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ISSUE 5
JUNE 22, 2016
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MSHA Releases Two Significant Proposals – Proposed Rule on Workplace Examinations and the Diesel Particulate

MSHA has released two significant proposals on June 8, 2016. First, the workplace examination proposed rule establishes several new requirements for operators: 1) conduct an examination before miners begin work in an area, 2) notify miners in the working place of any conditions found that may adversely affect their safety or health, 3) the competent person conducting the examination must sign and date the examination record before the end of each shift and the record must include information regarding adverse conditions found and corrective action taken, and 4) operators must make the record available to miners and their representatives. This is a significant change to the existing workplace examination rule found at 56./57.18002.

The second release from MSHA is the pursuit of a rulemaking to limit the diesel exhaust at underground coal and metal/non-metal mines. The Request for Information is looking for industry data and experiences to control diesel exhaust and determine whether existing permissible exposure limits are adequate. Recent studies support diesel particulates as a human carcinogen that can result in lung cancer.

The comment period closes for both proposals on September 6, 2016. For assistance in drafting comments or if you would like a member of the Law Office to provide testimony at any hearings, contact the Law Office. To read the full article, [Click Here](#).

EEOC Issues Final Rules on Employer Wellness Programs By: Adele L. Abrams, Esq., CMSP

Wellness programs, sometimes termed “corporate fitness” initiatives, have grown in popularity in recent years and can result in significant benefits to companies and their workers, in terms of health improvements, increased morale, and cost-savings on health insurance. Many employers offer programs that sometimes use medical questionnaires or health risk assessments and biometric screenings to determine a worker’s health risk factors (e.g., weight, cholesterol, blood glucose levels, and blood pressure). Other wellness programs provide educational health-related information or programs that may include: nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals. Often, programs are linked to benefits such as reduced health insurance premiums or bonuses to encourage participation or link financial incentives to achievement of certain specified health outcomes.

But there can be pitfalls when structuring these programs, and employers must take care to avoid running afoul of employment laws such as the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), the Age Discrimination in Employment Act (ADEA), the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (aka “Obamacare”).

HIPAA’s nondiscrimination provisions, as amended by the Affordable Care Act, generally prohibit group health plans and health insurance issuers providing group health insurance in connection with a

INSIDE THIS ISSUE

MSHA Releases Two Significant Proposals	1
EEOC Issues Final Rules on Employer Wellness Programs	1
OSHA Approves Variance for LOTO Procedures	4
Feds Assisting WV Workers Affected by Layoffs in Coal Mining Industry	4
TSCA Modernization Bill Passes the Senate	5
After KenAmerican Resources, Will the Commission Ever Affirm the Granting of a Summary Judgment?	6
DOL Expands Overtime Eligibility	6
New W-SVEP OSHA Program Announced	7
OSHA, MSHA Spring 2016 Regulatory Agenda	7
Commission Expands MSHA’s Access to Records	9
MSHA Alert: Proximity Detection Systems	10
Subcommittee on Workforce Protections Hearing: “Reviewing Recent Changes to OSHA’s Silica Standards”	11

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EEOC Issues Final Rules, Con't

group health plan from discriminating against participants and beneficiaries in premiums, benefits, or eligibility based on a health factor. However, an exception to the general rule allows premium discounts, or rebates or modification to otherwise applicable cost sharing (including copayments, deductibles, or coinsurance), in return for adherence to certain programs of health promotion and disease prevention.

Generally, health-contingent wellness programs must be available to all similarly situated individuals and must:

1. Give eligible individuals an opportunity to qualify for a reward at least once per year;
2. Limit the size of the reward to no more than 30 percent of the total cost of coverage (or, 50 percent to the extent that the wellness program is designed to prevent or reduce tobacco use);
3. Provide a reasonable alternative standard (or waiver) to qualify for a reward;
4. Be reasonably designed to promote health or prevent disease and not be overly burdensome; and,
5. Disclose the availability of a reasonable alternative standard to qualify for the reward in plan materials that provide details regarding the wellness program.

Examples of health-contingent wellness programs include a program that requires employees to walk or do a certain amount of exercise weekly (an activity-based program) or to reduce their blood pressure or cholesterol level (an outcome-based program) in order to earn an incentive.

The federal Equal Employment Opportunity Commission (EEOC) has now weighed in with a pair of final rules, published in the May 17, 2016, Federal Register, concerning how these programs interface with the ADA and GINA. The rules generally continue to permit wellness programs to be implemented, consistent with their stated purpose of improving worker health, while still retaining protections for employees against discrimination. Wellness programs that do not include disability-related inquiries or medical examinations (such as those that provide general health and educational information) are not subject to the final rule, although such programs must be available to all employees and must provide

reasonable accommodations to employees with disabilities.

The final rule clarifies that an employee health program satisfies the standard if it has a “reasonable chance of improving the health of, or preventing disease in, participating employees and is not overly burdensome or a subterfuge for violating the ADA or other laws prohibiting employment discrimination. A program that includes measurements, tests or collection of health-related information without providing results or advice to improve the health of participating employees would not meet the “reasonably designed” criteria, nor would a program be valid if it mainly shifts costs from the covered entity to targeted employees based on their health, or is aimed at getting information for employers to use in estimating future health care costs.

