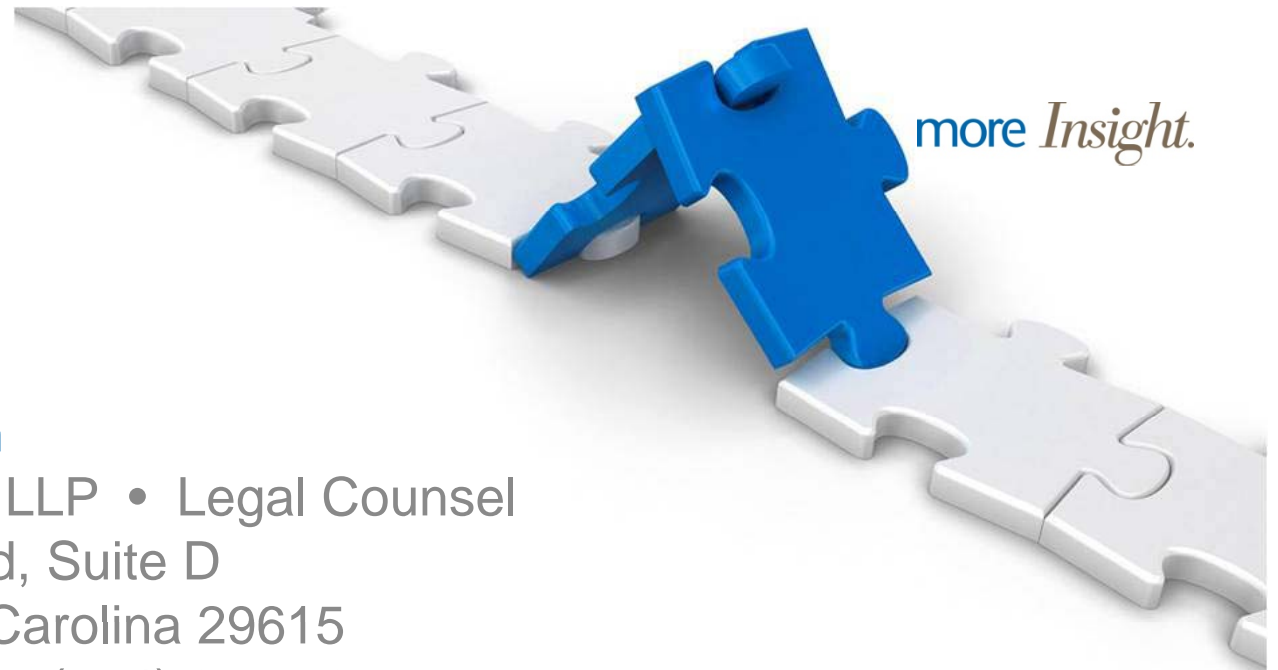




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The MSHA Enforcement Process

Mining Association of South Carolina – 2012 MASC Mining Workshop
April 17, 2012 – Columbia, South Carolina



Presenter

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We will be covering:

- Background of the United States Department of Labor
- Current Enforcement Climate
- Understanding Gravity and Negligence and their Impact on Civil Penalties
- Legal Challenges under the Mine Act

U. S. Department of Labor

FEDERAL MINE SAFETY
AND HEALTH REVIEW
COMMISSION APPEAL LEVEL
(5 COMMISSIONERS)

ADMINISTRATIVE LAW JUDGES

“On the record” hearings of disputes
Between mine operators and MSHA
about enforcement actions and final
Administrative orders of the agency
Presentation of Facts by Witnesses,
Documents, Exhibits

MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Headquarters, Arlington, VA
Assistant Secretary of Labor for
Mine Safety and Health

12 Districts
About 45 Field Offices
(District Managers)

Conference Officers

Informal attempt to resolve
disputes between mine operators
and MSHA about enforcement
actions

Inspectors
Supervisors
Specialists

Federal Mine Safety and Health more *Insight.* Review Commission

- ▶ MSHA issues regulations covering health and safety in the nation's mines
- ▶ Federal mine inspectors employed by MSHA enforce these regulations by issuing citations and orders to mine operators
- ▶ The Commission is concerned solely with the adjudication of disputes under the Mine Act, including the determination of appropriate penalties
- ▶ The “Commission” is an independent agency that provides trial and appellate review of legal disputes arising under the Mine Act. It does not regulate mining or enforce the Mine Act
- ▶ The Commission was *established* as an independent agency to ensure its impartiality
- ▶ Most Commission cases deal with the appropriateness of civil penalties, and address whether the alleged violation actually occurred
- ▶ Other cases include orders to close a mine, miners' charges of safety related discrimination and miners' requests for compensation after the mine is idled by a closure order

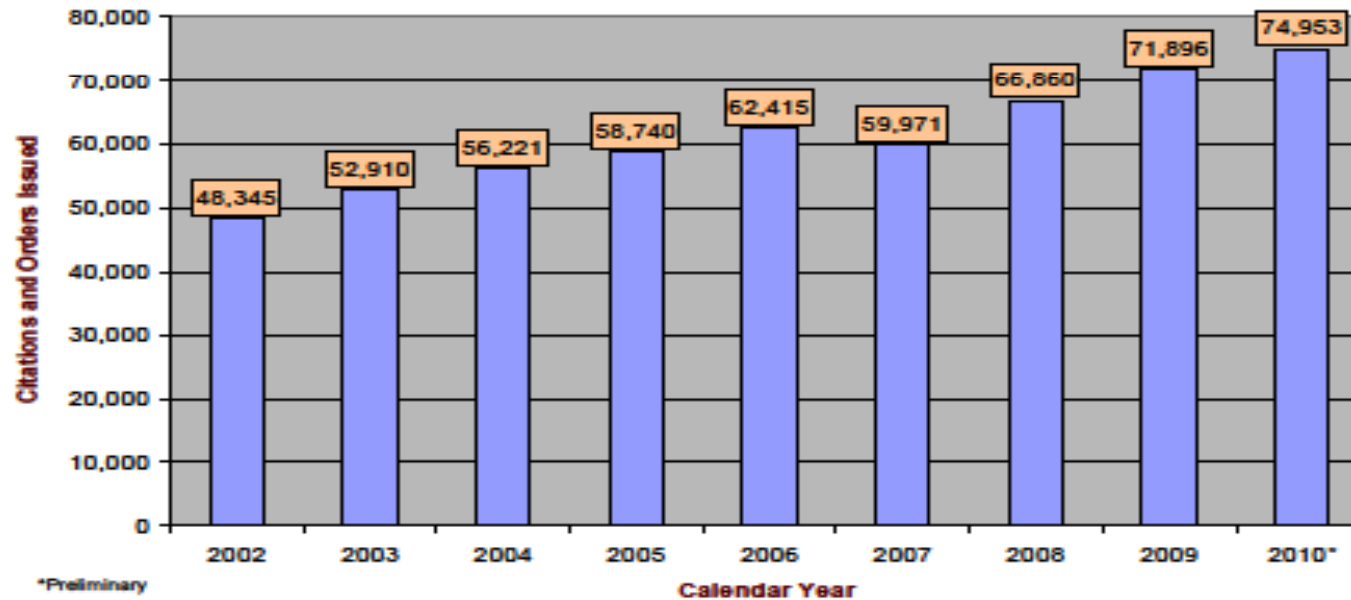
Federal Mine Safety and Health Review Commission

