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## INSIGHTS

The Patton Boggs Safety & Health and Crisis Management Newsletter

JULY 2008

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## I. CONGRESSIONAL ACTION

### 1. CONGRESS INCREASES MSHA FUNDING

The Mine Safety and Health Administration's (MSHA's) coal inspection program would receive \$155 million in fiscal year 2009 in a budget approved by the Senate Appropriations Committee. The amount is \$10 million over the President's request, and reflects a personal effort by Sen. Robert Byrd to keeping money flowing to the agency's coal enforcement arm. The budget proposal now goes to the full Senate.

Byrd also engineered another \$4.4 million for coal enforcement this year. That money replaces funds that had been transferred from Coal to Metal/Non-Metal (M/NM) and to the Solicitor's Office to defend agency citations from industry appeals. MSHA has committed to completing 100% of its inspections in M/NM this year for the first time ever, and the money has been earmarked for that purpose.

### 2. CONGRESS TAKES ON OSHA FOR UNDERREPORTING

The House Education and Labor Committee has taken the Occupational Safety and Health Administration (OSHA) to task for allegedly permitting some employers to underreport their injury and illness experience, due to lax enforcement of the agency's recordkeeping requirements.

The OSHA 300 log is the form OSHA requires employers to maintain to record workplace injuries and illnesses. The log, in turn, is used by the Bureau of Labor Statistics (BLS) as a primary data source for its annual nationwide survey of occupational injuries and illnesses. At a hearing last month, several witnesses testified that the BLS survey could underreport injuries and illnesses by as much as 69%.

OSHA whistleblower Bob Whitmore claimed OSHA has an incentive to provide a favorable injury report because doing so makes it appear to be more effective in accomplishing its mission than it really is.

Whitmore described three cycles through which OSHA has evolved the enforcement of its recordkeeping rules. In the first, recordkeeping violations topped the list of the most oft-cited OSHA rules, but fines were usually light. However, beginning in 1986, a new instance-by-instance violation policy called the egregious penalty began to be enforced. Fines for inaccurate recordkeeping jumped dramatically. As a result, "the national injury and illness rates rose this period," Whitmore claimed.

However, after Congress passed a law holding agencies such as OSHA directly accountable for the rise and fall in injury and illnesses statistics, OSHA backed off on enforcement. "OSHA ceased virtually any meaningful recordkeeping enforcement actions after 1991," testified Whitmore, who has been placed on administrative leave from his long-time job as director of OSHA's injury and illness recordkeeping system.

Among his five suggestions for improving reporting was Whitmore's recommendation that corporate safety officers be required to certify the accuracy of their injury reports in a manner similar to existing requirements under the Sarbanes-Oxley statute for certifying the accuracy of financial statements.

Besides lax enforcement, witnesses listed a number of alleged incentives employers have for undercounting, including reducing the possibility of being targeted for OSHA inspections, lowering workers compensation premiums, earning bonuses, and improving chances for being awarded government contracts. A witness for the U.S. Chamber of Commerce disputed some of those claims.

The June 19 date of the hearing was timed to coincide with the release of a Committee report on underreporting that identified "OSHA's reliance on self-reporting by employers" as a major cause of the problem. The report also faulted the agency for failing to do anything meaningful about underreporting.

At the request of the Committee, the Government Accountability Office is conducting a study on underreporting. Its report, due around the end of the year, is likely to fuel legislation in Congress next year. Contact Henry Chajet ([hchajet@pattonboggs.com](mailto:hchajet@pattonboggs.com), 202.457.6511) or John Austin ([jaustin@pattonboggs.com](mailto:jaustin@pattonboggs.com), 202.457.6167) for more information.

## II. REGULATORY UPDATE

### 3. MSHA RULEMAKING RUSH CONTINUES

Continuing with the regulatory push spurred by the Sago Mine disaster and the MINER Act, the Mining Safety and Health Administration (MSHA) issued two major proposed rules in June and is on track to release a third rulemaking initiative this month.

#### **Belt Air**

The MINER Act directed NIOSH to set up an advisory panel on the use of air in conveyor belt entries to ventilate working faces in underground coal mines. Belt air, as the practice is called, has been controversial ever since passage of the 1969 Coal Act, which essentially banned the practice. However, over the years some operators were granted variances from MSHA to use belt air, provided they installed safeguards, including systems along the belt to monitor the air.

