

Week of **July 21, 2014**

Judge Makes Latest Move in Dispute with DOL Solicitor over Mine Act Provision

A dispute over a proposed settlement agreement in a case before the Federal Mine Safety and Health Commission has devolved into a tit-for-tat exchange between a Commission administrative law judge (ALJ) and the U.S. Department of Labor's Office of the Solicitor (SOL) over a provision of the Mine Act.

The latest move came July 1 when ALJ William Moran denied two motions that had been submitted by a SOL attorney representing MSHA. In one motion, SOL asked that the full five-member Federal Mine Safety and Health Review Commission hear the dispute over the interpretation of Section 110(k) of the Act. The provision states, in pertinent part, that no proposed penalty contested before the Commission "shall be compromised, mitigated or settled" except with the Commission's approval.

Moran determined the language of the provision clearly vests final authority for settlements with the Commission and its judges. However, SOL believes otherwise, holding the Commission's function in settlement cases is merely to assure they are clear and transparent to the public.

The tussle erupted in March when Moran denied a conference and litigation representative's (CLR) motion to settle 32 citations written against American Coal Co.'s New Era Mine by cutting the fine 30 percent across the board. When the CLR provided no citation-by-citation justification for the reduction, Moran refused to go along, saying he could not approve the motion without a supporting rationale.

SOL then entered the picture, submitting a motion, also without specific justification, asking Moran to reconsider

his earlier denial. He refused, arguing the Commission's role in approving settlements is supported by the Act, its legislative history and the Commission. Noting that SOL's motion excluded any reference to the deterrent effect of penalties in promoting the health and safety of miners, Moran said this is why Commission judges must "guard the guardians."

Moran rejected SOL's motion because he disagreed with the way SOL framed the dispute. SOL "ask[s] the wrong questions and attempt[s] to limit the scope of interlocutory review," he said. The judge also denied a second SOL motion for a stay of the settlement proceeding to allow the Commission to decide the underlying interpretive question. He expressed concern that "witnesses may be lost, memories may fade and other evidentiary infirmities may ensue" if he granted the stay.

SOL has since inserted boilerplate language into proposed settlements before Moran and other Commission judges stating, in effect, that SOL has determined the proposed compromise is in "the public interest and [serves] the effective enforcement and deterrent purposes of the Mine Act." However, ALJs have struck the language, describing it as "immaterial and impertinent."

Moran directed SOL and the operator to participate in a conference call on July 15 to set the date for a hearing before him on the question of law the case has sparked. The issue appears headed to the full Commission and possibly to a court of appeals after that.

OSHA Issues Warning about Heat Illness

OSHA kicked off its annual Heat Illness Prevention Campaign by warning employers who fail to take precautions to protect employees from recognized heat-stress hazards they could face citations under the agency's general duty clause.

At a June news conference to highlight the fourth year of the campaign, OSHA chief Dr. David Michaels said employers must provide water, rest and shade to protect workers from heat-related illnesses. "This is a common sense thing," Michaels said.

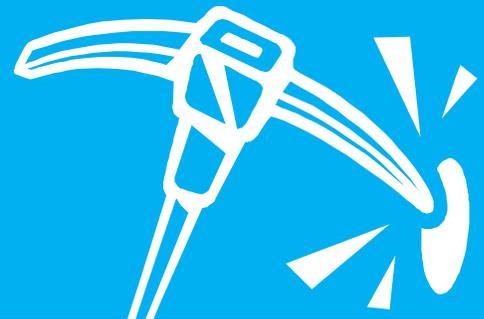
Michaels called attention to the June 2013 death of a temporary worker who died after working on a garbage truck in Texas during a 10-hour shift when the heat index reached 99°F. OSHA cited the refuse collection company and the temporary labor agency that hired the worker. The agency proposed \$33,000 in fines, which are being contested. OSHA issued 11 citations for heat-related violations last year, Michaels said.

Heat stress led to 31 worker deaths in 2012 and made another 4,000 ill enough to be recorded in injury and illness logs, according to the Assistant Secretary. He emphasized the need for workers to acclimatize to hot weather, especially those new to laboring outdoors and those who may not have worked in hot weather for several months, such as seasonal laborers. Michaels recommended that employers allow time for their workers to acclimatize and then monitor workers' conditions.

The agency maintains a dedicated website (<https://www.osha.gov/SLTC/heatillness/index.html>) that contains information in English and Spanish on heat stress prevention and treatment. Included is a free heat safety tool smartphone app (https://www.osha.gov/SLTC/heatillness/heat_index/heat_app.html) that calculates the heat index and recommends precautionary measures.

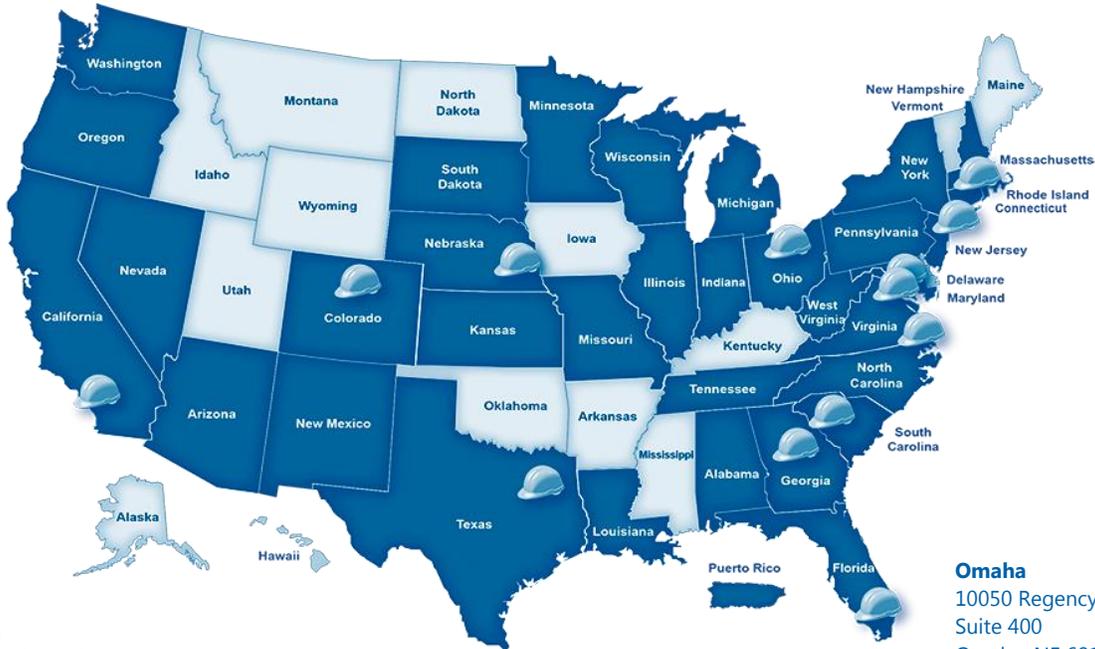
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