LAW OFFICE OF
ADELE L. ABRAMS P.C.

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MSHA Hearing on Reopening of Workplace Examination Rule Reveals Split in Industry

By Adele L. Abrams, Esq., CMSP

The Mine Safety & Health Administration (MSHA) has completed a series of public hearings and solicitation of comments on its proposal to reopen the 2017 final rule amending requirements for conducting and documenting workplace examinations at Metal/Nonmetal (M/NM) mines (30 CFR 56/57.18002). The final rule was developed under the Obama administration but appeared in the January 23, 2017, Federal Register. The proposed reopening appears in the September 12, 2017, Federal Register (82 FR 42757), and would weaken some of the more protective elements of the revised rule, which is now stayed until June 2, 2018, to allow time for it to be modified or rescinded based upon comments received.

MSHA's original rule remains enforceable and requires exams to be conducted each shift by a "competent person" but does not require any documentation of the hazards identified or remediated. Moreover, the old rule permits exams to be conducted at any time during the shift, including its final minutes after miners have been working in the area for hours, and does not require notification of miners about the hazards identified (other than withdrawal of miners exposed to an imminent danger).

While most commenters supported effective workplace examination requirements for all active working places each shift, they varied significantly on how this should be achieved and documented – and whether travelways should be included in the definition. A coalition of mining interests disagreed that any new rule was needed, calling for a return to the original 1970's requirements. Commenters who represent miners disagreed that the 2017 rule was unnecessary, and supported its full enforcement for greater protection of workers.

Law Office President Adele Abrams, who is also a Certified Mine Safety Professional, testified in her own capacity in support of the accountability that comes with also recording the details of hazards identified, as well as the date of the corrective action. She agreed with MSHA's proposed modification to exempt from recordkeeping conditions that are "promptly corrected" but urged the agency to clarify what "promptly" means and whether interim corrections (such as caution tape) would suffice or whether a permanent fix was needed to qualify for the documentation exclusion. Abrams also supported requirements to have the examinations done either prior to the start of the shift, or before miners enter the working place, rather than allowing the exams to be performed after miners have already had hazardous exposures.

Abrams noted that MSHA currently has conflicting policy on document retention: the agency's Program Policy Manual says that workplace exam records can be discarded once MSHA has performed an inspection, whereas the standard (and a 2015 Program Policy Letter) both state that records must be kept for a 12-month period and made available to MSHA upon request. Policy also notes that those conducting the mandated examinations must be adequately task trained to do so, under Part 46 or 48 (whichever is applicable) and inadequate inspections – determined by MSHA identifying uncorrected hazards that violate its standards – can trigger a workplace exam citation as well as a citation for inadequate training. The "adequacy" of

INSIDE THIS ISSUE

Law Office of
Adele L. Abrams, P.C.
Abrams Safety & Health
www.safety-law.com

D.C. Metro
4740 Corridor Place,
Suite D
Beltsville, MD 20705
(301) 595-3520
(301) 595-3525 fax

Colorado
600 17th St Ste 2800,
Denver, CO 80202
(303) 228-2170
(301) 595-3525 fax

West Virginia
1045 Bridge Road
Charleston, WV 25301
(301) 595-3520
(301) 595-3525 fax

MSHA Hearing, cont.

an examination is not defined in the standard, nor does that term appear in either the old or new rules, but a 2016 decision of the Federal Mine Safety & Health Review Commission, in Sunbelt Rentals, affirmed that examinations must be "adequate."

A key objection to MSHA's new documentation requirements arise from concern that inspectors may use historical documentation in order to issue citations for conditions that have been remediated successfully, or to heighten negligence to a flagrant level because the documentation shows patterns or practices. MSHA inspectors can cite companies even where a violation is not present during the inspection, as long as the inspector "believes" a violation had occurred. This belief can stem from discussions with miners, from admissions by the mine operator or from reviewing documentation that admits to a violative condition being present at some point in the past. Mine examiners have been found by FMSHRC to be "agents of management" who can be personally fined up to $70,000 under Section 110(c) of the Mine Act, even where the examiners are hourly miners.

To resolve this self-incrimination potential, Abrams urged MSHA to limit the document retention period to either six months or since the most recent MSHA inspection, whichever is shorter. Abrams also encouraged MSHA to follow OSHA's lead and formally adopt a self-audit safe harbor of sorts for these workplace examinations, to eliminate citations for previously corrected violative conditions. Information on the rule can be reviewed at www.regulations.gov.

