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# ***MSHA Citation Defense – An Operator’s Guide***

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# *Keynote Speakers*



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# ***MSHA Citation Defense – An Operator's Guide***

# The Litigation Process

1. A Citation is issued
2. The Citation is Contested
3. The Secretary Files a Formal Petition
4. An Answer is Drafted and Filed
5. The case is assigned to a lawyer with Dept. of Labor (some go to a CLR)
6. Written Discovery is Exchanged
7. Settlement Negotiations are undertaken
8. If no settlement can be reached, a trial is held before an Administrative Law Judge (ALJ), wherein the merits of our defenses are decided by the ALJ

# Citation Issuance

This is the step in the process where you as the operator are acting as the eyes and ears for your attorneys.

# Contesting the Citation

What you can do when determining which citations to contest:

- Create a folder with all relevant evidence
- When the rebuttals are created, put them into a format that is legible
- Create a policy that no document that could be used as evidence in defending the petition be destroyed or thrown away

# Answer

- The petitions that are filed by the Secretary of Labor (SOL) are cookie cutter, and can be answered quickly
- 30 day deadline for response
- The Secretary will generally file a Motion to Stay the proceedings for 6 months
- The Secretary, like the operator has a deadline on how long they can wait to file the petition after it is contested by the operator

# Assignment of the Petition

- The case is assigned to an ALJ and a specific solicitor within the Secretary's office
- Each ALJ has a different style
- Each solicitor has a different approach to advocating for the Secretary

# Discovery

- Discovery is conducted in very much the same way as it would be in regular tort litigation
- With regard to the discovery that is served upon the Secretary:
  - As much information and documentation as possible is needed
  - When the information is available early in the litigation...

# Discovery

- With regard to answering discovery:
  - The Secretary requests that all pieces of written evidence that supports our positions be provided
  - When we are unable to provide that evidence, it allows the Secretary to beat our best arguments because we cannot prove them
  - The more evidence that is provided early in the litigation, reduces the amount of time will be spent with employees to answer discovery

# Negotiations toward Settlement

- Most importantly, your input, guidance and acceptance of negotiated terms is always the driving force in negotiations
- In just about all situations, the ALJ requires that serious negotiations take place prior the formal hearing on the Petition
- While not true in every situation, the negotiations come down most directly to a balance between penalty paid and gravity of the citation
- Each solicitor has their own style of negotiation, but it is here that, the better the evidence that has been retained and information from the ground regarding citation issuance begins to pay off

# Trial

- The trial of a petition follows the path of regular litigation except for there is no jury and the judge is an ALJ
- Needed:
  - All evidence produce during discovery
  - Witnesses from the mine to testify
  - Time to prepare the case and time with the witnesses
- The decision regarding going to trial is completely up to you
- Appeal

# Spoliation

- Definition:
  1. A failure to preserve material evidence in anticipation of litigation
  2. Prejudice to the party claiming spoliation
  3. Bad faith on the part of the party alleged to have failed to preserve material evidence
- IO Coal Commission Decision brought spoliation/adverse inference to ALJ Proceedings
- When is an Operator on *Notice to Preserve Materials*?

# Primer on Discovery

- Prior to the Back-log Project, many MSHA contests were completed without discovery
- Provides background on the other side's arguments and their method of proving those arguments
- Interrogatories, Requests for Production, Requests for Admission, Depositions

# Consequences of Spoliation

- Inability to negotiate the best settlement
- Adverse inference instruction/inability to contest some part of the citation
- Increased cost of contest
- Sanctions
- Dismissal

# Making the Best Argument for Contest

- Witnesses – Who was with the inspector? Who was in the area? Who was operating the equipment?
- Documents – Permissibility books, electrical exams, belt examinations, pre-shift and on-shift exams.
- Not just for the day of the citation – preserve documents for weeks before.
- How long did condition exist?

# The Backlog Program

- Increase is the Backlog Program
- It is the Secretary's goal to get these cases off of its docket

# The Backlog Program

- Pursuant to Chapter 7 of Public Law 111-212, the “Supplemental Appropriations Act, 2010” the DOL received an appropriation for the purpose of reducing the existing case backlog before the Commission, and other purposes related to mine safety
- As of July 29, 2010, the Commission had a total of 17,591 cases in its trial-level inventory

# The Backlog Program

- FMSHRC's Office of Administrative Law Judges (OALJ) prioritizes cases involving fatalities, injuries, flagrant violations, emergency response plans, mine closures, and discrimination complaints
- Overview of the Secretary's strategy with regard to the cases in the backlog
  - FMSHRC has utilized measures such as global settlement conferences and calendar calls to dispose of cases expeditiously

# The Backlog Program

- According to the Secretary, “focused litigation and trial preparation led to case resolutions, with a number of large proposed settlements negotiated on the eve of trial.”

# Take - Aways

- Preserve documents and witnesses
- Discovery has taken on greater importance in MSHA proceedings
- Talk to your counsel about the information provided in each litigation
- Provide early settlement authority
- Settlement negotiations center around the evidence available
- Backlog project has served to increase the volume of contest proceedings

# *Thank You!*



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