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- ▶ The Commission is comprised of two bodies: the administrative law judges (ALJs) who decide cases at the trial level
- ▶ ALJ's are hired by the Commission and are headed up by the Commission's Chief Administrative Law Judge
- ▶ ALJs do not serve for a specific term
- ▶ Commission currently has approximately 19 ALJs
- ▶ The 5-member "Review Commission" which provides appellate review of ALJ trial decisions
- ▶ Commissioners are appointed by the President of the United States, and confirmed by the U.S. Senate and serve 6 year terms
- ▶ Review of an ALJ decision by the Commission is not guaranteed but requires the affirmative vote of two Commissioners
- ▶ Most of the cases accepted for review are generated from petitions filed by parties adversely affected by an ALJ decision. However, cases can also be accepted based on the Commission's own direction for review
- ▶ An ALJ decision that is not accepted for review becomes a final, non- precedential order of the Commission. Appeals from the Commission's decisions are to the U.S. courts of appeals

Current Enforcement Climate

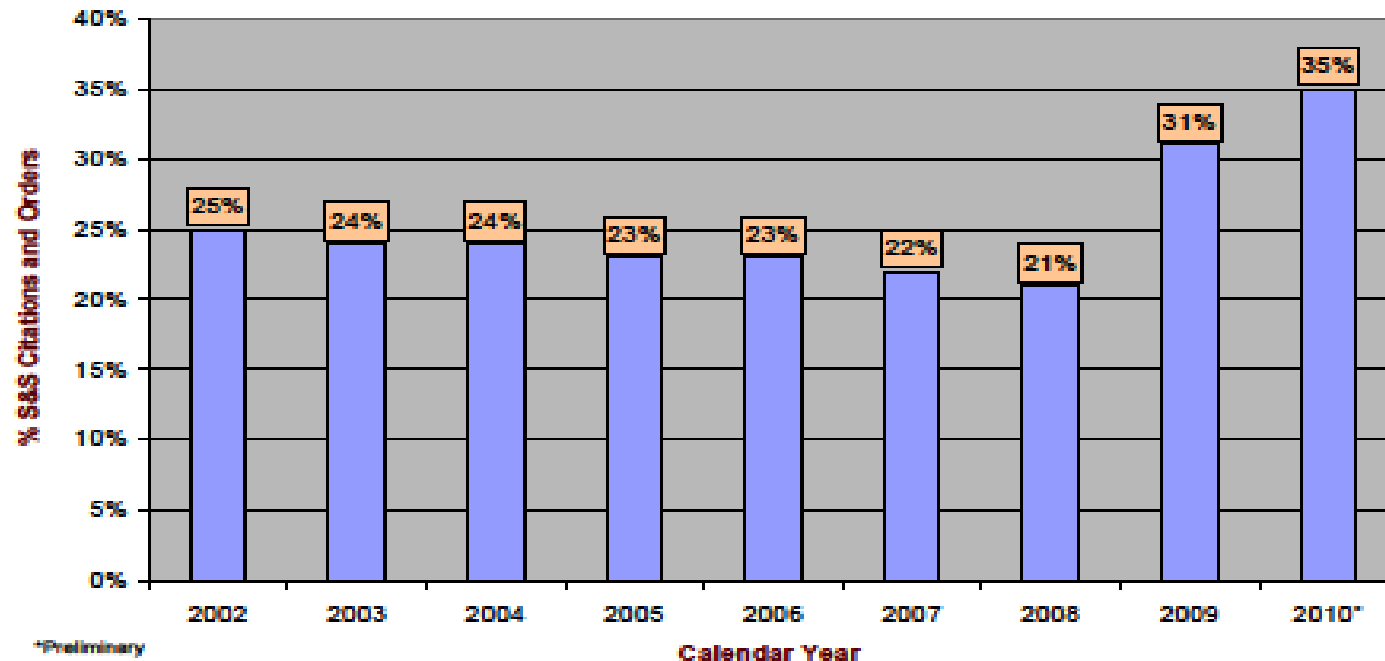
▶ Total Citations/Orders Issued Metal/ Non Metal – CY 2002 – CY 2010



- The total amount of Citations and Orders issued by MSHA to MNM mines increased 55 percent from 48,345 in CY 2002 to 74,953 in CY 2010.
- The total amount of Citations and Orders issued by MSHA to MNM mines increased 20 percent from 62,415 in CY 2006 to 74,953 in CY 2010.

