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Occupational Safety and Health Administration

Court Rules Against Employees Seeking to Force OSHA to Issue Imminent Danger Order

By Gary Visscher, Esq.

Workers cannot compel OSHA to issue an imminent danger order where OSHA does not believe an imminent danger exists, and the agency completed its enforcement proceedings, according to the 3rd U.S. Circuit Court of Appeals.

We have been following this novel case under the OSH Act, which, if the plaintiffs had been successful in their argument, it would have created a new, though limited, private right of action for enforcement of the Act. Previous articles on this case described the decision by the federal district court (June 2021) and arguments made on appeal to the 3rd U.S. Circuit Court of Appeals (March 2022).

Last month the 3rd Circuit issued its decision, and affirmed, though on different grounds, the federal district court's dismissal of the plaintiffs' claims.

Briefly, the background of the case is as follows. Employees of Maid Rite Specialty Foods (aided by their designated representative) filed a lawsuit in federal district court, asking the court to issue a writ of mandamus to force OSHA to seek an imminent danger order against the employer for failing to adequately protect the employees from covid-19 exposures in the workplace.

The employees had earlier filed a complaint for unsafe working conditions with OSHA, in March 2020. OSHA initially responded to the complaint by asking the plant to describe what protections it was providing. Eventually, in July 2020, OSHA did conduct an in-person inspection. OSHA did not issue citations against Maid-Rite, nor did it issue an imminent danger order, as the employees had requested in their complaint to OSHA over unsafe working conditions.

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The workers then filed the lawsuit in federal district court, seeking a writ of mandamus to force OSHA to issue the imminent danger order and seek an injunction against the employer. The basis for the lawsuit was a provision in section 13 (d) of the OSH Act, which states that if the Secretary "arbitrarily or capriciously fails to seek relief…, any employee who may be injured by such failure, or the representative of such employees, might bring an action against the Secretary…for a writ of mandamus to compel the Secretary to seek such an order and for such further relief as may be appropriate."

Before the district court, OSHA argued that section 13 (d) only authorizes the court to issue a writ of mandamus if an inspector has recommended that an injunction for an imminent danger be sought and the Secretary "arbitrarily and capriciously" declines to follow the inspector's recommendation. The district court agreed with this argument, and said that under the statute, an inspector's finding of an imminent danger and recommendation to seek an injunction, and the Secretary's refusal to go along with the recommendation, are necessary preconditions for a court to consider issuing a writ of mandamus under section 13 (d).

On review in the 3rd Circuit court, the Secretary of Labor retreated from the argument which had prevailed in the district court. The court noted in a footnote that it considered OSHA's decision "not to pursue this path to have been a wise one."

Instead, the 3rd Circuit said the case turned on language in subsection 13 (a), which provides that the federal district court has jurisdiction to issue an injunction when "a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

In other words, "the Secretary may not seek emergency injunctive relief after OSHA has completed its standard enforcement proceedings…. It follows that a district court may not grant – and a plaintiff may not seek – a writ of mandamus compelling the Secretary to seek injunctive relief under [section 13 (d)] after OSHA's enforcement proceedings are completed," the court wrote.

The plaintiffs argued that the provision in section 13 (d) allowing a federal district court to order "such further relief as may be appropriate" would allow for their case to proceed even after OSHA had completed "standard enforcement proceedings."

The 3rd Circuit disagreed with that argument. In the Court's words, "We appreciate Plaintiffs' concern that this interpretation … means that [this section] will provide an avenue for relief in only limited circumstances. Yet it seems to us that such a limitation is exactly what Congress intended….By design, the private right of action under [section 13 (d)] is narrowly circumscribed. And in this case, given that OSHA's standard enforcement proceedings had concluded, relief under [section 13(d)] was unavailable."

Occupational Safety and Health Administration

Storage Standards Violated Where Items Fell From Racks

By Gary Visscher, Esq.

Warehouses, distribution centers, and other places of employment that use tall racks or shelves for storage should double check to make sure products cannot fall if the rack, or a nearby rack, is bumped or jostled and there is a potential for items to fall of those adjoining racks.

Employers may need to install safeguards against employee injury as a result of a recent decision by the Occupational Safety and Health Review Commission.

The decision came in a case involving a Walmart distribution center. Walmart was cited in 2017 for a violation of 29 C.F.R. § 1910.176(b). That standard requires that "bags, containers, bundles, etc. stored

in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse."

Walmart was cited after a Walmart employee was injured by falling containers of crescent rolls. The containers were on pallets, which were placed on storage racks up to 50 feet high. The pallets were placed two-deep, back-to-back with a small space in between pallets.

