MSHA Launches Pilot Program for Conferencing Citations

Insights
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The Mine Safety and Health Administration (MSHA) has launched a pilot program for Part 100 conferencing in the hopes of reducing the number of contested citations. Under the pilot program, which will run from April 1 – June 30, 2019, MSHA will hold conferences with operators with the understanding that the goal of the conference is to reach a negotiated settlement before the contest process begins. During the conference, the operator and MSHA would negotiate both paper changes and penalty amounts for all citations conferenced. If a resolution is reached, both parties would sign an agreement indicating the terms of the settlement and that the operator agrees not to contest the citations or assessments before the Federal Mine Safety and Health Review Commission ("FMSHRC"). If a settlement is not reached, the operator would retain its contest rights before the FMSHRC. The pilot program applies only to 104(a) citations that are not subject to a special assessment.

The pilot program has several potential benefits for mine operators. Whether operators can even obtain a conference has long been a source of frustration, as under 30 C.F.R. §100.6(a), MSHA has the "sole discretion" whether or not a conference is even granted. It would seem, however, that if the pilot program is going to work, MSHA would be more inclined to grant conference requests. Second, if MSHA is committed to reducing contested citations through the program, it should be more willing to negotiate reductions than operators may have previously experienced in the Part 100 conferencing process.

When participating in a conference, operators should take care to advise MSHA that anything stated or written during the conference is for settlement purposes only and cannot be used in future contest proceedings if a settlement is not reached. Under Federal Rule of Evidence 408(a), neither (1) an offer or acceptance of an offer to settle a claim, nor (2) "conduct or a statement made during compromise negotiations about a claim" are admissible "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Fed. R.Evid. 408(a). Given that the stated purpose of the pilot program is to negotiate a settlement, Federal Rule of Evidence 408(a) *should* apply. Still, operators should emphasize this point in any written document setting forth its position or at the outset of any in-person meeting. Operators may wish to consult counsel prior to engaging in negotiations through the pilot program to ensure they are fully prepared for a conference.

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