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Court of Appeals Rejects OSHA's Standard Interpretation

By: Gary Visscher, Esq.

A decision last month by the Court of Appeals for the Eighth Circuit rejected an interpretation of the machine guarding standard made by OSHA in the context of an enforcement case. The decision provides support for surmounting the frequent fallback argument by MSHA and OSHA when prosecuting citations, that if the provision of the cited standard is ambiguous or unclear, the review commissions and/or the federal courts must "defer" to the agency's interpretation of the standard, even if that interpretation has never been publicly given prior to the enforcement case.

The case, *Perez v. Loren Cook Company*, arose from an incident in 2009 in which a lathe operator was killed when a 12-pound workpiece broke off a lathe, flew out from the machine and struck the operator. OSHA cited the company for seven violations under the machine guarding standard, 29 C.F.R. § 1910.212 (a)(1), and issued penalties totaling \$490,000. After Loren Cook contested the citations, the case went before OSHRC ALJ Ken Welsch, who ruled that the cited standard is intended to address "point of contact" risks and does not apply to the ejection of large workpieces such as occurred at Loren Cook. The Review Commission declined to review and the judge's decision became a final order of the Commission. The Secretary of Labor appealed the decision to the Court of Appeals for the Eighth Circuit. The initial three judge panel of the court reversed OSHRC's decision. Loren Cook then petitioned for rehearing en banc, and on rehearing, the Court of Appeals decided, 8 – 4, to affirm the Commission's order.

OSHA argued, both before the Commission and to the Court of Appeals, that its interpretation of the guarding standard as applying to the hazard in this case should be upheld because "the Secretary's interpretation of its own regulation is entitled to considerable deference." While recognizing that Supreme Court precedent, in general, gives deference to an agency's interpretation of its own regulations, the Court of Appeals also noted that the Supreme Court has identified several circumstances in which deference is not warranted. The Court of Appeals found this case fit those circumstances.

First, the Court of Appeals found that OSHA's interpretation "strains a commonsense reading of the section" of the standard. In addition, the Court said that the Secretary had failed to show that the standard had been consistently interpreted in the manner that OSHA was seeking in this enforcement case. The Court referred to OSHA's Machine Guarding eTool, as well as enforcement cases, to show that OSHA had previously described the standard as focused on point of contact hazards. The Court also cited a 1982 decision by the Second Circuit Court of Appeals, *Carlyle Compressor v. OSHRC*, which also declined to apply the guarding standard to "anything flying out of the machine."

Finally, the Court of Appeals concluded that the interpretation proffered by OSHA would amount to "unfair surprise" if applied against Loren Cook in this case.

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Court of Appeals, Con't

Citing Supreme Court decisions, the Court of Appeals wrote that there "are strong reasons for withholding deference from an agency's interpretation of an ambiguous regulation when an agency acquiesces in an interpretation for an extended period of time and then changes its interpretation to sanction conduct that occurred prior to the new interpretation."

Although the decision is precedent only with regard to OSHA's guarding standard and in cases in the Eighth Circuit, the Court of Appeals stated in a footnote that "[w]e recognize the concerns raised about *Seminole Rock's* [the 1945 Supreme Court decision giving deference to administrative agency interpretations] consistency with separation-of-power principles... and the perverse incentive it provides agencies to issue ambiguous regulations." The Court of Appeals noted that several members of the Supreme Court recently expressed willingness to "take a serious look at the continued validity of the doctrine."

CalOSHA Proposes Regulations to Address Workplace Violence In the Health Care Sector By: Joshua Schultz, Esq., MSP

CalOSHA has released a new proposed rule intended to protect healthcare workers in all health facilities from workplace violence.

The standards were proposed pursuant to the Healthcare Workplace Violence Prevention Act, which was signed by Gov. Jerry Brown in 2014, requiring the CalOSHA Standards Board to adopt a standard regulating workplace violence preparation and response by hospitals no later than July 1, 2016. The CalOSHA Standards Board released the proposed standard, titled "Workplace Violence Prevention in Health Care," for public comment ahead of a Dec. 17th public meeting.

The regulations seek to prevent not only acts of violence but also threats of violence by imposing a number of new requirements upon employers. Most notably, employers must develop and implement a Workplace Violence Prevention Plan and train employees on the elements of the plan.

The Workplace Violence Prevention Plan is central to the proposed regulations. The requirements of a Workplace Violence Prevention Plan contain 11 elements with multiple subparts. These proposed standards require that any plan must, among other items, include a policy preventing retaliation for reporting workplace violence, procedures to communicate with employees regarding workplace violence matters, and assessment procedures to identify and evaluate environmental risk

factors.

The requirement of any plan to include an assessment of environmental risk factors represents a serious burden for employers. The rule requires employers to identify all areas of environmental risk factors, including, but not limited to areas where employees work in isolation from other employees, areas of poor illumination, areas where there is a lack of physical barriers between employees and persons at risk of committing workplace violence, areas where there is a lack of effective escape routes, and entryways where unauthorized entrance may occur.

The plan requirements also include a mandate to assess patients and visitors' potential for workplace violence, an onerous task which the regulations suggest can be achieved by observing different factors. These factors include a patient's mental status, a patient's treatment and medication status, a patient's history of violence and "any disruptive or threatening behavior displayed by a patient."

