

STRIKE ONE - YOU'RE OUT?

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While many of the papers and speakers at this special institute may address in some fashion MSHA's comprehensive black lung prevention plan, and some information and topics may overlap, this presentation will specifically focus on legal issues which will likely arise as MSHA continues to press the issues associated with ventilation and respirable dust exposure. The points I am addressing might fit under Yogi Berra's observation of "It's de'ja vu all over again!" Legal disputes about notice and comment rulemaking versus general statement of policy and agency discretion are about to be explored again. In addition, new rounds of litigation appear likely concerning the medical and scientific reliability of analysis results for respirable dust and quartz content based on single-shift samples.

This paper also presents some practical guidance to operators during the chaotic times of change from where we are to where we are going with new rulemaking and continuing policy changes pertaining to ventilation, respirable dust exposure and the black lung prevention efforts.

Initially, common ground clearly exists among regulators and the regulated community on the goal of reducing -- and even eliminating -- adverse occupational health impacts to coal miners. If nothing else, the financial burdens that fall on individuals, their families, and their employers make such a goal of utmost importance to all involved. Of course, the friction arises where a regulatory authority with enforcement powers sets a course to achieve its stated goal with an arsenal full of "tools" that it has and will deploy at its discretion. Those tools include Program Information Bulletins, Program Policy Letters, Procedure Instruction Letters, Notice and Comment Rulemaking, and Enforcement Actions such as safeguards, citations, and orders.

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Typically, the regulated community would prefer to have its voice heard or a "seat at the table" when rules or guidelines are being discussed that impact its personnel and its operations (i.e., notice and comment rulemaking). But often and seemingly more frequent in recent months, the agency chooses to act by using other tools which allow it to move more quickly towards its objectives. Because of the high stakes which include, at the practical level, control of mining operations, it is likely that more litigation will be in our future as the regulated community responds to the agency's use of all of its "tools." Many of those issues will center around the notion that operators perceive MSHA seeking to impose general rules at all underground mines in the plan approval process. In those instances operators and their respective national and state trade associations may choose to respond by challenging such actions as inappropriately being taken without the benefit of notice-and-comment rulemaking where medical, scientific, and legal analysis can be applied to a proposed "rule" before it comes into being.

Legal precedent has held, "While MSHA may consider conditions which are common to a number of mines, MSHA is prohibited from imposing general rules applicable to all mines in the plan approval process." Peabody Coal Company, 15 FMSHRC 381, 386 (March 1993) citing, UMWA v. Dole, 870 F.2d 662, 669-72 (D.C. Cir. 1989). Precedent also supports MSHA's positions. For example, in National Mining Association, Alabama Coal Association, (No. 08-14309, Dec. 15, 2009), the U.S. Court of Appeals for the Eleventh Circuit most recently addressed a case in which the regulated community challenged MSHA's Procedure Instruction Letter No. 108-V-03 addressing extended or deep cuts as invalid because it did not result from notice-and-comment rulemaking. The court held that the subject PIL was merely a general statement of policy with the agency free to exercise discretion in its application and therefore did not have to be the subject of notice-and-comment rulemaking.

Background and Practical Observations:

The Federal Mine Safety and Health Act of 1977 as amended (the "Act") and its implementing regulations require operators to adopt appropriate roof control and ventilation plans. These plans are subject to the Secretary of Labor's approval.² However, in the past few years, coal operators have increasingly asked their lawyers: "Whose plan is it?" In particular, operators have frequently raised issues in the context of plan disputes about ventilation and respirable dust compliance, as well as extended cuts. A fundamental question that arises from the discussion of these issues is simply: "What do we do if we disagree with MSHA about a plan provision?"

While the plain language of the Act provides that operators adopt such plans, it is equally clear that the Secretary, acting through its administrators and specifically the applicable District Manager, must approve of the plans. And that's where the rub occurs. Once the dialogue with the District Manger ends without a resolution, what rights does an operator have to challenge the agency that wields enforcement power over its operations? Does an operator dare exercise those rights?

