American Bar Association Section of Labor and Employment Law
Occupational Safety and Health Law Committee
2019 Midwinter Meeting
San Juan, Puerto Rico
March 5 – March 8, 2019

Tuesday, March 5

12:30 p.m. – 1:00 p.m. Registration

1:00 p.m. – 6:15 p.m. Mine Safety and Health Administration Track, Part I

1:00 p.m. - 1:15 p.m. Opening and Introductions

Mark E. Heath, Spilman, Thomas & Battle PLLC, Charleston, WV
Doug Parker, Worksafe, San Francisco, CA

1:15 p.m. - 1:45 p.m. MSHA Goals For 2019

Hon. David G. Zatezalo, Assistant Secretary for Mine Safety and Health Administration, U.S. Department of Labor, Washington, DC

Introduction Mark E. Heath, Spilman, Thomas & Battle, PLLC, Charleston, WV

1:45 p.m. - 2:15 p.m. Report from the Mine Safety and Health Review Commission

Hon. Michael G. Young, Acting Chairman and Commissioner, Federal Mine Safety and Health Review Commission, Washington, DC

Introduction Doug Parker, Worksafe, San Francisco, CA

2:15 p.m. - 3:15 p.m. Pattern of Violations Cases After Pocahontas Coal

Moderator: Willa B. Perlmutter, Stoel, Portland, OR

Panelists: Mark E. Heath, Spilman, Thomas & Battle, PLLC, Charleston, WV
Doug Parker, Worksafe, San Francisco, CA

3:15 p.m. - 3:30 p.m. Break

3:30 p.m. - 4:30 p.m. Settlement Agreements after American Coal II, Rockwell and Solar Sources

Moderator Kristin White, Jackson Kelly, Denver, CO

Panelists: Nicholas W. Scala, Conn Maciel Carey LLP, Washington, DC
Thomas Paige, Deputy Associate Solicitor for Mine Safety and Health Administration, Mine Safety and Health Division, Solicitor of Labor
Doug Parker, Worksafe, San Francisco, CA
4:30 p.m. - 5:00 p.m.  MSHRC Report on Current Issues in Case Processing, Time Deadlines, Workloads and Procedures

Introduction:  Doug Parker, Worksafe, San Francisco, CA

Speaker:  Hon. Robert J. Lesnick, Chief Administrative Law Judge, Mine Safety and Health Review Commission, Washington, DC

3:30 p.m. – 5:00 p.m.  OSHA Primer
The primer provides a description of the fundamentals of the Occupational Safety and Health Act, the Occupational Safety and Health Administration, and the authority of the Occupational Safety and Health Review Commission. The session will cover the statutes involved in OSHA practice, OSHA enforcement of the regulations and standards promulgated pursuant to the OSH Act, the role of the Commission and appellate courts, and practice before those tribunals.

Panelists:  Lindsay A. DiSalvo, Conn Maciel Carey, LLP, Washington, DC
Paul Spanos, U.S. Department of Labor, Office of the Solicitor, Boston, MA
Randy Rabinowitz, OSH Law Project, Washington, DC

6:00 p.m. – 7:00 p.m.  Welcome Reception at El San Juan Hotel

Wednesday, March 6

7:00 a.m. – 8:00 a.m.  Registration and Continental Breakfast

7:00 a.m. – 8:00 a.m.  New Attendees’ Breakfast

8:00 a.m. – 12:30 p.m.  General Sessions

8:00 a.m. – 8:15 a.m.  Opening Remarks by Committee Co-Chairs
Jonathan Karmel, Union and Employee Co-Chair, Karmel Law Firm, Chicago, IL
Madeleine T. Le, Public Co-Chair, Counsel for OSHA, Office of the Solicitor, Dallas, TX
Steve McCown, Employer Co-Chair, Littler Mendelson, Dallas and Austin, TX

8:15 a.m. – 8:30 a.m.  Welcome Remarks by Section Leadership
Joseph E. Tilson, Section Chair, Cozen O’Connor, Chicago, IL
Victoria L. Bor, Council Liaison, Sherman Dunn, P.C., Washington, DC

8:30 a.m. – 9:00 a.m.  Remarks from the Solicitor’s Office
The Solicitor of Labor will offer observations about SOL policy and enforcement of the OSH Act.

