



OSHA, Too? Will OSHA Citations Also Be Invalidated in the Wake of the Jones Brothers Case?

Insights

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After the Sixth Circuit Court of Appeals' decision in *Jones Brothers, Inc. v. Sec'y of Labor*, citations upheld by administrative law judges within the Federal Mine Safety and Health Review Commission ("FMSHRC") may be suspect. We discussed the implications of the *Jones Brothers* on Mine Safety and Health Administration ("MSHA") cases [here](#). But does the case also have any ramifications for ALJ decisions regarding Occupational Safety and Health Administration ("OSHA") citations? After all, ALJs with the Occupational Safety and Health Review Commission ("OSHRC") are appointed not by the full OSHRC, but by its Chairman. Is that sufficient under the Appointments Clause?

Recap

To briefly recap, in June 2018, the Supreme Court held, in *Lucia v. SEC*, that ALJs within the Securities and Exchange Commission were required to be appointed according to the Appointments Clause of the Constitution—that is, they must be appointed by the President, a court of law, or by a head of department. On July 31, 2018, the Sixth Circuit applied this decision to ALJs within FMSHRC, binding those ALJs to the same appointment process and finding that appointment by the FMSHRC's Chief ALJ was insufficient; appointment by the full FMSHRC was required.

Application to OSHA?

The same reasoning may apply to OSHRC ALJs. Like SEC and FMSHRC ALJs, ALJs within OSHRC hold "'continuing offices established by law' and exercise 'significant discretion when carrying out important functions.'" *Jones Brothers* (quoting *Lucia*). As *Jones Brothers* said of FMSHRC ALJs:

Like SEC administrative law judges, they preside over trial-like hearings. In that role, they shape the administrative record by taking testimony, regulating document production and depositions, ruling on the admissibility of evidence, receiving evidence, ruling on dispositive and procedural motions, and issuing subpoenas. Indeed they exercise nearly all the tools of federal trial judges.

On the other hand, the statutes governing appointment of ALJs within FMSHRC and OSHRC vary. For FMSHRC appointments, the governing statute provides that the "Commission" "shall appoint" ALJs, and the Sixth Circuit found that only the Commission, acting as a whole, could act as a department head under the Appointments Clause by appointing ALJs. 30 U.S.C. § 823(b)(2). For OSHRC appointments, however, the governing statute provides that the "Chairman" of the Commission "shall appoint" ALJs. 29 U.S.C. § 661(e).

Does this matter? Can Congress delegate the power to appoint ALJs to those other than the President, a court of law, or a department head? Because of the potential to upend ALJ decisions regarding OSHA citations, we may soon find out.

If your company has been impacted by an OSHRC ALJ decision or is currently contesting an OSHA citation, you may want to seek the advice of counsel to discuss your options. We will keep you posted on any developments.

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