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OSHA Issues New Enforcement Procedures for Reported Injuries/Fatalities By: Gary Visscher, Esq.

In September 2014, the Occupational Safety and Health Administration (“OSHA”) issued a Final Rule that changed employers’ duty to report serious injuries to OSHA. Under the former rule, employers were required to report (within 8 hours of the event) work-related fatalities and events resulting in the hospitalization of 3 or more workers. Under the new rule, which became effective on January 1, 2015, employers must report any work-related fatality within 8 hours, and any hospitalization, amputation, or loss of an eye within 24 hours. The incident is reportable to OSHA if hospitalization occurs within 24 hours of the event causing the hospitalization.

The employer must file a report of any of these incidents to OSHA, either by calling the OSHA 800 number (800-321-6742), or by contacting the OSHA area office. (OSHA is also working on an online reporting form, but it is not yet in operation.) Deaths or hospitalizations that occur in “state plan states” are reported to the state OSHA agency. State plan states have until January 1, 2016 to adopt and put the new requirements into effect. Some states have already done so and others are in the process.

One of the issues raised when OSHA issued the new reporting requirements was whether OSHA would be able to respond to the increased number of injury reports under the new rule. OSHA estimated that the new rule would result in approximately 117,000 reports being

filed with OSHA or the state agencies each year. (By comparison, federal OSHA conducts about 35,000 inspections per year and combined state and federal inspections have been between 75,000 and 80,000 per year.)

In response, OSHA said that it did not anticipate launching an inspection or investigation with each report, but would respond in other ways to some or many of the reports. What that means more precisely was made clearer in “Interim Enforcement Procedures” which the Director of Enforcement Programs sent to the OSHA field offices in December, 2014. The memo was recently reported in the press, though OSHA did not post the memo on its website.

OSHA’s reporting rule (29 C.F.R. 1904.39) requires that the employer provide only limited information to OSHA when reporting a fatality or hospitalization – the company name, location of incident, time of incident, number of persons involved, names of injured workers, contact person and phone number, and a brief description of the incident.

Under the new “Interim Procedures,” the OSHA Area Office, either in the initial phone call or in a follow up call, will ask the employer (or the employer’s agent) for additional information, using a questionnaire that is included in the Interim Procedures.

The questionnaire includes some potentially concerning questions, and employers should be careful in how they respond. For example, the questionnaire asks the employer to describe in some detail what caused the accident or injury, and whether “something like this has,

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Interim Procedures, Con't

almost happened?"

Based on the information gathered from the employer and OSHA's records, the area office will designate the report for one of three categories of response:

- Category 1 includes fatalities, hospitalizations of two or more employees, any injury involving a worker under 18, same or similar events in previous 12 months, worksites or employers with a history of repeat, willful, egregious, or failure to abate citations, worksites or employers covered by a national or local emphasis program or OSHA's Severe Violator Enforcement Program (SVEP), or imminent danger. Category 1 reports automatically trigger an inspection.
- Category 2 reports may trigger an on-site inspection. The Interim Procedures include several criteria that the Area Director should use in deciding whether "employees are still being exposed" to the hazard, were "temporary workers or other vulnerable populations injured or made ill," "does the employer have a prior OSHA inspection history," and "is there a whistleblower complaint/inspection pending."
- Category 3 is for reports that the Area Director determines, on the basis of the questions under Category 2, that an inspection is not warranted. For those reports, OSHA says it will generally follow the "phone/fax" procedures that OSHA currently uses for responding to certain employee complaints. The Interim Procedures refer to these procedures as "Rapid Response Investigation," or "RRI."

The Interim Procedures mean that OSHA Area Offices, in particular, will likely see a significant increase in workload. The Area Offices must contact and interview each employer who files a report, and enter the information into a separate database. The Area Offices are also responsible for conducting additional inspections, and implementing "RRI" for those worksites that are not inspected. OSHA's most recent budget submission to Congress, for the fiscal year beginning October 1, 2015, requests an additional \$6.7 million and 40 FTE (full-time equivalent employees) to "manage workload resulting from" the new reporting requirements.

