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Back to the Drawing Board (Somewhat) - D.C. Circuit Court of Appeals Invalidates Workplace Examination Final Rule

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On June 11, 2019, the United States Court of Appeals for the District of Columbia Circuit overturned the 2018 version of MSHA's workplace examination final rule and ordered the agency to implement the text of the 2017 proposed standard.

In United Steel, Paper, and Forestry et al. v. Mine Safety and Health Administration et al., No. 18-1116 (June 11, 2019), the three judge panel considered a timely petition for review by two labor unions against MSHA and the United States Department of Labor. The labor unions argued MSHA's 2018 amendment to the workplace examination rule violated the Federal Mine Safety and Health Act's (Mine Act) "no-less-protection standard" (30 U.S.C. § 811(a)(9)) and the Administrative Procedure Act.

By way of background, MSHA sought to revise its workplace examination rule for metal/nonmetal mines starting in 2015. Through notice and comment rulemaking, the agency first proposed a rule in 2017, which, for purposes of discussion here, required an examination of the working place to occur at least once each shift *before miners begin work* in that place. This new rule was supposed to become effective in May 2017, but MSHA delayed the effective date. In April 2018, MSHA promulgated a final rule, which changed when an operator would be required to perform the examination. Instead of requiring operators to complete the examination before miners begin work in an area, the 2018 version required operators to examine each working place at least once each shift before work begins *or as miners begin work in that place*. Additionally, the 2018 version provided an exception to the recordkeeping requirement – namely, if an operator was able to promptly correct a hazardous condition then the operator did not need to record it. These modifications prompted the labor unions to petition the Court of Appeals for the District of Columbia Circuit.

The Mine Act enables MSHA to promulgate new rules and regulations. If a new rule is promulgated, it shall not reduce the protection afforded miners by an existing mandatory health or safety standard. Additionally, if MSHA amends a regulation, it must state the basis for its conclusion. See Nat'l Min. Ass'n v. MSHA, 116 F.3d 520, 536 (D.C. Cir. 1997). Put another way, it is a safeguard in place to ensure "no reductions in the level of safety below existing levels be permitted, regardless of the benefits accruing to improved efficiency." United Mine Workers of Am., Int'l Union v. Dole, 870 F.2d 662, 666 (D.C. Cir. 1989).

In its decision, the D.C. Circuit Court of Appeals found the 2018 version reduced the level of safety afforded to miners. The Court first observed the 2018 version “appears to increase miners’ exposure to health and safety risks.” United Steel, No. 18-1116, *6. Furthermore, the Court held the 2018 version does not allow for notification before exposure and allows miners to work in an area before the workplace examination is completed, thereby increasing “the likelihood that miners may be exposed to an adverse condition before it is discovered.” Id. at *7.

The Court also took issue with the factual findings MSHA made when it first promulgated the 2017 version. There, MSHA clearly articulated the rule “requires that a competent person conduct an examination before work beings so that conditions that may adversely affect miners’ safety and health are identified before they begin work and are potentially exposed.” Id. at *8. Likewise, the Court also had reservations about MSHA’s change to the recordkeeping requirement. In the 2017 version, MSHA wanted mine operators to record “all adverse conditions found, even those that are corrected immediately.” Id. at *9. The 2018 version, however, carved out an exception for those hazardous conditions that were corrected immediately. Id. at *10. For these reasons and because MSHA could not reasonably explain its reasoning for the change from one version to the next, the Court vacated the 2018 version and ordered the 2017 version reinstated.

So, where does this leave mine operators moving forward? The only thing certain is the 2018 version of the workplace examination rule is technically still in effect as the D.C. Circuit Court of Appeals case is not yet final. Mine operators may assume once the case is final the industry would have to revert to the 2017 version of the workplace examination final rule. That would mean all workplace examinations must be completed before miners begin work in that place and any adverse condition encountered – even if corrected immediately – need to be recorded in the examination record. However, the United States Court of Appeals for the Eleventh Circuit currently has an appeal brought by the National Mining Association, National Stone, Sand & Gravel Association, Portland Cement Association, American Iron and Steel Institute, Georgia Mining Association, and Georgia Construction Aggregate Association regarding the 2017 version. The Eleventh Circuit stayed the challenge to that case until the D.C. Circuit decided the union challenge. Now it would appear the Eleventh Circuit case is ripe for review which leaves further doubt as to how operators are to comply with the workplace examination rule.

Stay tuned for further updates on this important issue.

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