Breaking News! David Zatezalo Appointed Assistant Secretary of Labor for Mine Safety and Health

On Wednesday, November 15th, the Senate confirmed David G. Zatezalo, of West Virginia as Assistant Secretary of Labor for the Mine Safety and Health. The Senate voted 52 to 46, along party lines to confirm Zatezalo.

NSSGA reported, "During his confirmation process, Zatezalo told the Senate Committee on Health, Education, Labor and Pensions that he would seek more consistent enforcement from agency officials and improved use of technology to boost safety and focus on "safer mining and health behaviors."

Firm Attorney & CIH Yellin Receives CSP Certification

Long-time Law Office Attorney Brian S. Yellin has been designated as a Certified Safety Professional by the Board of Certified Safety Professionals (BCSP), adding to his established professional credentials that also include being a Certified Industrial Hygienist (CIH). Yellin passed the CSP examination in November 2017. This makes him possibly the only practicing attorney in the US to hold both top-tier professional safety and health certifications. He also earned an M.S. in environmental and occupational safety and health from City College of New York, and his J.D. from the University of Baltimore.

Prior to becoming an attorney, Yellin worked for the Occupational Safety and Health Administration, eventually acting as the area director for OSHA's Manhattan Area Office in New York. He joined the Law Office while in law school as a clerk, and has been a practicing attorney at the Law Office of Adele L. Abrams PC since 2005. He is admitted to the Maryland and Montana bars, handles environmental, safety and health legal matters, and provides consultation nationwide.

Yellin is a leader in the firm's efforts to assist clients with industrial hygiene and OSHA/MSHA compliance, including providing training, on-site sampling and assessment, and program development on OSHA's revised crystalline silica standard. He is a frequent speaker at national and regional conferences and is a Professional member of both the American Society of Safety Engineers (ASSE) and the American Industrial Hygiene Association (AIHA). He is based at the firm's Washington, DC, area office. For more information, contact Yellin at (301) 595-3520.

NSC Points to Critical Needs in Contractor Safety Management

By Adele L. Abrams, Esq., CMSP

In September 2017, the National Safety Council (NSC) released a comprehensive report analyzing the needs and benefits of contractor safety management programs, including utilization of third-party management approaches. The issue of contractor management -- in terms of environmental, safety and health performance – is a critical one, particularly as the use of outside contractors and temporary workers increases across the board, in both Occupational Health and Safety Administration (OSHA) and Mine Safety and Health Administration (MSHA) regulated sectors.

Many contractors perform non-routine tasks at worksites and may have no direct supervision by an Environmental Health & Safety (EHS) manager, or may be at the worksite with no supervision at all. General contractors or host employers may be apprehensive about directing the work of third-party contract employees, out of fear of tort liability for negligent training or negligent supervision. Such workers can include pure "contractors" (employed by a bona fide subcontractor), "temporary workers" (hired through a staffing agency or union hall), and "contingent workers" (often these are "day laborers" who are hired for short terms projects informally and often under employment scenarios that violate federal and state labor laws).

The NSC report focuses on the pre-qualification stage of managing contractors: why pre-qualification is so critical, how third-party pre-qualification can add rigor to the process, and how prequalification helps contractors improve safety performance overall. In conducting its research, NSC examined over 17,000 companies that were included in third-party prequalifier BROWZ's database from 2007-2015.

What the NSC survey revealed was that suppliers, contractors and vendors who submitted to the third-party prequalification screening process had significant reductions in injuries, including a 48 percent lower DART rate (days away, restricted duty, transferred rate) arising from occupational injuries and illnesses) than the national average. Moreover, 54 percent of the time, third-party prequalified companies had a stronger annual rate of improvement for TRR (total recordable rate), DART and LWR (lost workday rate) rates when compared overall with the safety performance of companies surveyed by the Bureau of Labor Statistics in the same industrial codes.

The contractor prequalification process begins with contractors submitting data and completing questionnaires, which are then used by the third-party organization to verify and score the data. The pre-qualifying company continues to monitor the contractor/supplier/vendor's performance and also looks for gaps in critical areas, including recordkeeping, training, safety culture, standards enforcement, and communication. Once these programmatic flaws are identified, the contractor can seek help in becoming safer and more qualified.

