



New Legislation on Workplace Harassment & Occupational Safety Impact

By Adele L. Abrams, Esq, CMSP

Workplace harassment can be an occupational safety and health issue, although most employers view it as an “HR” issue to be addressed within the framework of existing civil rights laws. However, a harder look is warranted at how workplace harassment and workplace violence can be intertwined. OSHA defines “workplace violence” as any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide. It can affect and involve employees, clients, customers and visitors.

Homicide is currently the fourth-leading cause of fatal occupational injuries in the United States. According to the Bureau of Labor Statistics Census of Fatal Occupational Injuries (CFOI), of the 4,679 fatal workplace injuries that occurred in the United States in 2014, 403 were workplace homicides. Sadly, workplace violence is the primary cause of occupational death for women in the United States. While some of these deaths occur when domestic violence follows employees into the workplace, others occur due to customers, clients in health care or social services settings, or as a result of aggression from co-workers.

During the Obama Administration, OSHA was in the process of developing a workplace violence prevention standard, applicable to health care and social service industry sectors, but that action has stalled under the current regulatory agenda. However, OSHA still has the power to issue citations and penalties under its General

Duty Clause (Section 5(a)(1) of the Occupational Safety and Health Act of 1970) where workplace violence is a “recognized hazard” in an employer’s workplace, and there is a feasible method of mitigating the hazard. OSHA has guidance on its website to assist employers in preventing workplace violence exposures for workers in a variety of industrial sectors.

Now, a bipartisan group in Congress has introduced legislation to improve reporting on the scope of harassment in the workplace. This information could assist in developing preventative policies and could assist OSHA in also taking more decisive action to address this aspect of the workplace violence issue.

H.R. 6406 is cosponsored by Reps. Lois Frankel (D-FL), Ted Poe (R-TX), Jerrold Nadler (D-NY), Barbara Comstock (R-VA) and Lisa Blunt Rochester (D-DE). The legislation would prohibit the use of nondisclosure agreements as a condition of employment, require the development of workplace training programs to educate about workplace harassment and prevention, among other provisions.

The bill would also mandate creation of a tip line to supplement complaints to the Equal Employment Opportunity Commission (EEOC), and it dictates that publicly traded companies disclose the number of workplace harassment settlements when filing their annual reports with the Securities and Exchange Commission. The legislation also prevents companies from taking tax deductions for expenses and attorneys' fees in connection with harassment litigation.

While the EEOC normally has jurisdiction over sexual harassment cases, in recent years some labor groups have called for (continued on page 4).

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The Impact of Supreme Court Nominee Brett Kavanaugh

By Tina Stanczewski, Esq., MSP

Opinions are split on how Supreme Court Justice nominee, Brett Kavanaugh will rule on Occupational and Mine Safety issues. Reviews of his opinions at the U.S. Court of Appeals for the D.C. Circuit, show that administrative law matters accounted for about 30% of his rulings. His stance leans towards Agency's functioning strictly within the scope of the law that Congress empowered them to enforce. A recent White House memorandum said, "Judge Kavanaugh has overruled federal agency action 75 times," during his time on the U.S. Court of Appeals for the D.C. Circuit.

Opponents of Judge Kavanaugh feel that his views coupled with the existing Supreme Court Justices will trigger an unending battle against Agency action. The closest indicators for Occupational and Mine Safety issues are Judge Kavanaugh's EPA rulings. Traditionally, he has ruled against the EPA. With the current Administration's stance on climate change and standing against the international, Paris Accord, we may see tightening of the EPA and U.S's enforcement of greenhouse gases. One of the hallmark EPA-friendly cases on climate change, *Massachusetts v. EPA* favored the Agency by a slim majority and with the opinion of Justice Kennedy, whom Judge Kavanaugh will replace. A new case may find a different ruling with what appears will be a very conservative majority.

One of his key OSHA rulings concerned SeaWorld. During a water show, a killer whale killed one of the trainers after dismembering her. OSHA fined the company \$75,000 under the general duty clause alleging Sea World may have known the whales were dangerous. Kavanaugh dissented, stating

The Department of Labor, acting with a fair degree of prudence and wisdom, has not traditionally tried to stretch its general authority under [federal law] to regulate participants taking part in the normal activities of sports events or entertainment shows... In this case, however, the department departed from tradition and stormed headlong into a new regulatory arena. ...In my view, the Department of Labor's unprecedented assertion of authority to proscribe SeaWorld's whale show is triply flawed."

The dissent showed Kavanaugh's viewpoints: limit overstepping by Agency's and protect businesses from unauthorized Agency action. This may provide a welcome change for business owners.

OSHA Proposes Changes to E-Recordkeeping Rule

By Adele L. Abrams, Esq., CMSP

On July 26th, OSHA released an advance copy of its proposal to revise the Obama-era Electronic Recordkeeping rule, which was issued in May 2016 and has already taken effect, at least in part. The Notice of Proposed Rulemaking (NPRM) has been cleared by the White House but at press time, it was uncertain what date it would be published officially in the Federal Register. OSHA has posted the pre-publication copy of the proposal on its [website](#). Once published, the official version will be posted at www.federalregister.gov and there will be a 60 day period for public comment from the date of publication.

OSHA claims that the purpose of the proposal is to "better protect personally identifiable information or data that could be re-identified with a particular individual by removing provisions of the rule. The current standard required all employers with between 20-249 workers at a worksite classified as hazardous (based on its NAICS classification) to submit their OSHA 300A logs electronically to OSHA on an annual basis. Larger employers, with worksites of 250+ employees, were to submit the OSHA 300A log initially for CY 2016 data, but were expected to add the 300 and 301 logs starting with their CY 2017 data (due July 1, 2018). However, prior to this year's due date, OSHA announced that only the 300A logs should be submitted by all covered employers, and that the agency website would not accept the 300 or 301 filings.

