



# **Special Institute on Mine Safety and Health Law**

March 23-24, 2010 • Washington, DC

**E&MLF**  
ENERGY & MINERAL LAW FOUNDATION

**Sponsored by the  
Energy & Mineral Law Foundation  
and the U.S. Department of Labor**

**Held at the USDOL Auditorium**

**U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC**

## *Program Schedule*

### **Tuesday, March 23, 2010**

8:00 a.m. Registration Desk Opens

9:00-9:10 a.m. Welcome and Introductions

- Edward M. Green, Program Co-chair, *Crowell & Moring LLP*, Washington, DC
- Heidi W. Strassler, Program Co-chair, Acting Associate Solicitor – Mine Safety and Health, *USDOL*, Arlington, VA

9:10-10:10 a.m. The Civil Penalty Case Backlog — What's to Be Done?

In 2005, MSHA civil penalties totaled 25 million dollars; in 2007, the total was 75 million dollars, and in 2008, almost 200 million. Operator contests of MSHA enforcement actions and proposed penalties have substantially increased and matters are being contested at rates faster than the current system for review has been able to effectively process. What are the factors contributing to this increase and what avenues currently exist to address it more effectively? This panel will consider the problem and discuss why enforcement actions, as well as penalties have risen; why the cumulative enforcement and penalty systems under the Mine Act and regulations is a factor; what the Mine Safety Act requires in terms of civil penalty assessment and fair adjudication; how are both enforcement and due process to be assured; how might cases be processed more expeditiously; what specific solutions might be attempted; can a larger dialog over and above formal litigation help?

- Moderator: Laura E. Beverage, *Jackson Kelly PLLC*, Denver, CO
- Michael T. Heenan, *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, Washington, DC
- The Honorable Robert J. Lesnick, Chief Administrative Law Judge, *Federal Mine Safety and Health Review Commission*, Washington, DC
- Keith E. Bell, Co-Counsel, Trial Litigation, Office of the Solicitor, *USDOL*, Arlington, VA
- Judith Rivlin, Assistant General Counsel, *United Mine Workers of America*, Fairfax, VA

10:10-10:30 a.m. Break

10:30-11:30 a.m. Plan Approvals Under the Mine Act

In recent years, issues regarding review and approval of ventilation, roof control, and emergency response plans required by the Mine Act have been at the forefront. This panel presentation will focus on the regulatory plan approval process, and challenges encountered, from the perspectives of both industry and enforcement.

- Moderator: Edward M. Green, *Crowell & Moring LLP*, Washington, DC
- Elizabeth S. Chamberlin, VP – Safety & Health, *Massey Coal Services, Inc.*, Richmond, VA
- R. Henry Moore, *Jackson Kelly PLLC*, Pittsburgh, PA
- Thomas A. Paige, Co-Counsel, Trial Litigation, Office of the Solicitor, *USDOL*, Arlington, VA

11:30 a.m.-12:30 p.m. Lunch on your own

12:30-1:30 p.m. Federal Coal Mine Health and Safety Act of 1969

- The Honorable Hilda L. Solis, *Secretary of Labor*
- Joseph A. Main, *Assistant Secretary of Labor for Mine Safety & Health*
- Congressional Speakers

1:45-2:45 p.m. Practicing Before the Administrative Law Judges (ALJs) of the Federal Mine Safety and Health Review Commission (Commission) – Comments and Practice Lessons from a Panel of ALJs

This panel, comprised of Administrative Law Judges, will address new time frame orders and general hearing procedures in use by the Commission's ALJs as well those trial techniques they find effective in hearings before them and those techniques that are better not used. This topic will also include a question and answer session during this panel.

- Moderator: The Honorable Robert J. Lesnick, Chief Administrative Law Judge, Federal Mine Safety and Health Review Commission, Washington, DC
- The Honorable Richard W. Manning, Administrative Law Judge
- The Honorable Jerold Feldman, Administrative Law Judge
- The Honorable Alan G. Paez, Administrative Law Judge

2:45-3:00 p.m. Break

3:00-4:00 p.m. Reform of the MSHA Respirable Dust Program

Labor Secretary Hilda Solis and MSHA Assistant Secretary Joe Main have pledged to “End Black Lung ACT NOW.” Reform of MSHA’s respirable dust regulations will be the centerpiece of this landmark campaign. That reform is unfinished business from the tenures of previous Labor Secretaries and MSHA chiefs, during which two separate proposed revisions to the current rules, in effect since the early 1970s, failed to gain support of either labor or industry. Will this time be any different? While there appears to be an emerging consensus on some issues (such as use of a newly developed personal dust monitor), other key issues (including reducing the dust and quartz standards and compliance based on single shift measurements only) remain potentially contentious. Current enforcement issues at play during these times of changing paradigms will also be discussed.

