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Guilty Until Proven Innocent: Denial Of Due Process In The MSHA Conference Process

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When the Mine Safety and Health Administration ("MSHA") issued Program Information Bulletin ("PIB") No. P09-05 on March 27, 2009, the due process rights of the mine operators suffered another devastating blow. By directing District Managers not to grant conference requests made pursuant to 30 C.F.R. § 100.6 until after civil penalties had been proposed and contested, MSHA took away mine operators only avenue for informally discussing citations and orders with MSHA at the time of issuance, leaving mine operators feeling as if they are guilty until proven innocent.

Even when conference requests are granted, however, mine operators face additional disadvantages in their quest for due process. This is primarily due to the fact that the MSHA employees conducting the conferences, the Conference Officers or Litigation Representatives ("CLRs"), report directly to the District Manager -- the same District Manager who oversees the inspectors whose actions are being challenged during the conference and is responsible for his district's overall enforcement statistics, including violations per inspection day, total number of citations/orders issued annually, etc. The District Manager supervises the CLRs and conducts their performance evaluations, which not only impact their advancement within the agency but also are directly tied to annual monetary bonuses awarded to MSHA employees. A party would never chose an employee of its adversary as a mediator. Why should mine operators be forced to do so?

To illustrate the problem, consider the following enforcement scenario faced by a client. For years operators within the client's district had been reporting roof falls only if they met the definition in 30 C.F.R. § 50.2(h)(8), which includes within the definition of "Accident" "[a]n unplanned roof fall at or above the anchorage zone in active workings [1] where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage." Last year, a roof fall was discovered in a return entry by an MSHA inspector. The roof fall occurred in an area that did not impair ventilation or impede passage and in an area in which no miners were normally required to work or travel. Nonetheless, the MSHA inspector returned the following day with a citation for failure to timely report the roof fall as an accident. Faced with the threat of a 104(b) closure order, the operator reported the roof fall and requested a conference.

Unbeknownst to the operators in the district, their new District Manager considered all roof falls in an underground mine to be reportable if anyone had access to the fall area and considered all unsealed areas of an underground mine to be "active", despite the definition in the regulations to the contrary. During the conference, the CLR told the operator the fall was a reportable accident because it was close to the travelway used by the operator's mine examiner, alluding to the District Manager's definition of "active workings" as all accessible areas. The citation stood as written.

Recently, the operator's mine examiner found a roof fall in a neutral entry in which no miners are normally scheduled to work or travel. Based on its past experience, the operator reported the roof fall to MSHA. An MSHA roof control specialist ("RCS") contacted the mine superintendent and questioned him about the location of the fall. The MSHA RCS informed the mine superintendent that since the fall was in an area in which no one was scheduled to work or travel and the fall did not interfere with ventilation nor impede passage, the roof fall was not a reportable accident.

Given the conclusion reached by the MSHA RCS, one cannot help but wonder if the conference on the prior citation might have had a different outcome had the CLR been free to apply the regulations as written without being concerned with the interpretation of the District Manager - his boss. Given the inherent conflict presented by the District Manager's supervisory authority over the CLRs, MSHA should consider revising its organizational structure. One way of ensuring that mine operators who request a conference will receive an impartial review of the citation/order at issue would be to have CLRs who conduct conferences report directly to the Administrator for Coal Mine Safety and Health at MSHA Headquarters instead of to the local District Manager. This simple adjustment would remove the inherent conflict that arises from the District Manager's oversight of both the inspectors and the CLRs and go a long way to restoring operators' faith in the conference process as a viable method of challenging erroneously issued citations/orders.

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(1) Operators within the district also relied upon the definition of "active workings" in 30 C.F.R. § 75.2, which defines the term as "[a]ny place in a coal mine where miners are normally required to work or travel."