

February 2016 Newsletter

Guest Column

Our Guest Column is by Michael Addair, an attorney with the law firm of [Dinsmore & Shohl, LLP](#) and is important to any contractor with a MSHA ID Number for a mobile crusher. Michael has experience representing and counseling clients in health and safety matters, including the litigation of OSHA and MSHA enforcement actions. Michael also represents clients in a variety of other litigation matters in state and federal courts. His defense of construction contractors against “deliberate intent” workplace injury lawsuits arising from alleged violations of safety regulations has earned him multiple selections to the Super Lawyers West Virginia Rising Stars® List for construction litigation. Michael is an active speaker and writer, having made presentations on a variety of legal issues and contributed to various legal blogs and industry publications. Dinsmore & Shohl will be presenting a legal seminar at the May [New Mexico Mine Health and Safety Conference](#) on “**Accompanying your MSHA Inspector**”.



Contractor Crushers with MSHA ID Numbers and MSHA Jurisdiction

In the case of [Hammerlund Construction, Inc.](#), *LAKE 2014-124-M* (November 23, 2015), Administrative Law Judge (“ALJ”) Jaqueline Bulluck ruled on the jurisdiction of the Mine Safety and Health Administration (“MSHA”) to cite an aggregate producer operating a portable crusher registered with MSHA as a “mine” on property it did not own for violations of mandatory safety standards related to conditions existing on such property. Judge Bulluck held, based upon the Mine Act’s liberal principals of jurisdiction, that MSHA can properly cite such an operator for such violations even where the premises owner maintains significant authority and control over operations at the property. Although [Hammerlund](#) is not a Federal Mine Safety and Health Re-

view Commission (“Commission”) decision, thus limiting its precedential value, other ALJs are likely to follow Judge Bulluck’s analysis.

The [Hammerlund](#) decision offers several valuable lessons for operators. First, the Mine Act, and Commission case law interpreting it, liberally confers jurisdiction upon MSHA. Accordingly, an operator will be unable to escape MSHA jurisdiction related to safety hazards existing on any property on which it performs significant activity that is essential to the mining operation and for which it exercises control over safety, regardless of the ownership of the land upon which the subject safety hazards exist or the fact that the property owner maintains a significant degree of control over the land and operations. In [Hammerlund](#), ALJ Bulluck ruled that an operator who was operating a portable crusher at a pit owned by another was subject to MSHA’s jurisdiction for inadequate berms at an unprocessed material dump site and failure to hazard train individuals employed by the property owner even though 1) the property owner reserved the final say over the operation of the pit; 2) the property owner was responsible for site preparation at the pit; 3) the property owner controlled access to the pit; 4) The property owner determined the location of the crusher, stockpiles, and dumpsite; 5) The property owner maintained the roadways with its bulldozer; 6) the property owner delivered unprocessed materials to the unprocessed material dump site with its dump trucks; and 7) the property owner employed the individuals allegedly exposed to the safety hazards. ALJ Bulluck rested her decision primarily on the fact that, despite landowner’s contractual reservations of significant control over the land and operations thereon, the operator contractually agreed to undertake responsibility for MSHA compliance, exercised defacto control over safety at the site by repairing the berms that had been destroyed by the property owner’s bulldozer, and performed significant activities upon the land in question that were essential to the mining operation.

A second lesson to be learned from [Hammerlund](#) is that aggregate producers operating portable crushers

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should be careful and diligent in contract negotiations. In this case, the operator agreed contractually to undertake responsibility for MSHA compliance in an area of the pit where it ceded substantial control to the property owner regarding site preparation, operation, and maintenance. An operator who assumes responsibility for regulatory compliance should insist upon and exercise final authority and responsibility for all activities relating to compliance, including the preparation and maintenance of site conditions. In this case, the berms were destroyed by the property owner's bulldozer while maintaining the roadways and dump site. Similarly, operators should not assume contractual responsibility for regulatory compliance where they are not prepared to undertake all activities necessary to ensure compliance. Operators who wish to cede control of these activities should insist upon contractual indemnity for regulatory liability from those to whom control is relinquished. Finally, where oper-

ators are contractually obligated to inform the property owner of unacceptable site conditions, the operator should do so promptly and stop work if possible until the condition is repaired by the owner.

Finally, Hammerlund teaches that actions will often speak louder than contractual language. Although contractual language in the Hammerlund case vested the final say regarding operation of the pit to the property owner and placed responsibility for site preparation and maintenance upon it, Hammerlund nonetheless constructed and performed maintenance on the berms. This was important to ALJ Bulluck as evidence confirming the operator's control over the unprocessed material dumpsite and overall safety compliance at the pit. The operator may have had a stronger argument that it lacked sufficient control over the site if it had insisted that the property owner construct and maintain adequate berms as part of its contractual responsibility for site preparation and operation.

~Michael Addair

Mining Safety Board

The New Mexico Mining Safety Board (MSB) met in Belen, NM on Friday, January 15, 2016. The business meeting was held in the morning followed by a tour of New Mexico Travertine (NMT). NMT is a specialty stone operation that processes stone from across the US for construction and building architecture. If you have



been in the Pit at UNM you have seen stone from NMT.

