



INSIGHTS

Resource for Safety, Health, and Environmental Law & Crisis Management

OCTOBER 2007

IN THIS ISSUE

1. **Safety Failure Results in Five Deaths, Criminal Plea, \$15M Fine, \$69M Liability Settlement, and \$26M Safety Investment**
2. **Utah Mine Disaster Likely to Prompt Congressional Legislation**
3. **MSHA Proposes Big Changes in Mine Rescue**
4. **Patton Boggs Offers Advice on New Civil Penalties**
5. **Road Jurisdiction Case Remains Unsettled**
6. **Regulatory Update**
7. **MSHA Raises Objections to S-MINER Act**
8. **Judge Orders OSHA to Release Monitoring Records**
9. **OSHA Issues Interim Final Rule on Retaliation Complaints**

1. **SAFETY FAILURE RESULTS IN 5 DEATHS, CRIMINAL PLEA, \$15M FINE, \$69M LIABILITY SETTLEMENT, AND \$26M SAFETY INVESTMENT**

An energy company recently pled no contest to six felony charges involving worker safety, paying \$15 million to settle criminal and civil charges. (*California v. KMGP Services Co.*, Cal. Super. Ct., Nos. 01-132885-5, N07-1598, 9/21/07). This settlement involved a 2004 pipeline explosion in California that killed five workers. The accident happened while a water main was being installed and a backhoe hit a high-pressure pipeline. The plea agreement resulted in the company being put on probation for two years and required the company to audit the implementation of pipeline safety regulations. In addition, the company is reported to have paid approximately \$70 million to the families of the deceased and others injured in the accident.

The magnitude of this settlement (and the amount of the payments) emphasizes the need to be proactive in risk reduction and to be prepared to react in the most risk-preventive manner when an accident happens. Cal/OSHA fined the company \$140,000 for the incident, issuing two citations (failure to communicate the proximity of its pipeline and not marking the location as an excavation project), and the company signed a consent agreement with the U.S. DOT Pipeline Safety Administration. Reportedly, prosecutors then used the regulatory failures to support their case, and the company revised its prevention program and committed \$26 million to improve pipeline safety.

The case reinforces the critical role of integrated physical and legal risk reduction as stressed by Patton Boggs' management training seminars and audits. For more information on PB training and audits, contact Henry Chajet (hchajet@pattonboggs.com) or Mark Savit msavit@pattonboggs.com).

2. UTAH MINE DISASTER LIKELY TO PROMPT CONGRESSIONAL LEGISLATION

The Crandall Canyon underground coal tragedy has left some members of Congress in no mood to permit MSHA to lighten up on enforcement or to put off additional regulations that could be directed at all of mining.

The Utah incident involved two separate tragedies. On August 6, a seismic event that miners call a “bump” or “bounce” trapped six miners, who remain unaccounted for to this day. Then, 10 days later, three rescue workers, including an MSHA official, died trying to reach them underground when another bump occurred. Six others were injured. Bumps are seismic events causing mine collapses due to pressure from the weight overhead. There is a debate as to whether the bumps were naturally occurring or were caused by excessive removal of coal pillars that provided support for the mine during a process called “retreat mining.” The press reported that the mine’s co-owners purchased the Utah operation a year earlier after the previous owner had ceased mining. MSHA approved the mining plan for the new owner, raising questions about the Agency and the mine owner. The Crandall Canyon mine was dug deep inside a mountain in central Utah.

At a hearing September 5 before a subcommittee of the Senate Appropriations Committee, Sen. Robert Byrd of West Virginia recounted how, after the Sago coal tragedy last year, Congress had given MSHA new authority under the MINER Act, funded more inspectors, and increased the budget for coal enforcement. Thus, Byrd told MSHA chief Richard Stickler, a hearing witness, “it is infuriating to watch MSHA even after the tragedy at Sago to continue a tepid, disjointed, and minimalist approach to mine safety.”

Byrd called on Stickler to “crack some heads” at MSHA. “Get rid of the political deadweight now, and empower your inspectors to go after recalcitrant operators who are daily putting the lives of our miners at risk.”

