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# **MINE SAFETY & HEALTH LAW**

## **Bulletin**

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### **MSHA ISSUES ITS NEW PROCEDURE FOR PART 100 SAFETY AND HEALTH CONFERENCES**

On March 27, 2009, the Mine Safety and Health Administration (“MSHA”) issued two new policy statements concerning Part 100 safety and health conferences.

- Program Information Bulletin (“PIB”) No. P09-05 is available on MSHA’s website at <http://www.msha.gov/REGS/COMPLIAN/Pib/2009/pib09-05.asp>.
- Procedure Instruction Letter (“PIL”) No. I09-III-03 is available on MSHA’s website at <http://www.msha.gov/REGS/COMPLIAN/PILS/2009/PIL09-III-3.asp>.

The policy statements were issued to inform MSHA personnel, mine operators, and independent contractors of the discretion of District Managers and Conference and Litigation Representatives (“CLRs”) to defer safety and health conferences under 30 C.F.R. § 100.6, until after civil penalties have been proposed and timely contested. The new safety and health conference procedure, which applies to coal and metal/nonmetal mines, represents a departure from MSHA’s longstanding practice of conducting safety and health conferences before civil penalties have been proposed.

#### **BACKGROUND**

In the past, when MSHA granted a safety and health conference, questions regarding the issuance of a citation or order, including the inspector’s evaluation of negligence, gravity, and good faith, were open for discussion. When a conference resulted in a modification to a citation or order, it was the District Manager’s duty to notify MSHA’s Office of Assessments of the conference results so that an appropriate civil penalty would be proposed. Because MSHA’s safety and health conferences did not include a discussion of the appropriate civil penalty for a citation or order, mine operators who disagreed with a proposed penalty amount were left with no choice but to file a contest with the Federal Mine Safety and Health Review Commission (“the Commission”) pursuant to 30 C.F.R. § 100.7.

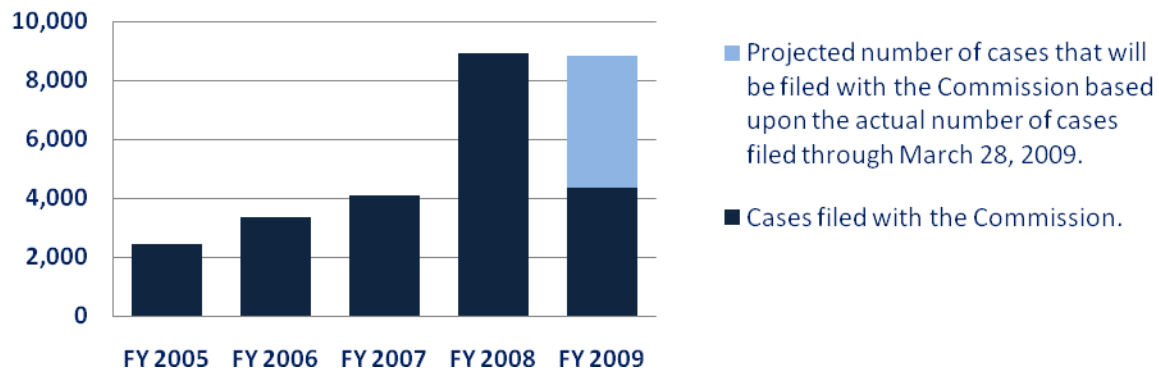
Until recently, it was common for mine operators to receive notice of a proposed penalty up to 18 months after the date of issuance of a citation or order. However, the Office of Assessments is now committed to proposing penalties “as expeditiously as possible” and has adopted the following goals, which are set forth in MSHA’s Program Policy Manual (“PPM”):

- Citations and orders not associated with a serious accident, fatality, or other special circumstance should be assessed within 31 days of the issuance date.
- Citations and orders not associated with a serious accident, fatality, or other special circumstance that are recommended for a special assessment should be assessed within 75 days of the issuance date.
- Citations and orders associated with a serious accident, fatality, or other special circumstance should be assessed within 180 days of the accident or special event date.

