

Week of May 26, 2014

Judge Questions Proposed Settlement with Coal Company

"Who will guard the guardians?" is the question an administrative law judge (ALJ) raised in a May 13 order denying a Labor Department motion to gain approval of a settlement that had been reached with an Illinois coal producer.

ALJ William Moran rejected the settlement when it was brought to him months before, because it included no justification for a proposed 30 percent across-the-board reduction of 32 citations issued to American Coal Co.'s New Era Mine. The latest motion asked the judge to reconsider that decision.

In the reconsideration motion, however, the Labor Department did not abide by Moran's earlier instruction that the reductions be explained. Instead, the Department's attorney argued the Federal Mine Safety and Health Review Commission had limited authority in such matters. She contended the Commission's role in approving settlements was "simply a procedural mechanism to ensure that [] settlement agreements negotiated by the Secretary are clear, transparent to the public, and in accordance with any otherwise applicable law. The Labor Department sought to justify the settlement as an exercise of its attorneys' professional judgment and, as quoted by Judge Moran, one that "considered the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going through a trial.

Judge Moran, however, described the motion as "seriously misguided" and "pure gobbledygook,"

charging that it "crosses an ethical line for the limits of proper advocacy." He repeatedly invoked Section 110(k) of the Mine Act, which gives the Commission authority to approve contested penalties, such as those in this case.

"The plain language [of Section 110(k)] is enough to eviscerate the Secretary's entire argument in its motion," he said.

Moran noted that the Labor Department's rationale was flawed because it ignored the health and safety of miners, which he said was why Commission judges must "guard the guardians." He pointed out the legislative history of the Mine Act shows Congress intended penalties to promote miner health and safety. His withering criticism continued:

"With no mention of the best interests of miners, nor reference to its client, the Mine Safety and Health Administration, nor any mention of Congress' concern about the deterrent effects of penalties, the Secretary, in what is little more than a power play, has demonstrated a disregard for any of these voices and by so doing underscored the wisdom of Congress' command that the Commission must approve such matters."

Moran ordered the Labor Department counsel either to submit a supported motion within 30 days or prepare for trial.

Proposals to Change Whistleblower Law Could Increase Litigation

OSHA wants to provide better protection for workers who report safety concerns, urging changes in the OSH Act that may increase the amount of whistleblower litigation.

Speaking at a Senate subcommittee hearing, OSHA chief Dr. David Michaels outlined proposals intended to amend whistleblower provisions in the Occupational Safety and Health (OSH) Act. They include giving OSHA authority to order immediate preliminary reinstatement of employees fired for reporting safety issues and allowing workers to bring private suits in federal court if OSHA fails to act within a certain time.

Observers worry, however, these changes risk burdening employers and clogging the courts with meritless cases. In fiscal year 2013, nearly 69 percent of 1,947 whistleblower cases on which OSHA made a decision were dismissed or withdrawn, according to agency data. The remainder were either settled or found to have merit.

Michaels said OSHA also would like to extend the 30-day statute of limitations for alleging retaliation to 180 days. He noted that about 200 cases per year are dismissed as untimely, in part because of the 30-day window.

Michaels said he sees preliminary reinstatement as a way to get employees back to work quickly. "The lack of

authority for OSHA to order preliminary reinstatement of employees ... delays employees' ability to return to work and receive a regular paycheck, even if it is clear that they were terminated for retaliatory reasons. Without an equivalent provision in the OSH Act, there is less pressure for adequate settlements that include reinstatement," Michaels testified, as quoted by *Law360*.

But if MSHA's experience with discrimination claims under the Mine Act is any indication, most whistleblowers will not return to work because employers do not want them back. Rather, they will be paid their wages, but kept off the job, thwarting Michaels's intent that they be reinstated.

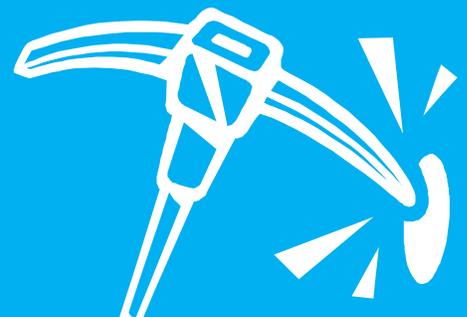
Nevertheless, proponents argue the changes could be an incentive for employers to resolve claims, especially if the threat of litigation hangs over them.

"As long as responding employers know that the cases will not be litigated, there is no incentive for them to abide by the law or to settle cases rapidly and fairly," Emily Spieler told lawmakers at the hearing, according to *Law360*. Spieler chairs OSHA's Whistleblower Protection Advisory Committee.

Legislation to amend the OSH Act is believed to have little chance of passage this year in Congress.

