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MSHA's Proximity Detection Final Rule Released

By: Adele L. Abrams, Esq., CMSP

On January 15, 2015, the Mine Safety & Health Administration released its final rule, establishing requirements for proximity detection systems on most continuous mining equipment in underground coal mines. There is a "phase-in" of the requirement with several key dates: Equipment manufactured after March 16, 2015 must meet the requirements by November 16, 2015. Continuous mining machines and equipment with proximity detection systems manufactured as of March 16, 2015, must meet the requirements by September 16, 2016. Finally, continuous mining machines manufactured but not equipped with the systems as of March 16, 2015, will have until March 16, 2018, to meet the requirements. No systems will be required on full-face continuous mining machines.

The goal of the final rule is to protect miners from the hazards of being pinned, crushed, and struck by the equipment. Although the final rule is limited to coal operations, it is possible that it could be expanded in the future to cover continuous mining machinery in underground metal/nonmetal mines, but the use of such equipment is still fairly limited in those sectors.

Proximity detection is a technology that uses electronic sensors to detect motion or the location of one object, relative to another. The systems provide a warning and can stop mining machine operations before an accident occurs. It is a way to counter the hazards of working in a confined space that has limited visibility, and uneven / slippery ground conditions.

In developing the rule, MSHA examined 75 fatalities over a 30 year period that could have been prevented by this technology, as well as nearly 240 nonfatal accidents.



A proximity detection system consists of machine-mounted components and also miner-wearable components. If the mine operator opts for the miner-wearable approach, every miner on each working section (including both production and maintenance shifts) would be required to wear it. The final rule also has maintenance and performance requirements for proximity detection systems and requires training for those persons performing the installation and maintenance on the systems.

There are currently four proximity detection systems approved under the existing regulations for permissibility in 30 CFR Part 18. Such systems will not introduce an ignition hazard when operated in potentially explosive work environments. MSHA estimated that just under half of the continuous mining machines now in use are equipped with the devices. Some of these will have to be modified to meet the new standard's requirements for warning signals. The new standard is codified at 30 CFR 75.1732. MSHA estimates the cost of the rule, after adjusting for a similar WV rule, will be \$46.7 million over a 10-year period.

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Review Commission Decision Recognizes Greater Hazard Defense

By: Gary Visscher, Esq. & Diana Schroeder, Esq.

Can a mine operator ever avoid a citation from MSHA by asserting that violating the standard was necessary in order to prevent a greater hazard to miners, and, if so, under what circumstances would such a defense be upheld? In a decision issued late last year, *Dawes Rigging & Crane Rental*, LAKE 2011-206-M (Dec. 10, 2014), the Commission indicated that such a defense could be made under the Mine Act, but also indicated that it would apply in very limited circumstances.

The case involved the assembly of a large mobile crane at a Michigan mine's pellet plant. A smaller crane was being used to hoist and position the lattice boom into location so that it could be attached to the body of the larger crane when sudden strong gusts of wind caused the boom to swing out of position and toward the cab of the larger crane. In order to avoid a collision with the cab, one of the workers maintaining the tag lines crossed under the boom and pulled the boom away from the cab. The workers were then able to bring the boom back into position and safely complete the assembly.

An MSHA inspector was observing the crane assembly from a distance and cited Dawes for a violation of 56.16009, which simply states, "Persons shall stay clear of suspended loads." The inspector also designated the alleged violation as an "unwarrantable failure" under section 104(d) of the Mine Act.

The Commission upheld the violation of the standard, but reversed the finding of the unwarrantable failure. With regard to the argument that the unexpected shift in the wind created the necessity of crossing under the suspended boom in order to prevent a "greater hazard" to the crane operator, the Commission recognized the existence of such a defense, but rejected its application in this case: "[a]lthough in some emergency situations there may be instances where an operator is justified in violating a standard to prevent an impending greater hazard," the Commission said that this was not such a case because "[t]his was an emergency of Dawes' own making by virtue of the number and placement of tag lines attached to the boom. Had Dawes employed additional tag lines or made effective use of the two existing tag lines, the crane assembly crew would have been better situated to counteract the effect of the sudden gust of wind without resorting to [Dawes'



employee] moving under the boom." In recognizing the existence of a "greater hazard" defense, the Commission cited an early Commission decision, *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 n.2 (Dec. 1983). In the footnote in *Sewell Coal*, the

