



Mining MSHA – Understanding The Contest Process

Insights

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Welcome to “Mining MSHA,” a regular series of posts focusing on mine safety fundamentals – but designed for both new and experienced mine safety professionals. This series will help safety professionals develop their MSHA legal knowledge, as we explore over 40 years of case law developed by the Federal Mine Safety and Health Review Commission and its bench of Administrative Law Judges. You will want to share this series with your safety personnel at all levels, because understanding what MSHA can and cannot legally do is the first step in managing your relationship with this enforcement agency. Join your [Fisher Phillips Mine Safety team](#) as we mine legal knowledge from the body of Federal Mine Safety and Health law.

Inevitably, a mine operator will receive a citation or order it disagrees with. The operator may attempt to conference the citation or order, discussing the merits of an enforcement action with the MSHA district. To request a conference, the operator should submit a written request to the district within 10 days of its issuance. However, it is within MSHA’s discretion whether to even conduct a conference.

If an operator can secure a conference, it will be given the opportunity to present to MSHA why the citation or order should be vacated or modified. MSHA will then advise the operator of its decision. Whether or not the citation or order is conferenced, an operator may formally contest the enforcement action. The contest process itself is straightforward – there are two options, the pre-penalty Notice of Contest (NOC), and the Penalty contest.

The Notice Of Contest

Once MSHA issues a citation or order, a mine operator has 30 days to file a notice of contest with the Federal Mine Safety & Health Review Commission. Pre-penalty notices of contest are voluntary and are typically filed when there are issues with abatement – terminating the citation would cause a negative operational impact, or to contest certain orders that are not assessed penalties such as 103(k) or 107(a) orders.

But a notice of contest can be filed to challenge the citation or order itself, any modification to a citation or order, and the length of time and reasonableness of abatement. A notice of contest must include a copy of the citation or order, a short statement of the operator’s position regarding each issue of law and fact, and state the relief requested.

An operator may request an expedited hearing on a Notice of Contest if it would be irreparably harmed if its case is not heard quickly. Typically, requests for expedited hearings are only granted if an operation is shut down as a result of an order. If an operator chooses not to file a notice of contest, it can still file a penalty contest.

The Penalty Contest

Once the penalty for a citation or order is assessed, a mine operator has 30 days from the receipt of the assessment form to contest the penalty and request a hearing before a Federal Mine Safety and Health Review Commission administrative law judge. The civil penalty contest is separate from the pre-penalty notice of contest and an operator who filed a pre-penalty contest must still contest the penalty when it is assessed.

While the penalty contest is not contingent upon filing a notice of contest, if an operator does not contest the penalty within 30 days of receipt, the citation and penalty become final, regardless if a notice of contest was filed. In a civil penalty proceeding, an operator contests the underlying violation and all aspects of that violation, including “significant and substantial” and negligence designations.

Why Contest?

There are various reasons a mine operator will contest a citation or order – it may disagree with the fact of a violation, dispute “significant and substantial” (S&S) and negligence designations, argue against unwarrantability and potential agent liability, and even argue to reduce the number of persons affected. The designations on a citation affect not only the penalty, but an operator’s enforcement history. If you have too many S&S citations, you could trigger a pattern of violations (POV) order. Your negligence can increase if you are consistently cited for the same conditions, and your repeat violations points increase penalties.

Conclusion

Operators should know their S&S rates, POV status, and what standards are hitting on repeat violations. Use this information to develop a strategy for contesting citations and remember that maintaining low S&S rates is always desirable. There is no question that under the current administration, we are seeing a significant decrease in enforcement actions issued. However, that could change, and if it does, operators want to be in the best position possible to adjust their contest strategy. Reach out to your mine safety lawyer, or [any attorney in our Mine Safety & Health group](#), for specific questions and guidance on the contest process.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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