NMT also mines travertine from their quarry west of Belen.

MSB members toured the manufacturing facility on a tour by NMT's President, Jim Lardner. The MSB tours operations across New Mexico so members from different areas of mining become educated about all types

of mining in New Mexico.

The next MSB meeting will be on May 13, in Socorro.

Bureau of Mine Safety Training Schedule February 2016

Date	Topic	Location
3	MSHA Part 48 AR	Albuquerque, New Mexico at Daniel B Stevens Deb Salvato, 505-822-9400
4	MSHA Part 46 AR	Santa Fe, New Mexico at Santa Fe Classic Rock Nancy, 505-474-4332
9	First Aid	Taos, New Mexico at Taos Sand & Gravel Randy Brooks, 575-741-1976
10-11	MSHA Part 48 AR & FA	Taos, New Mexico at Medina Sand & Gravel 575-758-3217
11	MSHA Part 48 AR	Albuquerque, New Mexico at NM Tech Bldg on Central Suzanne, 575-835-5460
17-18	MSHA Part 48 AR & FA	Española, New Mexico at CR Minerals Joe Griego, 505-428-2941
17-18	MSHA Part 46 AR & FA	Alamogordo, New Mexico at RD Blankenship 575-430-4824
23-25	MSHA Part 48 NM	Albuquerque, New Mexico at 814 Solutions Stacey, 505-872-0846
24-25	MSHA Part 46 AR & FA	Ruidoso, New Mexico at SW Paving & Grading Eleanor, 575-336-1278

www.bmi.state.nm.us/navTrng.htm

Upcoming Seminar



The Bureau of Mine Safety in conjunction with MSHA and [Jackson Kelly PLLC](#) will bring New Mexico a mining safety seminar in April.

Two sessions will be held in Albuquerque and Roswell and will feature a half day update and review of MSHA's Rules to Live By taught by Roger Montali of the MSHA Mine Safety and

Health Academy and a half day session on Supervisor Responsibilities with Dana Svendsen of Jackson Kelly PPLC. The sessions will be held April 25 and 26 at the two locations.

A third session on the same topics will be held in Silver City on April 28th. Roger will teach the Rules to Live By session while the Supervisor Responsibilities session will be taught by Brad Peay, Supervisor for Special Investigations for MSHA's South Central District.

Outstanding Contribution to Safety Award



The New Mexico Mine Health and Safety Conference will again present the Outstanding Contribution to Safety (OCS) award. The purpose of the OCS award is to recognize those New Mexico miners who have demonstrated exceptional influence, initiative and leadership in the application of health and safety principles. We want to encourage each and every New Mexico miner to redouble his or her resolve to

promote safe and healthful practices on and off the job. Eligibility is open to nearly all individuals who work in the mining industry in New Mexico. This includes hourly personnel, supervisors, managers, and owner-operators. New Mexico resident contract personnel and suppliers who are directly involved in the mine development, construction, operation, and maintenance are also eligible. Individuals whose title or primary role focuses on safety or health are not eligible.

Visit our [website for a nomination form](#) which must be returned by April 1st.

2016 New Mexico Mine Health and Safety Conference

Mark your calendars for our 9th annual New Mexico Mine Health and Safety Conference to be held in Socorro on May 2, 3 and 4, 2016. We're excited this year with our theme of "Drive Safety Home" and have scheduled an exciting keynote session for Wednesday morning.

Vince "Bluto" Saporito is the Director of Check-6 Mining. For organizations desiring high reliability solutions with predictable outcomes Bluto brings proven solutions from the military and commercial aviation industries. His experience stems from his 24 year service flying fighter jets for the U.S. Navy and experience as a military diplomat. As a pilot, he repeatedly served as a flight instructor, including a tour

as a TOPGUN instructor in Fallon, NV. Throughout his career, he flew all models of the F-14 Tomcat and F/A-18 Hornet, accumulating over 2900 flight hours, 449 aircraft carrier landings and 45 combat missions. Bluto understands the importance of predictable outcomes in high risk situations!

The planning committee welcomes participation from all New Mexico miners, and is in need of an Exhibitor and Publications Chair. Call Randy Logsdon at 575-234-3622.



May 2nd—4th 2016—*SAVE THE DATE!*



for the
9th Annual
New Mexico
Mine Health
& Safety
Conference

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A New Resource for New Mexico's Mining Community

The importance of education and proper training cannot be overstated, but when it comes right down to it, there's no substitute for experience. This is something New Mexico Tech's new associate professor of mineral engineering, Dr. Sekhar Bhattacharyya, knows firsthand. A certified underground mine foreman and professional engineer, his own practical experience in coal mining stretches back more than two decades and encompasses a variety of real life challenges, from being in charge of multi-million dollar projects for Joy Global in India, to working as a production supervisor at Consol Energy's Blacksville No. 2 coal mine in West Virginia, and consulting as a senior mining engineer for Norwest Corporation in Utah.