- Moderator: Edward M. Green, *Crowell & Moring LLP*, Washington, DC
- Gregory Wagner, M.D., Deputy Assistant Secretary of Labor for Policy, *MSHA*
- Robert Glenn, CIH, *Crowell & Moring LLP*, Washington, DC
- Dennis O’Dell, Director of Health & Safety, *United Mine Workers of America*, Fairfax, VA
- Joseph A. Lamonica, *Bituminous Coal Operators Association*, Washington, DC
- Thomas F. Rubenstein, *Dinsmore & Shohl LLP*, Morgantown, WV

4:00-5:30 p.m. MSHA Enforcement – Inspection Issues: 1) 103(j) and (k) Orders and Accident Reporting Under MSHA and State Law; 2) Handling Document Requests During Routine Inspections and 3) Documenting the Scene for Litigation

This panel will examine: The new MSHA policy on use of 103(j) control orders vs. 103(k) orders in mine incidents as well as developing law under accident reporting requirements for both MSHA and various states with reporting statutes; MSHA’s right to take original records, rather than copies; MSHA’s requests to inspect records not required to be maintained under the Mine Act during routine inspections; and the steps an operator should take to document its defenses to a citation or order.

- Moderator and Speaker: Marco M. Rajkovich, Jr., *Rajkovich, Kilpatrick, Williams, & True, PLLC*, Lexington, KY
- Jeffrey K. Phillips, *Steptoe & Johnson PLLC*, Lexington, KY
- Willa B. Perlmutter, *Crowell & Moring LLP*, Washington, DC
- Gary McCollum, Corporate Counsel, *Alliance Coal, LLC*, Lexington, KY
- Derek Baxter, Senior Trial Attorney, Office of the Solicitor, *USDOL*, Arlington, VA

6:00 p.m. Reception for Registrants and Speakers Hosted by EMLF Members  
*Reception held at the offices of Crowell & Moring LLC, 1001 Pennsylvania Avenue, NW*

## Wednesday, March 24, 2010

9:00 -10:00 a.m. Advances in Mine Safety and Health — An Industry Perspective

- John Caylor, Vice President – Corporate Safety and Occupational Health, *Freeport-McMoRan Copper & Gold*, Phoenix, AZ
- Kenneth Murray, VP of Operations, *Alliance Coal LLC*, Lexington, KY
- Bruce Watzman, Senior VP for Regulatory Affairs, *NMA*, Washington, DC

10:00-10:15 a.m. Break

10:15-11:30 a.m. MSHA Enforcement — Litigation Issues: 1) Developments in the Law of Significant and Substantial, Unwarrantable Failures and Part 100 criteria; 2) Flagrant Violations and Defenses and 3) Use of the Pattern of Violations Process.

This panel will discuss issues related to the various classifications of violations, including unwarrantable failure, gravity (significant and substantial), negligence, number of persons affected and expected injury. The significance of the classifications to the civil penalty assessment process will also be examined. Second, in relation to the growing use of “Flagrant violation” designations, the panel will examine the legislative basis for this enforcement action, examples of recent usage and defenses. Finally, the panel will examine the Pattern of Violation review process and how the Pattern enforcement is being applied and challenged in litigation.

- Moderator and Speaker: Margaret S. Lopez, *Ogletree, Deakins, Nash, Smoak & Stewart, LLC*, Washington, DC
- Thomas C. Means, *Crowell & Moring LLP*, Washington, DC
- Brian J. Warner, *Shuman, McCuskey & Slicer, PLLC*, Morgantown, WV
- Thomas A. Paige, Co-Counsel, Trial Litigation, Office of the Solicitor, *USDOL*, Arlington, VA

11:30 a.m.-12:30 p.m. A Primer on Section 105(c) Complaints and Temporary Reinstatement.

