



A publication of the
Oregon Independent Aggregate Association
PO Box 571
Stayton, Oregon 97383
www.oraaggregate.com

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Oregon Independent Aggregate Association Newsletter

February 2019

Chairman's Message

This month's newsletter is chuck full of good information provided by several supporters of OIAA:

From the Law Office of Adele Abrams – Last month it was announced that OSHA and MSHA (along with other Dept of Labor agencies) will significantly increase civil penalties. This will influence state-level OSHA penalties as well. Adele provides a detailed summary in this newsletter, including important discussion of how contesting violations can affect the penalties. Thanks to Adele for the notice and her summary.

Also, Matt DeAtley with DeAtley Law provides a thorough discussion of why independent contractors on mine sites must be compliant with MSHA regs. This is important not only for mine operators but also for contractors who have a "continuing presence" on mine sites. Thanks to Matt for his detailed explanation and insight for how to manage compliance risks.

Kim Redding with N-Compliance Safety Services has had continued discussions with MSHA regarding recent inspection practices in the Northwest. We are reaching out to members to share your experiences. Written statements and examples will demonstrate the issues. We have to communicate what the problems are if we want things to change. Your active participation is needed! Thanks to Kim for heading this effort.

Erick Staley
Chairman

OSHA & MSHA Hike Civil Penalties

By Adele L. Abrams, Esq., CMSP

In January, the U.S. Department of Labor announced significant hikes in the civil penalties imposed by both the Occupational Safety & Health Administration (OSHA) and the Mine Safety & Health Administration (MSHA), as well as other agencies within DOL (e.g., Employment Benefits Security Administration, Employment & Training Administration, and the Wage & Hour Division). The new penalties took effect January 23, 2019, for MSHA and federal OSHA. State OSHA programs must be of equal effectiveness, which means that they must also raise their penalties.

Federal OSHA's new penalties raise the maximum to \$132,598 for willful and repeat violations, up from the previous high of \$129,336. The mandatory minimum penalty for those elevated citation classifications is now \$9,472. Regular "serious" and "other than serious" citations, as well as failure to abate situations, will carry a new maximum fine of \$13,260 (up from \$12,934).

MSHA also announced its civil penalty increases. The new maximum for regular assessments is \$72,620, while the maximum for "flagrant" violations was raised to \$266,275. When Congress first created the "flagrant" classification in the 2006 MINER Act, the maximum penalty was \$224,000. Flagrant violations are those issued under Section 104(d) of the Mine Act ("unwarrantable failure" violations) that are classified as at least "reasonably likely" to cause "permanent disability" or to be fatal, with either a "high" or "reckless disregard" negligence classification.

The mandatory minimum fine for failing to report a fatality or serious injury within 15 minutes was hiked to \$6,052, while penalties for failing to abate a violation can now reach \$7,867 per day. Minimum penalties for unwarrantable failure violations under Section 104d1 of the Mine Act are now \$2,421, while Section 104d2 infractions trigger minimum fines of \$4,840. The minimum penalty for Section 104a and 104g citations and orders is now \$135.

Unlike OSHA, MSHA can also issue personal penalties to miners for certain transgressions, such as smoking in an underground gassy mine or near flammables, and the new penalty for those violations is \$332. However, MSHA can also issue personal penalties to agents of management, including hourly trainers or workplace examiners, of up to the new \$72,620 maximum, under Section 110(c) of the Mine Act. This occurs where the miner knew or should have known of a violation (or personally participated in it, such as failing to wear PPE), failed to initiate corrective action, and has authority to direct the workforce in some manner.

All statutory penalty mandates are binding on the agencies at the first stage, when they propose their penalties as citations are issued. However, if a case is contested and litigated before the OSHRC or FMSHRC, those judges have "de novo" penalties authority. This means they are not bound by what OSHA or MSHA has proposed, or what Congress mandated, but can decrease or increase the ultimate fines as they see fit, or as agreed upon by the parties in settlement.

Normally, the new penalties only apply to violations cited after the effective date but the agency's stance on retroactive application hasn't been made clear at this time, and the pre-publication notice states that "the increased penalty levels apply to any penalties assessed after the effective date of this rule." This suggests that, for example, if a violation occurred in December 2018 but is not cited (with a proposed penalty) until May 2019, after the new penalties take effect, the 2018 violation could be sanctioned at 2019 rates. This issue may have to be addressed by the courts in the future.

For more information on OSHA/MSHA defense, contact the Law Office of Adele L. Abrams PC at 301-595-3520 (DC area) or 303-228-2170 (Western).

