

Week of April 7, 2014

Mine Operators, not Contractors, Have Injury Reporting Duty

When a reportable injury occurs at a mine to an employee of an independent contractor which has no supervisory duty there, the mine operator, not the contractor, must report the injury to MSHA, a federal appeals court in Richmond has made clear.

That decision of the U.S. Court of Appeals for the Fourth Circuit, however, also raises two other issues. First, if the independent contractor does have supervisory responsibility, is it also required to report? The decision is silent on this question. Second, if two or more "operators" meeting the regulatory definition are at a mine, does each have to report the injury even though the employees of neither operator incurred the injury? Here, the answer appears to be "yes."

The incident triggering the litigation occurred after an employee of Bates Contracting & Construction was injured at Dickenson-Russell Coal (DRC) Co.'s Roaring Fork No. 4 Mine in Virginia. Bates reported the accident on MSHA's 7000-1 form, but the operator did not because it had a policy at the time of not reporting contract workers' injuries.

MSHA cited the operator, DRC, for failing to timely report, an alleged violation of its Part 50.20(a) regulation, and assessed a \$127 fine. The company appealed, but an administrative law judge ruled the definition of "operator" in the Part 50 regulation was controlling and thus DRC had to report. As for the

contractor's filing, the judge described it as "gratuitous." After the Federal Mine Safety and Health Review Commission declined to review the decision, DRC appealed to the Fourth Circuit.

The appeals panel noted the judge's decision was narrow in that he did not consider what Bates's reporting role would have been had it possessed supervisory responsibility at the mine, which it did not. The panel added that it had no reason to disturb the ALJ's decision, thus leaving that question unresolved.

But the Court went on to hold that where two or more operators are subject individually to the Part 50 reporting requirement, each one of them must report every qualifying accident or injury. This appears to mean all mine operators on a job site must report an accident even if none of their employees was injured.

The judges were unfazed about the duplicative reporting this interpretation would create. "Coordination between operators is therefore necessary if each operator is to accurately report the injury to MSHA while minimizing the already slight duplication of effort caused when multiple operators gather the same information about a reportable injury before filing separate reports," they wrote.

Supervisor Not an Agent under Mine Act

An hourly employee who supervised a four-person team, but had no control over hiring, selecting or disciplining team members, is not an agent under the Mine Act, a judge has ruled.

An "agent" is any person charged with responsibility for the operation of all or part of a mine or the supervision of miners there (Section 3(e) of the Act). In prior rulings, including a precedent setting case won by Jackson Lewis shareholder, Henry Chajet, *Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000), the Federal Mine Safety and Health Review Commission has focused on a miner's job functions, not his title, in determining questions of agent status.

Administrative Law Judge James Gilbert said a process manager working for Taft Production Co., a cat litter producer in California, was not an agent based on his job duties. While the employee gave his team members

tasks to complete and supervised them, he neither hired nor selected them for his team. Personnel issues were handled by the manager's boss. In addition, Gilbert said, "No evidence was presented that [manager] was responsible for the safety of his team or for ensuring compliance with mandatory safety standards."

Finding that the manager's duties "weigh more heavily toward a rank and file miner," Gilbert determined he was not an agent.

In addition, during an inspection in August 2012, MSHA cited the employer for four housekeeping violations. Gilbert upheld all of them and concurred with MSHA's \$3,321 assessment.

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Ask a Jackson Lewis Attorney

Q:

We are updating our employee handbook, and we have heard that it is not advisable to have a “progressive discipline” policy. Is this true?



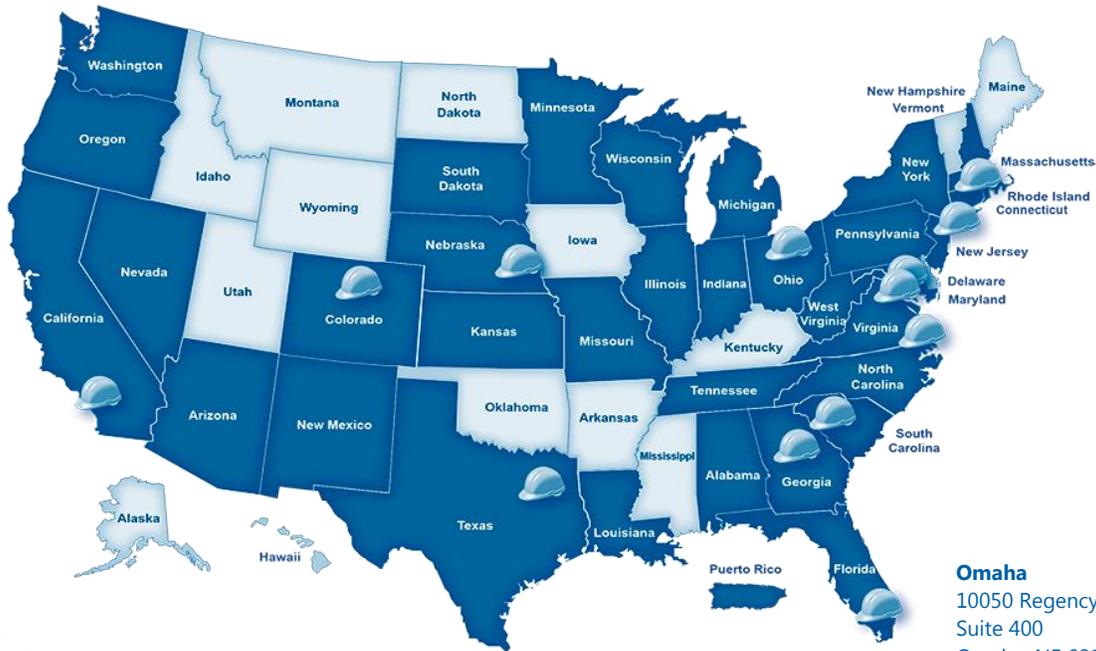
**Answer provided by Teresa Burke Wright,
a shareholder in the Washington, D.C. Region office:**

Many companies continue to use “progressive discipline” policies, which generally state that for unsatisfactory performance or continuing misconduct, an employee may be subjected to a verbal warning, then a written warning, then a final warning, and finally termination. Such policies also may contain examples of conduct that may warrant these steps, and/or more severe conduct that may result in immediate termination. These examples may include theft, misrepresentation, falsifying company documents, acts or threats of violence, harassment, etc.

Progressive discipline policies are fine, as long as it is clear that (1) no employee is entitled to any particular step in the progressive discipline process; (2) the employer retains discretion to use the steps in any particular order (and to skip or repeat steps as warranted); and (3) employees remain “at will” at all times. So long as the policy preserves management discretion and clearly shows that it represents guidelines only, progressive discipline policies need not be eliminated from employee handbooks. As usual, always check your state and local laws for additional handbook requirements and ways to ensure your workers remain “at will” employees under the laws of your state.

Do you have an employment law question that may be of interest to other employers? If so, please send it to Regan Harrison at regan.harrison@jacksonlewis.com for consideration in upcoming issues of this newsletter.

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