MSHA ABATEMENT – WHAT DOES THIS MEAN FOR OPERATORS?

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WHAT WE WILL BE COVERING

→ Statutory Requirements
→ Policy Guidance (Compliance Assistance)
→ MSHA Reality
→ Caselaw
→ Remedies for Mine Operators
STATUTORY REQUIREMENTS
Statutory Requirements

→ Section 104(a) of the Mine Act

→ If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. *In addition, the citation shall fix a reasonable time for the abatement of the violation.* The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.
Statutory Requirements

→ In the Mine Act, “abatement” is defined as…

→ Still waiting…

→ Still waiting…

→ Still waiting…
In the Mine Act, “abatement” is not defined at all.

“Abatement” is not defined in the regulations either.

Generally understood in the industry to mean “correction” of the violative condition upon which MSHA issued the enforcement action.

Example: Loose guard at a conveyor belt – abatement would be to re-hang the guard correctly.
Statutory Requirements

→ Section 104(b) of the Mine Act

istrator representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
Statutory Requirements

Section 104(b) of the Mine Act

What is the purpose of this section of the Mine Act?

• “To spur swift abatement of existing violations and compel operator compliance with the Act.”
Statutory Requirements

→ “Failure to abate” orders (under Section 104(b)) could bring penalties of $7,867 per day for each day the violations remains unabated.

⇒ Section 104(b) orders also trigger SEC reporting under Dodd-Frank Mine Safety Disclosure Requirements.

→ Section 104(a) does not provide any guidance as to how an enforcement action should be abated.

→ Section 104(a) does not provide any guidance as to what MSHA’s authority is to request how an enforcement action should be abated.
POLICY GUIDANCE (COMPLIANCE ASSISTANCE)
Policy Guidance (Compliance Assistance)

Program Policy Manual – Volume I

“When an inspector issues a Section 104(a) citation, the time for abatement should be determined, whenever practical, after a discussion with the mine operator or the operator’s agent. The degree of danger to miners is the first consideration in determining a reasonable time for abatement.”

• Do these discussions actually occur?
• What should be discussed in these conversations with the inspector?
Upon expiration of the time fixed for abatement, the inspector should review the circumstances, and if circumstances so justify, extend the abatement period. If not extension of time is justified, and the violation is unabated, the inspector shall issue a withdrawal order under Section 104(b).”

Do inspectors review all circumstances before issuing a failure to abate order under Section 104(b)?
Policy Guidance (Compliance Assistance)

→ Program Policy Manual – Volume I

⇒ “The filing of a petition for modification by an operator shall be a consideration in determining the reasonableness of the time fixed for abatement of any violation which relates to the safety standard sought to be modified.”
Section 100.3(f) deals with penalty assessments – and provides operators a 10% reduction in the base penalty amount of a regular assessment for timely abatement of the Section 104(a) or 104(d) citation.
Policy Guidance (Compliance Assistance)

→ Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines (PH13-I-1) (Dec. 2013)

→ Violation Description – essential elements to be considered in a violation description include:

C. The location or equipment where the violation or hazard exists. This element must be specifically identified for several reasons:

1. It serves as notification to the mine operator for abatement purposes;

2. It informs the miners and miners’ representative(s) of the exact location of the hazard; and

3. It serves as clarification for inspectors on abatement visits.
Policy Guidance (Compliance Assistance)

→ Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines (PH13-I-1) (Dec. 2013)

⇒ Violation Description

• Normally found in Section 8 (Condition or Practice)
• Should also be found in Section 15 (Area or Equipment)
Policy Guidance (Compliance Assistance)

→ Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines (PH13-I-1) (Dec. 2013)

⇒ Violation Description

• But there are certainly times when the description in Section 8 is less than desirable and more often Section 15 is left completely blank.
Policy Guidance (Compliance Assistance)

→ Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines (PH13-I-1) (Dec. 2013)

→ Section 104(a) Citations
  • The time fixed for abatement of a violation shall be determined, whenever practical, after a discussion with the mine operator or the operator’s agent. Inspectors shall give primary consideration to the health and safety of miners in establishing abatement times for all citations.

→ Section 104(b) Orders
  • In determining whether to issue a Section 104(b) order, the inspector must determine whether there is a reasonable basis for extending the abatement date.
Policy Guidance (Compliance Assistance)

→ Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines (PH13-I-1) (Dec. 2013)

⇒ Documentation of Airborne Contaminant Violations

G. When issued, state in extensions what items are required to be accomplished by the abatement due date.

⇒ Orders of Withdrawal – Airborne Contaminant Violations

C. When an inspector issues a Section 104(b) order of withdrawal, item 8 of the citation/order form should note, in detail, the reasons for the operator’s failure to abate the citation and what must be done to achieve abatement of the condition or practice that caused the issuance of the citation.
Policy Guidance (Compliance Assistance)

→ Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines (PH13-I-1) (Dec. 2013)

→ Termination (Abatement) Times for Citations

• “Inspectors shall give primary consideration to the health and safety of miners in establishing abatement times for all citations.”

