

Week of **December 15, 2014**

## Operator's Delay in Beginning MSHA Inspection Not Unreasonable, Judge Rules

While delaying the start of an MSHA inspection for about 30 minutes could be an offense under the Mine Act, MSHA was unjustified under the circumstances in citing a Montana sand-and-gravel operation for its alleged indirect denial of entry to an MSHA inspector, a Review Commission judge has ruled. *MSHA v. Portable, Inc.*, FMSHRC No. WEST 2013-526-M (Dec. 5, 2014).

In his decision, Administrative Law Judge William Moran concluded operator Portable, Inc. did not intend to delay the inspection, nor was the delay unreasonable. He attributed the delay to "the unfamiliarity of those at the mine with how to deal with a mine inspection and the lack of precision on the Inspector's part in communicating the immediacy associated with this right to inspect."

Section 103(a) of the Mine Act affords MSHA the right of entry to mines for inspection purposes and prohibits anyone from providing advance notice of inspections.

When an inspector showed up at Portable's Wash Plant Mine in August 2012, an employee told the inspector it was Portable's policy to require all visitors to be escorted while on mine property, but the operator was unable to locate an escort quickly.

Although the MSHA inspector testified he usually starts his inspection after five minutes of arrival, proceeding unaccompanied if necessary, in this instance he chose to wait a longer time for the Mine to provide an escort. After 30 minutes, he began the inspection unaccompanied and was joined by the crusher operator some 20 minutes later. The judge noted the inspector neither attempted to explain his authority to begin an inspection unescorted nor did he begin his inspection.

"There was no testimony or documentary evidence presented by either side that [inspector] was told that he was *not permitted* to inspect the mine at any point during the 30 minute waiting period despite the description in the citation suggesting otherwise," Moran said [his emphasis].

**We want to wish everyone happy holidays and a very merry new year!**

We are taking the holidays off and will resume this newsletter after the 1st. *See you then!*



The inspector's testimony also was undercut by his supervisor, who testified that in some of the hundreds of inspections in which he (the supervisor) had been involved, he had waited 30 minutes or more for an escort and had not issued a citation over the delay. He stated that he had inspected the Wash Plant Mine twice, once waiting 15 to 20 minutes for an escort, and had not issued a citation for impeding his inspection.

The typical procedure at the Mine when an inspector arrives is for someone to inform the safety director, who is not immediately available, since she works at an office about 10 minutes away. However, she was unavailable that day, causing a scramble to find a replacement at the mine, where just five people were working.

"[T]he Secretary's previous interactions with Portable set the stage for its expectations, and was indicative of the amount of time it considered to be a reasonable period to wait," Moran stated. The inspector was actually a conference and litigation representative ("CLR") out of Denver who was helping temporarily to complete inspections. "It is fair to state that no claim ... would have arisen but for the temporary inspector's lack of appreciation of the protocol that MSHA had been observing with Portable," the judge said.

MSHA also offered an alternative theory — that the Mine was guilty of the offense of providing advance notice. In support of the allegation, the agency suggested the Mine had corrected hazardous conditions after realizing an inspection was imminent. However, ALJ Moran dismissed the charge after finding no evidence in the record to support it.

He vacated the citation, which had been written as high negligence and specially assessed at \$1,000. The operator was represented by Jackson Lewis attorneys Donna Pryor and Breyana Penn.

## OSHA Cites Employer, Staffing Agency after Accident

A Wisconsin-based services company and a staffing agency providing the company with temporary labor were cited by OSHA after a maintenance worker suffered severe burns when he came into contact with an energized electrical source.

Arvato Digital Services, LLC received one alleged willful citation and 10 alleged serious citations over the incident in May at its distribution center in Pleasant Prairie and faces a \$124,000 proposed penalty. Parallel Employment Group was handed four citations, all alleged as serious, and faces a \$26,000 proposed penalty.

Injuries to the 24-year-old worker left him unable to work for more than four months, OSHA said in a press release. The agency asserted the accident occurred as the worker was trouble-shooting an electrical failure on a heat-sealing machine.

