

*Week of September 1, 2014*

## 'Major Issues' Affect Cal/OSHA's Mission Capability, Federal OSHA Says

The California Division of Occupational Safety and Health, better known as Cal/OSHA, is so understaffed the agency is challenged to fulfill its mission, federal OSHA said in its annual monitoring and evaluation report of the state agency.

Besides understaffing, federal auditors described as "major issues" a low rate of serious violations and long citation lapse time, which is the period between the start of an inspection and issuance of a citation. The critique covered the 2013 fiscal year.

"The lack of staffing affects the citation lapse time, the number of inspections conducted, and the response time to complaints," federal officials said. "In particular, the number of inspections conducted by the current Cal/OSHA staff is well below the federal average. To compound this problem, there has been a steady decrease in inspectors since FY 2011."

The report also said California's rate of serious, willful or repeat violations had fallen significantly below the federal average, suggesting Cal/OSHA's "limited resources are not being applied most efficiently and effectively." Contributing factors likely included targeting low hazard industries and inappropriately coding non-enforcement activities as inspections, auditors said.

Problems also were seen in the state's program to protect whistleblowers from retaliation for lodging workplace health and safety complaints. Documentation of such cases was "often not adequate," and in four of 19 cases auditors examined, the conclusion investigators drew was not supported by the evidence.

In an August 7 letter to OSHA's Region 9 Manager, Christine Baker, Director of the California Department of Industrial Relations, the agency in charge of Cal/OSHA, agreed with OSHA's concerns regarding staffing levels and enforcement inspections. Baker said a new leadership team at Cal/OSHA since September 2013 was working actively "to restore and strengthen" it in key areas. Cal/OSHA's FY 2014 budget includes funds to fill 27 previously unfunded positions, she said. In addition, an infusion of \$5.7 million in new money will bring 15 new hires to Cal/OSHA's process safety management unit.

As for enforcement inspections, "We have initiated processes to increase the timeliness, volume, and quality of our inspections," Baker said. She listed several "ongoing efforts" then added that the state "will also work with OSHA to document our high hazard targeting methods and create a plan for evaluating effectiveness."



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## Judge Denies MSHA's Motion for Temporary Economic Reinstatement in Discrimination Case

A mine employee sought temporary economic reinstatement after filing a discrimination claim over alleged safety issues, but a judge has ruled physical reinstatement is the only available remedy.

Cheryl Garcia resigned as an industrial hygienist at Veris Gold U.S.A., Inc.'s Jerritt Canyon Mill in Nevada alleging she faced hostility from management. She filed a discrimination claim with MSHA. In July, Administrative Law Judge David Simonton ordered Veris to put Garcia back to work while her discrimination case proceeded through litigation.

But, going to bat for Garcia, MSHA objected, contending Garcia faced increased hostility from the assistant mill manager, who had recently been promoted to mill manager. The agency asked Simonton to economically reinstate Garcia by directing the company to pay her wages and benefits rather than have her return to work. Veris objected.

MSHA argued that the relevant discrimination provision of the Mine Act gave Simonton the authority to order economic reinstatement. In a decision issued August 22, the judge disagreed. Quoting directly from the statute, Simonton said the language indicated physical reinstatement was the sole remedy. He added that he could not find, nor could MSHA identify, a single instance where the Federal Mine Safety and Health Review Commission granted economic relief over an operator's objections.

The agency pointed out a 2011 case in which a judge had economically reinstated a miner over his objections.

However, Simonton dismissed it, saying evidence in that case indicated there was a potential for workplace disruption if the complainant returned to work. Garcia's allegations of hostility were in dispute, though, because Veris said it had investigated Garcia's allegations about the mill manager and had found them to be meritless. Simonton also noted that MSHA had offered no independent corroboration of Garcia's contentions.

Paraphrasing from the 2011 case, Simonton commented, "[A]n order of temporary economic reinstatement without the operator's consent would deprive Respondent of the labor it generally receives during temporary physical reinstatement."

He said Veris had acted in good faith by proposing a physical reinstatement plan whereby Garcia would get her old job back and receive full pay and benefits. However, she had said no, instead requesting part-time weekend work on a four-week trial basis while she continued work at her current job.

In striking MSHA's reconsideration motion, Simonton also directed the two sides to continue negotiations on his temporary reinstatement order while continuing a discussion to settle Garcia's claim.

On a procedural matter, Simonton said he would normally have barred MSHA's motion because it was filed late, violating a Commission rule. Instead, he agreed to consider it because the agency had alleged Garcia would face increased hostility as a result of the mill manager's promotion.

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