At one time, Bhattacharyya found himself working with “Weekend Warriors,” miners with 20 or 30 years of experience who worked three days a week for 12 hours a day, one of whom he often consulted on mine ventilation questions. “Because of his experience,” Bhattacharyya said, “he was always able to offer the right advice.”

Mine ventilation and mine safety are the main focus in Dr. Bhattacharyya's research and teaching. This has led to research sponsorship from NIOSH for a study titled “*Reduction of Noise Exposure in Underground Mines by Improving Auxiliary Ventilation Technologies*,” a two year effort that began in September 2015, in collaboration with Dr. Felipe Calizaya of the University of Utah. Their paper on the project has been accepted for the SME 2016 Annual Conference this month, as part of the technical program. The presentation is scheduled for Tuesday, February 23, at 9 a.m.

“Hearing loss is a real problem for miners. There's tremendous noise in mines, and miners typically suffer hearing loss,” Bhattacharyya said. “By the age of 60, more than 70 percent of miners have a hearing loss of more than 25 decibels, and more than a quarter have a loss of more than 40 decibels.”

Dr. Bhattacharyya comes from a family tradition of teaching, and has always had the intention of transitioning from the mine to the classroom. And when it comes to preparing the mining engineers of tomorrow for their future careers, the benefit of having a professor with two decades of mining experience is immeasurable.

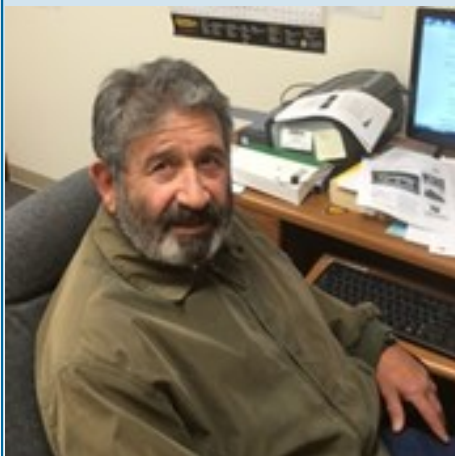
“Unlike electronics or biosciences, it is not possible to replicate the actual working mine in the classroom. So, it's really important that people teaching mining should have come through that route and have firsthand experience,” Bhattacharyya said. “When teaching, I always give examples of what is done in a mine.”

In addition to firsthand knowledge and experience, Dr. Bhattacharyya maintains a strong emphasis on compliance and safety. Once, while working as a foreman, he observed a mason who was standing on a stool lean over a wall at chest height, to pick up an item he needed. The mason called in sick the next day – it turned out in picking up that item improperly, he had broken three ribs.

“When you don't pay attention you can do bad things to yourself,” Bhattacharyya said. “You need to pay attention to small details, even in how you pick up a load – you can injure yourself without even realizing it.”

Dr. Bhattacharyya comes to New Mexico Tech from the University of Utah, and teaches classes in mine ventilation, mine systems, and geostatistics & mineral evaluation. He also advises the mineral engineering department's senior design teams. He hopes to be joined in Socorro soon by his wife, Dr. Gargi Bhattacharyya, who has a PhD in biochemistry and is currently working as a researcher at Utah State University, and his two sons, Rik and Rishi.

SAFETY CORNER



Larry Sanchez has worked as a miner trainer at the NM Bureau of Mine Safety for 15 years. Larry has dedicated his working career of over 50 years to the mining industry. Below are 10 general safety tips from his Part 46 and Part 48 training book.

GENERAL SAFETY

1. Never assume an employee with extensive experience is knowledgeable in the task that they are being assigned
2. Improve illumination and add bright color contrast to the workplace by painting guarding yellow or red using bright red stop switches for electrical controls
3. Increase task rotation to reduce complacency and the adverse effects of repetitive motion
4. Organize the work area to avoid the need to lift or reach above the shoulders or below the knees
5. Have supplies packaged in lighter units[40 pound bags instead of 80 pounds]
6. Encourage workers to obtain assistance when lifting heavy items
7. Repair uneven floors and install skid resistant material especially for stair treads install shallow angle stairways instead of ladders
8. Use redundant alarm systems that use flashing lights audible alarms and or vibration and eliminate background noise
9. Signs that are posted should have large letter type to improve readability
10. Our workforce continues to age. In 6 years $\frac{1}{4}$ of our workforce will be 55 or older. Design and plan workplace health and safety accordingly.



Join the Southwestern Regional Mine Rescue Association of Carlsbad for their annual mine rescue contest being held **April 4-7, 2016** in Mescalero/Ruidoso, NM at the Inn of the Mountain Gods Resort and Casino. The contest will include the Field Problem, Team Tech, and First Aid scenarios as well as tests. If there is enough interest, they are going to try and have training available for Advanced First Aid, Advanced MX6 and BG4, including Level 2 certifications. They are also trying to make calibration of RZ testers available to teams. Registration packets will be sent out and will include contest and training specifics.

They will be limiting the number of teams to 18 on a first come first served basis.

For any questions or expressions of interest please contact the following:

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