In addition to training on the Workplace Violence Prevention Plan, employers must train employees on how to recognize the potential for violence, how to counteract factors that lead to the escalation of violence, how to seek assistance to prevent or respond to violence, and strategies to avoid physical harm.

Finally, the proposed rule includes recordkeeping requirements for employers. Facilities must maintain records of workplace violence hazard identification, evaluation, and correction; training records; and records of violent incidents, including violent incident logs, reports, and records of investigations of violent incidents.

OSHA Issues Guidance on Whistleblower Anti-Retaliation Programs By: Diana Schroeder, Esq.

OSHA recently announced it is seeking comments on a draft document which is intended to provide guidance for employers in developing a whistleblower anti-retaliation program. OSHA is requesting comments on the draft document, and the comment period ends on January 19, 2016.

The guidance makes recommendations for best practices to public, private and non-profit employers in developing a whistleblower anti-retaliation program, which can be tailored for each unique workplace. Although OSHA acknowledges that the guidance document does not create a new legal obligation, OSHA seeks to assist employers that may overlook the

Whistleblower, Con't

importance of establishing an effective anti-retaliation program. The program is designed to open communication between the employee and employer, when workplace issues arise. Employees who fear retaliation by the employer, or who are frustrated with the lack of response from an employer if they do report, will not report problems in the workplace. Retaliation occurs when an employer takes "adverse action" against an employee who raises concerns about an activity or condition that may have a negative impact on the safety, health, or well-being of employees in the workplace. Several examples of adverse actions can include: firing or laying off, demoting, reducing pay or hours, or taking disciplinary actions, such as issuing a written warning or a suspension to the reporting employee.

OSHA's new draft guidance document, entitled Protecting Whistleblowers: Recommended Practices for Employers for Preventing and Addressing Retaliation is based on the OSHA Whistleblower Protection Advisory Committee's recommendations issued in April 2015. The Advisory Committee consists of corporate safety and compliance directors, legal experts, union representatives, public policy professionals, academics and regulators, all who convened at the invitation of the Assistant Secretary for OSHA. The Committee concluded that "these [whistleblower protection] programs and practices can make a specific and positive difference in organizations that are ready and able to improve communication with employees and eliminate the occurrence of retaliation in the workplace." Achieving these goals will most likely have a positive impact on the company's overall success.

The core elements of the Workplace Anti-Retaliation Program include:

- 1) Organizational and leadership commitment to the Program;
- 2) A company culture that encourages raising workplace and retaliation concerns and the fair resolution of these concerns;
- 3) A system for responding to employees' reports of workplace and retaliation concerns;
- 4) Effective anti-retaliation training;
- 5) Monitoring the progress and success of the Program, tracking emerging issues, and making necessary improvements; and
- 6) Performing program audits to assess the effectiveness of the Program.

OSHA requests that interested parties submit

Comments in response to the draft Program guidance. In particular, OSHA requests that comments include responses to the following questions:

- Are there any important features that employers should include in an anti-retaliation program not addressed in the document? If so, please describe what additional features you think should be included.
- Are there any concepts in the document that are difficult to understand? If so, please describe them and, if possible, how you would recommend that OSHA make these concepts more clear.
- What are the challenges to implementing the recommendations in the document? Please describe those challenges and, if possible, how you would recommend that OSHA address them in this guidance document.
- Are there issues specific to small businesses that need to be addressed? If so, please describe those issues and, if possible, how you would recommend that OSHA address them in this or a separate guidance document.
- Are there industry-specific issues in developing an anti-retaliation program that you would like to see addressed, possibly in a separate document? If so, please describe those issues and, if possible, how you would recommend that OSHA address them in this or a separate guidance document.

The Protecting Whistleblowers: Recommended Practices guidance document can be found online at http://www.whistleblowers.gov/protecting_whistleblowers.pdf.

For assistance drafting comments for submission to OSHA on this guidance (comment period closes on January 19, 2016), or assistance drafting or revising a Whistleblower Protection Program, please contact the Law Office.

Increases in OSHA and MSHA Penalties By: Gary Visscher, Esq.

The budget agreement passed by Congress and signed into law by President Obama on November 2 (Bipartisan Budget Act of 2015) raised the nation's debt limit. It also "re-set" (increased) overall spending limits for defense and domestic programs, and made several changes to entitlement programs including Medicare and Social Security.

The budget agreement made another change that

Budget, Con't

received much less public attention but will soon impact employers who receive citations from OSHA or MSHA. In 1996 (as part of an earlier budget agreement), Congress required most federal agencies to adjust civil penalties for inflation. The 1996 law required the covered agencies to make a one-time initial adjustment, going back to when the penalties had been previously last updated, and then make additional inflation adjustments every four years thereafter.