Current Enforcement Climate

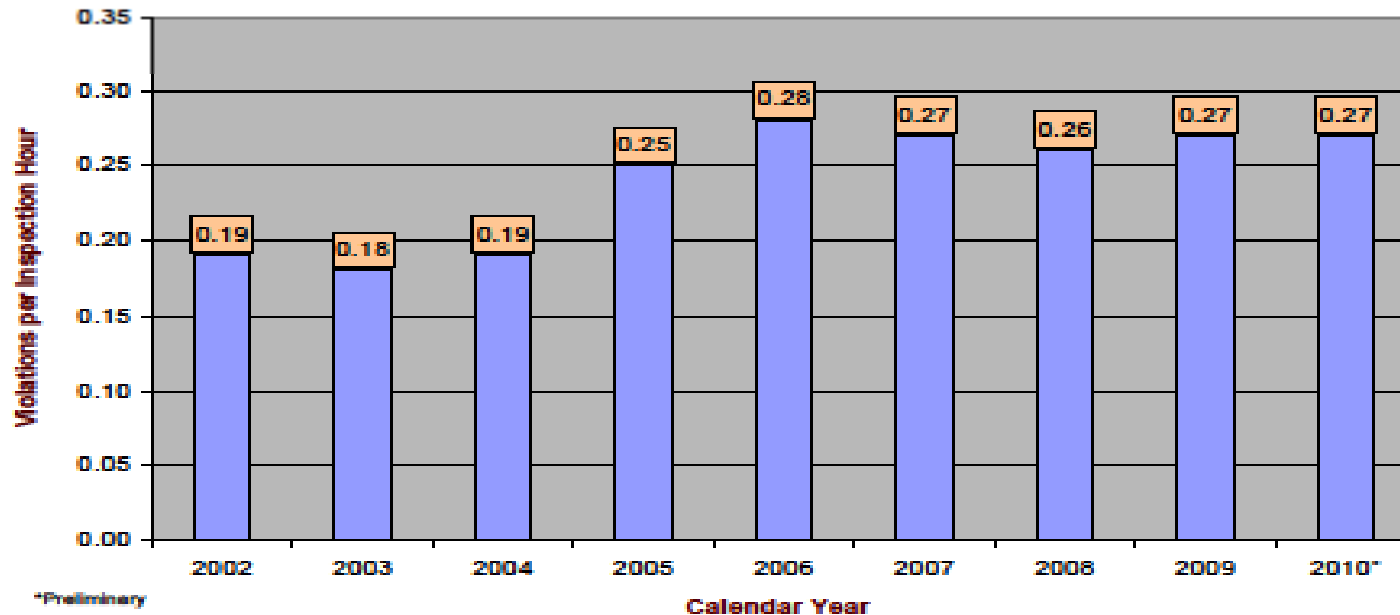
▶ Percentage of S & S Citations/Orders Metal/Non Metal – CY 2002 – CY 2010



- The percent of “S&S” citations and orders for MNM mines increased 40 percent from 25 percent in CY 2002 to 35 percent in CY 2010.
- The percent of “S&S” citations and orders for MNM mines increased 52 percent from 23 percent in CY 2006 to 35 percent in CY 2010.

Current Enforcement Climate

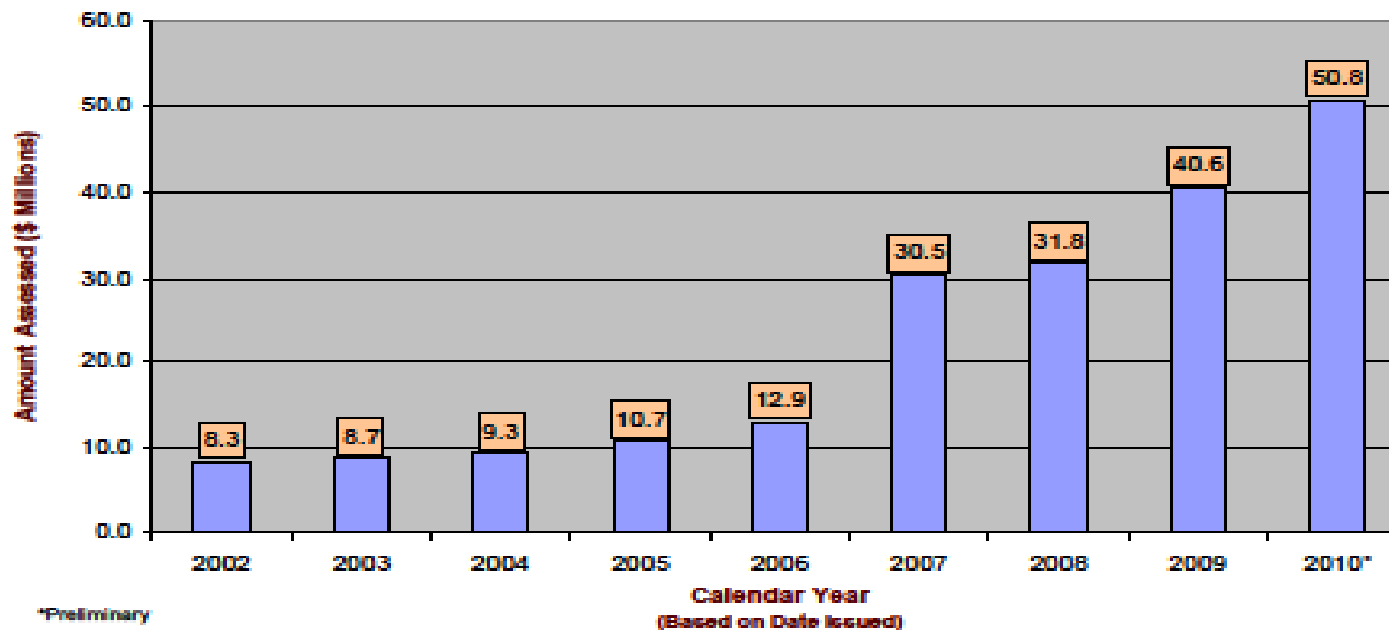
▶ Violations Per Inspection Hour Metal/ Non Metal – CY 2002 – CY 2010



- Violations per Inspection Hour for MNM mines increased 42 percent from 0.19 in CY 2002 to 0.27 in CY 2010.
- Violations per Inspection Hour for MNM mines decreased 4 percent from 0.28 in CY 2006 to 0.27 in CY 2010.

