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Commission Issues Decision on Meaning of “Attended” in Drilling Standard By: Gary Visscher, Esq.

MSHA’s drilling standard at 30 C.F.R. 56.7012 states that “[w]hile in operation, drills shall be attended at all times.” A recent decision by the Federal Mine Safety and Health Review Commission addressed the question of whether the standard, and the word “attended,” requires a drill operator to remain within reach of the drill’s controls at all times when the drill is operating, as the Secretary of Labor argued it did in issuing two citations against the drilling company, Drilling and Blasting Systems, Inc.

The case arose in 2012 when an MSHA inspector saw a drill operator walking around outside of the drill’s cab while the drill (an Ingersoll Rand DM30) was drilling blast holes at a quarry near Pittston, North Carolina. According to the inspector, the drill operator was seen walking about 18 feet from the cab. Subsequently, during the same inspection, the inspector saw the drill operator sitting in the cab of a pickup truck that was parked approximately 20 feet from the drill, while the drill was operating. The inspector issued two citations, both charging a violation of 56.7012.

Before the administrative law judge and before the Commission, the Secretary of Labor argued that the word “attended” in the standard meant that the drill operator must remain in the drill’s cab – “within arms-reach of the controls” – when it was operating. The inspector testified that being able to immediately reach the controls was necessary if something went wrong with the drill; he also testified that it was dangerous for the operator to be outside the cab because a drill bit might

become stuck and fragment, possibly causing fragments to strike an operator.

At the hearing before Administrative Law Judge Rae, witnesses for Drilling and Blasting pointed out that it may be more dangerous for the drill operator to remain in the cab at all times, since the operator needs to monitor ground conditions and the operation of the drill, neither of which could be done as effectively by remaining inside the cab. Drilling and Blasting also pointed out that they had previously been informed by an MSHA supervisor that having the operator leave the controls during operation was permissible under the regulation. Judge Rae found that the Secretary’s interpretation of the standard as presented in support of the citations against Drilling and Blasting, was “plainly erroneous,” and vacated the citations.

On appeal to the Commission, the Secretary again argued that his interpretation of the regulation was entitled to deference, and should therefore be upheld. In response to the judge’s conclusion that requiring the drill operator to remain in the cab at all times would lead to “extraordinarily dangerous results” because the operator would not be able to effectively monitor ground conditions and all aspects of the drill’s operations, the Secretary claimed that those concerns could be addressed by having a second person present to monitor conditions from outside the cab of the drill.

In its opinion, the Commission agreed that the word “attended” in the standard is ambiguous, and wrote that ordinarily the Commission must defer to the agency’s interpretation of its own ambiguous regulation. However, the Commission said, deference is inappropriate when the Secretary’s interpretation is “plainly erroneous,” as the Commission found was the case here.

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Attended in Drilling Standard, Con't

The Commission cited testimony, credited by the judge, regarding the safety-related tasks that the drill operator must or may better accomplish away from and outside the cab of the drill, including monitoring ground conditions during drilling and examining the condition of the drill during operation. The Commission noted that the only testimony regarding safety concerns from the operator getting out of the cab was from the inspector, and that the judge “entirely refused to credit” the inspector’s testimony on safe drilling practices “taking into account [his] lack of experience in drilling.”

The Secretary argued that rejection of his interpretation might mean that the drill operator could leave the area (to eat lunch or use a bathroom) while the drill was operating. Drilling and Blasting pointed out that its own work rules required the operator to shut the drill down if the operator needed to leave the immediate area for any reason.

The Commission cited the judge’s conclusion that the “the operator’s interpretation of ‘attended’ is logical,” and adopted that interpretation “for purposes of this case.” “The operator defines ‘attended’ here as ‘being within the area where the drilling is being done so that the drill operator can monitor the area for changing ground conditions destabilizing the drill jacks, malfunctioning of the pressured hoses, overheating, leaking, or other complications.’”

The importance of this case for drillers and the drilling industry – both financially and in terms of safety - was underlined by the fact that NSSGA requested and was granted leave by the Commission to file an amicus brief supporting Drilling and Blasting’s position and the judge’s decision that the citations should be vacated.

OSHA Sets New Exposure Limits and Work Practices for Silica

By: Gary Visscher, Esq.

OSHA’s long-awaited rule setting new requirements for working with or around respirable crystalline silica was published in the Federal Register on March 25, 2016.

The new rule covers construction, general industry, and maritime. Identical standards were issued for general industry and maritime. The construction standard is similar but has some important differences, as discussed below. The rule does not cover agriculture. MSHA previously delayed its rulemaking on silica exposure in mining while

waiting for OSHA to finalize its silica standards. With the issuance of OSHA’s final rule, MSHA is expected to move forward with a silica standard for mining, based on the OSHA standard.