The 1996 law covered MSHA and EPA (and most other federal agencies), but excluded OSHA from the “automatic” inflation penalty adjustment. A principal argument for excluding OSHA in 1996 was that OSHA penalties had only recently been substantially increased, as a result of a budget agreement in 1990. The 1990 budget agreement increased the maximum penalties for a serious violation from \$1000 to \$7000 and for a willful or repeat from \$10,000 to \$70,000. The maximum amounts set in 1990 for OSHA penalties have remained in effect since then. MSHA was covered by the 1996 law requiring that penalties be adjusted for inflation. As a result, MSHA maximum penalties have been adjusted for inflation, most recently in 2013, when the maximum penalty for flagrant violations was increased from \$220,000 to \$242,000 and the maximum penalty under section 103 (j) for failure to make timely notification to MSHA of an accident was increased from \$60,000 to \$65,000.

The “Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015” which was included in the Bipartisan Budget Act revokes the exclusion of penalties under the OSH Act (as well as three other previous exclusions) from the inflation adjustment requirement that has applied to other agencies since 1996. The new law requires that OSHA penalties be adjusted for inflation since the last update. Since OSH Act penalties were last set in 1990, the initial inflation adjustment will be based on cumulative inflation (as measured by the Consumer Price Index) since 1990. The result is that sometime in 2016, the maximum penalty for serious and other than serious violations will increase from \$7000 to around \$12,500 and the maximum penalty for willful and repeat violations will increase to around \$125,000. The inflation adjustment law applies to any penalty amounts set by statute. Thus the minimum penalty for willful or repeat violations will be increased, from the current \$5000 to about \$9000.

The exact amounts for the new OSHA penalties will be published by OSHA in the Federal Register early next year. OSHA is expected to wait until after the Office of Management and Budget issues guidance to agencies on the implementation of the 2015 law, which OMB must issue by the end of February 2016. The law requires

that the penalty increases go into effect no later than August 1, 2016.

Although MSHA and EPA civil penalties have been covered by the 1996 inflation adjustment law, the 2015 amendments to the law will also impact penalties under the laws they administer. The 1996 law included a 10% cap on the initial inflation adjustment, meaning that the initial adjustment could not raise penalties more than 10%. Agencies which had civil penalties which were set many years earlier (some, for example, in the 1970's) were not able to fully account for inflation in their initial adjustment because of this cap. Reports by both Government Accountability Office (GAO) and the Administrative Conference were critical of the design of the 1996 law in part because of this resulting “inflation gap.” The new law removes the 10% cap and requires all agencies to recalculate the inflation adjustment back to the last update prior to 1996. Penalties for which the previous 10% cap limited the initial inflation adjustment will need to be recalculated and increased to reflect inflation since the last update prior to 1996.

The 1996 law included certain “rounding rules” which effectively meant that smaller penalty amounts were unlikely to be increased at all during time periods of relatively low inflation. For example, in its 2012 rulemaking which led to the increases noted earlier for flagrant violations and for failing to notify MSHA after an accident, MSHA noted that none of the other penalties under the Mine Act would be adjusted “because the increases under the inflation adjustment formula were rounded to zero pursuant to the Inflation Adjustment Act’s rounding rules.”

Increases will be made more frequently under the new law. The 2015 law changes the “rounding rules” so that future increases will be rounded to nearest multiples of \$1. Agencies will also be required to calculate the inflation adjustment every year, instead of every four years under the 1996 law.

In short, as a result of the 2015 law, employers can expect that in 2016 OSHA will increase the maximum (and minimum) penalties by around 82%, and that civil penalties set by statute under other federal laws (including MSHA and EPA-administered laws) will be increased by smaller amounts, and be increased more frequently in future years.

Update on Employee Wellness Programs

By: Gary Visscher, Esq. & Diana Schroeder, Esq.

On October 30, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) issued a Proposed Rule amending the regulations of the Genetic Information Nondiscrimination Act (GINA) as they relate to employee wellness programs that are part of group health plans. The proposed rule would allow employers that offer wellness programs to provide limited financial and other incentives in exchange for an employee's spouse providing information about his or her current or past health status.

Among its many other changes to health care and health insurance, passage of the Affordable Care Act (ACA) (also known as "Obamacare") ushered in a new era for employee wellness programs. The ACA promotes employee wellness programs by establishing or increasing incentives for their creation, and clarifying rules regarding their operation. Many employers had instituted some type of wellness program prior to the ACA, but the ACA has apparently accelerated their use. A 2014 survey of large companies found that more than half offered some type of wellness program for their employees, ranging from completion of a health risk assessment (HRA) to financial incentives for meeting certain outcomes.

The implementing regulations for wellness programs under the ACA were jointly issued by the Departments of Health and Human Services (HHS), Labor, and Treasury in June 2013, effective for plan years beginning January 1, 2014. The regulations define many of the details for such programs, such as what constitutes a "wellness program" and what rules apply to "health contingent wellness programs" (e.g., programs that provide a reward to those who do not use, or cease using, tobacco products, or achieve cholesterol or weight levels).

Two issues that were not dealt with by the 2013 regulations, because the laws are administered by the EEOC, were the possible conflicts with existing regulations under the Americans with Disabilities Act (ADA) and GINA. Both of these statutes and their implementing regulations include restrictions on an employer requesting or using an employee's personal health information.

In April 2015, EEOC issued a proposed rule clarifying how the ADA applies to wellness programs. The proposed rule allows "voluntary" medical examinations, and allows wellness plans to be "voluntary" if the incentive involved does not exceed 30 percent of the total cost of coverage, a level similar to what is allowed for employer wellness programs under the 2013 implementing regulations issued by HHS, Labor, and Treasury. EEOC's comment period on the proposed

regulations under the ADA ran until June 19, 2015.

