

WHAT ABOUT THAT CASE BACKLOG?*

By Michael T. Heenan

MSHA civil penalties have risen rapidly since enactment of the MINER Act in 2006. Total penalties in 2005 were around \$25,000,000 and by 2008, they were almost \$200,000,000. Each mine's "history of violations" can contribute enormously to accumulation of high penalties and also can bring about other grave enforcement in the form of mine closure orders. MSHA has undertaken enforcement as never before of "pattern of violations" provisions, also founded on mine history. If mine operators are to be fairly regulated and not unfairly penalized, the record on which enforcement is based better be right.

The way the system works, it is up to the individual operators of mines to employ available procedures to make sure they are not improperly faulted or penalized. Enforcement actions that will not withstand legal scrutiny should be vacated. This will not happen unless the miner operator takes advantage of guaranteed rights of review by the Federal Mine Safety and Health Review Commission, the independent adjudicatory agency which has exclusive authority to assess penalties under the Federal Mine Safety and Health Act.

Mine operators conduct their businesses under intense scrutiny with respect to even the most insignificant of safety considerations. They have developed a strong culture of safety. They take pride in their safety programs and want their MSHA record to reflect the success of their efforts. They do not want to be unfairly charged. Historically, many operators have taken issue with enforcement actions when the associated penalty was of virtually no consequence, but rightness and fairness were at issue. Today, operators have many more reasons to want to make sure that enforcement is fair in all respects.

Today, it is not just whether there was a violation that operators need to be concerned about; virtually every one of the multiple findings in every citation has significance far beyond anything previously. For one thing, each written finding by an inspector directly affects calculation of proposed civil penalties against the company. It is not surprising, therefore, that with the rapid escalation in enforcement, there has been a substantial rise in requests for hearings, and there is a backlog of cases.

A former head of the Assessment Office once commented to me: "If operators are not contesting, penalties are not high enough." If there is merit to this, then penalties are apparently now "high enough." But I think there is much more to the case backlog. And I think there may be more that can be done to reduce the backlog, even without expansion of government resources. Before discussing backlog solutions, I feel it is important to consider in greater depth the multitude of considerations pertinent to contest proceedings

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Importance of Review of Inspector Discretion

In the Mine Safety Act, Congress has developed an effective enforcement system and an effective review system. The combined approach, when properly implemented, allows operators to feel they are being treated as they deserve. It allows them to respect the system. An operator is much more motivated to comply with a respected system than one that is viewed as arbitrary and unfair. This is true even if achieving fairness proves to be an expensive proposition for the operator. And it is expensive. The time, effort and costs of seeking review of enforcement actions typically involve a greater burden overall on companies than MSHA penalties, but the review process has the desired effect all around. The government may presently feel burdened by the level of contests, but the government should appreciate that the system is working just as it should and everyone benefits.

Under the Mine Safety Act, MSHA inspectors have a surprising level of discretion, which they can exercise for better or worse. Since MSHA enforcement is in every case rooted in actions of inspectors in the field, it is worth remembering that no group of people is equally capable, and as individuals, we are all far from perfect. Some inspectors have excellent judgment; others do not. Some inspectors are by nature perceptive and fair. Others are more interested in their own self-importance and sense of power when they sense their intimidating effect on mine personnel. Some inspectors have years of experience and have learned well how to apply MSHA's regulations and others have not. Regardless, even well intentioned inspectors make mistakes. Operators care about avoiding the consequences of such mistakes.

Demise of the Informal Conference Procedure

MSHA regulations provide an "opportunity to review with MSHA each citation and order issued during and inspection." However, the regulations also state: "It is within the sole discretion of MSHA to grant a request for a conference and to determine the nature of the conference." For most of MSHA's existence, an operator needed only to alert the MSHA district office of a desire for such an informal conference and it was granted to review any or all citations and orders. It was not a hearing, but rather a request that the agency review its own actions. It was a thoroughly welcome and successful procedure. For many companies, this was all the review they felt they needed.

Fairness and appropriateness of inspector enforcement actions are important issues, and effective review is dependent on complete information. Inspector citations and orders are theoretically subject to ongoing supervisory review, but as in all organizations, supervisors are naturally inclined to encourage and support inspector discretion unless it is exercised in a clearly inappropriate manner. More importantly, without operator input, supervisors have only the inspector's report on which to base their review and there is little likelihood that very many actions will be called into question internally. Moreover, with the current emphasis on enforcement, supervisors have reason to be concerned about

criticism against themselves if they second guess harsh enforcement by an inspector. Consequently, there is very little self correction by the agency.

