

**American Bar Association
Section of Labor and Employment Law
Occupational Safety and Health Law Committee
2018 Midwinter Meeting
Santa Monica, California
February 27 – March 2, 2018**

Tuesday, February 27

12:30 p.m. – 7:00 p.m.

Registration

1:00 p.m. – 6:15 p.m.

Mine Safety and Health Administration Track

1:00 p.m. – 1:10 p.m.

Welcome and Explanation for MSHA Program and Goals for Future Years

This is the first Mine Safety Track at our meeting, and we hope to continue to expand coverage of mine safety issues in future years.

Moderator:

TBD

Speakers:

Mark E. Heath, *Spilman, Thomas & Battle PLLC, Charleston, WV*
Art Traynor, *United Mine Workers of America, Washington, DC*

1:10 p.m. – 1:30 p.m.

MSHA Goals for 2018 and Regulatory Changes

Assistant Secretary David G. Zatezalo was sworn in as the 9th head of MSHA on Nov. 30, 2017. Charged with safety enforcement for all of the nation's mines – coal and all other minerals – he will address his goals for the agency and where it is headed.

Moderator:

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

Speaker:

Patricia Silvey, *Mine Safety & Health Administration, Washington, DC*

1:30 p.m. – 2:30 p.m.

Do's and Don'ts for Appellate Advocacy before the Federal Mine Safety Health and Review Commission

This panel will address methods for more affective advocacy in both written briefs and oral argument. Commissioner Cohen has served 10 years on FMSHRC and will discuss what he has seen work, and perhaps more importantly, what does not.

Introduction:

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

Speaker:

Robert F. Cohen, Jr., *Federal Mine Safety & Health Review Commission, Washington, DC*

2:30 p.m. – 3:30 p.m.

**Settlements and an ALJ's Ability to Control Them:
Where Are We Headed?**

Recently, ALJs have been more critical of settlements proposed by mine operators and MSHA. In one recent case, an ALJ wanted to review inspector notes and MSHA photographs before ruling on a settlement. When MSHA refused, the ALJ rejected the settlement. This panel will discuss the role of ALJs in the settlement approval process.

Moderator: **Jacqueline Bowman Ponder**, *Solar Sources Mining LLC, Indianapolis, IN*

Speakers: **Doug Parker**, *Worksafe, Inc., Oakland, CA*
Art Traynor, *United Mine Workers of America, Washington, DC*
Ross Watzman, *Jackson Kelly, Denver, CO*
Daniel Wolff, *Crowell Moring, Washington, DC*

3:30 p.m. – 3:45 p.m. **Break**

3:45 p.m. – 4:45 p.m. **105c Temporary Reinstatement:
Economic vs. Actual Reinstatement and Other 105(c) Issues**
In Temporary Reinstatement cases, when an ALJ orders reinstatement, the operator typically economically reinstates the miner rather than putting the miner back on the job. At least one recent ALJ has questioned whether the miner should in fact be reinstated rather than economically paid to stay home while the underlying discrimination case is litigated. Panelists will discuss where the law may be headed on this issue.

Moderator: **Kristin R.B. White**, *Jackson Kelly, Denver, CO*

Speakers: **William Doran**, *Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC*
Mark E. Heath, *Spilman Thomas & Battle PLLC, Charleston, WV*
Doug Parker, *Worksafe, Inc., Oakland, CA*
Art Traynor, *United Mine Workers of America, Washington, DC*

4:45 p.m. – 5:15 p.m. **How ALJs Are Assigned and Efforts to Speed up the Processing of MSHA Cases**
Judge Lesnick, Chief Administrative Law Judge for the FMSHRC, will address efforts to speed up case processing, explain how cases are assigned and other issues before him.

Introduction: **Art Traynor**, *United Mine Workers of America, Washington, DC*

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

5:15 p.m. – 6:15 p.m. **MSHA Roundtable on Hot Topics: 103(f) Walk Around Rights, Remedies in 105(c) Outside the Act, Flagrant Citations and Status of Pattern of Violations**
This panel will look at developing issues in walk around rights in mine inspections, the status of ongoing litigation involving pattern of violations, flagrant citations and what ALJ's can order as remedies in 105(c) discrimination cases.