Faced with a growing number of such variance requests, the agency adopted a rule in 2004 allowing belt air, provided that approved atmospheric monitoring systems (AMS) and other safeguards were in place. That rulemaking came under criticism when two miners died in a belt fire in West Virginia in January 2006.

The MINER Act called on MSHA to decide what to do about belt air within six months of the release of the panel

report, which came out last December. However, Congress subsequently changed its mind, and in the 2008 appropriations bill ordered MSHA to initiate rulemaking. In response, MSHA recently issued proposed regulations entitled: "Safety Standards Regarding the Recommendations of the Technical Study Panel on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining; Conveyor Belt Combustion Toxicity and Smoke Density; Proposed Rules."

With release of the proposal, acting MSHA chief Richard Stickler said its objective "is to improve mine safety by significantly reducing the hazard of conveyor belt fires in underground coal mines." The measure calls for underground coal mine operators to purchase conveyor belts that are more flame-resistant than those under the existing standard, beginning one year after the effective date of the final rule. Existing belts would be permitted until replacement is necessary.

Mine operators would also be required to replace point-type heat sensors with carbon monoxide sensors, install smoke sensors, improve belt maintenance, and standardize lifeline signals to identify direction of travel to the surface, storage caches for self-contained self-rescuers, obstructions to escape, and refuge alternatives.

In addition, the proposal stipulates that the primary intake escapeway must have a higher ventilating pressure than the belt entry, airlocks must be required where high air pressure differentials exist between air courses on personnel doors along escapeways, minimum and maximum air velocities must be established in belt entries, and dust levels must be reduced in entries where belt air is used.

MSHA's proposal got a cool reception from Democratic lawmakers and the United Mine Workers (UMW). A spokesman for Rep. George Miller (D-CA) said provisions of S-MINER legislation would be preferable because they ban belt air except in the rare instances when it would be necessary for safety reasons. Sen. Ted Kennedy (D-MA) agreed. The S-MINER bill was approved in the House in January and awaits Senate action. S-MINER would also require belt replacement in underground metal/non-metal (M/NM) mines. The UMW said it continues to favor an outright ban.

MSHA is taking comments until Sept. 8, and has scheduled four public hearings as follows: August 19, Salt Lake City; August 21, Lexington, KY; August 26, Charleston, WV; and August 28, Birmingham, AL.

### **Refuge Alternatives**

MSHA's second major rulemaking addresses refuge alternatives in underground coal mines. MSHA's statutory mandate was to consider the use of refuge chambers in underground mines. The agency chose not to act on the congressional recommendation due to concerns that refuge chambers might not withstand the force of an explosion or might actually trap miners in a fire. The agency also believed refuge sites might spur miners to seek shelter when escape is the preferred alternative in an emergency.

However, after 12 miners died in an explosion at the Sago mine, new life was breathed into shelters as an alternative in an emergency. Believing escape routes were blocked, all but one of the miners succumbed to toxic gases behind a makeshift barricade they had set up while awaiting rescue. The incident prompted officials in West Virginia to mandate the use of refuge shelters in that state.

As with belt air, the MINER Act directed NIOSH to study the issue, and MSHA to act on NIOSH's recommendations. Again, Congress changed its mind and ordered MSHA to respond to the NIOSH report with rulemaking. The Institute's report concluded that refuge alternatives were both feasible and practical in most underground coal mines.

MSHA's proposal would require a protected, secure space, with an isolated atmosphere that creates a life-sustaining environment for trapped miners in the event that escape in an emergency underground is not possible.

The proposal allows three types of refuge alternatives, and requires training so that miners can locate, transport, activate, use, and maintain refuge alternatives. Refuge alternatives and their components, such as breathable air and harmful gas removal, would need to sustain persons for 96 hours, or 48 hours if advance arrangements are made for additional supplies from the surface of the mine. Food, water, lighting, first-aid supplies, and sanitation

provisions would be required, as well as two-way communications.

The S-MINER bill would commission a panel to make recommendations for providing equal protection for underground M/NM miners in emergencies. This likely would translate into a recommendation for refuge chambers in those mines as well.

Hearings are set in the same four cities as the belt air sessions: July 29, Salt Lake City; July 31, Charleston; Aug. 5, Lexington; and Aug. 7, Birmingham. The comment period closes Aug. 18.

