MSHA HOT TOPICS – UPDATE ON MSHA NEWS AND RECENT COMMISSION CASES

October 23, 2019
Mine Safety and Health Conference
Reno, Nevada
Jason M. Nutzman

1775 Sherman Street
Suite 2500
Denver, Colorado 80203
Phone: 303.831.6956
Cell: 864.569.3378

707 Virginia Street East
Suite 1300
Charleston, West Virginia 25301
Phone: 304.357.9938
Cell: 864.569.3378

jason.nutzman@dinsmore.com
Dinsmore uses reasonable efforts to include accurate, complete and current (as of the date posted) information in this presentation. The information herein speaks as of its date. Accordingly, information may no longer be accurate as the passage of time may render information contained in, or linked to, this presentation outdated. Dinsmore is not responsible or liable for any misimpression that may result from your reading dated material. This presentation is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any dispute.

RESPONSIBLE ATTORNEY: Jason M. Nutzman
WHAT WE WILL BE COVERING

→ “One MSHA” Initiative

→ Powered Haulage, Seat Belt Usage, Conveyor Safety, Fire Suppression

→ Legal Developments

→ MSHA Data Trends
“ONE MSHA” INITIATIVE
“One MSHA” Initiative

MSHA Assistant Secretary David Zatezalo introduced the program shortly after he was confirmed.

Goal – cross-train inspectors to enforce regulations at both coal and M/NM mines

Why is this program necessary? MSHA wants efficiency and allow for more on-site inspection time.

• Example – flying a coal mine inspector from Colorado to Alaska when there is already a M/NM field office in the area.

Tim Watkins (former District 12 Manager) named as Administrator for Mine Safety and Health Enforcement

• Will have oversight responsibilities for both coal and M/NM operations.
“One MSHA” Initiative

→ First part of the program used 21 cross-trained inspectors at approximately 90 operations.

→ According to MSHA no major issues have been reported.

→ Reality – any issues?

⇒ MSHA Special Investigators are also now crossing the line – Coal District 10 (Madisonville, KY) is investigating violations at a M/NM mine in Oklahoma (South Central District)
“One MSHA” Initiative

→ As of April 2019 MSHA was still developing plans for this initiative.

→ Second part of the plan is to re-align district offices into new offices which make sense geographically and to inspect more than 100 mines with cross-trained inspectors.

⇒ Likely outcome – some M/NM mines being assigned to primarily a coal office and coal mines being assigned to primarily M/NM offices.

⇒ District numbers (for coal) and geographic designations (for M/NM) will be removed – new district offices will bear the city in which it is located.
Powered Haulage, Seat Belt Usage, Conveyor Safety, Fire Suppression
Powered Haulage, Seat Belt Usage, Conveyor Safety, Fire Suppression

→ Initiative to include outreach, training, and collaboration on the following:

⇒ Large vehicles hitting small vehicles
⇒ Seat belt usage
⇒ Conveyor safety

→ According to MSHA powered haulage accounts for the greatest share of fatalities

⇒ 50% of 2017 fatalities
⇒ 48% of 2018 fatalities
Powered Haulage, Seat Belt Usage, Conveyor Safety, Fire Suppression

- Large vehicles hitting small vehicles:
  - Distractions identified by MSHA
    - Cell phone use
    - Talking to vehicle passengers
    - Eating or drinking
    - CB communication
    - Watching videos
    - Changing a radio station, CD, mp3, or digital music device
Seat belt usage

MSHA identified 38 fatalities from 2007 to 2017 where a miner was not wearing a seat belt.

• 35 victims may have survived had they been wearing a seat belt.
• 30 victims had an adequate seat belt available but did not use it.

Possible solutions for improved seat belt usage:

• Active control interlock (i.e., seat switch, ignition switch)
• Administrative controls (i.e, nuisance alarm, training, policies)
Powered Haulage, Seat Belt Usage, Conveyor Safety, Fire Suppression

→ Conveyor safety

⇒ Lock-out/Tag-out best practices:
  • Ensure that no miner is in harm’s way before starting belt.
  • Provide a visible and/or audible alarm system with a start-up delay to warn persons the belt will begin moving.
  • Establish policies and procedures for performing specific tasks on belts and ensure miners are trained.
→ Conveyor safety

Guarding best practices:

• Inspect guards to make sure in place and provide necessary protection.

