



Federal Mine Safety and Health Review Commission Issues Unanimous Decision Vacating Fall Protection Citation

Insights

7.15.19

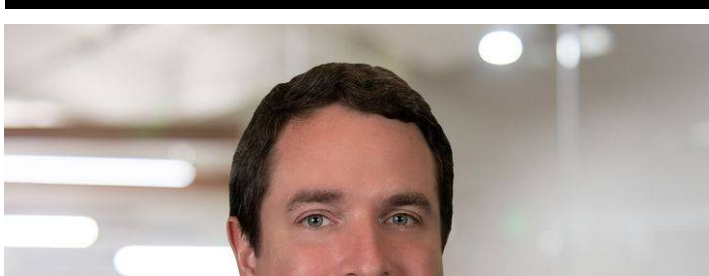
Unanimous decisions from the Federal Mine Safety and Health Commission are rare, but on July 11, 2019, the Commission ruled 5-0 to reverse an Administrative Law Judge's finding of a fall protection violation in *Sims Crane* because the ALJ improperly shifted the burden of proof. Vacating the decision before it, the Commission found that the ALJ focused upon Sims's counterarguments without determining whether the Secretary proved his claims by a preponderance of the evidence. The Commission then held that the Secretary failed to establish that a danger of falling existed as a violation of section 56.15005 requires. It vacated the Secretary's citation without remand.

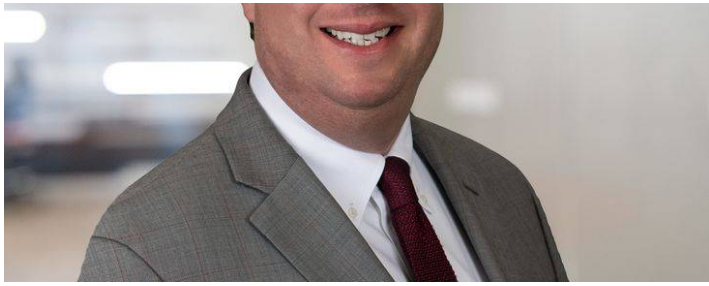
The Secretary claimed that a 6-foot-long, 36-to-42-inch wide walkway on a crane 7 feet above the ground posed a fall hazard. Citing a lack of handholds and the inspector's opinion that a person could fall at any time, even while taking two steps across a slip-resistant surface, the Secretary presented no other evidence. And the ALJ credited Sims' witnesses when they testified that the equipment was safe, only finding a violation because Sims failed to produce a document certifying that it complied with the International Organization of Standards 2867, which written guidance from MSHA incorporated.

Rejecting the ALJ's analysis that a violation existed because Sims failed to comply with guidance, the Commission reaffirmed that agency guidance is not binding. The Commission then found that the ALJ's factual analysis showed that the Secretary failed to establish that a danger of falling existed. To the Commission, the record supported no other conclusion, and it vacated the citation against Sims Crane, reminding the Secretary that he must prove violations that he alleges.

Contact your Mine Safety Attorney, any Fisher Phillips Attorney, or Ben Ross (bross@fisherphillips.com) with any questions about *Sims Crane* or other workplace safety matters.

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