In the NPRM, OSHA proposes amending 29 CFR 1904.41 by permanently rescinding the expansive filing requirements for those establishments with 250 or more workers at a location, and would limit it to the 300A log going forward. OSHA seeks input on the rule's impact on worker privacy, including the risks posed by exposing workers' sensitive information to possible Freedom of Information Act (FOIA) disclosure. OSHA is also proposing that employers provide their Employer Identification Number (EIN) electronically along with their injury and illness data submission.

In related matters, OSHA is being sued by Public Citizen over its implementation of the rule, with the interest group challenging the deferment in the log submission as having been done without going through rulemaking. Public Citizen also has litigation pending over OSHA's refusal to release the already-submitted employer data through a FOIA (continued page 12).

OSHRC: An Agency's Interpretation of Its Regulations Will Undergo Careful Scrutiny

By Brian Yellin, Esq.

The Occupational Safety and Health Review Commission ("OSHRC") ruled in *Secretary of Labor v. Seward Ship's Drydock*, Docket No. 09-1901, that 29 C.F.R. §1910.134(d)(1)(iii) does not require an employer to conduct a respiratory hazard assessment. OSHRC determined that this paragraph only applies to the selection of respirators.

29 C.F.R. §1910.134(d)(1)(iii) provides: "The employer shall identify and evaluate the respiratory hazard(s) in the workplace; this evaluation shall include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form. Where the employer cannot identify or reasonably estimate the employee exposure, the employer shall consider the atmosphere to be IDLH." [Immediate Danger to Life and Health]

OSHRC determined that the words "the respiratory hazards" indicated that this paragraph "applies only to the selection of respirators," and "presumes that such (respiratory) hazards are present." The majority found that one would have to look elsewhere to determine when respirator use was required. In construing the standard, OSHRC refused to give deference to the Secretary of Labor's interpretation. The Secretary has appealed OSHRC's decision.

The Commission said that another section of the standard, 29 C.F.R. §1910.134 (a), limits the applicability of the standard to where respirators are "necessary." The Commission then discussed the meaning of the word "necessary." The majority said that respiratory protection was "necessary" only if the employee exposure was over the Permissible Exposure Limit (PEL) or "it was reasonably foreseeable that a sudden spike of contaminant levels would be so quick as to preclude [the employer] from timely protecting its employees.

The majority found that OSHA had failed to provide evidence indicating that the employees carbon monoxide or iron oxide in excess of the PEL, or that exposures exceeding the PEL were reasonably foreseeable. The dissenting commissioner sharply disagreed with the majority on this point, finding evidence in the record that employee exposures during welding operations could plausibly exceed the PEL.

OSHRC cited testimony from Seward's expert witness, a marine chemist, who testified that the results of OSHA's carbon monoxide testing using a direct reading instrument to obtain "grab" samples from within the interior tanks "cannot be used to infer an eight-hour time weighted average."

Because the "grab" sample results were below the PEL (the peak carbon monoxide concentration measured was 40 parts per million) and the sample was not collected over an eight-hour time-weighted average, the OSHRC ruled that the Secretary failed to prove a "reasonable possibility of exceeding the PEL for an eight-hour time weighted average."

Employers should be aware that, notwithstanding the Commission's decision regarding the respiratory protection standard, OSHA's personal protective equipment standard, 29 C.F.R. §1910.132(d)(1), requires an employer to "assess the workplace to determine if hazards are present...."

From an industrial hygiene viewpoint, the decision is problematic for a number of reasons. At trial, the ALJ determined that Seward's marine chemist had evaluated the potential respiratory hazards within the confined spaces on the barge and determined that the atmospheres had normal oxygen levels, there was no carbon monoxide, and no explosivity.

The marine chemist's hazard assessment did not address potential overexposures to welding fumes. The evaluation of the barge's confined spaces was conducted before welding began. Thus, the marine chemist's assessment was appropriate for determining whether initial entry into the confined spaces was safe, (i.e. no explosive, toxic, or oxygen deficient atmosphere existed.) Given the fact that OSHA determined that at least one welder's exposure to iron oxide was 9.1 milligrams per cubic meter over an eight-hour time-weighted average, the potential for exceeding the PEL of 10 milligrams per cubic meter seems a reasonable possibility.

In addition, OSHRC discounted OSHA's taking of "grab" samples to estimate the welders' eight-hour time-weighted hour exposure. OSHRC highlighted Seward's marine chemist expert's testimony arguing that "grab samples cannot be used to infer an eight-hour time-weighted average." However, "grab samples" obtained through means such as the use of a direct reading instrumentation (e.g. Draeger CO detector, SKC detector tubes, etc.) may constitute an effective method of characterizing the atmospheric conditions within a work area such as a confined space.

OSHRC, cont.

Depending on the number and location of the samples, a powerful inference can be derived from the data these sampling and analytical methods yield.

None of OSHA's testifying Certified Safety and Health Officer (CSHO)'s is a Certified Industrial Hygienist ("CIH") and OSHA did not engage an industrial hygiene expert witness to rebut the marine chemist's testimony. OSHA could also have employed the use of carbon monoxide dosimeters to measure the welders' personal exposures to carbon monoxide over the entire duration of their work shift.