• When guarding is removed to perform work belt drives must be de-energized and blocked against motion. All employees should be trained and lock and tags be provided to miners who work on belts.

• Miners should be trained in hazard recognition and avoidance.

• Miners conducting examinations should be trained to perform thorough examinations to identify hazards.
Conveyor safety

Crossover best practices:

• Install adequate crossovers at all belt transfer points and train miners to use them.

• Install barriers at strategic locations to block areas that can be used to improperly cross the belt.

• Install a visual and audible pre-start alarm that signals several seconds before the start-up of the belt.

• Install pull cords and switches that control power to the belt to stop the belt in emergencies.
Power Haulage, Seat Belt Usage, Conveyor Safety, Fire Suppression

→ Fire Suppression System Inspection Initiative

⇒ Best practices:

• Review owner’s manual which should contain system inspection procedures.

• Request most recent inspection report.

• Check manual actuators.

• Check valves.

• Check for rust, dents, or other significant damage on tanks.

• Escape – ensure miners are trained to understand and the use of the primary, secondary, and alternate means of egress.
LEGAL DEVELOPMENTS
Workplace Examination Final Rule

Court of Appeals for District of Columbia Circuit on June 11, 2019 sided with labor unions and found the 2018 version of the rule violated the Mine Act’s “no-less protection standard.”

MSHA confirmed in late August that it would adhere to the ruling reinstating the 2017 final rule meaning:

- All examinations must be done before miners enter a working area.
- All adverse conditions encountered – even if corrected immediately – must be recorded.
Legal Developments

→ Workplace Examination Final Rule

⇒ Open Discussion:

• What changes (if any) have you made to adapt to the workplace examination rule?

• What has worked well under the new rule?

• What have you seen as far as enforcement by MSHA under the new rule?

• Any suggestions for the attendees?
Legal Developments

→ Federal Mine Safety and Health Review Commission Cases

⇒ River Hill Coal Company, 40 FMSHRC 1436 (Oct. 2018) (ALJ Gill)

• Section 104(b) failure to abate order issued – operator argued the abatement time was unreasonable.

• Inspector issued enforcement actions regarding structural hazards of two buildings and gave the operator five days to abate – inspector returned on fifth day and work not performed and more importantly while the operator locked the buildings the keys were readily available for anyone to use. Operator argued it needed more time to abate despite the fact the inspector simply wanted access to the buildings removed (i.e., locks and no access to the keys).

• ALJ Gill noted the Mine Act does not define what constitutes full abatement and thus, the Secretary’s interpretation is controlling and specifically the inspector’s understanding of what constituted abatement – for this case – was a reasonable interpretation of the Mine Act.
Legal Developments

→ Federal Mine Safety and Health Review Commission Cases

  • MSHA issued an enforcement action alleging advance notice of an inspection because someone from inside the mine asked if there was “company outside” and the response was “Yeah, I think we do,”, “Yeah, I think there is,” or “I don’t know.”
  • ALJ Gill vacated (for a second time) the enforcement action because the MSHA inspector was not credible and could not remember what was said – couple with the testimony of the dispatcher who said he understood advance notice and would not make a statement like what was alleged.
  • ALJ Gill also noted the mine was large and MSHA had a constant presence not only for inspections for but other reasons and thus it was perfectly common and appropriate to communicate that MSHA inspectors were present without violating the advance notice prohibition.
Legal Developments

→ Federal Mine Safety and Health Review Commission Cases

⇒ Peabody Midwest Mining, LLC, 41 FMSHRC 79 (Feb. 2019) (ALJ Rae)

• MSHA cited the operator for a violation of 30 C.F.R. Section 75.364(b)(2) for an inadequate weekly examination.

• Inspector alleged the examination book vaguely listed hazards and corrective action taken.

• At hearing, the supervisor testified he never thought it was necessary to list specific locations if the hazard had been corrected.

