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Workplace Safety and Health Update

Week of ***July 6, 2015***

Judge Orders MSHA to Disclose POV Facts, While Challenge to Rule Proceeds in Federal Court

Two Administrative Law Judges have severely criticized MSHA's lack of transparency and fairness and its delays in applying its Pattern of Violations (POV) Rule. The latest ruling, from ALJ Margaret Miller, results from a POV issued to Pocahontas Coal based on 42 violations. In November 2014, ALJ William Moran issued an Order dismissing pattern charges in a case related to Brody Mining.

The POV Rule itself is being challenged in a case brought by the National Mining Association, the Portland Cement Association, and the National Sand Gravel and Stone Association in a federal District Court in Ohio. The national challenge advances despite more than a year of opposition by MSHA to any review whatsoever by the federal courts. The challengers argue that MSHA:

(1) denies due process of law by its use of alleged violations, 30 percent of which are reversed when challenged, instead of final violations;

(2) fails to adhere to rulemaking requirements by not publishing its POV criteria and improvement plan requirements for notice and comment; and

(3) violates the Mine Act by abandoning the former POV rule, which MSHA admitted improved safety, in favor of a rule whose impact cannot be predicted.

Ordering MSHA to submit to depositions and provide facts in the Pocahontas Coal case, ALJ Miller held the Secretary had been unwilling to provide information needed to understand its POV issuance.

The Pocahontas POV notice alleged a pattern of 42 violations, but not the people and facts that made and supported the POV determination. Therefore, the ALJ ordered discovery to proceed.

POV enforcement allows the agency to require miners be withdrawn until no allegedly serious violations are found following a mine-wide inspection. Since inspectors classify roughly one-third of all alleged violations as serious, it can be difficult for a mine to shed the designation.

Judge Miller's order came after MSHA sought a protective order from her in April to prevent Pocahontas from deposing agency attorneys involved in the decision to issue the POV notice. In May, Judge Miller denied part of MSHA's motion, holding that factual information considered by MSHA and its attorneys when selecting and grouping the 42 enforcement actions could be relevant and, thus, was discoverable. Likewise, "facts involving who, what, when and where the selections were made, may be relevant, were discoverable and were not privileged," the ALJ stated.

MSHA asked Judge Miller to reconsider, arguing, in part, that the agency's Coal Administrator, Kevin Stricklin, was the decision maker and that MSHA attorneys provided only advice in the form a recommendation. MSHA also contended that ALJ Miller improperly rejected its privileges argument opposing the depositions because the agency issued the NPOV in anticipation of litigation. Therefore, it asserted, internal deliberations that led to the NPOV may be withheld because they are privileged. The agency further contended its NPOV decision represented an exercise in prosecutorial discretion, making it subject to judicial review only to the extent of determining if MSHA had considered the eight listing criteria in the POV regulation and if the agency had notified Pocahontas of the basis for the POV designation.

Pocahontas, in support of the order, argued that Stricklin had merely authorized issuance of the NPOV, that agency attorneys were involved in the decision-making process, and that MSHA's privileges argument did not extend to factual information. In addition, Pocahontas argued that MSHA's action was arbitrary and capricious because it did not consider the POV factors set forth in the regulations, refused to communicate with the company, and disobeyed an order to provide an individual for deposition. The operator asked to depose both the field office supervisor and an MSHA attorney.

Judge Miller held that Pocahontas was entitled "to learn the facts he [Stricklin] relied upon in making that decision." She also noted that MSHA attorneys "may have played a role." Moreover, she said she needed to know the facts to judge the company's arbitrary and capricious charge, which she described as "one of the major issues in this proceeding."

MSHA's field office supervisor's declaration had provided some relevant facts, continued Judge Miller, but Pocahontas could depose him to determine if he had more facts to offer. However, if this still failed to produce full disclosure, then Pocahontas should prepare questions for MSHA's attorneys, the judge directed.