In addition to the time-honored approach of requesting a meeting with the District Manager and seeking to work things out,³ another procedure, discussed below, exists in MSHA's Program Policy Manual which addresses this topic.

MSHA's Program Policy Manual at Chapter V.G-4 "Mine Plan Approval Procedures" addresses the "Contest of Mine Plan Approval Actions" at page 4 and provides in part:

"In those situations when MSHA can no longer accept a provision of an approved plan, cannot approve a provision in a new plan, or cannot approve a proposed change to an

² See sections 302(a) and 303 (o) of the Act as well as 30 C.F.R. §§75.220(a)(1) and 75.370(a)(1).

³ See 30 C.F.R. §§75.220(b)(2) and 75.370(c)(2) which provide for operators to have an opportunity to discuss the issues with the District Manager for roof control and ventilation plans, respectively.

approved plan, operators should be afforded the opportunity to contest MSHA's denial of approval. Where the operator disagrees with MSHA and indicates the desire to seek a citation to contest before the Federal Mine Safety and Health Review Commission, a citation should be issued. Normally, this would be a 104(a) citation and not involve unwarrantable failure findings, unless the circumstances justify it. ..."

MSHA's Program Policy Manual also sets forth an item that may be of particular interest to operators in Chapter V.G-4. That section entitled, "Criteria and Guidelines in Mine Plan Approvals," states in part:

"On occasion, MSHA has required criteria from the roof control and ventilation standards to be included in plans for all mines as a condition of the approval, without appropriate regard for the specific mining conditions. There have also been instances when Agency 'guidelines' have been required in plans in a similar manner. The use of the criteria and guidelines in this manner has been successfully challenged in court and should be discontinued."

MSHA standards require operators to develop suitable plans on a mine-by-mine basis. Criteria and guidelines are reference information in the same nature as experience and knowledge of the particular conditions at the mine. Certain criteria or guidelines may have broad application, but operators should include them on an "as-needed" basis, rather than an across-the-board requirement. The evaluation should be whether the provision contained in a guideline is needed at a specific mine, rather than being concerned with why it is not included in the mine plan. MSHA does not require plans in all cases to conform to the criteria, provided that operators afford no less than the same measure of protection to the miners as if they had conformed to the criteria. Comparably, if a mine operator exceeds the requirements of an approved mine plan, MSHA should not immediately require the operator to

include these additional measures as part of the mine plan. This kind of revision should be based on an "as-needed" basis and should take into account current and projected mining conditions.

Areas of Concern to Operators.

A typical problematic scenario arises when a District Manager writes a letter to an operator and refers to analysis results for individual samples⁴ for the subject mining unit, which lead the District Manager to question the adequacy of the mine's methane and dust control plan. Though the samples are sometimes taken a year or more before the date of the letter, a District Manager often requests or requires the operator to promptly amend or revise its plan. In a similar vein, some Districts have used alleged respirable dust issues to request the deletion of previously approved extended cuts.

While Volume V of MSHA's Program Policy Manual gives the District Manager discretion to initiate a mine plan change, the ultimate issue is whether provisions in the plan are not suitable to the particular conditions at the mine. It is not uncommon that the data reveals that the apparently isolated analysis results may have been attributable to a particular and limited geological anomaly. And it may not justify revising the mine plan. In fact, the Program Policy Manual requires the District Manager to give to the operator written notification that identifies the reason why the changes are needed. Importantly, District Manager must give the operator an opportunity to meet with District personnel to discuss any proposed changes. If the changes are justified, then the District must set a reasonable time for the operator to submit revised plan provisions.

