Federal Court Reworks MSHA Workplace Exam Standard

Insights
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On June 11, 2019, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion vacating the Mine Safety and Health Administration's ("MSHA") 2018 rule ("2018 Amendment") entitled, *Examinations of Working Places in Metal and Nonmetal Mines*, codified at 30 C.F.R. § 56/57.18002, s*ee* 83 Fed. Reg. 15,055 (Apr. 9, 2018). In so doing, the D.C. Circuit ordered the reinstatement of MSHA's January 23, 2017 version of the rule ("2017 Standard"), which revised the previously existing workplace examination standard at 30 C.F.R. § 56/57.18002.

By way of review, on January 23, 2017, MSHA published a final rule which revised the previously existing workplace examination standard at 30 C.F.R. § 56/57.18002 by requiring:

1. Examination of each working place before miners begin work in that place;
2. Mine operators to notify miners of adverse working conditions in their working places;
3. Completion of a record of examination to include: the name of the person conducting the examination, the date of the examination, the location of all areas examined, a description of each condition found that may adversely affect safety or health and be supplemented with the date of corrective actions when necessary; and
4. Operators to make these records of examinations available to miners' representatives and authorized representatives of the Secretary.

Examinations of Working Places in Metal and Nonmetal Mines, 82 Fed. Reg. 7680, 7682 (Jan. 23, 2017). The 2017 Standard was slated to take effect in May 2017, but MSHA delayed the effective date of the rule until October 2, 2017. *See Examinations of Working Places in Metal and Nonmetal Mines*, 82 Fed. Reg. 15,173 (March 27, 2017); *Examinations of Working Places in Metal and Nonmetal Mines*, 82 Fed. Reg. 23,139 (May 22, 2017).

In September 2017, before the 2017 Standard took effect, MSHA proposed to modify the 2017 Standard. And on October 5, 2017, after a three-day period of effectiveness, MSHA withdrew the 2017 Standard and delayed its effective date to June 2, 2018. *See Examinations of Working Places in Metal and Nonmetal Mines*, 82 Fed. Reg. 46,411 (Oct. 5, 2017).

On April 9, 2018, MSHA published the 2018 Amendment. *See Examinations of Working Places in Metal and Nonmetal Mines*, 83 Fed. Reg. 15,055 (Apr. 9, 2018). The 2018 Amendment took effect on June 2, 2018 and contained two key changes to the 2017 Standard: (1) Examinations could occur

before or as miners begin work; and (2) Operators could exclude from their records adverse conditions that are promptly corrected.

Subsequently, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC, and the United Mine Workers of America International Union ("Unions") filed a petition for review of the 2018 Amendment before the U.S. Court of Appeals for the D.C. Circuit, arguing that the 2018 Amendment violated the Mine Act's no-less-protection standard, 30 U.S.C. § 811(a)(9), and the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. The thrust of the Unions' challenge was that the 2018 Amendment provided less protection than the 2017 Standard. It was this challenge that the D.C. Circuit ruled upon on June 11.

In vacating the 2018 Amendment and reinstating the 2017 Standard, the panel found that the 2018 Amendment violated the no-less-protection rule relative to the 2017 Standard because it "does not allow for notification before exposure" which "allows miners to work in an area before the examination is completed [such that] there is the likelihood that miners may be exposed to an adverse condition before it is discovered." Slip op. at 7. The panel rejected MSHA's explanation that the 2018 Amendment provided no-less-protection than the 2017 Standard, finding that MSHA relied on a "non-existent notification-before-exposure duty" which cannot be reconciled with factual findings that MSHA made in support of the 2017 Standard. Slip op. at 7-8. The panel likewise rejected MSHA's justification for recordkeeping revision in the 2018 Amendment, finding that MSHA offered no basis for its conclusion that the supposed benefits will equal or exceed those yielded by the 2017 Standard. Slip op. at 10-13.

The majority panel concluded that the 2018 Amendment was, therefore, "unenforceable," and that "vacatur of the 2018 Amendment automatically resurrects the 2017 Standard." Slip op. at 14. Thus, the panel "ordered MSHA to reinstate the 2017 Standard" Slip op. at 14.

It is noted that a challenge to the 2017 Standard is currently pending in the United States Court of Appeals for the Eleventh Circuit. That challenge had been stayed pending the outcome of the Unions' challenge to the 2018 Amendment in the D.C. Circuit.

Related People

Patrick W. Dennison
Partner
412.822.6627
Email

Arthur M. Wolfson
Partner
412.822.6625
Email

Service Focus

Workplace Safety and Catastrophe Management