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OSHA Tries Fourth Amendment “Work-around”

By: Gary Visscher, Esq.

What constitutes a reasonable scope for an inspection after the employer reports an injury or an employee complaint is received, is before a federal district court in Georgia.

The case involves poultry processor Mar-Jac Poultry, Inc. Mar-Jac Poultry complied with OSHA’s 2014 injury reporting rule by reporting a burn to a maintenance employee in February 2016. The burns were caused by an arc-flash while the employee was repairing an electrical panel.

In response, OSHA sent three inspectors, including a health inspector, to Mar-Jac in order to undertake a “wall-to-wall” inspection of the plant. Mar-Jac demanded a warrant before OSHA expanded the inspection beyond the area and activities that resulted in the employee injury. OSHA then secured a warrant, and Mar-Jac filed a motion to quash. A hearing was held before a magistrate judge in April 2016, and in early August, the magistrate judge issued a written report and recommendations, agreeing with Mar-Jac that a warrant authorizing a comprehensive inspection was too broad.

In *Marshall v. Barlow’s Inc.*, 436 U.S. 307 (1978), the U.S. Supreme Court held that, under the Fourth Amendment’s protections against government search and seizure, OSHA must have “probable cause” to inspect an employer’s workplace, and that probable cause may be met by either “specific evidence of an existing violation” or by showing that the inspection was based on “reasonable legislative or administrative standards for conducting the inspection.” In practice, this has meant that OSHA must follow an “administratively neutral” plan, based on objective criteria such as injury rates, for selecting employers for comprehensive inspections.

Accident/injury and complaint inspections

are usually restricted to the area or hazard where the accident or injury occurred, or the complaint made, unless there is evidence of other violations at that workplace.

OSHA argued that it had two constitutionally permitted bases for expanding the inspection beyond the area and hazard where the injury occurred. First, OSHA argued that a Region 5 Regional Emphasis Program (REP) provided that when OSHA received a complaint and injury report regarding a poultry processor covered by the REP, OSHA may initiate an REP inspection, which were comprehensive inspections covering hazards often found at poultry processing facilities. The magistrate judge noted, however, that Mar-Jac was not on the list of facilities targeted for inspection under the REP.

Second, OSHA argued that even if the REP did not provide a basis for expanding the scope of the inspection, a history of hazards commonly found at poultry processors justified expanding the inspection beyond the area and cause of the injury.

The magistrate judge found that neither of those arguments satisfied probable cause as set forth in the *Barlow* decision, and in the 11th Circuit’s subsequent decision in *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982). In *Sarasota Concrete*, the Court of Appeals denied OSHA’s attempt to secure a warrant authorizing an inspection of the entire workplace based on a specific employee hazard complaint.

The magistrate’s recommendation goes before a U.S. district court judge. OSHA has filed objections to the magistrate’s report, and a decision by the court is expected this fall.

Report Targets OSHA Settlement Practices By: Adele L. Abrams, Esq., CMSP

On August 1, 2016, the Occupational Safety and Health Administration’s (OSHA) civil penalties increased by nearly 80%, to a new high of \$124,709 per violation (for willful and repeat violations) and to over \$12,000 for serious and

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Report Targets OSHA, Con't

other-than-serious citation items. This marked the first OSHA fine hike since 1990.

The higher fines will apply to citations relating back to inspections that predate August 1st for which citations had not yet been issued. OSHA has a six-month statute of limitations in which to issue citations and their penalties, so soon all citations will carry the new fines. Each year thereafter, OSHA now has authority to increase its penalties annually, indexed to inflation. So more changes lie ahead.

What isn't yet clear is the real-world impact of the revised penalties, especially because OSHA is often quick to play "let's make a deal" during its informal conferences. There are specific reductions, for quick abatement, for small business size, and for having a strong written safety and health program, etc. Other penalty reductions are achievable if the employer adds a sweetener, such as agreeing to third party audits, adoption of a safety and health management program, changes in incentive programs, providing enhanced training such as the OSHA 30-hour course for supervisors or the 10-hour course for all rank and file workers.