OSHRC also determined that since only one of the welder's exposures to iron oxide was as high as 9.1 milligrams per cubic meter, but did not exceed the PEL of 10 milligrams per cubic meter, the welders were not exposed to a respiratory hazard.

OSHRC concluded OSHA cannot cite an employer for a violation of 29 C.F.R. §1910.134 unless it can demonstrate that an actual hazard such as an overexposure to a PEL exists. However, as the dissenting opinion points out, evidence of an actual overexposure is not a pre-requisite for OSHRC to make a finding of "significant risk of harm" because the intent of the OSH Act and the cited paragraph of the respirator standard is to prevent harm. See *Snyder Well Servicing, Inc.*, 10 BNA OSHC 1371, 1375-76 (No. 77-1334, 1982).

[Workplace Harrasment, cont. from page 1.](#)

OSHA to bolster protections against sexual harassment and assault in the workplace. In addition to physical injuries to employees arising from rape or other forms of physical assault, workplace harassment also can trigger workplace stress and manifest into physical symptoms that could be compensable under state worker's compensation systems.

For more information on creating effective workplace violence and harassment prevention programs, contact the Law Office at 301-595-3520 (eastern) or 303-228-2170 (western).



OSHA Seeks Crane Comments on Railroad Applicability

By Adele L. Abrams, Esq., CMSP

On July 19, 2018, OSHA published a proposed rule concerning the use of cranes and derricks in construction. The proposed rule focuses on how the 2010 final rule's requirements apply to railroad roadway work. The comment deadline is September 17, 2018. Comments should be submitted [electronically](#), referencing Docket No. OSHA-2015-0012. See 83 Fed. Reg. 34076 (July 19, 2018).

The rule was the result of a negotiated rulemaking, and was viewed as drawing from industry best practices to prevent crane tipovers, electrocution of crane operators from power line contact, as well as crane collapses and the hazard of workers being struck by equipment or its loads. Other provisions called for ensuring safe ground conditions, inspection procedures, mandatory safety devices, and crane operator certification requirements.

After the final rule was published in 2010, the Association of American Railroads (AAR) filed suit challenging the requirements and a settlement agreement was reached. That settlement required OSHA to undertake rulemaking to propose expansion of several exemptions, and to clarify the application of the crane rule to work on or alongside of railroad tracks. One of the issues was the applicability of the "ground conditions" provision to railroads. AAR has agreed to dismiss its petition challenging the rule within 7 days of OSHA's publication of a final rule addressing these issues.

The exemptions under consideration would not apply to bridge work. They would exempt roadway maintenance machines that are "flash-butt welding trucks" and equipment with similar low-hanging workhead attachments). The proposal also would exempt railroad equipment operators from the certification requirements. In addition, the clarification includes provisions relating to safety devices, work-area controls, out-of-level work, dragging loads sideways, equipment modifications, and manufacturer requirements. OSHA acknowledged there are few significant injuries from the use of cranes and derricks in railroad track construction and maintenance. In settlement discussions, both labor and management agreed that continuing the "generally accepted as safe" practices promotes the safety of the workers.

OSHA has estimated that the rule will result in net cost savings of between \$15.7 and \$17 million per year, and this is being classified by OSHA as a "deregulatory action" consistent with President Trump's Executive Order 13771.

OSHR Changes Secretary's Burden of Proof For "Repeat" Citations

By Brian S. Yellin, Esq., MS, CIH, CSP

The primary question decided by the Occupational Safety and Health Review Commission in *Secretary of Labor v. Angelica Textile Services, Inc.*, OSHRC Docket No. 08-1774 (6/24/18) is the degree to which a previously issued citation must be "substantially similar" to a current citation involving the alleged violation of the same OSHA standard in order to be properly classified as a "Repeat" violation.

In *Angelica*, the Commission reviewed two citations alleging "Repeat" violations of section 29 C.F.R. 1910.147(c)(4)(ii) (lockout-tagout standard) and 29 C.F.R. 1910.146(d)(3) (Confined Space standard). The Commission's decision resolved the oldest case on the Commission's docket – the citations in the case were issued as a result of an inspection during the Bush Administration, in September 2008.

Angelica Textile Services operated a commercial laundry in New York. The same type of wash machines used at the laundry in New York were also used at an Angelica facility in New Jersey which OSHA had cited in 2005. Among the citations at the New Jersey facility were citations for violations of the above referenced sections of LOTO and Confined Space standards. Both citations were premised on Angelica not having machine - specific written procedures.

After the 2005 citations, Angelica revised its written procedures and added machine - specific "surveys." OSHA and OSHRC found that the surveys complied with the requirement for machine – specific procedures.

In 2008 OSHA inspected Angelica's New York facility, and issued citations under the same sections of the LOTO and Confined Space standards. However, this time OSHA cited Angelica because certain written procedures were not sufficiently detailed in setting out the steps that employees must follow to de-energize and re-energize equipment. For example, OSHA charged that written procedures did not "clearly identify all of the specific steps to be followed by employees to control hazardous energy, including the operation and location of lockout controls," and did not include "specific procedures for verifying de-energization."

Because the citations alleged that Angelica had violated the same sections of the LOTO and Confined Space standards as were cited in the 2005 citations, OSHA classified the violations as Repeat violations.

In 2012, after a hearing in the case, the Administrative Law Judge vacated the LOTO and Confined Space citations. The judge did not reach the question of whether the violations were properly classified as Repeat violations.

