



Special Institute on Mine Safety and Health Law

March 21-22, 2018 • Washington, DC



**Provided 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

Wednesday, March 21

9:00-9:15 a.m.

Welcome

9:15-9:45 a.m.

Update from MSHA/SOL leadership

- Kate O'Scannlain, Solicitor of Labor, *U.S. Department of Labor*, Washington D.C.
- David G. Zatezalo, Assistant Secretary of Labor, *Mine Safety and Health*, Arlington, VA

9:45-11:00 a.m.

Current MSHA 105(c) Issues

This panel will discuss current issues in MSHA 105(c) cases, including: (1) temporary reinstatement and the problem of the untruthful complainant; (2) interference claims and the split in authority between the *Pepin* and *Franks* tests; and (3) other recent 105(c) developments.

- Moderator: Jonathan R. Ellis, *Steptoe & Johnson PLLC*, Charleston, WV

Participants:

- Andrea J. Appel, *USDOL, Office of the Solicitor of Labor*, Philadelphia, PA.
- Suzanne F. Dunne, *USDOL, Office of the Solicitor of Labor*, Chicago, IL
- Eric Dullea, *Husch Blackwell LLP*, Denver, CO
- Mark E. Heath, *Spilman, Thomas & Battle, PLLC*, Charleston, WV

11:00-11:15 a.m.

Break

11:15 a.m.-12:30 p.m.

Litigation Roundtable

The Litigation Roundtable consists of four panelists with a wealth of experience in the Solicitor's Office and the defense bar. Topics will include use of expert witnesses in FMSHRC proceedings, including who qualifies as an expert, when experts are appropriate, and preparation and production of expert witness reports. Other topics will include an update and current trends related to the FMSHRC's handling of negligence determinations, settlements, and/or plan litigation in the ventilation, roof control, and ERP contexts.

- Moderator: John Rainwater, Associate Regional Solicitor, *USDOL, Office of the Solicitor of Labor*, Denver, CO

Participants:

- Jason Grover, *USDOL, Office of the Solicitor of Labor, Division of Mine Safety and Health*, Arlington, VA
- Margaret S. Lopez, *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, Washington, DC
- Jason M. Nutzman, *Dinsmore & Shohl LLP*, Charleston WV
- MaryBeth Zamer, *USDOL, Office of the Solicitor of Labor*, Nashville, TN

12:30-1:30 p.m.

Lunch on Your Own

1:30-2:30 p.m.

Use of Privilege

This moderator-led panel will examine the use of privileges (i.e., attorney-client, work product, and deliberative process) in internal investigations, MSHA and criminal investigations, and contest discovery and litigation.

- Moderator: Daniel W. Wolff, *Crowell & Moring LLP*, Washington, DC

Participants:

- Willa B. Perlmutter, *Stoel Rives LLP*, Portland, OR
- Winfield Wilson, *USDOL, Office of the Solicitor of Labor*, Washington, DC

2:30-3:30 p.m.

Limits on MSHA Jurisdiction

A February 13, 2017 Sixth Circuit decision in *Maxxim Rebuild Company LLC v. Federal Mine Safety and Health Review Commission* held that the Mine Act's definition of "coal or other mine" refers to locations, equipment and other things in, above, beneath or appurtenant to active mines. The circuit court held that MSHA did not have jurisdiction over a shop that makes and repairs mining equipment and machine parts that was not located on active mine property. This panel will explore how this decision affects the assertion of jurisdiction by MSHA in the future and whether it has any effect beyond the facts of the case to other disputes concerning MSHA jurisdiction.

■ Moderator: Donna Pryor, *Husch Blackwell LLP*, Denver, CO

Participants:

■ Patrick W. Dennison, *Jackson Kelly PLLC*, Pittsburgh, PA

■ Brad J. Mantel, *USDOL, Office of the Solicitor of Labor, Division of Mine Safety and Health*, Arlington, VA

■ Stephen D. Turow, *USDOL, Office of the Solicitor of Labor, Division of Mine Safety and Health*, Arlington, VA

3:30-3:45 p.m.

Break

3:45-5:00 p.m.

Administrative Law Judge Panel

This Q&A will feature questions solicited from registered attendees prior to the conference.

■ Moderator: Karen L. Johnston, *Jackson Kelly PLLC*, Denver, CO

■ Moderator: Lucy C. Chiu, *USDOL, Office of the Solicitor of Labor, Division of Mine Safety and Health*, Arlington, VA

Participants:

■ Thomas P. McCarthy, Administrative Law Judge, *FMSHRC*, Washington, DC

■ Margaret A. Miller, Administrative Law Judge, *FMSHRC*, Denver, CO

■ William B. Moran, Administrative Law Judge, *FMSHRC*, Washington, DC

■ David Simonton, Administrative Law Judge, *FMSHRC*, Denver, CO

5:30-6:30 p.m. **Reception**

A reception hosted by EMLF members will be held at 1001 Pennsylvania Avenue, at the law offices of Crowell & Moring.

Thursday, March 22

9:00-10:15 a.m.

Topics in Constitutional Law

This panel will address two Constitutional issues that may have far-reaching implications for Mine Safety & Health Law: (1) whether Administrative Law Judges (ALJs) must be appointed in accordance with the Appointments Clause of the Constitution and, if so, whether the Commission's ALJs are validly appointed; and (2) whether MSHA has shifted to a punitive enforcement scheme that may implicate Sixth Amendment concerns. This panel will analyze both issues from a Constitutional perspective and consider their practical ramifications in the litigation of mine safety matters.