Current Enforcement Climate

▶ Total Dollar Amount Assessed Metal/ Non Metal – CY 2002 – CY 2010



- The total dollar amount assessed by MSHA to MNM mines increased 512 percent from \$8.3 million in CY 2002 to \$50.8 million in CY 2010.
- The total dollar amount assessed by MSHA to MNM mines increased 294 percent from \$12.9 million in CY 2006 to \$50.8 million in CY 2010.

HOW CAN THE INDUSTRY COMBAT more *Insight.* THESE TRENDS?

- ▶ By focusing on improving safety and regulatory compliance in your operations
- ▶ By understanding how to deal with MSHA's moving target of enforcement through pre-enforcement awareness training

Improving Safety and Regulatory Compliance

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- ▶ Strive to make regulatory compliance the rule at your operations
 - ▶ Strict compliance with MSHA regulations must be a requirement and not an option
 - ▶ There must be a willingness to learn from situations where MSHA is correct
 - ▶ There must be a willingness to educate and train managers to recognize and challenge MSHA when they are wrong

Improving Safety and Regulatory Compliance

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- ▶ Create a culture of safety in the workplace
 - ▶ The attitudes, beliefs, perceptions, [patterns of behavior], and values that your employees share in relation to safety" (Cox and Cox, 1991)
 - ▶ The development and maintenance of your company's safety culture cannot be overstated
 - ▶ Safety and regulatory compliance must be made more than just a slogan, it must be a part of your culture of safety
 - ▶ Safety and regulatory compliance must become personal

Improving Safety and Regulatory Compliance

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- ▶ Strive to create clear communications
 - ▶ Communication in the workplace is key
 - ▶ Understand, and not just read, roof control, methane dust control, and ground control plans
 - ▶ Communicate all changes and modifications in plans when they occur, not when a citation is issued for failure to follow the plan change. Information must be disseminated widely
 - ▶ Make sure communications do not just emanate from the top down – miners in the working place are best situated to warn of hazards
 - ▶ Many times accidents and citations can be prevented by communication

Improving Safety and Regulatory Compliance

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- ▶ Be humble enough to learn from your mistakes
 - ▶ Be sure to think beyond abatement of a citation - are there systemic or latent hazards you need to address?
 - ▶ Communicate with the miners involved regarding the citation, and include the citations in safety talks
 - ▶ Discuss ways to prevent the reoccurrence of the condition that lead to the citation

Improving Safety and Regulatory Compliance

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- ▶ Insist on personal responsibility
- ▶ The Mine Act ignores personal responsibility
- ▶ Without the threat of personal responsibility, shortcuts replace safe work habits
- ▶ In some cases employees do not learn the value of safe work habits until it is too late

MSHA's Moving Target of Enforcement

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- ▶ Strict adherence to compliance should be the goal but enforcement is an ever moving target with MSHA
- ▶ Consistency in MSHA enforcement is rare
- ▶ Regulations are frequently enforced differently depending on the MSHA District or the MSHA inspector involved
- ▶ MSHA district managers and inspectors interpret regulations differently
- ▶ MSHA often regulates through agency policy (i.e. PIBs, PILs, PPLs, and Program Policy Manuals, etc.) ignoring the law

MSHA's Moving Target of Enforcement

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- ▶ MSHA often utilizes improperly, or poorly trained inspectors
- ▶ Often the politics of regulation rules the day
- ▶ Focus on pre-enforcement awareness education and training for management folks who deal with MSHA inspectors daily
- ▶ Make this a part of what you do every day in order to challenge MSHA's issuing of citations and orders that are unnecessary or overwritten

Use MSHA's Roadmap to Improve Compliance

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- ▶ MSHA tracks the top cited standards each year
- ▶ Using this roadmap as a guide will assist in reducing citations and orders
- ▶ It also eliminates the low hanging fruit

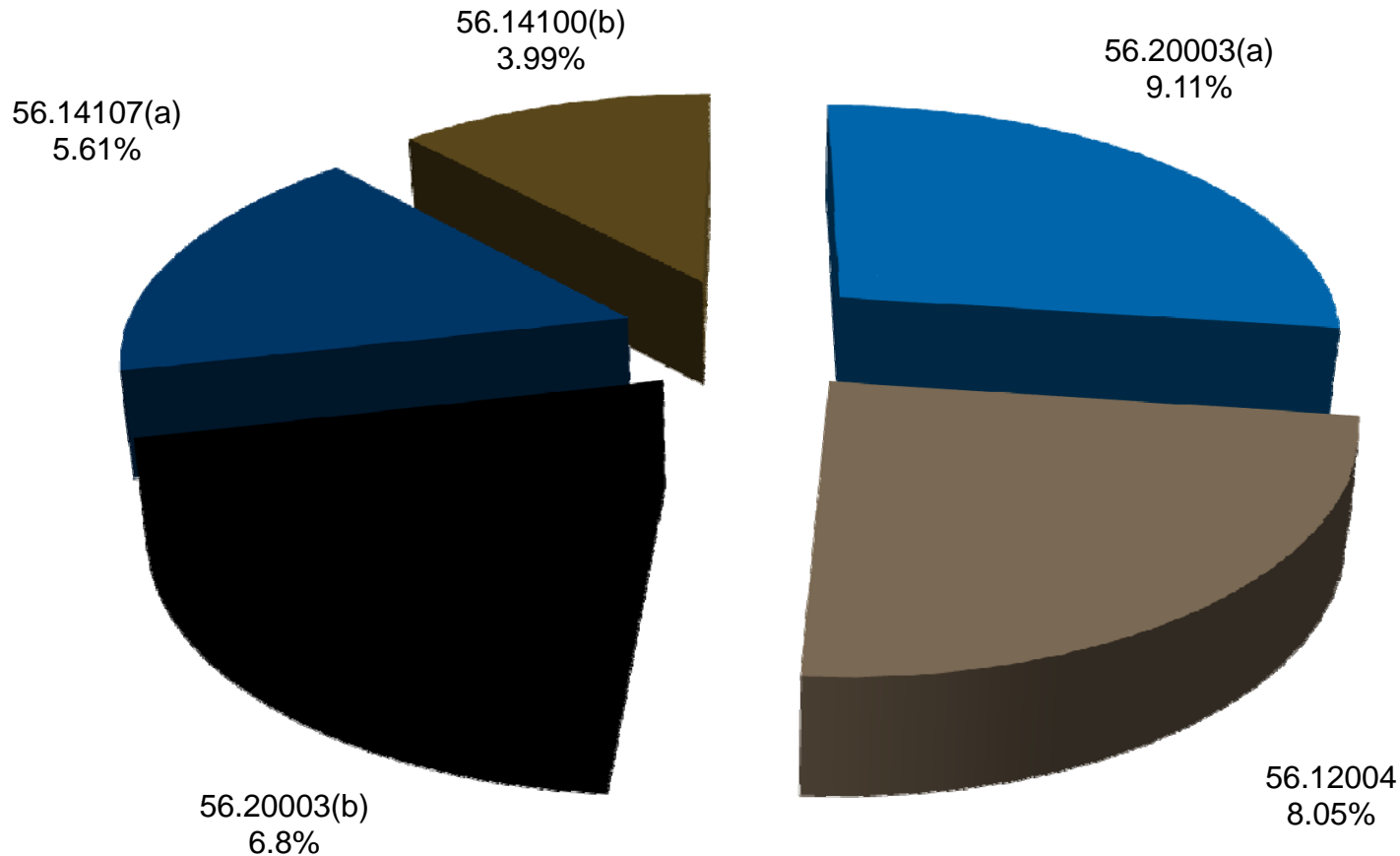
MSHA's 5 Most Frequently Cited Standards 2011 – Facility – Metal

