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FMSHRC Judge Rules in Favor of Operator – Reduces Penalties from \$547K to \$44K

By Justin M. Winter, Esq.

On May 23, 2014, a Federal Mine Safety and Health review Commission Administrative Law Judge issued a ruling in MSHA v. Winn Materials, LLC. In the case argued by Justin Winter and Nicholas Scala, of the Law Office of Adele Abrams, the judge reduced the civil penalties by 92% and modified 7 104(d)(1) unwarrantable failures to non-Significant and Substantial 104(a) citations.

The MSHA Inspector went to investigate a hazard complaint, which contained an allegation regarding guards in the mine's processing plants. As a result of the inspection, MSHA issued multiple unwarrantable failures for alleged lack of guarding and inadequate guarding on tail pulleys throughout the plant. The citation and orders were specially assessed, and assessed a total civil penalty of \$547,100 for the seven alleged violations.

The judge modified the 104(d), unwarrantable failure, issuances to 104(a) citations due in large part to his finding that the alleged violations were not reasonably likely to result in an injury, and therefore were not "significant and substantial."

Five of the seven orders alleged a complete lack of guarding of tail pulleys, while two of the seven orders alleged inadequate guarding of tail pulleys. MSHA argued that the citation and orders were valid as issued by the inspector because work activities, such as greasing, cleaning, belt alignment, maintenance, and miner foot traffic brought miners within close proximity to the alleged hazards. However, the operator explained that miners do not perform any work on the cited tail pulleys while the belts are in operation, and miners do not travel on foot within close proximity to the cited conditions. Specifically, the operator argued that cleaning is not performed by miners on foot utilizing shovels, as alleged by MSHA. Rather, the operator disputed the claims by asserting that enclosed skid steers perform the cleaning duties, which contributed to the guards possibly being out of position. The operator further argued that greasing is only performed prior to start-up, and workplace examinations in this area are performed during a drive-through by plant personnel. Lastly, the operator offered mitigating circumstance by describing work practices and procedures for the repair and replacement of damaged guard, in addition to weekly safety meetings with the entire workforce.

INSIDE THIS ISSUE

FMSHRC Judge Rules in Favor of Operator – Reduces Penalties from 547K to 44K	1
MSHA Issues Final Rule on Exposure to Respirable Coal Dust	3
Commission Hold Defects Found during Pre-Shift Inspections are Citable	4
Whistleblower Protections: An Expanding Horizon	5
Relevant Updates	6
Another Win For The EPA: Inside The D.C. Circuit's Latest Decision	7

FMSHRC Judge Rules in Favor of Operator – Reduces Penalties from \$547K to \$44K(cont.)

Each of the orders contained in this case were initially issued a negligence designation of “Reckless Disregard”, as MSHA alleged that the operator exhibited an absence of the slightest degree of care for the safety of miners due to the guarding conditions the inspector discovered during his inspection. MSHA argued that multiple unguarded tail pulleys constituted reckless disregard, and the operator did not do enough to reattach damaged guards and improve general guarding of the tail pulleys. MSHA further argued that none of the cited areas were barricaded off, and miners could approach any of the tail pulleys and contact moving machine parts. Respondent argued that repairs had been implemented to damaged guards, and miners were trained on conveyor belt safety. The judge ruled that mitigating factors were present which warranted negligence reductions for each of the violations in this case.

Three of the seven 104(d)(1)'s in this case were designated by MSHA as flagrant violations, meaning that the operator displayed a reckless of repeated failure to make reasonable efforts to correct a known violation of a standard that could have been reasonably expected to cause death or serious bodily injury. MSHA argued that because the operator did not detail repair efforts implemented for the cited guarding conditions to the inspector during the inspection, these efforts should be discounted. However, the ALJ ruled that the operator presented significant credible evidence that that it took considerable efforts to protect workers from entanglement hazards prior to the inspection, specifically referencing safety talks emphasizing pinch points, and the use of enclosed mobile equipment for cleaning purposes. The ALJ also took into consideration the operator's clean accident and inspection history leading up to the inspection. Due to the fact that the ALJ removed the reckless disregard status from all of the orders, the flagrant designation was eliminated.