Liability for Independent Contractor Violations: Why a Mine Operator should ensure Independent Contractors are compliant with MSHA Regulations

Matt DeAtley, Attorney

February 2019

Nearly every mine operator will have an independent contractor working in their site at some point, whether the contractor is at the site to drill, blast, crush, or even change a tire. Most contractors are subject to MSHA regulations and should the contractor violate an MSHA regulation, MSHA can hold the mine operator similarly liable for the violation. In this article, I will first briefly describe the point at which a contractor becomes subject to MSHA jurisdiction. Next, I will cover MSHA's ability to cite both the contractor and the mine operator and the criteria an inspector will use in deciding to issue citations to both the contractor and mine operator. Finally, I will list a few strategies for mine operators to protect against liability for contractor violations.

MSHA's Jurisdiction Over Independent Contractors

The same sentence of the Mine Act that gives MSHA jurisdiction over mine operators also gives MSHA jurisdiction over contractors performing work at a mine. Specifically, the Mine Act subjects every "operator" to MSHA regulation, but defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine".¹

By this definition, any independent contractor performing services or construction at a mine site is subject to all the same regulations as any mine operator, including training requirements and documentation. Certain courts have found that *any* contractor performing services at a mine will be under MSHA jurisdiction, while other courts (including the 9th Circuit) have found that the contractor must have a "continuing presence" at the mine to be subject to MSHA jurisdiction.² Examples of situations where there was not a "continuing presence" at a mine (and putting the contractor outside MSHA jurisdiction) include a power company entering a mine to read the meter or a steel company delivering steel for use at the mine site.

Citing an Operator for an Independent Contractor's Violation

The Mine Act makes the mine operator principally responsible for MSHA compliance.³ Further, since the Mine Act is a strict liability law, MSHA can hold the operator liable — even absent a showing of fault. Putting both laws together, it means that MSHA can issue a citation for a violation committed by a contractor to 1) the independent contractor, 2) the mine operator, or 3) both.⁴

Although MSHA has the right to cite both the contractor and the operator, it is MSHA's policy to only cite the contractor for the contractor's violation of the Mine Act.⁵ However, an inspector will still cite the operator if the inspector believes the operator is in some way responsible for the violation. The Program Policy Manual sets out four criteria to assist an inspector in determining whether to issue a citation to both the contractor and the operator:

- 1) The operator has contributed to the occurrence of the independent contractor's violation;
- 2) The operator has contributed to the continued existence of the independent contractor's violation;
- 3) The operator's miners are exposed to the hazard created by the independent contractor's violation; or
- 4) The operator has control over the condition that is in the violation.⁶

If any of these criteria are satisfied, the inspector will likely issue a citation to the operator in addition to the citation issued to the contractor.

¹ 30 USC § 802(d).

² *Old Dominion Power Co. v. Donovan*, 772 F.2d 92, 97 (4th Cir. 1985).

³ 30 USC § 801(e).

⁴ MSHA Program Policy Manual, III.45-1; *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 154-55 (D.C. Cir. 2006).

⁵ MSHA Program Policy Manual, III.45-1.

⁶ MSHA Program Policy Manual, III.45-1.

Strategies to Reduce the Risk of Concurrent Citations

Generally, operators can reduce the risk of liability by separating the operator and contractor's work as much as possible during interactions at the mine site. Operators should also include protective contract provisions to limit liability for contractor's violations. The following are a few steps operators can take to limit liability:

- 1) **Require the independent contractor to be just that – independent.** To limit the risk of contributing to a violation, do not allow the contractor to use mine assets, including equipment, shops, or tools.
- 2) **Limit supervision to evaluating progress and compliance with contract requirements.** The less control the operator has over the contractor, the less MSHA will see the operator contributed to the violation or controlled the condition. Also, perform limited safety checks on contractor equipment, with exception to contractor equipment that could present a hazard to miners. The goal is to separate the operator and the contractor, as much as possible, and protect operator from contractor violations.
- 3) **Fence off, tape off, or otherwise separate the contractor's work area and prohibit miners from entering the contractor's work area.** By doing so, operators will minimize exposure to any safety hazards created by a contractor's violation.
- 4) **Require contractors to obtain their own MSHA identification number and maintain a register for contractors.** Operators are required to keep a register of their contractors with each contractor's 1) trade name, business address, and business telephone number; 2) a description of the nature of the work to be completed and where at the mine the work is performed; 3) the contractor's MSHA ID number, if any; and 4) the contractor's address of record for service of citations or other documents.⁷ Requiring contractors to have an MSHA ID number alerts MSHA to the contractor and eases recordkeeping burdens for both parties (although regulations do not require contractors to obtain MSHA ID numbers).
- 5) **Ensure contractor compliance with MSHA training requirements, Part 50 reporting, and recordkeeping requirements.** Mine operators must provide and document site-specific Hazard Awareness Training for all contractor employees. Operators should also require contractors to verify Part 46/48 training requirements for all employees at the mine site, as no amount of distancing can isolate an operator from allowing a training violation to occur or continue.
- 6) **Require contractors to comply with Mine Act and MSHA regulation when drafting the contract for work, including provisions for the contractor to verify it will produce, file, and maintain all required reporting and documentation.** Such provisions will allow the operator deniability and show that the mine operator will not assist the contractor except where the contractor's actions would place miners in harm's way.
- 7) **Include MSHA-specific indemnifications.** A quirk of operator/contractor liability is that an operator cannot challenge MSHA's decision to cite an operator for a violation — only whether the violation existed and the proposed penalty amount. Requiring the contractor to indemnify the operator against MSHA enforcement directed at violations committed by the contractor can help alleviate potentially large fines to the operator imposed by MSHA in cases where the violation exists and the penalty amount cannot be reduced.