Speaker:  Hon. Kate S. O’Scannlain, Solicitor of Labor, U.S. Department of Labor, Washington, DC
9:00 a.m. – 10:00 a.m.  **2018-2019: OSHA Remarks and Key Issues in Enforcement**
This panel will address developments on OSHA’s enforcement programs and initiatives, including National Emphasis Programs, new standards, egregious cases, enforcement of novel hazards, monitoring of corporate settlements, use of the recordkeeping rule regarding injury reporting, the data initiative uses for inspection targeting, and the status of Severe Violator Enforcement Program.

**Moderator:** Steve McCown, *Littler Mendelson, Dallas and Austin, TX*

**Speaker:** Patrick Kapust, *Acting Director of the Directorate of Enforcement, U.S. Department of Labor, Washington, DC*

10:00 a.m. – 10:15 a.m.  **Break**

10:15 a.m. – 11:15 a.m.  **Whistleblower, Retaliation, and Alternative Litigation**
This panel will discuss whistleblower and retaliation investigations and cases brought under the OSH Act and alternative litigation strategies and remedies outside of the OSHA regime. These alternative litigation methods include “citizen lawsuits” under federal environmental statutes, tort claims against employers for negligence in creating unsafe workplaces, including by nonemployees, and state statutes (e.g., unfair competition and fair advertising) to enforce workplace standards.

**Moderator:** Kenneth D. Kleinman, *Stevens & Lee, Philadelphia, PA*

**Panelists:** Schean Belton, *U.S. Department of Labor, Office of the Solicitor, Nashville, TN*
Scott Hall, *Motley Rice LLC, Kansas City, MO*
Susan Wiltsie, *Hunton & Williams, Washington, DC*

11:15 a.m. – 12:30 p.m.  **Remarks from the Occupational Safety and Health Review Commission**
This panel will provide an update on the OSHRC, including providing insights on caseloads, procedural issues and changes, and the current state of the Commissions. Questions from the audience are encouraged.

**Moderators:** Victoria L. Bor, *Sherman Dunn, P.C., Washington, DC*
Paul Waters, *The Waters Law Group, Tampa, FL*

**Panelists:** Hon. Heather MacDougall, *Chairman, Occupational Safety and Health Review Commission, Washington, DC*
Hon. Cynthia Attwood, *Commissioner, Occupational Safety and Health Review Commission, Washington, DC*
Hon. James Sullivan, *Commissioner, Occupational Safety and Health Review Commission, Washington, DC*
Mine Safety and Health Administration Track, Part II

1:00 p.m. - 2:15 p.m.  Interference Claims Under Section 105c:  Where are We and Where are We Headed?
Safety bonus program; requests to notify the company when calling MSHA on complaints and other interference claims; the two tests being used by ALJs.

Moderator:  Mark E. Heath, Spilman, Thomas & Battle PLLC, Charleston, WV

Panelists:  T.J. Baker, United Mine Workers of America, Triangle, VA
Jason Grover, Counsel for Trial Litigation, Mine Safety and Health Division, Solicitor of Labor, Washington, DC
Tony Oppegard, Lexington, KY
Kristin White, Jackson Kelly, Denver, CO

2:15 p.m. - 3:30 p.m.  Panel on Hot Issues in Mine Safety: S&S, Flagrant; Experts in Hearings; Pre-shift Examinations at Non-Metal Mines, and MSHA Enforcement at Non-Metal Mines; Developments in traditional 105(c) cases

Moderator:  Daniel Wolff, Crowell & Mooring, Washington, DC

Panelists:  T.J. Baker, United Mine Workers of America, Triangle, VA
Jason Grover, Counsel for Trial Litigation, U.S. Department of Labor – Mine Safety and Health Division, Washington, DC
Margaret “Margo” S. Lopez, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC
Tony Oppegard, Lexington, KY

