



# **The 6th Circuit Punts on MSHA's New POV Rule**

Insights

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In a recent decision, the U.S. Court of Appeals for the 6th Circuit dismissed the mining industry's challenge to the Mine Safety and Health Administration's ("MSHA") recently revised pattern of violations ("POV") rule concluding that the Court lacked authority to hear the claim.

## ***POV Background***

Under the Mine Act, MSHA has the power to issue a POV notice to mine operators of mines that have demonstrated a recurring pattern of significant and substantial ("S&S") violations of mandatory health or safety standards. Once an operator is given POV notice, if an MSHA inspector finds a subsequent S&S violation within ninety days, MSHA has the authority to issue a withdrawal order, shutting down production and removing miners from the affected area until the violation has been abated.

## ***A Change in the Landscape of MSHA Enforcement***

In 2013, MSHA revised the POV rule, making significant changes to one of MSHA's most powerful enforcement tools. Significantly, the new POV rule eliminated the potential POV ("PPOV") notification, by which mine operators were given a warning that they were in danger of being placed on POV status. Under the old rule, mine operators were given an opportunity to implement a corrective action plan ("CAP") to avoid being issued POV notice.

Even more significant (and controversial) is the elimination of the old rule's requirement that MSHA could only consider final orders in reviewing a mine's history of violations. Under the new rule, MSHA can consider all S&S citations, regardless of whether the citations are currently being contested by mine operators. In other words, the new POV rule eliminated what many in the mining industry consider to be a mine operator's fundamental due process right to challenge the inspector's finding before it can be considered in the POV process.

## ***Mining for Answers – The Mining Industry Questions MSHA's New POV Rule***

Following the issuance of the new rule, several mining industry groups, including the National Mining Association, petitioned the 6th Circuit to review MSHA's new POV rule. These groups challenged the validity of the new rule, arguing that, among other things, the removal of certain procedural safeguards such as the PPOV notice and the requirement to base POV notice on final orders constitutes a deprivation of due process. Without reaching the merits of these arguments, the 6th Circuit dismissed the challenge for lack of jurisdiction.

In making its ruling, the 6th Circuit explained that the Mine Act only allows the courts of appeals to decide cases when 1) a party challenges a citation for violating the Mine Act or its regulations before the Review Commission and then appeals an adverse decision, or 2) a party adversely affected by a mandatory health or safety standard files a petition challenging the validity of such mandatory standard. The mining industry groups argued that the 6th Circuit is permitted to review all substantive rulemaking under the Mine Act, not just mandatory health or safety standards. Alternatively, the groups also argued that MSHA's new POV rule should be considered a mandatory health and safety standard.

The 6th Circuit ultimately rejected these arguments and held that because the Mine Act does not explicitly provide jurisdiction to review rules that are not mandatory health and safety standards, it lacked jurisdiction over the initial review of the new POV rule. In concluding that the new POV rule was not a mandatory health or safety standard, the panel explained that mandatory standards impose obligations on mine operators such as setting acceptable levels of dust in the air, identifying what type of information must be included on maps of mines, and establishing how to ground high-voltage circuits. In contrast, the new POV rule "is directed at the Secretary [not mine operators] and provides a mechanism to measure mine operators' compliance with the mandatory health or safety standards."

### ***Down For the Count?***

Although the 6th Circuit could have chosen to transfer the case to the proper venue rather than dismissing it, the panel declined to do so, explaining that the petitioners, who represent mining groups' interests across the country, did not identify the district court where the case could have originally been brought. The mining industry groups must now decide whether to re-file the case, challenge the application of the POV rule to a particular mine through the Commission, or give up the fight.

### ***How to Avoid POV Status***

Without any judicial review of the substantive arguments raised by the mining industry, MSHA's new POV rule remains in full force and effect. Mine operators, especially those that receive a large number of S&S citations, must be proactive in taking steps to avoid POV status. With the new POV rule placing the burden of monitoring enforcement history on mine operators, operators should take advantage of MSHA's Monthly Monitoring Tool for Pattern of Violations, which can be found on the agency's website, to track citation history on a regular basis.

It is also important that supervisors and managers are knowledgeable of the legal standards for S&S designations so that they can challenge any erroneous S&S determinations during the inspection. It is a good practice for mine operators to request an informal conference within ten days of being issued an S&S citation to dispute the inspector's findings and reduce the gravity of the citation to non-S&S before it's entered into MSHA's database. Remember, although contesting a citation no longer postpones the issuance of a POV notice, nothing prevents operators from formally contesting what they believe to be an improperly issued S&S citation.

Finally, mine operators approaching POV status should implement and submit a corrective action plan to their MSHA District Manger, which may be considered as a mitigating circumstance to justify postponement or non-issuance of a POV notice. For more tips on how to stay off MSHA's POV "Naughty List," check out Fisher Phillips attorney Matthew Korn's article *MSHA's Still Making Its POV List, But No Longer Checking It Twice.*

To read the 6th Circuit's full decision, [CLICK HERE](#).