The Judge held that since work is only performed on the tail pulleys while the belts are de-energized, and skid steers primarily perform the cleaning duties, miners would have no work related reason to be on foot near the tail pulleys while running; therefore, likelihood of injury resulting from the cited guarding conditions would be unlikely to occur. Moreover the judge held that the MSHA Inspector admitted during his testimony that he observed no work of any kind being performed on operable belts, nor did he testify to evidence of miner foot traffic near operable belts. MSHA's lack of evidence concerning miner foot traffic near operable tail pulleys contributed to the Judge's ruling. In his decision, the judge stated that MSHA has not shown more than a remote possibility of a worker on foot even entering the around the exposed tail pulleys in which an injury could occur. Furthermore, the judge determined that since 104(d)(1) unwarrantable failures require a finding of a “significant and substantial” designation, that all issuances must be modified to non-S & S 104(a) citations.

As a result of the above modifications, the operator's reduced the civil penalties from \$547,100 to \$44,000.

MSHA Informs Industry of Renewed Enforcement Focus for M/NM

During the Industrial Minerals Association-North America (IMA-NA) Spring meeting, MSHA M/NM officials Marvin Lichtenfels and Neil Merrifield alerted attendees to expect more liberal use of the 107(a) imminent danger order by inspectors. Additionally, MSHA warned of heightened scrutiny of task training records, lock out/tag out procedures and workplace examination records. These warnings were also echoed in a news release by MSHA on May 28, 2014, which included that coal inspectors would be venturing into M/NM mines for “walk and talks” with miners. These inspectors will still have the power to issue citations or orders to the operators. MSHA's goal with the enforcement focus is to quell the spike in M/NM fatalities; since October 2013 there have been 20 M/NM fatalities.

MSHA Issues Final Rule on Exposure to Respirable Coal Dust

By Gary Visscher, Esq.

On May 1, 2014 MSHA published a new respirable coal dust standard. The new rule (assuming it is allowed to take effect after court challenges) will replace rules promulgated in 1980 that implemented the Interim Mandatory Health Standard in section 202 of the 1977 Mine Act. Section 202 established an interim permissible exposure limit, effective three years after passage of the Act, of 2.0 milligrams of respirable dust per cubic meter of air. The new rule reduces the exposure limit from 2.0 milligrams to 1.5 milligrams per cubic meter of air. The new rule also reduces the permissible dust level in entries used for ventilation from 1.0 to .5 milligrams per cubic meter of air. The same reduction (1.0 to .5 milligrams) applies to any area in which any "Part 90" miners (miners who have evidence of pneumonconiosis) are working.

Although the reduction in the permissible exposure level has generally received the most attention, the new standard also changes how sampling is done, changes that may have a bigger impact than the reduction in the exposure limit for many mining operations.

Currently, coal mine operators collect bimonthly samples and submit them to MSHA for analysis. Compliance or non-compliance with the exposure limit is based on an average of five samples. The new rule allows MSHA to use a single, full-shift sample to determine compliance with the exposure limit. According to MSHA, the current practice allows mines to average dust samples from several shifts, thus allowing the possibility that some miners are exposed to levels of dust above the standard.

The new rule also requires sampling on all shifts, and requires that samples be taken over the entire shift that miners work, rather than stopping after 8 hours. The rule also requires that samples be taken when mines are working at 80% of average production, rather than the 50% under the existing rule. MSHA describes these changes as "closing loopholes" in the current sampling procedure.

The new rule requires that dust exposure in high dust concentration areas be measured by use of a "continuous personal dust monitor," a device worn by the miner, which provides a "real-time" display of cumulative dust levels. The purpose is to provide readings that the mine operator can use to take corrective actions without waiting days or weeks for MSHA's lab results. This purpose is reinforced by the new rule's requirement that the operator take "immediate" action if any sample indicates excessive levels of respirable dust. The operator must also record the action taken and make it available for inspection by MSHA.

The new rule also significantly increases the frequency and number of samples that would be required in mines, requires that dust controls be examined and the exam certified to before each shift. The new rule also increases the requirements for certified persons who perform dust sampling and maintain and calibrate equipment.

