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MSHA Enforcement Trends for Metal / Nonmetal Mine Operators

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Presenter

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We will be covering

- MSHA Federal Budget Impact
- MSHA's Reorganization Plan (OAASEI)
- MSHA's Regulatory Agenda
- Most Commonly Cited Standards of 2011
- Standards Overlapping Various Segments of Metal/Nonmetal
- MSHA's Rules to Live By I and III
- MSHA Practices Affecting Future Enforcement
- Important ALJ and Commission Decisions

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MSHA Federal Budget Impact

- ▶ Federal budget requests announced February 13th
- ▶ For MSHA, the budget request is \$371,896,000 next fiscal year. (<\$638,000)
- ▶ Despite decrease, more funds directed to enforcement and standards development
- ▶ \$1.8 million increase in M/NM to fully fund enforcement staff positions
- ▶ Despite increase, MSHA expects decrease in impact inspections from 40 to 30

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MSHA's Reorganization Plan – Office of Assessments, Accountability, Special Enforcement and Investigations (OAASEI)

- ▶ Two major subgroups
 - ▶ Civil Penalties and Assessment Center
 - ▶ The Special Enforcement, Investigations and Accountability (SEIA) office



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MSHA's Reorganization Plan – Office of Assessments, Accountability, Special Enforcement and Investigations (OAASEI)

- ▶ SEIA will have two reporting Units
 - ▶ Office of Accountability (OA)
 - ▶ Technical Compliance and Investigations Office
 - ▶ Discrimination complaints, special civil or criminal investigations
 - ▶ Special enforcement strategies (flagrants, impact inspections, POV, injunctions)



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MSHA's Reorganization Plan – Office of Assessments, Accountability, Special Enforcement and Investigations (OAASEI) cont.

- ▶ Agency response to criticism following UBB
- ▶ Designed to “better target chronic violators”
- ▶ TCI's goal – evaluate, develop and refine strategies for use of special enforcement tools



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MSHA's Regulatory Agenda for 2012

- ▶ A rulemaking on crystalline silica (May)
- ▶ A rulemaking to revise civil penalty procedures (February)
- ▶ A rulemaking on notification of legal identity (April)
- ▶ A rulemaking on proximity detection equipment (January)
- ▶ A final rule on pattern of violations (April)



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Beware of the Most Commonly Cited Standards in 2011

- ▶ Facility – Metal
- ▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	146	9.10%	56.20003(a)
2	129	8.04%	56.12004
3	109	6.80%	56.20003(b)
4	90	5.61%	56.14107(a)
5	64	3.99%	56.14100(b)

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Beware of the Most Commonly Cited Standards in 2011

- ▶ Facility – Non Metal
- ▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	133	11.79%	56.12004
2	87	7.71%	56.14107(a)
3	81	7.18%	56.12032
4	58	5.14%	56.14100(b)
5	51	4.52%	56.12018

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Beware of the Most Commonly Cited Standards in 2011

▶ Facility – Sand and Gravel

▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	24	9.34%	56.12004
2	14	5.45%	56.14107(a)
3	13	5.06%	56.14100(b)
4	13	5.06%	56.12018
5	12	4.67%	56.5001(a)/.5005

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Beware of the Most Commonly Cited Standards in 2011

▶ Facility – Stone

▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	357	7.51%	56.20003(a)
2	270	5.68%	56.12004
3	269	5.66%	56.14107(a)
4	265	5.57%	56.12032
5	212	4.46%	56.14100(b)

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Beware of the Most Commonly Cited Standards in 2011

- ▶ Surface – Metal
- ▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	326	7.35%	56.14100(b)
2	311	7.01%	56.12004
3	270	6.09%	56.20003(a)
4	210	4.74%	56.14107(a)
5	176	3.97%	56.12018

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Beware of the Most Commonly Cited Standards in 2011

- ▶ Surface – Nonmetal
- ▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	217	6.79%	56.14107(a)
2	205	6.41%	56.14100(b)
3	168	5.26%	56.12004
4	140	4.38%	56.12032
5	98	3.07%	56.14132(a)

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Beware of the Most Commonly Cited Standards in 2011

▶ Surface – Sand and Gravel

▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	2,068	9.41%	56.14107(a)
2	1,275	5.80%	50.30(a)
3	1,188	5.41%	56.12004
4	1,152	5.24%	56.14100(b)
5	836	3.80%	56.14132(a)