"Workers should not conduct maintenance and trouble-shooting without shutting down electrical sources and wearing personal protective equipment," said Chris Zortman, OSHA's area director in Milwaukee. "Both temporary staffing agencies and host employers must train and equip their employees properly."

The willful citation against Arvato stems from OSHA's belief the company failed to implement electrical safety practices for employees. In addition, OSHA asserted that

Arvato failed to require personal protective equipment for employees working near exposed, energized electrical parts. The company also did not develop procedures to de-energize circuits and equipment safely or ensure stored energy capacitors were grounded, OSHA contended.

Both Arvato and Parallel Employment were cited for allegedly not training temporary employees in electrical safety and exposing workers to operating machinery parts on conveyers and press equipment.

OSHA cites as willful those alleged violations it deems to have been committed with intentional, knowing or voluntary disregard for the law or with plain indifference to employee safety and health. Serious infractions are those the agency believes carry a substantial probability of death or serious physical harm from a hazard about which the employer knew or should have known.

OSHA launched what it called its Temporary Worker Initiative in April 2013 after receiving a series of reports of fatal injuries suffered by temporary employees, many during their first days on the job. Besides stepped-up enforcement, the agency has issued guidance on the respective roles of employers and their staffing agencies for the safety and health of temporary staff and on injury and illness recordkeeping requirements.

*Jackson Lewis is hosting an upcoming webinar on*

### 2014 Mid-Year Election: Expectations from the 114<sup>th</sup> Congress

Hosted by Jackson Lewis' Government Relations practice group, this complimentary 90-minute webinar will discuss possible congressional responses to the issues mentioned above, as well as anticipated changes in congressional leadership and how those changes could impact the Administration's pro-employee and pro-labor agenda.

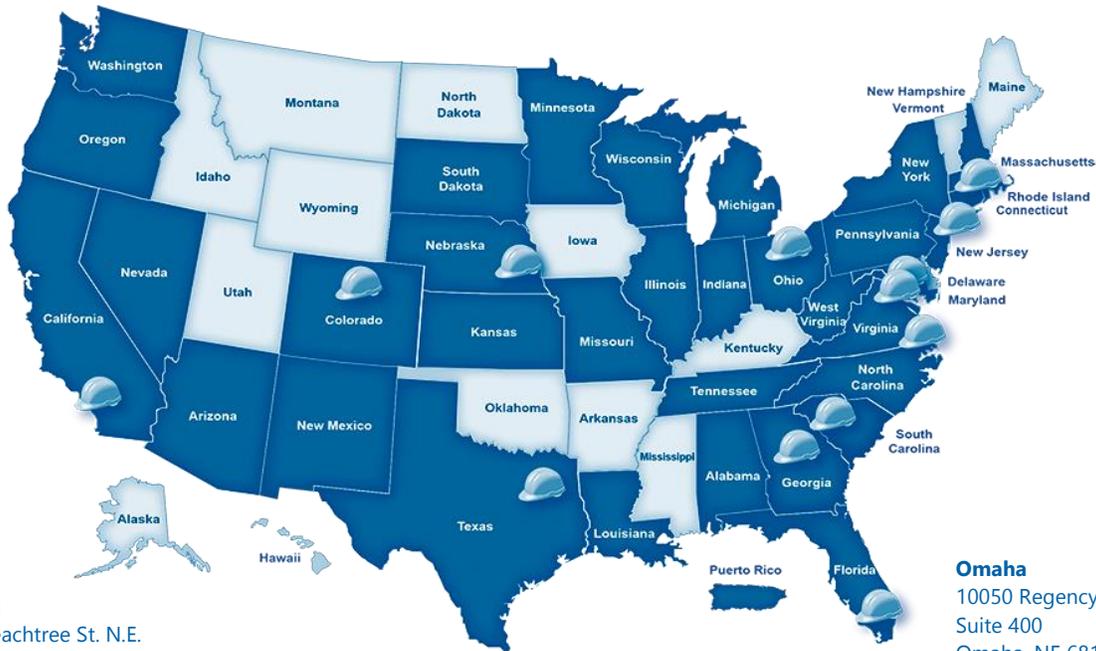
**Friday, January 9, 2015** ■ 12:00 – 1:30PM EST

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