Whether Congress will agree to that request remains to be seen. If the additional funding is not

provided, OSHA will need to decide how to balance additional inspections and investigations from injury reports with other inspection priorities. For employers, the Interim Procedures raise a number of cautions.

For one, the Interim Procedures reinforce the caution that employers should be careful not to "over report" injuries. Even though not every report will result in an inspection (unless the incident or the employer falls under Category 1), any report may result in an inspection. In that regard, it should be remembered that under the rule, "hospitalization" is defined as an "in-patient" admission; it does not include emergency room treatment or "observation" at a hospital without formal admission.

Similarly, in December OSHA issued a Standard Interpretation letter on the definition of "amputation" in the reporting rule. The letter reiterates that under the rule "amputations do not include avulsions, enucleations, degloving, scalping, severed ears or broken or chipped teeth." The letter also states that whether an incident involves an "amputation" or an "avulsion" depends on a health care professional's diagnosis. Thus it is important that the health care professional's diagnosis accurately reflects the nature of the injury.

In addition, employers should be careful in responding to questions about the incident. In addition to the questions that the Area Office is directed to ask the employer in determining which "response category" the incident should fall under, the Interim Procedures also include a form referred to as a "Non-Mandatory Investigative Tool" which the Area Office will send to employers not designated for an inspection. The questionnaire is intended to help the employer conduct a thorough incident investigation; however the questionnaire asks for such information as "what caused or allowed the incident to happen," and "if there were safety procedures not being followed, why were they not being followed?"

Employers are not required to provide information beyond the information listed above that is required by the rule. However, employers should respond to OSHA's request for information about the incident; the Interim Procedures state that failure to respond to OSHA's request for information may result in the *(Con't on pg 9)*.

High Court Establishes Agencies' Leeway in Reinterpreting Regulatory Rules Without Notice or Comment

By: Amged M. Soliman, Esq.

The Administrative Procedures Act (APA) established the procedures federal administrative agencies must use for rule making. In doing so, the APA made a distinction between two different types of rules: 1) legislative rules which are issued through notice-and-comment rulemaking with the force and effect of law; and 2) interpretive rules that advise the public of an agency's construction of its rules (with no notice-and-comment or force and effect of law). On March 9th, in *Perez v. Mortgage Bankers Association*, the U.S. Supreme Court found that under the APA, an agency can alter an established and widely understood interpretation of a given rule without notice or an opportunity for comment.

The Mortgage Bankers Association took issue with the fact that the Department of Labor's (DOL) Wage and Hour Division (WHD) had changed its interpretation regarding whether mortgage-loan officers qualified for an administrative exemption to overtime pay requirements under the Fair Labor Standards Act (FLSA). In essence declaring whether or not companies were responsible for paying said officers more money for working longer than 40 hours per week. Initially, in 1999 and again in 2001, the WHD issued letters stating that mortgage-loan officers did not qualify for the administrative exemption. In 2004 the DOL issued new regulations regarding the exemption and in 2006 the WHD issued a new opinion letter indicating that those loan officers did fall within the exemption. In 2010, the WHD said loan-officers did not qualify for the exemption (without notice-and-comment procedures). Challengers of the Agency's ability to pull such substantive 180 degree position changes without notice-and-comment argue that such unilateral changes are arbitrary and capricious, and alter prior policies that stakeholders relied upon.

The Court noted that interpreting a rule is not the same as amending a rule on the part of an agency, and that the APA clearly states that unless notice of a hearing is required by a specific statute, the Act's notice-and-comment requirement does not apply to interpretive rules. The Court noted that in drafting the APA with such considerable leeway for agencies' interpretations, Congress allowed a variety of constraints on agency decision-making, including requiring an agency to provide substantial justification when its new policy rests upon factual findings that

contradict those which motivated its prior policy, or when its prior policy has produced serious stakeholder reliance. Some statutes, such as the FLSA, contain language that protects regulated entities from liability when they act, in good faith, with prior agency interpretations. Ultimately, regulated entities should familiarize themselves with the interpretations that affect their industry.