Commission stated that "[w]e realize that emergency situations may arise where the gravity of circumstances and presence of danger may require an immediate response by the operator or its employees, necessitating a departure from the terms of a mandatory standard without first resorting to the Act's modification procedures. In such conditions, an exception to the Act's modification and liability provisions may be necessary in order to further the Act's primary goal, the protection of miners." However, as in *Dawes*, the Commission said that the exception would not apply in that case and did not elaborate on what would be necessary for the exception to apply: "Therefore, we reserve for a case appropriately raising such an issue detailed consideration of any emergency exception to the general rules on modification and liability."

Thus, the Commission has kept alive the possibility of a "greater hazard" defense under the Mine Act, but not defined the conditions under which it would apply. Some previous decisions have suggested that the "greater hazard" defense is only available under the Mine Act if the operator has previously petitioned MSHA for an exception to, or modification of the standard, which is obviously impractical in an immediate danger and unanticipated situation such as this.

Although it did not vacate the citation in *Dawes Rigging*, the Commission did vacate the unwarrantable failure designation. The Commission found that the "extensiveness and duration" of the violative condition – the employee was exposed to the suspended boom for only a matter of seconds – weighed against finding an unwarrantable failure. In addition, the Commission said that the reason that the employee crossed under the boom - to address an "imminent threat" to the crane operator - "should be considered as a mitigating factor" that "significantly mitigates against a finding that Dawes was indifferent to the safety of its employees."

MACH MINING LLC V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By: Ryan Horka (J.D. May 2015)

On January 13, 2015, the Supreme Court of the United States heard oral arguments in *Mach Mining, LLC v. Equal Employment Opportunity Commission*. While the substantive issue of the case concerns Mach Mining's employment discrimination against women, the procedural issue, which has taken the front seat, looks to the EEOC's conciliation requirements under Title VII. Under Title VII, the EEOC is required to attempt to resolve a claim through conciliation before suing a private employer. This can be a useful tool for employers and provides an avenue for avoiding lengthy and costly legal battles.

Conciliation is a form of alternative dispute resolution (ADR), through which the parties to a dispute meet, individually and together, with a conciliator in an effort to resolve any issues. A conciliator acts much like a mediator in their role throughout this process. However, conciliation differs from mediation and arbitration - two other forms of ADR - in very distinct ways. For instance, a conciliator, unlike an arbitrator, has no actual legal authority to seek evidence or witnesses, and usually gives no award or decision in the matter. Conciliation is a much less formal, and much less structured, means of adjusting and settling disputes through extra-judicial methods.

In 2008, a woman applied for a job as a miner with Mach Mining and was subsequently denied the job. Shortly after, the woman filed a complaint with the EEOC, claiming that she was denied the job because of her sex. The EEOC conducted an investigation into the employment practices of Mach Mining, resulting in an EEOC lawsuit for systemic hiring discrimination against women, on the basis that Mach Mining had never hired a female miner. Mach Mining attempted to dismiss the case, claiming that the EEOC did not make a good faith attempt to conciliate with them before filing the suit. The Seventh Circuit ruled in favor of the EEOC. This decision generated a split with six other circuits that have permitted employers to argue such a defense.

In their *Mach Mining* decision, the Supreme Court of the United States will determine the extent to which courts can review the conciliation efforts made by the EEOC to informally resolve a claim or dispute before filing a suit in court. Mach Mining believes the court should rule that a "modest" judicial review be allowed, to inquire into whether the EEOC has met

their burden to attempt to conciliate in any particular case. In Mach Mining's view, at minimum, the EEOC should conference with a willing employer and put some good faith offer on the table.

The EEOC asserts that the Seventh Circuit was correct in finding that Congress did not intend for any judicial review of the EEOC's conciliation efforts prior to a suit being filed. Instead, the EEOC argues, Congress specifically left the standard up to EEOC discretion. In direct disagreement, Mach Mining argues that Congress included the provision with a clear intent for conciliation to act as the preferred method of resolving disputes and a procedural protection for employers.

