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Recent MSHA Decisions and Initiatives

Nicholas W. Scala

Chair, MSHA Practice Group

Nicholas W. Scala

nscala@connmaciel.com • 202.895.2797

Nick Scala is Chair of the national MSHA • Workplace Safety Practice at **Conn Maciel Carey** and a Certified Mine Safety Professional. He focuses on all aspects of mine safety and health law:

- Represents mine operators and independent contractors in inspections, investigations & enforcement actions involving MSHA
- Advises clients in all phases of involvement with MSHA, particularly guiding companies through contest proceedings before the Federal Mine Safety and Health Review Commission
- Prepares clients for and manages incident, fatality, and special investigations conducted by MSHA, and defends company representatives in section 110 proceedings

The Federal Mine Safety and Health Review Commission

➤ Judicial Review (Sec. 106):

- ❖ The Federal Mine Safety and Health Review Commission (FMSHRC) was formed under The Mine Act.
- ❖ Administrative Law Judges and five-person Commission hear cases and appeals.

✓ Contest can continue through FMSHRC:

SEC. 106. (a)(1) Any person adversely affected or aggrieved by an order of the Commission issued under this Act may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside.

The Federal Mine Safety and Health Review Commission

- Five Commissioner panel
 - ❖ Currently two commissioners, and as such FMSHRC has lost quorum
 - ❖ Three replacement commissioners have been appointed, but none confirmed by Senate.
- Creates binding case law on the mining industry
 - ❖ Hear appeals of Administrative Law Judge cases
- Previously, a four Commissioner panel resulted in 2-2 stalemates
 - ❖ In this situation, the judge's ruling stands but does not becoming controlling case law
 - ❖ Company and MSHA will have to seek review before the federal circuit court system to receive decision

Jurisdiction Cases

Maxxim Rebuild Company LLC. (KENT 2013-566, 2016-989)

- **Status – Decision Issued by 6th Circuit Court of Appeals**
- **At issue:** Whether an off-site fabrication and repair facility used to make and repair mining equipment was under MSHA jurisdiction?
- **Decision:** 6th Circuit held that the off-site shop was not under jurisdiction because it did not meet the definition of a “coal or other mine.”

“MSHA jurisdiction only extends to such facilities and equipment if they are in or adjacent to –in essence part of – a working mine.”

Jurisdiction Cases

Maxxim Rebuild Company LLC. (KENT 2013-566, 2016-989)

➤ Why Important:

- ❖ Overrules Commission Decision in *Jim Walter Resources* case, granting MSHA authority to inspect off-site facilities, such as off-site supply shop.

“Once the agency tries to extend its jurisdiction to off-site shops and off-site equipment, the language of the statute provides no stopping point, leaving the scope of its jurisdiction to the whims of the Secretary.”

- ❖ Limits MSHA jurisdiction *“to locations and equipment that are part of or adjacent to extraction, milling and preparation sites.”*

Jurisdiction

Cranesville Aggregate Companies, Inc. (OSHRC 09-2011 & 09-2055)

- **Status – Remanded by 2nd Cir. Court of Appeals to OSHRC and ALJ**
- **At issue:** Whether or not OSHA has jurisdiction over bagging operation at mine site.
- **Decision:** 2nd Circuit gave deference to the Secretary of Labor’s Interpretation of “Milling” in determining that the bag plant was not part of the mining process.

Jurisdiction

Cranesville Aggregate Companies, Inc. (OSHRC 09-2011 & 09-2055)

- **Why Important:** Contradicts instances where MSHA has claimed jurisdiction over similar operations

*“Section 3(h)(1) of the Mine Act gives MSHA jurisdiction over lands, structures, facilities, equipment, and other property used in, **to be used in, or resulting from mineral extraction or used in or to be used in mineral milling.**”*

This includes the authority to regulate the construction of such facilities, structures and other property. Further, Section 3(h)(1) directs the Secretary of Labor, in making a determination of what constitutes mineral milling, to give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.”

Jurisdiction

Rain for Rent (WEST 2017-0377)

- **Status – Decided by ALJ (Pending before the FMSHRC when quorum returns)**
- **At issue:**
 1. Did MSHA have jurisdiction over contractor truck in parking lot?
 2. Did MSHA violate 4th Amendment by inspecting truck?
 3. Did MSHA violate 103(f) walk around rights of contractor?
- **Decision:** ALJ upheld citation as issued and found that MSHA inspector acted properly and did not overstep.

