

Week of **January 12, 2015**

## Mine Safety Commission Rejects Lessened Penalties Set by Judge in Two Cases, but Upholds Reduction in a Third

Saying the judge got it wrong, the Federal Mine Safety and Health Review Commission has overturned an administrative law judge's (ALJ) sharp reduction in fines for two MSHA violations, but left standing the judge's reduction ordered in a third.

In the first case, MSHA proposed a \$4,000 penalty against Utah coal producer Hidden Splendor Resources, Inc. for a July 2009 violation involving an accumulation of float coal dust and coal fines on a surface belt tailpiece. The agency classified the violation as significant and substantial (S&S), high negligence and unwarrantable failure (i.e., aggravated conduct beyond ordinary negligence).

ALJ Richard Manning upheld the high negligence and unwarrantable failure determinations, but did not sustain the S&S classification and reduced the fine to \$500. MSHA objected because the penalty reduction fell below the minimum set by statute for unwarrantable failure violations. Holding that the statutory minimum is binding on its judges, the Commission vacated the lowered fine and set the penalty at \$4,000 in a December 23 decision.

In the second case, MSHA cited Hidden Splendor for a roof control violation in August 2008. The infraction was written as S&S and high negligence, with a \$6,458 proposed fine. ALJ Manning sustained MSHA's classifications of the violation, but cut the fine to \$5,000, saying only that the lower amount was "appropriate." MSHA appealed, arguing the judge was obligated to explain his reasoning for a fine substantially different from the one proposed. The three-member Commission agreed, and remanded the case to the judge for further explanation.

MSHA also appealed a third decision in which ALJ Manning fully upheld the S&S, high negligence and unwarrantable failure designations for an order associated with an April 2009 training violation, but cut MSHA's proposed \$5,645 fine to \$4,000 based on mitigating circumstances. In this instance, the agency contended the judge should not have considered mitigating circumstances because the violation was written as high negligence. However, noting that judges have independent discretion to set penalties, the commissioners said ALJ Manning did not abuse his discretion and upheld the penalty.

In setting penalty amounts, ALJs are bound by the Mine Act to consider each of six penalty criteria. While concurring with his colleagues on the Commission panel, Commissioner Robert Cohen, Jr., added a five-page opinion in which he stated why he believed Manning's decision on the training violation "fully reflects the principles contained in the Mine Act."

Cohen cited a decision by the U.S. Court of Appeals for the Seventh Circuit that underscored the independent role accorded Commission judges in setting final penalty amounts and added that, based on hearings in which both sides present their arguments regarding a contested violation before a judge, the judge is able to "take a more nuanced approach [than MSHA inspectors] to the degree of negligence."

The Commission's decision and Cohen's concurrence come in the shadow of an MSHA rulemaking proposal in which the agency seeks, in part, to restrict the Commission's discretion to set penalties independently. Two public hearings have been held and two more are scheduled for February. The comment period closes March 12.

## OSHA Sets Record for Whistleblower Investigations

A milestone has been reached in federal whistleblower cases: OSHA has investigated more than 3,000 cases in a fiscal year for the first time ever.

According to the agency, it took on 3,060 cases during FY 2014, 91 (3%) more cases than during FY 2013. OSHA administers the whistleblower provisions of 22 federal statutes.

OSHA did not disclose the number of whistleblower complaints it received in 2014 that were rejected after the initial screening and not investigated. However, a 2014 *Bloomberg BNA* study showed that in cases filed from 2011 through 2013 under the whistleblower provision of the Occupational Safety and Health (OSH) Act, only 41% passed the initial screening.

While the reasons for the increase are not clear, one explanation could be the elevated media attention given to large monetary awards and settlements. A Washington-based attorney who represents whistleblowers told *Bloomberg BNA* that punitive damage awards of \$100,000 and more in Surface Transportation Assistance Act (STAA) cases and new Federal Motor Carrier Safety Administration (FMCSA) rules have encouraged drivers to bring claims if they are told to exceed legal driving hour limits.

Despite the new high in case filings, the chairperson of OSHA's Whistleblower Protection Advisory Committee, Emily Spieler, said there had been predictions OSHA's caseload would be boosted by the agency's introduction of online filing for whistleblower complaints in late 2013, coupled with a U.S. Supreme Court decision in March on the whistleblower provisions of the Sarbanes-Oxley Act (SOX), holding that statutory protection extended to a public company's private contractors and subcontractors.

