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SAFETY AND HEALTH ENFORCEMENT DEVELOPMENTS

MSHA Update

by Cole A. Wist

In a highly-anticipated decision involving two sets of consolidated contest proceedings, the Federal Mine Safety and Health Review Commission has affirmed a May 2011 ALJ order that upheld a broad interpretation of MSHA's authority to compel a mine operator to produce documents and information during an MSHA inspection. The case, *Big Ridge, Inc. v. Secretary of Labor* (FMSHRC May 24, 2012), represents the current front line in an ongoing and contentious battle between regulators and operators regarding MSHA's authority to demand documents from mine operators that are not specifically mandated in the law or regulations.

The *Big Ridge* cases arose from recent aggressive demands from federal mine inspectors during audits of operator accident, illness, and injury reporting records. At issue were categories of information sought in MSHA's "Uniform Audit Request" letter, and included the following: workers' compensation filings, Family and Medical Leave Act (FMLA) releases and records, sick leave records, drug tests, medical reports, medical histories, treatment notes, EMT and ER notes, ambulance reports, explanation of benefits, and x-rays. Not surprisingly, mine operators, including the litigants in *Big Ridge*, have resisted these broad document requests asserting that the records are not required to be maintained under the Mine Safety and Health Act of 1977 (Mine Act) or any of MSHA's regulations. Consistent with established enforcement practices, operators have further maintained that these tactics go far beyond prior agency inquiries related to injury and illness reporting compliance and violate privacy rights of individual mine employees. Like ALJ Kenneth Andrews, the Commission has rejected these arguments.

By way of background, there are numerous records and reports that are required by law and regulations to be maintained and produced upon request by MSHA. Requirements for specific records appear both in the Mine Act and in regulations promulgated by MSHA. Mine operations personnel are generally familiar with the requirements related to expressly required records, such as training certificates and workplace examination records. These records are regularly demanded by inspectors and are promptly provided by mine personnel. However, questions frequently arise regarding what the operator's obligation is with respect to inspector requests for the many non-mandatory documents that are maintained by operators. Further complicating this dilemma, the Mine Act provides fairly vague parameters regarding MSHA's

authority to compel production of these types of records. Moreover, an operator's decision to produce non-mandatory records is often complex with potentially broad implications—typically, any information a mine operator provides becomes public information.

In its decision in the *Big Ridge* cases, the Commission concluded that MSHA's authority to seek non-mandatory documents exists in statute and in regulations. Specifically, the Commission concluded that the "plain language of section 103(h) [of the Mine Act] provides a broad Congressional grant of authority to the Secretary" and requires mine operators to provide such information as the Secretary may deem "relevant and necessary." In the Commission's view, the language of section 103(h) "effectively expands, rather than restricts, the Secretary's right of access." (The Commission did acknowledge, however that the Secretary's document requests must be "reasonable.")

The Commission in *Big Ridge* also found authority for its decision in Part 50 of MSHA's regulations by holding that section 50.41 requires operators to provide access to "information" related to accidents, injuries, or illnesses occurring at their mines. As to the scope of such information, the Commission concluded that "[t]he only limitation on the Secretary's authority is that the information must be 'relevant and necessary' to a determination of Part 50 compliance. Like section 103(h) . . . section 50.41 . . . lacks any language restricting the Secretary's access to any particular documents." The Commission rejected the applicability of an earlier ALJ decision that held that there are limits on how far the government can go without a search warrant. The Commission distinguished this ALJ decision as simply prohibiting "wholesale rummaging" through operator records—but otherwise bearing no relationship to requests for records "relevant and necessary" to a reasonable audit.

In its lengthy decision, the Commission also held that individual privacy rights cannot block reasonable governmental needs for information when the government has taken measures in good faith to protect individual privacy. Finally, the Commission determined that its holding did not conflict with the U.S. Constitution and other statutes cited by the petitioners, including the FMLA, the Americans with Disabilities Act, and the Genetic Information Non-Discrimination Act.

It is possible that MSHA may seek to overplay this decision by arguing in future inspections that the Commission has opened the door for discovery of all of an operator's documents and records regardless of whether they are mandated by the Mine Act or MSHA's regulations. We believe that such an interpretation would be overreaching and erroneous given that the Commission's holding pertains exclusively to MSHA's audit powers under Part 50. Moreover, simply because the Commission has held that discoverable Part 50 audit documents extend beyond those required to be maintained by the Mine Act or regulations does not mean that MSHA's powers in this area are unlimited. MSHA must still establish that the requested records are "relevant and necessary to a determination of operator compliance with Part 50 reporting requirements" and operators should not overlook analysis of whether this burden has been met.

In his dissenting opinion, Commissioner Michael Duffy offers a glimpse of the scope of the legal challenges yet to come in an appeal of this decision and in likely future litigation regarding MSHA's aggressive position related to its document request powers. Duffy observed:

> As for the general deficiencies of the auditing initiative, it must be rejected as illegitimate because it cannot be reconciled with fundamental and manifest constitutional principles relating to privacy and due process. Supreme Court jurisprudence respecting the scope and legitimacy of warrantless access to private records demands that such records must first be required to be generated and maintained pursuant to enabling legislation or implementing regulations. Neither of those predicates obtains in these circumstances as the Secretary readily admits. Consequently, the Secretary is not authorized to demand records that have not been required to be maintained, either by the Mine Act or the regulations set forth in 30 C.F.R. Part 50.

