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Federal Appeals Court Sides With MSHA And Review Commission On Imminent Danger Order

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A federal appeals court panel has determined that a MSHA inspector had the authority to briefly shut down a mine over concerns about levels of potentially explosive methane, dealing a blow to the employer's arguments of overreach.

[In the decision](#), judges in the Eleventh Circuit ruled against Warrior Met Coal Mining LLC, which appealed a decision of the Federal Mine Safety and Health Review Commission (the Commission). The case is notable for the Circuit's affirmation of the mine inspector's ability to effectively close a mine, if only for a short period due to a perceived imminent danger to workers.

Judges backed up an administrative law judge (ALJ) decision which was upheld by a split Commission and then appealed to the Eleventh Circuit by Warrior. As the appellate panel concluded:

"The ALJ's decision demonstrates careful consideration of the factual circumstances in light of the witness testimony presented, and it supports the conclusion that the MSHA inspector did not abuse his discretion in issuing the withdrawal order. To hold otherwise would require us to re-weigh conflicting evidence and the ALJ's credibility determinations." 

Essentially the judges held that the inspector was within his discretion in issuing an "imminent danger withdrawal order" under Section 107(a) of the Mine Act and they "agree with the Commission that the ALJ's decision was supported by substantial evidence."

This continues, and bolsters a concerning trend for the industry in legal decisions regarding the issuance of 107(a) orders. The industry has previously expressed concerns that MSHA issues these withdrawal orders without inspectors even attempting to investigate the extent, reasonableness or imminence of injury related to a perceived hazard.

Methane Prompts Inspector Concern

The case originated with the MSHA inspection of a coal mine operated by Jim Walter Resources (JWR), in which after detecting a potentially explosive concentration of methane gas in a roof cavity, the inspector issued a

withdrawal order that required the “temporary cessation” (for about 20 minutes) of mining activities, the appellate panel noted.

JWR contested the withdrawal order before an ALJ and following an evidentiary hearing, the judge [determined in January 2014](#) that the inspector had not abused his discretion in issuing the order. The judge in reaching this conclusion said that the “critical question in determining whether an accumulation of methane presents an imminent danger is whether there is an ignition source that might reasonably be expected to cause an explosion” that could result in harm or serious injury to miners.

The ALJ noted that there was no dispute that there was a methane buildup in a roof cavity of the mine that was in the explosive range (above 5 percent). The judge then accepted only one of four potential ignition sources identified by the inspector – a Lo Trac vehicle routinely used to transport mining materials.

There was conflicting testimony as to whether the Lo Trac could have entered the area near the roof cavity, but the ALJ ultimately concluded that although the risk was remote, the inspector’s decision to issue the withdrawal order was “objectively reasonable,” the appeals decision said.

Following the ALJ’s decision, JRW later petitioned for review before the Commission, where three of the five members [affirmed the ALJ’s decision](#) in September 2015, determining that it was supported by substantial evidence.

Two dissenting commissioners viewed the inspector’s withdrawal order as premature because there was “clearly time to consider whether there was a reasonable expectation of injury before abatement [of the methane concentration] could be completed.”

During the court appeal, JWR filed for bankruptcy and Warrior purchased JWR’s assets at a bankruptcy sale, and carried on the appeal as the new owner.

Judges Find Imminent Risk

Warrior made several arguments to the court, the decision noted, but at its core the appeal argued that alternate inferences from several facts – the mine’s inactivity, lack of miners near the roof cavity, and the unlikelihood that the Lo Trac vehicle could have entered the area in time to ignite the methane – should determine the case in its favor. But the judges disagreed given the substantial evidence standard:

“The inspector testified that he observed at least eight workers at the mine and that he knew the Lo Trac vehicle was mobile. Three workers testified that they were in the area near the roof cavity, including one miner who was directed to move the Lo Trac vehicle to a washing station nearby. A safety supervisor and a miners’ representative were with the inspector when he found the methane buildup in the roof cavity. The fact that no coal was being produced in the area, alone, does not rule out the possibility of an imminent risk.”

The Eleventh Circuit panel concluded that the Commission judge considered all the facts:

“Importantly, the ALJ did not ignore the alternative inferences; rather, he determined that the inspector was within his discretion – by evaluating the circumstances at the time he issued the withdrawal order – to ensure the

safety of the workers at the mine.”

Conclusion

While this ruling is very specific as to the facts, MSHA can be expected to be somewhat emboldened in the event it decides to shut down a mine over a perceived imminent safety threat. This also means the Commission’s judges in reviewing cases like this will be more likely to find a sound legal basis in withdrawal orders, if even remote evidence of risk has been identified.

The deference offered inspectors, regarding what in many cases is a snap judgement to issue a 107(a), is the shield the courts have found in upholding the orders. However, even if the decision to issue a 107(a) was made quickly (and ultimately in error), the Commission has been reluctant to vacate 107(a) orders.

Operators can present arguments and evidence that the imminent danger alleged was not as dangerous or imminent as the inspector initially perceived, however this case and others demonstrate that still may not be enough overturn the inspector’s decision to issue the order. This deference to the inspectors’ discretion does not demand the blind affirmation of the orders, yet that appears to be the direction of both ALJ and the Commission decisions.

While recent political developments, i.e. a new administration pledging to reinvigorate the mining industry and get regulators out of the way, mean that MSHA could be less likely to pursue such orders going forward, the potential is always there. Now the Agency has a fairly straightforward appellate court decision that could help bolster further withdrawal orders by inspectors.