The Commission was unanimous in reversing the judge and upholding the citations. With regard to the LOTO procedures, the Commission determined that the written procedures did not sufficiently inform employees of the specific procedural steps necessary to properly and safely lock out energized equipment and did not have documented instructions for verifying lockout for the washers and other equipment. The Commission also found that the Confined Space standard was ambiguous with regard to inclusion of LOTO procedures. The Commission determined that the Secretary's interpretation was reasonable and deferred to the Secretary with regard to the Confined Space standard.

The Commission split, however, on whether the violations could be classified as "repeat" violations. The majority held that the violations did not satisfy the criteria for repeat violations, and classified them as "serious." The dissent (on this part) would affirm OSHA's allegation that the violations were "repeat violations."

The OSH Act, in section 17 (a), provides for higher civil penalties for repeat violations (currently up to \$129,336, the same as for willful violations), but the statute does not define what constitutes a repeat violation. The Commission has defined a "repeat" violation as one where "at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation."

It is often assumed (and sometimes stated, including by courts of appeals (see *Triumph Construction Corp v. Sec. of Labor*, 2d Cir., 2/14/2018)) that the basis for a repeat violation is established where the alleged violation is of the same standard as was cited in the previous final order. (for more on Triumph Construction, see April 2018 newsletter).

In *Angelica*, however, the Commission began by noting that an alleged violation of the same standard presents only a *prima facie* (continued page 12)

FY 2019 Appropriations Update

By Adele L. Abrams, Esq., CMSP

As the federal government's Fiscal Year (FY) 2018 nears its end, once again Congress has moved forward in its efforts to enact safety-related agency appropriations for the coming year, which begins October 1, 2018. The latest action occurred on July 11th, when the House appropriations committee approved funding for the Departments of Labor and Health & Human Services (HHS), following a subcommittee hearing that lasted nearly 13 hours.

Although OSHA and MSHA are key targets for the Trump Administration's deregulatory efforts, as a practical matter the funding since the change in leadership has remained fairly stable, in large measure do to the fact that no Labor-HHS legislation was enacted for either FY 2017 or FY 2018 – all appropriations were included in broader omnibus spending bills that kept the government operating, on a tenuous basis.

For FY 2019, however, the new administration and GOP-dominated Congress are poised to put cutbacks into place, and the pending House appropriations bill would fund OSHA at levels even below those proposed in the Trump FY 2019 budget.

In FY 2018, OSHA is funded at \$552.7 million. The House FY 2019 bill would cut this to \$545.2 million, and would eliminate the funding for OSHA's longstanding Susan Harwood training grant program. The House appropriations committee approved this cut by a 30-22 vote, following the rejection of efforts by Democratic members to restore OSHA funding to current levels. The appropriations committee chairman, Rep. Tom Cole (R-OK), rationalized the Harwood grant elimination by noting that the Department of Labor's apprenticeship programs received funding increases. Those apprenticeship programs are not oriented toward occupational safety and health.

The House committee report also addresses the pending changes to the OSHA cranes and derricks standard, concerning provisions on crane operator certification and training requirements, and directs the agency to carefully consider the comments submitted by the July 5th deadline, and to prioritize comments on changes that relieve regulatory burdens without compromising safety. Finally, the Senate report directs OSHA to notify the appropriators at least 10 days in advance on launching any new National Emphasis

Program (or those at the regional or local level), and to provide the "circumstances and data used to determine the need" for such programs.

The National Institute for Occupational Safety & Health (NIOSH) fared better than OSHA in the House legislation. The agency was initially targeted for major slashes in funding and transfer from the CDC to NIH within the Department of Health & Human Services, in the Trump FY 2019 budget. That budget also envisioned eventual elimination of NIOSH by having its activities absorbed by other existing NIH agencies. NIOSH was created, along with OSHA, in the 1970 Occupational Safety & Health Act and was tasked with conducting research on safety and health issues, performing health hazard evaluations, and making recommendations to OSHA on regulatory needs and proposals. Despite the calls for NIOSH's demise, the House Labor-HHS appropriations bill maintains NIOSH's current FY 2018 funding of \$335.2 million for next year. The committee ignored the administration's request to relocate the agency.

MSHA did not do as well in the House measure, which rejected a requested Trump budget increase and cut funding below current levels, from \$373.8 million to \$367.6 million, which includes \$10.5 million to fund the state grants program that provides localized training and other support services in many states for mine operators. The reduction in overall funding was justified by noting significant numbers of mine closures and miner relocations, and the Committee urged the agency to "bring MSHA enforcement into proportion by redistributing resources and activities to the areas where mine production is currently occurring."

On the Senate side, bipartisan legislation was cleared by the committee on June 29th and awaits floor action. The Senate measure increases OSHA funding for FY 2019 to \$556.787 (\$4 million above FY 2018). It preserves the Harwood grants program, and also requires OSHA to resume posting fatality information on its website. The Senate measure includes an additional \$100,000 for NIOSH (earmarked for the National Mesothelioma Registry and Tissue Ban Committee) but otherwise maintains the current \$335.2 funding for the agency. The MSHA would receive \$373.8 million for FY 2019, consistent with current levels. The Trump budget had called for an MSHA funding increase to \$375.9 million.

The disparity between the funding levels signals that, if the bills ever make it to full votes in each chamber, there will be significant disputes in conference.

FY 2019, cont.

This raises the likelihood that, for FY 2019, OSHA, MSHA and NIOSH may again be funded through a continuing resolution along with all of the Departments of Labor and HHS.

MSHA's Respirable Coal Dust Rule Open for Comment

By Sarah Ghiz Korwan, Esq.

