



MSHA/OSHA

REPORT

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SAFETY AND HEALTH ENFORCEMENT DEVELOPMENTS

MSHA Update

by [Michael T. Heenan](#)

End of Temporary Reinstatement—That Was Not Temporary

[Margo Lopez](#) and [Denise Giraud](#) in our Mine Safety Practice Group are to be highly congratulated for an extraordinary victory *that favors the entire mining industry*. In *Vulcan Construction Materials v. Federal Mine Safety and Health Review Commission*, the Seventh Circuit Court of Appeals eliminated a grossly unfair burden from Vulcan and many other companies. Ms. Lopez argued the case in February of this year and the decision was issued on October 25, 2012.

The Issue

Under the Federal Mine Safety and Health Act, if an employee is discharged because the employee engaged in protected safety activity, that employee must be reinstated to his or her job with full back pay and benefits. The question is: How long does temporary reinstatement last?

Anyone may initiate a case simply by making a complaint to MSHA, and MSHA must conduct a complete investigation if the complainant has alleged facts that, if ultimately proven to be true, would constitute unlawful discrimination. MSHA's investigation can take months, but there is a provision in the law that provides for a discharged complainant to be *temporarily reinstated* pending a ruling on the claim. This is no small burden for an employer, but a short temporary reinstatement is a lot less burdensome than one that goes on and on.

Historically, it was understood that if, MSHA finds no wrongful discrimination, the temporary reinstatement ends. But that rule changed in recent years. The new ruling issued by the Federal Mine Safety and Health Review Commission (with MSHA's urging) was *that even if MSHA denies the complainant's case*, the complainant must stay reinstated so long as the complainant continues with the case on his or her own.

The reinstatement (actual or economic) thus could last until a *final denial* is issued—and this would be the case no matter how many times the claim is denied. With appeals to the judge,

then the Commission, and ultimately the U.S. Court of Appeals, it can take years for a case to be resolved—all the while with the company having to continue to pay an individual whom the company believes was validly discharged.

Court of Appeals Decision

In a unanimous opinion, the Seventh Circuit has reversed MSHA's and the Federal Mine Safety and Health Review Commission's reading of the law and has held that the Mine Act plainly and unambiguously requires temporary reinstatement to end *when MSHA decides, based on its investigation, that a discrimination case has no merit*, notwithstanding that the employee may continue to litigate the case on his or her own behalf.

The Seventh Circuit went on to state that, *even if it had found that the law was not clear on this matter, it would not have accepted MSHA's position in the case*. In a significant part of the decision, the court discussed legal principles of deference at length, limiting significantly the degree of deference that courts in the Seventh Circuit will accord to administrative agency interpretations of the laws they administer. In this regard, the Seventh Circuit's decision mirrored that of the Sixth Circuit in a case decided earlier this year that also limited the scope of temporary reinstatement and the degree of deference accorded to MSHA's interpretations of the Mine Act.

For Vulcan, the Seventh Circuit decision means that the company can stop paying a complainant whose claim was long ago rejected by the U.S. Department of Labor. For the mining industry overall, it provides enormous relief.

OSHA Update

by **Tressi L. Cordaro**

Wanted: Regulatory Agendas for 2012

Under the Regulatory Flexibility Act, the federal government is required to give notice of significant rulemaking activities by publishing semi-annual regulatory agendas (unified agendas) that describe current and intended activity on federal regulations and standards. Typically, the Office of Information and Regulatory Affairs (OIRA) issues an April regulatory agenda sometime during the summer and an October regulatory agenda sometime in the winter.

No current year regulatory agendas have been published. The only regulatory agenda published in 2012, was for the fall of 2011. And despite promises that an April 2012 regulatory agenda was forthcoming, no agenda was published. This has caught the attention of Republicans in Congress. Senator Rob Portman (R-Ohio) sent a letter to the President in late August stating: "Concerns about bad press in an election year are no excuse for keeping these plans under wraps. With regulatory burdens already hindering job creation, the American people are entitled to know the full magnitude of new Obama Administration regulations coming down the pike."

On November 1, 2012, Congressman John Kline (R-MN), Chairman of the U.S. House Committee on Education and the Workforce, issued a press release stating that he had been informed that the 2012 spring regulatory agenda would not be published and that OIRA was now focusing on publishing the fall regulatory agenda. The Committee has asked for an explanation as to why no spring agenda was published and has further asked for the anticipated date of the fall agenda publication. Additionally, the Committee is seeking information as to exactly what the U.S. Department of Labor submitted for both the spring and fall agendas, along with expected dates for issuance of final rules.

There are roughly 140 federal regulations awaiting final approval at the Office of Management and Budget (OMB). Among them are OSHA's final standards regulating Crystalline Silica, Confined Spaces in Construction, Electrical Power Transmission and Distribution, Electrical Protective Equipment, Beryllium and Food Flavorings Containing Diacetyl and Diacetyl Substitutes. Also, given the importance of the Injury and Illness Prevention (I2P2) standard to Assistant Secretary of Labor for OSHA David Michaels, there is no doubt that employers can anticipate a proposed rule on that topic in the near future.

The MSHA/OSHA Report is not a comprehensive newsletter and does not cover a full spectrum of agency news. Rather, it focuses on one or more selected items of particular interest.