The ADA and GINA generally prohibit employers from obtaining and using information about the employee’s own health conditions, or the health conditions of family members (including spouses). Title I of the ADA prohibits discrimination against individuals on the basis of disability in regard to employment compensation and other terms, conditions, and privileges of employment, including “fringe benefits available by virtue of employment, whether or not administered by the covered entity.”

The ADA requires – with some limitations -- “reasonable accommodation” of qualified workers with covered disabilities who request accommodation and can perform the essential functions of their job with such accommodation. The ADA also prohibits discrimination against workers who are “associated with” someone who is disabled, and so an employer’s knowledge of a family member’s health conditions could trigger ADA protections, even if the employee is not personally disabled.

GINA generally restricts the acquisition and disclosure of genetic information and prohibits the use of genetic information in making employment decisions. It also restricts employers and other entities covered by GINA from requesting, requiring, or purchasing genetic information, unless one or more of six narrow exceptions applies, and strictly limits the disclosure of genetic information by GINA-covered entities. One of these exceptions permits employers that offer health or genetic services, including such services offered as part of voluntary wellness programs, to request genetic information as part of

EEOC Issues Final Rules, Con't

these programs, as long as certain specific requirements are met. The regulations implementing GINA make clear that one of the requirements is that the employer-sponsored wellness program cannot condition inducements to employees on the provision of genetic information.

GINA defines "genetic information" to include: Information about an individual's genetic tests; information about the genetic tests of a family member; information about the manifestation of a disease or disorder in family members of an individual (i.e., family medical history); requests for and receipt of genetic services by an individual or a family member; and genetic information about a fetus carried by an individual or family member or of an embryo legally held by the individual or family member using assisted reproductive technology.

Both laws do allow employers to obtain such information through screenings and examinations, if it is providing health or genetic services as part of a voluntary wellness program. The final ADA rule provides that wellness programs that are part of a group health plan and that ask questions about worker health, or include medical exams, may still offer incentives of up to 30 percent of the total cost of self-only coverage. The final GINA rule specifies that the value of the maximum incentive attributable to a spouse's participation may not exceed 30 percent of the total cost of self-only coverage. No incentives are allowed in exchange for the current or past health status information of the employee's children or in exchange for specified genetic information, such as family medical history or results of genetic tests, of the employee or her spouse or children.

The final rules take effect January 1, 2017, and apply to all workplace wellness programs, including those in which workers participate without also enrolling in a particular health plan. The rules require programs to be "reasonably designed to promote health and prevent disease." The ADA rule makes clear that information from wellness programs may be disclosed to employers only in aggregate terms, and the employees now receive a notice telling them what information will be collected as part of the program, with whom it will be shared and for what purpose, limits on disclosure, and how information will be kept confidential. The GINA final rule includes statutory

notice and consent provisions for health and genetic services provided to employees and their family members. Both regulations prohibit employers from requiring employees or family members to agree to the sale, exchange, transfer, or other disclosure of their health information in order to participate in a wellness program or to receive an incentive.

The EEOC issued interpretative guidance along with the final rules, and it includes best practices for ensuring confidentiality, including: adopting and communicating clear policies, training employees who handle confidential information, encrypting health information, and providing prompt notification to workers if a breach occurs.

The rules also make clear that covered entities cannot require employees to participate in workplace wellness programs, may not deny employees access to health coverage under their plans or benefit packages for refusing to participate, and may not limit coverage (other than permitting a higher deductible if linked to a permissible financial incentive). Employers may not take adverse action against workers who choose not to answer disability-related inquiries or to undergo medical examinations, and cannot retaliate against workers who decline to participate, or who file charges with the EEOC concerning the workplace wellness program.

On a related note, the National Institute for Occupational Safety & Health (NIOSH) also has included components of workplace wellness programs as part of its "Total Worker Health" initiative (<http://www.cdc.gov/niosh/TWH/totalhealth.html>). This initiative includes policies, programs and practices that integrate protection from work-related hazards with promotion of injury and illness prevention efforts to advance overall worker well-being, and that of their families. NIOSH notes that there can be work-related risk factors for health conditions such as abnormal weight fluctuations, cardiovascular disease, depression, and sleep disorders. NIOSH program elements relating to wellness programs include: fatigue and stress prevention, healthier work shift concepts, adequate meal and rest breaks, access to healthy food options, tobacco-free policies, chronic disease prevention and disease management, work-life programs, and access to safe green spaces and non-motorized pathways.

For more information on compliance with federal or state employment and labor laws, contact Adele L. Abrams, Esq., CMSP, at 301-595-3520.

OSHA Approves Variance for LOTO Procedures

By: Gary Visscher, Esq.

Section 6 of the Occupational Safety and Health Act provides for granting variances to employers from the specific provisions of OSHA standards.

The statute allows three types of variances. Section 6(a) provides for granting a **temporary variance** prior to the effective date of a standard, when the employer can show that it cannot comply with a standard by the effective date because of conditions or circumstances outside of the employer's control. Section 16 of the OSH Act allows "variations, tolerances, and exemptions" which are determined to be necessary and proper to avoid serious impairment to the national defense. Section 6(d) allows **permanent variances** if, upon an application, the employer shows that the alternative protections proposed "are as safe and healthful as those which would prevail if he complied with the standard."