The accident resulted when a forklift operator retrieving a pallet on the adjoining aisle inadvertently pushed a pallet holding containers of crescent rolls, causing the pallet to tip and containers to fall. An employee working in the aisle under the crescent rolls received injuries to her head, shoulders, and back from the falling crescent roll containers.

Walmart made a variety of arguments that the cited standard did not apply. Initially before the ALJ, Walmart argued that the standard did not apply because the material that was being moved by the forklift operator was being "placed in storage" rather than "stored." The ALJ rejected that argument. The ALJ also found that the other elements for finding a violation (the terms of the standard were violated, one or more employees had access to the cited condition, and the employer knew or with reasonable diligence could have known of the condition) were met and upheld the citation.

Walmart appealed to the Commission. In the appeal Walmart argued the standard did not apply because the materials on pallets were stacked on racks and therefore were not "stored in tiers" as the standard states. The Commission majority agreed with the argument.

In a 2 to 1 decision, the Commission held that the standard did not apply because "tiers" requires items to be in "layers," which the Commission said meant items must be stacked directly on top of each other. Since the Commission found that the standard did not apply, it did not decide whether the other elements necessary for a violation were met.

OSHA appealed the Commission decision to the 2nd U.S. Court of Appeals, which rejected what it said was the Commission's "cramped definition" of the word "tiers" in the standard. *Secretary of Labor v. Walmart* (2d. Cir., Oct. 4, 2022).

Citing dictionary definitions as well as common usage, the 2nd Circuit said that the word "tiers" in the standard is not limited to situations in which "materials were stacked on top of each other directly" but could include "the shelves…upon which Walmart stores its containers of materials, i.e. the pallets."

Having found that the standard applied, the Court of Appeals remanded the case to the Commission to determine whether the other elements of a violation had been met. In a decision dated February 8, 2023, the Commission determined that all the elements for a violation had been proven and upheld the citation.

First, the Commission found that the terms of the standard were violated because the pallets were not "stable and secure against sliding or collapse." Citing dictionary definitions, the Commission said that standard applied not only to situations where materials might give way under their own weight but also applied where an outside force dislodged materials and caused the "collapse."

Walmart argued that its racking was consistent with industry standards. However, the Commission said that Walmart provided no evidence regarding industry standards beyond a single statement by its general manager. Furthermore, the Commission said, industry standards would not be dispositive where, as here, company managers knew "that pallets regularly tip and spill merchandise."

The Commission also found that the elements of employee exposure to and employer knowledge of the condition were met. The Commission noted evidence from the record that the injured employee had previously informed managers of her concerns regarding falling items and the distribution center's general manager testified that he received reports about tipped pallets a least a few times per month."

In the original citation, the means of abatement of the violation was described as the installation of

front-to-back beams or crossbars on all racks at the large distribution center, which would block pallets from shifting. OSHA gave a 19-day abatement period.

There was testimony from Walmart's manager that installing the beams would take at least six months, because the beams would need to be fabricated and custom installed. The Secretary had provided no evidence that the beams could be installed in 19 days. The Commission extended the abatement to six months and assessed the proposed penalty of $10,864.

Occupational Safety and Health Administration

OSHA's Authority to Issue Safety Standards is Challenged

By Gary Visscher, Esq.

Fifty-three years after passage of the Occupational Safety and Health Act, a case currently before the U.S. Court of Appeals for the 6th Circuit is challenging the constitutionality of a major part of the statute, OSHA's authority to issue safety standards.

The plaintiff in the case, Allstates Refractory Contractors, argues that the OSHA's authority regarding safety standards is so broadly defined in the statute that it is an unconstitutional delegation of legislative authority to an administrative agency. The OSH Act's only criteria applicable to safety standards (as compared to health standards to which section 6 (b)(5) applies) is that such standards must provide protections for workers that are "reasonably necessary or appropriate."

The current case in the 6th Circuit is not an appeal of a citation that Allstates Refractory received, nor does it target a specific OSHA safety standard. Allstates Refractory was cited most recently in 2019 but settled the citation. Two years later Allstates Refractory sued the Labor Dept. in federal district court, seeking to have all safety standards promulgated under 29 U.S.C. 655 (b) be declared invalid due to Congress' unconstitutional delegation of legislative authority when it passed the OSH Act in 1970.

Allstates Refractory filed its lawsuit in the federal district court for the northern district of Ohio. The federal district court granted summary judgment to the Labor Dept.. The case is now on appeal to the Sixth Circuit.

Legal challenges to OSHA's safety standards as an unconstitutional delegation of legislative authority is not entirely new. The argument was made in "the early days" of the Act, most notably in *Blocksom & Co. v. Marshall*, 582 F.2d 1122 (7th Cir. 1978), where the Court of Appeals denied the claim that the OSH Act's authority to issue safety standards was an unconstitutional delegation of legislative authority.