Because the Office of Assessments expects to propose civil penalties within 75 days of the issuance date for the vast majority of citations and orders, it is no longer impracticable for MSHA to defer safety and health conferences until after penalties have been proposed.

While improvements in timeliness at the Office of Assessments have made it *possible* for MSHA to change its conference procedure, it is the increased number of cases filed with the Commission that has made the change *necessary*. As reflected in the chart below, the number of cases filed by mine operators and independent contractors increased dramatically in FY 2008, and the number of cases that will be filed in FY 2009 is projected to be nearly as great.

**CASES FILED WITH THE COMMISSION**



The sharp increase in the number of cases filed with the Commission is not surprising considering that the total dollar amount of civil penalties sought by MSHA in CY 2008 was nearly eight times greater than the total dollar amount sought in CY 2005:

Calendar Year	Number of Civil Penalties Proposed	Percentage of Civil Penalties Contested	Total Civil Penalty Dollars	Percentage of Total Civil Penalty Dollars Contested
2005	117,000	6.2%	\$25 million	29.5%
2006	136,000	7.3%	\$35 million	34.6%
2007	130,000	14.9%	\$74 million	53.7%
2008	199,000	22.8%	\$195 million	67.1%

The total dollar amount of proposed civil penalties more than doubled in CY 2007 as a direct result of MSHA adopting new civil penalty regulations in April of that year. Then, in CY 2008, an even more dramatic increase occurred because (1) the new civil penalty rules were in effect for a full 12 months and (2) the number of civil penalties proposed by MSHA was 53% higher than in CY 2007.

In response to MSHA's heightened enforcement activity and the across-the-board increase in civil penalty dollar amounts, many mine operators are now choosing to contest penalties that in the past they would have simply paid. The large number of penalty contests filed since the beginning of CY 2007 has placed a heavy burden on the Office of Solicitor and on the eight Administrative Law Judges who preside over cases that are filed with the Commission. For this reason, MSHA is changing its safety and health conference procedure in an attempt to resolve contested violations and their associated civil penalties before matters advance further into the litigation process.

## MSHA'S NEW PROCEDURE FOR SAFETY AND HEALTH CONFERENCES

MSHA's new conference procedure does not change the basic requirement at 30 C.F.R. § 100.6 that a request for a safety and health conference must be made in writing and must include a brief statement of the reason(s) why each citation or order should be conferenced. According to MSHA's PPM, "an operator should be notified of the right to a safety and health conference at the time the inspector issues a citation or order or at the inspector's closeout conference." This notification starts the 10-calendar-day period within which a mine operator may submit a request for a safety and health conference. A request for a safety and health conference will be granted at the discretion of the District Manager or his or her designee.

In most situations where a request is granted, the conference will be scheduled after the civil penalties have been proposed and MSHA has received a timely notice of contest from the mine operator. The CLR assigned to the case will notify the mine operator of the date, time, and location of the conference. Failure to timely contest the proposed penalties generally will result in the conference being cancelled.

In order to allow sufficient time for the conference process, the CLR will file a letter with the Commission requesting a 90-day extension of time for filing a Petition for Assessment of Civil Penalty. If MSHA and the mine operator are able to reach a settlement as a result of the conference, the CLR will file a Petition for Assessment of Civil Penalty and a Motion for Decision and Order Approving Settlement with the Commission. In situations where the parties are unable to reach settlement, the mine operator retains the right to have a hearing before one of the Commission's ALJs.

CLRs, in consultation with appropriate Regional Solicitors or Solicitors with the Mine Safety and Health Division, may choose to conduct *pre-penalty* safety and health conferences involving potential Pattern of Violation ("POV") orders, S&S citations issued during a POV program assessment period, statutory violations, flagrant violations, and accident-related violations.

According to MSHA, "the benefit of this new conference procedure is a savings to operators and MSHA of time and expense without engaging in litigation." Whether this proves to be a true statement will depend upon a number of factors, not the least of which will be MSHA's willingness to make meaningful concessions towards settlement at the conference stage.

***If you would like any further information or assistance regarding this Safety and Health Bulletin, please feel free to contact Tim Olson at (303) 659-5040 or [tim@tro-law.com](mailto:tim@tro-law.com).***

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