Permanent variances are not easily obtained or often granted. According to a list of applications maintained on OSHA's website, in 46 years OSHA has granted a dozen permanent variances, while nearly 20 times that number were either denied or withdrawn without approval. The meager chances of success have no doubt also discouraged many other employers from seeking variances to allow the employer to use alternative means to protect employees.

In that context it is note-worthy that OSHA recently granted a permanent variance to a Connecticut steel plant, to allow the plant to use alternative protections to the Lockout/Tagout (LOTO) standard.

The "permanent" variance was granted to Nucor Steel Connecticut Incorporated (NSCI), which requested the variance for the process of cleaning rolls used to shape steel bars and rods. Frequent cleaning is necessary to prevent rust building up on the rolls, but disconnecting and locking out the rolls at the energy source required employees to access the Motor Control Room. At this plant, however, access to the Motor Control Room was restricted to qualified electricians because of potential arc flash hazards. As a result, the employees who cleaned the rolls were not able to attach their own locks to the energy disconnect, or personally verify that the equipment had been locked out, as required by the LOTO standard.

The LOTO standard includes a "minor servicing" exception, 29 C.F.R. § 1910.147 (a)(2)(ii). The exception has been limited to "minor servicing

activities that take place during normal production activities" and "are routine, repetitive and integral to the use of the equipment." Cleaning and grinding the rolls did not meet the exception for "minor servicing."

NSCI developed an alternative system and technologies for assuring that rollers could not be accidentally energized while workers were cleaning them, and could not be re-started outside of the employee's control. The system includes several "layers" of administrative controls.

NSCI filed its initial application in September 2014. After several rounds of additional questions and requests for information from OSHA, OSHA granted an interim order allowing the alternative system in December 2015. OSHA also invited public comment on the application for a permanent variance. The permanent variance was issued in April 2016. The variance comes with additional requirements for NSCI to report to OSHA (1) any injuries suffered as a result of the alternative energy control procedures, and (2) an annual written evaluation with the results of quarterly inspections.

Notwithstanding NSCI's eventual success in obtaining a variance, the case points to the challenges of the variance process. However, the case shows that there may be situations in which a variance may be obtained to allow alternative protections that fit with the particular circumstances of a workplace. If you have questions about the process or other aspects of requesting a variance, let us know.

Feds Assisting WV Workers Affected by Layoffs in Coal Mining Industry

By: Ryan Horka, Esq.

In 2012, the Department of Labor (DOL) provided an initial award of \$1.8 million to Workforce West Virginia for services and training to workers affected by layoffs in the coal industry. Since that time, the coal demand continues to decrease and, as a result, the number of layoffs increases. In April of 2014 and September 2015, West Virginia received awards of \$5,636,376 and \$3,288,902, respectively. At the time of the 2015 award, the program was comprised of approximately 1,700 participants from about 290 employers.

Recently, the DOL announced another award of \$4,318,182 to Workforce West Virginia to support the already-enrolled participants, plus approximately 300 additional workers affected by layoffs in the industry who will enter the program.

TSCA Modernization Bill Passes the Senate

By: Ryan Horka, Esq., and Gary Visscher, Esq.

After several years of work, and months of negotiations between the House and the Senate, the TSCA Modernization Act of 2015 – also referred to as the Frank R. Lautenberg Chemical Safety for the 21st Century Act – is making its way to President Obama’s desk. The House approved the bill on May 24th and the Senate approved it on June 7. President Obama is expected to sign it into law. The bill brings significant and fundamental changes for the nation’s primary industrial chemicals law – which has not been updated in 40 years. It also marks the first major revamp of an environmental statute since the Safe Drinking Water Act Amendments of 1996.

The bill addresses numerous shortcomings in the existing law, including the partial “grandfathering” of chemicals that were in use or production when the 1976 law passed. It is estimated that there are between 30,000 and 70,000 such chemicals; under the new law EPA is required to prioritize existing use chemicals as “high” or “low” priority, and to begin a process to systematically assess those deemed “high priority.”

The bill also clarifies and strengthens EPA’s authority to restrict and regulate new chemicals and new chemical uses. The new law requires chemical manufacturers to submit information on new chemicals and chemical uses to EPA, and EPA will have enhanced authority to require additional testing. The bill also revises the safety standards used under TSCA, including eliminating a provision in existing law which the Court of Appeals relied upon in a 1991 decision overturning EPA’s ban on asbestos.

In general, EPA will be allowed to restrict chemicals manufacture and use if there is “unreasonable risk,” and “to the extent practicable.” The revised standard in the legislation gives EPA greater flexibility in restricting and regulating chemicals; it may also be assumed that the flexibility in the law will lead to continued challenges when applied to the regulation of specific chemicals.

A key part of the negotiations leading to the new law was the extent to which states would be pre-empted when EPA begins evaluating and/or

regulating a specific chemical. The final bill is a very detailed compromise as to when state regulation is pre-empted. Existing state laws (including California’s “Prop 65”) and regulations would generally not be affected, nor does the preemption provision affect common law (tort) actions.

