



**CONN
MACIEL
CAREY**

April 3, 2017

Northeast Mine Safety & Health Conference

MSHA Legal Update

Nicholas W. Scala

Co-Chair, MSHA Practice Group

Conn Maciel Carey LLP

Nicholas W. Scala

nscala@connmaciel.com • 202.895.2797

Nick Scala is a Co-Chair of the national MSHA • Workplace Safety Practice at **Conn Maciel Carey** and a Certified Mine Safety Professional, where he focuses on all aspects of mine safety and health law:

- Represents mine operators and independent contractors in inspections, investigations & enforcement actions involving MSHA
- Advises clients in all phases of involvement with MSHA, particularly guiding companies through contest proceedings before the Federal Mine Safety and Health Review Commission
- Prepares clients for and manages incident, fatality and special investigations conducted by MSHA, and defends company representatives in section 110 proceedings

Agenda



MSHA Under President Trump

What Is Happening With The Commission

Case Law Developments

MSHA Under President Trump

- Promoting policies that are anti-regulation and limited government involvement in industry
 - Staunchly criticized over-regulation of the coal industry during campaigns
- Lobbied for and received significant union votes → safety and health in the workplace core issues
- Focus on revitalizing mining industry through energy and infrastructure policies
 - ❖ Domestic energy production
 - ❖ Decrease in regulation → Specifically spoke on Environmental
 - ❖ Funding for infrastructure improvement (first 100 days goal)

MSHA Under President Trump

- Secretary of Labor nominee Alexander Acosta in confirmation hearings right now approved by HELP vote to be scheduled for Senate.
 - Second nominee after Puzder withdrew his name
 - Seen as safer pick, and one who will not buck status quo
- Stated he would enforce Dept. of Labor regulations fully and fairly
 - Includes OSHA, MSHA and Wage and Hour
- Still no Assistant Secretary for MSHA or OSHA
 - Unlikely to be appointed before confirmation of Labor Secretary

MSHA Under President Trump

- “2 for 1” Regulation Rule
 - Agencies must propose two rules that will be withdrawn for each new rule they propose in rulemaking.
 - Attempt to remove outdated or burdensome regulations
- Congressional Review Act (CRA)
 - Congress has 60 legislative days to review
 - Joint passage revokes new regulation
 - Substantially similar regulation is forbidden unless expressly authorized by law
 - Ex: Volks Recordkeeping rule – required maintenance of injury and illness records for five years and circumvented OSHA’s six month statute of limitations

MSHA Under President Trump

- What could happen with MSHA?
 - Likely see status quo maintained for scheduled regulation and enforcement
 - ❖ Statutorily required inspections
 - ❖ Decrease possible in impact and special emphasis programs, more focus on non-enforcement
 - ❖ Possible decrease in pursuit of discrimination and agent liability cases
 - Rulemaking prohibition on new regulations

The Federal Mine Safety and Health Review Commission

- Third party created by Mine Act to hear disputes between operators and MSHA
- Five Commissioner panel
 - ❖ Currently four, and awaiting nomination of a fifth and final member
 - ❖ This is a positive development for industry
- Create binding case law on the mining industry
 - ❖ Hear appeals to Administrative Law Judge cases

The Federal Mine Safety and Health Review Commission

➤ Judicial Review (Sec. 106):

- ❖ The Federal Mine Safety and Health Review Commission (FMSHRC) was formed under The Mine Act.
- ❖ Administrative Law Judges and five-person Commission hear cases and appeals.

✓ Contest can continue through FMSHRC:

SEC. 106. (a)(1) Any person adversely affected or aggrieved by an order of the Commission issued under this Act may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside.

The Federal Mine Safety and Health Review Commission

- Four Commissioner panel has resulted in 2-2 stalemates
 - In this situation, the judge's ruling stands but does not becoming controlling case law
 - Company and MSHA will have to seek review before the federal circuit court system to receive decision
- Has this happened yet?
 - *Consolidation Coal (meeting)*
 - *Bussen Quarries (meeting)*

Jurisdiction Cases

Jones Brothers Inc. (SE 2016-246)

- **Status – On Appeal to Commission**
- **At issue:** Whether or not site used to extract material for use in adjacent road construction is a borrow pit?
- **Decision:** Judge ruled on Motions for Summary Judgement that operation was a mine, not borrow pit, and therefore under MSHA jurisdiction. Company and MSHA jointly requested the decision be made final so that appeal could begin to Commission (company not challenging individual citations)

Jurisdiction Cases

Jones Brothers Inc. (SE 2016-246)

- **Why Important:** OSHA/MSHA Interagency agreement defines Borrow Pit

“an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.”

- The judge determines definitions of “one-time or intermittent” not met and drilling and blasting remove site from borrow pit status

Jurisdiction Cases

Maxxim Rebuild Company LLC. (KENT 2013-566, 2016-989)

- **Status – Decision Issued by 6th Circuit Court of Appeals**
- **At issue:** Whether an off-site fabrication and repair facility used to make and repair mining equipment was under MSHA jurisdiction?
- **Decision:** 6th Circuit held that the off-site shop was not under jurisdiction because it did not meet the definition of a “coal or other mine.”

“MSHA jurisdiction only extends to such facilities and equipment if they are in or adjacent to –in essence part of – a working mine.”