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1. 56.20003(a)	146 violations	9.11%
2. 56.12004	129 violations	8.05%
3. 56.20003(b)	109 violations	6.80%
4. 56.14107(a)	90 violations	5.61%
5. 56.14100(b)	64 violations	3.99%

MSHA's 5 Most Frequently Cited Standards 2011 – Facility – Metal

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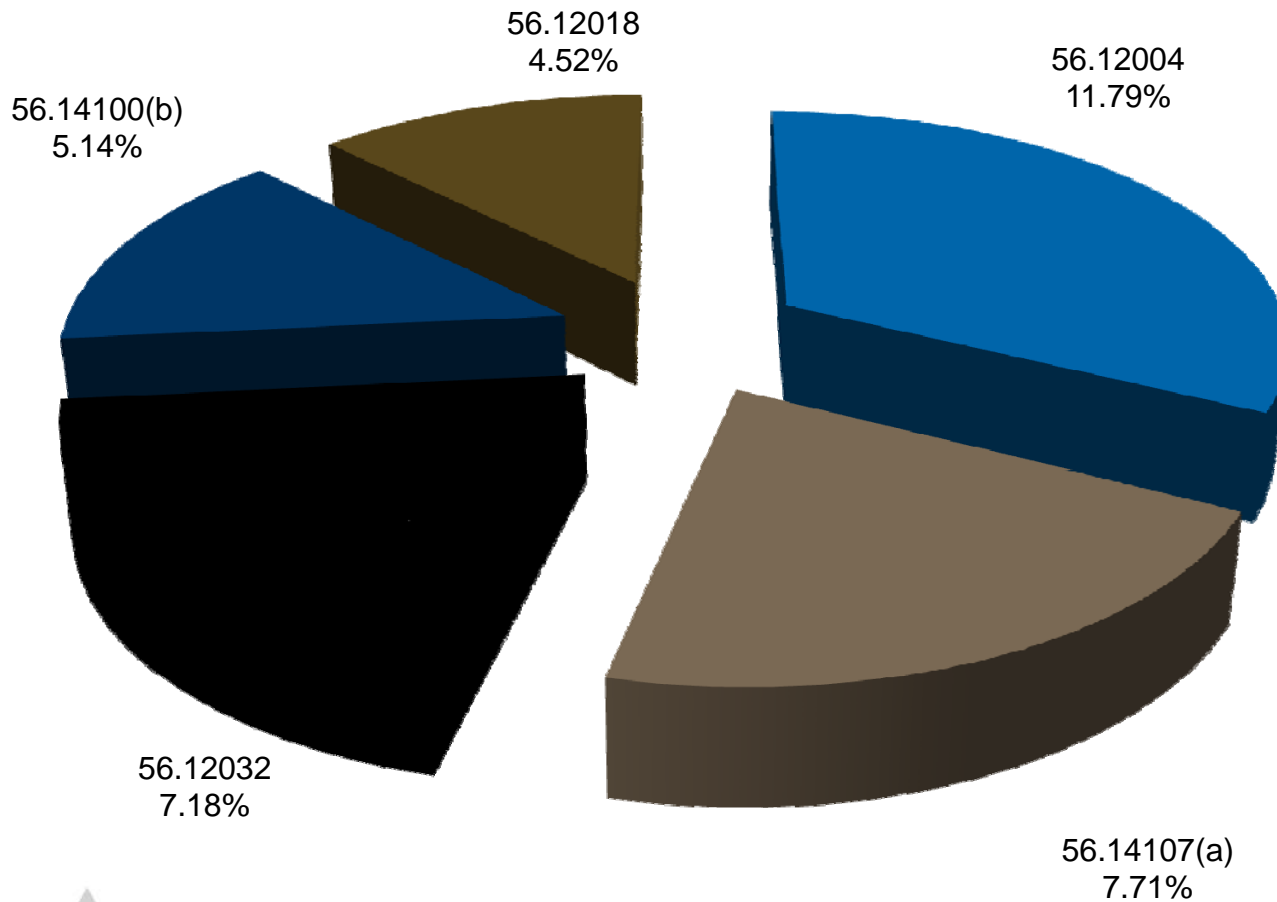
MSHA's 5 Most Frequently Cited Standards 2011 – Facility - Nonmetal

more *Insight.*

1. 56.12004	133 violations	11.79%
2. 56.14107(a)	87 violations	7.71%
3. 56.12032	81 violations	7.18%
4. 56.14100(b)	58 violations	5.14%
5. 56.12018	51 violations	4.52%

