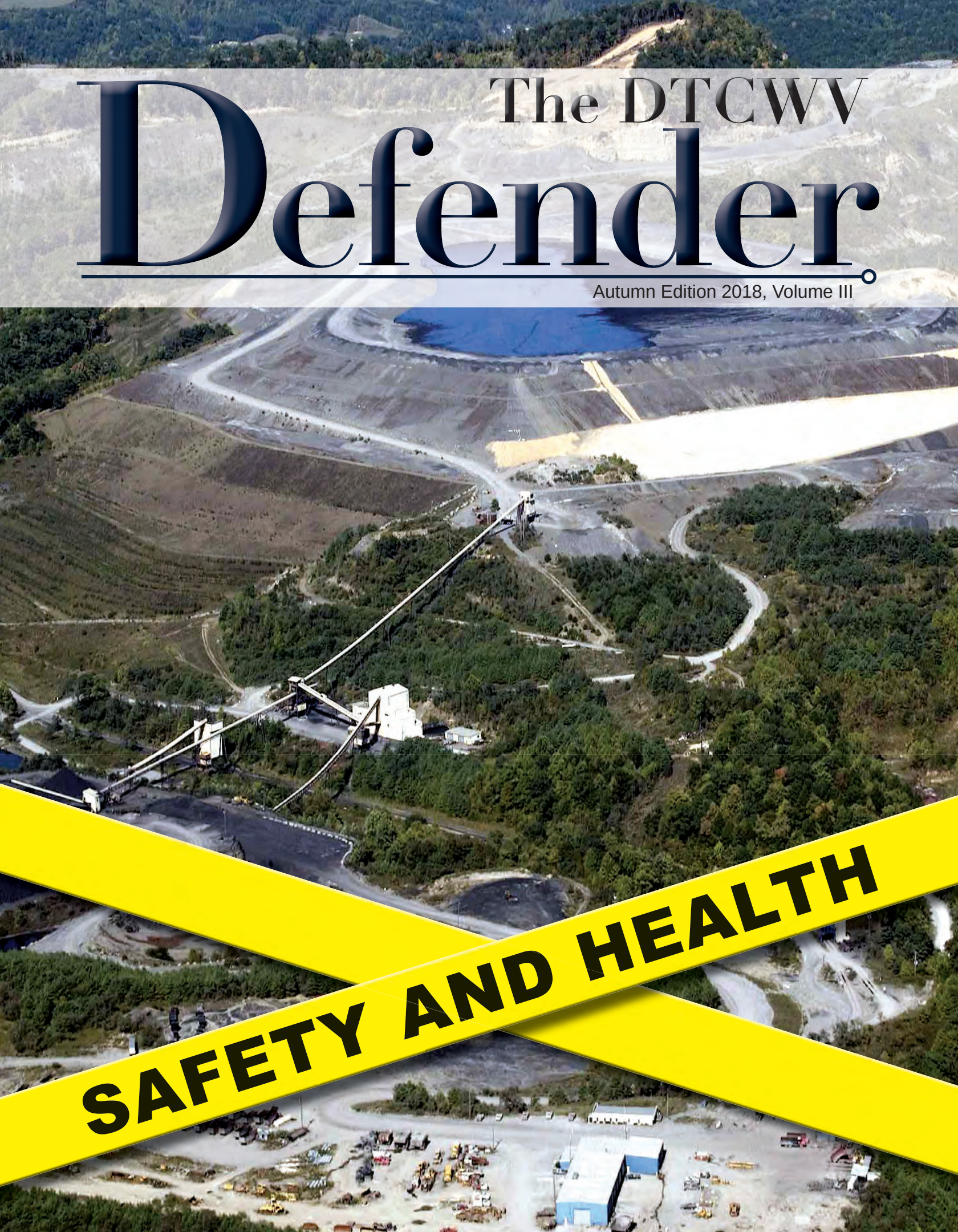
The DTCWV Defender

Autumn Edition 2018, Volume III



SAFETY AND HEALTH

President's Page

Erik W. Legg, *Farrell, White & Legg, PLLC*

Fellow Defenders,

As we move into the final months of what has been an unprecedented and challenging time for the legal profession in our great state, DTCWV marches onward toward a brighter 2019. In September, your Board of Governors gathered at Adventures on the Gorge in beautiful Fayette County to hold our annual planning meeting in which we set the agenda and discussed priorities for this DTCWV year. Topics of focus included, for example, the evolving makeup of our membership, challenges to growing membership and involvement that seem to be endemic to so many organizations today, diversity initiatives, continued attention to and utilization of social media platforms to market our organization and share value with members, and enhancing organization and activity among our substantive law groups. The meeting was productive and energizing, and Adventures on the Gorge was a terrific host.

We spent some time at the meeting discussing the status of our substantive law groups, identifying the ways in which those groups provide value and create opportunities for our members, and evaluating the strengths and weaknesses of those committees. We continue to view involvement in the substantive law committees as a great opportunity for members to take a more active leadership role in the organization and for younger lawyers to network and to likewise find leadership opportunities. If you are not active in one or more committees, we encourage you to avail yourself of these benefits. And if you know of a young lawyer who is eager for an opportunity to get more involved in the organization or simply get his or her name out there, please encourage them to volunteer to plan an event or submit an article for one of these groups.

The other recent major DTCWV event was the Trial Academy, which was hosted by Jackson Kelly's Charleston offices on September 14 and 15, 2018. The program was excellent, as always, and we commend event chair Sara Brown (MacCorkle Lavender, PLLC), Young Lawyers Committee Chair Katherine MacCorkle Mullins (Steptoe & Johnson PLLC), and their entire Young Lawyers team for planning and coordinating the event. Well done!