The new standards replace exposure limits for general industry and construction which were adopted by OSHA in 1971. While the number of deaths from silicosis has decreased since then, OSHA cited studies showing that respirable silica exposure contributes to deaths from lung cancer, respiratory diseases and other lung diseases, and kidney disease.

Although OSHA’s reduction in the Permissible Exposure Limit, or PEL, for respirable silica generally receives the most attention, as is the case with most of OSHA’s comprehensive health standards, the silica standard also includes provisions on exposure assessment, written exposure control plans, medical surveillance, and other provisions. The following is a summary of the final rule’s provisions.

Effective Dates. Compliance with the new standard for **general industry and maritime** is required **two years after the effective date** (thus, on or about June 23, 2018), except that medical surveillance is not required where employees are exposed above the action level but below the PEL until 4 years after the effective date of the standard.

A separate effective date applies to requirements for engineering controls for **hydraulic fracturing** operations in the oil and gas industry. The compliance date for the oil and gas industry to implement engineering controls is **five years from the effective date** of the standard, or June 23, 2021. OSHA stated that the delayed compliance date is because engineering controls in hydraulic fracturing are “still in development.”

Compliance with the **construction industry** standard, however, is required **one year after the effective date** of the standard, June 23, 2017. The one exception is for provisions in the standard on methods for laboratory sample analysis as required by the standard for exposure samples; OSHA delayed the compliance date for requirements regarding sample analysis methods for both the general industry and construction standards until June 2018.

PEL and Action Level. The final rule adopts the same PEL and “action level” as were in the proposed rule – a PEL of 50 micrograms per cubic meter of air, and an action level of 25 µg/m³. OSHA states in the preamble that even at the new PEL, “significant risk of material impairment to health” remains, but that the “50 µg/m³ is appropriate because it is the lowest level

Silica, Con't

feasible for all affected industries.”

Construction: “Specified Exposure Control Methods”. An innovative regulatory approach proposed by OSHA in the proposed standard for construction was the inclusion of specific work practices (“specified exposure control methods”), which, if followed, eliminate the need to conduct exposure monitoring or implement other measures to achieve compliance with the PEL.

The final rule adopts this approach, and expands the number of “specified exposure control methods” from 13 in the proposed rule to 18 in the final rule. Those work practices are listed (and have already become known as) “Table I” practices.

The final standard also makes these same “specified control methods” available for general industry when the same task is performed in a general industry setting. If the employer (construction or general industry) chooses not to implement the specified control measure, the “default” requirements for exposure monitoring and implementing controls to meet the PEL apply.

Exposure Assessment. The standard for general industry and maritime requires an exposure assessment of each employee “who is or may reasonably be expected to be exposed” at or above the action level. If the monitoring indicates that exposures are above the action level but below the PEL, monitoring must be repeated every six months. If exposure is above the PEL, monitoring must be repeated every 3 months.

As discussed above, construction employers who implement the “specified exposure control methods” in Table I are not required to conduct exposure monitoring for those employees during those activities. If the possible exposure is in a task not covered by the specified exposure control methods, or those methods of controlling exposure are not implemented, the employer must follow the same exposure assessment protocols as general industry.

Sample Analysis. The standard requires that samples taken to satisfy the monitoring requirements be evaluated by a laboratory that complies with laboratory testing procedures in Appendix A to the new rule. The ability of accurately measuring respirable silica content at or around the action level provoked considerable debate in the rulemaking, and OSHA has extensive discussion on that issue in the preamble to the rule.

Regulated Areas. The standards for general industry and maritime require that an employer establish a “regulated area” wherever exposure is or can reasonably be expected to be above the PEL. The regulated area must be marked and access to the area limited, and persons entering the regulated area must wear a respirator.

The proposed rule included a similar requirement for construction. However, the final rule deletes the requirement for a “regulated area” in the construction standard.

Methods of Compliance. Employers covered by the general industry and maritime standards must reduce exposures below the PEL with engineering and work practice controls, unless the employer can demonstrate that such controls are not feasible. In that case, the employer must use such controls to the extent feasible and supplement them with the use of respiratory protection.

As described earlier, Table I in the final construction standard includes 18 specific construction operations or tasks with “specified exposure control methods” that construction employers may utilize to comply with the standard.

Under both standards, employers who implement controls must also have a written exposure control plan. The construction standard requires that a “competent person” oversee implementation of the plan.

