



**Labor Department IG Report
Critiques OSHA & MSHA
By Adele L. Abrams, Esq., CMSP**

A November 2018 report by the US Department of Labor’s (DOL) Office of the Inspector General (IG) has identified serious management and performance challenges facing many DOL agencies, including the Occupational Safety & Health Administration (OSHA) and the Mine Safety & Health Administration (MSHA). Federal OSHA has jurisdiction over 9 million workplaces with 136 million workers, while MSHA has responsibilities for the safety and health of approximately 320,000 miners nationwide at more than 13,000 surface and underground mines. The IG report indicates that there are challenges for both agencies in the best use of resources to protect workers in high risk industries such as construction, mining, forestry, fishing and agriculture.

One problem the IG found is the lack of reliable data on workplace injuries, exacerbated by underreporting of injuries by employers. This hampers efforts to effectively focus inspection and compliance efforts on the most hazardous workplaces. OSHA’s electronic recordkeeping rule required high hazard employers in workplaces with between 20 and 249 employees, and all employers with worksites of 250 or more employees to submit their injury and illness data online to OSHA, starting with FY 2016 data. However, many employers have not met their obligations to date, and the rule remains in litigation.

The IG report also identifies abatement verification as a challenge for OSHA. Many citations get closed out because the related construction project ended and the cited

conditions were no longer present, rather than because employers had corrected them. Consequently, OSHA received no assurances that employers would use improved practices at other or new worksites. The Occupational Safety & Health Act allows employers to delay abatement of the cited conditions if it contests the underlying citations (except in some imminent danger situations), until the matter either is settled or is finally adjudicated and the citation is upheld. By contrast, MSHA requires abatement of cited conditions at mines promptly (often the same date or week as the citation is issued) regardless of whether the citation is contested.

On the mining side, the IG report identified challenges in curbing black lung illness cases arising from coal dust exposure. The IG cited a 2018 study by the American Journal of Public Health noting that black lung cases are at a 25 year high in Appalachia’s coal mining states, and MSHA is currently seeking comment on its 2014 coal dust rule. MSHA is also focusing efforts on reducing powered haulage accidents, which accounted for half of all mine fatalities in 2017.

When evaluating the agencies’ progress in facing these challenges, the IG notes that OSHA encourages employers to comply with injury/illness reporting requirements through enforcement, outreach, and compliance assistance. OSHA is also scrutinizing its internal controls. MSHA has increased industrial hygiene sampling at mines for silica, quartz and diesel particulate emissions. The agency is also working with mine operators and stakeholders

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Happy Holidays
from the Law Office

Labor Dept IG Report, Con't.

to develop proximity detection and collision warning systems on equipment to stop machine motion or send warnings to the machine operator when it detects a person or object in its path. MSHA has issued a Request for Information on powered haulage safety and other technology, with a comment period deadline of December 24, 2018.

Future efforts suggested by the IG report for OSHA include completion of initiatives to improve employer injury/illness reporting, enhancing staff training on abatement verification, especially of small and transient employers, and finalizing its evaluation and analysis program. MSHA was urged to identify methods for improving reporting of accidents, injuries and illnesses. MSHA needs to take steps to ensure compliance with the Respirable Coal Dust rule, including: (1) review the quality of coal mine dust controls in mine ventilation and dust control plans; (2) analyze sampling data quarterly; (3) monitor operator sampling equipment; (4) re-evaluate the RCD rule in light of new information in the AJPB study; and, (5) increase testing and enforcement for other airborne contaminants. MSHA should continue its powered haulage initiative through compliance and technical assistance visits, enhanced training, and sharing knowledge of available technology.

The IG office has its own workplan that includes investigation into OSHA's complaint-triggered inspections, penalty reductions, whistleblower protection programs, and other process and management issues. The IG notes that OSHA investigates approximately 9,000 employee complaints annually, but issues citations in only about a quarter of those inspections, in part because the agency is not required to interview complainants.

The IG report and FY 2019 workplan will likely provide support for anticipated OSHA and MSHA oversight hearings in the US House of Representatives in 2019, as Democrats regain control of that chamber and scrutinize OSHA rollback of protections under some rules and policies adopted during the Trump administration. It is also expected that the comprehensive OSHA reform legislation, the "Protecting America's Workers Act," will be reintroduced. The legislation has been introduced over the past few congressional sessions but was not given any committee consideration, a situation that will now change in the House of Representatives.