Black lung disease, and MSHA's respirable coal dust rule, "Lowering Miners' exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors" (Dust rule), published on May 1, 2014, have both been in the news cycle this summer. In a Request for Information (RFI), MSHA announced in July that they are "soliciting stakeholder comments, data, and information to assist the Agency in developing the framework for this study to assess the impact of the Dust rule on lowering coal miners' exposures to respirable coal mine dust to improve miners' health." The comment period will extend a full year, until July 9, 2019.

The Dust rule requires the use of a continuous personal dust monitor (CPDM) in underground coal mines. The devices provide real-time information about dust levels, allowing miners and coal operators to make adjustments and take corrective action, immediately, instead of letting overexposures continue. In addition, miners wearing the CPDMs receive information about their personal exposures and can sometimes modify their activities or locations within a mine in response to elevated readings.

Significantly, last month, National Academies of Sciences, Engineering, and Medicine (NAS) released its review of MSHA's Dust rule, which took full effect in August, 2016. After comprehensive evaluation of the Dust rule and recommendations for future regulations, the review found the new rule may be inadequate on many levels. The disease has reportedly reached epidemic proportions in the industry due to changes in mining practices and more needs to be done, according to the report.

The NAS review committee found that new samples from the CPDMs are inadequate because only a small fraction of miners are required to wear a monitoring device and it is possible that those coal miners using the CPDMs are not representative of the miners with the highest exposures. In addition, since those miners wearing the CPDMs might adjust their activities to

avoid high concentrations of dust, the sampling might no longer be representative of the miners with the highest exposures. The NAS report also says that it is unclear if the Dust rule has been effective because many miners with black lung disease contracted the ailment from exposure that occurred years earlier.

Further, the NAS report noted changes in mining technologies over the past several decades might have led to changes in typical particle size distributions of respirable coal mine dust and this is not being checked. Specifically, there has been a shift toward mining practices to thin seam mining, as relatively thick and high-quality coal seams have diminished. To ensure adequate head room for miners and equipment, more rock strata is mined as thin coal seams are being extracted for continuous and longwall mining methods. Mining surrounding rock along with coal likely results in changes in particle size, shape, composition and concentration, and probably increases miners' exposure to respirable crystalline silica.

Further, the NAS report noted changes in mining technologies over the past several decades might have led to changes in typical particle size distributions of respirable coal mine dust and this is not being checked. Specifically, there has been a shift toward mining practices to thin seam mining, as relatively thick and high-quality coal seams have diminished. To ensure adequate head room for miners and equipment, more rock strata is mined as thin coal seams are being extracted for continuous and longwall mining methods. Mining surrounding rock along with coal likely results in changes in particle size, shape, composition and concentration, and probably increasing miners' exposure to respirable crystalline silica.

The new dust monitors do not provide real-time sampling of silica dust, but the review recommends for the development of a real-time silica dust sampling monitor, and the National Institute for Occupational Safety and Health (NIOSH) is apparently trying to invent such a device. These developments will likely impact how MSHA proceeds with any crystalline silica standard, to align protections with those afforded by OSHA's final rule that came into full effect in June 2018, and which has a permissible exposure limit that is one-half of the current limit permitted by MSHA.

Coincidentally, another study published in the American Journal of Public Health earlier this month, also found a profound increase in black lung disease in recent years. According to the study, authored by affiliates with the NIOSH Centers for Disease Control

MSHA's Respirable Coal Dust Rule, cont.

and Prevention, Morgantown, WV, one in five coal miners who have worked in West Virginia, Kentucky, or Virginia has coal workers' pneumoconiosis (CWP).

The study reported that the low point for the disease was in the late 1990's, but since that time, it has been increasing, particularly in Appalachia. Notably, the national prevalence of CWP in miners with 25 years or more of tenure now exceeds 10%. The study further found that the most severe form of the disease – progressive massive fibrosis – now occurs in 5 percent of veteran miners in the region, the highest rate ever recorded. The conclusion of the study is that "(c)urrent CWP prevalence estimates will likely be reflected in future trends for severe and disabling disease, including progressive massive fibrosis."

Based on its review, the NAS reported that "a fundamental shift is needed in the way mine operators approach exposure control," including "beyond compliance" efforts that exceed the safety requirements of federal rules and regulations. Undoubtedly, further research and development efforts are necessary to fully understand the effects of changes in mining methods on miner health.

For assistance in implementing effective dust control and occupational health programs, or in developing input on the MSHA proposal, contact the Law Office's experienced coal mine safety personnel: Sarah Korwan, Esq. (Charleston, WV, office – 304-543-5700) or Michael Peelish, Esq. (Maryland/DC area office – 301-595-3520).

MSHA Announces Request for Information Regarding Using Technology for Mine Safety By Joshua Schultz, Esq.

On June 26, 2018, MSHA published a Request for Information ("RFI") seeking information and data on engineering controls for mobile equipment at surface mines and for belt conveyors at surface mines and underground mines. Additionally, the Agency is requesting suggestions from the regulated community on best practices, training materials, policies and procedures, innovative technologies, and any other information to improve safety in and around mobile equipment and working near and around conveyor belts.

This RFI functions similar to any federal agency's rulemaking procedures; the Agency published the notice of the RFI on June 26th, and is seeking comments

from the industry within 180 days. Comments and responses to the RFI are due by December 24, 2018.

The RFI specifically mentions engineering controls which increase the use of seatbelts, enhance equipment operator's ability to see all areas near the machine, warn equipment operators of potential collision hazards, prevent equipment operators from driving over a highwall or dump point, and help prevent entanglement hazards related to working near moving or re-energized belt conveyors.