3:30 p.m. - 3:45 p.m.  Break

3:45 p.m. - 4:45 p.m.  Power of MSHA ALJs after the Sixth Circuit Ruling in Jones Brothers, 898 F.3d. 669 (July 31, 2018), and Where Do We Go from Here

Moderator:  Willa B. Perlmutter, Stoel Rives LLP, Portland, OR

Panelists:  Tom Paige, Deputy Associate Solicitor for Mine Safety and Health (MSH) Division, U.S. Department of Labor
John Williams, Williams Kilpatrick & True, Lexington, KY

4:45 p.m. - 5:15 p.m.  MSHA Enforcement Statistics: Citation and Order Numbers, Total Penalties; 105(c) and Temporary Reinstatement Claims, and Orders

Presenter:  Jason Grover, Counsel for Trial Litigation, U.S. Department of Labor, Mine Safety and Health Division, Washington, DC

Introduction:  Mark E. Heath, Spilman, Thomas & Battle PLLC, Charleston, WV

5:30 p.m. – 7:00 p.m.  Committee Reception
Thursday, March 7

7:00 a.m. – 8:00 a.m. Continental Breakfast

8:00 a.m. – 11:15 a.m. General Sessions

8:00 a.m. – 9:00 a.m. Issues of Ethics, Professionalism and Civility in OSHA/MSHA Practice, including a discussion of practice issues for those with a multi-state practice

This session will present current issues, but focus on the particular ethical issues confronting those with a multi-state OSHA practice and the measures they take to avoid ethical traps.

Moderator: George Salem, DLA Piper, Washington, DC

Panelists:
- Hon. Covette Rooney, Chief Administrative Law Judge, Occupational Safety and Health Review Commission, Washington, DC

9:00 a.m. – 10:00 a.m. The General Duty Clause: Its Use and Limitations

This panel will discuss cases that have shaped how OSHA has used the general duty clause with a deep analysis of the elements of 5(a)(1), and how that will affect the type of advice management lawyers will need to give to their clients, as well as OSHA’s and employees’ expected approach.


Panelists:
- Jonathan Karmel, Karmel Law Firm, Chicago, Illinois
- Dennis J. Morikawa, Morgan, Lewis & Bockius, LLP, Philadelphia, PA
- Orlando J. Pannocchia, Counsel for Regional Litigation and Advice, U.S. Department of Labor, Office of the Solicitor, Washington, DC

10:00 a.m. – 10:15 a.m. Break

10:15 a.m. – 11:15 a.m. The Role of Safety in Emergency Response, including Hurricanes Irma and Maria: The response to the natural disasters in Puerto Rico with special presentations from Puerto Rico Officials including State Plan Involvement


Panelists:
- Edwin G. Foulke, Fisher & Phillips LLP, Atlanta, GA
- Luis Diaz-Marcano, Division Counsel PR OSHA
- William Shaklee, Senior Associate Counsel, U.S. Compliance, Walmart Stores, Inc. Bentonville, AR

11:15 a.m. – 12:30 p.m. Breakout Sessions
A. OSHA Recordability, Reportability and Impact on Workers’ Compensation; Interplay between OSHA’s Amended 29 CFR 1904.35 and Workers’ Compensation Laws and Administration

There has always been a significant interplay between workers’ compensation compensability, which varies from State to State, and OSHA recordability. In 2014 OSHA expanded reporting requirements for amputations and injuries requiring hospitalization, and in 2016 OSHA added anti-retaliation provisions designed to avoid discouraging employees from reporting injuries. Now, with several years of experience with these revised requirements, the panel will discuss their impacts on on workers’ compensation programs and, among other things, the immediate reporting of injuries, drug free workplace programs, and tangentially safety incentive programs.

Moderator: Crystal S. McElrath, Swift Currie, Atlanta, GA
Panelists: Michael Doyle, Counsel for OSHA, U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA
Eric Frumin, H&S Director, Change to Win, New York, NY
William J. Wahoff, Steptoe & Johnson, PLLC, Columbus, OH

B. The Process Safety Management Standard Interpreted

In September 2018, OSHRC issued a landmark decision that will influence compliance and process safety cases for years to come: BP. What is the likely approach by OSHA in consideration of BP’s interpretation and degree of deference to the Agency’s scientific positions?

