



LAW OFFICE OF ADELE L. ABRAMS P.C.

ISSUE 2
FEBRUARY 18, 2016
Copyright 2016

NIOSH Reports on Occupational Hearing Loss & Tinnitus

By: Adele L. Abrams, Esq., CMSP

On February 1, 2016, the National Institute for Occupational Safety & Health (NIOSH) released a study on the prevalence of hearing difficulty and tinnitus among workers in the United States. Hazardous noise affects some 22 million workers nationwide, and many cases of hearing loss among employed adults are attributable to occupational noise exposures. In addition, tinnitus (“ringing in the ears”) often occurs along with hearing loss and can impact both work and personal relations, as well as quality of life.

The new study relied upon data from the 2007 National Health Interview Survey (NHIS), which includes self-reported information on hearing difficulty, tinnitus, and exposures to occupational noise across various industries and occupations. The key findings include:

- Seven percent of American workers never exposed to noise on the job had hearing difficulties, and five percent reported tinnitus. Two percent of the unexposed workers had both conditions. By contrast, among workers who had been exposed to occupational noise, the rates were 23 percent, 15 percent, and 9 percent, respectively.
- Workers in the agriculture, forestry, fishing and hunting sectors had a significantly higher risk of hearing difficulty, tinnitus and co-occurrence, while workers in the manufacturing sector also had significantly higher rates for tinnitus and co-occurrence.
- Workers in life, physical and social science occupations and personal care,

and services sectors, had significantly higher risks for hearing difficulty.

- Workers in architectural and engineering occupations had significantly higher rates for tinnitus.

Workers with hearing loss can have difficulty localizing sounds or hearing warning signals, which can put them at heightened risk of injury on the job and also for off-the-job accidents. Tinnitus can disrupt sleep and concentration, increase fatigue, and can impact alertness and job performance. It also can increase the risk of accidents.

NIOSH, which is directed under the OSH Act and Mine Act to suggest regulatory action and to identify emergent health and safety hazards, recommends increased awareness of hearing problems, targeted interventions, better implementation of current best practices for hearing conservation in the workplace, and stronger regulations. Enrollment of workers in a hearing conservation program already is required by OSHA and MSHA when the action level of 85 dBA over an eight-hour time-weighted average is exceeded, and both agencies have a permissible exposure limit of 90 dBA for workplace exposures.

The agency reports that, in the United States, hearing loss is the third most common chronic health condition among older adults, after hypertension and arthritis. Occupational hearing loss can occur when workers are exposed to loud noise, but it can also be caused by workplace exposures to ototoxic chemicals, and approximately 10 million workers are exposed to these substances on the job. Ototoxic chemicals include

INSIDE THIS ISSUE

NIOSH Reports on Occupational Hearing Loss & Tinnitus	1
MSHA’S New Coal Mining Dust Rule Upheld by Court	2
OSHA Issues New HazCom Classification Guidance	3
Proposed 2017 Budget for Workplace Safety Agencies Submitted to Congress	4
MSHA issues Machinery and Equipment Hazards Alert, Will Increased Enforcement Follow?	4
Simplified OSHA Reporting Web Page	5
Three Coal Mining Deaths in 19 Days is “Troubling”	5
EEOC Announces New Reporting Requirement for Pay Data from Employers	5

**Law Office of
Adele L. Abrams, P.C.**
www.safety-law.com

D.C. Metro
4740 Corridor Place, Suite D
Beltsville, MD 20705
(301) 595-3520
(301) 595-3525 fax

Colorado
1625 17th St, 3rd Floor
Denver, CO 80202
(303) 228-2170
(301) 595-3525 fax

West Virginia
1045 Bridge Road
Charleston, WV 25301
(301) 595-3520
(301) 595-3525 fax

NIOSH, Con't

organic solvents, such as styrene and trichloroethylene, heavy metals including mercury and lead, and asphyxiants such as carbon monoxide and hydrogen cyanide.

The danger of potential hearing loss due to chemical exposure should be addressed when employers provide hazard communication training to workers prior to product use, as required under 29 CFR 1910.1200 (OSHA) and 30 CFR Part 47 (MSHA), and safer chemicals should be substituted where feasible to reduce the potential for occupational hearing loss among workers. For more information on structuring an effective hearing conservation program or mitigation of noise and chemical risks in the workplace, contact the Law Office's Adele Abrams, Esq., CMSP, or Brian Yellin, Esq., CIH, at 301-595-3520.

MSHA'S New Coal Mining Dust Rule Upheld by Court

By: Sarah Korwan, Esq.