Today, conference requests are regularly met with responses that say, for example: “A conference will be scheduled after...penalties...have been assessed.... Failure to timely contest the proposed penalties will result in your conference request being cancelled.” In other words, current MSHA policy today is to discuss inspector enforcement actions only in the context of formal civil penalty contests initiated before the Federal Mine Safety and Health Review Commission.

Right to Commission Determination of Propriety of Enforcement

Although civil penalty contests were already on the rise, elimination of informal conference opportunities by MSHA has made formal contests the only reliable avenue for dialogue. The loss of an opportunity to speak with MSHA promptly and informally on a pre-penalty basis immediately after an inspection, without regard to any specific penalty and without the filing of formal penalty contests, is unfortunate. MSHA would say that the informal conference procedure was a casualty of the backlog due to increased contests generally. I do not think much thought has been given to the impetus for contests created precisely as a result of the unavailability of conferences. Operators have more reasons to talk to MSHA than just civil penalties.

In talking about rights of review, it is important that I stress that MSHA has the power to *propose* penalties, but the power to actually assess penalties lies exclusively with the Federal Mine Safety and Health Review Commission. Congress created the Commission to decide enforcement cases arising under the Federal Mine Safety and Health Act of 1977. The Commission is authorized to review citations and orders separate and apart or together with proposed civil penalties. The MINER Act amendments of 2006 did not change the longstanding procedures of the 1977 Act. Commission review is available as a matter of right. With respect to penalty determinations, all *proposed* penalties are set out by MSHA on a form that provides space for the operator to indicate whether a hearing is desired on all or specific penalties.

Mine operators may forfeit their right to have the Commission determine their penalties. Consistent with law, MSHA regulations state: “If the proposed penalty is not paid or contested within 30 days of receipt, the proposed penalty becomes a final order of the Commission and not subject to review by any court or agency.” In other words, if an operator does nothing to preserve rights to Commission determination, or if the operator does not check the right box for which citations it wants to have reviewed, penalties proposed for the citations by MSHA will become final and unreviewable orders of the Commission by reason of a legal fiction.

Summary Penalty Proposals by MSHA

In connection with Congress's authorization of the Secretary of Labor (acting through MSHA) to *propose* penalties, Congress basically removed from the Secretary burdens of detailed review of relevant facts. The law states:

In proposing civil penalties under this Act, the Secretary may rely upon a summary review and shall not be required to make findings of fact concerning the above factors.

In practice, the Secretary's (MSHA's) review of facts is limited. Penalty proposals are primarily calculated on the basis of points assigned to subjective and often speculative conclusions of the individual inspector issuing the citation. As a practical matter, individual inspectors are actually determining the amount of most proposed penalties. Each inspector finding on every citation and order, along with information from MSHA's files regarding size of the company and history of violations, constitute the sum total of what goes into a proposed monetary penalty calculation. With limited exceptions for "special assessments," the information provided by the inspector and taken from the files is summarily assessed by MSHA's civil penalty computer program. The penalty calculation variables for each citation are more numerous than the six criteria listed for Commission determinations under the Act. The variables include all of the following:

- Type of Mine or Contractor
- Production or Hours Worked
- Size of Controlling Entity
- History of Previous Violations
- Time Period during which History Calculated
- Repeat Violations per Inspection Day
 - Less than six
 - How many more than six
- Negligence
 - None
 - Low
 - Moderate
 - High
 - Reckless Disregard
- Likelihood of Injury or Illness
 - None
 - Unlikely
 - Reasonably Likely
 - Highly Likely
 - Occurred
- Gravity of Possible Injury
 - No lost work days
 - Lost work days or restricted duty
 - Permanently Disabling
 - Fatal
- Number of Persons Potentially Affected

- One
- Two
- Three
- Four
- Five
- Six
- Seven
- Eight
- Nine
- Ten or More
- Good Faith of Operator in correcting alleged violation
- Whether the Operator failed to timely abate the violation
- Whether the alleged violation was “Significant and Substantial”
- Whether the alleged violation was due to “Unwarrantable Failure”
- Whether the alleged violation was associated with an imminent danger

Because of the subjectivity inherent in so many of the findings that are translated into points for penalty calculations, penalty amounts can vary widely—all depending on what particular subjective conclusions inspectors include as findings in their citations. Small companies can end up with a hundred thousand dollar total penalty from a relatively few violations over the course of a couple of inspections. A large company could end up with a five thousand dollar penalty for many more violations issued over many days. It mostly depends on the subjective findings of inspectors as to what is a violation and what findings are to be associated with a violation. In many respects, if it were not for Commission review, the inspector would be the judge and jury. Depending on temperament, the inspector could exercise power well outside his or her job description.

