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ENVIRONMENTAL

Hackney, Inc. v. McLaughlin, 895 F.2d 1298

Author: Judge McKay

Defendant, Hackney, Inc. (“Hackney”), appealed a decision and order of the Occupational Safety and Health Review Commission (the “Commission”) which held that Hackney committed “nonserious” violations of the Occupational Safety and Health Act of 1970. The enforcement action and subsequent Commission order arose out of an inspection by the Occupational Safety and Health Administration (“OSHA”) of a workplace operated by Hackney. On appeal, Hackney argued that: (1) the search warrant for the inspection was unconstitutional; and (2) the “nonserious” violations should have been designated as *de minimus*.

First, the Tenth Circuit found that Hackney’s challenge to the constitutionality of the search warrant was based on the neutrality of OSHA’s inspection plan as applied. Hackney sought discovery of facts concerning the plan in order to prove it was not neutral as applied. The court restricted Hackney’s challenge based on the “four corners doctrine” which limits challenges to the validity of search warrants to review of materials submitted to the magistrate. Because the court found no evidence meeting the “four corners doctrine,” it affirmed the Commission’s order precluding discovery. Furthermore, the court found that because Hackney did not make a preliminary showing of discriminatory application of OSHA’s inspection plan, the Commission’s denial of discovery or an evidentiary hearing directed toward an attack on the search warrant was also proper. Finally, the court held that substantial evidence supported the Commission’s determination that the violations were “nonserious” rather than *de minimus*.

Colorado v. Idarado Mining Co., 916 F.2d 1486

Author: Judge Baldock

Defendants, Idarado Mining Company (“Idarado”), Newmont Mining Corporation, and Newmont Services Ltd. (“Newmont”), appealed a mandatory injunction issued under CERCLA. This injunction required them to carry out an extensive cleanup plan created by the State of Colorado (“State”) including liability for permanent relocation of trailer park residents, and for cleanup of both Red Mountain Creek and certain mine portals. Idarado and Newmont also appealed the district court’s finding that Newmont was an owner and operator of Idarado’s facilities, and that the State’s plan was not inconsistent with the national contingency plan (“NCP”).

The Tenth Circuit decided, for reasons of judicial efficiency and lack of finality, that only two issues were ripe for appeal: (1) whether

the State could seek an injunction to enforce its plan under CERCLA; and (2) whether CERCLA empowers the State to impose relocation expenses upon responsible parties. The court held that the 1986 SARA amendments to CERCLA do not empower the states to seek such injunctive relief against responsible parties. The court explained that such a holding would amount to a grant of judicial legislation which is inconsistent with § 106 of CERCLA, and with the statute as a whole. The court further held that although the federal government is so empowered under CERCLA, the statute does not empower the states to impose liability for permanent relocation.

Village of Los Ranchos de Albuquerque v. King, 906 F.2d 1477

Author: Judge Ebel

Plaintiff, Village of Los Ranchos de Albuquerque (the "Village"), brought suit against certain officials in the federal highway administration ("FHWA"), the city of Albuquerque, and the county of Bernalillo. The Village brought suit when two bridges were proposed to be built. The Village was concerned with the effects that the projects would have on the environment of their community. The district court granted summary judgment in favor of the defendants, and the Village appealed on four grounds: (1) the construction of the Montano bridge was a major federal action subject to the requirements of the National Environmental Policy Act ("NEPA"); (2) alternatively, the bridge construction was improperly segmented from another major federal action; (3) the construction of the bridge required compliance with § 106 of the National Historic Preservation Act ("NHPA"); and (4) the construction of the bridge required compliance with § 4(f) of the Department of Transportation Act ("DTA").

The Tenth Circuit affirmed the decision of the district court. The court first ruled that the construction of the Montano bridge was not a major federal action subject to the requirements of NEPA. The court reasoned that there was not sufficient participation on the part of the federal government for the project to become a major federal action. Thus, requirements of the NEPA did not apply. Second, the court ruled that the bridge project and the neighboring major federal action were only peripherally related and, therefore, properly segmented. Finally, the court found that the NHPA and the DTA only applied to federal actions. Since the bridge project was not a federal action, the court found the statutes inapplicable to the bridge project.