Lastly, I don't want to miss this opportunity to again plug the 2019 Annual Meeting, which will be held at Glade Springs Resort on June 12-14, 2019. Your Board is hard at work planning the program, and we hope to see all of you there.

In the meantime, enjoy this issue of The DTCWV Defender which highlights Health and Safety Law.

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Introduction

Charles Bailey, *Bailey and Wyant, PLLC*

To be a good Litigator/Defender, you need to know the myriad safety and health laws and regulations that govern the conduct of businesses. In West Virginia, where mineral extraction and chemical manufacturing and storage are key components of the economy, litigation involving these companies is inevitable. Many of us devote a substantial amount of time representing coal, oil, gas, and chemical companies and other manufacturers who are sued for a variety of reasons. Each of us faces the daunting tax of understanding OSHA and MSHA laws, rules, and regulations. Therefore, we need to know how these claims are actually adjudicated and decided. Mark Heath of Spillman Thomas & Battle, LLC, advises us that there is competing jurisdiction between MSHA and OSHA over former mine sites. Thus, if you are involved in a matter involving reclaimed properties that may have either been sold or used for another reason, Mark's article will help you wade through this issue. Chris Pence and James P. McHugh of Hardy Pence, PLLC, provide a significant article on what is an accident within the safety and health practice. There are twelve specific definitions of accident, but the most contentious one is found in 30 CFR: 50-2h-2. This article is a must read for the definition of an accident.

John McCreary and Mychal Schultz of Babst Calland gives us a primer on the contest of an OSHA citation. Each of us has been confronted with violations stating non-serious, serious, repeat, or willful. John and Mychal provide us a nice overview of how these cases are argued and decided. Max Corley of Steptoe & Johnson, PLLC, provides an overview of the key regulatory and enforcement developments of 2018. I was particularly interested in the silica standard, the increase in OSHA fines, and the debate for the National Heat Stress Standard. For those of us who litigate issues regarding heat stress, you know that OSHA for years has relied primarily on the duty to provide a safe workplace rather than promulgating rules and regulations. Now we see a push for more specific regulations.

Past President Gerard "Gerry" Stowers of Bowles Rice, LLP, reminds us of the history of our organization and how it evolved to what it is today. Gerry reminds us of the benefit each member receives by interacting with the others. He also acknowledges the excellent CLE credits one can receive by participating in Defense Trial Counsel of West Virginia events. My circle of professional colleagues has expanded greatly through participation in this organization and becoming a board member.

Mike Cimino (DTCWV golf outing coordinator) and Arthur Wolfson wade in the murky waters of working under a crane bar. It makes a big difference whether the person under the bar is in the process or rigging. This case showcases, as do the others discussed in this edition, why our members who practice in safety and health must be very skilled in the area of statutory and regulatory interpretation.

As always, should you have an idea about a topic for the Defender, or should you just want to share an article that may be of interest to the members, please do not hesitate to reach out to Peggy, Jill, or me.

Mark Your Calendars Now!

DTCWV 37th Annual Meeting

The Resort at Glade Springs

June 12, 13 & 14, 2019

Contest of an OSHA Citation

John McCreary and Mychal S. Schulz, *Babst Calland*

After inspection, the Area Director of the responsible OSHA office will issue citations containing the alleged violations of the OSH Act. Citations must be issued in writing within a "reasonable time" after the inspection. Section 9(a) of the Act (29 U.S.C. § 658(a)) requires that the citation:

- Describe the violations with particularity;
- Reference the standards violated;
- Fix reasonable times for abatement; and
- Impose a monetary penalty where appropriate.

The employer must post the citations at or near the place where the violation occurred. *Id.* § 658(b).

There are four degrees of violation under the OSH Act:

- **Willful Violations** – "where the evidence shows either an intentional violation of the Act or plain indifference to its requirements;" carrying penalties of up to $129,336 per violation and potential criminal liability if a willful violation results in a fatality. 29 USC §§666(a), (e);
- **Repeat Violations** – violations "substantially similar" to those the employer has committed within the five preceding years; carrying penalties of up to $129,336 per violation. 29 USC §666(d);
- **Serious Violations** – violations that present a "substantial probability" that death or serious physical harm could result to an employee; penalties can be up to $12,934 per violation. 29 USC §666(b); and
- **Non-Serious (Other than Serious) Violations** – violations that do not have a substantial probability of death or serious injury, *e.g.*, certain record-keeping violations; penalties can be up to $12,934 but are typically much less. 29 U.S.C. §666(c).

In addition to these degrees of violation, OSHA can impose penalties for Failure to Abate (correct) a violation of up to $12,934 **per day** for each day during which the violation continues. 29 U.S.C. § 666(d).

Penalties are adjusted annually pursuant to rule. *See* https://www.federalregister.gov/documents/2016/07/01/2016-15378/department-of-labor-federal-civil-penalties-inflation-adjustment-act-catch-up-adjustments.

The employer has fifteen working days in which to contest violations, proposed penalties, and/or abatement methods or dates. The Notice of Contest must be in writing, and filing tolls the abatement dates and payment of penalties. During the fifteen-working-day period, OSHA encourages employers to engage in the "informal conference" process to resolve the citation. An informal conference is a settlement conference in which OSHA Area Directors have a great deal of discretionary authority to compromise the citations and penalties. These conferences frequently result in settlement. Note, however, that requesting an informal conference does **not** stay the fifteen-day contest period. 29 CFR § 1903.20.