Then, on October 30, 2015, EEOC issued a second set of proposed regulations addressing how GINA applies to employee wellness programs. Title II of GINA generally restricts employers from requesting or otherwise acquiring "genetic information," and defines genetic information as including family medical history, including that of family members (spouse and children). Current regulations allow six narrow exceptions, including allowing employers to request such information as part of a voluntary wellness program, but does not allow such programs to offer "inducements" to employees based on provision of genetic information. The proposed regulations by EEOC address the application of the "non-inducement" provision under GINA, to generally make it consistent with the limitations on incentives in the ACA regulations issued by HHS, Labor, and Treasury.

The comment period on the EEOC's GINA proposed rule closes on December 29, 2015. EEOC has indicated that a final rule under both the ADA and GINA will be issued in February 2016. If your company is considering offering a wellness program, or submitting comments to EEOC on the GINA proposal, please contact the Law Office for guidance and/or assistance.

Retaliation Complaints Filed by Public Transit and Railroad Workers

By: Diana Schroeder, Esq.

On November 9, 2015, OSHA issued a final rule impacting retaliation complaints for public transportation agency employees and railway transit employees. The regulations govern the employee protection (whistleblower) provisions of the National Transit Systems Security Act (NTSSA), and the Federal Railroad Safety Act (FRSA). This final rule responds to the ten comments received in 2010, and establishes the final procedures and time frames for the handling of whistleblower retaliation complaints. The final rule addresses the time frames for employee complaints to OSHA, investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, and review of ALJ decisions and final decisions.

Announcing the final rule, OSHA Assistant Secretary Michaels stated that "[r]ailroad workers have the right to report injuries . . . without fearing that they will be retaliated against Railroad and public transit agency workers must never be silenced by the threat of losing their job when their safety or the safety of the public is at stake."

The final rule became effective on November 9, 2015. For more information about the final rule, or related guidance, please contact the Law Office.

MSHA's Flavor of the Month: Confined Spaces

By: Sarah Korwan, Esq.

The Mine Safety and Health Administration (MSHA) recently announced it will be enforcing safety standards over the next several months in the Metal/Nonmetal (M/NM) sector of mining to target hazards associated with confined spaces. Prompted by a recent fatality and a serious accident due to work in confined spaces, MSHA indicated that it "will be placing special emphasis on enforcing its standards related to entering bins, hoppers, silos, tanks and surge piles," M/NM Administrator Neal Merrifield stated in a message to stakeholders.

A confined space is generally defined as an area or location that is not designed for continuous worker activity, usually has limited access to entering and exiting, and may have a hazardous atmosphere. Confined spaces include, but are not limited to, tanks, vessels, silos, storage bins, hoppers, vaults, pits, manholes, tunnels, equipment housings, ductwork, and pipelines.

Unlike the Occupational Safety and Health Administration (OSHA), MSHA does not have regulations that specifically address confined spaces at the mine. However, MSHA standards do address some of the hazards found in confined spaces such as air quality and physical agents (30 CFR §56/57.5001(a), .5002, and .5005(c)), oxygen deficiency (30 CFR §56/57.5015), procedures during repairs and maintenance (30 CFR §56/57.14105), safety belts and lines (30 CFR §56/57.15005(c)), and bins, hoppers, silos, tanks, and surge piles (30 CFR §56/57.16002). Merrifield noted that "(t)hese standards regulate hazardous atmospheres; material that has the potential to engulf an entrant; walls that converge inward or floors that slope downward and taper into a smaller area which could trap or asphyxiate an entrant; and any other recognized safety or health hazard, such as unguarded machinery, exposed live electrical wires, or high heat."

In addition to increased enforcement, MSHA will direct additional resources on education and outreach, including walk-and-talks. Merrifield urged the industry to do the same, and be proactive with a focus on the issue of hazards in confined spaces. Miners may be unaware of potential hazards and the many causes of injury, illness, and death associated with the confined spaces they encounter, and, therefore, education and training are critical.

The industry is encouraged to conduct hazard assessments of all confined spaces to determine whether hazards exist or whether the work to be done in the space can create hazards, as well as implementing a Confined Space Entry program, which trains miners to recognize and avoid confined space hazards.

MSHA provided a link to a list of recommended best practices on its website, as well as a warning to

workers not to enter a confined space to rescue another worker without special lifesaving equipment or assuring that air in the space is safe to breathe. According to the alert, rescue attempts in a toxic atmosphere by untrained personnel are extremely dangerous and can lead to multiple deaths. The best practices alert was developed as part of a safety effort between MSHA and the Industrial Minerals Association-North America, an MSHA Alliance partner.

OSHA Posts Updated

"Safety and Health Program Guidelines"

By: Gary Visscher, Esq.

OSHA has posted on its website a document entitled "OSHA Safety and Health Program Management Guidelines, November 2015 Draft for Public Comment." According to the cover page, the Draft Guidelines are intended to "update and replace" OSHA's 1989 voluntary guidelines on Safety and Health Management Programs.