Regardless of whether a third party conducts the screening, or the prime contractor handles it internally, the pre-qualification process should not simply consider past performance by focusing solely on lagging indicators such as incidence rate. Rather, a proactive contractor will want to consider the safety culture and programs that their prospective subcontractors have in place, and how the company provides positive reinforcement for exceeding basic minimum safety standards.

While contractor pre-qualification may be a long and arduous process, there are clear benefits in terms of safety performance and prevention of injuries and illnesses. Pre-qualification can also help to solidify relationships between GCs and their contractors, and can help contractors to modify their undesirable behavior, and strive for continual improvement, because they may take a long-term view of their contracting relationship.

When OSHA recently revised its "Safety & Health Management Program" guidelines for the first time since 1989, it added a new program component directly addressing contractor prequalification, coordination and training. See program guidelines here.

OSHA's enforcement posture is that subcontractors (or staffing agencies) and the host employers (or general contractors) are *jointly responsible* for maintaining a safe work environment for temporary workers - including, for example, ensuring that OSHA's training, hazard communication, and recordkeeping requirements are fulfilled. All workers at a worksite must be afforded access (without charge) to mandatory personal protective equipment, and must be protected from hazards created by their direct on-site employer and also from hazards created by other companies performing work in proximity (e.g., excessive exposures to crystalline silica in violation of OSHA's new construction rule, which took effect on 9/23/17).

Contractor Safety Management, cont.

OSHA can hold both the host employer and any employers of contractors, temporary employees or contingent workers, responsible for the violative condition(s) that are present in the workplace, regardless of the entity that created the hazard. When determining who is responsible at a multi-employer worksite, OSHA considers several factors. First, which employer is able to prevent and correct the hazard. Second, which employer is able to mandate compliance with OSHA standards at the worksite. For example: staffing agencies or union hiring halls might provide general safety and health training, and then the host employer or general contractor responsible for on-site safety would need to provide specific training tailored to the particular workplace equipment/hazards.

OSHA has concerns that some employers may use temporary workers as a way to avoid meeting all their compliance obligations under the OSH Act and other worker protection laws; that temporary workers get placed in a variety of jobs, including the most hazardous jobs; that temporary workers are more vulnerable to workplace safety and health hazards and retaliation than workers in traditional employment relationships; and that temporary workers are often not given adequate safety and health training or explanations of their duties by either the temporary staffing agency or the host employer. Therefore, it is essential that both employers comply with all relevant OSHA requirements.

OSHA's Safety & Health Management Program Guidelines for Construction set out a number of communication steps that general contractors can take to help improve overall safety and health on complex construction projects. These include:

- The general contractor communicates with contractors, subcontractors, and staffing agencies to determine which among them will implement and maintain the various parts of the safety and health program, to ensure protection of all on-site workers before work begins. These determinations can be included in contract documents that define the relationships between the parties and confirmed during pre-construction meetings.
- The general contractor establishes and implements procedures to exchange information with contractors, subcontractors and staffing agencies about hazards present on the job site and the measures that have been implemented to prevent or control such hazards.
- The general contractor gathers and disseminates information sufficient to enable each employer to assess hazards encountered by its workers and to avoid creating hazards that affect workers on the site.
- Contractors, subcontractors, and staffing agencies regularly give the general contractor any information about injuries, illnesses, hazards, or concerns reported by their workers and the results of any tracking or trend analysis they perform.
- Each contractor or subcontractor establishes and implements a procedure for providing the general contractor with information about the hazards and control measures associated with the work being done by its workers, and the procedures it will use to protect workers on the site.
- The general contractor gives contractors, subcontractors, and staffing agencies the right to conduct site visits and inspections and to access injury and illness records and other safety and health information.
- The general contractor provides contractors, subcontractors, and staffing agencies and their workers information on hazards that could occur as a result of nonroutine operations or emergencies and procedures to follow in emergency situations.
- Information is communicated before on-site work starts and, as needed, if conditions change.

Preparation is the best approach, and this means that GCs should include in contracts and bid documents any safety-related specifications and pre-qualifications that it will require of its subcontractors, and ensure that contractors, subcontractors, and staffing agencies selected for the work meet those requirements. The GC also must identify issues that may arise during on-site work and include procedures to be used by all contractors, subcontractors, and staffing agencies for resolving any conflicts before work starts. This may be accomplished through pre-construction meetings, site visits, web-based orientation or other methods depending on the nature, duration and location of the project.

