

Congressman / Senator _____

US House of Representatives / Senate

Washington, DC

Subject: MSHA Enforcement and Contestment Backlog

Representative / Senator _____:

Enforcement of the Mine Safety and Health Act must be fair, equitable and consistent, but over the past few years this has not been the case. This has caused the backlog of contested citations. Years of an aggressive safety commitment by South Carolina's mine operators have resulted in a steady improvement of our safety performance. For instance, between 2005 and 2009 all mines in our state attained an average injury incidence rate of **1.13** injuries per 200,000 hours worked.

(<http://www.msha.gov/DRS/DRShome.htm>)

Compare that to other industries and to the national mining rates.

| <i>*BLS Estimates of Nonfatal Occupational Injury and Illness Rates by Industry Division, 2007-2008</i> | | |
|---|-------------|-------------|
| Industry Division | 2007 | 2008 |
| Trade, Transportation & Public Utilities | 4.9 | 4.4 |
| Manufacturing | 5.6 | 5.0 |
| Construction | 5.4 | 4.7 |
| Agriculture, Forestry & Fishing | 5.4 | 5.3 |
| Education & Health Services | 5.2 | 5.0 |
| Retail Trade | 4.80 | 4.40 |
| Leisure & Hospitality | 4.50 | 4.20 |
| Service Providing | 3.80 | 3.60 |
| MINING | 3.70 | 3.50 |
| Financial Activities | 1.40 | 1.50 |
| Private Sector Average | 4.20 | 3.90 |

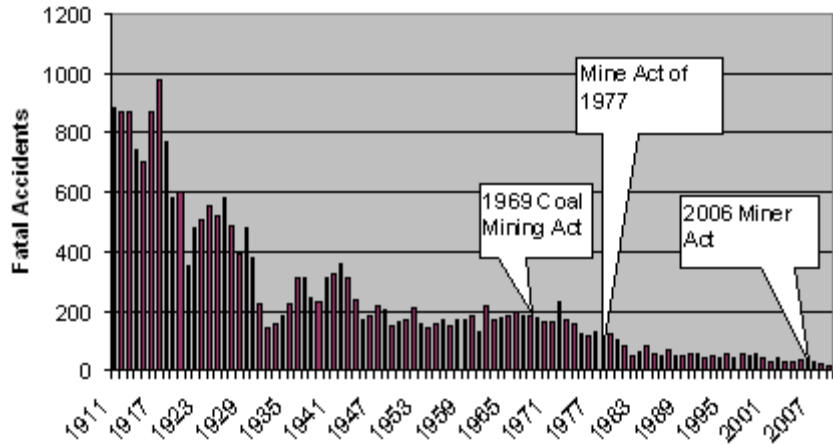
South Carolina's mines are already some of the safest in the nation. In 2009 there were only 19 reportable injuries out of more than 3 million man-hours. Mine operator employees haven't experienced a fatality since the mid 1990's. (<http://www.msha.gov/DRS/DRShome.htm>)

Backlog of Contested Citations

MSHA's director, Joe Main, has recently stated that mine operators are "gaming the system". "Mine operators are taking advantage of loopholes and contesting citations to avoid stiffer penalties". Congress set the stage in 2006 when they decided MSHA was a weak agency and was not doing their job. They rushed the MINER ACT through Congress without due consideration of the consequences that changing Part 100 (assessment of fines) would have on all mining. The agency should have expected and prepared for increased litigation. The MINER ACT created a "history" category that has essentially forced the mine operators to examine citations more closely for appropriateness. Also, MSHA is now forced to show Congress they are doing a better job than before. Unfortunately, the only way MSHA can prove this is to write more citations. Meanwhile, mining's health and safety record is one of continuous improvement.

Metal / Non-Metal Mining

ccidents, injuries and deaths have been on an almost uninterrupted downhill track since 1910. This trend began nearly 70 years before the Mine Act of 1977 required fines, civil penalties or closures orders for violations. (<http://www.msha.gov/stats/centurystats/mmmstats.asp>)



MSHA's Impact on Mining in South Carolina

As of May 24, 2010, the backlog of contested citations in SC had grown to 551 with a proposed penalty of \$1,006,931. Between January 2010 and May 2010, 74 citations were handled through the contestment process. In that process we find that 72% (53) citations were simply thrown out and are what the industry calls "bad paper" or "junk citations". The penalty amount for these junk citations was \$298,893.

(<http://www.msha.gov/DRS/DRShome.htm>)

Nationally, in a study of MSHA litigation for 2008, there was a 40% reduction in affirmed penalty dollars from those originally proposed by the inspector. The decisions by Administrative Law Judges and conference litigation representatives, further illustrate what appears to be inappropriate enforcement by MSHA inspectors. This 40% reduction comes directly from inspectors over assessing the likelihood, gravity, and/or negligence of a violation or the inspector was simply citing a violation where no violation or hazard existed.

This inconsistency of enforcement is frustrating and unnecessarily costly. Mining companies like any other business layout a budget each year with dollars set aside for health and safety. Mine operators are forced to divert their attention and resources toward battling this federal agency over inappropriate citations.

Answer to the Backlog

Provide Feedback to the Inspectors

When the Solicitor or Citation Litigation Representative (CLR) modifies or vacates a contested citation, the inspector that wrote the citation does not receive any feedback. The Solicitors Office or the CLR will initially contact the inspector requesting details about the citation prior to its resolution. However, the inspector is not being provided with feedback concerning final outcome of the citation. The Alternative Case Resolution Initiative (ACRI) Handbook outlines procedures for the CLR to provide the inspector with the results of the pre-hearing settlement. Opportunities for MSHA inspectors to improve consistency, apply appropriate enforcement action and reduce technical or interpretive errors are completely lost. Without a feedback mechanism inspectors are doomed to continue contributing to the backlog.

(<http://www.dol.gov>)

Properly Train MSHA Inspectors

MSHA can assist and help build upon the industry's success by becoming better trained themselves and meeting their own training requirements. If inspectors focus their efforts on clear safety violations, versus arbitrary assumptions that a standard is unmet we will have significantly fewer citations contested.

The Office of Inspector General had this to say:

During fiscal years (FY) 2007-2008, MSHA increased the number of inspectors by 26 percent and provided initial training to more than 350 entry-level inspectors. However, 56 percent of the 102 journeyman inspectors we sampled had not completed MSHA's required retraining during the FY 2006-2007 training

cycle. MSHA lacked controls to track and assure completion of required periodic retraining by journeyman inspectors, and there were no consequences for not attending retraining courses.
(<http://www.oig.dol.gov/public/reports/oa/2010/05-10-001-06-001b.pdf>)

Respectfully yours,