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***Ohio Spring Thaw
Legal Update: Interference Claims
under Section 105(C)***

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Nicholas W. Scala
Partner and Chair, MSHA Practice Group

Nicholas W. Scala

nscala@connmaciel.com • 614.418.6048

Nick Scala is Chair of the national MSHA • Workplace Safety Practice at **Conn Maciel Carey** and a Certified Mine Safety Professional. He focuses on all aspects of mine safety and health law:

- Represents mine operators and independent contractors in inspections, investigations & enforcement actions involving MSHA
- Advises clients in all phases of involvement with MSHA, including guiding companies through contest proceedings before the Federal Mine Safety and Health Review Commission and defending discrimination and interference claims against mine operators.
- Prepares clients for and manages incident, fatality, and special investigations conducted by MSHA, and defends company representatives in section 110 proceedings

Agenda

Section 105(c) of the Mine Act

Discrimination or Interference?

Updates on Interference Cases

Responding to and Avoiding Claims

MSHA Whistleblower Role

- MSHA enforces whistleblower protections under §105(c) of the Mine Act of 1977.
- §105(c) outlines two avenues for MSHA to pursue whistleblower claim:
 1. ***Discrimination***
 - ❖ Discriminating against miners, applicants for employment and miners' representatives; and
 2. ***Interference***
 - ❖ Interfering with the exercise of miners' rights in the future.

MSHA Whistleblower Role

*No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or **otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act...***

MSHA Whistleblower Role

...including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 [30 U.S.C. § 811] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

MSHA Whistleblower Role

A miner has the right to:

- *Refuse to work if the miner has a good faith, reasonable belief that a specific working condition threatens the miner's health or safety.*
- *File or make a complaint under the Mine Act of a hazardous condition or a violation of the safety or health standards to a Federal or State agency, a mine operator, an operator's agent or a miners' representative.*
- *Institute, testify, or assist in any proceeding conducted under the Mine Act.*
- *Have medical evaluations leading to a possible transfer to another job location because of harmful physical agents and toxic substances.*
- *Withdraw from the mine for not having the required safety and health training.*
- *Exercise any statutory rights afforded by the Mine Act.*

MSHA PIB P10-17 (2010)

105(C) Complaint Statute of Limitations

- Whistleblower complaints must be filed within specified statutory time frames which generally begin when the adverse action takes place
 - ❖ The first day of the time period is the day after the alleged discrimination or interference took place.
- The miner, representative, or applicant must sign the complaint and should send the complaint to MSHA within **60 days** of the discriminatory act.
 - ❖ If received after 60 days, complainant is giving the opportunity to explain why the delay took place and MSHA may still investigate the allegations.

What is “Protected Activity”?

Examples of activity protected by 105(c):

- Making a workplace safety complaint to MSHA;
- Participating in an MSHA inspection;
- Complaining to employer of workplace safety concerns/issues;
- Participating in MSHA enforcement action against employer;
- Testifying in a deposition or hearing; and
- Receiving requisite/necessary training or removing oneself from worksite if not trained.

Examples of Adverse Actions

- The following actions have been found to be adverse:

- Discharge
- Demotion
- Failure to Hire
- Failure to promote
- Denial of Pay
- Change in Duties
- Denial of benefits
- Poor evaluation
(depending on facts)

- MSHA guidance also identifies the following:

- Blacklisting
- Harassment
- Hostile work environment
- Making a Threat
- Intimidation
- Denial of overtime
- Lay-off/Failure to recall
- Suspension
- Reducing hours

Discrimination or Interference?

While similar, the two categories are distinct:

Discrimination:

- ✓ Involves miner exercise of protected activity
- ✓ Operator adverse action against miner
- ✓ Adverse action due to exercise of protected activity

Interference:

- ✓ Prohibits or prevents miner ability to exercise protected activity
- ✓ Does not expressly require intent or motive to prevent protected activity (looks at totality of circumstances of result of action by employer)

Interference Legal Test

Currently two tests exists without the Commission codifying one or the other.

➤ *Franks & Hoy Test:*

- ❖ A person's actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights; and
- ❖ The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

❑ *Two miners failed to give identities of employees engaged in potential serious safety violations to company management or MSHA*

Interference Legal Test

➤ *Pepin Test:*

- ✓ The Respondent's actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights
 - ✓ Such actions were motivated by the exercise of protected rights.
 - ✓ If this is established by complainant, operator may defend by demonstrating a “legitimate and substantial reason that outweighs the harm cause to the exercise of protected rights.
- ❑ *A miner filed complaints of safety with MSHA and felt punished for doing so. Felt intimidated and feared for job security after discussion with mine management.*

Interference Cases

Marshall County Coal Company, Et al. v MSHA et al.