The new Guidelines are being issued in the context that OSHA's top regulatory priority during the first term of the Obama Administration was issuance of an Injury and Illness Prevention Program ("I2P2") regulation or standard. I2P2, for which regulatory language was never publicly released, does not appear on OSHA's most recent regulatory agenda.

OSHA states that the "guidelines are advisory and informational" and "do not create any new legal obligations or alter existing obligations created by OSHA standards, OSHA regulations, or the OSH Act." However, there are a number of ways in which such guidelines may be used by OSHA in defining an employer's responsibilities in providing a safe workplace. The Draft Guidelines also bring OSHA's main document on safety and health management programs more in line with other modern safety and health management system tools, such as the ANSI Z-10 standard.

The 2015 Draft Guidelines differ from the 1989 guidelines as much in style as in substance. The 1989 guidelines were published in the Federal Register. The 2015 Draft Guidelines are posted on OSHA's website, with accompanying pictures and other visuals to help explain the various parts of the Draft Guidelines, and to generally make them more understandable.

The 1989 guidelines listed four elements for an effective safety and health program: (1) management commitment and employee involvement; (2) worksite analysis; (3) hazard prevention and control; and (4) safety and health training.

The 2015 Draft Guidelines expand the number of elements to six: (1) management leadership; (2) worker

Safety Programs, Con't

participation; (3) hazard identification and assessment; (4) hazard prevention and control; (5) education and training; and (6) program evaluation and improvement.

In addition, the 2015 Draft Guidelines include a separate program element on "coordination and communication on multi-employer worksites" for worksites and workplaces at which multiple employers and their employees may be present.

Under each element, OSHA lists several "action items" which provide specific examples of measures that would implement that particular element of a safety and health program. The Draft Guidelines state that "while the action items are specific, they are not prescriptive...Your safety and health program can and should evolve." The Draft Guidelines also state that "Guideline implementation will likely differ from workplace to workplace due to the unique circumstances present at each site."

As might be expected, the 2015 Draft Guidelines (as compared to the 1989 guidelines) emphasize the element of "worker participation" in safety and health and in the safety and health program. OSHA also uses the Draft Guidelines to reiterate its current opposition to any incentive or employee bonus programs that offer rewards based on the number or rate of injuries and illnesses.

At the same time, the 2015 Draft Guidelines urge management to establish measurable goals, and to regularly (at least once a year) evaluate progress in achieving those goals. The Draft Guidelines follow modern management tools in emphasizing that "the concept of continuous improvement is key to the guidelines."

Included with the Draft Guidelines are two appendices. Appendix A lists a variety of "implementation tools and resources," including checklists and examples from states (California, Ohio) of resources published for employers to identify and measure safety goals. Appendix B is a list of current OSHA standards that include program requirements. Most current program requirements are specific to the hazard covered by the standard; however, Appendix B notes that OSHA's construction standard, 29 C.F.R. §1926.20, already requires construction employers to have a general safety program.

OSHA has invited public comments on the Draft Guidelines, which may be submitted until February 15, 2016. Along with the Draft Guidelines themselves, OSHA has posted a series of questions which it hopes commenters will address.

If you would like additional information or background on the Draft Guidelines, or assistance in drafting comments, please let us know.

MSHA Stakeholder

Meeting Predicts New Initiatives

By: Adele L. Abrams, Esq., CMSP

On December 1, 2015, the Mine Safety & Health Administration (MSHA) held a consolidated stakeholder meeting for coal and metal/nonmetal mining interests, leading up to Miner's Recognition Day on December 6, 2015, and celebrating the conclusion of October and November, 2015, as two continuous months with zero fatalities.

MSHA Assistant Secretary Joe Main addressed a live gathering, primarily from mining associations, unions, and law firms, in its Arlington, VA, office, but stakeholders were able to participate via web and phone and raise questions during the coal and metal/nonmetal breakout sessions that followed. He noted that Congress had established Miner's Recognition Day in 2009. Promotional materials were posted on the MSHA website.

Main discussed the Respirable Coal Dust rule, for which Phase 2 will commence in 2016. MSHA has obtained 62,000 samples during phase one and most were in compliance. He addressed the fateful day, August 3, 2015, when the metal/nonmetal sector had three separate fatalities. This triggered more scrutiny of workplace examinations and task training, and a new workplace examination rule has been placed for further action on MSHA's latest regulatory agenda. Main said, "We put more boots on the ground for enforcement and training." Overall, compliance has improved, and significant & substantial (S&S) citations decreased (between 2010-2015) at the top 200 mines. The End Black Lung campaign has met new historical lows, even with the new, more stringent, sampling standards.

MSHA is advocating establishment of safety and health management programs at mines, although this is not on the rulemaking agenda, and Main called on mine operators to involve miners in the development of these programs. He said "inclusion of labor is the biggest factor." Progress is being made, with 2014 marking the lowest number of coal deaths in history, and also the lowest injury rates. But, in 2015, 10 coal and 15 metal/nonmetal miners have died to date." The question," he said, is "how are we going to end the year?"