In addition, OSHA has been without an Assistant Secretary of Labor since the January 2017 inauguration, although Deputy Assistant Secretary Loren Sweatt has served as acting chief. Trump had nominated Scott Mugno, former safety official for Federal Express, to head the agency but his nomination has stalled in the Senate. It is unclear whether Mugno will be renominated in January, whether another candidate will be selected, or whether OSHA will remain without a confirmed head for the duration of this administration.

Silica Enforcement Data for FY 2018

By Adele L. Abrams, Esq., CMSP

The first full year of OSHA enforcement of its new crystalline silica standard has been completed for the construction sector, and data are now available to indicate how the standard is being enforced by both federal OSHA and the state plan states that run their own programs. The FY 2018 data are also available for enforcement in general industry and maritime, but few citations have been noted yet because that rule only took effect June 23, 2018, and FY 2018 ended on September 30, 2018.

Most of the state plan states have adopted the federal rule "as is," but some states recodify their standards and they are permitted to have rules more stringent than the federal government. Cal-OSHA is a prime example of this, and it applies its silica rule to both the OSHA-regulated sectors (general industry, construction, maritime, agriculture) but it also has dual enforcement authority over mines in California. This makes those operations subject to both MSHA and OSHA requirements, and necessitates mine operators in that state to protect its workers to the more protective OSHA rule (50 ug/m³ as an 8-hour time weighted average) rather than the MSHA rule, which uses a formula that is the equivalent of 100 ug/m³ for respirable crystalline silica, and conforms to the 1973 ACGIH TLV.

The following are the data currently available from OSHA. In all, 640 citations were issued between federal and state OSHA covering all sectors. The breakout on enforcement is as follows:

Federal OSHA: The agency issued 523 citations during 189 inspections with total assessed penalties of \$800,982. There were no data on how many of these citations are still pending due to litigation, and how many were accepted without contest. Of the citations issued under the construction rule (29 CFR 1926.1153), the majority of them (493) were issued during construction worksite inspections.

Silica, Con't.

However, other industry sectors may be found to have workers who perform construction work when their activities go beyond maintenance tasks. In addition, general industry employers can be cited under the construction rules if they have construction contractors/subcontractors performing tasks falling under Part 1926 in their workplaces. The non-construction sectors receiving silica citations under Part 1926 included: waste management and remediation services; public administration; arts, entertainment and recreation; real estate and rental leasing; agriculture, forestry, fishing and hunting; retail trade; and health care and social assistance.

Only one federal OSHA citation was issued during FY 2018 under the general industry rule (29 CFR 1910.1053), in the retail trade sector. A \$685 penalty was proposed, suggesting that this may have been for a paperwork violation classified as “other than serious.” The maximum OSHA penalty for serious and OTS violations is \$12,934, while the top penalty for repeat and willful citations is now \$129,336.

State Plans:

Limited state plan enforcement data are also now available, as some states waited more than six months before adopting the federal construction rule, and some are just now coming online to enforce the general industry and maritime rules. For the states whose citation data reflected enforcement activity, the following were issued. State plan states not listed on this table had not yet taken enforcement actions under the silica standards. All citations below were issued under 29 CFR 1926.1153.

State	# Cit. / # Insp.	Penalties	Sectors Cited
AK	13 / 5	\$21,425	Construction
IA	4 / 1	\$10,000	Construction
MD	9 / 2	0	Construction
MI	58 / 23	\$2,550	Construction Waste Management
MN	7 / 1	\$6,000	Construction
NV	2 / 2	\$2,678	Construction
NM	4 / 1	\$16,950	Construction
NC	28 / 12	\$25,650	Construction
TN	7 / 3	\$2,550	Construction
VT	5 / 2	\$9,777	Construction
VA	29 / 18	\$310,922	Construction Educational Services
WY	1 / 1	\$4,268	Construction

The key rule segments targeted by OSHA for citation purposes are: exposure monitoring (either not done when required because “Table 1” is not followed, or performed incorrectly), lack of an appropriate written exposure control plan, and training inadequacies.

As reflected in the enforcement data, when an employer is inspected and cited under the silica standard, it is common for OSHA to issue multiple citations rather than having the compliance elements grouped into a single violation.