The Eleventh Circuit recently denied a challenge, brought by the National Mining Association and other industry parties ("petitioners"), to the final rule limiting coal dust exposure for mine workers. The three-judge panel found that MSHA has authority to issue the rule and that the substance of the new rule, imposing single-shift sampling and mandating the use of Continuous Personal Dust Monitors ("CPDMs"), is permissible.

Pursuant to the "New Dust Rule," as referred to by Court, mine operators must take samples over the entire shift of a miner rather than over a maximum of eight hours, or a miner's shift, if shorter. Also, mine operators are required to take samples over a "normal production shift," defined as one in which the amount of material produced is "at least equal to 80 percent of the average production recorded by the operator for the most recent 30 production shifts" rather than one where production was only required to be at least 50 percent of the average of the prior five bimonthly samples.

Among the most significant changes brought by the New Dust Rule is the mandate that compliance will be based on a single, full shift sample of coal dust, portal-to-portal, rather than simply on an average of multiple samples, and this is at the crux of the petitioners' objections.

The petitioners charged that MSHA lacked authority to issue the rule under the Federal Mine Safety and Health Act because it failed to act in concert with the Secretary of Health and Human Services (HHS) and the National Institute of Occupational Safety and Health (NIOSH).

The Court found that, although MSHA must consider the advice of NIOSH, it has the sole responsibility to issue regulations covering miners' health as it relates to RCD levels. In any event, the Court noted, MSHA did consider the scientific findings and proposals NIOSH had been making for "decades," but NIOSH simply did not formally "sign on the dotted line."

The petitioners also challenged the substance of the rule, alleging that it ignored evidence that the new sampling regulations will significantly increase the possibility of inaccurate results. The industry petitioners challenged whether MSHA considered "best available evidence" and whether MSHA demonstrated technological or economic feasibility of such standards. Notably, the petitioner's questioned whether MSHA's decision to move from multi-shift averaging to single shift sampling was appropriate.

The Court found the industry petitioners' allegations untenable for many reasons and held that the sampling method was neither impermissible nor arbitrary or capricious, despite the potential for "significant variability of coal dust concentration in the mine and imperfection in sampling method." The court found that, simply because the method is not perfect, does not render it invalid.

Finally, the industry petitioners raised numerous objections related to the feasibility of the new rule, particularly with regards to the Continuous Personal Dust Monitor ("CPDM"). Here, again, the Court struck down this challenge, finding that MSHA met its burden regarding economic and practical feasibility and the mandatory transition to CPDMs was not arbitrary or capricious. The Court ruled that MSHA had shown adequate evidence the CPDM and sampling rules will produce accurate results and that the agency went through an "extremely thorough" process to draft the new rule.

In closing, the Court, in denying the petitions for review, held that the "requirements of the statute are not otherwise arbitrary, capricious, or an abuse of discretion." Luke Popovich, spokesman for the National Mining Association, has indicated that an appeal of the decision is likely.

OSHA Issues New HazCom Classification Guidance

By: Adele L. Abrams, Esq., CMSP

In February 2016, the Occupational Safety & Health Administration (OSHA) released its long-awaited technical guidance for classification of chemicals under the revised “HAZCOM-2012” standard, which incorporates the elements of the United Nations’ Global Harmonization System (GHS) of hazard communication. The new rule requires the use of pictograms, new format Safety Data Sheets (SDS) and revised product labels. The 2016 guidance, which is 432 pages in length, is aimed at manufacturers and importers of potentially hazardous chemical products, and the employers who use them in OSHA-regulated workplaces. It can be downloaded at <https://www.osha.gov/Publications/OSHA3844.pdf>.

OSHA’s revised HazCom standard was issued in March 2012, but the first portion to take effect was retraining of all employees on the new GHS elements, and this was required by December 1, 2013. The next set of deadlines expired in 2015, with manufacturers required to use the new labeling and to ship new format SDSs to downstream customers by June 1, 2015, and with importers required to follow suit by December 2015. Both of these deadlines have slipped in terms of enforcement, however, as OSHA recognized that many manufacturers were waiting to obtain revised chemical classification information from the upstream chemical manufacturers who supply them. Similarly, importers were impeded in meeting their obligation because the chemical product manufacturers had, in some cases, not yet completed their product review and materials revisions.

The next deadline under HAZCOM-2012 will be June 1, 2016, when all employers will have to comply with all provisions of the revised standard, including maintaining the new format SDSs and ensuring that products have new style labels (with some grandfathering exceptions for palletized products and those received from manufacturers prior to the deadlines. OSHA is already enforcing the training provisions, however, in both federal OSHA and state plan states.

