JUNE 27, 2019 | MSHA LEADERSHIP, RULEMAKING & STANDARDS

# Appellate Court Rescinds MSHA's Workplace Exam Rule for Metal/Nonmetal Mines and Imposes More Stringent Exam Requirements

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On June 11, 2019, the U.S. Court of Appeals for the District of Columbia issued a decision vacating MSHA's current Metal/Nonmetal Workplace Exam Rule and installing a 2017 version of the rule ("2017 Rule") as enforceable.

The challenge to the rule was brought by various labor unions contesting MSHA's 2018 amendments to the revised 56/57.18002 (the 2018 Rule). The 2018 Rule, finalized in June 2018, went into effect in October 2018. Now, the 2017 Rule is in effect, and citations can be issued for noncompliance with its requirements by MSHA inspectors. [see our previous post detailing the 2017 final rule here].

In reinstating the 2017 Rule, the Court of Appeals put into effect two requirements operators previously did not have to comply with:

1. All workplace exams must be done ***BEFORE*** miners enter a working area; and
2. All adverse conditions observed during a workplace exam must be recorded, even if corrected/abated prior to miners entering the working area.

The challenge to the 2018 Rule was two-fold, first, in the 2018 amendments, MSHA modified the requirement that the workplace exam must be done "before" miners enter a working area, allowing operators to conduct the exams "before ***OR AS***" miners enter the workplace. This change was made to assist operators coping with what could have been a burdensome requirement (that workplace exams for all working areas of the mine be completed prior to any miner beginning work).

Stakeholder feedback during rulemaking suggested that requiring all workplace exams be complete ***before*** miners enter the working area could be difficult at operations where one or two employees complete workplace exams for the entire mine. In practice, this could force the examiners to begin their shifts long before the remaining employees.

Second, MSHA also amended the 2018 Rule to remove a small portion of the recordkeeping requirements for the

new workplace exams. The 2018 Rule required operators to record a description of any adverse condition that was not promptly corrected, e.g. corrected before any miner was exposed to the potentially hazardous condition. The initial 2017 Rule required operators to record all adverse conditions observed, including those immediately and/or promptly corrected. Under these terms, observing a condition such as a tool in a walkway, which can be easily and immediately corrected, must be recorded as an adverse condition on the workplace exam.

The Court found that MSHA failed to provide adequate explanations as to why the 2017 Rule was amended and how the 2018 amendments created a safer working environment for miners. In finding such, the Court vacated the 2018 Rule, meaning MSHA can no longer enforce the entire version of the workplace exam standard in effect since October 2018. However, instead of reverting enforcement back to the previous version of the rule that MSHA enforced for more than 40 years, the Court installed the 2017 Rule version of MSHA's new workplace exam regulation.

With the latest decision, there are now more stringent requirements for operators conducting workplace exams. The exams must be completed prior to miners entering every working area at a mine on a given shift, and any and all adverse conditions observed must be recorded. This rule puts into effect provisions that industry has never had to follow, per MSHA's regulations, and which operators must adhere to immediately.