There are two "tracks" in the litigation of a contest: regular proceedings and simplified proceedings.

In regular proceedings, which are analogous to civil trials, the Secretary of Labor (represented by a regional office of the Solicitor of Labor) must file a Complaint within twenty days (though Regional Solicitors frequently request extensions of time). The Employer's answer is due twenty days after the Complaint is served. Regular proceedings are governed by the Federal Rules of Civil Procedure where the Occupational Safety and Health Review Commission (OSHRC) has not promulgated its own Rule. OSHRC Rule 2, 29 CFR §2200.2. Written discovery is available to all parties in accordance with the Federal Rules of Civil Procedure, though depositions may be taken only by agreement of the parties or upon order of the Administrative Law Judge. OSHRC Rules 52-56; 29 CFR §2200.52-.56. Each party may present evidence and file proposed findings of fact and conclusions with the ALJ. The ALJ will issue a decision, which becomes final unless appealed to the OSHRC. OSHRC jurisdiction is discretionary, and it does not accept every case presented. OSHRC Rules 60, 69-74, 90-92; 29 CFR §§2200.60, -.69, -.74, -.90, and -.92.

Simplified proceedings differ from a regular contest proceeding in the following ways:

- Complaints and answers are not required in a simplified proceeding;
- Pleadings generally are not required. Early discussions among the parties and the ALJ are required to narrow and define the disputes between the parties.
- The Secretary is required to provide the employer with certain informational documents early in the proceeding.
- Discovery is not permitted except as ordered by the ALJ.

- Interlocutory appeals are not permitted.
- Hearings are less formal. The Federal Rules of Evidence do not apply. Instead of briefs, the parties will argue their case orally before the ALJ at the conclusion of the hearing. In many instances, the ALJ will render a decision from the bench.

OSHRC Rules 200–210; 29 CFR §2200.200-2200.210. A contest may be designated for simplified proceedings by the Chief ALJ on his or her own motion, or any party may request it. OSHRC Rule 203; 29 CFR §2200.203.

For both regular and simplified proceedings, hearings are held close to the community where the alleged violation occurred and are presided over by an ALJ.

Appeals from final decisions of an ALJ or the OSHRC may be taken to the United States Court of Appeals having jurisdiction over the place where the violations occurred or in the Court of Appeals for the District of Columbia Circuit. 29 USC §660(a).

MSHA v. OSHA Jurisdiction Over Former Mine Sites – Where is the Line?

Mark E. Heath, *Spilman, Thomas, and Battle, PLLC*

Recent events in southern West Virginia have focused attention on what safety agency has responsibility over former mine sites and when in the reclamation process does a site become OSHA regulated under the Occupational Safety and Health Act ("OSHA").

The federal Mine Safety and Health Administration ("MSHA") inspects and regulates all mineral extraction in the United States, including coal and any mineral mined.

Under a 1977 Memorandum of Understanding between MSHA and OSHA, once MSHA no longer inspects a site, the site is covered by OSHA. MSHA typically stops inspecting former mine sites once a site no longer has active mining and most reclamation is completed.

The question recently is: Where, exactly, is that line?

In advance of mining, activities like timbering before a MSHA legal identification number is established fall under OSHA jurisdiction.

During actual mining, the mines are inspected by MSHA.

After all reclamation, the sites eventually are under OSHA jurisdiction once most reclamation is completed.

There are now a number of sites in West Virginia that once had mining activity that have been sold to other companies. Some properties still have ponds and drainage facilities, even though environmental bonds are released and no mining is taking place.

Such sites are likely covered by OSHA, and owners need to have OSHA training plans, injury logs, hazard communication, and other OSHA-employer requirements in place. Failure to do so can leave the owner with exposure to significant penalties in an OSHA inspection that could occur following any accident on the site.

Additionally, MSHA is now considering a change to its inspection procedures, *i.e.*, that once a mine site has Phase One bond release, it is no longer under MSHA jurisdiction. Under environmental rules, when a site has a Phase One release, it can no longer be mined, and only monitoring and reclamation activity is allowed. This stage would be a logical place to terminate MSHA jurisdiction.

OSHA Update 2018: Key Regulatory and Enforcement Developments

Max L. Corley, III, *Steptoe & Johnson PLLC*

The year 2018 brought important developments for employers in OSHA regulatory compliance and enforcement. This article provides a summary of those developments and their impact on the business community.

Electronic Reporting for Injury and Illnesses

OSHA previously amended its record-keeping standard for Injury and Illnesses, 29 CFR Part 1904, in 2016 to require electronic reporting under certain circumstances. This rule-making effort was a veiled attempt by OSHA to guilt employers into complying with safety regulations by publicly disclosing all injuries and illnesses occurring at their operations regardless of the facts, circumstances, and context of such incidents. Specifically, in industries for which injury and illness reporting was mandated, employers with 250 or more employees were required to submit their OSHA 300, 300A and 301 to the agency electronically. The annual summary forms (300A Logs) had to be submitted by the extended deadline of December 15, 2017. Employers with 250 or more employees in industries that are routinely required to keep injury and illness records were obligated to submit the 300 and 301 Logs to the agency electronically beginning on July 1, 2018.