Hazard classification is the process of evaluating the full range of available scientific evidence to determine if a chemical is hazardous, as well as to identify the level of severity of the hazardous effect. When complete, the evaluation identifies the hazard class(es) and associated hazard category of the chemical. The HCS defines hazard class as the nature of a physical or health hazard, e.g., flammable solid,

carcinogen, and acute toxicity.

Hazard category means the division of criteria within each hazard class, e.g., acute toxicity and flammable liquids each include four hazard categories numbered from category 1 through category 4. These categories compare hazard severity within a hazard class and should not be taken as a comparison of hazard categories more generally. A chemical identified as a category 2 in the acute toxicity hazard class is not necessarily less toxic than a chemical assigned a category 1 of another hazard class. The hierarchy of the categories is only specific to the hazard class.

The hazard classification process provides the basis for the hazard information that is provided in SDSs, labels, and worker training. OSHA notes that understanding the hazards of chemical products in the workplace is the critically important first stage in the process of establishing an effective hazard communication program. The process of hazard classification consists of four basic steps:

- Selection of chemicals to evaluate;
- Collection of data;
- Analysis of the collected data; and
- Records of the rationale behind the results obtained.

The guidance covers the following areas: (1) introduction (2) overview of the hazard classification process; (3) how to identify chemicals to be classified; (4) explanation of the process of data collection; (5) description of the process and information needed for data analysis; (6) discussion of information used to record the rationale used in developing classification of the various hazards; and (7) guidance on how to classify health hazards, physical hazards, and hazards not otherwise covered by the Hazard Communication Standard.

The guidance includes multiple appendices, some of which simply define terms that are used in the booklet and in the standard, as well as outside resources for chemical classification. Two Appendices are key and should be carefully reviewed by employers and others who must classify their own chemical products.

Appendix C contains a list of chemicals for which OSHA has adopted permissible exposure limits. This is a helpful starting point for identifying chemicals that are toxic or hazardous. The HCS does not contain a “floor” (list) of chemicals pre-determined to be hazardous under the standard (except for chemicals OSHA has already determined to be carcinogens); however, there are lists of hazardous chemicals compiled by authoritative sources that classifiers may find useful to consult. The chemicals listed in Appendix C are an example of one such list. OSHA suggests that classifiers should also

HAZCOM, Con't

consult the American Conference of Governmental Industrial Hygienists' (ACGIH's) list of Threshold Limit Values (TLVs) and the items identified as carcinogens by the International Agency for Research on Cancer (IARC), Monographs on the Evaluation of Carcinogenic Risks to Humans, or the Report on Carcinogens from the National Toxicology Program (NTP). These lists are updated periodically, and users should check to determine whether there has been an update. In addition, a list of OSHA-designated carcinogens is provided in Appendix D.

For assistance in reviewing or revising SDSs or product labels, contact the Law Office for additional information.

Proposed 2017 Budget for Workplace Safety Agencies Submitted to Congress

By: Gary Visscher, Esq.

President Obama's proposed budget for fiscal year 2017, which was submitted to Congress on February 9, 2016 includes substantial increases in funding for OSHA and MSHA, with the largest increases for both agencies going to enforcement.

The President's budget request would increase overall funding for OSHA by \$43 million, or 7.8%, over the 2016 funding level of \$552.8 million. The budget proposal also includes adding 100 "full-time equivalent" (FTE) positions to OSHA's staff.

Federal enforcement would receive the largest increase in dollars and personnel – an additional \$18 million and 60 employees. In addition, whistleblower enforcement would receive an additional \$4.1 million and 22 additional staff.

The budget proposal also calls for an increase of nearly \$6 million, or 17%, for "safety and health statistics." The increase includes \$1.5 million "to support a new injury and illness tracking system." OSHA proposed to amend its injury and illness recording regulations to require establishments with 20 or more employees to electronically submit injury and illness information on a quarterly and/or annual basis. In addition, the budget request would add 5 FTE positions and \$900,000 to the safety and health statistics line for a new "data analytics unit."

For MSHA, the President's proposed budget for FY 2017 would increase overall funding by \$21.5 million, or 5.7%. Of the overall increase, \$7.5 million would go to coal mine enforcement, and \$2.9 million to metal/nonmetal enforcement. The Office of Assessments and Special Enforcement would receive

an additional \$1.2 million and 6 additional FTE positions "to improve the timeliness of special assessments and improve special investigations and accountability audits."

It should be noted that the overall proposed funding levels for OSHA and MSHA for FY 2017 are similar in size to the increases proposed in the Administration's 2016 budget request. However, the final appropriation bill signed by the President maintained funding levels for both agencies at the previous year's level, \$552.8 million for OSHA and \$375.9 million for MSHA.

