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ISSUE 7
AUGUST 29, 2016
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Zika Is Now an OSHA Issue

By: Adele L. Abrams, Esq., CMSP

In August 2016, the Centers for Disease Control (CDC) confirmed that there are now cases of the Zika virus, which were locally acquired from mosquitoes in the United States in Florida. The spread of the virus domestically at this point may be inevitable, and health consequences affect not only pregnant women and their babies (who may be born with profound disabilities including microcephaly), but even healthy adult workers. This has triggered significant discussion about how to protect outdoor workers, such as those engaged in construction, pest control, and landscaping activities.

Now, the Occupational Safety & Health Administration (OSHA) has gotten into the act, issuing interim guidance that will be updated as more information becomes available on this emergent workplace hazard. OSHA reminds employers that they have an obligation to provide a workplace “free from recognized hazards” to its workers, under threat of General Duty Clause citations and their maximum penalty of \$124,709 per violation.

Occupational contraction of Zika falls within the scope of this “general duty” and OSHA has previously issued similar enforcement warnings with respect to the H1N1 pandemic flu and the Ebola virus. For its part, the National Institute for Occupational Safety & Health (NIOSH) is monitoring the spread of Zika in the continental United States and its territories, as well as in other regions where workers may have visited and

become infected before returning to the US.

The case statistics continue to grow disturbingly. As of August 10, 2016, the continental US has nearly 2,000 travel-associated Zika cases, 22 sexually transmitted cases, and 6 locally mosquito-acquired cases; but when US territories are included, they add 31 travel-related cases and over 6,500 locally acquired cases. The vast majority of cases currently are in Puerto Rico, where a public health emergency has been declared by the US government, which will allow the US Department of Health & Human Services to award grants, access emergency funds, and temporarily appoint personnel where needed.

In terms of adverse health consequences, there has been one infant Zika death reported in Texas, and the potential number of infected mothers and infants is still being tabulated. Meanwhile, the continental US and its territories have recorded 26 Zika-related cases of Guillain-Barré syndrome in adults. Guillain-Barré syndrome is a disorder in which the body's immune system attacks part of the peripheral nervous system. The first symptoms of this disorder include varying degrees of weakness or tingling sensations in the legs. In many instances the symmetrical weakness and abnormal sensations spread to the arms and upper body.

These symptoms can increase in intensity until certain muscles cannot be used at all and, when severe, the person is almost totally paralyzed and the condition becomes life threatening because it can impact breathing, blood pressure and heart rate. There is no known cure for Guillain-Barré syndrome.

In its warnings to employers, OSHA notes that the Zika virus has the potential to

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Zika, Con't

spread wherever mosquitoes capable of spreading the disease are found, including the southern and southwestern states. Symptoms are often mild and begin within a week of being infected, but often those infected are unaware of the illness even though they can sexually transmit it to others for an extended period of time. The most common symptoms are fever, rash, joint pain and “pink eye” but victims may also have muscle pain, headache or even neurological and autoimmune complications. Infected infants can suffer brain defects, eye and hearing deficits, and impaired growth.

OSHA urges employers to protect workers from getting mosquito bites, given that there is no currently approved Zika vaccine and no specific treatment for infected workers. OSHA expects employers to train workers about their risks of exposure to Zika, both via mosquito bites and direct contact with infectious blood and bodily fluids (e.g., first aid providers and health care workers), and also on how to protect themselves. Workers who are, or may become pregnant – or whose sexual partners may become pregnant – should be trained on the modes of transmission and the link to birth defects.

If occupational exposure and transmission occurs, and no mitigating action was taken to reduce exposure to the extent feasible, employers could have liability for worker’s compensation damage claims, or personal injury tort claims, in addition to possible OSHA citations.

Those who could come in contact with infectious bodily fluids may need specialized personal protective equipment and should follow the protocols in OSHA’s Bloodborne Pathogens standard (“BBP,” 29 CFR 1910.1030).