A 2011 decision by the D.C. Circuit in *Natl Mar. Safety Assn*, 649 F.3d 743, also rejected the argument that OSHA's authority to issue safety standards was so broad that it was an unconstitutional delegation of legislative authority.

A bit of dicta in a Supreme Court 2001 decision, *Whitman v. Amer. Trucking Assn*., 531 U.S. 457 (2001) has given new life to the non-delegation argument. In that case, the Supreme Court rejected an argument that EPA had acted under an unconstitutional delegation, but in the opinion, the Court said that unconstitutionally broad grants of authority to administrative agencies would not be "cured" by an agency's own guidelines and parameters on how it will exercise its authority. Thus, the argument is made in the OSHA context that the lengthy rulemaking procedures which OSHA has adopted since 1970 (often as a result of court decisions) for issuing a safety standards does not fix the problem of the originally unconstitutionally too-broad delegation of authority.

Now that argument is being tested in the 6th Circuit case. The Labor Dept.'s brief, filed on January 23, 2023, argues that while the Supreme Court said an agency's own guidelines and parameters could not cure an overbroad delegation of authority,

meaningful boundaries on OSHA's authority to issue safety standards have been set by court decisions. Particularly, the Labor Dept. argues that, "the Supreme Court has repeatedly recognized that the Act cabins the Secretary's authority in meaningful ways."

The government brief cites four decisions that limit and guide OSHA's safety standards-setting authority:

- the Supreme Court's 1980 Benzene decision, *AFL-CIO v. API*, 448 U.S. 607 (1980), which requires finding significant risks are present and can be reduced or eliminated by the standard;
- the Supreme Court's 1981 Cotton Dust decision, *American Textile v. Donovan*, 452 U.S. 490 (1981), which "limits the Secretary to promulgating only safety standards that are economically and technologically feasible;"
- the Supreme Court's 2022 COVID-19 vaccine mandate decision, *NFIB v. Department of Labor*, 142 S.Ct. 661 (2022), which limits the Secretary by not allowing the Secretary to promulgate "broad public health measures;" and,
- the 1994 decision by the D.C. Circuit, *UAW v. OSHA*, 37 F.3d 665 (D.C. Cir., 1994), which among other things requires that workplace safety standards "provide a high degree of employee protection."

In addition, the brief also argues that the OSH Act restricts OSHA's authority by requiring OSHA to explain why its rule better effectuates the purposes of the OSH Act any time that OSHA promulgates a safety standard that differs substantially from an existing national consensus standard.

The case has attracted considerable interest, and in addition to the briefs filed by Allstates Refractory and the U.S. Labor Dept., multiple entities and associations have filed amicus briefs with the Court of Appeals. As briefs are just now being filed, it will likely be several months before the 6th Circuit issues a decision in the case.

Occupational Safety and Health Administration

OSHA Reboots SST Enforcement Initiative

By Adele L. Abrams, Esq., ASP, CMSP

Just before Valentine's Day, OSHA delivered a greeting outlining its updated Site-Specific Targeting (SST) initiative. The inspection plan covers non-construction worksites with 20 or more employees, and uses "objective data" derived from the electronic injury and illness data submitted by employers under 29 CFR Part 1904.41.

The new SST enforcement plan uses reported data from CY 2019 through 2021 to select the establishments OSHA will inspect, resources permitting.

These are "programmed" inspections which are the lowest priority – the other inspections in this category are triggered under OSHA's 10 National Emphasis Programs. Unprogrammed OSHA inspections include response to fatalities and catastrophic events, imminent danger inspections, and responses to hazard and whistleblower complaints.

The new SST program, CPL 02-01-064, took effect immediately and will be in effect for two years. It officially cancels the previous program and its criteria, issued in 2020. States that administer their own OSHA programs are directed to have equivalent programs within 60 days of February 7, 2023.

Under the program, OSHA generates inspection lists of companies with elevated "Days Away, Restricted or Transferred" (DART) rates; companies that have upward trending rates during CY 2019-2021, companies that did not provide a required electronic Form 300A to OSHA; and certain companies with low DART rates in CY 2021, to verify the data accuracy and quality control.

The main changes between the 2020 and 2023 versions are:

- For high-rate establishments, the SST plan will select individual worksites for inspection using

CY 2021 Form 300 A data, rather than CY 2019 data.

• For upward trending establishments, the SST plan selects individual establishments based on CY2019-2021 Form 300 A data, rather than CY 2017-2019 information.

• Low rate establishment lists will be generated using CY 2021 Form 300A data, instead of CY 2019 data.

• The "non-responders" list will be generated using CY 2021 data, rather than CY 2019. Non-responders are identified by OSHA generating a random sample of establishments that failed to electronically submit data (based on NAICS code).

