



Opinion: It's Time For Mine Safety Agency To Create Voluntary Protection Program

Insights

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As the current administration continues with its purported deregulatory agenda, the Mine Safety and Health Administration (MSHA) is struggling for an identity. After years of some of the most stringent compliance activity ever seen from an enforcement agency, the mining industry is experiencing record low injury rates and a historically low number of fatalities. While there may be some disagreement between the cause and effect of such historically low numbers, there cannot be any question that this extreme level of government oversight came with a cost.

The Current System Is Not Effective

Since at least 2006, MSHA waged a regulatory war on industry. From 2007-2011, industry saw record numbers of enforcement actions issued. Assessed penalties eclipsed the \$100 million mark. Special investigation rates were the highest in MSHA's history. MSHA had a clear intent to use a carrot-and-stick approach to compliance – but without the carrot. The agency punished operators into compliance, those who fought back were bullied. Many resorted to legal challenges to MSHA's enforcement. Contest cases clogged the legal system, creating a backlog of cases that took years to clean out.

However, industry eventually emerged on the other side. Not all operators survived, but those that did have been galvanized. Safety has never been in such sharp focus for so many operators, large and small.

Today, MSHA is an agency searching how to make a meaningful impact on mine safety. MSHA has been directed to reduce the number of citations issued, cut assessed penalty dollars, and virtually stop its special investigations program. The agency has reduced its workforce by almost 500 employees since 2016. In 2020, expectations are the agency will have its budget cut to reflect the diminishing impact the agency has.

The Solution: VPP

Luckily, the Occupational Safety and Health Administration (OSHA) has the answer. In 1979, OSHA worked with state regulators in California to develop an experimental program that created a partnership between employers and a government safety agency. This partnership put safety, not enforcement, first. This experimental program was a success, and in 1982 OSHA officially created the Voluntary Protection Program (VPP). It has paid dividends ever since.

Under the VPP, OSHA and employers work together to prevent injuries, illnesses, and fatalities. The VPP includes hazard prevention, jobsite analysis, and training. There is a rigorous application process followed by an involved qualification program. Companies that make it through are re-evaluated every three to five years to remain in the program. The plus side: companies that are part of the VPP are exempt from programmed inspections while they maintain their VPP status.

OSHA's VPP has been a success because the partnership creates a performance-based safety management system that significantly reduces hazards in the workplace. The average VPP worksite has a lost time/injury rate more than 50% below the industry average.

Creating a partnership between MSHA and operators could be what pushes the mining industry further towards the goal of zero fatalities. Creation of a VPP would allow MSHA to focus their inspection and compliance efforts on the operations that need it most. Instead of racing from mine to mine to complete inspections, MSHA could renew its approach to safety and spend more time with the miners, observing work practices and fostering a safe workplace.

The Time Is Now

This is not the first time to suggest MSHA create a VPP. At least several times before, industry has requested MSHA move away from an outdated enforcement scheme and help develop safety and health programs that utilize modern methodology and technology and focus on safety. MSHA has always responded that the Mine Safety and Health Act of 1977 (Mine Act) mandates complete inspections of all surface and underground mines under MSHA jurisdiction. The creation of a VPP, MSHA argues, is contrary to this specific mandate under the Mine Act. MSHA takes the view that it is an enforcement agency, that operators are not “partners” in safety, and that no mines could be exempt from the “complete inspection” requirement of the Mine Act.

However, MSHA has made a recent change to their inspection procedures that should give it pause before summarily rejecting the VPP concept. For years, MSHA used ITS to track inspections at mines. ITS is a database that MSHA uses to track every piece of equipment on a specific mine site. MSHA used this program to create a checklist of all mining equipment, and once that checklist was checked off, the inspection could be considered “complete.” Beginning in January 2020, MSHA stopped using ITS to track inspections and switched to an “as encountered” system. This means that inspectors inspect equipment as they encounter it on their inspections. MSHA made this switch so that the inspectors do not waste significant time tracking down a specific piece of equipment, and inspectors are no longer required to fill out a checklist in order to complete their inspections. As a result, MSHA inspectors have been directed to match their inspection times under an “as encountered” system to their inspection times from the ITS inspection system. For example, if an MSHA inspector took 100 hours to complete an ITS inspection at a specific mine, the inspector has been directed to spend 100 hours on an “as encountered” inspection at that same mine in order to consider it a “complete inspection.”

What this really means is that MSHA has changed its interpretation of what a “complete inspection”

is. This is significant because MSHA has shown it can meet the Mine Act inspection mandates now it sees fit. Thus, MSHA could easily decide participation in a VPP could meet the Mine Act inspection mandates. MSHA could easily develop a VPP that exempts mines from inspections if certain criteria are met. MSHA is free to decide what those criteria are, and whether meeting the criteria fulfills the “complete inspection” requirements of the Mine Act.

At some point, whether it is now or when the agency has more progressive leadership, there will be a change. Adjustments must be made to keep this agency relevant. We are already seeing a decline in inspections, funding, and agency personnel. The creation of a VPP will give MSHA a new mission, a new direction, and a new way to create a safer workplace for our nation’s miners.

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