MSHA Citations Upheld by Administrative Law Judges Before April 3, 2018 May Be Invalid

Insights
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Over the last few years, there has been debate regarding whether ALJs are "inferior officers" under the Appointments Clause of the Constitution. This provision provides that officers, including inferior officers, may only be appointed by the President, "Courts of Law," or "Heads of Departments." U.S. Const. Art. II, § 2, cl. 2. In June, the United States Supreme Court held that ALJs within the Securities and Exchange Commission are "inferior officers" and therefore must be appointed according to the Appointments Clause. *Lucia v. SEC*, 138 S.Ct. 2044 (2018).

What does this have to do with Mine Safety and Health Administration ("MSHA")? Prior to April 3, 2018, ALJs within the FMSHRC were appointed by the Chief Administrative Law Judge. The Chief Administrative Law Judge, however, is not a "Head of Department;" rather, the Commission, acting as a body, is. If FMSHRC ALJs are inferior officers, therefore, were they correctly appointed? If they were not appointed correctly, what is to happen regarding the decisions they have made?

The Commission became concerned enough regarding this issue that, on April 3, 2018, and before the *Lucia* case was decided, it issued a notice ratifying the prior appointment of FMSHRC ALJs by the entire Commission.

Sixth Circuit Rules that the Commission Illegally Appointed its ALJs

Enter the Sixth Circuit. On July 31, 2018, it held that Commission ALJs were inferior officers under *Lucia*. *Jones Brothers, Inc. v. Sec'y of Labor*, --- F.3d --- (6th Cir. 2018). The court also held that the Commission had illegally delegated its appointment power to the Chief ALJ but had "cured" the defect by the April 3 ratification by the Commission. Accordingly, it held that the company cited by MSHA was entitled to a new hearing before a different ALJ.

Ramifications

The ramifications of the *Jones Brothers* case may be far reaching:

- Current cases. For cases that were decided by an ALJ prior to April 3, 2018, and that are still in the appellate process, operators should consider adding this issue as a basis for their appeal and ask that a new hearing be granted before a different ALJ.
- Closed cases. Based upon *Jones Brothers'* logic, ALJ decisions before April 3 that became final orders of the Commission were decisions that could have been made by illegally appointed

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judges, and therefore there is an argument that those decisions are void. Operators that have been significantly impacted by these illegal decisions may want to consider whether declaratory relief can be obtained.

- Future cases. When MSHA assesses how to characterize alleged violations of the Mine Act and what penalty to impose, it considers the company's history of previous violations. If MSHA relies upon an illegal decision by an ALJ, the company should consider contesting the citation and penalty on that ground.

If your company has been impacted by a decision made by an improperly appointed Commission ALJ, you may want to seek the advice of counsel to discuss your options. We will keep you updated on any developments.

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