Jurisdiction Cases

Maxxim Rebuild Company LLC. (KENT 2013-566, 2016-989)

➤ Why Important:

- ❖ Overrules Commission Decision in *Jim Walter Resources* case, granting MSHA authority to inspect off-site facilities, such as off-site supply shop.

“Once the agency tries to extend its jurisdiction to off-site shops and off-site equipment, the language of the statute provides no stopping point, leaving the scope of its jurisdiction to the whims of the Secretary.”

- ❖ Limits MSHA jurisdiction *“to locations and equipment that are part of or adjacent to extraction, milling and preparation sites.”*

Jurisdiction Challenges

- If you have concerns about scope of MSHA jurisdiction, it is essential to challenge it as soon as possible.
- Failing to challenge jurisdiction over a site or property, i.e. accepting citations or inspection of the property, will significantly decrease arguments against jurisdiction
- Contact MSHA field office and/or District to discuss scope of MSHA jurisdiction over property
 - Ex: Sand pits and Pugmills
- Notify MSHA counsel of issue and initiate contest of Jurisdiction immediately

Reporting

Northshore Mining Company (LAKE 2014-219)

- **Status: Decided by the Commission**
- **At issue:** Whether or not an injury was reportable given the scope of treatment received and affect on miner's ability to perform job?
- **Decision:**
 - ALJ held that miner only received first aid and not medical treatment, therefore injury was not reportable – vacating citations against operator
 - FMSHRC held that ALJ ruled in error because injury was reportable as “occupational injury” as miner was unable to work following doctor appointment.

Contractor Training

Ash Grove Cement Company (CENT 2015-614)

➤ **Status: Decided by ALJ**

➤ **At issue:**

- ❖ Whether or not environmental clean-up workers were miners under The Mine Act?
- ❖ Whether production operator was liable for a contractor electrician failing to have new miner training?
- ❖ Whether “extraordinary circumstances” existed to cite operator for lack of training on contractor?

Contractor Training

Ash Grove Cement Company (CENT 2015-614)

➤ **Status: Decided by ALJ**

➤ **Decision:**

- Environmental clean-up workers, on-site to clean hydraulic oil spill, were not miners because:
 - ❖ Not involved in any milling, crushing, or maintenance or repair of mining equipment or any other type of mining operations
 - ❖ Were not on site for “frequent or extended period of time”
- ❖ Mine was not liable to lack of new miner training for contract electrician because it was contractor’s primary responsibility and MSHA failed to prove “extraordinary circumstances”

Imminent Danger Orders

Warrior Coal (SE 2011-407)

- **Status:** Decided by 11th Circuit Court of Appeals
- **At issue:** Whether Imminent Danger Orders under Section 107(A) was appropriately issued for elevated methane readings in a roof cavity of underground mine?
- **Decision:** 11th Circuit found the both the Commission and ALJ were correct in upholding the 107(A). That the inspector did not abuse his discretion in issuing the withdrawal order, even if the occurrence is later determined to be not as dangerous or imminent as initially thought.

Imminent Danger Orders

Knife River Construction (WEST 2013-1009)

- **Status: Decided by Commission (Settled in Federal Circuit)**
 - Split decision with dissent. (3-2)
- **At issue:** Whether Imminent Danger Orders under Section 107(A) could be issued for citations designated as Unlikely to Occur and Non S&S?
- **Decision:** Commission affirmed ALJ decision, based upon notion that the inspector's reasonably believed an imminent danger existed at the time of issuance and did not abuse his discretion to issue the order/withdrawal.

Significant & Substantial

Consolidation Coal Co. (VA 2012-42, VA 2013-192)

- **Status:** Decided by ALJ, split decision pending from Commission
- **At issue:** Whether ALJ correctly found a roof control plan citation to be Non S&S?
- **Decision:** The Commissioners split on this decision 2-2 during the meeting. This is of note, because while the judge's decision will become a final order (unless appealed to the Federal Circuit) it will not be controlling case law.

Additional Cases of Interest

- ❖ *Cypress Pointe Inc. (CENT 2015-480-M) ALJ*
 - ❖ *Berming citation vacated when plant manager rebuilding berms/draining pit after flooding.*
- ❖ *Noranda Alumina LLC (CENT 2015-71-M) FMSHRC*
 - ❖ After review by 5th Circuit, FMSHRC decides to grant Motion to Reopen in case where penalties were paid due to change of management personnel at facility.
- ❖ *American Coal Company (LAKE 2011-13) FMSHRC and DC Circuit*
 - ❖ MSHA withdraws from further contest regarding whether or not FMSHRC has power to deny settlement.

Check out our MSHA blog: **the MSHA DEFENSE report**



CONN
MACIEL
CAREY

www.MSHADefenseReport.com

the **MSHA DEFENSE** report



CONN
MACIEL
CAREY

2017 **MSHA** **WEBINAR** series

**Working with MSHA: Alternative
Citation Resolution**
Tuesday, April 25th

**MSHA Citations and Orders
Beyond 104(A)'s**
Thursday, June 20th

**MSHA's Most-Cited Standards and
How to Avoid Them**
Wednesday, May 17th

**Working Effectively With Counsel
During Investigations and Contest**
Wednesday, July 19th

QUESTIONS?



Contact Information



Nick Scala

Co-Chair, MSHA • Workplace Safety Group

Conn Maciel Carey PLLC

Washington, D.C.

202.895.2797

nscala@connmaciel.com

@MSHA_Guy (Twitter)