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Workplace Safety and Health Update

Week of ***February 10, 2014***

Recourse to Appeals Court No Option in Temporary Reinstatement Cases

Appellate court review does not appear to be an option for mine operators seeking relief from orders temporarily reinstating miners in discrimination cases.

Citing lack of jurisdiction, the U.S. Court of Appeals for the Fourth Circuit, in Richmond, has thrown out a case filed by a West Virginia coal operator brought under a doctrine allowing review of cases that are in the midst of adjudication.

After Cobra Natural Resources fired a miner in October 2012, the miner alleged he had been released for making safety complaints and promptly filed a discrimination claim with the Mine Safety and Health Administration (MSHA). Cobra argued the discharge was lawful because the miner was laid off as part of a reduction-in-force announced the following month at its Mountaineer Mine.

However, the administrative law judge disagreed with Cobra, ruling the complaint had not been brought frivolously, and ordered the miner to be temporarily reinstated pending review of the case on its merits. He rejected Cobra's contention that the miner's discharge was part of a reduction-in-force. Cobra appealed to the Federal Mine Safety and Health Review Commission, specifically challenging the judge's analysis of its layoff argument. The Commissioners agreed to hear Cobra's case, but upheld the judge's ruling. Cobra then appealed to the Fourth Circuit.

In a split decision, issued January 27, the three-judge appeals panel said the case did not meet requirements necessary for an appeal to be heard while the case was still being heard by the Commission. The "collateral order doctrine," allowing cases still being litigated to be heard on appeal if there is a compelling collateral reason, was to be applied stringently and only in exceptional cases, the court explained. The majority said Cobra's appeal did not rise to that level.

The judges said their review applied to the entire category of cases the Cobra proceeding represented. Thus, the court appeared intent on discouraging other companies from also seeking relief from a temporary reinstatement order in appellate courts.

In his 30-page rebuttal, the dissenting judge argued the Commission decision requiring reinstatement did represent a final agency order. Therefore, he reasoned, the court could have assumed jurisdiction without resorting to the collateral order doctrine. He said he would have decided the case on its merits and remanded the panel's decision to the Commission.

Appeals Court Hears Oral Arguments in POV Case

Oral arguments were presented before the Sixth Circuit Court of Appeals in Cincinnati last week, pitting the mining industry against MSHA over the agency's pattern of violation (POV) rule. Jackson Lewis attorney Henry Chajet argued on behalf of the National Mining Association, National Stone, Sand, and Gravel Association, Portland Cement Association, Kentucky Coal Association, and Ohio Coal Association.

The industry contends that the POV rule exceeds MSHA's authority under the Mine Act, violates members' due process rights, and is unlawful, arbitrary and capricious. The rule departs significantly from past agency practice. One onerous change allows MSHA to POV-classify a mine operator based on serious violations merely alleged by enforcement personnel, rather than those that have been judicially reviewed. A substantial number of such violations are reduced or vacated by MSHA or a judge once contested.

Short of an immediate, broad shutdown order, the POV rule is among the most powerful tools in MSHA's enforcement arsenal. MSHA considers a mine to be a pattern violator once the mine has received a number of violations MSHA alleges are significant and substantial (S&S), among other criteria. Once labeled as pattern-listed, MSHA can issue an order withdrawing miners from any affected area of the mine until the alleged hazard is abated, each time the mine receives a single S&S citation.

MSHA would terminate an operator's POV notice either after a mine-wide inspection produces no S&S violations or where no withdrawal order is issued within 90 days of the date the notice was sent. Given the number of S&S citations mines typically receive, getting off pattern status is extremely difficult.

Relying on citations that it issued even before the new rule took effect in March, MSHA labeled four underground coal mines in West Virginia and Kentucky as pattern violators last fall. Two of them now are in non-producing status.

Jackson Lewis attorneys Henry Chajet, Avi Meyerstein, Douglas Hoffman, and Collin O'Connor Udell represent five industry trade associations in the lawsuit.

On Tuesday, February 4th, Jackson Lewis Workplace Safety and Health practice group Co-Chair, Brad Hammock, testified on behalf of the U.S. Chamber of Commerce at a hearing held by Congress' Subcommittee on Workforce Protections regarding the Occupational Safety and Health Administration's (OSHA's) sub-regulatory agenda. The hearing, "OSHA's Regulatory Agenda: Changing Long-Standing Policies Outside the Public Rulemaking Process," featured lawyers from the U.S. Chamber, as well as the National Association of Manufacturers discussing instances in which they said OSHA has altered standards outside the formal regulatory process. For more information or to view an archived webcast of the hearing, please click **here**.

