting failed applicants and recertifying other operators.

The type/capacity certification was a major point of contention in the final rule as some crane certification bodies did not specify this on the

operators' cards, making the training possibly ineligible for compliance with the final rule. The 2010 rule envisioned a phase-in for four years, but OSHA continued to receive comments from the regulated community expressing concern about the feasibility of getting all operators properly certified by next month. Moreover, it was revealed during stakeholder meetings that only two out of the four accredited testing organizations were issuing the type/capacity certifications.

In granting the three-year extension, OSHA notes that this allows the agency to consider its further rulemaking options concerning certifications and employer obligations. It is not constrained to wait for the three-year period to expire before making further amendments to the crane standard and could impose an earlier deadline through separate rulemaking. It remains crucial that, during the extension period, employers continue to ensure that operators are capable of operating cranes and derricks during the extension period so that workers who operate cranes (and those in the vicinity) are not endangered.