■ Moderator: Arthur M. Wolfson, *Jackson Kelly PLLC*, Pittsburgh, PA

Participants:

■ Noelle Holladay True, *Williams, Kilpatrick & True, PLLC*, Lexington, KY

■ Mark Savit, *Husch Blackwell LLP*, Denver, CO

■ Timothy Williams, *USDOL, Office of the Solicitor of Labor*, Denver, CO

10:15-10:30 a.m.

Break

10:30-11:30 a.m.

Perspectives on Criminal Enforcement under the Mine Act

This presentation will provide views from the DOL Solicitor's Office, operator's counsel and the Department of Justice on what criminal enforcement means, how it works, what issues arise and how to navigate recommendation, referral, preparation and trial of a criminal matter arising out of the Mine Act.

- Moderator: Dana Ferguson, *USDOL, Office of the Solicitor of Labor, Division of Mine Safety and Health*, Arlington, VA

Participants:

- Robert Booth Goodwin, *Goodwin & Goodwin*, Charleston, WV, former U.S. Attorney for the Southern District of West Virginia
- Philip T. Inglima, *Crowell & Moring LLP*, Washington, DC
- Mary Sue Taylor, *USDOL, Office of the Solicitor of Labor*, Nashville, TN

11:30 a.m.-12:30 p.m.

Patterns and Flagrants: "I Know Them When I See Them"

Years after their respective enactments in 1977 and 2006, the "pattern-of-violations" (POV) and "flagrant violations" provisions of the Federal Mine Safety and Health Act have eluded definition. MSHA updated its POV regulations and began POV enforcement, and targeted mine operators must now develop corrective action plans to avoid this draconian classification. Flagrant violations can now result in penalties of up to \$256,000 and trigger personal sanctions under Section 110 of the Mine Act. MSHA, operators, lawyers, and judges have struggled to give meaning to these terms that can carry significant economic consequences and even lead to criminal prosecution of mine management. Justice Potter Stewart famously stated that he could not define the term "pornography," but he knew it when he saw it. Can we do better with POV and flagrant? This panel reviews recent attempts to do so.

- Moderator: Adele L. Abrams, *Law Office of Adele Abrams, P.C.*, Beltsville, MD

Participants:

- Mary Kathryn Cobb, *USDOL, Office of the Solicitor of Labor, Division of Mine Safety and Health*, Dallas, TX
- Christopher D. Pence, *Hardy Pence LLC*, Charleston, WV
- Jeffrey K. Phillips, *Steptoe & Johnson PLLC*, Lexington, KY
- Edward Waldman, *USDOL, Office of the Solicitor of Labor, Division of Mine Safety and Health*, Arlington, VA

12:30-2:00 p.m.

Lunch on Your Own

2:00-4:00 p.m.

Commission Oral Argument

Secretary of Labor v. Consol Pennsylvania Coal Company, LLC, Docket No. PENN 2014-816. Christopher D. Pence and James P. McHugh, Hardy Pence LLC, Charleston, WV are counsel for Consol Pennsylvania Coal Company, and Cheryl Blair-Kijewski will be arguing for the Solicitor's Office.

Program Committee

- Jonathan R. Ellis, *Steptoe & Johnson PLLC*, Charleston, WV
- Jason Grover, *USDOL, Office of the Solicitor of Labor, Division of Mine Safety & Health*, Arlington, VA
- Donna Pryor, *Husch Blackwell LLP*, Denver, CO
- Arthur M. Wolfson, *Jackson Kelly PLLC*, Pittsburgh, PA



Yes, I want to attend the Mine Safety & Health Law Special Institute

Registration fee includes meeting materials and presentations.

<i>Registration fees</i>	<i>Early Bird (by March 1)</i>	<i>After March 1</i>
General Registration Fee.....	\$475	\$575
EMLF and RMMLF Members.....	\$350	\$450
Government Employees/Government Attorneys	\$225	\$325
USDOL Attorneys and Staff	Complimentary	Complimentary

First Name _____ M.I. ____ Last Name _____ Badge name _____

Organization/Firm _____ Title _____

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City, State, Zip _____

Daytime Phone _____ Fax # _____

Email Address _____ Guest _____

State(s) for CLE Credits? _____ Do you need AAPL Credit? _____

Fees:

Conference registration \$ _____

Total \$ _____

The program will be accredited for attorneys and contains 540 minutes of Continuing Legal Education (CLE), or approximately 9.0 hours in states which calculate a CLE hour based on 60 minutes, and 10.8 hours of CLE credit in states which calculate a CLE hour based on 50 minutes. Materials for the program will be available for viewing and downloading on the EMLF website at <http://www.emlf.org>. If your state bar requires hard copies of the presentations at the time of the program, please download and print the online materials so you will be able to comply with this requirement.

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

Card # _____ Expiration date _____

Signature _____ CVV code (security code) _____

Cancellation policy

Registration refunds less \$75 will be made for cancellations received by March 1. No refunds will be made thereafter, but substitutions can be made at any time.

Three ways to register

- If registering online, go to 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

EMLF has not blocked hotel guest rooms for this educational event.
 Go to washington.org, the official tourism site of Washington, DC
 – <https://washington.org/places-to-stay>