The Agency noted that since 2007, 61 miners have been killed in accidents involving mobile equipment. MSHA determined that contributing factors in many of these accidents included: 1) no seatbelt, seatbelt not used, or inadequate seatbelts; 2) larger vehicles striking smaller vehicles; and 3) equipment operators' difficulty in detecting the edges of highwalls or dump points, causing equipment to fall from substantial heights. Regulations address each of these hazards, including 30 CFR § 56.14130 (which requires seatbelts shall be worn by the equipment operator); 30 CFR §56.9101 (operators of mobile equipment shall maintain control of the equipment while it is in motion); 30 CFR § 56.9301 (dump site restraints); and 30 CFR §56.9303 (construction of ramps and dumping facilities).

MSHA further announced that the agency will hold stakeholder meetings to discuss and share information about the issues in response to the RFI. The meetings will be held on the following dates and in the following locations:

Date/Time	Location
August 16, 2018 11:00 a.m. (Eastern)	Webinar
August 21, 2018 9:00 a.m. (Pacific)	Reno, NV
September 11, 2018 9:00 a.m. (Eastern)	Beckley, WV
September 20, 2018 9:00 a.m. (Eastern)	Albany, NY
September 25, 2018 9:00 a.m. (Eastern)	Arlington, VA

MSHA RFI, cont.

MSHA noted that persons may send comments by any of the following methods:

- Federal E Rulemaking [Portal](#).
- E Mail: zzMSHA-comments@dol.gov.
- Mail: MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202-5452.
- Hand Delivery or Courier: 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal holidays.
- Fax: 202-693-9441.

All submissions must include “RIN 1219– AB91” or “Docket No. MSHA 2018-0016.”

Our firm will be testifying at one of MSHA’s seven stakeholder meetings and look forward to sharing our experiences with MSHA and the industry through our written comments which are due by December 24, 2018.

A Look Back on Surface Haulage By Michael R. Peelish, Esq.

It was March 1996 when a surface haulage accident occurred at a large copper mine in Arizona. At that time, I was the Director of Safety for the company. I immediately departed to the mine for the MSHA investigation and to conduct the company’s internal investigation. What happened next was quite different. It was a call from Assistant Secretary of Labor McAteer asking, or should I say demanding, what mine operators were going to do to stop the rash of surface haulage fatalities and serious injuries. He was upset about big trucks running over little trucks, big trucks backing through the berms, and drivers not wearing seatbelts. And he was right to be upset.

After some thought and conversation with my industry colleagues, MSHA, NIOSH, and several mine operators came together to form the Surface Haulage Task Group Working in Cooperation with MSHA. Because the manner in which this effort was set up, it was not constrained by the typical rule making process and the purpose and sense of urgency was more real: define surface haulage best practices as fast as possible; create an efficient delivery system to put this information into the hands of mine operators and miners; and then “encourage”, not force, mine

operators to implement these best practices to change the paradigm in the industry.

The Task Group met at the Mine Academy and at various surface mines to formulate rules of engagement and to chart an expeditious path forward. The objective agreed to by the Task Group was to use MSHA’s accident analysis and operators’ experiences and equipment manufacturers’ expertise regarding what was achievable to prioritize the incident types and causes and the possible solutions which formed the content of the best practices. These best practices were then delivered as training aids by inspectors to mine operators and miners alike and the source of MSHA resources materials. This entire effort took a little over a year and produced around 18 best practices because there was a sense of urgency and focus on the part of MSHA, researchers, industry and the manufacturers to reduce surface haulage incidents. Also, the worst fear of some of my industry colleagues was that the best practices developed by the Task Group would become regulations. That did not happen.

For reasons that need to be defined, the industry is again having too many surface haulage incidents. As noted in the previous article, Assistant Secretary for MSHA, Dave Zatezalo, has issued another call to industry in the form of a Request for Information regarding Safety Improvement Technologies for Mobile Equipment at Surface Mines, and for Belt Conveyors at Surface and Underground Mines. In my opinion, MSHA’s approach is spot on. Ask the right questions to the right folks and solutions will come forth. The opportunity to refocus the industry must include the correct balance of engineering solutions and training in work practices, and it must recognize the vast difference between the size and type of mining operations. While miners still move dirt, rock and ore, their methods and equipment have changed and how MSHA and the industry can form an alliance to address incidents sooner rather than later and how management and miners embrace new ways of addressing old problems will be the difference between good and poor incident rates.

OSHA Issues Bulletins on Temporary Workers By Gary L. Visscher, Esq.

OSHA launched its Temporary Worker Initiative (TWI) in 2013 “to increase OSHA’s focus on temporary workers” and help prevent work-related injuries and illnesses among temporary workers. Temporary

OSHA Issues Bulletins, cont.

workers as defined in the TWI are workers hired and paid by a staffing agency and supplied to a host employer to perform work on a temporary basis. OSHA considers the staffing agency and host employer to be joint employers, both responsible for compliance with the OSH Act.

An additional purpose of the TWI has been to identify the responsibilities of joint employers for safety and health and compliance in areas which may be especially troublesome where temporary workers are involved.

To that end, OSHA has issued a series of TWI Bulletins. Previous bulletins addressed Injury and Illness Recordkeeping, PPE, Whistleblower Protections, Safety and Health Training, HazComm, Bloodborne Pathogens, and Powered Industrial Truck training.

OSHA recently issued two new TWI bulletins, on Respiratory Protection and Noise Exposure and Hearing Conservation programs.