The new law includes deadlines and timetables for EPA to meet, including mandates for listing and prioritizing chemicals for risk evaluation and deadlines for proposing regulation of high priority chemicals. The law includes user fees intended to generate an additional \$25 million which is dedicated to EPA’s implementation of the law.

With regard to existing chemicals, the EPA will utilize a two-step process:

- 1.) Risk Evaluation: determine whether the substance poses a risk to the public. If so, the EPA must issue a rule regulating that substance.
- 2.) Risk Management: EPA weighs the environmental and health effects of the substance against the benefits of its intended purpose. In addition, they must conduct a cost-benefit analysis of any proposed regulatory action, and identify the reasonably ascertainable economic consequences of the rule.

If a substance requires a rule, pursuant to the analysis above, the rule must be proposed within one year and a final rule must be published within one additional year.

New chemicals will be reviewed without regard for the cost or the purpose of the product. Each new chemical will be designated as:

- 1.) Chemical presents an unreasonable health risk;
- 2.) Chemical may present an unreasonable health risk;
- 3.) Chemical is not likely to present a health risk; or
- 4.) Chemical is a low-hazard material.

If EPA finds that there is “no unreasonable risk” it must explain its finding. Those falling within either of the first two designations must be regulated.

TSCA primarily affects manufacturers and importers of chemicals, but the new law will also eventually impact the use and availability of certain chemicals. If you have any questions or would like additional information on the new law, please contact the Law Office.

After KenAmerican Resources, Will the Commission Ever Affirm the Granting of a Summary Judgment?

By: Michael Peelish, Esq.

In a recent case involving advanced notice, surprisingly, Upper Big Branch was not mentioned. Not surprisingly, after some good lawyering by the Respondent, KenAmerican Resources, and some poor lawyering by the Secretary (as noted by the Commissioners), the Commission still overturned ALJ Gill's decision to grant summary judgment. This case was brought forth on the following stipulated facts: on April 20, 2012, seven inspectors arrived at the mine to investigate hazardous conditions. The inspectors took control of the mine communications system and, while listening, heard a call come from unit #4 in which a person asked the dispatcher if there was "company outside," to which the dispatcher responded, "yeah, I think there is." MSHA then asked "who is on the line," and there was no response from underground.

ALJ Gill granted the Respondent's motion for summary judgment because the citation failed to allege a violation of section 103(a) of the Mine Act. He opined that the factual scenario was undisputed and, therefore, the Respondent did not violate section 103(a) as a matter of law.

The ALJ agreed with Respondent that the ambiguous nature of the language was not covered by Section 103(a). The Secretary agreed that the facts were not in dispute and that a reasonable inference could be drawn that advance notice was provided.

Commissioners Cohen, Nakamura, and Jordan voted to vacate the summary judgment and remand the case for trial since, in their minds, the evidence needed to be viewed in a light most favorable to the opposing party. They arrived at this conclusion even though that argument was not before the Commission, since the facts were not in dispute. Commissioners Althen and Young voted to affirm the summary judgment. Citing scripture, Commissioner Althen claimed his colleagues had "seen but not observed, and heard but not listened." He further elaborated that as a practical matter this was a waste of time since the facts were not in dispute and the ALJ had drawn a reasonable inference in deciding to grant the summary judgment. Essentially, everything the ALJ needed he had. Meanwhile, Commissioner Young wondered why the legal rigors of trial practice were not against the Secretary since the Secretary did not

conduct discovery or file a motion in opposition.

Even though the facts were not in dispute and the ALJ must have drawn a reasonable inference to come to his conclusion, the Commissioners had to step in and make arguments on behalf of the Secretary because the Secretary failed to do so. The reality is that the ALJ did his job under Rule 56 of the FRCP and the Commission should not have saved the Secretary's case. After this case, I am not sure what set of facts would provide a better platform for seeking a summary judgment. Going forward, Respondents should be cautious of spending time writing articulate, legally sound briefs to only have them ignored by the Commission whom in this case seemed to be seeking any way to uphold the Secretary's position. This is a case of good facts being ignored.

DOL Expands Overtime Eligibility

By: Ryan Horka, Esq.

On May 18, 2016, the Department of Labor (DOL) published its final overtime expansion rule. The rule will take effect on December 1, 2016, and it is estimated that it will extend overtime protections to over 4 million workers within the first year. The significant changes that the rule implements are:

- 1.) The salary threshold for the "white collar exemption" to the FLSA overtime rules will more than double for most workers, rising from a salary of \$23,660 (\$455/week) to a salary of \$47,476 (\$913/week). This sets the salary level at the 40th percentile of earnings of full-time salaried employees in the lowest-wage Census region (currently the South).
- 2.) The salary threshold for "highly compensated" employees will be set at the 90th percentile of full-time salaried employees nationally (currently \$134,004).
- 3.) It allows for employers to utilize nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the salary level.
- 4.) The salary and compensation levels will be reevaluated every three years to account for changes in the above-referenced percentiles, and to ensure that the changes are serving their purpose.

When the rule takes effect on December 1, 2016, there will be no phase-in of the salary thresholds; the increase will become effective immediately.