Throughout the arguments, some of the justices questioned the EEOC's stance of "take it or leave it," judicial review. A very intriguing question came from Chief Justice Roberts during the EEOC's arguments. He asked, "[c]an the employer get judicial review if the EEOC lies about conducting conciliation?" Leading counsel for EEOC, Saharsky, to say that such a thing would never happen. To which Chief Justice Roberts responded, "that assumes the EEOC is always right." Roberts went on to say that it is "utterly unreasonable" that a court should have absolutely no judicial review into a process such as this. These same sentiments were asserted by Justice Kennedy when he said, in response to Saharsky, "all I hear is no review, period, good bye."

The confidentiality requirement, included by Congress, concerning EEOC conciliation meetings also became a substantial topic of oral arguments as well. EEOC argues it supports their position that there should be no judicial review where Mach argues that it is a simple settlement term for the parties to abide.

Additionally, Mach Mining argued that the EEOC's view presents an enormous incentive for the EEOC not to conciliate in certain cases where it would like to send a public message.

Now, the Supreme Court has the opportunity to resolve the circuit split and clarify the scope of both the EEOC's duties during the conciliation process and the court's boundaries in reviewing that process. Hopefully, the end result will provide employers with a fair and just process that can assist them avoid lengthy legal battles.

The Regulatory Accountability Act of 2015

By: Sarah Korwan, Esq.

Last month the House of Representatives passed the Regulatory Accountability Act of 2015 (“RAA”), a much needed reform to how federal regulations are made. Since 1946, federal regulations have been created by the authority of the Administrative Procedures Act (“APA”), with little change to the process. The exponential growth and burden to small businesses and manufacturers could hardly be anticipated 70 years ago. To provide relief, the RAA is designed to reform the process by requiring justification for new regulations, identifying alternatives, evaluating the impact on jobs and the economy, assessing the cost-benefit impact of the regulations, and incorporating input from the regulated business community.

The RAA refines and reforms the regulatory process in a number of ways. First, the Act codifies many of the requirements now imposed on agencies from an Executive Order established in 1981 (E.O. 12866). This Order required agencies to assess the costs and benefits of proposed rules and to consider alternatives. Giving these requirements the force of law ensures that they cannot be vacated without congressional action and provides the basis for judicial review of agency compliance.

The Act also establishes notice requirements that are linked to the monetary impact of a rule. For a “major” rule (\$100 million in impact or more annually), advance notice of proposed rulemaking must be released to solicit public comment. For “high-impact” (\$1 billion or more annually) rules, agencies must hold an oral evidentiary hearing involving all affected parties with a full opportunity for cross-examination of witnesses from all sides. The hearing is meant to give regulators better information to base their final decisions.

There are important judicial reforms in the RAA, as well. Notably, the RAA provides that judicial review is available for failure to comply with the Information Quality Act, a supplement to the APA. The standards for the scope of judicial review of agency rulemaking are revised to: (1) prohibit a court from deferring to an agency's interpretation of a rule if the agency did not comply with requirements of the rulemaking process; (2) preclude deference to an agency's cost-benefit analyses and other economic assessments if the agency fails to comply with Office of Management

and Budget guidelines for performing such analyses; and (3) preclude deference to agency guidance documents. These limits close a potential loophole by preventing agencies from asserting their interpretation is simply guidance and therefore not required to go through the rulemaking process with notice and comment. Finally, the RAA also applies a “substantial evidence” test for judicial review of rulemakings.

The bill now goes to the Senate, where it has been assigned to the Committee on Homeland Security and Governmental Affairs for review, and will likely go to subcommittee and hearings. A similar Act was passed in 2013 and 2014, but failed to gain traction in the Democrat-controlled Senate. Although, the White House has already threatened to veto the bill, there is renewed hope of passage by the new Republican-led Senate, in an effort to stem the tide of increased regulations, and encourage business development and job growth.

MSHA Hosts Stakeholder Call to Address Spike in M/NM Fatalities

By: Nicholas Scala, Esq., CMSP

On Friday, January 30, 2015, MSHA head Joe Main and the Metal/NonMetal (M/NM) division held a stakeholder conference call to discuss the rise in fatalities at M/NM mines in the past year. A similar call was held in May 2014 to address the same issue, following the spike from October 2013 through the beginning of 2014. The call comes after 25 fatalities occurred in M/NM mines during 2014, with another four (4) occurring in January 2015.