Moderator: Gregory D. Dillard, Katten Muchin Rosenman, LLP, Houston, TX
Panelists: Rick Engler, U.S. Chemical Safety and Hazard Investigation Board, Washington, DC
Doug Parker, Worksafe, San Francisco, CA
Peter Vassalo, Senior Attorney, U.S. Department of Labor, Office of the Solicitor Washington, DC

C. OSHA Inspection Issues

This panel will cover legal issues that may arise during OSHA inspections. Among topics covered will be the scope of inspection, walkaround rights, employee and management interviews, warrants and subpoenas, production of documents, voluntary compliance programs, use of drones and AI, and rapid response to Complaints.

Panelists: Elizabeth Nadeau, Law Office of Elizabeth Nadeau, Washington, DC
Nelva J. Smith, Steptoe & Johnson PLLC, Columbus, OH
Tim Williams, U.S. Department of Labor, Office of the Solicitor, Counsel for Safety & Health, Denver, CO

12:30 p.m. – 12:45 p.m. Committee Business Meeting
5:30 p.m. – 7:00 p.m. Diversity Reception
Friday, March 8

7:00 a.m. – 8:00 a.m. Continental Breakfast

8:00 a.m. – 12:30 p.m. General Sessions

8:00 a.m. – 9:00 a.m. Objection Overruled, or Will It Be Sustained?
A panel of OSHRC Administrative Law Judges will each in turn discuss the best practices of counsel in litigating cases before them at OSHRC.

Moderators: Eric E. Hobbs, Ogletree Deakins, Milwaukee, WI
Madeleine T. Le, Office of the Solicitor, Dallas, TX

Panelists: Hon. Patrick Augustine, Administrative Law Judge, Occupational Safety and Health Review Commission, Denver, CO
Hon. Heather Joys, Administrative Law Judge, Occupational Safety and Health Review Commission, Atlanta, GA
Hon. Dennis L. Phillips, Administrative Law Judge, Occupational Safety and Health Review Commission, Washington, DC

9:00 a.m. – 10:00 a.m. Significant Decisions
This panel will survey OSH Commission and Appellate Decisions in the interval that will have an influence on other cases in the future.

Moderator: Jonathan L. Snare, Morgan, Lewis & Bockius LLP, Washington, DC

Victoria L. Bor, Sherman Dunn, P.C., Washington, DC
Eric Conn, Conn Mcaiel Carey, LLP, Washington, DC

10:00 a.m. – 10:15 a.m. Break

10:15 a.m. – 11:15 a.m. Toward a Safe New Day: Rethinking 21st Century Safety Programs
OSHA and some employers have traditionally focused on metrics such as injury rates and worker’s compensation experience modification rates or subscribed to compliance with ISO programs as evidence of an effective safety program and culture. The advent of new technology and new thinking about behavior-based safety programs suggests that reliance on traditional measures may be misplaced and even a misallocation of resources. Panelists will discuss traditional approaches to safety programs and explore whether new approaches can improve workplace safety.

Moderator: Ronald W. Taylor, Venable LLP, Baltimore, MD

Panelists: Nick DiMartino, Corporate Vice President, Safety, MasTec, Greensburg, PA
Eric Frumin, H&S Director, Change to Win, New York, NY
Patrick Kapust, Acting Director of the Directorate of Enforcement, Washington, DC
Fred Rhine, Owner and CEO, FDRsafety, LLC, Franklin, TN
11:15 a.m. – 12:15 p.m.  **Construction Update**  
Construction is a high hazard industry that covers a wide range of activities. The panel will discuss recent trends in construction enforcement, including OSHA’s enforcement policy regarding crane operator certification, the agency’s emphasis on trenching and excavation, and the implementation of the silica rule from the OSHA, employee, and employer perspectives.

**Moderator:**  *TBA*

**Panelists:**  
Victoria L. Bor, *Sherman Dunn, P.C.*, Washington, DC  
Scott Ketcham, *Acting Director, Directorate of Construction Programs*, Washington, DC

12:15 p.m. – 12:30 p.m.  **Closing Remarks**