



## LAW OFFICE OF ADELE L. ABRAMS P.C.

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### Heat Stress is Critical Safety Issue

By Adele L. Abrams, Esq., CMSP

After the horrendous winter that many parts of the U.S. experienced, the coming of summer is certainly welcomed by most of us. But less desirable is the potential for heat-stress-related illness on the job. Why is this a workplace concern? Simply put, heat can make workers ill or even kill them, and OSHA will hold the employer responsible. The construction industry has many job tasks that could put workers at risk, especially if they are engaged in roofing, framing, trenching and excavation, paving activities, or even operating forklifts to load trucks.

#### THE HEAT IS ON

Factors that may cause heat-related illness include: high temperatures and humidity, low fluid consumption, direct sun exposure with no shade, limited air movement (no breeze), physical exertion, use of bulky clothing and equipment, poor physical condition, pregnancy, some medications, lack of previous exposure to hot workplaces, or a history of heat-related illness.

Exposure to excessive heat can cause heat stroke, where the worker's body temperature rises to levels above 104 degrees and can result in death if not treated promptly. Signs include confusion, loss of consciousness, and seizures. Workers suspected of having heat stroke should be moved to shady, cool, areas, wet down with cool water and cold cloths or ice around the body,

and wet clothing with cold water. Lesser conditions include heat exhaustion, heat cramps, and heat rash, but all such conditions require treatment and should be taken seriously.



Heat stress is one of the main issues cited by the agency under Section 5(a)(1) of the Occupational Safety and Health Act—the “General Duty Clause” (GDC). The fines for willful violations can reach \$70,000 per affected worker, and if a heat stress citation relates to a worker's death, criminal sanctions can also be imposed on the employer. The GDC requires all employers to provide a workplace free from “recognized hazards” that cause or are likely to cause death or serious physical harm.

OSHA has posted examples of its enforcement actions for heat stress in construction: In 2012, OSHA cited LH Mauser & Sons, a Maryland-based milling and paving company following a heat-related fatality, which occurred while a worker was paving a church parking lot in Washington, D.C. The violation involved failure to provide a program addressing heat hazards related to outdoor work in direct sunlight. The employer did not maintain a work/rest regimen, train employees on prevention of heat stress, or ensure that employees consumed adequate amounts of water. The company also was cited for failing to report the fatality to the agency within

#### INSIDE THIS ISSUE

Heat Stress is Critical Safety Issue	1
Clean Water Act Watch	2
OSHA and MSHA Regulatory Agenda	3
Global Warming Rules Limited	3
Highway Trust Fund Dangerously Low and Seeking Replenishment	4
Congress Investigates the Chemical Safety Board	4
ACUS Recommends Further Transparency From Agencies	5
OSHA Delays Enforcement of Updated Electrical Standard	5
Supreme Court Holds Obama Administration Recess Appointments Unconstitutional	6
Fracking Update from Colorado	6
Federal Court of Appeals Supports Employer's Right to Terminate Truck Driver with Alcoholism	6
Operator's Walk- Around Rights Preserved Even During MSHA Impact Inspection	7

## Heat Stress is Critical Safety Issue (cont.)

the required 8 hours (some “state plan” states have even more stringent reporting requirements than federal OSHA).

In 2013, a Pennsylvania roofing company, United States Roofing Corp., received the maximum OSHA penalty for exposing employees to heat hazards while engaged in roofing activities at a middle school. On the day of the inspection, the workers were in direct sun while the heat index was 105 degrees. The fact that they worked with hot tar magnified the hazards. As in the previous case, the employer was faulted for lack of a protective regimen and failure to train workers on precautionary measures against heat-related illness. Unlike some other GDC heat stress cases, no fatalities occurred, but the maximum penalty was still imposed.

### HEAT STRESS MANAGEMENT

OSHA promotes having a heat stress management program that includes: (1) a work/rest regimen that includes a provision to allow workers to become acclimated to extreme heat conditions; (2) scheduling outside work during the cooler portions of the day, where feasible; (3) providing cool water and encourage water consumption of 5 to 7 ounces every 15 to 20 minutes; and, (4) establishing a screening program to identify workers with health conditions aggravated by exposure to heat stress (some medications can also place workers at higher risk of heat-related illnesses). Moreover, all workers should receive training on heat stress prevention, including temporary workers that may be retained through employment agencies or union hiring halls. Training must be conducted in a language that workers can understand, and if work instructions are (for example) given in Spanish, then safety training must also be provided in that language. There are other OSHA standards that can be cited relative to occupational heat exposure. The personal protective equipment standard, 29 CFR 1926.28 requires every employer to conduct a hazard assessment (which should be documented in writing) to determine the appropriate PPE to protect workers engaged in various tasks. There are many items on the market that can help cool workers, including headbands and work vests with cold packs. Employers can also provide controls, such as shaded areas, frequent rest breaks, or worker rotation. OSHA’s sanitation standard, 1926.51, also requires employers to provide potable water (safe for