Medical Surveillance. Both the general industry standard and the construction standard require that the employer “make [medical surveillance] available” for each employee “who will be” exposed to silica at or above the action level for 30 or more days per year. Medical exams must be made available to such employees every 3 years, or more frequently if recommended by a health care provider.

The final standard provides that the health care provider report to the employer only the fact of and date of the examination, unless the employee authorizes that additional information (including recommended limitations on the employee’s exposure to silica) be given to the employer.

Under the construction standard, the requirement for medical surveillance is triggered if the employee will be required to use a respirator for 30 or more days per year. The employer must make available an initial baseline medical examination within 30 days of hiring, unless the employee has received an exam within the last three years.

Commission Rules POV Notice is Not Reviewable

By: Gary Visscher, Esq.

Under revised “pattern of violations” (POV) procedures adopted by MSHA in 2013, MSHA may issue a “POV notice” to an operator based upon prior issuance of citations or orders for alleged violations that are deemed to “significantly and substantially contribute to the cause and effect of health or safety standards.” If within 90 days following the issuance of such a POV notice, MSHA issues a citation or order for a “significant and substantial” (S&S) violation, MSHA must issue a withdrawal order under section 104 (e) of the Mine Act. Each additional alleged S&S violation thereafter results in an additional withdrawal order until MSHA conducts a complete mine inspection and finds there are no S&S violations.

Last month, in a case of first impression, the Federal Mine Safety and Health Review Commission ruled that mine operators may not obtain review of the POV notice. Rather, the Commission held that operators may only challenge the basis and legitimacy of the POV notice when and if the operator contests a withdrawal order resulting from having previously been issued a POV notice.

The case is *Sec. of Labor v. Pocahontas Coal Company* (Feb. 16, 2016). Pocahontas Coal received a POV notice in October 2013, based on MSHA’s review of citations and orders issued during a 12-month period ending on August 31, 2013. The notice listed 36 citations and orders issued against Pocahontas during the screening period. Pocahontas filed a notice of contest to the POV notice. Subsequently, MSHA issued withdrawal orders under section 104(e), for alleged violations subsequent to the POV notice. Pocahontas then contested the withdrawal orders.

The Secretary of Labor filed a motion to dismiss the contest of the POV notice on the basis that the Commission does not have jurisdiction to review a POV notice independent of a subsequent withdrawal order under section 104(e). The judge to whom the case was assigned granted the Secretary’s motion, and Pocahontas appealed the dismissal to the Commission.

The Commission found that both the language of the Mine Act and the legislative history of the provision in the Mine Act supported its ruling that a POV notice is not reviewable by the Commission. The Commission said that section 105(d) of the Mine Act limits the Commission’s jurisdiction to contests to citations, orders, proposed penalty assessments, and the reasonableness of abatement time. The

Commission found that a POV notice does not fall under any of those actions.

Citing to its decision in Brody Mining LLC, 36 FMSHRC 2017 (Aug. 2014), the Commission said that the validity of the POV notice may, however, be challenged by an operator in contesting a subsequent withdrawal order that is issued as a result of the operator having received a POV notice.

Misclassification of Workers Costs Employer in OSHA Inspection

By: Adele L. Abrams, Esq., CMSP

When OSHA came to a call at a Connecticut construction worksite, it did not end happily for the employer. Seven different violations of the OSH Act were alleged by the agency, and in the recent ruling, *Secretary of Labor v. David Dzenutis d/b/a Royal Construction Company* (February 2016), Administrative Law Judge Keith Bell upheld every citation and imposed over \$20,000 in civil penalties. But the real significant finding was that the company had misclassified as “subcontractors” four individuals whom OSHA claimed were actual employees. The court agreed, and found that OSHA had jurisdiction over the company and that the citations were properly issued because company “employees” had exposure to the violative conditions.

The court found that the company violated the following standards:

- 29 CFR 1926.59 for not having a written hazard communication program,
- 29 CFR 1926.150 for not having a fire extinguisher,
- 29 CFR 1926.502 for failing to use fall protection,
- 29 CFR 1926.1051 for failing to provide a ladder at a point of access,
- 29 CFR 1926.1053(b)(1) for failing to properly extend a ladder,
- 29 CFR 1926.1053(b)(22) for improperly carrying a load on a ladder, and
- 29 CFR 1926.1053(b)(21) (repeat violation) for failing to grasp a ladder with at least one hand.

Were these overly picky citations? The judge didn’t think so and affirmed them all as serious and/or repeat. The reason? The company’s primary defense was that it was not an “employer” within the meaning of the OSH Act because the workers on site were “subcontractors.” Under the Act and prevailing case law, only “employers” may be cited for an OSHA violation, but having a single employee satisfies the

Misclassification, Con't

requirement.