Among the possible reductions, even if a citation is upheld as valid may be: (1) a 10 - 80 percent reduction for an employer with fewer than 250 employees, (2) 10 percent off if the employer has been inspected in the past five years and received no willful or repeat violations, and (3) 15 percent reduction for fixing the hazard within 24 hours of the inspection (after the condition is pointed out by the inspector but prior to the citation being issued). OSHA particularly stresses the "quick fix" option because, once the employer formally contests the citation, abatement requirements are stayed pending the outcome of litigation.

So, the practical results of the major penalty enhancement can be blunted by proactive approaches to citation conferences. Blunted too much, according to the Center for Progressive Reform (CPR), which released its new report, "OSHA's Discount on Danger," this summer, shortly before the penalty increases took effect. CPR strongly criticized Congress for not modernizing the Occupational Safety & Health Act of 1970, failing to close loopholes in the law, and placing budgetary constraints on OSHA enforcement, which had challenged the agency's ability to address energized-equipment hazards in a timely manner and to enforce existing standards.

The CPR report studied private sector OSHA enforcement cases that were finalized during the Obama administration, through June 8, 2016. It looked at penalties imposed for all violations cited in fatality investigations, penalties imposed for willful violations in hazard complaint cases, and also specifically looked at all penalties imposed in poultry processing facilities for any type of investigation. It concluded that the amounts by which OSHA reduces penalties "threatens to negate the deterrent value of

citations."

CPR made a number of recommendations that OSHA will likely take to heart in the next administration (depending on the outcome of the elections, of course):

- Empower workers and their representatives by giving them a meaningful voice in the settlement process. CPR suggests that OSHA include workers in settlement conferences, possibly with a separate conference if requested, and that employees who filed hazard complaints should be informed of possible settlement terms, period of abatement required, protections against whistleblower retaliation, and other issues germane to the case.
- Provide OSHA area offices with additional guidance on calculating penalty reductions and negotiating settlements. The guidance should discourage officials from agreeing to large discounts and other concessions "as a matter of practice." Specifically, CPR says that penalty reductions should be off the table when the economic benefits of noncompliance exceed the proposed penalties. Area offices should demand that employers do more than just "comply" with the law in order to get a beneficial settlement.
- Establish national guidelines discouraging informal settlement of cases involving "unconscionable" violations, such as those involving trench collapses, machine guarding, lockout/tag out violations, or cases involving hospitalizations or fatalities.

CPR adds that citations should only be withdrawn (vacated), modified or reclassified when there is clear error on the part of the inspector, when evidence clearly cannot support the citations or when the employer has provided convincing evidence to support an affirmative defense (e.g., unpreventable employee misconduct).

Meanwhile, as OSHA considers its response to the CPR report, conferences continue apace and beneficial outcomes remain frequent. They are typically held within the first 15 working days after the employer receives the citation and penalty package. If the employer does not file a written notice of contest before that period elapses, the penalties become final if not otherwise altered during conference. Simply scheduling the conference does not preserve your contest rights, however, so if the OSHA office cannot squeeze in your case before the contest period elapses, you have no choice but to file a formal contest. Most offices will still hold a conference even if a contest was filed, but any settlement must be ratified by the U.S. Department of Labor's Solicitor's Office.

MSHA's Recent Outreach To Reduce Coal Mining Accidents

By: Sarah Korwan, Esq.

There is good news for coal miners. Since October 2015, fatalities in the nation's coal mines is down significantly (although eight tragic losses did occur since that time). The bad news is that more than 1,100 nonfatal accidents have occurred since fall 2015 resulting in restricted duty, missed days at work, and permanent disabilities for the miners who worked there. The Mine Safety and Health Administration (MSHA) wants to reduce these numbers and has "issued a call" to raise awareness.

On August 29, MSHA published a statement reminding coal miners who are working in underground and surface mines around the country, to pay attention and engage in better safety practices. In addition, during the month of September, inspectors engaged directly with coal miners, as well as operators through "walk and talks", in reminding them to "stop and take a breath" between tasks. The purpose of the "walk and talks" is to raise miners' awareness of hazard recognition and safe practices.