Main discussed the forthcoming implementation of Phase 2 of the respirable coal dust rule, and concerns about the black lung claims filed as compared to the NIOSH data of black lung cases in active miners. He said that, following the Upper Big Branch disaster, of 24 miners who were autopsied, 17 had pneumoconiosis, yet the mine had only one black lung case filed. When Phase 2 begins, on February 1, 2016, it will require increased sampling.

Stakeholder Meeting, Con't

Jeff Duncan, head of MSHA's Educational Policy Development division, discussed training initiatives including the quarterly call for MSHA Part 46/48 trainers, and a new training page on the MSHA website. He said that training materials from the TRAM conference in October 2015 are available on the website as well. The MSHA Educational Field Services department merged with the Small Mines Office, and is now EFSMS. The agency preserved "the best of both programs," but will no longer offer Compliance Assistance Visits (CAVs), which had allowed a citation-free courtesy inspection upon request prior to mine startup, or after significant changes. The agency has redefined a "small mine" as now being one with 10 or fewer workers. This will be used relative to State Grants Programs. About 50 percent of the 7,800 mine visits conducted by his division were at small mines. The department also makes training available using its electrical trailers. MSHA is also evaluating trainers, and 953 have been observed. Not a lot of problems were found, Duncan said.

For Metal/Nonmetal initiatives, ongoing efforts will target confined spaces (through an alliance project with the Industrial Minerals Association – North America), a new miner training video project (in conjunction with the Maine Aggregates Association), and a new task training program (with help from the Operating Engineers Union).

The meeting also served as a launch for the BETA testing of MSHA's new website, at www.msha.gov, which is being updated to be more user-friendly. Feedback on the test site (a link is on the current website top bar) is sought by MSHA. At the meeting, Adele Abrams urged MSHA to retain historical information that can have legal significance (e.g., old Program Policy Letters, guidance materials, and training information) and advise if the material no longer reflects the agency's position. OSHA manages historical interpretative information in this manner on its website. Abrams also advocated for retention of Bureau of Mines studies for use in technical evaluations.

In the metal/nonmetal breakout session, Pat Silvey and Shelia McConnell discussed the MSHA regulatory agenda. Key items include a proposed rule on workplace examinations (due 2/16), a final rule modifying MSHA citation structure and civil penalty computations (being written now), proximity detection (the agency requests whether this should cover underground metal/nonmetal equipment as well as coal), and a proposed crystalline silica rule (due in Spring 2016, following OSHA's lead). MSHA is also revisiting the diesel issue, this time focusing on diesel exhaust (the current rule covers diesel particulate matter in underground mines). MSHA will also examine the issue of underreporting of occupational illnesses, a problem compounded by the latency period

which results in the miner often leaving employment pre-diagnosis.

Neil Merrifield, the MSHA Metal/Nonmetal Administrator, discussed that sector's fatalities between October 2013 and August 2015, and the 20 impact inspections conducted in metal/nonmetal. MSHA initiatives have included: workplace examinations (August 2015), Seasonal Safety (October 2015) and Confined Spaces (November 2015). These are carried to mines by MSHA personnel during "walk and talks."

There will be a "Go Home for the Holidays – Work Safely" bulletin released shortly. Future focus areas will be Lockout/Tagout (January 2016), Spring Thaws (March – May 2016), and "The Second Deadliest Month" (April 2016). October is historically the deadliest month, which is why MSHA especially noted this year being fatality free for the first time.

MSHA is also disseminating near miss alerts. The agency continues to encourage stakeholder involvement. MSHA was urged to provide more assistance on the metal/nonmetal processing side, such as information, pictures, and safety programs. In response to questions, Merrifield confirmed that the agency should be able to award Part 46/48 training credit for personnel who attend the Spring Thaw meetings often held in conjunction with state or regional mining associations or state grants programs.

The FAST Act

By: Ryan Horka, Esq.

The Fixing America's Surface Transportation Act ("FAST Act"), signed into law by President Obama on December 4, 2015, will reauthorize the federal highway and public transportation programs beginning in FY 2016. The bipartisan legislation focuses on improving the nation's surface transportation system which is comprised of over 4 million miles of public roads, over 600,000 bridges, and over 270,000 public transit route miles. It will, among other things, increase state flexibility in how federal funds are utilized, accelerate the implementation of transportation improvements through environmental review process reforms, and emphasize roadway infrastructure safety. Through its reforms, the legislation aims to improve the nation's infrastructure quality and percentage of Gross Domestic Product (GDP) devoted to infrastructure investment, which currently rank 16th and 15th in the world respectively.

The FAST Act will provide greater flexibility to state and local governments, promote innovation, and accelerate projects through a number of avenues. First, the FAST Act will streamline the environmental review and permitting process and accelerate project delivery by eliminating duplicative regulatory processes. To accomplish this, the FAST Act empowers states to use their already existing

The FAST Act, Con't

local laws and regulations if they are substantially equivalent to those of the National Environmental Policy Act (NEPA). Second, the FAST Act eradicates or consolidates at least six offices within the Department of Transportation that perform duplicative functions. Third, it establishes a National Surface Transportation and Innovative Finance Bureau in an effort to assist state, local, and private sector partners with transportation projects.

