

## Abating Abatement Process of Mine Safety and Health Administration Enforcement Actions

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Mine operators are often faced with difficult choices when faced with citation and order abatement deadlines imposed by **MSHA** inspectors. These choices can impact the available workforce, production and allocation of resources. When an MSHA inspector issues a citation or order, he or she has broad discretion in setting the deadline for an operator to abate the cited condition in order to have the citation or order terminated. Inspectors set abatement deadlines based on a number of subjective and undefined factors and the mine operator has little input in the determination of abatement deadlines, beyond making a request or suggestion. Ultimately, the decision rests with the inspector. We have represented clients who have experienced unfair enforcement based on unreasonable abatement periods set by MSHA. While most MSHA inspectors try to maintain a dialogue with mine operators to set reasonable abatement periods there are instances where inspectors arbitrarily set unreasonable abatement periods and the results can be severe and costly to mine operators. This article provides practical guidance to mine operators in abating citations and orders and outlines a mine operator's recourse when the inspectors have abused their discretion during the abatement process.

There have been instances where an MSHA inspector has verbally told a mine foreman one abatement deadline, only to set an earlier abatement period in writing on the enforcement action. As a result, the mine operator was operating on a different abatement timetable than the MSHA inspector and when the inspector returned to the mine site, the abatement period set in the enforcement action had expired but not the verbal one made to the foreman. As a result, the mine operator was issued a Section 104(b) Failure to Abate Order. This occurrence could have easily been prevented had the foreman checked the abatement period written on the enforcement action. More often, issues arise when the inspector sets an abatement period with which an operator cannot reasonably comply or the inspector refuses to extend the abatement period.

Mine operators are not without recourse when an inspector abuses his discretion in setting abatement times. First, mine management should carefully review enforcement actions to identify the written abatement time and communicate with the foremen responsible for conducting the abatement to ensure that they are aware of the abatement time and that it is the same as the deadline verbally given by the inspector. Management also should determine whether or not the abatement period is reasonable and whether or not the operator can comply with it. If management determines that more time is necessary then the operator should promptly communicate with the inspector to request

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additional time. Most inspectors are amenable to reasonable requests. If the inspector is unwilling to yield on the abatement period then the operator should consider contacting the inspector's supervisor or the MSHA District Manager to try and resolve the issue before any enforcement. It goes without saying that the operator should immediately and adequately danger off the area and document in detail the action taken and the date and location of the same.

Mine management also must regularly communicate with the foremen or miners overseeing the abatement to follow-up on the progress of the abatement. Such progress should also be carefully documented. Again, if more time is required to complete the abatement the operator should promptly notify MSHA and seek an extension.

Should an MSHA inspector subsequently issue a Section 104(b) Failure to Abate Order the operator should consider filing a Section 105 Notice of Contest within thirty (30) days of the issuance of the order. Operators often make the mistake of waiting until the proposed assessment for the underlying enforcement action is issued by MSHA on a Form 1000-179 and contesting the proposed assessment of the enforcement action believing that they are also contesting the Section 104(b) Failure to Abate Order. This is not the case. Although MSHA can issue proposed penalty assessments for Section 104(b) Failure to Abate Orders such orders are typically non-assessed and appear in the same block as the underlying enforcement action on the MSHA Form 1000-179. This creates the false impression that the Section 104(b) Failure to Abate Order is also being contested when the proposed assessment for the underlying enforcement action is marked for contest. The operator may waive its right to challenge the Section 104(b) Failure to Abate Order if it fails to file a Section 105 Notice of Contest within thirty (30) days of the issuance of the order.

In a noteworthy decision, the Federal Mine Safety and Health Review Commission ("Commission") recently held that an inspector abused his discretion when setting abatement times that ultimately resulted in the issuance of four Section 104(b) Failure to Abate Orders being issued to a taconite producer. In *Hibbing Taconite Co., LAKE 2013-231-RM, et al.*, the operator was issued three housekeeping citations under 30 C.F.R. Section 56.20003(a) and a single equipment citation under 30 Section 56.14011(b). The inspector set the abatement time for a weekend when the mine operator had limited manpower. After granting an extension for two of the citations the inspector set the next abatement period for the following morning at 8:00 a.m. even though the operator could not possibly comply within the time allotted. The inspector subsequently issued four Section 104(b) Failure to Abate Orders and the operator contested the issuance of them. Administrative Law Judge Margaret Miller ruled in MSHA's favor and upheld the four orders and the operator petitioned the Commission for review of the decision.

Upon review, the Commission ruled in favor of the operator finding that the four Section 104(b) Failure to Abate Orders were issued improperly by the MSHA inspector. The Commission noted that the inspector set the abatement time to obtain immediate corrective action but conceded that the operator may not have been capable of abating the cited conditions within the time allotted. The operator worked to address numerous conditions within the cited areas and the inspector conceded that the operator had conducted a significant amount of cleanup within the abatement period. Although the operator had not erected barricades or warning signs the conditions were reported in company examination reports. The Commission held that the inspector abused his discretion when he set abatement times that cut short the amount of time reasonably necessary to correct the cited conditions. The Commission stated that an MSHA inspector "must set an abatement time based upon the amount of time necessary to fully abate a violation." Then, if the operator fails to comply, the MSHA inspector must determine if an extension is warranted without affecting safety and if the operator's delay was justified under the circumstances. Then, and only then, would it be appropriate

for the inspector to issue a Section 104(b) Failure to Abate Order.

The *Hibbing* decision is instructive and provides operators with the leeway and input needed when abating cited conditions. Mine management should maintain an open dialogue with the MSHA inspector in determining the reasonable amount of time needed to abate the conditions. The operator should document its abatement time and extension requests along with facts and information supporting the request and the inspector's response. The abatement period set by the inspector in the enforcement action should be checked for accuracy and should be communicated to all participants in the abatement process. The operator must clearly define the responsibilities of the participants. The abatement process should begin as soon as possible and the cited areas should be properly barricaded and warning signs conspicuously placed. Management must also follow-up to ensure the progress and completion of the abatement and all follow-up efforts should be documented. In addition, all necessary corrective action, participants and resources utilized should be documented, as well as the time period of the corrective action and completion. Lastly, should MSHA ultimately issue a Section 104(b) Failure to Abate Order the operator must consider whether or not a contest is warranted and do so within thirty (30) days of issuance.

The abatement process is intended to ensure safety through the prompt correction of hazards. However, inspectors are not the sole arbiters in deciding the reasonable amount of abatement time. A mine operator's input is valuable. The Commission has recognized a mine operator's interest in the setting of abatement times and operators should be actively involved in those decisions through an open and honest dialogue with MSHA. Through careful planning and active participation the difficulties of the abatement process can be abated.

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