

Week of **September 8, 2014**

OSHA, NIOSH Issue Guidance on Temporary Worker Safety

OSHA and NIOSH have teamed up to produce a guidance document featuring safety and health best practices for employers and temporary staffing agencies which supply labor to them.

OSHA data indicate that temporary workers are at increased risk of injury or illness compared to other workers. Host employers and their staffing agencies share responsibility for the health and safety of temporary workers. As such, the six-page document recommends that the written contract between the two parties should clearly define the temporary worker's tasks and the safety and health responsibilities of each employer. According to the publication, a written agreement is important because "[t]he joint employment structure requires effective communication and a common understanding of the division of responsibilities for safety and health."

Other recommendations include joint evaluations of the worksite, training temporary agency representatives to identify and eliminate potential safety and health hazards, and providing training and new project orientation to temporary employees. Staffing agencies are urged to maintain contact with temporary workers to verify that the host has fulfilled its responsibilities for a safe workplace.

For purposes of the guidance, "temporary workers" are defined as those supplied to a host employer by a

temporary agency, regardless if the job is actually temporary. The guidance spells out recommended practices, as opposed to legal mandates. However, a section on reporting injuries and illnesses references the legally required reporting duty of the employer providing day-to-day supervision, which in most instances would be the host employer.

"Whether temporary or permanent, all workers always have a right to a safe and healthy workplace," OSHA Assistant Secretary David Michaels said last month in announcing the initiative at the annual meeting of the Voluntary Protection Programs Participants' Association. "Staffing agencies and the host employers are joint employers of temporary workers and both are responsible for providing and maintaining safe working conditions. Our new Recommended Practices publication highlights this joint responsibility."

In an OSHA news release, NIOSH Director Dr. John Howard added, "Recognizing that temporary workers are often new to the workplace to which they are sent, we believe these recommended practices will provide a strong foundation for host employers and staffing agencies to work together to provide a comprehensive program that protects the safety and health of all workers."

OSHA's Temporary Worker Initiative, launched last year, includes outreach, training and enforcement to assure that temporary workers are protected in their workplaces.

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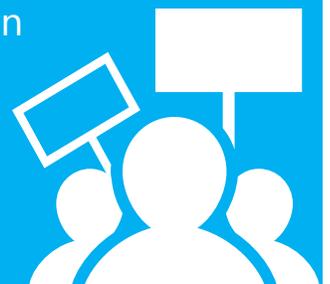
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Split Commission Holds MSHA POV Rule Valid

The Federal Mine Safety and Health Review Commission has held that MSHA's pattern of violations (POV) rule is "facially valid," but that opinion was not rendered unanimously.

The case before the Commission involved a challenge by Brody Mining, LLC over the designation of its No. 1 underground coal mine in West Virginia as a POV violator by MSHA in October 2013. The notice was based on 54 agency-issued citations and orders written over a 12-month screening period ending the previous August 31. The commissioners accepted the case after its chief justice certified the proceeding for interlocutory review.

Two central questions the five-member panel faced were whether or not the rule is valid and if the criteria MSHA uses in determining POV eligibility require notice and comment rulemaking. The agency followed appropriate rulemaking procedures when it promulgated a POV rule in 2013. However, although the rule listed specific POV criteria, it did not disclose minimum numeric thresholds that had to be met for POV eligibility. Those thresholds were enumerated subsequently by MSHA.

In a decision August 28, the majority commissioners held that MSHA's regulation was not arbitrary, capricious or an abuse of discretion, but represented "a reasonable approach consistent with the language and purpose of the Mine Act." As such, it was valid and no further notice and comment was required. The majority also held that MSHA's POV notice to Brody did not violate the mine operator's due process right because appropriate protections are available to Brody to guarantee it.

However, in a 31-page dissent, Commissioner William Althen sharply disputed his colleagues' decision. He agreed with Brody that MSHA's specific numeric pattern criteria are substantive in nature and thus must undergo the process of public comment. He cited a case from the Seventh Circuit in which the court struck down as arbitrary an eight-foot height requirement for enclosing dangerous animals set without public comment by the Department of Agriculture.