MSHA also produced data on the number of non-fatal accidents in each state. The states with triple digit non-fatal accidents include West Virginia (419), Kentucky (191), and Pennsylvania (130). MSHA reports that at least 30 of these accident could have been fatal.

Outreach is a significant part of MSHA's work. MSHA has offered additional information on safe roof and rib practices, respirable dust rule compliance, and provided extra services to small mines. Operators should take advantage of these services when available.

Department of Labor Awards Grants for Health and Safety Training

By: Jordan Posner, J.D.

As part of its efforts to ensure adequate workplace safety and health training, the Department of Labor (DOL), for its 38th straight year, awarded 77 organizations with a combined \$10.5 million dollars in ongoing efforts to train high-risk employers and workers. The Susan Harwood Training Grants Program is designed to fund nonprofit organizations, including community/faith-based groups, employer associations, labor unions, joint labor/management associations, and colleges and universities. These groups include small-business employers and underserved, at risk workers in high-hazard industries.

To apply for a grant, employers must focus their training and education in one of the following categories; Capacity-Building Developmental Programs, Capacity-Building Pilot Programs, Targeted Topic Training, and Training and Educational Materials Development.

DOL awarded \$3.6 million to 28 organizations to develop new targeted training materials and programs

addressing workplace hazard prevention strategies. In order to be considered for this grant, recipients must address an occupational safety and health topic. Areas of focus include heat illness prevention, fall prevention in construction, chemical hazards, hazard communication, workplace violence, and silica exposure.

In addition, 11 organizations received a combined \$1.5 million in new capacity building grants to provide targeted populations with training, education, and assistance to workers and employers. Also, \$4 million in follow-on grants was given to 26 capacity building grantees. Lastly, \$1.4 million was provided to targeted topic grantees who performed adequately during the 2015 fiscal year.

The award range for capacity building grants (pilot, developmental, and developmental follow-on), spanned from \$80,000 to \$526,500. For targeted topic grant recipients, awards ranged from \$62,314 up to \$140,000, with most businesses being almost fully funded. Lastly, targeted topic follow-on grant recipients were funded between \$60,747 and \$126,000.

This program has provided training for approximately 2.1 million workers, both employers and employees, in 24 different languages. Most importantly, the continued funding of this program enables the Department of Labor to continue its mission under the Occupational Safety and Health Act and "safe and healthful workplaces."

Drill Entanglements "It Only Takes a Second"

By: Michael Peelish, Esq.

It only takes a second for something to go wrong. This fact is never more evident than when it comes to drill entanglement accidents. Many equipment related accidents have indicators or opportunities to avoid accidents that are ignored. For instance, bad breaks don't just happen. They are spongy and then they don't work. Not blocking equipment against movement just doesn't happen. Someone consciously failed to take action. But drill entanglements happen before you realize it. And the consequences can be very, very serious.

Based on a rash of accidents involving drillers, MSHA issued a Safety Alert in August. Drilling is unique insofar as it can be done in a remote area of a mine and does not always involve multiple people, and thus is in some respects unattended. So if something does go wrong, assistance may not be close by. It is critical to follow MSHA's best practices, incorporate them into your safe operating procedures, ensure miners are trained on the equipment, and that they are following the manufacturers guidelines for safe operating procedures.

New Department of Labor Regulation May Cause Employers to Pay More in Overtime

By: Jordan Posner J.D.

Two separate lawsuits which were filed on September 20, 2016 in the United States District Court's Eastern District of Texas, have set in motion strong backlash to a new Department of Labor rule on overtime. Set to go into effect December 1, 2016, a new salary threshold mandates that if you earn less than \$913 per week, or \$47,476, you qualify for overtime. This number almost doubles the current salary level of \$455 per week, or \$23,660 annually. The law also increases the annual compensation requirement for highly compensated employees ("HCE"). Employees will be required to work enough to meet "annualized weekly earnings of the 90th percentile of full-time salaried workers nationally, which based on fourth quarter 2015 data is \$134,004 in order to meet the definition of HCE. Finally, the rule establishes an indexing mechanism to automatically increase the standard level test and HCE compensation every three years. The Department of Labor projects that by 2020, the standard could rise to \$981 per week, or \$51,000 annually.