Outdoor workers clearly are also at a heightened risk of exposure, and OSHA recommends the following employer actions:

- Inform workers about their risks of exposure through mosquito bites and train them how to protect themselves (check the CDC Zika website to track Zika-affected areas);
- Provide insect repellants and encourage their use, in accordance with manufacturer’s recommendations, including how to properly combine the use of repellant and sunscreen;
- Provide workers with clothing that covers their hands, arms, legs, and other exposed skin, and

consider providing hats with mosquito netting to protect the face and neck;

- Encourage warm-weather workers to wear light-weight loose-fitting clothing that will be a barrier to mosquitos, provide workers with sufficient shade, water, and rest, and monitor them for heat illness symptoms;
- Eliminate sources of standing water (e.g., tires, buckets, wheelbarrows, cans and bottles) whenever possible to reduce mosquito breeding, and train workers about the importance of getting rid of standing water where mosquitos can proliferate at the worksite; and,
- Consider reassigning workers who are or may become pregnant, or male workers whose partners may become pregnant, by reassigning them to indoor tasks during the outbreak (but be careful not to violate any workers’ rights under the Pregnancy Discrimination Act provisions of the Civil Rights Act).

Workers should be urged to monitor for symptoms, and to seek prompt medical attention if there are concerns about disease infection. If a worker does become infected, they should be urged to rest, drink fluids, take fever and pain reducing medications, and to speak with a health care professional before taking any prescription drugs. In addition, to prevent transmission via sexual contact, condom use or abstinence are encouraged by the CDC. If the exposure occurs due to blood-borne transmission in the workplace, employers must comply with the medical evaluation and follow-up requirements in the BBP standard, and should consider options for granting sick leave during the infectious period.

Finally, OSHA reminds employers that workers are protected under Section 11(c) of the OSH Act from retaliation arising from the worker raising concerns about workplace safety and health. Employers similarly cannot retaliate against employees who report an occupational injury or illness, including Zika infection.

For additional information, review the [OSHA guidance](#).

**Expansion of OSHA Process
Safety Management Standard Advances
By: Gary Visscher, Esq.**

The Occupational Safety and Health Administration Process Safety Management (PSM) standard dates back to 1992. Congress mandated the OSHA standard, along with EPA's Risk Management Program rule in the 1990 Clean Air Act Amendments.

As written, the PSM standard affects, primarily, large chemical manufacturers and processors. Congress mandated the standard after a series of explosions at large chemical plants in 1989 and 1990, and the standard is targeted at those facilities. If a plant or process is covered, the standard requires extensive analyses and documentation of 14 process "elements." PSM imposes the greatest paperwork burden of any single OSHA standard.

In the 24 years since the PSM standard was issued, there have been a number of proposals to amend the standard and to expand the coverage of the PSM standard. Many of these proposals came after accidents and explosions. In 2012, a fire and explosion at a West, Texas fertilizer storage facility took the lives of 15 workers, mostly emergency responders who responded to the initial fire and were unaware of or unprepared for, the explosion from ammonium nitrate stored at the facility. In the wake of that tragedy, President Obama issued Executive Order 13650, which, among other things, required agencies, including OSHA, to review chemical process regulations.

OSHA initiated a rulemaking process in 2013. Before issuing a proposed standard, OSHA is required to convene a Small Business Advocacy Review Panel, better known as a "SBREFA panel," to hear the concerns of and review the particular impact of the draft proposal on small businesses. Earlier this summer the SBREFA panel on the PSM proposed rule was convened, and the report of the SBREFA panel was filed in the rulemaking record this month.

Based on materials made public as part of the SBREFA review process, OSHA will propose approximately 15 significant changes to the PSM standard. Some of the changes will expand the scope of coverage of PSM; thus many businesses that have not previously been covered by PSM may be covered in the future. The expansions includes:

(1) Narrowing or eliminating the current exemption for atmospheric storage tanks.