MSHA's 5 Most Frequently Cited Standards 2011 – Facility - Nonmetal

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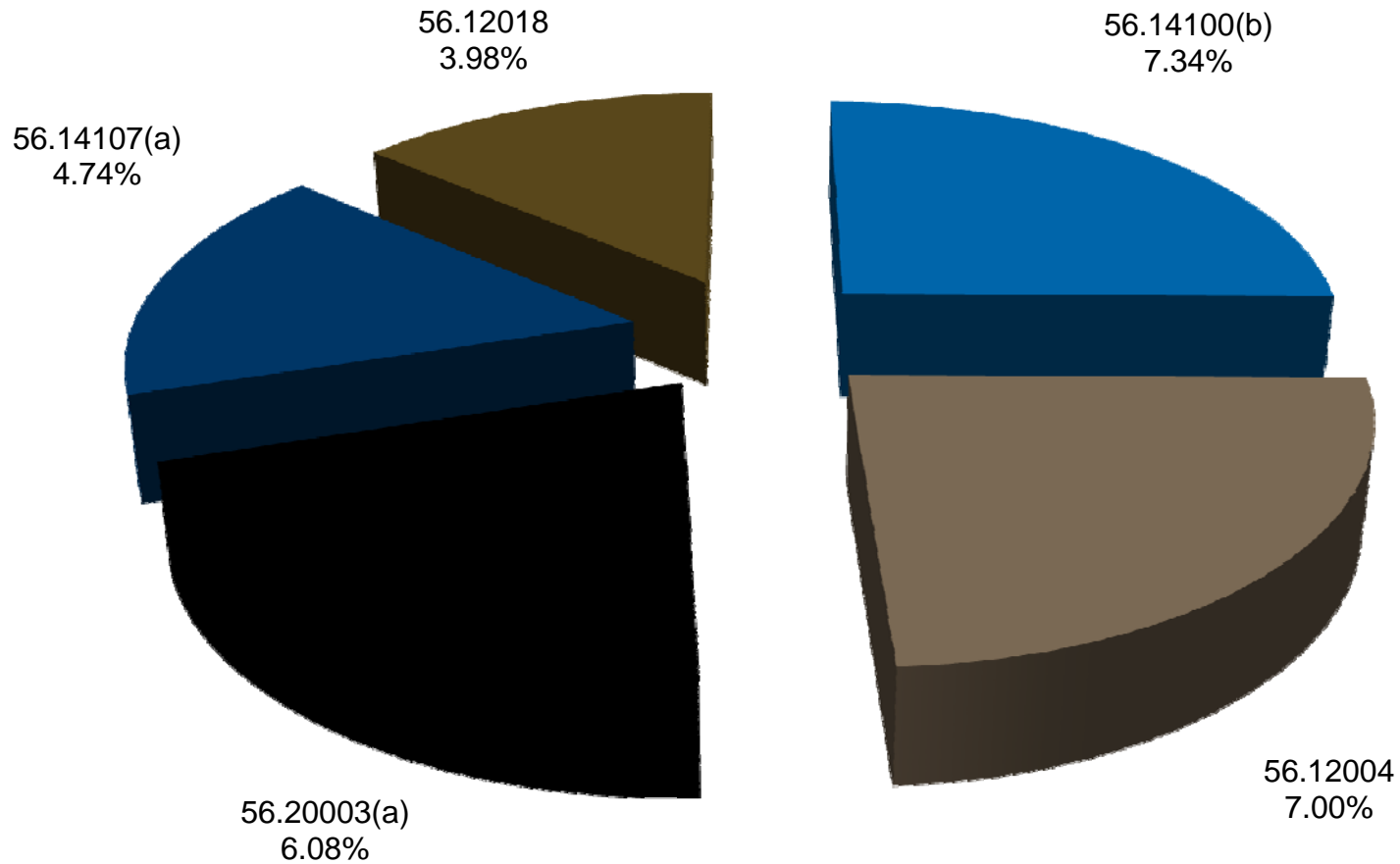
MSHA's 5 Most Frequently Cited Standards 2011 – Surface – Metal

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1. 56.14100(b)	325 violations	7.34%
2. 56.12004	310 violations	7.00%
3. 56.20003(a)	269 violations	6.08%
4. 56.14107(a)	210 violations	4.74%
5. 56.12018	176 violations	3.98%

