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Lies, Damn Lies and Statistics: The Truth Behind MSHA Penalty Challenges

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The Mine Safety and Health Administration ("MSHA") recently released a document entitled "Contested Penalty Date- FY 2008-2009"[1] containing data on the disposition of cases contested before the Federal Mine Safety and Health Review Commission ("Commission"). The data was requested by the U.S. House Education and Labor Committee which is apparently investigating claims by MSHA officials that mine operators are abusing the Commission's procedure for contesting MSHA citations and penalties.

In a recent meeting with the National Mining Association ("NMA"), the Education and Labor Committee staff focused on a comparison of percentage reductions of penalties in 2008 and 2009 to percentage reductions in significant and substantial ("S&S") and unwarrantable failure citations and orders during the same time period.[2] For example, the 2008 data suggests that 7,086 penalties were decided by the Commission with an average penalty reduction of 41 percent. For 2009, 6,342 penalties were decided with an average penalty reduction of 47 percent. The Committee's staff then compared these percentages with a 20.16 percent reduction in S&S in 2008, and a 19.9 percent reduction in S&S for 2009.

A similar comparison was made regarding unwarrantable failure citations and orders issued under section 104(d) of the Mine Act. In 2008 the data suggests 872 unwarrantable failure penalties were decided by the Commission with an average penalty reduction of 42 percent. During the same period in 2009, 670 unwarrantable failure penalties were decided with an average penalty reduction of 54 percent. These numbers were compared to a 26.94 percent reduction in unwarrantable failures in 2008, and a 29.55 percent reduction in 2009.

Reasonable minds might differ over the significance, if any, of the comparisons being made in the data. What is assured, however, is that the Education and Labor Committee seems prepared to run to their Congressional colleagues in support of the agency's position that this data somehow illustrates that MSHA's inspectors are not overwriting citations and orders. It should come as no surprise to anyone in the regulated community that MSHA has turned to Congress for support of its publicly stated belief that the Commission's burgeoning docket is no fault of its own. Instead, MSHA argues the log jam at the Commission is directly attributable to the actions of unscrupulous mine operators whose lawyers are abusing the system. Apparently, the argument runs something like this: if mine operators can overwhelm the Commission's case load, their high paid lawyers will be well positioned to strong arm helpless representatives of the solicitor's Office into significant reductions in civil penalties. Nonsense!

First of all, no one disputes the fact that challenges to MSHA citations and orders are on the rise. According to the Commission's website, there were 3,357 contest cases filed in fiscal year 2006. During fiscal year 2008, the number rose to 8,134. The question is what is driving the increase? MSHA's position - and now apparently the position being advanced by the Education and Labor Committee - is that contest cases are dramatically increasing because mine operators are "gaming" the system.

The irony in MSHA's hue and cry is that much of the increase of which it complains is in one form or another of its own making. Anyone who follows mine safety in America is cognizant of the dramatic up tick in MSHA enforcement over the past couple of years. Many would argue that a large percentage of the citations now being issued are driven by political pressures that have come home to roost for the agency following the tragic events in 2006. MSHA's own numbers show an increase of 29,707 additional enforcement actions issued in the coal sector between 2006 and 2008, not to mention an outrageous increase in civil penalties in 2007 following an extensive overhauling of the rules for assessing those penalties. The net result: an increase in assessed penalties from 53.5 million dollars in 2007 to 152.7 million dollars in 2008 - a whopping 285 percent increase, and curiously not a statistic reported by MSHA to the Education and Labor Committee. Incredibly, these numbers only represent civil penalties assessed by MSHA in the coal sector of the mining industry.

In March of 2009, MSHA made a large problem even worse by releasing Program Information Bulletin No. P09-05 ("PIB"). In the face of increasing enforcement and higher penalties, the PIB essentially eliminated the only opportunity available for the mine operators to informally discuss disputed citations and orders with MSHA at the time of issuance. The PIB also hampered the regulated community's opportunity to informally discuss disputes with MSHA district personnel within ten days of receiving the paper.

The PIB mandates that any conference requested by the mine operator under 30 C.F.R. § 100.6 will be deferred until *after* the operator files a contest with the Commission. In other words, MSHA is now *forcing* the operator to initiate a formal legal challenge to the Commission before getting an opportunity to discuss the validity of any enforcement actions, or just as importantly any aspects of the enforcement actions, issued by the agency. MSHA cynics, like me, believe that the PIB was actually an ill-conceived attempt by the Agency to make operators believe that requesting a conference is not really worth the trouble of getting involved in a formal legal challenge before the Commission. Many operators ignored the smoke and mirrors of the PIB, and are actively seeking conferences.