West Virginia's Creating Coal Jobs and Safety Act of 2015

By: Ryan Horka, J.D. (May 2015)

On March 12, 2015, West Virginia Governor Earl Ray Tomblin signed the Coal Jobs and Safety Act of 2015 into law. The Act bolsters the drug testing program within West Virginia's coal industry, brings consistency to regulatory oversight by syncing state reclamation rules with federal laws, adjusts the aluminum water quality standard to reflect the latest science and better protect the environment, and places oversight of underground diesel equipment in the hands of experienced state mine safety regulators. However, opponents of the Act argue that it actually takes away from and causes a "roll back" in safety standards.

Many of those opposed to the Act, point to the rules related to the movement of underground equipment as a major issue. Specifically, one of the provisions allows for the movement of some coal mining equipment without the removal of coal miners from the mine. Supporters of this provision point out that with today's technology, where equipment is moved every hour of every day, it is unnecessary and inefficient to remove miners every time that a certain piece of equipment is moved. In contrast, opponents point to the disasters at Upper Big Branch, Sago, and Aracoma, and ask whether mine safety regulations, regardless of the state of technology, should be "rolled back." Only time will tell the full effect of the new provisions. However, Governor Tomblin, in signing the Act into law, directed the Board of Coal Mine Health and Safety to adopt rules related to the movement of underground equipment.

Governor Tomblin urged the Board to collaborate in the development of regulations to ensure the safety of coal miners, while allowing for more operator flexibility to increase production and compete long-term. As the coal industry faces economic challenges, opponents doubt that the Act's economic goals, nor the safety goals, will be realized through this law.

Beyond Compliance: Building a Safety Culture Builds Your Business

By: Sarah Korwan, Esq.

The Occupational Safety & Health Administration (OSHA) estimates that employers pay almost \$1 billion per week for direct worker's compensation costs as a result of injuries realized in the workplace. Unfortunately, the costs of major incidents go beyond the hard dollars, and do not account for intangible losses such as a company's reputation, employee morale or competitive edge. For obvious reasons, safer companies tend to be more appealing to potential clients and to insurers.

In 1988, the term "safety culture" was coined when it was first used in a report from the International Nuclear Safety Advisory Group, which defined it as, "an organizational (sic) atmosphere where safety and health is understood to be, and is accepted as, the number one priority."¹ Since then, the concept has continued to evolve.

The International Environmental Corporation clearly has an integrated safety culture. The Oklahoma City manufacturing operation recently announced it had reached 1 million consecutive man-hours of operation without a lost-time injury – an achievement which took nearly two years. According to Dennis Kloster, president of IEC, safety truly begins at the top and is not simply a cliché, as the safety messages are infused into every aspect of the organization.

The first step in a meaningful safety culture is to embrace and promote a safety philosophy throughout the organization. This means defining the company mission, which includes a safety culture. The ultimate goal of an authentic safety culture is an injury free work place. This is achieved when the safety culture is a way of everyday life and not just a slogan.

To fulfill the safety culture mission, communication and education are keys to success. It's been my observation that organizations with a safety culture show a genuine concern for employee wellbeing, and this is reflected in all levels and departments of the organization. Further, a commitment by all employees to an ongoing "safety state of mind" on a daily basis is critical to a fully realized safety culture. Equally, when employees are reminded, on an ongoing basis, of the impact that an injury can have on their home life and personal relationships they will be more likely to work safely and avoid risks that could result in accidents.