Employment Law Q&A

Q:

An employee complained that a coworker made a sexual comment about her body and repeatedly invited her out on dates. We conducted a full investigation but were not able to determine what really happened – it was a "he said, she said" with no witnesses. What should we do?

A:

A company's primary legal obligation when it learns of possible harassment is to take steps to ensure it does not recur. Having a detailed anti-harassment policy with a complaint procedure, investigating complaints, and taking appropriate action are all important steps that help a company fulfill that obligation. Disciplining or terminating an employee who violated a company harassment policy can be appropriate, but not every investigation results in discipline or termination. While discipline is important, it's a company's paramount duty is to take action designed to prevent future occurrences and ensure a professional, non-harassing workplace for everyone.

When a harassment investigation is inconclusive, a company still can take steps to prevent similar incidents. These steps may include (1) recirculating the harassment policy to the two employees involved – or to all employees; (2) conducting anti-harassment training; (3) requiring the two employees to simply stay away from each other if possible, and if not, informing both that all communications should be business-related; (4) transferring one of the employees to another shift, department or location (but never transfer the complaining party without his or her consent); and (5) reminding both employees of the company's anti-retaliation policy. The company can also inform both employees that although the investigation was inconclusive, the company expects no problems going forward. Chances are that one of two things will happen: first, there may be no further incidents, in which case the company has successfully put a stop to any harassment that did occur. Or, there may be further incidents – which will likely shed light on the earlier "inconclusive" investigation. In that case, stronger action should be taken against the employee found to have violated the company's anti-harassment policies.

With experienced OSHA and MSHA attorneys located strategically throughout the nation,

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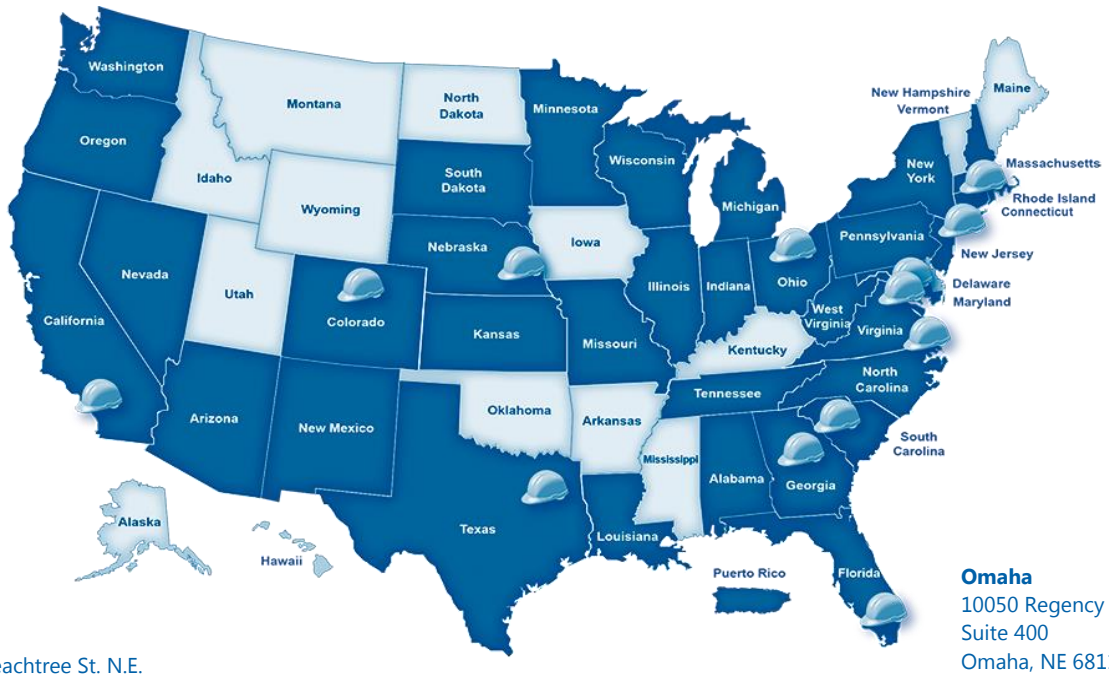

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