If OSHA arrives and finds the business is an administrative office and not high hazard, they will stand down. Similarly, if the worksite does not meet the criteria due to being under 20 employees, the inspection will be terminated. There may also be a "records only" inspection conducted that includes employee interviews, to verify the employer injury and illness data. Any violations in plain view or brought to OSHA's attention during discussion with workers can expand the scope of the inspection.

More changes may be in store for SST in the future. The OSHA e-Recordkeeping rule, which was issued at the tail end of the Obama administration, was subsequently gutted in terms of the reporting scope under the Trump Administration. It has been reopened and is at the final rule stage, with the issuance expected in June 2023. If the deadline is met, it will likely apply to data from CY 2023 and beyond.

The planned changes include revising the list of NAICS codes covered for small employers, changing that size definition from 20-249 employees to 20-99. Larger employers would have to submit all forms (Form 300, Form 301 and Form 300A), if the proposed rule is followed. The current rule also includes enhanced whistleblower protections (29 CFR 1904.36) for workers retaliated against for reporting an injury or illness, or for exercising any of their rights under Section 11(c) of the OSH Act. Those provisions are not expected to be altered in the current rulemaking.

For more information on OSHA recordkeeping compliance, contact Adele Abrams at safetylawyer@gmail.com.

Fair Labor Standards Act

Meat Plant Service Fined $1.5M For Child Labor Violations

Sarah Ghiz Korwan, Esq.

The US Labor Dept. Has enjoined Packers Sanitation Services Inc. (PSSI) from actions that violate the child labor provisions of the Fair Labor Standards Act, following reports in August that PSSI had assigned minors to work in hazardous occupations.

Initially, the Labor Dept. cited PSSI for illegally employing 31 children in three meat packing plants where the PSSI had contracted to clean and sanitize. The children worked on overnight shifts, and several suffered chemical burns from the corrosive cleaners they were required to use. Most were Latino and did not speak English.

This was apparently just the tip of the iceberg.

On February 17, the Labor Dept. fined Packers Sanitation Services Inc. (PSSI) $1.5 million in civil penalties for violations which involved employing at least 102 children – from 13 to 17 years of age – in "hazardous occupations", specifically, cleaning power equipment, such as bone saws, brisket saws and head splitters, during overnight shifts. In addition, DOL's investigation revealed that the practices for which the company was cited were not anomalous inasmuch as the underage workers were found working in 13 meatpacking plants in eight states. According to the DOL, at least three of the

child workers suffered burns and other injuries while working for PSSI, one of the country's largest food safety sanitation service providers.

PSSI is owned by the Blackstone Group, and it is unlikely that the civil penalties will have much effect on their bottom line, but the optics are not good for the company. However, because this incident made national news, hopefully it will serve as a reminder to all employers that workers are protected by the Fair Labor Standards Act and employers who violate wage and labor laws will be held accountable.

Since 2015, the DOL's Wage and Hour Division has seen significant increases in child labor violations, but it's unclear whether the increase is because more companies are employing children or because there have been more investigations of these companies.

In fiscal year 2021, the division found 2,819 minors employed in violation of the law and assessed employers with nearly $3.4 million in civil money penalties[1] (which puts in perspective the outsize of the penalties assessed against PSSI). Last year DOL reported that since October 2017, five hazardous occupations – as defined by child labor law – accounted for approximately 90% of non-agricultural hazardous occupations' violations and approximately 61% of non-agricultural child labor injuries. These hazardous occupations include:

- Driving a motor vehicle or work as an outside helper on motor vehicles.
- Power-driven hoisting apparatus occupations, including the operation of forklifts.
- Occupations that involve power-driven meat-processing machines (including meat slicers and other food slicers), slaughtering and meat packing plants.
- Operating power-driven bakery machines, including vertical dough or batter mixers.
- Power-driven paper-products machine occupations, including the operation of compactors and balers.

To assist businesses that employ child labor, the Wage and Hour Division of the DOL launched a web site providing Seven Child Labor Best Practices for Employers that focuses on the importance of training, sharing information and using practical tools to identify the hazardous occupations young workers must avoid.

Occupational Safety and Health Administration

OSHA's Initiative to Protect Undocumented Workers

By: Diana Schroeher

Effective March 30, OSHA will be able to assist undocumented workers by issuing VISA application certifications if OSHA determines that a worker is a victim of certain qualifying criminal activities.

These special VISAs will permit the worker to remain in the United States to assist law enforcement authorities investigate the crimes.

This new Initiative gives OSHA the authority to identify worker victims during an its onsite OSHA safety investigations.