As part of instilling values in employees, a successful program would include weekly safety topic taught by shift or section foremen, as well as safety briefings at monthly company-wide meetings. Building a safer workplace and industry, requires constant effort and continual improvement, but the result is well worth the investment of time, resources and money.

Creating an effective safety culture is an ongoing process and is a large commitment on behalf of the entire company, however, the effort results in a positive attitude toward safety and a reduction in accidents and incidents, which will foster better business and increase the bottom line. Here are a few tips from OSHA to consider when building a strong safety culture at your organization:

1. *Define safety responsibilities:* For each level within your organization, this should include policies, goals and plans for the safety culture.
2. *Obtain top management "buy-in":* Everyone should be on board when establishing goals and objectives for their safety culture.
3. *Enforce accountability:* A process that holds everyone accountable for being visibly involved, especially managers and supervisors will lead to positive change.
4. *Conduct self-assessments or audits:* Regular self-audit mechanisms can and should be used to evaluate your site processes with other recognized models of excellence.
5. *Develop awareness training and kickoff:* Site-wide knowledge and involvement is critical to a successful culture. Consider creating a company safety slogan or phrase and seek buy-in for new procedures and programs.
6. *Celebrate success:* Make your efforts public to keep everyone motivated and updated.

Creating a safety culture is not an overnight task, but the benefits are enormous. A company with a strong safety culture typically experiences fewer at-risk behaviors, consequently they also experience low accident rates, low turn-over, low absenteeism, and high productivity. These are usually companies who are extremely successful in excelling in all aspects of business.² For assistance with developing or improving your safety program, contact the Law Office.

¹ The International Nuclear Safety Advisory Group (INSAG) is an advisory group to the Director General of the International Atomic Energy Agency.

² Occupational Safety & Health Administration website, "Creating a Safety Culture".

Silica Exposure – NIOSH Issues Best Practices to Control Exposure in Asphalt Milling Industry

By: Diana R. Schroeder, Esq.

The Silica/Asphalt Milling Machine Partnership recently issued guidelines for control of crystalline silica dust for highway construction workers who may be exposed to dust while engaged in paving and other asphalt milling tasks. The Partnership was formed in 2003, and is coordinated by the National Asphalt Paving Association (NAPA). The Partnership also includes national and international manufacturers of heavy construction equipment for the U.S. asphalt paving market, numerous paving contractors, several labor organizations, and government organizations including the National Institute for Occupational Safety and Health (NIOSH), the Occupational Safety and Health Administration (OSHA), and the Federal Highway Administration.

The Partnership was formed for the purpose of identifying engineering controls that could be used to reduce silica exposure. Inhalation of respirable crystalline silica has potentially adverse health effects, including debilitating and potentially fatal lung diseases. Following 10 years of collaborative research, including extensive field and laboratory studies, the Partnership (through NIOSH) issued the “Best Practice Engineering Control Guidelines to Control Worker Exposure to Respirable Crystalline Silica During Asphalt Pavement Milling.” See [CDC](#).

OSHA defines Respirable crystalline silica as “very small particles at least 100 times smaller than ordinary sand you might encounter on beaches and playgrounds – it is created during work operations involving stone, rock, concrete, brick, block, mortar, and industrial sand. Exposures to respirable crystalline silica can occur when cutting, sawing, grinding, drilling, and crushing these materials. These exposures are common in brick, concrete, and pottery manufacturing operations, as well as during operations using industrial sand products, such as in foundries, sand blasting, and hydraulic fracturing (fracking) operations in the oil and gas industry.” See [OSHA](#).

According to NIOSH, there are approximately 367,000 highway and bridge construction workers who may be exposed to crystalline silica through use of various machinery used to remove and recycle asphalt pavement, including cold-milling machines with rotating cutters to remove and grind the pavement.