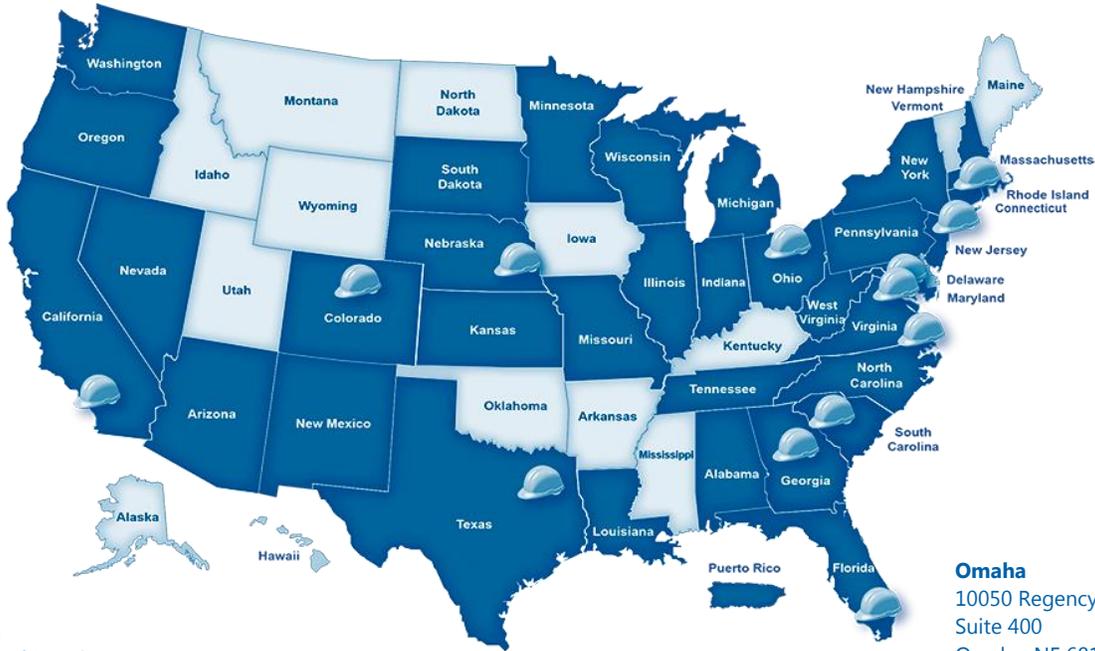
Jackson Lewis is co-sponsor of the upcoming 2-day seminar on
"Understanding MSHA Litigation"

[Click here for more information and to register.](#)



Visit www.oshalawblog.com to subscribe to Jackson Lewis' OSHA Law Blog!

With experienced OSHA and MSHA attorneys located strategically throughout the nation, Jackson Lewis is uniquely positioned to serve all of an employer's workplace safety and health needs:



Atlanta

1155 Peachtree St. N.E.
Suite 1000
Atlanta, GA 30309
Dion Y. Kohler, Esq.

Boston

75 Park Plaza, 4th Floor
Boston, MA 02116
Stephen T. Paterniti, Esq.

Cleveland

6100 Oak Tree Blvd.
Suite 400
Cleveland, OH 44131
Vincent J. Tersigni, Esq.

Dallas

3811 Turtle Creek Blvd.
Suite 500
Dallas, TX 75219
William L. Davis, Esq.

Denver

950 17th Street
Suite 2600
Denver, CO 80202
Donna Vetrano Pryor, Esq.
Mark N. Savit, Esq.

Greenville

55 Beattie Place
One Liberty Square
Suite 800
Greenville, SC 29601
Robert M. Wood, Esq.

Los Angeles

725 South Figueroa Street
Suite 2500
Los Angeles, CA 90017
David S. Allen, Esq.
Benjamin J. Kim, Esq.

Metro New York

58 South Service Road
Suite 410
Melville, NY 11747
Ian B. Bogaty, Esq.
Roger S. Kaplan, Esq.

Miami

One Biscayne Tower
2 South Biscayne Blvd.,
Suite 3500
Miami, FL 33131
Pedro P. Forment, Esq.

Norfolk

500 E. Main Street
Suite 800
Norfolk, VA 23510
Thomas M. Lucas, Esq.
Kristina H. Vaquera, Esq.

Omaha

10050 Regency Circle
Suite 400
Omaha, NE 68114
Kelvin C. Berens, Esq.
Joseph S. Dreesen, Esq.

Orlando

390 N. Orange Avenue
Suite 1285
Orlando, FL 32801
Lillian C. Moon, Esq.

Washington, D.C. Region

10701 Parkridge Blvd.
Suite 300
Reston, VA 20191
Henry Chajet, Esq.
Tressi L. Cordaro, Esq.
Garen E. Dodge, Esq.
Bradford T. Hammock, Esq.
R. Brian Hendrix, Esq.
Avidan Meyerstein, Esq.
Michael T. Taylor, Esq.

Jackson|Lewis

For more information on any of the issues discussed in this newsletter, please contact:

Brad Hammock at HammockB@jacksonlewis.com or (703) 483-8316, Henry Chajet at henry.chajet@jacksonlewis.com or (703) 483-8381, Mark Savit at mark.savit@jacksonlewis.com or (303) 876-2203, or the Jackson Lewis attorney with whom you normally work.

The articles in this Update are designed to give general and timely information on the subjects covered. They are not intended as advice or assistance with respect to individual problems. This Update is provided with the understanding that the publisher, editor or authors are not engaged in rendering legal or other professional services. Readers should consult competent counsel or other professional services of their own choosing as to how the matters discussed relate to their own affairs or to resolve specific problems or questions. This Update may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome.

© 2014 Jackson Lewis P.C.

Mail regarding your subscription should be sent to contactus@jacksonlewis.com or Jackson Lewis P.C., 666 Third Avenue, New York, NY 10017. Attn: Client Services. Please include the title of this publication.