Regarding respiratory protection, TWI Bulletin #8 states that the staffing agency and host employer “are jointly responsible to ensure that workers wear appropriate respirators when required.” However, the bulletin states that the host employer will usually have primary responsibility for complying with the standard’s requirements for evaluating exposure levels, implementing and maintaining controls, providing an appropriate respirator, and maintaining a respiratory protection program.

According to the bulletin, a staffing agency has responsibility to take “reasonable steps” to ensure that its employees are protected from workplace hazards, “including being aware of the respiratory hazards at the worksite, the protective measures by the host employer, and any requirements for respiratory protection for their employees.”

The host and staffing agency may decide upon a division of the employer’s responsibilities under the standard. Host employers and staffing agencies are advised to ensure that a division of responsibilities is in writing.

The bulletin specifically addresses responsibility for maintenance and retention of records of medical evaluations and health questionnaires required by the standard. The bulletin states that “joint employers must agree who will retain these medical records prior to beginning work.” The bulletin notes that medical records of an employee who has worked for an

employer less than one year do not need to be retained by the employer if they are provided to the employee upon termination of employment.

The other new TWI bulletin (#9) is on Noise Exposure and Hearing Conservation. Similar to the bulletin on respiratory protection, the bulletin on Noise Exposure and Hearing Conservation states that the primary responsibility for complying with the standard, including implementing a hearing conservation program, is with the host employer. The staffing agency “should take reasonable steps to ensure that the host employer has a hearing conservation program in place that covers temporary workers in the same manner that that host employer’s workers are covered.”

The bulletin specifically addresses responsibility for baseline and annual audiometric testing under the standard. Noting that a short-term employee may be missed by the host employer’s testing program, the bulletin states that the staffing agency may be better positioned to provide baseline and annual testing, but that “neither employer may avoid their ultimate responsibilities under the OSH Act by requiring another party to perform them.” The bulletin advises that employers who use staffing agencies should confirm in writing the specific responsibilities for conducting testing prior to the work beginning.

While the bulletins are advisory, they do provide guidance on how OSHA would likely enforce the standards when temporary or contract workers are present. Please let us know if you would like more information or have questions about managing temporary and contract workers.

OSHC Restricts Relief for Late Filed Contests By Gary L. Visscher, Esq.

The OSH Act provides that employers have 15 working days after receipt of a citation and penalty to file a notice of contest. If the employer does not file a notice of contest within 15 days of receipt, the citation and penalty become a final order. The employer may, however, file a motion to reopen (or to allow late filing) with the Occupational Safety and Health Review Commission (OSHC).

The applicable rule in such cases is Federal Rule of Civil Procedure 60. Most petitions to reopen when an employer misses the 15 day time to file the contest are based on Rule 60 (b)(1), under which OSHRC may reopen final orders if the late filing was due to “mistake,

OSHA Restricts Relief, cont.

inadvertence, surprise, or excusable neglect.”

In the lead case on the meaning of “excusable neglect,” *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380 (1993), the Supreme Court said that excusable neglect includes “situations in which the failure to comply with a filing deadline is attributable to negligence.” The Court said that under the excusable neglect standard, relief is not limited to situations in which the failure to comply with a filing deadline was due to events or circumstances outside the party’s control – “A party’s failure to file on time for reasons beyond his or her control is not considered to constitute ‘neglect.’” The Supreme Court then listed four factors to guide lower courts and agencies in determining whether or not the person’s “neglect” was “excusable.”

Although OSHRC has traditionally cited the *Pioneer* decision on “excusable neglect,” of late OSHRC has adopted its own much more restrictive test for granting relief. In a recent decision, *Coleman Hammons Construction*, (6/13/2018), the Commission stated that relief for late filed notices of contest will be denied if “the reason for the delay was within the Respondent’s control.”

The Commission’s test reverses the Supreme Court’s statement that “excusable neglect” must, by the definition of “neglect,” include situations where the reason for delay are within the control of the party which failed to file on time. The Commission’s test also will rarely be met.

In *Coleman Hammons Construction*, for example, the citations and penalties were sent to the small company’s office. The individual who signed the certified mail receipt put the envelope on the desk of the project superintendent for that job site so he would see it when he returned to the office. The project superintendent was unexpectedly away from the office for “several weeks” and did not see the envelope from OSHA until he returned, by which time the 15-day period had run.

Coleman Hammons had received previous citations from OSHA, which it handled in a timely manner. So this was not an employer who was either a “scofflaw” who ignored its obligation to respond to OSHA citations, or a serial late filer. At one time the Commission would very likely have found that the company’s record of handling citations in a timely manner, and its explanation for the “neglect” in this instance, would be sufficient for the Commission to find it was “excusable.” However, the

Commission’s current test – that relief will be granted only if the reason for the delay is completely outside the Respondent’s control – resulted in the Commission denying relief.

The “outside the Respondent’s control” test was also the reason for denying the relief in *David E. Harvey Builders, d/b/a Harvey-Cleary Builders* (which this firm handled). In that case a citation from an inspection in Georgia was mailed to the company’s regional office in Maryland. An assistant in the Maryland office emailed the citation to the project superintendent in Georgia. Both the assistant and the superintendent assumed that the other would send the citation to the corporate safety office in Texas, which was responsible for handling OSHA citations company-wide. The oversight was discovered 3 days after the time to file the notice of contest expired. The company immediately contacted the OSHA area office but was told it would need to seek relief from the final order from OSHRC. Without a hearing, the ALJ denied Harvey-Cleary’s motion to reopen, because the company did not show that the miscommunication between the assistant and project superintendent which resulted in the late filing was outside the company’s control. (ALJ, 7/14/2017) The company subsequently appealed the decision to the U.S. Court of Appeals, but the court denied review on basis that the decision did not constitute an abuse of discretion (D.C.Cir., 5/11/2018).