• ALJ Rae noted “MSHA has recognized that a record of all hazards found, as well as the corrective action, serves as a history of the types of conditions that can be expected in the mine. When the records are properly completed and reviewed, mine management can use them to determine if the same hazardous conditions are recurring and if the corrective action being taken is effective.”
Legal Developments

→ Federal Mine Safety and Health Review Commission Cases

⇒ Peabody Midwest Mining, LLC, LAKE 2018-0159 (June 27, 2019) (ALJ Simonton)

- MSHA issued an unwarrantable failure violation for an alleged violation of 30 C.F.R. Section 75.363(a) which requires any hazardous condition found to be posted with a conspicuous danger sign and the hazard corrected immediately or the area posted until it is corrected.
- The MSHA inspector found accumulations in an area and alleged the mine operator did nothing to correct the violation.
- The mine operator argued that the accumulations were a combination of rock dust and road dust with low amounts of float coal dust.
- ALJ Simonton credited the testimony of the operator’s witnesses, the operator’s own samples of the accumulations, and the record books which noted ongoing corrections to the alleged hazard, and ultimately vacated the enforcement action.
Legal Developments

Federal Mine Safety and Health Review Commission Cases


- MSHA issued an enforcement action because the mine operator failed to notify MSHA within 15 minutes of an accident.
- A miner suffered a fatal heart attack while operating an excavator – natural causes and not related to work. The mine operator did not report it until the following morning.
- ALJ upheld the violation and the $5,000 penalty.
- On appeal the mine operator argued death by natural causes does not fall within the ordinary meaning of “accident” and thus not reportable.
- The unanimous Commission found Part 50 reporting requirements clear and all on-site deaths are reportable within 15 minutes.
MSHA DATA TRENDS
MSHA Data Trends

→ 2018 Data – Total Number of Enforcement Actions

⇒ Coal 38,701 (47.89%)
⇒ Metal/Nonmetal 42,118 (52.11%)
⇒ Total 80,819

→ 2019 Data – Total Number of Enforcement Actions*

⇒ Coal 32,348 (46.24%) (48,522**)
⇒ Metal/Nonmetal 37,608 (53.76%) (56,412**)
⇒ Total 69,956 (104,934**)

*2019 Data through August 2019
** Data Trend for 2019
MSHA Data Trends

→ 2018 Data – Total Number of S&S Enforcement Actions

⇒ Coal 8,583 (19.49%)
⇒ Metal/Nonmetal 9,147 (19.24%)
⇒ Total 17,730 (20.65%)

→ 2019 Data – Total Number of S&S Enforcement Actions*

⇒ Coal 6,894 (21.31%) (10,341**)
⇒ Metal/Nonmetal 8,025 (21.34%) (12,037**)
⇒ Total 14,919 (21.33%) (22,378**)

*2019 Data through August 2019
** Data Trend for 2019
# MSHA Data Trends

## 2018 Data – By Regulation

### Coal
- 75.400: 3,608 (26.76%)
- 75.370(a)(1): 1,630 (12.09%)
- 75.1403: 1,352 (10.03%)

### Metal/Nonmetal
- 56.14107(a): 2,443 (16.54%)
- 56.12004: 2,135 (14.46%)
- 56.14100(b): 1,685 (11.41%)
MSHA Data Trends

→ 2019 Data – By Regulation*

⇒ Coal

- 75.400 2,797 (26.93%)
- 75.370(a)(1) 1,369 (13.18%)
- 75.1403 1,220 (11.75%)

⇒ Metal/Nonmetal

- 56.14107(a) 2,275 (16.17%)
- 56.12004 1,966 (13.97%)
- 56.14100(b) 1,549 (11.01%)

*2019 Data through August 2019
### MSHA Data Trends

#### 2018 Data – By Section of the Act

<table>
<thead>
<tr>
<th>Category</th>
<th>Section</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Coal</strong></td>
<td>104(a)</td>
<td>37,569</td>
<td>97.10%</td>
</tr>
<tr>
<td></td>
<td>103(k)</td>
<td>296</td>
<td>0.76%</td>
</tr>
<tr>
<td></td>
<td>104(b)</td>
<td>179</td>
<td>0.46%</td>
</tr>
<tr>
<td><strong>Metal/Nonmetal</strong></td>
<td>104(a)</td>
<td>40,791</td>
<td>96.85%</td>
</tr>
<tr>
<td></td>
<td>104(g)(1)</td>
<td>685</td>
<td>1.63%</td>
</tr>
<tr>
<td></td>
<td>104(b)</td>
<td>146</td>
<td>0.35%</td>
</tr>
</tbody>
</table>
MSHA Data Trends

