

APRIL 11, 2016 | MSHA INSPECTIONS, CITATIONS & ENFORCEMENT

Drilling Industry Victory Demonstrates Risks and Costs of Inexperienced MSHA Inspectors

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A [key recent decision](#), vacating two MSHA citations against a drilling contractor, underscores how a refusal by inspectors to consider the proven safety practices of a specific business, like contract drilling, can lead to long, costly litigation for the companies involved.

Industry's arguments carried the day, but only after a lengthy process in which attorneys took the case all the way to the Federal Mine Safety and Health Review Commission's five-member panel. Not only are cases like this costly to the employer, but also highly detrimental as it makes bidding on new jobs much more difficult while violations stay on the record. Such a victory for the contract drilling company is especially bittersweet, given the strongly worded decision by the Administrative Law Judge ("ALJ"), which MSHA appealed, therefore requiring the drilling contractor to undergo further litigation 

Fortunately, the Federal Mine Safety and Health Review Commission upheld a judge's decision that MSHA had failed to carry its burden of proof in showing that a drilling contractor violated [30 C.F.R. § 56.7012](#), which states that *"while in operation, drills shall be attended at all times."* The panel upheld an ALJ's ruling that the agency had not shown that a violation of the word "attended," as used in the standard, occurred in the situation in dispute.

That's because the standard is ambiguous with respect to whether "attended" means the drill operator must remain within arm's reach of the drill's controls at all times, the judge held. A definition which the inspector attempted to enforce without a basis in law or policy to do so.

At issue were two citations against Drilling and Blasting Systems Inc. ("D&B"), which in March 2012 was drilling blast holes at Lucky Stone Corp.'s granite quarry in Pittsboro, N.C.

An MSHA inspector observed the D&B drill operator outside of the drill cab while the drill was in operation on the drill bench, with the operator walking towards the drill from about 18 feet away. The inspector issued a citation, and, because of a language barrier, contacted the operator's foreman to have the foreman instruct the operator that he had to always remain inside the cab of the drill, so as to be within arm's reach of the controls in the event of that drill steel may become stuck during drilling, requiring the operator to shut down the machine.

When the inspector returned the next morning, he again observed the drill operator outside the cab of the drill while it was operating, this time the operator was in a pickup truck parked about 20 feet from the drill facing away where he was updating the drill log, before he left the truck and returned to the drill.

The inspector issued another, almost identical citation under 30 C.F.R. § 56.7012, to the drilling contractor. MSHA later proposed total penalties of \$1,080 for both. In both citations the inspector alleged that the drill was not being “attended” in violation of section 56.7012. The citation states that “[a] miner may suffer fatal injuries in the event the steel and/or bit becomes hung in the hole causing the steel to fragment under pressure.”

D&B contested the assessment and the underlying citations on the ground that its operator was “attending” the drill from outside of the cab within the meaning of that term as it used in section 56.7012, and performing his duties in a safe manner supported by industry practices around the country.

At the subsequent hearing, the inspector defended the citations this way, according to the commission’s decision:

“He stated that he had never operated a drill, and was aware of no reason why a drill operator would need to leave the cab. He maintained that while MSHA had issued no written guidance interpreting ‘attended’ with respect to a drill to mean within arms-reach of its controls, he recalled an MSHA Mine Academy instructor stating as much at a training class in 2008 or 2009.”

What the inspector failed to take into account was the drill used had an automatic sensor to shut down when it was it encountered a spike in pressure due to the steel being stuck, and the inspector acknowledged that if drill steel gets hung up in a hole, the drill is supposed to stop, the decision states. It goes on:

“His concern, however, was that if the drill did not automatically shut down, the drill steel could fragment under pressure, explode, and spray steel shrapnel that could prove fatal should it strike any miner in the vicinity of the drill. He discussed having viewed the aftermath of such a fragmenting incident where he was previously employed, at Ararat Rock Products in Mt. Airy, NC.”

The inspector stated that a warning that fragmenting was occurring would “probably” be produced by the steel slowing down and then stopping, which would signal the miner at the drill’s controls to immediately shut the drill down. But he estimated that it would have taken “several seconds” for the drill operator in the cited case, when he was 18 feet away from the drill, to get to the controls and shut the drill down in such an event.

However, several witnesses for D&B explained how MSHA had erred in issuing the citations, mainly from lack of the inspector’s knowledge of contract drilling, and ignorance of drilling procedures employed to ensure the safety of the operator.

The D&B witnesses testified, among other things, that drills are stable when in operation and are not designed for the operator to stay in the cab during operation; they had never seen or heard of any fragmenting event as described by the inspector; and if a bit fragmented it would be contained underground.

MSHA had regularly inspected D&B’s drilling operations for years and never applied the inspector’s interpretation, they said, and under “Best Practices,” drillers are instructed to monitor the equipment and ground

conditions constantly, which requires the operator to be outside of the cab. Witnesses also pointed out that the inspector's interpretation of the standard previously had been rejected by an MSHA Field Office Supervisor, who had previously vacated a similar citation issued to D&B.

It is necessary for the drill operator to check and perform maintenance and carefully observe ground conditions while the drill is operating; and as a result, the inspector's interpretation would create significant hazards for drilling operations.

A judge determined that the MSHA's interpretation of "attended" was plainly erroneous and not entitled to deference (as is ordinarily the case when an agency interprets its own ambiguous regulation). Commissioners upheld the judge's decision that MSHA had failed to meet its burden of proof.

Not only did this score a win for the industry, but it is also interesting to note that the National Stone, Sand and Gravel Association was allowed to submit an amicus brief in the case. The trade group argued in support of the drilling contractor, that to defer to the Secretary's interpretation would necessitate sweeping changes in the drilling industry that would be financially detrimental and extraordinarily dangerous.

The operational practices used by D&B on the days of MSHA cited the company were in line with both MSHA regulations and industry-wide accepted safety procedures, practices that now have the backing of Federal Mine Safety and Health Review Commission caselaw. Therefore, drilling contractors and the mines that employ them, or their own drill rigs, can continue to operate with confidence while their employees monitor the equipment and ground conditions from outside the drill cab.