All entities involved with a project must harmonize their safety and health policies and procedures to resolve important differences, so that all workers at the site have the same protection and receive consistent safety information (i.e., conduct site-specific training). All employers on a multi-employer worksite must

Contractor Safety Management, cont. (2)

coordinate to deal with unexpected staffing needs by ensuring that enough trained and equipped workers are available or that adequate lead time is provided to train and equip workers. Introducing under-trained workers in the middle of a project is a certain recipe for disaster. Finally, it is essential to ensure that managers with decision-making authority are available and prepared to deal with day-to-day coordination issues.

Whether temporary or permanent, all workers have a right to a safe and healthy workplace. Never allow any worker to be treated as second-class citizens when it comes to safety!

MSHA Addresses New Assistant Secretary's Confirmation Process, Enforcement Initiatives During Quarterly Training Call

By Joshua Schultz, MSP

During a November 8, 2017 Quarterly Training Call, Acting Assistant Secretary of Labor for Mine Safety and Health, Wayne D. Palmer, expressed optimism that David Zatezalo, the Trump Administration's nominee for the position, would be confirmed before the year ends.

MSHA also addressed a number of recent fatalities which have occurred in the Coal and Metal/Nonmetal sectors. The agency focused particularly on fatal accidents occurring at the longwall panline at underground coal mines. During the past five years, three miners have been killed working in the longwall panline. Marcus Smith, of MSHA's Accident Investigation Division, offered best practices related to working on the longwall, including analyzing tasks and hazards before beginning work, conducting frequent examinations of the work area, and checking on miners working alone.

Deputy Assistant Secretary for Operations Patricia W. Silvey, once again noted that the Agency would conduct extensive compliance outreach before the new workplace examination rule is implemented. Ms. Silvey promised that MSHA would hold seminars in the field on the new rule, distribute training materials and develop training manuals for the inspectors, which will be available to the regulated community. These documents can be utilized as policy to clarify ambiguity in the new rule. MSHA has published proposed rules delaying the implementation of the final rule; the original effective date had initially been pushed from March 2017 until October 2017, but was further extended until March 2, 2018.

Court Upholds OSHA's Refusal to Provide Testimony in Third Party Injury Claim

By Gary L. Visscher, Esq.

In *Ocas v. U.S. Department of Labor* (June 26, 2017), the question was whether a former Occupational Health and Safety Administration (OSHA) inspector should be compelled to provide testimony in a personal injury case regarding an investigation she conducted of a construction accident which seriously injured a construction worker. The injuries occurred as a result of a fall while the worker was installing windows at a multi-unit residential construction project.

After the accident, OSHA investigated, and determined that the worker was working as an independent contractor at the time, "and that OSHA did not have jurisdiction over his employment." OSHA apparently did not issue citations against the general contractor or any other employer on the project.

The worker and his wife subsequently filed a personal injury lawsuit against the property owner, building architect, general contractor, and several subcontractors. The worker's attorney obtained a redacted copy of OSHA's inspection report through a Freedom of Information Act request, and then sought to have the OSHA inspector testify at trial on OSHA's investigation.

Federal law, 5 U.S.C. § 301, authorizes agencies of the federal government to determine whether employees and former employees will testify in third-party lawsuits. Department of Labor's (DOL) regulations provide that the Department applies a balancing test where the Department will weigh the plaintiff's need for the testimony against any adverse effects to the Department.

In denying the request for the inspector to testify, DOL claimed that the former OSHA inspector whose testimony was sought "had no independent recollection" of the inspection, and that the request would burden DOL resources because DOL would have to provide an attorney to accompany the former inspector during the deposition.

Although the personal injury case was brought in state court, a separate lawsuit was filed in federal district court to appeal DOL's decision. The federal district court declined to reverse DOL's decision, stating that the applicable standard for reviewing DOL's action was the "arbitrary and capricious" standard, and DOL had given adequate reasons for declining to allow the former inspector to testify.

Refresh Your Annual Refresher Training

By Sarah Ghiz Korwan, Esq.

As 2018 approaches, are you considering how you will implement an educational and effective annual refresher training? It's not too soon to start thinking and preparing for this.