Moderator: **Justin M. Winter**, *Jackson Lewis, P.C., Washington, DC*

Speakers: **Todd C. Myers**, *Blackhawk Mining LLC, Lexington, KY*
April Nelson, *Associate Solicitor for Mine Safety and Health Division, Office of the Solicitor, Division, Arlington, VA*
Doug Parker, *Worksafe, Inc., Oakland, CA*
Art Traynor, *United Mine Workers of America, Washington, DC*
John M. Williams, *Williams, Kilpatrick & True, PLLC, Lexington, KY*

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:

Benjamin Kim, *Allen Matkins Leck Gamble Mallory & Natsis, LLP, Los Angeles, CA*

Nicole Marquez, *Worksafe, Inc., Oakland, CA*

Paul Spanos, *Office of the Solicitor, Boston, MA*

6:00 p.m. – 7:00 p.m.

Welcome Reception at Fairmont Miramar

Wednesday, February 28

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

Melissa Bailey, *Employer Co-Chair, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC*

Orlando Pannocchia, *Public Co-Chair, Office of the Solicitor, Washington, DC*

Randy Rabinowitz, *Union and Employee Co-Chair, OSH Law Project, Washington, DC*

8:15 a.m. – 8:30 a.m.

Welcome Remarks by Section Leadership

8:30 a.m. – 9:00 a.m.

Remarks from the Solicitor's Office

A representative from the Office of the Solicitor will offer observations about SOL policy and enforcement of the OSH Act.

Speakers:

April Nelson, *Associate Solicitor for Mine Safety and Health Division, Office of the Solicitor, Division, Arlington, VA*

Ann Rosenthal, *Associate Solicitor for Occupational Safety and Health Division, Office of the Solicitor, Washington, DC*

9:00 a.m. – 10:00 a.m.

2017-2018: OSHA Remarks and Key Issues in Enforcement

This panel will address developments on OSHA's enforcement programs and initiatives, including egregious cases, enforcement of novel hazards, monitoring of corporate settlements, the new recordkeeping data initiative and potential uses for inspection targeting, and the Severe Violator Enforcement Program.

Moderator:

Steve McCown, *Littler Mendelson, Austin, TX*

Speakers: **Richard Mendelson**, *Acting Deputy Assistant Secretary, OSHA, Washington, DC*
Thomas Galassi, *Director, Directorate of Enforcement Programs, OSHA, Washington, DC*
Orlando Pannocchia, *Counsel for Regional Litigation and Legal Advice, Office of the Solicitor, Washington, DC*

10:00 a.m. – 10:15 a.m. **Break**

10:15 a.m. – 11:30 a.m. **A View from the Field: Legal Issues Arising from Enforcement**
This panel will discuss legal issues that may arise during OSHA inspections. Among topics discussed will be walkaround rights, employee and management interviews, warrants and subpoenas, multiple agency jurisdiction, post-inspection/pre-citation discovery and use of expert witnesses.

Moderator: **Ronald Taylor**, *Venable, Baltimore, MD*

Speakers: **Eric Frumin**, *Change to Win, New York, NY*
Eric Hobbs, *Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Milwaukee, WI*
Madeleine Le, *OSHA Counsel, Office of the Solicitor, Dallas, TX*

11:30 a.m. – 12:30 p.m. **Interplay between the NLRA and OSHA: Employee Involvement in Safety and Health**
Whether employees work in a unionized workplace or not, they have rights under the NLRA to improve workplace health and safety conditions, as well as protections from unlawful discrimination or retaliation for exercising those rights. These rights include, under appropriate circumstances, the right to obtain health and safety information, to refuse unsafe work, to bargain over health and safety issues, and to form safety committees. This panel will explore the rights and obligations of both employees and employers under the NLRA, and their interplay with OSHA.

Moderator: **Peter Wade**, *Ice Miller, Columbus, OH*

Speakers: **Jonathan D. Karmel**, *Karmel Law Firm, Chicago, IL*
Kenneth Kleinman, *Stevens & Lee, Philadelphia, PA*

5:30 p.m. – 7:00 p.m. **Reception at Fairmont Miramar**
Sponsored by Katten Muchin Rosenman LLP

Thursday, March 1

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

8:00 a.m. – 8:30 a.m. **Remarks from Mine Safety and Health Administration**
Representatives from the Mine Safety and Health Administration and the Federal Mining Safety and Health Review Commission will discuss MSHA priorities and provide an update on the FMSHRC.

