



**OSC | 11**  
Ohio Safety Congress & Expo

**#371 Mining in today's regulatory environment**

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Ohio Bureau of Workers' Compensation

## Mining in Today's Regulatory Environment

- Ohio Safety Congress
- March 31, 2011
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## Outline of Presentation

- Mine Safety Background
- MSHA vs. OSHA
- MSHA Inspections
- General Duty
- Individual Civil Penalties

## Mine Safety Background

- MSHA/OSHA
  - Since the 1970s, MSHA and OSHA have been the agencies regulating worker safety.
  - At first glance, it appears simple: MSHA regulates "mines"; OSHA regulates most everything else.
    - "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce...shall be subject to the provisions of [the Mine Safety Act]."
  - But it's not that simple...

## What is a "Mine" according to MSHA?

- Legislative history states it was the intent of Congress that a mine be given the broadest possible interpretation, and that all doubts be resolved in favor of inclusion of a facility within the coverage of the Act.
- Mine includes:
  - (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground
  - (B) private ways and roads appurtenant to such area, and
  - (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form or if in liquid form, with workers underground or used in, or to be used in, the milling of such minerals or the work of preparing coal or other minerals, including custom coal preparation facilities.

## What is "Milling"?

- Crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing, cutting stone, heat expansion, retorting (mercury), leaching, and briquetting.
- It does not matter if the processing is done in a facility miles away from the quarry: these processes are still "mining" and therefore regulated under MSHA.

### So what is regulated under OSHA?

- Generally anything that does not fall under the MSHA jurisdiction of mining; for example:
  - Concrete Batch Plants
  - Asphalt Batch Plants
  - Hot Mix Plants Plants

### MSHA/OSHA – What’s the difference?

MSHA	OSHA
Mandatory Inspections	No Mandatory Inspections
Walkaround Pay for Employee's Representative	No Walkaround Pay
Authority to Close Plant	No Closure Authority
Mandatory Penalties	No Mandatory Penalties
No General Duty Clause	General Duty to Correct Hazards
Individual Civil Penalties for Corporate Officers and Agents	No Individual Civil Penalties

### MSHA Inspections

- Mandatory
  - Two per year for surface mines
  - Four per year for underground mines

### MSHA Inspections - No Advance Notice

- The inspectors cannot give you notice
- You and your employees cannot give each other notice of their arrival.

### MSHA Inspections - No Advance Notice (continued)

- Possible Consequences
  - Permanent injunction
  - Temporary injunction
  - Criminal fine of up to \$1,000
  - Imprisonment
  - Civil penalty under Section 110(a)
  - Personal liability on individual corporate agents
    - More about this in a few minutes

### MSHA Inspections

- Right to Accompany Mine Inspector
  - You may have an operator’s representative and an employees’ representative accompany the mine inspector during the inspection.
  - They can’t just come on the property and start inspecting.
  - You cannot excessively delay or call other employees to warn.
  - Employees’ representative is entitled to walk-around pay.

## Citations and Orders

- Basic difference
  - Citations notify of violation but do not close the plant
  - Orders close part or all of the plant

## Citation and Mandatory Penalty

- Will give time-period to correct.
- Will be sent to MSHA Office of Civil Penalty Assessments to determine amount of penalty, which is mandatory, based on the following five factors:
  - Size of business (tonnage and employee hours worked)
  - History of operations (last 30 months)
  - Degree of gravity (was the violation □ Significant and Substantial □?)
  - Degree of negligence
    - The Mine Act is a strict liability statute, so a penalty is due even where there is no negligence, but may be higher depending on the level of negligence.
  - Demonstration of good faith
    - Timely abatement may reduce the fee
    - Not addressing may increase penalty points

## Missing Sixth Factor - Ability To Continue In Business

- Required under the regulations to be considered
- However it is presumed unless the operator affirmatively provides evidence to the contrary.

## General Duty Clause

- OSHA - Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.
- MSHA - No general duty clause.
  - But, general language in the regulations may create the same effect, e.g., "safe work procedures."

## Liability - Common Law

- For most businesses, corporate directors, officers, and agents are not liable for the liabilities of the corporation, unless personally negligent in their duties.
- But this is NOT the case for mine operators.

## Indemnification of Employees and Agents of the Corporation

- Pursuant to Section 1701.13 of the Ohio Revised Code, a corporation may indemnify any person who was or is a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation.

## Individual Liability

- Section 110 (c) of the Mine Safety Act says those who take action on behalf of a corporation have personal liability:
  - Whenever a corporate operator violates a mandatory health or safety standard or order, any director, officer, or agent of said corporation, who knowingly authorized, ordered or carried out such violation ... shall be subject to the same civil penalties, fines and imprisonment that may be imposed on a mine operator.
- Applies to both corporations and limited liability companies.

## Individual Liability (continued)

- "Agent" is broadly defined
  - Any management person so long as the individual has a degree of responsibility for operating a mine.
  - Front-line supervisors such as mine managers, superintendents, foremen, safety personnel, and their assistants may be targeted for investigation.

## Individual Liability (continued)

- "Knowingly"
  - A knowing violation occurs when a person in a position to protect employee safety and health fails to act on the basis of information that gives that person knowledge or reason to know of the existence of a violative condition.
    - Some level of authority
    - Some level of knowledge of the condition
      - The condition just must be violative - the person does not have to know they are violating the law to be personally liable.

## Individual Civil Penalty Assessments

- If an individual assessment is proposed, the individual will have 30 days to contest the violation.
- Important to be timely because it becomes a final order not subject to appeal or review.

## Increase in Penalties

- Difficult to get statistics, but generally:
  - Number of penalties has increased
    - Inspectors may be penalized for missing a violation but face no consequences for erroneous citations, producing numerous "false positives."
  - Cost of penalties has increased.
    - Highly subjective determination and wide discretion afforded the inspector.
  - Huge backlog of contested cases.
    - Informal process to resolve disagreements between the inspector and the operator has been suspended, forcing the increase of formal contests.
  - No clear connection between the increase in penalties and mine safety.

## Conclusion and Questions

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