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From: SafetyLawyer@aol.com [mailto:SafetyLawyer@aol.com]
Sent: Friday, November 10, 2006 9:37 AM
To: Silvey, Patricia - MSHA
Cc: silvey.pat@dol.gov
Subject: RIN 1219– AB51

PLEASE NOTE: I twice attempted to send this to the e-mail address listed in the Federal Register (zzMSHAcomments@dol.gov) and it bounced back each time on 11/9/06. Please include this in the administrative record for this rulemaking. Thank you!

November 9, 2006

Dear Ms. Silvey,

I wish to supplement my initial comments to address the issue of informal conferences raised in the reopened rulemaking concerning modification of 30 CFR Part 100 criteria. In this modified proposal, MSHA suggests that mine operators and contractors should be required, in advance, to explain the basis for their conference request with regard to each challenged citation/order.

As an attorney and Certified Mine Safety Professional (and holder of an MSHA Contractor ID number), I am regularly involved in conferencing citations/orders on behalf of clients. The normal process is that my client will receive a citation and forward it to me for review. We will request a conference (usually scheduled two to three weeks after the request, due to the Conference and Litigation Representative's case load). I will then compile information on the alleged violation, interview relevant personnel and examine pertinent documents and case law to prepare the arguments in support of mitigating the gravity/negligence or as a basis for vacating the citation/order entirely.

I previously objected to MSHA's proposal to truncate the conference request period from 10 days to 5 days. That proposal will not expedite the penalty process but will simply reduce the use of the conference process by making it more difficult for operators to qualify for this "privilege" (which seems to be at the discretion of the District Manager in the first instance). As I previously noted, many operators will not be able to file for a conference in this short period of time because of internal delays in obtaining copies of citations and evaluating them so quickly - much less having time to get outside counsel involved in the process.

MSHA's latest modification, to require a statement of the basis for the conference request, further complicates the conference process and adds yet another stumbling block to further minimize the use of this facet of the ACRI process. Most operators - large and small - will lack the ability to do the comprehensive analysis of citations in such a short period of time (5 days) that would be necessary to accurately reflect the arguments (legal and factual) that they might want to raise in conference. Moreover, it creates the potential for inaccurate information to be proffered if such investigations/analyses are done in a hurry. This could subject the company representative to possible prosecution by the government under 18 USC as, in many cases, investigations will still be open at the time the conference occurs. Care must be exercised in conference, as MSHA can make a citation "worse" (increase negligence/gravity) if incriminating information is provided. Therefore, companies must have time to confer with counsel before submitting any information or statements that could incriminate the company or its supervisors.

Rather than take this risk, mine operators and contractors may avoid the conference process altogether and simply file notices of contest instead. This will increase litigation expenses for all concerned and result in contests of citations that might otherwise have been vacated or modified to the operator's satisfaction in conference.

There is no statutory obligation under the MINER Act (Public Law 109-236) to modify the current conference procedures in any

way. I urge MSHA to withdraw entirely the portions of this rulemaking that would shorten the conference request period or otherwise place conditions upon the granting of conferences.

Thank you for your consideration of my perspective.

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