EVIDENCE

Dugan v. EMS Helicopters, Inc., 915 F.2d 1428
Per Curiam

Defendant, EMS Helicopter, Incorporated (“EMS”) and Zimmer, appealed jury verdicts in favor of plaintiff, Dugan, for compensatory and punitive damages arising out of a fatal helicopter crash. On appeal, EMS asserted: (1) there was insufficient evidence to submit to the jury the issues of Zimmer’s liability and punitive damages against EMS; and (2) the district court erred in not admitting into evidence a complaint Dugan filed against different defendants which arose out of the same crash.

First, the Tenth Circuit affirmed the district court’s denial of a motion for directed verdict on the issues of Zimmer’s liability and punitive damages against EMS. The court explained that the situation presented a classic example of a jury determination based on sharply disputed evidence. Accordingly, the jury’s conclusion was not disturbed on appeal. Moreover, there was sufficient evidence of gross misconduct to present the issue of punitive damages to the jury. Second, the court held that the district court erred in not admitting the complaint which Dugan filed against different defendants. Because the complaint alleged facts which were directly inconsistent with positions Dugan argued at trial, the complaint was admissible as an admission against interest pursuant to Fed. R. Evid. 801(d)(2). This conclusion, however, did not end the court’s analysis. The court stated that the ultimate decision whether to admit or exclude the ancillary complaint requires balancing under Fed. R. Evid. 403. Using this balancing analysis the court stated that the district court’s failure to allow the complaint’s introduction was reversible error. The court explained the complaint was: (1) highly relevant to the allocation of fault; (2) directly relevant to the issue of punitive damages; and (3) relevant for impeachment. The case was, therefore, reversed and remanded to the district court for a new trial.

United States v. Hill, 901 F.2d 880
Author: Judge Tacha

Defendant, Hill, was convicted on several counts of possession and distribution of cocaine. In his joint trial with co-defendant, Lux, the district court permitted the government to testify about statements made by Lux prior to trial which incriminated Hill as a drug dealer. Hill appealed, arguing the district court erred by admitting the hearsay statements of his nontestifying co-defendant.

The Tenth Circuit held that the admission of the co-defendant’s prior statements incriminating Hill as a drug dealer violated his sixth amendment right to confront his accuser. The court reasoned that Hill could not exercise his right to cross-examination where the accuser was

a co-defendant who refused to testify at trial. The error required reversal unless the admission was harmless beyond a reasonable doubt. Here, the government's other evidence against Hill, while substantial, was not so overwhelming that the co-defendant's statements regarding Hill's drug trafficking did not have a probable impact on the jury.

Huffman v. Caterpillar Tractor Co., 908 F.2d 1470

Per Curiam

Defendant, Caterpillar Tractor Company ("Caterpillar"), petitioned for rehearing and suggestion of rehearing *en banc*. Caterpillar argued that the district court erred when it allowed into evidence remedial actions previously taken by Caterpillar. In particular, Caterpillar alleged that the district court violated Fed. R. Evid. 407 ("Rule 407"), which prohibits admission of subsequent remedial measures.

The Tenth Circuit denied the request for a hearing *en banc*, explaining that no new reason for reconsideration was presented. The court stated that the remedial action taken by Caterpillar was not a subsequent measure after the accident in question, but rather, was chronologically undisputed as having taken place prior to the accident. The court explained that pursuant to Rule 407, evidence of subsequent remedial measures is inadmissible if they occur after the accident or injury, not after the time of manufacture of the product or creation of the hazard. In the case at hand, the court stated that Caterpillar's change in product design occurred before the accident involving Huffman, regardless of whether the measure occurred when design work began or when it was first implemented.

United States v. Ryans, 903 F.2d 731

Author: Chief Judge Holloway

Defendant, Ryans, moved to suppress evidence of tape recordings which were played in his criminal proceeding. Ryans stated that the recordings contained statements made to a government informant after he retained counsel. Consequently, Ryans argued that the government violated the Code of Professional Responsibility, Rule 7(104)(A)(1), by improperly causing an informant to communicate with him after retention of counsel. The district court granted Ryans's motion, and the government appealed.

The Tenth Circuit reversed, ruling that Rule 7 was inapplicable to the investigative phase of law enforcement. In contemplating an adversarial relationship between litigants, the rule's proscriptions do not attach during the investigative process, and before the initiation of criminal proceedings. Since Ryans had not yet been indicted at the time the tapes were made, Rule 7 was not violated.