(2) Covering oil and gas drilling and production facilities.

(3) Expanding coverage of reactive chemical hazards.

(4) Expanding the list of highly hazardous chemicals that are listed in Appendix A to the standard, including the addition of hydrochloric acid and ammonium nitrate.

(5) Re-defining and narrowing the exemption for "retail establishments."

Other significant changes to PSM under consideration by OSHA include:

- Expanded employees' stop work authority,
- Requiring facilities to conduct a "safer technologies" analysis,
- Expanded application and documentation of "recognized and generally accepted good engineering practices (RAGAGEP), and
- Require that PSM audits, which must be done every three years, be conducted by an independent third party auditor.

Small business representatives expressed concerns with the impact on the changes and expansions on many small businesses. The PSM standard is not only expensive for operators of covered facilities, it is also burdensome and expensive for OSHA to enforce. The SBREFA panel report recommends that OSHA consider whether the goals of the proposed regulation might be accomplished in some cases by more limited regulation, rather than imposing the full panoply of PSM requirements. A "PSM-lite" regulation for smaller operators has long been discussed. Whether OSHA will be able to incorporate such an approach into its proposed standard remains to be seen.

While OSHA has not stated a definite time frame, it is likely that the Obama Administration will want to issue the proposed rule before leaving office in January 2017. The proposed rule will be subject to hearings and public comment.

Department of Labor Launches “Hear and Now” Noise Safety Challenge

By: Joshua Schultz, Esq. MSP

The U.S. Department of Labor announced a competition encouraging participants to submit proposals to help reduce workplace noise exposure and hearing loss. The initiative, titled “Hear and Now,” is a partnership between the Occupational Safety and Health Administration, (OSHA), Mine Safety and Health Administration (MSHA), and the National Institute for Occupational Safety and Health (NIOSH).

The competition requires interested parties to submit ideas to the Challenge.gov website by Friday, September 30, 2016. OSHA, MSHA, and NIOSH will select ten finalists who will be invited to present their submissions to an investor/judge panel at the Noise Safety Challenge Event on October 27, 2016 in Washington, D.C.

The competition organizers suggested three idea topics:

- Design technology that will enhance employer training so that workers consistently wear hearing protection when needed.
- Design a real-time detection system that will alert workers, wirelessly through their mobile devices, when hearing protection is not blocking enough noise to prevent hearing loss.
- Design selective hearing protectors that allows workers to hear important alerts or human voices while protected from harmful noise.

Both OSHA and MSHA subject their regulated communities to comprehensive noise regulations. OSHA requires employers to administer a continuing, effective hearing conservation program whenever employee noise exposures are at or above an eight-hour time-weighted average (TWA) of 85 dBA. MSHA’s Part 62 regulations require operators to enroll miners in a hearing conservation program if a miner’s noise exposure equals or exceeds the “action level” during any work shift. MSHA defines an “action level” as an 8-hour time-weighted average of 85 dBA integrating all sound levels from 80 dBA to at least 130 dBA. least 130 dBA.

OSHA and MSHA recommend both engineering controls, administrative controls, and personal protective equipment to help reduce worker exposure to noise.

Engineering controls include modifying or replacing equipment or creating other physical changes to reduce the noise level at the worker’s ear. Administrative controls are non-physical alterations in the workplace that reduce or eliminate the worker exposure to noise, such as reducing employee hours and creating noise-free zones.

Although MSHA’s hearing conservation program regulations require operators to provide hearing protectors to any miner whose noise exposure equals or exceeds the action level, both OSHA and MSHA consider PPE to be the last resort for workplace safety.

“Fair Pay & Safe Workplaces” Executive Order Guidance Issued by DOL

By: Adele L. Abrams, Esq., CMSP

The U.S. Department of Labor (DOL) published final guidance on its implementation of Executive Order 13673 in the August 25, 2016, Federal Register, effective immediately, to assist the Federal Acquisition Regulatory Council (the FAR Council) and Federal contracting agencies in implementation of its new final rules on the issue. The FAR rule was concurrently published with the DOL guidance, but the rule does not take effect until October 25, 2016. Consult the DOL guidance for more details.