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Beware of the Most Commonly Cited Standards in 2011

▶ Surface – Stone

▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	1,402	7.45%	56.14107(a)
2	1,269	6.74%	56.14100(b)
3	1,027	5.46%	56.12004
4	746	3.96%	56.14132(a)
5	720	3.83%	50.30(a)

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Beware of the Most Commonly Cited Standards in 2011

▶ Underground - Metal

▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	197	5.57%	57.3200
2	156	4.41%	57.14100(b)
3	126	3.56%	57.12004
4	124	3.51%	57.11001
5	120	3.39%	57.20003(a)

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Beware of the Most Commonly Cited Standards in 2011

▶ Underground - Nonmetal

▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	120	8.09%	57.12004
2	114	7.68%	57.3200
3	70	4.72%	57.20003(a)
4	68	4.58%	57.14107(a)
5	66	4.45%	57.14100(b)

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Beware of the Most Commonly Cited Standards in 2011

- ▶ Underground – Sand and Gravel
- ▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	23	10.00%	57.3200
2	14	6.09%	57.12004
3	10	4.35%	57.14100(c)
4	10	4.35%	57.14132(a)
5	10	4.35%	57.14101(a) (2)

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Beware of the Most Commonly Cited Standards in 2011

- ▶ Underground – Stone
- ▶ 01/01/11 – 2/28/12

Rank	# of Viols.	Percent *	Standard
1	113	5.29%	57.14100(b)
2	113	5.29%	57.3200
3	106	4.96%	57.20003(a)
4	85	3.98%	57.12004
5	70	3.28%	57.14107(a)

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Standards Overlapping Various Segments of Metal/Nonmetal

▶ Surface Facilities

- ▶ 56.12004 – Electrical conductors
- ▶ 56.14107(a) – Moving machine parts
- ▶ 56.14100(b) – Safety defects; examination, correction and records
- ▶ 56.20003(b) – Housekeeping
- ▶ 56.12032 – Inspection and cover plates



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Standards Overlapping Various Segments of Metal/Nonmetal

▶ Underground

- ▶ 57.3200 – Correction of hazardous conditions
- ▶ 57.12004 – Electrical conductors
- ▶ 57.20003(a) – Housekeeping
- ▶ 57.14100(b) – Safety defects; examination, correction and records
- ▶ 57.14107(a) – Moving machine parts



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MSHA's "Rules to Live By I and III"

▶ The first phase included 13 M / NM standards:

- ▶ §56.9101 - Operating speeds and control of equipment
- ▶ §56.12017 - Work on power circuits
- ▶ §56.14101(a)* - Brake performance
- ▶ §56.14105 - Procedures during repairs or maintenance
- ▶ §56.14130(g) - Seat belts shall be worn by equipment operators
- ▶ §56.14131(a) - Seat belts shall be provided and worn in haul trucks



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MSHA's "Rules to Live By I and III" cont.

▶ The first phase included 13 M / NM standards:

- ▶ §56.14205 - Machinery, equipment, and tools used beyond design
- ▶ §56.14207 - Parking procedures for unattended equipment
- ▶ §56.15005 - Safety belts and lines
- ▶ §56.16002(c) - Bins, hoppers, silos, tanks, and surge piles
- ▶ §56.16009 - Persons shall stay clear of suspended loads
- ▶ §56.20011 - Barricades and warning signs
- ▶ §57.3360 - Ground support use



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MSHA's "Rules to Live By I and III" cont.

- ▶ The third phase included 6 M / NM standards:
 - ▶ §46.7(a) - New task training
 - ▶ §56.3130 - Wall, bank, and slope stability
 - ▶ §56.3200 - Correction of hazardous conditions
 - ▶ §56.14100(b) - Safety defects; examination, correction and records
 - ▶ §56.15020 - Life jackets and belts
 - ▶ §57.14100(b) - Safety defects; examination, correction and records [underground mines only]

MSHA's "Rules to Live By I and III" cont.

