



LAW OFFICE OF ADELE L. ABRAMS P.C.

SPECIAL EDITION
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Denver Branch of Firm Officially Opens August 4, 2014

On August 4, 2014, the Law Office officially opens its Denver Branch. Located in downtown Denver, this expansion will bring the Firm's services closer to Western and Mid-West clients. Leading the office as Managing Attorney, Joshua Schultz, Esq., MSP, has over six years practicing Administrative Law, in particular, litigation under the Mine Act and the Occupational Safety and Health Act. He began his legal career at the Law Office of Adele Abrams in September 2008.

This expansion marks a milestone in the Law Office's journey. Founded in 2001 by Adele Abrams, Esq., CMSP, the Law Office has grown from a single attorney practice to include 10 attorneys with two holding the Certified Mine Safety Professional designation, two holding the Mine Safety Professional designation, and one holding a Certified Industrial Hygienist designation. The practice prides itself by following Adele's motto: "If they cite it, we will fight it." From small to large companies, each client receives dedicated, personal attention. This approach will continue at the Denver office.

While the Firm is renowned for defending clients against the Mine Safety and Health Administration and the Occupational Health and Safety Administration, it also defends against

enforcement actions from the Environmental Protection Agency, Department of Transportation, and other Federal agencies. With attorneys barred in 7 state jurisdictions, the Firm also defends state-related enforcement cases, and employment matters in DC, MD, MI, MT, OH, PA, and SC.

Besides bringing the Law Office's services closer to the Western states, each attorney will have access to the new office's amenities. The office has ample space for training, depositions, meetings, and trial preparation to support client cases.



With four safety professional attorneys on staff, including Mr. Schultz, as well as multiple non-attorney consultants in the Western U.S., West Coast clients will gain easier access to Part 46/48 training and safety audits from the Firm. This expansion is a welcome addition to the Firm's purpose of client satisfaction.

The office is located at 1625 17th St, 3rd Floor, Denver, CO 80202, in lower downtown Denver. The phone number is 303-228-2170.

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MSHA Proposed Civil Penalty Rule: What Will Happen to Operator Contest Rights?

On July 31, 2014, the Mine Safety and Health Administration's (MSHA) *Proposed Rule for the Criteria and Procedures for Assessment of Civil Penalties* was published in the Federal Register. Publishing the rule begins the 60 day period for public comment, all of which must be received or postmarked by midnight Eastern Daylight Savings Time on September 29, 2014. The proposed rule's link is: <http://www.gpo.gov/fdsys/pkg/FR-2014-07-31/pdf/2014-17935.pdf>.

MSHA claims the rule's design and goal is to "place greater emphasis on more serious safety and health conditions, thus providing improved safety and health for miner." However, the proposed rule appears to seek a reduction in contested citations and orders by the industry, by providing disincentives for contesting citations and orders, which would further decrease the MSHA litigation backlog.

MSHA proposes to reconstruct the existing citation and order criteria, and to modify the point system that is used to assess penalties for issued citations. The new rule, if made final in its proposed form, would change the penalty point protocol from a system with 208 available points to only 100 points; however, the current minimum penalty, \$112, and maximum, \$70,000, would remain the same for non-flagrant violations. What this means is that while MSHA places emphasis on the decrease in the total number of points designated for each section of the citation, the affective weight of each section is also changing. Additionally, MSHA proposed that the statutory minimum for 104(d)(1) citations and orders, and 104(d)(2) orders increase by 50%, from \$2,000 to \$3,000 and \$4,000 to \$6,000 respectively.

Before addressing the proposed changes to specific sections of the penalty assessment and citation format, there are several questions left unanswered by MSHA's proposed rule:

- Will the new format of the citations result in a greater likelihood of Significant & Substantial citations issued to mine

operators?

- How will the new negligence designations affect the issuance of 104(d) citations and orders and categorization of "flagrant" violations?
- Under the proposed rule and, specifically, because of the proposed 20% penalty reduction on uncontested citations, what will happen to the informal contest process that is handled through the district office personnel?
- Will filing a conference request remove operators from qualification for the additional 20% reduction in penalty?

Another key issue is whether the proposed changes will adversely affect an operator's ability to settle contested citations once MSHA narrows the range of designations on each issuance. This problem stems from the current position among certain Federal Mine Safety and Health Review Commission (Commission) judges wherein they require each settlement to contain sufficient paper modifications (e.g., reductions in gravity, negligence, or number of miners affected) to justify any monetary reductions offered in settlement. Recently, Administrative Law Judge Moran addressed the issue by rejecting a settlement which included an across the board monetary reduction, without citation/order modifications to justify the reduced fines. American Coal Company (ALJ, May 13, 2014). It remains unclear how much existing case law decided by the Commission and its judges (such as the definitions of "significant and substantial" (S&S) and "unwarrantable failure" violations) will no longer be relevant given the proposed changes. This could also require new clarification through litigation.

Under the proposed rule, MSHA is suggesting changes to most categories which affect the penalty determination. Some of these changes, such as negligence and gravity, will be visible on each citation issued to operators, other are used internally by the MSHA Office of Assessments.

MSHA Proposed Rule, cont.