As it has in past budgets, the Obama Administration's FY2017 budget requests reduced funding for NIOSH, by eliminating funding for Education and Research Centers (ERCs) and the Agriculture, Forestry and Fishing grants. Congress has declined to go along with eliminating funding for those programs in past years.

The U.S. Chemical Safety and Hazards Investigation Board, which is operating with new leadership, would, under the Administration's budget proposal, receive its first funding increase in several years, from \$11 to \$12.4 million.

MSHA issues

Machinery and Equipment Hazards Alert, Will Increased Enforcement Follow?

By: Joshua Schultz, Esq., MSP

Following an increase in fatal accidents involving machinery and non-haulage mobile and quarry equipment over the past several years, MSHA issued an enforcement alert focusing broadly on equipment use at Metal/Nonmetal Mines. The alert was addressed to Metal and Nonmetal Mine Operators, specifically noting several standards which are applicable to the use of mining equipment at Metal/Nonmetal Mines.

Many of the standards noted by the alert are also included in MSHA's Rules to Live By enforcement initiative. MSHA trained inspectors to scrutinize mines for potential violations of Rules to Live By standards and gives extra consideration to violations of these standards for increased negligence and special assessments.

MSHA's alert noted that "MSHA standards require operators to maintain control of mobile equipment while it is in motion, and to operate at speeds consistent with conditions of mine roadways, tracks, grades, clearance, visibility and traffic."

Machinery Hazard Alert, Con't

This statement references the language used in 30 CFR § 56/57.9101, "Operating speeds and control of equipment," a Rules to Live By Standard which is frequently cited following an accident involving mobile equipment. Due to the strict liability nature of the Mine Act, Administrative Law Judges have upheld violations of this citation where the operator had taken "reasonable steps" to prevent an accident and was not negligent with regard to the accident.

Additionally, the alert discusses parking procedures for mobile equipment. MSHA's alert references 30 CFR § 56/57.14207, which is also a Rules to Live By standard. This standard requires that operators ensure unattended vehicles are placed in a park position with the parking brake set and the wheels chocked or turned into a bank if parked on a grade. If you have independent contractors regularly visiting your mine site, ensure that chocks are available for their vehicles, as MSHA may issue concurrent citations to the contractor and mine operator for a failure to properly chock vehicles.

The alert also mentions ground control issues, which are featured in Rules to Live By standards 30 CFR § 56.3130 - "Wall, bank, and slope stability," and 30 CFR § 56.3200 - "Correction of hazardous conditions." During inspections and after accidents, MSHA inspectors are instructed to review highwall examination records to ensure all noted conditions have been corrected. If items noted in highwall examination records are present during inspections or if an accident occurred in the vicinity of a noted condition, MSHA may impute knowledge of a hazardous condition to the operator and issue Unwarrantable Failure citations and orders. Ensure all areas where a hazardous condition may exist are posted with a warning against entry and a barricade to prevent access. We recommend installation of berms and signs preventing access to any non-working areas.

Due to the broad nature of this alert, it overlaps and reinforces a number of topics covered by recent enforcement initiatives, especially the Rules to Live By. Expect to see a strong focus on these standards from inspectors during future inspections.

Simplified OSHA Reporting Web Page

In an effort to help employers comply with reporting requirements, OSHA has created a streamlined reporting webpage and now offers the option to report incidents online. To visit the web page, go to following link: <https://www.osha.gov/report.html>.

Three Coal Mining Deaths in 19 Days is "Troubling"

In the first three weeks of 2016, the coal industry experienced three fatalities in three separate mining accidents. This comes on the heels of the safest year in mining history, and is the highest number of coal accidents to occur in this time period since January of 2006.

The first fatality occurred on January 4, in West Virginia, when a 53-year-old miner was killed when he became entangled in a moving underground conveyor. The second fatality occurred on January 16, in Pennsylvania, when a 31-year-old miner was killed when falling material pinned the victim to the mine floor. The third fatality occurred on January 19, in Kentucky, when a 36-year-old miner was killed when he became pinned between a continuous mining machine and a coal rib. MSHA plans to "ramp up its targeted enforcement, education and outreach efforts to respond to the troubling number of mining fatalities that have occurred so far this year."

EEOC Announces New Reporting Requirement for Pay Data from Employers By: Diana R. Schroeder, Esq.

