Testing for Interference in MSHA 105(c) Discrimination Cases

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The legal basis of interference is in Section 105(c)(1) of the Federal Mine Safety and Health Act ("Mine Act") - "No person shall discharge or in any manner discriminate against . . . **or otherwise interfere** with the exercise of the statutory rights of any miner." 30 U.S.C. §815(c)(1). The interference test has developed into a two-part evaluation of an operator's reaction to protected activity or treatment of miners' rights. The real question is whether MSHA must show if an operator's actions were motivated by protected activity or were intended to interfere with miners' rights to establish an interference claim.

While recent cases have emphasized the concepts of interference, the Review Commission's reference to an "interference test" dates to at least 1982, when the Review Commission discussed interference in Moses v. Whitley Development Corp., 4 FMSHRC 1475 (Rev. Comm. Aug. 1982). This case involved a claim that an operator interrogated and harassed a miner because it believed he had reported an accident to MSHA. The Commission determined that coercive interrogation and harassment over the exercise of protected rights were among the "more subtle forms of interference" referred to in the legislative history of the Mine Act. The Commission found that a company interferes with a miner's protected rights when it instills fear of reprisal or chills the exercise of protected activity.

The issue of interference in a discrimination case resurfaced in 2005. In Secretary of Labor on behalf of Gray v. North Star Mining, Inc., et al., 27 FMSHRC 1 (Rev. Comm. Jan. 2005), a supervisor allegedly threatened a miner after the miner was subpoenaed to testify before a grand jury regarding Mine Act violations. The ALJ determined that the miner and the supervisor were friends and that the threat was essentially a joke. Nonetheless, the Commission stated that operator statements should be evaluated under a test that "has its genesis in section 8(a)(1) of the National Labor Relations Act." The Commission decided that the totality of the circumstances surrounding a supervisor's statements must be considered. The Commission also concluded that the supervisor's intent or motive and the effect of a supervisor's statement is a necessary component in determining whether the company interfered with the miner's exercise of statutory rights.

Following the Review Commission's decision in the Gray case, MSHA proposed a two-part "interference test":

- A person's actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of

class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights; and

- The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

This two-part interference test was used in UMWA on behalf of Franks & Hoy v. Emerald Coal Resources, LP, 38 FMSHRC 799 (ALJ Miller April 2016). This case involved questioning of witnesses during a company investigation following MSHA's investigation into a complaint. The ALJ found interference when the operator insisted that the two miners provide information about a possible safety violation and suspended them when they did not. The ALJ applied MSHA's proposed test for interference, noting that intent of the operator was not an element of that test.

The same ALJ also applied this interference test in Secretary on behalf of McGary et al. v. Marshall County Coal Co. et al., 38 FMSHRC 2006 (Rev. Comm. Aug. 2016) & 40 FMSHRC 261 (Rev. Comm. March 2018). This case involved the CEO's "awareness meetings" with the work force, specifically requesting that when employees filed anonymous hazard complaints to MSHA, those conditions would also be reported to the company so they could be addressed. The ALJ applied MSHA's two-part test and found the operator had interfered with the miners' rights to make anonymous complaints. On appeal, the Commission affirmed the ALJ's finding but did not adopt a test for interference. This case is currently pending before the D.C. Circuit Court of Appeals. Oral argument occurred in January 2019, so a decision could be forthcoming.

Similarly, in Secretary on behalf of Greathouse v. Monongalia County Coal Co., et al., 38 FMSHRC 941 (ALJ Miller May 2016), the same ALJ as in Franks & Hoy and McGary again applied the same test for interference. This case involved "Safety and Production Bonus Plans" at six underground coal mines. This bonus program disqualified miners from the bonus if there was a lost time accident, S&S citation or withdrawal order at the mine. The ALJ found that this bonus program interfered with miners' rights by discouraging safety reporting and reducing time spent on safety measures. The ALJ's decision was appealed to the Review Commission, which split in a 2-2 decision. The case is also currently before the D.C. Circuit Court of Appeals pending the outcome of McGary.

In a departure from using MSHA's two-part interference test, the ALJ in Secretary on behalf of Pepin v. Empire Iron Mining Partnership, 38 FMSHRC 1435 (ALJ Barbour June 2016), applied an interference test that was something closer to what the Review Commission used in the Gray case. Pepin involved a confrontation between a manager and an hourly employee after safety cards were filed with the operator and an anonymous complaint was filed with MSHA. In finding there was interference, the ALJ applied a three-part test:

1. Respondent's actions can be viewed, from the perspective of members of the protected class, as tending to interfere with the exercise of protected rights;
2. Such actions were motivated by the exercise of protected rights.

3. If the foregoing is established, the operator may defend by showing a business justification that outweighs the harms caused.

The Pepin case was not appealed to the Commission, but the three-part test used in this case was rejected regardless of its precedential value. In Wilson v. Armstrong Coal Co., 39 FMSHRC 1072 (ALJ Lewis May 2017), a different ALJ declined to apply the Pepin test – questioning its appropriateness and finding that it would lead to "absurd results." Instead, the ALJ applied MSHA's two-part test to find interference. This case was also not appealed to the Review Commission.

Ultimately, the D.C. Circuit Court of Appeals should provide the Review Commission with some precedential directive regarding an interference test. Hopefully, any test that is developed will be objective and provide an opportunity to consider all the evidence, including operator motivation and intent, when determining whether there is a case of interference.

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