drinking). Heat stress illnesses that result in medical treatment, restricted work activity, or lost workdays must be recorded on the OSHA logs and failure to do so will result in citations under 29 CFR 1904.7. Lack of heat stress training can also be cited under 1926.21, the safety training and education standard for construction.

Some simple steps that can help reduce risks include reducing physical demands by using mechanical devices or assigning additional workers, monitoring weather reports, and rescheduling jobs with high heat exposures to cooler times of day, or postponing projects to cooler seasons if feasible, and monitoring workers who must wear PPE that can increase heat levels, such as Tyvek or rubber items, when outdoor temperatures exceed 70 degrees.

OSHA has launched a campaign to prevent heat stress illness and death, and more information can be found at [www.osha.gov/heat](http://www.osha.gov/heat). The agency also has a free application for mobile devices to enable workers and supervisors to monitor the heat index at their workplaces. It is available for both Android and iPhone devices and can be downloaded at [www.osha.gov/heatapp](http://www.osha.gov/heatapp). This summer, play it cool and keep workers safe!

### Clean Water Act Watch

By Tina M. Stanczewski, Esq., MSP

Congress continues to schedule hearings over the Environmental Protection Agency’s (EPA) proposed expansion of the term “Waters of the United States.” The proposed rule significantly changes the current interpretation of what constitutes a water of the U.S. and if passed, could have chilling effects.



The EPA is attempting to clarify the term, but the clarification may encompass more streams and downstream waters as protected waterways. This may impact permitting. Congressional hearings are being scheduled and the comment period ends October 2014. Opponents of the proposed rule raise several issues including the efficacy of the science applied and the uncertainty of how businesses will be expected to comply with the rule. Businesses should consider submitting comments either individually, through an organization, or consulting their attorney for assistance in drafting comments.

## OSHA and MSHA Regulatory Agenda

By Gary Visscher, Esq.

Employers and many employees may feel that they already have quite enough federal regulations to try to follow in their workplaces. But the inexorable growth of the “4th branch of government” – as a recent article by law professor Jonathon Turley termed it - marches on.

Two times each year agencies across the federal government are expected to publish their “regulatory agendas” to let the public know what new regulations are being worked on, and when the regulated community can expect them. The regulatory agendas are not like meeting agendas – they don’t actually mean that the items on the agenda will be done as listed. But they do give some indication of agency priorities.

The most recent regulatory agenda was published on May 23, just before the Memorial Day weekend. The Department of Labor’s agenda lists 91 items, of which OSHA and MSHA account for almost half. The full agenda is on the government’s main regulatory website, Regulations.gov.

For OSHA, the most significant changes from the previously published agenda in December, 2013 is the indication that two potentially far-reaching standards will take longer than OSHA previously planned. A rule to require and regulate employers’ safety and health programs (“Injury and Illness Prevention Program” rule or “I2P2”) was taken off the “proposed rule” list and listed as a “long term action” with dates unspecified. In addition, the next step planned for a new standard on Combustible Dust, a small business (SBREFA) panel review, was pushed back from April 2014 to December, 2014.

While these items will be delayed from the previous regulatory agenda, the May, 2014 agenda lists items on which OSHA plans to issue final rules in the coming months: confined spaces in construction, walking-working surfaces (which could include new provisions on fall protection on trucks), and electronic reporting of injuries and illnesses.

The agenda does not indicate any new dates as to the timetable for the respirable crystalline silica standard that OSHA conducted public hearings on earlier this year. The rule is currently in the “post hearing comment period.” The expectation is that a

final rule will be issued near the end of 2016.

The 2010 Construction Crane Standard includes requirements for crane operator certification that are scheduled to become effective November 10, 2014. However, OSHA has published a proposed rule to extend that effective date to November 10, 2017.