The changes in the new rule will phased in over several years. Required changes in sampling technique and frequency take effect on August 1, 2014. The requirement to use the Continuous Personal Dust Monitor takes effect February 1, 2016. The reduction in the permissible exposure limit takes effect on August 1, 2016. MSHA is conducting a number of training and outreach sessions on the new rule during May and June.

The new rule has been challenged in a lawsuit filed in the U.S. Court of Appeals for the D.C. Circuit. Among issues raised in the challenge are the availability and reliability of continuous monitoring technology that is required by the new rule. The outcome of that challenge is not likely to be known for some time.

Outreach On New Coal Rule

Tina Stanczewski, Esq., MSP

Patricia Silvey, MSHA Deputy Assistant Secretary for Operations, spoke at the Small Business Association's Roundtable to discuss the new coal rule. This rule is part of MSHA's campaign "End Black Lung—Act Now!"

According to Silvey, the key reasons for ending black lung disease include the number of deaths and cost. It has been the cause or contributing factor in the deaths of more than 76,000 miners since 1968. Further, it has cost more than \$45 billion in federal compensation benefits have been paid to victims and their survivors. With all the efforts since the 1970's miners still develop the disease

The rule addressed recommendations in NIOSH's Criteria Document and the Secretary of Labor's Dust Advisory Committee Report. There were over 2000 pages of comments received by MSHA and 7 hearings were held in coal mining regions around the country.

MSHA held several stakeholder meetings to educate industry on the rule and will hold best practice dust control workshops as a joint activity with NIOSH to be held after October 1, 2014.

Commission Hold Defects Found during Pre-Shift Inspections are Citable Nicholas Scala, Esq., CMSP

In 2009, during an inspection at Wake Stone quarry in Battleboro, NC, a company Superintendent requested that prior to an MSHA's inspection of mobile equipment that was not in operation, the operator be given the opportunity to perform a pre-shift inspection. During that pre-shift inspection, the operator found two pieces of mobile equipment had defective horns, and was then issued citations for each by the inspector. The operator contested the citations, under the position that if the defects were found during the pre-shift inspection, and while the equipment was not in operation, it should not be citable.

The Administrative Law Judge agreed with the operator, vacating both citations. The judge opined that an operator could not determine a horn was defective without testing it, and that the issuance of citations during the pre-shift inspection lessened operator incentive to conduct pre-shifts.

However, the Secretary of Labor and MSHA appealed the decision to the Federal Mine Safety and Health Review Commission (FMSHRC), and their decision was published on April 18, 2014. In the decision, FMSHRC reversed the judge, reinstating both citations and remanding them to the judge for penalty assessment.

FMSHRC held that operators are required, under the strict liability of the Mine Act to maintain all elements of mobile equipment which is not withdrawn from service. Moreover, FMSHRC referred to the operator's basis for contest as "gamesmanship" to avoid citations, claiming since the operator requested the right to pre-shift following the inspector's requests to inspect the equipment, the operator was attempting to take advantage of a loophole during the inspection.

Furthermore, FMSHRC also held the term "maintain [means] that warning devices shall be capable of performing on an uninterrupted basis at all time...[and] imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair."

This decision places all operators on notice that any alleged defect found on a piece of mobile equipment, is citable if the equipment is operable and ready for use. It places an untenable burden on operators to ensure all components are functioning at ALL times. Clearly in the disconnected view of the FMSHRC, every alleged defect at a mine must be repaired before it fails to work, if operators want to avoid citations.

MSHA Holds Training Summit: Vows to Issue More Citations and Imminent Danger Orders Nicholas Scala, Esq., CMSP

On May 22, 2014, MSHA held a conference call for trainers and stakeholders in the Metal/Non-Metal (M/NM) sector to address the spike in fatalities since October 2013 and alert trainers to MSHA's enforcement plans to combat the rise in deaths. MSHA Administrator for M/NM, Neil Merrifield, expressed that the increased in fatalities fell back upon the operators and failure to adequately train miners, focusing on task training. Merrifield further stated it was MSHA's duty to audit mine operators, but the operators' duty to keep miners safe.