### **Diesel Particulate Matter**

MSHA's final limit for exposure to diesel particulate matter (DPM) in underground M/MN mines went into effect May 20. MSHA said the new limit, 160 micrograms per cubic meter, measured as total carbon, would be immediately enforceable.

On that date, the agency released two documents: a *Federal Register* notice announcing the new permissible exposure limit (PEL) and a Program Policy Letter. The documents outlined the sampling protocol MSHA intended to use for compliance. Compliance would be based on the result of personal sampling, as before. However, area samples would also be collected in parts of the mine expected to be free of non-diesel sources of carbon that could falsely elevate the personal sample result.

Noticeably absent from either document were specifics on factors to correct for random errors that occur during sampling and analysis. These so-called "error factors" require adjustments to the exposure limit. Thus, if the error factor for 160 is determined to be 10%, MSHA would not cite if the compliance sampling result were 176 or less. As a result, operators were left in the dark on the precise limits MSHA intended to enforce.

The agency also resisted an effort to obtain a copy of a consultant's report that it relied upon to develop the final sampling protocol, saying release was exempt under a provision of the Freedom of Information Act. The report was said to have been prepared by Jon Kogut, a retired MSHA employee with extensive experience in helping develop its DPM rulemaking.

After more than a month, on June 27 MSHA finally put out a 2-page document, aimed at operators, that gave specifics on its enforcement plan. Results of TC analysis at or above 191 and elemental carbon (EC) results at or above 176 will be citable. In addition, EC results below 176 will be cited if the adjusted TC result, multiplied by its error factor, exceeds a threshold criterion. Adjusted TC is assumed to be free of non-diesel carbon interferences.

With the May 20 Federal Register notice, MSHA's protracted and contentious DPM rulemaking would appear to have come to an end, unless expected challenges by the MARG coalition and industry associations are successful, or the agency voluntarily reopens the rulemaking. The agency's final rule, released on the last day of the Clinton Administration in 2001, sparked industry lawsuits. However, the results of a diesel exposure and health effects study of miners, currently being conducted by NIOSH and the National Cancer Institute, is expected to be released this year. If those results show no health effects at the final limit, operators may once again challenge MSHA's final PEL on that basis.

### **Substance Abuse**

MSHA is expected to issue a proposal rule on substance abuse this month. The proposal has been at the Office of Management and Budget for review since June 3.

### III. ENFORCEMENT

#### 4. NEW PATTERN OF VIOLATION NOTICES

Sixteen mine operators were put on notice last month that they are potential violators of MSHA's pattern of violation provision under Sec. 104(e) of the Mine Act.

"Repeated safety and health violations by mine operators will not be tolerated," said MSHA chief Richard Stickler in a press release.

Fourteen coal mines and two metal/non-metal operators are on the latest list, the third in a series under an enhanced enforcement initiative. A total of 40 operations have received letters since the program began a year ago.

Stickler contended that the lists, part of what he termed MSHA's "comprehensive approach to enforcement," have greatly increased the agency's effectiveness. In support, he said seven of eight operators on the first list reduced their rate of significant and substantial (S&S) violations by an average of 50% during the following 90-day review period. One mine closed. Operators on the second list, released in December, lower their S&S rates by an average of 65%.

MSHA expects potential pattern violators to reduce their S&S violation frequency rate by at least 30% during the review period, or reduce the rate to below the national average for the sector. If they fail, they will be subject to severe enforcement penalties, including shutdown of areas where alleged serious violations are identified on subsequent inspections.

Because of the draconian consequences that could result from being named a pattern violator, operators who receive potential pattern notices should seek counsel immediately. Patton Boggs' attorneys have decades of experience in assisting operators under these circumstances. Contact Henry Chajet ([hchajet@pattonboggs.com](mailto:hchajet@pattonboggs.com), 202.457.6511) or Mark Savit ([msavit@pattonboggs.com](mailto:msavit@pattonboggs.com), 303.894.6117) for assistance with patterns of violation and how to avoid them.

#### 5. MSHA CITATIONS FOR VIOLATIONS INCREASE

In a media teleconference June 16, MSHA boss Richard Stickler said the agency issued a record 140,000 citations and orders last year, and is on track to issue 180,000 this year. He said that these figures included a roughly 60% increase in the number of unwarrantable failure violations for alleged high negligence.

Assessments were over \$75 million in 2007 and, with the current bulge in citations and orders, will likely top \$100 million this year.

He also complained that some 200 operators were appealing 100% of the violations and orders they have received in recent months.