A factor which is not part of the Secretary of Labor’s calculation is one of the six criteria which Congress requires the Commission to consider in assessing any penalty. That is “ability to continue in business.” Clearly, it was not Congress’s intention to drive companies out of business with excessive civil penalties. For small companies, the size of their final penalties can be the difference between surviving and not surviving, particularly in this difficult economy. Large companies, on the other hand, usually can survive because all of their business is not typically tied up in a single mine, but penalties in the hundreds of thousands of dollars per mine per year does take a toll on any mine.

Practical Aspects of Case Processing—How the System Really Works

The fact is that a hearing is not needed in most cases. What is needed is a fair exchange of information—a dialog. Formal case procedures provide an opportunity for just that. Before a case proceeds very far, each side has to evaluate the strength of their respective cases. Judges direct the parties to talk to one another. Then each party can explain to the other what its position is on the issues in the case and what evidence will be introduced in support. Both sides will discover weaknesses in their separate cases. There will be dialog and a compromise may be reached. The compromise will be presented to the Commission administrative law judge in a motion to approve settlement. Generally, the motion is

written and submitted by the government. In most cases, because good reasons are given for the settlement, the judge will approve it. Case closed. Further expenditure of resources is unnecessary. The interests of judicial economy are served. This really is no different from case handling in tribunals everywhere.

How the System Might be Improved

MSHA has tried to improve the review system by inserting a conference opportunity at the front end of the formal review procedure. Because of the volume of cases, MSHA is relying to a great extent on its own employees serving as Conference and Litigation Representatives (CLRs) rather than attorneys from the Labor Department Solicitor's office. Certainly, companies have endeavored to enter into negotiations with CLRs or attorneys to see if issues can be resolved before the cases become subject to formal Commission procedures. To this end, CLRs typically request a ninety day extension from the Commission to see if the case can be settled before a formal Petition for Assessment of Civil Penalty is filed and the case is subject to all Commission formalities.

A general trend in negotiations with MSHA is that CLRs, like inspectors, do not take into account what can and cannot be proved. Typically, they are refusing to address the issues that will be front and center in a trial. Instead, they assume a position of intransigence and rely on a percentage of operators becoming discouraged and giving up. Consequently, nothing gets resolved-- unless the operator backs down and goes away. Most operators know that this is not a fair review and they are going to have to stay the course to protect their rights.

Of course, the problem is not always necessarily solved when attorneys have the case. It can become a game of negotiations rather than a determination of what is right—what should be recommended to the judge as a resolution. As a result, neither side can get serious until right before trial. That is when what can be proved becomes more important than insisting that the inspector was right in all respects. This is not what operators expect when they seek review. They believe that if given a fair review, the validity of their position will be recognized and citations will be adjusted accordingly.

Obviously, I am generalizing to make a point. In many instances, the negotiation process is the key to effective and efficient resolution. So what can enhance the effectiveness of negotiations? Here is my list of items for consideration.

- ***Reinstate the Pre-penalty Conference Process***—This can restore MSHA's ability to promptly address issues arising in the field, and should help operators feel like they can get true consideration of their issues and concerns by the agency. When matters are resolved early, parties are less likely to get into a litigation stand-off.
- ***Reduce Discovery***--Too much time and effort goes into discovery that serves little purpose other than to force up the cost of efforts to get review. If operators are willing to forego discovery, the government should also. (The Labor Department has made provision for "Simplified Proceedings" to expedite OSHA cases in this way.)

- ***Allow Elective Mini-trials***—Parties could go to hearing with just one witness on each side and with exhibits submitted in advance, for example.
- ***Allow Simplified Written Submittals***—In many cases, there is little disagreement as to facts, and issues can be narrowed by agreement of the parties. What they cannot agree on is the appropriate result. Judges could decide cases based on simplified submittals and perhaps query the parties in a telephone conference regarding any apparent factual differences.
- ***Provide for Mediation***—Former solicitors, former judges and other attorneys may be willing to serve on a panel to mediate cases. The parties could share the costs. (With the substantial increase in penalties going into the federal Treasury, there ought to be a way for the government to fund its part of the bill.)
- ***Consider Global Settlement Conferences*** in which companies could bring all their issues to the government for fair consideration, without having to go through a long drawn-out piecemeal conflict approach.

Conclusion

I do not presume to have the answers, but I do offer my suggestions as a possible starting point. There are things wrong with the current system that need to be fixed, or at least improved. In the meantime, the only way operators have a chance of getting things changed is to broadly contest current enforcement and the associated penalties.

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