The OSHA inspector testified that he interviewed each of the four workers and each identified himself as an employee of Royal Construction, said that they were paid hourly and took direction from Mr. Dzenutis. Royal Construction also provided all the materials and equipment needed for the job. None of the workers carried worker's compensation insurance, nor were they individually licensed contractors.

During the inspection, Mr. Dzenutis told the inspector that two of the men were employees and two others were subcontractors. But at trial, the defense theory was that all four were actually contractors. He testified that they were under their own supervision, had their own tools and made their own hours. But other testimony showed that Royal did provide the materials, tools, trailer and equipment needed for the project, and it determined when the individuals would work, and for how long. Some had worked for Mr. Dzenutis on previous projects, and the work they performed was part of the regular business of Royal Construction (as opposed to a specialty trade that would normally be subcontracted out).

In finding that the workers met the statutory criteria for being classified as "employees" of Royal Construction, the judge said: "To assess whether an employer/employee relationship exists, the Commission looks to the hiring party's right to control the manner and means by which the work is accomplished. This is commonly known as the *Darden* test, after the US Supreme Court decision in *Nationwide Mutual Insurance Company v. Darden* (1992).

Judge Bell noted that the relevant factors in conducting an inquiry into the employer/employee relationship include:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

The totality of the evidence convinced the judge that Royal Construction had employees at the worksite: all four of the men at issue were deemed "employees" under the *Darden* factors. The judge also noted that, because Mr. Dzenutis did not deny that he himself was working on the project, this alone would have subjected Royal Construction to the OSH Act. But while there was conflicting testimony on the employee status issue, the ALJ held that the inspector's testimony about how the workers themselves described the relationship was more convincing, and entitled to more weight, than the company representative's statement. In addition to conferring OSHA jurisdiction on the employer, the number of employees is also a criterion used to determine civil penalty amounts.

The lesson learned here for employers is simply that OSHA (and the court) may not agree with you that the workers on your project are "subs" or "independent contractors" automatically, and OSHA is currently very sensitive to the issue of misclassification of workers (especially day laborers in construction and landscaping industries) because often workers who are viewed as non-employees are provided with lesser protections than permanent employees. They may get inadequate training or supervision, and may not be provided with personal protective equipment required by OSHA. They are often injured at rates significantly higher than bona fide employees.

While it is not clear whether this occurred in the Royal Construction case, when OSHA finds there has been misclassification of workers, contingent and temporary worker safety is an emphasis area with OSHA. The agency has launched a webpage dedicated to temporary worker (those from staffing agencies) and contingent worker safety, and prudent employers will review this information to ensure that they understand reporting, PPE, training and other requirements for such short-term workers. https://www.osha.gov/temp_workers/index.html

When misclassification of employees as "contractors" is suspected, OSHA can do a cross-referral to other federal and state agencies to launch investigations. Consequences can include a Department of Labor payroll audit (to determine if workers who were misclassified are due any overtime under the Fair Labor Standards Act), action by state worker's compensation and labor departments (for failure to count the employees in making contributions for unemployment insurance, or for denying worker's compensation coverage), and even

Misclassification, Con't

the IRS gets into the act by pursuing employers for failing to make their share of employee payroll deductions for social security, etc.

The bottom line is that, while it may be tempting to use short-term workers without benefit of putting them on the official payroll, it is against the law to misclassify workers. Use this case as an opportunity to analyze your hiring and payroll practices, and be sure that you never permit any workers to be "second class citizens" when it comes to safety on your project. For more information on proper worker classification, or to understand other legal obligations concerning workers, contact the Law Office.

Supreme Court Declines to Review OSHA Citation in Theme Park Shooting

By: Gary Visscher, Esq.

Earlier this month the U.S. Supreme Court ended long – running proceedings in a case involving what was undoubtedly one of the more unusual applications of the OSH Act's "general duty clause." The Supreme Court declined to review a decision by the Third Circuit Court of Appeals which upheld a single citation against Western World, d/b/a Wild West City.

Western World operated a theme park which put on historical re-enactments, including famous, or infamous, gun fights. During one such reenactment in the summer of 2006, one of the performers was shot in the face with live ammunition. He survived, but suffered serious injuries.

The shooting was investigated by local police, who informed OSHA of the incident. As a result of its investigation, OSHA issued a single citation against Western World, alleging a violation of section 5(a)(1) of the OSH Act. The OSHA case was then stayed while a criminal investigation continued. The criminal proceedings were completed in October 2012 (without completely resolving how the shooting occurred). After a hearing in the OSHA case in 2013, OSHRC Administrative Law Judge Augustine upheld OSHA's "general duty clause" citation against Western World and assessed the proposed penalty of \$1250.