Executive Order 13573, signed into law on July 31, 2014, and known as the “Fair Pay & Safe Workplaces” order, is aimed at improving efficiency and cost savings in the federal contracting process, and requires contractors and subcontractors to comply with certain federal and state labor and occupational safety and health laws as part of demonstrating their “responsibility” to be awarded contracts. It requires federal contracting officers to make an affirmative determination of a contractor’s compliance with the laws during the past three years, before issuing a contract award.

The E.O. came after a report by the Senate HELP committee, which found that laws enforced by DOL, including OSHA standards, were violated 1,776 times by 49 federal contractors between 2007-2012, while these contractors were awarded over \$80 billion in federal contracts.

Fair Pay, Con't

DOL notes that some states, including North Carolina, prequalify contractors to determine if they have received any repeat or willful OSHA violations, and contractors must produce copies with their applications. Research indicates that responsible-contracting policies can have a positive impact on contract performance, without negatively affecting competition.

The E.O. requires disclosure of violations of 14 federal labor laws (including OSHA requirements), as well as equivalent state laws, that must be disclosed by contractors and also subcontractors working on covered contracts of \$500,000 or more. There are also “paycheck transparency” provisions, and written disclosure as to whether an individual is being treated by the contractor as an “independent contractor” rather than as an employee. The E.O. also limits the use of pre-dispute arbitration clauses in employment agreements on covered federal contracts.

The final guidance will require contractors to disclose OSHA violations, as well as violations of collective bargaining and civil rights laws, wage/hour requirements, child labor laws, and certain other statutes. Any violation of any labor law that results in death or serious injury will be considered a “serious” violation pursuant to the E.O. DOL does not, however, require disclosure of criminal violations and focuses on civil violations.

Review Commission Comes Unbuckled in Seat Belt Decision By: Sarah Ghiz Korwan, Esq.

Since the Federal Mine Safety and Health Review Commission’s reversal of the Administrative Law Judge in *Sec. of Labor v. Nally & Hamilton Enterprises*, KENT 2011-434 (July 19, 2016), it is no longer enough that the mine operator has a seat belt policy, reviews that policy with new and current employees regularly, and makes efforts to strictly enforce compliance. The Review Commission, in reversing 42 years, held the operator is liable, even if the miner negligently endangers himself. Commissioners Robert Cohen, Jr. and Michael Young wrote separate dissenting opinions.

Pursuant to 30 CFR § 77.1710, miners “shall be required to wear” protective clothing and devices under circumstances outlined in a number of subsections, including subsection (i), which

mandates seat belt use in certain vehicles when there is a danger of overturning and where rollover protection is provided. The subsection is relevant because the case is about a rollover accident involving a 100-ton truck that occurred in April 2010 at the Chestnut Flats Mine in Kentucky. The driver, who was not wearing a seat belt, sustained a lost-time injury. The Mine Safety and Health Administration (MSHA) cited Nally & Hamilton (N&H) Enterprises for violating the standard and assessed the operator \$52,500.

In the case before ALJ William Moran, there was no dispute in the facts, which included the company’s comprehensive seat belt policy and enforcement program. In addition, during MSHA’s investigation, the truck operator admitted to not wearing a seatbelt and, at the hearing, the inspector acknowledged that it was the truck operator who was negligent.

In fact, the record below established N&H had a mandatory seat belt use policy, and employees were required to sign a statement prior to hire in which they agree to adhere to the safety policy. The policy was restated during monthly foreman’s safety talks and at annual refresher training, which employees also have to acknowledge by their signature. The driver signed the appropriate form six times from 2004 through 2009. In addition, the operator had disciplined an employee found not to have been in compliance. In another instance, an N&H employee who was wearing a seat belt escaped injury after an accident.