Disturbance of the asphalt creates dust and the potential for exposure. The NIOSH guidelines conclude that use of water-spray in conjunction with ventilation controls are considered to be the best practice approach to controlling asphalt pavement milling dust. Use of these controls can consistently reduce exposure below the NIOSH Recommended Exposure Limit (REL) and the proposed OSHA Permissible Exposure Limit (PEL). The following controls were among those identified as effective methods of reducing worker exposure:

- Placement of ventilation controls on all new asphalt milling machines at manufacture;
- Maximizing cover around the cutter drum and conveyor belts of milling machines;
- Designing an outlet that releases dust at high speed away from the worker on machines without dust collectors; and
- Water sprays that prevent or suppress dust on milling machines if ventilation dust controls are not available.

In addition to the comprehensive NIOSH “Best Practices” document, the Center for Construction Research and Training (CPWR), NIOSH and NAPA issued a brief “Field Guide for Controlling Silica Dust Exposure on Asphalt Pavement Milling Machines.” See [Field Guide](#).

The NIOSH Best Practices document provides a comprehensive background, case studies, recommendations, and resources for implementation of controls; the Field Guide provides a helpful introductory overview. Although OSHA’s rulemaking is still in the proposal stage, the rule proposes a new permissible exposure limit, calculated as an 8-hour time-weighted average, of 50 micrograms of respirable crystalline silica per cubic meter of air (50 µg/m³). This is half of the current OSHA PEL for general industry, a rule dating back to 1971. OSHA also proposes other provisions for employee protection such as preferred methods for controlling exposure, respiratory protection, medical surveillance, hazard communication, and recordkeeping. OSHA has estimated that the proposed rule would save nearly 700 lives per year and prevent 1,600 new cases of silicosis per year.

Watch for the updates on this important rulemaking in upcoming newsletter issues.

MSHA's New "Rules to Live By" Calculator For Heightened Enforcement

By: Tina M. Stanczewski, Esq., MSP

On March 15, 2010, the Mine Safety and Health Administration ("MSHA") initiated Rules to Live By ("RTLB"), an outreach and enforcement program targeting those standards most commonly occurring with fatalities. To date, RTLB targets 19 metal/non-metal ("M/NM") standards and 38 coal standards through three phases. Phase I, called Fatality Prevention targeted 24 standards (11 from coal and 13 from M/NM); Phase II, called Preventing Catastrophic Accidents targeted nine standards cited during major disasters from 2001 to 2011 that contributed to 5 or more fatalities, and the most recent RTLB, Phase III, called Preventing Common Mining Deaths targeted 14 standards, (eight in coal and six for M/NM).

MSHA deemed the standards within these phases as contributing to the root cause of fatalities. With 62 coal and M/NM fatalities between January 1, 2014 and March 31, 2015, fatality prevention is a critical issue. As a result, MSHA has recently deployed a web tool to allow operators and the public to track a mine's RTLB violations and compare the mine's activity to the national average for RTLB violations. The tool is similar to the Pattern of Violation ("POV") tool. It is yet another indicator MSHA is using to assess a mine's safety, for better or worse, and – like POV -- focuses on "issued" citations/orders (alleged violations), rather than on finally adjudicated or paid (admitted) violations (which are used for MSHA VPID and RPID rates to compute subsequent penalties).

MSHA's goal is to educate operators on what they consider to be the root cause of these fatalities and reduce future fatalities. Through the web tool, MSHA hopes operators will self-audit and use the data for additional training and/or prevention. Joseph A. Main, Assistant Secretary of Labor for MSHA summarized the Agency's position under Phase III: "The goal of this phase of 'Rules to Live By' is to reduce numbers of deaths and injuries from the targeted standards by having mine operators identify and correct all hazardous conditions, direct MSHA enforcement toward confirming that violations related to these conditions are not present at mines, and ensure miners are better trained to recognize and avoid these particular hazards."

MSHA launched the RTLB calculator with a demonstration given to Stakeholders on February 25, 2015. The calculator is available at the MSHA website:

See [Calculator](#). The tool permits users to enter the mine ID and a date range (or use the default range) to calculate the mine's total RTLB violations as a percentage. You will be given the total number of RTLB violations and a list of the individual standards violated. This percentage is determined based on the RTLB violations and total inspection hours during the period.

