



INSIGHTS JANUARY 2012 - LITIGATION/COURTS

DOL SEEKS UNPAID FINES

Last month, the Labor Department (DOL) announced twice within three days that it had gone to court on behalf of MSHA to collect unpaid fines from quarry operators. DOL wants payment of \$142,993 for fines and associated charges for 58 alleged violations from Mize Granite Quarries, Inc., a dimension stone producer in Georgia. The government is seeking another \$196,833 from a North Carolina operation, North 321 Stone Co., Inc., for 103 uncontested citations written between August 2005 and February 2011.

MSHA & COMMISSION SUED

After MSHA issued a closure order that shut down most of the underground portion of an Iowa industrial sand operation, the operator challenged the action and also sued in federal court, alleging due process denials resulting from MSHA enforcement abuse and Federal Mine Safety and Health Review Commission delays of closure order review. The litigation carries major implications for mine operators.

MSHA issued a closure order under Sec 103(k) of the Mine Act (governing mine accidents) in November following a noninjury roof fall at that MSHA's inspector agreed was not a reportable Part 50 defined "accident." The agency did not limit the order to a zone immediately around the collapsed area, rather it extended the order to cover almost the entire underground mine. MSHA would not lift the closure order until the operator bolted and meshed the roof in virtually the entire underground mine. . . MSHA imposed the condition regardless of a ground control plan the agency had just approved the month before, consistent with industry practice that generally permits scaling in stable areas to control ground conditions. Citing safety concerns, the agency even refused to allow ground control experts to re-enter the mine.

The mine countered that a fall risk could not be generalized to everywhere in the mine, particularly to areas that had been stable for decades. When MSHA wouldn't budge, the operator appealed to the Review Commission and sought an expedited hearing, arguing MSHA's action was illegal and costing the operator tens of thousands of dollars a day. Thirtythree calendar days after issuance of the closure order, Administrative Law Judge Thomas McCarthy upheld the order, ruled that he has no authority to modify it, but vacated the accompanying citation. The company filed an emergency appeal to the Review Commission that the Commission declined to hear, opening the way for a circuit court of appeals review.

Frustrated by the illegal MSHA closure order and the lack of authority and delays in the Commission review process, the company also filed suit in federal district court against MSHA and, in an unprecedented action, against the Review Commission as well. The suit alleges MSHA has a pattern and practice of exceeding statutory authority, supported by the Commission's lack of meaningful and timely review. The company contends MSHA illegally expanded the scope of its 103 K closure order authority without any evidence of risks or rulemaking to support its demands.

Pending Circuit Court action, the closure order remains in place because Judge McCarthy refused to lift or even to modify it, regardless of the lack of any injury, violation of the ground control plan, violation of any ground control regulations, or imminent danger, all admitted by MSHA.

In federal district court, the mine seeks a permanent injunction to prevent MSHA from issuing withdrawal orders not authorized by the Mine Act. The operator also seeks a court order to compel the Commission to promulgate rules and procedures to speed up its proceedings when an operator requests an expedited hearing after receiving a withdrawal order.



Contact Henry or Brian Hendrix(bhendrix@pattonboggs.com, 202-457-6543) for more information about this important case.

Important Note: This document does not constitute legal advice and counsel should be consulted regarding specific factual situations which will determine the compliance advice applicable to any particular question regarding the subject matter. If you would like additional information or advice and counsel on training, compliance or audits, please let us know.