Currently there are five categories of negligence: No Negligence, Low Negligence, Moderate Negligence, High Negligence and Reckless Disregard. The proposed rule would reduce that to three options: Not Negligent, Negligent, and Reckless Disregard. Under the proposed rule MSHA defines Negligent as *“the operator knew or should have known about the violative condition or practice.”* This new definition effectively eliminates mitigating circumstances as a defense to the negligence designation and removes them from consideration by the inspector and the agency. The definitions for *“Not Negligent”* (*the operator exercised diligence and could not have known of the violative condition or practice*) and Reckless Disregard (*the operator displayed conduct which exhibits the absence of the slightest degree of care*) remain the same from the current rule. If the new rule becomes final, the negligence designations would carry more weight towards the final penalty assessment than under the current formula.

MSHA also proposed changes to the gravity designation currently employed by eliminating elements under both likelihood of occurrence and severity of possible injury. The proposed rule would reduce the likelihood of occurrence designations from five options (No Likelihood, Unlikely, Reasonably Likely, Highly Likely, and Occurred) to three (Unlikely, Reasonably Likely, and Occurred). A chief concern with this change is whether or not this reduction in choices would lead to a steep increase in the number of S&S citations issued. It also means that Imminent Danger orders issued under Section 107(a) of the Mine Act could be triggered by simple *“reasonably likely”* findings rather than the current use of *“highly likely”* to distinguish such situations.

Also under the gravity section of penalty assessment, MSHA proposed changes to the severity of injury category. Currently the category includes No Lost Workdays, Lost Workdays or Restricted Duty, Permanently Disabling, and Fatal. Under the proposed rule, MSHA would eliminate the Permanently Disabling category. Relative to the existing penalty assessment system, the total weight of the gravity designations would decrease

overall, however the relative weight of the severity of injury designation would have a greater impact on the penalty amount. MSHA also would alter the category that assigns points based on number of affected miners, and the same penalty points would be assigned whether 1 miner or 100 miners were impacted.

Further changes and potential effects on the penalty assessment process compared to the current rule include:

1. Mine size will have less impact on the penalty determination, which could disproportionately impact small operators;
2. Controller and contractor size will have similar impact on the penalty determination; and,
3. Mine or contractor violation history (violations per inspection day and repeat violations per inspection day) would have a much greater impact on penalty determination.

An element of the proposed rule which should receive a significant amount of attention in the comments is MSHA’s incentive for operators not to contest issued citations and orders. MSHA includes a proposition that if a mine does not contest issued citations, promptly abates the cited conditions, and pays the penalties before any citation or order becomes final, then the operator is eligible for an additional 20% penalty reduction, on top of the already existing 10% good faith reduction (assuming operator eligibility). However, this 30% maximum penalty reduction is not offered if the operator contests the citations, and MSHA does not address how informal (or 10 day) conferences may affect an operators’ ability to qualify for the reduction.

This is, quite obviously, an attempt by MSHA to persuade operators against contesting citations and it will likely have an adverse effect on an operators’ ability to receive penalty reductions in formal contest. While a monetary reduction is often the operator’s motivating factor in contesting citations, quite often citations are disputed because of disagreement over the fact of violation, the classification as S&S (which impacts Pattern of Violations findings), abatement requirements that are unduly burdensome or unwarranted, or because

MSHA Proposed Rule, cont.

of legal issues such as whether MSHA has jurisdiction over the cited operation.

Related to the additional 20% reduction as a disincentive to contest citations, the proposed rule also includes proposals to limit the Commission's Administrative Law Judges' (ALJ) ability to modify penalties at hearing. Currently an ALJ has de novo review of assessed penalties before them at hearing, meaning the ALJ has the power to modify any penalty as they see fit (which can be by increasing or reducing the penalty). MSHA made three proposals, two of which would limit an ALJ's power to modify citations. MSHA believes that operators are now taking contested citations and orders to hearing before Commission judges in order to receive lower penalties when the Secretary of Labor and MSHA will not offer these in settlement. MSHA believes the current system, of de novo review, undermines the deterrent effect and purpose of penalties under the Mine Act. To remedy this in MSHA's view, the agency proposes the ALJ's must follow the point system under Section 100.3 of the Mine Act, or the ALJ's can deviate from the penalty system but only under specific circumstances (in the same way that U.S. District Court judges were previously allowed to depart from federal sentencing guidelines, where justified). However, MSHA includes a third option, which would retain the current the system with de novo review.

This is important because the Commission (an independent agency that is not part of the U.S. Department of Labor) and its judges are designed to be a separate and impartial decision maker for the agency and industry to plead their cases before. By allowing MSHA to regulate the Commission's ability to decide cases, the operator would be placed a great disadvantage in the contest process, and leave the operator without a body to plead their case, which was not controlled or guided by MSHA regulation, until the Federal Circuit Courts.

The potential impacts of MSHA's proposed rule are both far reaching and should be carefully considered by industry. What is painted as an

attempt to increase the efficiency of processing and assessing penalties by the MSHA, reads as a not so subtle attempt to reduce operators incentive and ability to contest, settle, and litigate MSHA assessed citations and orders.

All members of the public are welcome to submit comments to this proposed rule, all of which must be received or postmarked by midnight EDT on September 29, 2014. If you have any questions or concerns regarding the comment process, or need assistance in crafting your comments, please contact the Law Office for assistance at 301-595-3520 (eastern office) or 303-228-2170 (western office).