For underground mines, the period is the last inspection quarter and for surface mines it is the previous six months. The tool also compares the mine's violations to the national average. A green code indicates the mine's RTLB violations are below the national average and a red code indicates the RTLB violations are above the national average. Those mines above the average may face additional spot and impact inspections, to supplement the mandatory "two's and four's."

The RTLB calculator is reflective of heightened enforcement due to the increase in fatalities. In 2011, there were very few mining deaths: the second lowest total number on record. However, since fall of 2013 there has been a surge. In a letter to M/NM Stakeholders concerning the recent rise in fatalities, Joe Main, stated "Many of these deaths involved deficiencies that should be part of any safety and health plan, such as daily and effective workplace exams to find and fix hazards; training, in particular task training for miners and supervisors performing work; providing and using personal protective equipment (seat belts, life vests, fall protection); de-energizing and lock out/tag out procedures; and pre-operational equipment checks followed by prompt management action to address deficiencies. These are safety fundamentals, which if done and done correctly will save lives." This is why RTLB is here and the calculator has been developed.

Phase I RTLB focused on nine accident categories including: falls from elevation, falls of roof and rib, operating mobile equipment (surface and underground), maintenance, lock and tag out, struck by mobile equipment (surface and underground), and blocking against motion. Phase II RTLB focused on coal disasters and standards under the following accident categories: mining methods, explosions, aftermath of a fire, and exams. No M/NM standards were targeted. Phase III RTLB focused on items such as task training and examinations.

To date, nineteen standards have been designated

“Rules to Live By “Calculator, Con’t.

as Rules to Live By for M/NM mines from Rules to Live By I (Fatality Prevention) and III (Preventing Common Mining Deaths). These include:

- § 46.7(a) – New task training,
- § 56.3130 – Wall, bank and slope stability,
- § 56.3200 – Correction of hazardous conditions,
- § 56.9101 – Operating speeds and control of equipment,
- § 56.12017 – Work on power circuits,
- § 56.14100(b) – Safety defects; examination, correction and records,
- § 56.14101(a) – Brake performance,
- § 56.14105 – Procedures during repairs or maintenance,
- § 56.14130(g) – Seat belts shall be worn by equipment operators,
- § 56.14131(a) – Seat belts shall be provided and worn in haul trucks,
- § 56.14205 – Machinery, equipment and tools used beyond design,
- § 56.14207 – Parking procedures for unattended equipment,
- § 56.15005 – Safety belts and lines,
- § 56.15020 – Life jackets and belts,
- § 56.16002(c) – Bins, hoppers, silos, tanks and surge piles,
- § 56.16009 – Staying clear of suspended loads,
- § 56.20011 – Barricades and warning signs,
- § 57.3360 – Ground support use, and
- § 57.14100(b) – Safety defects; examination, correction and records.

The coal standards covered by the RTLB campaign and calculator in all three phases of the program are:

- § 75.202 Roof, face, and ribs support,
- § 75.220(a)(1) Develop and follow approved roof control plan,
- § 75.511 No electrical work shall be performed on energized low, medium, or high-voltage distribution circuits or equipment,
- § 75.1403-10(i) Maintenance of off-track haulage roadways,
- § 75.1725(a) Equipment shall be maintained in safe operating condition or, removed from service,
- § 75.1725(c) No repairs until power off and blocked
- § 77.404(c) No repairs or maintenance shall be performed until the power is off and machinery is blocked,
- § 77.1607(g) All persons shall be clear before starting or moving equipment,
- § 77.1607(n) Mobile equipment shall not be left unattended unless brakes are set, chocked,
- § 77.1710(g) Safety belts and lines shall be used where there is a danger of falling,
- § 77.1710(i) Seatbelts shall be worn in a vehicle where there is a danger of overturning and where roll protection is provided,
- § 75.203(a) The method of mining shall not expose any person to hazards caused by excessive widths of rooms, crosscuts and entries, or faulty pillar recovery methods,
- § 75.223(a) Revisions of the roof control plan shall be proposed by the operator when conditions indicate that the plan is not suitable,
- § 75.333(h) All ventilation controls, including seals, shall be maintained to serve the purpose for which they were built,
- § 75.337(f) Welding, cutting, and soldering with an arc or flame are prohibited within 150 feet of a seal,
- § 75.360(a)(1) A certified person must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work underground,
- § 75.360(b)(3) Preshift examinations shall include the working places, approaches to worked-out areas and ventilation controls on these sections. The examination shall include tests of the roof, face and rib conditions on these sections and in these areas,
- § 75.370(a)(1) The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine,
- § 75.1504(a) Each miner shall participate in a mine emergency evacuation training and drill once each quarter,
- § 75.1505(b) All maps shall be kept up-to-date and any changes shall be shown on the maps by the end of the shift on which the change is made,
- § 75.362(a)(1) - On-shift examination,
- § 77.404(a) - Machinery and equipment; operation and maintenance,
- § 77.405(b) - Performing work from a raised position; safeguards,
- § 77.1000 - Highwalls, pits and spoil banks; plans
- § 77.1605(b) - Loading and haulage equipment; installations,

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- §77.1606(a) - Loading and haulage equipment; inspection and maintenance,
- §77.1607(b) - Loading and haulage equipment; operation, and §77.1713(a) - Daily inspection of surface coal mine; certified person; reports of inspection.

In MSHA’s view, operators are on notice about these standards, which may increase the negligence level for citations/orders issued under each of the designated rules. Each mine should review the RTLB and ensure that management is aware of these targeted standards. Inspectors will be looking for violations related to these standards, therefore heightened scrutiny of the mine will occur. Inspections will also focus on standards similar or related to the RTLB standards. MSHA has provided inspectors with specific training related to these standards and the fatalities that have occurred from them (according to MSHA).

This year, MSHA has reassigned coal inspectors to M/NM mines to further completion of the mandatory inspections, and has implemented a walk and talk program which will be categorized as an E17 Special Emphasis Program where inspectors will visit the mine to examine but also to educate. Observations will most likely be conveyed to the field office and further inspections may occur.

Operators should be proactive to avoid issuances, but also be guarded about receiving unwarrantable violations. If a mine receives a citation under an RTLB standard, it is likely the issuance will be cited harsher than normal. Operators could see S&S, fatal, high negligence and a special assessment. With the increase in fatalities, operators should expect additional inspections, citations, and increased penalties for citations falling into the RTLB category or ones that are deemed to reflect a pattern in recent accidents and fatalities.

Together with the POV web tool, operators may track their susceptibility to heightened enforcement efforts. The key to avoiding heightened scrutiny is to ensure proper training, including refresher, conduct thorough and targeted workplace examinations, and ensure every employee reports safety hazards immediately. As MSHA works to decrease fatalities, operators must deal with RTLB, which appears to be a long-term enforcement campaign. For more information or assistance, call the Law Office.

ACCSH Considers Draft Changes to OSHA’s Crane Standard By: Adele L. Abrams, Esq., CMSP

On March 31 – April 1, 2015, the Advisory Committee on Construction Safety and Health (ACCSH) met in Washington, DC, to review a draft proposed rule circulated by OSHA to modify its construction crane standard in several ways. They also heard public testimony from more than 20 witnesses representing a variety of construction groups, unions, individual companies, and the Coalition for Crane Operator Safety (CCOS).

The current crane rule, adopted in August 2010 through the negotiated rulemaking process, has been controversial with respect to crane operator certification requirements, and OSHA has extended compliance with the current standard’s certification mandates until November 2017. In the interim, the agency is trying to reach a resolution as to whether operators must be certified as to both “type” and “capacity” of cranes.