New W-SVEP OSHA Program Announced

By: Adele L. Abrams, Esq., CMSP

On May 27, 2016, OSHA's Region 7 unveiled its new pilot program, the "Whistleblower-Severe Violator Enforcement Program" or W-SVEP. The program is similar to its enforcement Severe Violator Enforcement Program which includes employers that routinely ignore federal workplace safety and health regulations, publicizes their misdeeds in an OSHA press release, and triggers follow up inspections at other worksites of the employer, searching for the same or similar hazards. Region 7 includes employers in Kansas, Missouri and Nebraska, and those companies under federal enforcement in Iowa.

"W-SVEP will focus on employers that engage in egregious behavior and blatant retaliation against workers who report unsafe working conditions and violations of the law," said Karena Lorek, OSHA's acting regional 7 administrator. "When employers retaliate against workers who exercise their legal rights, other workers may suffer a chilling effect and fear exercising their rights to speak up. Problems don't get fixed, and workers get hurt. Employers that act in that manner deserve greater public scrutiny and a powerful response from OSHA," Lorek added. "In the past three years, four large regional employers would have met the criteria for inclusion in W-SVEP."

The criteria for inclusion on the W-SVEP log will include:

- All significant whistleblower cases (those involving penalties over \$100,000).
- Cases deemed worthy of either litigation or the issuance of merit Secretary's Findings in connection with egregious citations, a fatality, or a rate-based incentive program for work-related injuries.
- A merit whistleblower case where the employer is already on the enforcement SVEP log.
- A company with three or more merit whistleblower cases within the past three years.

Once an employer is determined to have met one of the criteria listed above, OSHA will place them on the W-SVEP log. After three years, a company may petition the regional administrator for a follow-up visit and removal from the program. At that time, OSHA will complete a comprehensive review of the

company's policies and practices to determine if they have addressed and remedied the retaliation and its effects sufficiently.

OSHA enforces the whistleblower provisions of 22 statutes protecting employees who report violations of various airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health care reform, nuclear, pipeline, worker safety, public transportation agency, railroad, maritime and securities laws.

Employers are prohibited from retaliating against employees who raise various protected concerns or provide protected information to the employer or to the government. Provisions protecting workers' rights to report injuries and illnesses without retaliation, and to be trained on their rights and reporting procedures, were included in the May 2016 final rule on e-Recordkeeping (codified at 29 CFR 1904.35 and 1904.36). In addition, the final rule also allows OSHA to issue civil penalties for any interference with other rights granted to employees under Section 11(c) of the OSH Act. The agency can also seek "make whole" relief for workers who have suffered discriminatory adverse action, including reinstatement, restoration of seniority and benefits, and back pay.

OSHA, MSHA Spring 2016 Regulatory Agenda

By: Gary Visscher, Esq.

Two times per year, spring and fall, the Executive Branch is required to publish a "Regulatory Agenda" that lets the public know what actions on regulations are planned over the next few months. In late May, the Obama Administration released its Spring 2016 Regulatory Agenda. The entire Regulatory Agenda is no longer published in the Federal Register, as it was for many years, but it is posted and available on the internet (www.reginfo.gov). A subset, the Regulatory Flexibility agenda, was published in the June 9, 2016, Federal Register.

Ironically, the release of the Spring 2016 Regulatory Agenda came in the same week as the Mercatus Center at George Mason University released a study showing the total "regulatory accumulation" since 1980 to be about \$4 trillion – a cost nearly one-quarter of total U.S. GDP. The latest Regulatory Agenda shows no sign that the accumulation of regulations will ease, and that is true as well of the portions of the Regulatory Agenda developed by OSHA and MSHA.

Regulatory Agenda, Con't

As the April and May newsletters have described, OSHA has already in 2016 released two major regulations, final standards for construction, general industry and maritime on Respirable Crystalline Silica, and a final rule requiring that establishments of 25 or more employees submit injury and illness records to OSHA for publication by the agency.

According to the Spring 2016 Regulatory Agenda, OSHA intends to issue two additional final rules affecting most employers this year. One is a standard on "walking working surfaces." Based upon the proposed standard which OSHA published in 2010, the rule will make a number of changes to Subparts D and I of OSHA's standards for general industry in 29 C.F.R. 1910, including changes and updates on requirements on housekeeping (possibly including combustible dust), ladders, stairs, platforms, and scaffolds used in general industry. In addition, the final rule will likely include new standards for fall protection systems used in general industry.

In the 2010 Notice of Proposed Rulemaking, OSHA listed several additional issues for the final rule, even though no specific regulatory language was included in the proposal. One was inclusion of specific regulations on fall protection from railcars and trucks and other motor vehicles. A second related issue listed by OSHA was whether to include specific language regarding fall protection for employees who must climb onto stacked materials during rigging or other work activity. It is unclear how either of these issues will be addressed in a final rule.

OSHA also plans to finalize a rule to change the statute of limitations for recordkeeping violations. In *AKM LLC v. Sec. of Labor*, 675 F.3d 752 (D.C. Cir 2012), the Court of Appeals held that the six-month statute of limitations for recordkeeping violations begins to run from the time that allegedly erroneous entries were made. OSHA is seeking to amend its regulations to state that the obligation to accurately record each injury and illness is an on-going and continuing obligation that lasts for the five years that records must be kept by the employer.