While room remains for operators to challenge the breadth of requests for records and information in a Part 50 audit, the *Big Ridge* decision admittedly narrows the playing field and slants the presumptions in MSHA's favor. Nevertheless, the vague "relevant and necessary" test will likely spark a new round of disputes and challenges. In addition, the U.S. Court of Appeals could reverse the Commission's decision in its entirety. (A Petition for Review was filed on June 4, 2012 in the Seventh Circuit.) In sum, this doesn't appear over by any means. Stay tuned.

OSHA Update

by Tressi L. Cordaro

OSHA's Oil & Gas Flame Resistant Clothing Memo Held to Be Improper Rulemaking

On March 19, 2010, OSHA issued a Fire Resistant/Retardant Clothing enforcement memorandum pertaining to oil and gas operations. The memo stated that engineering and administrative controls may not be sufficient to protect oil and gas workers from the hazard of flash fires and that 1910.132(a) would be cited if employers did not provide and require employees to use flame resistant clothing (FRC). The memo can be found on OSHA's website here.

Later in 2010, in part relying on the March 2010 memo, OSHA cited Petro Hunt, a national oil and gas company, for failing to provide employees engaged in production operations appropriate personal protective equipment (PPE), specifically failing to provide FRC. Two Petro Hunt employees were gauging the level of crude oil in storage tanks—one employee had on FRC and the other, the supervising employee, did not. OSHA learned that Petro Hunt did not require its employees to wear FRC.

In accordance with the March 2010 memo, OSHA cited Petro Hunt for a violation of 29 C.F.R. 1910.132(a), which requires an employer to provide PPE "wherever it is necessary by reason of hazards." The standard as written is a general performance standard and it does not state specifically how the employer is required to comply with the standard. Rather the standard gives the employer the flexibility, after performing a hazard assessment, to make reasonable determinations as to when PPE is necessary for employees.

In *Secretary of Labor v. Petro Hunt, LLC*, (OSHRC, June 2012), by relying on the March 2010 memo, the Secretary sought to establish that Petro Hunt had knowledge that flash fires were hazards and therefore FRC was required under 1910.132(a). In response, Petro Hunt alleged that the memo created a specific standard, one which required all oil and gas employers regardless of circumstances or controls in place to provide employees with FRC. As such, the memo amounted to improper rulemaking because it did not go through the notice and comment process.

In his decision, ALJ Patrick Augustine held that the memo constituted a new standard under the Administrative Procedures Act (APA). His rationale was that the memo "takes a performance standard and imbues it with a specific obligation that FRC must be worn during enumerated oil and gas operations regardless of the particular circumstances that may be present at any individual facility. By doing this, Complainant has changed the requirement of the underlying standard; thus, engaging in improper rulemaking under the aegis of an enforcement standard."

He further held that the memo was not an interpretation of 1910.132(a) or a general statement of policy, either of which would qualify as an exception under the APA, and therefore not require notice and comment rulemaking. The ALJ concluded, that "[b]y using the terms 'concludes' and 'requires' [in the March 2010 memo] Complainant has gone beyond mere interpretation and stepped into the realm of rulemaking by converting a performance-based standard into a specific standard. Complainant cannot 'require' anything more than what is authorized by regulations." Further the ALJ held that that requirements in 1910.132(a) were plain and unambiguous and not in need of interpretation. He pointed out that the standard requires the employer to perform a hazard assessment under 1910.132(d) and that within the oil and gas industry, the memo "constitutes an indirect repeal of section 132(d)...because the hazard assessment is "inconsistent with a blanket determination that FRC, or any PPE for that matter, is required in all instances."

The ALJ concluded that the FRC memo was not sufficient to put an employer on notice that a hazard existed requiring FRC and held that the Secretary failed to establish that there was a hazard present that required the use of FRC. Petro Hunt had instituted a series of engineering and administrative controls, none of which were shown to be insufficient. As a result, the ALJ vacated the citation.

What does this mean for employers? While the decision will likely be appealed to the Review Commission, it raises the issue of just when does "enforcement guidance" cross the line into rulemaking. If the ALJ decision is upheld by the Review Commission, OSHA's future use of enforcement guidance would be subject to greater scrutiny.

Final Electric Power Transmission and Distribution and Electrical Protective Equipment Rule Goes to OMB

After over 12 years of rulemaking, on June 27, 2012, the draft final rules for the general industry power transmission standard, 29 C.F.R. 1910.269, and the construction standard for power transmission and distribution, 29 C.F.R. 1926 Subpart V were sent to the White House's Office of Management and Budget (OMB). Specifically, within OMB, the Office of Information and Regulatory Affairs (OIRA) is tasked with reviewing draft final rules from various federal agencies.

OIRA reviews draft final rules to ensure that such rules are consistent with applicable law and that the draft rules do not conflict with rules or actions of other federal agencies. Technically, OIRA has 90 days to review the draft final rules; however, the agency has been known to delay reviews of final rules long past 90 days. Once the draft final rules clear OIRA, OSHA will publish the final rules.

The revisions to 1910.269 and 1926 Subpart V are generally supported by both management and the International Brotherhood of Electrical Workers. Many parts of both standards are simply outdated and there is no denying that updated standards are welcomed in the industry.

The question remains whether the final rules will be issued prior to the November election or whether Washington politics will delay otherwise welcomed and much anticipated standards.

The MSHA/OSHA Report is not a comprehensive newsletter and does not cover a full spectrum of agency news. Rather, it focuses on one or more selected items of particular interest.