ALJ Moran found sufficient evidence that the operator had taken reasonable steps to comply with the seatbelt regulation and, as noted, vacated the citation. He held that, based upon the plain language of the Regulation and precedent set in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672, 1674-77 (Oct. 1983), the standard’s language imposes a “duty to require, not a duty to guarantee.” Based on this, he concluded that N&H’s policies and enforcement satisfied the Review Commission’s interpretation of this standard. In the event the Review Commission determined that a violation had occurred, Judge Moran’s made alternative findings and stated he would assess a civil penalty of \$100.

MSHA appealed the ALJ’s decision. The dispute on appeal, as at hearing, was the proper

Seatbelt, Con't

interpretation of 30 CFR § 77.1710. The Secretary asserted, and the Review Commission agreed, that the operator is strictly liable, without regard for the operator's efforts to train and enforce its seatbelt policy, or even the equipment operator's failure to comply with such policy.

As noted above, N&H advocated that the Review Commission's interpretation of 30 C.F.R. section 77.1710 (as applied to safety belts and lines), as relied upon for 40 plus years since Southwestern should be followed.

The Review Commission, in a nineteen-page decision, gave six minor reasons to overturn this decision. In essence, the Review Commission said that the Mine Act is all about protecting safety of the miner, and despite the operator's best efforts to train and strictly enforce policy, the operator will ultimately be held accountable. Paradoxically, the Review Commission affirmed the ALJ's finding of "no negligence" since, as the ALJ found, the operator had a training and enforcement program (which, ironically, was established because it believed this was sufficient to avoid liability). The Review Commission also did not accept the ALJ's alternative findings and sent the case back for a determination on the issue of whether the violation was significant and substantial and the assessment of penalty.

It is time that MSHA allows the miner to share some responsibility in work-place practices. The operator is not a babysitter and cannot be in all places at all times. If MSHA were truly serious about the miners' safety, perhaps they would consider giving the worker some accountability for their own safety.

MSHA Celebrates 40 Years at the National Mine Health and Safety Academy By: Sarah Ghiz Korwan, Esq.

On August 17, 2016 government and industry leaders gathered to honor and celebrate the success of the National Mine Health and Safety Academy in Beaver, West Virginia. In addition to a Mine Simulation Laboratory above ground, a 48,000 square-foot building with both a simulated coal mine and a simulated metal/nonmetal mine, the Mine Academy includes classrooms, dormitories, shops, a cafeteria, library, and physical fitness facilities.

At the event celebrating 40 years of operation at the Mine Academy, a number of dignitaries and representatives congratulated the Mine Academy for

its service to the industry and for helping protect the industry's greatest asset: the miner. Secretary of Labor, Thomas Perez, and United Mine Workers of America president, Cecil Roberts, both offered their congratulations by video.

Evan Jenkins, Congressman from the Third District of West Virginia, where the Mine Academy is located, was there to personally offer his remarks. He congratulated the Mine Academy on its passion for caring for miners and the mining industry.

Representatives for WV Senators Shelley Moore Capito and Joe Manchin read statements, as did representatives for AFL-CIO president, Richard Trumka, for Leo Gerard of the United Steelworkers, and Hal Quinn of the National Mining Association. All congratulated the Mine Academy on their success in training and dramatic improvements in safety, but also noted that the journey to safety continues.

The National Mining Association Senior Vice President Bruce Watzman spoke on behalf of NMA President Hal Quinn who challenged those gathered to consider what can be done "differently to ensure not just steady, continued, incremental improvement, but dramatic, steady progress". He also noted that "public and private partnerships, in technology and deployment, as well as policy direction have led to gains in all areas. Let's keep humility close at hand, recognizing that neither public nor private sectors have a monopoly on the best ideas for driving to zero injuries and fatalities."