The FAST Act also contains reforms focused upon national priorities and the promotion of interstate commerce. In accordance with the flexibility that the FAST Act provides to states in addressing their local priorities, it will also assist states on projects that could not otherwise be funded, or projects that require coordination with other states. In this effort, the FAST Act will refocus funding and create a Nationally Significant Freight and Highway Projects program with \$4.5 billion in funding in FYs 2016-2021, for projects of regional or national significance.

The FAST Act will provide states with greater flexibility to focus their funding on driver safety priorities. Likewise, recognizing that advances in technology may allow us to significantly reduce the number of accidents caused by driver error (93% of highway crashes), the FAST Act promotes investment in innovation and transportation technology. It does so by promoting private investment in the surface transportation system, supporting the deployment of transportation technologies, and encouraging the installation of vehicle-to-infrastructure equipment. Further, the FAST Act will update federal research and transportation standards in order to reflect the growth of technology in transportation. Moreover, it will encourage states to adopt programs to increase driver awareness regarding how to safely operate around commercial motor vehicles, improve incentives for states to adopt laws improving highway safety, and increase transparency of data regarding how states are following federal guidelines for automated red light and speed enforcement cameras. Through these focuses, the FAST Act aims to significantly lessen the number of traffic fatalities that occur each year – approximately 32,000.

In accordance with this focus on safety, the FAST Act also reauthorizes the hazardous materials safety program of the Pipeline and Hazardous Materials Safety Administration (PHMSA). In doing so, it contains crucial reforms that attempt to even further fortify the safe and efficient movement of hazardous materials across the country. The PHMSA, which oversees the movement of almost 4 billion tons of hazardous materials throughout the country each year, supervises the movement of materials ranging from everyday items used by the

general public, such as batteries and paints, to dangerous chemicals, such as fuels and fertilizers. The reforms contained within the FAST Act include the enhancement of emergency preparedness and response, the strengthening and improving of crude-by-rail, and the streamlining of processing and creating of certainty and transparency for industry.

On November 17, the Congressional Budget Office (CBO) released estimates for the cost of the Surface Transportation Reauthorization and Reform Act (STRRA), the House's version of what became the FAST Act. While the legislation would set highway and transit authorization levels for six years, beginning in FY 2016, a separate provision prohibits the Secretary of Transportation from distributing the final three years of authority to states unless subsequent legislation is passed to ensure that the Highway Trust Fund (HTF) has sufficient resources. This is a significant concern, considering that HTF revenue shortages have impeded transportation investments over the past decade. Some of those concerns have been quelled, but some people still point to many of the underlying funding measures as stunts or gimmicks which only serve to delay finding a real long-term solution to the issues that our national highway and transportation systems face.

OSHA/MSHA Agenda Offers a Few Surprises

By: Adele L. Abrams, Esq., MSP

In late November 2015, the US Department of Labor released its semi-annual regulatory agenda, covering OSHA and MSHA rulemaking activities. The OSHA regulatory agenda held a few surprises, most notably the announcement that a final crystalline silica rule is slated for February 2016. In addition, the agency's revised "Slip, Trip & Fall" final rule is due in April 2016. While not as controversial as some measures, this standard has been at Office of Information and Regulatory Affairs/Office of Management and Budget (OIRA/OMB) for review since July 2015, longer than the normal 90 day period.

The crystalline silica rule has not yet gone over to OIRA for review and approval prior to publication, so the February final rule deadline is likely to slip. For reference, the proposed silica standard sat in limbo at OIRA for approximately two years. However, this rule now seems to be the Obama administration's priority for completion and there are legal advantages to publishing it well in advance of any administration change, so that any litigation or action by Congress to rescind it will be handled by the current administration. By contrast, the "midnight" OSHA rule of the Clinton administration (the highly controversial ergonomics standard) was able to be rescinded under the Congressional Review Act because it did not face a veto action from newly elected President Bush.

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OSHA's I2P2 standard is still MIA from the regulatory announcement that OSHA will update its voluntary safety and health management program guidelines; it is safe to declare I2P2 dead for this administration.

In addition to some modestly revised "due dates" for ongoing actions, there are a few additional items of interest. OSHA is moving forward on its action to prevent backover injuries and fatalities, and is focusing on emerging technologies, such as cameras and proximity detection systems (PDS), to supplement the use of spotters and traffic control plans. Stakeholder discussions have already occurred and the next scheduled action is a SBREFA panel, to commence in September 2016. As noted below, MSHA has a similar initiative for underground mines involving proximity detection systems for mobile equipment (expanding on its recent PDS rule for continuous mining machinery).

The Process Safety Management (PSM) update initiative, which was prompted by Executive Order 13650 in the wake of the West, TX, disaster, is now at the SBREFA stage (small entity representatives are being selected, with the SBREFA panel to be completed by April 2016). The Request for Information (RFI) previously conducted sought to identify issues related to modernization of the PSM and related standards (e.g., explosives) to prevent major chemical accidents.

OSHA has added a Powered Industrial Trucks RFI to its agenda, with an October 2016 due date. OSHA was urged by the Industrial Truck Association to update and expand the standard to account for revisions to ANSI standards that were incorporated by reference into the current rule (29 CFR 1910.178). OSHA is also looking to update its mechanical power presses standards, which are 40 years old and do not address technological changes. OSHA had conducted an Advanced Notice of Proposed Rulemaking (ANPRM) in 2007, but will do an RFI in September 2016 to get more current input.

