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Review Commission Grants MSHA Ability to Enforce "Adequacy" Requirement for Workplace Exams

By: Nicholas W. Scala

What precisely the word "adequate" means for purposes of meeting federal workplace exam rules has come into focus after the Federal Mine Safety and Health Review Commission (the Commission) rejected a judge's interpretation of MSHA's requirements.

A new administrative law judge (ALJ) decision will be out soon that matches the Commission's findings with respect to the mine safety code at CFR 56.18002, covering workplace safety exams. Commissioners in a 3-2 decision remanded the issue to the ALJ and upheld the MSHA citations against three companies.

Essentially the Commission found that there is an adequacy requirement in 56.18002 based on the "reasonably prudent person" test. The rule requires the operator's designated competent person to examine each working place at least once each shift for safety and health hazards.

Mine operators should understand the implications of this key Commission ruling, particularly as it occurs at the same time MSHA pursues a rulemaking to toughen regulations aimed at ensuring that workplace exams provide enough safeguards. (We recently presented a webinar on this subject; here's a link to the recording.)

By gaining traction for the enforcement of an adequacy requirement on the exam itself, it is not unforeseeable that MSHA will attempt to enforce adequacy requirements throughout all elements of the Proposed Rule on Workplace Exams for Metal and Nonmetal Mines. This will likely include determinations on the adequacy of descriptions for adverse conditions and corrective actions, also adequacy of corrective actions if a particular adverse condition persists. Unfortunately, for operators, the determination of adequacy will be left to individual inspectors and presents boundless opportunities for interpretation and consistency issues.

This is a really hot issue for industry because the term "adequate" has so far been so vaguely defined and subject to considerable subjective interpretation by MSHA inspectors.

Commissioners in the split decision reversed the administrative law judge (ALJ) ruling in MSHA v. Sunbelt Rentals Inc., LVR Inc., and Roanoke Cement Co. LLC, with all agreeing on the part of the decision that creates an adequacy test.

Case At Hand

The legal dispute arose over MSHA citations to all three companies. As ALJ Thomas McCarthy stated, the issues are mainly twofold:

(1) Whether LVR and Sunbelt violated § 56.18002(a) by failing to perform an "adequate" workplace examination to discover a "latent" hazard; and

(2) Whether Roanoke Cement violated § 56.18002(a) by failing to perform an independent workplace examination on Jan. 8, 2013.

The three companies are related as follows:

Roanoke Cement operates a pre-heat tower comprising six vertically-connected conical vessels, which process raw-mix limestone material heated to about 2,000 degrees Fahrenheit. LVR performs annual pre-heat tower maintenance under contract with Roanoke, and for several years, has contracted with Sunbelt to erect scaffolding within the pre-heat tower so LVR can perform its work.

All three operators received citation from an MSHA inspection, which they later contested as a group.

According to the ALJ ruling, on Jan. 2, 2013, Roanoke and LVR walked the exterior staircase of the pre-heat tower and inspected each level by looking through 2′ by 2′ doors to inspect for damaged refractory and buildup of loose material. None was observed.

Roanoke also provided site-specific hazard awareness training to LVR and Sunbelt employees before they arrived on site.

On Jan. 7, 2013, Sunbelt employees began scaffolding work inside the tower, and on Jan. 8, Sunbelt was erecting scaffolding at the sixth level within the pre-heat tower.

At the start of the shift, a Sunbelt supervisor examined the area where the Sunbelt crew would be working and visually inspected the interior areas of the pre-heat tower above the sixth level. No physical objects or things were located between the sixth and seventh levels.

The supervisor did not climb the exterior staircase to the seventh level to peer through the small door because Sunbelt employees were not working on that level, the ALJ decision says.

The supervisor indicated that the sixth level provided a better vantage point to examine interior areas above the sixth level because he could see the entire seventh floor; the conditions that he observed that day were the same as those observed in all the other pre-heat towers at Roanoke where Sunbelt had worked over the past seven years; he had never seen more than dust or small particulates fall from the inside of the pre-heat tower; and that any material buildup on the walls was solid.

The supervisor had received MSHA training and workers used personal protective equipment among other safety precautions, the ruling notes.

A Sunbelt employee was struck by a falling piece of material and knocked unconscious during the work. The MSHA inspector later noted that peering through a door on the seventh level he observed material that could fall through to the lower levels, and then issued the citations.

ALJ, Commission Differ

The central question posed by the case is adequacy of the exams. In analyzing the case, Judge McCarthy noted:

"Commission law holds that the requirements of 30 C.F.R. § 57.18002 are three-fold: (1) daily workplace examinations are required to identify workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record must be kept by the operator." (citing *FMC Wyoming Corp.*)

The ALJ found all three requirements were met, including that the supervisor was a "competent" person.

Judge McCarthy noted MSHA's arguments that the workplace exam was not "adequate" as it did not include the seventh floor and also that whether Sunbelt met the standard is a material fact in dispute. But the Judge noted:

"The plain language of Section 56.18002(a) does not include an adequacy requirement. No adequacy requirement is contained in MSHA's program policy guidance regarding the requirements of Section 56.18002."

Also, no adequacy requirement is present in Commission case law interpreting the three requirements of section 56.18002(a), he noted. Judge McCarthy also found that all three respondents lacked notice that the standard required "adequate" workplace exams.

Judge McCarthy accordingly issued a summary judgment dismissing the Secretary's claims. The Commission overturned the ruling, with the majority saying the rule contains an adequacy standard:

"We do not agree that the operator must only examine the workplace to a standard of care slightly surpassing not conducting the examination at all."

Commissioners in the majority – Chairman Jordan, Nakamura and Althen – argued that the standard does include an adequacy mandate because application of the "reasonably prudent" miner test is appropriate (citing *U.S. Steel Mining Co.*) and elaborated:

"The reasonably prudent person test provides that an alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting correction within the purview of the applicable standard." (citing *Spartan Mining Co., Inc.*)

In conclusion the majority argued that to comply with the standard, the exam "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize."

The Commission also rejected a motion from LVR and Roanoke to be dismissed from the case, saying "the validity of the citations against LVR and Roanoke was inextricably intertwined with the citation to Sunbelt."

Commissioners Young and Cohen concurred with the majority on the adequacy test but dissented on the inclusion of Roanoke and LVR in the citations.

Conclusion

Where this issues stands is that the ALJ has to rule again based on the findings and instructions of the Commission. We can look for this new decision to align the adequacy test with the Commission's and determine if the workplace exams at issue were conducted to that standard.

Although the ALJ's decision will not be binding throughout FMSHRC proceedings, the Commission's findings of an adequacy requirement will influence the interpretation and enforcement of workplace exams standards moving forward.

At the same time MSHA proceeds with its rulemaking effort in the same area, and you can be certain that the Commission's findings will come into play, perhaps by remedying the vagueness issue through a specific definition in the regulatory code.

Mining operators should consider analyzing their own workplace exam procedures in light of the Commission's ruling, especially as it relates to the "reasonably prudent person" test – and follow and weigh in on MSHA's rulemaking on this important issue.