Many employers were opposed to the rule for a variety of reasons, including concerns that the data would inaccurately reflect upon the effectiveness of their safety programs and actual compliance histories. Others were skeptical of the rule as an effort by the Obama administration to assist union organizing campaigns, to provide employees with settlement leverage in litigation, or to expand OSHA's enforcement tools. More importantly, employers were concerned that the rule would result in disclosure of employee medical information and infringe upon privacy rights. In fact, in a notice published in the Federal Register on July 30, 2018, OSHA acknowledged that some of the electronically submitted information is sensitive in nature. For instance, by requiring employers to provide descriptions and explanations of injuries and affected body parts, the names of treating hospitals, and dates of birth, the risks to employee privacy increase dramatically. The agency further considered industry concerns that such electronic information would lack context through FOIA requests or once published on-line.

Following the change in administrations in 2016 and simmering industry concerns, OSHA indicated that it would likely re-evaluate the reporting rule in 2018. As a result, the consumer advocacy group, Public Citizen, filed suit against OSHA in the U.S. District Court for the District of Columbia to coerce it to implement and enforce the rule.

On July 30, 2018, just days after the lawsuit was filed, OSHA published a proposed rule to amend its record-keeping standard for injuries and illnesses. The proposed rule provides two significant changes to rectify industry concerns.

First, OSHA would rescind the electronic submission mandate for information from the more detailed OSHA Forms 300 and 301 for employers with more than 250 employees. Only electronic submission of annual summary data (OSHA 300A Logs) reflecting aggregate injuries and illnesses, without details of each instance, would be required.

Second, while the proposed rule is being considered, OSHA will not enforce the July 1, 2018 deadline for electronic submission without further notice. Comments on the proposed rule were due by September 28, 2018.

Based on the rule change, certain employers must still submit the annual OSHA 300A Logs, as follows: (1) those having 250 or more employees in industries routinely required to keep injury and illness records; (2) those with 20 to 249 employees in certain designated industries (see 28 CFR 1904.41 Appendix A); and (3) employers notified by OSHA to electronically submit such data. For employers required to keep such records but not submit them electronically, the records must still be produced to OSHA upon request, which customarily occurs in response to a specific complaint or incident.

Silica Standard

OSHA previously issued a final rule to limit employee exposure to respirable crystalline silica aimed at preventing lung cancer, silicosis, chronic obstructive pulmonary disease, and kidney disease. The rule contained two standards, one for Construction and one for General Industry and Maritime. Both standards took effect on June 23, 2016, and industry must comply as follows:

Construction Industry:	September 23, 2017
General Industry & Maritime:	June 23, 2018
Hydraulic Fracturing:	June 23, 2018
Engineering Controls (Fracking):	June 23, 2021

OSHA had indicated that it would give employers a thirty-day grace period to adjust to the new rule. During this grace period, OSHA assisted employers in complying with the new standard. Nevertheless, OSHA indicated that it would subject employers who fail to make any effort to comply to air monitoring and non-compliance citations. OSHA planned to release interim guidance on inspections and enforcement to aid compliance efforts and to reduce arbitrary, inconsistent enforcement.

Under the new silica standard, employers are generally required to:

- Ascertain whether employees are or may reasonably be exposed to silica at or above an *action level* of 25 micrograms per cubic meter of air averaged over an eight-hour day;
- Prevent employee exposure to respirable crystalline silica above a permissible exposure limit ("PEL") of 50 micrograms per cubic meter of air averaged over an eight-hour day;
- Utilize an engineering control hierarchy (such as water or ventilation) to reduce exposure before employers can rely on respirators for protection;
- Limit access to areas where exposure levels exceed the PEL and offer medical examinations to employees with high exposure;
- Develop a written plan to control exposure;
- Provide training on the health risks of silica exposure and ways to reduce such risks; and
- Maintain records of employee exposure and medical examinations.

In addition, only certain employers must comply with the medical surveillance requirements this year. For instance, medical surveillance must begin when the rule takes effect where employees are exposed to respirable silica at or above the PEL for thirty or more days per year. However, medical examinations must be offered to employees beginning on June 23, 2020 where there is exposure at or above the *action level* for thirty or more days in a year.

Increase in OSHA Fines for 2018

For the third consecutive year, maximum penalty amounts for OSHA violations increased in 2018 by two percent (2%) overall to offset inflation. The new, maximum penalty amounts are: (1) **$12,934** for serious or other-than serious safety viola-

tions and failing to comply with posting requirements upon an OSHA inspection; (2) **$12,934** for failing to abate a violation found by OSHA, which accrues daily until the violation is abated; and (3) **$129,336** for willful or repeated violations of an OSHA safety regulation.

The Debate for a National Heat Stress Standard

This past summer, which was one of the hottest on record, a debate was ignited on whether OSHA should develop a national heat stress standard to protect workers. The agency has not promulgated specific limits on heat exposure beyond unofficial guidance to employers. Rather, the agency typically relies on the broad General Duty Clause to cite employers for unsafe work conditions or practices contributing to excess heat exposure.

On July 6, 2018, NIOSH sparked the renewed debate when it issued a report recommending that employers comply with suggested exposure limits and that OSHA adopt a specific rule on occupational heat stress. Recently, various consumer advocacy groups petitioned OSHA to develop a national heat stress standard through notice and rule-making. The agency denied a similar request years ago by relying on its enforcement authority pursuant to the General Duty Clause. However, in the case Secretary of Labor, Department of Labor v. A.H. Sturgill Roofing, Inc., pending before the Occupational Safety & Health Review Commission, OSHA's reliance on the General Duty Clause may be challenged.

Notably, the recent NIOSH report, incorporating deep-rooted recommendations, suggests that OSHA's current guidance on heat stress "might not be sufficiently protective." NIOSH asserts that the temperature threshold for screening and taking preventative measures due to hazardous heat levels should be reduced from the previously suggested heat index of 91°F to 85°F.