In the first case, seventeen states including Nevada, Texas, Alabama, Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, Wisconsin, and Kentucky ("State Plaintiffs"), sued the Department of Labor. The second lawsuit includes 53 organizations which include twenty-eight voluntary, non-profit, membership organizations. This group represents tens of thousands of businesses located in Texas, as well as thirteen Chambers of Commerce, and thirteen national associations.

The law specifically takes aim at "white-collar" workers, or those who are bona fide executives, administrative or professional employees. Both sets of plaintiffs make clear that the new salary level will cause a surge in exempt employees to be covered by the new overtime law. This new decree undoubtedly hurts employers in industries where employees in white-collar capacities are paid lower than the threshold.

A second consideration that the State Plaintiffs address, is that "rather than analyzing and allowing for notice and comment about the duties that employees actually perform in the modern economy, the government simply doubled the "salary basis test." Plaintiffs allege that this rule will also have drastic impacts on state government and businesses because employment costs will be harshly increased.

As a result, states may be forced to eliminate or reduce essential government services or functions, and will have to reclassify some salaried employees as hourly employees or reduce hours to avoid payment of overtime. The Department of Labor even projects more than 4.2 million employees across the country will lose their exempt status immediately when the rule goes into

effect, and an additional 3.9 million employees by the second year's end.

The rule takes effect December 1, 2016 unless the court intervenes. All employers should review their policies, perform an audit of their workforce to determine impacted employees, and pay close attention to the new rules. If you would like any additional information or assistance on the rule, please contact the Law Office.

Court of Appeals Overturns OSHA's Revision of PSM Retail Facility Exemption

By: Gary Visscher, Esq.

In the aftermath of the 2013 fertilizer storage facility fire and explosion in West, Texas that killed 15 people, including emergency responders, President Obama issued an Executive Order, E.O. 13650, requiring federal agencies, including OSHA, to review and revise standards and regulations intended to prevent chemical accidents and explosions. Subsequent to the Executive Order, OSHA initiated a rulemaking on revisions to the Process Safety Management (PSM) standard, 29 C.F.R. 1910.119. The August 2016 Newsletter includes an article on the recently completed report of the Small Business Review (SBREFA) Panel on more than a dozen changes to PSM that OSHA is considering.

Even while reviewing changes to the PSM standard, OSHA also issued enforcement memos revising its interpretation of the current PSM standard. The most controversial of these was a July 22, 2015 "Memorandum on Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption." The memorandum announced a new policy with regard to coverage of "retail facilities." The PSM standard exempts "retail facilities" from application of the standard, (29 CFR 1910.119(a)(2)(i)), but does not define what "retail facilities" are.

Beginning with a letter of interpretation issued shortly after the PSM standard was promulgated in 1992, OSHA defined the exemption for "retail facilities" as applying to "an establishment at which more than half of the income is obtained from direct sales to end users." OSHA's July 22, 2015 enforcement memo said OSHA would no longer follow that definition.

Instead, the July 2015 memo announced a new definition: only facilities that are defined as "retail" under the North American Industry Classification System (NAICS) Manual are eligible for the exemption. The NAICS Manual defines retailers as "...organized to sell merchandise in small quantities to the general public."

The change announced in the July 2015 memo

Court of Appeals, Con't

especially impacted agricultural fertilizer suppliers, though it affected other suppliers, such as some oil and gas distributors, as well. The Agricultural Retailers Association and the Fertilizer Institute and individual businesses challenged the July 2015 memo as an illegal rulemaking in the Court of Appeals for the D.C. Circuit.

Late last month the Court of Appeals issued its decision “vacat[ing] OSHA’s Memorandum for failure to abide by the OSH Act’s procedural requirements.” Specifically, the Court of Appeals held the July 22, 2015 enforcement memo was a “standard” under the OSH Act, and therefore required notice and comment in accordance with section 6 of the OSH Act.