- **Status – Petition for Review Denied by US Court of Appeals for DC. Decided by Commission**
- **At issue:** Did mine operator interfere with miner's rights by requiring that all anonymous safety complaints filed with MSHA also be filed with company, to address the items
- **Decision: The ALJ and Commission found this to be interference with the miner's rights against discrimination.**
- **Why is this important?** → Industry thought this was an opportunity for the DC Circuit to outline which test (*Franks & Hoy* or *Pepin*) was the established rule to follow in interference claims

Interference Cases

Greathouse v. Monongalia County Coal Company

- **Status – Appealed to DC Circuit Court of Appeals; voluntarily dismissed after ruling in McGary**
- **At issue:** Did mine operator interfere with miner’s rights by instituting “production and safety” bonus program at six underground coal mine based upon issuance of S&S citations or withdrawal orders, lost time injuries and production pace
- **Decision:** The ALJ and Commission found this to be interference with the miner’s rights against discrimination.
- **Why is this important?** → *Another application of Franks & Hoy test for interference claim which was not struck down or confirmed by FMSHRC or higher court; split decision by FMSHRC*

Interference Cases

McNary v. Alcoa World Alumina, LLC

- **Status – Full Commission affirmed ALJ decision finding no interference (January 22, 2020)**
- **At issue:** Were miner’s rights interfered with when miners rep and mine management had disagreement during emergency response at mine site
- **Decision: FMSHRC affirmed ALJ ruling that miner failed to establish first element of *Franks & Hoy Test***
 - ❖ *A person’s action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights*

Interference Cases

Justice v. Rockwell Mining , LLC

- **Status – Decided by ALJ (Jan. 2020) – FMSHRC Moved to review *sua sponte***
- **At issue:** One claim of discrimination and three claims of interference all dismissed by the ALJ
- **Decision: ALJ dismissed all claims from mine**
 - **Claims involved requiring miner to switch mobile equipment; miner not selected for “vacation time” work crew; interrupting employee while he discussed safety concern with MSHA inspector**
- **Why is this important?** → ALJ applied both *Franks & Hoy* and *Pepin* tests when making decision. FMSHRC addresses lack of specific test in notice of review.

The Federal Mine Safety and Health Review Commission

- As of March 2019, the FMSHRC has a full panel of Commissioners and will until 2020



William I. Althen
Commissioner



**Marco M.
Rajkovich, Jr.**
Chairman



**Arthur R. Traynor,
III**
Commissioner



Mary Lu Jordan
Commissioner



Michael G. Young
Commissioner

Responding to Section 105(c) Whistleblower Complaints



Recommendations for Responding to Investigation

- If complaining worker still employed, ensure no retaliation
- Conduct your own investigation of the claim:
 - ❖ Determine whether it is timely;
 - ❖ Collect documents related to claim;
 - ❖ Interview employees with any knowledge of the claim; and
 - ❖ Record your investigation and findings
- Prepare position statement/response letter to respond to charge of retaliation

Position Statement – Primary Goals

- Give context to the Charging Party’s allegations from the employer’s point of view
 - ❖ Explains employer’s actions in the context of the relevant law
- Tell a story that is easy for the investigator to follow:
 - ❖ Provide documentation/exhibits to support position statement and refute Charging Party’s “Facts”
 - ❖ Demonstrate that the employer takes the allegations seriously
 - ❖ Establish trust with Agency
 - ❖ Persuade agency to dismiss the complaint



Position Statement – Statement of Facts

Provide background on the parties

- ⑩ Type of business and details of relevant establishment
- ⑩ Applicable policies and procedures (quote them)
- ⑩ Job and Job duties of Charging Party

Describe context for basis of charge

- ⑩ Introduce key players/decision makers involved
- ⑩ Discuss issues with employee's performance
- ⑩ Explain reasons for any disciplinary/adverse action
- ⑩ Explain in a manner to show action was lawful

Position Statement – Legal Analysis

- This is the crux of the position statement because investigator will use to determine if charge should proceed
- Clearly lay out how charging party has failed to meet legal burden
- Examples:
 - ❖ Employer has established legitimate reason for adverse action and employee cannot show pretext
 - ❖ Employee cannot establish causal connection between protected action and adverse action
 - ❖ Employee's activity was not protected by the applicable law

Position Statement – Supporting Documentation

- Employers should provide supporting documentation as attachments to the position statement as evidence of its contentions
- For Example:
 - ❖ Copies of policies/procedures
 - ❖ Write-ups and disciplinary notices
 - ❖ Employment evaluations
 - ❖ Affidavits of supervisors/employees
- **HOWEVER**, carefully consider what documentation to provide because may be disclosed to opposing party



Recommendations to Avoid Interference Claims



Train, Train, Train

- Direct supervisors and managers must be trained on retaliation and how to manage protected employees
- Specifically, management should receive instruction on:
 - ❖ How to respond to complaints;
 - ❖ Types of actions that are likely considered adverse;
 - ❖ Perception of retaliation – proximity in time;
 - ❖ Effectively communicating a legitimate, but adverse employment action; and
 - ❖ Documenting a legitimate response to employee conduct



Develop and Maintain Documentation

Prior to and at the time of adverse action, essential to document every step

- ⑩ Maintain clear, written documentation of all disciplinary action
- ⑩ Detail decision-making process for action in accordance with company policies/procedures
- ⑩ Document all training and instruction provided on applicable policies and procedures

Conduct an investigation of any complaint of retaliation and document process

- ⑩ Keep notes of employee interviews;
- ⑩ Record reason(s) for determination of outcome;
- ⑩ Provide written certification of any follow-up actions pursuant to outcome; and
- ⑩ Apprise complainant of findings and resolution(s)

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MSHA Part 50 and Training Recordkeeping Requirements

Tuesday, September 22nd

Attorney-Client Privileged Audits and Investigations

Tuesday, July 21st

MSHA and FMSHRC Mid-Year Update

Thursday, December 12th

Legal Responsibilities and Liabilities with Contractors at a Mine



Contact Information

Nick Scala

Chair, MSHA • Workplace Safety Group

Conn Maciel Carey LLP

Washington, D.C.

Columbus, OH

614.418.6048

nscala@connmaciel.com

@MSHA_Guy (Twitter)