Under 30 C.F.R. §70.100 respirable dust analysis has come to require the average of five valid samples, not simply a single shift

⁴ Despite legal precedent which has held that single shift samples are scientifically inadequate to support an enforcement action and which, among other reasons, is why MSHA protocol requires an average of five valid samples to substantiate a respirable dust violation under 30 C.F.R. §70.100 or §70.101.

sample. Nevertheless, MSHA has historically altered and reduced an operation's respirable dust standard on the basis of a single shift sample with a quartz content in excess of 5%. That coupled with the use of single respirable dust sample analysis results for a "concern for plan adequacy" District Manager letter discussed above form the basis for this paper's title: "Strike One - You're Out?".⁵

Even MSHA's own Health Technology Center personnel considered this type of protocol as suspect. In an analytical paper titled "MSHA's Revised Quartz Enforcement Program",⁶ Messrs. Tomb, Parobeck and Gero, reported, among other findings, that "... a quartz determination based on a single sample is equivalent to the long-term average approximately 20 percent of the time, and is only within three percent approximately 72 percent of the time, indicating that a quartz determination from a single sample is not a good estimator of the long-term average quartz level of an operation." This type of finding led to the revised quartz program which among other things allows the mine operator to collect and submit an alternate sample after receiving notification from MSHA of a quartz sample in excess of 5%.

However, no one has fully scientifically, medically or legally evaluated the reliability of such a protocol, which still has underpinnings in analyzing single samples for quartz content. Indeed, the Tomb, Perobeck, Gero report found that when they averaged one MSHA and one operator sample, the dust standard equaled or was within ten percent of the standard determined from the MSHA sample alone only 51 percent of the time. And 36 percent of the time, the standards were 10 to 20 percent higher. When they used three samples (one from MSHA and two from operators), the standards exceeded those of a single MSHA sample 83 percent of the time! While the Tomb, Perobeck and Gero report did not comment directly on this finding, one aspect of the revised

⁵ Beyond the scope of this paper is any discussion or analysis of MSHA's alternative "weight" based methodology of measuring for quartz in micrograms.

⁶ Copy attached as Exhibit A, from "In Respirable Dust In The Mineral Industries, R.L. Franz and R.V. Ramani, eds., University Park, PA, The Pennsylvania State University, 1986, pp.9-14.

protocol that underscores potential statistical and validity issues is the assumption of validity attached to the first MSHA sample analysis results.⁷ Interestingly, in an early case examining the reliability of a single shift sample of respirable dust, MSHA challenged the legitimacy of the analysis results for a single sample collected on a single shift. In Excel Mining, 334 F.3d 1, U.S. Court of Appeals for the D.C. Circuit (July 8, 2003), the Court upheld MSHA's position which would allow multiple samples over the same shift or multiple samples over multiple shifts, but did not allow a single sample from a single shift to be the basis for evaluating an operator's compliance.⁸

That same revised quartz program contemplated that after six months, MSHA would reevaluate an operation with an altered respirable dust standard due to the presence of quartz in excess of 5%. However, for operators it sometimes seems that once MSHA establishes a reduced respirable dust standard, the operator cannot easily get a re-evaluation based on a more current quartz analysis. After all, MSHA controls the timing of the gathering and designation of samples that will be analyzed for quartz content.

Concerning enforcement actions, MSHA's Handbook Series, Chapter 1, Respirable Dust, at page 1.29 provides an important bit of information for operators dealing with a reduced respirable dust standard due to quartz. Paragraph 2 provides in part that "If the sampled entity is on a reduced standard, the inspector will delay any enforcement action until the results of quartz analysis are received. ..." In practical terms, this provision means that MSHA should not take any enforcement action if the quartz analysis of a more current sample would reveal a result that,

⁷ For example if the initial MSHA sample results in an analysis of anything greater than 15% quartz content, then even a prudent operator following the protocol and submitting valid first and second optional samples with 0% quartz content analysis will see a reduced respirable dust standard since the average of 15, 0 and 0 = 5 and any amount above 15% for the first MSHA sample will cause the average to exceed 5%.

⁸ Relying on the "Notice of Finding That Single Shift Measurement of Respirable Dust Will Not Accurately Represent Atmospheric Conditions During Such Shift", 37 Fed. Reg. 3833 (Feb. 23, 1972), relied on by MSHA in formulating its interpretation of §202(f)(2) of the Act, to which the Court gave deference.

if used as the 30 C.F.R. §70.101 value, would result in a reduced respirable dust standard that would not be exceeded by the current average respirable dust concentration results. In some instances, the more current sample might be part of MSHA contemporaneous samples gathered to measure compliance.