The fire and explosion at a fertilizer storage facility in West, Texas in April, 2013 which took the lives of 14 people, and President Obama’s subsequent Executive Order on Improving Chemical Facility Safety and Security pushed changes to the Process Safety Management (PSM) standard onto the regulatory agenda and to near the top of the priority list. While OSHA has not yet proposed changes, it is expected to address a variety of “coverage” issues that will make many currently plants and operations that are currently not covered subject to PSM requirements.

While MSHA’s agenda is much shorter than OSHA’s, it does include several items of interest to miners and mine operators. One is respirable crystalline silica, which MSHA has listed as a “long term action” without specifying any dates. It is expected that as soon as OSHA completes its revised standard on crystalline silica, MSHA will propose to adopt roughly the same criteria. Also on MSHA’s agenda is a long-standing plan to amend the criteria and procedures for proposed assessment of civil penalties. The next step in that rulemaking is publication of a proposed rule, which was scheduled to occur in May, 2014.

If you have any questions about any of these issues or anything else on OSHA’s or MSHA’s Regulatory Agenda, please let us know.

### Global Warming Rules Limited

By Tina M. Stanczewski, Esq., MSP



The Supreme Court ruled in June 2014 that under certain circumstances, the EPA lacks authority to regulate carbon dioxide emissions. Permits for greenhouse gases are issued to plants that produce iron and steel, cement, fertilizer, chemicals, and other items. Overall, the limitation is a very specific carve out for expansion of facilities or building of new ones, but it reduced the EPA’s regulating authority by about 3%.

## Highway Trust Fund Dangerously Low and Seeking Replenishment

By Nicholas Scala, Esq., CMSP

The Highway Trust Fund is nearly broke. That fact has the Senate and House scrambling to submit plans to resolve the issue. The Secretary of the Department of Transportation once again let state departments of transportation know that there will be a delay in highway funding reimbursements without congressional action to replenish the trust fund.

Separate proposals have been made by the House and Senate. In late June, the Senate Finance Committee chairman announced a plan to provide a \$9 billion dollar supplement to the trust fund for the remainder of the year. However, Senate republicans have already expressed their opposition to this plan, which would include changes to tax and estate planning laws.



Separately, a bipartisan bill has been proposed by members of the House which would increase the federal gas tax by 12 cents. The federal gas tax has not increased since 1993. The 12 cent increase would take place over two years, at 6 cents per year. It is estimated that the 12 cent increase would result in \$164 billion over 10 years, and the proposal has received backing from multiple industry organizations, including the Highways Materials Group.

With an alarming amount of the country's roadways and bridges in need of repairs or replacement, Congress must act swiftly to find a sustainable source of income for the Highway Trust Fund, perhaps the 12 cent hike in Federal Gas Tax is a step in the right direction.

## Congress Investigates the Chemical Safety Board

By Gary Visscher, Esq.

The Chemical Safety Board (CSB) is a small, fairly recent (1998) federal agency mostly known in the chemical and energy industries. That is because CSB's role is to investigate significant chemical releases, fires, and explosions and report their findings, in much the way that the NTSB is charged with doing after airplane and other transportation accidents. The CSB does not have regulatory or enforcement authority; its impact depends on publishing high quality, timely information which is useful to help other operations to prevent accidents.

Despite its short history and the mostly technical nature of its work, the CSB has gone through multiple episodes of internal management changes. The current episode was aired at a Congressional hearing on June 19, 2014. The Chairmen of the House Committees on Oversight and Government Reform and Science, Space, and Technology released a lengthy report detailing incidents of management retaliation against agency whistleblowers, efforts to intimidate staff and stifle debate and discussion over agency investigations, and disregard of approved operating procedures. The issues detailed in the Congressional report have contributed to the departure of senior staff investigators. Some at the hearing suggested this impacts not only the quality but the timeliness of accident investigation reports. As a result, some accident reports have not been completed until 4 or 5 years after the accident.

The June 19 hearing also included the EPA Inspector General, who is designated as the inspector general for the CSB, and the Director of the Office of Special Counsel, who both testified about CSB's delays and refusal to turn over government documents to those agencies. Many employers and federal and state agencies find CSB's attitude towards these requests ironic given the history of conflicts over CSB's access to documents and accident sites. The CSB has also increasingly turned towards advocating legislative and regulatory policies, rather than insuring the quality and credibility of accident analysis. The Congressional report and hearing will likely trigger further evaluation of the function and organization of the CSB.