NIOSH further recommended that employers adopt a comprehensive program to prevent heat stress illnesses, which should include, at a minimum, the following general elements:

- Proactive measures to prevent heat exposure in excess of suggested limits;
- Utilization of the Wet-Bulb Globe Temperature ("WBGT") test daily to measure heat stress risk, which includes factors such as humidity, sunlight, and wind, among others;
- When WBGT is unavailable, utilization of a heat index of 85° to monitor excess heat exposure;
- Utilization of engineering and administrative controls to reduce or prevent heat stress;
- Protocols to acclimate employees to heat conditions of the work environment according to a prescribed schedule;
- Providing hydration and shaded break areas; and
- Implementing medical surveillance.

It remains to be seen whether OSHA will pursue rulemaking on a national heat stress standard, especially if its ability to rely on the General Duty Clause is diminished by court action. Given the current administration's well-publicized effort to reduce the regulatory burden on employers, any rule-making effort is unlikely for the near future. Nevertheless, employers should consider taking practical steps to mitigate heat stress risks to ensure employee safety and reduce potential liability.

Past President's Post

Gerard R. Stowers (DTCWV President 2011-2012), *Bowles Rice LLP*

I knew from my early days of law school that I wanted to be a litigator. At the time, I didn't know that "litigators" came in different flavors. Shortly after being admitted to the Bar in May 1976, I began my practice at Bowles Rice. I was the firm's twelfth lawyer. One of the reasons I joined Bowles was because it didn't have an established litigation section or practice group. I would seemingly have the flexibility to grow a litigation practice. The firm did not have an identity as a "defense" firm but rather a "business" practice. This sometimes put us on the plaintiff's side of cases. As a new lawyer, I only had a vague understanding of the plaintiff's bar and its organization. There was no comparable state defense organization. Nationally I found DRI, which I joined. I was not present for the August 13, 1981 informal gathering of defense lawyers at the Holiday Inn in Parkersburg, which John Palmer wrote about in his recent post. Soon thereafter, however, I received a telephone call from Al Emch, asking if I wanted to be a Charter Member of a new group named the "Defense Trial Counsel of West Virginia." I readily accepted. Many years later and after two separate terms on the Board, I became the 29th President of DTCWV in its 30th year. I have now completed my 42nd year in the practice of law, and DTCWV has been, in so many ways, invaluable to me both personally and professionally.

As an early devotee of the organization, I attended most of the DTCWV Annual Meetings and was a budding Board member. I vividly recall some of those early meetings at the Blennerhasset Hotel, where I was afforded the opportunity to make my first public legal presentation. I don't remember the exact topic, but it was during a time of change in tort law in West Virginia. The highlight of those early meetings, however, was the late-night camaraderie in the smoke-filled hospitality suite, where the "deans" of the defense bar regaled us with their "war stories." These "war stories," told by Jack Bailey, Joe Wallace, Fred Davis, Dean DeLaMater and others, were, to say the least, eye opening to a young lawyer!

From these meetings and associations, I began to understand the tribulations of being a defense lawyer in West Virginia. As a State, we had not yet earned the distinction of being labelled a "hell-hole," but were seemingly well on our way. I learned about strategies and problematic issues. I heard about outrageous verdicts—and defense verdicts too! I learned about the sitting judges and their peculiarities. The abolition of contributory negligence was a barn burner. The old-timers were aghast! They could hang "contrib" on virtually any plaintiff. Slowly, I learned how to think like a "defense" lawyer and, over the years, became one.

In 2002, President, Henry Jernigan asked if I wanted to go back on the Board. I readily agreed and again served as a Board member, moving through the various officer chairs of the organization. This process took ten years to complete but allowed me the opportunity to give back to the organization that had meant so much to me as a young, formative defense lawyer.

I also learned that personal relationships are one of the key sources of new referral business. Whether it is because of a conflict, a narrow area of practice, or geographical boundary, referrals come from those you know and with whom you have built trusted relationships. I can point to no other single source of new business than from my association with members of DTCWV. It has been invaluable to me and our firm. These relationships are not limited to only our lawyer members. Our vendors and sponsors are also referral sources, as well as talented expert witnesses. Every member should get to know them on a first name basis and retain them when the opportunity arises. I also cannot overlook the value of the seminars at the Annual Meetings as well as the substantive groups. Our meeting rooms are no longer "smoke-filled" but still produce valuable information.

Shortly after becoming an officer of DTCWV, I began attending DRI's regional meetings and national break-out sessions for State and Local Defense Organizations (SLDOs). The SLDO meetings with defense lawyers from other states ultimately convinced me that DTCWV could be much stronger and influential, in many ways, than it was. In our statehouse corridors, it was once common to hear legislators ask, "What do the trial lawyers say about this bill?" Today, we hear, "What do the defense lawyers say?" As an organization, we have grown since those early days in 1981. We have gone from thirty or so members to over five hundred while staying true to our mission. We have more members than the trial lawyers. Our bank account has grown as well. I am very proud of our past accomplishments as an organization, its value to me and my practice, and, looking forward, I can say with confidence that our best years as an organization are still ahead of us.