Moreover, when mandated worker training under the rule is not provided, OSHA may cite the employer under both the silica rule, and also under the Hazard Communication Standard (29 CFR 1910.1200), with separate penalties for each. The silica rule requires training on the employer’s site-specific program and controls for their task, the medical surveillance program, the health hazards of silica, how to maintain engineering controls, perform housekeeping, and use tools according to the manufacturer specifications, and on the OSHA rule’s other requirements. Training must be conducted in a language and vocabulary that workers can understand. If an employer is utilizing temporary workers, or day laborers, they will have to provide training for those individuals as well as protecting them in the same manner as their own permanent employees.

If silica exposures are found to exceed the permissible exposure limit, or if respiratory protection is mandated under “Table 1” of the rule and respirators are not provided or used properly, OSHA policy also calls for issuing citations under its respiratory protection standards. Those “redundant” citations, issued concurrently and related to silica but under other OSHA standards, are not reflected in the data above.

For assistance with silica compliance, competent person training, or on-site industrial hygiene support, please contact the Law Office.



Adele Abrams presents at the ASSP National Capital Chapter meeting on 11/13/18 on Opioids, Medical Marijuana & Workplace Safety.

Proper Planning for Temporary Workers' Health and Safety

By Michael Peelish, Esq.

Under OSHA, protecting temporary or supplied workers is a joint responsibility. Make no mistake about it. Temporary workers play an important role when it comes to the work requirements of employers, and a temporary worker should receive the same respect and training as a permanent employee. The process starts with an agreement between the employer and temp agency to allocate risks and responsibilities. What are the possible issues? Adequate description of the tasks and recognition of the safety and health hazards that the employee will be facing; requisite training to perform those tasks safely; if an incident occurs, how will the investigation be handled; and how will the temp agency maintain communications with its employees. If these issues are not worked out up front, then the finger pointing will begin if an unfortunate event occurs.

A scenario you don't want to be faced with could go like this. Employer calls the temp agency and says send me over a couple of your best to work at the project on Main Street under our general agreement because we are behind and need to make up time. Temp agency responds, no problem, they will be there tomorrow. When the employees show up, the job tasks involved the use of respirators for which they were not fit-tested; or hazardous chemicals that were not covered in Haz-Com training; or hazards associated with fall from heights and they did not have fall protection. Now, we know that the project is behind and the employer needs bodies, so they put the employees to work and something happens. OSHA shows up and this story does not go well.

Prevent this scenario through planning. OSHA has posted to its website Recommended Practices. Our firm can also advise on the proper allocation of risks and responsibilities, from the level of training needed, to auditing potential safety and health hazards of the work sites – which are all tasks that should be completed before temp agencies assign their employees to a work site.

OSHA Reissues Policy On Respiratory Hazards Not Covered By Existing PELs

By Brian Yellin, Esq., CIH, CSP

On November 2, 2018 OSHA reissued its "Enforcement Policy for Respiratory Hazards Not Covered By OSHA Permissible Exposure Limits" (Enforcement Policy). The Enforcement Policy is intended to clarify OSHA's existing enforcement policy for developing and issuing citations where there are no existing Permissible Exposure Limits (PELs) for occupational exposure to air contaminants.

The current [Enforcement Policy](#) is a reiteration of a substantially similar policy issued January 24, 2003 and describes the applicability of the "General Duty Clause," Section 5(a)(1) of the Occupational Safety and Health Act, which requires each employer "to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."

The General Duty Clause applies to occupational safety and health hazards where there are no existing standards. In order to sustain a violation of the General Duty Clause, OSHA must prove the following elements by the preponderance of the evidence:

- 1) The employer failed to keep the workplace free of a hazard(s) to which employees of the employer were exposed;
- 2) The hazard was recognized;
- 3) The hazard was causing or was likely to cause death or serious physical harm; and
- 4) There was a feasible and useful method to correct the hazard.

The Enforcement Policy is carefully crafted to ensure that citations for alleged violations of the General Duty Clause are "not based solely on evidence that a measured exposure exceeded a recommended Occupational Exposure Limit (OEL) such as a Threshold Limit Value (TLV), or based on the fact that there is a documented exposure to a recognized carcinogen."

Further, the Enforcement Policy cautions that unless the inspection case file contains evidence that proves all four of the required elements necessary to sustain a violation of the General Duty Clause, the area office should issue a hazard alert letter to the employer advising that employees are being exposed to a "potentially serious respiratory hazard from a chemical that exceeded an OEL..." The Enforcement Policy contains a sample hazard alert letter.

OSHA Reissues Policy, Con't.