Byrd reminded Stickler that he has a hold on Stickler’s nomination as MSHA Assistant Secretary, one he put in place 15 months ago. The Senator’s grip on the nomination has effectively prevented Senate action to confirm Stickler. As a result, President Bush recess-appointed Stickler last October to fill the vacant post. His appointment expires at the end of this year. Byrd’s sway over the Agency also extends to its funding, since Byrd chairs the Senate Appropriations Committee.

Since the Sago accident in West Virginia in January 2006, Congress has enacted the MINER Act, and MSHA has pushed through two interim final rules governing seals and emergency evacuation, as well as an enhanced enforcement scheme that greatly increases the cost of citations and for the first time ever puts teeth into its pattern of violations enforcement weapon. In addition, MSHA issued a new proposal to beef up mine rescue teams and equipment early this month.

Even before Crandall Canyon, lawmakers drafted legislation called the S-MINER Act that is designed to supplement the MINER Act. The new measures were described as oriented toward prevention of mine accidents, whereas the MINER Act primarily addressed emergency response. The S-MINER Act has been opposed almost universally by the mining industry. In the House, the legislation originated in the Committee on Education and Labor, which reportedly is to mark up the measure October 10-11.

That committee has scheduled a hearing on Crandall Canyon and mine safety for October 3. Additionally, no fewer than a half-dozen investigations are underway into Crandall Canyon and MSHA’s performance related to it. Besides MSHA’s accident investigation, both chambers of Congress have initiated probes and the Department of Labor (DOL) has launched what it described as an “independent” investigation. Moreover, the state of Utah has begun a limited investigation of its own, and several Republican lawmakers have called for an investigation by the DOL’s Inspector General.

The only real question is whether Congress will wait until after the probes are complete to pass more punitive legislation, or instead act preemptively.

3. MSHA PROPOSES BIG CHANGES IN MINE RESCUE

Under changes proposed by MSHA, the number of rescue stations serving underground coal mines would expand by 30%, while the number of rescue teams would grow by 39%. Changes the Agency proposes in rescue equipment will also affect underground metal/non-metal (M/NM) operations.

In response to a MINER Act mandate, MSHA issued a proposed rule September 6 to amend 30 CFR 49 that would require rescue stations to be situated within an hour's ground travel time from the mines they serve. The current requirement is two hours. MSHA estimates the provision would result in the creation of 28 more rescue stations. Ninety-two rescue stations now serve the nation's 653 underground coal mines.

In addition, rescue team training would be expanded to 64 hours annually from the current 40-hour requirement. Such annual training also would require participation in two mine rescue contests a year, and include once-a-year training under apparatus in smoke, simulated smoke, or an equivalent environment. Team members would also have to be knowledgeable about the operations and ventilation in the mines they cover. An existing requirement to complete an initial 20-hour program of instruction, applicable to persons seeking to become rescue team members, would remain unchanged.

The proposal recognizes four types of mine rescue teams and spells out requirements for them. Each would be required to participate semi-annually in rescue training at the small mines they cover. However, at large mines, rescue training requirements differ. For instance, mine-site and state-sponsored rescue teams would have to train annually at large mines; composite teams, semi-annually; and contract teams, quarterly. The current eligibility requirement of a minimum of a year's underground mine experience within the past five years remains unchanged; however, contract team members are to be made up of persons with a minimum of three years' underground coal mine experience within the past 10-year period preceding their membership on the team.

One of the two teams serving large mine operators must be either a mine-site team or a composite team. For purposes of the regulation, small mines are those employing fewer than 36 miners underground.

So-called "small and remote" mines may seek an alternative mine rescue capability if approved by the District Manager. Under the proposal, MSHA considers an underground coal mine as small and remote when the total underground employment of the operator's mine and any surrounding mines within an hour's ground travel time is under 36. Due to their unique nature, underground anthracite mines would have to meet slightly different requirements.