Although this concept appears untested, it would seem to lend relevancy and credibility to an operator's request that MSHA use quartz analysis results for samples taken after the sample which was used under 30 C.F.R. §70.101 to establish the reduced standard. Thus, the best advice for operators is not to wait for issues to arise, but instead (1) keep good records of sample collections, (2) review the MSHA data retrieval system for results, and (3) if MSHA took samples that you believe should have been analyzed for quartz, consider asking the "health" inspector from the local District to ensure getting all results.

Operators should also be aware of Chapter 1 of the MSHA Handbook Series. At page 1.48, the Handbook addresses an operator's right to request a reevaluation of the applicable quartz level. In our experience, if an operator on a reduced respirable dust standard believes circumstances have changed, and wants to be reevaluated, that operator must be proactive and should make a formal request to the District Manager under the Handbook protocol.

Abatement issues are also critical and operators should know that 30 C.F.R. §70.201(d) provides in part:

"... the operator shall take corrective action to lower the concentration of respirable dust within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken."

It is not uncommon for MSHA to attempt to require operators to submit plan changes, which MSHA must approve, before MSHA allows any sampling to ascertain compliance. However, we have also found

that many operators have yielded this issue because they already included provisions in their plans that expressly provide for such a protocol in the event of even a single incident of noncompliance.

Operators should also be aware of Program Information Bulletin ("PIB"), No. P09-31, issued on August 25, 2009, which among other things, seeks to clarify the sampling procedure for an operator which has received a respirable dust citation under Part 70 or 71. This PIB explains that the last sentence of 30 C.F.R. §70.201(d) does require operators to take samples on each production shift when the operators seek abatement. This contradicts what has become an accepted practice in many locations of collecting samples only on one production shift per day -- and typically the same shift, such as the day shift for each of five consecutive days.

Finally, an additional resource for operators is MSHA PIB No. P07-20, issued on July 31, 2007, which allows "operator" samples with less than 0.45 mg weight gain to be analyzed for quartz at the MSHA lab, just as MSHA-collected samples with less than 0.45 mg weight gain may be analyzed. Operators must precisely follow the defined protocol, but this PIB may be one of the practical means for operators to deal with the one-strike-you're-out protocol where a single analysis in excess of 5% quartz resulted in a reduced respirable dust standard below 2.0 mg/3.⁹

An operator may call on the plan-dispute provisions of MSHA's Program Policy Manual to deal with such issues. Ironically, the operator that has already included provisions in its plan that go beyond the regulatory scheme is held to those "higher" standards as the starting point of the inquiry and legal analysis. This frequently makes the operator's case much more difficult. Other issues may be similarly overreaching and may depend on mine specific conditions and factors, which are frequently lost in the shuffle. These issues include: limiting

⁹ See the attached Exhibit B for a sample protocol for operators to consider.

or excluding extended cuts, changing from blowing to exhausting ventilation schemes, limiting or prohibiting the use of scrubbers, changing water pressures, numbers of sprays, mean air velocities, quantity of air, etc.

Conclusion

Our advice to operators is to be cautious about what you agree to put in your plans, especially when abating a citation. Maintain your ventilation and dust controls, follow your preventative maintenance plans for cleaning screens and scrubbers and ductwork, check sprays and water lines, follow your roof control plan, strive for improvement, and be consistent with your follow-up. Moreover, keep excellent records pertaining to your respirable dust sampling and analysis program. Ultimately, we would seek to focus on improving health and safety for miners, not to wrangle with tangential legal skirmishes. We hope open communication and dialogue can avoid these distractions. To the extent muddy issues require additional litigation to clarify, we hope the regulated community and regulators candidly discuss the issues and frame the litigation in a tight and concise manner.

Thank you.