• “The termination time for a citation must be specific and provide a reasonable time for mine operators to abate the conditions, practices, or circumstances which caused the issuance of the citation.”

• “Citation abatement times shall not be established for the convenience of the mine operator, or for the inspector, or because the mine operator has filed an appeal with the Federal Mine Safety and Health Review Commission, or because the operator filed a Petition for Modification.”
Policy Guidance (Compliance Assistance)

Coal Mine Safety and Health General Inspection Procedures Handbook (PH16-V-1) (June 2016)

- “Where appropriate, photographs of abatement or termination measures should also be taken.”
- “In addition, the citation is required to fix a reasonable time for the abatement of the violation.”
- “When a violation of Sections 75.400, 75.402, or 75.403 is found, abatement should be set at the shortest reasonable time after careful evaluation of conditions on a mine-by-mine basis, including whether the mine liberates large volumes of methane gas or has a history of methane ignitions.”
- “Rehabilitation or clean-up of the affected portion of the airway should be the primary focus in regard to termination of the citation with appropriate abatement time given considering the scope of work involved…. The inspector shall give primary consideration to the health and safety of miners in establishing abatement times.”
Policy Guidance (Compliance Assistance)

- Metal and Nonmetal General Inspection Procedures Handbook (PH16-IV-1) (June 2016)
  - “Where appropriate, photographs of abatement or termination measures should also be taken.”
  - “Inspectors shall give primary consideration to the health and safety of miners in establishing violation abatement times.”
  - “The termination time and date for a citation must be specific, taking into account the degree of hazard to the miner(s), and provide a reasonable time for the operator to abate the violative condition or practice.”
Policy Guidance (Compliance Assistance)

→ Metal and Nonmetal General Inspection Procedures Handbook (PH16-IV-1) (June 2016)

⇒ Inspections of Second Escapeways, Underground Hoisting Facilities, and Refuge Chambers:

• In setting an abatement time for violations inspectors should, at a minimum, consider the following factors:

  - Potential hazard or hazards to miners;
  - The time required to safely evacuate all but the necessary maintenance personnel from the mine;
  - The type of self-rescue devices available;
  - The time required to notify all miners underground of the unavailability of an escapeway including instructions for use of the remaining escapeway in the case of an emergency;
  - The likelihood of a fire, explosion, or other similar event; and
  - The time required to return the affected escapeway to operation.
The Mine Act does not give the inspector (and thus MSHA) the authority to request a specific method of abatement.

Reality is that if the inspector is unhappy with the method of abatement he can independently determine that the hazardous condition was not totally abated within the required time and issue a Section 104(b) order.

- In 2017 MSHA issued 464 Section 104(b) orders.
- In 2018 MSHA issued 325 Section 104(b) orders.
- Through August 2019 MSHA issued 284 Section 104(b) orders.
Unreasonable MSHA abatement requests generally fall into three categories:

1. **Timing**
   - MSHA only allowing a few hours to correct the alleged violation.

2. **Method of abatement**
   - Operator begins abatement process only to have MSHA refuse to accept the operator’s plan for abatement.

3. **Cost for abatement**
   - Cost to address the violation is expensive and sometimes unnecessary as there are alternative methods to reach the same goal.
MSHA Reality

→ Related abatement issues with MSHA:

⇒ (1) Moving the goalpost with abatement
  • MSHA initially agrees with what the operator is doing to abate the alleged violation and then – through modifications and extensions of the original enforcement action – requires the operator to address another issues not originally included in the original enforcement action.

⇒ (2) MSHA fails to return in a timely manner to terminate an enforcement action.

⇒ (3) MSHA asks the operator to submit a new plan (i.e., training plan, ground control plan, emergency response plan) in order for the enforcement action to be abated.
MSHA Reality

→ Sample Enforcement Actions
What does the future hold with MSHA?


OIG reviewed the 2018 Scofflaw program and noted MSHA is using Section 104(a) enforcement actions to force operators to pay outstanding civil penalties. If the Section 104(a) enforcement action is not timely abated then a Section 104(b) order is issued in order to shut down the mine until payment is made.

- MSHA issued 15 Section 104(b) orders in 2018 and 3 Section 104(b) orders in 2019 under this approach.
- Could we see more of this in the future?
Caselaw

→ What does MSHA need to establish?

