



D.C. Circuit Court of Appeals Provides Little Guidance on MSHA 105(c) Interference Test

Insights

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Section 105(c)(1) of the Federal Mine Safety and Health Act (“Mine Act”) provides “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). 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), the CEO held a series of “Awareness Meetings” with the work force, specifically requesting that when employees filed anonymous hazard complaints to the Mine Safety and Health Administration (“MSHA”), they report those same conditions to the operator. Complaints were filed with MSHA after these meetings and a hearing was held in front of an Administrative Law Judge (“ALJ”) to determine whether these meetings interfered with miners’ rights.

The ALJ hearing these complaints applied a two-part “interference test” and found the operator had interfered with the miners’ rights to make anonymous complaints. On appeal, the Federal Mine Safety and Health Review Commission (“Review Commission”) affirmed the ALJ’s finding but did not adopt a specific test for interference. The case was appealed to the D.C. Circuit Court of Appeals, and one of the issues before the D.C. Circuit was which interference test should be applied in a case where interference is alleged – should an interference test consider an operator’s actions, whether they were motivated by protected activity or were intended to interfere with miners’ rights.

On May 7, 2019, the D.C. Circuit Court of Appeals affirmed the ALJ’s and Review Commission’s holdings that the operator’s “Awareness Meetings” interfered with miners’ rights to file anonymous complaints with MSHA pursuant to § 103(g) of the Mine Act. Marshall County Coal Co., et al., v. Federal Mine Safety and Health Review Commission and Secretary of Labor, Mine Safety and Health Administration, No. 18-1098, slip op. (D.C. Cir. May 7, 2019). However, the D.C. Circuit declined to establish an interference test because it found regardless of the interference test used, the operator’s “Awareness Meetings” interfered with miners’ rights and were motivated by the filing of Section 103(g) complaints, finding that the effect of these meetings was to discourage miners from filing complaints with MSHA.

The two proposed interference tests are the Franks test and the Pepin test. The Franks interference test, used by the ALJ and Review Commission in this case, is a two-part analysis that does not consider an operator’s motivations or intent:

- A person's action 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 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.

See *Franks v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (2014) vacated and remanded sub nom. *Emerald Coal Resources, LP v. Hoy*, 620 F.App'x 127 (3d Cir. 2015).

Alternatively, the Pepin test requires a finding that interference was motivated by the exercise of protected activity:

- The operator's actions can be reasonably viewed, from the perspective of members of the protected class, as tending to interfere with the exercise of protected rights, and that
- Such actions were motivated by the exercise of protected rights.
- If the foregoing is established, the operator may defend by showing a business justification that outweighs the harms caused.

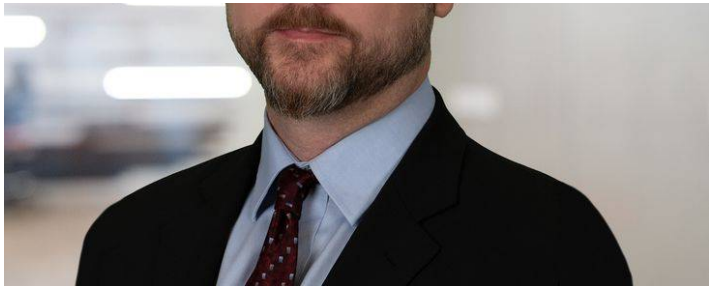
Pepin v. Empire Iron Range Mining Partnership, 38 FMSHRC 1435, 1453-54 (2016)

In declining to establish an interference test, the D.C. Circuit found that the mine operator in this case did not ask the ALJ to apply an alternative to the Franks test for interference, and that the operator accepted Review Commission precedent as standing for the proposition that "the motive of an operator in taking any action is not considered when undertaking analysis of an interference claim." Furthermore, the D.C. Circuit found that in front of the Review Commission, there was no objection to the ALJ's application of the Franks test, and no proposal of an alternative interference test. Because of this, the D.C. Circuit did not find it necessary to establish a specific interference test because, ultimately, the result would have been the same whether applying the Franks test or the alternative Pepin test.

The D.C. Circuit also upheld the proposed \$100,000 in penalties and found the operator had forfeited any challenge to the personal reading requirement – that the CEO would have to read an "approved" statement regarding § 105(c) of the Mine Act to the miners attending the "Awareness Meetings."

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