The EEOC has released a Proposed Rule which would require employers with over 100 employees to report its employees' W-2 earnings, by gender, race, ethnicity and by job category. The EEOC and the Office of Federal Contract Compliance Programs (OFCCP) already require disclosure of similar data, except pay data, which is required annually, and submitted on the EEO-1 Form. The EEO-1 is a screening tool for discriminatory pay practices, prohibited by fair pay laws. The EEOC's comment period in response to this Proposed Rule closes on April 1, 2016.

Concerns already surfacing include issues of confidentiality of pay data, the possibility for increased scrutiny and enforcement action, and the reliability of the data actually collected by the EEOC, leading to possible false positives – variations in pay data that appear to be discriminatory. If the proposal becomes final, the new reporting requirement, on the revised EEO-1 Form, would be due on September 30, 2017.

On January 29, 2016, the White House announced this new proposal in conjunction with the 7th anniversary of the passage of the Lilly Ledbetter Fair Pay Act, President Obama's first substantive legislation signed into law after assuming office. This legislation was passed to address the Supreme Court's 2007 decision severely limiting an employee's right to address unequal pay. Despite the passage of the new Fair Pay

EEOC, Con't

Act, pay gaps still persist in the workplace. According to the National Women's Law Center website, "[w]omen today are paid, on average, only 77 cents for every dollar paid to men. And the gap is even worse for women of color – African American women earn only 64 cents and Latina women earn only 55 cents for each dollar earned by males."

The EEOC's Small Business fact sheet states that the new reporting requirement will "enable the EEOC and OFCCP to focus their resources to more effectively enforce federal pay discrimination laws." According to the Proposed Rule, the EEOC and OFCCP anticipate that the new reporting requirement will "encourage employers to self-monitor and comply voluntarily if they uncover pay inequities" in their wage systems.

The EEOC Fact Sheet clarifies that the EEOC has collected data on the current EEO-1 data collection form since 1966, and currently applies to all employers with over 100 employees, and federal contractors with over 50 employees. The EEO-1 report currently requires employers to report the number of workers they have by job category, and then by ethnicity, race, and gender. EEOC now proposes to require the additional reporting requirement of employee pay data to the EEO-1 form.

This new rule would not change who needs to report -- if your business is not currently required to file an EEO-1 Form, then your business would not be required to file an EEO-1 Form with the pay data.

One chief concern is how the government will maintain the confidentiality of the collected data. EEOC confirms that they will continue to protect the confidentiality of the data as they have for nearly 50 years, by using "pay bands and collection of aggregated data", and publishing only aggregated data which does not reveal individual employer or employee information. Confidentiality is also protected through continued enforcement of Title VII's criminal sanctions against EEOC officers or employees who release EEO-1 data. The OFCCP holds information collected by federal contractors confidential, but concedes that federal contractor data may be subject to release under the Freedom of Information Act.

For more information about the Proposed Rule, compliance with the Fair Pay Act and related laws, or assistance drafting comments to EEOC (**due by April 1, 2016**), please contact the Law Office.

Adele L. Abrams Speaking Schedule

Feb. 22: Society of Mining Engineers, Phoenix, AZ
 Feb 25: BLR Webinar on Amputation Prevention
 March 2: Florida Mine Safety Conference, Bartow, FL
 March 3: National Wooden Pallet & Container Association Leadership Conference, Orlando, FL
 March 7: Progressive Business Conferences Webinar on Infectious Disease Prevention
 March 15: IMA-NA Technology and Safety Workshop, San Diego, CA
 March 17: BLR Webinar on Hazard Communication
 March 17: ASSE NOVA Chapter Meeting, Presentation on Safety & Health Management Systems
 March 22: AGG-1 Conference, Nashville, TN
 March 23: Indiana Safety & Health Conference, Indianapolis, IN
 March 28: Oregon Independent Aggregates Association, Part 46 Annual Refresher Training, Albany, OR
 March 29: Oregon Independent Aggregates Association, Part 46 Annual Refresher Training, Roseburg, OR
 April 6: BLR Safety Summit, Austin, TX
 April 21: AIHA/Johns Hopkins APL Safety Conference, Laurel, MD
 April 22: Sassaman Training Conference, Valley Forge, PA
 April 26: BLR Webinar on Safety Incentive Systems
 May 2: Pacific Rim Safety & Health Conference, Honolulu, HI
 May 5: Minnesota Safety Council Conference, Minneapolis, MN
 May 23: National Electrical Contractors Association Safety Professionals Conference, Indianapolis, IN
 June 7: SafePro Inc. Mine Safety Law Institute, Savannah, GA
 June 8: ASSE Delmarva Chapter Luncheon, Salisbury, MD
 June 27: ASSE Professional Development Conference, Atlanta, GA