"So it appears to me that they are deliberately abusing the system and creating a backlog that is making it difficult for MSHA and for everyone involved," he remarked.

To call attention to those companies, MSHA has posted a list on its website identifying operators, the number of citations and orders written against them and the percentage of the total they are contesting. The list covers the six-month period ending March 31.

Through June, the Federal Mine Safety and Health Review Commission had received 6,628 new cases since Oct. 1. At the same time a year ago, only 2,727 cases had been filed. With just three months left in the fiscal year, the Commission could end up with nearly 9,000 new cases.

Operators who feel that they are the victims of bad paper should not hesitate to exercise their due process right of appeal. Whether a violation exists at all is not the only reason to appeal a citation. MSHA has been calling a much larger percentage of violations significant and substantial and has increasingly asserted that citations are the result of high negligence or result in death. Many of these characterizations are questionable and, if left unchallenged, could result in much higher fines and a more serious history of violations. It is an operator's right to challenge these elements as well as the violation itself. On the other hand, if an operator receives a settlement offer that would result in the modification of a citation for a clear-cut infraction that results in the citation being fairly weighted for negligence and gravity, consideration should be given to accepting the settlement and removing the case from the Commission's caseload.

## IV. CHEMICAL SAFETY BOARD / NIOSH

### 6. NIOSH DIRECTORSHIP UNCERTAIN

John Howard's six-year term as Director of NIOSH expires this month, and, in a short press release July 3, the CDC said he would not be reappointed. Even after his term expired, bi-partisan efforts continued to seek Howard's reappointment.

Dr. Christine Branche, currently a NIOSH associate director, will fill Howard's position until a new director is named.

### 7. CHEMICAL SAFETY BOARD REPORTS

A report released last month by the Chemical Safety Board (CSB) concluded that an explosion and fire at a solvent distribution facility in Kansas a year ago likely resulted from a metal float measuring device in a storage tank. Solvent was being transferred to the tank at the time of the explosion, which destroyed the facility and forced the evacuation of 6,000 nearby residents. No one died in the explosion.

The CSB issued recommendations to OSHA and chemical manufacturers to urge that Material Safety Data Sheets be changed to account for the potential of an explosion from the buildup of static charges inside tanks used to store non-conductive flammable liquids. Other safety recommendations were made as well.

In a separate investigation, the CSB concluded that human error was to blame for an accident at an ink and paint manufacturing facility in Massachusetts. The CSB also attributed the massive explosion and fire at the plant in November 2006 to the absence of safeguards, such as alarms and automatic shutoffs, which would have prevented a 10,000-pound mixture of flammable solvents from overheating in an unattended building.

No one died in the early morning blast, but a CSB member said community damage—at least 16 homes and three businesses damaged beyond repair—was the worst the CSB had seen in its 10-year history.

The Board urged that changes be made to national fire codes and in-state licensing and inspection procedures to improve safety at facilities handling hazardous materials.

A CSB investigation continues into an explosion at a sugar refinery in Georgia. The disaster claimed 13 lives, and led to House-approved legislation to control combustible dusts. Investigations also remain underway into accidents at two Texas refineries, an explosion and fire in Florida, a fire in Colorado, and a propane explosion at a store in West Virginia.

## V. THE COURTS

### 8. COURT UPHOLDS CIVIL SUIT AGAINST MINE OFFICIALS

The Wyoming Supreme Court has let stand a lower court ruling that found two mine officials guilty of “willful and wanton, intentional negligence” in a 2002 accident that left a miner paralyzed.

The decision means the mine’s safety manager is responsible for \$3.9 million in damages and the mine manager, \$5.5 million. The award is part of a \$22 million judgment in the case, which involved a highwall accident at a surface coal operation.

The remainder of the award, \$12.5 million, was attributable to the operator. However, the company was not named in the lawsuit because, under state law, companies that pay into the state’s workers’ compensation program are immune from such damages. MSHA’s accident investigation report concluded that the mine had failed to adequately insure highwall safety.

### 9. CONTRACTOR/OPERATOR LIABILITY

After the *Twentymile* decision in 2006, MSHA hardly needed another court victory to underscore the judiciary’s support for interpreting federal safety law as having given the agency free rein to cite operators for infractions committed by their contractors. Nevertheless, that is exactly what the Fourth Circuit Court of Appeals handed MSHA last month.