Focusing on similar areas that he did throughout the year at speaking engagements, Joe Main and MSHA made specific note of the increase in supervisor and contractor fatalities. These two categories comprised 14 of the 24 fatalities in 2014. Additionally, truck drivers were frequently the victims of the incidents with six (6) fatalities. This led MSHA to declare that starting Monday February 2, 2015, M/NM, coal and MSHA's Educational Field Services (EFS) personnel will be setting out on focused inspections regarding those “high risk” positions. Moreover, MSHA listed several other specific areas that inspectors will focus on in the coming year:

1. Training, including task-training for task specific hazards, for both miners and supervisors;
2. Effective workplace exams before starting tasks;
3. Providing and using the proper Personal Protective Equipment (PPE);

Stakeholder Call, Con't

4. Lock out/Tag out procedures; and
5. Pre-operational (pre-shift) equipment inspection, followed by prompt management action to address any defects.

So what does this mean for operators?

It means that MSHA will be increasing their efforts and thoroughness during inspections, and that any citations issued under the specific areas above can be expected to carry more significant paper designations and fines. This also follows a year in which MSHA has investigated and prosecuted a record number of whistleblower claims from miners, and you can be sure MSHA will take particular interest in any complaints made regarding deficiencies in these areas at a mine. Operators would be wise to ensure that all training records and training practices are effective and satisfy MSHA requirements. Also, re-educating miners on the proper work procedures and use/operation of equipment will provide a safer workplace, and one with less MSHA headaches in the coming months.

If you would like additional information regarding the required records or additional training materials, please feel free to reach out to the Law Office for assistance.

Regulatory Fairness Act of 2015 & The Waters of The U.S. Rule

By: Tina M. Stanczewski, Esq., MSP

Another bill reflective of members of Congress' dissatisfaction with the Environmental Protection Agency (EPA)'s increased regulations, lack of oversight, and poor analysis of business impact has been proposed by Senator Vitter. It is called the Regulatory Fairness Act of 2015 (RFA).

The bill amends the Clean Water Act (Act) and is in direct response to the EPA's proposed expansion on the term "Waters of the U.S." in a proposed rule. The CWA permits the government to regulate any discharge into "navigable waters." The proposed rule - Clean Water Rule was published in the Federal Register on April 21, 2014. The comment period has ended.

The RFA seeks to limit the EPA's authority to veto CWA permits for dredge-and-fill operations. In essence, to curtail provisions in the proposed rule. There is concern that the rule gives too much power to the EPA for asserting jurisdiction over water and

related permitting.

If the rule is implemented, water that traditionally has been exempt from EPA oversight may become regulated. For mining, catchment ponds or ditches may require permits. This issue also significantly impacts the farming industry who tend to create watering holes for their farm animals. With the permitting process being riddled with red tape and lengthy, the economic impacts could be overwhelming. Opponents believe it is a war on property rights. Further, there have been issues between the EPA and the Army Corps of Engineers (Corp) concerning existing permits and whether the EPA can revoke them once the Corp has approved it.

Proponents of the rule argue that there are clear exemptions for irrigation ditches and drainage ponds. The issue lies with the broad granting of interpretative power given to the EPA and Corp through the rule. What one person considers exempt, another may not. Confusion over the definition "Waters of the U.S." developed from several Supreme Court case rulings that have left both the EPA and some industry stakeholders feeling uncertain.

The most recent Supreme Court case, *Rapanos v. United States*, 547 U.S. 715 (2006), concerned the EPA's ability to regulate isolated wetlands under the CWA. Rapanos sought to fill wetlands for commercial building. Corps regulations find wetlands to be covered by the CWA if they are adjacent to navigable waters or a tributary of the water. The EPA brought suit against Rapanos and argued that the waters were "adjacent wetlands" under the Corps' rules.

The reasoning focused on how the water drained into man-made areas that eventually flowed into navigable waters. The Supreme Court ruled in favor of Rapanos but did not develop a clear definition of the term navigable waters. Herein lays the EPA's impetus for the proposed rule. This has spurred increased congressional investigation.