## ACUS Recommends Further Transparency From Agencies

By Tina M. Stanczewski, Esq., MSP

The Administrative Conference of the United States (ACUS), held its 60<sup>th</sup> plenary session in early June 2014 which resulted in four recommendations. As an independent federal agency, ACUS gains insight from members in the private sector, federal government, and academia.

The four recommendations included 1) Resolving Freedom of Information Act (FOIA) disputes through Alternative Dispute Resolution (ADR), 2) Government in the Sunshine Act, 3) Guidance in the Rulemaking Process, and 4) "Ex Parte" Communications in Informal Rulemaking.

Citizens often challenge the thoroughness and/or the release of information provided by an Agency upon receipt of a FOIA request. Although there are exemptions to a FOIA request, if a requestor believes the information should be available, then an appeal to the agency head occurs. After that, if the issue remains, the requestor sues in federal district court. Right now, there are hundreds of challenges each year. This creates additional expenses for the court system which in turn means expenses to the taxpayer.

This is not a new idea. As early as 1987, a similar recommendation was considered. In addition, in 2007, Congress passed the OPEN Government Act which created specific FOIA officers to address and intervene on disputes. Overall, the process is moving forward.

ACUS made recommendations covering heightened transparency by Agencies in light of the Sunshine Act. With some exemptions, the Sunshine Act, enacted in 1976, requires agency meetings to be open to public observation. The recommendations include providing a description of the primary mechanisms for conducting business, communicate substantive business occurring outside of open meetings, and using technology to transfer information more easily. In essence, agencies need to convey the protocols for activities, let citizens know about behind-closed door activities (subject to Sunshine Act), and get information to the public.

The third recommendation focused on the rulemaking process whereby agencies should follow established best practices when drafting preambles. The focus is on communication. If the preamble

contains guidance information, the public needs to clearly understand this.

The fourth recommendation concerned ex parte communications in informal rulemaking. Again, best practices were established to help agencies manage communications between itself and nongovernmental interest groups to convey in detail informal rulemaking proceedings. Informal rulemaking occurs often and does not require "on the record" testimony, where formal rulemaking does. Under the Administrative Procedure Act, information rulemaking requires a notice, a public comment period (considered by the agency, and then the final rule.

## OSHA Delays Enforcement of Updated Electrical Standard

By Tina M. Stanczewski, Esq., MSP

On July 10, 2014, the updated electrical standard becomes law. However, OSHA has issued a temporary delay on the issuances of citations under the rule until October 31, 2014. This gives businesses some time to absorb and implement the necessary compliance measures. However, business should not wait until October to become familiar with the guidelines.

The existing rule is 40 years old and OSHA believes that the updates will save 20 lives and prevent 118 serious injuries each year. The law focuses on workers on or around power lines and the procedures, safety measures, and daily activities encountered.

As of January 1, 2015 the hazard assessment is due and by April 1, 2015, companies need to comply with new arc-rated clothing and PPE standards. Specifically, the major changes include (although not an exhaustive listing): 1) heightened and specific training requirements, 2) open communications between employers and contractors whereby safety information is shared and coordination of work rules occurs, 3) fall protection must be used by April 1, 2015 when a worker climbs or changes location on poles, towers, or similar structures (unless infeasible or creates a greater hazard), 4) there are revised minimum approach distances effective on April 1, 2015, and 5) electrical arc hazards must be assessed under specific guidelines and PPE enforced.

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## **Supreme Court Holds Obama Administration Recess Appointments Unconstitutional**

**By Nicholas Scala, Esq., CMSP**

The United States Supreme Court recently unanimously ruled that President Obama's "recess" appointments of government officials were unconstitutional. Specifically, this referred to multiple appointments of officials to the National Labor Relations Board (NLRB). The Justices held that recent appointees were invalid given that the president appointed them without consulting the Senate, even though they were not at "recess."

The recess appointment clause allows the president to appoint individual to government officials if the Senate is not in session to participate in the selection. The Supreme Court found that the Senate was still in session when the president decided to their involvement while making appointments to the NLRB. It is still unclear how this will affect the agency, however it is not out of question that decisions made since those officials were appointed, the winter 2011-12, may be vacated.

## **Fracking Update from Colorado**

**By Nicholas Scala, Esq., CMSP**

Recently, the Colorado Oil and Gas Conservation Commission ordered a water services company to cease use of a wastewater disposal well following seismic activity, believed to be linked to wastewater injection. It is common practice across the United States to dispose of wastewater, or fracking fluid, in injection wells. The process forces the wastewater deep into the Earth's surface where it will be filtered and cleaned before rejoining the water table, over the course of many years.