While OSHA analyzes the input received in response to its RFI on updating permissible exposure limits (PELs), for which the record closed in October 2015, it has added a new item to the agenda: "Revocation of Obsolete PELs," which involves a new RFI to be issued in July 2016. OSHA notes "widespread agreement" that OSHA PELs are outdated and the agency is considering revoking a small number of chemical PELs for which the OSHA PEL substantially exceeds other recommended occupational exposure limits, and for which OSHA has evidence that workers are not being exposed at levels approaching the current OSHA PEL. The agenda states: "The agency expects that upon revocation of these outmoded and ineffective PELs that it may use other enforcement tools (e.g., the General Duty Clause) in limited circumstances should worker health and safety be jeopardized." OSHA

is also resurrecting its initiative to create a new "Tree Care Standard" to address this high hazard sector. OSHA issued an Advanced Notice of Proposed Rulemaking (ANPRM) in 2008 but the issue was removed from the agency agenda due to lack of resources. The next action will be stakeholder meetings starting in June 2016.

OSHA continues to fix its cranes and derricks construction standard. Proposed amendments make a number of technical corrections, but also clarify the exclusion for work activities by articulating cranes, and adds definitions. A proposed rule is due in April 2016. In a related rulemaking activity, OSHA will issue a proposed rule in March 2016 to identify criteria for employers to follow to ensure their crane operators are completely qualified, beyond certification. OSHA has extended the certification deadline to allow this rulemaking activity, and will clarify issues including the "type and capacity" requirement from the 2010 final rule.

In the recordkeeping area, OSHA plans to finalize its electronic injury/illness rule in March 2016 (it is at OIRA under review currently), which means it likely will not take effect until the 2017 calendar year. OSHA also has a proposal to amend its recordkeeping regulations to make it clear that the duty to make and maintain accurate injury/illness records is an ongoing obligation that does not expire if the employer fails to create the necessary record when it is first required to do so. Comments on the proposed rule, which would overturn the US Court of Appeals ruling in *AKM LLC v. Secretary of Labor* (the "Volks" case), closed in October 2015 and submissions are now under review.

For its part, MSHA's agenda states that, in February 2016, it will propose a rule on workplace exams. This follows up on the controversial July 2015 Program Policy document that MSHA issued, indicating that if multiple safety violations are observed by the agency, the mine operator may also be cited for inadequate workplace examinations and (possibly) for inadequate task training of its workplace examiners. According to the agenda, MSHA's forthcoming proposed rule will: clarify requirements for the examinations and the abilities of the "competent person" responsible for conducting these once-per-shift inspections of all active working areas; require new task training under Parts 46 & 48; and expand record-keeping requirements concerning correction of hazards, and initiation of corrective actions.

MSHA will issue its final civil penalties rule in March 2016. After receiving significant negative testimony during public hearings from mine operators, unions, and even the Federal Mine Safety & Health Review Commission, MSHA indicated it would make revisions to the proposed rule but has not detailed what those changes will be. In April 2016, MSHA will propose a rule on crystalline silica, based

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on the work done by sister agency, OSHA and likely using the same risk assessment, as appropriately modified for the mining industry. MSHA's current PEL equates to 100 ug/m³, the same as OSHA's general industry standard. However, unlike OSHA, MSHA does not currently accept PPE for compliance and requires engineering or administrative controls for abatement. In addition, MSHA will base non-compliance citations on a single sample that exceeds the codified PEL.

MSHA also has proposed a rule concerning proximity detection systems in underground mines, both coal and metal/nonmetal. The agency asserts that the rule would strengthen protection for underground miners by reducing the potential of pinning, crushing or striking hazards associated with mobile equipment. The comment period ends on December 15, 2015 (it was just extended from December 1st) and no further action is listed on the agenda.

The final item on MSHA's agenda concerns exposure of underground miners to diesel exhaust. MSHA already has a diesel particulate matter (DPM) standard for underground metal/nonmetal mines (160 ug/m³ of total carbon is the PEL used, as a surrogate for DPM) but it will now look at other components of diesel exhaust, noting the subject has "important public health implications." MSHA seeks information on approaches that would improve control of DPM and diesel exhaust, and will publish a RFI in February 2016.

Contact us for more information on the agenda and how it impacts your company.

UPDATE ON OSHA BUDGET AND SILICA RULEMAKING

The House GOP had voiced the possibility of blocking the proposed silica standard. However, the proposed GOP budget doesn't mention it. However, the proposed budget freezes the agency's funding at its current level of \$552.8 million instead of increasing it by 7 percent, as the Administration had requested. The House further reiterated that OSHA should not be overusing guidance documents and letters of interpretation instead of rulemaking. The Process Safety Management Standard was specifically mentioned as a topic that requires rulemaking and OSHA has been directed not to enforce based on its recent "interpretations" of the standard. The House may vote on the proposed budget this week.



HAPPY HOLIDAYS

Adele, Diana, Gary, Josh, Tina, Justin, Nick, Ryan, Sarah, Brian, Jim, Carmen, Lorein, and Michaeleen