The new authority was announced February 13. If OSHA issues a VISA certification, it will support an undocumented worker's application for either U Nonimmigrant Status or T Nonimmigrant Status. The worker must be a victim of a crime involving human trafficking, forced labor, extortion, obstruction of justice, felony assault or manslaughter to be eligible for the U or T VISA status. DOL wants all workers to feel empowered to share information with investigators, including reporting workplace safety and health issues or labor law violations.

Workers whose immigration status or work authorization status may be in flux may feel

[1] https://www.dol.gov/newsroom/releases/whd/whd20220729

discouraged from reporting for fear of retaliation. OSHA said this new initiative will "help the agency better fulfill its mission to make U.S. workplaces as safe and healthy as possible", and will also "provide the agency with a critical tool for protecting immigrant and migrant worker communities regardless of their lack of immigration status or temporary worker employment authorization."

OSHA's news release can be accessed at the following link:

https://www.osha.gov/news/newsreleases/readout/02132023

Occupational Safety and Health Administration

Modernization of Voluntary Protection Program In the Works

By Adele L. Abrams, Esq., ASP, CMSP

On February 16, 2023, OSHA published a request for comments on ways to "modernize" its decades-old Voluntary Protection Program (VPP), and potential changes include charging a fee for VPP participation, offering new incentives for joining the program, and switching to a "tiered" approach for worksite recognition.

Currently, companies qualifying for VPP status are exempt from "Programmed" OSHA inspections – including those under the National Emphasis Programs and the new Site-Specific Targeting Program (discussed elsewhere in this issue).

The notice appears in the *Federal Register* and allows 60 days for public comment (due April 14, 2023), although this could be extended. There is also an opportunity to request a public hearing, but because this is a policy modification and not a rulemaking, there is no mandate for a hearing before altering current criteria.

The VPP, established in 1982, has generally been credited with saving lives and providing examples of how companies can successfully implement world-class occupational safety and health programs and reduce injuries and illnesses while maintaining productivity. VPP worksites have a "DART" rate that averages 53% below the average for the participant's industry sector (non-construction) and 60% lower for construction. This favorable trend has been noted since 2001. VPP is available to diverse industries: employers and contractors, large and small companies, union and open shops, and even site-based and mobile workforce sites are all eligible. There are approximately 2,200 organizations recognized as VPP sites currently.

It does, however, use significant OSHA human and financial resources. Participants must have and maintain superior "DART" (injury/illness) rates, and have adopted safety and health management systems (SHMS), as well as going beyond minimum compliance through alignment with ANSI, ISO or other consensus standards, and ensuring employee participation (usually through a union presence at the workplace). There are other metrics used, and these are among the details now under review.

There has been criticism of the program as well from various quarters, including observing that VPP worksites still have histories of fatalities and catastrophic event after attaining VPP recognition, and opposing the routine inspection exemptions. VPP sites do have to report severe injuries and fatalities under 29 CFR 1904.39 in the same manner as other sites, and they are also subject to inspections arising from complaints, referrals and imminent danger observations.

Some have suggested that VPP sites should pay an application fee, renewal fee, or auditing fee as this money comes out of OSHA's budget and uses funding that could otherwise be reprogrammed for rulemaking or enforcement activities.

In the *Federal Register* notice, OSHA asks for information on nine different aspects of VPP, as well as welcoming more general comments on the program:

- Incentives for employers to participate;
- Methods of assessing SHMS effectiveness;
- Potential use of consensus standards in the program;
- Possible roles for either private certification bodies or certified OHS professionals in VPP reviews (this use of NGOs or special employees was discussed at length during the 2017 stakeholder meetings);
- A "tiered" approach to the program;
- Potential reforms to OSHA's administration of VPP;
- The role of "special governmental employees (SGE) in the process; and
- The program's name (which has in the past caused some to misconstrue it as making compliance "voluntary").

During the Trump Administration, criteria were changed to make it more difficult to evict a VPP participant from the program, and there were two stakeholder meetings held early in his term but no major revamp occurred.

For assistance with the comment process on this issue or other OSHA/MSHA assistance, contact Adele Abrams at safetylawyer@gmail.com.

Occupational Safety and Health Administration

AGs Demand Heat Rule Action

By Adele L. Abrams, Esq., ASP, CMSP

As OSHA works feverishly to prepare a heat illness prevention rule at the federal level through the regular rulemaking process, some state attorneys general have reached a boiling point.

Dissatisfied with the delay in protecting workers from the adverse effects of prolonged exposure to excessive temperatures (indoors and outdoors), seven state AGs have petitioned the federal agency to issue an emergency temporary standard (ETS) for this hazard, to be effective May 1, 2023. OSHA has been developing new guidance while also planning a small business review panel later this year.

