

# **MSHA (Mine Safety and Health Administration) Ignores Mine Operators' Walk-Around Rights at Its Peril**

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When MSHA ignores its statutory obligation to allow representatives of mine operators to walk with agency inspectors during their visits, it can jeopardize enforcement actions taken while government agents are unaccompanied.

That risk was realized in February 2012 when an inspection party showed up at Martin County Coal Corporation's (MCC) Voyager No. 7 Mine in Kentucky in response to an anonymous ventilation complaint. Before the group entered the mine, they prevented the operator from arranging for any company representative to accompany them. The ventilation complaint subsequently was found to lack merit.

Three members of the seven-person inspection party, however, set off on a regular inspection. They found alleged cracks in the walls (ribs) near three conveyor belts, two loose rib bolts and an entry wider than allowed. Fallen material at an intersection indicated to inspectors that a crack had allowed the material to break free from the rib.

Inspectors issued a citation and two orders for alleged ground control violations. A third order was issued for failure to conduct adequate on-shift examinations because inspectors believed the alleged hazardous conditions were obvious and had existed for over a month. In all, MSHA proposed \$50,024 in penalties.

However, the observations on which the violations were based conflicted with those of another inspector who testified he had not observed the cited conditions in visits during the prior two-week period. Company representatives corroborated his testimony.

Administrative Law Judge Jerold Feldman deferred to the "broad discretion" of the inspectors who had noted the conditions. He also supported their designation of the alleged hazards as likely to lead to reasonably serious injuries. However, he did not sustain their characterization of unwarrantable failure, i.e., that the operator's alleged failure to address the hazards demonstrated aggravated conduct beyond ordinary negligence.

Feldman also said another reason for rejecting the unwarrantable failure designations was inspectors' failure to recognize the operator's walk-around right under section 103(f) of the Mine Act. A Federal Mine Safety and Health Review Commission decision recognized the operator's 103(f) right and stated evidence in a legal proceeding may be excluded when that right is violated if the operator can show prejudice.

"The prejudice to MCC in this case is self-evident" because it prevented the operator from resolving factual disputes that could have been settled on-site, Feldman wrote. The judge did not say if violation of the operator's walk-around right alone would have led him to dismiss the elevated negligence classification.

He deleted the unwarrantable failure designations and cut the fine for the three hazardous conditions infractions to \$4,000 each. He also vacated the on-shift examination order. Since his decision was based in part on the dissenting testimony of the MSHA inspector, Feldman also called on the agency to assure no reprisals would be taken against him.

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