Western World appealed the case to the Commission, which declined to review, and then to the U.S. Court of Appeals for the Third Circuit. In March 2015, the Court of Appeals upheld the ALJ's decision. Western World petitioned the U.S. Supreme Court, but the Supreme Court has now denied Western World's petition.

The unusual facts alleged in the citation in the Western World case are a reminder of the breadth of application of the general duty clause. That provision of the OSH Act reads, "Each employer (1) shall 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 to his employees."

In order to establish a violation of this provision, OSHA must prove 4 elements: (1) a condition or activity in the workplace presents a hazard to an employee, (2) the condition or activity is recognized as a hazard, (3) the hazard is causing or likely to cause death or serious physical harm, and (4) a feasible means exists to eliminate or materially reduce the hazard. In addition, in order to sustain a violation, OSHA must show that the employer knew, or by exercising reasonable diligence would have known, of the condition or activity.

Judge Augustine defined the hazard in Western World as "the use of operable firearms and the presence of live ammunition." Western World allowed performers to bring and to use their own firearms during re-enactments. Western World's policy was to inspect the firearm the first time it was brought on site, but generally not thereafter, though it reserved the right to do so. Western World's policies prohibited performers from bringing any live ammunition to the park, but did allow performers to bring their own blank ammunition, or use blanks provided by the park. Prior to the incident, Western World did not generally inspect boxes of blank ammunition provided by performers.

After the shooting occurred in July 2006, Western World's president searched the employees' dressing area and found two boxes of live ammunition in an unlocked gun case belonging to one of the performers, though not the performer alleged to have fired the live ammunition during the re-enactment. The employee in whose gun box the live ammunition was found was subsequently fired by Western World.

How the live ammunition made it into the re-enactment was not explained in the OSHA case; Western World alleged that the employee who fired the shot found the box of live ammunition in a fellow performer's gun box, and intentionally shot at another employee during the performance. However, the evidence supporting that scenario was in deposition testimony in a separate civil case, which the judge declined to allow to be introduced in the OSHA proceedings. In his written decision, Judge Augustine noted that performers were trained and instructed not

Park Shooting, Con't

to aim their guns directly at their “targets” but to aim to the side and towards the ground.

The administrative law judge found that Western World failed to adequately implement, monitor or enforce policies regarding use of personal firearms and prohibiting live ammunition at the park.

Laws in several states permit employees to bring firearms onto an employer’s worksite, though generally those laws are limited to company parking lots and private vehicles. Although the facts of the case are unique, the holding of the case suggests that any employer who allows employees to bring firearms onto the employer’s worksite must insure that policies are in place and are being implemented and enforced to prevent any misuse or accidents involving firearms.

Key Coal Legislation in West Virginia

By: Sarah Korwan, Esq.

Although the coal industry continues to spiral downward at an alarming rate, business leaders in West Virginia have considered several pieces of legislation in an effort to salvage what remains in that State. Not all legislation survived the session, which ended March 12, 2016.

West Virginia Senate Bill 705 proposed lowering the severance tax on coal production from 5% to 4% beginning July 1, 2017, and to 3% beginning July 1, 2018. Initially, it applied only to coal but was amended by the Senate to extend the same phased-in reduction of severance tax to natural gas production.

The amended version of SB 705 passed the Senate but was defeated by the House of Delegates. WV Governor, Earl Ray Tomblin, was also against the tax cuts because of the state’s significant budget deficit.

The coal industry, including Bob Murray of Murray Energy, the largest coal producer in the state, and Bill Raney, president of the West Virginia Coal Association, blasted the House of Delegates and Republican leadership, saying that a tax break would have offered companies an incentive to keep mines open.

On the House side, West Virginia House Bill 4726, the Coal Jobs and Safety Act of 2016, was passed by the House of Delegates and the Senate. The bill has three main components. First, it gives State government the liberty to reduce fines for operators who don't report serious accidents within 15 minutes. Existing law requires a \$100,000 fine for violations of the reporting law. The HB 4746 would provide for fines of “up to” \$100,000 and give the state mine safety

director authority to “later amend the assessment” of such penalties, “if so warranted.”

Secondly, it permits mine operators to seek assistance from the state agency's rescue teams for backups to their own specially trained teams for response to explosions and fires. The law still requires companies to provide at least two mine rescue teams at all times when miners are underground, but also allows the operator to reach out to the West Virginia Office of Miners’ Health Safety and Training Mine Rescue Team as a second or backup team, should the need arise.