Part 46 Annual Refresher Training (ART) requires each miner to receive a minimum of 8 hours of annual refresher training at least once every 12 months. The training must include instruction on changes at the mine that could adversely affect the miners' health and safety. It must also address other health and safety subjects relevant to the mine. MSHA's website offers the basic requirements and forms, but not much in the way of the creative (which means effective) delivery of the ART. Below are a few ideas which will reduce the drudgery. Since it's required, make it interesting and meaningful, otherwise, it might be a wasted opportunity and effort.

First, consider demonstrations, and/or showing YouTube video demonstrations. For example, to demonstrate the importance of properly worn personal protective equipment, put on a harness improperly. Then, start walking around the room and explain why a loose harness is a bad idea. As you do this, allow the harness to slip off your shoulder and then physically demonstrate how they might slip out of it and hit the ground. You do not need to explain step-by-step, instead, continue presentation as your harness falls off. When it hits the ground, stop and note that getting home safely that night might be a problem.

In addition, there are many YouTube videos which illustrate the importance of testing a ground fault circuit interrupter (GFCI). While many videos can be boring and not a good use of time, there are several funny videos related to the GFCI which are quite good.

It is also important to actively engage those in the training. Here are a few ideas I gathered from the Internet. They may seem silly, but involving the workers in wacky presentations will likely lead to memorable lessons.

- Set up a workplace safety quiz or game in the style of a popular game show.
- Divide workers into teams, and get each team to write a song or rap about the concept you're teaching. It's amazing how those lyrics will stay in their minds over time.
- Play work safety bingo, with small incentives or prizes for the winners.
- Get groups of staff to make posters (humor and creativity encouraged) about a safety concept. The posters act as a visual reminder long after your safety presentation is over.

Another thing to remember is that, when preparing for the ART, workers themselves often know where they need refreshing, as well as what safety issues are lurking on the job. Maybe they need a refresher on their CPR training, or perhaps, they've noticed that hazardous materials aren't always handled properly. Since you may not always be at the work site, ask the miners, union reps, or foremen, which topics need to be addressed. Make the process anonymous if asking for this information from workers may cause fear of calling out a colleague. It will give you valuable information about where to focus your workplace safety training.

Finally, use training videotapes only as a supplement to training sessions. Hands-on, interactive, real-life accident or near-miss stories work best. If workers are bored or feel they don't need the training again, they may engage in "presenteesim", i.e. being present at the ART but not paying attention. Remember, this is your chance to refresh and reinforce best safety practices, so make the most of this important opportunity – it's in everyone's best interest.

OSHA's Interim Enforcement Guidance for Silica Compliance

By Michael R. Peelish, Esq.

On October 19, 2017, OSHA issued its Interim Enforcement Guidance for the standard which established a new 8-hour time weighted average (TWA) permissible exposure limit (PEL) of 50 micrograms per cubic meter. This guidance shed some light on how OSHA will approach enforcement activities. The Guidance was enlightening in several aspects, detailed below.

(1) OSHA states "the respirable crystalline silica (RCS) standards do not prohibit employers from rotating employees to different jobs to achieve compliance with the PEL."

This is a strong statement by OSHA. In its preamble to the RCS Standard, OSHA was not as generous in its

Interim Enforcement Guidance, cont.

examples of when employee rotation would be permitted. However, taken literally, this statement means that employers can rotate workers to meet the PEL. In practice, employers could use this practice for Table 1 tasks to keep employees from having to don respirators if the task required the use of a respirators after four hours. Employers must still have an exposure control plan setting forth how they will manage administrative controls to ensure the competent person manages the work tasks according to Table 1 and the exposure control plan.

For tasks outside Table 1, employers must still have exposure assessment data to support that employees are below the PEL for the task being performed. To ensure compliance, the employer must have an exposure control plan for the task that sets forth how the administrative controls work. For example, the exposure control plan could establish that the employer will rotate employees after a certain number of hours before rotating to another task with no exposure.

(2) OSHA has acknowledged that "Using sweeping compounds (e.g., non-grit, oil- or wax-based) as an acceptable dust suppression housekeeping method."

Employers are permitted to lay down sweeping compounds on certain areas and use a broom to gather the dust. For example, an exposure assessment for employers who install drywall would include installing the drywall, and drywall mud (or grout). After the grout has been applied but before sanding begins, the employer will lay down sweeping compound to gather the dust. This process will allow the employer to clean up the sweeping compound by simply using a broom. Use of sweeping compounds are a very effective way to manage all dust created during the sanding process.