Against this backdrop, it seems logical that operators would attempt to protect themselves by exercising their right to due process. After all, this is still America, and the last time I looked at the Constitution due process was still one of our guaranteed rights. Unfortunately, the industry is facing a well organized assault on its right to due process that MSHA is trying to cleverly disguise as an attempt to micro-manage the Commission's swelling docket, and thereby quell any opposition to its enforcement power. The effort is well organized and has now reached the halls of Congress, as evidenced by the recent meeting between NMA and the Education and Labor Committee to discuss the success - or lack thereof - of industry legal challenges to the Commission.

Assuming for the sake of argument the data provided by MSHA is accurate, there is more than one way to construe its meaning. To begin with, it takes a Herculean leap of logic to suggest that an MSHA citation was properly issued simply because the paper was not reduced in a settlement from S&S to non-S&S, or from 104(d) to 104(a). Nevertheless, this seems to be the measuring stick being used by the Education and Labor Committee. Conspicuous by its absence in the data is any accounting of the citations and orders that were not vigorously challenged by the operator's representative simply because the Solicitor's office agreed to significantly reduce the monetary penalty as a trade off to the full blown challenge.

Does this occur in MSHA challenges? Of course it does, and the fact of the matter is that in far too many situations operator representatives gauge their success in MSHA contests based lock, stock and barrel on the dollars saved on the civil penalty. While a reduction in penalty dollars is certainly something we strive to accomplish in any MSHA challenge, doing so without challenging the merits of S&S and unwarrantable failure can be tremendously problematic.

First, allowing over-written citations to stand emboldens the issuing inspector to continue his practice of satisfying his supervisor without being called to task for his decisions. Second, and more importantly, this type of practice is the reason mine operators develop negative citation histories. A negative history, of course, has far reaching ramifications for future penalties, and increases the possibility of operations being

subjected to special enforcement weapons such as a pattern of violations under section 104(e) of the Mine Act.

Critics will certainly find fault with my willingness to look behind the data provided by MSHA to the Education and Labor Committee, but as the saying goes "the proof is in the pudding." It was not at all surprising to me that a review of 2008/2009 settlement data regarding challenges to S&S and unwarrantable failure citations and orders for one of our MSHA practice groups' larger mining clients revealed strikingly different results than the data provided to the Education and Labor Committee.

For example, the data provided by MSHA depicted a success rate of only 19.9 percent in challenges to S&S citations in 2008/2009. Our MSHA practice group's success rate on challenges of S&S citations in 2008/2009 was 50.28 percent for the particular client referred to above. The differences in success rates for unwarrantable failure citations and orders is even more pronounced. MSHA's data depicted an average success rate of challenges to 104(d) paper in 2008/2009 of 28.0 percent. Our MSHA practice group's success rate for challenges to 104(d) paper for 2009/2009 for the same client was 83.0 percent. This begs the question of whether the Education and Labor Committee would reach the same conclusions on the validity of MSHA's citation writing based on our practice group's percentages of success.

The differences in the industry averages provided by MSHA to the Education and Labor Committee can partially be explained by the old saying that "there are lies, damn lies, and then there are statistics." However, there are also additional explanations buried deep in the data that reflect this particular client's success, which include a strong commitment to the safety and health of its workforce, and a complete understanding of the importance of pre-enforcement awareness and training for its employees.

I believe that an operator's success in challenging improperly issued MSHA enforcement actions is directly related to its employees' ability to *properly identify and proactively remove* conditions in the workplace that *actually* rise to the level of S&S and unwarrantable failure. Employees must also be trained in the art of preparing for the defense of S&S and unwarrantable failure allegations when they are gratuitously imposed by MSHA inspectors.

The political spin placed on the statistics MSHA provided to the Education and Labor Committee is nothing more than the Agency's next step toward systematically dismantling the mining industry's due process rights. U.S. Supreme Court Justice Oliver Wendell Holmes once wrote that "whatever disagreement there may be as to the scope of the phrase 'due process of law' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." Implementing initiatives like PIB No. P09-05 - and trying to convince members of Congress that the majority of legal challenges to MSHA are baseless - is a dangerous assault on due process, and the industry must rise to this challenge before it is too late.

Sadly, what is often lost in all of the wrangling with MSHA is the fact that the Mine Act was created to enforce safety standards in a way that protects the health and welfare of one of the nation's most precious resources - its miners. Unfortunately, like any regulatory enforcement program, our nation's mining laws will never elude political pressure. Bare statistics about the industry's enforcement history is an inappropriate measuring stick to determine an operator's true commitment to safety. It is time for the industry to change the debate, and insist that its commitment to safety be judged not by the number of citations and orders MSHA issues, but also by the precipitous decline in deaths, serious injuries, and lost time accidents achieved by the industry over the past three decades.

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[1] The 2009 data is through June 30, 2009.
[2] The data also looks at percentages of reductions in citations marked with High Negligence and Reckless Disregard. This article will focus on the data involving S&S and Unwarrantable Failure.