MSHA/OSHA REPORT
WWW.OGLETREEDEAKINS.COM
Ogletree Deakins

May 2013

SAFETY AND HEALTH ENFORCEMENT DEVELOPMENTS

MSHA Update

by Michael T. Heenan

Escalating Enforcement by MSHA of Prohibition against Advance Notice of Inspection

Section 103 of the Federal Mine Safety Act requires the Secretary of Labor to conduct frequent inspections and investigations at mines. It further states: "In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person." Section 110(e) provides: "Unless otherwise authorized by this Act, any person who gives advance notice of any inspection to be conducted under this Act shall, upon conviction, be punished by [fine, imprisonment, or both]." A recent Senate bill would extend penalties to federal and state inspectors as well as all private persons.

MSHA Enforcement

MSHA has drastically enlarged its interpretation of "advance notice" to include all communications at a mine that would alert others to MSHA's presence. MSHA has also markedly increased enforcement of the "no advance notice" provisions at metal and non-metal mines as well as coal mines. Security guards at mine gates have been told that they cannot even notify the safety department that inspectors have arrived. "Capturing" the mine phones and radios is often part of inspection procedure to physically prevent notice within the mine. MSHA press releases frequently make reference to this procedure—particularly in targeted "impact inspections."

In enforcing this provision, the government can seek injunctions in federal district court, impose high civil penalties (up to $220,000 potentially per violation), and bring criminal actions—all of which are increasingly being pursued. As just one example, a recent news report (*Mine Safety and Health News*, March 4, 2013, at page 136) contains an item regarding David Hughart, the former president of Massey's Green Valley Resource Group. Pleading guilty to criminal conspiracy, "Hughart admitted that he and others at Massey conspired to violate health and safety laws and concealed those violations by warning mining operations when MSHA inspectors were arriving to conduct inspections." (A continuing investigation is being conducted by the FBI, the Department of Labor Inspector General, and the Internal Revenue Service

Criminal Division. At present Hughart faces up to six years in prison and a $350,000 fine. Sentencing will be held in June 2013.)

Typically, the only way mine operators can obtain review of agency enforcement is by filing "Notices of Contest" of citations and orders before the Federal Mine Safety and Health Review Commission. Over the years, there have been a few attempts by companies to bypass the Commission and go into federal district court, but the cases have been routinely dismissed. As for seeking Commission review, it would be a serious matter for a company to give "advance notice" deliberately in order to contest a citation, but if a company were to be cited for an inadvertent "advance notice," the citation or order could be challenged in a pre-penalty notice of contest (or a later civil penalty contest).

Permissible Communications

Notwithstanding MSHA's enforcement of the advance notice prohibition, there are times when communications regarding an inspector's presence are necessary and therefore permissible. As an example of necessary communications, Section 103(f) of the Mine Act provides that: "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine." To enable this to happen, obviously notice must be given to those who need to know, which almost invariably can be done without inspector objection. On occasion, the inspector may withhold permission—and there have been instances when this has been deemed acceptable under the law.

As a practical matter, most inspectors do not seem to be overly concerned about advance notice, unless there is a blatant disregard of the prohibition. Reasonable caution and avoidance of gratuitous comments by company personnel regarding an inspection that is in progress or about to begin can circumvent potential "advance notice" difficulties. If an inspector's actions in any particular case appear to be unreasonable or contrary to law, this can be promptly brought to the attention of the inspector's supervisor or the district manager. It is their supervisory obligation to make sure that mine operator rights are not abused.

OSHA Update

by Tressi L. Cordaro

Non-Union Employees at Worksite Safety Inspections Contradicts OSHA Regulation and Creates Host of Issues for Employers

With private sector union density steadily declining, unions will take help anywhere they can get it. The most recent case in point: the Occupational Safety and Health Administration (OSHA) issued an interpretation letter on February 21, 2013, stating that non-union employees can select anyone—including outside, non-employee union representatives—to accompany OSHA compliance officers during safety and health inspections of an employer's work site.

The interpretation letter was issued in response to a request from Steve Sallman, a health and safety specialist with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. Sallman asked whether, under OSHA rules, workers at a non-unionized workplace could authorize an individual affiliated with a union to act as their representative. This involvement would include, he wrote, "representing the employee(s) as a personal representative" and "accompanying the employee on an OSHA inspection" in a non-unionized workplace.

Deputy Assistant Secretary of Labor for OSHA Richard Fairfax, who is retiring from the agency soon, replied that union representatives are welcome, even at union-free work sites where they have no official standing or representative role. OSHA allows workers at establishments without collective bargaining agreements to designate who will act on their behalf during inspections.

