



MSHA's Still Making Its POV List, But No Longer Checking it Twice

Insights

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Staying Off MSHA's "Naughty List"

The Mine Safety and Health Administration (MSHA) recently released a Final Rule that significantly changes the way the Agency charged with protecting America's miners enforces one of its most powerful enforcement tools: pattern of violations (POV).

Before the Final Rule becomes effective on March 25, 2013, operators subject to MSHA's jurisdiction should familiarize themselves with these important changes to MSHA's existing POV rules. By monitoring your company's enforcement history, training your supervisors and managers, and challenging erroneous "significant and substantial" (S&S) determinations, you can best protect your company from being placed on POV notice.

Some Background

Under the law, MSHA has the authority to issue a pattern of violations notice to mine operators with a pattern of recurrent S&S violations. Specific screening criteria is available on [MSHA's website](#). Prior to issuance of the Final Rule, MSHA would issue a potential pattern of violations (PPOV) notice to operators, allow the operator to review and comment on the documents upon which the PPOV is based, and develop a corrective-action plan to reduce S&S violations. If the operator did not meet prescribed improvement goals, MSHA would then issue the POV notice.

Upon a subsequent inspection, for each S&S violation found, MSHA has authority to issue an order withdrawing miners from the affected area until the cited condition is corrected. This can cause significant production delays for operators as it may take several days to correct some conditions. An operator may be taken off POV status when 1) an inspection of the entire mine is completed and no S&S violations are found; or 2) no withdrawal order is issued by MSHA within 90 days of the issuance of the pattern notice.

The New Final Rule Change

MSHA implemented the POV Final Rule because the Agency determined that "the existing regulation does not adequately achieve the intent" of the Mine Act that "the POV provision be used to address mine operators who have demonstrated a disregard for the health and safety of miners."

Unsatisfied with the current POV regulation, MSHA decided to streamline its requirements under the regulation to increase "the efficiency and effectiveness in issuance of a POV notice." Despite

concern from several commenters that the changes fail to provide operators sufficient due process, MSHA's revisions significantly alter the current regulation.

Elimination Of PPOV Notice Requirement

The Final Rule eliminates the requirement that MSHA warn an operator that its citation history may subject it to a POV notice. By eliminating the PPOV notice, MSHA has affirmatively placed the burden of tracking and monitoring enforcement history on mine operators. This is significant because operators are currently afforded the opportunity to meet with MSHA to discuss any errors or inaccuracies in citation history, explain any mitigating circumstances, and submit a corrective-action plan to reduce the number of S&S citations.

MSHA responded to commenter concern about this change by explaining that operators have the burden of tracking their citation history to determine whether their mine sites are approaching the screening criteria thresholds. MSHA noted that operators may still submit a corrective-action plan, which may serve as a mitigating factor against a POV notice. Operators may also request a meeting with the MSHA District Manager to discuss any errors or inaccuracies in MSHA's data. Finally, operators are permitted to request expedited temporary relief from the Federal Mine Safety and Health Review Commission (FMSHRC) in the event a closure order is issued.

Elimination Of Final Order Requirement

Arguably the most significant change is that MSHA has abandoned the requirement that citations must be "final orders" and will now consider all S&S citations issued to an operator. Prior to the Final Rule, MSHA could only consider "final orders," or citations that have been accepted by the operator, resolved through settlement, or adjudicated by an Administrative Law Judge (ALJ). Now, MSHA will consider any S&S citations issued – even those citations contested by operators and pending at the FMSHRC.

MSHA claimed that its POV notice regulation was not as effective as it should be because it often takes several years for citations to become final orders. According to MSHA, the safety concerns warranting POV notice may not be relevant by the time the citations become final orders. But as many operators know, S&S designations are often overturned by ALJs, or even modified to non-S&S by MSHA during informal conferences or settlement negotiations. MSHA's consideration of non-final citations leaves open the possibility that a mine operator could be placed on POV status based on citations that are improperly designated S&S. Interestingly, MSHA's Final Rule failed to mention the percentage of citations that were reduced from S&S to non-S&S.

A Moving Target

In addition to the changes discussed above, MSHA decided that it has the authority to change its screening criteria for POV at any time, without formal notice and comment rulemaking. If MSHA decides to modify the screening criteria, it will provide an opportunity for stakeholders to comment on the proposed changes before they go into effect. Although MSHA indicates that the screening

criteria may move in either direction, MSHA's revised regulation indicates that the Agency intends to increase the use of its POV authority, rather than make the screening criteria more lenient.

Protecting Your Company

Fortunately, most mine operators do not receive a sufficient number of S&S citations to trigger the current screening criteria thresholds and the Final Rule will not likely impact their operations. Mines that do receive a significant number of S&S citations should take the following steps to avoid POV status.

Regularly Review Citation History

MSHA's website includes a Monthly Monitoring Tool for Pattern of Violations that all operators should regularly review. If your mine site has met one or more of the applicable screening criteria, you should review your health and safety programs to determine the root cause of S&S citations. If your site is nearing POV status, you should also consider meeting with your District Manager to discuss your site's citation history, point out any inaccuracies in the data, and consider implementing a corrective action plan. MSHA provides a sample corrective action plan that can be modified to fit your needs.

Train Your Supervisors

Supervisors and managers should be trained to spot and immediately correct any hazardous conditions at your mine site. Additionally, your supervisors and managers should be familiar with the legal tests for S&S and unwarrantable failure designations. With proper training, your supervisors and managers will be prepared to discuss potential citations with MSHA during an inspection, reducing the chances of an erroneous determination. Your supervisors and managers should be prepared to explain to MSHA why a potential citation is not appropriately designated S&S in a clear and concise manner.

Challenge Erroneous S&S Designations

Once MSHA begins relying on non-final S&S citations to assess POV status, it will be more important than ever to aggressively challenge erroneous S&S designations. Your supervisors and managers who participate in inspections will be your first line of defense. Convincing an inspector that a potential citation is not properly designated S&S is the best way to prevent POV status.

Additionally, take advantage of the informal conference procedure by requesting a conference within 10 days of issuance of an S&S citation. This will be your last opportunity to dispute the inspector's findings prior to the citation being entered into MSHA's database.

You may also formally contest the citation if the informal conference does not accomplish the goal of reducing the citation to non-S&S. At this point, MSHA will file a Petition with the FMSHRC to enforce the citation. Be prepared to present your arguments to MSHA's representative regarding the reasons the S&S citation was improperly issued. Ultimately, you may choose to present your arguments to an ALJ at a hearing and later appeal the decision to the FMSHRC and other courts of appeal.

appeal.

Staying off MSHA's POV list may be more difficult once the Final Rule is in place, but by implementing these strategies, most mine operators will not need to worry about being on the "naughty list" this year.

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