The proposal would also amend Part 75.1501 to add provisions affecting the person now required to be available to take charge in an emergency during each shift miners are underground. MSHA proposes that this individual have current knowledge of the mine's emergency response and mine rescue notification plans. New annual training requirements have been proposed as well.

As for equipment, both coal and M/NM mines would have to upgrade mine rescue equipment and increase the amount of it.

The Agency has scheduled four public hearings on its proposal: Oct. 23, Salt Lake City; Oct. 25, Lexington, KY; Oct. 30, Charleston, WV; and Nov. 1, Birmingham, AL. The comment period closes Nov. 9.

4. PATTON BOGGS OFFERS ADVICE ON NEW CIVIL PENALTIES

Due to recent changes in MSHA's civil penalty criteria, mine safety and health professionals need to pay close attention to their companies' past citation history to avoid possibly huge compliance costs on subsequent inspections.

The advice came from Mark Savit of Patton Boggs during separate talks this summer at the annual conference of the International Society of Mine Safety Professionals and the National Stone, Sand & Gravel Association's Environment, Safety & Health (ESH) Forum. Willa Perlmutter, also with Patton Boggs, joined Savit on the podium during the ESH Forum in Chantilly, VA September 5.

Referencing changes that went into effect in April, Savit suggested that mine officials recalculate under the current higher penalty scheme all penalties they received last year under the old penalty arrangement. A firm that paid \$14,000 for 114 citations last year would pay \$40,000 under the new system, but \$300,000 if the same citations are issued a year from now, he said.

"Suddenly, paying attention to what you got in the past in relation to what you are going to get is very, very important," he remarked, referring to penalty provisions that address an operator's history of previous violations. He also cautioned against getting repeat citations under the Sec. 104(d) unwarrantable failure provision. "You need to see if you have exposure to that violation down the road because the third such citation will earn you a flagrant \$220,000 penalty," he said.

Under the revised scheme, violation history is based both on the total number of violations and the number of repeat violations of the same citable provision of a standard within the preceding 15-month period.

Penalty assessments are calculated based on the number of points assigned. Under the history criterion, an operator may be assessed up to 25 penalty points based on violations per inspection day (VPID). VPID is determined by dividing the total number of inspection days at a mine into the total number of violations that have been paid, finally adjudicated, or are final orders of the Review Commission over the 15-month period. Thus, a mine with 16 such violations in six inspection days is charged 2.6 VPID. Since more than 2.1 VPID yields the highest point total, the mine in this example would be assessed the maximum 25 points.

Supervisory and trainee time are not included as inspection days, nor are non-inspection activities. No excess history points are assigned to mine operators assessed fewer than 10 such violations over the preceding 15 months. VPID is not used in assessments of independent contractors. Instead, they are assigned points, also up to 25 maximum, based on the total number of violations accrued at all mines they served during the preceding 15 months. They get no points for fewer than six total violations during the period.

A new repeat violations penalty provision assigns points, up to 20 maximum for both operators and independent contractors, if a repeat violation of a citable standard occurs during the 15 months. In both cases, no points are assigned for fewer than six repeat violations. As with excess history, the inspection day concept applies only to operators.

Savit also advised that safety officials be prepared to argue down negligence penalties, since costs go up dramatically as the level of negligence increases. "Arguing with MSHA to drop to low from moderate negligence would save \$400-\$500 per citation," he said. The company has a basis for argument if it can demonstrate in writing the consequences to employees who violate MSHA rules, including notes of such discussions during safety meetings. Likewise, arguing to reduce the seriousness of S&S infractions "could save \$800-\$1,000," the Denver-based attorney said.

Savit said there is as yet no solid legal precedent for the various gradations of S&S and negligence such as "unlikely," "reasonably likely," "low," "moderate," etc. However, as operators contest these types of citations, a supporting legal basis will be developed.

Safety professionals should also begin charting their employers' citation history and costs as a means to show the value safety personnels bring to the company.

Citing recent MSHA accident investigation reports critical of Conference Litigation Representatives (CLRs) who reduce penalty amounts or dismiss citations altogether, Savit predicted that "the amount of a citation that will go away at the CLR level is going to go down."