About the Author:

Matt DeAtley is the fifth generation in a mining family and founded DeAtley Law, PLLC with the specific goal of assisting mine operators and contractors with MSHA Disputes. You can contact Matt at www.deatleylaw.com or by calling (208) 816-0625.

⁷ 30 CFR § 45.4(a).



Registration will close on Midnight March 3rd.

A registration form is at the end of this newsletter if you have not signed up already do it today.

OIAA 2019 Part 46 Refresher Training

Presented by: Adele Abrams & Josh Schultz

Roseburg Class – Douglas County Fairgrounds - March 11, 2019

Albany Class – Linn County Fair & Expo – March 12, 2019

2019 Board Meeting Schedule

*Our next meeting will be held on April 17th at 10AM
KPD Office Springfield, Oregon*

2019 Board of Directors

Erick Staley – Chairman
Roy Garrison – Vice Chairman
Mary McNatt- Treasurer
Kellie Ramar – Secretary
Melissa Mullins
Jerry Davidson
Bill Ruchti
Andrew Siegmund
Jim Jeffries
Dan Kauffman

Attention!!

We are looking for a few board members to replace those that we will be losing in 2019. If you are interested or would like more information on becoming a voice of your association please contact Chairman Erick Staley.

VISIT OUR WEBSITE AT WWW.ORAGGREGATE.COM



January 14, 2019

ANNUAL PART 46 TRAINING REGISTRATION

- Premier Corporate Members** Free to all your employees
- Corporate Members** Free to the first 10 employee \$ 100.00 for each additional
- Associate Members** Free to your first employee \$ 100.00 for each additional

Note: An Employee is someone on your actual payroll not contract company employees or Subcontractors

(Please check your membership type and pay for any additional employees accordingly)

REGISTRATION IS ON A FIRST COME FIRST SERVED BASIS

Register early to ensure that you get your preferred location, space is limited to each class.

Non-members the charge is \$ 350.00 for small companies (1 – 2 attendees) and \$ 650.00 for larger companies (3 or more). Please complete the information below. An invoice will be mailed to you. If you want to join the association and receive a discount on this training please contact Kellie Ramar at (503) 849-5583

Coffee and lunch will be provided at both of these trainings. **To guarantee that everyone gets lunch and that we are not paying for lunches we do not need,** please help us keep an updated count of your employees that will be attending by calling or e-mailing with updates as you add or remove from the list.

Thank you
Kellie Ramar – OIAA Secretary

Please circle the training date you wish to attend and list all the employees that will be attending.

- March 11, 2019 Douglas County Fair Grounds – Roseburg Oregon 7:30 AM – 5:00 PM
- March 12, 2019 Linn County Fair & Expo- Albany Oregon 7:30 AM – 5:00 PM

Company Name: _____ **Contact Person:** _____

Phone Number: _____ **e-mail address** _____

Please print clearly or type your employee’s first and last name that will be attending.

(Attach a second sheet if necessary)

NAME

NAME

- | | |
|-----------|-----------|
| 1. _____ | 11. _____ |
| 2. _____ | 12. _____ |
| 3. _____ | 13. _____ |
| 4. _____ | 14. _____ |
| 5. _____ | 15. _____ |
| 6. _____ | 16. _____ |
| 7. _____ | 17. _____ |
| 8. _____ | 18. _____ |
| 9. _____ | 19. _____ |
| 10. _____ | 20. _____ |

Fax your completed form to (503) 357-3649, e-mail to kramar@kenleahy.com or mail to Kellie Ramar 14815 E 53rd Street, Yuma Arizona 85367. **To make sure you don’t get left off the list fax or e-mail is recommended.**

Please e-mail or call me immediately if you need to make any changes to you