A hearing was held by the The Joint House Committee on Transportation and Infrastructure with U.S. Senate Committee on Environment and Public Works on February 4, 2015. Senate Chairman Bill Shuster (R-PA) issued the opening remarks for the hearing. His statement focused on the traditional state-federal partnership for the management of waterways and how it has worked for many years. According to Schuster, the expansion of the term Waters of the U.S. may permit the EPA to regulate any

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body of water, even though water quality has improved since the CWA's inception.

Gina McCarthy, Administrator EPA, stated that the proposed rule is a response to stakeholder's request for clarification on what are waters covered by the Act. McCarthy asserted that *Rapanos* did not invalidate any of the EPA's existing regulations. Since the decision, there has been confusion over the regulatory authority given the EPA.

E. Scott Pruitt, Attorney General, State of Oklahoma voiced opposition to the rule and found it to be an attack on private property rights. Examples of waters that would require permitting approval by the EPA under the new scheme would include ponds for livestock on farmland. He stated the proposed rule "reeks of overexpansion."

Overall there were seven witnesses, mostly opposing the rule. Chairman Shuster stated that this is the beginning of the discussion and the oversight will continue. No further hearings are scheduled at this time.

President's Budget Proposal

Includes \$478 Billion for Infrastructure and Increases for OSHA and MSHA

By: Nicholas W. Scala, Esq., CMSP & Gary Visscher, Esq.

The White House recently released President Obama's new budget proposal. It includes \$478 Billion reserved for public works programs, (construction and upgrade of ports, roads, bridges and public transportation). Partial funding of the bill comes from requiring U.S. companies to pay taxes on overseas profits, which they currently can delay indefinitely. This funding, combined with the remaining money in the Highway Trust Fund, would combine to create the \$478 Billion. The proposal must now be approved by Congress, which is by no means a given.

Additionally, the President's budget sets out the following proposed budgets for government agencies:

OSHA – The Administration is requesting a significant increase – nearly \$40 million, or 7% – for OSHA, from \$552.8 million in 2015 to \$592 million for FY2016. Included in the increase is a \$17 million increase for federal enforcement and a \$3.4 million increase for whistleblower programs. State programs would also receive an increase, from \$100.8 million to \$104.3 million.

The increased funding includes funding for 2 initiatives, according to OSHA's budget documents: (1) \$5.15 million and 23 Full-time Equivalent workers (FTE) to implement the Executive Order on Chemical Facility Safety and Security, including revisions to the PSM standard, and (2) \$6.7 million and 40 FTE to implement "Rapid Response Investigation" protocols to "manage workload resulting from enhanced reporting of injuries in the 2014 revisions in the Recordkeeping Standard.

The Administration is also again proposing to include language to amend the long-standing appropriations rider preventing OSHA from using appropriated funds to inspect small businesses (less than 10 employees) in industries with lower than average injury rates. The proposed language would allow inspections of small businesses that have Program Safety Management (PSM) or Risk Management Plan (RMP)-covered processes. The Administration proposed a similar change in the 2015 budget.

MSHA – The Administration is requesting an increase of \$19 million for MSHA, from \$375.9 million in 2015 to \$394.9 for FY 2016. The largest increase would be for coal mine enforcement, which would increase by about \$7.9 million, from \$167.8 million to \$175.7 million. Metal/nonmetal enforcement would be increased by about \$2 million, from \$91.7 million to 93.8 million. The budget proposal also includes a \$1 million increase and 6 FTE for the Office of Assessments, "to improve the timeliness of special assessments."

NIOSH – The Administration is requesting a total of \$606 million for NIOSH. That total includes \$268 million for the World Trade Center Health Program. Discretionary funding under the Administration proposal would be a reduction of \$51 million from 2015, which the Administration would achieve by proposing to eliminate the Education and Research Centers (ERC) and Agriculture, Forestry and Fishing sector research programs, as the Administration has proposed to do in past budgets.

CSB, OSHRC, FMSHRC – The Administration proposes an increase of \$1 million for the Chemical Safety Board, from \$11 million to \$12.271 million in FY 2016. Funding for the Federal Mine Safety and Health Review Commission would increase slightly, from \$16.751 million to \$17.085 million, and funding for the Occupational Safety and Health Review Commission would increase from \$11.639 million to \$13.212 million in FY 2016.