5. ROAD JURISDICTION CASE REMAINS UNSETTLED

A case that would force MSHA to clarify its jurisdiction over roads appurtenant to mines under special circumstances remains in limbo under the Mine Act.

The Mine Act in part defines a coal or other mine as an area from which minerals are extracted and “private ways and roads appurtenant to such area.” MSHA cited National Cement of California in 2004 for failing to install berms or guardrails along a 4.3-mile private roadway leading to its Lebec Cement Plant near Los Angeles. The company argued before an Administrative Law Judge (ALJ) that the road was outside MSHA’s jurisdiction because National Cement was not the sole user, nor did it own the road or maintain it in its entirety. The ALJ disagreed, saying the road was both private and appurtenant, and thus fell under MSHA jurisdiction under the unambiguous language of the Act.

National Cement appealed. The Review Commission reversed the ALJ, saying that although the road was indeed “private” and “appurtenant,” Congress did not intend for such a road to be included in Mine Act jurisdiction because to do so could lead to absurd results. For instance, if a serious accident occurred on the road involving vehicles over which National Cement had no control, mine regulations required the mine operator to report the incident and intervene to prevent the destruction of evidence. The Commission ruled that only the portion of the road over which the operator and its customers had exclusive use could be considered appurtenant.

MSHA in turn appealed the Commission’s decision to the U.S. Court of Appeals for the D.C. Circuit. In a split decision released this summer, a three-judge panel said the operator had raised legitimate concerns. The judicial body also held that the Mine Act language was not clear, and directed the Review Commission to send the case back to MSHA to re-interpret the statute’s ambiguous language. The Court will review the matter again in light of MSHA’s re-interpretation. As of this writing, MSHA had yet to act on the decision.

The case is being closely watched because it could potentially affect a number of other operators in a similar situation.

6. REGULATORY UPDATE

MSHA – Several proposed rules and an emergency temporary standard (ETS) are in the pipeline at MSHA.

SEALS – The Agency’s ETS applies to seals. The rule was issued in May to comply with requirements of the MINER Act. The Agency must finalize the rule within nine months.

ASBESTOS – MSHA has set a June 2008 date for release of a final rule on asbestos. The regulation was proposed in 2005 in response to a request by the Labor Department’s Inspector General that MSHA act to lower its permissible exposure limit for asbestos in the wake of the Libby events related to a vermiculite mine in Montana. Proposed rules on mine rescue teams and equipment were released this month, so final action is not likely before the end of the year, even though the Agency is under the statutory gun to have them done and in effect by December 15.

CARBON CONVERSION FACTOR – In its regulatory agenda, MSHA said it would propose before October a total carbon-to-elemental carbon conversion factor as part of its ongoing rulemaking on diesel particulate matter (DPM) in underground M/NM mines. That deadline is not likely to be met. The final permissible exposure limit for DPM measured as total carbon of 160 micrograms per cubic meter goes into effect in M/NM next May 20.

BELT AIR – In addition, rulemaking will be an option for MSHA once it receives reports from a technical panel on use of belt air in underground coal mines and another from NIOSH on refuge chambers. The belt air panel will release its recommendations at a three-day meeting September 17-19, and will issue a final report sometime shortly after that. MSHA then has six months to act.

NIOSH – NIOSH's deadline on refuge chambers is December 15. The MINER Act gives MSHA six months after that to tell Congress what it plans to do.

OSHA – OSHA is expected to propose two regulations and issue two final rules within the next several months.

CONSENSUS STANDARDS – A final rule would update OSHA standards based on national consensus standards

PERSONAL PROTECTIVE EQUIPMENT – A final rule is in the works that would require employer payment for personal protective equipment.

CONFINED SPACES – A proposal is forthcoming to address confined spaces in construction.

RESPIRATION FIT-TESTING – An abbreviated Bitrix qualitative fit-testing protocol for respirator wearers is expected to be proposed.

All four documents are currently under review by the Office of Management and Budget.