The reissued policy is less specific as to the health hazard assessment that OSHA compliance officers should follow when evaluating a potential violation of the General Duty Clause, including “how the chemical is being used, any efforts the employer has taken to reduce the hazard and any adverse health effects that may be experienced by employees.”

Like the 2003 version, OSHA’s reissued Enforcement Policy indicates that the agency will review all available occupational exposure references and recommendations, including Recommended Exposure Limits (RELs) established by the National Institute for Occupational Safety and Health (NIOSH) and TLV’s established by American Conference of Governmental Industrial Hygienists (ACGIH). The Enforcement Policy also advises compliance officers to conduct literature searches for studies conducted by manufacturers and trade associations.

It is important to note that OSHA carries the burden of proving both the technical and economic feasibility of an abatement method(s), which is a high bar for the agency to overcome.

For a copy of the Enforcement Policy or assistance with industrial hygiene support or litigation, please contact the Law Office.

Court of Appeals Limits Scope of OSHA Inspection By Gary Visscher, Esq.

Previous articles (see October and December 2016 and May 2017 newsletters) have discussed *U.S. v. Mar-Jac Poultry*, an important case on OSHA’s authority to expand the scope of an inspection beyond the inspection’s initial cause.

In *Mar-Jac*, a maintenance employee suffered arc flash burns while repairing an electrical panel. In accordance with OSHA’s injury reporting rule, Mar-Jac reported the injury to OSHA, and OSHA initiated an inspection of the circumstances and potential hazards associated with the reported injury. However, OSHA also attempted to expand its inspection to the rest of the poultry processing plant and to other hazards. When the company refused to allow the expanded inspection, OSHA obtained an administrative search warrant. Mar-Jac moved to quash the warrant, and after a hearing, the magistrate judge agreed with Mar-Jac that the

inspection sought by OSHA was not consistent with “probable cause” under the Fourth Amendment. The magistrate judge’s recommendation was upheld by the district court, and OSHA appealed to the U.S. Court of Appeals for the 11th Circuit.

The Court of Appeals affirmed the district court’s decision quashing the subpoena. The Court said that the general burden for probable cause in the case of administrative subpoenas is satisfied if the inspecting agency shows it has a “reasonable suspicion” of a violation. In the case of OSHA inspections, the Court said that there is a distinction between programmed inspections (section 8(a) inspections), which are conducted in accordance with a general administrative plan, and unprogrammed inspections (section 8(f) inspections) which must be based on specific evidence of an existing violation.

The Court of Appeals reviewed the administrative warrant against Mar-Jac under the requirements for unprogrammed inspections, because on appeal, the government relied upon Mar-Jac’s injury records (300 logs) to show reasonable suspicion of hazards in the workplace, which, it argued, gave OSHA sufficient basis to expand its inspection.

On October 9, 2018, the Court of Appeals rejected OSHA’s argument. The Court said that evidence of a “specific violation plus a past pattern of violations may be probable cause for a full scope inspection.” However, the Court of Appeals said that was not the case presented in Mar-Jac. As did the district court, the Court of Appeals distinguished between injuries and hazards, on the one hand, and evidence of violations, on the other.

The Court concluded that the injuries reported on Mar-Jac’s 300 log did not evidence reasonable suspicion of violations. “The existence of a ‘hazard’ does not necessarily establish the existence of a ‘violation,’ and it is a ‘violation’ which must be established by reasonable suspicion in the application [for a valid warrant].” The Court noted, for example, that the logs showed 25 incidents (in a workforce of 1,112) of “ergonomics-related” injuries, but the log entries “have vague descriptions and fail to show any pattern as to the location of the injury...or any pattern as to the department or work area where the injuries occurred.”

The Court of Appeals decision is important because it re-affirms that OSHA may not simply “button hook” a full scope or expanded inspection when the reason for the inspection is a report of an injury, or an employee

Fifth Circuit Allows OSHA Multi-Employer Enforcement Policy

By Gary Visscher, Esq.

Previous articles (June 2017 and December 2017 newsletters) have discussed *Hensel Phelps Construction*, an OSHA “multi-employer enforcement policy” case arising in the U.S. Court of Appeals for the Fifth Circuit. (The Fifth Circuit includes the states of Texas, Mississippi, and Louisiana.)

In June 2017, an OSHRC ALJ vacated a citation which OSHA had issued to Hensel Phelps as the general contractor and “controlling employer” at the worksite, under OSHA’s multi-employer enforcement policy. The ALJ found that the citation fit within OSHA’s multi-employer policy, but vacated the citation because the case arose in the 5th Circuit, and the law in the Fifth Circuit was that the OSH Act limited liability for an employer to violations to which its own employees were exposed.