Finally, the bill changes the way the state Department of Environmental Protection handles complaints about blasting at surface mine operations. Specifically, it will eliminate the Office of Explosives and Blasting and transfer the office's duties to the DEP's Division of Mining and Reclamation, which, in any event, usually addresses these issues.

Industry opponents label this bill as a “safety rollback.” However, state mine safety officials and UMWA agreed not to oppose the bill in exchange for an agreement by the West Virginia Coal Association not to push through the industry’s other bill, which union and state officials view as more drastic.

Finally, West Virginia lawmakers are expected to pass House Bill 4435, which allows electric utility companies to place surcharges on monthly bills in order to retrofit boilers at coal-fired power plants. The bill provides that electric companies must request a rate hike from the Public Service Commission (“PSC”) to implement updates and modernization to their coal fired power plants. This effort is to encourage electric companies to continue to use coal and not switch over to alternative sources of power.

This also gives the PSC the ability to authorize the rate hike in an expedited manner to help ease the cost that the company will incur more quickly. The electric company is required to submit an annual plan to the PSC to show the status of improvements and where the extra money is being spent for modernizations. Finally, the bill sets up provisions to track whether the extra money from the rate hike was used in full or will be put towards the next year’s upgrades.

The measure passed in the House of Delegates and also advanced through the Senate’s Committee on Energy, Industry and Mining, and now goes to the Senate for review.

OSHA Revises Procedures for Responding to Employer Reports of Injuries/Fatalities

By: Gary Visscher, Esq.

OSHA's revised reporting requirements regarding workplace injuries and fatalities took effect a little more than one year ago, on January 1, 2015. Whereas under previous rules, employers were required to report any fatality or incident involving the hospitalization of 3 or more employees to OSHA within 8 hours of the incident occurring, under the new rule that took effect on January 1, 2015 (29 C.F.R. 1904.39), employers must report to OSHA any fatality within 8 hours, and any work-related hospitalization, and any amputation or loss of an eye within 24 hours.

Reports of those events may be made by calling OSHA's 800 number (800-321-6742), calling the local OSHA area office, or by completing an on-line reporting form on OSHA's website.

Most state OSHA plans have adopted reporting requirements that are identical to federal OSHA's requirements. A few states have adopted reporting requirements that vary in detail from the federal OSHA requirements, though the state requirements must be "at least as effective as" the federal requirements. A few states have not yet revised their reporting requirements.

The April 2015 newsletter reported on "Interim Procedures" that OSHA's national office had issued for how OSHA would respond to those injury and fatality reports. The Interim Procedures introduced a new OSHA acronym – RRI, for "Rapid Response Investigation." Rather than conduct an on-site inspection after each report, OSHA area offices were directed to prioritize or "triage" the reports. Some would be designated for inspection, and others would receive an RRI, which meant that the area office would conduct a phone interview with the employer, ask a number of questions and request that the employer provide information, including steps taken by the employer in response to the event leading to the reported injury.

This month, OSHA's Directorate of Enforcement issued "Revised Interim Enforcement Procedures for Reporting Requirements under 29 C.F.R. 1904.39." The Revised Interim Enforcement Procedures describe in greater detail the procedures that OSHA will follow after receiving a report of a fatality, hospitalization, amputation, or loss of an eye. The Revised Procedures also (1) state that employers who respond to an RRI in a manner satisfactory to the OSHA area office will not

be cited for any violations involved in the incident, and (2) provide for increased penalties (up to \$7,000) for employers who fail to report a fatality, hospitalization, amputation or loss of an eye, as required by 1904.39.

The Revised Procedures, like the previous interim procedures, require the Area Office receiving a report (of a fatality, hospitalization, amputation, or loss of eye) to assign the report to one of three categories. Category 1 reports will result in an on-site inspection. Reports in Category 1 are

- Fatalities and hospitalizations of 2 or more,
- injuries to workers under age 18,
- reports pertaining to employers with a history of similar hazards or incidents in past 12 months,
- reports pertaining to employers with a history of egregious, willful, failure to abate, or repeat citations, and the employer is in the Severe Violator Enforcement Program (SVEP)
- reports pertaining to a hazard covered by a local or national emphasis program,
- any imminent danger.

All other reports fall into Category 2 or 3. Whether these reports will lead to an on-site inspection is left to the area director's discretion, and based on information about the incident from the employer's initial report of the incident, any additional information that is provided in a follow up telephone call with the employer, and any other information that the area office may have about the incident.

Reports in Category 2 that do not result in an on-site inspection, and Category 3 reports, will receive an RRI. An RRI involves a phone interview with the employer by the area office. The area office will then follow up the phone call with a letter to the employer. The area office has a set of questions/subjects to cover in the interview, including "explain[ing] the actions the employer must complete as part of the RRI process."