The AGs allege that climate change poses a grave danger to tens of millions of workers in the United States, with both heat and degraded air quality presenting health threats. The states represented in the petition are California, New York, Illinois, Maryland, Massachusetts, New Jersey and Pennsylvania. All have democrats holding the Attorney General positions.

The petition specifies that the ETS should be triggered when the heat index reaches 80°F, and said employers should implement certain steps to prevent hard – specifically, sufficient potable water, shade/cool areas, and rest breaks. These steps are already memorialized in the guidance on OSHA's website (www.osha.gov) and via the NIOSH/OSHA heat illness app, which can be downloaded for free and helps calculate the heat index while directing the user on steps to take. https://www.cdc.gov/niosh/topics/heatstress/heatapp.html

Some state-run OSHA program already have or are developing their own unique heat illness prevention rules, including California, Oregon, Washington, Minnesota, and Maryland. Federal OSHA and other state plan states can use their "General Duty Clause" as a gap-filler to cite employers who expose their employees to the "recognized hazard" of excessive heat where there are feasible mitigation measures that can be implemented. However, several years ago in the *Sturgill Roofing* case, the Occupational Safety and Health Review Commission held that OSHA could not rely on the National Weather Service's Heat Index for enforcement purposes because it was not a reliable scientific measurement.

There are industrial hygiene methods, such as the wet bulb globe test, that can be utilized by employers and industrial hygienists to calculate heat exposure as well as the NIOSH app. At this time, the states that have adopted heat illness prevention standards have taken varying approaches, including the

"trigger temperature" used, which creates a compliance challenge for employers operating in multiple states with conflicting laws.

For assistance in crafting an effective heat illness prevention program that complies with applicable laws, contact the Law Office at 301-595-3520.

Information on the NIOSH app can be found here: www.cdc.gov/niosh/topics/heatstress/heatapp.html

Occupational Safety and Health Administration

Regional Emphasis Program Targets Auto Parts Industry

By Adele L. Abrams, Esq., ASP, CMSP

February 2023 marked the rollout of a new OSHA Regional Emphasis Program (REP) targeting the auto parts supplier industry in the southeast. The REP applies to workplaces within the jurisdiction of federal OSHA's Atlanta East/Atlanta West (GA), Birmingham and Jackson (MS) area offices. The four- year initiative replaces an earlier (2019) program focused on safety hazard exposures in this industry.

There is no impact on any state plan agencies in this region.

Hazards associated with the auto parts supplier industry that will be the focus of OSHA inspections under the REP include amputations, caught-in, crushing, struck-by and electrical injuries that also have resulted in worker deaths. The REP impacts primarily employers falling under NAICS Code 3363XX ("Manufacture Motor Parts").

The Bureau of Labor Statistics (BLS) indicates that, in 2021, this sector had higher injury/illness rates (3.3 per 100 full-time workers) than overall private industry (2.7 per 100 FTW). The sector's DART (days away, restricted and transfer injuries) rate has dropped since 2016 to 2.1, but is still above the national average rate of 1.7.

During the previous REP in this sector, over 200 inspections were conducted and nearly 90% resulted in serious, repeat or willful violations. Many of the citations involved either lockout/tagout violations or inadequate machine guarding. OSHA's objective is to heighten awareness within the industry of these health and safety hazards and encourage employers to voluntarily correct hazards and comply with regulations and practices.

Employers identified by OSHA as within the scope of the REP will soon receive a letter. OSHA Area Directors will provide educational and compliance assistance materials to employers, workers, unions and trade associations to explain the hazards for this industry. The free consultation service is provided under OSHA Act Section 21(d), and is available to small employers to help identify and correct potential hazards at the worksite and to improve their occupational safety and health management systems.

Where enforcement inspections occur, they will be "comprehensive safety inspections" with emphasis on lockout/tagout, guarding and electrical hazards, but any other violations in plain view or brought up during discussions with workers can be cited. If health hazards such as heat stress or ergonomic concerns are raised, there will be a referral to an OSHA Industrial Hygienist, and a health inspection event will begin within five working days.

Once an employer receives a letter from OSHA under the REP, the inspection activity should begin within 30 days, giving companies time to request a consultation service on-site visit in lieu of an OSHA inspection. If a worksite already had an OSHA comprehensive inspection within the previous two years, it will be removed from the REP list. The REP inspections will be limited to establishments with 10 or more employees. If a worksite on the list reports a fatality or serious injury event, an unprogrammed inspection will commence into the accident/incident, but there will be a concurrent focused inspection under the REP.

Companies in this sector located in Alabama, Georgia and Mississippi should be proactive and

start to review their compliance with lockout/tagout, machine guarding and electrical standards now to avoid being caught by surprise. OSHA penalties are now more than $145,000 per citation, and under the newly adopted "Instance-by-Instance" (formerly "egregious") penalty program, this fine can be multiplied by the number of affected workers when the violation involves high gravity hazards such as those covered by this REP.