According to OSHA's interpretation, non-union employees can select a person who is affiliated with a union or a community organization to act as their "personal representative" in filing complaints on the employees' behalf, requesting workplace inspections, participating in informal conferences to discuss citations, and challenging the abatement period in citations being contested by an employer. The interpretation letter goes on to state that "a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative."

In support of its position, OSHA points to the federal Occupational Safety and Health Act of 1970 (OSH Act), the Secretary's regulations implementing the OSH Act, and OSHA's Field Operations Manual. According to OSHA, all three sources "recognize the role of an 'employee representative' who may represent employees' interests in enforcement-related matters."

The position taken in the letter is a clear departure from OSHA's longstanding practice. In an informal poll of experienced workplace safety and traditional labor attorneys at Ogletree Deakins, all confirmed that they had never encountered a situation where OSHA had insisted, requested, or permitted a non-employee union representative to participate in an inspection, informal conference, or any other aspect of an OSHA matter.

More importantly, this interpretation is directly contrary to OSHA's own regulation at 29 C.F.R. §1903.8(c), which states that "the representative(s) authorized by employees *shall* be an employee(s) of the employer." (Emphasis added.) The regulation goes on to state that a third party who is not an employee (such as an industrial hygienist or a safety engineer) may be allowed where the OSHA compliance officer determines there is good cause. OSHA's current interpretation conveniently omits the examples of an industrial hygienist or safety engineer provided in the regulation and also fails to explain when there would ever be "good cause" to allow a non-employee union representative to represent employees during an OSHA inspection. Arguably, the regulation limits such third-party representation to those with expertise in safety and health matters and is not as broad as OSHA's interpretation suggests. Even if the non-employee union official is a safety and health specialist, there is no legal or policy basis for OSHA to intercede on behalf of a union in an organizing campaign by allowing union

representatives the authority—and apparent power—to assist an OSHA compliance officer during an inspection.

Further, this broad definition of "employee representative" in no way harmonizes with other definitions of "employee representative" contained in OSHA's own regulations. For example, OSHA's regulations regarding cooperative agreements between federal OSHA and states for the use of state personnel in providing consulting services includes a definition of "employee representative." Specifically, 29 C.F.R. §1908.2 defines "employee representative" as "the authorized representative of employees at a site where there is a recognized labor organization representing employees."

As a practical matter, in the midst of an inspection, will employers challenge an OSHA compliance officer's assessment and subjective judgment that the union's presence is "reasonably necessary to the conduct of an effective and thorough physical inspection"? Is it incumbent upon the employer to withdraw consent to the inspection and demand a warrant? This is a move few employers will want to undertake for fear of the negative consequences in the outcome of the inspection, not to mention the potential for a disruptive "sideshow" during the inspection. Indeed, if an employer resists the participation of a non-employee union representative in an inspection, where or how an employer seeks recourse is unclear. If an employer challenges the union representative's authority, but is unsuccessful, what message does that convey to employees about the union's "powers"?

Additionally, OSHA's interpretation raises several other issues not addressed by the agency. How is the appropriate employee representative determined and who makes this determination? Is it by a majority vote of the employees? What if some employees object to the selected representative? Do those employees get to select their own representative? Can there be multiple employee representatives? What protections does an employer have regarding the release of trade secrets or any other similar confidential matters to such an employee representative? What types of agreements can the employer require of the representative to ensure confidentiality? May a non-employee walkaround representative take photos or videos, or participate in sampling for employee exposure to toxic substances? Is an employer required to provide an outside or non-employee union representative with documents, such as OSHA 300 logs and 301 forms pursuant to §1904.35, which requires limited access to an employer's injury and illness records for employees and their representatives?

Beyond the practical issues this interpretation raises but fails to answer, OSHA's policy may encourage unions to use OSHA complaints and inspections as organizing tools to gain access to an employer's facility from which the outside union organizer ordinarily would be excluded. As important, the OSHA inspection would allow the union organizer to have personal contact with employees, which is often invaluable during organizing campaigns. As stated earlier, the presence of a union organizer accompanying an OSHA compliance officer could also convey a message to non-union employees that the union has real power beyond the control of the employer and that is therefore beneficial to their interests.

Based on the language in §1903.8, the general expectation should continue to be that the employee representative will be an employee of the employer. OSHA should continue its longstanding policy of avoiding intervention in labor relations disputes. Indeed, it should be a rare case that a third party—whether a safety engineer, industrial hygienist, or a non-employee union representative—is allowed to act as an employee representative.

The MSHA/OSHA Report is not a comprehensive newsletter and does not cover a full spectrum of agency news. Rather, it focuses on one or more selected items of particular interest.