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Political Enforcement v. Due Process: Does the Victor Create Safety for Our Nation's Miners?

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Since 2006, the mining industry in the United States has experienced several tragic events. The incidents at Sago, Aracoma, Darby, and Crandall Canyon resulted in sweeping changes in both state and federal mining laws, in addition to increased scrutiny by state and federal regulators. To its credit, the mining industry responded by shortening the time for reporting accidents, developing emergency response plans, adding additional mine rescue teams, lifelines, stronger underground seals, emergency shelters, tracking systems, redundant communications and additional self contained breathing apparatus units. The regulated community rose to the occasion and answered the call of the Mine Safety and Health Administration ("MSHA"), Congress and state legislatures. The mining industry invested millions of dollars into changes which regulators and politicians promised would improve mine safety, and help to assure that miners would return home safely.

What happened to the benefits that miners and their families were supposed to reap from the myriad changes in mining laws following these tragic events? Why is it that a mammoth federal enforcement agency spending hundreds of millions of dollars continues to see fatalities occur? Has safety in our nation's mines collapsed entirely? Is MSHA not issuing enough citations, and levying enough fines? Or, is it possible something is looming behind MSHA's regulatory curtain that creates the illusion that issuing citations and fines guarantees a safe workplace? Several little known facts about MSHA enforcement may help answer some of these troubling questions.

In 2006, the year of the Sago mine disaster, MSHA issued 77,727 citations and orders in the coal sector of the mining industry.[1] By 2009 that number skyrocketed to 102,660, an increase of 32%. In addition, in 2007 the Department of Labor enacted the largest penalty increase in the history of the Federal Mine Safety and Health Act ("Mine Act"). The change in the penalty formula dramatically increased penalties from $12.2 million dollars in 2006, to a staggering $141.2 million dollars in fines in 2009, an increase of nearly 1,100 %.[2]

Given MSHA's dramatic increase in citations and fines between 2006 and 2009, one would question whether the industry's commitment to safety collapsed during this time period. Interestingly, the exact opposite occurred. MSHA's data suggests that between 2006 and 2009, the coal mining industry experienced a decrease in fatal accidents from 47 fatalities in 2006, to 18 in 2009.[3] Similarly, injury rates also dropped from 4.46 to 3.67. Remarkably, the declines occurred during the same time period that coal production in the United States reached its highest levels in history.[4]

Prior to the recent incident at the Upper Big Branch Mine ("UBB") MSHA would have argued that this data proves that writing citations and levying big fines against coal companies results in safer coal mines. Unfortunately, for MSHA, this line of reasoning runs counter to their up-to-the-minute excuse for why

accidents and fatalities continue to occur in spite of increased scrutiny on mine operators.

MSHA, the Obama administration, and other anti-coal Washington politicians have recently locked arms in a full scale media blitz to deflect negativity regarding the UBB mine accident. MSHA's approach places the blame for continued accidents and deaths on industry attorneys who are supposedly restraining enforcement by contesting MSHA citations and orders.[5] Senator Jay Rockefeller (D-WV) recently stated on the floor of the United States Senate that the "the appeals process allows operators to get away with a myriad of safety violations by tying the matter up in court." These accusations are clever and they have great media appeal. Unfortunately, the oratory is littered with half truths and is actually little more than political posturing. It is about time someone sets the record straight.

First, what MSHA and the Washington anti-coal politicians conveniently leave out of their public scorn is that every single condition cited by an MSHA inspector must be corrected within a time frame established by the issuing inspector. If the mine operator fails to correct the condition within the time established by the inspector a failure to abate order will be issued pursuant to §104(b) of the Mine Act.

The widely recognized "B Order" permits MSHA to withdraw miners from the affected area, and also allows the agency to issue a fine of $7500 for each day the condition remains uncorrected. Just as important, the §104(b) failure to abate order becomes part of the mine operator's history of violations at that particular operation, and is subsequently a key factor in MSHA's pattern of violation analysis for the mine. The truth is a miner operator's decision to challenge any MSHA citation or order only comes about after the alleged hazard has been removed and the condition corrected. An operator's due process rights have always been subordinate to the safety of its miners - and rightfully so.

Second, the reality is a high percentage of MSHA citations, and their accompanying fines, do not survive legal challenges. This is due in large part to the fact that MSHA has been under substantial political pressure from Congress since 2006 to issue more citations and orders. This Congressional intrusion has resulted in countless citations and orders being issued irrespective of their validity. Further complicating the issue is that this is occurring at the same time MSHA is admitting to a deficiency in training for their inspectors. Recently, the Department of Labor revealed that MSHA inspectors were not properly trained or provided with appropriate continuing education training. The report suggests that in many instances MSHA inspectors, who had not completed training, were making inspections and issuing enforcement actions. This candid disclosure is particularly troubling in light of the subjectivness that is inherent in the issuing of MSHA citations and orders.

I am not suggesting that conditions in mining operations are perfect at all times. Underground mining occurs in a dynamic environment where conditions change dramatically in a split second, and violative conditions can occur just as rapidly. I am also not suggesting that every enforcement action MSHA issues is invalid. The dynamic nature of the underground mining environment provides plenty of opportunity for miscalculation on both sides of the equation.

For these reasons, and a host of others, the right to due process is a critical piece of the mine health and safety puzzle. To be sure, the dismantling of due process, as advocated by MSHA and its supporting cast of Washington politicians, would be a major set back to mine safety. It is absolutely crucial that we continue to maintain a system that distinguishes between MSHA enforcement actions that actually identify violations of the law, and those which are issued simply to provide political cover for MSHA's agency heads and elected politicians. If the individuals advocating the elimination of due process would bother to ask, I am sure most miners would say that the intervention of politics into mine safety does nothing to make their workplaces safer.

Former U.S. Supreme Court Justice Felix Frankfurter once wrote that "the requirement of “due process” is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble…" Our mining industry is currently experiencing troubled times. But, as Justice Frankfurter so eloquently affirmed, the elimination of due process of law in times of difficulty will not solve the problem. We all agree that the

loss of even a single miner is one more than we are willing to accept. The interested parties must come together, once again, to solve this problem without trampling a time honored constitutional protection that is so very crucial to health and safety. Our nation's miners deserve no less.

The views expressed in this article are not the views of Dinsmore & Shohl LLP but of the author.

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(1) MSHA's regulatory jurisdiction encompasses coal, and the metal/nonmetal sector of the U.S. mining industry.
(2) In 2008 the total dollar amount of penalties assessed by MSHA was $194,193,704. According to MSHA's website this was the largest amount of penalties assessed by MSHA in a single year.
(3) These numbers are for underground and surface coal mining operations.
(4) http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT10.HTM
(5) Because of limitations on the length of this article I am not able to address the political rhetoric being advanced regarding the pattern of violations issue. However, I would be remiss if I did not say that if there truly is a limitation on MSHA's ability to use of the pattern of violations it is entirely self-induced. The fact is MSHA seldom, if ever, used the pattern of violations as an enforcement weapon prior to the Sago incident. More importantly, §104(d) and §107(a) of the Mine Act provides MSHA will all the power they would ever need shutdown a mine, or to withdraw miners if an MSHA inspector truly believes a hazard exists.