OSHA appealed the ALJ’s decision to the Commission, which at the time had only one member. The Commission declined review, and OSHA appealed to the 5th Circuit. The Fifth Circuit’s position as cited by the ALJ had been set forth in cases decided in 1975 and 1981. OSHA’s multi-employer enforcement policy has been upheld by the Courts of Appeals for the D.C., Second, Sixth, Seventh, Eighth, and Tenth Circuits, with the Fifth Circuit often being cited as the lone exception to the courts’ affirmance or acceptance of the policy.

In deciding *Hensel Phelps*, the Fifth Circuit noted that its previous decisions, *Southeast Contractors* (1975) and *Melerine v. Avondale Shipyards* (1981), were issued prior to the Supreme Court’s decision in *Chevron v. NRDC* (1984), which established the principle that where legislative language leaves ambiguity, courts must give deference to the interpretation given by the agency charged with enforcing the law if the agency’s interpretation is reasonable.

The Fifth Circuit then considered the impact of a second U.S. Supreme Court decision, *National Cable & Telecommunications Ass’n v. Brand X Internet Services* (2005), which addressed the situation where a court’s prior interpretation of a statute conflicts with an agency’s interpretation otherwise entitled to “Chevron deference.” The rule announced in *Brand X* is that “a court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron*

deference only if the prior decision holds that its construction follows from the unambiguous terms of the statute.”

The Fifth Circuit then analyzed the language of the OSH Act, and found that the statute is ambiguous regarding whether an employer’s liability under the Act is limited to violations to which the employer’s own employees are exposed to the hazard from the violation. The Court found that the statute is ambiguous, and that OSHA’s multi-employer enforcement policy was a reasonable interpretation of the statute.

The Court also addressed OSHA’s issuance of the 1998 Multi-Employer Citation Policy, which Hensel Phelps argued should not be given deference because it was not issued through notice-and-comment rulemaking or formal agency adjudication. The Court said that OSHA’s authority for the multi-employer enforcement policy derived from the statute, and the 1998 Policy statement “is an agency document that provides guidance to OSHA inspectors as to when it may be appropriate to cite a particular employer.”

“In sum, we conclude that the Secretary of Labor has the authority under section 5 (a)(2) of the Occupational Safety and Health Act to issue citations to controlling employers at multi-employer worksites for violations of the Act’s standards.” The Court of Appeals reversed the Commission’s order vacating the citation and remanded for further proceedings.

Mar-Jac, Court of Appeals Decision, Con’t.

complaint. Employers should always inquire as to the basis or reason for an OSHA inspection, and should be attentive to limiting the scope of the inspection to the reasons and basis given for the inspection.

For a copy of the decision or for more information or assistance with an OSHA inspection, please contact the law firm.

*Have a safe and happy
holiday and new year.*

2019 SPEAKING SCHEDULE**ADELE ABRAMS**

2019 Speaking

- Jan. 16: Associated General Contractors Safety Conference, Miami, FL, Presentation on Legal & Ethical Considerations for EHS Professionals
- Jan. 23: Mechanical Contractors Association of America Safety Director's Conference, Lake Buena Vista, FL, Presentation on Traversing Marijuana and Post Accident Drug Testing Traps
- Feb. 12: ASSP Northwest Safety Conference, Minneapolis, MN, Presentation on Medical Marijuana and Workplace Safety
- Feb. 13: NSSGA Annual Meeting Legal Forum, Indianapolis, IN, Presentation on Sexual Harassment & Workplace Violence Issues
- Feb. 26: Society of Mining Engineers, Denver, CO, Presentation on Legal & Ethical Considerations for Mine Safety Professionals
- Feb. 28: Indiana Safety & Health Conference, Indianapolis, IN, Presentation on Safety in the "Gig Economy"

2019 Webinars

- Jan. 10: BLR Webinar, OSHA E-Recordkeeping Update
- Jan. 11: Pennsylvania Aggregate & Concrete Assn. Webinar, OSHA/MSHA Forecast 2019
- Feb. 4: ClearLaw Webinar, OSHA Walking/Working Surfaces Rule

GARY VISSCHER

- Feb. 14: Post incident Drug Testing Webinar

BRIAN YELLIN

- Feb. 11: Worker Safety Conference for the Meat & Poultry Industry, Respirator Protection Fit Testing Protocol