To this former OSHRC Commissioner, this current very restrictive test by the Commission for granting relief for late filed notices of contest is unnecessary and regrettable. The Commission has much more discretion under Rule 60, and the Supreme Court’s decision in *Pioneer*, to allow (i.e. to re-open) contests in which a final order is entered due to late filing is more appropriate than its current “outside the control of the employer” test.

Nor is there any good policy reason for a test that results in relief being denied in nearly every motion to reopen a late filed notice of contest. In the end, it should be emphasized, “relief” merely means that the employer will be allowed to have the citation and penalty reviewed by the Commission, to simply “have its day in court.” Giving employers the opportunity to have independent review of citations and penalties is the reason that Congress established OSHRC.

Given the Commission’s current approach, however, employers should pay close attention to insuring that notices of contest are filed within the 15 days.

OSHA Restricts Relief, cont.

Particularly, companies with multiple worksites and offices need to make sure that anyone who handles mail, at any level of the company and any company location, is aware of the company's procedures, and is aware that OSHA citations and penalties must be handled expeditiously.

E-Recordkeeping Rule, cont. from page 3

request. Under the previous administration, OSHA had announced plans to publish the data on line and to make it publicly searchable by establishment. None of the data collected to date have been made public by the agency. OSHA also previously had claimed that it had a method for redacting the public information to avoid interference with worker privacy, a position that the agency has now reversed.

The anti-retaliation provisions of the legislation, which affect incentive, discipline and drug testing programs, took effect in December 2016 and so were not affected by the stay of other data submission provisions. No changes to those provisions (29 CFR 1904.35 and 1904.36) are included in the new NPRM. Both parts of the rule – whistleblower protections and the data submission – are still the subject of active legislation filed by industry groups against OSHA in 2016. The court did not stay implementation of the rule while the case is pending.

Burden of Proof, cont. from page 5

case of “substantial similarity,” and “we decline a mechanical application of the test for establishing a repeat characterization.” In other words, the Commission said that a violation of the same standard as was cited in the previous final order does not by itself establish the basis for a “repeat” violation.

The Commission then discussed how the employer may rebut the prima facie case “by evidence of the disparate conditions and hazards associated with these violations of the same standard.” The Commission noted the differences between the issues involved in the 2005 and 2008 citations. In 2005 Angelica was cited for not having machine specific procedures, whereas the 2008 citations alleged that the procedures were not sufficiently detailed. The Commission characterized the 2008 violations as “only minimal deficiencies...,” reflecting that after those prior violations, Angelica took affirmative steps to achieve compliance and avoid similar violations.” The Commission also cited the employer’s “meaningful reduction” of LOTO and Confined Space hazards after the 2005 citations.

In a lengthy dissent, Commissioner Attwood accused the majority of abandoning years of precedent and adopting as the test for whether a violation was a “repeat” violation essentially the same factors as would establish that a violation was “willful.” The dissent argued that the employer’s “good faith” in abating the previous violation should not be a consideration in determining whether a violation is a “repeat” violation, but may be considered in determining the penalty. Finally, the dissent accused the majority of ignoring Supreme Court decisions on giving deference to the Secretary on questions of statutory interpretation.

Let us know if you would like more information about this decision or have questions regarding repeat violations or other OSHA-related matters.

2018 SPEAKING SCHEDULE

ADELE ABRAMS

Speaking

- September 6: MEI Conference, Presentation on Crystalline Silica and the Mining Industry, Las Vegas, NV
- September 21: ASSP Region VI Professional Development Conference, Presentation on OSHA/MSHA Update, Myrtle Beach, SC
- September 24: Chesapeake Region Safety Council, Free Workshop on MSHA Workplace Examinations Rule, Baltimore, MD
- September 27: Great Plains Safety Conference, multiple presentations, Kearney, NE
- October 9-10: Pacific Rim Conference, multiple presentations, Honolulu, HI
- October 16: BLR, All-day Master Class on OSHA Recordkeeping, Dallas, TX
- October 18: ASSP Hudson Valley PDC, NY, Presentation on OSHA/MSHA Update
- October 23: National Safety Congress, Presentation on Legal and Ethical Considerations for EHS Professionals

Webinars

- August 28: BLR/Avetta Webinar, ADA, OSHA and Medical Marijuana
- September 11: BLR Webinar, OSHA Regulation of Construction V. Maintenance Activities
- September 24: BLR Webinar on OSHA Crystalline Silica Rule
- September 25: BLR/Avetta Webinar on Temporary Worker Safety
- September 26: Business 21: Webinar on OSHA Recordkeeping Requirements
- October 25: ClearLaw Webinar on OSHA Walking/Working Surfaces Regulations

MICHAEL PEELISH

- August 16: Chesapeake Region Safety Council, Competent Person training, Baltimore, MD

DIANA SCHROEHER

- September 12: Penn State Mine Safety Seminar, Legal Developments in Mine Safety Law, Dover, DE

TINA STANCZEWSKI

- September 20: N.C. Mine Safety & Health Law School, Castle Hayne, NC

GARY VISSCHER

- August 25: BLR Webinar on Post Accident Drug Testing: Avoiding Retaliation Claims under OSHA
- September 25: BLR Webinar on LOTO: Alternative Measures and OSHA Compliance