The Fluid Definition of an "Accident" Under the Mine Act and its Regulations

Christopher D. Pence and James P. McHugh, *Hardy Pence PLLC*

In mine safety and health parlance, an "accident" has specific definitions, and many actions are required of a mine operator when it has experienced certain types of "accidents." The law also affords the state and federal mine safety agencies a great deal of power when an "accident" occurs. While the term is generally defined in Section 3(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §802(k) (as amended) ("Mine Act"), it is the twelve more specific definitions related to MSHA notification, found in 30 C.F.R. § 50.2(h), that often lead to conflict between the federal Mine Safety and Health Administration ("MSHA") and mine operators. Of the twelve specific definitions of an "accident" found in Part 50 of the federal regulations which require MSHA notification, the most contentious is found in 30 C.F.R. § 50.2(h)(2), which defines an accident as "[a]n injury to an individual at a mine which has the reasonable potential to cause death." This article will explore recent litigation surrounding how MSHA must satisfy its burden to prove that an "accident" occurred and review an operator's ability to seek review of a Section103(k) order related to an "accident."

Upon the occurrence of an "accident" at a mine, the operator is required to preserve the scene of the accident (30 C.F.R. § 50.12), notify MSHA (and the state agency) within fifteen minutes (30 C.F.R. § 50.10), complete a form provided by MSHA setting forth certain details relating to the accident and investigation of the accident (30 C.F.R. § 50.20), and complete a more thorough report if requested by MSHA (30 C.F.R. § 50.11), among other things.

The Mine Act also affords MSHA a great deal of authority through Section 103(k), which provides as follows:

> (k) In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

Mine operators and mine safety and health practitioners know that an operator will typically have to modify mining plans or implement new procedures in order to convince MSHA to terminate a Section 103(k) order and resume normal mining

operations in the affected area. Additionally, the issuance of a Section 103(k) order routinely results in a suspension of production for a period of time, which can last from a few hours to weeks, if not longer. Mine operators therefore seek to limit the issuance, scope, and duration of Section 103(k) orders. Conflict often arises regarding the issuance, modification, and refusal to modify Section 103(k) orders.

Any operator who disagrees with the issuance or scope of the order can seek review through the Federal Mine Safety and Health Review Commission. Realistically, expedited review will take at least one week and often longer. In the meantime, areas of the mine or equipment, or the entire mine, may be under the control of MSHA, and production may be limited. As the financial stress of production mounts, operators typically work with MSHA, and often agree to modifications with which they disagree, in order have Section 103(k) orders terminated and the affected area returned to normal. As a practical matter, Section 103(k) orders are often terminated, and it is the rare case that an operator can afford to have the issuance or scope of a Section 103(k) order reviewed by an administrative law judge ("ALJ").

One such case now pending is the contest proceeding in *M-Class Mining, LLC v. Secretary of Labor*, Docket No. 2018-188-R. In that case, M-Class is contesting the validity of a 103(k) order issued by the Secretary, asserting that MSHA cannot prove that an "accident" occurred, a fundamental prerequisite to the issuance of a Section 103(k) order. The case involves a miner who had been working as a mechanic and was among a group of many miners working to fill voids in the mine roof caused by a roof fall. Toward the end of the shift, the miner complained of dizziness and symptoms which would suggest the stomach flu. No other miners working in the area experienced any such symptoms. The miner was taken out of the mine and eventually to the hospital, where blood tests revealed elevated carboxyhemoglobin. The operator and MSHA were notified of his condition and an investigation of the work area began. The investigation focused on a diesel-powered compressor the miners were using in connection with their work. Before a thorough investigation was complete, MSHA issued a Section 103(k) order removing the compressor from service. No problems were found with the compressor and no source of carbon monoxide was ever discovered. Additionally, none of the carbon monoxide detectors carried by the miners or mounted in specific locations in the mine detected elevated levels of carbon monoxide. Nevertheless, MSHA refused to terminate the Section 103(k) order unless the operator submitted a plan to prevent a reoccurrence.

M-Class contested the Section 103(k) order and refused to modify any plans or procedures beyond an initial agreement reached shortly after the order was originally issued. The ALJ scheduled a hearing to determine whether the Section 103(k) was validly issued. Just prior to the hearing, MSHA "terminated" the order and asserted that the ALJ had lost jurisdiction because the matter was moot. The operator refused to accept the "termination" and asserted that the ALJ had the authority to vacate the Section 103(k) order. Any result to the contrary would allow MSHA to illegally issue a Section 103(k) order as a control mechanism and then evade judicial review by terminating the order prior to the hearing. The ALJ initially ordered briefing on this issue.

Prior to the *M-Class* case, the Commission had explained its jurisdictional authority and determined that the Commission generally has authority to review Section 103(k) Orders. *See Secretary v. Pocahontas Coal Co.*, 38 FMSHRC 157, 162 (2016). Although this case did not precisely address the situation in which a Section 103(k) Order had been terminated, there is no reason to believe that the termination of the Order would have changed the outcome. In discussing its authority to review Orders, the Commission acknowledged case law from the 8th and 10th Circuit Courts of Appeal as well as the Act's legislative history. *Id.* citing *Am. Coal Co. v. Dept. of Labor,* 639 F.2d 659, 660-62 (10th Cir. 1981), *Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 515-16 (8th Cir. 2012); and S. Rep. No. 95-181, at 13 (1977), Legis. Hist. at 601.

