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Workplace Safety and Health Update

Week of ***July 13, 2015***

Aggregates Producer Gets $65,000 EAJA Award

A judge has awarded a sand and gravel operator $65,218 in attorneys' fees and expenses incurred in successfully defending itself from an allegation by the Mine Safety and Health Administration that the agency was justified in citing the operator for impeding an inspection of the operator's wash plant in Montana.

Portable, Inc. filed a claim under the Equal Access to Justice Act (EAJA) for recovery of litigation costs following Administrative Law Judge William Moran's decision last December to vacate MSHA's impeding citation and its associated $1,000 special assessment. In that ruling, the judge had rejected MSHA's claim that Portable unreasonably delayed the inspector for nearly 30 minutes in August 2012 in violation of Section 103(a) of the Mine Act, which gives MSHA right-of-entry authority to conduct mine inspections.

MSHA contended that its enforcement action had been substantially justified. Quoting court decisions, Moran referenced a 1988 decision by the U.S. Supreme Court, which ruled that justification is satisfied when "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Relying on that ruling, the Federal Mine Safety and Health Review Commission stated in a 1999 EAJA decision that "'the essence of substantial justification is whether reasonable people could genuinely differ.'"

In the latest litigation, MSHA did not dispute Portable's eligibility for an EAJA award or challenge the expenses it claimed. However, the agency contended that because events associated with the citation represented "indirect denial" of its inspection authority, MSHA was substantially justified in taking the enforcement action. Portable was represented by Jackson Lewis attorney Donna Pryor in both its successful defense of the citation and in its EAJA claim.

In his decision, on July 2, Moran concluded that "under the particular circumstances, there was no unreasonable delay." As recounted by the judge, when the inspector arrived, a mine employee informed him it was company policy for safety reasons for the inspector to be escorted. In this case, the escort was to be the safety director, who was not on site and had to be summoned. The inspector responded that he would "go ahead and wait downstairs" for the escort.

After about 20 minutes, the employee returned to tell the inspector his escort had not yet arrived, prompting the federal official to issue the impeding citation. However, Moran said that because the inspector had been "pacified" to that point, the clock documenting a delay only began to run then. The employee also informed the inspector that the safety director had advised that the MSHA representative could begin his inspection by himself.

"Therefore, the delay was minimal to non-existent, once the inspector insisted that the inspection occur," Moran concluded.

The judge also called attention to testimony in which the inspector stated he usually waited five minutes for an escort, but if one did not arrive within that time, he would launch his inspection and tell mine personnel the escort could meet up with him. "Yet, in this instance he did not follow his own announced practice," Moran noted. "Instead, he accepted the brief delay."

Additionally, the inspector admitted that he had never explained the Section 103(a) inspection requirements to anyone at Portable. "This admission does not aid the Secretary's claim that its action was substantially justified," the judge remarked. Moran also cited testimony from the inspector's supervisor, who stated that, as an inspector, he

had sometimes waited for 30 minutes or more for an escort without issuing an impeding citation.

Suggesting an alternative theory of liability, MSHA also had sought to charge Portable with providing advance notice of an inspection, which is another Mine Act prohibition. In a footnote, Moran said he had dismissed that claim in his December decision, and that it was not under consideration in the EAJA litigation. He also commented that a remark from his earlier decision applied equally to his EAJA decision; that is, that the ruling should not be broadly interpreted as endorsing what constitutes acceptable delays for inspections.

OSHA Reporting Rule Producing Insights and Challenges

The Occupational Safety and Health Administration's new injury reporting rule has produced insights into injuries in specific industry sectors, as well as provided a continuing challenge to the agency over how it responds to injury reports.

At a meeting of the National Advisory Committee on Occupational Safety and Health (NACOSH), on June 18, OSHA Administrator Dr. David Michaels said he was surprised by the high number of notices from supermarkets for amputations. OSHA responded to the unexpected information by issuing a fact sheet in May for safely operating food slicers and grinders. OSHA's definition of amputation includes the loss of a fingertip without bone loss. The rule, at 29 CFR § 1904.39, requires employers to notify OSHA within 24 hours whenever a worker is admitted to a hospital, suffers an amputation or loses an eye. Previously, OSHA had to be contacted only when three or more workers were hospitalized.

As of June 12, the agency had received 5,474 notices since the new rule took effect on January 1, Michaels said, as reported by *Bloomberg BNA*. He described the change brought on by the rule as "essentially a new way of doing business" and described OSHA's ongoing response to the reports as a "work in progress," according to the news source. This is because OSHA, with limited resources, faces the challenge of balancing its response to the reports against its commitment to conducting programmed inspections of high-hazard industries.

The Assistant Secretary said about 40 percent of the reports have prompted an OSHA inspection, while another 46 percent have resulted in OSHA contacting the employer to learn more about the incident. The agency refers to the latter action as a "rapid response investigation," often resulting in asking the employer to investigate the accident to determine how it happened and what corrective measures were implemented to prevent a recurrence. OSHA also requests that the employer report back to the agency within about a week, Michaels said.

"What we're trying to do is get employers to think about what is going on in the workplace and have them abate their hazard because we can't go to every workplace," Michaels said, as quoted by *Bloomberg BNA*.

During some conversations, the employer puts the onus for the accident on the employee, saying, for instance, that the injury occurred because the worker stuck his hand into a machine, Michaels explained.

Because that kind of a response is "a victim-blaming understanding of the cause," it raises the agency's concern, commented the Administrator, who added that if OSHA is not satisfied with an employer's investigation, it can conduct one of its own. "We've got to help employers overcome that thinking," Michaels said. "A root-cause analysis that comes up with, 'It's the worker's fault,' is really a problem."

OSHA told NACOSH the agency wants to create a searchable database from data in each report; specifically, information about the injury, the circumstances surrounding it, and how the employer reduced associated hazards. The database would be similar to injury and fatality information offered online by the Bureau of Labor Statistics. The $100,000 cost for a contractor to extract information from the reports awaits approval.

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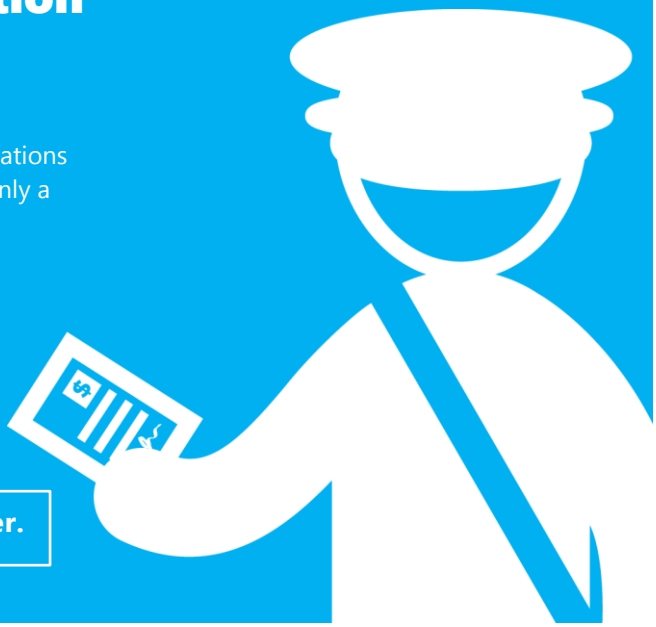

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