The case involved an accident that occurred during an elevator shaft sinking project being performed by an independent contractor at a West Virginia underground coal mine. A crane hoist failed, dropping a six-ton bucket. No one was seriously injured, but MSHA cited both the mine operator and independent contractor for the same six alleged violations.

The Appeals Court ruled that MSHA possesses complete and un-reviewable discretion to cite an operator and its contractor for identical violations of the Mine Act. Any other interpretation, the Court held, might encourage operators to use contractors to shield themselves from safety violations.

The jurists went a step further by holding that MSHA’s decision as to who to cite cannot be challenged in court. Their reasoning was based on a series of Supreme Court rulings. In those cases, the High Court concluded that judicial review of discretionary decisions is not available when a statute, such as the Mine Act, is drawn so broadly as not to provide any law or meaningful standards that can be applied to a federal agency decision.

Finally, the Fourth Circuit held that the authority of the Federal Mine Safety and Health Review Commission does not extend to review of MSHA’s discretionary, policy-based enforcement decisions.

The decision is the latest nail in the coffin for the view that mine operators should not be held liable for violations committed by their contractors. Two years ago, the D.C. Circuit emphatically reversed a Commission decision in *Twentymile*, holding that MSHA possessed discretionary authority to cite the operator, the independent contractor, or both, for safety violations committed by the contractor.

The latest development highlights the importance for operators to seek the advice of counsel in drawing up carefully worded indemnification clauses in contract documents. Contact Henry Chajet ([hchajet@pattonboggs.com](mailto:hchajet@pattonboggs.com), 202.457.6511) or Mark Savit ([msavit@pattonboggs.com](mailto:msavit@pattonboggs.com), 303.894.6117) for assistance.

## 10. W.R. GRACE CRIMINAL TRIAL PENDING

The Supreme Court declined last month to review a lower court ruling in the criminal case against W.R. Grace & Co., clearing the way for a high-profile trial that will begin in a Montana courtroom this year or early in 2009.

The case was brought against Grace in 2005 by the EPA for "knowing endangerment," a violation of the Clean Air Act that carries a possible 15-year prison sentence on each of three counts. The knowing endangerment count lies at the heart of the allegation that seven top Grace executives intentionally concealed the dangers associated with asbestos-contaminated vermiculite at its now-closed Libby mine. One of the Grace officials has since died. Grace has denied any criminal wrongdoing.

The trial was originally set to begin in September 2006, but has been delayed by judicial rulings and subsequent appeals. Early in the proceedings, a district court judge ruled for Grace on a number of key issues. However, many of those decisions were overturned by an appeals court which in turn prompted appeals by Grace to the High Court.

The case turns in part on the definition of asbestos. That makes it of interest to mining companies that disturb rock containing so-called cleavage fragments, non-asbestiform amphiboles similar in chemical composition to asbestos but lacking common dimensional characteristics. Mining interests sued MSHA in April over the definition of asbestos in the agency's final asbestos rule. Patton Boggs represents some of the plaintiffs in that case.

Henry Chajet ([hchajet@pattonboggs.com](mailto:hchajet@pattonboggs.com)) can provide further information.

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The [Patton Boggs Health and Safety Law Group](#) consists of attorneys who have resolved client problems in environmental, energy, natural resource, and safety and health law since the late 1960s. With lawyers in Washington, D.C., Alaska, Colorado, Texas, New Jersey, New York, and Northern Virginia, we have experience with EPA, OSHA, MSHA, NIOSH, DOT, OPS, Coast Guard, NTSB, FAA, FDA, CSP, the Chemical Safety Board, and almost every other federal and state government environmental, health, and safety agency here and in many foreign governments around the world. We speak a variety of languages; have backgrounds in business, science, engineering, industry, and government; and combine preventive law counseling with courtroom and lobbying expertise to achieve results. For more information go to: <http://www.pattonboggs.com> or contact [Henry Chajet \(hchajet@pattonboggs.com\)](mailto:hchajet@pattonboggs.com) at 202-457-6511, [Mark Savit \(msavit@pattonboggs.com\)](mailto:msavit@pattonboggs.com) at 202-457-5269, [Cole Wist \(cwist@pattonboggs.com\)](mailto:cwist@pattonboggs.com) at 303-894-6159, or [John Austin \(jaustin@pattonboggs.com\)](mailto:jaustin@pattonboggs.com) at 202-457-6167

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