OSHA’s proposal was met with significant opposition because it reached beyond the type/capacity issue into crane operator evaluation and reevaluation requirements. Specifically, OSHA’s draft would require the employer to ensure that each operator is evaluated with respect to each equipment that they would use by an individual with knowledge, training and experience needed to assess equipment operators.

Many of the commenters at the ACCSH meeting noted that, as proposed, each type of crane would have to be set up in every possible configuration for evaluation, which would be an ongoing process for those operators who use multiple types and capacities of cranes.

The evaluation would need to be done annually, covering demonstrated competency in: signaling, set-up, assembly/disassembly, driving, inspection, maintenance, operational aids, and shutdown. In addition, there would have to be similarly comprehensive re-evaluation whenever an operator operates the crane equipment in an “unsafe manner” (undefined) or if the operator had not operated a particular piece of equipment within the previous six months.

After weighing the testimony and considering

Crane Standard, Con't

provided guidance that will be presented to OSHA, on the operator certification issue, a motion was passed to recommend that operators can either be certified as to "type" only or as to "type and capacity" – the rationale being that this covers all of the four testing/certification groups currently operating and would eliminate any immediate recertification needs for conformity with the rule.

ACCSH also recommended that OSHA revisit the language requiring visual observation of the crane operator in each and every crane configuration during the initial and subsequent annual evaluation. OSHA clarified at the meeting that it had not been the agency's intention to require a full evaluation each year; the employer will need to review the operator to see if they are still safely operating the equipment. ACCSH recommended that instead of annual reevaluation, OSHA should consider having this less frequently, to coincide with the five-year recertification requirement. The committee agreed that if an operator operates a crane in an unsafe manner, the employer should reevaluate them at that point.

Similarly, the committee agreed with commenters that six months "out of seat" was too short a period to trigger reevaluation. No motion was approved on this point, but ACCSH stressed to OSHA that they did not want to see the "six month" provision in the eventual proposed rule that will be published for general comment.

There was another controversial provision, which OSHA added in its draft, that would require the "controlling entity" who authorizes equipment to be used, but who does not directly employ the crane operator, to ensure prior to operation that the crane operator: (1) has documentation showing that he or she has been evaluated and certified in accordance with the standard for the equipment being operated; (2) is an operator-in-training who will be continuously monitored by a trainer; or (3) the controlling entity evaluates the operator in accordance with paragraph (b) of the proposal (which includes the evaluation criteria for the employer, listed above).

This provision caused considerable controversy because the term "controlling entity" was not defined and could create confusion with the "controlling employer" under OSHA's multi-employer worksite

doctrine for dual citation issuance. OSHA clarified at the meeting that this entity would be the one that hired and brought the crane on site, and so could be a subcontractor on a multi-employer project. ACCSH recommended that OSHA clarify this in the rule and referred them to the Washington State OSHA program standard for cranes, which uses and defines the term "crane user" instead of referring to "controlling entity."

The other significant issue was inclusion of "Appendix D" in the draft rule, which sets forth a complex form to be used in documenting the crane operator evaluation. After hearing comments for two days, OSHA acknowledged that it will consider making this a non-mandatory appendix. It will also consider accepting other forms of certification, including documents prepared for compliance with task training under the Mine Safety & Health Administration.

To obtain a copy of OSHA's draft proposal, or for other information on this forthcoming standard, contact Adele Abrams, Esq., CMSP or Nick Scala, Esq., CMSP, at 301-595-3520.

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worksite being scheduled "for an immediate on-site inspection." Employers should limit the information they submit to known facts, rather than opinion or speculation, or admitting or appearing to admit a violation. In addition of course, whatever information is provided must be truthful; submitting false information to OSHA can result in criminal charges.

Please let us know if we can provide further information or assistance on this or other OSHA compliance issues.