



MSHA's Meter is Running - Form 1000-179

September 1, 2009

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***As seen in the September issue of *Coal People* magazine.** The entire publication can be found on www.coalpeople.com.

"Enforcement" is now the word of emphasis at the Mine Safety and Health Administration. According to MSHA statistics, civil penalties to coal mines climbed 1,152%, \$12.2 million to \$152.7 million, from 2000 to 2008 – supposedly the era of cooperation between operators and the agency. With the price of poker going up, operators need to be keenly aware of the procedures for contesting citations and civil penalties. The first step is making sure you're in the game and that requires filing your contest by returning MSHA's proposed penalty assessment form, also known as the 1000-179 form, within 30 days of receipt.

By marking a citation or order for contest on the 1000-179 form, you're contesting both the penalty and the fact of violation. The 30 day rule is a statutory rule found in the Mine Act at 30 U.S.C. §815(a). The statute provides that if the operator fails to notify MSHA of its contest within 30 days, the citations and penalties become final orders of the Federal Mine Safety and Health Review Commission. As such, the penalties are due in full and subject to statutory interest and other fees the longer they remain unpaid.

By way of background for those not familiar with the process, the 1000-179 form lists the citations MSHA has processed for assessment. The penalties are calculated according to the point scheme adopted by regulation in 30 C.F.R. §100.3. The penalties depend on the inspector's findings on negligence and gravity, the size of the mine and controlling entity, and the mine's violation history and repeat violations of the same standard. Special assessments may be issued when MSHA believes the regular assessments are insufficient for the seriousness of the violations. Regular assessments under the point scheme range from \$112 to \$70,000, but "flagrant" penalties can reach \$220,000 per order. Given that 1000-179 forms sometimes contain upwards of 80 citations, you can see that it is not something you want lost in the mail pile at your operation while the deadline slips by.

The 1000-179 form is sent from MSHA by FedEx to the mine. This is an important point because FedEx keeps track of when the package arrived at the mine site and also who signed for the package. This means that MSHA knows exactly when the 1000-179 is due to be returned. In the past when MSHA sent the 1000-179 forms by regular mail, an operator could perhaps get an extension for filing its contest by claiming that the 1000-179 form had not made it to the mine or had not made it by the date MSHA claimed it had. Those days are over.

In fact, recent Commission decisions have indicated a harder line for granting operators' "motions to reopen." Although not specifically provided for in the Commission's procedural rules, a motion to reopen can be filed with the Commission when an operator has failed to timely file a 1000-179 form. Essentially, the motion is asking for relief under Federal Rule of Civil Procedure 60(b) due to mistake, inadvertence, or excusable neglect. Recent Commission case law has struck down some of the more common reasons given by operators for failing to timely file, including administrative or clerical error – e.g., the secretary or receptionist misplaced it, or the mail person delivered it to the wrong place. The Commission has also

frowned on motions filed after MSHA has sent the operator a delinquency notice or collection letter. The Commission still grants motions to reopen, but in order to be successful, an operator must provide a "meaningful explanation" and "specificity" for why it filed to timely contest the penalties. The old dog-ate-my-1000-179-form story won't cut it.

The best practice for an operator is to develop a system for handling 1000-179 forms from the receptionist to the top of mine management. A good plan should include date-stamping the arrival of the form, calendaring the due date, and identifying a back-up plan if the person who typically handles the form is away from the mine. These small steps can save an operator a lot of money and the headaches that result when an important citation has not been contested or when MSHA refers your uncontested and unpaid penalties to collection agencies that swamp your receptionist with mail and phone calls.

The best defense to an overwritten citation is worthless unless you can get in front of a judge. That's why proper handling of the 1000-179 form is essential to any successful coal operation.