MSHA’s Final Dust Rule Draws Industry Ire

MSHA has released a new regulation, lowering the amount of permissible coal dust and forcing the use of new technology. The industry believes that the rule is neither justified nor feasible and will kill jobs.

The regulation, released April 23, is intended to prevent coal workers’ pneumoconiosis (CWP), better known as black lung disease, by reducing exposure to coal dust in both surface and underground coal miners. The new rule increases mine operators’ sampling requirements, mandates use of a new personal dust monitor (PDM) that provides results instantaneously, expands medical testing requirements, lowers the overall exposure limit by 25% and requires immediate corrections of conditions. It will be phased-in over two years with most provisions for sampling effective this coming August, use of the PDM by February 1, 2016, and full compliance, including to lower exposure limits, by August 1, 2016.

The regulation includes changes to what was proposed in October 2010. The most prominent is a reduction in the exposure limit to 1.5 mg/m³ of air from 2 mg/m³. In MSHA’s October 2010 proposal, the agency had proposed a cut to 1 mg/m³. For working miners suffering from CWP and for air used to ventilate working places, the limit drops to 0.5 mg/m³ from 1 mg/m³. A single MSHA-collected compliance sample over the limit will trigger a citation.

Industry officials objected to the proposed rule, saying a focused approach was needed to improve current effective protections, rather than an industrywide mandate that is not technically achievable. The National Mining Association and others complained MSHA had ignored “better protection” and “proven solutions.” These include supplied clean air helmets, rotating miners as a means of limiting exposure and imposing a mandate on miners to participate in x-ray testing programs.

On April 24, MSHA Assistant Secretary Joe Main said the agency would be reaching out to interested parties in an informal alliance to help spread word about the rule and how to comply with it. The agency also pledged to release an extensive set of compliance materials and to hold six briefing sessions on the rule throughout the coalfields in the next two months.

On May 1, Jackson Lewis filed suit against Department of Labor and MSHA in the U.S. Court of Appeals for the Eleventh Circuit, challenging the validity of the new coal dust rules on behalf of the National Mining Association, the Alabama Coal Association, Walter Energy, and Warrior Coal Co. The Circuit had overturned a 1998 MSHA dust rule based on the agency’s improper rulemaking procedure and its failure to demonstrate feasibility. Murray Energy and a group of other companies have filed a separate challenge in the Sixth Circuit Court of Appeals.
General Duty Clause Use Could Increase, Attorney Warns

An appeals court decision upholding OSHA’s application of the general duty clause in the death of a SeaWorld trainer may embolden the agency to apply it more broadly, an industry lawyer says.

Dawn Brancheau died when a killer whale grabbed her during a live performance in Orlando in February 2010. OSHA issued three citations to the entertainment company, one under the general duty clause of the Occupational Safety and Health (OSH) Act. A judge upheld the citation. SeaWorld appealed to the D. C. Circuit, but a three-judge panel sided with OSHA.

SeaWorld unsuccessfully argued OSHA had failed to prove that the company recognized trainers’ interaction with killer whales was hazardous and that a feasible means existed to reduce the hazard.

Jackson Lewis attorney Tressi Cordaro said she sees OSHA’s SeaWorld enforcement action as part of a broader trend by OSHA of reaching into industries the agency has traditionally left alone.

“I don’t see how, if OSHA’s got the green light in the entertainment industry, they can’t move into sports,” she told Bloomberg BNA. Cordaro cited a hypothetical example of OSHA intervening after an NFL quarterback dies on the field from heat stress.

The general duty clause was never meant to substitute for OSHA’s developing regulatory standards, “but that’s what you’re seeing,” Cordaro said.

OSHA, though, denies it plans a more expansive role. Agency chief David Michaels told Bloomberg BNA in January he has no plans to broaden use of the general duty clause. His comment was made in the context of the agency’s application of the provision in a case involving alleged overexposure to styrene, even though the level was below the OSHA legal limit.

A similar remark was made around the same time by an OSHA spokesman, who asserted the clause is reserved for extreme cases, mainly because the agency must overcome a high legal bar to prove them.
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