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

Speakers: **Robert F. Cohen, Jr.**, *Commissioner, Federal Mine Safety and Health Review Commission, Washington, DC*
Patricia Silvey, *Deputy Assistant Secretary for Mine Safety and Health, Mine Safety and Health Administration, Washington, DC*

8:30 a.m. – 9:30 a.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*
Dennis J. Morikawa, *Morgan, Lewis & Bockius, Philadelphia, PA*

Panelists: **Hon. Heather MacDougall**, *Chairperson, 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*

9:30 a.m. – 10:30 a.m. **Developments in Administrative Law: What Role Does Deference Play When a New OSHA Administration Seeks to Change Agency Policies?**
Deference plays a significant role in much of what OSHA does from an enforcement and policy-making perspective. This panel will discuss deference as it relates to changes in OSHA policies. If the agency's policy change also requires a change in a legal interpretation, would that affect whether it gets Chevron deference? Would it affect the amount of weight under Skidmore (if that standard were applicable)? What can the agency do to maximize the probability that it will get Chevron deference? Through what hoops must the new administration jump to get deference or weight, such as explaining the reason for changing policy? This panel will discuss also of these issues and address recent case law – including *Encino Motors* – that may impact this issue.

Moderator: **Amanda Strainis-Walker**, *Conn Maciel Carey, Washington, DC*

Speakers: **Ann Rosenthal**, *Associate Solicitor for Occupational Safety and Health Division, Office of the Solicitor, Washington, DC*
John Martin, *Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC*
Scott Nelson, *Public Citizen Litigation Group, Portland, OR*

10:30 a.m. – 10:45 a.m. **Break**

10:45 a.m. – 11:45 a.m. **Breakout Sessions**

A. The Role of Chemical Safety Board

The United States Chemical Safety Board (CSB) often plays a key role in investigating the causes of chemical accidents, and its findings may apply to individual companies, industry groups and standards, and even other government agencies. The CSB is focused on preventing and mitigating accidents and has extensive subpoena and investigation powers. It has significantly impacted recent rulemaking efforts by OSHA and EPA. This panel will discuss the CSB's work, including how CSB investigators approach

investigations and operate in the field and how the agency works with OSHA and other agencies on joint investigations.

Moderator: **Greg Dillard**, *Katten Muchin Rosenman, LLP, Houston, TX*

Speakers: **Madeleine Le**, *OSHA Counsel, Office of the Solicitor, Dallas, TX*
Vanessa Allen Sutherland, *U.S. Chemical Safety Board, Washington, DC*

B. Update on Cal-OSHA

This panel will discuss developments in recent Cal-OSHA developments, including the agency's rulemaking and policymaking agendas. The panel will also address differences between Cal-OSHA and federal OSHA in terms of critical standards, operations and procedures.

Moderator: **Jason Mills**, *Morgan, Lewis & Bockius LLP, Los Angeles, CA*

Speakers: **Christine Baker**, *California Director of Industrial Relations, CITY, CA*
Nathan Schmidt, *Chief Counsel, California Division of Occupational Safety and Health, CITY, CA*
Michael Wood, *Administrator, Oregon OSHA, Salem, OR*

C. Heat Stress: Understanding the Industry Standards and Protecting Employees

Employees working indoors and outdoors may be exposed to a hazard resulting from excessive heat. OSHA compliance guidance and information from the American Conference of Governmental Industrial Hygienists and other groups explain how employers may develop policies that may protect employees from this hazard, but the issue is often complex. A "one-size-fits-all" program may be difficult to develop, and factors such as personal medical conditions may mean that a program does not protect all employees. This panel will discuss the legal issues that may arise when OSHA cites the heat stress under the General Duty Clause and practical issues employers may face in developing programs.

Moderator: **Lori Y. Baggett**, *Carlton Fields Jordan Burt, PA (Tampa)*

Panelists: **Jordan Barab**, *Consultant, Takoma Park, MD*
Shontell Powell, *Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Atlanta, GA*
Diane Sherman, *Regional Counsel, Office of the Solicitor, New York, NY*

D. Settlement Issues That Arise in Challenges to OSHA Standards

Petitions for Review are often filed when OSHA issues health and safety standards. The parties challenging the OSHA standard often seek modifications to the standard or ask OSHA to issue compliance guidance interpreting the standard in a particular way. These results are unlikely to be achieved through litigation in the appellate courts. This panel will discuss approaches to non-judicial resolution of challenges to OSHA standards.