In *M-Class*, after the parties briefed the issue, the ALJ relied on the precedent in *Pocahontas* and rejected MSHA's challenge to the Court's jurisdiction to decide whether the 103(k) order should be vacated, holding:

> The Act's structure authorizes review of citations and abatement orders under § 104 and imminent danger orders under § 107(a), and thus similarly grants the Commission authority to affirm, vacate, or modify § 103(k) Orders. *See Pattison Sand Co., LLC* v. *FMSHRC,* 688 F.3d 507, 515-16 (8th Cir. 2012) citing *Am. Coal Co.* v. *U.S. Dep't o/Labor,* 639 F.2d 659, 660-61 (10th Cir. 1981). As such, the Commission may and in fact has reviewed the validity and scope of a (k) Order, as well as whether an operator violated the terms of such an Order. *Id.* citing *Jim Walter Res., Inc.,* 37 FMSHRC 1868 (Sept. 2015); *Kentucky Fuel Corp.,* 38 FMSHRC 2905 (Dec. 2016) (ALJ). M-Class v. Secretary of labor, LAKE 2018-188-R, *Order Denying Secretary's Motion to Dismiss* (July 18, 2018), 3 (emphasis added).

From this general note concerning the Commission's jurisdictional power related to 103(k) orders, the ALJ concluded the "Commission's authority to affirm, modify, or vacate a (k) Order extends to the review of terminated (k) Orders." *Id.* The ALJ further reasoned that even if the Secretary decides to "terminate" a 103(k) order, this does not address the question of whether the order was validly issued in the first instance. The ALJ based his decision in part on the fact that the Commission has previously "reviewed whether the Secretary abused his discretion in issuing (k) Order . . . ." *Id.*

After finding that the Section 103(k) order is reviewable and that he has jurisdiction to vacate it, the question that remains is what MSHA will be required to prove in order to sustain the order. M-Class contends that the Secretary will be required to prove the statutory prerequisite to the issuance of a Section 103(k) order which, in this case, means that the Secretary will be required to prove that there were injuries to an individual at the mine which had the "reasonable potential to cause death." M-Class will present testimony from a toxicologist opining that the injuries did not have such a potential and will present evidence that there was no

equipment underground that produced elevated levels of carbon monoxide. MSHA will likely contend that it need not actually prove that an accident occurred and that the Section 103(k) order should be upheld if the Inspector reasonably believed that an "accident" occurred and did not abuse his discretion in issuing the order.

A similar case which deals with the Secretary's burden of proof as to an "accident" is making its way through the court system and is currently on appeal to the United States Court of Appeals for the Third Circuit. In *Secretary v. Consolidation Pennsylvania Coal Co., LLC*, 40 FMSHRC ____, slip op., Docket No. PENN 2014-816 (August 22, 2018), the Commission upheld a violation of 30 C.F.R. § 50.10(b) (failing to immediately report an accident) issued after the operator failed to report an accident where a miner was crushed. The miner was caught in a pinch point between a scoop bucket and a rail car and suffered a broken pelvis. None of the testifying witnesses with any medical background, or who spoke with someone with a medical background, opined that the miner's injuries had a reasonable potential to cause death. The miner was conscious, alert, and responsive throughout his evacuation and was never in shock. The miner's physician reported that the miner had a "small [internal] bleed" and told two people that the bleeding would resolve without surgery, which it did. MSHA did not dispute this account. There was no medical evidence that the miner's injuries were life-threatening or had a "reasonable potential to cause death," and it was clear MSHA was relying primarily on the mechanism of injury as opposed to the medical evidence of the actual injuries. The operator asserted that the complete absence of medical evidence establishing that the injuries were life-threatening was a "per se" defense to the citation.

The ALJ held that MSHA could meet its burden of proof without medical evidence, asserting that there is very little medical evidence within fifteen minutes of an event and that is when the operator must decide whether to call MSHA. Notwithstanding the statutory and regulatory element, the ALJ found that the medically untrained Inspector could rely on a "totality of the circumstances" test which incorporates several non-statutory factors in an effort to avoid presenting medical evidence as to the predicate element. *Secretary v. Consol Pennsylvania Coal Company, LLC*, 39 FMSHRC 1279, 1294-1299 (2017). In particular, the ALJ held:

> [T]his Court holds that the proper test for determining a violation of § 50.10(b) is whether, considering the totality of the circumstances, *including the nature of the accident*, an operator knew or should have known that the injury/injuries sustained by the miner had a reasonable potential to cause death.

Id., n. 5.

The ALJ also found, notwithstanding the absence of competent medical evidence (or prudent operator evidence), that "considering the totality of the circumstances in light of the protective purpose of the Act and mandatory safety standard, a prudent operator, knowledgeable of the industry would have or should have known that [the] injuries had the reasonable potential to cause death." *Id.* at 1298. In other words, the ALJ held that it does not matter if the injuries actually had a "reasonable potential to cause death" if they simply would appear this way to a reasonably prudent operator (as interpreted by the Inspector without actual testimony from a reasonably prudent operator).

On review, the Commission relied heavily on its earlier decision in *Signal Peak*, 37 FMSHRC 470 (2015) and rejected the operator's argument that the absence of some medically competent evidence is a "per se" defense to a §50.10(b) citation, holding that "[t]he regulation . . . does not look to an opinion of a medically qualified expert." *Secretary v. Consol Pennsylvania Coal Co., LLC*, 40 FMSHRC ____, slip op. at 8, Docket No. PENN 2014-816 (August 22, 2018). The Commission also adopted the ALJ's broad interpretation of §50.10(b), holding:

> [R]elevant information [for determining if there was an "accident"] includes the totality of the circumstances *including the nature of the event causing injury*. The *outcome determinative inquiry* in this case is whether responsible Consol employees had information that would lead a *reasonable person to conclude there was a reasonable potential for death* based upon the nature of the injury and the totality of the circumstances. The Judge found such information existed. We agree.