Remember: The cheapest OSHA citations to defend are the ones that are never issued!

Mine Safety Safety and Health Administration

MSHA Focusing On Generator Grounding; Guidance Needed

By Michael Peelish, Esq.

Over the past several months, we have seen an increase in citations alleging inadequate grounding of systems, specifically generators. The regulation states:

> **30 CFR § 56.12028 Testing grounding systems.**
>
> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

To find out more about what MSHA accepts as adequate testing, I contacted an MSHA official and asked about the protocols for testing grounding systems.

The MSHA official indicated that Tech Support would be rolling out a program to inform mine operators how to properly conduct resistance and continuity testing of electrical equipment, with a focus on generators. He noted that MSHA has been seeing more issues with grounding systems and wanted to assist operators in both coal and M/NM in how to test for electrical continuity and resistance.

The problem is MSHA doesn't have written protocols, and no answer as to when this program will be rolled out. The MSHA official stated that MSHA did not have a specific written program but that it was more of an informal approach.

Recently, a document surfaced, along with a citation to a mine operator, setting forth MSHA's protocols regarding testing of electrical systems. It appeared more in-depth than what I have seen from MSHA in the past. For instance, electrical motors have external ground lugs for testing purposes; however, MSHA's protocols state that the ground wire within the controller or motor should be disconnected and attached to the test lead. Having read that portion of the protocol gave me concern that mine operators and MSHA are not on the same page.

Testing of grounding systems is critical and both MSHA and mine operators need to ensure that protocols consider all aspects of how to do the testing safely and adequately without an extreme approach to achieve the same goal.

Occupational Safety and Health Administration

Court Dismisses SC Challenge To OSHA Penalty Increases

By Michael Peelish, Esq.

A challenge to OSHA's penalty increases by the State of South Carolina was dismissed by a federal court for lack of jurisdiction.

The court's dismissal effectively upholds the federal OSHA's contention that penalties under 21 state's OSH programs must match the increased federal penalty amounts, as mandated by Congress under

the Federal Civil Penalties Inflation Adjustment Act in 2015.

South Carolina argued that the OSH Act allows state plans to set their own penalty levels, and that OSHA's mandate to match or exceed its own figures violates the law.

It also argued that even though the agency first announced that requirement in 2016, each increase to OSH penalties is a distinct rulemaking subject to judicial review.

The court disagreed and ruled the inflation adjustments are exempt from APA notice and comment.

This legal dispute needs to rise to a higher authority to get fixed, i.e., Congress. Not only are OSHA's penalty adjustments increasing, the Mine Safety and Health Administration penalties are also increasing and not sustainable.

Penalty Increases Under the 2015 Inflation Adjustment Act:

OSHA serious increased from $14,502 to $15,625

MSHA maximum for a citation flagrant penalty increased from $79,428 to $85,580

MSHA flagrant increased from $291,234 to $313,790

LAW OFFICE OF
ADELE L. ABRAMS P.C.

Adele Abrams at the Society of Mining Engineering conference in Denver, CO where she presented on MSHA Crystalline Silica Rules.

The Law Office of Adele L. Abrams PC is a full service law firm, focusing on occupational and mine safety and health, employment, and environmental law.

Our attorneys are admitted to practice in Maryland, Colorado, Washington DC, Michigan, Montana, Pennsylvania, and West Virginia. We handle OSHA, MSHA, and EPA administrative law cases around the United States. Our attorneys are admitted to federal courts including: US Supreme Court, US Court of Appeals (DC, 3rd and 4th Circuits), and US District Courts (Maryland, Tennessee, Washington, DC, and West Virginia).

In addition to our litigation practice, the Law Office offers mediation and collaborative law services, as well as consultation, audits, and training on safety, health and employment law issues.

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Don't Miss These Events in 2023!

Adele L. Abrams, Esq., Firm President, CMSP

Adele Abrams, Esq., ASP, CMSP

March 7: OIAA – Annual refresher training, Albany, OR

March 8: OIAA – Annual refresher training, Roseburg, OR

March 9: Artex Conference, Speak on Psychological First Aid & Workplace Mental Health, Grapevine, TX

March 14: Avetta/BLR Webinar – OHS Update

March 15: NECA-DC -- presentation on Medical Cannabis and Workplace Safety

March 16: ASSP/AIHA OHS Conference – Presentation on OHS Update 2023, Laurel, MD

April 17: National Business Institute – Maryland Employment Law Seminar (virtual)

April 20: PA Aggregates & Concrete Assn. -- webinar, Medical Cannabis Update

April 24: MSHA 101 -- Johns Hopkins University School of Public Health

April 26: Maine Aggregates Association – MSHA/OSHA Enforcement Update, Portland, ME