Moderator: **Kathryn McMahon**, *Conn Maciel Carey LLP, Washington, DC*

Panelists: **Ed Baird**, *Deputy Associate Solicitor, Occupational Safety and Health, Office of the Solicitor, Washington, DC*
Randy Rabinowitz, *OSH Law Project, Washington, DC*
David Sarvadi, *Keller & Heckman, Washington, DC*

11:45 a.m. – 12:45 p.m.

Sexual Harassment as a Safety and Health Issue

This Panel will examine whether sexual harassment could constitute a serious workplace safety and health issue. Recent studies show pervasive harassment may manifest in physical symptoms in victimized employees. Does that mean that sexual harassment could result in a hazard that employers must address or risk citation under the General Duty Clause? How could OSHA's examination of such issues potentially conflict with existing state and federal employment discrimination laws and could OSHA require abatement measures that may implicate labor/management relations? The panel also will discuss how other countries, such as Canada, treat sexual harassment as a safety issue and how the issue of harassment has been addressed in OSHA's CPL on Workplace Violence.

Moderator: **Carla Gunnin**, *Jackson Lewis, P.C., Atlanta, GA*

Panelists: **Valerie Butera**, *General Motors Company, Detroit, MI*
Orlando Pannocchia, *Counsel for Regional Litigation and Legal Advice, Office of the Solicitor, Washington, DC*
Jora Trang, *Worksafe, Inc., Oakland, CA*

12:45 p.m. – 1:00 p.m.

Committee Business Meeting

5:30 p.m. – 7:00 p.m.

Diversity Reception at Fairmont Miramar

Friday, March 2

7:00 a.m. – 8:00 a.m.

Continental Breakfast

8:00 a.m. – 9:00 a.m.

Issues of Ethics, Professionalism and Civility in OSHA/MSHA Practice

This panel will consider ethical and professional issues related to lawyer conduct in the practice of safety and health law before Administrative Law Judges and the Commissions.

Moderator: **George Salem**, *Law Offices of George R. Salem, PLLC/Strategic Advisor, DLA Piper, Washington, DC*

Panelists: **Hon. Covette Rooney**, *Chief Administrative Law Judge, Occupational Safety and Health Review Commission, Washington, DC*
Hon. Robert Lesnick, *Chief Administrative Law Judge, Federal Mine Safety and Health Review Commission, Washington, DC*

9:00 a.m. – 10:00 a.m.

Key Issues Affecting Medical Services at the Workplace

OSHA has issued several citations to employers for failure to provide proper medical care to injured workers. What duty do employers have to provide medical care to workers? If employers do provide such care, what laws govern the administration of medical services?

Moderator: **Victoria L. Bor**, *Sherman Dunn, P.C., Washington, DC*

Panelists: **Debbie Berkowitz**, *National Employment Law Project, CITY, STATE*
Jane Heidingsfelder, *Jones Walker LLP, New Orleans, LA*
Karen Mock, *OSHA Counsel, Office of the Solicitor, Atlanta, GA*

- 10:00 a.m. – 10:15 a.m.** **Break**
- 10:15 a.m. – 11:15 a.m.** **The General Duty Clause: How Does OSHA Prove Its Case and What Role Do Industry Standards Play?**
Since the OSH Act was enacted in 1970, the case law on General Duty Clause has evolved. This panel will discuss OSHA’s burden of proof, including the role industry or consensus standards may play in establishing that the hazard was “recognized” by the employer.
- Moderator:** **Douglas W. Crim**, *Douglas W. Crim PLC, Detroit, MI*
- Panelists:** **Schean Belton**, *Senior Trial Attorney, Office of the Solicitor, Nashville, TN*
Katie (Weatherford) Tracy, *Center for Progressive Reform, Washington, DC*
William Wahoff, *Steptoe & Johnson PLLC, Columbus, OH*
- 11:15 a.m. – 12:15 p.m.** **Whistleblower Protections Beyond Those Provided by 11(c)**
OSHA administers anti-retaliation provisions in more than 20 federal laws. State whistleblower laws and common law doctrines may also protect employees who report safety and health hazards from retaliation. This panel will discuss anti-retaliation laws, other than section 11(c), that may protect workers engaged in health and safety activities.
- Moderator:** **Howard Mavity**, *Fisher & Phillips LLP, Atlanta, GA*
- Panelists:** **Randy Rabinowitz**, *OSH Law Project, Washington, DC*
Alka Ramchandani, *Jackson Lewis, P.C., San Francisco, CA*
- 12:15 p.m. – 12:30 p.m.** **Closing Remarks**