

# IMAGE MATTERS

BY R. BRIAN HENDRIX



Every mine operator knows (or should know) the image the Mine Safety and Health Administration (MSHA) has of an operator matters when it comes to enforcement, at least in terms of day-to-day enforcement. In other words, if MSHA's perception or view of a particular mine operator — you, for example — is that it is trying to do the right thing and is playing it straight or honest with it,

then it will be less likely to spend extra time at your mines and will be more likely to give you the benefit of the doubt when it comes to compliance issues, plan approvals and the like. How you respond to MSHA on a daily basis — particularly how you respond to enforcement actions — also matters.

I am not saying that MSHA will cut a “good operator” a break or shirk its statutory enforcement duties to favor one operator over another. I am also not saying that MSHA's opinion of an operator is always well-formed or correct. I am saying MSHA's effectiveness depends, in part, on its willingness and ability to focus more on the mines and the issues that have the greatest impact on miners' safety and health. We can debate how well MSHA does that. However, MSHA has an opinion about you and your operation, and that opinion factors in its enforcement decisions.

MSHA bases its opinion of an operator on all sorts of information. Compliance history and injury and illness rates partially shape MSHA's view of an operator, i.e., an operator's image. However, MSHA's opinion of you isn't just based on data. How your people interact with inspectors during regular inspections and your response to MSHA enforcement actions also shapes its opinion of you.

I want to focus on how your people interact with MSHA during regular inspections and how you respond to the “good paper” MSHA issues, i.e., citations and orders that properly identify and characterize violations. In coal, last year, MSHA issued more than 60,000 citations and orders and assessed more than \$60 million in penalties.

What do you do with “good paper”? The obvious starting point is to abate the violation as soon as possible and pay the assessed penalty in a timely fashion. That's just the starting point though. To get the most value out of each citation and order MSHA issues, do you make sure that:

- (1) supervisors and rank-and-file miners responsible for the area where MSHA discovered a cited condition or practice are familiar with the violation MSHA cited? Do they actually review every violation? Do you discuss why the violation occurred? How similar violations will be avoided in the future? Do you make sure that MSHA sees what you're doing to learn from mistakes? A discussion and review of every violation need not take much time, and it is one of the best ways to demonstrate that you are trying to improve.
- (2) supervisors and rank-and-file miners are familiar with the standard that MSHA cited and what it requires? All miners (not just supervisors) should be familiar with MSHA's standards. I would not expect every miner to be able to quote MSHA standards chapter and verse. However, every miner

should have a good, solid understanding of the standards MSHA cites most frequently and those that are most likely to have an impact on safety and health. If your people aren't well versed on MSHA's ventilation, coal accumulation, electrical and roof control standards, it will show. You can bet it will be readily apparent to MSHA inspectors, and MSHA may assume that their ignorance of the law is evidence that you do not value compliance.

(3) supervisors and rank-and-file miners are familiar with a mine's MSHA-approved plans, particularly as changes are made (and approved)? If your people aren't familiar with the plans and can't explain the basics of those plans to MSHA inspectors, MSHA isn't likely to view your people as well-informed.

(4) supervisors know how much each violation costs the company? The penalty MSHA assesses for each violation is just the starting point. Your people should also know the true cost of MSHA penalties to the company. Generally speaking, MSHA penalties are not deductible as business expenses. Do your supervisors know how many tons of coal you need to produce in order to cover the cost of MSHA penalties? If MSHA understands that your people know what MSHA penalties really mean to the company's finances, MSHA will understand that you appreciate the impact MSHA penalties have and do not simply treat penalties as the cost of doing business.

(5) supervisors and rank-and-file miners listen to MSHA inspectors and go out of their way to treat inspectors with professional courtesy and respect? If your people know their jobs, know their rights and are (relatively) comfortable interacting with inspectors, you are well ahead of the game. To be sure, it's hard to maintain your composure during an inspection conducted by a difficult inspector. Not all inspectors act professionally, and some lack the experience, training and/or expertise necessary for the job. However, most do act professionally, and those inspectors, the good inspectors, will know how you dealt with the difficult inspectors. MSHA will also notice if senior managers do not attend opening and closing conferences or otherwise do not pay much attention to MSHA when inspectors are on the property. Make sure your senior managers attend opening and closing conferences and demonstrate that they are engaged on compliance issues.

As I said above, MSHA bases its opinion of an operator on many different types of information. How you interact with MSHA during regular inspections and, particularly, how you respond to “good paper” will have a significant impact on MSHA's opinion of you. With a little work, you can ensure that impact will be a positive one.

*R. Brian Hendrix is a shareholder in the Washington, D.C., region office of Jackson Lewis P.C. He advises clients on matters involving environmental, health, and safety law, focusing on litigation, incident investigations, enforcement defense, and regulatory compliance counseling.*