MSHA plans to bring additional inspectors to the M/NM mines for "walk and talks" with miners to address the surge in fatalities with the workforce. Additionally, MSHA is instructing inspectors to issue more citations and Section 107(a), Imminent Danger Orders, if the inspector believes they see a hazardous situation. Imminent Danger Orders require immediate withdraw of miners from the area until the allegedly hazardous condition is abated. Although Imminent Danger Orders are themselves, not assessable with a penalty, a citation or order almost always accompanies the issuance of a 107(a) and these can be specially assessed.

When the call was opened up for questions or comments, some industry participants plead to MSHA for additional training resources.

Are Surface Mining Fatalities On the Rise? Tina M. Stanczewski, Esq., MSP

The Mine Safety and Health Administration (MSHA) convened a stakeholder meeting on May 5, 2014 to discuss trends in metal/non-metal fatalities since October 2013. MSHA suggested there is a 1) lack of quality task training, 2) a failure of adequate workplace examinations, and 3) flaws in mine safety programs. For the 19 fatalities that occurred between October 2013 and May 4, 2014, MSHA's analysis shows:

- New or Significant Trends
 - 6 of 19 deaths underground
 - 4 contractors killed
 - Explosive related deaths increased
 - 6 supervisors killed, including a mine owner
 - Explosive related deaths increased
 - Experience at mine and task contributory factor
- Characteristics That Were Not a Factor in Fatality
 - Seasonal activities not a factor
 - Size of mine not a factor.
 - Experience in mining industry not a factor.

Whistleblower Protections: An Expanding Horizon

Joshua Schultz, Esq., MSP

Mine operators should be familiar with the anti-discrimination provisions of Section 105(c) of the Mine Act. These provisions subject mine operators to penalties which can reach \$60,000 per violation in addition to costly temporary reinstatement of workers who file complaints. In addition to the discrimination protections of the Mine Act, operators should be aware that they can be held liable under various other federal statutes. Numerous environmental statutes enforced by the EPA contain anti-discrimination provisions, including the Clean Air Act; Comprehensive Environmental Response, Compensation and Liability Act; and the Toxic Substances Control Act. Additionally, operators are subject to the whistleblower protections of the Sarbanes-Oxley Act and the Surface Transportation Assistance Act (STAA).

Recently, OSHA ordered an Iowa company to pay more than \$123,000 in back wages, legal fees and fines under Section 405 of the STAA. Although OSHA does not generally have jurisdiction at mine sites, operators are subject to the regulations of the STAA. OSHA's regional offices investigate STAA claims, regardless of whether MSHA could also investigate claims between the worker and employer under the Mine Act's protections. Mine operators are subject to these regulations if they employ CDL drivers.

Economic Reinstatement NOT automatic remedy to Temporary Reinstatement

Complainants need only meet a low burden for a Judge to order an operator to provide temporary reinstatement under Section 105(c) of the Mine Act. In a temporary reinstatement action, the issues before the judge are whether the claim is not frivolous and whether such activity "was reasonably contemporaneous with the adverse action complained of." Faced with an order of temporary reinstatement, many mine operators elect to pay the complainant their salary in lieu of actual reinstatement while the action is pending, reasoning that it may be less disruptive to workforce.

In a recent decision, Administrative Law Judge Moran denied a company's motion for economic reinstatement instead of actual reinstatement because the company sought to offset the earned income the Complainant could receive from outside employment against the payment the mine owed the Complainant during the period of temporary reinstatement. In this case, Charles Riordan v. Knox Creek Coal Corp., Judge Moran refused Knox Creeks' motion which would have instituted economic reinstatement offset by

income earned by the miner at any other employment despite Mr. Riordan's objections.

Judge Moran's ruling would not prevent an operator and a complainant from entering an agreement providing economic reinstatement offset by earned income if the complainant agrees to such a provision.

Additionally, Judge Moran reiterated a previous ruling that where an operator chooses to pay a miner economic reinstatement in lieu of actual reinstatement, the operator does not have grounds to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim.