On OSHA's near-term regulatory agenda are proposals addressing cranes & derricks and explosives. Additionally, OSHA said it would complete a peer review of a health effects and risk assessment document on silica this month. An economic analysis of an alternative to OSHA's Hazard Communication Standard was due to be completed last month, but the Agency has yet to announce the work has been completed.

Explosives users and some mining companies await issuance by the Department of Homeland Security (DHS) of a final list of chemicals covered under an anti-terrorism rule the Department issued in April. A draft chemical list, included as Appendix A to the rule, includes a reporting requirement for companies that use more than 2,000 pounds of ammonium nitrate with a nitrogen content of 28-34%. Several molecular explosives commonly used in commercial explosives are also listed in the proposed appendix, including but not limited to TNT, RDX, HMX, PETN, and NG.

DHS originally said the final Appendix A would be released in July. A Department spokesman said to expect it within the next few months. Firms that use or are expected to use any of these chemicals in the quantities listed are advised to register as soon as possible at <https://csat-registration.dhs.gov> to complete a questionnaire in order to obtain a username and password. Once the final list is promulgated, affected parties will have just 60 calendar days to complete a so-called Top-Screen application. Companies out of compliance face fines of up to \$25,000 a day and shutdown of operations.

Contact Henry Chajet (hchajet@pattonboggs.com) or John Austin (jaustin@pattonboggs.com) for further information or assistance.

7. MSHA RAISES OBJECTIONS TO S-MINER ACT

At a contentious Congressional hearing this summer, MSHA voiced concerns about sweeping new proposed legislation that would have an impact all of mining.

Called the S-MINER Act, the legislation from the House Committee on Education and Labor is actually two bills, H.R. 2768 and H.R. 2769, that drafters say are geared toward preventing accidents, and is companion legislation to last year's MINER Act, which focused on emergency response in underground coal mines. Nearly identical legislation has been introduced in the Senate.

The hearing before the House Subcommittee on Workforce Protections got off to a raucous start when minority leader Joe Wilson (R-SC) complained that the leadership, by allowing the Republicans just a single

witness to the Democrats' three, effectively shut out mining industry officials from expressing their views. The minority then sought to have Bruce Watzman of the National Mining Association join witnesses at the speakers' table, but the move was voted down.

Witnesses for the Democrats were Dennis O'Dell and James Weeks, representing the United Mine Workers (UMW), and Mike Wright of the Steelworkers. The Republicans called Kevin Stricklin, Coal Administrator at MSHA.

In his testimony, Stricklin voiced objections to 16 provisions of the comprehensive legislation. Stricklin took issue with a clause that would require mine operators to inform MSHA when they have completed abating a situation or condition that has led to a citation because he asserted it would weaken current requirements for abatement. At present, an MSHA inspector must personally verify through an on-site visit that abatement was completed satisfactorily.

A provision requiring notification of emergencies and serious incidents would actually establish emergency notification procedures less stringent than current requirements, while the legislation's expansion of the scope of what constitutes an "imminent danger" would promote "an inconsistent and inappropriate use of the term."

Mines in remote areas would have trouble meeting a requirement to provide an ambulance or other means of emergency medical response. He also objected to a provision that would interject the Chemical Safety Board (CSB) into mine accident investigations. "We don't have anything to hide," he testified. Moreover, if the CSB's conclusions and recommendations differed from MSHA's, questions could arise about which report represented the final word on the cause of the accident and the basis for any MSHA enforcement action.

The veteran MSHA official also raised concerns about S-MINER Act provisions regarding strengthening existing communications systems. He said the Agency believes wireless communications represents the best technology, even though no such system is as yet commercially available for use in underground mines. He told lawmakers MSHA is concerned that if something other than wireless systems are accepted, then current research to perfect the technology will stop.

Congress should not mandate refuge chambers universally in underground coal mines because they are not feasible in low-height mines. Besides, requiring them may foreclose other options that offer greater protection.

If Congress mandates monitoring behind all seals, as proposed, it could weaken protections by removing an incentive for operators to build seals so strong that monitoring would not be necessary. The provision requiring monitoring through boreholes is not feasible at operations lacking surface property rights or where geologic conditions are unfavorable.