Jurisdiction

Rain for Rent (WEST 2017-0377)

- **Why Important:** Confirms clear expectation that vehicles involved in the mining process can be inspected whenever on mine property.
- Clarifies authority of inspector investigate and examine allegedly violative conditions, even when company representative is not present.

Jurisdiction Challenges

- If you have concerns about scope of MSHA jurisdiction, it is essential to challenge it as soon as possible.
- Failing to challenge jurisdiction over a site or property, i.e. accepting citations or inspection of the property, will significantly decrease arguments against jurisdiction
- Contact MSHA field office and/or District to discuss scope of MSHA jurisdiction over property
- Notify MSHA counsel of issue to review facts and defenses, prepare for litigation if necessary

Suspended Load/Spreader Bars

Sims Crane (SE 2015-315-M)

- **Status – Decided by FMSHRC Commission**
- **At issue:** Whether or not ALJ correctly found that spreader bars constitute a suspended load, and consequently being beneath the spreader bar for any reason is a violation of 56.16009.
- **Decision:** FMSHRC upheld citation, but declined to accept ALJ interpretation, finding that MSHA PPL and other regulations permit being beneath spreader bars when involved with rigging.

Suspended Load/Spreader Bars

Sims Crane (SE 2015-315-M)

- **Why Important:** Clarifies MSHA regulations with respect to working beneath spreader bars. Allows MSHA to still issue citations if beneath spreader bars and not in the act of rigging.

“Hence, if miners rig a spreader bar under the conditions prescribed by section 56.14211, there is no violation of section 56.16009. However, section 56.16009 prohibits miners from being in a fall zone when they are not engaged in rigging work.”

107(a) Imminent Danger

Cumberland Contura, LLC (PENN 2018-50-R)

- **Status – Decision Issued by ALJ**
- **At issue:** Was a 107(A) properly issued after a miner had walked through an area the inspector felt was unsafe.
- **Decision:** 107(A) was vacated because the inspector's determination was not reasonably investigated and supported by facts available, and the inspector issued the 107(A) after the miner was clear of the hazard.

107(a) Imminent Danger

Cumberland Contura, LLC (PENN 2018-50-R)

- **Why Important:** Trend has been to give inspectors a great deal of discretion to issue 107(A) orders. Recent litigation has upheld 107(A) orders even when the related citation modified to “Unlikely.” Courts focus on if the inspector abused their discretion in issuance.
 - The ALJ in *Cumberland* evaluated the circumstances which led to the 107(A) and determined that the inspector’s belief and issuance were misplaced and thereby vacated the 107(A).

ALJ Settlement Authority

The American Coal Company (LAKE 2009-35)

- **Status – Decided by FMSHRC Commissioners**
- **At issue:** Whether or not a FMSRHC ALJ had the authority to deny an agreed to settlement between Secretary and operator?
- **Decision:** After the Secretary provided “substantive explanations” for the modification to penalty amounts, the Commissioners approved the settlement.

ALJ Settlement Authority

The American Coal Company (LAKE 2009-35)

- **Background:** This case was before the FMSRHC twice regarding the dispute. It also went before the D.C. Circuit, but MSHA discontinued litigation and brought further contest through the FMSHRC.
- **Why Important:** In this instance, an ALJ demanded additional information from the Secretary (MSHA) in order to approve settlement. The dispute resulted in the operator having to litigate the case long after agreeing to settlement terms.

Initiatives and Emphasis Programs

Powered Haulage:

1. Mobile equipment at surface mines;
2. Seatbelt usage; and
3. Conveyor belt safety.

➤ Inspections will have greater focus on these areas, and enforcement is expected to increase.



Powered Haulage Safety Initiative

Emphasizing prevention of accidents involving conveyors, lack of seat belt usage and vehicle collisions

Initiatives and Emphasis Programs



Fire Suppression System Initiative

On September 7, 2018, a miner was burned when a fire occurred on the rock truck he was operating. At the time of the accident, the miner was hauling spoil material from the pit to the dump site. As he was positioning the truck at the dump site, a bulldozer operator saw a fire near the engine compartment and operator's cab. The bulldozer operator radioed the miner operating the truck. After stopping the tr

Fire Suppression Systems:

- Focus on mobile equipment
- Inspectors will review fire suppression systems, and operators placed on notice that systems must be checked and maintained.
- [MSHA published checklist for inspections](#)