Whistleblower Protections Extend to Commercial Truckers with OSHA

Nicholas Scala, Esq., CMSP

Recently the Federal Government, especially OSHA and MSHA, has been extending and enforcing whistleblower protections for workers. Of late, OSHA sat before the Senate Health Education Labor & Pensions (HELP) committee, lobbying for amendments to the OSH Act whistleblower protections under Section 11(c), and both OSHA and MSHA have increased the number for whistleblower cases being investigated and prosecuted. In these cases, employers can face forced reinstatement of the complainant, punitive damages, fines, and possibly penalties against individual company agents. These complaints arise when an employee feels they were discriminated against or terminated due to raising safety related concerns.

However, in addition to employees under a company's payroll, operators must also pay attention to complaints made by contract commercial truck drivers hauling for the company. Under the Surface Transportation Assistance Act (STAA), drivers have 180 days after the alleged discrimination or termination to file a complaint. Any complaint is investigated and assessed by OSHA, even if the company is a mine operator normally under the jurisdiction of MSHA. A Kansas based company was recently penalized by OSHA for allegedly wrongfully terminating a driver who relayed safety concerns about new routes. The company faced of \$100,000.00 in back pay to the driver, in addition to another \$100,000.00 in compensatory and punitive damages.

Furthermore, OSHA who currently requires whistleblower complaints be made within 30 days of the alleged adverse action, filed a memorandum of intent to notify all complainants who file after the 30 days of the National Labor Relation Board's six (6) month deadline.

Whistleblower Protections Extend to Commercial Truckers with OSHA (cont.)

OSHA will also be including this information to complaints which are closed by OSHA investigators, thereby offering complainants another forum to bring action against employers.

Any safety complaints made to an employer, by their own employees or contractors, must be investigated and the employer should not adversely act against the employee or contractor as a result.

EPA's Expansion of Waters of the US Instills Fear in Many

With the Supreme Court denying Mingo Logan Coal's petition for review of the lower court's holding that the EPA's can withdraw previously issued permits, many land and business owners are left without guidance. The key issue is whether, under Section 404(c) of the Clean Water Act, the EPA has the authority to withdraw disposal site specifications after the U.S. Army Corps of Engineers ("Corps") has issued a permit? This gives the EPA the ability to unilaterally decide on whether a landowner can obtain or keep a previously issue permit. It could create a chilling effect for those in the permit stage or companies with existing permits.

Although the district court rejected EPA's assertion of veto authority, The D.C. Circuit held that the Clean Water Act "clearly and unambiguously" allows the EPA to intervene in any manner for an existing permit if the Agency believes an adverse impact may occur from a discharge.

In 2007 the Corps issued Mingo Logan Coal Company a Clean Water Act section 404 permit. This granted Mingo the ability to discharge dredge and fill material into portions of waterways deemed "Waters of the United States." The permit process included EPA review. Many mines and other businesses require these permits to function. When water runs through or abuts the property, environmental impacts must be assessed. With the EPA also proposing to expand the definition of Waters of the U.S., industry faces very uncomfortable and unknown territory. The business impact will be significant.

Uncertainty over when and why the EPA may revoke a Section 404 permit hinders business's ability to fully assess project risk and cost

With Mingo Logan's petition for cert, along with 12 amicus briefs (26 states joined West Virginia's brief) being denied, the case is returning to the district court on remand. Several issues remain and briefs are due June 11, 2014 for the other issues. The remaining issues may provide a mechanism for challenges that at minimum assist industry with defining the impact of the ruling to its day to day and future planning.

Brody Mining, LLC, Pattern of Violation Challenge Heard by the Commission

May 22, 2014 the Federal Mine Safety and Health Review Commission (the "Commission") held oral arguments in the case Brody Mining, LLC v. MSHA. The case challenges the validity and constitutionality of MSHA newly enacted (March 2013) Pattern of Violations criteria. The new rule, as opposed to the old, takes into account all issued citations and orders, instead of only final citations and orders.