While those are final rules scheduled for 2016, the Regulatory Agenda shows work being done on a host of other issues. OSHA plans to issue 7 proposed rules

during 2016, including proposed rules on beryllium, infectious diseases, and construction crane operator qualification/certification.

In addition, OSHA lists 18 regulatory items in the "prerule" stage. They include the often delayed SBREFA panel review for a combustible dust rule (now planned for October 2016), as well as a SBREFA panel review for a standard on Communication Tower safety (in July 2016). OSHA also states that it will issue a Request for Information on "Preventing Violence in Healthcare" in November 2016.

OSHA also plans to issue a Request for Information on a plan to revoke "obsolete PELs" in Table Z-1. According to the Agenda item, revoking these PELs would be done in order to use "other enforcement tools (e.g. the General Duty clause)." OSHA has previously stated that it considers the current Z-1 PELs to be obsolete, so how broadly this regulatory procedure sweeps remains to be seen.

While the Mine Safety and Health Administration (MSHA) Regulatory Agenda is shorter than OSHA's, it includes regulations that will significantly affect employers and operators subject to MSHA jurisdiction. As described elsewhere in this newsletter, MSHA has issued a proposed rule to amend requirements regarding workplace exams. In conjunction with release of the rule, MSHA announced that it would conduct four public hearings on the proposed rule during the 90 day comment period.

In addition, MSHA plans to issue a Proposed Rule on Respirable Crystalline Silica in September 2016. MSHA had put this rulemaking on "pause" while OSHA completed its silica rulemaking. MSHA typically relies heavily on OSHA's health effects work, and it is likely that the MSHA rule will propose a permissible exposure limit similar to that in OSHA's recent standards.

MSHA plans to issue the Final Rule on proximity devices in underground mines later this year. MSHA's Regulatory Agenda does not include any mention of MSHA's Civil Penalty proposed rule, which was issued in July 2014. During a recent stakeholder meeting, Assistant Secretary Main indicated that the agency is undecided on the future course of the proposed changes to Part 100 penalty criteria.

Please let us know if you have questions about any of these items or other upcoming regulations.

Commission Expands MSHA's Access to Records

By: Gary Visscher, Esq.

In the course of his inspection of an underground coal mine, an MSHA inspector observed miners working near what he considered to be hazardous roof and rib conditions. The inspector issued the operator a 107(a) withdrawal order, and subsequently issued a citation and order alleging unwarrantable failures related to the roof and rib conditions.

MSHA then informed the operator that it had begun a 110(c) investigation to determine whether charges would be brought against any individual officer, director, or agent of the company. As part of the investigation, MSHA requested that the operator turn over the names, addresses, positions, shifts worked, and telephone numbers of all employees of the mine. The operator objected to the scope of the request and the demand for employees' personal information. After several requests, MSHA issued the operator a citation alleging a violation of section 103(h) of the Mine Act. When the operator continued to decline to provide the information, MSHA issued a failure to abate order under section 104(b) of the Mine Act.

The operator contested the citation and failure to abate order, and the Secretary of Labor and the operator filed cross motions for summary judgment on the Secretary's authority to demand the information. The administrative law judge granted the Secretary of Labor's motion, finding that MSHA's demand was "reasonable and for a legitimate government purpose." The operator appealed the judge's decision to the Commission, and last month the Commission upheld MSHA's right to the requested records and information. (*Warrior Coal LLC*, 5/17/2016).

The majority opinion relied on the Commission's previous ruling and the Seventh Circuit Court of Appeals affirmance in *Big Ridge, Inc.*, 34 FMSHRC 1003 (May 2012), *aff'd* 715 F.3d 631 (7th Cir. 2013). That case involved an audit of accident, injury and illness reports, under 30 C.F.R. §50.41, and MSHA's demand that the operators turn over employee medical records and payroll information as part of MSHA's audit.

The operator argued that the authority to demand employee records in *Big Ridge, Inc.* was limited to the medical records that were at issue and the specific provisions in Part 50. Part 50, 30 C.F.R. §50.41, provides that the operator

"shall allow" MSHA access to information related to an accident, injury or illness which MSHA considers "relevant and necessary" to verify compliance with the reporting requirements under Part 50.

The Commission, however, cited the language in section 103(h) of the Mine Act: "In addition to such records as are specifically required by this Act, every operator...shall establish and maintain such records, make such reports, and provide such information, as the Secretary...may reasonably require from time to time to enable him to perform his functions under this Act."

"In other words," the Commission stated, "MSHA's statutory authority is not limited to 'relevant and necessary' information." Instead, the Commission held that the only inquiry is whether the request is (1) relevant to MSHA's purpose, (2) "sufficiently" limited in scope, and (3) specific in directive so that the operator was informed of how to comply.

The Commission majority analogized MSHA's demand for documents and records under section 103(h) to an administrative subpoena, and cited cases under other statutes in which federal courts have enforced such subpoenas. The standard applied to enforcement of administrative subpoenas was whether the information requested was not "plainly incompetent or irrelevant to any lawful purpose." Moreover, the Commission cited Supreme Court case law placing the burden on the objecting party to show that information that was subject to an administrative subpoena was not relevant to a lawful purpose.

As the concurring and dissenting commissioners noted, the Mine Act does not grant subpoena authority to MSHA; proposals to amend the Mine Act in recent years have included giving MSHA such authority. So there is some irony in the Commission's description of section 103(h) as essentially already giving MSHA such authority.