The actions include conducting an internal investigation of the incident, verification of abatement or corrective action taken by the employer, posting the RRI letter from OSHA in a conspicuous place in the workplace, and providing a copy of the RRI letter and written abatement verification to the employee union representative or safety and health committee of the facility.

The procedures provide that the employer has five working days to respond. If the employer needs additional time to complete its investigation or

Injury Reporting, Con't

complete abatement, the employer must so notify the area office. If the employer does not respond within 5 days to the RRI letter, or provides an inadequate response, the area director may initiate an inspection or make further attempts to contact the employer.

If the employer does provide a satisfactory response to the RRI letter, OSHA will not conduct an inspection and, therefore, not issue citations. Instead OSHA will notify the employer that the "matter is closed." (Be aware, however, that information provided in response to an RRI could be used by OSHA in a subsequent inspection, including as the basis for a willful violation)

OSHA believes that there has been substantial under-reporting by employers since the revised reporting requirements went into effect in January 2015. A "first year" report released by OSHA on the reporting requirements found that there had been a little over 10,000 reports filed in the first year, while OSHA estimated that the actual number of covered incidents might be twice that number.

So, while the Revised Interim Procedures provide for a "safe harbor" when OSHA chooses to conduct an RRI in response to a report of an injury resulting in a hospitalization, the Procedures also direct tougher penalties for employers who fail to report incidents as required by 1904.39. The document states that failure to report will result in an "other than serious" citation, and an unadjusted penalty of \$5,000, or where the area director "determines it is appropriate to achieve the necessary deterrent effect," an unadjusted penalty of \$7,000.

Employers should (1) insure that incidents that are covered by the reporting requirements are reported to OSHA, using the 800 number or on-line form, or contacting the Area Office, and (2) if an incident does occur and you are contacted by the area office, respond to any requests from the area office in a timely manner. Not responding is tantamount to inviting an OSHA inspection. At the same time, you should be careful in responding to requests for information, especially before you have all of the facts of the accident and any issues with implementing abatement measures.

Commission Reverses ALJ's Decision, Vacates Four Failure to Abate Orders

By: Ryan W. Horka, Esq.

In a recent Federal Mine Safety and Health Review Commission decision involving Hibbing Taconite Company ("Hibbing Taconite"), four "Failure to Abate" orders were vacated. Section 104(b) of the Mine Act provides that an inspector shall issue a failure to abate order when: (1) **a cited violation has not been "totally abated"** within the time period originally fixed or as subsequently extended, **and** (2) "that the period of **time for the abatement should not be further extended."** In reviewing the issuance of failure to abate orders, the Commission utilizes an "abuse of discretion" standard which is met when "there is no evidence to support the decision[,] or if the decision is based on an improper understanding of the law."

In the Hibbing Taconite matter, inspections began in the evening hours of December 12, 2012, at which time the first verbal citations were issued. The following morning, December 13, 2012, the inspector returned to the site to continue his inspection and issue written versions of the verbal citations he had issued the day before, including a housekeeping violation at issue in the Commission matter.

The housekeeping citation set an abatement time of 8:00 am that morning. However, upon re-inspecting, the inspector verbally issued an extension due to progress that had been made. On the morning of December 14, 2012, the inspector once again returned to the site, bringing with him the written version of the extension for the housekeeping violation, extending the time for abatement to 8:00 am that morning. At that time, Hibbing Taconite's operations manager expressed concern regarding the short abatement times set by the inspector. However, the inspector continued his inspection and simply explained that he was setting short abatement times in order to get immediate corrective action. He went on to issue eight more verbal citations that day.

When he returned the next day, Saturday, December 15, at 11:45 am, he brought the written versions of those eight verbal citations. The abatement time listed for each one was 8:00 am that morning. Since the abatement time had already passed, he continued on to re-inspect the areas that were the subject of four of the citations.

Failure to Abate Orders, Con't

Upon reaching the areas, he determined that no miners were working on abating the conditions, the conditions had not yet been abated, there were no posted barricades or warnings, and there were no mitigating circumstances. At this time, pursuant to section 104(b) of the Mine Act, the inspector issued failure to abate orders in connection with those four citations and, for each of them, set an abatement time of 8:00 am the next morning.