MSHA Rulemaking Agenda

MSHA Rulemaking Initiatives:

Pre-rule Stage:

1. Exposure of UG Miners to Diesel Exhaust
2. Regulatory Reform of Existing Standard and Regulations
3. Alternatives to Petitions for Modification
4. Retrospective Study of Respirable Coal Mine Dust Rule
5. Safety Improvement Technologies for Mobile Equipment at Surface Mines and Belt Conveyors as Surface and UG Mines

MSHA Rulemaking Agenda

MSHA Rulemaking Initiatives:

Final Rule Stage:

1. Refuge Alternatives for UG Coal Mines

- Rule was remanded by US Court of Appeals for DC for additional comment on training element. Specifically, seeking comments if training should be done quarterly or annually.

MSHA Civil Penalty Increase

Agency	Law	Name/ Description	CFR Citation	2018		2019	
				Min Penalty (Rounded to nearest dollar)	Max Penalty (Rounded to nearest dollar)	Min Penalty (Rounded to nearest dollar)	Max Penalty (Rounded to nearest dollar)
MSHA	Federal Mine Safety & Health Act of 1977	Regular Assessment	30 CFR 100.3(a)		\$70,834		\$72,620
MSHA	Federal Mine Safety & Health Act of 1977	Penalty Conversion Table	30 CFR 100.3(g)	\$132	\$70,834	\$135	\$72,620
MSHA	Federal Mine Safety & Health Act of 1977	Minimum Penalty for any order issued under 104(d)(1) of the Mine Act	30 CFR 100.4(a)	\$2,361		\$2,421	
MSHA	Federal Mine Safety & Health Act of 1977	Minimum penalty for any order issued under 104(d)(2) of the Mine Act	30 CFR 100.4(b)	\$4,721		\$4,840	
MSHA	Federal Mine Safety & Health Act of 1977	Penalty for failure to provide timely notification under 103(j) of the Mine Act	39 CFR 100.4(c)	\$5,903	\$70,834	\$6,052	\$72,620
MSHA	Federal Mine Safety & Health Act of 1977	Any operator who fails to correct a violation for which a citation or order was issued under 104(a) of the Mine Act	30 CFR 100.5(c)		\$7,673		\$7,867
MSHA	Federal Mine Safety & Health Act of 1977	Violation of mandatory safety standards related to smoking standards	30 CFR 100.5(d)		\$324		\$332
MSHA	Federal Mine Safety & Health Act of 1977	Flagrant violations under 110(b)(2) of the Mine Act	30 CFR 100.5(e)		\$259,725		\$266,275

“One MSHA”

- “One MSHA” reconfiguration is a priority of Assistant Secretary David Zatezalo to merge the M/NM and Coal divisions
 - ❖ We saw early efforts with former Asst. Secretary Joe Main when coal inspectors started being transferred to M/NM mine
 - ❖ Goal is to increase efficiency of Agency and decrease travel time/reduce costs
- Timothy Watkins named Administrator for Coal and M/NM Mine Safety and Health
- As of October 1, 2018 (Start of MSHA 2019 FY) 90 mines around the country were selected for merger/exchange of inspectors. This mostly consists of coal Inspectors traveling to M/NM mines

Advanced Notice with Inspectors

- Section 103(a) of the Mine Act:
prohibits giving advance notice of inspections conducted by MSHA inspectors
- Applies to all MSHA inspections at all types of mines, however, more so an issue in underground coal. There was a 2010 Program Information Bulletin issued (P10-15) on Advanced Notice, part of this identified that two coal operations were found in violation of 103(a) during impact inspections.
- So what does that mean for my inspection?
- How does this work with Section 103(f) “Walk Around Rights”?

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the MSHA DEFENSE report



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2019 MSHA **WEBINAR** series

Thursday, April 11th

What to Do During MSHA Accident and Injury Investigations

Tuesday, June 4th

Preventing and Defending MSHA Whistleblower
Claims

Thursday, October 10th

Responding to MSHA Document Requests

Thursday, August 8th

Mid-Year MSHA and FMSHRC Update

Thursday, December 12th

Requirement and Limitations of MSHA Citations
and Orders

Questions?



Contact Information



Nick Scala

Chair, MSHA • Workplace Safety Group

Conn Maciel Carey LLP

Washington, D.C.

Columbus, OH

614.418.6048

nscala@connmaciel.com

@MSHA_Guy (Twitter)