Id., 8 (emphasis added). This issue is far from settled, as an ALJ recently ruled that MSHA does have the burden to prove that an "accident" occurred and vacated a similar reporting citation when there was no medical evidence supporting MSHA's allegation that injuries to a miner had the reasonable potential to cause death. *See Secretary v. Knight Hawk Coal*, LLC, 2018 WL 4384586 (September 6, 2018).

Mine operators know that when MSHA is notified of an "accident," an order under Section 103(k) follows shortly thereafter. In most instances, there is no dispute about whether an "accident" occurred and the only question is the scope of the Section 103(k) order or the actions required for termination. However, when there is no accident, the question of MSHA's authority and what prerequisites must be met in order to exercise that authority have serious financial implications for mine operators.

Commissioner Finds Suspended Load Violation when Miner's Presence Under a Crane Spreader is not Part of Rigging

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In a case closely watched by the crane operating and mining industries, the Federal Mine Safety and Health Review Commission, in a 3-1 decision, held that a miner's presence under a crane's spreader bar violates MSHA's suspended load standard when not connected with the rigging process. However, if rigging is occurring under the conditions prescribed by 30 C.F.R. § 56.14211, there would be no suspended load violation.

In *Sims Crane*, Docket No. SE 2015-315-M (Rev. Comm. April 25, 2018), the Commission considered the validity of a citation issued under 30 C.F.R. § 56.16009, which requires that "[p]ersons shall stay clear of suspended loads." During the inspection at issue, the inspector observed a miner standing under a crane's "spreader bar," a lifting device attached to the crane's hoist hook that assists in balancing heavy objects during lifting. At the time the miner was under the spreader bar, the crane operator was extending the boom to position it above the object to be lifted.

The inspector initially issued an oral imminent danger order, requiring the miner to move out from under the spreader bar. The crane operator left the cab, walked under the spreader bar to discuss the issue with the inspector, and then walked back under the spreader bar to return to the cab. The inspector retracted the imminent danger order but issued a NonS&S citation alleging a violation of § 56.16009 for failing to stay clear of a suspended load.

At the initial hearing, the Administrative Law Judge ("ALJ") upheld a violation, finding that the spreader bar constituted a "suspended load" for purposes of the standard. The operator, however, appealed the ALJ's ruling, and its appeal was joined by fifteen companies and industry groups as *amici curiae*. The operator argued that the spreader bar is not a "load" but rather "loadattaching equipment" outside the scope of the standard. The operator further argued that considering "load-attaching equipment" within the meaning of "suspended load" would preclude certain tasks in the rigging process that require miners to work within the fall zone of the loadattaching equipment.

The Secretary countered the operator's arguments by insisting that the presence of a miner under a spreader bar constituted a violation of the suspended load standard. Notwithstanding this position, on February 6, 2017, The Mine Safety and Health Administration ("MSHA") issued Program Policy Letter ("PPL") No. P17-IV-01, which states that MSHA will not issue a citation for a miner's presence under a suspended load if two conditions are met: (1) the miner is "involved in the attachment of objects or materials to the loadattaching equipment or are detaching the load," and (2) "adequate measures are in place to protect miners from hazards associated with loadattaching equipment during these processes."

The Commission recognized that notwithstanding § 56.16009's requirement of staying clear of suspended loads, two other standards – 30 C.F.R. §§ 56.14210 and 56.14211 – allow miners to work under suspended loads or objects involving mobile equipment so long as the equipment is designed to protect the miner from falling objects or where certain blocking or securing measures are taken. Specifically, it noted that § 56.14211 allows miners to perform work on top of, under, or from a raised component of mobile equipment once the component has been adequately blocked or mechanically secured to prevent accidental lowering. The Commission concluded that there would be no violation of § 56.16009 if miners were rigging a spreader bar under the conditions described in § 56.14211. However, a violation of § 56.16009 may be found if a miner is present under a spreader bar when not engaged in rigging work.

Based upon this reasoning, a majority of the Commission found that the crane operator's return to his cab while traveling under the spreader bar was not part of rigging work and therefore constituted a violation. Because the Commission found a violation on this basis, it declined to address whether the first miner's presence under the spreader bar or the crane operator's walk from the cab to the inspector while under the spreader bar constituted violations.

Although he agreed with the other Commissioners concerning their interpretation of the standard, Chairman Althen disagreed that a violation occurred. The Commissioner reasoned that the inspector had halted a lawful rigging process by issuing the initial and improper imminent danger order. The Commissioner continued his reasoning that the crane operator's travel under the spreader bar, first to see why the inspector halted activity, and second, to return to his cab to continue work, was all part of this lawful rigging process. Therefore, Commissioner Althen concluded that even under the interpretation adopted by the Commission, the miner's travel under the spreader bar was not a violation.

DTCWV 2018 Trial Academy

The recent DTCWV Trial Academy, planned by the Young Lawyers Committee, was a very successful event based on attendee feedback. Some comments were "The presentations were fantastic." and "This was extremely helpful and worthwhile." Program Chair Sara Brown (MacCorkle Lavender PLLC) and her committee worked tirelessly to develop the program. DTCWV is grateful for their commitment. No program is successful if your speakers are not loaded with valuable information. Speakers Monté Williams, Mario Bordogna, Christina Terek, Keith Gamble, Mark Hayes, Al Emch, Jane Harkins, Don Sensabaugh, Arie Spitz, and Robert Ryan did their research to provide each attendee with an abundance of material to use in their daily practice. Thank you, speakers.

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