→ 2019 Data – By Section of the Act*

Coal

• Section 104(a) 31,484 (97.33%)
• Section 103(k) 214 (0.66%)
• Section 104(b) 157 (0.49%)

Metal/Nonmetal

• Section 104(a) 36,515 (97.09%)
• Section 104(g)(1) 562 (1.49%)
• Section 104(b) 127 (0.34%)

*2019 Data through August 2019
MSHA Data Trends

→ 2018 Data – By Likelihood

⇒ Coal

• No Likelihood 1,498 (3.94%)
• Unlikely 27,926 (73.45%)
• Reasonably Likely 8,370 (22.01%)
• Highly 151 (0.40%)
• Occurred 77 (0.20%)

⇒ Metal/Nonmetal

• No Likelihood 3,570 (8.55%)
• Unlikely 29,029 (69.52%)
• Reasonably Likely 8,909 (21.34%)
• Highly 176 (0.42%)
• Occurred 71 (0.17%)
# MSHA Data Trends

## 2019 Data – By Likelihood  (*2019 Data through August 2019*)

### Coal
- No Likelihood: 1,304 (4.10%)
- Unlikely: 23,615 (74.22%)
- Reasonably Likely: 6,752 (21.22%)
- Highly: 84 (0.26%)
- Occurred: 62 (0.19%)

### Metal/Nonmetal
- No Likelihood: 2,980 (7.99%)
- Unlikely: 26,286 (70.47%)
- Reasonably Likely: 7,827 (20.98%)
- Highly: 134 (0.36%)
- Occurred: 72 (0.19%)
MSHA Data Trends

→ 2018 Data – By Injury

⇒ Coal
  • No Lost Workdays 2,762 (7.26%)
  • Lost Workdays 25,928 (68.19%)
  • Permanently Disabling 4,811 (12.65%)
  • Fatal 4,521 (11.89%)

⇒ Metal/Nonmetal
  • No Lost Workdays 3,681 (8.82%)
  • Lost Workdays 20,950 (50.17%)
  • Permanently Disabling 8,212 (19.67%)
  • Fatal 8,912 (21.34%)
MSHA Data Trends

→ 2019 Data – By Injury  (*2019 Data through August 2019)

Coal
- No Lost Workdays 2,233  (7.02%)
- Lost Workdays 21,766  (68.41%)
- Permanently Disabling 4,147  (13.03%)
- Fatal 3,671  (11.54%)

Metal/Nonmetal
- No Lost Workdays 3,092  (8.29%)
- Lost Workdays 18,658  (50.02%)
- Permanently Disabling 7,425  (19.911%)
- Fatal 8,124  (21.78%)
MSHA Data Trends

→ 2018 Data – By Negligence

⇒ Coal

• No 45 (0.12%)
• Low 9,681 (25.46%)
• Moderate 26,542 (69.81%)
• High 1,739 (4.57%)
• Reckless Disregard 15 (0.04%)

⇒ Metal/Nonmetal

• No 27 (0.06%)
• Low 6,405 (15.34%)
• Moderate 31,927 (76.46%)
• High 3,387 (8.11%)
• Reckless Disregard 9 (0.02%)
MSHA Data Trends

2019 Data – By Negligence (*2019 Data through August 2019)

Coal
- No: 34 (0.11%)
- Low: 8,818 (27.71%)
- Moderate: 21,506 (67.59%)
- High: 1,451 (4.56%)
- Reckless Disregard: 8 (0.03%)

Metal/Nonmetal
- No: 14 (0.04%)
- Low: 6,323 (16.95%)
- Moderate: 28,070 (75.26%)
- High: 2,880 (7.72%)
- Reckless Disregard: 12 (0.03%)
Jason M. Nutzman

1775 Sherman Street
Suite 2500
Denver, Colorado 80203
Phone: 303.831.6956
Cell: 864.569.3378

707 Virginia Street East
Suite 1300
Charleston, West Virginia 25301
Phone: 304.357.9938
Cell: 864.569.3378

jason.nutzman@dinsmore.com