May 29, 2014 the Commission held an open meeting to discuss the case, which was open to the public. Although the several of the commissions expressed concerns with the new Pattern of Violations rule, Commissioners Young, Nakamura, Cohen and Chairman Jordan all stated they were planning to uphold the rule and MSHA's authority under it. Commission Althen staunchly opposed the rule and MSHA's defense of it at the meeting, but stated he was still considering his decision. The Commission will continue to deliberate and draft a decision for the matter, at which time the parties will have to decide whether or not to appeal to the Federal Circuit courts.

MSHA Small Mines Division Merges

MSHA Secretary, Joe Main, announced the merger of the small mines program with the education policy and development. The goal is to cross-train all employees in these programs to provide small operators with more assistance. It will be implemented by June 29, 2014.

Another Win for the EPA: Inside the D.C. Circuit's Latest Decision

Diana Schroeher, Esq.

On May 7, 2014, the D.C. Circuit upheld the EPA's latest Rulemaking on national ambient air quality standards (NAAQS or "soot standards"), unanimously denying the Petitioners', National Association of Manufacturers (NAM) and other industry groups, challenges. *National Ass'n of Mfrs. v. EPA*, No. 13-1069, May 9, 2014. EPA is on a winning streak in federal courts on pollution control measures – this is the third court victory just this year for the EPA.

EPA's Final Rule was issued on January 15, 2013 pursuant to the Clean Air Act's mandate that EPA review the NAAQS standards at least once every 5 years. The centerpiece of the new 2013 Rule reduces the level of fine particulate matter emissions from 15 micrograms per cubic meter to 12 micrograms per cubic meter. EPA cited an "increased confidence in the association between exposure to particulate matter and serious public health effects" at levels between 12.8 and 14.8 micrograms per cubic meter, as the primary basis for its promulgation of the aggressive new Rule.

Other substantial revisions included amending the monitoring network provisions by eliminating "spatial averaging", which permitted multiple monitoring sites to average their emissions results, and also requiring States to place additional monitoring stations for collection of emissions data near "heavily trafficked" roads in large metro areas.

Petitioners, NAM and others challenged the new Rule in the D.C. Circuit on several fronts. First, they challenged the 2013 Rule's NAAQS emissions reduction by arguing (under an arbitrary and capricious standard) that EPA's Notice of Proposed Rulemaking "prejudiced" the outcome by failing to request specific comments. That EPA afforded disproportionate weight to certain scientific studies, and finally, that EPA failed to respond to Petitioners' comments citing studies supporting maintaining the then-current NAAQS standards.

The Court dismissed these arguments, concluding that EPA acted reasonably and was well within its

broad discretion. The Court was also not persuaded by Petitioners' arguments that the EPA acted unreasonably in eliminating spatial averaging. The Court found that spatial averaging had enabled some portions of the compliance area to exceed the emissions standards during certain times, including in locations where particularly sensitive persons likely reside. Allowing these "excess emissions" (under the existing standard) was not consistent with EPA's goals of "providing requisite protection for all individuals."

Finally, the Petitioners' challenged EPA's new additional monitoring stations and argued that the data collected from these densely-populated areas will not be representative, and will result in high concentrations of particulate matter. The NAAQS program had already required States to operate monitoring networks to measure concentration of pollutants, and EPA proposed an additional 50 stations. The EPA reasoned that the NAAQS Rule required obtaining an "accurate, area-wide picture of ambient air quality" and ignoring monitoring results from densely populated areas would "abdicate this responsibility." The Court found that EPA's decision and explanation were reasonable, given the substantial discretion granted EPA under the Clean Air Act, and dismissed the Petitions.

Representing another victory for the current administration, the D.C. Circuit's decision set the stage for the June 2, 2014 White House release of new proposed rules targeting greenhouse gasses – the "Clean Power Plan." This new Rule cuts carbon emissions from existing coal-fired power plants and other industrial facilities. You can read more about the "Clean Power Plan" in the June 2, 2014, EPA Press Release.

Additionally, the EPA has multiple other matters pending in the court system, specifically there is a matter pending in the United States Supreme Court. Stay tuned, the law office will cover the decision expected later in June from the Supreme Court on EPA's regulation of stationary source emissions under the Clean Air Act.