MSHA's 5 Most Frequently Cited Standards 2011 – Surface – Metal

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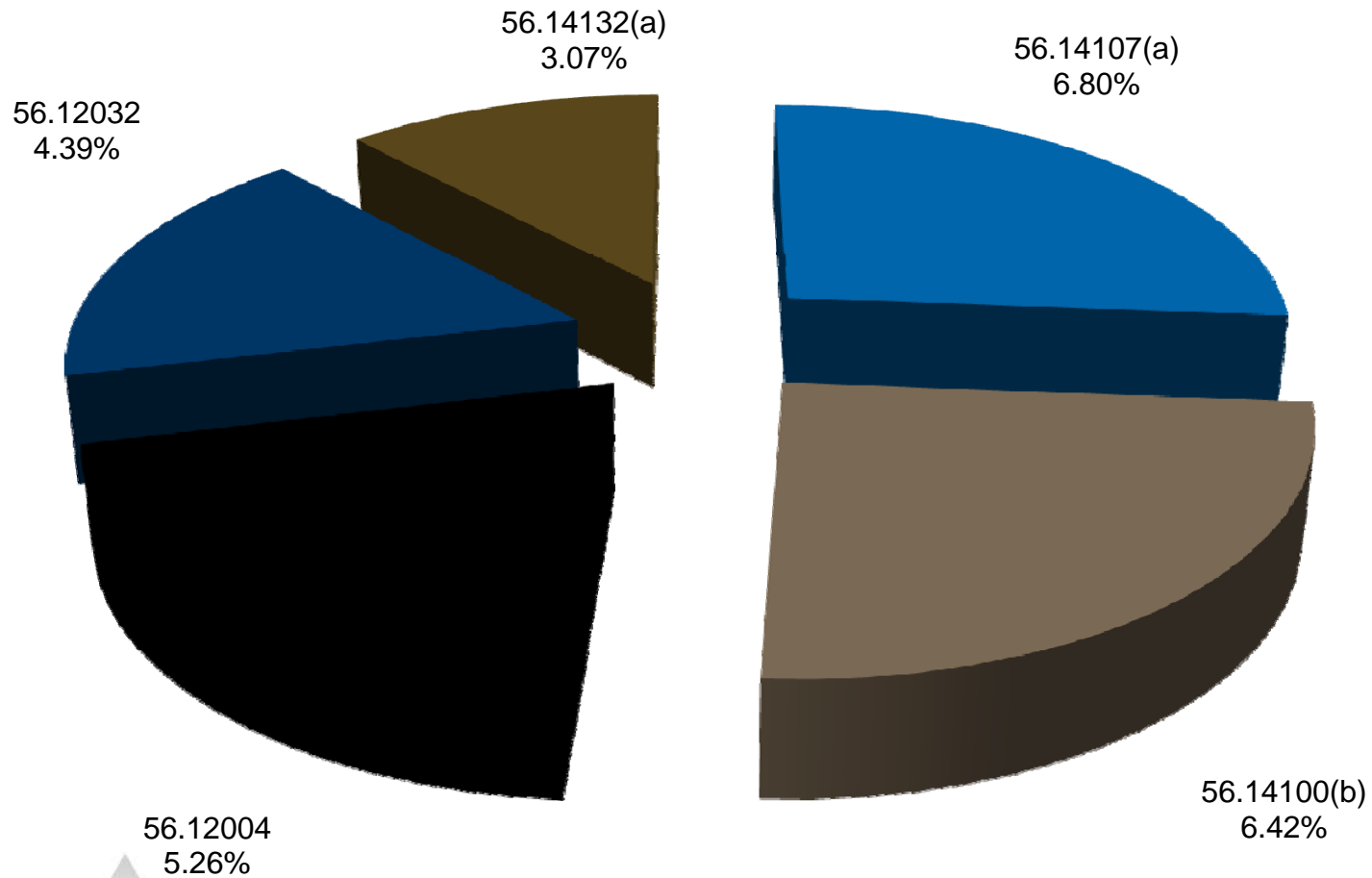
MSHA's 5 Most Frequently Cited Standards 2011 – Surface – Nonmetal

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1. 56.14107(a))	217 violations	6.80%
2. 56.14100(b)	205 violations	6.42%
3. 56.12004	168 violations	5.26%
4. 56.12032	140 violations	4.39%
5. 56.14132(a)	98 violations	3.07%

MSHA's 5 Most Frequently Cited Standards 2011 – Surface – Nonmetal

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Use MSHA's Roadmap to Improve Compliance

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▶ For 2011:

- ▶ Facility – Metal – These five represented 33.56% of MSHA citations issued
- ▶ Facility – Nonmetal – These five represented 36.34% of MSHA citations issued
- ▶ Surface – Metal – These five represented 29.14% of MSHA citations issued
- ▶ Surface – Nonmetal – These five represented 25.94% of MSHA citations issued
 - ▶ This is a roadmap for reducing citations
 - ▶ Audit your citation history to see how you compare with these numbers
 - ▶ Focus more education, training, and compliance in these key areas

Pre-enforcement Awareness Training

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- ▶ Understand the MSHA enforcement process
- ▶ Understand S&S, gravity, negligence, and unwarrantable failure designations
- ▶ Understand the importance of accompanying the MSHA inspector; and the absolute necessity of taking notes
- ▶ Exercise your right to challenge “Political Paper” issued by MSHA that leads to elevated civil penalties, PPOVs /110(c) investigations, etc.

Civil Penalties

- ▶ The maximum civil penalty assessment is now \$70,000.00 under MSHA's March 10, 2008 Inflation Adjustment Rule
- ▶ The minimum regular assessment is now \$112.00
- ▶ The maximum daily civil penalty for failure to correct a violation within the time permitted for abatement is now \$7,500.00 under MSHA's March 10, 2008 Inflation Adjustment Rule
- ▶ Failure to abate citations result in the issuance of a § 104(b) Order

Gravity

- ▶ It is the inspector's evaluation of how serious a condition is
- ▶ The inspector gauges the seriousness by looking at:
 - ▶ The possibility that an injury or illness might occur (10A)
 - ▶ How severe an injury might be if the situation occurs (10B)
 - ▶ If the violation is S&S (10C)
 - ▶ The number of persons who might be affected (10D)

10(A) Possibility of Injury or Illness

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- | | |
|---------------------|-----------|
| ▶ No Likelihood | 0 Points |
| ▶ Unlikely | 10 Points |
| ▶ Reasonably Likely | 30 Points |
| ▶ Highly Likely | 40 Points |
| ▶ Occurred | 50 Points |

10 (B) Severity of Illness or Injury

- | | |
|------------------------------------|-----------|
| ▶ No Lost Workdays | 0 Points |
| ▶ Lost Workdays or Restricted Duty | 5 Points |
| ▶ Permanently Disabling | 10 Points |
| ▶ Fatal | 20 Points |

Definition of Lost Workdays or Restricted Duty

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- ▶ Any injury or illness which would cause:
 - ▶ the injured or ill person to lose one full day of work or more after the day of the injury or illness, or;
 - ▶ which would cause one day or more of restricted duty
- ▶ 30 CFR 100.3(e) Table XII

Definition of Permanently Disabling

- ▶ Any injury or illness which would be likely to result in:
 - ▶ the total or permanent loss of the use of any member or function of the body
- ▶ 30 CFR 100.3(e) Table XII

Definition of Fatal

- ▶ Any work related injury or illness resulting in death, or which has a reasonable potential to cause death
 - ▶ 30 CFR 100.3(e) Table XII