The issue in cases involving agency “interpretations” of its regulations is often framed in terms of whether the new interpretation is in effect a “legislative rule,” which must go through notice and comment, or an “interpretative rule,” which does not, under the Administrative Procedure Act. In a 2014 Supreme Court decision, *Perez v. Mortgage Bankers Assn.*, 135 S.Ct 1199, the Supreme Court said that under the APA agencies could change or reverse even long-standing interpretations of their regulations without notice and comment rulemaking, so long as the new interpretation is explained and allowed by the regulation.

The Court of Appeals said that the issue in this case, however, was the construction of the OSH Act. Citing previous decisions by the D.C. Circuit, the Court distinguished a “standard,” which the Court said is “a remedial measure addressed to a specific and already identified hazard,” from a “regulation,” which is intended to “uncover violations of the Act and uncover unknown dangers.” The enforcement memorandum involved “substantive protections” and as a “standard” required notice and comment.

The Court noted that the change in application of the PSM standard was intended to “address a particular significant risk...: the risk of storing large quantities of highly hazardous chemicals for distribution to end users in bulk quantities, as had been the case at the West, Texas fertilizer company.” In addition, the Court noted that “the essential effect and object of the Memorandum is to expand the substantive reach of the PSM standard by narrowing an exemption from that standard.”

The Court said that because its decision was determined by the OSH Act, it did not need to address the issue of whether the enforcement memo was a “legislative” or “interpretative” rule under the APA.

For now, OSHA’s previous and long-standing definition of the exemption for retail facilities remains in effect. The exemption is likely to be one of the issues that will be addressed in OSHA’s rulemaking on PSM.

OSHA and DOT Issue Joint Guidance on Labeling Hazardous Chemicals

By: Gary Visscher, Esq.

The U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA), sets labeling requirements for hazardous items in transportation, as provided in the Hazardous Materials Regulations (HMR) at 49 CFR Parts 100-180. The Occupational Safety and Health Administration (OSHA) sets labeling requirements for hazardous items in the workplace, as provided in the Hazard Communication Standard (HCS) at 29 CFR § 1910.1200.

On September 19, 2016 the two agencies released a Joint Guidance Memorandum, intended to clarify how the agencies’ respective requirements fit together. The Joint Guidance Memorandum is available on OSHA’s website.

The Memorandum addresses three issues. First, the Memorandum clarifies that “[d]uring transportation, DOT’s HMR governs hazardous materials labeling requirements.” HCS applies at workplaces before and after transportation, but HCS labeling is not required on shipping containers in transport, whether or not HMR requires labeling the container.

Second, the Memorandum clarifies that HCS 2012 labeling requirements for bulk shipments may be met by either labeling the immediate container or by transmitting the required label with shipping papers, bills of lading, or other electronic means, so long as it is available to workers in printed form on the receiving end of the shipment.

Third, the Memorandum clarifies that a bulk shipment may bear both the DOT HRM marking or label and the HCS 2012-compliant label. In general, HRM prohibits attaching any label or marking on a package or container which might confuse or conflict with an HMR-required label or marking. However, the Joint Guidance Memorandum states that a marking or label conforming to HCS 2012 is not prohibited, and that “an HCS 2012-compliant OSHA label and a DOT HMR label or marking may both appear on the same package.

OSHA Whistleblower Program Update

By: Diana R. Schroeder, Esq.

Two new issues are noteworthy on OSHA’s Whistleblower program – OSHA’s scrutiny of settlement agreements, and the announcement of a Western region Pilot Program to expedite processing of claims.

First, on September 15, 2016, OSHA issued guidance on permissible criteria for inclusion in settlement agreements that are reached between the complainant and the employer while the whistleblower complaint is still under

Whistleblower Program, Con't

investigation. The OSH Act, Section 11(c) prohibits discrimination against employees for participating in protected activity. Protected activity includes employee participation in an OSHA inspection, or talking with an inspector, testifying in proceedings, reporting a work-related injury or illness, and raising a safety or health complaint with the employer. The OSHA Whistleblower Protection Program enforces 22 different statutes that protect workers who report alleged violations of health and safety practices (or engage in other protected activity) in the transportation industry, consumer and investor protection industries, and the occupational, environmental and nuclear safety industries.

