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Managing the Compliance Duality of Contractor Work Place Examinations: Food for Thought for Mine Operators

*By Max L. Corley**

It is well known that the Mine Act imposes “strict liability” on mine operators and contractors for violations of safety and health standards, which means that both operators and contractors can be cited for violations regardless of fault. This compliance duality poses substantial safety and economic risks to mine operators who can, and often are, cited for violations committed by contractors on mine property. The author of this article discusses reasonable steps that mine operators can, and should, take to prevent or reduce this exposure.

Mine operators in coal and metal/nonmetal sectors of the mining industry have long struggled with managing the compliance and safety issues posed by independent contractors working on mine property. This issue has gotten more complex and difficult to navigate due to the current regulatory environment, heightened Mine Safety and Health Administration (“MSHA”) enforcement, and policy directives focused on work place examinations and the restraints on time and resources available to mine operator safety and management personnel, among others. However, it is imperative that mine operators focus attention to properly managing contractor safety and compliance at their operations to reduce potential safety risks and liability exposure.

STEPPED UP ENFORCEMENT

MSHA’s stepped up enforcement related to work place examinations is nothing new to the coal industry, which has more stringent and detailed regulations governing such examinations than those governing metal/nonmetal mine operators. On July 22, 2015, MSHA issued Program Policy Letter (“PPL”) P15-IV-01, which was directed to metal/nonmetal mine operators to clarify MSHA’s policy and interpretation of the work place examination standards set forth in 30 C.F.R. Sections 56.18002 and 57.18002. This PPL raised more questions than it answered and served to broaden MSHA’s enforcement reach without the regulatory burden of notice rulemaking. While the focus of the PPL is on mine operators, less attention has been given to the work place examinations of independent contractors.

It is well known that the Mine Act imposes “strict liability” on mine operators and contractors for violations of safety and health standards, which means that both operators and contractors can be cited for violations regardless of fault. This compliance duality poses substantial safety and economic risks to mine operators who can, and often are, cited for violations committed by contractors on mine property.

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It goes without saying that some mine operators either fail to monitor the activities of contractors on their property or engage in sporadic and inconsistent monitoring at best. This certainly is not the rule within the industry as many operators do a good job of monitoring contractors, but it does exist. The typical issues that arise involve mine operators not adequately tracking the whereabouts of contractors on mine property, their work activities or the identities and training of the contractor's employees, and not ensuring that the contractors are performing proper work place examinations of their work areas, tools, and equipment. However, there are reasonable steps that mine operators can, and should, take to prevent or reduce this exposure.

REASONABLE STEPS TO PREVENT OR REDUCE EXPOSURE

First, mine operators must instill a culture of accountability at their operations and implement a company-wide system and procedures for the selection, orientation and monitoring of contractors working on their property. Mine operators must begin by properly vetting the contractors by requiring them to provide concrete and adequate proof that their employees have received the necessary MSHA Part 46/48 training and task training for any work activities or equipment they operate. This training review must extend beyond just requiring a copy of the MSHA form 5000-23. The contractor's history of violations, injuries and accidents should also be reviewed on MSHA's Data Retrieval System and proper follow-up to gauge their compliance efforts. References should be obtained and contacted to assess other operators' experiences with the contractor. Careful review of the contractor's certifications, licenses, permits and other professional activities is recommended. Thorough vetting at this early stage is worth the time and money spent doing so and may reduce potential exposure and liability down the road.

Next, mine operators and contractors should have a written contract for the work being done. The contract should expressly set forth both parties rights and responsibilities, including the duty for contractors to supply their own employees, foremen, equipment, tools, personal protective equipment ("PPE"), and to conduct proper work place examinations of their work area, tools and equipment. Mine operators should also consider enforcing any breach of the contract. Operators should expressly reserve the right to audit the contractor's activities. Often, these duties are blurred as mine operators fail to adequately communicate expectations and responsibilities to the contractors. The operator must ensure that it has received a list of the contractor's employees that will be working on mine property, including all necessary documentation of insurance, their employees' training and job history, and any background checks performed by the contractor at the time of hiring. Operators can also request confirmation of any past Section 110(c) actions against any of the contractor's foremen for a "knowing" violation of the Mine Act or safety regulations. Information related to any prior lawsuits against the contractor related to their performance or work accidents can be requested or independently researched, including the contractor's MSHA 7000-1 forms. Consistent and effective enforcement of a contractor's contractual duties is recommended.

Once the vetting and contract negotiation process is complete, a mine operator's

responsibilities are not over. When the contractor's employees first arrive on mine property to begin work, the operator must ensure that a proper intake procedure is in place, including identifying, recording and tracking the employees on site, the extent of their miner and task training, their familiarity with the Mine Act and 30 C.F.R. standards applicable to their work and the supply and availability of all necessary PPE. Any contract employees lacking the proper training or knowledge of applicable safety standards or PPE should not be permitted to work on the property. The operator must then ensure that all of the contractor's employees receive appropriate site-specific hazard training and orientation for that particular mine site. Such training should also include the mine operator's company safety and mine emergency policies and go beyond the typical form signing or short video. It is imperative that the training be well-documented.

Once the contractor has begun work on mine property, the contractor should be solely responsible for conducting work place examinations of the contractor's immediate work area, its tools or equipment, and proper housekeeping, assuming the operator communicated or contracted these duties to the contractor. It is a good practice for operators to conduct regular "cursory" examinations of the general area where contractors are working to observe them performing their work, to ensure they are not straying from their work areas and to raise any serious safety concerns observed, especially with regard to the use of PPE such as fall protection. Such cursory examinations can help operators identify any shortfalls in the contractor's safety efforts and provide the operator with a defense to enforcement actions issued to both parties.

However, it is important that operators not exert control or direct the contractor's specific work or work force beyond general communication about the location, scope or nature of the work to be performed, or defenses to enforcement actions issued to the operator for a contractor's conduct could be compromised. Operators should immediately address any hazards observed that pose an "imminent danger," but communicate lesser violations with the contractor's managers.

Operators must also implement an effective system for tracking arrival and departure of contract employees, their travel and locations on mine property and the contractor's use of new employees or the removal of employees from the project. Operators also must ensure that contract employees are conducting the necessary equipment examinations to ensure such equipment is free of defects. Operators must be especially diligent in monitoring contractors to prevent their activities from exposing the operator's employees to potential hazards. Clear lines of communication and responsibilities between the operator and contractor must be established to effectively manage safety risks and emergency response.

Mine operators also should periodically conduct random audits of the contractor's work area, tools, and equipment to ensure they are complying with company safety policies and regulations. Any deficiencies should be addressed with the contractor's managers. Operators also should audit the contractor's training plans and the competency of the trainers to ensure they have been approved by MSHA.

Lastly, mine operators are responsible for reporting any "accident," as defined in

Part 50, that occurs on mine property, including accidents involving contractors. Failure to do so likely will result in enforcement action. Proper monitoring of contractor activities on mine property will also reduce potential enforcement should MSHA initiate a Part 50 audit of a mine operator's records.

CONCLUSION

Please note that the suggestions provided in this article are not exhaustive of the measures that can or should be taken by mine operators to monitor contractors—they can be effective if thoughtfully implemented. Proper management of the compliance duality that exists between operators and contractors will result in more mutually beneficial working relationships, prevention of hazards and accidents, improved safety records and a reduction of liability exposure and risk. While the time, effort, and cost of taking such measures is extensive, the benefits are well worth it.