The agency made determinations on 3,271 complaints in FY 2014, just one less than in 2013. A total of 25% were

settled or went before an administrative or federal judge. Of these, just 64 (2%) resulted in a "merit" decision, a designation that means OSHA referred the complaint to a judge after the parties could not come to terms. OSHA dismissed 1,652 complaints (51%), while complainants withdrew 710 (22%) others, for a dismissal figure of 73%. Each of the two results was two percentage points higher than the comparable figure from FY 2013. In 99 (3%) of the outcomes, the cases were withdrawn by the complainant and re-filed in federal court in what is known as a "kick out" from administrative proceedings.

The bulk of the cases were safety-related, including 1,729 (57%) filed under the OSH Act's anti-retaliation clause, Section 11(c). This is about the same number as a year ago. The figure may climb this year. OSHA Assistant Secretary Dr. David Michaels has indicated the agency intends during 2015 to lower the threshold for making judgments on whether to investigate a whistleblower case using a "reasonable cause" threshold instead of the current "preponderance of the evidence" benchmark.

Rounding out the top three types of cases were 463 brought under the STAA and 351 under the Federal Railroad Safety Act. The numbers represented an increase of 95 and four, respectively, over FY 2013.

The growth of STAA cases may have stemmed from a 2014 memorandum of understanding between OSHA and FMCSA, which put OSHA in the driver's seat for handling cases in which commercial vehicle drivers alleged they were discriminated against for reporting safety issues and were seeking redress.

Of the whistleblower cases unrelated to safety, SOX complaints accounted for 145 cases, the fewest in a decade, while cases under the Consumer Financial Protection Act grew to 47 cases, up 68% from FY 2013.

*Jackson Lewis is hosting an upcoming webinar on*

## Top Data Privacy and Security Issues for 2015

In 2014 we saw a number of significant events and legal developments in the world of data privacy and security, and we see no signs of that slowing in 2015. In connection with National Data Privacy Day, Jackson Lewis' co-Practice Group Leaders, Nicky Jatana and Joe Lazzarotti, will kick-off a series of webinars for the year that will address a wide range of data privacy and security issues for businesses

*Kick-off Session:*

**Wednesday, January 28th** ▪ 1:00 – 2:00PM EST

*All Additional Sessions:*

**The 4<sup>th</sup> Thursday of Every Month** ▪ 1:00 – 2:00PM EST

*Please join us for this kick-off webinar, and those that follow, which will dig deeper into these issues and more!*

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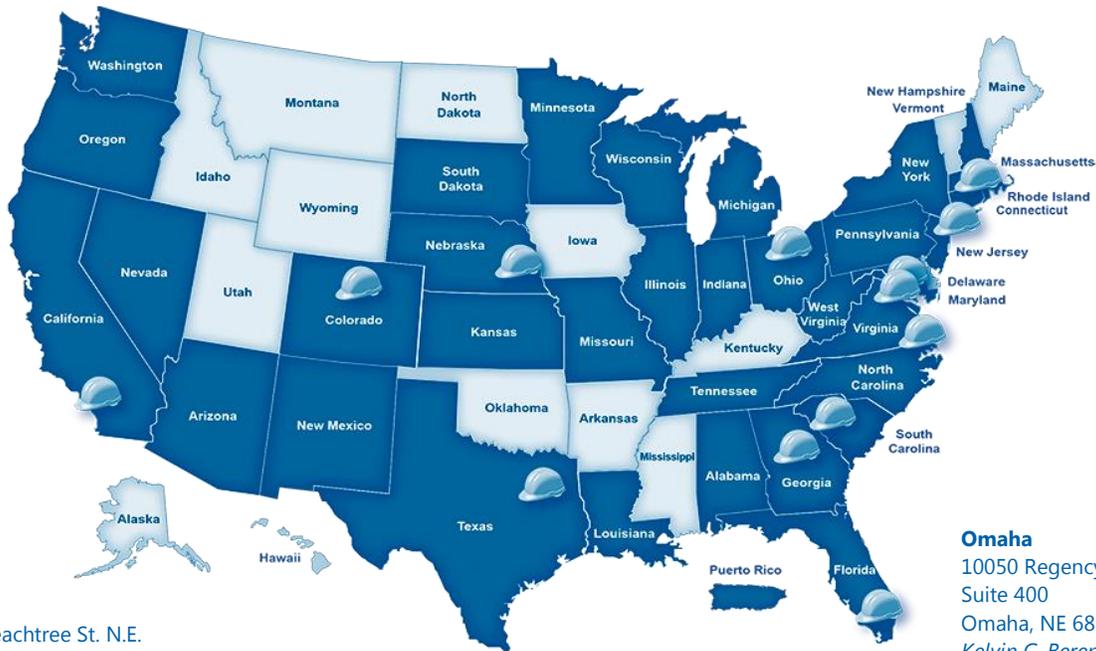
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