(3) OSHA adds clarity to respirator use by stating, "If Table 1 requires respiratory protection when the anticipated task duration exceeds four hours, employees engaged in the task must wear the respirator during the entire period of time they are performing the task, not just the period of time that exceeds four hours."

This explanation provides guidance which was not entirely apparent from the language of the RCS standard. Now employers know how Table 1 will be applied in certain circumstances. However, an employer may not know at the time a shift begins if a task will extend beyond four hours. Once an employer realizes that a task will take more than four hours, they should either stop the task at four hours or use job rotation to keep the employee from exceeding four hours, and possible silica exposure.

New Rule Requires Use of Electronic Logging Devices for Commercial Drivers

By Michael R. Peelish, Esq.

On December 16, 2015, the Federal Motor Carrier Safety Administration ("FMCSA") amended the Federal Motor Carrier Safety Regulations to include the Electronic Logging Devices and Hours of Service Supporting Documents Rule, also known as the ELD rule. By December 17, 2017, employers who meet the hours of service rules must have installed an ELD in their vehicles, and the handwritten grid graphs will be a process of the past. However, the ELD rule allows carriers using automatic on-board recording devices installed before December 17, 2017 to transition to ELDs by December 17, 2019.

The rule requires (1) ELD use by commercial drivers who are required to prepare hours-of-service ("HOS") records of duty status ("RODS") under 49 CFR Section 395.8(a), (2) sets ELD performance and design standards and requires ELDs to be self-certified and registered with FMCSA, (3) establishes what supporting documents drivers and carriers are required to keep, and (4) prohibits harassment of drivers based on ELD data or connected technology (such as fleet management system). The rule also provides recourse for drivers who believe they have been harassed.

The second phase implementation of the ELD rule, especially the availability of "effective" technology was an important topic at the National Drillers Association Mid-Atlantic Region annual meeting. There are now 14 ELD manufacturers listed on FMCSA's website based on the self-certification process. The presenter noted some of the items that employers should consider when purchasing ELDs such as (1) does the ELD have a printout for inspectors or, if chosen, is the screen display adequate, (2) how much additional meaningful data can the ELD capture versus what is required, and (3) how easy is the ELD for producing the needed reports. Once implemented, the ELD will likely be a huge time saver with ancillary benefits.

The ELD rule does have some exemptions, including 100 air-mile radius drivers may continue to use timecards, as allowed by section 395.1(e)(1); 150 air-mile radius non-CDL freight drivers may continue to use

Electronic Logging Devices, cont.

timecards, as allowed by section 395.1(e)(2); using paper RODS for not more than 8 days during any 30-day period; conducting "drive away-tow away" operations; and driving vehicles manufactured before model year 2000.

Any significant change can be difficult to implement if not planned and well executed. A National Drillers Association presenter had implemented the technology and was very positive about the time saving improvements he had seen as a manager. However, he noted several pitfalls to avoid including (1) make certain the ELD meets the technical specifications since the ELD manufacturers self-certify; (2) conduct adequate training and ensure the manufacturers are part of that training, (3) ensure that practices and policies comply with the ELD rule, and (4) follow-up early on to ensure implementation issues get worked out quickly. There was consensus by those who had implemented the ELD rule that in the end it will provide a good return on the investment.

OSHA Crane Operator Certification Delay & Competency Requirement Extension In Effect

As detailed in our September 2017 issue, article entitled "OSHA Extends Deadline for Crane Operator Certification", the crane certification and competency requirements will not take place until November 10, 2018. The extension and delay will allow OSHA to complete a related rulemaking to address issues with its existing Cranes and Derricks in Construction standard (29 CFR part 1926, subpart CC).

SPEAKING SCHEDULE

ADELE ABRAMS
11/16/17 Business 21, Webinar on Effective Incident Investigations
11/29/17 BLR, Webinar on Lockout/Tagout Requirements and Exceptions
12/01/17 AIHA Conference, Princeton, NJ, Presentation on OSHA Crystalline Silica Rule
12/07/17 BLR Seminar on Drug Testing & Substance Abuse Prevention, San Antonio, TX
12/12/17 BLR Webinar, Top OSHA Compliance Challenges for 2018
12/14/17 BLR Webinar, OSHA Documentation Issues: Sword or Shield

MICHAEL PEELISH
11/20/17 Silica Presentation, Safe Hawk Compliance Services, Philadelphia, PA