The S-MINER Act would ban belt air in intake air courses, a measure Stricklin said is premature because a technical study panel is currently reviewing the issue. Its report is due out soon. A requirement to pull self-contained self rescuers (SCSRs) for inspection would remove 10,000 SCSR from service at a time, lessening worker protection.

A provision to brief incoming shift supervisors on hazardous conditions underground may not be practical due to irregular work shifts and the large number of people who would have to be involved. Geologic conditions would limit the feasibility of a one-size-fits-all provision to strengthen ventilation controls in some underground coal mines. Measures addressing lightning, multi-gas detectors, and mine location maps are unnecessary.

As expected, union officials expressed strong support for the legislation. In a prepared statement after the legislation was introduced in June, the UMW said it satisfied most, if not all, of the safety and health needs of miners.

Industry is nearly unanimously opposed to the Congressional initiative. The National Stone, Sand & Gravel Association, which represents aggregates producers, has arranged for members to meet with Congressional staff September 19. Their message is that the bills will not improve mine safety, are punitive, will create confusion, and threaten continued safety progress.

Contact Henry Chajet (hchajet@pattonboggs.com) for assistance addressing this proposed legislation.

8. JUDGE ORDERS OSHA TO RELEASE MONITORING RECORDS

A judge in New Jersey has told OSHA to release over two million occupational exposure monitoring records collected over the years by OSHA inspectors during some 75,000 workplace inspections.

The decision in a Freedom of Information Act (FOIA) case represented a victory for Adam M. Finkel, a university professor specializing in risk assessment who formerly worked for OSHA. Citing various FOIA exemptions that preclude release, OSHA had sought to withhold the records from Finkel, who said he "had several important research purposes in mind for the data."

Finkel said he wanted to study exposures to beryllium, undertake an analysis to determine if controls installed to comply with environmental regulations actually increase worker exposure, and evaluate whether OSHA is conducting an effective program of health hazard sampling and enforcement. Finkel, who spent eight years in the Agency's Health Standards Office and worked as a Regional Administrator, left after winning a whistleblower case in 2003.

9. OSHA ISSUES INTERIM FINAL RULE ON RETALIATION COMPLAINTS

OSHA seeks comment by October 9 on an interim final rule it has released that amends its procedures for enforcing whistleblower provisions of seven statutes.

The intent of the rule, issued August 10, is to implement statutory changes to employee protection provisions in Section 211 of the Energy Reorganization Act (ERA) of 1974 as amended in 2005, and to promote consistency with procedures in six environmental whistleblower statutes administered by OSHA under Part 24 of its regulations. Highlights of the proposed changes include, but are not limited to:

- expanding the definition of "employer" to extend coverage to more employees;
- permitting a complainant to bring a de novo action in federal district court in ERA cases where the Department of Labor has not issued a final decision within one year after filing the complaint;
- adjusting the timeframe to 30 days from five days for filing objections to an OSHA Finding and Order and requesting a hearing before an ALJ;
- giving ALJs explicit regulatory authority to limit discovery in order to expedite a hearing; and
- changing procedures to provide that an appeal to the Administrative Review Board (ARB) is no longer a matter of right, but accepted only at the discretion of the ARB.

Nilgun Tolek (202-693-2199) is the contact for further information. Comments may be submitted electronically at <http://www.regulations.gov> and must include the OSHA docket #: OSHA-2007-0028.

IMPORTANT NOTE: This newsletter does not constitute legal advice and counsel should be consulted regarding specific factual situations which will determine the compliance advice applicable to any particular question regarding the subject matter. If you would like additional information or advice and counsel on training, compliance or audits, please let us know.

NOTE: You may receive INSIGHTS from other people, which often occurs. To SUBSCRIBE, change your address or to change your e-mail format, simply click here. To UNSUBSCRIBE or OPT-OUT, simply e-mail INSIGHTS@pattonboggs.com with "UNSUBSCRIBE" in the subject line. To correspond with INSIGHTS, send your message to INSIGHTS@pattonboggs.com. Thanks.
