

11th Circuit Upholds Mining Agency's Coal Dust Rule, Phase-In Continues

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The Mine Safety and Health Administration may continue phasing-in its new coal dust rules, a three-judge panel of the Eleventh Circuit Court of Appeals has decided, relying on what it called a “holistic interpretation” of the Mine Act to uphold MSHA’s new rules. [National Mining Association, et al. v. Sec’y of Labor, et al.](#), No. 14-11942 (Jan. 25, 2016). The rule expands sampling requirements, changes sampling methods and tools, lowers permissible exposure limits, and requires immediate corrective actions by mine operators.

The National Mining Association (NMA), Murray Energy Corp., and associated coal interests, challenged MSHA’s extensive new rules as not supported by the evidence in record, not feasible, and contrary to the Mine Act. The industry challenged, among other provisions:

1. the use of single dust samples to determine compliance and MSHA’s declaration that single sample results are “accurate”;
2. the adoption of a reduced dust limit;
3. the collection of an increased number of mandated samples, taken under higher production rates than current sampling;
4. the use a new, instantaneous read-out, sampling device; and
5. the agency’s refusal to accept personal protective equipment as a compliance method.

The industry stressed that the rules must be feasible but were not, and that the Mine Act specifically required the Department of Health and Human Services (HHS), through the National Institute for Occupational Safety and Health (NIOSH), to set the exposure limit and issue a joint finding with MSHA on single-sample accuracy, rather authorize MSHA to act alone.

MSHA and HHS/NIOSH acted jointly in making previous, single-shift sampling accuracy findings,

including a rulemaking invalidated by the Eleventh Circuit Court of Appeals in 1998. In that case, the court accepted NMA's argument that an economic feasibility analysis was required under the Mine Act (Section 101, the Act's general rulemaking provision), but not conducted.

In the current case, the three-judge panel invoked this earlier decision to support its ruling. According to the judges, Section 101(a) unambiguously accords MSHA alone with authority to promulgate new regulations. "It is clearly the law of this circuit that the transition to a single-shift sampling regime is a matter to be promulgated by MSHA alone," they wrote. "In holding squarely that this matter is governed by section 101 ... *National Mining* [the earlier case] forecloses any other result," the Court said.

The industry parties have not gone away quietly. Describing the 1998 single-sample case as "far more limited than the Panel portrays," and calling the new decision "an unfortunate error of law," Jackson Lewis attorney Henry Chajet said, "The Panel decision uses this misread precedent to support the deletion of the Mine Act's clear Congressional delegation of coal dust and single sample rulemaking to HHS/NIOSH, while justifying the result by saying NIOSH was consulted and that sufficed." Chajet, who represented NMA on behalf of the firm, added, "Yet, there is no language in the [Mine] Act, the APA [Administrative Procedure Act], or any other statute that permits an agency to bypass a direct Congressional delegation of authority to another agency."

A spokesman for Murray Energy (one of the petitioners in the case) vowed to continue the challenge. The petitioners could seek *en banc* review by the full court of the Eleventh Circuit, based on their belief that the three-judge panel misread the statute or misapplied U.S. Supreme Court precedent regarding controlling, express words of a statute. The petitioners also could seek review by the Supreme Court.

The decision allows MSHA to continue its rollout of the rule, which the agency is doing in phases. Phase 1, effective in August 2014, required sampling during high production periods and ushered in single sampling. Phase 2 began February 1, 2016, and requires much more sampling as well as use of a newly developed monitoring device that measures dust levels instantaneously. This monitoring device has been the subject of concerns over its accuracy. Finally, a lower permissible exposure limit goes into effect this coming August 1.

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