The keynote speaker for the event was Assistant Secretary of Mine Safety and Health, Joe Main. He noted that great strides have been made, notably by the fact that 254 miners died on the job the year the Mine Academy opened, in 1976, and that 28 miners died in 2015. The 2015 number, however, is a new bench to exceed. The reduction in fatalities, Main observed is due to compliance and consistency in safety which has been accomplished through education and training. Finally, Main acknowledged that the Mine Academy might not have been built were it not for the advocacy and support of the late Sen. Robert C. Byrd. And, according to Main, the Mine Academy, is vital to fulfillment of MSHA's mission.

Mine Act Clear on Commission's Role in Settlements

By: Tina M. Stanczewski, Esq., MSP

The Commission issued a unanimous decision yesterday in The American Coal, Co., case (Docket No. LAKE 2011-13) finding that Section 110(k) of the Mine Act empowers it with the authority to oversee settlements, not just approve them as a generalist court. The issue was whether the Secretary had to provide some form of factual support for a penalty-only reduction. The July 2016 issue of the Firm's Newsletter detailed the issues in the case, which included a 30% reduction for 32 citations without any factual support.

The Commission found that the ALJs have the authority to reject settlements that lack factual support or are not in the best interest of protecting the health and safety of miners. The Decision found that the Mine Act's legislative history clearly showed Congress' intent for the Commission to have an active role in the approval of settlements. Additional support for the Commission having an active role included the fact that penalties become final orders of the Commission not the Secretary. Other courts, such as the Federal Occupational Safety and Health Review Commission simply approve settlements, but there is no provision in the Occupational Safety and Health Act that is similar to Section 110(k).

The tension of this issue has been reflected over the past few years in the language used by both the Secretary and the ALJs in their settlement motions.

The Secretary has been adding the language:

"In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better or worse after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above."

When the ALJs issue Decisions based on the motions, this language is struck and not acknowledged. The Commission's guidance as to the factors that should be considered in a settlement proposal examine the six statutory criteria under Section 110(i) of the Mine Act to determine if the penalty

Reduction is "fair, reasonable, appropriate under the facts, and protects the public interest."

This is the extent of guidance for the Secretary to follow when submitting settlements. It is expected that the Secretary will appeal the decision to the U.S. Court of Appeals.

ALERT

The comment deadline for the Workplace Examination Proposed Rule has been extended until September 30, 2016, and the comment deadline on the request for information concerning diesel exhaust to November 30, 2016. Call the Law Firm for assistance with writing comments.

SPEAKING SCHEDULE

ADELE ABRAMS

- August 29-30: AHMP Conference, Washington, DC, speaking on OSHA General Duty Clause and OSHA Crystalline Silica Final Rule
- August 30: AHMP Conference, Washington, DC, speak on OSHA General Duty Clause
- August 31: National Business Institute, Baltimore MD, speak at one day employment law seminar
- September 7: BLR webinar, OSHA Crystalline Silica Final Rule
- September 22: ASSE Region VI PDC, Myrtle Beach, SC, speak on Legal Liability for Safety & Health Professionals
- September 27-28: Prestressed Concrete Institute symposium on crystalline silica
(Adele Abrams, Michael Peelish and Brian Yellin are speaking)
- 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

DIANA SCHROEHER

- September 14, 2016, MSHA Workplace Exam Proposed Rule, Miner Training Program, POLYTECH Area School District Campus Woodside, DE

JOSHUA SCHULTZ

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

TINA STANCZEWSKI

- September 12, 2016, MSHA Enforcement Updates, NSSGA Safety Meeting, Hyatt Regency, Washington, D.C.
- September 16, 2016, National Drilling Association Conference, 2016 to 2017 Administration Transition – How Will It Affect My Business, Hilton Garden Inn, Pittsburg, PA,
- September 29, 2016, MSHA Inspections, Citations and Litigation What You Need to Know, N.C. Mine Safety & Health Law School, Castle Hayne, NC
- 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