⇒ **Mid-Continent Res., Inc.,** 11 FMSHRC 505 (Apr. 1989)

• The Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the citation existed at the time the section 104(b) withdrawal order was issued.
Caselaw

→ What does MSHA need to establish?

⇒ Hopkins County Coal, LLC, 38 FMSHRC 1317 (June 2016)

• Section 104(b) plainly sets out two enumerated conditions the Secretary must establish before he can issue a withdrawal order: (1) that the underlying violation has not been totally abated within the set abatement time, and (2) the abatement time should not be extended.

• If those two conditions are satisfied, Section 104(b) mandates that the Secretary must determine the extent of the area affected by the violation and then issue an order which requires the withdrawal of all persons from that area.
Caselaw

→ Are there limits on what MSHA can require?


  • MSHA is without authority to require a mine operator to take additional specified action beyond what was necessary to remedy and correct the violative condition cited.

  • The original citation alleged three violations of the operator’s ventilation plan (extended cut/line curtain 25 feet from last roll of bolts/rolled up curtain) and only having 145 feet per minute of air at the end of the line curtain.

  • The Section 104(b) order then references lack of air for certain locations but the order did not affirmatively state that the original conditions still existed (nor for that matter include these new issues – i.e., moving the goalpost).
Are there limits on what MSHA can require?

**Southern Ohio Coal Co.,** 14 FMSHRC 1781 (Nov. 1989)

- The operator followed the “suggested” course of action to abate an enforcement action and thus the subsequent Section 104(b) order was issued improperly.
- MSHA “suggested” building an overcast then backed off indicating that was not the best course of action.
Caselaw

→ What can the operator argue?

⇒ Clinchfield Coal Co., 11 FMSHRC 2120 (Nov. 1989)

• An operator may challenge the reasonableness of the length of time set for abatement or the Secretary’s failure to extend that time.
• The Commission will look to see if the MSHA inspector abused his discretion.
Caselaw

→ What is full abatement?

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

• The Mine Act does not indicate what satisfies full abatement.

• Thus, when the Mine Act is silent on an issue, the Secretary’s interpretation is controlling.
What should an MSHA Inspector consider in setting appropriate abatement obligations?

Hibbing Taconite Company, 38 FMSHRC 393 (Mar. 2016)

- The inspector must set an abatement time based upon the amount of time necessary to fully abate a violation. Factors to consider include:
  - Extent of the violative condition;
  - The availability of miners to undertake cleaning work; and
  - Competing safety concerns.
What should an MSHA Inspector consider in setting appropriate abatement obligations?

Hibbing Taconite Company, 38 FMSHRC 393 (Mar. 2016)

• The inspector may consider such information such as whether the operator delayed beginning the abatement process and whether any delay was justified, giving priority to the safety of miners exposed to the unabated conditions.
REMEDIES FOR MINE OPERATORS
Remedies for Mine Operators

→ Section 105(d) of the Mine Act

→ Permits operators the right to file a Notice of Contest to challenge “the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104.”

• This would be a challenge to the original enforcement action issued by MSHA.

• Thus, if you believe that abatement requirements may be a problem a Notice of Contest is a way to address that issue through an expedited hearing.

• As we have seen, however, the filing of a Notice of Contest with the Commission does not relieve the operator of the obligation to abate the hazardous condition.
Remedies for Mine Operators

→ Section 105(d) of the Mine Act

⇒ Challenge the Section 104(b) order by filing a Notice of Contest
  • Risk as failure to abate orders could be assessed at $7,867 per day.
Remedies for Mine Operators

→ Section 105(b)(2) of the Mine Act

→ Challenge the Section 104(b) order by filing a written request for temporary relief from any modification or termination of any order issued under Section 104.

→ An administrative law judge may grant relief after a showing by the applicant that there is a substantial likelihood that the findings of the Commission will be favorable to the applicant and that such relief will not adversely affect the health and safety of miners.
Remedies for Mine Operators

→ Petitions for Modification

→ Section 101(c) of the Mine Act provides, in relevant part:
  • Upon petition by the operator…the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

→ Similar language is set forth in 30 C.F.R. Section 44.4
Remedies for Mine Operators

→ Petitions for Modification

→ This avenue requires the operator to post the petition on the mine bulletin board until a ruling on the petition becomes final.

→ MSHA must then post notice in the Federal Register allowing all interested parties to comment on the petition.

→ MSHA will then have to investigate the petition and then MSHA will make a proposed decision and order which will become final 30 days later unless a request for a hearing is filed.

→ An application for temporary relief from enforcement may be filed at any time before a proposed decision and order is issued.

• MSHA will then investigate the application and issue a decision within 60 days from filing.
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