When the employer and the complainant reach a settlement of the employee's complaint, the terms of the settlement agreement must be approved by OSHA, and will be screened for "gag provisions" -- terms contained in the agreement that restrict or discourage an employee from engaging in protected activity. These gag provisions, often contained in confidentiality or non-disparagement provisions, will not be approved by OSHA if considered sweeping and would have a chilling effect on the employee's 11(c) rights. Other examples of provisions that OSHA will not approve include:

- a. "A provision that restricts the complainant's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on a respondent's past or future conduct. For example, OSHA will not approve a provision that restricts a complainant's right to provide information to the government related to an occupational injury or exposure.
- b. A provision that requires a complainant to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct.
- c. A provision that requires a complainant to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage complainants from engaging in protected activity.
- d. A provision that requires a complainant to waive his or her right to receive a monetary award (sometimes referred to in settlement agreements as a "reward") from a government-administered whistleblower award program for providing information to a government agency. For example, OSHA will

not approve a provision that requires a complainant to waive his or her right to receive a monetary award from the Securities and Exchange Commission, under Section 21F of the Securities Exchange Act, for providing information to the government related to a potential violation of securities laws. Such an award waiver may discourage a complainant from engaging in protected activity under the Sarbanes-Oxley Act, such as providing information to the Commission about a possible securities law violation. For the same reason, OSHA will also not approve a provision that requires a complainant to remit any portion of such an award to respondent. Also, OSHA will not approve a provision that requires a complainant to transfer award funds to respondent to offset payments made to the complainant under the settlement agreement."

Liquidated damages provisions, where clearly disproportionate under the circumstances, will also trigger OSHA involvement and a request to the parties to remove/revise the unacceptable provision(s).

If OSHA determines the settlement agreement does contain an unduly restrictive clause, it must be removed or clarified before OSHA will approve the settlement as lawful and consistent with the purposes of the whistleblower statute(s). OSHA may require the inclusion of standardized provisions which clearly identifies the rights of the employee once the settlement is concluded. This new Guidance serves to update OSHA's Whistleblower Investigations Manual. See OSHA's Guidance located at: [DeFacto GagOrder Provisions](#).

Second, on August 16, 2016, OSHA announced a whistleblower "Expedited Case Processing Pilot Program" in the Western region, which will allow complainants to request "expedited processing" of their OSHA whistleblower complaint. The pilot program became effective on August 1st, and only includes Arizona, California, Hawaii, Nevada and three U.S. territories. The program will permit employees to ask OSHA to halt their whistleblower investigation and issue findings for review and consideration by an OSHA administrative law judge (ALJ).

The ALJ may grant the same relief that OSHA may grant, including back pay, front pay, compensatory damages, punitive damages and, if authorized by the individual statute, attorney's fees and reinstatement. Only certain cases will qualify for the expedited processing. The case will be assessed for the following criteria:

- The claim is filed under a statute that allows for de novo review by an administrative law judge;
- Depending on the statute, 30 or 60 days have passed from the date the complainant first filed

Whistleblower Program, Con't

with the claim with OSHA;

- OSHA has interviewed the complainant;
- Federal investigators have evaluated the complaint and the complainant's interview to determine if the basic elements of a retaliation claim exist;
- Both the complainant and the respondent have had the opportunity to submit written responses, meet with an OSHA investigator and present statements from witnesses; and
- The complainant has received a copy of the respondent's submissions and had an opportunity to respond.

Once OSHA officials determine that these criteria are met, they will evaluate the claim to determine - based on the information gathered up to the date of the complainant's request for expedited processing - whether reasonable cause exists to believe that a violation of the statute occurred. OSHA officials will then take one of three actions: dismiss the claim and inform the complainant of the right to proceed before an administrative law judge; issue merit findings as expeditiously as possible; or deny the request for expedited processing.

For more information on OSHA Whistleblower Program updates, or any other OSHA program or initiative, please contact the Law Firm.

A team from the Law Office recently presented a silica compliance conference for the Precast/Prestressed Concrete Institute. Pictured left to right: Brian Yellin, Esq. CIH, Adele Abrams, Esq. CMSP, John Head PE (Q4 Impact), Michael Peelish, Esq and Wes Harkins CSP CIH.