- ▶ MSHA will focus "impact inspection" program on surface mines (23 of 37 mining fatalities)
- ▶ Targeted standards more likely to result in special assessments (computer program) (50 M/NM fatalities from 2001 – 2010)

MSHA Practices Affecting Future Enforcement

- ▶ Inexperienced MSHA inspectors – inconsistent / arbitrary
- ▶ Reinstatement of Informal Safety and Health Conferences
- ▶ Non-Assessed Violations (notices of contest / expedited hearings)
 - ▶ §107(a) Imminent Danger Orders
 - ▶ §104(b) Failure to Abate Orders



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MSHA Practices Affecting Future Enforcement cont.

- ▶ §104(d) Unwarrantable Failure Violations (motions to modify)
- ▶ High Negligence, High Severity, Non-S&S Violations
- ▶ §110 Special Investigations against foreman
 - ▶ Personal civil assessments
 - ▶ Criminal sanctions
 - ▶ Foremen's rights during investigation



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MSHA Practices Affecting Future Enforcement cont.

- ▶ Training Violations / §104(g) Orders / Liability for Contractors
 - ▶ New Miner Training
 - ▶ Experienced Miner Training
 - ▶ Hazard Training
 - ▶ Task Training
- ▶ Examinations of Work Areas
- ▶ Part 62 Noise Standards

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MSHA Practices Affecting Future Enforcement cont.

- ▶ Miners right's campaign – increased discrimination complaints (OAASEI)
- ▶ Settlement Conferences / Global Settlements
- ▶ Collections Actions

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Important ALJ and Commission Decisions

- ▶ Conflict of Authority - Secretary's Late Filing of Petitions / Dismissals of Civil Penalty Proceedings
- ▶ The Commission to Clarify Evidentiary Standards for "Flagrant" Violations
- ▶ Motions to Reopen Civil Penalty Assessments



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Important ALJ and Commission Decisions cont.

- ▶ Mine Operator's Right to Challenge Violations Subject to a POV Notice
- ▶ Advanced Notice
- ▶ Spoliation of Evidence
 - ▶ Adverse Inferences
 - ▶ Exclusion of Evidence
 - ▶ Deference to Inspectors



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Questions?

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Max Corley is a Partner in the Labor Department and a member of the Employment Practice Group. His practice is focused on the defense of clients in federal and state coal mine safety and met/nonmetal safety regulatory matters before federal and state administrative agencies, federal court and state courts and civil defense litigation. Max regularly represents mine operators and contractors in the coal industry and in the metal/nonmetal sector of MSHA enforcement, including mine operators, quarry operators and producers of various metals, stone, sand, gravel and other aggregates. He actively defends operators and contractors in MSHA civil penalty proceedings, Section 110 special investigations of mine management and foremen and other enforcement matters. He also assists operators with accident and fatality investigations and provides pre-enforcement and post-enforcement safety consultation services and training to mine management and company safety representatives.

Utilizing his business and litigation background, Max effectively assists clients in navigating their regulatory compliance obligations. He also has extensive civil litigation experience and practice in defending against claims involving workplace deliberate intent, wrongful death and personal injury, commercial litigation, products liability and breach of warranty, medical malpractice and professional liability, insurance defense, premises liability and other torts.

Memberships & Affiliations

- ▶ West Virginia State Bar
- ▶ West Virginia Coal Association
- ▶ Eastern Kentucky Coal Association
- ▶ Eastern and Mineral Law Foundation (EMLF)
- ▶ National Stone, Sand and Gravel Association (NSSGA), Member of Safety and Health Committee
- ▶ West Virginia Defense Trial Counsel, Member of Safety and Health Committee
- ▶ Putnam County Chamber of Commerce, Past Member of Board of Directors, 2005-2010
- ▶ American Red Cross, Central West Virginia Chapter, Past Member of Board Directors, 2005-2010

Distinctions

- ▶ Peer Review Rated BV in *Martindale-Hubbell*

Education

J.D., West Virginia University College of Law, (Associate Editor and Member, West Virginia Law Review, 1995-1997; Member, Marilyn E. Lugar Trial Association, 1997) B.B.A., Marshall University, (magna cum laude; Outstanding Student Award for the College of Business Accounting Department; Dean's List; Recipient of the Walter C. Treanor Memorial Scholarship, 1994)

Bar Admissions

West Virginia

Court Admissions

West Virginia Supreme Court of Appeals
Northern District of West Virginia
Southern District of West Virginia

Related Services

Litigation
Products Liability
Mass Tort
Mine Safety & Health Administration
Tort
Workplace Safety

Related Industries

Natural Resources
Insurance