May 4: National Waste & Recycling Assn. Legal Symposium, Presentation on OHS Legal Update, New Orleans

May 18-19: Psychological First Aid & Workplace Mental Health, NSC Spring Safety Conference & Expo, Indianapolis, IN

May 24: National Electrical Contractors Assn. -- Safety Director's Conference, speak on OHS Update, Nashville, TN

May 31: Construction Safety Conference -- presentation on Substance Abuse Prevention & Drug Testing, Dallas, TX

June 13: SAFEPRO Mine Safety Law Institute, Savannah, GA

June 14 -15: BLR Master Class on OSHA Recordkeeping and Enforcement (virtual, 8 hours total)

Sept. 12: ASSP Region VI PDC -- Pre-conference class on OHS Update

Sept. 13: ASSP Region VI PDC -- presentation on Psychological First Aid & Workplace Safety

Sept. 19 - 20: 9/19-20: BLR Master Class on OSHA Recordkeeping and Enforcement (virtual, 8 hours total)

Sept. 26 - 27: BLR Master Class on CalOSHA law and federal changes, San Diego, CA

Oct. 24: PA Governor's Safety Conference, Presentation on Psychological First Aid, Hershey, PA

Nov. 8: ASSP/AIHA PDC, Presentation on OHS Update, Rochester, NY

Our Attorneys

Adele L. Abrams, Esq., CMSP
Firm president

Adele L. Abrams is the founder and president of the Law Office of Adele L. Abrams P.C. in Beltsville, MD, Charleston, WV, and Denver, CO, a multi-attorney firm focusing on safety, health and employment law nationwide. As a certified mine safety professional, Adele provides consultation, safety audits and training services to MSHA and OSHA regulated companies.

She is a member of the Maryland, DC and Pennsylvania Bars, the U.S. District Courts of Maryland, DC and Tennessee, the U.S. Court of Appeals, DC, 3rd and 4th Circuits, and the United States Supreme Court. She is a graduate of the George Washington University's National Law Center. Her professional memberships include the American Society of Safety Professionals, National Safety Council, the National Stone, Sand & Gravel Association, Associated Builders and Contractors, the Industrial Minerals Association-North America, and the American Bar Association. In 2017, she received the NSC's Distinguished Service to Safety Award.

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Diana Schroeher's practice is concentrated in employment law, occupational safety and health law, and maintains a wide-ranging local Maryland practice. She has extensive experience representing clients in the Maryland Courts, before the federal Equal Employment Opportunity Commission, the Department of Labor, Mine Safety and Health Administration, the Occupational Safety and Health Administration and many other federal and state administrative agencies. Diana is a member of the Maryland bar, and the U.S. District Court for the District of Maryland.

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Gary Visscher, Esq.
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Gary Visscher has long-time involvement in occupational safety and health (OSHA and MSHA) and employment law. Prior to his current position, Gary worked in several U.S. government positions, including Workforce Policy Counsel for the U.S. House of Representatives Education and Workforce Committee, Commissioner on the Occupational Safety and Health Review Commission, Deputy Assistant Secretary for OSHA, and Board Member for the U.S. Chemical Safety Board. He has also served as Vice President, Employee Relations for the American Iron & Steel Institute, and as adjunct professor of Environmental and Occupational Health Policy at the University of Maryland Baltimore County (UMBC). Gary is a member of the Michigan and District of Columbia bars.

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Sarah Ghiz Korwan,
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Sarah Ghiz Korwan is a graduate of West Virginia University College of Law. She is the Managing Attorney of the Law Office of Adele L. Abrams P.C.'s West Virginia office. She has extensive experience representing mine operators and individuals cited by the US Department of Labor, Mine Safety and Health Administration and the WV Office of Miners' Safety and Training, and in accident investigations.

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Michael R. Peelish, Esq.
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Michael R. Peelish is an attorney and mining engineer with degrees from West Virginia University College of Law, Morgantown, WV (JD), and West Virginia University, Morgantown, WV (B.S. in Mining Engineering). He has over 28 years working in the mining sector and at OSHA-related facilities. He has handled cases before the MSHA and OSHA Review Commissions and in state and federal courts. Before re-entering the legal profession, he had company oversight for safety and health for 19 years and during that time served as a senior executive for over 14 years for multiple publicly traded mining companies with oversight for human resources, environmental affairs, purchasing, government affairs, training, natural gas production JV and methane capture operating unit, and continuous improvement. Throughout his career, he has worked with mine operators and OSHA general industry facilities on 5 continents to implement safety and health programs, to audit operations against their safety and health programs, and to seek improved ways of protecting employees' safety and health. He regularly performs safety and health audits and exposure assessments for his clients.

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