Warrior Coal also argued that turning over employees' personal contact information contradicted MSHA's assertion (in its Special Investigations Handbook) that employee participation in investigations is voluntary. The Commission majority said that an employee may, on an individual basis, decline to participate in an investigation when contacted by the inspector.

As mentioned earlier, MSHA issued the operator a citation for violating section 103(h), and a failure to abate order under section 104(b). Section 104 (b)

Warrior Coal, Con't

states that a failure to abate order directs the operator to withdraw miners from “the area affected by the violation.” Warrior Coal argued that the order issued against it was unauthorized because it did not satisfy the “area affected” requirement. The Commission majority rejected this argument on the basis that the Secretary had interpreted the statute as allowing a “no area affected” order and the Commission was giving “Chevron deference” to the Secretary’s interpretation.

In a concurring opinion, Commissioner Althen agreed with the majority that MSHA’s record request was reasonable and therefore authorized by section 103(h). However, he disagreed with equating section 103(h) and an administrative subpoena. He also found due process concerns in that MSHA could assess daily fines under section 104(b) prior to the operator being afforded a hearing on the legitimacy of the document request.

In a forceful dissent, Commissioner Young described the majority’s decision in this case as “an alarming and unconstitutional expansion of the law” which would “permit the sort of low-level policy freelancing the Supreme Court has expressly disapproved on Fourth Amendment grounds.”

Commissioner Young found the record request in this case “facially overbroad and unreasonable.” He described the request as a “fishing expedition,” and not in conformity with the Supreme Court’s decision in *Donovan v. Dewey*, 452 U.S. 594 (1981), which established MSHA’s authority (and limits on) warrantless inspections:

“Having been granted the power to conduct unnoticed inspections, and access without a warrant to various documents and information, the agency nonetheless asserts it must also have the power to require the operator to produce documents beyond those needed to investigate a known violation, in order to determine if there might be other violations elsewhere in the mine, without providing any foundational facts to gird its suspicions.”

As Commissioner Young warns, the Commission decision will undoubtedly lead to more requests for operator records beyond those that are mandated by the regulations. Although the Commission decision did not give MSHA completely unbridled access to operator records, the threshold for the Commission as to what MSHA “may reasonably require”

appears to be quite low. Operators should, however, insist that MSHA inform them as to the specific purpose of any records request, and to determine that the scope of any request be limited to stated purpose.

MSHA Alert: Proximity Detection Systems

By: Ryan Horka, Esq.

Just this month, MSHA released a safety alert regarding installation, maintenance, and checks of Proximity Detection Systems (PDS). This alert followed two incidents in which warning and shutdown zones were not set properly and pre-operational checks of the system were not being completed in accordance with manufacturer recommendations.

The first incident, involving a miner wearing a miner wearable component (MWC) and working on the opposite side of a line curtain from a scoop equipped with a PDS, occurred on February 11, 2016. The scoop was tramping through the line curtain as the miner was on his knees, in the process of “spadding down” the curtain. The scoop was raised above the miner and, although he was able to roll and avoid severe and possibly fatal contact, he sustained a broken leg.

The second incident occurred on May 19, 2016. During an MSHA visit to a mine where a similar PDS system was installed, MSHA found that the system was operating “erratically” on a continuous mining machine. Through the course of their investigation, MSHA found the shutdown zones were set too close to the machine and the machine mounted components only indicated an infraction when the MWC indicated that it was within the shutdown zone. In their Safety Alert, MSHA set forth the following “Best Practices”:

- 1.) Ensure Proximity Detection Systems are properly installed and maintained by a trained person.
- 2.) Conduct pre-operational checks by following procedures provided by PDS manufacturers.
- 3.) Contact PDS manufacturers to ensure that the PDS software updates are installed regularly.
- 4.) Verify that the warning and shutdown zones are set as recommended by the PDS manufacturer to stop the machine before a miner is contacted.
- 5.) Ensure that both the MWC and the Machine Mounted Components indicate corresponding warning and shutdown zone status.
- 6.) Reference MSHA’s video regarding General Inspection Procedures for PDS.
- 7.) If technical issues arise, contact the PDS manufacturer and your local MSHA District Office.

Subcommittee on Workforce Protections
Hearing: “Reviewing Recent Changes to OSHA’s
Silica Standards”
By: Ryan Horka, Esq.

A hearing was held by the Subcommittee on Workforce Protections on April 19, 2016, to discuss the recent changes to the OSHA Silica Standards. At the hearing, three main topics of discussion dominated the conversation: (1) the technological and financial feasibility of the new exposure limits, (2) the flexibility of the rule to account for situations where the new requirements may fix one problem but create others, and (3) whether new limits will have any effect, given OSHA’s seeming inability to enforce the regulations already in place.

In terms of the technological feasibility of the changes, Ed Brady, of the National Association of Home Builders, argued that the 80% decrease in exposure limits required by the new rule is just not possible. Building upon this point, Janis Herschkowitz, of the American Foundry Society, pointed out that the new standard sets the exposure limit at a level of silica in a certain area that equates to a packet of sweet and low sugar over the length of a football field, 13 feet high. Further adding to the analogies, Henry Chajet of the U.S. Chamber of Commerce pointed out that one eye drop in the hearing room would exceed the new exposure limit if it were silica. Adding to his point, Chajet explained that respirable silica is present in extremely small particles which can be tough to completely eliminate. According to Chajet, Brady, and Herschkowitz, the new standard is not practicable or feasible.