This session will address MSHA’s use of Section 105(c) and Temporary Reinstatement procedures, including legislative history, the temporary reinstatement process, and use of economic reinstatement. The panel will also address recent case law on all these areas, including recent ALJ and Commission rulings on temporary reinstatement.

- Moderator and Speaker: Mark E. Heath, *Spilman, Thomas & Battle, PLLC*, Charleston, WV
- Melanie J. Kilpatrick, *Rajkovich, Williams, Kilpatrick & True, PLLC*, Lexington, KY
- W. Christian Schumann, Counsel, Appellate Litigation, Office of the Solicitor, *USDOL*, Arlington, VA

12:30 p.m. Lunch break on your own

2:00-3:30 p.m. Oral Argument Before the Federal Mine Safety and Health Review Commission (Sitting in Special Session at the USDOL Auditorium)

*Secretary of Labor v. Eastern Associated Coal Corp.*, Docket No. WEVA 2007-335

Issue: Whether the Administrative Law Judge erred in finding that a violation of roof control requirements was not caused by the operator’s “unwarrantable failure” to comply.

- For the Secretary, Edward Waldman, Office of the Solicitor, *USDOL*, Arlington, VA
- For Eastern Associated Coal Corp., R. Henry Moore, *Jackson Kelly PLLC*, Pittsburgh, PA

## ***Program Committee***

- Edward M. Green, Co-Chair, *Crowell & Moring LLP*, Washington, DC
- Heidi W. Strassler, Co-Chair, Solicitor’s Office, *USDOL*, Arlington, VA
- Laura E. Beverage, *Jackson Kelly PLLC*, Denver, CO
- Elizabeth S. Chamberlin, *Massey Coal Services, Inc.*, Richmond, VA
- David J. Hardy, *Allen Guthrie & Thomas PLLC*, Charleston, WV
- Mark E. Heath, *Spilman, Thomas & Battle, PLLC*, Charleston, WV
- Michael T. Heenan, *Ogletree Deakins Nash Smoak & Stewart, LLC*, Washington, DC
- Melanie J. Kilpatrick, *Rajkovich, Kilpatrick, Williams, & True, PLLC*, Lexington, KY
- Margo S. Lopez, *Ogletree Deakins Nash Smoak & Stewart, LLC*, Washington, DC
- Gary McCollum, Corporate Counsel, *Alliance Coal, LLC*, Lexington, KY
- Suzan E. Moore, *Alpha Natural Resources, Inc.*, Abingdon, VA
- Marco M. Rajkovich, Jr., *Rajkovich, Kilpatrick, Williams, & True, PLLC*, Lexington, KY
- F. Thomas Rubenstein, *Dinsmore & Shohl, LLP*, Morgantown, WV



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You may pay by \_\_\_\_\_ check or \_\_\_\_\_ credit card. EMLF accepts MasterCard, VISA or American Express.

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### Registration information

#### Conference Registration

EMLF full institute registration fee includes all educational sessions, meeting materials and Tuesday evening hosted reception sponsored by EMLF Member law firms.

General Registration fee .....	\$400
EMLF Member fee .....	300
Government/NPO .....	200

#### Accommodations

EMLF has not blocked hotel guest rooms for this educational event. Go to the DC Chamber of Commerce where you can make online reservations based on location at the Visitors' Center – <http://www.dchamber.org> – or Washington.org, the official tourism site of Washington, DC – <http://washington.org>.

### Three ways to register

- If registering online, go to [www.emlf.org](http://www.emlf.org)
- If registering by fax, call 859.226.0485
- If registering by mail, send form and payment to EMLF, 340 South Broadway, Suite 101 Lexington, KY 40508

### Cancellation policy

Refunds less a \$75 administrative fee will be given for written registration cancellations received by March 15. No refunds thereafter but registration fee credits less \$75 will be given towards any future EMLF program. Substitutions can be made at any time without charge by contacting the EMLF office at 859.231.0271.

### Mandatory CLE and Professional Credit

Conference accreditation is pending from states with mandatory Continuing Legal Education. Conference consists of 665 minutes (11 hours in 60-minute states and 13.3 hours in 50-minute states). Registrants may be required to reimburse EMLF for MCLE filing fees for certain states. Please list the states or organization where you will be seeking professional education credits:

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