Although injection wells are common practice, with nearly 145,000 wells in the United States and roughly 300 in Colorado, this is not the first time there has been seismic activity reportedly linked to use or overuse of injection wells. Both Ohio and Oklahoma have also reported seismic activity which could possibly be linked to the hydraulic fracturing process, and specifically the use of injection wells for wastewater disposal.

Moving forward the industry is developing and constructing wastewater recycling and filtering

## **Fracking, cont.**

facilities, to avoid such widespread use of wastewater injection wells and less the environmental impact. The discovery and exploration of shale reserves around the country, unlocked by the hydraulic fracturing and horizontal drilling processes, has been an economic coup thus far for the country, and we can hope the industry is striving for more efficient and environmentally sustainable means of access the oil and gas reserves.

However, at this time the use of injection wells is still as essential element of the process and we will likely continue to hear reports of seismic activity linked to their use. For Colorado, the well in question will be idle for at least 20 days while the area is monitored.

## **Federal Court of Appeals Supports Employer's Right to Terminate Truck Driver with Alcoholism**

**By Nicholas Scala, Esq., CMSP**

The United States Court of Appeals for the Eleventh Circuit recently affirmed a lower court's decision to grant summary judgment to a trucking company, Crete Carrier Corporation, holding the company did not violate the Americans with Disabilities Act (ADA) or Family and Medical Leave Act (FMLA) by terminating an employee diagnosed with alcoholism. Specifically, the 11th Circuit held that an individual not qualified to operate a commercial truck under Department of Transportation (DOT) standards, cannot claim protected status under the ADA.

Crete terminated the employment of one of its commercial truck drivers after being diagnosed with alcoholism by his personal physician. Under DOT regulations, an individual is not qualified to operate a commercial vehicle if he/she has a "current clinical diagnosis of alcoholism." The DOT regulations express that it is the employer who determines who is qualified to operate a commercial vehicle. Therefore, if a company determines that an employee is not suited to operate a commercial motor vehicle based upon the diagnosis of alcoholism, it is their right and responsibility to take action. Additionally, Crete had company policy allowing the termination of any individual diagnosed with alcoholism in the previous five years, and given the safety sensitive nature of

## Federal Court of Appeals, cont.

operating a commercial motor vehicles, such company policy is permissible.

Although this is a rare decision in favor of employer rights when considering the ADA and FMLA, employers must be careful to maintain awareness of the regulations and standards governing their operations, both by enforcement agencies such as the DOT and requirements under employee protection statutes and acts. The specific circumstance outlined in the Crete decision led to that specific result, however different facts, timing or manner of termination, or the plaintiff pleading different arguments could have resulted in a less favorable outcome for employers.

It is always important for employers to review such rules and regulations prior to drafting company policy. Employers must ensure that the individuals they appoint to be in charge of company compliance are competent first and foremost. Additionally, any rules or practices that are established, especially concerning discipline must be enforced uniformly. No favoritism is allowed. If unsure on how to proceed consult a professional.

## Operator's Walk-Around Rights Preserved Even During MSHA Impact Inspection

By Diana Schroeder, Esq.

Judge Thomas McCarthy vacated two citations written during a portion of an inspection where the operator's representatives were denied their right to accompany the inspector. Three MSHA inspectors arrived at Big Ridge's Willow Lake Portal mine for an "impact" inspection and placed the phone system on lock-down to prevent calls to the underground in advance of the inspection team. This effectively prevented the company personnel to coordinate the usual operator's team to accompany each of the three inspectors. This "walk-around" right (for both operator's and miners' representatives) to accompany an MSHA inspector is outlined in the text of the Mine Act at Section 103(f).

The Judge in *Secretary v. Big Ridge*, Docket No. LAKE 2012-453-RM (McCarthy, June 19, 2014), applied a rule which served to exclude MSHA's evidence relating to the violations written while unaccompanied by an operator's representative. The Judge vacated two of the three citations issued, because there was insufficient evidence to support the violations. Judge McCarthy held that the operator had been "actually prejudiced" when denied the ability to gather evidence to "prepare or present its defense" during the inspection process, which would have included the operator's ability to observe, test conditions, take photographs, challenge the inspector's findings, and record contemporaneous notes.

Judge McCarthy's well-reasoned decision clarifies MSHA's long-standing "statutory obligation" allowing the operators' representatives to accompany MSHA inspectors during an inspection, including an impact inspection.