Disagreeing with Chajet, Brady, and Herschkowitz, Congressman Mark DeSaulnier of California pointed to the success that CalOSHA has already had with more aggressive regulations. From his view point, it has not created any issues with compliance or enforcement. He also pointed to some of the Canadian provinces which have lower level exposure limits, in arguing that the changes to the Silica Rule are both practicable and feasible. Similarly arguing that the changes are feasible, Dr. James Melius of the Laborers’ Health and Safety Fund of North America encouraged those present to remember that new technology will bring new, cheaper, more practicable ways to reduce exposure.

OSHA estimates that the changes will result in an annual benefit of \$3.8-7.7 billion, and only \$1 billion in

annual costs. According to OSHA, the annual benefits include healthcare cost savings, medical benefit savings, workers compensation savings, etc. However, not everyone agrees with OSHA’s estimated numbers. Brady pointed out that, according to a CISB calculation, the new rule will actually cost about \$5 billion. According to Brady, a portion of the distinction between the projected costs arises from OSHA’s failure to take into account, or at least accurately take into account, a couple of costs. First, testing of construction workers would cost about \$1.2 billion/year if each worker were tested only once (3.2 million construction workers x \$377.77/test). Second, recordkeeping alone would cost about \$1.1 billion/year.

In terms of the financial feasibility of the changes for individual companies, OSHA claims that the necessary alterations could be made using only the first year’s profits. Herschkowitz strongly disagreed with this projection, arguing that her company would need to spend over \$1.4 million, about 2 ½ times the first year’s profits, with no guarantee that the alterations would actually work.

The witnesses also set forth concerns regarding a multitude of new problems that the changes to the Silica Rule will create. In essence, they claimed that the changes amount to fixing one problem, while creating several others. For example, Herschkowitz claimed that her facility would be required to utilize a wet vac, or other source of water, near molten material. She noted that everyone in the foundry industry, as well as some other industries, knows that you never want to have water near molten material. In her estimation, the new rule will cause a significant number of foundry closures and ultimately cause the industry to go overseas to places like China, where there are much less stringent regulations. When questioned on the topic, Brady conveyed similar sentiments. He used examples of working on tiles and rooves, discussing the danger of creating wet surfaces when working in certain areas.

Feasibility of compliance aside, much of the discussion at the hearing surrounded OSHA’s failed enforcement up to this point. The Chairman began the hearing by discussing OSHA’s failure to utilize the resources already in place to address the Silica issue. He pointed out that OSHA itself admits that 30 percent of tested workplaces have failed to comply with the already existing exposure limit for silica. However, instead of ramping up enforcement measures, OSHA spent a significant amount of time and money on a new regulatory regime.

Silica, Con't

According to him, first and foremost, OSHA should be enforcing its existing standards because, if they are not, there is no point in creating new ones. Chajet agreed with this argument, stating that this is an issue with enforcement, not an issue with a rule. Expanding upon the Chairman's point, he noted that, not only have 30 percent of tested workplaces been out of compliance, 2/3 of that 30% have been 2-3 times above the current exposure limit. In his opinion, OSHA should refocus on reality, and the bigger problems that they face.

Stay tuned for more updates on the OSHA Silica Rule.

ADELE ABRAMS SPEAKING SCHEDULE

June 23: ClearLaw Webinar on Effective Discipline of Unsafe Workers

June 27: ASSE PDC, Atlanta GA, speak on Multi-Site Establishment Safety Management

June 28: ASSE PDC, Atlanta, GA, speak on Legal Privilege Issues for Safety & Health Documents

June 29: Progressive Business Conferences Webinar on Medical Marijuana Issues in Employment

July 11: Lorman Webinar on Effective Discipline of Unsafe Workers

July 26: BLR Webinar on Effective Management of OSHA Inspections

July 27: Business 21 Webinar on OSHA Recordkeeping

July 28: BLR Webinar on Hazard Recognition and Control

August 8: Chesapeake Region Safety Council, Baltimore, MD, seminar on OSHA's Crystalline Silica Rule

August 30: AHMP Conference, Washington, DC, speak on OSHA General Duty Clause

August 31: National Business Institute, Baltimore MD, speak at one day employment law seminar

September 22: ASSE Region VI PDC, Myrtle Beach, SC, speak on Legal Liability for Safety & Health Professionals

October 5, Chesapeake Region Safety Council Annual Conference, Baltimore, MD

October 17: National Safety Council Annual Congress, Anaheim, CA, speak on Legally Effective Incident Investigation

November 1: MSHA Southeast Mine Safety Conference, Birmingham, AL, speak on crystalline silica

November 29: Northern Region Assn. of Safety Professionals, Fargo, ND, speak on OSHA Update, and Legal Liability Issues for ESH Professionals

December 13: Oregon independent Aggregates Assn./SafePro Inc., Albany, OR, speak on Mine Safety Legal Issues