MSHA October Stakeholder Meeting

By: Jordan Posner, J.D.

On October 4, 2016, MSHA hosted a Stakeholder Meeting designed to address the 14 metal and nonmetal ("MNM") fatalities in 2016 and the eight coal fatalities this year. MSHA recapped best practices for each of the different mortalities which occurred. The agency stressed the progress it made in 2015, as only 17 miner deaths were recorded, including a streak of 133 days without a fatality in MNM mining. MSHA promised to expand its 'walk and talk' events with mine operators and employees across the country, send out "near miss" alerts, monthly initiatives and focused inspections. MSHA discussed coal mining's plan continue speaking with as many miners as possible and educate them on best safety practices. Lastly, MSHA reiterated how important seatbelt use is at the mine, with the month of "Deadly October" upon us. Each year three miners pass away, all preventable deaths.

The meeting also yielded interesting points of data to consider:

- This year, there have been four supervisor fatalities.
- Workers between the ages of 50-59 and 60+, contributed to 36% and 29%, respectively of the total deaths this year.
- 36% of the fatalities were of employees with one to five years of experience.
- 29% of the deaths were supervisors and another 29% were truck drivers.
- 21% of the fatalities were involved those who worked in machinery and another 21% were those who performed powered haulage.
- Lastly, half of the mine fatalities occurred within sites employing 50% each for mines between 10-50 employees and the other half with those of 100+ employees.

The coal breakout session focused on Prefabricated Refuge Alternatives, voice communications in self-contained breathing devices for the next generation of self-contained self-rescuers (SCSRs), and Mine Rescue Teams. MSHA released guidance on prefabricated refuge alternatives that underground coal mines must comply with by December 31, 2018 when the new rule takes effect. The rule requires manufacturers to conduct testing to assess internal temperature of the unit, ability to withstand flash fire, ability to be safely moved even with an injured miner on a stretcher inside, among other items.

Manufacturers must submit design requirements for the chambers that include the following topics: 1) Space and volume, 2) Isolation, 3) Preshift, 4) Unauthorized entry, 5) Pressure relief, 6) Human waste disposal, 7) Exterior gas measurement, 8) Durability, 9) Transport, 10) Two way communication, 11) Flame resistant, and 12) Maintenance accessibility.

A NIOSH partnership meeting will be held on October 19, 2016, in Pittsburg to discuss research on the topic.

SPEAKING SCHEDULE

ADELE ABRAMS

- October 5, Chesapeake Region Safety Council Annual Conference, Baltimore, MD
- October 17: National Safety Council Annual Congress, Anaheim, CA, speak on Legally Effective Incident Investigation
- October 26: BLR webinar, Crystalline Silica Exposure Control Plans
- November 1: MSHA Southeast Mine Safety Conference, Birmingham, AL, speak on crystalline silica
- November 9: ClearLaw webinar, Crystalline Silica
- November 16: SafePro Inc. Mine Safety Law Institute, Savannah, GA
- November 29: Northern Region Assn. of Safety Professionals, Fargo, ND, speak on OSHA Update, and Legal Liability Issues for ESH Professionals
- December 2: Chesapeake Region Safety Council, full-day seminar on crystalline silica, Baltimore MD
- December 13: Oregon independent Aggregates Assn./SafePro Inc., Albany, OR, speak on Mine Safety Legal Issues
- December 15: ClearLaw webinar, OSHA Injury/Illness Reporting Requirements

JOSHUA SCHULTZ

- October 11, 2016, Navigating Safety and Liability Issues at Multi-Employer Worksites, 11th Annual Alaska Occupational Safety Summit, Anchorage, Alaska

TINA STANCZEWSKI

- October 26, 2016, Environmental Law Update, 2016 Joint Technical Symposium, Long Beach, CA

GARY VISSCHER

- October 27, 2016, BLR Webinar: Safety and Employee Discipline Programs: Legal and Safety Considerations
- November 1, 2016, Silica Standard and OSHA Updates, Western Michigan IH Society, Grand Rapids, Michigan