She ordered a status conference and instructed MSHA to address all remaining issue, but also admonished Pocahontas for "overreaching in its demands and arguments," advising the company to focus solely on the real issues of the case.

The MSHA delays and lack of transparency in the Pocahontas and Brody cases serve as an example of the need for a national solution to MSHA's invalid POV rule. The Ohio federal district court is scheduled to hold a status conference in July. Jackson Lewis is counsel to the industry associations seeking federal district court review.

Colorado Supreme Court: Medical Use of Marijuana Not 'Lawful'

In a long-awaited decision, the Colorado Supreme Court unanimously upheld an employer's termination of an employee who tested positive on a drug test due to his off-duty use of medical marijuana. *Coats v. Dish Network, LLC*, No. 13SC394 (June 15, 2015). Interpreting Colorado's "lawful activities statute," the Court held the term "lawful" refers only to activities that are lawful under both state and federal law. Since marijuana remains unlawful under federal law, although its medical use is allowed under state law, the Court refused to extend the protection of the statute to the employee.

Background

Brandon Coats was employed as a telephone customer service representative by Dish Network, LLC. In 2010, Coats received a medical marijuana license from the state to use marijuana to treat muscle spasms caused by his paraplegia. In May 2010, Coats tested positive for tetrahydrocannabinol ("THC"), a component of marijuana, during a random drug test for the employer. As a result, Dish fired Coats for violation of the company's drug policy.

Coats filed suit, alleging wrongful termination under Colorado's "lawful activities statute." The statute prohibits employee discharge based on the employee's engagement in "lawful activities" while the employee is off of the employer's premises and during nonworking time. Coats argued that Dish terminated his employment for his off-duty use of medical marijuana, which was "lawful" under Colorado's Medical Marijuana Amendment.

The trial court, however, dismissed his claim, finding that the Medical Marijuana Amendment provided registered patients with an affirmative defense to criminal prosecution, but *did not make their use of medical marijuana a "lawful activity" under the lawful activities law*.

On appeal, a divided Court of Appeals affirmed the decision of the trial court, basing its decision on the

illegality of marijuana under the federal Controlled Substances Act. The Court of Appeals found that for a specific activity to be "lawful," the activity must be permissible under both state *and* federal law. Because federal law prohibits the use of marijuana, the employee's conduct could not be a "lawful activity" protected by the Colorado statute.

No Restriction on "Lawful"

The Colorado Supreme Court affirmed the opinion of the Court of Appeals in a 6-0 ruling. The high court held that the term "lawful," as used in the Colorado lawful activities statute, is not restricted in any way. Accordingly, an activity that is unlawful under federal law, such as medical marijuana use, is not a "lawful" activity, even if it is permissible under Colorado law.

The Court unanimously rejected the employee's argument that "lawful" should be read to include those activities that are lawful under Colorado law alone. It said that it refused to "engraft a state law limitation onto the statutory language." Because the employee's use of medical marijuana was unlawful under federal law, his off-duty use of medical marijuana was not protected.

The Court also noted that although Congress recently passed a budget bill prohibiting the U.S. Department of Justice from using federal funds to prevent states from implementing medical marijuana laws, marijuana use remains illegal under federal law.

While Colorado is regarded as one of the most liberal states in the country as to marijuana use, Colorado's medical marijuana law provides that "nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place." Even the state's recreational marijuana statute provides that "nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees." Other states, however, have medical marijuana laws that expressly prohibit employment discrimination against medical marijuana users.

This case continues the trend of employer victories in medical marijuana cases. Employers have successfully litigated medical marijuana cases in California, Colorado, Michigan, Montana, Oregon, and Washington. Although public acceptance of medical marijuana is growing and more states continue to enact medical marijuana laws, the courts recognize that federal illegality is still a significant obstacle for marijuana users who wish to challenge their employer's employment actions.

If you have any questions about this or other workplace issues, please contact the Jackson Lewis attorney with whom you regularly work.

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