Hibbing Taconite challenged these failure to abate orders and the matter proceeded to a hearing before an ALJ. As previously stated, "in reviewing the issuance of failure to abate orders, the Commission utilizes an "abuse of discretion" standard which is met when "there is no evidence to support the decision[,] or if the decision is based on an improper understanding of the law." In upholding the failure to abate orders, the ALJ did not find that the inspector had abused his discretion in issuing the orders and not granting further extensions. Instead, the ALJ found that the inspector had a clear understanding of the law and that he was primarily concerned with the safety of the miners at the site. Subsequently, Hibbing Taconite filed a petition for discretionary review, leading to the Commission decision set forth on March 3, 2016.

At the Commission level, Hibbing Taconite made two arguments against the failure to abate orders: (1) the inspector did not set reasonable times for the abatement of the cited conditions and (2) the inspector was unreasonable in refusing to extend the time for abatement. In addressing the first argument, the Commission focused on the requirement, under section 104(a) of the Mine Act, that an inspector "fix a reasonable time for the abatement of [a] violation." During testimony, the inspector stated that he universally set abatement times of 8:00 am the morning after he issued verbal citations. In addition, he went on to testify that he was "surprised they got it done in three days as extensive as it was," referring to the vast area that the cited conditions covered. Furthermore, his field notes made it clear that he understood that sometimes all of the conditions may not be able to be taken care of in that time period.

Due to this testimony and the surrounding circumstances, the Commission found that the inspector "did not base the abatement times on such factors as the extent of the violative conditions, the availability of miners to undertake cleaning work, and competing safety concerns." Rather, he set an arbitrary abatement time of 8:00 am the next morning, which

constituted a "misunderstanding of the law, and amounted to an abuse of discretion. While the Commission noted that the inspector's concern for miner's safety is "a laudable and important concern," they also made it clear that inspectors must act in accordance with the provisions of the Mine Act in striving to achieve that end. If an abatement should reasonably take three days, that should be the abatement time period. If an abatement should reasonably take 24 hours, that should be the abatement time period. If an extension is reasonably needed, it should be granted. However, inspectors may not arbitrarily set their abatement times. For this reason, the Commission reversed the ALJ's decision and vacated the failure to abate orders. There was no need to address Hibbing Taconite's second argument.

OSHA Budget

By: Ryan W. Horka, Esq.

OSHA has submitted its final budget request under the Obama administration and, in doing so, aggressively rebutted several issues raised by Congress in an attempt to justify the agency's direction and agenda. While in a typical year, OSHA usually only uses a page or two to address Congress' concerns, this year they utilized nine pages, while addressing eight issues.

Primarily, OSHA targeted the House Appropriations Committee's assertion that the agency focuses too many resources on enforcement, at the expense of focusing enough resources on compliance and education. According to the Committee, "[t]his approach is costly and overly burdensome on employers and . . . has created an unnecessarily hostile environment between the federal government and private enterprises."

In rebutting this assertion, OSHA points to the large number of employers that would rather cut corners and put their employees at risk than spend a little extra money to conform to OSHA's regulations. In addition, OSHA listed out the numerous compliance assistance programs that they provide for employers across the country.

In the 2017 budget request, OSHA is requesting \$595 million, a \$42 million increase from this year's funding. Notably, the enforcement budget would increase by about \$18 million and the compliance assistance budget would increase by about \$2 million.

Stay tuned for updates on how much of this requested increase, if any, is granted to the agency for FY 2017.

Michael R. Peelish, Esq. Joins Law Office



We are pleased to announce that Michael R. Peelish, Esq., has joined the Law Office effective April 1, 2016, as Of Counsel, handling MSHA and OSHA litigation nationwide. Michael is admitted to the state bars of Pennsylvania, Colorado and West Virginia, and will be based in the firm's DC area headquarters but will also support the litigation and safety activities in our Denver, CO, and Charleston, WV offices.

An attorney as well as mining engineer, Michael also has managed U.S. and international occupational and mine safety programs at the corporate level for companies including Consolidation Coal Company, Cyprus Amax Minerals Company, RAG American Coal and Foundation Coal Company, and most recently Alpha Natural Resources.

We are pleased to have an experienced mining industry safety and legal practitioner join our firm, as Michael brings a significant breadth of knowledge, having represented mining companies in all aspects of their operations – from preparation of mine plans and variances to conducting various types of investigations to litigating enforcement actions. He is well known throughout the mining community and within MSHA, and was twice selected to represent the U.S. mining industry at the International Labor Organization, to rewrite the 1985 Code of Safety and Health Practice and to draft principles addressing the Evolution of Training within the global mining sector.

Michael earned his J.D. at West Virginia University, where he also earned a B.S. in Mining Engineering. He is a member of the Society of Mining Engineers, the Society for Human Resource Management, and also is a former board member of the Virginia Center for Coal and Energy Research. He can be reached at 301-595-3520 or by email at mpeelish@aabramslaw.com.