Althen noted that MSHA has made its pattern criteria binding on the agency, and citing the Seventh Circuit's ruling, he said, "If the agency binds itself or others to a set of criteria, then, as the *Hoctor* court expressed, it is vital for the public to have a right to comment." There is "[v]oluminous precedent" that action by an agency that binds it, the affected public or both is a substantive rule, he added.

The cudgel behind POV status is severe business disruption brought on by orders withdrawing miners potentially affected by any violation an inspector believes represents a hazard sufficient to cause serious injury or illness. Althen held that Brody was entitled to a constitutionally-guaranteed due process hearing before it was POV-targeted because its potential loss from repeated withdrawal orders outweighs any valid government interest in mine health and safety. The government interest is not paramount because the enabling POV provision of the Mine Act "is not aimed at immediate, current, or even recent hazards," Althen said, rather its intent is to change the long-term culture of a few habitual offenders.

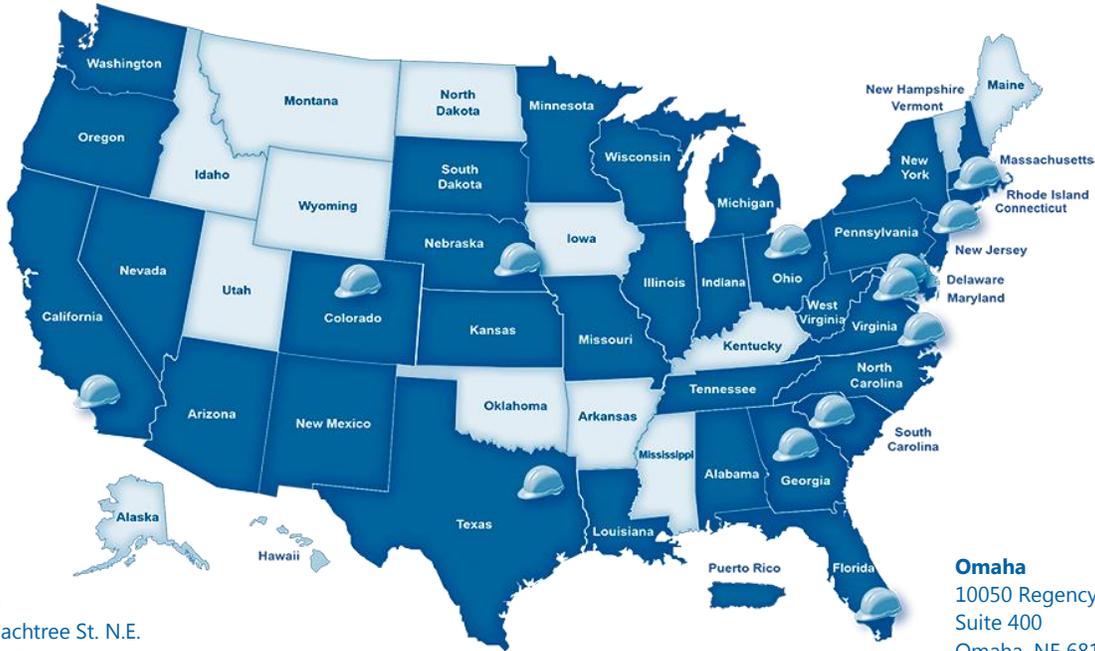
He also noted the absence of any protective safeguards for operators before imposition of the POV enforcement tool. He called attention to MSHA's argument that an operator may seek to ameliorate or vacate a citation through informal discussions with MSHA supervisors, but noted that Brody's request to conference citations had been rejected on five different occasions.

He also scoffed at MSHA's argument its web-based POV monitoring tool afforded operators adequate advance notice of its POV status. "The right to a hearing before imposition of a severe penalty in a non-emergency context is not satisfied by an asserted opportunity to self-police oneself to foresee and avoid violations of government regulations," he said.

Althen concluded he would vacate the judge's decision and forbid MSHA from issuing POV notices until after its criteria went through notice and comment rulemaking. However, the ruling majority affirmed the judge's interlocutory order and remanded the case for further proceedings.



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