(10)(C) Significant & Substantial

- ▶ The inspector will check the box either yes or no
- ▶ A violation is S&S if based on the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to (by the alleged violation) will result in injury or illness of a reasonably serious nature

10(D) Number of Persons Affected

- ▶ This means the number of persons potentially affected if the event occurred or were to occur
- ▶ Points are assigned to each person potentially affected:

Number of Persons	Points
0	0
1	1
2	2
3	4
4	6
5	8
6	10
7	12
8	14
9	16
10 or more	18

Negligence

- ▶ The Mine Act requires operators to be on the alert for hazards that can affect employee safety
- ▶ And to take steps to prevent or correct these hazards
- ▶ The failure to do so is called negligence

Degrees of Negligence

- ▶ No Negligence: The operator exercised diligence and could not have known of the violative condition
- ▶ Low Negligence: The operator knew or should have known of the violative condition, or practice, but there are considerable mitigating circumstances

Degrees of Negligence

- ▶ Moderate Negligence: The operator knew or should have known of the violative condition or practice, but there were mitigating circumstances
- ▶ High Negligence: The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances
- ▶ Reckless Disregard: The operator displayed conduct which exhibits the absence of the slightest degree of care

Negligence

- ▶ In each citation or order the inspector must evaluate the degree of negligence from among five options:

Degree of Negligence	Points
None	0
Low	10
Moderate	20
High	35
Reckless Disregard	50

Legal Challenges Under the Mine Act

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- ▶ When do you contest a citation or order?
 - ▶ Unfortunately, in the current enforcement climate the answer is: Often

Things to Consider When Deciding more *Insight.* to Contest a Citation/Order

- ▶ The Mine's PPOV Screening
- ▶ The Severity of the Citation
- ▶ Its Impact on your History
- ▶ How the Citation is worded (Condition and Practice)
- ▶ Gravity
- ▶ Negligence
- ▶ Penalty amount

Filing Timeframes

▶ NOTICE OF CONTEST

- ▶ We must file the notice of contest within 30 days from receipt of the citation/order
- ▶ Notice of contest filings for §107(a) orders and § 103(k) orders is 30 days from receipt of the order
- ▶ Because there is no penalty assessed on §107(a) § 103(k) orders this is the only opportunity you have to challenge MSHA's action

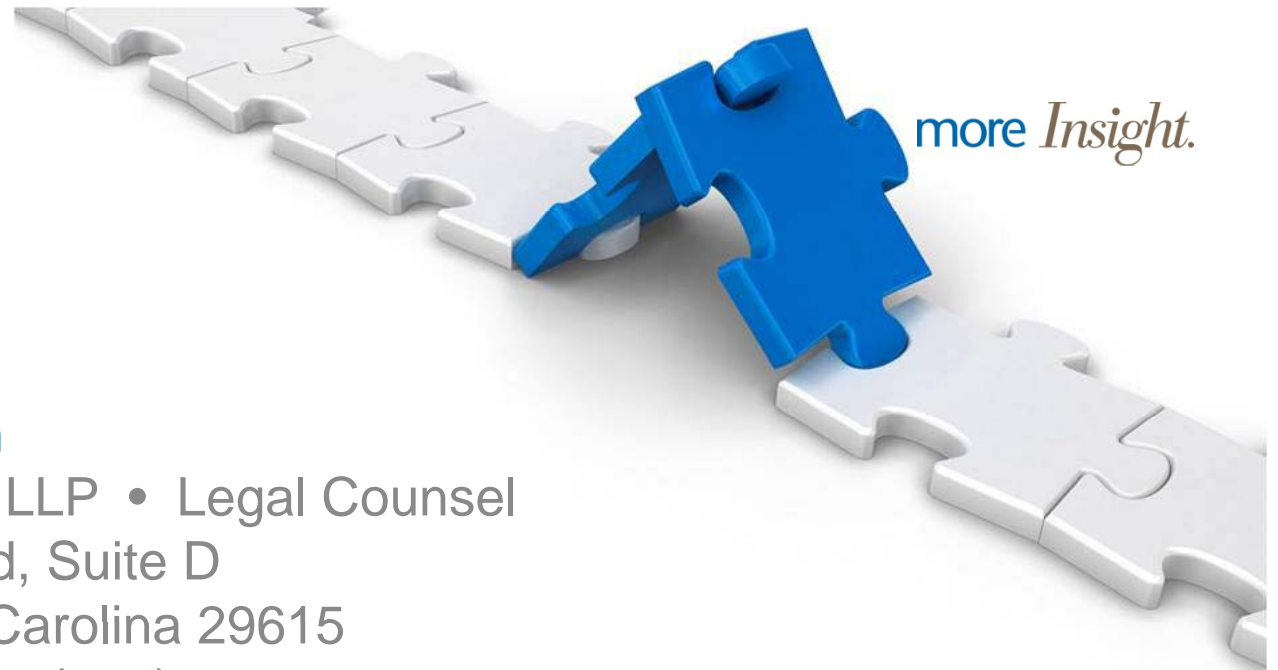
Filing Timeframes

▶ 1000-179 FORM: Penalty Challenge

- ▶ You have 30 days from your receipt of the form to file our Response. It is not 30 days from when your attorney receives the form
- ▶ Once the Secretary of Labor receives the contested 1000-179 form, she has 45 days to file the Petition for Assessment of Civil Penalty
- ▶ Once you receive the Petition for Assessment of Civil Penalty, we have 30 days to file our Answer to the Petition. This is 30 days from your receipt of the Petition, and not 30 days from when your attorney receives the petition (unless Petition is sent directly to counsel)

Motions to Reopen

- ▶ It is becoming increasingly more difficult to get cases re-opened with the Commission
- ▶ They must be filed immediately upon receipt of Judge's notice of a final order in a case
- ▶ Any delay in the filing of the motion to reopen will hinder your success in having a case re-opened by the Commission
- ▶ You must be able to show:
 - ▶ Mistake
 - ▶ Inadvertence
 - ▶ Surprise
 - ▶ Excusable neglect



Questions?

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